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Maria Kruk

POLISH CONSTITUTIONAL COURT: TO CHANGE OR NOT TO CHANGE? (A few reflections on the new Constitutional Tribunal Bill)

Polish constitutional court, officially called the Constitutional Tribunal (hereinafter also the Tribunal or TK), is one of those institutions that enjoy extraordinary authority and public confidence. The paradox is that TK earned this good opinion in the period when the Polish political system was not democratic and other state institutions had lost theirs long before. The Tribunal was introduced to the Constitution of Poland[1] in 1982 in order to meet a part of the constitutional doctrine and some politicians' earlier demands[2]. However, despite the constitutional decision, the future of the Tribunal was uncertain: at first, it was anticipated that the bill would not be passed and then, that the Tribunal would turn out to be unable to act in the actual political circumstances[3]. The sceptics did not make a big mistake, especially as far as the first prediction is concerned. The Tribunal[4] was established and started adjudicating but no sooner than in 1986, because the Act on the Tribunal[5] had not been passed until 1985. The long delay in passing the Act that was essential for the real establishment of the Tribunal shows how reluctant the political authorities were to accept the

[1] At that time, the Constitution of the People's Republic of Poland of 22 July 1952, hereinafter the PRL Constitution.

[2] The proposals to establish a constitutional court in Poland were put forward in the period between the two World Wars but, like in other European countries, they were not approved. After World War II, they were firmly rejected because of political and ideological reasons. The idea started to revive in the circles of constitutional law specialists in the 60s. The Alliance of Democrats (one of the two "satellite" parties of the Polish United Workers' Party) also put forward such proposals. And so did Solidarność and parliamentary groups in the 80s.

[3] L. Garlicki, *Ewolucja ustrojowej roli i kompetencji polskiego Trybunału Konstytucyjnego* [Evolution of the role and competence of the Polish Constitutional Tribunal], [in:] *Księga XX-lecia orzecznictwa TK* [20 years of Constitutional Tribunal rulings], Wyd. TK, Warszawa 2006, p. 3.

[4] Act of 29 April 1985 on the Constitutional Tribunal, Journal of Laws No. 22 item 98, then amended several times; it entered into force on 1 January 1986. The Act is supplemented by Resolution of the Sejm on the proceeding of TK.

[5] At the same time, the State Tribunal was introduced to the Constitution but the appropriate Act was passed the same day because the authorities needed it. The State Tribunal adjudicated on state officials' accountability for a breach of Constitution or other acts.

opinions. The intention of the communist party, however, was not to delay the operation of the Tribunal but to limit its rulings' legal power and keep an eye on its members. To that end, the Constitution said that rulings on unconstitutionality of Acts were not ultimate decisions and were subject to reconsideration by the Sejm (thus, the Sejm could reject them[6]) and the members of the Constitutional Tribunal not awarded the attributes of a judge were chosen by the Sejm (from the candidates nominated by MPs or the Sejm Presidium). Briefly speaking, the Sejm was given full control over the Constitutional Tribunal, although one must remember that it was the time when the constitutional system rejected the separation of powers, which (theoretically) did not allow for any – except for the sovereign's (then "the working people's") – control over the Sejm or an Act as a "product" of its legislative power. The possibility to reject rulings of TK on non-compliance of statutory law with the Constitution, the Sejm's exclusiveness in selecting the Tribunal members and some legal limitations were the price the Tribunal had to pay for its establishment. Despite that price, it was not really welcome (there were even ideas for a moratorium on its launch) by the political authorities, which knew what to be afraid of.

That is why the "leading political authority", as the Constitution of 1952[7] described the communist party, did not want to give up its decisive influence on the first personal composition of the Tribunal (12 members, half of which were exchanged every 4 years and which had no right to serve one more term) and proposed the Sejm detailed party "quotas" (half of the members representing the communist party, 2–3 members – independent (non-party) ones) and a list of names[8]. The list, despite the earlier – as a witness of those manoeuvres recalls[9] – even provocative personal proposals, surprisingly, in general met the constitutional requirement for the candidates to have "outstanding legal knowledge". After some changes had been forced in the Sejm, especially as there was no constitutional law specialist in the former proposal, the Tribunal with the membership of some well-known professors was finally formed.

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[6] It required 2/3 of votes, i.e. the majority required to change the Constitution. It is, however, necessary to remember that when the principle was established, the majority was not difficult to obtain because the Sejm was unanimous then and there were seldom any opinions against bills to be passed on the political authorities' demand. However, if the Sejm had not rejected the ruling of TK and had found it justified, it would have amended or repealed the Act.

[7] Formally, since the amendment of 1976; earlier, the political doctrine had approved of the role of the communist party in the state, especially its consequences for the state governance.

[8] With a cynical justification that the candidates to such an important state organ should be nominated by the political decision-making body of the highest rank.

[9] Z. Czeszejko-Sochacki, professor, one of the authors of the Act on the Constitutional Tribunal: *W oczekiwaniu na pierwszy skład Trybunału Konstytucyjnego – 1985 rok (wspomnienia)* [Waiting for the first composition of the Constitutional Tribunal – 1985 (memoirs)] [in:] *Trybunał Konstytucyjny. Księga XV lecia* [Constitutional Tribunal – 15th anniversary jubilee book], (vol. XV series *Studia i Materiały*), Warszawa 2001, p. 27 and the following; Volumes: *Księga XV-lecia* [15th anniversary jubilee book], *op. cit.*, *Księga XX-lecia* [20th anniversary jubilee book] and *Księga XXV-lecia* [25th anniversary jubilee book] contain rich sources and a discussion of the history and rulings of TK.

Another key moment was the issue of the first ruling. Although the authorities hoped that there would be no entity with the right to do so[10] that would file a motion to the Tribunal and the "evil" would be postponed this way, a local administrative organ in Wroclaw had the courage to bring a suit against one of the government regulations[11]. There was a lot of public interest in what the Tribunal was going to do: commend the authorities or oppose them. Let us have a look at the memoirs, in which we read: "We remember the tension that accompanied the first ruling. It was probably the most important moment for the future practice…" and then: "The Tribunal surprised the authorities in an unpleasant way, in its first ruling it proved to be a completely independent organ supporting the citizens (…). This was thanks to the first bench of judges who adjudicated"[12]. This way, the Polish Constitutional Tribunal started gaining public trust and law circles' esteem as well as the respect of state organs, which, since then, while creating law, had to take into account a potential possibility that a given Act would be discredited in the course of a constitutional process.

But the Tribunal did not have easy tasks to do, though. First of all, the Constitution itself was a problem. It was puffed up with declarative principles of a not really democratic origin, "non-juridical" ones and containing almost no formal (procedural) guarantees of citizens' rights. It had no value as a model for legal regulations. International law could not help either: it was excluded from the standard legal "turnover", especially from the possibility to be used in court. But soon, the democratic transformation succoured the Tribunal, because already in 1989 the Constitution declared that: "the Republic of Poland is a democratic rule of law state, implementing the principle of social justice"[13]. The Tribunal quickly decoded the contents of the principle stating that they constitute the element of the Polish Constitution and since then the rule of law state has been the main model for rulings on compliance of the law with the Constitution[14]. This helped

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[10] The act gave some central state organs, groups of MPs and other parliamentary bodies, some of the local administration organs, trade unions, cooperatives organizations etc. the right to appeal to TK if a given Act was related to the range of their operation. Since 1989, the catalogue of those entities has been changing with the course of democratic transformation and the establishment of new state institutions, e.g. the President or the Senate.

[11] The essence and the grounds for the ruling have been discussed many times, including L. Garlicki, *Pierwsze orzeczenie Trybunału Konstytucyjnego (refleksje w 15 lat później)* [First rulings of the Constitutional Tribunal (commentaries made 15 years after)] [in:] *Księga XV-lecia…* [15th anniversary…], *op. cit.*, p. 40; M. Kruk, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego* [Principle of equality in the Constitutional Tribunal rulings] [in:] *Księga XX-lecia…* [20th anniversary…], *op. cit.*, p. 281.

[12] J. Zakrzewska, Professor, well-known oppositionist; she was appointed TK member in 1989. The statement was made at the Polish – Dutch colloquium in Warsaw in 1991. The citation by L. Garlicki, *Początki działalności…* [The beginning of operation…], *op. cit.*, p. 37.

[13] Act on the Amendment to the Constitution of 29 December 1989, which repealed the previous name of the Polish state and re-established the traditional one (as it did with the traditional Polish national emblem). Polish transformation started in June 1989 and the parliamentary election of June 1989 unequivocally decided on the democratic character of the political system reforms to come.

[14] M. Wyrzykowski, *Zasada demokratycznego państwa prawnego – kilka uwag* [Principle of a rule of law state – a few comments] [in:] *Księga XX-lecia…* [20th anniversary…], *op. cit.*, p. 233, in detail:

but did not eliminate all the difficulties. The principle of the rule of law state was like an isolated island on the sea of the previous legal system. Moreover, numerous incidental changes of legislature and the Constitution introduced a lot of internal discrepancies in the legal system. The rulings of the Tribunal "tidied" the legal system and developed the constitutional doctrine[15].

In the transformation period, there were no obstacles in fact to change the regulations limiting the Tribunal, but it was decided that its new status should be determined by the new Constitution. But this, because of many reasons, had to be awaited until 1997. And, although until then the general conception of the Tribunal had not changed, the political system democratization touched it, too. First of all, some oppositional judges became TK members and soon the "party limits and recommendations" for the TK members' selection imposed by the former authorities were totally eliminated, especially as the old party system ended, too. Now, the new parties gained the privilege to nominate the candidates and elect the Tribunal members. This way, a new problem appeared, but it will be discussed below. Moreover, some changes in the authorities structure also contributed to the new principles of the rulings' applicability. As, since 1989, the President has had the right to appeal against statutory law before signing it, it was considered that in the case of a preventive adjudication, the ruling must be treated as ultimate. Annoyed by the fact that its rulings on unconstitutionality of Acts are not dealt with by the Sejm, in 1993 the Tribunal passed a resolution, which was next included in the Act, stating that in the event the Sejm does not deal with the ruling within six months, it enters into force. Making use of the obtained right to interpret law, the Constitutional Tribunal adjusted law to the changed conditions in the democratic state[16]. The new competence, however, met with a negative opinion of the Supreme Court, which found it to be a threat to its right to interpret law, which was also important in the future.

Thus, although the constitutional conception of the Tribunal was not changed, it put roots in the democratic standards of the rule of law state and built its position of public authority. That is why – especially in relation to the Polish situation – it is erroneous to state, as it sometimes happens during international debates, that Eastern European countries' constitutional courts that came into

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E. Morawska, *Klauzula państwa prawnego w konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego* [Rule of law state clause in the Constitution of the Republic of Poland in the light of the Constitutional Tribunal rulings], Toruń 2003.

[15] See M. Kruk, *Progrés et limites de l'Etat de droit, La Pologne*, Pouvoires, No. 118 /2006, in particular pp. 76–78.

[16] In April 1989, the Council of State (type of collegial head of state) was repealed and the office of the President was created. The President was given the right to refuse to sign an Act and to file a motion to TK to institute a preventive adjudication (or to send it back to the Sejm for re-reading as well as to dissolve the parliament). TK "inherited" the right to interpret statutory law from the Council of State. Then, the second Parliament Chamber, the Senate, was established. In 1992, the Constitution was passed and it regulated the relationship between the legislative, executive and judicial powers, but the changes were not made in other areas, including the Constitutional Tribunal.

being in the last years of the communist regime and at the beginning of transformation were forced to adjudicate based on the old law and this way they only strengthened its undemocratic contents.

Passed in 1997, the Constitution of the Republic of Poland[17] introduced the expected changes regarding the Tribunal at last. Firstly, it unambiguously defined TK as part of the judiciary power stating that "Courts and Tribunals are a separate power independent of the other powers", however, it differentiated them by not awarding the tribunals (the Constitutional Tribunal and the State Tribunal) the virtues of organs of administration of justice, which is often criticized in literature on this subject. But its members are formally called judges and treated as such. The number of judges was increased to 15 and they are individually elected for a 9-year term. The most important change, however, is the ultimate force of all the rulings that become commonly binding[18]. Moreover, international law was included into the Tribunal's cognition – the agreements that bind Poland become a model and a subject to adjudication. TK cognition was formulated as a hierarchic control of norms[19], adequately to the new system of sources of law specified in the Constitution, however, the Tribunal was not given competence in the field of the European Union law[20], which will pose a practical problem later. Moreover, the Tribunal was given other powers: to adjudicate the compliance of political parties' aims and activity with the Constitution and to solve jurisdiction disputes between the constitutional state organs[21]. However, it lost its competence to interpret law, which resulted from the above-mentioned dispute between TK and the Supreme Court. The loss of this power in a way influenced the development of the so-called interpretational rulings, which also arouse controversies.

The constitutional novelty that did not change the character of the Tribunal so much but did change the guarantees of human rights is the introduction of a common constitutional complaint. Everybody whose constitutional rights and freedoms were breached by a court ruling or an administrative decision can file a complaint. But the complaint can be filed not against the ruling or decision

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[17] The Constitution of 2 April 1997 was voted for in a referendum (Journal of Laws No. 78 item 483) and entered into force on 17 October 1997.

[18] Nevertheless, the trace of the former influence of the Sejm on the rulings on unconstitutionality of Acts remained in temporary regulations because it was decided that, in the period of two years from the date when the Constitution entered into force, the rulings on unconstitutionality of Acts that had been passed before would continue to be dealt with by the Sejm, which would also decide whether to repeal them or not. It did not apply only to rulings issued as a result of legal inquiries.

[19] Although, listing the detailed levels of that hierarchy, the Constitution does not contain such a general formulation of TK competence (see below).

[20] The Constitution of 1997 provides that the law [it] establishes is directly applicable as it has priority over other Acts in the event of their collision.

[21] Since there were no cases regarding political parties, TK solved the 2009 well-known dispute between the President and the Prime Minister (Government) on the conflict of powers of the two organs in connection with their participation in the European Council (Decision of 20 May 2009, ref. Kpt 2/08).

but against the legal basis, i.e. a normative act, that was the basis for the issue of the ruling or decision. This solution is criticised (see below). Despite that, the institution has been intensively used since the very beginning – by citizens and other entities: natural and juridical persons. The changed conception of the Tribunal, especially the guarantee in the form of a constitutional complaint, caused that the Act on the Constitutional Tribunal, whose passing was a condition for a "launch" of some new instruments of the protection of the Constitution, was passed before the end of the constitutional *vacatio legis*, so that it could come into force together with the Constitution[22].

But not all the elements of the former conception of TK were eliminated. The way in which the judges of the Tribunal are elected remains the same. The authors of the new Constitution did not decide to limit the Sejm's rights in this respect, so the Sejm is still responsible for the election of judges, while the Act – as before – charges a group of 50 MPs and the Presidium of the Sejm with the task of nominating candidates. As the Presidium has never tried to act as an all-party group in this respect, everything remains in the hands of the MPs of one Chamber, which is full of competing political groups. And although the review of the constitutions of other European states reflects a search for a differentiated system of electing constitutional court judges or prescribes an obligation to elect them by a 2/3-majority vote that goes beyond party divisions, Poland maintains the monopoly of one Chamber. And that is the one that dominates legislation[23]. Neither the Constitution, nor the Act introduced any obstacles in the way of MPs obtaining a position of a TK judge, which results in a necessary exception of a judge from the adjudicated case because "just before" the appeal, they were involved in the passing of the regulations appealed against. In addition, it elicits reflections on their political impartiality, so quickly acquired, as just before that, they had played a very definite political role and had been identified with a particular political party.

This, however, did not cause such public concerns as another phenomenon connected with the system of electing judges. While in 1985, as it was mentioned at the beginning, there was no agreement on the influence of the dominant political party on the composition of the Tribunal, now – in democratic conditions – the problem has revived in a different version. Every time a judge is elected for a vacancy (sometimes there are a few vacancies because individual terms finish at a different time), groups of 50 MPs representing their political

[22] Act of 1 August 1997 on the Constitutional Tribunal, Journal of Laws of 2000 No. 643 with amendments that followed.

[23] The Parliament is based on the principle of non-equality of the two Chambers; the legislative process always starts in the Sejm; the Senate has the right to take part in the process later through amendments or rejection, but these have to be accepted by the Sejm; thus, the final decision belongs to the Sejm (with the exception of the proceeding regarding the amendment to the Constitution and ratification of an international agreement that passes authority to an international organisation, when both Chambers must vote for).

party parliamentary fractions nominate "their" candidates[24]. Those who have the strongest support win (there is an absolute majority rule at the presence of half of the MPs) and, in practice, they are the candidates of the currently governing party (with very rare exceptions). This way, the above-mentioned monopoly of one Chamber also means the monopoly of a party or a majority coalition, which are not eager to support an opposition candidate or do this really seldom. The Sejm is not especially interested in the constitutional criterion of "outstanding legal qualifications" and the Sejm Committee interviewing candidates in general recommends them all. The criteria are just formal ones[25], and even if they were not, what qualification does the Sejm Committee have to assess the level of the candidates' legal expertise?

However, the system of electing judges, especially the applied practice, have been criticised from two angles. Firstly, by the parties that lost, even if on another occasion they had won. The statements made after the election of judges in 2010 can illustrate that: "…the Civic Platform club, not having supported the [Democratic Left] Alliance candidate, …leads to politicising the Tribunal". Another loser (Law and Justice member) added that the Constitutional Tribunal "is a purely party-oriented institution"[26]. Although, in the practical activities of the Tribunal, the relationship between the judges and the parties that promoted them is not easy for an outsider to notice, the Sejm has in fact done nothing to weaken the impression of party competition and political labelling of judges. Even the Sejm Presidium's right to recommend candidates agreed upon is not used. The Act did not introduce any other procedure supporting the "all-party" attitude (e.g. in the form of a "designating" committee *sui generis* or a 2/3-majority vote obligation).

In this situation, the public opinion, especially legal circles, demanded that more attention is given to legal and ethical qualifications than a party label. Three well-known non-governmental organizations, i.e. the Polish Section of the International Commission of Jurists, the Stefan Batory Foundation and the Helsinki Committee for Human Rights, formed a coalition for the establishment of the Civic Monitoring of the Candidates of Judges (OMKS), declaring:

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[24] Bigger parliamentary groups, having more than 50 members, propose their candidates. There were situations when smaller groups were looking for MPs who would support their candidates and were unsuccessful because MPs from bigger parliamentary groups were bound by discipline and had to act according to their party line. See E. Siedlecka, *Trybunał Konstytucyjny: jest nowy sędzia i stare problem* [Constitutional tribunal: there is a new judge and old problems], Gazeta Wyborcza of 14 July 2012.

[25] Act on the Constitutional Tribunal defines them mainly by reference to qualifications for a judge of the Supreme Court or the Supreme Administrative Court; candidates who do not meet these formal criteria are not nominated for election. In the cases described by the press, when the candidates did not meet the criterion of "irreproachable character", the Commission did not call their candidacy into question and the circumstances were revealed in a different way (in one case, the resignation took place after the election).

[26] http://www.salon24pl/news/75079,pis-i-sid-po-prowadzi-do-upartyjnienia-tk, 26 November 2010.

"We want to involve the civic community in the process of electing judges"[27]. The monitoring was not fully satisfactory, however, a number of times, it was possible to interview some of the candidates at open community meetings (some candidates refused to take part in such interviews). But it contributed to the inculcation of a belief that the selection of TK judges should not be limited to the proceeding appropriated by political parties in one Chamber of the Parliament[28]. As a result, some changes in this respect have been proposed in the new Bill on the Constitutional Tribunal[29].

As it was already mentioned above, the Act on the Constitutional Tribunal passed in 1997 was amended many times because the conditions of the Tribunal's work changed, there was a need to respond to social signals, the law changed after the sources of Polish law had been enriched by the law of the European Union, and the court's experience and the methods of adjudicating matured. In such a situation, the initiator (the President of the Republic of Poland, whose main consultant and in fact the author of the bill was TK itself[30]) decided to present a project of a completely new Act instead of another amendment. The project proposes this new approach to the system of electing TK judges, inspired by this experience as well as the demands made by public opinion and legal circles.

What causes that the new Act can be treated only as partly successful is the fact that there was no decision to amend the Constitution at the same time. Most experts' opinions are that without amending the Constitution, the reform of the Tribunal will not have the desired effect[31]. And the changes in the Constitution would be necessary first of all in connection with the above-mentioned issue but also a few others.

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[27] www.monitoringsedziow.org.pl, also: Ł. Bojarski, *Obywatelski monitoring wyborów sędziów TK – nowa inicjatywa organizacji społecznych* [Civic monitoring of election of the Constitutional Tribunal judges – new social organizations' initiative] [in:] *Księga XXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań TK – założenia a ich praktyczna realizacja* [25th anniversary jubilee book of the Constitutional Tribunal – Evolution of roles and tasks of the CT – assumptions and their practical implementation], Wyd. TK, Warszawa 2010, p. 175.

[28] K. Wojtyczek, at present Judge of the European Court of Human Rights in Strasburg, writes in her book *Sądownictwo konstytucyjne w Polsce, Wybrane zagadnienia* [Constitutional Court System in Poland – selected issues], Wyd. TK, Warszawa 2013, p. 94: "It is obvious that public opinion is interested in the candidates' attitude to political and ethical issues, which are much more important for people than their opinions on legal matters".

[29] The Bill was filed by the President on 10 July 2013 (the Sejm paper No. 1590).

[30] Which provoked strong criticism from K. Pawłowicz, *Sędziowie we własnej sprawie* [Judges in their own case], Rzeczpospolita of 19 February 2014, p. A11 (also: rp.pl/opinie). The author accuses the Bill of proposing a series of unconstitutional solutions and calls for the exclusion of all non-parliamentary entities from participation in the TK candidates' electoral proceeding and for inadmissibility of a waiting period.

[31] For the opinions see: orka.sejm.gov.pl; and: www.obserwatorkonstytucyjny.pl/ustawa-o-tk/. The opinions were developed by: A. Herbet i M. Laskowska; B. Banaszak; D. Dudek; M. Chmaj; M. Wiącek; P. Czarny for the Bureau of Research of the Sejm.

Thus, with no assumption to amend the Constitution, the Bill proposes that, within the existing constitutional formula with regard to the election of TK judges by the Sejm, a new element is introduced to the procedure, i.e. designating "nominee candidates" by – apart from 15-member MP groups – authorized entities involved in legal practice, e.g. some courts, academic Law Faculty Boards, legal profession associations and scientific organizations, etc. From the nominee candidates selected in such proceeding, 50-member groups of MPs or the Sejm Presidium, as before, would select "final" nominees for the election of judges. It is evident that this does not change much but it makes public opinion involved in an unprecedented way. Moreover, it lets us not only assume that designating candidates by legal circles is a step to meet the constitutional professional qualifications requirement (not only formal ones but also of the outstanding character), but also believe that it is a form of verification of their personality, ethical attitude and "irreproachable character"[32]. In connection with this issue, some other regulatory solutions were proposed in the Bill, e.g. with regard to a waiting period in the case when a senator or an MP mandate is changed for a judge mandate, the definition of deadlines in the judge election proceeding with the allocation of time necessary for consultations on the candidates, who – at present – are often nominated in the last moment. Independent of whether the particular elements of the proposed proceeding of electing judges are good or not (the catalogue of entities authorized to designate nominee-candidates, the rules of public consultations etc.), there was criticism – although not commonly expressed – of its unconstitutionality; and it was expressed by the parliamentarians[33].

The Bill as a whole is in general well assessed; it introduces many novelty proposals that, although deal with important issues, do not determine any essential changes of the conception of the Tribunal or a specific aspect of its work. It is almost impossible because at the very beginning, it was decided not to amend the Constitution. This way, any substantial changes, some of which are really necessary, arouse doubts whether they are in compliance with the Constitution. While the former Constitution was very sparing in connection with the Tribunal, the binding one treats some aspects in a way that does not allow for the legisla-

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[32] The Bill on TK, with no reference to the Act on the Supreme Court, formulates the requirements, including the "irreproachable character". In addition, the requirements are as follows: Polish citizenship, legal capacity, no limitation of civic rights, completion of legal studies (MA degree), good health, 10-year experience in specified legal professions or a higher doctoral degree or a professorship and at least 40 years of age.

[33] The author quoted in footnote No. 30 is an MP and she was nominated but not elected a TK judge several times. As she strongly criticizes the fact that the Bill was prepared by TK and not by the Sejm, the involvement of non-parliamentary entities in the judges' electoral proceeding and the introduction of a waiting period between the MP's term and starting the judge term, one can perversely state that according to her it is really bad that the Tribunal creates law for itself, but it is good that MPs elect themselves TK judges. Some legislation experts of the Bureau of Research of the Sejm, M. Laskowska i A. Herbet, also express critical opinions on judges electoral proceeding and the waiting period (see the opinions cited in footnote No. 31).

tor's freedom. This does not mean that no ambitious attempts have been made; the best example is the above-discussed one.

The proposal to establish the role of the Constitutional Tribunal in a universal way is one of such attempts. The Constitution defines it as part of the judiciary but while it gives courts the powers of institutions of administration of law, in the case of the Constitutional Tribunal, it only lists the areas of its competence without specifying its role and position in the political system[34]. Thus, the Bill shows that "TK is an organ of the executive that is to guard the constitutional order of the Republic of Poland" (Article 1); in addition, it "rules on the hierarchical compliance of norms, and fulfils other tasks specified in the Constitution" (Article 2). Although many experts see advantages of this "court of law" position, there are also drawbacks: there are also other organs that guard the constitutional order and they guard it in different ways. Thus, experts propose to combine the cited articles and to highlight that TK guards this order through a hierarchical supervision of law…[35]. Because one can find a difference between stating (by listing areas of competence) that TK adjudicates on non-compliance of some norms with the other ones and defining that it guards the constitutional order as a whole, guards it in a complex aspect, also in the aspect of rulings execution, signalling deficiencies of law (see below) and solving other issues. But also here, it is believed that it would be better if the Constitution specified the general role of the Constitutional Tribunal in public life.

One of the worries of the Polish public life is the dilatory execution of the rulings of the Tribunal[36] and rather poor response to information on oversights and loopholes that the Constitutional Tribunal sends to legislative organs (these are reports on problems resulting from rulings passed to the two Chambers of the Parliament and comments on oversights and loopholes sent to the legislative bodies because their elimination is indispensable). The Bill strengthens the importance of this information addressed to the Sejm and other judiciary organs giving them a signalling character, but in addition – and this gives some hope for improvement – letting the Tribunal ask the signal recipient to inform the Tribunal what the addressee's stand in the signalled case is. It is an idea aimed at disciplining addressees, who have not responded to the Tribunal's comments energetically so far. The problem of execution, or rather non-execution, of the rulings of the Tribunal has triggered discussions on possible resolution actions for years. The Senate has undertaken one such "action", issuing its own resolu-

[34] In addition, the literature highlights that it lists them in a rather chaotic way, K. Wojtyczek, *Sądownictwo…* [Court system…], *op. cit.*, p. 115; Since most opinions state that the change is good, although probably not well formulated, B. Banaszak is of the opinion that it is useless because TK position results from the Constitution.

[35] As e.g. in the opinions of M. Laskowska and A. Herbet, D. Dudek, P. Czarny cited in footnote No. 32

[36] In order to improve the situation, the Senate, which has the legislative initiative power, undertook a mission of developing bills and analysing the oversights in law reported by TK.

tion pledging to get involved in this specific mission. It analyses the rulings of the Tribunal and, using its right to legislative initiative, proposes adequate changes in law, which to some extent has improved the situation in the legislature. However, this has not solved the problem and that is why the Bill on the Constitutional Tribunal has become an occasion for a typically theoretical discussion: Which organ of the state authority should be deemed responsible in this sphere? On the one hand, a number of circumstances point at the government as an organ responsible for the state policy and managing the state administration and thus having all the instruments necessary to execute the rulings, both by filing bills and by influencing other legislative organs that are in general connected with administration[37]. On the other hand, the role of the President is pointed out as the Constitution entrusts "guarding the compliance with the Constitution" to the President. The supporters of that solution highlight that the President also has some defined superior authority. But it seems to be mainly inspiring in character. Independent of these doctrinal considerations, it seems already evident that further normative decisions are inevitable, but they are not included in the Bill. Probably, a new constitutional regulation would also be necessary here?

In the Constitutional Tribunal ruling practice over years, many types of different rulings have been issued. They have been classified in doctrinal commentaries in different ways, as e.g. "scope of law" rulings (a regulation, in a certain scope, complies/does not comply with …), "interpretational" rulings (a regulation understood in a certain way complies/does not comply with…), rulings "stating omission", not to say "legislative omission", etc. In addition, there are some complications regarding legal consequences of the rulings, especially temporary ones (*ex tunc* or *ex nunc*), or e.g. the problem with the so-called "revival of law" (whether and in what circumstances a repealed regulation can "revive", i.e. "return" the former regulation) as well as other consequences and their diversity depending on the character (mode) of ruling. There are such and many other problems, especially as – according to opinions expressed in discussions and by experts – "the Tribunal was neither consistent in using individual ruling formulas or in the way it defined the consequences of the rulings"[38]. There were demands to regulate these issues but as the Constitution does not formulate any rules in this respect, the Act was the only solution (that was probably one of the reasons to entrust the task of developing the Bill to the Tribunal). But the Bill has not introduced anything new in this respect.

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[37] An example is sometimes given that shows that after the Constitution entered into force, the Government (the Council of Ministers) was made responsible for "providing the Sejm with the bills necessary to implement the provisions of the Constitution within the time limit of two years" (Article 236 of the temporary and final regulations), which meant that the duty to undertake adequate steps to adjust law to the new Constitution was assigned to this executive organ.

[38] Cited opinion expressed by M. Laskowska and A. Herbet.

There are some other issues that the Bill does not solve. The problem is that, in fact, they cannot be regulated in an Act without the amendment of the Constitution. These issues, often discussed in the Polish study of constitutional law, include e.g. a dilemma resulting from an exception made in the Constitution to the rule regarding the time when the ruling enters into force[39]; the problem is that the Tribunal can postpone the date when a normative act expires (an Act even by 18 months and another regulation by 12 months). Although the reasons for that are understandable (most often these are the consequences for the budget or other serious consequences for the legal system[40]), the fact that regulations that do not comply with the Constitution remain in force arouses a lot of doubts. At the same time, no unique, consolidated way of dealing with such norms has been developed (e.g. the rule of non-application) but what is more, the legal consequences of non-constitutionality of a regulation have not been recognised.

Another issue that originated from one of the rulings of the Tribunal is its attitude towards the Law of the European Union, especially the secondary legislation[41]. The Constitution says that this law "is applicable directly and has priority over other acts". This way, the Constitution confirmed the European Union principle of the EU law priority over the member states' national laws but with "understatement" concerning its interaction with the national constitution. Not including adjudication of the constitutionality of this law in the catalogue of the Tribunal competence, the Constitution satisfied the European doctrine. It is an effect of the fact that TK cognition in general refers to (Article 188) legal acts passed by the central organs of the state. This means: not local law (which is adjudicated by the Supreme Administrative Court) and not the EU secondary legislation. But a way out has been found. As the right to a constitutional complaint relates to "an Act or another normative regulation" and dealing with the complaint is independent TK competence, the Tribunal decided that "another regulation" does not have to belong to the category of acts issued by the central organs of the state and this way it created an opportunity for adjudication – in the course of complaint proceeding – of the secondary EU legislation. In a certain particular case, it proved to be in compliance with the Constitution, but now

[39] According to the Constitution, TK rulings are subject to prompt announcement and enter into force on the day when they are announced.

[40] An example situation may be the introduction of "the European warrant of arrest", which was in conflict with the constitutional ban on extradition of a Polish citizen (a Polish citizen filed a constitutional complaint against the provision of the Criminal Proceeding Code, which adopted "the European warrant of arrest") and TK issued a ruling on non-compliance, which resulted in the necessity to amend the Constitution (Article 55) and obliged the legislator to do this in 18 months time.

[41] As far as the primary law, i.e. treaties, is concerned, it is assumed (not without opinions that put this attitude in question) that they are subject to the same regime as ratified international agreements, whose compliance with the Constitution can be adjudicated. With reference to the EU secondary legislation, see Article 91 item 3 of the Constitution of the Republic of Poland.

the question is: What consequences would non-compliance cause? There is no good answer. The Bill does not help to find it and the decision not to amend the Constitution is not creating a chance to solve the problem[42].

There are some other problems that cannot be solved by the Act, e.g. the concept of a constitutional complaint, which has attracted criticism for a long time. It relates to the conception of a constitutional complaint so only an amendment to the Constitution would satisfy the demands. The essence of a constitutional complaint was discussed above (the right to appeal against a normative act constituting grounds for a valid court ruling or administrative decision). In a sense, such a narrow frame results from a concern that a complaint proceeding could change into another court instance letting the Tribunal "verify" court of law rulings (another area for dispute with the Supreme Court). The abundant literature and discussions on the issue of a complaint, although all its advantages are emphasised, criticize this narrow character. Speaking about the dispute between the Courts, one author expressed the weakness of a complaint in the most concise way: "…the reached compromise led to a radical limitation of the scope of a constitutional complaint, which – being an instrument of assessment of individual solutions' constitutionality – changed into an individual motion to adjudicate the constitutionality of abstract and general legal norms"[43]. And a TK ruling, even if it adjudicates unconstitutionality of an act, will not repeal the former ruling but will refer the complainant "…back to the appropriate court procedures…"[44]. But, of course, this general issue of the conception of a constitutional complaint does not exhaust a series of other related interpretational and procedural problems, which started to appear and grow in the course of practice and which are discussed in the literature.

As the Bill on TK – as it was already mentioned – proposes a series of other necessary organizational changes, after the parliamentary work on it, it will probably be passed[45]. And, undoubtedly, it will be for the benefit of its everyday operation. Thus, the Shakespearean question in the title of the article does not make sense and most opinions accept the demand to change the Act. But isn't

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[42] This way, an opportunity to adjudicate the constitutionality of territorial law with the use of a constitutional complaint procedure was created.

[43] W. Wróbel, *Skarga konstytucyjna – problemy do rozwiązania, Księga XX-lecia*… [Constitutional complaint – problems to be solved, 20th anniversary jubilee book], *op. cit.*, p. 55.

[44] See M. Safjan, *Ewolucja funkcji i zadań Trybunału Konstytucyjnego – próba spojrzenia w przyszłość* [Evolution of functions and tasks of the Constitutional Tribunal – an attempt to look ahead] [in:] *Księga XXV-lecia*... [25th anniversary…], *op. cit.*, p. 26.

[45] It is after the so-called first reading in the Sejm (debate on general principles) and now is being worked on in the Commission. There will be the second reading soon (plenary discussion on detailed issues based on the Commission's report), followed by the third reading (voting), after which – if it is passed (there are opponents of the project) – the Bill will be sent to the Senate. Potential amendments reported by this Chamber will be passed or rejected by the Sejm and this way the Act will be finally passed. Then the President will sign it unless he sends it back to the Sejm for re-reading or to the Constitutional Tribunal for a preventive adjudication of its constitutionality. What will the Tribunal do then?

this going to make the need of radical changes "lie dormant" for another long period?

Thus, the question about the change of the legal regulation on the Polish constitutional court makes sense in a broader dimension and many debaters highlight that. It has been almost 30 years since the Constitutional Tribunal was established, and 17 years since a new conception of the Polish constitutional court together with the democratic Constitution of 1997 entered into force. The Tribunal has become well established and gained experience but also faced many problems. Some of them pose a threat to the capital of public trust collected so far; others expose the court ruling system to inconsistency and inability to properly fulfil the function to protect rights and freedoms. Thus, perhaps we should accept the opinions of many experts and the public and also amend the Constitution? Appreciating all the achievements of the Polish constitutional court over the period of decades, we should not give up better solutions for the future. Because, as Marek Safjan, former President of the Tribunal, said: "everything that is good can be even better"[46], and Jerzy Stępień, also former President, echoed his idea saying: "what is better is not always the enemy of what is good"[47].

POLISH CONSTITUTIONAL COURT: TO CHANGE OR NOT TO CHANGE? (A FEW REFLECTIONS ON THE NEW CONSTITUTIONAL TRIBUNAL BILL)

Summary

Since mid-2013, the Sejm has been working on the Bill on the Constitutional Tribunal. Expert opinions on that project highlight that, at the same time, it would be better to amend the Constitution of the Republic of Poland of 1997 with respect to the regulations defining the conception, electoral proceeding and the competence of this "court of law". However, such a solution has not been taken into account. In such a situation a question arises: To what extend can we expect the new Act to meet all the demands to reform the Constitutional Tribunal? How will the desired changes be accommodated within the scope of the Constitution?

The article is an attempt to confront the Bill with the demands with regard to the constitutional conception of the Tribunal expressed in the legal-constitutional literature and experts' opinions as well as by the legal circles and the public. In that

[46] *Op. cit.*, p. 40.

[47] J. Stępień, *Lepsze nie zawsze wrogiem dobrego*, in: *Księga XXV-lecia*... [What is better is not always the enemy of what is good], *op. cit.*, p. 131.

context, the article discusses essential problems that have not been solved so far, especially the way of electing judges (only by the Sejm, only after the designation by the MPs, by absolute majority vote). The article presents a thesis that this solution strengthens the old system originating from the 80s, i.e. the period when the dominating party ensured its influence on the Tribunal by appointing its judges. And although other TK limitations were removed in the democratic system, this one remains. What is worse, in the new democratic conditions, it creates favourable circumstances for political parties' competition in the parliament in order to win seats for "their" judges and, as a result, lets the Tribunal be accused of being involved in politics. The Bill, inspired by non-governmental organizations' opinions, proposes some changes but they meet with objections that they will be unconstitutional. This is another reason why changes should not be limited to the Act.

POLSKI SĄD KONSTYTUCYJNY – ZMIENIAĆ CZY NIE ZMIENIAĆ? (KILKA REFLEKSJI NA TLE PROJEKTU NOWEJ USTAWY O TRYBUNALE KONSTYTUCYJNYM)

Streszczenie

Od połowy 2013 roku w Sejmie trwają prace nad projektem nowej ustawy o Trybunale Konstytucyjnym. W ekspertyzach wobec tego projektu zwraca się uwagę, iż korzystniejsza byłaby równoczesna lub uprzednia zmiana niektórych przepisów Konstytucji RP z 1997 r., określających koncepcję, sposób wyboru i kompetencje tego „sądu prawa". Jednak takiej zmiany nie przewidziano. W tej sytuacji powstaje pytanie, na ile można się spodziewać, że nowa ustawa sprosta wszystkim postulatom reformy Trybunału Konstytucyjnego? Na ile pożądane zmiany będą się mieścić w ramach konstytucji? Artykuł jest próbą krótkiej konfrontacji projektu z propozycjami wysuwanymi pod adresem konstytucyjnej koncepcji Trybunału nie tylko w literaturze prawno-konstytucyjnej i opiniach ekspertów, ale także w środowisku prawników i w opinii publicznej. W tym kontekście porusza istotne nierozwiązane dotychczas problemy, jak zwłaszcza sposób wyboru sędziów (tylko przez Sejm, tylko na wniosek posłów, bezwzględną większością). W artykule wysuwa się tezę, że ten sposób petryfikuje stary system, wywodzący się z lat 80., czyli z okresu, kiedy także poprzez wybór sędziów partia hegemoniczna zapewniała sobie wpływ na Trybunał. I choć inne ograniczenia TK zostały w systemie demokratycznym usunięte, to jedno pozostało bez zmian. Co gorsza – w nowych warunkach demokratycznych sprzyja konkurencyjnej walce partii politycznych w parlamencie o miejsca dla „swoich" sędziów i w efekcie pozwala na zarzut upartyjnienia sądu. Projekt ustawy, inspirowany opinią organizacji pozarządowych, proponuje w tym zakresie pewne zmiany, ale spotyka je zarzut niekonstytucyjności. To kolejny powód, aby nie ograniczać zmian tylko do ustawy.

LA COUR CONSTITUTIONNELLE POLONAISE – CHANGER OU NE PAS CHANGER? (QUELQUES RÉFLEXIONS CONCERNANT LE PROJET DU NOUVEAU DROIT DU TRIBUNAL CONSTITUTIONNEL)

Résumé

Depuis la moitie de 2013 dans notre Diète on continue les travaux sur le projet du nouveau droit sur le Tribunal constitutionnel. Dans les expertises concernant ce projet on souligne que le changement simultané ou antérieur de plusieurs articles de la Constitution de la République polonaise de 1997 serait plus profitable surtout pour définir la conception, le moyen du choix et compétences de cette «cour du droit». Pourtant on n'a pas prévu ce changement. Dans cette situation une nouvelle question apparait: jusqu'à quel point peut-on espérer que le nouveau droit remplit toutes les demandes de la reforme du tribunal constitutionnel? Jusqu'à quel point les changements demandés seront compris dans le cadre da la Constitution? L'article forme un essai de la courte confrontation du projet et des propositions présentées auprès de la conception constitutionnelle du Tribunal non seulement dans la littérature juridique et constitutionnelle ainsi que dans les opinions des experts mais aussi dans le milieu des juristes et de l'opinion publique. Dans ce contexte l'article parle de quelques problèmes importants non résolus jusqu'à présent comme par exemple le choix des juges (par la Diète, seulement à la demande des députés, par la majorité absolue). Dans l'article il y a une thèse qui établit l'ancien système d'origine des années 80, c'est-à-dire de cette période où le parti dirigeant a aussi influencé sur le Tribunal par le choix des juges. Et malgré l'effacement de toutes les autres limites du Tribunal constitutionnel, c'est un élément qui reste sans changement. Et ce qui est pire encore, dans ces nouvelles conditions démocratiques cet élément favorise la lutte compétitive des partis politiques afin d'avoir des places pour «ses propres» juges ce qui en effet permet de formuler un reproche de partialité de cour. Le projet du droit inspiré par l'opinion des organisations non gouvernementales propose certains changements dans ce cadre mais il rencontre aussi ce reproche d'être contre la constitution. Et c'est une raison suivante de ne pas se limiter seulement à ce droit.

ПОЛЬСКИЙ КОНСТИТУЦИОННЫЙ СУД – ИЗМЕНЯТЬ ИЛИ НЕ ИЗМЕНЯТЬ? (НЕСКОЛЬКО РАЗМЫШЛЕНИЙ ПО ПОВОДУ НОВОГО ЗАКОНОПРОЕКТА О КОНСТИТУЦИОННОМ СУДЕ)

Резюме

С середины 2013 года в Сейме продолжается работа над проектом нового закона о Конституционном суде. В экспертизах, касающихся этого проекта, обращается внимание на то, что более выгодным было бы одновременное либо предварительное изменение некоторых положений Конституции РП 1997 года, определяющих концепцию, форму выборов и компетенции этого «суда над правом». Однако такое изменение не предусматривается. В этой ситуации возникает вопрос, насколько вероятно, что новый закон будет отвечать всем требованиям реформы Конституционного суда? Каким образом желанные изменения будут умещаться в рамках Конституции? Статья является попыткой краткого противостояния между проектом и предложениями, выдвигаемыми в адрес конституционной концепции суда не только в конституционно-правовой литературе и заключениях экспертов, но и среди юристов и в общественном мнении. В этом контексте затронуты существенные и нерешённые до сих пор проблемы, такие, как, в частности, форма избрания судей (только в Сейме, только по предложению депутатов, абсолютным большинством). В статье выдвигается тезис, что эту форму удерживает старая система, сохранившаяся с 80-х годов, представляющих период, когда через избрание судей правящая партия обеспечивала себе влияние на Конституционный суд. И, хотя другие ограничения полномочий КС были устранены – упомянутое выше осталось без изменений. Кроме того, это ограничение в новых демократических условиях влечёт за собой конкурентную борьбу политических партий в парламенте за места для «своих» судей и в итоге позволяет упрекнуть суды в партийной пристрастности. Законопроект, инспирированный взглядами внеправительственных организаций, предлагает в этой сфере определённые изменения, однако встречает на своём пути упрёк в неконституционности. Это служит очередным поводом к тому, чтобы не ограничиваться изменениями только в законе.

Iuś Novum
2/2014

Zbigniew Czarnik

CONSTITUTIONAL AND LEGAL ASPECTS OF THE PRINCIPLE OF DOUBLE-INSTANCE ADMINISTRATIVE PROCEEDING

The Constitution of the Republic of Poland provides every party to administrative proceeding with the right to appeal against rulings and decisions made in the courts of the first instance (trial courts)[1]. In the doctrine, it is assumed that law defined in this way is public subjective law, whose content is the right to challenge, with the use of legal steps, public administration commending activities[2]. At the same time, it plays a supervisory role with regard to the decisions made during a particular instance, however, the constitutional legislator does not define the concept of the right to appeal against the proceeding and leaves the decision on how this right is to be executed to ordinary legislation, which adopts different solutions, most often those developed in the past. Because of that, the treatment of the principle of the right to appeal is a derivative of the historical development of the scope of supervision of public administration. As a result, the already existing solutions developed in the pre-constitutional period are accepted and this means that many of them can raise doubts from the point of view of the constitutional principle.

It seems that the doctrine treats this issue routinely, thus it does not make an attempt to critically assess the former regulations and does not confront them with the content of Article 78 of the Constitution. The organs whose main task is to ensure the compliance of acts with the Constitution act in a similar standard way and there is a complete lack of consideration to the discussed constitutional principle and its compliance with international law that Poland is a signatory[3] to. This state must arouse fears and anxiety, especially in the times when the

[1] Article 78 of the Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, with the changes that followed).

[2] See: A. Błaś, and J. Boć [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* [Constitutions of Poland and a commentary on the constitution of the Republic of Poland of 1997], Wrocław 1998, p. 140.

[3] Article 13 on the Protection of Fundamental Human Rights and Freedoms (Journal of Laws of 1993, No. 61, item 284 with the amendments that followed).

legislative power more and more often gives up a systematic solution of norms and accepts a temporary one and alternative procedures to protect rights and freedoms. Thus, everything is unclear, including the issue whether whatever protection is possible and guaranteed. It should be also stated that the state occurs in a situation when there is an increased number of constitutional organs whose task is to protect constitutional virtues.

The question about a constitutional scope of the principle of the right to appeal (courts of first and second instance) against administrative proceeding is in fact a search for *ratio legis* for the "specific" appeal system existing in the Polish law, adopted from the past, e.g. in social insurance, which – despite the new regulation of 1998, i.e. after the Constitution had entered into force – maintains anachronistic solutions of the times of the People's Republic of Poland because it deprives a party of the right to appeal with results typical of administrative proceeding. There are many such cases and they do not only result from the past. The legislative presence is eager to create them[4]. Such exceptions stop being exceptional and it is difficult to find justification for them in the time when there is a full court supervision of public administration. It seems that the belief that administration works best when it is not supervised has won. Thus, the exertion of appropriate understanding of the constitutional principle of the right to appeal in administrative proceeding is in fact an attempt to ensure an adequate standard of human rights protection.

Referring these comments to particular examples, it is necessary to highlight all kinds of the appellate procedures, in which courts were given the power to supervise the decisions taken by administrative organs. A model for such proceeding is Article 83 item 2 of the Act on the System of Social Insurance [ASSI][5], which provides that an appeal can be made to a court and not to the administrative organ of the second instance. Such a solution seems to be defective. Article 78 of the Constitution creates the right to appeal against a decision issued by an administrative organ of the first instance for every party. Thus, for the party, whose case is adjudicated in the course of a decision, it creates a specific proceeding "claim" that consists in a request to launch a proceeding before an organ of the second instance, which aims to supervise the adjudication issued formerly. The consequence of the system of supervision that was designed this way is the principle of the right to appeal. On the other hand, its essence is such a construction of the proceeding, where a civil-legal decision is made,

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[4] E.g. Articles 109–110 of the Act of 27 August 2004 on providing health care services financed from public funds (Journal of Laws No. 164 of 2008, item 1027 with the amendments that followed); in accordance with the Act, the President of National Health Fund is an organ that decides on the provision of services in the case when the issues are subject to court competence; due to that there is a legal mess, both in the field of subjective and objective matters. Such a state is neither good for the stability, nor the authority of a court.

[5] Act on the System of Social Insurance of 13 October 1998 (Journal of Laws No. 205 of 2009 item 1585 with the amendments that followed) hereinafter referred to as ASSI.

that the organs of two instances within the same administrative structure, could supervise the way in which the case had been dealt with formally and as to the subject matter.

The principle of the right to appeal expressed in Article 15 of the Code of Administrative Proceeding[6] does not allow for exceptions. It seems that Article 78 of the Constitution does not legitimize such an exception, however, the regulation's second sentence says that any exceptions to the principle of each party's right to appeal against decisions and rulings issued by an organ of the first instance can be constituted by an Act. However, accepting the conclusion made based on the linguistic interpretation of Article 78 second sentence of the Constitution, which assumes that there may be legal situations with no appeal against a decision, as happens in Article 83 item 2 of the ASSI, would be in conflict not only with the first sentence of Article 78 of the Constitution, but also with Article 6 item 1 of the European Convention on the Protection of Fundamental Human Rights and Freedoms and Article 14 item 1 of the International Covenant of Civil and Political Rights. It would not meet the requirement of procedural justice, which is indispensable in the process of an appropriate protection of rights. Thus, it is necessary to treat the rule that some decisions issued by public administrative organs can be exempt of appeal against as unacceptable.

Appeal as a mechanism of supervision of non-absolute administrative decisions is a condition *sine qua non* of a properly built legal order, i.e. such that meets the rule of appropriate protection of an individual's rights against the commending activities of the State and which ensures legal activities of public administration organs. An exception made in this matter in Article 83 item 2 of the ASSI does not apply these values. Although it allows for filing an insurance case appeal in court, it does not give a court a possibility to fully supervise whether the ruling issued by ZUS [Social Insurance Institution] is in compliance with law. The compliance is to refer to the correct use of regulations of the substantive and proceeding law because an appeal as a complaint measure is supposed to implement the constitutional principle of legality and law abiding operation of administration.

Limitations to that lead to a violation of the fundamental procedural rights of a party to an administrative proceeding because the party has no possibility of questioning the appropriateness of the proceeding while it is pending. The approval of this state is connected with a permission and consent for a radical limitation to the rights of a party to the administrative proceeding in comparison with the standard proceeding defined in the provisions of the Code of Administrative Proceeding (CAP). It is necessary to highlight that the proceeding conducted by ZUS is a type of administrative proceeding, which is stated

[6] To read more about the principle see: Z. Kmieciak, *Odwołanie w postępowaniu administracyjnym* [Appeal in administrative proceeding], Warszawa 2011, p. 54.

in Article 180 § 1 of the CAP and, if the Act on Insurance does not introduce exceptions, it is pending based on those provisions. There must be an appeal organ within this proceeding because Article 181 of the CAP says separate regulations are to establish this organ.

Thus, an appellate organ cannot be any court, either a common court or an administrative one. Courts are not organs of administration, which is stipulated in the Constitution, which in Article 10 introduces a principle of the separation of powers and in Article 184 defines administrative courts' cognition. At the same time, Article 177 specifies the scope of tasks of the judiciary, emphasizing that its main task is the administration of justice in all cases, except those whose adjudication was restricted to a special court jurisdiction. On the other hand, administrative courts supervise administrative activities with regard to the scope specified in the Act. The analysis of these regulations unanimously shows that none of the discussed courts can be an appellate organ. This means that every decision issued by ZUS should not be subject to supervision in the course of appeal filed in a court of appeal as was regulated in Article 181 of the CAP.

What model of supervision can be adopted is another issue. The Act can choose if it is a full devolutionary model[7], adequate to the Polish system of law, or if the legislator uses a non-devolutionary model. Regardless of this choice, which is left to the legislator to decide on and is stated in Article 78 second sentence of the Constitution, every kind of adjudication of the administrative organ must be subject to supervision within an administrative proceeding. Such a conclusion is the main condition and assumption of appropriate protection of rights in the relations between a citizen and public administration. The system of appeal to a court against the decisions made by ZUS does not meet the requirements because it deprives a party of the right to supervise such adjudication and thus violates Article 78 sentence 1 of the Constitution. It is worth saying that, in the rulings of the Constitutional Tribunal, the supervision of decisions in appellate proceedings is recognized to be the fundamental guarantee of the protection of the rights of an individual. The examination of a case twice is of key importance for ensuring that protection (see the ruling of the Constitutional Tribunal of 15 December 2008, P57/07, and the ruling of the Constitutional Tribunal of 14 October 2009, Kp4/09).

In such conditions, a situation defined in Article 83 item 2 of the ASSI cannot be treated equivalent to appeal and one cannot assume that the course of decision verification adopted there means the administration of the constitutional rights to appeal. Article 78 of the Constitution supports the state of no approval of this solution. Since everybody has the right to appeal against a decision of the first instance, the exceptions from that rule cannot consist in depriving anybody

[7] More on the topic of administrative course of appeal: J. Zimmermann, *Administracyjny tok instancji* [Course of administrative instances], Kraków 1986, p. 11 and next.

of that right. They can, however, occur in two situations. One of them is the right to appeal to the same organ (non-devolutionary means), which – according to rulings – meets the constitutional requirement but can be connected with the adoption of a principle that administrative proceeding is only a preliminary procedure preceding a court proceeding. Then, administrative proceeding can take place in one instance. Then, a court does not supervise an administrative decision in the course of adjudicating the appeal, but autonomously rules in the case, which can be filed in court because the administrative proceeding has been exhausted. In both cases, there is an exception in view of Article 78 second sentence of the Constitution. Such an exception can be accepted because it does not violate constitutional principles and does not make a court an appellate organ whose task is to supervise administration. A different interpretation of the discussed exception remains in conflict with the rules provided by the Constitution.

Highlighting the unconstitutionality of the present solution, it is also necessary to consider that the administrative course of instances plays a supervision and control role[8], and due to that it guarantees the administration of the constitutional rule of law defined in article 7 of the Constitution. In accordance with the provision, the organs of public authority act in compliance with law and within the limits of law. From that principle, the Constitutional Tribunal rulings derive many other detailed principles, e.g. the principle of legal certainty, the principle of definiteness (unambiguity) of law or the principle of the legal system completeness. Based on these considerations, the principles that deserve special attention are those that request that the organs of public authorities "dealing with the case" (decision making bodies as well as those administering law) act in a way that guarantees law certainty. Meeting this legal demand is only possible in the case when an organ adjudicating an appeal can verify activities undertaken within administrative proceeding and assess decisions about rights and duties.

A lack of such a possibility frees an organ from the necessity to act in compliance with law because the violation that takes place there does not translate into the final assessment of the ruling. Just because of these reasons, there is a possibility of change in the interpretation and administration of law that is adjusted to the situation and meets political needs but does not serve the appropriate administration of law. This kind of practice is in conflict with the opinions expressed by the Constitutional Tribunal many times, e.g. the violation of the demand to ban "the change of rules" in the course of the proceeding in order to satisfy a party's particular interests, i.e. "within the same case", including improper interpretation of law. Sometimes, the principle is also called a principle of observance of interests pending or a ban on using traps (compare rulings of the Constitutional Tribunal: (1) of 12 September 2005, S 13/05, Journal

[8] See J. Zimmermann, *Polska jurysdykcja administracyjna* [Polish administrative jurisdiction], Warszawa 1996, p. 178 and next.

of Laws No. 186, item 1566, OTK ZU Series A, No. 8, item 91, p. 1084; (2) of 14 March 2005, K 35/04, Journal of Laws No. 48, item 461, OTK ZU Series A No. 3, item 23, p. 276 and (3) of 2 December 2002, SK 20/01, Journal of Laws No. 208, item 89, OTK ZU Series A, No. 7, item 89, p. 1162).

Thus, the defective interpretation of the constitutional principle of the right to appeal against administrative decisions (two instances) has various consequences. Not all of them have been discussed because they are not only important from the legal point of view. They are often connected with irresponsibility of the State for the economic consequences of discretionary acting and lead to the liquidation of an economic entity. Such actions are possible in the time when no wójt (mayor of a rural commune) can expect a lack of supervision of their discretional decision even if it solves a minor case. In the same legal system, the decisions of ZUS worth many-million zlotys and those of other regulatory organs are not subject to such supervision. The obvious lack of balance between these situations has no justification if the principle of the right to appeal is connected with the idea of a democratic rule of law state.

CONSTITUTIONAL AND LEGAL ASPECTS OF THE PRINCIPLE OF DOUBLE-INSTANCE ADMINISTRATIVE PROCEEDING

Summary

The article discusses the issues connected with a party's constitutional right to appeal against a decision made by public administration organs. A model conception assumes that appropriate protection of an individual's rights is possible only in a situation when an organ of the second instance can supervise a decision made by an organ of the first instance. The formal condition of appropriateness of such supervision is a statutory assumption that the two organs remain in the administrative structure and this way they create an administrative sequence of instances. In so designed constitutional model, an administrative court is an instance of supervision of the final decisions of the above-mentioned organs. Law approves some exceptions to that solution, which consist in exemption of some administrative decisions from supervision by another instance and appeals against them are adjudicated by a common court, which – in accordance with the Constitution – has no supervision power over administration, thus has a limited jurisdiction over its operation. The article highlights constitutional doubts that are connected with the phenomenon and threats it can pose to the protection of an individual's rights.

ASPEKT KONSTYTUCYJNOPRAWNY ZASADY DWUINSTANCYJNOŚCI POSTĘPOWANIA ADMINISTRACYJNEGO

Streszczenie

W artykule została podjęta problematyka konstytucyjnego prawa strony do odwołania się od rozstrzygnięcia organów administracji publicznej. Modelowe ujęcie zakłada, że prawidłowa ochrona praw jednostki jest możliwa tylko w sytuacji, gdy decyzja organu pierwszej instancji może być skontrolowana przez organ wyższego stopnia, przy czym warunkiem formalnym poprawności takiej kontroli jest ustrojowe założenie, iż organy pozostają w strukturze administracji i w ten sposób tworzą administracyjny tok instancji. Ostatecznie działania organów w tak ukształtowanym, konstytucyjnym modelu kontroluje sąd administracyjny. Od tego rozwiązania prawo dopuszcza wyjątki, które polegają na wyłączeniu niektórych spraw administracyjnych spod kontroli instancyjnej, a odwołania w nich składane rozpoznaje sąd powszechny, który konstytucyjnie nie sprawuje kontroli administracji, zatem ma ograniczone kompetencje w zakresie ingerowania w jej działalność. Artykuł wskazuje na związane z tym zjawiskiem wątpliwości konstytucyjne oraz niebezpieczeństwa, które mogą wiązać się z ochroną praw jednostki.

L'ASPECT CONSTITUTIONNEL ET LÉGAL DU PRINCIPE DE DEUX INSTANCES DE LA PROCÉDURE ADMINISTRATIVE

Résumé

Dans l'article on présente la problématique du droit constitutionnel de la partie pour appeler d'un jugement des organes de l'administration publique. La présentation modèle admet que la protection juste des droits de l'individu n'est possible que dans le cas où la décision de l'organe de première instance peut être contrôlée par l'organe du degré supérieur où la condition formelle de la correction de ce contrôle repose sur un principe constitutionnel que les organes restent dans la structure de l'administration et ainsi forment tout un système des instances. Finalement, l'action des organes dans ce modèle constitutionnel ainsi formé est contrôlée par la cour administrative. De cette solution le droit admet quelques exceptions qui excluent certaines affaires administratives du contrôle de l'instance et leur appel est traité par la cour universelle qui de point de vue constitutionnel n'accomplit pas de contrôle de l'administration alors, elle a des compétences limitées dans le cadre d'intervention à son activité. L'article indique tous les doutes constitutionnels et les dangers qui peuvent être liés avec la protection des droits de l'individu dans cette situation.

КОНСТИТУЦИОННО-ПРАВОВОЙ АСПЕКТ ПРИНЦИПА ДВОЙНОЙ ИНСТАНЦИИ АДМИНИСТРАТИВНОГО СУДОПРОИЗВОДСТВА

Резюме

Статья поднимает проблематику конституционного права стороны на обжалование решений государственных органов. Такой подход предполагает, что соответсвующая защита прав субъекта возможна только в ситуации, когда решение органа первой инстанции может быть контролировано органом высшей инстанции, причём формальным условием правильности такого контроля является конституционная предпосылка, что органы остаются в рамках административной структуры и таким образом представляют ход инстанций. Окончательные решения в сформированной таким образом конституционной модели находятся под контролем Административного суда. Право допускает исключения из такого решения, состоящие в освобождении некоторых административных вопросов от контроля инстанциями, а предъявляемые обжалования рассматривает общий суд, который с точки зрения Конституции не осуществляет контроля над государственными учреждениями, в связи с чем имеет ограниченные компетенции в сфере вмешательства в их деятельность. Статья указывает на связанные с этим явлением сомнительные моменты конституционного характера, а также опасности, касающиеся защиты прав субъектов

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SCOPE OF THE CONCEPT OF A CRIMINAL THREAT IN ACCORDANCE WITH ARTICLE 115 § 12 OF THE CRIMINAL CODE

In the legal-criminal aspect, a threat is undoubtedly of special importance. The concept of a criminal threat (included in the three successive Polish Criminal Codes: Article 91 § 4 of the Criminal Code of 1932, Article 120 § 10 of the Criminal Code of 1969 and Article 115 § 12 of the Criminal Code of 1997) has not changed substantially. In accordance with Article 115 § 12 of the Criminal Code in force, a criminal threat is a threat to commit a crime (a punishable threat) as well as a threat to undertake steps to initiate a criminal proceeding or dissemination of information that affronts the veneration of a person or his close relation. The term was broadened in the Criminal Code of 1969 by adding a clause (existing also in the Criminal Code of 1997) in accordance with which "an announcement of an intent to undertake legal steps in order to protect the rights violated by crime".

Thus, it is clear that a criminal threat contains three different types of threat:

a) a punishable threat (in accordance with Article 190 § 1 of the Criminal Code),
b) a threat to undertake steps to initiate criminal proceeding,
c) a threat to disseminate information affronting the veneration of a person or his close relation.

Re. (a): A punishable threat is of particular importance within the criminal threat category. It is mentioned in Article 115 § 12 of the Criminal Code at the top of other types of threat and constitutes a crime on its own against the liberty defined in Chapter XXIII of the Criminal Code[1]. Other types of criminal threat are the perpetrator's modus operandi aimed at achieving a particular objective.

[1] Article 190 § 1: "Who threatens another person to commit a crime to harm him or his close relation, if the threat raises the threatened persons justified fear that it will be carried out, is subject to punishment in the form of fine, limitation of liberty or imprisonment for up to two years."

A threat is against a person's legal peace, i.e. awareness of safety one has being protected by law. The subject to protection is, as it is often emphasised in the doctrine, a victim's subjective feeling of liberty that is limited by the fear that some unpleasant events included in the perpetrator's threats will come true[2]. Z. Papierkowski wrote that it is an activity petrifying the sphere of individual liberty[3]. W. Świda, on the other hand, stated that: "The protected good (…) is the feeling of liberty, a freedom from concern and fear"[4] and O. Chybiński discussed it in a bit broader way stating that it is a freedom from threats, i.e. an individual's feeling of safety free of a concern that a crime will be committed to harm him or his relation[5]. A similar opinion can be found in the more modern doctrine of criminal law where it is unanimously assumed that the subject to legal-criminal protection against a punishable threat is a man's freedom in psychological sense, a freedom from concern, fear resulting from an announcement that a crime will be committed to harm the threatened person or his close relation[6], or – as M. Filar states – "a freedom from the feeling of fear caused by other people's activities or a threat causing psychical discomfort and reducing his psychical life standard"[7]. It was also expressed in court rulings[8]. The subject to protection is

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[2] S. Glaser, *Polskie prawo karne w zarysie* [Polish Criminal Law – Outline], Kraków 1933, p. 333; L. Peiper, *Komentarz do kodeksu karnego, prawa o wykroczeniach, przepisów wprowadzających obie te ustawy* [Commentary on the Criminal Code, Law on Offences and Regulations on the Execution of the two Acts], Kraków 1936, p. 505; S. Glaser, A. Mogilnicki, *Kodeks karny. Komentarz; prawo o wykroczeniach, przepisy wprowadzające, tezy z orzeczeń Sądu Najwyższego, wyciągi z motywów ustawodawczych* [Criminal Code – Commentary; Law on Offences – Executive Regulations; Supreme Court Rulings Theses, Excerpts from Legislative Reasons], Kraków 1934, p. 802.

[3] See Z. Papierkowski, *Prawo karne (część szczególna)* [Criminal Law (Special Part)], z. I, Lublin 1947, s. 150.

[4] W. Świda [in:] *Kodeks karny z komentarzem*, I. Andrejew, W. Świda, W. Wolter (ed.), Warszawa 1973, p. 483; similarly I. Andrejew, *Polskie prawo karne w zarysie* [Polish Criminal Law – Outline], Warszawa 1976, p. 374 and D. Gajdus [in:] *Prawo karne. Zagadnienia teorii i praktyki* [Criminal Law – Theoretical and Practical Issues], A. Marek (ed.), Warszawa 1986, p. 343.

[5] See O. Chybiński [in:] *Prawo karne. Część szczególna* [Criminal Law (Special Issues)], O. Chybiński, W. Gutekunst, W. Świda (ed.), Wrocław–Warszawa 1980, p. 204; similarly J. Śliwowski, *Prawo karne* [Criminal Law], Warszawa 1979, p. 384.

[6] A. Marek, *Wolność jako przedmiot ochrony prawa karnego* [Liberty as Subject to Protection by Criminal Law] [in:] *Prawnokarne aspekty wolności* [Criminal Law – Liberty Aspects], M. Mozgawa (ed.), Zakamycze 2006, p. 26; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo* [Criminal Code – Commentary – Rulings], Warszawa 2000, p. 359; R. Góral, *Kodeks karny. Praktyczny komentarz* [Criminal Code – Practical Commentary], Warszawa 2007, p. 321; J. Wojciechowska [in:] *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* [Crime Against Liberty, Freedom of Thought and Religion, Sexual Orientation and Decency, Veneration and Bodily Inviolability – Chapters XXIII, XXIV, XXV and XXVII of the Criminal Code – Commentary], B. Kunicka-Michalska, J. Wojciechowska (ed.), Warszawa 2001, p. 33 and A. Zoll, *Kodeks karny, Część szczególna, Komentarz* [Criminal Code – Special Issues – Commentary], A. Zoll (ed.), volume II, Warszawa 2008, p. 509.

[7] See M. Filar, *Kodeks karny. Komentarz* [Criminal Code – Commentary], M. Filar (ed.), Warszawa 2008, pp. 790–791.

[8] See ruling of the Supreme Court of 9 December 2002, IV KKN 508/99, Lex No. 75496.

not a good that would be infringed if a threat were carried out[9]. On the other hand, in the decision of 15 February 2007, the Supreme Court pointed out that the level of threat to the feeling of a victim's safety must be assessed based on his behaviour[10].

The behaviour implementing the features of a crime of a punishable threat (Article 190 § 1 of the Criminal Code) consists in threatening another person that a crime will be committed to harm him or his close relation[11].

The feature of the verb expression "threatening that a crime will be committed" is within the definition of a criminal threat provided for in Article 115 § 12 of the Criminal Code. It contains an announcement of the commission of a crime, i.e. an announcement of the commission of a felony or a misdemeanour of harming the threatened person or his close relation. This scope of penalisation seems to be right. It would be purposeless to broaden the penalisation on a threat to commit an offence because it might cause the inclusion of a "not serious" threat into the scope of Article 190 § 1 of the Criminal Code, or narrowing it to a threat of specified crimes because the liberty of a man that a perpetrator infringes should be protected to the broadest possible extent.

A threat is an influence exerted on another person's psyche by announcing the evil that the threatened person will face from the threatening person or someone else whose behaviour the threatening person can influence. Usually, the evil is to happen to the threatened person in the event he refuses to comply with the threatening person's will but it is also possible that a threat is not connected with a demand but is intended to create the threatened person's feeling of fear that a threat will come true[12].

The subject to the executive activity provided for in Article 190 of the Criminal Code is a person who faces a threat[13] (and according to W. Świda, his psyche with regard to the feeling of safety)[14], but it does not have to be the same as the person on whom the threat is to be carried out but it has to be a close relation.

Persons against whom threats are made must be unambiguously defined although a threat does not have to be expressed in their presence. A threat does not have to be carried out straight away. It can be a future risk. For the existence

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[9] See ruling of the Appellate Court in Lublin of 30 January 2001 (II AKa 8/01), OSA 2001, No. 12, item 88.

[10] Decision of the Supreme Court of 15 February 2007 (IV KK 273/06), Prokuratura i Prawo 2007, No. 7–8, item 7, pp. 8–9.

[11] In accordance with Article 115 § 11 of the Criminal Code, a close relation is a spouse, an ascendand, a descendant, a sibling, a linear or collateral relative, a person that is in the relationship resulting from adoption and their spouse, and a cohabiting person.

[12] K. Nazar-Gutowska, *Groźba bezprawna w polskim prawie karnym* [Criminal Threat in Polish Criminal Law], Warszawa 2012, pp. 138–139.

[13] See S. Budziński, *O przestępstwach w szczególności. Wykład porównawczy z uwzględnieniem praw obowiązujących w Królestwie Polskim i Galicji Austriackiej* [On Crimes in Particular – A Comparative Lecture with Regard to Rights in the Kingdom of Poland and Austrian Galicia], Warszawa 1883, p. 44.

[14] See W. Świda, *Prawo karne* [Criminal Law], Warszawa 1978, p. 435.

of a crime, it is not necessary that a perpetrator undertakes any activities to carry out the threat or that he really intends to carry it out or has real opportunities to carry it out, neither is the fact why he makes a threat[15]. Only a subjective receipt of the threat by the threatened person is important, i.e. whether the threat really inflicted upon him a concern or the feeling of fear that it may be carried out[16].

Persons against whom a threat cannot be made are juridical persons because they are not able to feel the threat until its content includes a threat to natural persons representing a given juridical one[17].

The issue concerning the form that a threat may take is of key importance. It makes it possible to answer the question "In what way did the perpetrator threaten?" as well as it can have impact on the effectiveness of the threat or the penalty for the perpetrator. The form of a threat influences the quantity and the quality of the threatened person's feelings, which subsequently has impact on the level of fear experienced and the reduction of resistance[18].

It is possible to threaten, i.e. announce trouble, in many ways. The Criminal Code of 1997 that is in force in Poland (like the previous codes) does not introduce any limitations with regard to the form of a threat; what is important is that the threatened person understands he will face trouble. In the event of a punishable threat, he must realise that a crime will be committed to harm him or his close relation. The threat can be explicit or presumed. The form of a threat is sometimes determined by the event circumstances, especially personal features of the threatening and the threatened persons[19]. One cannot exclude a situational threat, i.e. one in which, in the light of circumstances, it is obvious that the perpetrator announces the future commission of a crime to harm the threatened person[20]. The perpetrator can threaten in a way that is not understandable for third parties but unambiguous for the addressee because of the situational context that is clear for the victim. Expressing a threat, a perpetrator can use various objects, e.g. a knife or even such an untypical thing as

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[15] K. Daszkiewicz-Paluszyńska, *Groźba w polskim prawie karnym* [Threat in Polish Criminal Law], Warszawa 1958, pp. 137–138; see also M. Filar [in:] *Kodeks karny, Komentarz* [Criminal Code – Commentary], O. Górniok (ed.), Warszawa 2006, p. 622.

[16] See ruling of the Supreme Court of 27 April 1990 (IV KR 69/90), Przegląd Sądowy 1993, No. 5, item 84.

[17] L. Peiper, Komentarz… [Commentary…], *op. cit.*, p. 506.

[18] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 121.

[19] Compare W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austriackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce* [Criminal Law – On Crimes in Particular – Comparative Lecture on Criminal Law in Austria, Germany, Russia and in Force in Poland], Warszawa 1924, p. 228.

[20] L. Peiper gave an example of waiting in front of a victim's place of residence in circumstances suggesting wrong intention; L. Peiper, *Komentarz…* [Commentary…], *op. cit.*, p. 505.

a car[21]. One can threaten with the use of spoken word[22] (expressed directly or via the means of communication, e.g. a mobile phone, or make threats which were recorded on electronic devices, e.g. CDs or DVDs), in writing (including short messages, e-mails, letters etc.), with gestures or any other behaviour that is clearly intended to be perceived as a threat to commit a crime. Thus, if the perpetrator's behaviour does not clearly show that he announces the commission of a crime or it is not evidently known who is going to be harmed, it cannot be assumed that there are features of a punishable threat[23].

In order to determine the scope of a punishable threat, it is essential to distinguish between a threat and a warning. It is highlighted in literature that the difference between a threat and a warning should be looked for in the different reason and aim of a threat and a warning. The reason for a threat is in general the perpetrator's hostile feeling while the reason for a warning is in general his benevolent feeling towards the addressee. A threat aim is to threaten another person while a warning is to protect the warned person against a danger facing them[24]. To distinguish between a threat and a warning, it is also important who is supposed to commit a crime that the warning concerns. It seems that the announcement of one's own crime should be usually treated as a threat. It would be difficult to assume that a person first announces that he is going to commit a crime that will harm another person and then wants to protect that person against this danger he himself is going to create[25].

The formulation of Article 190 of the Criminal Code does not provide that the person who expresses a threat and the person who is to carry the threat out must be the same. The threatening person and the perpetrator of a crime, however, must be linked in the sense that committing the announced crime depends on the threatening person, i.e. the threatening person must have influence on whether the announced crime is going to be committed or not[26]. According to A. Spotowski, informing another person that someone wants to kill him is not a punishable threat unless the information provider has influence on the behav-

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[21] Ruling of the Supreme Court of 3 April 2008 (IV KK 471/07), OSN 2008, No. 10, item 9; for more broadly see J. Kosonoga, Gloss on the ruling of the Supreme Court of 3 April 2008, IV KK 471/07, Wojskowy Przegląd Prawniczy 2010, No. 1, pp. 143–149.

[22] See M. Surkont, *Zniesławienie i znieważenie w polskim prawie karnym* [Defamation and Insult in Polish Criminal Law], Gdańsk 1982, p. 73 and *ibid*. *Treść i forma karalnego znieważenia* [Content and Form of Criminal Defamation], Palestra 1981, No. 6, pp. 66–74.

[23] A. Spotowski [in:] *System prawa karnego, O przestępstwach w szczególności* [System of Criminal Law – On Crimes in Particular], (ed.) I. Andrejew, L. Kubicki, J. Waszczyński, part II, volume IV, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989, p. 30.

[24] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 131.

[25] A. Spotowski [in:] *System…* [System…], *op. cit.*, p. 31; compare also K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 132.

[26] See M. Filar [in:] *Kodeks…* [Criminal Code…], *op. cit.*, s. 791, and also K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 95.

iour of the third party. Even if the information provider wanted to cause the informed person's concern, such behaviour would not be a punishable threat[27].

One must distinguish between a situation in which a threatening person announces a commission of a crime by another person he is in agreement with and he can influence and a situation in which a threatening person addresses his announcement not directly to the threatened person but to another person who is to pass the announcement to the right addressee. This will be called an indirect threat. It is pointed out in literature that an "indirect" threat is a ground for criminal proceeding only in the event when there is a link of agreement between the threatening person and the person who passes the threat to the victim or when a perpetrator informing the third person about a threat at least predicted that the threat would be passed to the victim and gave consent to that[28].

We can also read about a problem connected with the determination of a difference between a threat expressed seriously to raise fear and limit the victim's freedom to make decisions and a threat that was not expressed seriously in order to make fun of a gullible person who is too ready to react to such an announcement with fear[29]. A threat for a joke will remain unpunished only when the concern it caused proves to be objectively groundless. But if a person threatening "for a joke" passes this threat in the way that will raise a justified concern about its implementation, he goes beyond the borders for penalization and his "joke" becomes a punishable threat[30]. In such a case, it is not enough to state that the perpetrator did not intend to carry out his threat (e.g. he threatened with an unloaded gun, which he knew).

One cannot speak about a punishable threat if the threatened person knew that the threatening person did not intend to carry out a threat because in such a case the threat does not raise justified fear that it would be fulfilled[31]. When a threat by joke is analysed, a question is asked whether the fact that other people knew that the perpetrator did not intend to carry out his announcement could influence the penalization of that threat. A. Spotowski's standpoint seems to be right. According to him, "This circumstance is not important because the knowledge other people have about the groundlessness of a threat cannot diminish the fear of the addressee"[32].

A punishable threat is a crime of result and the result is making a victim be concerned about the implementation of the threat. One cannot treat the implementation of a threat, i.e. a commission of a crime, as a result. For the existence

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[27] A. Spotowski, [in:] *System…* [System…], *op. cit.*, p. 31.

[28] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, pp. 137–138.

[29] *Ibid.,* pp. 133–134.

[30] M. Filar, *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 622; similarly A. Spotowski [in:] *System…* [System…], *op. cit.*, p. 34; differently J. Wojciechowski, *Kodeks karny, Komentarz* [Criminal Code – Commentary], Warszawa 1997, p. 331.

[31] J. Wojciechowska [in:] *Przestępstwa przeciwko…* [Crimes Against…], *op. cit.*, p. 691.

[32] A. Spotowski [in:] *System…*[System…], *op. cit.*, p. 35.

of a crime under Article 190 of the Criminal Code, the implementation of the threat does not matter. Neither can we agree with the standpoint that this crime is committed at the time of expressing a threat[33].

The assessment whether a threat really raised the threatened person's fear is based, apart from his reliable information about his feelings, on the symptoms of being endangered observed in his behaviour by others. The danger that the threat will be carried out does not have to be objective. Only a threat must be objective. The threatening person may be objectively dangerous and despite this the threatened person may be not afraid of his threat. And conversely, he may have an unimpeachable opinion and despite that can raise the threatened person's fear[34]. Causing the threatened person's fear should be assessed subjectively. The subjective feeling depends on a individual's personal features and his state that results from the threat. If, for instance, a perpetrator takes out a gun and threatens to shoot, although the gun is unloaded or damaged, the threatened person does not know about it and can treat the threat as possible. The threatening person knows that the threatened person will believe in the threat and it will make him be concerned. Subjective assessment is necessary but not sufficient because the Act uses a term "substantiated fear", thus its assessment requires an objective element[35]. A fear can be treated as substantiated if an average man that has similar features of personality, psyche, intellect and mentality in similar conditions in all probability would treat the threat as real and causing concern.[36] Thus, the decisive prerequisites will be circumstances and the way in which the threat was expressed, which can substantiate the real fear that it will be carried out. This makes it possible to eliminate threats that nobody sensible would treat as serious from the scope of threat penalization[37].

The crime of a punishable threat was classified in the Polish criminal law as a common crime (*delicta communia*). Any person can be subject to it if he meets the general conditions of criminal liability.

A punishable threat is a deliberate crime that can be committed in a direct intent. A controversy arises in connection with the other form of deliberateness, i.e. a possible intent. Some representatives of the doctrine believe that threatening another person is an intentional activity requiring deliberateness in the form

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[33] M. Siewierski [in:] *Kodeks karny...* [Criminal Code…], *op. cit.*, p. 426. This opinion is expressed by e.g. J. Wojciechowski, see *ibid*., *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 360 and R. Góral, who stated that the crime results in creating a given person's feeling of fear that a threat is going to be carried out and a commission takes place at the moment of expressing it; see *ibid*. *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 322.

[34] L. Peiper, *Komentarz…*, *op. cit.*, p. 508.

[35] See the ruling of the Appellate Court in Cracow of 4 July 2002 (II AKa 163/02), KZS 2002, No. 7–8, item 44.

[36] M. Filar, *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 622.

[37] A. Marek, *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2010, p. 437.

of a direct intent[38]. Others state that it is enough that a perpetrator predicts such an effect of the threat and gave it his consent[39].

Re. (b): Another type of a threat is **a threat to undertake steps to initiate criminal proceeding**. There is an evident difference in comparison with a punishable threat because a punishable threat is a crime in itself (Article 190 § 1 of the Criminal Code) and a threat to undertake steps to initiate criminal proceeding never has such features; moreover, it may not be classified as a criminal threat[40]. It must be reminded that in accordance with the regulations in force, everybody has a social duty to report a commission of a crime that is subject to the criminal proceeding *ex officio* (Article 304 of the Criminal Procedure Code)[41]. Thus, a given person does not only have the right but also a duty to report a crime. Based on the Criminal Code in force (similarly as in the Criminal Code of 1932 and 1969) a threat to undertake steps to initiate criminal proceeding constitutes a crime only in the event the perpetrator uses it as a means of forcing a person (to act, omit or annul)[42]. Threatening to undertake steps to initiate criminal proceeding as such (if a threatening person does not intend to force another person to any specific behaviour) is not punishable[43]. Such a threat would be unpunished if the perpetrator only made it or even carried it out. However, in the analysed case, criminality of the perpetrator's behaviour lies elsewhere.

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[38] The standpoint is expressed by: S. Goczałkowski [in:] *Encyklopedia podręczna prawa karnego* [Concise Encyclopaedia of Criminal Law], W. Makowski (ed.), volume II, Warszawa, p. 575; W. Świda, *Prawo…* [Criminal Law], *op. cit.*, p. 519; D. Gajdus [in:] *Prawo karne…* [Criminal Law…], *op. cit.*, p. 343; A. Marek, *Kodeks…* [Criminal Code…], *op. cit.*, p. 366; A. Zoll [in:] Kodeks karny. Część szczególna. Komentarz [Criminal Code – Special Issues – Commentary], A. Zoll (ed.), volume II, Zakamycze 2006, p. 546.

[39] O. Górniok [in:] *Kodeks karny, Komentarz* [Criminal Code – Commentary] (ed.) A. Wąsek, Gdańsk 2002, p. 977, similarly R. Góral, *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 322.

[40] M. Surkont, *Przestępstwo zmuszania w polskim prawie karnym* [Crime of Forcing in Polish Criminal Law], Gdańsk 1991, p. 95. M. Mozgawa, Przestępstwo zmuszania [Crime of Forcing] [in:] *Przestępstwa przeciwko dobrom indywidualnym, System Prawa Karnego* [Crime Against Personal Rights – Criminal Law System], vol. 10, (ed.) J. Warylewski, Warszawa 2012, p. 460.

[41] Article 304. § 1: Everybody, having learnt about the commission of a crime prosecuted *ex officio*, has a social duty to report it to a prosecutor or the Police. The provision of Article 191 § 3 is applied adequately. § 2. State and self-government institutions that, in connection with their duties, learned about the commission of a crime prosecuted *ex officio* are obliged to report it to a prosecutor or the Police without delay and undertake necessary steps until an organ responsible for prosecution arrives or until an adequate decisions are issued by that organ in order to prevent traces of crime and evidence being destroyed. § 3. The Police shall immediately pass a report about the commission of a crime that must be investigated by a prosecutor or their own data indicating the commission of a crime together with collected material to a prosecutor.

[42] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 96.

[43] As the Supreme Court noticed in its ruling of 12 November 1937, 2 k1072/37, see ruling 97/38, "a threat to undertake steps to initiate criminal proceeding, if it meets the requirements of Article 242 of the Criminal Code, constituting in fact a legal act, has the features of a crime defined in Article 251 of the Criminal Code [at present Article 191 of the Criminal Code – the authors' comment], only when it constitutes a means of implementation of another aim, which the perpetrator wants to achieve by a threat. It does not contain, however, any features of a crime when it announces an intent to undertake legal steps".

M. Surkont rightly notices that a threat to undertake steps to initiate criminal proceeding is a form of forcing; by exerting pressure on the victim's will a perpetrator wants to make him behave in a required way[44]. In general, one cannot use the knowledge about a crime committed by someone to make that person behave in a particular way, although there are some exceptions to that rule. And thus, if a victim who knows the perpetrator informs him that if he does not give the stolen object back or if the perpetrator does not compensate the damage, the crime will be reported, the threat is not going to be treated as a criminal one[45]. In fact, it is an example of a warning rather than a threat. As A. Spotowski notices, such an attitude often results in the resolution of a conflict without the involvement of a court with benefits for both parties (one of them regains their possession, the other avoids legal liability) and although such behaviour can be treated as inappropriate from the ethical point of view, it cannot be treated as a crime[46]. It must be noticed that a person who makes a threat against (or rather warns) a perpetrator that there is a possibility of initiating criminal proceeding does not have to be a victim himself. He may happen to be the third party, e.g. a witness of a crime, or someone who learns about a crime from a reliable person and addresses the perpetrator of a crime with a demand that he should return the stolen property to the victim or the crime will be reported to the law enforcement institutions.

As a rule, a threat to undertake steps to initiate criminal proceeding is a crime (Article 191 of the Criminal Code) only when it is a means of forcing, however, sometimes this kind of behaviour can be a crime in itself classified under Article 190 of the Criminal Code[47]. It will occur when a perpetrator threatens that he will report a crime that the threatened person did not commit. In such a case, the perpetrator threatens to commit a misdemeanour intended to harm a victim and his act should be classified based on Article 190 of the Criminal Code[48]. A threat to undertake steps to initiate criminal proceeding includes a threat to

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[44] M. Surkont, *Przestępstwo…* [Crime…], *op. cit.*, s. 95–96.

[45] As M. Siewierski writes "If a person injured by a crime demands – under a threat of reporting it to a prosecutor – a compensation for damage caused by that crime, we may only treat it as a warning of the perpetrator about legal and criminal consequences of his act and an appeal to him to compensate the damage. Whether it is only an admissible appeal to compensate damage or a crime specified in Article 167 of the Criminal Code [at present Article 191 of the Criminal Code – the authors' comment] depends on given circumstances. If, e.g. a victim uses it as a pretext and demands excessive compensation, his act will have the features of a crime specified in Article 167 [at present Article 191 of the Criminal Code – the authors' comment]". M. Siewierski [in:] *Kodeks karny…* [Criminal Code…], *op. cit.*, pp. 429–430.

[46] A. Spotowski [in:] *System…* [System…], *op. cit.*, p. 44.

[47] M. Mozgawa, *Przestępstwo zmuszania* [Crime of Forcing], p. 462.

[48] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 97. As the author writes "Treating such cases as threats to undertake steps to initiate criminal proceeding would not be right. It would result in impunity of people who threaten in this way without the use of the discussed threat as a means of forcing (because if such a threat is a means of forcing, the case does not raise any doubts and is classified as in Article 251 [at present Article 191 of the Criminal Code – the authors' comment] – K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 97.

file a private charge (in case of crimes prosecuted on private accusation), to file a motion to prosecute a crime (in case of crimes prosecuted on a motion of the injured person) or report a crime prosecuted *ex officio*[49]. Thus, it does not apply to any other kind of proceeding different than the criminal one, e.g. a civil proceeding (although sometimes the consequences of the other ones can be very troublesome, e.g. the obligation to compensate the damage) or a disciplinary one (where the consequence may be dismissal from work). Some doubts arise in connection with offences (especially now, when these cases are adjudicated by courts and not by boards judging petty offences). K. Daszkiewicz-Paluszyńska expressed an opinion that a threat to undertake steps to initiate criminal proceeding includes cases concerning misdemeanour (called penal-administrative proceeding then)[50] but W. Świda is contrary to it[51]. In the doctrine, the latter opinion is assumed to be right because a threat to undertake steps to initiate criminal proceeding in cases regarding misdemeanour does not find grounds in Article 91 § 4 of the Criminal Code of 1932 nor in Article 120 § 10 of the Criminal Code of 1969, nor in the context of Article 115 § 12 of the Criminal Code of 1997. There are arguments that this threat should regard only an announcement of the proceeding in criminal cases and not regarding misdemeanour because misdemeanour proceeding is not criminal proceeding in the sense of Article 115 § 12 of the Criminal Code[52]. It is not so certain, however, because one can say that is a special kind of proceeding that is defined outside the Criminal Procedure Code (in the Penalties Execution Code). While in the past, the case was simpler – as a rule, courts did not adjudicate on in cases of misdemeanour – today, this argument is not valid. A stronger argument is that if we assumed that a threat to undertake steps to initiate proceeding concerning misdemeanour applied, there would be a disharmony with a punishable threat (in the sense of Article 190 of the Criminal Code), which – as we know – applies only to a threat to commit a crime (and not misdemeanour)[53].

However, there is a problem how to deal with a threat to undertake steps to initiate proceeding in cases regarding minors. Here, again, it can be briefly stated that it is not applicable because these are not subject to criminal proceeding. But, if we take into account the plane of proceeding regarding punishable acts (i.e. acts that are crimes, fiscal crimes or are listed in the Act on the proceeding against minors), the situation is not so unambiguous. Why can we treat certain behaviour as one meeting the requirements of a threat to undertake steps to initiate a criminal proceeding when it is addressed to adults and not in the case

[49] K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 102.
[50] *Ibid.,* p. 103.
[51] W. Świda, *Prawo karne* [Criminal Law], Warszawa 1989, p. 443.
[52] A. Spotowski [in:] *System…* [System…], *op. cit.*, p. 46.
[53] M. Mozgawa, *Przestępstwo zmuszania* [Crime of Forcing], p. 463.

such a threat is made against a minor (a person on whom, because of their young age, this threat may exert even bigger pressure)? Yet, *de lege lata*, the situation is unambiguous – a threat to undertake steps to initiate criminal proceeding against a minor is not applicable, although we may have serious doubts if it is a right solution.

A threat to give evidence against a person in pending criminal proceeding can never be treated as a threat to undertake steps to initiate criminal proceeding. The Supreme Court was wrong in its opinion expressed in a ruling of 1933[54], in which it stated that: "a threat to undertake steps to initiate criminal proceeding can be applicable not only in connection with the initiation of activities in the juridical sense, i.e. as a form leading to the administration of criminal law, but can also concern the implementation of penal repression in substantive sense, and thus it will be a criminal threat to threaten to give evidence against the accused in the pending trial or threatening to deliver compromising evidence". The standpoint was rightly criticised in the doctrine[55], and the Supreme Court itself abandoned it in a later decision[56]. The phrase used by the legislator: "to initiate criminal proceeding" cannot get a broader interpretation, and thus e.g. a threat made by a victim that he is not going to withdraw an already filed motion to pursue the perpetrator is not a threat to undertake steps to initiate criminal proceeding (because it was already initiated).

The Act excludes the announcement to undertake steps to initiate criminal proceeding that aims to protect the legal good violated in the course of a crime by a person to whom it was addressed from the scope of a criminal threat category (e.g. a threat to report a crime planned by the perpetrator in order to prevent the commission of an illegal act or a threat to initiate a proceeding against a perpetrator of appropriation, who does not want to return a given object)[57].

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[54] 1 K 734/33, Zb. Orz. 28/11. The ruling quoted after K. Daszkiewicz-Paluszyńska, who does not give its date. K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 101.

[55] Compare criticism by K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 102. A. Spotowski rightly stated that such treatment of an announcement of an intent to make aggravating testimonies in the course of pending proceeding (or disclosing compromising evidence in connection with the pending proceeding) would be an inadmissible going beyond the scope specified in the provision (i.e. Article 251 of the Criminal Code of 1932, Article 167 of the Criminal Code of 1969, Article 191 of the Criminal Code of 1997) A. Spotowski [in:] *System…* [System…], *op. cit.*, p. 46.

[56] Compare ruling of the Supreme Court of 7 July 1949, Wa K 1305/49, PiP 1950, No. 7, p. 140.

[57] As A. Zoll emphasises, "such an announcement may refer to past events (a crime was committed by a perpetrator) as well as future events (a threat addressee is planning to commit a crime). It should be also assumed that an announcement to disseminate information affronting veneration is not a criminal threat if the conditions specified in Article 213 § 2 are met". A. Zoll [in:] *Komentarz KK, cz. szczególna* [Commentary on the Criminal Code – Special Part], vol. II, 2008, p. 518. Still in accordance with the Criminal Code of 1932, when there was no equivalent (Article 115 § 12 last sentence), K. Daszkiewicz-Paluszyńska expressed an opinion that an exception can be made from the rule that a threat to undertake steps to initiate criminal proceeding can be a threat based on facts that really substantiate criminal proceeding in the event when: (1) the threatening person is a victim, (2) action, omission or annulment, to which a perpetrator forces, remains connected with the forced person's act (e.g. to get a stolen object returned, to withdraw a discrediting allegation etc.), (3) the forced person does not flagrantly

It is obvious that such a threat is not a punishable one in the sense of Article 115 § 12 of the Criminal Code (and thus a person who makes it cannot be made liable based on Article 191 of the Criminal Code)[58]. The solution included in the last sentence of Article 115 § 12 of the Criminal Code ("the announcement of an intent to undertake steps to initiate criminal proceeding in order to protect the rights that were violated by crime is not a threat") was not known to the Criminal Code of 1932, however, even then both the doctrine and the judicature highlighted that it is necessary to limit the too broad concept of a threat[59]. The postulates of the doctrine were taken into account in Article 120 § 10 of the Criminal Code of 1969 by including a limitation similar to that in Article 115 § 12 of the Criminal Code in force. However, it should be pointed out that in the discussed regulations of the Criminal Code of 1969 and the Criminal Code in force, there is an unfortunate phrase: "…is not a threat". In each of these cases, the perpetrator's behaviour is a threat although with no criminal features. As a result, the postulate *de lege ferenda* of M. Surkont to substitute the phrase "is not a threat" by a phrase "is not a criminal threat" seems to be justifiable (and still up-to-date)[60]. Spending a bit more time on the interpretation of the last sentence of Article 115 § 12, one should consider also the terms: "crime" and "only" used in it. Is it really necessary to treat it as a crime *sensu stricto*? The question must be given a negative answer because there are no grounds to predict the protection of the right that was violated by a crime (*stricte*) but not by an illegal act (that is not a crime e.g. because of a lack of fault). This approach is also justified by logical and purposefulness interpretation. With regard to the phrase that the announcement of initiating proceeding aims only to protect law, it is necessary to state that linguistic interpretation directives unambiguously suggest that a person announcing his intent cannot aim at anything else (and anything more) as only to protect the right that was violated by a crime[61]. A. Marek

misuse his advantage over the forced person that results from that person's fear of criminal proceeding. K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, pp. 100–101.

[58] J. Wojciechowska [in:] *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej, Rozdziały XXIII. XXIV, XXV i XXVII kodeku karnego, Komentarz* [Crimes Against Liberty, Freedom of Thought and Religion, Sexual Orientation and Decency, Veneration and Bodily Inviolability, Chapters XXII, XXIV, XXV and XXVII of the Criminal Code – Commentary], B. Kunicka-Michalska, J. Wojciechowska (ed.), Warszawa 2001, p. 49.

[59] Compare S. Glaser, A. Mogilnicki, *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 390; K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 104. Compare also ruling of the Supreme Court of 12 January 1937, II K 1072/37, OSNK 1938, No. 4, item 97.

[60] M. Surkont, *Przestępstwo…* [Crime…], *op. cit.*, p. 100.

[61] Compare J. Majewski [in:] *Kodeks karny, Część ogólna, Komentarz* [Criminal Code – General Issues – Commentary], vol. I, A. Zoll (ed.), Zakamycze 2004, p. 1449; M. Surkont, *Groźba spowodowania postępowania karnego jako postać groźby bezprawnej w polskim prawie karnym* [A threat to undertake steps to initiate criminal proceeding as a form of criminal threat in Polish criminal law], Pal. 1993, No. 9–10, p. 18. Differently – as it seems wrongly – A. Wąsek believes that an aim or a motive of the perpetrator's action (protection of the right violated by a crime) does not have to be the only, or even the main one the perpetrator takes into account because he may want e.g. to distress another person. A. Wąsek [in:]

is right to emphasise that the perpetrator's striving to achieve another aim does not eliminate the features of a criminal threat (forcing to particular behaviour, e.g. a motion to prosecute, change of the will etc.)[62].

Re. (c): The third type is **a threat to disseminate information affronting the veneration of a person or his close** relation. A threat to disseminate information discrediting a person, if it does not aim to force, is not a crime; only the perpetrator's intent to force the threatened person to behave in a particular way constitutes forcing[63]. As K. Daszkiewicz-Paluszyńska rightly states, the threatening person announces his intent to damage the reputation of another person or challenge the good opinion of them, or will attempt to create an opinion of low moral values of that person or his close relation[64].

As the provision of Article 115 § 12 stipulates, a threat must concern "information" affronting the veneration. It is worth mentioning that based on Article 212 of the Criminal Code criminalising defamation, the terms: "demeanour" and "features" were used. Demeanour is the manner in which a person behaves – his performance (e.g. commission of a crime, immoral conduct); and features are certain inborn and acquired personal features (e.g. alcoholism, drug addiction, mental illness etc.). Thus, it should be thought that the concept of "information" is broader than demeanour and features because there is certain information that cannot be classified as the victim's demeanour or features that can have a negative (sometimes even shameful) effect (e.g. the fact that the victim was raped or that a wife threw a husband out)[65]. Defamatory information (that a perpetrator threatens to disseminate) may be either true or false; the truthfulness of a statement – as M. Surkont states – is less important because the assault consists in the aim to force[66]. The information must discredit the threatened person or his close relation. Thus, the victim can be a person threatened that information will be disseminated to discredit him or his close relation (in accordance with Article 115 § 11 of the Criminal Code). There seems to be a controversy whether that is applicable only to a living close relation or also to those who died. M. Surkont's opinion is adequate for this situation: "the end of natural personality stops the legal protection of the deceased but in many cases his defamation can damage

Kodeks karny. Komentarz [Criminal Code – Commentary], vol. I, O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, L. Tyszkiewicz, A. Wąsek (ed.), Gdańsk 2005, p. 845.

62 A. Marek, *Kodeks karny* [Criminal Code], p. 317–318.

63 M. Surkont, *Zapowiedź rozgłoszenia wiadomości uwłaczającej czci jako postać groźby bezprawnej* [Announcement of the intent to disseminate information affronting veneration as a form of a criminal threat], NP 1989, No. 5–6, p. 101 and next.

64 K. Daszkiewicz-Paluszyńska, *Groźba…* [Threat…], *op. cit.*, p. 103.

65 Compare comments by M. Surkont, *Przestępstwo…* [Crime…], *op. cit.*, pp. 111–112.

66 *Ibid.*, p. 112.

the reputation of his close relations who are still alive. And this can be the aim of the threatening person"[67].

In colloquial use, veneration means respect, esteem, appreciation but it is also associated with a cult and admiration (in the latter sense, it is not subject to legal-criminal protection). There is a dual perception of the term "veneration": its external (objective) and internal (subjective) comprehension. Speaking about external veneration, we mean the values the person has in the opinion of other people (it is a man's social importance), and speaking about internal veneration, we mean a man's feeling of personal dignity (it is a man's internal value). In the case of the provisions of Article 212 of the Criminal Code, the subject to protection is the external (objective) element, and in the case of defamation (Article 216 of the Criminal Code) – the internal (subjective) element, i.e. dignity[68].

It must be clearly emphasised that the provision of Article 115 § 12 of the Criminal Code speaks of a threat to disseminate information affronting the veneration of the threatened person or his close relation and compares it with a threat under Article 190 (and a threat to undertake steps to initiate criminal proceeding). Thus, while Article 190 of the Criminal Code speaks of a threat to commit a crime (any type of crime, i.e. also a crime against veneration), then, in the case of dissemination of information affronting the veneration (of the threatened person or his close relation) – in the course of making conclusion *a contrario*, it is not applicable to a threat that is within the scope of Article 190 (because these would be overlapping scopes). Thus, as a result, it concerns such a threat that is neither defamation nor an insult. It can be another demeanour that is not a crime but violates a man's personal rights (in accordance with Article 23 of the Criminal Code)[69]. In A. Zoll's opinion, it is not a criminal threat to announce the intent to disseminate information affronting veneration if the conditions for admissible criticism justification are fulfilled (under Article 213 § 2 of the Criminal Code)[70]. It seems that it can also be a situation provided for in Article 213 § 1 of the Criminal Code ("A crime specified in Article 212 § 1 does not take place if a non-public allegation is true"). In such a case there is no defamation at all under the condition that the allegation is true (it conforms with the real state of things) and is non-public[71]. A doubt arises, however, in the context of "trumpeting" referred to in Article 115 § 12 of the Criminal Code,

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[67] *Ibid.*, p. 114.

[68] M. Mozgawa [in:] *Kodeks karny. Komentarz* [Criminal Code – Commentary], M. Mozgawa (ed.), Warszawa 2012, p. 503; M. Mozgwa, *Przestępstwo zmuszania* [Crime of Forcing], p. 465.

[69] A. Marek, Kodeks karny… [Criminal Code…], *op. cit.*, p. 318.

[70] A. Zoll [in:] A. Barczak-Oplustil, M. Bielski, G. Bogdan, Z. Ćwiąkalski, P. Kardas, J. Raglewski, M. Szewczyk, W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz* [Criminal Code – Special Issues – Commentary], vol. II, Warszawa 2008, p. 518.

[71] Obviously, lack of crime in accordance with Article 212 § 2 is not applicable because of the fact that the classified type is carried out with the use of mass communication media (and this includes non-publicity of an allegation).

whether the term "trumpet" means "publicize, make everybody know, blab'[72]. According to W. Wolter, using the verb "trumpet" we mean "behave in a way that leads to a situation in which information reaches a wider circle of people, which can, although does not have to, have features of making things public"[73]. According to A. Marek, "'trumpeting' should be understood as letting things be known not to a single person only but to a bigger number of people"[74]. The announcement of the intent to pass the information affronting the veneration of one person to another one is not a criminal threat unless the third person is purposefully selected (is known for having an unbridled tongue) and is sure to pass the information further[75]. Summing up, it can be stated that it does not matter whether the announcement concerns making information known to the public (e.g. during a mass meeting) or in a non-public way (e.g. by letting more than one person know, informing them one by one[76]). Thus, it is clear that trumpeting may be performed in a non-public way.

Summing up, it must be stated that the concept of a criminal threat as defined in Article 115 § 12 of the Criminal Code was not formulated clearly enough. Although too broad concept of a threat was used in the Criminal Code of 1932, which was limited in Article 120 § 10 of the Criminal Code of 1969 and Article 115 § 12 of the Criminal Code in force (by including a reservation that "an announcement of an intent to undertake steps to initiate criminal proceeding is not a threat if it aims to protect the right violated by a crime"). It is a right solution but it is not fortunately formulated because an announcement included in the provision *in fine* constitutes a threat too, although it does not have the attributes of criminality. Thus, it is justifiable to support a postulate *de lege ferenda* that the phrase "is not a threat" should be supplied with a word "criminal"[77].

Another highlighted doubt is the fact that a threat to undertake steps to initiate criminal proceeding concerns a threat to initiate criminal proceeding in connection with a crime or a fiscal crime. The threat does not concern proceeding in a case in connection with an offence or a fiscal offence or the proceeding against minors. This kind of limitation raises doubts, especially in the context of the proceeding against minors (because of the reasons discussed above). Being outside the scope of the provision, cases of initiating proceeding against minors may turn out to be essential in social sense and it might be considered whether the statutory scope of a criminal threat should be broadened by these situations.

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[72] *Słownik języka polskiego PWN* [PWN Dictionary of the Polish Language], vol. III, (ed.) M. Szymczak, Warszawa 1984, p. 89.

[73] W. Wolter [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem* [Criminal Code with a Commentary], Warszawa 1973, p. 526.

[74] A. Marek, *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 318.

[75] Cit. M. Surkont, *Przestępstwo…* [Crime…], *op. cit.*, pp. 115–116.

[76] J. Majewski [in:] *Kodeks karny…* [Criminal Code…], *op. cit.*, p. 1451.

[77] M. Surkont, *Przestępstwo…* [Crime…], *op. cit.*, p. 100.

What has caused discrepancies between the doctrine and the judicature for a long time (and still does) is the issue whether the existence of the threatened person's justified fear that a threat can be carried out constitutes an essential element of an act in the case of the whole criminal threat or should be only associated with a crime of a punishable threat when is occurs as a feature and condition for its commission. It seems that while a punishable threat is a crime by itself and its essence consists in raising the threatened person's fear, the Criminal Code uses a concept of a criminal threat also for the statutory definition of a series of features of other crimes. In such a situation, a threat and its direct result constitute only a certain stage in the implementation of the perpetrator's another criminal intent. Raising fear is not the perpetrator's final aim but constitutes a means of obtaining another aim. That is why a threat should be objectively serious enough to the threatened person to make him convinced that he is endangered by the implementation of the announced wrong[78].

SCOPE OF THE CONCEPT OF A CRIMINAL THREAT IN ACCORDANCE WITH ARTICLE 115 § 12 OF THE CRIMINAL CODE

Summary

The article deals with the concept of a criminal threat in accordance with Article 115 § 12 of the Criminal Code in force. The statutory definition of a criminal threat contains three different types of a threat that are thoroughly analysed in the article: a punishable threat (as specified in Article 190 § 1 of the Criminal Code), a threat to undertake steps to initiate criminal proceeding and a threat to disseminate information affronting the veneration of the threatened person or his close relation. The authors believe that the concept of a criminal threat is not formulated clearly enough and suggest possible ways of amending the provision.

[78] K. Nazar-Gutowska, Groźba bezprawna… [Criminal Threat…], *op. cit.*, pp. 237–238.

ZAKRES POJĘCIA GROŹBY BEZPRAWNEJ W ROZUMIENIU ART. 115 § 12 KODEKSU KARNEGO

Streszczenie

Artykuł dotyczy zakresu pojęcia groźby bezprawnej w rozumieniu art. 115 § 12 obowiązującego kodeksu karnego. Stosownie do definicji ustawowej groźba bezprawna zawiera w swojej treści trzy różne rodzaje gróźb, które zostały w artykule poddane szczegółowej analizie: groźbę karalną (w rozumieniu art. 190 § 1 k.k.), groźbę spowodowania postępowania karnego oraz groźbę rozgłoszenia wiadomości uwłaczającej czci zagrożonego lub jego osoby najbliższej. Autorzy podnoszą, że pojęcie groźby bezprawnej nie jest dostatecznie jasno sformułowane i wskazują możliwe kierunki zmian tego przepisu.

LE CHAMP DE LA NOTION DE MENACE ILLÉGALE DANS LE CADRE DE L'ART. 115 §12 DU CODE PÉNAL

Résumé

L'article concerne le champ de la notion de menace illégale dans le cadre de l'art. 115 § 12 du Code pénal actuel. En expliquant la définition constitutionnelle la menace illégale comprend dans son contenu trois genres différents des menaces qui sont analysées d'une façon détaillé dans cet article: menace punissable (dans la compréhension de l'art. 190 § 1 du Code pénal), menace introduisant la procédure pénale et aussi menace de diffusion de l'information portant atteinte à l'honneur de la personne menacée ou ses proches. Les auteurs indiquent que la notion de menace illégale n'est pas assez clairement formulée et ils montrent les directions possibles de changement de ce règlement.

ОБЪЁМ ПОНЯТИЯ ПРОТИВОПРАВНОЙ УГРОЗЫ В СТАТЬЕ 115 § 12 УГОЛОВНОГО КОДЕКСА

Резюме

Статья касается определения объёма понятия противоправной угрозы, нашедшего отражение в статье 115 § 12 действующего Уголовного кодекса. Согласно установленному законом определению, противоправная угроза включает в себя три различных вида угроз, которые в статье были подвергнуты тщательному анализу: наказуемую угрозу (как определено в статье 190 § 1 УК), угрозу, влекущую за собой уголовную ответственность, а также угрозу разглашения информации, задевающую честь находящегося под угрозой лица либо его близких. Авторы утверждают, что понятие противоправной угрозы не является достаточно точно сформулированным, и указывают на возможные направления изменений этих положений.

Zbigniew Kwiatkowski

COURT COMPETENCE IN CRIMINAL TRIALS IN THE EVENT OF TRANSFERRING A CASE TO A COURT OF THE SAME LEVEL DUE TO TRIAL ECONOMICS (ARTICLE 36 OF THE CPC)

The constitutional principle of the right to a fair trial means that "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court" (Article 45 item 1 of the Constitution of the Republic of Poland)[1]. The cited provision is not limited only to the ascertainment that "(…) everyone shall have the right to a fair and public hearing, without undue delay, before (…) court", but also defines other attributes of the organ authorised to adjudicate. The organ should be "competent", "impartial" and "independent"[2]. This means competence to examine the case with regard to both the subject matter and the territory. In the light of the constitutional right to a fair trial, it is assumed in the doctrine that "the hearing before a competent court is a guarantee of the rule of law in the administration of justice and the feeling of trust to individual independent courts and their ability to adjudicate objectively"[3].

It should be emphasised that the Constitution of the Republic of Poland does not enact rules concerning the determination of the competence of a court to adjudicate in a case. In accordance with Article 176 item 2 of the Constitution "the organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute". The provision unambiguously states that the criteria for determination of the courts competence with regard to the subject

[1] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483 with amendments that followed).

[2] D. Szumiło-Kulczycka, *Prawo do sądu właściwego w polskim procesie karnym i gwarancje jego realizacji* [Right to a competent court in the Polish criminal proceeding and its guarantees], [in:] *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia* [Criminal proceeding rules vs. contemporary challenges – Professor Stanisław Waltoś commemorative book], (ed.) J. Czapska, A. Gaberle, A. Światłowski, A. Zoll, Warszawa 2000, p. 247.

[3] W. Grzeszczyk, *Właściwość miejscowa sądu z delegacji ze względu na dobro wymiaru sprawiedliwości (art. 37 k.p.k.)* [Territorial court jurisdiction with regard to the good of the administration of justice (Article 37 of the Criminal Procedure Code)], Prokuratura i Prawo 2000, No. 9, p. 121.

matter and territorial jurisdiction can be regulated only by an Act and not an implementing regulation supplementing an Act, i.e. a legal act that is of lesser importance than an Act of Parliament. This does not mean, however, that an Act can arbitrarily specify the competence of a court and leave e.g. the issues to be decided by another organ of the State, e.g. a court[4]. Thus, the competence of common courts in criminal cases is regulated in the provisions of Part II of Chapter 1 titled *Jurisdiction and composition of a court* (Article 24–39) and Article 7, 11 and 11a of the Act of 6 June 1997 on the Regulations implementing Criminal Procedure Code[5]. In the quoted provisions, the legislator precisely defines the competence of a court, especially with regard to the subject matter and the function determined by the specialist type of supervision and the territory[6]. The legislator specified the competence with regard to the subject matter first of all in accordance with the character of undertaken procedures by authorising a juridical organ of an adequate status to perform them, i.e. deal with a certain case in the first instance within legal liability for an act[7]. Broadly understood economic criteria are also taken into consideration, including the proceeding costs for the persons summonsed to appear in court from remote places[8]. Territorial competence (jurisdiction) means a court is authorised to proceed because of the place where an event took place and gave grounds to carry out these activities[9]. The provisions of the Criminal Procedure Code allow for some specific exceptions resulting in various juridical situations – *forum extraordinatum*. They create circumstances where a case can be transferred to another court of the same level as the one that has jurisdiction to adjudicate. In such a case, there is, by virtue of the special provision, a change of the general regulation of the criteria that result in special competence. The present Criminal Procedure Code (CPC) allows for such regulations in the event when, first of all, most people who must be summonsed live far away from the competent court and close to the court where the case is to be transferred to. In such a situation, the competent court can ask the court of a higher level to transfer the case to another court of the same level (argument from Article 36 of the CPC). Secondly, the good of the administration of justice can justify the transfer of a case to another court of the same level by the Supreme Court (argument from Article 37 of the CPC).

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[4] K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.) – (kilka uwag)* [Competence from transfer (Article 36 of the CPC) – a few comments)] [in:] *Rzetelny proces karny. Księga Jubileuszowa Profesor Zofii* Świdy [Fair criminal trial – Professor Zofia Świda jubilee book], (ed.) J. Skorupka, Warszawa 2009, pp. 332–333.

[5] Act of 6 June 1997 – Regulation implementing the Criminal Procedure Code (Journal of Laws of 1997, No. 89 item 556 with amendments that followed).

[6] M. Cieślak, *Polska procedura karna. Podstawowe założenia* teoretyczne [Polish Criminal Procedure – Basic Theoretical Assumptions], 3rd edition, revised and supplemented, Warszawa 1984, p. 238.

[7] *Ibid.*, p. 239.

[8] S. Waltoś, *Proces karny. Zarys systemu* [Criminal Trial – System outline], Warszawa 2009, pp. 161–162.

[9] *Ibid.*, p. 160.

Thirdly, the exclusion of all the judges of a court from adjudication of the case justifies its transfer by the court of a higher level to another court of the same level (argument from Article 43 of the CPC). Fourthly, the limitation of prosecution specified in Article 101 of the CPC makes the appellate court decide to transfer the case for examination to another court of the same level (argument from Article 11a of the Regulations implementing the CPC).

Remaining outside the subject matter scope of the considerations of the situations discussed in Article 37 of the CPC, Article 43 of the CPC and Article 11a of the regulations implementing the CPC, it is necessary to state that further reasoning will concern the change of the territorial competence of a court specified in Article 36 of the CPC. In accordance with that provision: "a court of a higher level than the competent court can transfer a case to another court of the same level if most people who must be summonsed to appear in court live close to that court and far away from the competent court".

A question is raised about *ratio legis* of Article 36 of the CPC. Considering this issue, it is necessary to notice that in the doctrine[10], there is an agreement that the provision of Article 36 of the CPC is dictated by the economics of a trial aiming to save time and cut the proceeding costs and, as a result, can influence the maintenance of "a reasonable time limit" for the case resolution[11], and concern about the speed of proceeding and trial economics should be of great importance[12]. It is also raised that Article 36 of the CPC is a response to the call for an economical trial[13], which essentially constitutes reference to the principle of trial economics[14]. The judicature also presents a unanimous standpoint that the competence from delegation specified in Article 36 of the CPC, constituting an exception to the general rules of territorial competence should be applied when it is justified by trial economics and there is a need to reduce social cost of the administration of justice and application of trial economics[15]. Thus, assessing the use of trial eco-

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[10] K. Marszał, *Proces karny. Zagadnienie ogólne* [Criminal trial – general issues], 2nd edition, revised, Katowice 2013, p. 202; S. Stachowiak, *Rodzaje właściwości sądu w ujęciu nowego Kodeksu postępowania karnego* [Types of court competence in the light of the new Criminal Procedure Code], Prokuratura i Prawo 1999, vol. 10, p. 21; F. Prusak, *Komentarz do Kodeksu postępowania* karnego [Commentaries on the Criminal Procedure Code], Volume I, Warszawa 1999, p. 179; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Tom I, Komentarz do artykułów 1–296* [Criminal Procedure Code – Volume I – Commentaries on Articles 1 – 296], (ed.) P. Hofmański, Warszawa 2011, p. 304.

[11] Z. Świda, *Właściwość sądu i prawo strony do rozstrzygania sprawy w „rozsądnym terminie"* [Court competence and a party's right to case adjudication in "reasonable time limits"], Państwo i Prawo 2005, vol. 10, p. 43.

[12] T. Grzegorczyk, *Kodeks postępowania karnego wraz z komentarzem do ustawy o* świadku *koronnym* [Criminal Procedure Code with commentaries on the Act on the State's evidence], Warszawa 2008, p. 169.

[13] S. Waltoś, Proces karny (…) [Criminal trial (…)], p. 161.

[14] K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)* [Competence and delegating the case (Article 36 of the CPC)], p. 335.

[15] Decision of the Supreme Court of 20 September 1976, III Ko 23/75, OSNKW 1975, vol. 12, item 165; also see: decision of the Supreme Court of 11 November 1972, III Ko 63/72, RPEIS 1973, No. 2, item 458.

nomics that can support the aim of transferring a case for examination to another court of the same level based on Article 36 of the CPC, it is not important whether the people who must be summonsed to appear in court live in the territory of the court's jurisdiction but how far away from the competent courts they live and if there are really substantial differences in the level of difficulties in getting to those courts, also because of public transportation available[16].

This opinion was accepted in literature[17], where it was rightly raised that the Supreme Court accurately emphasised the importance of the adjudication of a case by the court having territorial competence. The Supreme Court expressed this opinion in its decision of 24 September 1982, I Ko 69/82[18], stating that the "provisions of Article 26 of the CPC and Article 27 of the CPC – at present Article 36 of the CPC and Article 37 of the CPC [comment by Z.K.] – cannot be subject to broader interpretation because the principle of the rule of law requires that a perpetrator should stand trial before the court having competence over the territory where the crime was committed". Thus, the decision to transfer a case for examination to another court than the territorially competent one should be made very carefully[19]. The Supreme Court also expressed that standpoint in its decision of 20 March 1972, Cs 26/72[20], stating that "not in every case, the decisive criterion for transferring a case for examination to another court shall be the consideration of costs cutting and difficulties that summonsed witnesses and the accused must cope with, especially if their number is not big and the distance from the place of their residence to the court is not considerable. In such a situation, what should be taken into consideration first of all is the speed of proceeding and the examination of the case without undue delay (…)".

Here, another question arises. What are the prerequisites of admissibility of the use of Article 36 of the CPC? Analysing the provision of Article 36 of the CPC, it is necessary to conclude that the transfer of a case for examination to another court of the same level based on this provision can take place only where "most people who must be summonsed to appear in court live close to this court and far away from the competent court" (*verbal egis*). The cited regulation constitutes two prerequisites of the transfer of a case to another court of the same level that must occur together. The first one is connected with the majority of people summonsed to appear in court. The second one concerns the distance between these people's place of residence and the location of the court territorially competent and the court competent by delegation. This means that "The possibility of changing the

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[16] Decision of the Supreme Court of 30 May 1981, IV Ko 43/81, OSNKW 1981, vol. 9, item 51.

[17] M. Cieślak, Z. Doda, *Kierunki orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (lata 1980–1983*) [Directions in the Supreme Court rulings with respect to criminal proceeding (1980–1983)], Palestra 1984, vol. 10, p. 26.

[18] OSNPG 1983, vol. 2, item 18, p. 8.

[19] A. Zachuta, *Właściwość sądu z delegacji w sprawach karnych (art. 36 k.p.k.*) [Court competence from delegation in criminal trials (Article 36 of the CPC)], Prokuratura i Prawo 2004, vol. 2, p. 152.

[20] OSNKW 1972, vol. 11, item 131.

court's jurisdiction based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – cannot be decided only because of the circumstance that most of the people summonsed to appear in court live close to another court. The provision can be applied only where the majority of them live far away from the competent court based on Article 21 § 1 of the CPC – at present Article 31 § 1 of the CPC [Z.K.][21]". Thus, the Appellate Court in Cracow was right to state that "in order to transfer a case based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – it does not matter which court is closer to where the people involved live. The change of the territorial competence of a court is admissible where "most of the people involved live far away from the competent court and close to (and not only 'closer' to) the designated court[22]". Where an adjudicating court, based on Article 36 of the CPC, examines the motion to change jurisdiction, it cannot limit itself only to a mechanical use of mathematical calculation, but must take into account real capabilities of the court designated to examine the case[23]. This is so because all the changes in the court competence based on Article 36 of the CPC are extraordinary in character as they are exceptions to the constitutional principle of case examination by a court whose competence is derived from the provisions of an Act. "The transfer of a case away from the court that is in fact territorially competent does not depend on asymmetric domination of the residents of particular court districts but on the difficulty they may face in connection with the necessity to appear in court, i.e. on transportation services, age, state of health etc. In order to change general rules of a court competence, there must be a major dominance of purposefulness of examining a case by another court that the actually competent one[24]". The opinion of the Appellate Court in Cracow that "not only the place of residence of witnesses (e.g. their administrative subjection to a voivodeship) is important for the transfer of a case for examination to another court than the usually competent one but real difference in the distance between these places and the courts involved and transportation conditions between them[25]" was right. "Thus, assessing the application of trial economics that can be an argument for the transfer of a case to another court based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.], it is not important if the persons that must be summonsed to appear in court live on the territory of the courts' jurisdiction but how far away from the courts they live and if there are real differences between the difficulties they must face in order to get to the courts

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21 Decision of the Appellate Court in Łódź of 1 March 1994, II AKo 14/94, KZS 1994, vol. 5, item 36.

22 Decision of the Appellate Court in Cracow of 25 March 1998, II AKo 20/98, KZS 1998, vol. 3, item 43.

23 Decision of the Supreme Court of 20 February 2008, III Ko 5/08, OSNwSK 2008, No. 1, item 396.

24 Decision of the Appellate Court in Cracow of 25 October 2001, II AKo 141/2001, KZS 2001, vol. 11, item 30; also see: decision of the Appellate Court in Cracow of 16 February 2000, II AKo 6/2000, KZS 2000, vol. 3, item 34.

25 Decision of the Appellate Court in Cracow of 9 June 2010, II AKo 113/2010, KZS 2010, vol. 5, item 35.

because of poor transportation conditions[26]". This point of view finds grounds in historical interpretation. The Criminal Procedure Code of 1928[27] admitted a possibility of transferring a case because of trial economics and clearly assumed that "If the majority of witnesses that must be summonsed to appear in a court of trial do not live in this court district and their place of residence is far away from that court, it can be transferred to the district where the majority of witnesses live" (Article 37). Although the cited provision *expresis verbis* stated that it concerned witnesses' place of residence, it was assumed in the doctrine[28] that "the change of jurisdiction by delegation to another court of the same level shall take place only in order to save time of the parties, witnesses and the State Treasury".

Another question arises whether the provision of Article 36 of the CPC can be applied where the case is on trial or also where the court is proceeding at a sitting. The judicature does not have the same standpoint on that issue. There is an opinion that "while the possibility of transferring a case to another court of the same level based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – depends on the determination that the majority of persons that must be summonsed to 'trial' live close to this court and far away from the competent court, it is necessary to assume that it is not admissible in proceedings that the Act does not specify to be adjudicated on trial (Article 87 of the CPC)[29] (…)" because Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – refers to summonses on persons to participate in trial. Thus, it should be applied only where it would improve the court proceeding. Thus, it is rightly assumed in the doctrine[30] that "the broadened interpretation of the provision of Article 36 of the CPC by recognizing the admissibility of a case transfer in order to facilitate the participation of parties and other persons at the sitting should not be approved due to its extraordinary character". The standpoint expressed by Z. Świda[31] that "competence by delegation based on Article 36 of the CPC is applicable when the case is adjudicated on trial and it is not admissible in the event of adjudicating in the case at a sitting (Article 341 or Article 343 of the CPC) and many people participate" should be approved. Thus, the opinion of the Appellate Court in Łódź that "the provision of Article 36 of the CPC can be applied also to sittings[32]" is a single one.

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[26] Decision of the Supreme Court of 30 May 1981, IV Ko 43/81, OSNKW 1981, vol. 9, item 51.

[27] Regulation of the President of the Republic of Poland of 19 March 1928 on the Criminal Procedure Code (Journal of Laws of the Republic of Poland of 1928, No.33, item 313).

[28] L. Peiper, *Komentarz do Kodeksu postępowania karnego i do przepisów wprowadzających tenże Kodeks* [Commentary on the Criminal Procedure Code and its implementing regulations], Kraków 1932, p. 51.

[29] Decision of the Supreme Court of 14 February 1996, WO 19/96, OSNKW 1996, vol. 5–6, item 29.

[30] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…* [Criminal Proceeding Code…], p. 304; T. Grzegorczyk, *Kodeks postępowania karnego…* [Criminal Proceeding Code…], p. 169, thesis 4.

[31] Z. Świda, *Właściwość sądu* (…) [Court competence (…)], p. 43.

[32] Decision of the Appellate Court in Łódź of 29 December 1998, II AKo 279/98, KZS 1999, vol. 6–7, item 79.

It is worth mentioning that the provision of Article 36 of the CPC does not differentiate whether it can be applied to the main hearing or the appellate hearing. *Lege non distinguente*, it is assumed in the doctrine[33] that the provision of Article 36 of the CPC applies to both the main hearing and the appellate one. A similar standpoint was expressed by the Supreme Court stating that "the transfer of a case for examination to another court of the same level cannot be obstructed by a circumstance that the case is examined by an appellate court because the provision of Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – is applicable to the proceeding before the court of the first instance as well as to the appellate proceeding[34]". The opinion was approved in literature[35]. Approving of the above-mentioned standpoint of the Supreme Court, W. Daszkiewicz raised that "the application of the rule specified in Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – should be even more careful as the appellate proceeding is freed of the task of examining the evidence". The Appellate Court in Cracow, in its decision of 2 September 2009, II AKo 99/09[36], stated "the provision of Article 36 of the CPC on the possibility of transferring a case to another court is not applicable to the appellate proceeding because in that stage nobody is summonsed to appear in court". It seems that the cited standpoint is not groundless. The appellate proceeding is a separate stage of the juridical proceeding[37] in which the adequate regulations typical of the proceeding before the court of the first instance are used unless the provisions regulating the appellate proceeding state otherwise (argument from Article 458 of the PC). The provision of Article 450 of the CPC regulating the participation of the parties in in the appellate proceeding in § 1 stipulates that the participation of a public prosecutor and a counsel in circumstances defined in Article 79 and 80 is compulsory. However, the participation of other parties and their plenipotentiaries and the counsel in circumstances that are not listed in § 1 is obligatory only where the President of the court or the court decides it is indispensable (argument from Article 459 § 2 of the CPC). In the light of the cited provision, the participation of the counsel in circumstances not listed in § 1 and other parties to the proceeding and their plenipotentiaries

[33] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 304; T. Grzegorczyk, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 169.

[34] See: decision of the Supreme Court of 31 January 1976, II Ko 2/76, OSNKW 1976, vol. 3 item 46.

[35] M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego. I półrocze 1976 r.* [Review of the Supreme Court rulings with respect to criminal proceeding – First half of 1976], Palestra 1976, No. 12, p. 48; W. Daszkiewicz, *Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – I półrocze 1976 r.)* [Review of the Supreme Court rulings (criminal procedure law – first half of 1976)], Państwo i Prawo 1977, vol. 3, p. 117; A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego (za rok 1976*) [Review of the Supreme Court rulings with respect to criminal proceeding (first half of 1976)], Nowe Prawo 1978, No. 2, p. 274.

[36] KZS 2009, vol. 11, item 46.

[37] M. Cieślak, *Dzieła wybrane. Tom II. Polska procedura karna. Podstawowe założenia* teoretyczne [Selected works, Volume II, Polish Criminal Procedure – Basic Theoretical Assumptions], Kraków 2011, p. 50; K. Marszał, R. Koper, R. Netczuk, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania* [Criminal trial – The course of proceeding], (ed.) K. Marszała, Katowice 2012, p. 261.

is, in general, not obligatory, thus they are not summonsed to appear in appellate court, but they have the right to participate in the appellate proceeding and so they must be notified about it.

Regardless of the above-mentioned issues, it must be noticed that, in accordance with the state *de lege lata*, an appellate court cannot conduct a proceeding to examine the evidence of the case subject matter (argument from Article 452 § 1 of the CPC), i.e. a procedure in which essential evidence is examined in order to adjudicate in the case. This means that, in general, witnesses and experts are not summonsed to the appellate hearing. This results in a conclusion that, in practice, these can be very rare situations in which the provision of Article 36 of the CPC will not be applicable to the appellate proceeding. However, if the appellate court, in extraordinary circumstances, based on Article 452 § 2 of the CPC, decides that there is a necessity to conduct examination of the evidence provided by witnesses, the necessity to use Article 36 of the CPC may become topical.

Another issue that requires consideration is the question: What is the mode of transferring a case to another court of the same level due to trial economics? The provision of Article 36 of the CPC does not regulate this subject matter, as it does not define the organ that can file a motion to transfer a case to another court with respect to the above-mentioned reasons. It is obvious that the competent court is the court that has the best knowledge of the prerequisites justifying the transfer of a case. Thus, it is right to assume in the doctrine[38] and the judicature[39] that it should be the initiative of the court whose competence was already determined based on Article 31 and Article 32 of the CPC, and the court of a higher level, based on general regulations, issues a decision on the matter. The court that is competent to examine a given case, presenting it to a court of a higher level with a motion to transfer it to another court of the same level should list all the persons who constitute the majority necessary to apply Article 36 of the CPC and point out the reasons why the transfer of the case is purposeful. The court of a higher level has the right and a duty to verify the motion *meriti* and can refuse to agree if it decides that there are no substantial and legal grounds to do so based on all the circumstances revealed during the proceeding.

The transfer of the case based on Article 36 of the CPC can take place not only on the request of the competent court but also can be preceded by motions filed by the parties to the proceeding[40].

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[38] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 306; K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)* (…) [Competence and transfer of a case (Article 36 of the CPC) (…)], p. 339; T. Grzegorczyk, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 169.

[39] Decision of the Appellate Court in Łódź of 9 February1999 II AKo 20/99, KZS 1999, vol. 6–7, item 80.

[40] J. Bratoszewski [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S. M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego, Komentarz, Tom 1* [Criminal Procedure Code – Commentary, Volume I], Warszawa 2003, p. 390.

Filing a motion by the court *meriti* based on Article 36 of the CPC to transfer a case to another court of the same level should take place after the competent court gets acquainted with the motions as to evidence filed by the parties and the subject to the proceeding as specified in Article 416 of the CPC (Article 352 of the CPC)[41]. Then, it can happen that the majority of people who should be summonsed to appear in court live close to the competent court and there are no grounds for the application of Article 36 of the CPC. The court *meriti* filing a motion to transfer a case based on Article 36 of the CPC should issue a decision on that matter[42]. In the judicature[43], there is an opinion that "in order to present a case requiring consideration based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – to a court of a higher level, there is no need to issue a decision. It is sufficient to sent the case files based on the order made by a judge (head of the department) with a letter listing the prerequisites of adjudication by a court of a higher level". This standpoint, however, must be treated as a single one.

It is worth mentioning that the court taking the initiative to transfer a case to another court of the same level based on Article 36 of the CPC as well as the court taking the decision on that matter, take the decision at a sitting in which the parties to the proceeding can participate if they appear in court (argument from Article 96 § 2 of the CPC). It is so because the court decides on the matter that, from the juridical point of view, is very important for them. It will depend on that decision whether a case will be examined by the court *meriti* whose territorial competence has been determined based on the provisions of Article 31 and Article 32 of the CPC or another court of the same level. It is also important because of the possibility of participating in the higher level court proceeding on the matter concerning the transfer of a case[44].

The decision on the matter of transferring a case to another court of the same level is made by a court of a higher level than the court competent to examine a case (argument from Article 36 of the CPC). Thus, a question arises whether "the court of a higher level", in accordance with Article 36 of the CPC, is a district court acting as a court of the first instance or a district court acting as a court of the second instance. The Criminal Procedure Code does not regulate the issue. In the literature on criminal proceeding, the opinions are varied. K. Zgryzek[45] is right to notice that "if a regional court as a court *meriti* competent to examine a case files a motion based on Article 36 of the CPC, the

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41 T. Grzegorczyk, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 169.

42 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* (…) [Criminal Procedure Code (…)], p. 306.

43 Decision of the Appellate Court in Cracow of 16 December 1992, II AKo 32/92, KZS 1992, vol. 12, item 7.

44 A. Zachuta, *Właściwość sądu z delegacji* (…) [Court competence by delegation (…)], pp. 154–155.

45 K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)*… [Competence by case transfer (Article 36 of the CPC)…], p. 342.

decision to transfer the case for examination to another court of the same level will be made by a district court but not as a court of appeal because the proceeding in the case is not the proceeding of the second instance but as a court of a higher level in the court organisational system and not the instance system". One can meet a standpoint that "if the initiative to transfer the case is taken in the proceeding before the court of the first instance, the district court acts as a court of appeal, not a court of the first instance, because its role is to verify the arguments presented by the court that has the territorial competence[46]". It is an erroneous opinion. Analysing the provision of Article 36 of the CPC, it is necessary to notice that the legislator uses the wording "a court of a higher level" and "a court of the same level", and not the term "a court of a higher instance". This means that the term "a court of a higher level", used in Article 36 of the CPC refers to the hierarchical system of particular organs of the administration of justice (courts) determined in the provisions of the Act of 27 July 2001 – Law on the System of Common Courts, not to the "court of the second instance". Although the provisions of the Act on the Law on the System of Common Courts (hereinafter referred to as Act on Common Courts or ACC) do not use the terms "a court of a lower level" or "a court of a higher level", taking into account the method of establishing common courts, it should be assumed that as district courts are established for the territorial jurisdiction of at least two regional courts (Article 10 § 2 of the ACC) and appellate courts are established for the territorial jurisdiction of at least two district courts (Article 10 § 3 of the ACC), a district court will always be a "court of higher level" for a regional court and an appellate court for a district court. The above-mentioned terminology unambiguously determines that the decision on the issue of transferring a case based on Article 36 of the CPC is not issued in the course of the instance but constitutes an internal matter of common courts organisation.

It must be emphasised that "the proceeding initiated by a motion filed in connection with Article 36 of the CPC does not constitute a proceeding aimed at examining the remedy at law; and only then a court of a higher level (from the organisational point of view) would also be a court of higher instance[47]". The regional court's motion filed to a district court in order to transfer a case to another court of the same level based on Article 36 of the CPC is not an appellate measure, and the district court's decision is not similar in character to a ruling issued in an appellate proceeding[48]. (…) Decisions made in connection with Article 36 of the CPC are made by agreement of two level courts, the court initiating the decision and the court of a higher level. The parties may

[46] M. Błoński, *Przekazanie sprawy innemu sądowi równorzędnemu* [Transferring a case to another court of the same level], System Informacji Prawnej LEX No. 176149, thesis 1.4.

[47] K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)*… [Competence by case transfer (Article 36 of the CPC)…], p. 342.

[48] Decision of the Supreme Court of 22 August 1974, VI KZP 21/74, OSNKW 1974, vol. 10, item 192.

present their opinions and motions with regard to the future decision or even initiate them. Although it is not adjudicating in the appellate mode, two courts of two levels decide, which prevents precipitous and arbitrary decisions (…)[49]. The standpoint was accepted in the doctrine[50].

Thus, the analysis done so far determines not only that "a court of a higher level", in accordance with article 36 of the CPC, is a district curt adjudicating as a court of the first instance but also what the composition of this court should be in order to issue a decision on transferring a case to another court of the same level. In the literature on criminal trials[51], it is highlighted that "the rules of the so-called functional competence of a court will be applied to a decision on this matter". Thus, K. Zgryzek[52] rightly states "there is no ground for a thesis that a district court as a court of a higher level as specified in Article 36 of the CPC is a court acting as a court of the second instance so the decision on transferring a case to another court should be made by a bench of the appellate department[53]", i.e. in the composition defined in article 30 § 2 of the CPC.

All the considerations lead to a conclusion that a court of a higher level than a regional court, in accordance with Article 36 of the CPC, is a district court acting as a court of the first instance. Thus, transferring a case to another court of the same level based on Article 36 of the CPC, it should make a decision during a sitting as specified in Article 30 § 1 of the CPC, i.e. as a one-man bench. This does not apply to an appellate court as a court of a higher level than a district court because an appellate court must always decide as a bench defined in Article 30 § 1 *in fine* of the CPC, regardless of the fact if it is to examine measures of appeal against rulings and directives issued by a district court as a court of the first instance or in cases delegated to it by the provisions of the Act[54].

In the doctrine[55], it is rightly highlighted that a court of a higher level can transfer a case based on Article 36 of the CPC to a court located in the same district as well as to a court in another district. This point of view is explained by the fact that a case should be transferred to a court that is close to the place of residence of the majority of people who must be summonsed to appear in court and not a court that is in the district of the court of a higher instance. In

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[49] Decision of the Appellate Court in Cracow of 9 February 2005, II AKz 9/05, Prokuratura i Prawo – supplement: Orzecznictwo 2005, vol. 11, poz. 26, p. 16.

[50] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 306 and the opinions presented there.

[51] K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)*… [Competence by transferring a case (Article 36 of the CPC)…], p. 342.

[52] *Ibid.*

[53] Erroneously M. Błoński, *Przekazanie sprawy innemu sądowi równorzędnemu*… [Transferring a case to another court of the same level…], thesis 1.4.

[54] K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)*… [Competence by transferring a case (Article 36 of the CPC)…], p. 342.

[55] J. Bratoszewski [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S. M. Przyjemski, R. A. Stefański, S. Zabłocki, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 390.

the Polish language, the word "majority" means more than a half[56]. Thus, using the word "majority" to the number of people who are subject to summons, in accordance with Article 36 of the CPC, it should be assumed that it means at least one person more.

The decision made by the court of a higher level based on Article 36 of the CPC cannot be appealed against[57]. Although, in accordance with the wording of Article 35 § 3 of the CPC, there is a right to appeal against the decision on competence, and the decision based on Article 36 of the CPC is undoubtedly such a decision, *argumentum a rubrica* is for the assumption that the provision of Article 36 of the CPC is only functionally connected with the decision of the competent court, which examines its competence *ex officio*[58].

In Article 36 of the CPC, the legislator entrusted a court of a higher level with a task of adjudicating on the issue of special competence that changes the general rules of examining a case by a territorially competent court. The right to file a complaint about competence provided for in Article 35 § 3 of the CPC is applicable in the event of the ruling issued by the adjudicating court. Taking into account the fact that a court of a higher level made a decision on competence, it is rightly assumed in the doctrine[59] that it is not justifiable to verify its ruling with regard to competence in the course of an appellate proceeding.

The decision made by a court of a higher level with respect to transferring a case for examination to another court of the same level based on Article 36 of the CPC is binding for the delegated court, designated to conduct the juridical proceeding[60]. This means that this court is not authorised to determine its non-competence based on Article 35 of the CPC. The decision based on Article 36 of the CPC does not constitute an inviolable legal state with respect to territorial jurisdiction[61]. Thus, if there are circumstances that are more important than trial economics, expressed in Article 36 of the CPC, that require – due to the good of the administration of justice – that a case is transferred to a court competent in accordance with the Act, there are no obstacles to refer a case for examination to the court that is originally competent[62]. In accordance with what

[56] E. Sobol (ed.), *Nowy Słownik Języka Polskiego* [New Dictionary of the Polish Language], Warszawa 2003, p. 1130.

[57] Decision of the Supreme Court of 21 June 2007, III Ko 42/07, OSNwSK 2007, No. 1, item 1390.

[58] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* (…) [Criminal Procedure Code (…)], p. 306 and rulings and opinions of the doctrine cited there.

[59] Ibid; T. Grzegorczyk, *Kodeks postępowania karnego* (…) [Criminal Proceeding Code (…)], p. 170; Z. Doda, *Glosa do postanowienia SN z dnia 12 lipca 1989 r., I Kz 81/89* [Gloss on the decision of the Supreme Court of 12 July 1989, I Kz 81/89], OSP 1990, No. 9, item 336, p. 718.

[60] Decision of the Appellate Court in Katowice of 30 April 2001, II AKz 330/01, Prokuratura i Prawo – supplement: Orzecznictwo 2002, vol. 3, item 21.

[61] Decision of the Supreme Court of 4 April 1995, III Ko 13/95, OSNKW 1995, vol. 7–8, item 49; decision of the Supreme Court of 21 September 2006, II Ko 51/06, OSNwSK 2006, vol. 1, item 1764.

[62] See: decision of the Supreme Court of 24 June 2010, II Ko 36/10, OSNwSK 2010, No. 1, item 127; also see: K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)* (…) [Competence by case transfer (Article 36 of the CPC) (…)], p. 341.

has been already said, a conclusion may be drawn that competence by transferring a case based on Article 36 of the CPC is not permanent and definitive in character but in order to change it, the occurrence of new substantive and legal circumstances is indispensable.

Summing up the above considerations, it should be noted that transferring a case by a court of a higher level to another court of the same level because of trial economics should be exceptional. It is a change of the general rule requiring a case examination by a court having territorial jurisdiction as determined in Article 31 and Article 32 of the CPC. The maintenance of the principle of the rule of law requires that a perpetrator stand trial before a court that is competent with regard to the place where the crime was committed[63].

COURT COMPETENCE IN CRIMINAL TRIALS IN THE EVENT OF TRANSFERRING A CASE TO A COURT OF THE SAME LEVEL DUE TO TRIAL ECONOMICS (ARTICLE 36 OF THE CPC)

Summary

The article presents the issue of court competence in criminal cases in the event of transferring them for examination to another court of the same level due to trial economics. The matter is regulated in Article 36 of the CPC in accordance with which a court of a higher level than a competent court can refer a case to another court of the same level if the majority of people who must be summonsed to appear in court live close to that court and far away from the court competent. The provision is applicable for both the proceeding before a court of the first instance as well as an appellate proceeding, however it cannot be applied to a sitting. The transfer of a case based on article 36 of the CPC can take place on the initiative of he court competent to examine it as well as it can be preceded by adequate motions filed by the parties to the proceeding. The decision of a court of a higher level to transfer a case for examination to another court of the same level, based on Article 36 of the CPC, is binding for the delegated court. Such a transfer should be treated as exceptional because it is a change of a general rule requiring a case examination by a territorially competent court as defined in Article 31 and Article 32 of the CPC.

[63] See: decision of the Supreme Court of 24 September 1982, I Ko 69/82, OSNPG 1983, No. 2, item 18.

WŁAŚCIWOŚĆ SĄDU W SPRAWACH KARNYCH W RAZIE ICH PRZEKAZANIA INNEMU SĄDOWI RÓWNORZĘDNEMU ZE WZGLĘDU NA EKONOMIKĘ PROCESU (ART. 36 K.P.K.)

Streszczenie

W artykule przedstawiono problematykę właściwości sądu w sprawach karnych, w razie ich przekazania innemu sądowi równorzędnemu, ze względu na ekonomikę procesu. Zagadnienie to reguluje przepis art. 36 k.p.k., według którego sąd wyższego rzędu nad sądem właściwym może przekazać sprawę innemu sądowi równorzędnemu, jeżeli większość osób, które należy wezwać na rozprawę, zamieszkuje blisko tego sądu, a z dala od sądu właściwego. Przepis ten może być stosowany zarówno na rozprawie przed sądem pierwszej instancji, jak i na rozprawie odwoławczej, nie ma natomiast zastosowania na posiedzeniu. Przekazanie sprawy, na podstawie art. 36 k.p.k., może nastąpić z inicjatywy sądu właściwego do jej rozpoznania, a także może być poprzedzone stosownymi wnioskami stron w tym zakresie. Postanowienie sądu wyższego rzędu w przedmiocie przekazania sprawy do rozpoznania innemu sądowi równorzędnemu, wydane na podstawie art. 36 k.p.k., jest wiążące dla sądu delegowanego. Przekazanie takie powinno być wyjątkowe, gdyż stanowi ono odstępstwo od ogólnej reguły, iż sprawę powinien rozpoznać sąd miejscowo właściwy, ustalony według zasad określonych w art. 31 i art. 32 k.p.k.

LA PARTICULARITÉ DE LA COUR PÉNALE DANS LE CAS DE TRANSFÉRER UNE AFFAIRE À UNE COUR HOMOLOGUE POUR DES RAISONS DE L'ÉCONOMIE DU PROCÈS (ART.36 DE LA PROCÉDURE PÉNALE)

Résumé

Dans l'article on a présenté la problématique des particularités de la cour dans les affaires pénales dans le cas de les transférer à une cour homologue pour des raisons de l'économie du procès. Cette question est régularisée par le règlement de l'article 36 du code de la procédure pénale selon lequel la cour du rang supérieur que la cour propre peut transmettre une affaire à une autre cour homologue si la plupart des personnes demandées au procès habitent plus près de cette cour et loin de la cour propre. Ce règlement peut être appliqué aussi bien pendant le débat dans la cour de première instance que pendant le débat d'appel mais il n'est pas applicable pendant la session. La transmission de l'affaire basant sur l'art.36 du code de la procédure pénale peut être réalisée à l'initiative de la cour propre à la reconnaitre et aussi elle peut être procédée par les demandes préalables des parties dans ce cadre. La décision de la cour du rang supérieur dans le sujet de la transmission de l'affaire à une autre cour homologue éditée à la base de l'art.36 du code de la

procédure pénale est essentielle pour la cour déléguée. Cette transmission devrait être exceptionnelle parce qu'elle constitue une exception de la règle générale qui dit que l'affaire doit être traitée par la cour propre par le lieu fixée d'après les principes définis dans l'art. 31 et l'art. 32 du code de la procédure pénale.

ПОДСУДНОСТЬ (ЮРИСДИКЦИЯ) СУДА В УГОЛОВНЫХ ДЕЛАХ В СЛУЧАЕ ИХ ПЕРЕДАЧИ ДРУГОМУ СУДУ, РАВНОЗНАЧНОМУ С ТОЧКИ ЗРЕНИЯ ЭКОНОМИКИ ПРОЦЕССА (СТ. 36 УПК)

Резюме

В статье представлена проблематика подсудности суда в уголовных делах, в случае их передачи другому равнозначному суду, принимая во внимание экономику процесса. Эта проблематика регулируется положением ст. 36 УПК, согласно которому вышестоящий суд по отношению к подсудному суду, может передать дело другому равнозначному суду, если большинство лиц, которых следует вызвать в суд на рассмотрение дела, проживают близко от этого суда и далеко от подведомственного суда. Это положение может быть применено как на рассмотрении дела в суде первой инстанции, так и на апелляционном рассмотрении дела, в то же время не может применяться в случае заседания суда. Передача дела, на основании 36 УПК, может произойти по инициативе суда, являющегося подсудным для его рассмотрения, а также может быть следствием соответствующих заявлений сторон по этому делу. Постановление вышестоящего суда, касающееся передачи дела для рассмотрения другому равнозначному суду, выданное на основании ст. 36 УПК, является обязательным для делегированного суда. Такая передача должна быть исключительной, поскольку является отступлением от общего правила, заключающегося в том, что дело должно рассматриваться в территориально подсудном суде, установленном согласно принципам, определённым в ст. 31 i ст. 32 УПК.

Iuś Novum
2/2014

Jerzy Skorupka

ON THE SUBSTANTIAL AND FORMAL ASPECTS OF THE CONCEPT OF A PARTY

1. At present, a party to the criminal proceeding is understood as an entity that has a legal interest in a favourable judgement on the proceeding subject matter[1]. The criterion for differentiating a party to the proceeding from other participants is recognised in having legal interest[2]. It is to be the party's own interest regardless of the fact if he/she defends themselves on their own or is defended by a counsel. It is also to be the legal interest based on substantive law. The protection of this interest should be guaranteed by the norms of the juridical proceeding law. Thus the substantive basis of the legal interest of parties is constituted by the norms of the substantive criminal law and probably (in a criminal trial) the norms of civil substantive law[3]. The formal basis is created by the regulations of the proceeding law that specify the sphere of rights and duties allowing for an active participation in the role of a subject to the interest provided for in the substantive law[4].

Thus, the element qualifying an entity as a party to the criminal proceeding is a concept of legal interest. It covers rights and duties based on law. Legal interest can be opposite to real interest. Whether the interest in favourable judgement on the proceeding subject matter is of legal or real character is based on the content of the binding regulations of substantive law. The provisions of

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[1] See T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish Criminal Proceeding], Warszawa 2011, p. 289; K. Marszał, *Proces karny. Zagadnienia ogólne* [Criminal Trial – General Issues], Katowice 2013, p. 215; J. Skorupka (ed.), *Postępowanie karne. Część ogólna* [Criminal Proceeding – General Issues], Warszawa 2012, p. 160; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu* [Criminal Trial – System Outline], Warszawa 2013, p. 178.

[2] See M. Cieslak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish Criminal Procedure – Basic Theoretical Assumptions], Warszawa 1984, p. 35; W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne* [Criminal Proceeding Law – General Issues], Volume I, Bydgoszcz 2000, p. 204; T. Grzegorczyk, J. Tylman, *Polskie postępowanie...* [Polish Criminal...], *op. cit.*, p. 289; B. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna* [Criminal Trial – General Issues], Kraków–Lublin 2002, s. 136; S. Waltoś, P. Hofmański, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 179.

[3] See S. Waltoś, P. Hofmański, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 179; K. Marszał, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 215.

[4] See S. Waltoś, P. Hofmański, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 180.

criminal law, civil law or other branches of law give grounds to treat an interest as a legal one. The fact that substantive law provides the protection of some values, i.e. gives them the status of legal interests, does not mean that the subject to the rights and duties becomes a party to the proceeding. He/she becomes one only when he/she requests the launch of a proceeding or, having been notified about the criminal proceeding organ's action, joins the trial.

The concept of a party to the proceeding is not the same as the concept of a party in substantive law, i.e. an entity (a party) to a legal relationship. K. Marszał rightly states that: "a criminal trial cannot be ruled out although there is a lack of a criminal-substantive relationship, i.e. a lack of violation of criminal substantive law. An indictment initiating a criminal trial before a court contains a statement about a violation of substantive law. Has it really taken place? This is what a court must adjudicate on after the hearing. Thus, the criminal-substantial relationship cannot be a decisive criterion for formulating a definition of a party to the proceeding because this fact can be established only as a result of the pending criminal proceeding"[5].

Thus, it is necessary to distinguish a party in the formal (proceeding related) meaning and a party in the substantial meaning. Based on criminal proceeding law, the concept of a party is autonomous in character. It was developed in science for the needs of this branch of law. As it is understood in substantial law, parties are entities of a specified legal relationship (e.g. a landlord and a lodger as parties to the rent agreement, an editor and an author as parties to the publication agreement etc.). However, a party in substantive law is not always the same as a party in criminal proceeding law. For instance, in the civil proceeding, a party to the proceeding is a receiver and in the substantive meaning – a bankrupt[6]; in the criminal proceeding, a party to the proceeding is a public or subsidiary prosecutor or a plaintiff and in the substantive meaning – a victim of crime (the injured). Both concepts refer to other features and qualifications, but this does not rule out that a party to the proceeding after the examination of the case can turn out to be a subject to rights or duties in the light of the legal relationship between them.

Legal interest resulting from substantive law, determining the recognition of a given participant of the criminal proceeding as a party to it is also an element (criterion) of distinguishing a party to the proceeding in substantive and formal (purely proceeding related) meaning. Speaking about a party to the proceeding in substantive meaning, we do not refer to a party to a legal relationship, but a party in a criminal trial, the concept of which is not determined by a substantive element. In the concept of a party to the proceeding in the substantive

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[5] See K. Marszał, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 215.

[6] For more see I. Gil, *Sytuacja prawna syndyka masy upadłości* [Legal Status of a Receiver], Warszawa 2007.

sense, legal interest in favourable judgement on the proceeding subject matter is a decisive element to recognise a given participant as a party to the proceeding; and in the concept of a party to the proceeding in the formal sense, this legal interest is not important for the recognition of a participant as a party.

2. However, basing the concept of a party to the proceeding on the substantive element raises disputes on what constitutes that substantive element. It should be reminded that the representative of German doctrine of the substantive concept of a party was A. von Kries, who believed that parties were entities whose rights and duties constituted the subject matter of the proceeding[7]. He defined parties as entities whose rights and duties were adjudicated on in a juridical proceeding[8]. The ability to become a party to the proceeding belonged to those for whom legal-penal claims (*strafrechtlische Anspruche*) could be derived from a crime, or who became liable. Legal-penal claims were the right of the State because the prosecution of criminals is public in character. A. von Kries distinguished the ability to become an active participant from the ability to act in the proceeding, which the State is deprived of because this is the ability of natural persons. A. von Kries was also of an opinion that a prosecutor and a plaintiff are not parties but representatives of a party, i.e. the State. Treating a prosecutor or a plaintiff as representatives of the party resulted from the assumption that the represented party (a State) can never take an active part in a trial. The statutory representative and the party itself have the same rights in the proceeding[9].

In Polish literature on criminal proceeding law, a concept of a party to the proceeding was also associated with the substantive-legal relationship. Parties were treated as entities "involved" in a relationship resulting from substantive law. S. Śliwiński stated "the parties to the proceeding are individuals [whose] trial this is, i.e. [their] trial"[10]. "Thus, an active part in a trial is a natural or juridical person or class plaintiff, on whose behalf a claim being a subject matter of the proceeding is examined (*cuius res in iudicum deducitur*). A passive party is a person who has been brought to trial, i.e. a person against whom a claim has been filed and must be adjudicated on in the proceeding (*is, contra quem res in iudicum deducitur*)"[11]. Thus, parties are juridical equivalents of two entities of the substantive-legal relationship – one can claim, the other is liable. As only a State has the right to file a "criminal claim", only a State is an active party

[7] See A. von Kries, *Lehrbuch des deutschen Strafprozessrechts*, Freiburg 1982, p. 2.
[8] See *ibidem*, p. 186.
[9] See *ibidem*, pp. 186–187, 288.
[10] See S. Śliwiński, *Polski proces karny przed sądem powszechnym* [Polish Criminal Trial Before a Common Court], Warszawa 1959, p. 155; According to S. Kalinowski, *Polski proces karny* [Polish Criminal Trial], Warszawa 1970, p. 189, the parties to the proceeding are only the entities in the proceeding, for whom the pending proceeding is "their trial", the favourable result of which they are interested in.
[11] See S. Śliwiński, *Proces karny. Zasady ogólne* [Criminal Trial – General Rules], Warszawa 1948, p. 281.

in a criminal trial. Thus, a public prosecutor or a plaintiff (the injured) is only a substitute of the State as a party[12].

L. Schaff presented a similar opinion. He believed that "parties or a party to the proceeding are those entities for whom the pending proceeding is [their] trial. Unlike a participant of the proceeding (a person who is taking part in the proceeding in whatever role), a party to the proceeding is a natural or juridical person on whose demand a criminal trial was initiated or on whose behalf a claim as a subject matter of the proceeding is examined (e.g. based on a civil suit in a criminal trial) or a natural person (never a juridical person) against whom the proceeding is pending"[13]. According to L. Schaff, a public prosecutor (a legal representative of the State) only plays the role of a party, however, is not a party to the proceeding. A trial is not a public prosecutor's one ("his" trial). It especially applies to a public prosecutor whose participation in a trial results from the function played by public prosecution service in connection with law enforcement. In this sense, a public prosecutor cannot be a party to the proceeding, i.e. in the juridical sense of the word[14].

3. The substantive concept of a party was criticised in the German and Polish doctrine. There were objections that it does not take into account that the entities having a dispute in the proceeding are parties also when in fact their substantive-legal relationship does not exist, thus regardless of the future court's judgement. Especially E. Beling emphasised that, although there are substantive parties and we speak about them in a criminal trial, the substantive-legal relationships do not give anybody a juridical role, and this is what matters in the determination of a party to the proceeding[15].

K. Binding expressed a different opinion on a party to the proceeding. According to him, a public prosecutor is "a suing State", thus also a party. A prosecutor brings a suit on his own behalf and not on behalf of the State[16]. K. Binding also said that in all private complaint trials, a State is a "hidden party". Thus, it is one even when it does not act through its substitutes. Even in such cases, a court's ruling either gives the right to punish or denies that right but not to the prosecutor but to the State[17].

In Polish literature, also M. Cieślak refers to the link between a party to the proceeding and the substantive-legal relationship. He states "a party is an entity acting in an adequate proceeding role whose interest is involved in a juridical

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[12] See S. Śliwiński, *Proces karny...* [Criminal Trial...], *op. cit.*, pp. 286–289.

[13] L. Schaff, *Proces karny Polski Ludowej* [Criminal Trial in the People's Republic of Poland], Warszawa 1953, p. 279.

[14] L. Schaff, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 279.

[15] See E. Beling, *Deutsches Reichsstrafprozessrecht*, Berlin–Leipzig 1928, p. 122 and next.

[16] See K. Binding, *Strafrechtliche und strafprozessualle Abhandlungen*, München–Liepzig 1915, pp. 55 and 69.

[17] See *ibidem*.

dispute"[18]. As M. Cieślak says, "a party is an entity involved in a dispute in a trial who files claims based on substantive law against another entity, or an entity against whom a claim is addressed"[19]. An entity whose interest is involved in a juridical dispute is a party in substantive meaning. Thus, a party is an entity whose interest is involved in a juridical dispute"[20].

M. Cieślak's standpoint demonstrates a different attitude to a party than that of A. von Kries's concept. According to M. Cieślak, it is not a problem whether a party to the proceeding is a subject to a substantive-legal relationship and a court is to decide on its substantive-legal rights and duties, but whether a given entity is interested in adjudication, i.e. whether it has a legal interest in it.

With regard to the concept of legal interest as an element creating a concept of a party to the criminal trial, W. Caszkiewicz states "a person can have an interest in the adjudication even if he/she is not a subject to a substantive-legal relationship (one of the parties to the relationship). The injured who acts as a plaintiff or a subsidiary prosecutor has a legal interest because – in accordance with the prosecution thesis – his/her good was infringed and the protection of that good is one of the aims of the proceeding. However, he is not subject to the substantive-legal relationship in the sphere of criminal law. Criminal substantive relationship resulting from a crime comes into existence between the State and a perpetrator of that crime[21]. W. Daszkiewicz also states that the scope of the legal interest is broader than the range of substantive-legal relationship because "the direct infringement of an individual good is a direct infringement of a common good and vice versa. That is why a crime is a fact that (directly and indirectly) touches the interests of individuals and the interests of the whole community"[22]. This leads W. Daszkiewicz to an opinion that "a party to a criminal procedure is an entity that participates in the proceeding on his/her own behalf or his/her representative acts on their behalf and who has a legal interest in a favourable ruling on the proceeding subject matter"[23].

Criticising a substantive approach to a party to the proceeding in the meaning suggested by A. von Kries and S. Śliwiński, W. Daszkieiwicz also states that "the problem of parties to a criminal trial can be solved only in connection with the essence of that process. It is necessary to first answer a question whether a criminal trial is a proceeding between parties. If we follow a standpoint that a criminal trial is a proceeding between parties, it is necessary to accept that an

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[18] See M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish Procedure – Basic Theoretical Assumptions], Warszawa 1973, p. 34.

[19] See M. Cieślak, *ibidem*.

[20] See M. Cieślak, *ibidem*.

[21] See W. Daszkiewicz, *Przedstawiciel społeczny w procesie karnym* [Civic Representative in a Trial], Warszawa 1976, p. 77.

[22] Compare M. Cieślak, *Polska procedura…* [Polish Criminal Procedure…], *op. cit.*, p. 391.

[23] See W. Daszkiewicz, *Przedstawiciel społeczny...* [Civic Representative...], *op. cit.*, p. 78.

active party is one on behalf of which a claim is investigated'[24]. According to this author, "this definition rightly detaches the concept of a party to the proceeding from the substantive-legal relationship. The argument quoted by the opponents of the idea that parties also exist when the substantive-legal relationship does not exist is in fact especially accurate". Moreover, if we assumed that an active party is a person who has the right to a claim in criminal proceeding, it would be necessary to treat a plaintiff as an organ of the State, which in this case would be a party. On the other hand, if – from the functional point of view – we assumed that an active party is the entity that files a claim to punish the accused, the difference between the right party to the proceeding and its representative who can also make such a request would disappear[25].

As a result, having assumed that an active party is an entity on whose behalf a claim is investigated, W. Daszkiewicz states that: "not every prosecutor is a party. […] Only a plaintiff is a party. As far as a public prosecutor is concerned, he is only an organ of the State that is a party. In the event there are a few public prosecutors, there are not many parties but a few representatives, or more precisely a few organs, of one party – the State"[26].

In the presented conceptions, the substantive element as a party to the proceeding is the existence of a given entity as a party to the substantive-legal relationship (S. Śliwiński, L. Schaff) or having a legal interest in favourable adjudication on the proceeding subject matter (M. Cieślak, W. Daszkiewicz). The result of the substantive approach to a party in the above-given meaning is the treatment of the State as an active party in a criminal trail. This is connected with the treatment of a public prosecutor and a plaintiff as a substitute of the State (S. Śliwiński) or an entity that only plays the role of a party (L. Schaff) or the treatment of a public prosecutor as an organ of an active party (W. Daszkiewicz).

4. In connection with the critical approach to the conception based on the "claim in criminal proceeding", it started to be assumed in the Polish doctrine that the substantive element of the definition of a party to the proceeding is the so-called interest in the adjudication on the proceeding subject matter. According to M. Cieślak, a party is "a subject to interests involved in a proceeding dispute playing a juridical role"[27]. According to S. Waltoś, a party is an entity having their "own legal interest" based on the substantive law and protected by criminal proceeding law[28]. W. Daszkiewicz also emphasises this aspect and

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[24] See *ibidem*.

[25] See W. Daszkiewicz, *Oskarżyciel w polskim procesie karnym* [A Prosecutor in a Polish Trial], Warszawa 1960, p. 35.

[26] See *ibidem*.

[27] See M. Cieślak, *Polska procedura karna…* [Polish Criminal Proceeding…], *op. cit.*, p. 35.

[28] See S. Waltoś, *Proces karny. Zarys systemu* [Criminal Trial – System Outline], Warszawa 2009, p. 185; According to K. Marszał, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 215, definitions of a party to the proceeding should be linked with the relationship of controversy. Briefly speaking, parties who

assumes that a party is an entity that "participates in the trial on his own behalf or on whose behalf somebody else acts and who has an interest in favourable adjudication"[29], as does K. Marszał, who assumes that parties are "subjects to a dispute relationship participating in the trial on their own behalf", i.e. "entities that have a legal interest in favourable adjudication on the proceeding subject matter" but they act "on their own or through their representative"[30]. On the other hand, according to S. Kalinowski, every party wants to achieve a "favourable" adjudication so has an interest in "winning in the dispute"[31].

5. Apart from the concept of a party to the proceeding in the substantive meaning, the German and Polish doctrines of the criminal proceeding law present standpoints in connection with the formal concept of a party to the proceeding. In the German doctrine of the proceeding law, K. Birkmeyer emphasised that "the concept of 'a creditor' and 'a debtor' is unimportant for the concept of a party to the proceeding. The rights and duties with regard to *res in iudicum deducta* are important for the doctrine on parties only in connection with the issue who, in general, plays the role of a party but not the issue who is a party in the proceeding"[32]. K. Birkmeyer continued that the adoption of the substantive-legal definition of a party leads to a denial of the existence of a party to the criminal proceeding because it must be assumed that the State is a party and a single party interest contrary to the interest of the accused cannot be imputed to the State. He concluded that a concept of a party must be derived from a purely juridical point of view. According to K. Birkmeyer, a party is a person who, in a criminal trial, pursues juridical adjudication against another person and who by force of his own decision, but under the supervision of a judge, decides about the proceeding forms and measures. A party understood in this way is a party in the formal meaning. In the substantive meaning, it becomes a party if there is an additional element, i.e. that it is involved in a dispute about its own right. The accused is always a party in the formal and substantive meaning. On the other hand, a prosecutor is always a party in a formal meaning because he files a claim in criminal proceeding which is not his but the State's[33].

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participate in a criminal trial on their behalf are entities in a controversy relationship. If you ask about these entities of this controversy relationship, it must be said they are entities having a legal interest in a favourable ruling on the proceeding subject matter. Thus, it can be assumed that parties having a legal interest in a favourable ruling on the proceeding subject matter are entities of the controversy relationship in the proceeding. A party acts on its behalf or acts through a representative.

[29] See W. Daszkiewicz, *Proces karny. Część ogólna* [Criminal Trial – General Issues], Poznań 1996, p. 205.

[30] See K. Marszał, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 215.

[31] See S. Kalinowski, *Polski proces...* [Polish Criminal...], *op. cit.*, p. 190.

[32] See K. Birkmeyer, *Deutsches Strafprozessrecht*, Berlin 1889, p. 292 and next.

[33] See *ibidem*.

In the Polish doctrine of criminal proceeding law, M. Siewierski formulated a purely juridical definition of a party stating that: "parties are persons who on their behalf file charges and support them before a court […] or pursue adjudication on their civil claims […] and persons against whom the proceeding is pending"[34]. The definition focuses, with regard to active parties, on the in-court stage of the proceeding but its author admits that also the injured acts as a party in the investigation[35].

Also the Supreme Court highlighted the distinction between a party to the proceeding in the substantive and formal meaning in its resolution of 14 February 1931[36] stating that: "the State is always a party to criminal proceeding in the substantive meaning. A party in the formal meaning, i.e. a subject to the proceeding relationship, is always a natural or juridical person, however this status of a person can result from the provisions of private or public law. A public prosecutor is "a representative of the State authority", thus he is an official organ of the State that prosecutes a criminal case. In such a situation, the State is a substantive and formal party, and a public prosecutor only an organ of that party. In cases based on civil lawsuit, a formal party to the proceeding is a plaintiff who does not act as an organ of the authorities and with the privileges of that organ but by virtue of their own proceeding right".

Not distinguishing between the substantive and formal aspects as K. Birkmeyer does, in the Polish doctrine, M. Cieślak expressed an opinion that the State is not a party and it is not a participant of the proceeding either, although a public prosecutor is its representative entitled to prosecute criminal cases and the court issues sentences on its behalf. The State is an element in whose interest the juridical proceeding functions in general and it cannot be associated with one or the other role in the proceeding[37]. In order to supplement the above standpoint, it is necessary to mention the opinion of T. Grzegorczyk and J. Tylman that "a public prosecutor in a criminal trial does not act in the interest of the State. He acts by virtue of a statutory delegation and assignment of competence to different organs of the State, acts on his behalf and this activity is his legal duty; thus, in fact a trial is also his trial. A prosecutor is interested in adjudication on the trial subject matter in accordance with the substantive and proceeding law, i.e. in a just ruling in both aspects. This is the prosecutor's own interest as an organ of public prosecution"[38].

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[34] See M. Siewierski, J. Tylman, M. Olszewski, *Polskie postępowanie karne w zarysie* [Polish Criminal Proceeding – An Outline], Warszawa 1974, p. 81.

[35] Compare *ibidem*, p. 35.

[36] See resolution of the Supreme Court of 14 February 1931, II Pr 195/30, RPEiS 1931, vol. III, p. 763.

[37] See M. Cieślak, *Proces karny* [Criminal Trial], Kraków 1951, part I, pp. 42–43.

[38] See T. Grzegorczyk, J. Tylman, *Polskie postępowanie...* [Polish Criminal...], *op. cit.*, p. 288.

6. Emphasising the legal interest in a favourable adjudication on the proceeding subject matter is a key element in deciding whether a particular participant as a party does not eliminate doubts connected with the prosecutor acting as a public prosecutor. It is rightly noticed that every crime infringes or puts at risk a public interest (of a community or the State) and private (individuals') interests[39]. A crime results in a conflict between a perpetrator and a victim and between a perpetrator and the community. A crime does not result in a conflict between a perpetrator and a prosecutor or the prosecution service or a public prosecutor because it does not infringe and does not put at risk any of their interests. Nevertheless, the prosecution service as an institution of the State and a prosecutor as an organ involved in the preparatory proceeding and also as a public prosecutor are interested in bringing a perpetrator to justice and (criminal or civil) liability. They do not do that, however, because they have their own legal interest but because they are obliged to do that by the community (a commune or the State) whose legal interests they represent in criminal proceeding. A public prosecutor does not have his own (private) interest in adjudication on the proceeding subject matter in the substantive sense because he cannot drop charges if those are based on the legally collected evidence, there is a high probability that a given person committed a crime and a trial is legally admissible. Prosecution as an institution and a prosecutor as an organ of criminal proceeding as well as a public prosecutor are legally obliged to prosecute crime and bring those who committed them to trial before a court. Because of that, the above-mentioned entities have an interest in adjudication on the proceeding subject matter, but it is not their personal interest but a legal interest. Thus, it is difficult to approve of the statement that a public prosecutor is interested in a favourable adjudication on the proceeding subject matter. Apart from the above-mentioned comments, there are other arguments against that: the duty to be objective and impartial and the pursuit of the criminal trial task, i.e. the prosecution of the culprit and the release of the innocent. However, it is in the interest of the community that the penal repression reaches only the perpetrator of a crime. A public prosecutor's legal duty is also to prove facts in the course of a trial, which results from the principle of innocence and the necessity to prove somebody's guilt. But a prosecutor does not meet these requirements in his own interest but in the interest of the community. Looking at the issue from this perspective, it is not difficult to treat the community (a commune or the State) as a party to the proceeding because of the earlier mentioned reasons. Because of them, K. Marszał says that a prosecutor is not a party to the proceeding in the same sense as the accused or the injured, who are involved. He only implements

[39] Compare M. Cieślak, *Polska procedura karna…* [Polish Criminal Procedure…], *op. cit.*, p. 391.

the rights of a party as a public prosecutor[40]. At the same time, he is – even at the juridical stage – an organ guarding the rule of law with the right to appeal against court rulings that are or are not in favour of the accused[41].

7. The above-mentioned issues take place in the event of defining a party to the proceeding in the formal sense. Adequately, a party to the criminal proceeding is an entity who on their behalf files a charge and supports it before a court or pursues a civil claim and a person against whom the proceeding is pending[42]. However, having in mind that parties to the proceeding already exist in the preparatory proceeding and the fact that it is the legislator who decides who is a party, it is necessary to modify the definition and assume that a party to the proceeding in a criminal case is an entity that is legitimised to prosecute before a court or to pursue civil claims and in the preparatory proceeding legitimised to protect its interests as well as an entity against whom the proceeding is carried out (legitimised to be a suspect or the accused), recognised to be a party by the provisions of the criminal proceeding law. Thus, active and passive participation in the proceeding on one's behalf and the legislator's will to recognise a given participant as a party to the proceeding is decisive in the recognition of a participant to be a party to the proceeding. In the discussed concept, the substantive element, e.g. the legal interest in favourable adjudication on the proceeding subject matter, is not a decisive element in the recognition of an entity to be a party of the proceeding. Thus, even if an entity has the said interest, it does not have to be a party to the proceeding.

The legislator's standpoint on the recognition of an entity specified in Article 52 of the Criminal Code to be a party to the proceeding expressed in the Act of 28 September amending the Criminal Procedure Code supports the adoption of the concept of a party only in the formal sense. *De lege lata*, the entity is not a party to the proceeding. It is assumed to have a status of a quasi-party[43], which is justified by the fact that its rights in the proceeding were regulated not in the provisions on parties but in particular provisions on the proceeding that altogether do not grant this entity all the rights that parties have in the proceeding[44]. However, it is necessary to notice that in accordance with Article 52 of the Criminal Code, in the event a perpetrator is sentenced for committing

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[40] See M. Lipczyńska, A. Kordik, Z. Kegel, Z. Świda-Łagiewska, *Polski proces karny* [Polish Criminal Trial], Warszawa–Wrocław 1975, p. 110.

[41] See M. Cieślak, *Polska procedura...* [Polish Criminal...], *op. cit.*, p. 33.

[42] See M. Siewierski, J. Tylman, M. Olszewski, *Polskie postępowanie...* [Polish Criminal...], *op. cit.*, p. 81.

[43] See T. Grzegorczyk, J. Tylman, *Polskie postępowanie...* [Polish Criminal...], *op. cit.*, p. 359; K. Marszał, Proces karny... [Criminal Trial...], *op. cit.*, p. 219; differently S. Waltoś, P. Hofmański, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 182, who treat this entity as a special party to the proceeding.

[44] With respect to that, it must be noticed that a plaintiff who has a status of a party to the proceeding can make use of only few rights of the parties (e.g. a public prosecutor or the accused).

a crime that resulted in material profit to a natural or juridical person or an organisational unit with no separate legal identity and that was committed on behalf or in the interest of that entity, a court rules that the entity that gained that material profit must return the whole or a part of it to the State Treasury; it does not apply to material profit that must be returned to another entity. Thus, the provision of Article 52 of the Criminal Code stipulates that there is subordinate liability, i.e. liability for somebody else's demeanour when: (1) an entity specified in Article 52 of the Criminal Code is sentenced for a crime resulting in material profit to them, (2) a crime is committed by a perpetrator acting on behalf or in the interest of an entity who gained material profit[45].

The entity specified in Article 52 of the Criminal Code, has a legal interest in favourable adjudication on the proceeding subject matter because the perpetrator's criminal liability bears the entity's liability to the State Treasury and the acquittal releases the entity from that liability. Despite that and although this entity has numerous rights in the course of the proceeding, including the right to appeal against the court ruling issued in the first instance (Article 425 § 1 of the Criminal Procedure Code), it is not recognised to be a party.

On the other hand, the Act of 28 of September 2013 amending the Criminal Procedure Code grants the entity liable for returning material profit form a crime to the State Treasury a status of a party to the proceeding. It is expressed in the provision regulating the status of the given entity in Article 81b in Part III of the Criminal Procedure Code titled "Parties, counsels, plenipotentiaries and a social representative" in Chapter 8a, which is after the Code Chapter dealing with the accused. In accordance with the new Article 8b, the entity liable for the return of material profit from a crime to the State Treasury is an entity, against which a prosecutor filed an indictment and a motion to a court to make them liable for such a return due to the profit gained in the circumstances defined in Article 52 of the Criminal Code. In the literature on this topic, it is highlighted that the above-mentioned amended regulation introduces changes that decide

[45] See W. Daszkiewicz, *Zobowiązanie do zwrotu korzyści majątkowej uzyskanej wskutek przestępstwa popełnionego przez inną osobę* [Obligation to return material profit obtained as a result of a crime committed by the third party], [in:] *Nowa Kodyfikacja Karna. Krótkie komentarze* [New Criminal Codification – Short Commentaries], volume 16, Warszawa 1998, p. 120; T. Grzegorczyk, *Sytuacja prawna podmiotu odpowiedzialnego za zwrot korzyści uzyskanej z przestępstwa innej osoby w procesie karnym* [Legal situation of an entity responsible for the return of profit obtained from a crime committed by another person in a criminal trial], [in:] *Nowa Kodyfikacja Karna. Krótkie komentarze* [New Criminal Codification], volume 1, Warszawa 1997, p. 55; R.A. Stefański, *Obowiązek zwrotu korzyści majątkowej uzyskanej z przestępstwa popełnionego przez inną osobę* [Obligation to return material benefit obtained from a crime committed by another person], Prok. i Pr. 2000, No. 3, p. 123; D. Skrzyńska, *Charakter odpowiedzialności z art. 52 Kodeksu karnego* [The character of liability under Article 52 of the Criminal Code], Prok. i Pr. 2002, No. 3, p. 40; also, *Zobowiązanie do zwrotu korzyści na rzecz Skarbu Państwa przez podmiot określony w art. 52 KK* [Obligation to return profit to the State Treasury by an entity specified in Article 52 of the Criminal Code], WPP 2002, No. 2, s. 56; D. Kaczorkiewicz, *Pozycja podmiotu zobowiązanego do zwrotu korzyści majątkowej w polskim procesie karnym (art. 52 Kodeksu karnego)* [Position of an entity obliged to return material profit in Polish criminal process (Article 52 of the Criminal Code)], Toruń 2005.

on the participation of a subsidiary liable entity in the criminal proceeding as a party[46].

It must be also pointed out that the cited amendment does not grant new essential rights to the entity defined in Article 52 of the Criminal Code. However, it considerably changes their position and situation in the proceeding because they did not use to be and now after the change they are a party to the proceeding.

8. Summing up, it must be said that the definition of the concept of a party to the criminal proceeding based on the substantive element of a legal interest in favourable adjudication on the proceeding subject matter or another substantive element raises irrevocable doubts about the treatment of a prosecutor and a public prosecutor as an active party. The adoption of the formal meaning of a party to the proceeding does not raise such problems. The substantive element in the form of a legal interest constitutes, however, a considerable supplement to the elements of the definition of a party to the proceeding. It highlights the argument (a reason or a cause) that makes a given entity launch a criminal trial or take part in it, file a charge or pursue a civil claim, or become a suspect or the accused protecting their interests in a trial.

ON THE SUBSTANTIAL AND FORMAL ASPECTS OF THE CONCEPT OF A PARTY

Summary

In the context of the latest changes in Polish criminal procedure, the author considers the meaning of the substantive element of the definition of a party to the proceeding in the form of legal interest in a favourable judgement on the proceeding subject matter. The author formulates a thesis that defining a party to a criminal trial based on the substantive element raises irrevocable doubts in connection with the treatment of a prosecutor or public prosecutor as an active party. The formal meaning of a party to the proceeding does not raise such problems.

[46] See K. Marszał, *Proces karny...* [Criminal Trial...], *op. cit.*, p. 220.

O POJĘCIU STRONY W ZNACZENIU MATERIALNYM I FORMALNYM

Streszczenie

W kontekście najnowszych zmian w polskiej procedurze karnej autor rozważa znaczenie materialnego elementu definicyjnego strony procesowej w postaci interesu prawnego w korzystnym rozstrzygnięciu o przedmiocie procesu. Autor stawia tezę, że definiowanie pojęcia strony w procesie karnym na podstawie materialnego elementu rodzi nieusuwalne wątpliwości co do traktowania prokuratora i oskarżyciela publicznego jako strony czynnej. Problemów takich nie rodzi przyjęcie formalnego znaczenia strony procesowej.

DE LA NOTION DE PARTIE AU SENS MATÉRIEL ET FORMEL

Résumé

Dans le contexte des derniers changements dans la procédure pénale polonaise l'auteur analyse le sens de l'élément matériel de définition de la partie du procès sous la forme de l'intérêt légal dans la décision avantageuse de l'objet du procès. L'auteur présente l'hypothèse que la mise en définition de la partie dans le procès pénal à la base de l'élément matériel cause des doutes inamovibles dans le cadre du traitement du procureur et accusateur public en tant que partie active. Ces problèmes n'apparaissent pas au moment d'accepter le sens formel de la partie du procès.

О ПОНЯТИИ СТОРОНЫ В МАТЕРИАЛЬНОМ И ФОРМАЛЬНОМ ЗНАЧЕНИИ

Резюме

В контексте новейших изменений в польском уголовном судопрооизводстве автор рассматривает значение материального элемента определений процессуальной стороны в форме правового интереса в выгодном рассмотрении дела о предмете процесса. Автор представляет гипотезу о том, что определение понятия стороны в уголовном судопроизводстве на основе материального элемента рождает непреодолимые сомнения касательно трактовки прокурора и общественного обвинителя как активной стороны. В свою очередь, такие проблемы не возникают в результате формального принятия значения процессуальной стороны.

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WITHDRAWAL OF THE INDICTMENT BY PUBLIC PROSECUTOR

I. Introduction

In the Polish criminal proceeding, there is a principle of accusatoriality that means the opening of a court proceeding is based on the demand made by a legally entitled prosecutor or another entity (Article 14 § 1 of the Criminal Procedure Code). The basic form of accusation is an indictment[1]. It plays the role of: (a) proceeding obligation, (b) proceeding impulse, (c) information, and (d) limitation of the right to accusation[2]. A court is obliged to hear the case only within the limits of the indictment and cannot go beyond them[3]. The indictment specifies the subjective and objective scope of the court proceeding. The frames are specified by the incident described in the indictment and not by particular elements of the description[4]. However, the court is not bound by the description and legal classification of the act described by the prosecutor; it is bound by the act as an actual incident[5].

In its classical form, the principle of accusatoriality makes the initiation of a criminal proceeding and its continuation dependent on the initiative of a party to the proceeding[6]. In such a form, it does not take place in the Polish criminal proceeding in cases regarding crimes prosecuted *ex officio*, because – in compliance with Article 14 § 2 of the Criminal Procedure Code – dropping the charge by a public prosecutor does not bind the court. Thus, the court can continue the

1 S. Waltoś, *Akt oskarżenia w procesie karnym* [Indictment in a criminal trial], Warszawa 1963, p. 10; M. Cieślak, *Polska procedura karna. Podstawowe założenie teoretyczne* [Polish criminal procedure – Basic theoretical assumptions], Warszawa 1971, p. 260; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym* [The influence of the injured on the course of preparatory proceeding in the Polish criminal trial], Warszawa 2006, p. 219.

2 S. Waltoś, *Akt oskarżenia*… [Indictment…], pp. 10–11.

3 S. Waltoś, *Akt oskarżenia*… [Indictment…], p. 12, K. Mioduski, *Akt oskarżenia* [Indictment], WPP 1953, No. 3, p. 263, Supreme Court ruling of 10 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50, Supreme Court ruling of 7 April 2009, II KK 329/07, LEX No. 507942.

4 Supreme Court ruling of 30 October 2012, II KK 9/12, LEX No. 1226693.

5 Supreme Court ruling of 21 September 2006, V KK 10/06, LEX No. 196961.

6 M. Cieślak, *Polska procedura karna*… [Polish criminal procedure…], p. 258.

proceeding although the public prosecutor recognized no ground for maintaining the indictment. As a result of this solution, the public prosecutor stops being a complainant. Having filed a complaint to the court, they lose control over the complaint[7] and are only a party to the proceeding. They cannot make the court desist from prosecution only because the charges are withdrawn[8]. Thus, it is a deviation from the principle of accusatoriality[9].

II. Dropping the charge by a public prosecutor

Dropping the charge is a prosecutor's statement on desisting form supporting the previously filed indictment. The Criminal Procedure Code does not directly specify the effects of a public prosecutor's decision in that respect. The solution raises doubts resulting form Article 14 § 1 *in fine* of the CPC, which directly says that the dropping of the charge does not bind the court.

The doctrine highlights that the court:

1) can discontinue the proceeding or continue it[10];
2) is obliged to continue the proceeding and can discontinue it only if other reasons to discontinue are revealed[11].

In the event of the former, attention is drawn to the fact that the regulation would have no sense if, in spite of the public prosecutor' withdrawal, the court was obliged to continue the proceeding. Discontinuation or continuation of the proceeding should depend on the court's assessment, which should take into account how advanced the proceeding is[12].

In the event of the latter, it is pointed out that the withdrawal of an indictment cannot cause its annihilation and create a situation defined in Article 17 § 1

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[7] I. Nowikowski, *Odwołalność czynności procesowych stron w polskim procesie karnym* [Revocability of the parties' proceeding actions in the Polish criminal trial], Lublin 2001, p. 94, Supreme Court ruling of 12 November 1996, II AKa 298/96, OSN Prok. i Pr. 1997, No. 6, item 25.

[8] F. Prusak, *Postępowanie karne. Wprowadzenie, Zasady procesu karnego* [Criminal proceeding – Introduction – Criminal trial rules], Warszawa 2001, p. 179.

[9] M. Cieślak, *Odstąpienie oskarżyciela publicznego…* [Public prosecutor's withdrawal…], p. 16; S. Waltoś, *Proces karny, Zarys systemu* [Criminal trial – System outline], Warszawa 2009, p. 281; Z. Gostyński [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M.R. Kmiecik, [in:] R. Kmiecik, E. Skrętowicz, *Proces karny, Część ogólna* [Criminal trial – General issues], Warszawa 2006, p. 84; I. Nowakowski, *Odwołalność czynności…* [Revocability of…], p. 95. In the doctrine, there are also standpoints that…

[10] M. Cieślak, *Odstąpienie oskarżyciela publicznego od oskarżenia* [Dropping the charge by a public prosecutor], Pal. 1961, No. 1, p. 15, *ibid.*, *Polska procedura karna…* [Polish criminal procedure…], p. 264.

[11] W. Daszkiewicz, *Oskarżyciel w polskim procesie karnym* [Prosecutor in the Polish criminal trial] Warszawa 1960, p. 177 and next; J. Tylman, *Zasada legalizmu w procesie karnym*, Warszawa 1965, p. 138; S. Stachowiak, *Funkcje zasady skargowości w polskim procesie karnym* [Function of the principle of accusatoriality in the Polish criminal trial], Poznań 1975, p. 58.

[12] M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (I półrocze 1977 r.)* [Review of rulings of the Supreme Court with respect to criminal proceeding (1st half of 1977)], Pal. 1978, No. 1, pp. 37–38.

point 9 of the CPC[13]. In the judicature, it is assumed that: "The fact that there is a principle of accusatoriality in the criminal proceeding (Article 6 of the CPC – at present Article 14 § 1 [comment by R.A.S.]) does not mean that dropping the charge by a public prosecutor is a negative prerequisite for criminal proceeding as defined in Article 11 point 4 (at present Article 17 § 1 point 9 [R.A.S.]) of the CPC and oblige the court to discontinue the proceeding. It apparently results form Article 36 of the CPC (at present Article 14 § 2 [R.A.S.]), in accordance with which dropping the charge by the public prosecutor does not bind the court. The provision should be read in the context of Article 361 § 2 of the CPC (at present Article 414 § 1 second sentence [R.A.S.]) establishing an obligation to issue an acquittal in case of circumstances defined in Article 11 point 1 of the CPC (at present Article 17 § 1 point 1 and 2 [R.A.S.]), thus, e.g. when the incident did not take place or the given person did not commit the act"[14]. It is accurately stated in the doctrine that dropping the charge by a prosecutor does not constitute a negative prerequisite for the proceeding and does not bind the court, and the court is always obliged to examine legal and actual grounds for such a withdrawal. While enforcement agencies are obliged to initiate criminal proceeding in case of crimes prosecuted *ex officio*, and a public prosecutor is obliged to file an indictment, on the other hand, somewhat symmetrically, there is an obligation to desist from prosecution or drop the charge if there are no sufficient grounds for it[15].

Dropping the charge – despite the opinion presented in the doctrine[16] – is not equivalent to the withdrawal of the indictment[17]. Contrary to what is said, dropping the charge does not result in the annihilation of the charge, although a public prosecutor expressed a will not to prosecute[18]. This does not result in the abandonment of the prosecution[19]. It is rightly pointed out that a public prosecutor stops supporting the charge but the complaint contained in the indictment does not stop existing. The legally entitled prosecutor's complaint exists in spite of his/her behaviour, as

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[13] Supreme Court ruling of 28 December 1976, VI KRN 286/76, OSNKW 1977, z. 3, item 25 with glosses by J. Bednarzak, OSPiKA 1977, No. 11–12, p. 501–503; S. Stachowiak, OSPiKA 1977, z. 11–12, pp. 503–505 with comments by A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego (za I półrocze 1977 r.)* [Review of rulings of the Supreme Court with respect to criminal proceeding (1st half of 19770], NP 1978, No. 9, p. 1325, W. Daszkiewicz, *Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – I półrocze 1977)* [Review of rulings of the Supreme Court (criminal procedure law – 1st half of 1977)], PiP 1989, No. 4, p. 37.

[14] Supreme Court ruling of 7 April 1994, II KRN 18/94, OSNKW 1994, No. 5–6, item 35 with a gloss by K. Woźniewski, Pal. 1995, No. 11–12, p. 231 and Inf. Pr. 1995, No. 1–3, item 262.

[15] S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997, V KKN 67/97, Prok. i Pr.1998, No. 7–8, p. 89.

[16] E. Skrętowicz: *Słowo wstępne*, [in:] *Kodeks postępowania karnego* [Criminal Procedure Code], Kraków 1997, p. 9–10.

[17] M. Cieślak, Z. Doda, *Przegląd orzecznictwa…* [Review of rulings…], Pal. 1978, No. 1, pp. 37–38.

[18] S. Śliwiński, *Polski proces karany przez sądem powszechnym, Zasady ogólne* [Polish criminal trial before a common court – General issues], Warszawa 1948, p. 104; J. Tylman, *Zasada legalizmu w procesie karnym* [Principle of legalism in a criminal trial], Warszawa 1965, p. 137.

[19] F. Praśkiewicz, J. Tylman, *Zmiana oskarżenia w procesie karnym powszechnym* [Change of indictment in a common trial], ZN U Nauki Humanistyczno-Społeczne. Prawo 1958, No. 9, p. 191.

they do not have to maintain the same attitude throughout the whole proceeding[20]. It is rightly assumed in the doctrine that Article 14 § 2 of the CPC does not apply to the withdrawal of the indictment but to the function of prosecution at the stage of the juridical proceeding, the aim of which is to support the filed indictment[21]. Dropping the charge has an effect *ex nunc*. This means that dropping the charge by a public prosecutor does not result in ineffectiveness of the indictment. The court is not authorised to discontinue the proceeding because of the lack of a public prosecutor's complaint[22], because the indictment continues to exist[23].

III. Withdrawal of the indictment

The Act of 27 September 2013 amending the Criminal Procedure Code and some other acts[24] substituted the concept of "dropping the charge by a public prosecutor" with "a withdrawal of an indictment by a public prosecutor". It is connected with the increase in contradictoriness of the juridical proceeding. In the explanatory statement to the Bill it was pointed out that "Contradictoriness also assumes, bigger than currently, freedom of the parties to decide on the scope and of their participation in the proceeding (which applies to parties other than the prosecutor) and broader control over the subject-matter of the proceeding (which applies to a prosecutor). Because of that, it was necessary to propose a new wording of the draft Article 14 § 2 of the CPC and constitute the possibility of withdrawing the indictment by a public prosecutor"[25].

1. The essence of indictment withdrawal

The word "withdrawal" means "return to a former state"[26]. The withdrawal of the indictment means that there is a return to the situation before the indictment was filed, i.e. there is a legal state as if the indictment had not been filed. The

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[20] S. Stachowiak, *Funkcja zasady skargowości w polskim procesie karnym* [Function of the principle of accusatoriality in Polish criminal trial], Poznań 1975, p. 58; *ibid.*, Gloss on the Supreme Court ruling of 28 December 1976, VI KRN 286/76, OSPiKA 1977, No. 123, p. 503.

[21] I. Nowakowski, *Odwołalność czynności…* [Revocability of…], p. 100.

[22] I. Nowakowski, *Odwołalność czynności…* [Revocability of…], p. 102; A. Gaberle, *Leksykon polskiej procedury karnej* [Lexicon of Polish criminal procedure], Gdańsk 2004, p. 134.

[23] F. Praśkiewicz, J. Tylman, *Zmiana oskarżenia…* [Change of indictment…], p. 191; W. Daszkiewicz, *Odstąpienie oskarżyciela publicznego od oskarżenia a zasada legalizmu* [Dropping the charge by a public prosecutor and the principle of legalism], Pal. 1961, No. 8, p. 44; S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997…, p. 91.

[24] Journal of Laws of 2013, item 1247, cited later as the amendment.

[25] *Uzasadnienie projektu ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw* [Explanatory statement to a bill amending the Act on the Criminal Procedure Code and some other acts], (the Sejm paper No. 870), p. 168.

[26] *Praktyczny słownik współczesnej polszczyzny* [Practical Dictionary of the Contemporary Polish Language], (ed.) H. Zgółkowa, vol. 7, Poznań 1996, p. 276.

complaint is annihilated and loses its legal validity. The withdrawal is effective *ex tunc*. This way, the indictment became a proceeding act that is revocable. A complaint in the form of an indictment is necessary not only to initiate the proceeding but also to continue it. The scope of public prosecutor's control over the indictment has changed. The public prosecutor's right to withdraw the indictment means that he/she does not lose control over this proceeding act after it has been filed in court and the indictment does not become a being independent of the organ that filed it in court. Having filed it in court, he/she has control over it.

It is rightly stated in the literature that a withdrawal of an act serves the removal of the results of that act, deprives the act of importance to the proceeding and is aimed at the future[27]. Since a withdrawal of an act makes it non-existent, there is a proceeding obstruction in the form of a lack of a legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC). "The withdrawal of the indictment – as the explanatory statement to the Bill emphasises – will mean the necessity to discontinue the proceeding based on Article 17 § 1 point 9 of the CPC due to the lack of an entitled prosecutor's complaint. The solution is indispensable in order to avoid situations, in which the court – which as a rule does not prove *ex officio* – would find itself in the event the prosecutor resigns from supporting the indictment"[28].

The consequences of the withdrawal of an indictment are different from those of dropping the charge. In the event of a withdrawal of an indictment, the court cannot continue the proceeding because, due to the negative proceeding prerequisite in the form of a lack of an entitled prosecutor's complaint, it is obliged to discontinue the proceeding based on Article 17 §1 point 9 of the CPC. It cannot do this – see below – directly after a withdrawal of the indictment by the public prosecutor because a subsidiary prosecutor may support the charge.

Withdrawing the indictment, a public prosecutor resigns from the right to a complaint. In accordance with Article 14 § 1 sentence III of the CPC, an indictment against the same person in connection with the same act cannot be filed again. The discontinuation of the proceeding by court results in a state of previously binding judgement (*rei judicatae*).

A withdrawal of the indictment with the consent of the accused can take place at every stage of the proceeding before the court of the first instance, thus also just before the end of the juridical proceeding after all the circumstances have been explained. In connection with that, a question arises what ruling should the court issue when the collected evidence clearly indicates the accused has not committed the act imputed to them. The issue is connected with the concurrence of proceeding prerequisites, which result in different proceeding consequences. Taking into account the prerequisite in the form of a lack of an

[27] I. Nowakowski, *Odwołalność czynności…* [Revocability of…], p. 101.
[28] *Uzasadnienie…* [Explanatory statement…], p. 168.

entitled prosecutor's complaint, the court should discontinue the proceeding, but taking into account the lack of evidence for the crime commitment or that it was committed by the accused, the court should acquit the accused.

In the literature, the issue of the concurrence of prerequisites is solved in various ways. It is assumed that:

1) In the case of the concurrence of prerequisites resulting in different proceeding effects, it is necessary to – in accordance with the principle of the strongest legal effect – take into account all the prerequisites in question and rule in agreement with the prerequisite resulting in the most important proceeding consequences; but, in the case of the concurrence of a formal proceeding prerequisite with the substantial condition of responsibility, it is necessary to discontinue the proceeding even if the case has been completely solved (the principle of the superiority of formal assessment)[29];
2) In the event of the concurrence of the acquittal prerequisite with another prerequisite resulting in discontinuation, it is necessary to discontinue the proceeding because guilt can be settled only in an admissible proceeding, but the solution applies only to discontinuation of the proceeding until the court proceeding starts, and when the court is convinced that there was no abolition of the presumption of innocence, it should rule acquittal because in public opinion it counts for more than discontinuation[30];
3) The most important prerequisite is taken into consideration[31];
4) The prerequisite resulting in the most important consequences is accepted; the proceeding cannot take place in a situation when it is found that an act has not been performed and in such a case formal prerequisites are not important.[32]

It is unacceptable to base on the principle of formal assessment priority because it strikes with too far-reaching formalism and does not take into account the interests of the accused. With respect to this stand, the negative proceeding prerequisite of an absolute character causes that the proceeding cannot take place[33] and makes it impossible to launch and conduct the proceeding in any legal proceeding situation and adjudicate on the substance of the case, which is admissible only in a correct proceeding, and a defective proceeding is when there

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[29] M. Cieślak, *Polska procedura karna…* [Polish criminal procedure…], p. 422; *ibid.*, *Nieważność orzeczeń w procesie karnym PRL* [Invalidity of rulings in criminal trials in the People's Republic of Poland], Warszawa 1965, p. 72–73; ibid. *Zbieg warunków negatywnych w postępowaniu* [Concurrence of negative conditions in the proceeding], NP 1958, No. 9, p. 35.

[30] S. Waltoś, *Proces karny…* pp. 476–477.

[31] S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code – Commentary], Warszawa 1996, p. 33.

[32] R.A. Stefański, *Zbieg przyczyn umorzenia postępowania przygotowawczego* [Concurrence of reasons for discontinuation of preparatory proceeding], Prok. i Pr. 2000, No. 4, pp. 74–75.

[33] M. Cieślak, *O przesłankach procesowych w polskim postępowaniu karnym* [On juridical premises in Polish criminal proceeding], PiP 1969, No. 12 [in:] M. Cieślak, *Dzieła wybrane* [Selected works], vol. IV, Kraków 2011, p. 281.

is a proceeding obstacle[34]. Discontinuation of a proceeding that is in its advanced stage, directly after a negative formal proceeding prerequisite has been found, would make the accused unable to be cleared of all groundless accusations. It is rightly emphasised in the doctrine that there would be an evident limitation of the right of the accused to obtain a substantial ruling in the proceeding that has been launched against him/her and this might lead to the unjust rulings[35].

It might seem that the interest of the accused is not important if they give their consent to a withdrawal and this way agree for a discontinuation of the proceeding instead of an acquittal. The conclusion is inappropriate because the accused can give consent to the withdrawal of an indictment, as they are not sure whether an acquittal will be ruled. They choose the withdrawal option that, in their opinion, is favourable to them because it guarantees they are not going to be sentenced.

The supporters of other solutions, although they provide various arguments, in fact represent the same stand that in the above-discussed case, the court is obliged to rule an acquittal and cannot discontinue the proceeding based on the lack of an entitled prosecutor's complaint. An acquittal ruling is most important and causes the furthest-reaching consequences.

The doctrine assumes a limited admissibility of issuing a substantial ruling, in spite of the fact that a negative proceeding prerequisite has been found, namely when it is revealed after all the proceeding activities and the collection of evidence have been completed. This kind of situation creates conditions for examining *in merito* grounds for charges[36]. Thus, it is not possible to discontinue the proceeding in a court case quoting the lack of an entitled prosecutor's complaint if the analysed and assessed circumstances do not make it possible to prove somebody's guilt or create doubts whether the act occurred at all. Due to that, the proceeding can be concluded with a substantial ruling of an acquittal.

2. Conditions for the withdrawal of an indictment

In accordance with the wording of Article 14 § 2 of the CPC, a public prosecutor can withdraw an indictment:
– until the start of a court proceeding during the first main hearing;
– in the course of court proceeding in the court of first instance with the consent of the accused.

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[34] K. Marszał, *Przedawnienie w prawie karnym* [Limitation in criminal law], Warszawa 1972, p. 105.

[35] Supreme Court resolution of 13 March 1997, I KZP 1/97, OSNKW 1997, No. 5–6, item 42 with comments by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 1997 rok* [Review of resolutions of the Criminal Chamber of the Supreme Court with respect to criminal proceeding law – 1997], WPP 1998, No. 3–4, pp. 159–160.

[36] M. Cieślak, *Polska procedura…* [Polish procedure…], pp. 420–421; R. Kmiecik, E. Skrętowicz, *Proces karny, Część ogólna* [Criminal trial – General issues], Kraków–Lublin 1996, pp. 206–207.

The accused has no influence on the withdrawal of an indictment before the start of a court proceeding, i.e. the indictment official presentation (Article 385 § 1 of the CPC). It can take place without their consent. It is possible only during the first main hearing. The main hearing was defined as "the first", which means "the first in a row, order, sequence referring to number one"[37], "occurring before all the other in a numerical, digital or alike order"[38]. The linguistic meaning indicates that it is the first chronological hearing. It is not possible to withdraw the indictment during the hearing that takes place later, after a break, although the court proceeding did not start during the previous hearing because this one is not the first hearing actually. The hearing conducted after the break even as a continuation is not the first one but a successive one. The same applies to a proceeding after the quashing of the judgement by the court of the second instance or the Supreme Court and referring the case to the court of the first instance for re-hearing. In such case, the entitlement is not revived. It was highlighted in the explanatory statement to the amending Bill, which says: "it will not be accessible after the quashing of a judgement and referring the case for re-hearing"[39].

The accused has a considerable influence on the withdrawal of the indictment after the start of the court proceeding because it can be implemented – in accordance with Article 14 § 2, sentence II, of the CPC – only with their consent. The consent of the accused as a condition of a withdrawal of an indictment is in the interest of the accused, who may be interested in finalising the trial and an acquittal judgement; while a withdrawal of the indictment in general results in the discontinuation of the proceeding, which can make some difference. The doctrine rightly highlights that one of the fundamental rights of the accused in the court proceeding is the right to judgement, i.e. the right to a substantial settlement of the case[40]. It is rightly pointed out that in the explanatory statement to the amending Bill that: "It is assumed that in the course of trial, the withdrawal of the indictment is admissible only with the consent of the accused (draft Article 14 § 2, second sentence, of the CPC), because otherwise, with the use of a unilateral proceeding act, a public prosecutor would be able to lead to the discontinuation of the proceeding in a situation when proving the prosecution theses before court faced difficulties. In such a case, a person accused of crime should have the right to acquittal, which is a better vindication than a discontinuation of the proceeding due to the withdrawal of an indictment"[41].

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[37] *Praktyczny słownik współczesnej polszczyzny* [Practical Dictionary of the Contemporary Polish Language] (ed.) H. Zgółkowa, vol. 28, Poznań 2000, p. 315.

[38] *Mały słownik języka polskiego* [Small dictionary of the Polish Language] (ed.) B. Dunaj, Wilga 2007, p. 455.

[39] *Uzasadnienie…* [Explanatory statement…], p. 168.

[40] W. Daszkiewicz, *Odstąpienie oskarżyciela publicznego od oskarżenia a zasada legalizmu…* [Dropping the charge by a public prosecutor and the principle of legalism…], p. 40.

[41] *Uzasadnienie…* [Explanatory statement…], p. 168.

In Article 14 § 2, sentence II, of the CPC, unlike in the case of the withdrawal of an indictment before the start of the court proceeding, there is a lack of a reservation that it applies to the first main hearing. *Prima vista*, it seems the condition does not apply to a withdrawal of an indictment after the start of a court proceeding. It is a right observation because it would be difficult to find reasonable prerequisites of the elimination of such a possibility during a successive hearing or in the course of one resulting from the quashing of the judgement and referring the case for re-hearing. It may be aimless to conduct a sometimes long trial that would be concluded with an acquittal when a public prosecutor comes to a conclusion that there is a lack of evidence to convict the accused and would like to withdraw the indictment with the consent of the accused who is interested in the fast conclusion of the trial.

The withdrawal of an indictment with the consent of the accused is admissible in the course of the court proceeding, i.e. not later than the court decides to close the trial (Article 405 of the CPC). In Article 14 § 2, sentence II, of the CPC, it was directly stated that it could take place *verba legis* "in the course of a trial". It is not possible in the prosecutor's speech, which is made after the court proceeding has been closed (Article 406 § 1 of the CPC).

The clear meaning of the expression in Article 14 § 2 of the CPC that an indictment may be withdrawn *verba legis* "before the court of the first instance" is that filing such a statement in the proceeding before the court of appeal is inadmissible.

The discussed conditions for the withdrawal of an indictment are formal in character. The act does not say anything about substantive conditions. There is no information in what circumstances a public prosecutor is entitled to withdraw the indictment. Undoubtedly, the conditions are the same as those applicable in the case of dropping the charge. In both cases it is a situation when in the public prosecutor's opinion there are no grounds to support the indictment. A public prosecutor represents the State and should not support prosecution when the evidence does not prove the grounds for prosecution. Supporting the indictment in spite of apparent facts – as it is rightly stated in the doctrine – is erroneous and socially destructive because it undermines the authority of the State organs acting as public prosecutors and shakes the belief in their (especially the prosecutor's) impartiality[42].

It is assumed in the doctrine that the dropping of the charge – which *mutatis mutandis* can be applied to the withdrawal of an indictment – can take place if, in the public prosecutor's opinion:

– prosecution is undesirable;
– the evidence the prosecutor possesses is apparently insufficient, seeming or false[43].

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[42] S. Stachowiak, Gloss on the Supreme Court ruling of 9 July 1997…, p. 90.

[43] M. Cieślak, *Odstąpienie oskarżyciela publicznego od oskarżenia* [Dropping the charge by a public prosecutor], Pal. 1961, No. 1 [in:] M. Cieślak, *Dzieła Wybrane*… [Selected works…], p. 182.

A prosecutor – in accordance with Article 32 item 2 of the Act of 20 June 1985 on the Pubic Prosecution Service[44] – is obliged to drop the charge if the results of the trial do not confirm charges. Although the directive applies to a public prosecutor, taking into account that other prosecutors may perform these activities (article 32 item 1 of the Act on the Public Prosecution Service), it is necessary to apply it to other prosecutors, too. It is rightly emphasised that a prosecutor drops the charge in the case when it is apparent that the accused did not commit the crime or there is no sufficient evidence for further prosecution or adjudicating is inadmissible because of a proceeding obstacle[45].

In the literature, the possibility of a withdrawal of the indictment because of a negative proceeding prerequisite has been called into question. There are opinions that in such a situation, a prosecutor acting as a proponent of the rule of law should file a motion to discontinue the court proceeding based on the adequate negative proceeding prerequisite[46]. This is, in my opinion, what a prosecutor should do only if the negative prerequisite is further-reaching than a lack of a legally entitled prosecutor's complaint.

The withdrawal of the indictment is in the form of a statement, which can be made in writing or orally and noted in the minutes (Article 116 of the CPC). It can be filed after the receipt of the indictment by the court because then the case is pending. It can be filed during the preparatory proceeding stage before the main hearing or during the main hearing. The Act does not require that prosecutors justify the withdrawal of the indictment but due to the educational role of the main hearing they should give reasons for filing the statement. It should be always connected with a precise and sufficient explanation of the decision.

It does not have to be connected with a motion to discontinue the proceeding based on the lack of a legally entitled prosecutor's complaint because this effect results from the Act (Article 17 § 1 point 6 of the CPC).

IV. Scope of withdrawal

An indictment can refer to more than one accused person (objective/personal scope) and two or more crimes (subjective/substantial scope). In connection with that, a question is asked: Must the whole indictment be withdrawn or is it possible to withdraw the part of the indictment referring to a particular accused person or some charges? Article 14 § 2 of the CPC speaks about a withdrawal of an indictment, which suggests the withdrawal of the whole one. The provision does not speak about a physical withdrawal of the document from court

[44] Journal of Laws of 2011, No. 270 with amendments that followed.
[45] J. Tylman, *Zasada legalizmu…* [Principle of legalism…], pp. 137–138.
[46] M. Cieślak, *Odstąpienie oskarżyciela publicznego…* [Dropping the charge by…], p. 182.

but a return made in an ideal sense. A different interpretation of the phrase would lead to a situation in which a public prosecutor would have to support prosecution of the accused or the act in spite of their strong conviction that it is groundless, and this would be in conflict with the prosecutor's tasks, which do not consist in supporting an indictment at all costs, but in acting as an organ of the State in compliance with the rule of law (Article 2 of the Act on the Public Prosecution Service). It is rightly emphasised in the doctrine that in the trial, a prosecutor strives for objective truth and should ensure that a crime perpetrator is justly punished and an innocent person is not convicted[47]. That is why a prosecutor is obliged to file such a statement in the case he/she believes there are no substantive or formal prerequisites for criminal conviction. A public prosecutor is responsible to take into account all the circumstances in favour of the accused or to their disadvantage (Article 4 of the CPC), and this principle is connected with undertaking steps that are adequate to the real and objective assessment of circumstances.

In the case of an indictment of a complex subjective, objective or subjective-objective character, it is possible to withdraw an indictment completely or partially. In the latter case, it can refer to some of the accused or some of the charges.

V. Victim's role

A withdrawal of an indictment does not require the injured person's consent, independent of their status in the court proceeding. But this does not mean that they have no influence on the further course of the proceeding. The Criminal Procedure Code enables victims to act as subsidiary prosecutors and support an indictment. In the explanatory statement to the Bill, it is emphasised that: "The new formulation of Article 14 § 2 of the CPC requires the protection of the interests of a subsidiary prosecutor, who should not be deprived of their rights due to a withdrawal of an indictment by a public prosecutor"[48].

In the case when the injured persons act as subsidiary prosecutors together with a public prosecutor, after the withdrawal of the indictment by the public prosecutor, they act on their own. In accordance with Article 54 § 2, sentence I, of the CPC, the withdrawal of the indictment by a public prosecutor does not deprive subsidiary prosecutors of their rights.

In the situation when the injured did not act in that role, they can obtain the status of subsidiary prosecutors if within 14 days from the notification of the

[47] S. Waltoś, *Problemy prawnoprocesowe przemówienia prokuratora na rozprawie głównej* [Legal and proceeding issues connected with the prosecutor's speech during he main hearing], NP. 1969, No. 5, p. 723.

[48] *Uzasadnienie…* [Explanatory statement…], p. 168.

withdrawal of the indictment by the public prosecutor they file a statement that they join the proceeding as subsidiary prosecutors (Article 54 § 2, sentence II, of the CPC). In the case the public prosecutor withdraws the indictment and the victims do not participate in the proceeding as subsidiary prosecutors, they are notified of the right to file a statement on joining the proceeding as subsidiary prosecutors. They have to do this – as it was already stated above – within 14 days from the notification of the withdrawal of the indictment by the public prosecutor. It is a preclusive deadline. Failure to meet it results in the loss of the right. When the statement is filed, the proceeding continues with the participation of the injured as an active party to the proceeding.

Due to the fact that after the withdrawal of the indictment by the public prosecutor the victim acting as a subsidiary prosecutor can support the prosecution, the court does not discontinue the proceeding based on the lack of a legally entitled prosecutor's complaint, but takes another decision that depends on whether a subsidiary prosecutor has already taken part in the proceeding. In the case the victim has acted in that role, the proceeding is continued, of course without the participation of the public prosecutor. If the withdrawal took place during the main hearing, the proceeding is continued. The Criminal Procedure Code does not rule to start the proceeding from the very beginning.

In the situation when a subsidiary prosecutor has not taken part in the proceeding so far, the judge rules a break and orders that the injured party is notified about the withdrawal of the indictment by the public prosecutor and the right to file a statement on joining the proceeding as a subsidiary prosecutor (*arg. ex* Article 54 § 2, sentence II and Article 16 § 2 of the CPC). In the case the statement is filed, the trial – in accordance with Article 402 § 2 of the CPC – is continued, and started from the beginning only when the bench has changed or the court decides to do so. In general, the court should decide to start the proceeding from the beginning in the case the public prosecutor withdraws the indictment after the examination of all the evidence and just before the trial is closed. A substantive support of the prosecution by the subsidiary prosecutor in such a case would be illusive.

If a victim does not file a statement on joining the proceeding as a subsidiary prosecutor in due time, the court discontinues the proceeding based on the lack of legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC).

VI. Conclusion

The Amendment of 2013 substitutes "the dropping of the charge by a public prosecutor" for "a withdrawal of an indictment", which is in agreement with the essence of an accusatory proceeding, because in a juridical proceeding a complaint belongs to a public prosecutor who initiates a court proceeding by

filing a indictment. Failure to bind the court by the dropping of the charge by a public prosecutor (Article 14 § 1 of the CPC before the Amendment of 2013) was in conflict with the essence of the principle.

A withdrawal of an indictment by a public prosecutor causes a discontinuation of the proceeding based on the lack of a legally entitled prosecutor's complaint (Article 17 § 1 point 9 of the CPC), which is in complete compliance with the principle of accusatoriality. It does not infringe the interests of the injured party, who can continue to support prosecution as a subsidiary prosecutor. At the same time, a withdrawal of an indictment in the course of the juridical proceeding requires obtaining the consent of the accused.

WITHDRAWAL OF THE INDICTMENT BY PUBLIC PROSECUTOR

Summary

The article discusses the issue of a withdrawal of an indictment by a public prosecutor, which was introduced to the Polish criminal proceeding by the Act of 27 September 2013 amending the Act on the Criminal Procedure Code and some other acts, which will enter into force on 1 July 2015. The essence of a withdrawal of an indictment, conditions for it, its scope and the role of the injured persons are discussed and a comparison with the former solution of dropping the charge by a public prosecutor is presented.

COFNIĘCIE PRZEZ OSKARŻYCIELA PUBLICZNEGO AKTU OSKARŻENIA

Streszczenie

Przedmiotem artykułu jest cofnięcie przez oskarżyciela publicznego aktu oskarżenia wprowadzone do polskiej procedury karnej ustawą z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, które wejdzie w życie w dniu 1 lipca 2015 r. Została omówiona istota cofnięcia aktu oskarżenia, warunki i zakres jego cofnięcia oraz rola pokrzywdzonego. Porównano także tę instytucję z dotychczas obowiązującym odstąpieniem oskarżyciela publicznego od oskarżenia.

LA RÉTRACTION DE L'ACTE D'ACCUSATION PAR UN ACCUSATEUR PUBLIC

Résumé

L'objet de l'article concerne la rétraction de l'acte d'accusation par l'accusateur public introduit dans la procédure pénale polonaise par le droit du 27 septembre 2013 vu le changement du droit – le Code de la procédure pénale et quelques autres droits – qui entre en vigueur le 1er juillet 2015. L'auteur parle de l'essentiel de rétraction de l'acte d'accusation, des conditions et du champ de sa rétraction et aussi du rôle de l'endommagé. Il a comparé cette nouvelle institution avec la rétraction de l'accusation actuellement obligatoire fait par l'accusateur public.

АННУЛИРОВАНИЕ ОБЩЕСТВЕННЫМ ОБВИНИТЕЛЕМ ОБВИНИТЕЛЬНОГО АКТА

Резюме

Предметом статьи является аннулирование общественным обвинителем обвинительного акта, введённое в польскую уголовную процедуру законом от 27 сентября 2013 г. об изменении закона – УПК, а также некоторых других законов, которые войдут в жизнь 1 июля 2015 г. Оговорена суть аннулирования, условия и сфера его аннулирования, а также роль потерпевшего. Данный институт подвергнут сравнению с применяемым до сих пор отказом общественного обвинителя от обвинения.

Maciej Rogalski

THE PERIOD OF RETENTION OF TELECOMMUNICATIONS DATA WHICH MUST BE DISCLOSED AT THE REQUEST OF THE COURT OR THE PROSECUTOR IN CONNECTION WITH PENDING CRIMINAL PROCEEDINGS

1. Under the Polish law, the issues relating to the disclosure of correspondence and mail and telecommunications data for the purpose of pending court and prosecution proceedings are regulated by the criminal procedure and by the Act – Telecommunications Law.

The issues relating to the disclosure of correspondence and mail and data, referred to in the Telecommunications Law, are regulated by Article 218 of the Code of Criminal Procedure (CCP). However, issues such as the monitoring and recording of telephone calls are regulated in Chapter 26 CCP. The provisions of Article 218 CCP lay down the obligation to disclose correspondence, mail or billings and other data at the request of the court or prosecutor. This obligation is imposed on offices, institutions and other entities referred to in Article 218 § 1 CCP, irrespective of the legal and organisational form of their business and ownership, in particular, of whether it is private entity or a state-owned one.

Pursuant to Article 218 § 1 CCP, all offices, institutions and entities engaged in postal activity or telecommunications activity, as well as customs offices and transport institutions and enterprises, are obliged to disclose to the court or prosecutor, at the request included in the decision, any correspondence and mail and data, referred to in Article 180c and 180d of the Act of 16 July 2004 – Telecommunications Law[1] (TL), if those are relevant to the pending proceedings.

The scope of things and information to be disclosed is defined in section one of Article 218 CCP. Those include: correspondence, mail and data referred to in Article 180c and 180d TL, provided that they are relevant for the pending proceedings. In practice, the decision obliging to disclose the same will be based on the fact that the correspondence, mail or billings may be relevant

[1] Journal of Laws No 171, item 1800, as amended.

for those proceedings. However, it will not be evident whether or not they are relevant until their content has been identified. If the court or the prosecutor acknowledge that the retained correspondence or mail is of no relevance for the proceedings, they should be immediately returned to the entity from which they were taken (Article 218 § 3 CCP). However, the obligation to return will not apply to billings, as they represent only the graphic form (printout) of the data stored at the network operators[2].

The provisions of criminal procedure define entities obliged and authorised to disclose data and the mode of disclosure thereof. The types and the scope of data being disclosed are defined by the provisions of the Telecommunications Law which are further specified by the regulation of the Minister of Infrastructure of 28 December 2009 on the detailed list of data and type of operators of the public telecommunications network, or providers of publicly available telecommunications services obliged to retain the same. This regulation was issued on the basis of Article 180c(2) TL[3]. Pursuant to Article 180c(1) TL, the obligation referred to in Article 180a(1) TL extends to data necessary to:

1) determine the terminal point of a network, the terminal telecommunications equipment, the end user:
   a) initiating the communication,
   b) receiving the communication;
2) determine:
   a) the date and time of the communication and duration thereof,
   b) the type of communication,
   c) location of the telecommunications terminal equipment.

The provision of Article 180a TL, referred to in Article 180c(1) TL, applies to the obligation to retain and disclose data. Provisions of Article 180a(1)(2) TL impose on operators of the public telecommunications network and providers of commonly available telecommunications services the obligation to disclose, namely to search, create appropriate data sheets, and send via the telecommunications network to authorised entities, including the court and the prosecutor, the data referred to in Article 180c(1) TL. Pursuant to Article 180a (1) TL, subject to Article 180c(2)(2), the operator of the public telecommunications network and the provider of publicly available telecommunications services are obliged, at their own expense, to:

1) retain and store the data, referred to in Article 180c TL, generated in the telecommunications network or processed by them, in the territory of the Republic of Poland, during the period of 12 months, counting from the date of communication or unsuccessful communication, and to destroy these data

[2] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Commentary], vol. I, Warszawa 2011, p. 1233.

[3] Journal of Laws of 2009, No 226, item 1828.

after that period, with the exception of the data protected under separate provisions;
2) disclose the data, referred to in section 1, to authorised entities, and to the Customs Services, the court and the prosecutor, on terms and conditions and in the manner defined in separate provisions;
3) protect the data, referred to in section 1, against accidental or unlawful destruction, loss or modification, unauthorised or unlawful retention, processing, access or disclosure, in accordance with the provisions of Article 159–175a, Article 175c and Article 180e TL.

In addition, pursuant to Article 180d TL, telecommunications operators are obliged to ensure conditions for access and recording, and to disclose to authorised entities, and also to the Customs Services, the court and the prosecutor, at their own expense, the data processed by them, referred to in Article 159(1) (1) and 3–5 TL, in Article 161 TL and in Article 179(9) TL, connected with the telecommunications service provided, on terms and conditions and in compliance with procedures defined in separate provisions.

2. The provisions of Article 218 CCP do not specify the duration for which the data referred to herein should be retained. The data retention period is the period during which those data should be also disclosed at the request of authorised entities. During that period, authorised entities may request that the telecommunications operator disclose the data. The data retention obligation extends to four types of activities: retention, storage, disclosure and protection of data.

The retention period is calculated individually for data relating to each communication or unsuccessful communication. Thus, the operator calculates the retention period individually for each daily data filing system being subject to retention. The expiration of that period should be calculated on the basis of Article 57 § 3 of the Code of Administrative Procedure under which the time periods specified in months end when that day in the last month which corresponds to the initial day of the time period ends. The initial day of the time period is the day on which the communication or unsuccessful communication occurred[4].

The period during which the data should be retained is specified in the Act – Telecommunications Law. Pursuant to Article 180a TL, the public telecommunications network operator and the provider of publicly available telecommunications services are obliged to retain the data, referred to in Article 180c TL, generated in the telecommunications network or processed by them, in the territory of the Republic of Poland, during the period of 12 months, counting from the date of communication or unsuccessful communication.

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[4] S. Piątek, *Prawo telekomunikacyjne. Komentarz* [Telecommunications Law. Commentary], Warszawa 2013, p. 1090–1091.

The 12-month period of data retention adopted in Poland is the effect of the amendment to the Telecommunications Law of 16 November 2012[5]. As of 21 January 2013, Article 180a(1)(1) TL was changed under that amendment, namely the data retention period referred to in Article 180c(1) TL for authorised entities was reduced from 24 to 12 months, counting from successful communication or unsuccessful communication. The two-year data retention period was challenged by authorities responsible for protection of civic rights and in the literature[6].

The provision of Article 180a(1)(1) TL constitutes the implementation of provisions of Article 6 of 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[7]. Directive 2006/24/EC was implemented into the national law by the amendment of the Telecommunications Law of 24 April 2009. This directive was the reaction to diverse terms and conditions of retention of transmission data in EU Member States in connection with the need to detect and prosecute criminal offences. Directive 2006/24/EC standardised the scope of data being subject to retention for the services of fixed network telephony and mobile telephony, Internet access, Internet e-mail and Internet telephony. Pursuant to Article 6 of the aforesaid directive: "Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication"[8].

According to the final clause of Article 180a(1)(1) TL, after the expiration of the period of 12 months those data need to be destroyed, except those data which were protected in accordance with separate provisions. Destroying the data means removing them permanently from the information resources of the telecommunications operator. Data must be removed in an irreversible manner, as only in then the obligation to destroy data may be regarded as fulfilled. It is not sufficient to transfer the data from the database used to fulfill the retention obligation to other databases. Once the obligation to destroy data has been fulfilled, the economic operator should be unable to recover the data using ordinary technical means used to conduct the telecommunications activity[9].

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5 Journal of Laws of 2012, item 1445.

6 Cf. M. Wach, *Zatrzymywanie danych telekomunikacyjnych przez dwa lata w celach bliżej nieokreślonych a prawo do prywatności* [Retention of telecommunications data for two years for unclear purposes versus the right to privacy], Radca Prawny: Dodatek Naukowy 2011, No. 115–116, p. 22.

7 L 105/54 PL Official Journal of the European Union 13.4.2006.

8 Cf. D. Adamski, *Retencja danych telekomunikacyjnych – uwagi de lege ferenda wynikające z przepisów wspólnotowych* [Retention of telecommunications data – de lege ferenda notes following from community law], Monitor Prawniczy 2007 No. 4, dodatek Prawo Mediów Elektronicznych 2007, Monitor Prawniczy 2007; No. 6; S. Piątek, *Telecommunications Law*, p. 1086–1087.

9 S. Piątek, *Prawo telekomunikacyjne…*, p. 1091.

The obligation to destroy does not apply to data where a legal basis exists for continued retention by the operator. The legal basis may be formed by regulations which oblige the operator to retain data for a definite period longer than 12 months, and regulations which merely allow him to retain data longer than 12 months for a definite period. After the expiration of 12 months, the operator himself decides if they will continue to process the data, and for how long, i.e. for the whole period possibly required for data processing (allowing for the principle of adequacy) or only for a part of that period.

The legal basis for retention of data for a period longer than 12 months by the telecommunications operator is formed by the provisions of the Act – Telecommunications Law – Article 164, 165 and 168 TL. The scope of data which may be retained under separate provisions of the law is much smaller than the scope of data covered by retention and it extends mostly to performed telecommunications services and their settlement. An exemplary provision which allows to retain data, which are substantially the same as the data referred to in Article 180c(1) TL, for a period longer than 12 months from the date of recording thereof is Article 168(2) TL. The aforesaid provision obliges the provider of publicly available telecommunications services to retain for a minimum period of 12 months the data on performed telecommunications services, the scope of which allows to determine amounts payable for the performance of those services and to review complaints, and in case any complaint is filed, for a period necessary to resolve the dispute.

The minimum period of retention of data which was set out in Article 168(2) at 12 months corresponds to the overall period of data retention under Article 180a TL. The provision of Article 168(2) TL does not specify the moment from which the expiration of the period of 12 months should be counted. The earliest moment from which the expiration of that period may be counted is the moment of recording of the data on the service performed. In the case of periodical settlements, the correct solution, which is also included in the provision of Article 168(2) TL, is the retention of data for a period of 12 months from the end of the settlement period. It is not permitted to shorten this period, but section 2 allows to extend it. However, this period may be extended only within boundaries permitted by the Act[10].

In practice, the way in which the duration of the data retention period is calculated gives rise to numerous interpretation doubts. Under Article 180a(1)(2) TL, the provider of telecommunications services is obliged to disclose to authorised state bodies the data, referred to in Article 180a(1)(1) TL. Article 180c(1)(1) TL refers both to data which the provider of telecommunications services is obliged to possess within the scope referred to in Article 180c for the period of 12 months from the date of their recording, and data from the same

[10] *Ibidem*, p. 982–983.

scope in respect to which a legal basis exists for continued retention thereof after the prescribed 12-month period, for example in the aforesaid Article 168 TL. In consequence, authorised state bodies have, under Article 180a(1) TL the right of access to the data, referred to in Article 180c TL, during the whole period wherein the provider of services retains those data. The same conclusion follows from Article 180d TL which obligates the provider of telecommunications services to disclose all data processed and possessed by them, as referred to in Article 159(1)(1) and (3–5), Article 161 and Article 179(9) TL. Those data are the same as the data referred to in Article 180c TL. Pursuant to Article 180a(1) (2) and (3) TL, the obligation of retention extends to all data referred to in Article 180c(1) TL during the period of 12 months of the date of recording the same, and also to data which have not been destroyed after 12 months in the case when there is a prerequisite for further retention thereof by the operator.

It needs to be emphasised that the terms and conditions, and the mode of disclosure should be standardised for data, referred to in Article 180c(1) TL, and retained under Article 180a TL, both during the period of the first 12 months of the date of their recording, and after the expiration of that period in the case of continued retention of data of a specific type. It follows clearly from Article 180a(1)(3) and 3 TL that the terms and conditions, and the mode of disclosure of data, defined in the regulations governing data retention, should also apply to data retained after the expiration of 12 months of their recording date.

It does not follow either from the justification of the amendment to the Act Telecommunications Law, implementing, in particular, the provisions of Article 180a and 180c TL, or from Directive 2006/24/EC that authorised bodies may be denied access, in the mode provided for by the regulation of the Minister of Justice of 28 April 2003 on the method of technical preparation of systems and networks used to transmit information – for gathering billings and other communications of information and methods of protection of IT data[11], to data referred to in Article 180c(1) TL, retained by the operator longer than 12 months.

In addition, there are no rational arguments in favour of the reasoning that, on the basis of the request to disclose data referring to Article 180c TL, the authorised entity is not allowed to request access to data older than 12 months, as it may obtain the said access under Article 180d TL.

Thus, the aforesaid provisions give rise to doubts about the relationship between Article 180a(1) TL, and other provisions justifying the ability of providers of publicly available telecommunications services to reuse data which are analogous to those referred to in Article 180c(1) TL for a period longer than 12 months from the data recording date. Under the current law, there is no provision to clearly determine the period after the expiration of which authorised state bodies will not be permitted to request access to any data retained

[11] Journal of Laws of 2003, No. 100, item 1023.

by providers of telecommunications services. Similarly, no consistent position has been taken in practice on the interpretation of the aforesaid provisions. It is worthwhile to quote the position of the Supreme Audit Office[12] which audited on a comprehensive basis the practices and compliance with the law of the gathering and disclosing of billings. It follows from those documents that according to the Supreme Audit Office actions such as "requesting the disclosure of telecommunications data for a period extending beyond the lawful retention period" are improper. Thus, there may arise doubts about the right conduct of the provider of telecommunications services, possessing the data relating to a given subscriber under Article 168 TL for a period longer than 12 months from the recording thereof, in a situation where the authorised state body requests in the appropriate mode that the data relating to the indicated subscriber, referred to in Article 180c and 180d TL, be disclosed.

It seems that under the current law the only acceptable interpretation is the one permitting a longer retention of data than 12 months by the telecommunications operator but only in the cases expressly provided for by the provisions of the Telecommunications Law and, which is crucial, only for the purpose specified therein. For example, as in Article 168 TL, for the purposes of complaint procedures. However, for the purposes of criminal proceedings, at the request of the court or the prosecutor, telecommunications data may be retained, in accordance with Article 180a(1)(1) TL, for a period no longer than one year. Thus, in the case of doubts concerning the right conduct of the provider of telecommunications services possessing, under Article 168 TL, any subscriber's data which are the same as the data referred to in Article 180c TL, after 12 months of the date of recording thereof, when an authorised state body requests that the provider of services disclose the data relating to that subscriber, possessed by the provider of services, referred to in Article 180c and 180d TL, i.e. if, in this situation, the provider of services is obliged to refuse to disclose the data to the state body, concluding that under Article 180a(1)(1) TL authorised state bodies are empowered to request data not older than 12 months of the date of recording thereof, or if the provider of telecommunications services should disclose to the authorised body those data, under Article 168 TL, as are retained longer than 12 months from the date of recording thereof, the answer will be – the provider should refuse to provide the data in question.

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[12] Cf. *Komunikat Najwyższej Izby Kontroli pt. NIK o billingach oraz dokument pt. Informacja o wynikach kontroli. Uzyskiwanie i przetwarzanie przez uprawnione podmioty danych z bilingów, informacji o lokalizacji oraz innych danych, o których mowa w art. 180 c i d ustawy Prawo telekomunikacyjne* [The communication of the Supreme Audit Office entitled SAO commenting on billings and the document entitled The audit report. Obtaining and processing data from billings, location information and other data by authorised entities, as referred to in Article 180 c and d of the Act – Telecommunications Law], http://www.nik.gov.pl/aktualnosci/nik-o-billingach.html].

3. The right to request disclosure of data and information, referred to in Article 218 § 1 CCP, is available to the court or the prosecutor. Those entities may request disclosure of correspondence, mail or data (billings), issuing a relevant decision. The decision should specify the thing to be disclosed. In the case of billings, the decision should name the user of the telephone whose billing is requested (or the electronic address whose list of correspondence is requested), and the period for which the billing is requested[13]. It is not required to issue a separate decision for each mail.

The right to open correspondence and mail and to order to open the same are reserved for the court or the prosecutor (Article 218 § 1 sentence 2 CCP). Pursuant to Article 143 § 1(7) CCP, the opening of any correspondence and mail is ranked among activities which must be recorded in writing. The provision of Article 218 § 1 sentence 2 CCP applies not only to correspondence or mail but also to billings, thus a reasonable assumption is made that the printed billing should be delivered in a sealed envelope[14].

In practice there are situations where the court or the prosecutor sends the decision relating to the disclosure of data under Article 218 CCP, protected by telecommunications confidentiality, by fax. In such cases, the bodies authorised invoke Article 132 § 3 CCP, stating that the service is effective and the decision should be implemented. In view of the contents of Articles 128 and 131 CCP, a question arises whether or not the decision should be implemented only when an authenticated decision issued under Article 218 CCP has been sent by mail to the obliged entity.

One should voice serious doubts as to whether a copy of the decision, referred to in Article 218 § 1 CCP, is effective if sent by fax. Pursuant to Article 128 § 1 CCP, judgments and orders are served in the form of authenticated copies if the Act demands that those be served. Decisions, without any doubt, qualify as judgments, referred to in Article 128 § 1 CCP. In consequence, a copy of the decision must be authenticated. Authentication involves the official confirmation of conformity with the original. The purpose is to confirm the authenticity of the document, thus allowing to make sure that a specific decision comes from the entity which issued the same. In order to confirm the authenticity of a document one needs to have the original.

Pursuant to Article 128 § 2 CCP, "all letters designed for participants of the proceedings shall be served in such a manner that the content thereof is not disclosed to any unauthorised persons". When the decision of the court containing data protected by the telecommunications secrecy is sent by fax, the data may come to the attention of unauthorised persons. Sending the decision by mail requires that the content be protected by a sealed envelope, and naming the

[13] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…*, p. 1231.
[14] *Ibidem*, p. 1233–1234.

sender results in the correspondence to be addressed only to authorised persons and required to implement the content thereof[15]. Attention should be drawn to the judgment of the Supreme Court of 23 November 2007, court file number IV CSK 228/07, which emphasised that "in the case of the declaration of will made by fax, it is impossible to establish whether or not the signature has been copied from another document to the document sent to the recipient. Neither is it possible to ascertain that the document signed was the definitive declaration, and not a a draft thereof, or a text containing a statement that the party concerned did not intend to make at all. For that reason, an assumption is made in the doctrine that sending the content of a declaration of will by fax serves only the purpose of prima facie evidence and must be confirmed in writing"[16]. An analogous position was taken by the Supreme Court in the resolution of 20 December 2006, court file number I KZP 29/06, where the court explained that, in view of the inability to meet the requirement of official confirmation of the signature authenticity, sending letters by fax does not ensure sufficient security with respect to the elimination of undesired interference with the content thereof[17]. However, in the order of 26 January 2012, court file number III KZ 93/11, the Supreme Court stated that the use of electronic media to serve letters (including letters sent by fax) did not lie within the discretion of the body, or participants of the proceedings, but applied only in cases strictly defined in the Act[18].

However, there is no consensus on the issue in question in the doctrine. According to one position, it is not permitted to serve judgments and orders in the mode referred to in Article 132 § 3 CCP. Those are served, according to Article 128 § 1 CCP, in the form of authenticated copies, whereas the transmission via electronic mail, like the serving of a photocopy of the letter, may not be equated with the serving of an authenticated copy thereof, even if it allows for viewing the letter[19]. The provision of Article 132 § 3 CCP refers to serving the statements of case but there is a difference between serving in this manner summons or notices, and serving copies of judgments and orders.

Other representatives of the doctrine present a completely opposite position. In their opinion, the possibility of serving letter via telefax or electronic mail may not be limited to sending summons and notices. There are no obstacles preventing the use of this "technical" method to send also judgments and orders, provided that a format is used which makes possible the transmitting of documents

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[15] Cf. *Zarządzenie Nr 81/03/DO Ministra Sprawiedliwości z dnia 12 grudnia 2003 r. w sprawie organizacji i zakresu działania sekretariatów sądowych oraz innych działów administracji sądowej* [Regulation No 81/03/DO of the Minister of Justice of 12 December 2003 on the organisation and scope of activity of court secretariats and other departments of court administration], § 18, Official Gazette of the Minister of Justice, No. 5, item 22 as amended.

[16] OSNC 2008, No. 3, item 88.

[17] OSNKW 2007, No. 1, item 1.

[18] OSNKW 2012, No. 3, item 34.

[19] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego…*, p. 791–792.

in a graphic form bearing the stamp and signature of the authenticating person. In this way the form of serving of the judgment or order, provided for in Article 128 § 1 CCP would be preserved. This solution would also be consistent with the spirit and provisions of the Act of 17 February 2005 on Computerisation of the Activities of Entities Performing Public Tasks (Journal of Laws No 64, item 565 as amended) which – establishing the State Computerisation Plan – imposes on public entities the obligation to facilitate the exchange of information, also in electronic form, through the exchange of electronic documents in matters within the scope of their activities (Article 16(1))[20]. In an analogous position it has been stressed that criminal proceedings should follow the development of technology, especially electronic communication. Seizing those opportunities is in the interest of participants of the proceedings themselves, as in most cases it substantially streamlines and expedites the proceedings. Therefore, it is assumed that the mode of service defined in Article 132 § 3 CCP may also be used with respect to all letters, including judgments or orders. In such cases, in view of the principle of that mode of service, the addressee would receive a copy, however, there is no doubt that this should be an authenticated copy of the judgment or order, e.g. a scan of the document in PDF format which guarantees the integrity of data contained therein[21]. However, it should be noted that this mode of service defined in Article 132 § 3 CCP may be used only with regard to persons who provid their telefax number or electronic mail address, and thus conclusively accept this form of service[22].

However, one needs to agree with the position that it is not permitted to serve judgments in the manner defined in Article 132 § 3 CCP. Those are served, according to Article 128 § 1 CCP, in the form of authenticated copies, whereas the transmission via electronic mail, even if, similarly to the serving of a photocopy of the letter, it allows for viewing the letter may not be identified with the serving of an authenticated copy thereof.

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[20] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, [Code of Criminal Procedure. Commentary], Legalis [online], volume 10, on Article 132.

[21] Cf. L. K. Paprzycki [in:] J. Grajewski (ed.), J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Commentary], Zakamycze 2006, p. 399.

[22] Cf. S. Steinborn [in:] J. Grajewski (ed.), L.K. Paprzycki, S. Steinborn, *Komentarz aktualizowany do art. 1–424 ustawy z dnia 6 czerwca 1997 roku Kodeks postępowania karnego*, [Updated commentary on Article 1–424 of the Act of 6 June 1997 – Code of Criminal Procedure], Lex [online] 2014, commentary on Article 132.

THE PERIOD OF RETENTION OF TELECOMMUNICATIONS DATA WHICH MUST BE DISCLOSED AT THE REQUEST OF THE COURT OR THE PROSECUTOR IN CONNECTION WITH PENDING CRIMINAL PROCEEDINGS

Summary

Following the implementation of the EU Directive by Poland, the period of retention of telecommunications data has been reduced from 2 years to one year. However, regulations permitting longer retention of data remain in force. This paper presents some doubts concerning the interpretation of those regulations, and problems of their application in practice, as well as a proposition to resolve existing discrepancies. It also addresses a major practical problem, namely the possibility of serving the decision obliging to disclose telecommunications data by fax or electronic mail, instead of sending the original by post.

OKRES PRZECHOWYWANIA DANYCH TELEKOMUNIKACYJNYCH PODLEGAJĄCYCH WYDANIU NA ŻĄDANIE SĄDU LUB PROKURATORA

Streszczenie

Przedmiotem artykułu jest problematyka udostępniania danych telekomunikacyjnych na żądania sądu i prokuratora w związku z toczącymi się postępowaniami karnymi. W następstwie zaimplementowania przez Polskę Dyrektywy UE skróceniu uległ okres przechowywania danych telekomunikacyjnych z 2 lat do jednego roku. Obowiązują jednak nadal przepisy, które pozwalają na dłuższy okres przechowywania danych. Artykuł przedstawia wątpliwości interpretacyjne oraz problemy w stosowaniu tych przepisów w praktyce, z propozycją rozwiązania powstałych rozbieżności. Zajmuje się także, posiadającym bardzo duże znaczenie praktyczne, problemem dotyczącym możliwości dostarczenia postanowienia zobowiązującego do udostępnienia danych telekomunikacyjnych faksem lub pocztą elektroniczną, zamiast przesłania oryginału pocztą.

LA PÉRIODE DE STOCKER DES DONNÉES DE TÉLÉCOMMUNICATION QUI SONT PASSIBLES D'UNE EXTRADITION À LA DEMANDE DE LA COUR OU DU PROCUREUR

Résumé

L'objet de l'article forme la problématique de l'accessibilité des données de télécommunication à la demande de la cour et du procureur nécessaires pour des procédures pénales mise en vigueur. A la suite de l'implémentation par la Pologne de la Directive de l'Union européenne la période de stocker des données de télécommunication a été réduit de 2 ans à 1 an. Pourtant il y a des règlements valides qui permettent de stocker ces données pour une période plus longue. L'article présente ces quelques doutes interprétatifs et les problèmes d'appliquer ces règlements en pratique ainsi que la proposition de résoudre des divergences actuelles. Il s'occupe aussi du problème qui a une très grande valeur pratique, celui qui concerne la possibilité de pourvoir la décision obligeant à l'accessibilité des données de télécommunication par fax ou par le courrier électronique au lieu d'envoyer l'original par la poste conventionnelle.

СРОК ХРАНЕНИЯ ДАННЫХ ТЕЛЕКОММУНИКАЦИИ, ПОДЛЕЖАЩИХ ВЫДАЧЕ ПО ТРЕБОВАНИЮ СУДА ИЛИ ПРОКУРОРА

Резюме

Предметом статьи является проблематика предоставления доступа к данным телекоммуникации по требованию суда и прокурора в связи с текущими уголовными делами. После принятия Польшей Директивы ЕС сократился срок хранения данных телекоммуникации с двух лет до одного года. Однако ещё действуют положения, позволяющие на более длительный срок хранения данных. Статья представляет собой интерпретационные сомнения, а также проблемы, касающиеся применения этих положений на практике, с предложением решения возникших несоответствий. Исследование посвящено также решению имеющей большое практическое значение проблемы, касающейся возможности передачи постановления, обязывающего предоставить доступ к данным телекоммуникации, посредством факса либо электронной почты, вместо высылки оригинала по почте.

Hans Ephraimson-Abt
Anna Konert

SWISSAIR 111 CRASH – CRISIS MANAGEMENT COOPERATION WHERE THERE IS NO CONTINGENCY PLAN

1. Introduction

At 22:31 on 2 September 1998, Swissair Flight 111 from New York JFK to Geneva crashed into the sea, five miles from the shores of St. Margaret's Bay – near Peggy's Cove, Nova Scotia, within the territorial waters of Canada. The cause of the crash was an electrical fire. The plane carried 229 passengers and crew from 16 countries, all of which were fatalities, as well as precious cargo. Rescue and recovery operations were started immediately during the night by local fishermen followed by the Canadian Coast Guard and the Navy. Over a period of two years more than two millions pieces of wreckage and body parts were recovered – brought to a Hangar at Shearwater for sorting, storage and processing. Lastly, a giant ship the *Queen of the Netherlands* was chartered to suck up a part of the ocean floor. Recovery tanks were used to sort out the silt. Aside from passengers and crew, Swissair flight 111 – which was dubbed "The UN Shuttle" – carried cargo including artworks, gold, diamonds and jewellery. Several years later the insurers applied for a treasure trove license because of missing valuables (diamonds). This operation came to the attention of the media and of the families. The treasure trove license was denied at that time by the Provincial Government of Nova Scotia[1].

2. The immediate aftermath of the tragedy – investigation

Since the tragedy occurred within the territorial waters of Canada the investigation into the crash was conducted by the Transportation Board of Canada

[1] See Stephen Kimber, *Flight 111, The Tragedy of the Swissair Crash*, Seal Books, Toronto 1999.

which reached out to interested parties (under the Chicago Convention) to contribute their expertise, including the US NTSB, the FAA, the British AAIB, the Boeing Corporation, Pratt & Whitney (engine manufacturer) and certain other third parties retained as experts. During the investigation the cockpit was reconstructed from the debris.

Flight 111 was operated by Swissair in code share with Delta Airlines (there were 53 Delta ticket holders on the plane). Swissair had an alliance with Delta Airlines – which included mutual assistance in case of an accident. Swissair – Delta: Under an Alliance Agreement with Swissair Delta Airlines activated its "Go" team and flew it first from Atlanta to New York – to establish a Crisis Management Center at JFK airport. The same day Delta flew the "Go" Team to establish a Crisis Management Center in an Office Building as well as at the nearby Lord Nelson Hotel, to house the families who were flown to Halifax. Swissair established crisis management centres in Zurich, Geneva and Halifax.

Mandatory incident crisis management plans were first mandated to be developed by carriers in 1997, after the TWA 800 crash when the United States Congress passed passenger assistance legislation – (creating the Office of Passenger Assistance at the US NTSB), followed in 2000 by the ICAO Circular 285-An/166 – Guidance On Assistance To Aircraft Accident Victims And Their Families[2].

Starting in 1995 certain airlines (beginning with Continental, followed by American Airlines, United and Delta in the US, Swissair and Air France) – had voluntarily developed crisis management programmes, with the participation of survivors or family members of prior tragedies.

The crisis management plans were not merely written guidebooks – the operators actually conducted training operations of airline volunteers and management.

This was the first time that the management of an airline had invited victims families to participate and advise long term on any level in post crash resolutions (followed by the management of Air France in the Concorde crash in 2000).

3. Regulation on liability towards passengers

The first international convention governing the rules relating to international air travel (officially referred to as the Convention for the Unification of Certain Rules Relating to International Transportation by Air[3]), called Warsaw Convention was the result of two international conferences (in Paris 1925 and in Warsaw 1929) and of work done by the Comité International

[2] See H. Ephraimson-Abt, A. Konert, *New Progress And Challenges In The Air Law – Air Crash Victims Families Protection*, Warszawa 2014.

[3] Signed at Warsaw on 12 October 1929.

Technique d'Experts Juridiques Aériens (CITEJA)[4] created by the Paris conference. The first idea came from a Polish proposal made on the general session of Commission Internationale de Navigation Aérienne (CINA) in Stockholm in 1924[5]. However, the official proposal was submitted by France at the 1925 Paris Conference. Sixty years later, in 1989 civil air transportation had matured and spanned the world. 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,
- the 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 1966,
- the Malta Agreement 1974,
- the decision of the Constitutional Court in Italy 1985 and the Italian Law 274 of 7 July 1988,
- the Japanese Initiative 1992,
- the New Zealand proposal 1995,
- the IATA Inter Carrier Agreement on Passenger Liability (IIA) 1995,
- the Agreement on Measures to Implement the IATA Inter Carrier Agreement (MIA) 1996,
- 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***.

Since the Warsaw System no longer fulfilled the goal of uniformity and did not meet the requirements of a modern air transport system, which was no longer weak and did not need any special protection, there was a need to update and modernize the private international air law by creating a new treaty. After several years of discussion and negotiations, this new treaty was ratified and

[4] J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts CITEJA (1933)*, JALC (1932).

[5] L. Babiński (Polish delegate on the Warsaw conference in 1929), *Miedzynarodowa unifikacja prawa przewozu lotniczego na tle Konwencji Warszawskiej* [International unification of law on air transport in the light of the Warsaw Convention], Studia Prawnicze 1968/18.

formally took effect as the Convention for the Unification of Certain Rules Relating to International Carriage by Air on 28 May1999[6].

The Montreal Convention introduces a number of changes, creating an air carrier's objective liability system without the monetary caps on damage claims exciding SDR 100,000 and for the damaged not exciding this amount a fault based liability system (Article 21), advance payment for air crash victims families (Article 28), mandatory insurance coverage of the carrier (Article 50), the "fifth jurisdiction" in which claims and disputes could be adjudicated (increasing the choice of forums for a claimant in a death or injuries action) (Article 33), modernized documentation requirements[7], among others[8].

4. The first week and thereafter

Some of the issues discussed with Swissair were the immediate financial needs of the victims families. This need arises because the surviving families require death certificates to probate wills to settle estates. Meanwhile bank accounts are frozen, credit cards blocked – while on-going financial obligations have to be met: mortgage/rent payments, instalment payments, daily expenses, utilities, telephone bills, children's education – post crash expenses – recoveries, funerals etc.

At the time of Swissair 111, there was no statutory requirement for the airlines/insurers to make advance payments.

Although mandated post crash crisis management programmes do not provide for advance payment, certain carriers, nevertheless, make such gestures voluntarily for competitive and public relation purposes[9]. However, such payments vary substantially as to their amount and conditions[10].

The occurrence of several major air crashes in the 1980s and 1990s – as well as the efforts to modernize the 1929 Warsaw" Convention – advance payments

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[6] A. Konert, *International Court Of Civil Aviation – The Best Hope For Uniformity?* Indian Journal of International Law, vol. No. 5/2012. See also P. Dempsey, M. Milde, *International air carrier liability: The Montreal Convention of 1999*, Montreal 2005; E. Giemulla, R. Schmid, *Montreal Convention*, Kluwer Law International, Hague 2006; M. Żylicz, *Nowe prawo międzynarodowego przewozu lotniczego (system warszawsko-montrealski)* [New law on international air transport (Warsaw–Montreal system)], PiP 1999/9.

[7] Chapter II of the Convention.

[8] See A. Konert, *International Court Of Civil Aviation...*, *op. cit.*

[9] This kind of voluntary advance payments has been made to 163 families of the Swissair 111 crash's victims (1998). They received SDR 15,000. Total advance payment was SDR 100,000. Switzerland accepted the EC Regulation 889/2002 in 1999.

[10] In PAA 103 (Lockerbie) and in TWA800, the two carriers lost $250 m and $800 m in ticket sales respectively with a minimal or wanting post crash crisis management including no advance payments versus Swissair 111, AF4590 (Concorde) and Alaska Air 261 which, partially against insurers' advice, decided on advance payments to all entitled parties in the amount of Article 21 limit of liability (*op. cit.*) [Egyptair 990 paid advances of 50% of the first offer). In contrast, six months after the AF4590 (Concorde) crash, Singapore Airlines paid in SQ006 only $25,000 in advances.

were discussed both within the European Civil Aviation Conference[11] and a work group that was formed at the National Economic Council in 1994[12]. Neither the IATA Intercarrier Agreement nor its two implementing resolution (MIA and IPA) included a requirement for advance payments[13]. However, the advance payment requirements were adopted in the 1999 Montreal Convention as matter of principle, subject to the laws of the Member States[14]. Subsequently, the European Union mandated the advance payments in their Order 889/2002[15]. The United States included the advance payments in their Post 11September 2001 Victims Compensation Plan regulations[16] and the Air Transport Association of America (ATA) introduced an Implementing Provisions Agreement to the 1999 Montreal Convention (IPA)[17] including an advance payment provision. The International Union of Aviation Insurers (IAUA) published Post Accident Recommended Best Practices[18].

The consensus reached by the negotiators of the 1999 Montreal Convention in the language of Article 28 reflects the substantial differences in the socio-economic environment among the 189 ICAO member countries, but – nevertheless – recognizes the immediacy of the need for advance payments of air crash victims families. The EU Regulation 889/2002 reflects the formalistic/legal need of the victims recovery and its identification, required to issue a death certificate to install or appoint a legal representative over the decedents' estate to make advance payments (Article 5 of the EC Regulation 889/2002). ATA/IPA establishes its own criteria whether advance payments are made (*at its own discretion*) which is tantamount to subverting the language and intent of Article 28

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[11] ECAC is an international organization with close ties to the United Nations, the ICAO, the Council of Europe and the institutions of the EU (for instance, Eurocontrol or Joint Aviation Authorities). ECAC was founded in 1955 in order to *promote the continued development of a safe, efficient and sustainable European air transport system by harmonis[ing] civil aviation policies and practices amongst its Member States [and promoting] understanding on policy matters between its Member States and other parts of the world*.

[12] NEC is a U.S. government agency in the Executive Office of the President. Created in 1993 by President Bill Clinton. Its functions are to coordinate policy-making for domestic and international economic issues, coordinate economic policy advice for the President, ensure that policy decisions and programmes are consistent with the President's economic goals, and monitor implementation of the President's economic policy agenda.

[13] IATA Intercarrier Agreement on Passenger Liability (IIA) endorsed by the 51st IATA General Meeting on October 30–31, 1995 with the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) and the Air Transport Association of America (ATA) Provisions implementing the IATA Intercarrier Agreement to be included in Conditions of Carriage and Tariffs (IPA).

[14] Article 28 of the Montreal Convention.

[15] Regulation (EC) No 889-2002 of the European Parliament and of the Council of May 13 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

[16] Victims Compensation Plan is a unique Programme created in the aftermath of the tragic events of 11September 2001.

[17] "Provisions implementing the IATA Intercarrier Agreement to be included in Conditions of Carriage and Tariffs (IPA).

[18] Post Accident Recommended Best Practices, November 2005, IUAI/PP1/05.
H. Ephraimson-Abt, A. Konert, *New Progress And Challenges...*, *op. cit.*

of Montreal and the implicit *immediate* needs of the victims' next of kin. Those very substantial gaps in Article 28 interpretation reflect philosophical and practical differences that exist among the various parties[19].

Inasmuch as the families' damages resolution generally takes more than one year – Swissair decided to pay the entire "strict liability" SDR 100,000 as advances. This decision was taken unilaterally by Swissair management against the initial opposition of their insurers. Actually, Swissair paid families $3,000 then $20,00 and the remainder thereafter. Advances were later deducted from the final damages settlement amount.

For the first time (and also against the advice of their insurers), Swissair decided to encourage the formation of a Family Association. The rationale of that decision was that the leadership of such association speaks for the families on all issues of common concern – creating a better mutual understanding, wider dissemination of answers to everybody, and faster resolution of problems. Swissair invited the families early on to meet in Geneva to organize and to discuss all open issues.

The TSB was in charge of the post crash investigation. For the first time, the Chairman of the TSB and the chief investigator reached out to the families directly and through the Family Association to keep them informed about the progress of the investigation and being available to provide answers to many questions asked. This created a relationship of mutual trust – and reduced the uncertainty raised by self-appointed experts that disseminated publicly all sorts of divergent, often sensational opinions, as to the causes of the crash. The TSB also gave the families controlled access to the Hangar in Shearwater especially during and in connection with annual memorial services, for them to see in real time the enormity of the destruction – and understand the difficulties encountered by the investigation – as well as the many problems that had to be resolved.

At the first family meeting in Geneva the TSB had organized a (at that time very expensive) TV conferencing link through which the families present there where informed of the status of the investigation – and all questions from the floor were answered in person, visually.

After the Swissair 111 tragedy, the Governor empanelled the Government of Nova Scotia Coordinating and Planning Secretariat presided over by former Chief Justice Lorne Clarke with Mr Ronald Morrison, the executive director – to plan the construction of a Memorial and organize first year Memorial services. The Secretariat included representatives of the Swissair Families Group[20].

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[19] *Ibid.*

[20] See also A. Konert, *Plan pomocy rodzinom ofiar wypadków lotniczych – Sprawozdanie z konferencji Narodowej Rady Bezpieczeństwa Transportu w Waszyngtonie (28–29.03. 2011)* [Plan of assistance to air accident victims' families – Report on the conference of National Transportation Safety Board in Washington (28–29 March 2011)], Ius Novum 2001, No. 4.

5. Legal issues

Several legal issues had to be resolved. First of all, it was a problem of jurisdiction. Although the tragedy occurred off the Coast of Canada, the appropriate courts for damages actions under the Warsaw Convention would be one of four alternatives – among them the country/court where the tickets were purchased and/or the last stop of a journey. (Example: NY – Geneva – New York (US), NY – Geneva – no return trip (Switzerland), Geneva – NY – Geneva (Switzerland). The second problem related to the Death On the High Seas legislation. The Death On The High Seas Act of 1920 limits recoveries of damages if the tragedy occurs 3 miles (1988 and FAA 12 Miles) from the US shores. Canada is more than 12 miles from US shores. Chief Judge Giles ruled that the limitations of DOHSA apply which had been modernized by law in 2000, retroactively to 1996 (TWA800).

The proceedings were also facilitated when Swissair insurers and the other parties' insurers involved agreed early on a distribution of their respective contribution to the negotiated and/or adjudicated damages.

Damages proceedings in Switzerland were conducted before a Justice of the Peace in Kloten (airport/Zurich, Switzerland).

6. Lessons learned and consequences

Investigation and post-crisis management of Swissair 111 crash gave us the following lessons:

- The early formation of a Victims Families Group gave the carrier, the investigator and the authorities a liaison to all families to discuss as well as to decide issues of common interest (except the resolution of damages that were handled by the individual families legal advisors);
- Instead of confronting each other through the media – questions were answered, information was circulated and problems were solved through direct contacts;
- The prepayment of the SDR 100,000 strict liability limit put the victims families into a comfortable financial position to whether the period between the time they lost their provider until the final settlement of the material damages[21];
- Instead of angry confrontation – especially through the media – a relationship of mutual trust was created between the victims families, the Investigators, and the carrier;

[21] H. Ephraimson-Abt, A. Konert, *New Progress And Challenges In The Air Law...*, *op. cit.*

- The Investigators could conduct their fact finding without constant publi pressure;
- No material losses were inflicted on the carrier vs. the loss of ticket sales in previous air crashes[22].

7. Conclusion: What remains to be done?

Many airports are already holding crisis management drills – a few of them have even developed comprehensive programmes – like Duesseldorf International, in the aftermath of their airport fire. Airline alliances worldwide should convince all of their partners to coordinate and unify their crisis management programmes – as well as their implementation, which would make management more meaningful and cost effective. There is a need to harmonize the varying language and cultural differences among the existing programmes – while still respecting cultural diversity. It is imperative that States ratify and implement already existing treaties to restore the intended uniformity – such as:
– the 1999 Montreal Convention,
– the 2001 ICAO Guideline 285 – post-crash crisis management,
– adherence to the IATA Intercarrier Agreement (IIA) of 1996.

It should be more generally realized that post-incident crisis management is not only the responsibility of individual, non-related, but involved entities. Therefore, wide-ranging and inclusive effective cooperation among all possibly involved parties is necessary – including joint training. It is a necessity that senior management on all levels – including governmental authorities – be involved in post-accident crisis management development, pre-incident determination of chain of command – and seamless interchanges when an incident happens as well as pre-incident training – and hands on representation.

Advance decisions should also be made with the insurers, which provide the post-crash funds and represent the affected parties in their damages resolution and – when it occurs – in any accountability procedures.

Where the resolution of Emergency responses and crisis management was successful, the participation by the leadership of victims representatives of past tragedies, in a liaison and advisory capacity, has proved to be of considerable benefit.

[22] *Ibid.*

SWISSAIR 111 CRASH – CRISIS MANAGEMENT COOPERATION WHERE THERE IS NO CONTINGENCY PLAN

Summary

On 2 September 1998, Swissair Flight 111 from New York JFK to Geneva crashed into the sea, carried 229 passengers and crew from 16 countries, all of which were fatalities as well as precious cargo. The article reflects the issue of the crisis management after this air crash and shows rescue and recovery operations. The goal is to show what remains to be done in the future regarding the investigation of air crashes.

KATASTROFA SWISSAIR 111 – WSPÓŁPRACA W ZAKRESIE ZARZĄDZANIA KRYZYSOWEGO W SYTUACJI, GDY NIE MA PLANU AWARYJNEGO

Streszczenie

W dniu 2 września 1998 r. lot Swissair 111 z Nowego Jorku JFK do Genewy rozbił się w morzu, przewożąc na pokładzie 229 pasażerów i członków załogi z 16 krajów. Wypadek lotniczy to nieoczekiwane i zazwyczaj katastrofalne wydarzenie. Następstwem wypadku lotniczego powinno być uruchomienie systemu zarządzania sytuacją kryzysową oraz stworzenie tzw. planu pomocy rodzinom ofiar. Plan musi uwzględniać między innymi następujące kwestie: poinformowanie rodzin zmarłych, których należy otoczyć opieką i traktować z szacunkiem, zwłaszcza biorąc pod uwagę wyznawaną przez nich religię, zapewnić im natychmiastową pomoc psychologiczną, stworzyć bezpłatną linię telefoniczną, zadbać o przewóz zwłok, pomóc w zorganizowaniu pogrzebów itp. Przedmiotem artykułu jest analiza problematyki zarządzania kryzysowego, ze szczególnym uwzględnieniem sytuacji po katastrofie lotu Swissair 111.

LA CATASTROPHE DU SWISSAIR 111 – COOPÉRATION DANS LE CADRE DE LA GESTION DE CRISE AU CAS DE MANQUE DU PLAN D'AVARIE

Résumé

Le 2 septembre 1998 le vol 111 de provenance de New York (aéroport JFK) à la destination de Genève s'est écrasé dans la mer avec au bord 229 passagers et membres du PNC de 16 pays. L'accident de l'aéronef est un événement inattendu et d'habitude catastrophique. L'accident de l'aéronef doit être suivi par la mise en marche de tout un système de la gestion de la situation de crise et la formation du plan d'aide des familles des victimes (ainsi dite). Ce plan doit prendre en considération entre autres les questions suivantes: informer les familles des personnes mortes et prendre

soin d'eux, c'est-à-dire les traiter avec respect, surtout penser à leur religion, leur assurer une aide immédiate psychologique, former une communication téléphonique gratuite, se charger du transport des dépouilles, aider aux funérailles etc. L'objet de l'article est une analyse de la problématique de la gestion de crise et en particulier, la situation après la catastrophe du vol Swissair 111.

КАТАСТРОФА SWISSAIR 111 – СОТРУДНИЧЕСТВО В ОБЛАСТИ КРИЗИСНОГО УПРАВЛЕНИЯ В СИТУАЦИИ, ЕСЛИ НЕТ АВАРИЙНОГО ПЛАНА

Резюме

2 сентября 1998 г. самолёт линии Swissair 111 из Нью-Йорка JFK в Женеву потерпел крушение в море, имея на своём борту 229 пассажиров и членов экипажа из 16 стран. Катастрофа самолёта – это неожиданное и обычно катастрофическое событие. Реакцией на катастрофу должно быть приведение в действие системы управления кризисной ситуацией, а также создание так называемого плана помощи родным и близким жертв. В плане должны быть учтены, в частности, следующие вопросы: уведомление родственников погибших, которых следует окружить заботой и уважением, особенно принимая во внимание их вероисповедение, обеспечить им необходимую психологическую помощь, создать бесплатные телефонные линии, позаботиться о перевозке тел погибших, помочь в организации похорон и т.д. Предметом статьи является анализ проблематики антикризисного управления, с особенным учётом ситуации после катастрофы линии Swissair 111.

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REPROACH FOR EVIDENT CONTEMPT OF REGULATIONS IN THE CRIMINAL PROCEEDING

1. Introduction

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

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

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

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

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

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

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

2.1. Legal character of the reproach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2. Subject to reproach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3. Reproach addressee's juridical guarantees

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

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

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

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

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

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

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

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

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

2.4. Consequences of reproach

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

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

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

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

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

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

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

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

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

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

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

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

3. Reproach for default and disciplinary proceeding

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

4. Reproach for default by the Supreme Court

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

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

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

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

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

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

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

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

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

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

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

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

5. Reproach for default by a superior prosecutor

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

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

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

6. Conclusions

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

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

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

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

REPROACH FOR EVIDENT CONTEMPT OF REGULATIONS IN THE CRIMINAL PROCEEDING

Summary

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

WYTKNIĘCIE OCZYWISTEJ OBRAZY PRZEPISÓW W POSTĘPOWANIU KARNYM

Streszczenie

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

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

Résumé

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

УКАЗАНИЕ НА ОЧЕВИДНУЮ КАРТИНУ ПОЛОЖЕНИЙ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ

Резюме

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

Tomasz Kalisz

SUBSTANTIVE PREREQUISITES OF CONDITIONAL RELEASE

I. The prerequisites, i.e. formal and substantive conditions, allowing for the administration of a conditional release of a convict from the rest of their imprisonment term are of key importance within various issues relating to this measure. In practice, the second group (the so-called substantive prerequisites) raise a broad discussion and real problems connected with their practical application. Binding regulations of the Criminal Code (Article 77 of the CC[1]) provide for one substantive prerequisite, i.e. the so-called criminological prognosis. The article aims to present the issues connected with the interpretation and administration of a conditional release from the perspective of that particular prerequisite. Within the existing model of a discretional court decision to grant or deny a conditional release, the determination of the content of a concept of criminological prognosis and the grounds and assessment of it are key theoretical and practical issues. The analysis of political and criminal assumptions that we formulate towards a conditional release and their influence on the regulations defining the prerequisites of this measure can also be a valuable addendum to the above-mentioned considerations.

II. Looking at the penalty of imprisonment from a historical perspective, it is difficult to imagine a situation in which the course of its execution would undergo modification, i.e. the so-called independent factors that could be assessed legally. In the past, the execution was a simple implementation of a penalty defined in a sentence, a literal execution. Over time, penal law has considerably moved the content of sanctions towards a more complex executive formula of a different character[2].

[1] A conditional release from the rest of the penalty of imprisonment is at present regulated by two Acts: Criminal Code of 6 June 1997 (Journal of Laws No. 88, item 553 with amendments that followed) and Penalties Execution Code of 6 June 1997 (Journal of Laws No. 90 item 557 with amendments that followed).

[2] L. Bogunia, T. Kalisz, *Pojęcie i nauka prawa karnego wykonawczego. Uwagi na tle procesu wyodrębniania dyscyplin naukowych prawoznawstwa* [Concept and study of penalties execution law – com-

Particular elements of sanction do not result only from the sentence. It often happens that the sentence ingredients cannot be defined straight away, some of them grow slowly and gradually change within the stage of the penal process administration. Thus, the need to modify a ruling in the course of its administration can occur many times. It can result from the expected changes or an occurrence of alarming signs of deepened reasons of social demoralisation. Thus, changes introduced to the ruling content can fundamentally change the sentence, e.g. a conditional release means cancelling isolation in favour of controlled freedom. The flexibility of the process of penalty administration assumes a diversity of influence exerted on convicts, which is based on an assumption of individual treatment. This results in a differentiated way of penalty execution, creating a possibility of using numerous ways of administering it. In practice, it means that the content of a sanction can often, to a great extent, stray from the so-called statutory "standard".

The above-mentioned circumstances build a clearly different perspective with regard to a conditional release than is commonly adopted in rulings. It concerns the inadmissible and difficult to accept practice of treating a conditional release as an extraordinary measure or a formula of non-execution of an entire penalty. To illustrate the problem better, it is worth giving a few example rulings: *…a conditional release that is prior to the completion of a sentence is an exception to the rule of serving an entire penalty as was ruled in the sentence…*[3] In another ruling, the court states that: *…the institution of a premature release is of an extraordinary character and can be extraordinarily applied…*[4] In practice, courts often emphasize that: *…the rule is the completion of an entire penalty and reductions in that are exceptions used when it is just, i.e. both well-deserved and purposeful…*[5]; or *…serving the entire binding penalty should always be a rule, thus a penalty should be served in the way it was ruled and without interruption…*[6] None of the binding regulations of criminal law, especially Article 77 § 1 of the CC, can give grounds to state that a conditional release is an exceptional measure[7]. From the perspective of a conditional release, it is difficult to find grounds to deny it

ments on the process of distinguishing jurisprudence disciplines], [in:] *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego* [Problems of penalties execution – Professor Jan Skupiński jubilee book], (ed.) A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, Warszawa 2013, pp. 580–581.

[3] Ruling of the Appellate Court in Cracow of 21 June 2000, II Akz 217/00, Krakowskie Zeszyty Sądowe of 2000, No. 6, item 12.

[4] Ruling of the Appellate Court in Lodz of 30 April 1999, II Akz 148/99, not published.

[5] Ruling of the Appellate Court in Cracow of 27 June 2000, II Akz 214/00, Krakowskie Zeszyty Sądowe of 2000, No. 7–8, item 54.

[6] Ruling of the Appellate Court in Gdansk of 22 August 2000, II Akz 630/00, Biuletyn orz. SA w Gdańsku of 2001, p. 40.

[7] S. Lelental, *Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych* [Conditional release in the rulings of the Supreme courts and appellate courts], Przegląd Więziennictwa Polskiego of 2000, No. 28, p. 122.

if both prerequisites: formal and substantive ones are met[8]. Finally, a probation period within a conditional release does not mean a reduction or nullification of penalty (an act of pardon). In fact, it is a form of completion of the penalty execution initiated in prison in different conditions (at liberty), although still connected with the implementation of the aim of imprisonment that is defined in Article 67 of the Penalties Execution Code[9].

Having taken the above-mentioned circumstances into account, one can see the change that has taken place in criminal law, especially the law on execution of penalties. The autonomy of executive proceeding is a pragmatic approach to a penal sanction based on scientific research results. And an assessment-related criminological prognosis treated as a prerequisite to conditional release is a consequence of the movement of stress towards individual and preventive targets[10].

In terms of preventing the separation of the execution stage from the sentencing stage, full autonomy in the case of a conditional release is ruled out. This is connected with abstractly defined formal minima (Article 78 of the CC). It is assumed that this element is to implement all aims of a penalty, not only the aim connected with individual prevention (it is decreed as a rule at the legislative stage). Thanks to formal thresholds, a specific bridge is developed between those two stages of penal proceeding, with clearly differentiated accents on detailed tasks. The only issue we can discuss in connection with a conditional release is the construction in Article 77 § 2 of the CC, which allows, in specially substantiated cases, for establishing stricter formal thresholds than those specified in the basic regulation in Article 78 of the CC (by the way, it is a somewhat controversial solution because of a clear lack of determinants of a concept of estimation)[11].

III. The provision of Article 77 § 1 of the Criminal Code exhaustively defines the elements that are taken into account when developing a criminological prog-

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[8] J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności* [Conditional release from the rest of the penalty of imprisonment] Warszawa 2010, pp. 204–207.

[9] L. Bogunia, *Wykonywanie* środków *karnych związanych z probacją w ujęciu nowego kodeksu karnego wykonawczego* [Execution of penalty measures connected with probation in the light of the new Penalties Execution Code] [in:] *Probacja w systemie prawa karnego wykonawczego* [Probation in the system of penalties execution law], (ed.) L. Bogunia, Wrocław 1998, pp. 119–124; G. B. Szczygieł, *Warunkowe przedterminowe zwolnienie a prewencja generalna* [Conditional release and general prevention], Gdańskie Studia Prawnicze, volume XIX, 2008, (ed.) J. Warylewski, p. 229.

[10] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna* [Polish criminal law – General issues], Kraków 2010, pp. 489–490.

[11] S. Lelental, *Rozdział III §28. Warunkowe przedterminowe zwolnienie* [Chapter III § 28: Conditional release] [in:] *System Prawa Karnego. tom 6, Kary i* środki *karne. Poddanie sprawcy próbie* [Criminal law system, volume 6, Penalties and penalty measures – Probation of the perpetrator], (ed.) M. Melezini, Warszawa 2010, pp. 1116–1121; Z. Sienkiewicz, *Rozdział XVIII.* Środki *związane z poddaniem sprawcy próbie* [Chapter XVIII: Measures connected with the perpetrator probation] [in:] *Prawo karne materialne. Część ogólna i szczególna* [Criminal substantive law – general issues] (ed.) M. Bojarski, 5th edition, Warszawa 2012, pp. 383–384.

nosis. The prognosis is at present the only substantive (evaluating) premise of a conditional release[12]. Its certain content based on definitely indicated quantifiers is of key importance for the practical implementation of a conditional release. A question that must be asked here is: Do the discussed construction and the mode of obtaining detailed findings create an opportunity to achieve a certain and unambiguous prognosis result and is the achievement of this result possible at all?

First of all, it must be emphasized that the so-called criminological prognosis concerns the future and unknown behaviour of a convict (specific figments of imagination in relation to how a convict will act at liberty after having been released from prison). Thus, it is not easy to accept an opinion (unfortunately, often) expressed in rulings that: *…a court can grant a conditional release only in the case of an unambiguous positive criminological prognosis, i.e. a convict's demeanour, features and personal conditions, lifestyle before and after crime commitment, behaviour during the imprisonment as well as the circumstances of crime substantiate a conviction that while serving the sentence the convict changed the behaviour in a positive and lasting way, which guarantees that after a release they will comply with law and will not commit a crime again…*[13] A prognosis is not the same as certainty; the concepts cannot be treated as equivalent. Otherwise, a conditional release would be a dead letter. Or, from the perspective of the idea expressed in the cited ruling, a period of probation and duties or monitoring would be absolutely useless. Also the premises of a withdrawal of a conditional release would be useless because each time we should have a guarantee of a convict's behaviour being in compliance with law.

In the prognosis process, it is essential to establish the content of its particular elements (factors) and to answer a question about the prognostic value of each element listed in Article 77 § 1 of the Criminal Code. The catalogue included in the provision is a closed one. This means, and it must be strongly emphasized, that a criminological prognosis cannot be made based on circumstances that are different from those listed by the legislator[14]. It is absolutely necessary to protest against a practice of referring, within a conditional release proceeding, to a court directive on penalty (Article 53 of the CC), a circumstance of the amount of

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[12] T. Bojarski [in:] *Kodeks karny. Komentarz* [Criminal Code – Commentary], 5th edition, (ed.) T. Bojarski, Warszawa 2012, pp. 194–195; P. Hofmański, L.K. Paprzycki, *Kodeks karny. Komentarz* [Criminal Code – Commentary], 2nd edition, (ed.) M. Filar, Warszawa 2010, pp. 401–403; A. Marek, *Kodeks karny. Komentarz* [Criminal Code – Commentary], 3rd edition, Warszawa 2006, p. 194.

[13] Ruling of the Appellate Court in Katowice of 11 December 2008, II Akz 1459/08, Prokuratura i Prawo supplement of 2009, No. 10, item 23.

[14] G. Wiciński, *Podstawy stosowania warunkowego zwolnienie z odbycia reszty kary* [Grounds for conditional release from the rest penalty to be served], Przegląd Więziennictwa Polskiego of 1999, No. 24–25, p. 32 and next; B. Myrna, *Warunkowe przedterminowe zwolnienie w* świetle *nowej kodyfikacji karnej, Nowa Kodyfikacja Prawa Karnego* [Conditional release in the light of new criminal statute – New criminal law statute], vol. VI, (ed.) L. Bogunia, Wrocław 2000, p. 241 and next.

penalty served so far, and in this context, its adequacy and proportionality to the circumstances of crime commitment, and prevention in general[15].

In accordance with the statutory provision, a criminological prognosis consists of: a convict's demeanour, features and personal conditions, crime commitment circumstances, behaviour before and after crime commitment and behaviour when serving the imprisonment. After the Act amendment of 2011, the circumstance connected with a convict's lifestyle before the commitment of crime is not listed in the catalogue any more. By the way, it is necessary to add the Penalties Execution Code contains two more regulations that have to be taken into account in a criminological prognosis. Article 162 § 1 of the Penalties Execution Code provides that a penitentiary court also takes into account an agreement resulting from mediation. And, in case of a perpetrator of crime defined in Articles 197–203 of the Criminal Code, committed in relation to paraphilia, a conditional release cannot be granted without asking for expert opinions.

The first quantifier of the prognosis is the so-called convict's demeanour[16]. It is a convict's attitude to life and given social phenomena, an approach, a presented stand and opinions. Relations with other people are also assessed, especially repetitive behaviour. Next, personal features are assessed. These are mainly biological features (age, sex, psychical and physical health condition, impairment etc.). Personal features also include the features of character, temperament, personality, self-assessment skills, conscience sensitivity, intellectual level, plans for the future, skills and interests. Personal conditions are a separate element. These are environmental conditions where a convict lives: accommodation, employment, professional activeness and financial position[17].

The above-mentioned factors must be assessed dynamically, i.e. with regard to the past, presence and possible changes. A convict's changes are especially valuable as they are desired effects of the penitentiary influence. It is also necessary to take into account events, sometimes totally independent of this influence, which result from the subsequent stages of every man's life (death or serious

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[15] Compare the quoted theses of the court rulings: S. Lelelntal, *Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2000 (II półrocze – 2002r.)* [Conditional release in the rulings of the Supreme Court and appellate courts in the 2000s (2nd half of 2002)], Przegląd Więziennictwa Polskiego of 2003, No. 40, p. 192 and the following, ibid., *Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w 2005 r.* [Conditional release in the rulings of the Supreme Court and appellate courts in 2005], Przegląd Więziennictwa Polskiego of 2006, No. 50, p. 135 and next.

[16] J. Macharski, *Pojęcie postawy w polskim prawie karnym* [Concept of demeanour in Polish criminal law], Państwo i Prawo 1976, No. 8–9, pp. 130–135.

[17] W. Rodakiewicz, *Warunkowe zwolnienie młodocianych z reszty kary pozbawienia wolności* [Conditional release of minors from the rest of the penalty of imprisonment], Wrocław 2005, pp. 142 and 150; J. Lachowski, *Warunkowe…*, op. cit., p. 254 and the following; S. Pawela, *O czynnikach prognostycznych przy warunkowym zwolnieniu* [On prognostic factors for conditional release], Nowe Prawo of 1983, No. 9–10, p. 71 and next; J. Wąsik, *O konieczności dalszego doskonalenia instytucji warunkowego zwolnienia* [On the need to further improve the measure of conditional release], Wojskowy Przegląd Prawniczy of 1982, p. 80 and next.

illness of a close person, marriage, birth of offspring etc.). Taking the decision of granting a conditional release, it is necessary to take into account the evolution of a convict's demeanour and changes in the field of their personal features and conditions.

The provision of Article 77 § 1 of the CC, within the establishment of a criminological prognosis, provides that – apart from the above-mentioned quantifiers – the circumstances of the crime commitment must be taken into account. This element is a very specific one among all the others that influence a prognosis. The circumstances were already taken into account first of all in the course of the criminal proceeding and a decision on a penalty. In the development of a prognosis their role is clearly statistical (they are not subject to any change). It seems that proposals to make this quantifier an auxiliary one is fully justifiable. It can be used especially in the scope in which the circumstances demonstrate a convict's personal features. But the circumstances of crime commitment should not be an independent element in the process of developing a prognosis. What is even more important, they should not be the only decisive factor in denying a conditional release.

The behaviour after the commission of crime – this element of the prognosis procedure is quite often connected with considering the convict's attempts to prevent the consequences of the crime, to compensate the loss, to make up for the wrong, but also their eagerness to show repentance, plead guilty and apologise to victims. The value of these circumstances for the prognosis can be varied. First of all, everybody has the right against self-incrimination (thus, does not have to plead guilty). Secondly, pleading guilty and other actions may be calculated to get a lenient penalty, thus may be treated by a convict absolutely instrumentally. There can also be a problem with a crime preparation, an attempt to commit crime or a crime only by virtue of statute (*malum prohibitum*).

The last of the circumstances enumerated in Article 77 § 1 of the CC is the behaviour during the imprisonment. It is one of the oldest prerequisites taken into account in the course of a conditional release administration (it is known to all Polish regulations dealing with this measure). The category is collective in character and covers all indications of a convict's action or omission whose assessment can influence a prognosis. The assessment of a convict's behaviour in the course of serving imprisonment must be complex and individual incidents should be assessed on an adequate scale. In comparison with all the other prognosis factors, it must be emphasised that this period is best documented because it is done during the imprisonment. The documentation is often developed in the form of specialist opinions, various diagnoses and regular performance assessment.

For the proper conditional release practice, the existence of an unquestionable and clear justification of the release decision is of great importance, also for a convict. A court should explain what elements were decisive in the criminological prognosis and what evidence it based on. We are moving in the space

of free assessment of evidence where decisions must be rationally justified. The parties to the proceeding have an obvious right to question them. It is aimed at showing deficiency in reasoning and not at polemic discussion of an alternative vision. From this perspective, the collected evidence and the justification prepared by the court should be convincing. Their role is to make a presentation of the course of reasoning and explication of reasons for taking a particular decision. All this is to convince the parties that it is right or to give them a chance to better prepare for a conditional release in the future. The indicated praxeological assumptions with regard to rulings on a conditional release also play an important role in supervision by appeal, which allows for a verification of a ruling appealed against. In practice, there are rulings with justifications that do not meet the above-mentioned requirements. Not rare cases of carelessly developed decisions, often with very laconic justification that is limited to a repetition of statutory prerequisites, must shock. In the case of denying a conditional release, it is incomprehensible that reference is made to circumstances that are not included in the catalogue of prognosis factors. Following S. Lelental, it is worth mentioning the following examples: only the obligatory part of penalty having been served, long time to the end of penalty, type (character) of the committed crime, lack of convict's condemnation of the crime he/she committed, convict's way of acting, sense of social justice, level of social harmfulness of the act, possibility to depreciate the original sentence, principle of serving full penalty, general preventive objectives[18].

Decision on whether to grant or deny a conditional release must be rationalised through a prism of the so-called statutory prerequisites of the measure (especially prognostic prerequisites). The practice of administrating this measure, especially the prognosis process, often seems to be independent of the current shape of the directives, proving that the issue can be dealt with from the perspective of the judge's autonomous disposition (a set of values and preferences resulting from individual attitudes of the representatives of the judiciary). It is difficult to explain the indicated latitude, sometimes going beyond the existing prognostic prerequisites, or the treatment of circumstances of Article 77 of the Criminal Code as sets of not really meaningful words quoted to provide justification for decisions, in terms of some kind of interpretational irregularities. With such practice of justifying decisions with regard to a conditional release, it is possible that courts are likely to follow the established routine in similar cases or, sometimes, act in accordance with their own system of values, individual attitudes and beliefs. This means that the practical importance of the provisions regulating the prerequisites of a conditional release should not be overrated. We can risk a very pessimistic statement that the regulations most often constitute a curtain for illusions that the process of conditional releases can be conducted

[18] S. Lelental, Chapter III § 28, *Warunkowe…* [Conditional release…] *op. cit.*, p. 1110.

following strict paradigms designed by the legislator, in the way that is totally independent of a judge's autonomous disposition, free of other sets of values and their preferences[19].

A dictionary of the Polish language defines the term "prognosis" as *…prediction of future facts, events and phenomena based on justified – usually scientific – premises, data, circumstances and research, formulated by specialists in a given field…*, or *…someone's prediction, supposition, often intuitive one…*[20] From the perspective of the linguistic definitions of the term "prognosis", we can have a problem with giving an answer to a question which of them better suits the process of prognosis within a conditional release. This strict assessment becomes clearer if we ask about the prognostic value of particular elements constituting a substantive prerequisite of a conditional release. Are the factors added in the course of the measure an effect of the legislator's conscious decisions based on scientific research or only somewhat intuitive search for such determinants? It is worth considering to what extent these elements are confirmed from the perspective of their prognostic effectiveness. It is necessary to verify them honestly in the context of the scientific findings of criminological, social, psychological and pedagogical studies. It is important to find an answer to the question to what extent the particular quantifiers of the criminological prognosis are checked in practice. When, in what conditions and towards what categories of convicts are specific factors better or worse at helping to develop a prognosis? What is the direction of mutual influence of these very diverse factors taken into account in the process? Which of the factors, if any, overlap and strengthen or weaken their effectiveness? Which of them act in the space of internal interaction, triggering or hampering expected changes? Finally, an important question is the issue of the assessment of particular prognosis factors from the perspective of dynamically changing social, environmental, scientific and technological conditions, especially changes in criminality. It seems we have to make up for this great omission.

IV. It is also worth looking at the prerequisites of a conditional release through a prism of the so-called political-criminal function that this institution can play or has played throughout its historical development. Several, differently specified, political-criminal functions of a conditional release are highlighted in literature[21]. The so-called individual-preventive function is a very clear one in this catalogue. Understood in a traditional way, it is an action targeting a particular

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[19] Compare: T. Kaczmarek, *Ogólne dyrektywy sądowego wymiaru kary w teorii i praktyce sądowej* [General directives of a juridical penalty in the juridical theory and practice], Wrocław 1980, pp. 153–166.

[20] *Uniwersalny słownik języka polskiego* [Universal Dictionary of the Polish Language], (ed.) S. Dubisz, Warszawa 2006, p. 568.

[21] A. Tobis, *Funkcje warunkowego zwolnienia i jego podstawy w prawie porównawczym* [Function of conditional release and grounds for it in comparative law], Poznań 1971, p. 12–61; B. Stańdo-Kawecka, *Warunkowe zwolnienie w krajach europejskich* [Conditional release in the European countries], Przegląd Więziennictwa Polskiego of 2007, No. 54, p. 5560; J. Lachowski, *Warunkowe zwolnienie z reszty kary poz-*

convict. With respect to a conditional release, the importance of its protecting and educational effect is emphasised. The so-called general preventive function is a typical antithesis of the former. In its assumption, a conditional release is a formula addressed to the community. The so-called formal thresholds for a conditional release and a possibility to toughen the conditions – Article 77 § 2 of the CC – can be the instruments of influence. A conditional release can also be discussed from the perspective of the mechanism of non-punitiveness of the criminal law system. In such an approach, the measure should be applied as quickly as possible, just after the substantial premise has been met. The probation period should not exceed the rest of the penalty term to be served. The function of individual treatment of the penalty of imprisonment also appears in literature. It concerns mainly the execution stage, where we say that the implementation of the penalty content should be a process depending on individual convict's needs.

It relates to a consideration of a particular convict's specific characteristic features and real adjustment of a sanction to a particular perpetrator in the course of execution. Such executive proceeding is in contradiction to a mechanical approach to the issue of penalty administration, and when the principle of flexibility in modifying penalties and other means of response to crime is taken into consideration, it is a demonstration of rational and modern policy on penalty execution. In the past, the importance of a conditional release as a specific prize for a convict was emphasised. It is connected with encouragement, or praise for the scope, speed and in particular stability of change in the socially desired attitudes of a convict. Another perspective is constituted by the so-called disciplinary function in the penitentiary policy. Clear and applicable criteria for a conditional release strengthen convicts' motivation to get involved in the process of the penitentiary rehabilitation system and, at the same time, increase the level of safety and order in penitentiary units.

In a spirit of that, we can also speak about the mechanism of regulating the overcrowding in prisons. A conditional release allows for a temporary decrease in the total number of convicts. The situation should not be assessed positively in terms of criminal policy. In economic terms, however, a conditional release must be perceived as a considerable cost reducing factor in penalty administration. The analysed measure is important for post-penitentiary assistance. It concerns institutional strengthening of activities within social re-adaptation of convicts after they have left prison. A properly completed, with respect to its content, probation period can help a convict to re-integrate, and in particular prevent a return to crime. Finally, a conditional release facilitates the implementation of the principle of *ultima ratio* penalty of imprisonment.

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bawienia wolności [Conditional release from the rest of the penalty of imprisonment], Warszawa 2010, pp. 139–157.

The presented perspective, in the context of a possible choice of one or some of the indicated functions as leading, will essentially determine the normative shape and practice in the field of a conditional release. We do not always fully realise what the consequences of the decreed or postulated functions of that measure are. The choice of one or some of them (assuming they are not contradictory) must determine the direction of detailed solutions. It is justifiable, especially in the context of work on the new regulation of a conditional release in Poland, to consider the political-criminal aspects of that measure – especially in connection with the functions that we would consciously like to be implemented in practice.

SUBSTANTIVE PREREQUISITES OF CONDITIONAL RELEASE

Summary

The article aims to present issues connected with the administration of a conditional release from the perspective of a substantive prerequisite in the form of criminological prognosis. Within the existing model of discretional court decision to grant or deny a conditional release, the establishment of the content of the concept of a 'criminological prognosis' and highlighting attitudes and directions in its assessment are the key theoretical and practical issues (especially from the perspective of penitentiary courts rulings). The analysis of political-criminal assumptions that are formulated towards a conditional release and their influence on the shape of the regulation on the content of the prerequisites of the measure supplements the indicated considerations.

PRZESŁANKA MATERIALNA WARUNKOWEGO ZWOLNIENIA

Streszczenie

Celem opracowania jest przedstawienie problemów związanych ze stosowaniem warunkowego zwolnienia, w perspektywie przesłanki materialnej w postaci prognozy kryminologicznej. W przestrzeni obowiązującego modelu dyskrecjonalnej decyzji sądowej w zakresie udzielenia bądź odmowy warunkowego zwolnienia, ustalenie treści pojęcia „prognoza kryminologiczna" oraz wskazanie podstaw i kierunku jej oceny to kluczowe problemy teoretyczne i praktyczne (zwłaszcza w perspektywie orzecznictwa sądów penitencjarnych). Uzupełnieniem wskazanych rozważań jest analiza założeń polityczno-kryminalnych, jakie formułujemy wobec instytucji warunkowego zwolnienia, i ich wpływ na kształt regulacji określających treść przesłanek tej instytucji.

LA PRÉMISSE MATÉRIELLE DE LA MISE EN LIBERTÉ CONDITIONNELLE

Résumé

Le but de cet article est la présentation des problèmes de l'application de la mise en liberté conditionnelle dans la perspective de la prémisse matérielle sous la forme du pronostic criminologique. Dans le cadre du modèle actuel de la décision discrétionnaire juridique pour présenter le refus de la mise en liberté conditionnelle, fixer le sens de la notion «pronostic criminologique» ainsi que démontrer les bases et directions de son évaluation – ce sont les problèmes-clés théoriques et pratiques (surtout dans la perspective de la jurisprudence des cours pénitentiaires). Le complément des considérations présentées est formé par une analyse des hypothèses politico- criminelles qui sont formulées à l'institution de la mise en liberté conditionnelle et son influence sur les régularisations qui définissent les prémisses de cette institution.

МАТЕРИАЛЬНАЯ ПРЕДПОСЫЛКА УСЛОВНОГО ОСВОБОЖДЕНИЯ

Резюме

Целью исследования является освещение проблем, связанных с применением условного освобождения в перспективе материальной предпосылки в виде криминологического прогноза. В сложившейся модели судебных дискреционных решений в сфере предоставления условного освобождения либо отказа его предоставить, определение содержания понятия «криминологический прогноз», а также указание на основы и направления его оценки – это ключевые теоретические и практические проблемы (особенно в перспективе судебной практики пенитенциарных судов). Дополнением к указанным рассуждениям служит анализ предположений политико-криминального характера, которые формулируются по отношению к системе условного освобождения, и их влияние на форму регулирований, определяющих содержание предпосылок данной системы.

Ius Novum
2/2014

Adam Olejniczak

PROTECTION AGAINST THE FRUSTRATION OF THE RIGHT OF FIRST REFUSAL (ARTICLE 600 § 1 OF THE CIVIL CODE)[1]

Reservation of the right to enter a transaction of purchase-sale of a given thing for one of the parties in a legal regulation or legal action in case the other party sold it to a third party – this is how the right of first refusal is defined in Article 596 of the Civil Code. Another provision of the Civil Code stipulates that not only a thing may be a subject to sale but also rights and energy (Article 555); and also the sale of organised sets (complexes) of tangible and intangible assets (a company) are included in the whole statutory regulation. The right of first refusal has been the subject matter of consideration for legal rulings and the doctrine for years[2]. The settlement in this field is not of fundamental importance for this work so I assume that the dominating standpoint[3] is correct

[1] The article makes use of another text by the author: *Udaremnienie prawa pierwokupu – uwagi na tle art. 600 § 1 Kodeksu cywilnego* [Frustration of the right of first refusal – comments in the light of Article 600 § 1 of the Civil Code], sent to print, Stowarzyszenie Notariuszy RP, a publication commemorating the renewal of prof. Maksymilan Padan's doctorate.

[2] Among the latest publications, compare the especially interesting analysis by J. Frąckowiak, *Skutki zastrzeżenia prawa pierwokupu w umowie na tle regulacji w kodeksie cywilnym* [Consequences of reservation of the right of first refusal in a contract in the light of the regulation in the Civil Code], [in:] *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce* [Treatises on Private Law – Jubilee book dedicated to prof. Aleksander Oleszko], (ed.) A. Dańko-Roesler, J. Jacyszyn, M. Pazdan, W. Popiołek, Warszawa 2012, pp. 108–123.

[3] Compare especially the resolution of the Supreme Court of 22 January 1973, III CZP 90/72, OSNC 1973, No. 9, item 147 and the sentence of the Supreme Court of 19 February 2002, IV CKN 784/00. OSNC 2003, No. 1, item 14, and also: R. Czarnecki [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], Warszawa 1972, p. 1324; J. Frąckowiak, *Skutki zastrzeżenia prawa pierwokupu…* [Consequences of reservation…]; Z. Gawlik [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], Volume III, *Zobowiązania – część szczególna* [Liabilities – Special Issues], (ed.) A. Kidyby, Warszawa 2010, p. 177; J. Górecki, *Umowne prawo pierwokupu* [Contractual Right of First Refusal], Kraków 2000, p. 17 and next; A. Kunicki, *Zakres skuteczności prawa pierwokupu* [Scope of effectiveness of the right of first refusal], Nowe Prawo 1966, No. 12, p. 1527 and next; M. Nesterowicz [in:] *Kodeks cywilny z komentarzem* [Civil Code with a Commentary], Volume II, (ed.) J. Winiarz, Warszawa 1989, p. 585; P. Machnikowski, Gloss on the ruling of the Supreme Court of 10 October 2008, II CSK 221/08, OSP 2010, vol. 1, p. 21; Z. Radwański, J. Panowicz-Lipska, *Prawo zobowiązań – cześć szczegółowa* [Law of Liabilities – Details], Warszawa 2012, p. 66 and next; M. Safjan [in:] *Kodeks cywilny. Komentarz do artykułów 450–1088* [Civil Code – Commentary on Articles 450 – 1088], Volume II, (ed.) K. Pietrzykowski, Warszawa 2011, p. 356;

and the entitled to the right of first refusal is subject to the unilateral-modification clause and can declare in due time the will to use this right (Article 597 § 2 of the Civil Code) if the obligor concludes a conditional contract for sale with the third party. The declaration of the will to use the right of first refusal results in an agreement between the obligants that has the same content as the contract between the obligor and the third party.

It is rightly highlighted in the doctrine that susceptibility to actions aimed at thwarting the possibility of satisfying the entitled obligant's interest is in a way typical of the right of first refusal[4], but the binding normative regulation does not strengthen the protection of the obligee[5] and, as some lawyers say, indeed encourages to attempt to deprive him/her of the possibility to make use of their rights[6]. The critical assessment of the current legal state is accompanied by comments that "the introduction of a clause on the right of first refusal to a contract is an expression of the parties' trust in a partner's loyalty" because the normative regulation is such that one can only believe that the obligor is going to act in accordance with the content of the right of first refusal and the resulting relationship[7].

There are various reasons why parties undertake actions aimed at thwarting the rights. The most frequently highlighted one is an intention to sell an object to a person who is not entitled to the right of first refusal or a wish to obtain an object that will be freed from the obligation imposed by the right of first refusal. The catalogues of actions that thwart the possibility of satisfying the interest of the entitled party to the right of first refusal include:
– concluding an unconditional contract for sale;
– desisting from notifying the entitled party about the conclusion of a conditional contract for sale;
– concluding a fictitious conditional contract for sale;
– concluding, in order to circumvent the law, a contract for sale that is not subject to the right of first refusal[8];

J. Skąpski [in:] *System prawa cywilnego. Prawo zobowiązań – część szczegółowa* [Civil Law System. Liability Law – Details], (ed.) S. Grzybowski, Ossolineum 1976, p. 169; K. Wyżyn-Urbaniak, *Sposoby ochrony uprawnionego z tytułu umownego prawa pierwokupu* [Ways of protecting the entitled to the contractual right of first refusal], Rejent 1996, No. 10, p. 92 ad next and p. 97 and next.

[4] Compare J. Górecki, *Umowne…* [Contractual…], p. 162.

[5] Compare especially J. Górecki, *Umowne…* [Contractual…], p. 162; K. Mularski, A. Olejniczak, *Ochrona uprawnionego z tytułu prawa pierwokupu przed pozornymi oświadczeniami woli* [Protection of the entitled to the right of first refusal against the fictitious declaration of will], RPEiS 2013, vol. 1, p. 29 and next; K. Wyżyn-Urbaniak, *Sposoby ochrony…* [Ways of protecting…], p. 92 and next.

[6] J. Górecki, *Umowne…* [Contractual…], p. 162. In the practice of the right of first refusal administration, one can also notice activities of the obligor and the obligee that aim to extort the implementation of the right of first refusal by using such a third person who does not want to buy an object and only pretends to intend to buy by concluding a conditional contract for sale (compare J. Górecki, *Umowne…* [Contractual…], pp. 164–165).

[7] K. Wyżyn-Urbaniak, *Sposoby ochrony…* [Ways of protecting…], p. 108.

[8] Donation can be such a contract. Contractual extension of the right of first refusal of real property to cases when the a purchaser donates it to a third party would strengthen the protection of the entitled

– encumbering an object with other obligations;
– formulating a conditional contract for sale in the way that discourages the entitled party from making use of the right of first refusal.

Literature presents the analysis of some instruments that serve the protection against actions thwarting the right of first refusal. In particular, it concerns concluding unconditional contracts for sale, concluding contracts for sale that is not subject to the right of first refusal and concluding fictitious contracts[9]. The issue of formulating a contract with the third party in the way that thwarts the right of first refusal is analysed in the doctrine and the judicature rather seldom; and only some aspects of this issue are analysed despite its importance for the economic turnover and difficulties connected with its interpretation[10].

The consideration presented in this article are limited to the violations of the right of first refusal against which the entitled is protected based on Article 600 § 1 sentence 2 of the Civil Code, which stipulates that the resolutions of the agreement with the third party that are aimed at the frustration of the right of first refusal are void for incapacity. The regulation should be thought to aim to protect the entitled to the right of first refusal against the obligor's actions aimed at stopping the obligees from making use of their rights.

First of all, it is necessary to define the conditions for treating the resolutions of a contract as such that aim to obstruct the implementation of the right of first refusal and next the consequences of this qualification.

It is necessary to start characterising the conditions for treating the resolutions of a contract as such that aim to obstruct the implementation of the right of first refusal by pointing out that what must be established are the resolutions of the contract concluded between the obligor and the third party. It does not refer, however, to any contract but a contract concluded by the obligor with another party that does not have the right of first refusal.

In the process of interpretation, one must take into account the taxonomy of the Act and the circumstance that for the appropriate reconstruction of a legal norm[11] protecting the entitled party cannot be confined to the content of the

to the right of first refusal although *de lege lata* it was rightly assumed by the Supreme Court to be inadmissible (compare the resolution of the Supreme court of 16 February 1996, III CZP 10/96, OSN 1996, No. 4 item 59, with an approval gloss by M. Litwińska, PPH 1996, No. 11, p 33 and next).

[9] Compare J. Górecki, *Umowne…* [Contractual…], p. 162 and next; K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…], p. 29 and next and M. Safjan, [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 378 and next; Compare also the ruling of the Appellate Court in Poznań of 14 November 2007, I ACa 698/07, LEX No. 370789.

[10] Compare J. Górecki, *Umowne…* [Contractual…], p. 162 and next; J. Jezioro [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], (ed.) E. Gniewka and P. Machnikowskiego, Warszawa 2013, p. 1105; K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…], p. 30 and M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 378 and next.

[11] More broadly about the reconstruction of norms from legal regulations, norm segmenting in regulations and a the reconstruction phase of interpretation, compare Z. Radwański, M. Zieliński, [in:] *System Prawa Prywatnego* [System of Private Law], volume 1, *Prawo cywilne – część ogólna* [Civil Law – General Issues], (ed.) M. Safjan, Warszawa 2012, p. 500 and next.

second sentence of Article 600 § 1 of the civil Code. For the analysed norm, it is important that in the first sentence of the paragraph the Act stipulates that: "the implementation of the right of first refusal results in the same contract between the obligor and the obligee as between the obligor and the third party […]. At the same time, the provisions of Articles 596–599 and 601 of the Civil Code also apply to that contract. This means that a term "a contract with the third part" used by the legislator twice in Article 600 § 1 of the Civil Code refers to the conditions of the contract for sale concluded by the obligor and the third party. It refers to a valid contract for sale under the condition that the entitled party does not make use of the right of first refusal. The legal construction of the right of first refusal in the Civil Code is built in such a way that only in the event of a valid conditional contract for sale concluded with the third party, the entitled party can make use of the right of first refusal. Thus, if the obligor concludes an unconditional contract or an invalid conditional contract with the third party, it means that Article 600 § 1 sentence 2 does not apply. Thus, the determination of the content of the term "frustration of the right of first refusal" is of key importance for the determination of substantive qualification premises of the contract resolutions based on Article 600 § 1 sentence 2 of the Civil Code.

In literature, it is highlighted that since the aim of the right of first refusal is to make it possible for the entitled party to buy a given object, "the direct frustration of the right of first refusal would have to be connected with an attempt to make the purchase of the given object void with regard to the identity or the obligee's right of first refusal"[12]. The analysis of the aim and function of the ascribed right of first refusal, despite some disputes over the legal character of the relationship between the obligor and the obligee, allows for the determination that by virtue of a legal regulation of the right of first refusal or in the course of legal action, the legislator wants to establish specific protection of the interest of one party in case another party wanted to sell an object. This protection consists in the right to be first to enter a business transaction of purchase but the possibility of applying the right is strictly defined with regard to the time of purchase and the content of the contract that guarantees that the holder of the right will become the owner of the object. A lack of the obligee's decision in a certain period results in the loss of the right. This means that the legislator, using the term "frustration of the right of first refusal", highlights a potential threat to the established protection: it refers to a situation when the obligee who intends to make use of his right, in a way against himself, will not be eager to file an adequate declaration. He would make this unfavourable decision with regard to the content of the obligation relationship that occurs in the event of making use of the right of first refusal specified by the resolutions of the contract for

[12] M. Gutowski, *Bezskuteczność czynności prawnej* [Inefficiency of Legal Action], Warszawa 2013, pp. 279–280.

sale. As a result, the frustration of the right of first refusal means the obligee is deprived of the established protection.

The frustration of the right of first refusal may result from various resolutions of the conditional contract for sale, thus both essential terms (*essentialia negotii*) and clauses (*accidentalia negotii*)[13]. First of all, these will be contract clauses specifying the main obligation aspects, i.e. the price and object, resolutions regarding extra obligations and additional conditions, e.g. a deadline, down payment, the right to withdraw from the contract, compensation for contract termination or a penalty fixed by contract.

It must be emphasised that the content of those contract resolutions must be subject to assessment. The meaning of the parties' declaration of intention should be reconstructed based on the rules of interpretation formulated by Article 65 of the Civil Code. This reconstruction, also taking into account all accompanying circumstances and the general social norms and customs, is made in the course of interpretation in order to define the individual norm established by the parties[14].

The normative regulation contained in the second sentence of Article 600 § 1 of the Civil Code requires that the aim of introducing given resolutions in a contract is defined and the establishment that their aim is the frustration of the right of first refusal is the premise of protecting the party entitled to the right of first refusal.

The parties to a contract establish its content in order to achieve an intended objective. This objective is legally relevant because while formulating the content of the expressed declarations of intent by the parties, one cannot be limited to the wording of the formulated document but must take into account the agreed intent of the parties and the aim of the contract (Article 65 § 2 of the Civil Code). It is thought that a contract aims to lead to the implementation of a state of things intended by the parties (expressed in the contract or not) or the state of things intended by one party and known to the other party[15].

However, Article 600 § 1 sentence 2 does not speak about such an aim. It refers to the intent the obligor associates with a particular contract clause regardless of circumstances whether this intent is shared by the third party

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[13] Compare J. Jezioro [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], pp. 378–379.

[14] With respect to the interpretation of declarations of will, compare especially Z. Radwański, *Wykładnia oświadczeń woli składanych indywidualnym adresatom* [Interpretation of Declarations of Will Addressed to Individuals], Ossolineum 1992; *ibid*, [in:] *System Prawa Prywatnego* [System of Private Law], vol. 2, *Prawo cywilne – część ogólna* [Civil Law – General Issues], (ed.) Z. Radwański, Warszawa 2008, p. 39 and next.

[15] Por. Z. Radwański, [in:] *System Prawa Prywatnego* [System of Private Law], vol. 2, p. 226. Compare also a critical gloss by P. Księżak on the ruling of the Supreme Court of 28 October 2005 (II CK 174/05, OSN 2006, No. 9, item 149), recognising a legal action void because its illegal aim was known only to one party to a contract (gloss in MoP 2007, No. 23, p. 1325 and next).

(the other party of a conditional contract for sale) or not, whether it is known to that party or not. Thus, it is necessary to establish, regardless of the aim of the contract expressed in its content or not, whether any resolutions of the contract with the third party aim at the frustration of the right of first refusal. The intent to frustrate the right of first refusal should constitute the reason of formulating the contract in a particular way.

The clauses that are usually classified as those that aim to frustrate the right of first refusal include the resolutions with regard to the obligation object, especially the price, resolutions restricting additional obligations and clauses establishing links with other contracts[16].

Reservation of a flagrantly high price in a conditional contract for sale is thought to be relatively frequent practice revealing the intent to frustrate the right of first refusal. It means the price is intentionally inflated. It is, however, highlighted that the establishment of the price at the level exceeding the average market prices is not yet the reason *per se* to convince that it was intended to frustrate the right of first refusal. But the price that absolutely goes beyond market prices may suggest the fictitiousness of a contract[17]. Here, it is necessary to draw attention to difficulties connected with legal classification of the findings regarding prices.

1) The intention of the parties might be a conclusion of an absolutely fictitious contract[18] with a flagrantly high price. The parties of such a contract enter into a secret agreement that the official contract is not binding. The obligor and the third party want to make an impression that the competence of the entitled party to declare the will to make use of the right of first refusal is up-to-date and the deadline is now fixed so if the entitled party fails to use his rights in due time, he will lose the right of first refusal. The conclusion of such a fictitious contract with a flagrantly high price is to discourage even the entitled party who is in possession of sufficient funds to make use of his right of first refusal. However, because the contract is void, the right of first refusal neither expires, nor there is a possibility of making effective use of this right[19].

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[16] Compare J. Jezioro, [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary], p. 379; J. Skąpski [in:] *System prawa cywilnego…* [System of Civil Law…], p. 171.

[17] M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 378.

[18] It regards a declaration of will that was not filed in order to hide other legal consequences – with the consent of the other party, the declaration of will was filed only under false pretence (about types of pretence more closely, compare K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…], p. 31, and also the ruling of he Supreme Court of 10 June 2013, II PK 299/12, LEX No. 1393828 and a ruling of the Appellate Court in Katowice of 24 September 2013, I ACa 701/13, LEX No. 1381388).

[19] More losely about the consequences of invalidity of a fictitious absolutely conditional contract for sale, K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…], p. 31 and next.

(2) The intention of the parties might be a conclusion of a fictitious contract specifying a different, lower price for a hidden legal relationship that is to bind the parties in fact. So it is a relatively fictitious contract[20] because the parties agree that they will be bound by a contract (described as a dissimulated one) but with a different content than the revealed one. The determination of the consequences of such decisions causes many difficulties. It must be determined whether they are void or not and how effective the undertaken legal steps (parts of the clauses) are.

A fictitious contract is void, however, the validity of a dissimulated (hidden) contract is assessed in accordance with the features of this action (Article 83 § 1 sentence 2 of the Civil Code), thus the requirements for validity specified for a hidden declaration (Article 83 § 1 of the Civil Code)[21]. It refers to the conformity of actions with the normative requirements, the maintenance of which is essential for effective and valid performance of particular actions, while in the event of specific named contracts, it is necessary that parties take into account all elements that are important and constitute the given contract.

In such a situation, the maintenance of a special form *ad solemnitatem*, first of all a notarial act, is of key importance. After years of disputes, it should be assumed with approval that in accordance with the dominating opinion, the relatively fictitious declaration is void if the relatively fictitious (simulated) contract was concluded in a special form *ad solemnitatem* (compare e.g. Article 158 of the Civil Code), required for a dissimulated (hidden) contract[22]. This standpoint is applied also in the event when only a part of a contract is hidden, especially the

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[20] Compare K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…], p. 32.

[21] In my opinion it is right that the parties entering the fictitious legal action, hiding the result they want to cause do not really perform two different activities but one, the consequences of which they hide, revealing "for the sake of appearance" simulated effects. The use of a term "another activity" in Article 83 only aims to point out that the activity is different than the revealed one. An activity with so defined (dissimulated) results may turn out to be important (compare M. Kepiński, Pozorność w umowach o przeniesienie własności nieruchomości [Fictitiousness in agreements on the conveyance of real property], NP 1969, No. 9, p. 1375 and Z. Radwański, [in:] System Prawa Prywatnego [System of Private Law], vol. 2, p. 393). The use of terms "a fictitious contract" and "a hidden contract" is to facilitate the specification of legal consequences of he declarations of will and does not indicate approval of the thesis on the performance of two different legal actions.

[22] Compare the rulings of the Supreme Court of 12 October 2001, V CKN 631/00, OSNC 2001, No. 7–8, item 91, of 27 April 2004, II CK 191/03, LEX No. 399727 and of 13 April 2005, IV CK 684/04, LEX No. 284205 and a resolution of the Supreme Court of 22 May 2009, III CZP 21/09, OSNC 2010, No. 1, item 13 and of 9 December 2011, III CZP 79/11, OSNC 2012, No. 6, item 74. Compare also, E. Drozd, *Pozorność w umowach przenoszących własność nieruchomości* [Fictitiousness in contracts conveying real property], Studia Cywilistyczne 1974, vol. XXII, p. 73 and next; K. Mularski, *Pozorność…* [Fictitiousness…], p. 636 and next and literature mentioned there; Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna* [Civil Law – General Issues], Warszawa 2013, p. 271; K. P. Sokołowski, Gloss on the resolution of the Supreme Court – Civil Chamber of 22 May 2009, III CZP 21/09, Orzecznictwo Sądów Polskich 2010, vol. 6, p. 438 and next.

one specifying its important elements as to the subject matter, e.g. the price[23]. One cannot speak about the maintenance of a special form of a particular contract if its *essentialia negotii*[24] has not been specified in the legally required form. This means that only the actions for which no special form is required will occur to be valid. As a result, a contract for sale of real property is in such a situation void. But a sale of movable property is valid and the parties are bound by the price really agreed upon (the specification of the revealed price will be invalid as being in collision with the real intention of the parties).

The recognition of this standpoint as the right one means that if the intention of the parties to a conditional contract for sale was to limit the fictitious character of a concluded contract to the element of price (instead the one specified in the contract, the hidden, in fact lower, price was to be binding for the parties) and the object to be sold is a movable, the concluded conditional contract (a dissimulated one) is valid and parties are bound by price established in a secret agreement. In such a situation, the conditions for an effective use of the right of first refusal by the entitled party who will buy the object based on the same contract "with the same content as the contract concluded between the obligor and the third party" (Article 600 § 1 sentence 1 of the Civil Code), i.e. for a lower price. However, if the object for sale is real property, because of the invalidity of a conditional contract for sale (a dissimulated contract), neither the right of first refusal expires, nor there is a possibility of using it effectively.

In literature, there is also an opinion that "if it was possible to determine the real price established between the parties, a conditional contract for sale would be valid and only the fictitious price would be void for the entitled party (it would be a modification of the consequence of Article 83 resulting from a special regulation of Article 600 § 1"[25].

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[23] However, in this scope, a different standpoint is presented in the resolution of the Supreme Court of 9 December 2011 (III CZP 79/11, OSNC 2012, No. 6, item 74), stating that the provision of Article 83 § 1 of the Civil Code "refers to another hidden legal action and not the fact of hiding an element of the content of the same legal action, e.g. a real price in the contract". At the same time, it refers to the ruling of the Supreme Court of 27 April of 2004 (II CK 191/03, LEX nr 399727), which states that it is inadmissible to prove the underpricing in a notarial act in order to prove the fictitiousness of a contract. It seems that the fictitiousness of a notarial act can be proved by witnesses' testimonies and interrogation of the parties also between the participants of the action and the limitations provided for in Article 247 of the Civil Procedure Code are not applicable here (sic rightly in the ruling of the Appellate Court in Lublin of 13 March 2013, ACa 773/12, LEX No. 1306003). The standpoint in the two decisions of the Supreme Court results, in my opinion, from an erroneous assumption that the parties performing a fictitious legal action, hiding the result they want to achieve, perform in fact two different acts (compare footnote 27).

[24] Also aims support this type of interpretation. The legislator requires that some actions should be performed in special forms, especially the provision of the turnover certainty (compare K. Mularski, A. Olejniczak, *Ochrona uprawnionego…* [Protection of the entitled…] p. 33).

[25] Sic M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary], p. 379, who refers to W. Czachórski's standpoint (*Zobowiązania. Zarys wykładu* [Liabilities – Lecture Outline], Warszawa 1994, p. 300); this opinion seems to be shared also by J. Górecki, *Umowne…* [Contractual…], p. 163 and next.

Firstly, it is difficult to approve of the thesis that the provision of Article 600 § 1 of the Civil Code contains special norms in the presence of Article 83 of the Civil Code and that both articles do not have a common scope.

Secondly, Article 600 § 1 sentence 1 of the Civil Code is applied in cases when a conditional contract for sale is valid. As it was already highlighted, the construction of the right of first refusal in the Civil Code is built in such a way that only in the event of a conclusion of a valid conditional contract for sale with the third party, the entitled party can make use of the right of first refusal. It also applies to the protection provided for in Article 600 § 1 sentence 2 of the Civil Code. If a legal regulation is applicable in a specified legal action, it is assumed to be valid. If it were different, the Act uses a term "invalid". In Article 600 § 1 sentence 2 of the Civil Code there is no term "invalid" contract only a possibility of recognising some of its elements as void for incapacity. This interpretation is strengthened by the way in which absolutely void actions are understood as such that do not result in any legal consequences of those that would if they were valid. This means that it is inadmissible for the legal system to require the recognition of only some elements of a contract as void (and only for the entitled to the right of first refusal) if the whole contract is invalid. This standpoint is in concord with the function ascribed to the provision of Article 600 § 1 sentence 2 of the Civil Code, and this is the protection of the entitled party who can make use of the right of first refusal in the event of the conclusion of a legally binding conditional contract for sale. If by virtue of the binding regulations, whether because of formal reasons or regarding the content of the concluded contract between the obligor and the third party, the contract is invalid, the norm specified in Article 600 § 1 sentence 2 of the Civil Code is not applicable at all. Because there is no subject to the regulation, i.e. legally binding "contract with the third party" against which the entitled party should be protected. His right of first refusal is not going to be violated. Invalidity of that contract means that the entitled party continues to have the right of first refusal with all the consequences specified in Article 597 and next of the Civil Code. Since a fictitious action is always invalid, a hidden action may prove to be valid. Then, it is possible to examine its content and aims in the light of the criteria expressed in Article 600 § 1 sentence 2 of the Civil Code[26].

It is not justified to pursue *per fas et nefas* such a result of the interpretation of the Civil Code regulations to enable the entitled to use his right of first refusal. The aim of the legal regulation of Article 600 § 1 sentence 2 of the Civil Code is only to protect the entitled party against depriving him of his right that

[26] This is how the Supreme Court interprets the possibility of examining the content and aim of a legal action with regard to the assessment whether it aims to circumvent the law or violates social rules. Such qualification is not possible in the event of a fictitious act as a void one and only a hidden action can be qualified as such if, based on Article 83 § 1 sentence 2, it might turn out to be valid (compare the ruling of the Supreme Court of 22 November 2012, UK 246/12, LEX No. 1308046).

he will be able to use when there is a statutory condition for declaring the will to make use of the right of first refusal. It is always the conclusion of a valid conditional contract for sale between the obligor and the third party. For the assessment of the contract validity, the content of Article 600 § 1 sentence 2 is legally irrelevant.

(3) Finally, the third situation – among differently classified contractual regulations with regard to price – takes place if in order to frustrate the right of first refusal the parties' aim is to introduce to the contract a price that considerably exceeds the market value of an object but it is not a fictitious contract but a binding one. The inflated price that the third person is ready to pay is to discourage the entitled to make use of the right of first refusal. In such a case, Article 600 § 1 sentence 2 of the Civil Code is applicable.

Apart from the provisions regarding the price of sale, the clauses that are classified as those that are intended to frustrate the right of first refusal include clauses making reservations of additional obligations, especially those that make the entitled a subject to especially difficult additional obligations that make the purchase absolutely unattractive[27]. These are often very untypical obligations that are personal in character. However, it is rightly highlighted in literature that the personal nature of these obligations reserved in a contract with the third party does not allow for recognising them as frustrating the right of first refusal[28]. This interpretation is supported in the content of Article 600 § 2 of the Civil Code, which provides for a possibility of paying the value of the obligation without the necessity to obtain the obligor's consent if the contract concluded between the obligor with the third party specifies an additional obligation the entitled cannot fulfil[29]. The regulation takes into account obligations that because of their character and the entitled party cannot be fulfilled. In general, it applies to such

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[27] M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], s. 379; J. Skąpski [in:] *System prawa cywilnego…* [System of Civil Law…], p. 171.

[28] J. Jezioro [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], pp. 378–379.

[29] There is no possibility of exchange if the entitled to the right of first refusal is the State Treasury or an organisational unit of local government because such an obligation is then treated as unreserved (Article 600 § 2 of the Civil Code). The scope of application of Article 600 § 2 of the Civil Code is subject to narrowing interpretation in the judicature and the doctrine. Compare especially the resolution of the Supreme Court of 21 April 1971, (III CZP 17/71, OSN 1971, No. 11, item 194), stating that it is not possible to treat the lifelong right to use a flat free of charge (personal easement) established on the real estate as unreserved due to the fact that the State Treasury made use of the right of first refusal and became the owner of the real estate. About the application of Article 600 § 2 of the Civil Code and the rights of the life annuitant and the Agricultural Property Agency if it makes use of the right of first refusal based on Article 4 of the Act of 11 April 2003 on the development of the agricultural system, compare J. Matys, *Niektóre problemy umowy dożywocia na tle ustawy o kształtowaniu ustroju rolnego* [Some issues connected with a contract for life usufruct in the light of the Act on the development of the agricultural system], Nowy Przegląd Notarialny 2005, No. 1, p. 30 and next and J. Mikołajczyk, *Uwagi na tle ustawy o kształtowaniu ustroju rolnego* [Comments on the Act on the development of the agricultural system], Studia Prawno-Ekonomiczne 2004, No. 69, p. 111 and next.

obligations that the entitled cannot fulfil because of their personal character, e.g. writing a literary work etc., although it can also be an additional obligation binding the third party to give the seller individually specified objects[30]. In such and similar situations, the entitled to the right of first refusal can make use of it covering the value of the obligations and this results in a change in the content of the obligation in the course of the implementation of the right of first refusal[31].

The proof of an untypical obligation, i.e. a very rare use of them in the civil-legal turnover, is not recognised as sufficient. It is necessary to determine that by introducing them to the contract the parties wanted to frustrate the right of first refusal. Thus, it is rightly emphasised that the assessment must be made carefully and recommended that in each case an analysis of the relationship between these resolutions and the aim to frustrate the right of first refusal should be made[32].

The resolutions in the contract with the third party that aim to frustrate the right of first refusal also include the introduction of additional contractual reservation in the form of the seller's right to withdraw from the contract if the entitled decides to use the right of first refusal[33] or a decision made in case such a situation takes place to establish the seller's right to repurchase the object. It can also be, introduced in case the entitled uses his right of first refusal, a decision to establish options of purchase for the seller or another person. It can also be an option of exchange, long-term rent or lease[34]. Attention is also drawn to the possibility of making the reservation in the form of a clause that introduces links between this contract and elements of another contract and this way reasonably decreases the attractiveness of the purchase[35].

The implementation of the right of first refusal is a formal prerequisite of making use of the protection against the actions aimed at the frustration of the right of first refusal. The entitled party implements the right by filing a declaration to the obligor, i.e. the seller (Article 597 § 1 sentence 1 of he Civil Code), which becomes binding the moment it reaches the obligor and he can get to know its content (Article 597 § 2 sentence 1 in connection with Article 61 § 1 of the Civil Code)[36]. It results in a contract between the obligor and the obligee that is in general the same as the conditional contract concluded by the obligor and the third party (Article 600 § 1 sentence 1 of the Civil Code). The only differences

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[30] Compare the explanation of reasons for the resolution of the Supreme Court of 21 April 1971, III CZP 17/71, OSN 1971, No. 11, item 194.

[31] J. Skąpski [in:] *System prawa cywilnego…* [System of Civil Law…], p. 172.

[32] M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], pp. 378–379.

[33] J. Skąpski [in:] *System prawa cywilnego…* [System of Civil Law…], p. 171.

[34] Compare M. Gutowski, *Bezskuteczność…* [Inefficiency…], pp. 281–282.

[35] M. Safjan [in:] *Kodeks cywilny. Komentarz…* [Civil Code – Commentary…], p. 379.

[36] In a special regulation contained in Article 110 item 1 of the Act of 21 August 1997 on real property management (uniform text: Journal of Laws of 2010, No. 102, item 651 with amendments that followed), a declaration of will to make use of the right of first refusal is not required to be filed to another person and becomes valid on its submission to a notary.

are that the buyer is the entitled to the right of first refusal and the sale is unconditional with the legal substantive consequence, i.e. the conveyance of property[37].

In accordance with the principle of freedom to choose a form of legal action (Article 60 of the Civil Code), the declaration can be made in different forms. This rule does not apply to cases when the right of first refusal relates to a contract for sale that requires the use of special forms in order to be valid. As Article 597 § 2 sentence 2 of the Civil Code stipulates, in such a situation, the declaration of the decision to use the right of first refusal should be filed in this particular special form. If the subjects to the right of first refusal are objects or rights requiring a special form of sale to remain valid, the failure to comply with that requirement in the course of implementing the right of first refusal makes the declaration invalid and does not result in the contract for sale between the obligor and the obligee.

The thesis that the implementation of the right of first refusal is the necessary prerequisite of the use of protection measures specified in Article 600 § 1 sentence 2 of the Civil Code should not raise doubts. It was highlighted earlier that the legislator protects the entitled in a situation when the entitled and the obligor enter into a contract with the third party that is specified in Article 600 § 1 sentence 1 of the Civil Code. If the entitled does not use the right of first refusal, he deprives himself of this right and makes the annulment of the contract between the obligor and the third party senseless. At the same time, Article 600 § 1 sentence 2 of the Civil Code provides the entitled with protection in the event when he wants to make use of his right despite those clauses that really discourage him from doing it. It is true that then the valid contract between the obligor and the obligee will be the same as the conditional contract between the obligor and the third party. However, then and only then, the entitled will be subject to the protection that the analysed provision stipulates. The judicature confirms that the above interpretation of Article 600 § 1 of the Civil Code is correct. The Appellate Court in Poznań stated in its ruling of 21 November 2007 that "Article 600 § 1 second sentence regards only these cases in which the right of first refusal is implemented and a contract between the obligor and the entitled (the first sentence of the provision) is concluded"[38]. Also in literature, void resolutions specified in Article 600 § 1 of the Civil Code that aim to frustrate the right of first refusal are linked with "the implementation of the right of first refusal based on the contract for sale including an inflated price"[39].

Thus, the application of Article 600 § 1 sentence 2 of the Civil Code should be denied in the event when the obligor and the third party did not conclude a contract for sale (in accordance with Article 600 § 1 sentence 1 of the Civil

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[37] Compare the decision of the Supreme Court of 17 July 2008, II CSK 114/08, LEX No. 465911.
[38] I ACa 920/07, Lex No. 370761.
[39] J. Górecki, *Umowne…* [Contractual…], p. 164.

Code). Either because of an unconditional character of a contract for sale (the Appellate Court in Poznań analysed this fact in the quoted ruling of 21 November 2007), or because of any other reasons, e.g. when a declaration of the use of the right of first refusal was not filed or the filed declaration proved to be invalid.

Apart from the implementation of the right of first refusal, there are not other prerequisites of the entitled party's protection against the resolutions that aim to frustrate his right of first refusal. The above-discussed resolutions become void *ex lege* and do not have to be ruled by court. However, in the case of a dispute, the entitled party must prove the prerequisites of the recognition of particular provisions of the conditional contract for sale as aiming to frustrate the right of first refusal, thus are void in accordance with Article 600 § 1 item 2 of the Civil Code.

The consequence of recognising these resolutions as void towards the entitled is such a form of defectiveness of a legal transaction that "is characterised by full validity and effectiveness towards all the parties with the exception of that who is subject to the relative ineffectiveness of his action", which means that a legal action is important but there is a limitation of the circle of entities "for whom the action maintains a complete legal validity"[40]. Since in the case of defectiveness specified in Article 600 § 1 sentence 2 of the Civil Code, only some resolutions in the concluded contract are subject to a sanction of voidability, it is justified to use a term "partial voidability"[41] in these cases.

As a result, a conditional contract for sale containing resolutions that aim to frustrate the right of first refusal develops the content of a legal relationship with a party who is entitled to use the right of first refusal in such a way that the resolutions of the contract that aim to frustrate the right of first refusal will not shape the content of this relationship.

[40] M. Gutowski, *Bezskuteczność…* [Inefficiency…], p. 47; similarly, Z. Radwański, A. Olejniczak, *Prawo cywilne...* [Civil Law...], p. 350.

[41] M. Gutowski, *Bezskuteczność…* [Inefficiency…], p. 421.

PROTECTION AGAINST THE FRUSTRATION OF THE RIGHT OF FIRST REFUSAL (ARTICLE 600 § 1 OF THE CIVIL CODE)

Summary

The right of first refusal (Article 595 and next of the Civil Code) create an obligor's obligation to sell objects to the third party unless the entitled party uses his right. The obligor and the third party can introduce to the contract they enter into various resolutions that aim to frustrate the right of first refusal. In accordance with Article 600 § 1 of the Civil Code, these resolutions are void. The work analyses the concept of frustration of the right of first refusal, shows prerequisites of the protection of the entitled that is specified in Article 600 § 1 of the Civil Code and explains the legal consequences, i.e. the sanction of partial relative voidability.

OCHRONA PRZED UDAREMNIENIEM PIERWOKUPU (ART. 600 § 1 KODEKSU CYWILNEGO)

Streszczenie

Prawo pierwokupu (art. 596 i n. k.c.) kreuje po stronie zobowiązanego obowiązek sprzedaży rzeczy osobie trzeciej pod warunkiem, że uprawniony ze swego prawa nie skorzysta. Zobowiązany i osoba trzecia mogą wprowadzać do zawieranej warunkowej umowy sprzedaży postanowienia mające na celu udaremnienie prawa pierwokupu. Na podstawie art. 600 § 1 Kodeksu cywilnego postanowienia te są nieskuteczne względem uprawnionego. Opracowanie analizuje pojęcie udaremnienia prawa pierwokupu, wskazuje przesłanki zastosowania określonej w art. 600 § 1 k.c. ochrony uprawnionego oraz wyjaśnia konsekwencje prawne, czyli sankcję częściowej bezskuteczności względnej.

LA PROTECTION CONTRE L'ANÉANTISSEMENT DU PRIMOACHAT (ART. 600 § 1 DU CODE CIVIL)

Résumé

Le droit de primoachat (art. 596 et suivants du code civil) forme de la part de personne engagée le devoir de vente au tiers sous condition que cette personne ne profitera pas de son droit. La personne engagée ainsi que la personne tiers peuvent introduire au contrat conditionnel de vente tous les points qui ont le but d'anéantir le droit de primoachat. Vu l'art. 600 § 1 du Code civil ces décisions ne sont pas

efficaces pour la personne engagée. L'article analyse la notion de l'anéantissement du droit de primoachat, indique les prémisses pour appliquer la protection de la personne engagée définit dans l'art. 600 § 1 du Code civil et il explique aussi les conséquences légales, c'est-à-dire la sanction partielle de l'inefficacité relative.

ЗАЩИТА ОТ ВОСПРЕПЯТСТВОВАНИЯ ПРЕИМУЩЕСТВЕННОМУ ПРАВУ ПОКУПКИ (СТ. 600 § 1 ГК)

Резюме

Преимущественное право покупки (ст. 596 ГК) наделяет соответствующего субъекта обязательством продажи вещей третьему лицу при условии, что имеющий эти полномочия не воспользуется своим правом. Наделённый обязательством вместе с с третьим лицом могут включить в составляемый условный договор продажи постановления, имеющие целью воспрепятствование преимущественному праву покупки. На основе статьи 600 § 1 Гражданского кодекса эти постановления являются неэффективными по отношению к наделённому правом. В исследовании подвержено анализу понятие воспрепятствования преимущественному праву покупки, указываются предпосылки применения определённой в ст. 600 § 1 ГК защиты наделённого правом, а также выясняет последствия правового характера, иначе говоря – санкции частичной относительной неэффективности.

Krzysztof Ślebzak

DETERMINATION OF THE LEGISLATION APPLICABLE AND THE PRINCIPLE OF BEING SUBJECT TO THE LEGISLATION OF A SINGLE MEMBER STATE – SELECTED ISSUES

1. General issues

The general principle resulting from the regulations on the coordination of social security systems is that a person can be subject to the legislation of a single Member State. It is expressed in Article 11 par. 1 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.[1] This principle results in other norms being in conflict with regard to the determination of the legislature applicable, in particular those included in Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 on the implementation of Regulation (EC) No 883/2004 with regard to the coordination of social security systems[2].

The principle of being subject to the legislation of a single Member State also results in a very important directive for the designated institutions of the given Member States and their organs of appeal. The decision of the competent institution and then the appellate organ can neither lead to excluding a person from any legislation on social security, nor to being subject to more than one legislation. The same assumption is the basis for the executive regulations that create norms for establishing legislation applicable. The experience of the Polish competent institution ZUS (Social Insurance Institution) as well as appellate organs then (courts adjudicating on appeals against the decisions issued by ZUS) prove that compliance with the principle of being subject to the legislation of a single Member State creates many problems in practice, the resolution of

[1] Official Journal of the EU: L. 2004.166.1. – hereinafter referred to as Regulation 883/2004 or basic regulation.

[2] Official journal of the EU: L. 2009.284.1. – hereinafter referred to as Regulation 987/2009 or implementing regulation.

which requires first of all the maintenance of a given procedure of coordinating the work of institutions of the particular Member States, which in practice may lead to competence disputes between them.

2. Procedural aspects of determining the legislation applicable

2.l. General rules of determining the legislation applicable

Regardless of the category of case that is dealt with on account of the EU coordination, the basic issue requiring resolution is first of all the determination of the legislation a given person is subject to. Articles 11–13 of Regulation 883/2004 cover this issue.

Article 11 of Regulation 833/2004 defines general principles of determining the legislation applicable. In accordance with Regulation 883/2004 par. 2: (a) a person pursuing an activity as an employed or self-employed person in a Member State should be subject to the legislation of that Member State; (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject; (c) a person receiving unemployment benefit in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State; (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State; and (e) any other person to whom sub-paragraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.

Article 12 of Regulation 883/2004 specifies special rules with regard to persons posted to another Member State to perform work there. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another person (par. 1). A similar situation is in the case of a person who normally peruses an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State (par. 2).

Article 13 of Regulation 883/2004 defines an exception to the general rules with regard to persons who are employed on the territory of more than one Member State. A person who normally pursues an activity as an employed person in two or more Member States shall be subject to: (a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or (b) if he/she does not pursue a substantial part of his/her

activities in the Member State of residence: (i) he/she shall be subject to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or one employer; or (ii) he/she shall be subject to the legislation of the Member State in which the registered offices or places of business of the undertakings or employers are situated if he/she is employed by at least two undertakings or at least two employers whose registered offices or places of business are situated in a single Member State; or (iii) he/she shall be subject to the legislation of the Member State in which the registered office or place of business undertaking or employer is situated, other than the Member State of residence, if he/she is employed by two or more undertakings or two or more employers, whose registered offices or places of business are in two Member States, one of which is a Member State of residence; or (iv) he/she shall be subject to the legislation of the Member State of residence if he/she is employed by two or more undertakings or two or more employers and at least two of these undertakings or at least two of these employers have a registered office or a place of business in various Member States other than the Member State of residence.

On the other hand, a person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to: (a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or (b) the legislation of the Member State in which the centre of interest of his/her activities is situated if he /she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity.

2.2. Being posted and performing work as an employed person in more than one Member State

From the point of view of the regulations and their practical application, doubts are raised by the difference between being posted and performing work on the territory of more than one Member State. In practice, it applies to a situation in which an applicant demands the determination of the legislation applicable in accordance with Article 13 of Regulation 883/2004, but in fact the provision is not applicable because the person was a posted employee (Article 12 of Regulation 883/2004) or should be subject to legislation in the Member State where he/she performs work (Article 11 par. 2 of Regulation 883/2004). Unlike in the case of being posted, performing work in more than one Member State at the same time occurs when pursuing an activity as an employed person or as a self-employed person takes place parallel to one another (at the same time) in a given period[3]. Thus, it is not applicable to pursuing activity as an employed

[3] E. Eichenhofer, *Sozialrecht der Europaischen Union*, Berlin 2006, pp. 110–112.

person or a self-employed person in subsequent periods (even very short ones). The issue is well illustrated by the Supreme Court ruling of 13 September 2011[4] in the case in which the insured demanded administration of the legislation applicable with regard to performing work in more than one Member State while he worked in Germany, Finland, France and Finland again in subsequent (a few months') periods.

Thus, recognising a case, first of all it is necessary to determine whether a person was or was not posted to perform work in a Member State. If not, it is necessary to consider if the requirement of Article 13 of Regulation 883/2004 is met. It is necessary to remember that the basic rule for determining the legislation applicable is specified in Article 11 par. 1 of Regulation 883/2004 that stipulates that the legislation applicable is the legislation of the Member State where a person pursues activity as an employed person or a self-employed person, and exceptions to that rule are regulated in the subsequent provisions, which either state that it is justifiable to desist from it (posting a person to perform work in another Member State – Article 12 of Regulation 883/2004) or determining the legislation applicable in accordance with Article 11 is not possible or very difficult (pursuing activities at the same time in at least two Member States – Article 13 of Regulation 833/2004).

2.3. Preliminary determination of the legislation applicable

Determining the preliminary legislation applicable and the consequences of that determination for the competent institutions, a person concerned and appellate organs pose other problems. Although the EU legislator regulated the rules of proceeding between the competent institutions in order to determine the legislation applicable, it raises a series of doubts.

First of all, it is necessary to notice that the scope of competence of a given institution consists in the ability to determine or refusal to determine that the legislation of the institution's Member State is the legislation applicable. This results from the territorial power of legislation of a given Member State and the competence of the organs of the given Member State within its borders[5]. The competent institution is not entitled to determine whether a person is subject to the legislation of another Member State because then the decision would result in legal consequences in another Member State and would bind the institution of another Member State. Thus, an institution competent in a Member State is entitled to issue a decision determining the legislation applicable of that Member State or refuse to determine it. Here, due to the above-mentioned principle of being subject to the legislation of a single Member State, a question is raised

[4] I UK 417/10, OSNP 2012/19-20/244.
[5] Pennings, *European Social Security Law*, 2010, pp. 4–6.

how it should act if it has doubts if a person is subject to the legislation of its or another Member State. Both positive and negative decisions may lead to non-compliance with Article 11 par. 1 of Regulation 883/2004. It is possible that the decision issued may result in exclusion of a person from the insurance system of any Member State or in making a person subject to legislation in more than one Member State. In order to avoid such situations there are implementing regulations on proceeding specifying the rules of determining the provisional legislation and explaining conflicting or doubt-raising circumstances by the institutions involved.

Depending on whether the case involves being posted or performing work on the territory of more than one Member State, the procedure of determining the applicable legislation was regulated in a different way. In case of employed persons being posted (or other situations that are not covered by work performance on the territory of more than one Member State), Article 6 of Regulation 987/2009 is applicable. On the other hand, in a situation when a person performs work in at least two Member States at the same time – Article 16 of the Regulation is applicable. The difference between the two provisions is essential. Although both deal with the determination of provisional legislation applicable, Article 16 par. 2 of regulation 987/2009 stipulates that the provisional determination shall become definitive within two months of its issue. Article 6 of the Regulation lacks such an executive directive.

2.3.1. Determination of provisional legislation based on Article 16 of Regulation 987/2009

In accordance with Article 16 of Regulation 987/2009, in the case of a person who pursues activities in two or more Member States, a competent institution of the Member State of his/her residence determines the provisional legislation applicable to them. The institution shall inform the designated institutions of each Member State in which activity is pursued of its provisional determination (par. 2). The provisional determination of the applicable legislation shall become definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it (par. 3), unless the legislation has already been definitively determined by agreement of the institutions concerned (par. 4) or one of the concerned institutions informs others before the two months deadline expires that it cannot approve of the determination of the applicable legislation or about its different view on the issue (par. 2).

First of all, a question is raised when determination of provisional legislation is admissible. The linguistic wording of Article 16 par. 2 of Regulation 987/2009 suggests that it is possible when the institution of the person's residence determines the legislation applicable in accordance with Article 13 par. 1 of

Regulation 883/2004 (supposedly, in accordance with the norms specified in the provision). Yet, proceeding in accordance with the directive of Article 13 par. 1 of Regulation 987/2009 may in practice also lead to a situation in which the institution of residence decides that the applicable legislation is the legislation of another Member State. But it cannot do that because of the above-mentioned principle of territorial competence of authorised institutions and consequences that might result from their decisions. This means the institution of residence may issue a decision determining the legislation of its Member State as applicable or issues a decision that the legislation of its Member State is not applicable. In both cases it informs institutions of other Member States of its resolution. In the former case, the consequences of the transformation of a preliminary decision into a definitive one are not negative for the person concerned because he/she becomes subject to the legislation of the given Member State. However, the institution of the other Member State can express doubts if the resolution is right. Then, the preliminary decision is not changed into a definitive one and legislation shall be determined by agreement. But when the institution of residence determines that a person is not subject to the legislation of its Member State, and institutions of other Member States do not report reservations, the person's situation is severe (it is unquestionable that the person was professionally active on the territory of more than one Member State). The assumption that the preliminary determination of legislation transforms into a definitive one would deprive a person of protection and would not comply with Article 11 of Regulation 883/2004. It would be necessary to assume that the institutions of the Member States cannot lead to such a situation; thus, the institution informed about the preliminary determination excluding a person from the legislation of the given Member State should also report reservations so that the preliminary determination of legislation would not be changed into a definitive one. In the case such a situation occurs, there is a possibility of appealing against the decision of the competent institution, however, in such a case, there is a question about verification competence of the appellate organs of the given Member State (this is discussed later).

The linguistic wording of Article 16 par. 2 of Regulation 987/2009 suggests that the designated institution of the place of residence shall provisionally determine the legislation applicable. Even if it is uncertain about the determination of its legislation as applicable, it is obliged to issue an adequate decision in which it determines the legislation applicable. Thus, there is no possibility of starting common agreement procedure without the prior issue of a decision in accordance with Article 16 of Regulation 987/2009.

There is another problem connected with the procedure based on Article 16 of Regulation 987/2009: its provisional character and in particular that, after two months from its issue, it transforms into a definitive one. Both preliminary and definitive character of the decision should be understood in the context of

consequences for the institution of another Member State, which means that by the time the decision has become a definitive one, there is a possibility that the informed institution reports reservations. However, after the two months' period (probably from the date when the decision is delivered to the other institution because it is not stipulated in the Regulation) there is no such possibility. However, this is a "horizontal" aspect of the definitive character of the decision (between the institutions) because with regard to the insured, the definitive decision is not one in the discussed interpretation. A person concerned can appeal against the decision based on the national regulations. In the light of this, there are interesting questions: (1) can the appellate organ verify a provisional decision that transformed into a definitive one? If yes, (2) what are the consequences of such verification for the institution of another Member State, the designated institution and the insured? Another issue is connected with the possibility of appealing against the decision determining the preliminary legislation.

As far as the first signalled issue is concerned, depriving the insured of the possibility of verifying the decision (in practice, the possibility of appealing against the decision) would be in conflict with the national regulations of the given Member State (e.g. in Poland Article 45 of the Constitution of the Republic of Poland stipulating the right to hearing before a court) and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to trial on the European law level. Taking into account the current guarantees of court standards, in my opinion, there is no legal possibility of interpreting Article 16 par. 3 of Regulation 987/2009 that would make the verification of the definitive decision as defined in the provision impossible. Thus, it should be assumed that the definitive decision has consequences only for the institution of another Member State and only under the condition that the decision has not been appealed against based on the national law regulations of the institution of residence.

Regardless of that, another question is asked: What does the phrase in Article 19 par. 3 "…the provisional determination of applicable legislation (…) shall become definitive…" mean from the legal point of view? Practically speaking, should the institution of residence issue a provisional decision first and inform another Member State and then issue the same but definitive decision and deliver it to the addressee or is it enough to issue a provisional decision and deliver it to the institution of another Member State and the applicant who should be informed that the time allowed for his/her appeal in accordance with the national law will depend on the decision of the institution of another Member State (which can report reservations within two months) and will start flowing after that date.

As far as the possibility of filing an appeal against the provisional decision is concerned, it seems that an appeal should be deemed to be premature, although, in my opinion, at that stage, the person concerned should have the right to par-

ticipate in the explanatory proceeding between the institutions of the Member States in order to guard his/her interests.

2.3.2. Determination of provisional legislation based on Article 6 of Regulation 987/2009

Another procedure of reaching agreement is based on Article 6 of Regulation 987/2009. From the point of view of the system, it must be assumed that it refers to any other proceeding of determining legislation applicable rather than the one determined based on Article 13 of Regulation 883/2004 in which this determination can raise doubts and dispute between the institutions of Member States. According to the former provision, unless otherwise provided for in the implementing Regulation, where there is a difference in views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States, the order of priority being determined as follows: (a) the legislation of the Member State where the person actually pursues his/her employment or self-employment, if the employment of self-employment is pursued in only one Member State; (b) the legislation of the Member State of residence where the person concerned performs his/her employment or self-employment in two or more Member States and part of this activity/activities in the Member State of residence or the person is not employed or self-employed; (c) in any other cases, the legislation of the Member State the application of which was first requested where the person pursues an activity or activities in two or more Member States (par. 1). Where there is a difference in views between the institutions or authorities of two or more Member States about which institution should provide the benefits in cash or in kind, the person concerned who could claim benefits if there was no dispute shall be entitled, on a provisional basis, to the benefits provided for by the legislation applied by the institution of his/her place of residence or – if that person does not reside on the territory of one of the Member States concerned – to the benefits provided for by the legislation applied by the institution to which the request was first submitted (par. 2). Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than a month after the date on which the difference of views, as referred to in par. 1 or 2 arose. The Administrative Commission[6] shall seek to reconcile the points of view within six months of the date on which the matter was brought before it (par. 3).

[6] For the role and legal status of the Administrative Commission see: D. Dzienisiuk, *Charakter prawny decyzji Komisji Administracyjnej do Spraw Koordynacji Systemów Zabezpieczenia Społecznego* [Legal character of the decisions of the Administrative Commission for Coordination of Social Security Systems], Ubezpieczenia Społeczne 2011, No. 1–2, pp. 17–23.

What is interesting, where the institutions of the given Member States do not reach agreement about the applicable legislation, neither Article 6 nor Article 16 of Regulation 987/2009 specifies how this situation should be resolved. Only the context of the system could suggest that after the procedure of Article 16 of Regulation 987/2009 has been exhausted, the procedure of Article 6 of the Regulation should start.

Taking the above-mentioned into account, a general conclusion can be made that based on the European Union regulations on coordination, it is not possible to exclude a person from the social insurance system of any Member State, and – on the other hand – make the person subject to the legislation of more than one Member State. It is worth mentioning that the provisionally determined legislation based on Article 6 of Regulation 883/2004, where there is no agreement between the Member States concerned, shall be in fact a definitive legislation but it is not certain whether such provisional determination requires the issue of a decision that can also be appealed against. Although the European Union law does not solve this issue, the national law of individual Member States can require the issue of a decision in each individual matter, which means that also in the case of provisional determination of the legislation the issue of such a decision is obligatory.

3. Verification of decisions on the determination of legislation applicable

3.1. Procedure before the competent institution and appellate proceeding

The possibility of verifying decisions on the determination of legislation applicable issued by a competent institution is another matter. The current legal state is rather complicated. It is worth mentioning that the proceeding before a competent institution is pending in accordance with the regulations of the given Member State and as far as the European Union coordination is concerned, the implementing provisions of the two regulations are additionally applicable. On the other hand, in the case of appellate proceeding, the provisions of the given Member State are applicable. What is most important, however, is that, in the case of the European Union coordination, the provisions of both regulations concern, first of all, the procedure between the institutions of the given Member States. This means that in the case of its violation, the appellate organ dealing with a complaint cannot (e.g. within its own procedure of evidence examination) follow a procedure agreed upon with the institution of another Member State and, in its appellate proceeding in particular, demand that the institutions of the other Member States undertake adequate steps. This would mean that the major instrument in the appellate proceeding, which would allow for forcing the competent institution of the given Member State to start

the procedure of reaching agreement, should be the repealing of the decision of the competent institution and referring it for re-examination. In this context, in order to ensure the implementation of the European Union Regulations' provisions on coordination, it would be necessary to adjust the provisions regulating appellate proceeding against the decisions issued by the competent institutions.

3.2. Assessment of the validity of an employment contract being the title to social insurance

The possibility of the assessment of the title to the social insurance system of a given Member State being the basis for determination of the legislation applicable (including e.g. the examination of the validity of an employment contract), especially in the context of the scope of competence of the designated institution, is another subject matter. The issue is well illustrated by the case that was adjudicated by the Polish Supreme Court (II UK 333/12), in which ZUS, as well as the courts of two instances, examined the validity of an employment contract with a foreign employer[7], which influenced the determination of the applicable legislation. Both the competent institution and the appellate courts, against the insured person's standpoint, decided that the employment contract concluded with the foreign employer was invalid (the contract had been concluded only in order to avoid paying the insurance premium in Poland) and due to that the person was not subject to the insurance system of the Member State where the person pursuits employment in accordance with Article 11 par. 2 of Regulation 883/2004. The Supreme Court did not agree with that standpoint.

The legislation applicable to employment contracts (being the title to social insurance) can be determined in various ways. Here, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) is applicable. In accordance with Article 8 of the Regulation, an individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country where the place of business which the employee was engaged is situated. This means that the assessment of employment could be made in accordance with the place where the contract is performed unless the parties decided otherwise.

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[7] On the same subject matter: K. Ślebzak, *Podleganie ubezpieczeniu społecznemu w przypadku jednoczesnego wykonywania pracy i prowadzenia działalności gospodarczej na terytorium dwóch państw członkowskich Unii Europejskiej* [Being subject to social insurance in the case of pursuing activities as an employed person and a self-employed person on the territory of two Member States of the European Union at the same time], PIZS 11/2013.

With respect to the coordination of social security systems, the legal relationship being the title to social insurance and the social insurance relationship are two independent legal relations that may be subject to the legislation of the different Member States. The difference is also visible in the context of definitions at the level of the European Union legal acts and the rulings of the Court of Justice of the EU on such concepts as an employee or contractual employment. This means that if the competent institution acting within the process of determination of the legislation applicable has doubts about the validity of a legal relation being the title to social insurance, it cannot decide on the matter on its own. First of all, it is obliged to determine if the person concerned – due to the existing contract – is subject to social insurance in another Member State. In the case such a fact is confirmed, it can challenge the grounds for providing the person with the social insurance system of the Member State concerned. This is the idea behind the resolution of problems arising in the case of disputes concerning the determination of legislation applicable as a basis for the provisions on the European Union coordination. In the cases concerning the determination of applicable legislation based on the coordination regulations, the institution of a given Member State is not authorised to assess the legal relation being the title to social insurance (here an employment relationship) in another Member State. The competence of courts in appellate proceedings concerning the validity of employment contracts should be viewed in a similar way.

By the way, it is worth mentioning that the provisions of Article 5 of the implementing regulation determine the matter of legal validity of documents and supporting evidence that have been issued in another Member State. Both the designated institution and courts are bound to comply with them. However, where there is doubt about the validity of a document or accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of the document. The issuing institution shall reconsider the grounds for issuing the documents and, if necessary, withdraws it (Article 5 par. 2 of Regulation 987/2009). Where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or accuracy of the facts of which the particulars contained therein are based, the institution of the place of stay or residence shall, in so far as this is possible, at the request of the competent institution, proceed to verification of the information or document (Article 5 par. 3 of Regulation 987/2009).

Summing up this part of the considerations, it can be stated that while at the stage of proceeding before a designated institution the rules in the context of competence to verify documents and supportive evidence are clear (this can be directly drawn from both Regulations of the European Union), it is not absolutely clear how the appellate organs should act where they have doubts about the provided

documents and supportive evidence. Moreover, having in mind the principle of being subject to single legislation, the appellate organ verifying the documents on its own cannot adjudicate in conflict with the rule. It would mean that the major form of adjudicating used by an appellate organ should be the repealing of the decision made by the competent institution and referring it for re-examination in order to carry out a procedure of reaching agreement based on the provisions of both Regulations. However, it would also be possible – based on the definition of the concept of "institution" as defined in Article 1 letter p of Regulation 883/2004 – to assume that appellate organs as institutions applying the European Union legislation on coordination are entitled (and even obliged) to undertake adequate actions based on Article 5 of Regulation 987/2009.

4. Conclusions

Having taken all the above-mentioned aspects into account, it is necessary to state that the determination of the applicable legislation in the context of a proceeding before a designated institution and then appellate organs is rather complicated. The lack of possibility of determination that is not in compliance with the provisions on the European Union coordination is a strict directive on acting. It applies to both the designated institutions and appellate organs. Thus, it is necessary to adjust the proceeding provisions regulating the appellate proceeding in the Member States so that those appellate organs had appropriate juridical rights (including those to adjudicate) that will not allow for the exclusion of a person form any social security system of a Member State or a resolution that would lead to being subject to the legislation of more than one Member State.

DETERMINATION OF THE LEGISLATION APPLICABLE AND THE PRINCIPLE OF BEING SUBJECT TO THE LEGISLATION OF A SINGLE MEMBER STATE – SELECTED ISSUES

Summary

The coordination of social security systems is regulated in the primary law of the European Union (Regulations No 883/2004 and 987/2009), which causes that the provisions are directly applied in the Member States. The general principle is the right to be subject to the legislation of a single Member State, which means that the designated institution of the Member State and other entities cannot make

a person excluded from a social security system or make him/her subject to the social security system of more than one Member State. In this light, the procedural aspects of determining the applicable legislation, especially the determination of the provisional legislation, seem to be particularly interesting. The article aims to present the issues connected with the determination of the legislation applicable, including the provisional one, and to consider the relations between the institutions of the Member States and between the institutions and the persons concerned as well as appellate organs.

USTALANIE USTAWODAWSTWA WŁAŚCIWEGO A ZASADA PODLEGANIA USTAWODAWSTWU JEDNEGO PAŃSTWA CZŁONKOWSKIEGO – WYBRANE ZAGADNIENIA

Streszczenie

Koordynacja systemów zabezpieczenia społecznego regulowana jest w prawie pierwotnym Unii Europejskiej (rozporządzenia: 883/2004 i 987/2009), co sprawia, że przepisy te są w państwach członkowskich stosowane bezpośrednio. Generalną zasadą jest podleganie ustawodawstwu jednego państwa członkowskiego, co sprawia, że zarówno instytucja właściwa państwa członkowskiego, jak i inne podmioty nie mogą doprowadzić ani do wyłączenia zainteresowanego z jakiegokolwiek systemu zabezpieczenia społecznego, jak i do objęcia go systemem zabezpieczenia społecznego więcej aniżeli jednego państwa członkowskiego. W tym świetle szczególnie interesująco przedstawiają się proceduralne aspekty ustalania ustawodawstwa właściwego, w szczególności wobec możliwości ustalenia ustawodawstwa mającego zastosowanie w sposób tymczasowy. Celem artykułu jest przedstawienie zagadnień związanych z określaniem ustawodawstwa właściwego, w tym również w sposób tymczasowy, uwzględniające relacje zachodzące zarówno pomiędzy instytucjami państw członkowskich, jak i relacje pomiędzy tymi instytucjami a zainteresowanym oraz organami odwoławczymi.

L'ÉTABLISSEMENT DE LA LÉGISLATION CONVENABLE ET LE PRINCIPE DE DÉPENDANCE À LA LÉGISLATION D'UN PAYS MEMBRE – QUELQUES QUESTIONS CHOISIES

Résumé

La coordination des systèmes de sécurité sociale est régularisée dans le droit primordial de l'Union européenne (règlements: 883/2004 et 987/2009) ce qui cause que ces règlements sont appliqués dans les pays membres d'une façon tout à fait directe. Le principe général parle de la dépendance d'un pays membre ce qui cause qu'également l'institution convenable d'un pays membre que les autres

sujets ne peuvent ni exclure cet intéressé du système de sécurité sociale ni le dépendre du système de sécurité sociale de plus d'un seul pays membre. Dans ce cadre les aspects procéduraux de l'établissement de la législation convenable se présentent extrêmement intéressants, et en particulier auprès de la possibilité de l'établissement de la législation qui peut être appliquée dans la manière provisoire. Le but de l'article est la présentation des questions sur la définition de la législation convenable, y compris la manière provisoire qui prennent en considération toutes les relations entre les institutions parmi les pays membres ainsi que les relations entre ces institutions et l'intéressé ainsi que les organes d'appel.

ОПРЕДЕЛЕНИЕ СООТВЕТСТВУЮЩЕГО ДЕЙСТВУЮЩЕГО ЗАКОНОДАТЕЛЬСТВА И ПРИНЦИП ПОДЧИНЕНИЯ ЗАКОНОДАТЕЛЬСТВА ОДНОГО ГОСУДАРСТВА-ЧЛЕНА – ОТДЕЛЬНЫЕ ВОПРОСЫ

Резюме

Координация систем социального обеспечения регулируется первоначальным законом Европейского союза (распоряжения: 883/2004 i 987/2009), в результате чего эти положения в государствах-членах ЕС применяются непосредственно. Основным принципом является подчинение законодательству отдельного государства-члена, что приводит к ситуации, когда как соответствующее учреждение государства-члена, так и другие субъекты не могут ни допустить исключения заинтересованного лица из какой бы то ни было системы социального обеспечения, ни обеспечить его системой соцобеспечения больше, нежели одного государства-члена. В свете этого достаточно интересно представлены процедурные аспекты определения соответствующего действующего законодательства, в особенности касательно возможности определения законодательства, предполагающего его временное применение. Целью статьи является освещение вопросов, связанных с определением соответствующего действующего законодательства, в том числе также на основе временного применения, с учётом отношений, возникающих как между учреждениями государств-членов, так и так и между этими учреждениями и заинтересованным лицом, а также апелляционными органами.

Mateusz Dróżdż

SECURITY OF SPORTS EVENTS IN POLAND – POLISH ACT ON MASS EVENTS SECURITY

I. Introduction

The issue of Polish football "hooliganism" and the organisation of the EURO 2012 football tournament in Poland and Ukraine has required not only building appropriate infrastructure but also implementing changes in numerous acts of law, setting out the rights and the duties of spectators at the matches. Poland's aim also was to present the country with regard to the implementation of the European Convention on Spectator Violence and Misbehaviour at Sport Events in particular at Football Games[1]. For that reason the aforementioned issue has been a prominent item on the political agenda in Poland.

In 2009 Polish government, after short deliberations, introduced the Act on Mass Events Security[2], which made it possible to ensure the safety and security at sport events. On the other hand, some commentators indicate that the Act contravened key principles[3] established in the Polish Constitution[4] and other legal acts[5]. This particular problem is not only limited to Poland but also concerns other countries as the Czech Republic or the United Kingdom[6].

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[1] European Convention on Spectator Violence and Misbehaviour at Sport Events in particular at Football Games, (ETS No. 120).

[2] Act on Mass Events Security of 20 March 2009 (Journal of Laws 2009, No. 62, item 504 with amendments that followed); hereinafter referred to as the "Act".

[3] See M. Warchoł, *Konstytucyjne problemy bezpieczeństwa imprez masowych* [Constitutional issues with regard to the security of mass events], Przegląd Legislacyjny 2012, No. 2; M. Adamski, *Nielegalne kary dla kibiców* [Illegal penalties for sports fans], Rzeczpospolita of 13 May 2013.

[4] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483); hereinafter referred to as (the) "Polish Constitution".

[5] H.E. Zadrożniak, *Imprezy masowe – wybrane dylematy oraz uwagi de lege ferenda* [Mass events – selected dilemmas and comments *de lege ferenda*], Samorząd Terytorialny 2008, No. 7–8; A. Janiłowski, B. Kwiatkowski, *Analiza krytyczna ustawy o bezpieczeństwie imprez masowych* [Critical analysis of the Act on the security of mass events], PKiNP 2010, No. 1; see M. Adamski, *Prawne wątpliwości po wypadku w Poznaniu* [Legal doubts after the accident in Poznań], Rzeczpospolita of 1 July 2013.

[6] See, for instance, G. Pearson, *A Cure Worse than the Disease? Reflections on Gough and Smith v. Chief Constable of Derbyshire*, Entertainment Law 2002, No. 11; C. Scott, G. Pearson, *Football banning, proportionality, and public order policing*, Howard Journal of Criminal Justice, 2006, No. 3.

In view of the impact of the current football "hooliganism", it is becoming increasingly relevant to adopt a comparative approach to the problem in question. The issue centres not only on the establishment of new legal rules, but also on the consideration of the sociological surveys, which very often indicate the main source of the aforementioned issue. Modern sport events have changed quite a bit and not all the changes have been for the better.

The main objective of the acts regulating that issue should be to reduce such behaviour as: alcohol consumption, fighting or throwing objects that may constitute a threat to the life or health of other persons. Within this context, a special role is played by the legislator, but also by police tactics, fans and police interactions. However, the Polish legislator has focused on the issue of imposing sanctions for "football hooliganism" and introduced only very harsh provisions, which cause a lot of problems in practice[7].

The rest of the paper is structured as follows: Section II discusses the history of the Act. Section III explores general information about the Act. The definition of "mass event", which is not used in most European countries, is explored in Section IV. It emphasizes practical problems resulting from that definition. Section V indicates the duties and rights of participants of mass events and also analyses penalties for non-compliance with the Act. Section VI presents the conclusion.

II. The Act's history

The Act replaced the former Act on Mass Events Security of 22 August 1997[8]. The legislator stated that the validity of the former act caused "an internal inconsistency, which is out of touch with other regulations and preventing the effective application of the law against rising stadium hooliganism"[9].

For that reason a new law on mass events security was passed. In the Act, the legislator defined the most important terms related to the scope of the Act and regulated the procedures of issuing permits for organizing a mass event. In the Act, the legislator also proposed new provisions to ensure the safety of a football match, for example, they introduced the institution of a club ban that consists in a prohibition on the participation in subsequent mass events organized by the

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[7] M. Adamski, *Prawny absurd: każdy mecz w Polsce miał spędzić na komendzie* [Legal absurd: he was to stay at the police station during each match], „Rzeczpospolita" of 12 September 2013; M. Adamski, *Imprezy à la „Projekt X" niezgodne z prawem* [Events a la "Project X" illegal], Rzeczpospolita of 30 October 2012; *Przez lampiony można mieć problem z prawem* [You can have a legal problem because of lanterns], Rzeczpospolita of 23 April 2013.

[8] Act on Mass Events Security of 22 August 1997 (Journal of Laws 1997, No. 106, item 680 with amendments that followed).

[9] From the justification of the Act's project (the Sejm of the Repulic of Poland – 6th term, vol. No. VI, 1074).

organizer[10]. In the project of the aforementioned amendment, a possibility to sell alcohol at sports events was envisaged, because as it was indicated "it was requested by local governments"[11]. Eventually, the legislator abandoned that idea.

The first amendment of the Act took place in July 2009. Its main aim was to specify sanctions for failure to appear in the police headquarters or other place designated by the commander of the police during a mass event. That loophole in the law caused that there were no sanctions for failure to comply with that obligation. That situation very often enabled a person with a football banning order to stay at the site of a mass sport event.

Further amendments to the Act were made with the passing of the Act on Sport of 25 June 2010[12]. In this case, the legislator concretized the definition of a closed area, and added various types of statutory authorization in order to adopt the Minister of Finance's regulation[13] imposing the obligation to conclude an insurance contract on the organizer.

One of the important, recent amendments took place on 12 October 2011[14]. Thanks to it, the legislator changed more than 30 provisions and added 11 articles. The amendments concerned about one third of the Act. The changes were established due to the organization of Euro 2012. However, in the justification of the project of amendments it was once again pointed out that "they make it possible to effectively combat the phenomenon of stadium hooliganism". In the justification, it was also stressed that ensuring mass participation in sport events should prevent "alcohol abuse and antisocial behaviour". At the same time, however, the amendments to the Act authorized the consumption of low-alcohol content drinks during a mass event. On the basis of that amendment, the legislator extended the scope of the club ban, which now also includes a ban on participation in away football matches. This change also allowed mass event organizer to refuse to sell tickets to persons when there is a reasonable suspicion that at the place and during the time of a mass event they may jeopardize its safety (that norm is considered unconstitutional by some commentators[15]). The aforementioned amendment also introduced mandatory accelerated proceedings in cases of unlawful acts within the meaning of the Act and the court's facultative obligation to rule that a person with a football ban should appear in the police

[10] A football ban already applies also to subsequent mass events in which the organizer's team takes part and which takes place outside his venue; About doubts regarding that amendment, see M. Dróżdż, *Zakaz klubowy to zbyt daleko idące ograniczenie* [Club ban – too far reaching restriction], Gazeta Prawna of 3 April 2012.

[11] From the justification of the Act's project (the Sejm – 6th term, vol. No. VI. 1074).

[12] Act of 22 July 2010 amending the Act on Mass Events' Security and Criminal Code (Journal of Laws 2010, No. 152, item 1021).

[13] Regulation of the Minister of Finance of 11 March 2010 on compulsory insurance of civil liability of the organizers of mass events, (Journal of Laws 2010, No. 54, item 323).

[14] Act of 31 August 2011 amending the Act on Mass Events' Security and some others acts (Journal of Laws 2011, No. 217, item 1280).

[15] See, for instance, M. Warchoł, *Konstytucyjne…* [Constitutional…], p. 36.

headquarters or another place designated by the commander of the police during a mass event. In this amendment, the legislator also set up, among others, criminal sanctions for an act of provoking fans to actions that pose a threat to an event's security.

III. General information about the Act

The new Act requires specific involvement of the responsible entities as well as implementation of various solutions enabling efficient and effective operations. According to the present text of the Act, the mass event organiser is responsible for security at mass events[16]. The organiser is obliged to ensure the safety of the individuals attending the event, the availability of medical services and support and proper technical conditions of the stadiums and other buildings where the event will take place. In addition, the organiser has a duty to protect public order. To guarantee all these things, they have to collaborate closely with the Police authorities.

In fulfilling the basic duties stipulated in the Act, organisers are also obliged to provide security and stewarding staff in numbers calculated in accordance with the number of people attending the event. The Act requires the mass event organiser to ensure the security and stewarding staff who must be trained on how to ensure mass event security. During the mass event, police forces do not have the right to attend sporting events. Only the commander of the police should be present during the event to ensure co-operation with the security manager. If the manager directly makes a written request to the police to intervene, they are allowed to enter and restore order[17]. Any kind of force against spectators can be used only if the spectators fail to obey orders to cease their unlawful behaviour.

In order to maintain public order and ensure the safety of football games, the police may collect, analyse and process information about individuals that may pose a threat to public order or safety, where there is a risk associated with such individuals. This process can be followed without the consent of the individual concerned.

The Act also includes norms, which give big power to a voivodeship governor to control the proceeding of obtaining the permit and continuation of mass events. In the case of a negative evaluation of the security level and the state of public order

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[16] M. Dróżdż, *Odpowiedzialność deliktowa oraz kontraktowa organizatora imprezy masowej* [Tort and contract liability of mass event organizer], Przegląd Sądowy 2013, No. 6, p. 61; T. Pajor, *Odpowiedzialność cywilna organizatora imprezy masowej* [Civil liability of mass event organizer], Przegląd Sądowy 2002, No. 10, p. 41.

[17] According to the Act, in the case when security services actions are ineffective, the organizer or the Security Manager requests the assistance of the Police and immediately confirms this fact by sending a written notification.

regarding a planned or finished mass event, a voivodeship governor, by means of an administrative decision, may prohibit a mass event in which spectators are seated in all sectors of a venue or in selected sectors or issue, for a definite or indefinite period, a ban prohibiting an organizer from organizing mass events in the whole voivodeship or in some of its parts. Also, a voivodeship governor may, by means of an administrative decision, stop a mass event if its continuation may pose a significant threat to life and health of persons and property and the actions by the organizer are insufficient to ensure safety and public order[18].

The Act included the norm regarding the complicated procedure of issuing permits for the organisation of mass events. To obtain a permit (which is also an administrative decision), the organiser has to attach for instance opinions of competent bodies, such as the fire brigade[19]. The aforementioned document is issued by local governments, i.e. an administrative officer of the commune, a mayor or president of the city. The permit specifies the requirements applicable to the event. This procedure and formalities (for instance, an organizer shall attach about 20 documents to the application for a permit to organize a mass event) cause that a lot of organizers try to avoid them when organising mass events, thus in that situation they are not obliged to obey rules established in the Act[20].

IV. Definition of a Mass Event

In the past, many organizers, due to the lack of a uniform definition of a mass event, avoided the requirements relating to the organization of mass events[21]. These entities often suggested, for instance, that a concert they organized is not a mass event within the meaning of the Act. In practice, that situation resulted in many disputes between them and law enforcement agencies. Hence, in the Act, the legislator established a legal definition of the concept of a "mass event".

Article 3 of the Act contains a catalogue of 19 legal definitions, including the definition of mass events. Paragraph 1 of the aforementioned article provides that the event shall mean a mass art and entertainment event, including a football game.

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[18] The issue causes a lot of discussion in the Polish doctrine. See for example mat, *Kontrowersje prawne związane z zamknięciem stadionu Legii* [Legal controversies in connection with Legia stadium closure], Rzeczpospolita of 4 December 2013.

[19] M. Dróżdż, *Co trzeba załatwić przed koncertem* [What is to be done before a concert], Rzeczpospolita of 15 January 2013.

[20] For that reason, a lot of football games organized in the lower league are not mass events and for instance, fans who have a ban on entering mass events may attend such an event; M. Adamski, *Zaostrzenie kar dla kibiców nie pomoże* [More severe penalties for sports fans will not help], Rzeczpospolita of 19 October 2013.

[21] C. Kąkol, *Bezpieczeństwo imprez masowych, Komentarz* [Security of mass events – Commentary], Warszawa 2012, p. 56 and next.

According to the interpretation of this provision, it should be expressed that the Act applies only to certain events, which are mostly commercial in nature and are usually adjusted to the achievement of specific profit. The legislator used a dichotomous division in that situation, i.e. mass events shall be a mass art or entertainment event. Thus, the legislator did not specify the definition of mass event directly[22].

In Art. 3 point 1 of the Act, some exclusions of the definition of a mass event were also established. The first of them has been included due to the specific location where the event takes place. The second group relates to the nature, type of event, and the people involved in the event.

According to the Act, events organized in theatres, operas, operetta houses, philharmonic halls, cinemas, museums, libraries, community centres and art galleries or other similar venues (like for instance an amphitheatre), as well as events in schools and educational institutions organized by managing bodies of these schools and institutions are not mass events. Events organized as a sports competition of children and young people and for disabled athletes, popular sports in the form of physical recreation generally accessible and free of charge, organized in open space, are not mass events, either. Closed events organized by employers for their employees are not mass events, either. All the above-mentioned exemptions must, however, comply with one condition, i.e. the type of an event has to be compliant with the intended use of the venue or site where the event is supposed to be held[23].

In accordance with Art. 2 of the Act, the provisions of this Act shall not apply to free-of-charge mass events organized on closed sites permanently managed by organizational entities subject to, subordinated or supervised by: the Minister of National Defence, Minister of Justice and ministers competent for: home affairs, education, higher education and physical education if these entities are the mass event's organizers. Such events are regulated by the executive regulations of the above-mentioned entities[24].

a) Mass art and entertainment events

In Art. 3 point 2 of the Act, the legislator included a definition of art and entertainment events. This provision stipulates that an art and entertainment event is an event of artistic or entertaining nature or an organized public projection of a television broadcast with the use of screens or devices allowing to project images with a diagonal of over 3 metres, which is supposed to take place

[22] G. Gozdór, *Bezpieczeństwo imprez masowych. Komentarz* [Security of mass events – Commentary], Warszawa 2008, pp. 54–56; C. Kąkol, *Bezpieczeństwo…* [Security…], p. 56.

[23] M. Dróżdż, *Definicja imprezy masowej – teoria a praktyka* [Definition of mass event – theory and practice], Edukacja Prawnicza 2013, No. 3, pp. 3–4.

[24] *Ibid.*, p. 4.

in a stadium or another venue not being a building or on a site allowing to hold a mass event for which the number of places made available for participants, specified in accordance with the provisions of the Construction Law and fire protection regulations, is not less than 1000, in a sports hall or in a building allowing to hold a mass event for which the number of places made available for participants, specified in accordance with the provisions of the Construction Law and fire protection regulations, is not less than 500[25].

b) Mass sports events

To determine the definition of mass sports events, the legislator adopted the same criteria as those used in Art. 3 point 2 of the Act. Pursuant to this normative act, a mass sports event shall mean a mass event the purpose of which is sport competition or popularization of physical education organised in a stadium or another venue not being a building or on a site allowing to hold a mass event for which the number of places made available for participants, specified in accordance with the provisions of the Construction Law and fire protection regulations, is at least 1000 and in the case of a sports hall or another site is not less than 300 or a site allowing to hold a mass event for which the number of places made available for participants is not less than 1000[26].

In Art. 3 of the Act, the legislator also defined a football game. Is was pointed out that a football game is one of the types of mass sports events the purpose of which is a football competition, organised in a stadium or another sports complex where the number of places made available by for participants, which is specified in accordance with the provisions of the Construction Law and fire protection regulations, is not less than 1000[27].

Taking that into consideration, it should be noted that the event is considered a mass one where the number of available places (not actual participants) exceeds the standard specified in advance. Therefore, if 10 supporters attend a football match, despite the 1500 places are available, it is still an event that is subject to the Act[28].

c) Risk mass events

Both kinds of mass events presented above may be recognized as increased risk mass events, which means mass events during which, based on the information about predicted threats or the previous experiences involving participants'

[25] M. Dróżdż, *Kiedy trzeba uzyskać zezwolenie na zorganizowanie imprezy masowej* [When is it necessary to obtain permission to organise a mas event], Rzeczpospolita of 19 December 2012.
[26] *Ibid.*; M. Dróżdż, *Definicja…* [Definition…], p. 5.
[27] *Ibid*.
[28] *Ibid*.

behaviour, there is a risk of possible acts of violence or aggression occurrence. The mass event risk may be stated only by the authority in its permit for the organization of a mass event.

In such a situation, for instance, the number of places made available for participants is not less than: 300 – for a stadium or another venue not being a building or site allowing to hold a mass event, 200 – for a sports hall or another building allowing to hold a mass event, 200 – for a football match[29].

V. Fans' rights under the Act and executive provisions

At the moment of a ticket purchase by a participant or the issue of another document allowing them to enter a mass event, the parties enter into an unnamed agreement[30], the normative content of which is most similar to a contract for services regulated by the Polish Civil Code[31]. This legal action, i.e. an agreement to make a mass event available, allows the viewer to participate in a particular mass event organized by the organizer in person or with third parties, and the organizer is required to provide the above events and to ensure the safety of the participants, in particular taking into account the rigors contained in the Act[32]. For that reason, at the moment of paying for the ticket, an agreement is concluded and participation in the mass event is authorised on the conditions there provided.

According to the Act, the tickets entitle fans to watch the game in the seat indicated. Moreover, as fans are consumers, they enjoy special protection under certain provisions of the Polish Civil Code and other acts, for instance, protection against unfair contractual terms[33].

After the introduction of one of the amendments to the Act, during soccer games in Poland, it is possible to buy and consume alcohol containing no more than 3.5% of alcohol. It is strictly prohibited to bring any alcohol into the stadium (it should be also emphasised that smoking during the event and also in public places is also strictly prohibited).

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[29] This regulation also causes a lot of problems in practice. See, for example, M. Adamski, *Rzecznik krytycznie o prawie na polskich stadionach* [Ombudsman critically about law at Polish stadiums], Rzeczpospolita of 30 November 2013.

[30] A. Koch, *Podstawy cywilnoprawnej odpowiedzialności organizatora za szkody powstałe w wyniku naruszeń porządku w związku z imprezami sportowymi* [Basis of civil legal liability of an organizer for damage resulting from public disorder during sports events], [in:] *Naruszenia porządku towarzyszące imprezom sportowym* [Public order violation in connection with sports events], Poznań 1995, p. 137.

[31] Polish Civil Code (Journal of Laws 1964, No. 16, item 28 with amendments that followed).

[32] T. Pajor, *Odpowiedzialność…* [Liability…], p. 41; To determine the significance of this agreement, part of the doctrine defines it as "a contract for the provision of a sports spectacle".

[33] Under Polish Civil Code they mean the terms of a contract concluded with a consumer that have not been individually negotiated shall not bind the consumer if they shape his rights and duties in a manner contrary to good practices with gross violation of his interests.

The interpretation of the Act is that the objective of the security services is to ensure the security of the spectators. During the events, stewards have to provide information on facilities and security requirements and the location of sanitary facilities, and, most importantly, the location of medical assistance places[34]. For the protection of the spectators, stewards must react quickly to any incidents that could breach the rights of the spectators. They are also obliged to control other spectators' compliance with the regulations to ensure safety. The stewards are also obliged to address any complaints and questions. Outside the stadium, fans may also obtain information from the police on issues related to organisation and, for example, transport. According to the Act, the National Chief of Police is the body responsible for processing, analysing and collecting information on mass event security. What is more, it also established a National Information Point for Mass Events, which is responsible for the exchange of information within the network of national football information points in other countries.

VI. Fans' duties under the Act and executive provisions

The Act establishes new standard of duties of the people attending mass events that were previously unknown in Poland, for example observance of the venue (premises) regulations or mass events regulations[35]. According to the Act, it is prohibited to enter restricted areas or to enter the stadium unlawfully. Spectators must follow orders given by the police as well as by stewards or other security guards. No alcoholic beverages, weapons or pyrotechnic products, or any objects that may pose a potential risk to the health of any spectators can be brought into the stadium. Clothes, and clothing accessories, such as scarves, cannot be used to prevent identification, and no items that promote racism or other discrimination are allowed. Spectators and even football players must not provoke other fans[36]. Nothing can be thrown onto the field and no violation of the bodily integrity of stewards, security guards or other fans will be tolerated.

Most of these behaviour patterns are considered criminal offences under Polish law. The court process may take place with the use of special proceedings, allowing a court ruling to be issued just hours after an arrest at an event.

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[34] M. Dróżdż, *A short legal guide for football fans: Rights and duties during Euro 2012 matches in Poland*, Warsaw Voice 2012, No. 6.

[35] *Ibid*.

[36] See the case in which a player of Legia Warsaw had a lawsuit for provoking fans. See *Piłkarz Ostrovii ukarany przez sąd za prowokowanie kibiców Polonii* [Ostrovia footballer sentenced for provoking Polonia supporters] of 21 October 2013 available on the website www. pap.pl

The provisions for such proceedings are defined in the Polish Petty-Offences' Proceeding Code[37] and also, in the Polish Criminal Procedure Code[38].

The court can ban a convicted fan from attending a stadium for a period from two to six years and can impose a fine. The fines can be extreme, ranging up to and exceeding five hundred thousand zlotys. In addition, certain offences and crimes may be dealt with by penalties of the restriction of liberty or imprisonment.

Under stadium regulations or mass events regulations, various items are prohibited in a stadium. In most cases, such items include: helmets, umbrellas, bottles, cans, mugs, jugs, alcoholic beverages, drugs and psychotropic substances and materials with political or religious content. It is also forbidden to bring: professional cameras and video cameras, animals, objects and clothes with commercial and promotional content, aerosols, large quantities of paper, loudspeakers, sirens or other sound-emitting devices or laser pointers. Fans should note that boxes, bags, backpacks and other items must be usually smaller than 25 cm × 25 cm × 25 cm.

The security guards and stewards are authorised, before and during the game, to verify identification documents, inspect bags and clothing and to check tickets. They will refuse entry to anyone who has a stadium ban or is under the influence of alcohol, drugs or psychotropic substances. They may also prohibit anyone who is behaving aggressively or provocatively from entering a match.

a) Sanctions for violation of the Act

In the Act the legislator established very restrictive and harsh punishments for failing to comply with the Act's provisions. In this case, the legislator followed the British norms[39] and in Chapter 9 of the Act enacted thirteen penal provisions, the main objective of which is to eliminate football hooliganism from Polish stadiums. Many of the penalties proposed in the Act are financial ones[40].

First of all, whoever fails to follow a security order issued pursuant to the Act, facility (ground) rules or regulations of a mass event by security or information staff, shall be subject to a penalty of deprivation of liberty or a fine not lower than PLN 2,000. The same punishment shall be imposed on anyone who, during a mass event, enters a place that is not intended for the public or even enters a sector other than that defined on a pass or another document that authorises

[37] Polish Petty-Offences' Code (Journal of Laws 2008, No. 133, item 848 with amendments that followed).

[38] Polish Criminal Procedure Code (Journal of Laws 1997, No. 89, item 555 with amendments that followed).

[39] See, for example, Act of 16 October 1989: *Football Spectators Act*, (1989 c. 37), available on website www. legislation.gov.pl

[40] C. Kąkol, *Bezpieczeństwo…* [Security…], p. 473.

entry to a mass event and refuses to leave the sector in spite of an order from an authorised person.

According to Art. 54 of the Act, whoever fails to follow an order issued by the Police or Military Gendarmerie at the venue and during a mass event shall be subject to a penalty of deprivation of liberty or a fine not lower than PLN 2,000.

Despite a permission to sell alcoholic beverages containing not more than 3.5% of alcohol, whoever, contrary to the provisions of the Act, brings or possesses alcoholic beverages during a mass event, shall be subject to a penalty of deprivation of liberty or a fine not lower than PLN 2,000.

A new crime, which was not established in the previous Act, is included in Art. 57 of the Act. Whoever, being obliged, fails to provide information on the security of a mass event or provides incorrect information in that respect, shall be subject to a penalty of deprivation of liberty or a fine not lower than PLN 2,000.

One of the most controversial norms is included in Art. 57a of the Act. According to that provision, whoever, at the venue and during a mass event, uses an item of clothing or an object to prevent or significantly hinder his/her identification, shall be subject to a penalty of deprivation of liberty or a fine not lower than PLN 2,000.

One of the most used provisions in practice is Art. 59 of the Act, which provides that whoever brings or possesses weapons within the meaning of the Act of 21 May 1999 on Weapons and Ammunition[41], pyrotechnical products, fire hazard materials and other hazardous objects or explosives during a mass event, shall be subject to a fine not lower than 180 times the daily fine, a penalty of restriction of liberty or a penalty of deprivation of liberty between three months and five years. The biggest issue nowadays in Poland is a large number of court proceedings for possessing pyrotechnical products.

According to Art.60 of the Act, whoever, during a mass sports event, including a football match, forces his/her way onto the facilities where the sports competitions are held or refuses to leave the place in spite of an order from an authorised person, shall be subject to a fine not lower than 180 times the daily fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to three years. Also, whoever, during a mass event, forces his/her way onto the facilities or to the grounds where the mass event is held or refuses to leave the place in spite of an order from an authorised person, shall be subject to a fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to one year.

Also, if someone, who is attending a mass event, throws an object that may constitute a threat to the life, health or security of the persons present on the

[41] Act of 21 May 1999 on Weapons and Ammunition (Journal of Laws 2004, No. 52, item 525, with amendments that followed).

ground or in the facilities where the mass event is held, or disturbs the course of the event in another way that is equally dangerous, shall be subject to a fine not lower than 120 times the daily fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to two years. The same punishment shall be imposed on anyone who, at the venue and during a mass event, violates bodily integrity of a member of the security and information staff. If the perpetrator, while perpetrating the acts referred above, uses an item of clothing or an object to cover his/her face and thus prevent or significantly hinder his/her identification, shall be subject to a fine not lower than 240 times the daily fine, a penalty of restriction of liberty or a penalty of deprivation of liberty between three months and five years.

The next very controversial provision, which causes a lot of doctrinal discussions, is Art.61 of the Act[42]. In accordance with that provision, whoever, at the venue and during a mass sports event, instigates fans to actions that are a threat to the event's security, shall be subject to a fine not lower than 180 times the daily fine or a penalty of restriction of liberty. For that reason, in practice, some court proceedings under investigation were against some football player who, for instance, showed fans the symbol of another team[43].

VII. Conclusion

The Act on Mass Events Security requires the organisers of mass events to guarantee the safety of spectators of those events, particularly sporting events. In general, the Act contains provisions included in the European Convention on Spectator Violence and Misbehaviour at Sporting Events in Particular at Football Matches, which pays special attention to programmes focused on the prevention of violation through sport and on building positive attitudes among fans and also conducted norm, which allow to analyse and evaluate activities undertaken by services and institutions in relation to sports events security.

The organisation of EURO 2012 required not only building new stadiums but also implementing new acts that establish rights and duties of football fans during matches that will take place there. What is more, the main aim of the legislation was to create legal regulations that ensure a safe environment for all spectators. For that reason, all enacted acts pay special attention to all aspects that may violate the aforementioned objective.

The Polish Act is the most relevant legal basis establishing the rights and duties of anyone attending matches. It should be expressed that some particular

[42] See, for instance, C. Kąkol, *Bezpieczeństwo…* [Security…], p. 575; W. Kotorowski, B. Kutrzępa, *Bezpieczeństwo imprez masowych. Komentarz do ustawy o bezpieczeństwie imprez masowych* [Security of mass events – Commentary on the Act on the security of mass events], Warszawa 2010, p. 188.

[43] See note No. 36.

internal acts of UEFA or FIFA will also affect other rights and duties, and for that reason, it is very important to read through the stadium regulations established by UEFA or FIFA.

However, in my opinion, some of the provisions of the Act contravened some key principles established in the Polish Constitution. For example, the institution of a club ban violates Art. 45 of that Act, which provides everyone has the right to court[44]. What is more, very often, the legislator used in the text of the Act indefinite clauses that allow some entities to use the Act to issue very controversial decisions. For example, in Poland, very often, a voivodeship governor closed stadiums or selected parts of a stadium due to the fact that the future mass events might violate public order. The problem is that in justification of that decision the aforementioned entities very often state that the example of behaviour that may cause that situation is, for instance, the fans' former conduct in the course of the game[45] or even offensive and vulgar slogans expressed earlier by supporters of one team[46]. Despite several changes, the Act still has various mistakes, which due to the volume of the work, cannot be thoroughly discussed herein (for example Art. 26 of the Act states that "To the application to a person appointed the Security Manager, which is referred to in Article 25 (1)(1), the organizer attaches (…) along with his personal information"[47].

As I mentioned earlier, modern sport has changed and the norms that regulate it have to be different[48] than, for example, those established in the mid-twentieth century. However, in such a case, the legislator cannot forget the basic principle of the rule of law, i.e. the right to court. For that reason, it is relevant to create a legal norm that will ensure security at sport events but also will be in accordance with the rule of law. What is more, it should be underlined that very often behaviour of some fans is a sociological issue rather than a legal one. If the legislators do not remember that rule, the rules that they establish may be totally ineffective. For that reason, I agree with Professor Pearson, who wrote in one of his papers that "These apparent protections are proving incapable of protecting the civil liberties of football fans that have been convicted of no offence from an overly zealous executive that has become obsessed with protecting the nation's reputation from the so-called "disease" that is football crowd disorder"[49].

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[44] T. Woś, H. Knysiak-Molczyk, M. Romańska, *Postępowanie sądowoadministracyjne* [Administrative juridical proceeding], Warszawa 2009, pp. 19–20.

[45] Decision BZK – II.6110.2.9.2013.AU.

[46] Decision ZK.I.68.31.2011.

[47] M. Dróżdż, *Czy przepisy dotyczące organizacji meczów piłki nożnej wymagają zmian?* [Do the provisions on football match organisation require changes?], Rzeczpospolita of 3 January 2013.

[48] See also: L.M.K. Lefteroff, *Excessive heckling and violent behavior at sporting events: A legal solution?* Business Law Review of the University of Miami School of Law 2005, No. 119.

[49] G. Pearson, *A Cure…*, p. 101.

SECURITY OF SPORTS EVENTS IN POLAND – POLISH ACT ON MASS EVENTS SECURITY

Summary

The article presents a general description of the Act on Mass Events Security, whose application in practice causes a lot of problems. The article aims to present the provisions of the Polish Act that regulates the security of sports events in Poland. The article presents an interpretation on various provisions of the aforementioned Act. The article provides the history of the Act, general information about it and a definition of "mass event". The paper also emphasizes practical problems that the definition causes. The article also points out the duties and rights of the participants of mass events and also presents the sanction for non-compliance with the Act.

BEZPIECZEŃSTWO IMPREZ SPORTOWYCH W POLSCE – POLSKA USTAWA O BEZPIECZEŃSTWIE IMPREZ MASOWYCH

Streszczenie

W artykule przedstawiono ogólny opis przepisów ustawy o bezpieczeństwie imprez masowych, których stosowanie w praktyce powoduje wiele problemów. Celem artykułu jest przedstawienie ustawy, która reguluje bezpieczeństwo imprez sportowych w Polsce. W artykule dokonano interpretacji jej różnych przepisów. Artykuł zawiera historię ustanowienia ustawy oraz ogólne informacje na jej temat. Praca opisuje także definicję „imprezy masowej". Artykuł przedstawia również praktyczne problemy, które powoduje ta definicja, oraz obowiązki i prawa uczestników imprez masowych, a także sankcje za nieprzestrzeganie ustawy.

LA SÉCURITÉ DES MANIFESTATIONS SPORTIVES DE MASSE EN POLOGNE – LE DROIT POLONAIS SUR LA SÉCURITÉ DES MANIFESTATIONS DE MASSE

Résumé

Dans l'article l'auteur présente une description générale des règlements du droit de la sureté des manifestations de masse parce que leur mise en pratique cause beaucoup de problèmes. Le but de cet article est la présentation du droit qui régularise la sureté des manifestations sportives en Pologne. Dans l'article l'auteur interprète ses différents règlements parce que l'article contient l'histoire de constituer le droit

ainsi que les informations générales à ce sujet. Il donne aussi la définition de la «manifestation de masse». Cet article présente quelques problèmes pratiques causés par cette définition ainsi que les droits et devoirs des participants des manifestations de masse et les sanctions contre non respect de ce droit.

БЕЗОПАСНОСТЬ СПОРТИВНЫХ МЕРОПРИЯТИЙ В ПОЛЬШЕ – ПОЛЬСКИЙ ЗАКОН О БЕЗОПАСНОСТИ МАССОВЫХ МЕРОПРИЯТИЙ

Резюме

В статье представлена общая характеристика положений закона о безопасности массовых мероприятий, применение которых на практике создаёт множество проблем. Целью данной статьи является освещение закона, регулирующего безопасность спортивных мероприятий в Польше. В статье произведена интерпретация его различных положений. Статья включает историю установления закона, а также общие информации о нём. Работа содержит также характеристику определения «массового мероприятия». Статья представляет также проблемы практического характера, вызванные этим определением, обязанности и права участников массовых мероприятий, а также санкции за несоблюдение закона.

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