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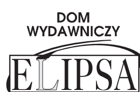

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Maria Kruk

STABILITY AND CHANGES IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

The current Constitution of the Republic of Poland was passed in 1997. But soon after it entered into force, proposals were put forward to amend it. Some of them were formalised and took the form of Bills amending the Constitution, but the majority of them were projects announced publicly in the form of new texts of the basic law, although they have never been finalised.

Such an intensive trend is worth analysing more deeply: What is the direction of the proposed changes and are they rational? What disadvantageous consequences for law, politics and public life result from the current Constitution? Can the amendment projects constitute guarantees for real and positive changes? Before this analysis can find answers to these and many other questions, it is necessary to present a short characteristic of the Constitution currently in force and the circumstances accompanying its development and adoption.

When in 1989 political system transformation started, one of the objectives was the amendment of the Constitution of 1952, which was gracefully called the 'Stalinist' one, which at the beginning was supposed to add it splendour but then became a disgraceful epithet. It introduced a schematic political system based on the accumulation of power, the hegemony of the communist party and its allied political associations, the lack of free elections and the lack of protection of citizens' rights and freedoms. As early as in 1989 successive amendments introduced changes to the system of the state institutions (President instead of the Council of State, the Senate as an upper chamber of the Parliament, the National Council of the Judiciary safeguarding the independence of courts, partly free elections, and recognition of international law), which together with some earlier democratic changes (the Supreme Administrative Court in 1980, the Constitutional Tribunal and the Tribunal of State in 1982, the Human Rights Defender in 1987) indicated a clearly new direction towards a political system although the old constitution was still in force. The introduction of a constitutional principle of a democratic state of law in December 1989 was of great importance in the field. The Constitutional Tribunal used it broadly in

order to find democratic principles in the text of the old Constitution although they did not actually exist in it. In spite of openness to new axiology and the ease of application of the new principles, and even fully free democratic election held in 1991, the adoption of a new constitution – unlike in other countries of East-Central Europe – was unsuccessful. That is why in 1992 Constitutional Act on mutual relations between the legislative and executive powers and the territorial self-government was passed. The Constitutional Act was for a transition period, which was traditionally called like in Poland of 1919 and 1947 the 'Small Constitution'[1], which was only a substitute for the new constitution but finally repealed the 'Stalinist one' and implemented a new political system of public authorities[2]. The Small Constitution was based on the already developed doctrine and the choice of the future system of government, and the conception of rights and fundamental freedoms. As far as the former area is concerned, it proposed the system that can be called a parliamentary one, as far as the latter is concerned, it introduced a category of human rights and freedoms corresponding to the international democratic standards. As a result, over two years of being in force, the Small Constitution was a 'test' on the use of the new principles in the state's practice and had influence on the provisions of the new constitution with respect to their adoption and the correction.

Simultaneously, a new constitution was being developed. The task was so inspiring that tens of the basic law projects came into being: developed by political parties, scientific centres, associations and individuals[3]. Formal work was being done based on special Act of 1992 on the mode of developing and passing the Constitution of the Republic of Poland[4]. As a result, apart from the Bills developed by the President and the Senate, a few political parties' and citizens'[5] projects were presented for debate before the National Assembly (the two chambers that were to pass a new constitution jointly). Thus, the range of the Bill's 'authors' was considerable, especially as the parties' projects represented all parliamentary factions[6]. Eventually, the Parliament worked on seven draft

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[1] Of 17 October 1992, Journal of Laws No. 84, item 426; see: *Małe Konstytucje. Ustawy zasadnicze okresów przejściowych 1919–1947–1992* [Small Constitutions – basic laws of the transition periods of 1919–1947–1992], (ed.) R. Jastrzębski, M. Zubik, Wydawnictwo Sejmowe, Warszawa 2014.

[2] The Act temporarily maintained a series of provision of the former Constitution in force, inter alia, the provisions on courts, other organs of the state, citizens' rights and duties.

[3] See, inter alia, collections: M. Kallas, *Projekty konstytucyjne 1089–1991* [Constitutional projects in 1089–1991], Wydawnictwo Sejmowe, Warszawa 1992; R. Chruściak, *Projekty konstytucji 1993–1997* [Constitution projects in 1993–1997], Part I and Part II, Wydawnictwo Sejmowe, 1997.

[4] Of 23 April 1992, Journal of Laws No. 67, item 336.

[5] The President and groups of at least 56 members of the National Assembly (the Sejm and the Senate) had the right to legislative initiative, and after the amendment of 1994, also 500,000 citizens. Projects developed by the Senate and political parties were therefore signed and formally filed by groups of MPs. The Trade Union Solidarność developed the citizens' project.

[6] When, in connection with the dissolution of the Parliament in 1993, not all the parties won seats in the Parliament, the Constitutional Act gave their projects legal validity so that they were not discontinued. After the election, some parties filed new projects or withdrew theirs.

Bills. After the first reading, all of them were referred to the National Assembly Constitutional Committee composed of 46 MPs and 10 Senators[7]. There were many other people who could present their opinions to the Committee (but could not vote), inter alia, representatives of Churches, civil organisations and state institution: the government, the President, the judiciary, Polish National Bank etc., and experts.

Such a broad representation is very important as it demonstrates the characteristic features of the mode of the work on developing the new constitution. If we add the time spent as well as diligent and laborious debates over every conception, every principle and every provision, it cannot be said that the new constitution was prepared without appropriate reflection (sometimes the mode of work was compared to a series of academic seminars), in the peace and quiet of a comfortable study, in a circle of confidants or tailored. Moreover, there were many disputes, opponents and opposing concepts until a compromise was reached and let a considerable majority of votes[8] pass the constitution. It was then also approved of in a referendum although it won a small majority this time.

The inspirations for the principles came from many different sources. On the one hand, these were axiology standards and the systems of western democracies as well as the Council of Europe and the European Union (at the time, Poland was already associated with the EU), on the other hand these were Poland's own constitutional traditions of the interwar period and a several hundred years old parliamentary system[9] and the experience of the period 1992–1997, which was mentioned above.[10] In general, the Constitution of the Republic of Poland of 2 April 1997 introduced a system of government based on the basic principle of answerability to the Parliament (the Sejm), with a dualistic executive power (the Council of Ministers and the President) applying, after the experience from the Small Constitution, a thorough separation of the competence of the two entities, giving the Government the task of carrying out the policy of the state and exempting the Cabinet from the supervision by the President. The President was given competence typical of the head of state, including tasks connected with diplomacy and the supreme command over the Armed Forces. In addition, the President has a few powers within the system of checks and balances (to

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[7] There are 460 MPs in the Sejm and 100 Senators in the Senate.

[8] The required majority of 2/3 was substantially exceeded in every ballot.

[9] M. Kruk, *Le parlement dans la tradition constitutionnelle polonaise*, [in:] *L'Etat et le droit d'Est en Ouest*, Mélange Michel Lesage, Paris 2006, p. 201.

[10] See, inter alia, M. Kruk-Jarosz, *Drafting the Polish Constitution*, Journal of Constitutional Law in Eastern and Central Europe, vol. 2/1995, no. 1, p. 112; M. Kruk, E. Popławska, *Les criteres et les prémisses de la reception des modeles constitutionnels lors de la transformation démocratique en Europe centrale et orientale. L'expérience polonaise*, [in:] *Imperialisme et chauvinisme juridiques/Imperialism and Chauvinism in the Law*, Reports presented to a colloquium on the occasion of the 20th anniversary of Swiss Institute of Comparative Law, Lausanne, 3–4 October 2002, Publication de l'Institut suisse de droit comparé, no. 48, p. 111; W. Sokolewicz, *La Pologne en marche vers une costitution démocratique* (1989–1997), [in:] *L'Etat et droit…*, *op. cit.*, p. 303.

veto Acts, dissolve the Sejm in specified situations), to nominate the Prime Minister and appoint the Council of Ministers, to introduce legislation, appoint judges etc. with no requirement for counter-signature of the Prime Minister (the so-called prerogatives). The position of the Prime Minister towards the ministers is developed following the chancellor's pattern but strengthened by the constructive vote of no confidence. It was supposed to prevent the so-called 'negative majority' in the Sejm and does it successfully. The transformation resulted in the multiplicity of political parties and the proportional electoral system does not eliminate them from the Parliament.

As it was mentioned, the Constitution of the Republic of Poland entered into force in October 1997, and a month later there was the first motion to amend it. It postulated that the parliamentary immunity is removed[11]. The issue had been discussed in the course of work on the Bill in the Constitutional Committee of the National Assembly and even after the Bill was passed by the Parliament, the President made an amendment to it[12], however, eventually the National Assembly voted it down. The persistence of that postulate does not really surprise because it is repeated in various circles, including parliamentarians, but the matter has never been finalised.

In the context of further proposals for change, that first single amendment was worth mentioning only because of its persistently repeated contents constituting a constant topic of constitutional debates. There were not many such incidental proposals although they referred to rather sensitive social issues as a rule. They include, inter alia, an attempt to strengthen the right to life by establishing the protection of the 'conceived life' aimed at the complete elimination of legal abortion (the regulation of the scope of admissible abortion in Poland constitutes a typical social compromise that was to be deleted by an amendment). This amendment, however subject to legislative work, has not been passed. Draft amendments filed or just proposed by various entities (political parties, parliamentary committees, the Human Rights Defender, public prosecutors) and concerning particular institutions (immunity again, introduction of the Council of State, the Constitutional Council, the Constitutional Convention, the change of the status of the Prosecutor General Office etc.) were numerous and all of them have been ineffective[13].

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[11] An MP cannot be subject to criminal proceeding without the consent of the Sejm, but he/she may give one's own consent.

[12] The procedure envisaged two readings of the Bill in the National Assembly and after passing it in the second reading, referral to the President, who was entitled to make amendments to be passed or rejected by the National Assembly (in the third reading, which ended in final ballot). Then the President ordered a referendum.

[13] Thorough descriptions of the proposals and the mode of work on them can be found in two works: R. Chruściak, *Prace konstytucyjne w latach 1997–2007* [Constitutional work in the period 1997–2007], and *ibid.*, *Prace konstytucyjne w latach 2008–2011* [Constitutional work in the period 2008–2011], both: Wydawnictwo Sejmowe Warszawa, 2009 and 2013, respectively (hereinafter cited as vol. I and vol. II).

However, two amendments to the Constitution have been passed successfully. The first of them resulted from the necessity to implement the European Union institution of the European Arrest Warrant, which the Polish Constitutional Tribunal adjudicated as being in conflict with a ban on extradition laid down in the Constitution in a definite form. This resulted in the change to the constitutional principle in the spirit of the EU law (Article 55). The other amendment that many constitutionalists and politicians received with scepticism as useless or even in conflict with the principle of free elections was banning persons convicted of a crime pursued by a public prosecutor from standing for election (Article 99 item 3). A little journalistic significance of this change was acceptable enough for all the parliamentary parties and they overcame the difficult barrier to a change in the Polish Constitution[14].

Only these two amendments were passed. Politicians soon learned that amendments to the Constitution, especially such that implemented the ideas of one political party or would serve the promotion of that party to the electorate is not possible because of the others' resistance. And none of them has enough strength, even the ruling party, which together with the coalition party can exceed the threshold of the fifty per cent of the Sejm membership. On the other hand, a strong suspicion has been established that the initiation of the procedure of amending the Constitution in order to achieve a particular objective would swing the door open to other 'smuggled' amendments or deform the initial proposal in such a way that the proposer would give it up. That was the case with the President's project concerning the addition of the so-called "European Chapter", i.e. a collection of the provisions on Poland's membership in the European Union in one new chapter (the current Constitution was passed a few years before Poland's accession to the European Union in 2004) and the Constitution contained only a few indispensable provisions with respect to that area[15].

The lack of trust in the possibility to amend the Constitution caused that filing the Bill on the Constitutional Tribunal, the President did not even plan to precede it with a desirable amendment to the Constitution because he expected similarly uncertain prospects that the proposal would succeed[16].

In such a situation a difficult tendency occurred, namely towards filing a considerable number of proposals of full new constitution texts or excessive revisions endorsed by political parties or other entities. The ease of filing such

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[14] Apart from other conditions, it requires that the two chambers vote for: the majority of 2/3 in the Sejm and supermajority in the Senate, which is not easy to obtain (four stable parties and temporarily 2–3 small parties, and non-party members).

[15] They concerned the mode of ratification of the Treaty on the transfer of some competences of the state organs to an international organ or an international organisation and awarding the act passed by that organ under the above-mentioned Treaty supremacy when there is a conflict with the statute.

[16] It was described in the former English version of the journal, in an article by M. Kruk, *Polish constitutional court: To change or not to change? (A few reflexions on the new Constitutional Tribunal Bill)*, Ius Novum 2/2014, p. 11.

proposals results from the fact that there are no prospects for passing them, which makes it possible to advertise political ideas without the need to take responsibility for them. This way, the opposition 'changes the political system' in accordance with its programme, the ruling party 'fulfils' promises made during the electoral campaign, other entities having considerable standing in the community look for solutions to some trouble coming into being in the process of governing, and some others 'exercise' the skills in developing concepts of various political systems. Such ready-made 'new constitutions' are even not filed as Bills. Either its authors do not have the right of legislative initiative (it is the right of 1/5 of the Sejm members, i.e. 92 MPs, the President and the Senate), or they are not convinced that it is worth fighting. If they had accidentally been filed, they had not been passed eventually.

But it is difficult not to have a look at some, at least ten, projects of a new political system. What are these political system ideas? There were seven projects of a new constitution (not taking into account a few versions of some of them), and two excessive revisions[17]. The authors were six political parties[18] (some of them already non-existent); three (completely different) projects were developed by the Human Rights Defender[19]. Apart from that, a social report on fundamental changes to the system of government[20] was announced, and recently one of the newspapers has been publishing a series of publications on successive proposals.

Most of these projects focused on the issue of the system of government, i.e. the relations between the Parliament, the Government and the President. It mainly concerned the relations within the executive power. With respect to that, there were a few options, including extremely radical ones that assumed that there was a system with no President or no Government. Those who were not so radical can be divided into those who, to a larger extent than at present, ousted the President from the executive power and left him with purely representative functions, and those who, quite the opposite, made him the head of the executive power supervising or even managing the Government. This focus on the issue of the system of government results from the fact that in accordance with the present Constitution, the executive power is dualistic, but – unlike in the classic parliamentary system – the head of state is elected in a direct general election, is not answerable to the Parliament but does not have broad executive

[17] Civic Platform's conclusions, as the only ones, were subject to examination by the Sejm.

[18] Law and Justice (PiS) – main opposition party, Self-Defence of the Republic of Poland (Samoobrona) and the League of Polish Families (LPR) – were in the ruling coalition in the period 2005–2007 – non-existent now, Civic Platform (PO) – ruling party since 2007 (in coalition with the Polish People's Party – PSL), Sprawiedliwa Polska [Just Poland] – new party, the Democratic Left Alliance (SLD).

[19] Professor Janusz Kochanowski, died in plane crash in Smolensk in 2010, announced the projects in 2009.

[20] Association "Doświadczenie i Przyszłość" [Experience and Future], in which the main conceptions of constitutional changes are attributed to three former Presidents of the Constitutional Tribunal.

competence. The internal and foreign policy of the state is the competence of the Government (the Cabinet called the Council of Ministers), which has full standard prerogatives in the area, with the exception of those clearly reserved for other state organs (Article 146 of the Constitution), including those for the President. However, there are not many reserved for the President and the Constitution requires that even in these areas the President cooperate with the Government. It is sometimes the source of tension. The President who enjoys strong legitimacy from a general election has little executive competence in contrast to the Government whose legitimacy is indirect – it is usually a coalition and the electorate have no influence on its composition, i.e. the choice of ministers. The decisions are influenced by the ruling coalition having a slight majority in the Sejm and only when there are no division between the partners or misunderstandings. This original sin of the Constitution[21] caused that there were situations when the Presidents fought for 'more', for 'what they wanted' or clearly criticised the Government, or in their official speeches presented their own, not necessarily agreed with the Government, opinion. The dispute over the participation in the European Council meeting is the most memorable one: the Prime Minister did not take into account the participation of the President, however, the latter turned up in Brussels. Eventually, on the Prime Minister' motion, the dispute was solved by the Constitutional Tribunal[22]. There were no other such spectacular conflicts, however, during the successive terms there were some Government's activities or – more often – the President's ones, which the media and the public perceived as a result of that lack of balance between the legitimacy and competence, as the President's typical attempt to get out of the straitjacket of the Constitution and to increase his influence on the executive, or to make the Government's life a little more difficult, or to emphasise his independence[23]. It would be difficult, however, to point out a case of evident breach of the Constitution by any of the organs, or such a practice that would mean falsifying the Constitution by actual seizure of the executive power by the President, or obstruction of the executive by persistent conflicts or rivalry between the two parties to the executive power. Nothing like that has taken place, especially as over quite long periods the President, the Government and

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[21] The first presidential general election took place on 25 November (and 9 December – second tour) 1990 when "The Nation" elected Lech Wałęsa in the first fully democratic ballot (the former President was elected based on a political contract in 1989 by the National Assembly). Then it was argued that the nation must not be deprived of the right.

[22] The Constitution envisages a possibility that the Constitutional Tribunal might resolve disputes over competence of the state organs (Article 189). Judgement Kpt 2/08 of 20 May 2009; gloss: M. Kruk, Przegląd Sejmowy no. 1/2010, p. 174.

[23] It can be noted that in the period of the so-called co-habitation, the Presidents vetoed many more Acts than when the ruling party and the President came from the same party, or when appointing the Government, they emphasised their autonomy but in practice they always appointed the Prime Minister nominated by the party (coalition) that won the election.

the parliamentary majority came from the same or similar political background (both organs came from the same party or a coalition). All the activities of the particular segments of government were and are contained within the constitutional framework although they sometimes cause political (sometimes social) frictions. Thus, if this issue drives amendment-related activeness, the real reasons are rather in the political parties' feeling that they should demonstrate their own ideas of a political system and are looking for solutions: shall the President have more power or shall the Government have it? And, of course, in connection with related issues. It is not very original. Although, as it was already mentioned, one of the opinion-forming, right wing Polish newspapers, Rzeczpospolita, started a cycle of publications called *Constitution – time for change* and invites well-known people to present their ideas of a new basic law. Here too, as one can expect, opinions are contradictory in the same spirit although they do not represent party views. But this will be discussed later.

What else do the authors of the new constitution projects propose changing? As always, the issue of MPs' immunity is a perfect topic (as it was mentioned above, postulating that the formal immunity is annulled is very popular). The proposals often contain an idea to decrease the number of members in the chambers[24], which was included in the proposals of Civic Platform and has been very popular with the public recently. There were also suggestions that the upper chamber of the Parliament, the Senate, should be dissolved or changed into a chamber representing the interests of territorial self-government (left wing ideas), or composed of the representatives of elites (including bishops, ex-Presidents etc.), which in fact were nothing new because such proposals had been formulated in the 1990s. Another issue is the continually discussed idea of single-member constituencies, i.e. repealing the constitutional principle of the proportional representation electoral system (in 2011, Senators were elected in single-member constituencies and as the results show the hope that the first-past-the-post system would help make elections less party-oriented remained unfulfilled. The widespread opinion that single-member constituencies will be conducive to ensuring real representation makes political parties eagerly support this postulate. However, nobody knows if they are sincere because in order to introduce such a system it would be enough to make a really cosmetic amendment to the Constitution, i.e. delete the word 'proportional' from the catalogue of electoral law provisions (Article 96 item 2 of the Constitution). But this is not happening somehow.

As it was mentioned above, apart from the proposals to change particular constitutional institutions, the dossier also contains a big number of full projects of a new constitution, even such that maintain a considerable majority of the

[24] E.g.: from 460 to 300 in the Sejm, and in the Senate from 100 to 44 Senators.

current text, so that the party being the author of the project could boast of an epoch-making achievement of developing a new constitution[25]. The best-known project was that developed by Peace and Justice, treated by the party and in the public perception as the Constitution of the Fourth (IV) Republic of Poland[26]. The institution-related part of the project did not introduce radical changes, however, it introduced a specific atmosphere in the sphere of ideology and axiology proposing aggravation of the 'adjudication' of the period of communism (the so-called lustration) on the one hand, and on the other hand – attributes of a strong state (the first phase of the project in the 2005 electoral campaign was entitled *Strong President, honest Poland*). Although none of the versions of the Constitution of the IV Republic of Poland has ever been passed, the period when Peace and Justice was in power (2005–2007) is often called the Fourth Republic of Poland.

Three projects of a constitution developed by the Human Rights Defender proposed three different types of government introducing other elements of change in the present system. Their relatively small connection with political realities and the experience of democracy in Poland incline us to assume that they provided the political class with a theoretical offer of political systems to choose from[27].

Trying to fulfil its promises of the electoral campaign, Civic Platform also worked on a project of a new constitution, which was even subject to parliamentary procedure, however, inefficiently. The project (also a few projects developed by MPs, since 2005[28]) was not a full text of a new basic law but was in the form of amendments to several provisions. It was developed based on the former documents edited by think tanks (experts). It decreased the number of MPs and Senators, repealed the principle of proportional elections and changed, in a way favourable for the Government, the relations between the President and the Government. One cannot forget that the final project was created in the difficult period of co-habitation (2007–2010) and the above-mentioned constitutional dispute between the President and the Prime Minister.

Regardless of the changes formalised in the projects, political parties presented their constitutional ideas in their electoral programmes. The issues

[25] For example, the project by Self-Defence (farmers' right wing), see: R. Chruściak, *op. cit.*, vol. I, p. 139.

[26] The Preamble to the present Constitution of 1997 introduced a term "the Third Republic". Having in mind that Poland of the interwar period was called the Second Republic, it was aimed at eliminating the undemocratic Constitution of 1952 from that numerical sequence. The project developed by PiS did not contain the formal name "the Fourth Republic of Poland", a project by a coalition party – LPR (national right wing) used it. For both projects see: R. Chruściak, *ibid.*, p. 143 and 133 respectively, and 333 (PiS), and also project by PiS, version of 2010: vol. II, p. 530.

[27] All three texts: see R. Chruściak, *op. cit.*, vol. II, successively: p. 438, p. 476 and p. 499.

[28] See R. Chruściak, *op. cit.*, vol. I, p. 384 and vol. II, p. 411.

were also analysed in scientific works, most often from the point of view of what is worth changing in the Constitution[29].

As it was mentioned above, recently the press has been involved in changing the Constitution, drawing the conclusion expressed by the left-wing leader that "the Constitution is not the Bible"[30]; it has been in force for 18 years so it is time to change it. Some of the opinions mentioned so far may be described by the statements characteristic of them: "It must be clear who rules"[31]. So, to make clear who rules, the ex-President Lech Wałęsa states: "I am for the presidential system"[32], and a philosopher involved in the evaluation of public matters responds: "God, save us from a strong president"[33]. One can say that it is like getting stuck in a rut again: and some want to have a strong president and others want to have a strong government, but these are only slogans. When it comes to real solutions, there is a lack of consistency, especially – what even worse – a lack of prediction of the consequences of the proposed principles. The third group is composed of those who are against changes: "I discourage you from introducing a revolution in the Constitution", says the ex-President of the Constitutional Tribunal and adds with conviction that this Constitution "worked well many times"[34], and ex-President Aleksander Kwaśniewski adds that the real social problems are the issues that can be solved with the amendments to the Constitution and alluding to the dispute on Act on in vitro, states: "We are not going to introduce in vitro to the Constitution"[35]. In such circumstances the newspaper carries out a survey and finds out that the citizens – prepared to think this way – want the Constitution to be amended and postulate that the number of parliamentarians is limited (48%), forests are not privatised (35%)[36], there are single-member constituencies (31%), the Senate is dissolved (29%), life is protected from conception till natural death (25%), the President has more power (21%) and the Constitution is not changed (only 11%). The survey only lacks information about the citizens' attitude towards MPs' immunity, which is strange because immunity has been a constant 'leitmotif' in the desired constitutional changes and … in fact, it should be modernised.

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[29] One of many publications on that topic is "Constitutional survey", (ed.) B. Banaszak, J. Zbieranek, Instytut Spraw Publicznych, Warszawa 2011.

[30] L. Miller, *Democratic Left Alliance (SLD)*, Rzeczpospolita of 22 April 2015, p. A11.

[31] K.M. Ujazdowski, member of the European Parliament, Rzeczpospolita of 21 April 2015, p. A7.

[32] Rzeczpospolita of 20 April 2015, p. A5; President Lech Wałęsa presented such a view at the beginning of his term (1990–1995) interpreting the constitutional provisions in favour of the President and filing a project of a constitution in this spirit in 1993; thus, he is right that in some sense the Constitution of 1997 laying down separation of the President's competence form the Government's (in favour of the Government) was designed 'against' him.

[33] M. Król, Rzeczpospolita of 23 April 2015, p. A7.

[34] Rzeczpospolita of 28 April 2015, p. C8.

[35] Rzeczpospolita of 27 April 2015, p. A6.

[36] The Government recently stated it had not been planning that.

However, no new thoughts or ideas that start bothering constitutionalism in the world have appeared either in the earlier reported projects, or in that short press discussion. At least in the field of solidarity, international cooperation, participation of the community in governing, the role of the constitution in horizontal relations (between individuals), modern role of the state towards an individual and many other issues. And if there are to be changes in institutions – let them be made where they are necessary, e.g. with regard to the Constitutional Tribunal[37].

But, as it is seen, the debate over the change of the Constitution is going on. If it gets weaker for a moment, another newspaper or a new political party will decide to revivify it and will ask again: the Government or the President? Meanwhile, efficiency or rather inefficiency of the projects and proposals indicates that those who these changes depend on – parliamentarians – are not striving for them. And it is not only because of the lack of consensus. In the research on the mandate to act as a representative conducted in 2010, the questions asked to the MPs of the Sejm were answered with a clear message: Do not change the Constitution[38].

But the tendency to postulate changes returned in an intensive form during the electoral campaign – in connection with the direct election of the President of the Republic of Poland[39] – in May 2015. One of the motives returned with full strength: single-member constituencies, with which part of the electorate cherish a hope for ousting political parties from power (i.e. "de-cementing the political scene" in order to increase non-party representation of the citizens[40]). Their introduction requires that the constitutional principle of proportional elections be repealed. Under this banner – symbolising the refusal of consent for the current political system and party relations – a rock man, Paweł Kukiz, forced his way onto the political scene winning over 20% of votes cast mainly by young electorate. Soon the President filed a legislative initiative for amending the Constitution in this spirit. This forecasts an intensive continuation of the events entitled "attempts to change the Constitution"; especially as a parliamentary election is taking place this autumn and the issue of the Constitution will be one of the bargaining cards.

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[37] See considerations cited in footnote 16.

[38] M. Kruk, K. Kubuj, M. Laskowska, J. Zaleśny, M. Godlewski, M. Olszówka, *Representational mandate in the Polish Deputies' practice*, Wydawnictwo Sejmowe, Warszawa 2013, p. 110 (publication in English, in addition it contains broad information about the Sejm of the Republic of Poland), p. 323.

[39] Since 1990 in Poland, the Nation has elected the President in a direct election.

[40] The results of the election in the United Kingdom cooled these hopes a little, because they clearly show that first-past-the-post system and single-member constituencies are favourable for a two party system.

STABILITY AND CHANGES IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

Summary

Soon after the Constitution of the Republic of Poland was passed in 1997, proposals to change it started to appear. On the one hand, they concerned single provisions, e.g. annulment of MPs' immunity; on the other hand, these were proposals of new versions of the whole text. The authors were political parties as well as other entities. Taking into account the fact that the Constitution of 1997 was passed after a few years of legislative work based on many projects and in the course of an intensive debate with the approval of the substantial majority of the National Assembly and then in the referendum, and additionally its principles had been 'tested' in the period of the 'temporary' Small Constitution being in force (1992–1997), such an intensive rush to change it must arouse curiosity about the motives and the directions of the new concepts. Especially as the majority of the proposals were not formalised as legislative initiatives either when the authors were entitled to do so, or when they had no opportunity to do that. As a result, since 1997 the Constitution has been amended twice, in both cases on a small, marginal scale. 2015 is the year of two electoral campaigns (the presidential and the parliamentary ones) and it is seen that the issue of the Constitution will be of great importance. The phenomenon, especially the motives, directions of change and the authors are analysed in the article.

TRWAŁOŚĆ I ZMIANY POLSKIEJ KONSTYTUCJI

Streszczenie

Rychło po uchwaleniu w 1997 r. nowej Konstytucji RP zaczęły pojawiać się propozycje jej zmiany. Z jednej strony dotyczyły one pojedynczych przepisów, jak na przykład zniesienia immunitetu poselskiego, z drugiej strony – były to propozycje nowych wersji całego tekstu. Autorami były partie polityczne, a także inne podmioty. Zważywszy, że konstytucja z 1997 r. uchwalana była w trwającym kilka lat procesie ustawodawczym, na bazie wielu projektów i w toku intensywnej debaty, przy poparciu zdecydowanej większości Zgromadzenia Narodowego i potem w referendum, a ponadto jej założenia wcześniej „sprawdzone" w toku obowiązywania „konstytucji tymczasowej" (1992–1997), tak intensywny pęd do jej zmieniania musi budzić ciekawość, tak co do motywów, jak i co do kierunków nowych treści. Zwłaszcza, że większość propozycji nigdy nie została sformalizowana w postaci inicjatywy ustawodawczej, ani wtedy, gdy autorzy mieli takie uprawnienie, ani wtedy gdy nie mieli na to szansy. W efekcie od 1997 r. konstytucja została zmieniona tylko dwa razy, w obu

przypadkach w niewielkim, marginalnym zakresie. Rok 2015 jest rokiem dwóch wielkich kampanii wyborczych (prezydenckiej i parlamentarnej) i już widać, że problem zmiany konstytucji zyska w niej istotną rolę. Zjawisko to, zwłaszcza motywy, kierunki zmian i autorzy, są przedmiotem analizy niniejszego artykułu.

LA STABILITÉ ET LES CHANGEMENTS DE LA CONSTITUTION POLONAISE

Résumé

Les nouvelles propositions du changement se sont apparues très bientôt après avoir résolu en 1997 la nouvelle Constitution de la République polonaise. D'une part, ils ont concerné les règlements particuliers comme par exemple la suppression de l'immunité parlementaire, d'autre part, il y avait des propositions de nouvelles versions du texte entier. Les auteurs entre autres, étaient les partis politiques ainsi que les autres sujets. En considérant que la constitution de 1997 était résolue pendant le procès législatif de plusieurs années, à la base de plusieurs projets et au cours du débat intense, sous l'appui de la plupart décisive de l'Assemblée nationale et puis le referendum ainsi que les principes «vérifiées» ultérieurement pendant la mise en rigueur de la « constitution provisoire (1992–1997) – cet essor intense pour la changer doit impliquer la curiosité aussi bien aux motifs qu'aux directions de nouveaux contenus. Surtout dans cette situation où la plupart des propositions n'a jamais été formalisée sous la forme de l'initiative législative ni à ce moment où les auteurs avaient cette législation ni à ce moment qu'ils n'y avaient de chance. En effet, depuis 1997 la constitution a été changée seulement deux fois, et dans ces deux cas vraiment d'une façon vraiment marginale. L'année 2015 est un période de deux campagnes électorales (présidentielle et parlementaire) et il est déjà visible que le problème du changement de la constitution y jouera un rôle essentiel. Ce phénomène, et surtout ses motifs, les directions du changement et les auteurs forment le sujet de l'article présent.

УСТОЙЧИВОСТЬ И ИЗМЕНЕНИЯ ПОЛЬСКОЙ КОНСТИТУЦИИ

Резюме

Вскоре после принятия в 1997 г. новой Конституции РП (Республики Польша) возникли предложения по её изменению. С одной стороны, они касались отдельных положений, таких, как, например, отмена парламентской неприкосновенности;

с другой стороны, имели место предложения нового варианта всего текста. Предложения исходили от политических партий и иных субъектов. Принимая во внимание, что Конституция 1997 г. принималась в условиях продолжающегося в течение нескольких лет законодательного процесса, на основе многочисленных проектов в ходе интенсивных дебатов, при поддержке подавляющего большинства Национального Собрания, и затем – во время референдума; кроме того, её предпосылки, «проверенные» ранее во время действия «временной конституции» (1992–1997), настолько сильное стремление к изменениям не может не вызывать пристального интереса, – как в отношении мотивов, так и в отношении направления нового контента. Тем более, что большая часть предложений никогда не была сформулирована в виде законодательной инициативы, – ни тогда, когда авторы обладали такими полномочиями, ни тогда, когда у них таких шансов не было. В результате с 1997 г. конституция менялась только два раза, и в обоих случаях в незначительной степени. 2015 год – год двух больших избирательных кампаний (президентской и парламентской), и, по всей видимости, проблема изменения конституции будет играть существенную роль. Данное положение вещей, прежде всего мотивы, направления изменений и авторы, служат предметом исследования и анализа настоящей статьи.

Anna Gołębiowska

LOCAL GOVERNMENT IN THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 1997

1. Introduction

Local government[1] constitutes the basis of a democratic system. The essence of the local government is, in turn, managing local affairs; it follows from the objectives of the civic society, which stipulates common realisation and defending the needs. This issue is important since local government constitutes a community of the inhabitants of a given region of a state, which is distinguished by its common awareness or common objectives and destiny. The development of local government is to enable local communities to wield power both directly and indirectly. Furthermore, it is to ensure that such power and authority satisfies the current needs of the inhabitants and creates favourable conditions for social, cultural, economic and civilisation growth.

Therefore, the following questions arise, namely: what is the essence of local government? And what role does local government play in a democratic state?

Making an attempt to answer the above-mentioned questions, it is vital to indicate the legal basis for the functioning of local government, which can be found in the provisions of the Constitution of the Republic of Poland of 2 April 1997[2]. These issues have been regulated in a number of articles, namely:

[1] A. Gołębiowska, *Prawo miejscowe samorządu terytorialnego w okresie II Rzeczypospolitej* [Territorial self-government by-laws in the period of the Second Polish Republic], Cogitatus No. 7, Wydawnictwo Collegium Varsoviense, Warszawa 2009, pp. 59–61. At the same time, it is worth mentioning that local government is formed by virtue of law and autonomously performs tasks following from the needs of its inhabitants. One can say that local government is a corporation of local community living in a particular territory, having a legal personality as well as the right to manage public affairs of local significance on its own account and for its own benefit. This is how the idea of the contemporary local government expresses the essence of a democratic state, thus contributing to shaping a civic society and the inhabitants' responsibility for "their homeland". For this reason, the existence of local government has positive impact on local communities, who receive an actual opportunity to manage their own affairs. The issues related to the recognition of the needs of local communities or defining their hierarchy and the possibility of satisfying them are transferred to the citizens, which in turn lead to the emergence of social leaders, who assume responsibility for the self-governing community.

[2] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws from 1997, No. 78, item 483 as amended).

in Chapter I entitled "Republic" (Articles 15 and 16) and in Chapter VII entitled: "Local government" (Articles 163–172). Besides, what is important for the issues related to local government is also Article 94 of the Constitution of the Republic of Poland, which indicates that local government bodies, pursuant to and within the boundaries of the rights included in the law, may issue local legal acts mandatory within the jurisdiction of such bodies.

Among other constitutional provisions, one should note Article 184 of the Constitution of the Republic of Poland, which defines the competence of the Supreme Administrative Court and other administrative courts. This mainly concerns issues related to the control of public administration operations, which includes, among others, making decisions on whether the resolutions passed by local government bodies comply with the legal acts. Moreover, Article 203 par 2 of the Constitution of the Republic of Poland is also significant, because it authorises the Supreme Audit Office to inspect the operations of local government bodies, community legal persons and other local organizational entities from the point of view of their legality, reliability and efficiency. However, apart from the provisions included in the Constitution of the Republic of Poland, basic regulations concerning local government are laid down in local government acts[3], each of which is related to local government entities of a different level. Besides, legal provisions related to local government are laid down in many other acts[4], as well as in the European Charter of Local Self-Government of 1985[5].

[3] At the same time, one should explain that since 1 January 1999, the basic three-level territorial division of the state has been in place, including communes, districts and provinces (Act of 24 July 1998 on the introduction of a basic three-level territorial division of the state – Journal of Laws of 1998, No. 96, item 603 as amended). Basic provisions on local government can be found in the following acts: Act of 8 March 1990 on commune self-government (consolidated text of 12 October 2001, Journal of Laws of 2001, No. 142. item 1591 as amended); Act of 5 June 1998 on district self-government (consolidated text of 27 October 2001, Journal of Laws of 2001, No. 142, item 1592 as amended); Act of 5 June 1998 on province self-government (consolidated text of 18 September 2001, Journal of Laws of 2001, No. 142, item 1590 as amended). The above-mentioned Acts are referred to as the system-regulating statutes and they contain solutions and decisions related to the functioning and governing principles of particular local government units and their operational mode.

[4] One should note that the provisions included in the system-regulating statutes have been complemented by other legal acts, namely: Act of 5 January 2011 – Electoral Code (Journal of Laws of 2011, No. 21, item 112 as amended), standardizing the elections to the decision making bodies of local government units as well as commune and town mayors; Act of 2000 on local referendum (Journal of Laws of 2000, No. 88, item 985 as amended); Act of 15 March 2002 on the system of the capital city of Warsaw (Journal of Laws of 2002, No. 41, item 361 as amended); Act of 7 October 1992 on regional accounting chambers (consolidated text of 26 April 2001, Journal of Laws of 2001, No. 55, item 577 as amended); Act of 12 October 2004 on self-government councils of appeal (consolidated text of 8 June 2001, Journal of Laws of 2001, No. 79, item 956 as amended); Act of 15 September 2000 on the principles of joining international associations of local and regional communities by local government units (Journal of Laws of 2000, No. 91, item 1009 as amended); Act of 21 November 2008 on self-government employees (Journal of Laws of 2008, No. 223, item 1459 as amended).

[5] European Charter of Local Self-Government of 15 October 1985 (Journal of Laws of 1994, No. 124, item 607, with the amendment that followed: Journal of Laws of 2006, No. 154, item 1107). The documents were adopted by the Council of Europe and ratified by Poland on 26 April 1993. Furthermore, it should be noted that due to the provision of Article 91 in connection with Article 241 par 1 of

2. The notion of local government

The explanation of the term 'local government' should begin with the indication that the notion is made up of objective and subjective elements. When considering the issue related to the subject of the local government, one should point out that it is the local community living in a given territory and referred to as the self-governing community. Therefore, an individual becomes a member of a community by virtue of law, because pursuant to Article 16 par 1 of the Constitution of the Republic of Poland: "The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law". It follows that the existence of a local government depends on the will of the legislator and that a local government is not formed pursuant to a voluntary act of the founding members, just as it cannot be dissolved pursuant to a statement of will of its members[6].

One can therefore say that in this meaning, local government is definitely an imposed organization. Anyway, one cannot live in a given territory and at the same time remain outside the community organized as a territorial self-governing union. Therefore, the decisive criterion in this case is the fact of residing in a given territory rather than being formally registered as having domicile there. Besides, being part of a self-governing community lasts as long as the person is constantly residing there. This means that one cannot resign from the participation in a self-governing community, just as one cannot be excluded from it. Therefore, a local government unit established by the legislator exists regardless of the will of its inhabitants and has no possibility to dissolve itself. One will inevitably reach a conclusion that individuals are assigned to local governments, rather than being members thereof. One can therefore say that local government has universal character, because it refers to the whole territory of a state and includes all its inhabitants. Due to this fact, local connections between self-governing communities are formed, including people residing in

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the Constitution of the Republic of Poland, the European Charter of Local Self-Government, being an international agreement, constitutes a source of law generally binding in Poland, with supra-system force. It follows from the provisions of the European Charter of Local Self-Government that it recognizes the role of local government as an instrument of the citizens' participation in managing public affairs pursuant to the principles of democracy and power decentralization, as well as the need to recognize the principle of local self-governance in the legislation and, of course, in the Constitution of the Republic of Poland. It is worth explaining that it refers to local government, which, pursuant to the Polish law, needs to be understood as commune and district government. At the same time, one should note that for a provincial government, one should apply the provisions of the European Charter of Regional Self-Government of 5 June 1997, which was adopted by the Council of Europe, but has not been ratified by Poland yet.

[6] See H. Szczechowicz, *Samorząd terytorialny w społeczeństwie obywatelskim* [Territorial self-government in a civil society], [in:] *Samorząd terytorialny na przełomie XX/XXI wieku* [Territorial self-government at the turn of the 20th and the 21st century], (ed.) A. Lutrzykowski, R. Gawłowski, M. Popławski, Toruń 2010, p. 91; A. Jackiewicz, A. Olechno, K. Prokop, *Samorząd terytorialny. Podręcznik dla studentów studiów administracyjnych pierwszego stopnia* [Territorial self-government – course book for the first cycle students in the field of administration], Siedlce 2010, p. 6.

a given territory within a state, which in turn contributes to the creation of social, cultural, economic and civilisation-related bonds and to the initiation of various enterprises related to the development of local communities. Thus, although the basis for defining a local government is the territorial bond, i.e. residing in a given territory within a state, both the provisions of the Constitution of the Republic of Poland and of the local government acts clearly point to its corporate nature.

On the other hand, considering the issue related to the object of the local government, one should explain that it is related to the performance of public tasks assigned to it by law, because pursuant to Article 16 par 2 of the Constitution of the Republic of Poland, local government participates in wielding public power, therefore its objective is to perform public tasks. It follows from Article 163 of the Constitution of the Republic of Poland, where it is emphasized that: "Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities". Therefore, one can say that the object of the local government is performing public administration, whereas public authorities are the institutions that possess statutory competences to make authoritative decisions binding both the citizens and legal entities[7].

At the same time, it would be appropriate to explain that the very essence of local government consists mainly in the fact that it is a decentralized form of public administration, and therefore it is a state, not a government, body. It is worth pointing out that local self-government and the government are two forms, mutually independent entities of the same public administration. Therefore, as far as the material aspect is concerned, they perform public tasks, but the scope of these tasks differs. Besides, it should be noted that local government is limited to local affairs, i.e. education, social care and welfare, environment protection or health protection, whereas the central government administration deals with general public and supra-regional affairs, related to the issues such as border security and monetary policy[8].

Continuing to explain the issue related to the notion of local government, one should point out that the purpose behind its existence is definitely the performance of public tasks of local or regional nature, because such tasks would be too cumbersome to be fulfilled by public bodies coordinated by the central government. Doubtless it refers to the tasks fulfilled by local or regional authorities, because they have direct contact with the communities and they have the best knowledge of the needs and opportunities to act if any events occur that would justify these needs.

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[7] See P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Commentary on the Constitution of the Republic of Poland of 2 April 1997], Warszawa 2008, p. 28.

[8] S. Wykrętowicz, *Samorząd jako wyraz demokracji obywatelskiej* [Self-government as the expression of civil democracy], [in:] *Samorząd w Polsce. Istota, formy, zadania* [Self-government in Poland – essence, forms and tasks], (ed.) S. Wykrętowicz, Poznań 2008, pp. 28–30.

When deliberating upon the explanation of the notion of local government, it seems appropriate to point out to Article 3 of the Constitution of the Republic of Poland, which stipulates that: "The Republic of Poland shall be a unitary State", which means that local government does not and cannot have its own sovereign tasks. There follows a statement that local government performs public tasks resulting both from constitutional provisions and from the legal acts, in its own name and in sole responsibility. Therefore, it is now worth presenting the opinion expressed by the Constitutional Tribunal, which sees the essence of local government in the fact that some classifications of affairs, separated from within the scope of the state authority, are entrusted to self-governing communities for autonomous handling[9].

At the same time, it should be noted that constitutional provisions included in Article 163 of the Constitution of the Republic of Poland, while granting local government the competence to participate in wielding public power, define that this participation consists mainly in performing those public tasks that are not reserved for the central government administration pursuant to the Constitution of the Republic of Poland and the statutes. Besides, participating in wielding public power consists, pursuant to par 1 of Article 166 of the Constitution of the Republic of Poland, in performing the tasks that include satisfying the collective needs of local communities, while pursuant to par 2 of the same Article, in performing public tasks assigned with a legal act, provided it follows from justifies public needs of the state.

3. Supervision over local government

When deliberating over the issues related to the supervision of local government, it is worth pointing out that pursuant to the decentralization principle, local government acts independently when performing public administration. However, this autonomy does not exclude the central government administration's possibility of supervising local government units. Due to the uniform character of the state, the autonomy of local government units should not be seen as tantamount to their sovereignty. Besides, local government must not be considered detachment from the state, because different standpoints would inevitably lead to the destruction of the state in the area of performing public tasks. Due to this fact, what is important is the standpoint presented by the Constitutional Tribunal, where it is explained that: "Guaranteeing local government the participation in wielding power and entrusting the public bodies implicitly with defining the scope and forms of such participation, the Polish

[9] Decision of the Constitutional Tribunal of 30 November 1999 (case reference no. Ts104/99, OTK ZU 2000, No. 1, item 21).

constitutional legislator has established positive legal basis for the functioning of the local government and thus included it in the power-wielding structure (…) at the same time denying it the feature of sovereign authority with a source of public power different than the law established by the state"[10].

When analysing the issue related to the supervision of local government, one should point out that institutional supervision is the competence of the President of the Council of Ministers and province governors, whereas budgetary supervision is the competence of the particular Regional Accounting Chamber. Moreover, the supervisory competence also rests with the Sejm, because as requested by the President of the Council of Ministers, it may dissolve the body that constitutes local government, but only in the event of a gross infringement of the Constitution of the Republic of Poland or of a statute. Due to this fact, it is important to quote Article 171 par 1 of the Constitution of the Republic of Poland, which stipulates that only criterion limiting the supervision is the legality of action. Therefore, it is worth noting that the autonomy of a local government means making decisions related to the affairs that are within its competence, excluding the cases defined in the provisions about supervision. Therefore, only the bodies defined in the legal provisions can interfere in the actions performed by a local government.

Another issue is introducing a system of electing joint bodies of self-governing community by its members, which effectively strengthens the feeling of self-governing and incites the conviction that the power is not imposed from above. It definitely means that they may autonomously decide who will represent them and act on their behalf. Thus, local and regional authorities are the representation of the self-governing community, so it can be concluded that their organization and place in the state structure constitute the means to achieve the objective defined as satisfying the broadly understood needs of the local or regional community.

4. Structure of local government

When considering the issues related to the structure of local government, it seems appropriate to note the territorial division of the state made up of three levels. It is vital to indicate the provision of Article 164 par 1 of the Constitution of the Republic of Poland, which stipulates that the basic unit of local

[10] Resolution of the Constitutional Tribunal of 27th September 1994 (case reference no. W 10/93, OTK 1994, No. 2, item 46). In the resolution it has been noted that: "Guaranteeing the local government the participation in wielding power and entrusting the public bodies implicitly with defining the scope and forms of such participation, the Polish constitutional legislator has established positive legal basis for the functioning of the local government and thus included it in the power-wielding structure in a democratic legal state (from Article 1 of the constitutional provisions that remained in force), at the same time denying it the feature of sovereign authority with a source of public power different than the law established by the state".

government is a commune, which is the minimal unit of the territorial division of the state. Moreover, it seems legitimate to consider par 1 of Article 4 of Act on commune self-government, pursuant to which forming, merging, demerging and abolishing as well as defining the boundaries of communes is the competence of the Council of Ministers. It is done with a decree issued by the Council of Ministers – ex officio or as requested by the commune council, pursuant to par 2 Article 4 of Act on commune self-government. Nevertheless, this is done after obtaining the opinion of the commune councils concerned, which in turn is preceded by the consulting sessions with the inhabitants, organized by commune councils, which follows both from the provision of Article 5 of the European Charter of Local Self-Government and from the opinions, mentioned by the provisions of Articles 4a and 4b of Act on commune self-government. At the same time, it should be added that the issue of defining and changing the commune boundaries is done in a way that safeguards the commune territory, considering the settlement and spatial structure, as well as social, cultural and economic bonds ensuring the ability to perform public tasks. On the other hand, pursuant to Article 6 of Act on commune self-government, the scope of commune activities includes any public affairs not reserved by the statutes to other bodies.

It is also worth noting that the allegation of the competence in favour of the commune allows for explaining doubts as to who is responsible for a particular task or competence at the local level. It is understandable that basic needs of individual such as those related to unemployment, public order, social care or education should be addressed at this very level. As a result, commune self-government should have most competence in the decentralized structure of local government. This is why local life is focused on this very level, because this is where individuals live, work and fulfil their needs as members of self-governing community.

On the other hand, starting the deliberations concerning the next unit of local government, which is in a district, one should consider the provision of par 1 of Article 3 of Act on district self-government. Pursuant to this provision, the Council of Ministers, with a relevant decree, forms, merges, demerges and abolishes districts and defines their boundaries, but subject to the fulfilment of certain conditions, which are, incidentally, the same as those included in Act on commune self-government. This is why, considering par 3 of Article 3 of Act on district elf-government, one should note that defining the district boundaries is done by indicating the communes that will be included in this district. Change of the border is made in a way that possibly ensures homogeneous territory of the district, considering the settlement and spatial structure, as well as social, cultural and economic bonds ensuring the ability to perform public tasks[11]. It seems

[11] It seems appropriate to explain that existing districts are not homogeneous, because there are townships and country districts (towns with district rights), which include: towns which had more than

rather important to note Article 7 par 1 of Act on district self-government. It results from its provisions that a district may only perform trans-communal public tasks defined in the statutes, listed by the legislator, as well as those indicated by the provisions of other statutes and acts of material law, considering the fact that they cannot infringe upon the communes' scope of action.

Therefore, considering the province government, one should note that it is defined as a regional self-governing community having a relevant territory. Due to the fact that the legislator has not defined the tasks of a province, one can claim that it performs province-related tasks defined in the statutes. However, one should observe that in Article 14 of Act on province self-government a classification of affairs listed in the statutes is provided. Besides, it is significant to note the indication included in Article 2 par 2 of Act on province self-government, because it contains a clause stipulating that the scope of province actions includes performing province-related public tasks, not reserved by the statutes to central government bodies. Continuing the considerations of the tasks delegated to the province government, one should note Article 4 par 1 of Act on province self-government, which emphasizes the character of province tasks and competences, because pursuant to it, the scope of actions assigned to province government does not infringe upon the autonomy of a district and a commune.

5. Decentralization of public power

In the Polish legal order, the notion of decentralization has been elevated to the rank of a constitutional provision included in Article 15 par 1 of the Constitution of the Republic of Poland, from which it results that: "The territorial system of the Republic of Poland shall ensure the decentralization of public power". Therefore, one can say that on the basis of this legal provision, decentralization constitutes a legal activity within the scope of public law, to which public power is subordinated as a subject, which effectively leads to the organization of a fragment of the state's territorial system. Thus, the notion of 'state decentralization' should be perceived as the willingness of the constitutional legislator to include also other types of public power within this term.

It is also worth recalling the standpoint of the Constitutional Tribunal, pursuant to which the notion of 'decentralization' is one of the terms whose meaning has

100 thousand inhabitants as of 31 December 1998; towns which ceased to be the seat of province governors as of 31 December 1998, unless at the request of a relevant town council it was decided that the town would not receive district rights; towns which obtained the status of a town with district rights when performing the first administrative division of the state into districts (Article 91 of Act on district self-government). At the same time, it should be explained that a town with district rights differs from a township, because a township includes a number of communes, while a town with district rights constitutes a commune that performs district tasks at the same time.

been exhaustively regulated in the Constitution of the Republic of Poland[12]. According to the Constitutional Tribunal, the notion of 'decentralization' expresses the prohibition to concentrate the power and the order requiring the legislator to search for the most effective structural solutions, which in turn would allow the local government entities to retain their ability to perform public tasks[13]. At the same time, it should be pointed out that the term "decentralization" expressed in Article 15 par 1 of the Constitution of the Republic of Poland constitutes an interpretational principle as regards other norms included in this statute and related to the system of public administration[14]. Therefore, it should be explained that the limits of decentralization are defined by the state legislator, whereas the very principle of decentralization should be interpreted in accordance with other system principles, inter alia the common good principle and the state uniformity principle, as expressed in Article 15 par 1 of the Constitution of the Republic of Poland. Local government constitutes the basic link of decentralized public administration and for this reason it ensures the decentralization of public power. It is appropriate to explain that correct functioning of a democratic state is not possible without introducing a horizontal division of power between the central and local government. It means that without the statutory transfer of at least some public tasks to local government, it would definitely be difficult to speak of decentralized public power[15].

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[12] Judgment of the Constitutional Tribunal of 18 February 2003 (case reference no. K24/02). In the judgment, it was noted that: "decentralization mentioned in the Constitution is not a one-off organizational enterprise, but a permanent feature of the political culture of the state, constructed on proper statutory solutions, pursuant to the constitutional principles of the Polish system".

[13] Judgment of the Constitutional Tribunal of 25 November 2002 (case reference no. K34/01). In the analysed judgment, the Constitutional Tribunal explained that: "The rule of public power decentralization has been expressed in Article 15 par 1 of the Constitution of the Republic of Poland, which states that the territorial system of the Republic of Poland ensures decentralization of the public power. (…) According to the Constitutional Tribunal, the principle of decentralization may not be understood in the way that the legislator has a duty to dismember the central organizational units and place them at the level of communes, districts and provinces. (…) The decentralization principle, expressed in Article 15 par 1 of the Constitution of the Republic of Poland does not involve a constitutional requirement of decentralizing all public organizational units. It is the legislator's responsibility to decide whether and to what extent such units should be subject to decentralization and at which level – province, district or commune – they should be constituted. The existing notion of decentralization also allows for the interference with the scope of autonomy held by local units, but only to the extent defined in the statutes. (…) The thesis about the unilateral process of decentralization (…) does not find any justification on the grounds of the sources of law, which do not stipulate – except for the Constitution – any laws of particular "strictness". Such "strictness" may be justified by political aspects, but does not have any basis in the mandatory political order".

[14] Judgment of the Constitutional Tribunal of 4 May 1998 (case reference no. K38/97). In the judgment, it was emphasized that: "the principle of public power decentralization and of the local government participating in performing a significant part of public tasks constitutes the rules for the organization and system of the whole state, not only local government".

[15] A. Gołębiowska, *Decentralizacja administracji publicznej na przykładzie samorządu gminnego. Zarys problematyki* [Public administration decentralisation exemplified by commune self-government – outline], Opere et Studio pro Oeconomia, No. 6, Warszawa 2009, pp. 63–74; At the same time, it is worth adding that the phenomenon of decentralization is considered from the viewpoint of many fields of science, inter alia sociology, management and organizational theory, as well as administrative science. There is

As provinces are made up of districts and districts, in turn, are made up of communes, this does not mean that this relationship makes one level dependent on another. And although a province is the largest unit, considering the territory and number of inhabitants, it does not hold executive competences with reference to districts and communes, which has been referred to in Article 4 par 2 of Act on province self-government. Pursuant to this provision, provincial government bodies are not supervisory or controlling bodies for districts or communes, neither are they higher-level bodies for them in administrative proceedings. On the other hand, in par 6 of Article 4 of Act on district self-government it has been laid down that district has no executive authority over communes, because the tasks of a district must not infringe upon the communes' scope of action. Therefore, one should explain that the units of all levels of local government are separately subject to the supervision exercised by central government administration, and what is more, for each of them separately, the relevant body for appeals shall be the self-government councils of appeal[16].

Considering the issues related to the principle of decentralization[17] of public power, one reaches the conclusion that the notion of "decentralization" means

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no doubt that this is related to the most momentous contents of the democratic legal state, i.e. equality or becoming close to the citizens and participation. Nevertheless, one should emphasize that the notion of decentralization stems from the legal science. Besides, the essence of decentralization is transferring both the tasks and competences of the public authorities to lower-level units, i.e. to local administration, considering the fact that these units have to be granted autonomy in performing assigned tasks. For this reason, local government units act as autonomous entities of the public law performing public tasks and they are responsible for such performance. Moreover, one should explain that there is no hierarchical subordination of local government bodies, either to the central administration bodies or to higher-level local government units. One can, therefore, say that the basic unit of local government is constituted by its particular, individual units, mutually independent, regardless of whether they would have been placed at the levels of the territorial division of the state, which does not in itself mean that there is any hierarchy between them, because local government units are independent of one another.

16 In the light of the above considerations, one can reach the conclusion that such shaping of relationships with regard to local government units excludes the possibility to recognize a higher-level local government unit as a higher-level body in the meaning of the Code of Administrative Procedure.

17 See A. Gołębiowska, *Decentralizacja administracji publicznej…* [Public administration decentralisation…], pp. 65–66. At this point, it seems appropriate to present a few concepts of understanding decentralization; R.W. Griffin, *Podstawy zarządzania organizacjami* [Organisations management basics], (ed.) M. Rusiński, Warszawa 1998, p. 350 shows that: "decentralization is a process of systematic delegation of power and authority within an organization to the middle and lower level managers"; J.A.F. Stoner, Ch. Wankel, (ed.) A. Ehrlich, *Kierowanie*, Warszawa 1994, p. 271 note that the notion of decentralization refers to the scope of transferring power to lower levels: "this terminology stems from perceiving an organization (…) as a series of concentric circles. The head of the organization is in the middle and from there a "network" of power grows. The more power is declared in the organization, the more decentralized it will be". According to the authors, decentralization is useful only to the extent to which it contributes to the efficient achievement of the organizational objectives. Within the scope of legal science, decentralization is not only a certain political assumption presented as an idea. The essence of decentralization is that it is sworn to the legal system; therefore it has its sources in legal norms. For this reason, the basis for decentralization in the legal and structure-related system of a given state will always be the legal norms present in such a system. Therefore, decentralization will have defined effects in the area of law when a given system includes in its scope of regulations certain legal institutions, inter alia those related to decentralized entities; M. Kotulski, *Pojęcie i istota samorządu terytorialnego* [Concept and

treating local government as a form of individual participation of the citizens in the process of governing, as well as an institution that serves to create democracy at lower levels[18]. Therefore, the decentralization of tasks must not be limited to imposing obligations on local government units, because those should be accompanies by certain rights and material resources needed to perform the assigned tasks. What is of great importance is the fact that without proper financial backup, the achievement of the objectives shall remain in the sphere of intentions, because without constant influx of support, local government could not exist.

This is why it now seems appropriate to refer to the judgment issued by the Constitutional Tribunal, which explains the legal definition of decentralization. This judgment also highlights the opinion related to the aspects of assigning public tasks to local level and the way local bodies use the property and rights that guarantee their autonomy. At the same time, the judgment of the Constitutional Tribunal includes statements on the possibility to make decisions on public affairs and having adequate financial resources to pursue its own policy[19].

6. Autonomy of local government units

The autonomy of local government units and their legal protection is declared both in the Constitution of the Republic of Poland[20] and in the system--related acts[21]. For this reason it is worth noting par 2 and 4 of the provisions of Article 4 of the European Charter of Local Self-Government. The presented

essence of territorial self-government], Samorząd Terytorialny, 2000, No. 1–2, p. 87 explains that "local government is one of the forms of executive power, functioning in the form of decentralized authority. Decentralized means not hierarchically subordinated to the central government administration".

[18] At the same time, it should be added that political activity of the citizens is not limited only to periodically organized elections, because the citizens are in a way connected to the state due to the fact that they manage familiar, local affairs. In order to solve problems and affairs, they develop their own initiative, which involves a greater effort. For this reason, we may observe that the activity of local government definitely relieves the burden of the central authorities, as they do not have to perform local tasks, but are able to delegate them to the people inhabiting a certain area.

[19] Judgment of the Constitutional Tribunal of 18th July 2006 (case reference no. U 5/04, OTK 2006, No 7, item 80).

[20] Article 165 par 2 of the Constitution of the Republic of Poland states: "The self-governing nature of units of local government shall be protected by courts".

[21] The autonomy principle has been expressed respectively in Article 2 par 3 of Act on commune self-government, Article 2 par 3 of Act on district self-government and in Article 6 par 3 of Act on provinces self-government. Besides, one should explain that this principle has been confirmed by the fact that local government units have been granted legal personality in the provisions of Article 2 par 2 of Act on commune self-government, Article 2 par 2 of Act on district self-government and in Article 6 par 2 of Act on province self-government. At the same time, it should be added that having legal personality is the main element of the autonomy of local government units due to the fact that they have ownership rights and other property rights. Furthermore, having legal personality enables them to manage the municipal property belonging to the self-governing community.

legal provisions indicate that performing tasks under the decentralization principle assumes autonomy during the implementation of such tasks. This means that local communities have, within the scope defined by law, full freedom to act in every affair, provided it is not excluded from their competence or is not included in the competences of other authorities. As a result, the competences assigned to local communities should be total and exclusive. Nevertheless, these competences may be challenged or restricted by another authority, but only in the matters stipulated by the law. Undoubtedly, autonomous performance of the tasks may not be tantamount to unlimited autonomy. If self-governing communities perform public tasks, then their activity should definitely remain under state supervision.

Therefore, the autonomy of local government should not be seen as its complete independence of the state, but rather as a precise definition of situations when the state can effectively step in the area of local government's activity[22]. It is worth noting that except for such cases, the state must not interfere with the area of local government's activity, which is indicated in Article 171 of the Constitution of the Republic of Poland. Pursuant to these provisions, supervisory bodies may interfere with such activity, but only in the situations defined by the provisions of legal acts and from the point of view of legality. One may say that such treatment of supervision does not limit the autonomy of local government, but becomes its guarantee.

Thus, it must be emphasized that the autonomy of local government units constitutes an implication of decentralization, which is confirmed by the judgment issued by the Constitutional Tribunal, where it is emphasized that: "decentralized bodies are characterized by autonomy, understood as having the right to act with relative independence within statutory, permitted limits, and by independence meaning being free from the interference of higher level authorities in the local affairs"[23]. If financial autonomy of local government units ensures participation in public revenue, respective to the assigned tasks, then one should note Article 167 par 1 and 2 of the Constitution of the Republic of Poland. The disposition of this provision indicates that the income of a local government unit is made up of its own income and general subventions as well as designated subsidies from the state budget. On the other hand, from the provision of Article 168 of the Constitution of the Republic of Poland, it results that the autonomy and independence of the state budget is guaranteed to the local government units by their fiscal autonomy, which means the right to define

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[22] Z. Niewiadomski, *Istota samorządu terytorialnego w Konstytucji RP* [Essence of the territorial self-government in the Constitution of the Republic of Poland], [in:] *Samorząd terytorialny a jakość administracji publicznej* [Territorial self-government vs. the quality of public administration], (ed.) A. Piekara, Warszawa 2002, p. 189.

[23] Judgment of the Constitutional Tribunal of 18 July 2006 (case reference no. U 5/04, OTK 2006, No 7, item 80).

the amount of taxes and local charges within the scope defined in the act[24]. Undoubtedly, guaranteeing financial autonomy is a serious problem related to the correct functioning of local government units. Therefore, a very important issue proving the autonomy of local government units is the fact that they have been granted the right to create local legal acts binding in the territory within their competence, within the scope defined in Article 94 of the Constitution of the Republic of Poland and other statutes[25]. At the same time, it is worth adding that pursuant to Article 169 par 4 of the Constitution of the Republic of Poland local government units may autonomously create the content of the statute determining their organizational structure and operational mode[26]. Nevertheless, a symbolic expression of the autonomy of local government units results from the fact that the legislator has granted them the right to define their own coat of arms, to erect monuments or grant honorary citizenship and to decide on the names of streets and squares.

Besides, it should be noted that pursuant to Article 165 par 2 of the Constitution of the Republic of Poland, the autonomy of local government units is subject to court protection. This issue is confirmed in Article 11 of the European Charter of Local Self-Government. Pursuant to the disposition of this document, local communities have the right to appeal, in the mode of court proceedings, in order to ensure the free execution of rights and respect of local governance principle, stipulated both in the Constitution of the Republic of Poland and in internal law. The contents of these provisions are repeated in local government acts, so due to this fact, a local government unit may assert its rights in an independent and impartial court, in the situation when they have been infringed upon due to the breach of the autonomy principle. This means that a local

[24] Besides, it is worth explaining that without one's own property and constant inflow of funds from taxes, it would be immensely difficult to speak of the autonomy of local government, since local government funds may not be limited only to subsidies from the state budget. There is no doubt that such a situation would lead to effective dependency of local government units on central administration. Nevertheless, one should note that the funding of tasks from own income is not guaranteed at each level of local government in a proper way. Some authors explain that: "Whereas the communes, including also towns with district rights, are usually capable of performing the assigned tasks regardless of the subventions and subsidies due to considerable property obtained through municipalization, the actual income of districts and provinces is obviously too scarce to balance the subventions and subsidies from the state budget, which are often too low. The very fact that local government budgets rely on subventions and subsidies as well as on share in the taxes collected by the state means that local government units are in this respect devoid of actual autonomy"; See H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności* [Territorial self-government – Bases of the political system and activities], Warszawa 2011, pp. 134–135.

[25] This is shown in the following provisions: Article 40 par 1 of Act on commune self-government, Article 40 of Act on district self-government and Article 89 par 1 of Act on province self-government. Furthermore, one should observe that granting local government units rights to create the law brings the legislator closer to the situations regulated by law, which in turn grants better knowledge on any needs and increases the effectiveness of the measures taken.

[26] "The internal organizational structure of units of local government shall be specified, within statutory limits, by their constitutive organs".

government unit has the right to a court proceeding in the broadest meaning. Thus, legal provisions should be interpreted in such a way, so that they would effectively respect the right to court. Therefore, what is of crucial importance is the contents of Article 166 par 3 of the Constitution of the Republic of Poland, which guarantees court protection of the autonomy of local government units through solving competence related disputes between local government bodies and central government administration by administrative courts, while pursuant to Article 191 par 1 point 3 of the Constitution of the Republic of Poland, it is possible to file a request to the Constitutional Tribunal[27].

7. Principle of subsidiarity and local government units

When considering the issues related to the essence of local government, one must not omit the fact that the principle of autonomy related to local government units corresponds to the principle of subsidiarity. For this reason, it seems appropriate to observe the provision included in the Preamble to the Constitution of the Republic of Poland. The constitutional provision indicates that: "We, the Polish Nation – all citizens of the Republic (…) hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities". In the Constitution of the Republic of Poland it has also been marked that the principle of subsidiarity constitutes "the unshakeable foundation of the Republic of Poland". Therefore, if the principle of subsidiarity assumes respecting the initiative or autonomy and freedom of action belonging to the individuals as related to the community, or such assigned to smaller communities with relation to greater communities, then one may say that it reinforces the principle of decentralization of public power by guaranteeing the performance of public tasks assigned to local government units[28].

[27] At the same time, it is worth noting that Article 3 § 2 point 7 of Act of 30 August 2002 – Law on the proceeding in administrative courts (Journal of Laws of 2002, No. 153, item 1270 as amended) explains that: "Controlling the activities of public administration by administrative courts includes passing judgments related to complaints about the acts of supervising the activity of local government bodies". Furthermore, it should be added that the guarantee of the court protection of the autonomy of local government units is the possibility of filing a common complaint pursuant to Article 101 of Act on commune self-government.

[28] Besides, it should be added that the essence of the principle of subsidiarity is to indicate both the secondary and the ancillary role of the state with regard to lower level communities. Therefore, state intervention in the affairs of citizens or their self-governing communities is allowed, but only in the situation when difficulties occur in performing assigned tasks. Therefore, if there is a multi-level structure of local government, then if it is impossible for lower level local government units to perform their tasks, then their competences with regard to such performance are taken over first of all by higher level local government units and if such performance exceeds their capabilities as well, then central administrative bodies can and should intervene. Thus, considering the principle of subsidiarity, one should point out that

Analysing the issue related to the principle of subsidiarity, one should note that it has been formulated by Catholic social science, contained in the encyclical of Pius XI entitled *Quadragesimo Anno*[29] and in the encyclical of John XXIII entitled *Mater et magistra*[30]. This principle has also been mentioned in the Catechism of the Catholic Church[31]. One can therefore say that the principle of subsidiarity stipulated intervention of a community or communities, starting from the bottom levels, as well as of other institutions of the civic society in the situation when a unit is not able to cope on its own. On the other hand, in the legal aspect, the principle of subsidiarity assumes that legal regulation of the citizens and their groups or unions should ensure maximum autonomy and participation in performing public tasks. This means that state as well as other communities should be helpful and supportive towards individuals, families and smaller communities. Furthermore, they should not take over the tasks that can be performed there. It means that the principle of subsidiarity stipulates that the maximum possible range of tasks should be performed at the level that is closest to the citizen, whereas higher level authority should support and complement the activity of lower level entities if they are autonomous, for the common good.

It is also important to indicate the contents of Article 4 par 3 of the European Charter of Local Self-Government, which offers an opinion on the principle of subsidiarity. It results from its disposition that: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy". The principle of subsidiarity has been elaborated on in Article 163 of the Constitution of the Republic of Poland, where there is an indication that there is an "allegation of competence" in favour of the local government, because:

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a greater community should only take up those tasks that the smaller community cannot perform on their own. This means that greater communities can and should take over the tasks from smaller communities, but only in the situation when the capabilities of the smaller communities prove inadequate. Therefore, public administration bodies should intervene only when a problem cannot be solved within the civic society.

29 Pius XI, *Quadragesimo Anno*, [in:] *Dokumenty nauki społecznej Kościoła* [Documents of Catholic social teaching] (ed.) M. Radwan, L. Dyczewski, A. Stanowski, vol. 1, Rzym–Lublin 1987, pp. 69–101.

30 John XXIII, *Mater et magistra*, [in:] *Dokumenty nauki społecznej Kościoła* [Documents of Catholic social teaching], (ed.) M. Radwan, I. Dyczewski, A. Stanowski, vol. 1, Rzym–Lublin 1987, pp. 221–268. In the encyclical it has been written that: "state authorities may only order what – as may be presumed – leads to the common benefit of the citizens. Therefore, taking care of the wellbeing of the whole state, public authorities should take the utmost care of balance and even development of agriculture, industry and services, as far as possible. While doing so, one should stick to the rule that the inhabitants of the regions where development is slower should feel as if they were the main originators of economic, social and cultural progress. Those deserve to be called citizens who contribute significantly to the work on improving their own fate. (…) This is why – pursuant to the principle of subsidiarity – public authorities should support and incite the initiative of individual people so as to allow them to perform their planned tasks, if possible".

31 *The Catechism of the Catholic Church*, canon 1894, Poznań 1994, p. 440. In the document it is indicated that: "pursuant to the subsidiarity principle, neither the state, nor any other greater community should replace the initiative and responsibility of the people and intermediary institutions".

"Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities". Therefore, one should note the provision of Article 164 par 1 and 3 of the Constitution of the Republic of Poland, which explains that this "allegation of competence" may be transferred to a lower level by establishing it in favour of a commune and referring to it as the basic unit of local government, but at the same time guaranteeing court protection of the autonomy of such a unit.

At the same time, it is worth adding that the "allegation of competence" in favour of the commune has been mentioned in the dispositions of Article 6 par 1 and 2 of the Act on commune self-government. The provision of par 1 indicates that: "The scope of communal activity shall include all public affairs of local significance, not reserved by the statutes to other bodies". On the other hand, par 2 of this provision explains that if the statutes do not stipulate otherwise, decisions on such affairs shall be the competence of the commune[32]. Thus, the view concerning the transfer of tasks to the higher levels of local government, or eventually, to the central administration, is correct. There is no doubt that the adopted solution indicated that the legislator assigns basic tasks and competences as close to the citizen as possible, because he sees it as the need to involve the citizen in the affairs directly related to his or her immediate environment. Therefore, it seems legitimate that public power may incite, support or complement the initiative of local and regional units and even communities in the situation when they cannot individually cope with the fulfilment of particular tasks. Nevertheless, public authority must not hinder those communities in their initiatives or tasks they undertake.

8. Conclusion

Summing up the deliberations concerning the essence of local government units in the Constitution of the Republic of Poland of 1997, one should emphasize that local government is an important element of a democratic state system. Definitely, its functioning depends on the extent of the citizen's involvement and on the level of their knowledge and social awareness. Even though, the issue related to the local community's participation in public decision-making processes is connected with voluntary, personal and active participation in the affairs related to the citizens' own immediate environment. There is no doubt

[32] Furthermore, it is worth pointing out that a commune, as a basic unit of local government and being closest to the citizen, should definitely be equipped with the broadest possible scope of tasks, provided that it will be able to perform these tasks effectively. Besides, one should consider the situation when a commune is not able to cope with particular tasks. Then, it is legitimate to claim that in such a situation the matter should be transferred to higher levels of local government, but only as a last resort can it be forwarded to the central administration.

that the participation of the local community in public life contributes to the shaping of a civic society.

In a democratic state, local government has a positive role, if only due to the fact that it is a social function, which involves transferring public administration in the hands of the properly organized social groups, aware of their own capability and ready to assume responsibility for performing public tasks. Such a solution ensures the best way of exercising the principles of decentralization and subsidiarity. Therefore, the people concerned enforce or impact the administration within the operation of public administration, which in turn must take into account the local levels. In the light of the above, there is no doubt that such a solution reinforces democratic institutions of the state and gives the citizens a chance to exert effective influence on public affairs. Moreover, it causes more efficient management of resources that these social groups have at their disposal and it allows for the evaluation of capabilities by adjusting actions to the actual needs of the local community.

LOCAL GOVERNMENT IN THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 1997

Summary

Decentralization understood as the absence of hierarchical subordination makes a basic condition of district government in Poland, contributing to creating the model of democratic law–governed state. On account of that structure of local authority, including district government connected with the concept of decentralization is an expression of political principles adopted in Poland after 1989. Related conceptions have been also pointed out. The nature of local authorities, their divisions created for the need of both governmental and self-government administration have been explained. Analysing issues connected with the local administration, the principle of subsidiarity has been mentioned – being widely used in the Polish legal system as well as in catholic social learning. Local government is form of man's involvement in public matters of a local character. Owing to this, it contributes to the formation of civil society that assumes common and conscious articulating, advancing and defending common interest, needs and aspirations. The problems of self-government, of looking into the needs of local communities, belong to the citizens themselves. Owing to this, those who are involved immediately have a real influence on the course of public matters.

SAMORZĄD TERYTORIALNY W KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ Z 1997 ROKU

Streszczenie

Decentralizacja, rozumiana jako brak hierarchicznego podporządkowania, jest podstawowym warunkiem podziału administracyjnego w Polsce, przyczyniając się do tworzenia modelu demokratycznego państwa prawa. Baza tej struktury władz lokalnych, w tym okręgów samorządowych związanych z koncepcją decentralizacji, jest wyrazem zasad politycznych przyjętych w Polsce po 1989 roku. Powiązane koncepcje zostały także wskazane. Charakter władz lokalnych, ich oddziały utworzone na potrzeby zarówno rządowej, jak i samorządowej administracji, zostały tu również objaśnione. Analizując zagadnienia związane z lokalną administracją, omówiono tu także zasadę pomocniczości – znajduje ona zastosowanie w polskim systemie prawnym, jak i katolickiej nauce społecznej. Samorząd jest formą zaangażowania człowieka w sprawy publiczne o charakterze lokalnym. Dzięki temu przyczynia się do tworzenia społeczeństwa obywatelskiego, które zakłada wspólną i świadomą artykulację, pogłębianie i obronę wspólnych interesów, potrzeb i aspiracji.

L'AUTONOMIE LOCALE DANS LA CONSTITUTION DE LA RÉPUBLIQUE POLONAISE DE 1997

Résumé

La décentralisation comprise comme manque de subordination hiérarchique est une condition basique du schéma administratif en Pologne ce qui contribue à la création du modèle de l'état démocratique de droit. La base de cette structure des autonomies locales, y compris les régions autonomes liées à la conception de décentralisation, exprime des principes politiques acceptés en Pologne après 1989. Ces conceptions attachées y ont été aussi démontrées. Le caractère des autonomies locales, leurs filiales créées aussi bien aux besoins de l'administration gouvernementale que locale y ont été expliqués. En analysant les questions de l'administration locale, on y parle aussi du principe d'assistance qui trouve l'application aussi dans le système légal polonais que dans la science sociale catholique. L'autonomie est une forme de l'engagement de l'homme aux affaires publiques du caractère local ce qui contribue à la création de la société des citoyens qui implique l'articulation commune et consciente, l'approfondissement et la défense des intérêts communs, des besoins et des aspirations.

МЕСТНОЕ САМОУПРАВЛЕНИЕ В КОНСТИТУЦИИ РЕСПУБЛИКИ ПОЛЬША С 1997 ГОДА

Резюме

Децентрализация, понимаемая как отсутствие иерархической соподчиненности, является основным условием административного деления в Польше, обуславливающим создание демократической модели правового государства. Базовое основание данной структуры органов местного самоуправления, в частности, муниципальных органов, действующих на основе концепции децентрализации, является выражением политических принципов, принятых в Польше после 1989 года. Указаны также сопряжённые концепции. Характер органов местного самоуправления, их подразделения, созданные для нужд как правительственной, так и муниципальной власти, также нашли здесь своё толкование. Анализируя вопросы, касающиеся местных органов власти, автор раскрыл суть принципа субсидиарности – он находит своё отражение как в польской правовой системе, так и в католическом социальном учении. Самоуправление является формой участия человека в решении общественных вопросов местного характера, благодаря чему способствует формированию гражданского общества, которое предполагает наличие совместного и сознательного акцента, расширение и защиту совместных интересов, нужд и запросов.

Krzysztof Ślebzak

A FEW COMMENTS ON THE CHARACTER OF THE RIGHT TO SOCIAL SECURITY IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

In the pre-industrial community, the issue of social security for the community was not really known. The basic form of support for the poor was social welfare (which remained dominant until the end of the 19th century). The legislation in that area usually obliged boroughs to ensure elementary care for every resident without means of livelihood. The Scottish social welfare system (Old Scottish Poor Law passed in 1574) and the English one (The Poor Relief Act passed in 1601) are good examples. At the time, the fact that there was a legal regulation aimed at helping the poor was perceived as an essential element of public order policy. At the same time, social welfare was very limited in character and it was used as a last resort. The Industrial Revolution also exerted a substantial influence on the creation of other forms of support (apart from social welfare). The first forms of social security resulted from workers' initiatives to develop friendly societies providing mutual financial help. In fact, these were forms of voluntary insurance organisations of little importance. It was due to the fact that their members were equally prone to particular risks. Apart from that, in the periods of economic crises, the number of members contributing to the fund decreased and the number of those in need increased dramatically. Thus, both social welfare and mutual credit associations were not able to provide workers with adequate protection. Workers' attempts to protect themselves against the above-mentioned risks were not successful either because of faint possibilities of gathering savings from low pay and a long-term unemployment risk.

The changes in the social structure and work organisation had a major impact on the development of political and social thought. On the other hand, rather tense relations between workers and employers as well as the political dispute typical of that conflict had a significant influence on bringing new legislation on social security. The first regulations on the broadly understood protection of labour were passed in England, where a professional Factory Inspectorate was established. The regulations aimed to protect workers against abuse by employers. At the same time in other countries, there was an idea of a state social policy defined as a state's

actions aimed at reducing the hurdles of workers' everyday life and weakening the class struggle by introducing various reforms. The first complex legal regulations aimed at protecting workers against the consequences of an illness, injury, breadwinner's death and old age were passed in the late 19th century in Germany ruled by Otto von Bismarck. These were: Sickness Insurance Law (1883), Old Age and Disability Insurance Law (1889) and Accident Insurance Law (1885). It was a typical model originating from business insurance. Its major characteristic features are: obligatory contribution dependent on the remuneration, benefits dependent on the amount of the lost income resulting from the risk covered by the insurance and a separate (other than budgetary) system of funding benefits. On the other hand, in the English speaking countries, the workers' protection system was based on the idea of social welfare and further developed as a form of social security implementation (Denmark and Scandinavian countries introduced this kind of system, too). Benefits were offered at a minimum level, equal for everyone, and the costs were covered from public finance resources.

Since then, the first forms of social security have undergone numerous changes in many countries. The elements characteristic of both models of social security can also be found today in the legal systems of many European Union member states.

In the European Union culture, the right to social security is a human right recognised for years. From the historic point of view, 'social security' appeared in the legal language for the first time in the decree of the Council of People's Commissars of 31 October 1919. The second normative act was passed in the United States (*The social security act*). It resulted from the economic crisis of the 1920s and the recognition of the need to solve social problems. A really stable implementation of the idea of social security took place only after World War II. It was reflected in a series of legal regulations. The first document that must be mentioned is the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1949. Article 22 stipulates that everyone, as a member of society, has the right to social security. The term was then repeated in other acts of international law, e.g. Convention 102 1nd 130 of the International Labour Organisation, the European Social Charter of 1961, the European Convention on Social Security of 1972 or the European Code of Social Security revised and adopted in 1990. As far as the expression of the right to social security in the European and international legal acts is concerned, the dominating attitude is the one that lists the social risk under protection. They are, inter alia, a disease, maternity, disability, an accident at workplace or an occupational disease, old age, unemployment or the loss of a breadwinner. Thus, there are risks strictly connected with labour, or in fact no possibility of working, or in more general terms – the loss of income.

The right to social security is also mentioned in the constitutional systems of many European countries. The present examples are the Constitutions of:

(1) Bulgaria (Article 51 (1) and (2): "(1) The citizens have the right to social security and social assistance. (2) Individuals who are temporarily unemployed receive social security assistance under the conditions and procedures regulated by law."), (2) Estonia (§ 28 sentence 2: "An Estonian citizen has the right to state assistance in the case of old age, inability to work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law."), (3) Luxemburg (Article 11 (5): "The law regulates as to their principles: social security (…)"), (4) Portugal (Article 63: 1. Everyone shall have the right to social security. 2. The state shall be charged with organising, coordinating and subsidising a unified and decentralised social security system, with the participation of trade unions, other organisations that represent workers and associations that represent any other beneficiaries. 3. The social security system shall protect citizens in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or ability to work. (…)"), (5) Romania (Article 47 (2): "Citizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law."), (6) Slovenia (Article 50 sentence 1: "Citizens have the right to social security, including the right to pension, under conditions provided by law."), (7) Italy (Article 38: "Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment."), (8) Finland (§ 19: "those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider."), (9) Lithuania (Article 52: "The State shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law.").

The analysis of the particular regulations indicates that in general there are two ways of formulating the right to social security. In the first case we deal with constitutional rights, in the other case we deal with reference to other (detailed) acts in which the right to social security will be regulated. The Constitution of Germany is a very interesting example, which lacks the right to social security. However, it is derived from the clause on the social state of law ("sozialer Rechtstaat" – Article 20 of the Basic Law of Germany). On the other hand, social rights were included in the German social codes.

In case of the Polish constitutional system, there was no clear reference to the concept of 'social security' until 1997. It resulted from historical conditions

connected with the more common use of a term 'social insurance' in legal acts. In the Constitution of 1927, Article 102 (2) stipulated that every citizen has the right to the state's protection of work, and in case of unemployment, illness, accident and disability – to social insurance that will be laid down in a separate act. The issue was regulated in a broader and more dynamic way in Article 60 of the Constitution of 1952[1]. Item 1 expressed the citizens' right to health protection and assistance in case of illness or disability. Item 2 stipulated that the broader and broader implementation of the right is provided by (1) the development of social insurance of blue collar and white collar workers in the event of illness, old age and disability as well as the development of various forms of social support, and (2) the development of the state-owned health service system, the improvement of sanitary facilities and the state of health in towns and villages, constant improvement of the health and safety conditions, a widespread campaign for disease prevention and combating, broader provision of free medical assistance, the development of hospitals, spas, clinics, village health centres and care for the disabled. Article 77 of the Small Constitution of 1992 kept in force Article 60 of the Constitution of 1952. The Constitution of 1997 laid down *expresis verbis* every citizen's right to social security in Article 67. According to item 1, "A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute". Item 2 states that "A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute".

In accordance with Article 67 of the Constitution, the scope of protection covers the indicated social risks: incapacitation for work by reason of sickness or prolonged ill health, old age as well as being involuntarily out of work and having no means of support. This enumeration means that Article 67 of the Constitution is not applicable to situations that are not laid down[2]. This scope is definitely narrower than that resulting from social security stipulated in international or European legal acts. This especially concerns Convention 102 of the ILO defining the minimum standard of social security or the European Social Charter. As both acts have been ratified by Poland and in the light of constitutional sources of law (Article 81 of the Constitution) are binding in the Polish legal system, there is no doubt that a domestic employer is obliged to follow the scope of the right to social security that results from those regulations. Thus, although the right to social security has been laid down in the Constitution

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[1] L. Garlicki, *Komentarz do art. 67 Konstytucji* [Commentary on Article 67 of the Constitution], [in:] *Konstytucja Rzeczypospolitej Polskiej, komentarz* [The Constitution of the Republic of Poland – commentary], vol. 5, p. 3.

[2] Judgement of the Constitutional Tribunal 11 July 2013, SK 16/12, OTK-A 2013/6/75.

of the Republic of Poland in a narrow scope, Poland is obliged to implement a wider scope, which actually takes place.

The constitutional right to social security guarantees that every citizen shall get a social benefit in the event of incapacitation for work by reason of sickness, disability, old age, involuntary unemployment and having no means of support[3]. On the other hand, the implementation of the obligation imposed on the state consists in developing the system and determining its rules as well as guaranteeing its operation. However, depending on the funding system, the role of the state will differ. It is more important in the repartition system ('pay as you go programme'), less important in the capital system, in which it must only appoint supervisory institutions[4]. It is especially important as repartition systems operate within social insurance systems, in which the pension (as well as the contribution) depends mainly on the formerly obtained remuneration (it also depends on the length of employment). On the other hand, in the capital system, usually operating within the so-called pillar model, pensions financed from the system supplement the basic system run by the state. Thus, pensions depend on the rate of return from investment of the total contribution to the scheme.

In case of the over-regulation of the right to social security at the constitutional level, one of the most interesting theoretical and practical issues is the question about the possibility of claims in accordance with the constitutional provision expressing the right to pension of a specified amount. Thus, in the above-mentioned constitutional systems, we either deal with the constitutional rights or only the reference to other legal regulations defining the rights. In the latter case, there is no doubt that the detailed contents of the given right are to be determined in secondary regulations. On the other hand, in case the right to social security is directly laid down in the constitution, a question about its material (substantial) substratum is raised. It is usually the source of many controversies in literature as well as court decisions, also in Poland. The issue has been discussed in the doctrine of constitutional[5], administrative[6] and social[7] law. In the jurisprudence of constitutional law, it is actually agreed that

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[3] L. Garlicki, *Komentarz do art. 67 Konstytucji* [Commentary on Article 67 of the Constitution], p. 4; judgement of the Constitutional Tribunal of 31 July 2014, SK 28/13, OTK-A 2014/7/81.

[4] Judgement of the Constitutional Tribunal of 7 May 2014, K 43/12, OTK-A 2014/5/50.

[5] K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [Limits on legislative intrusion into human rights in the Constitution of the Republic of Poland], Kraków 1999, pp. 53–58.

[6] W. Jakimowicz, *Publiczne prawa podmiotowe* [Public rights], Kraków 2002, pp. 256–259.

[7] K. Kolasiński, *Konstytucyjne prawo do zabezpieczenia społecznego a nowy system ubezpieczeń społecznych* [Constitutional right to social security vs. the new system of social insurance], PIP of 1999, No. 5, p. 10; R. Pacud, *Prawo do zabezpieczenia społecznego w Konstytucjach Rzeczpospolitej Polskiej* [Right to social security in the Constitution of the Republic of Poland], Zeszyt Naukowy Akademii Polonijnej of 2002, No. 1, pp. 138–140; *ibid.*, *Oczekiwanie prawne na emeryturę dożywotnią* [Expected entitlement to life pension], Bydgoszcz–Katowice 2006, pp. 259–264; M. Zieleniecki, *Prawo do zabezpieczenia społecznego* [Right to social security], Gdańskie Studia Prawnicze, Volume XIII, 2005, pp. 580–581.

social rights, including the right to social security, should be classified as the so-called entitlements resulting in the possibility of claiming specified behaviour from the obliged party, i.e. its action (provision of benefits) for the claimant's benefit. According to K. Wojtyczek, the possibility of implementing social rights depends on the establishment of specific legal norms, which causes that an individual cannot make use of the right without an adequate legal regulation[8]. In his opinion, the legislator has the basic task of: "(1) developing the system of state institutions appointed to enforce particular regulations and creating mechanisms to raise finance, indicating particular institutions appointed to provide certain benefits and providing them with adequate financial resources to do that, (2) determining the circle of the entitled persons, (3) defining grounds for obtaining given entitlements, (4) determining the contents of the benefit and creating legal measures in the event of law violation"[9]. B. Zawadzka expressed a similar opinion, stating that social rights differ from other types of citizens' rights because the provisions regulating their application in detail clearly determine the scope of their application[10]. Thus, the state determines in them the limits to its obligations towards the citizens. Therefore, social rights are in her opinion a special type of rights because they do not protect a citizen against the state but require that the state act in a positive way. According to her, social rights are social entitlements that do not give legal grounds for individual claims[11]. They can only be enforced with the use of detailed legislation. The fact that they lay down active participation of the state or third parties does not make the constitutional regulations insufficient. In the light of that, it can be stated that the constitutional rights determine an individual's legal status only *prima facie* and on the grounds of the constitution they can be determined as only the rights of that kind. In case of some constitutional rights, this means that definite determination of this status depends mainly on the legislator.[12] The thesis might be also applied in case of the right to social security, whose introduction to the constitution results from the adoption of the conception of a broad role of the state. That is why, according to L. Garlicki, the discussed norm expresses the state's constitutional obligation to provide pensions, which is not correlated with any entitlements of an individual that might be subject to individual claims against the state[13].

In the literature on administrative law, W. Jakimowicz paid special attention to the issue of legal characteristics of social rights. He classified the right to social

[8] K. Wojtyczek, *Granice...* [Limits...], pp. 31–32.
[9] *Ibid.*
[10] B. Zawadzka, *Prawa…* [Rights…], p. 7.
[11] B. Gronowska, *Prawo konstytucyjne* [Constitutional law], (ed.) Z. Witkowski, Toruń 2000, p. 99.
[12] P. Tuleja, *Bezpośrednie stosowanie Konstytucji w świetle jej nadrzędności* [Direct application of the Constitution in the light of its supremacy], Kraków 2003, p. 167.
[13] L. Garlicki, *Polskie…* [Polish…], pp. 110–111.

security as public rights with positive contents. They consist in the possibility of demanding that an adequate institution act in a specified and active manner, and they provide an individual with the right to demand that the state ensure the conditions for making use of the benefits to which an individual is entitled[14]. In this author's opinion, social rights can be directly executed in accordance with the Constitution (or the Constitution and a statute), and they include, inter alia, the right to social security, or they can be claimed exclusively within the scope of statutes[15]. According to him, this "dual way of regulating a citizen's freedoms and social rights results from a compromise between the standpoint that the Constitution must guarantee a certain minimum, but this minimum must be fully obtainable with the use of claims determined in the constitution, and a call for a broad and caring role of the state"[16].

On the other hand, in the literature on the social security law, the dominant standpoint is that the contents of the law is determined by the legislator, however, Article 67 (1) of the Constitution does not stipulate that the legislator has absolute freedom to create institutions and mechanisms to guarantee the rights. The legislator's freedom to select legal solutions is limited by the essence of a given law as well as the constitutional axiology connected with respecting the principle of social justice and equality[17]. In the literature on social law, there was an attempt to determine the normative contents of Article 67 (1) of the Constitution, looking for the meaning of the concept of 'social security', which as a legal language term has not been introduced to general legislation. It was stated that the constitutional right to social security is determined by the functions it is to play[18]. Reference to the function of social security while determining the normative contents of the right to social security also has grounds in the role that the Constitution has to play. Such interpretation of the right to social security goes far beyond the proposed framework established by the European social standards. In this context, the constitutional formulation of the right to social security may raise doubts because, in the discussed provision, the scope of social security was determined in a narrower way than that traditionally adopted in international law and doctrine, and the institution of social support was left outside its scope (Compare Article 67 (2) of the Constitution of the Republic of Poland). This is why, in M. Zieleniecki's opinion, the contents of Article 67 (1) of the Constitution cannot constitute grounds for the definition of social security[19].

[14] W. Jakimowicz, *Publiczne…* [Public…], p. 256.
[15] *Ibid*., pp. 257–258.
[16] *Ibid*., p. 259.
[17] K. Antonów, *Prawo do emerytury* [Right to pension], Kraków 2003, p. 47.
[18] K. Ślebzak, *System emerytalny pracowników jako element zabezpieczenia społecznego* [Employees' pension scheme as an element of social security], a typescript, Poznań 2003, p. 204 and the following.
[19] M. Zieleniecki, *Prawo…* [Right…], p. 566.

It only formulated a citizen's right to social security and its implementation was left to the ordinary legislator.

Similar standpoints can be found in the judgements of the Constitutional Tribunal. First of all, it is stated that the right to social security expressed in Article 67 of the Constitution is the entitlement and is fully enforceable[20]. However, it does not result in any material entitlements; thus, neither the constitutional right to any specific form of social security[21] nor the right to a specified method of awarding or valorising it[22] can be derived. Only statutes regulating these issues thoroughly can constitute grounds for claims[23].

On the other hand, however, the Tribunal states in the established decisions that Article 67 of the Constitution stipulates grounds for differentiating, firstly, the minimum legal scope of the right to social security, adequate to the constitutional essence of the right, and, secondly, the rights guaranteed by statute and going far beyond the constitutional essence of the discussed right[24]. With regard to the former sphere, the recognition of a breach of Article 67 of the Constitution can take place in case the legislator failed to provide the persons specified in Article 67 (1) and (2) of the Constitution with such benefits that will ensure the minimum means to live. However, the event when the legislator has the freedom to lay down the scope of entitlements resulting from the right to social security and may – as a rule – annul the entitlements going beyond the essence of that right must be assessed differently. In such a case, the assessment of constitutionality of the binding law may concern the issue whether the legislator acted with respect to other constitutional principles and norms, especially those that determine the rules of amending the law. However, a violation of the right to social security cannot be pronounced in case of the area that the legislator does not have to regulate following Article 67 of the Constitution. This is due to the fact that the provision does not regulate the scope or the form of benefits that goes beyond the essence of the right to social security[25]. At the same time, it is stated that the statute must ensure the benefits providing the minimum

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[20] Sentence of the Constitutional Tribunal of: 8 May 2000, SK 22/99, OTK ZU 2000/4/107; 7 September 2004, SK 30/03, OTK ZU 2008/8/A/82; 31 July 2014, SK 28/13, OTK-A 2014/7/81.

[21] Sentence of the Constitutional Tribunal of: 6 February 2002, SK 11/01, OTK ZU 2002/1A/2; 17 June 2014, P 6/12, OTK-A 2014/6/62; 13 May 2014, SK 61/13, OTK-A 2014/5/52; of 17 December 2013, SK 29/12, OTK-A 2013/9/138; of 17 December 2013, SK 29/12, OTK-A 2013/9/138; of 25 June 2013, P 11/12, OTK-A 2013/5/62; of 24 February 2010, K 6/09, OTK-A 2010/2/15; 27 January 2003, file no. SK 27/02, OTK ZU no. 1/A/2003, item 2; 7 September 2004, file no. SK 30/03, OTK ZU no. 8/A/2004, item 82; 19 July 2005, file no. SK 20/03, OTK ZU no. 7/A/2005, file no. 82; 20 November 2006, file no. SK 66/06, OTK ZU no. 10/A/2006, item 152; of 1 April 2008, SK 96/06, OTK-A 2008/3/40.

[22] Sentence of the Constitutional Tribunal of 17 December 2013, SK 29/12, OTK-A 2013/9/138.

[23] Sentence of the Constitutional tribunal of 17 December 2013, SK 29/12, OTK-A 2013/9/138; of 29 May 2012, SK 17/09, OTK ZU 2012/5/A/53; 13 May 2014, SK 61/13, OTK-A 2014/5/52.

[24] Sentence of the Constitutional Tribunal of 25 February 2014, SK 18/13, OTK-A 2014/2/15; of 25 June 2013, P 11/12, OTK-A 2013/5/62; of 28 February 2012, K 5/11, OTK-A 2012/2/16; of 8 June 2010, SK 37/09, OTK-A 2010/5/48.

[25] Sentence of the Constitutional Tribunal of 25 February 2014, SK 18/13, OTK-A 2014/2/15.

means to live so that basic needs can be met[26]. Thus, the statutory execution of the constitutional social right can never be below the minimum determined by the essence of the given law[27]. Thus, the aspect that refers to the minimum scope of social security and tries to determine it dominates this line of adjudication. Although it is not stated anywhere that the regulation may constitute grounds for an unambiguously determined entitlement, reference to the minimum means to live seems sufficiently definite and calculable.

However, as far as the right to social security above the specified minimum is concerned, the judicial decisions provide that the legislator is in charge of laying down the rights adequate to the political, social and economic objectives and developing such legal solutions that will best serve to meet them. That is why the adjudication on the aptness and purposefulness of the solutions remains beyond the cognition of the Tribunal[28]. Although the duty imposed on the legislator to implement the social guarantees laid down in the Constitution by developing adequate regulations does not constitute the obligation to develop the maximum benefit system, the protection of social rights should manifest itself in such development of legal solutions that would constitute the optimum implementation of the constitutional right[29]. It must be done, however, in the way that "on the one hand, takes into account the existing needs and, on the other hand, possibilities of meeting them"[30].

In the light of the above-presented discussion, it can be stated that although there are many opinions on the right to social security, its contents may be described as relatively unambiguous. On the one hand (the bottom level), we deal with the duty to guarantee the minimum right (the essence of the right); on the other hand, however, it (the top level) is about the execution of the right to social security in the optimum way. It seems that it would be possible to determine the minimum (definite) contents of social security and let an individual formulate claims in case the legislator fails to develop statutory regulations[31], which in fact makes reference to the adjudication of the Constitutional Tribunal, which assumes absolute obligation to safeguard the minimum (essence) right to

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[26] Sentence of the Constitutional Tribunal of 7 February 2006, SK 45/04, OTK ZU 2006/2/A/15; of 11 July 2013, SK 16/12, OTK-A 2013/6/75.

[27] Sentence of 8 May 2000, file no. SK 22/99, OTK ZU no. 4/2000, item 107; of 27 January 2010, SK 41/07, OTK-A 2010/1/5.

[28] Sentence of 24 April 2006, P 9/05, OTK-A 2006/46; of 11 July 2013, SK 16/12, OTK-A 2013/6/75; of 22 June1999, K 5/99.OTIK ZU 1999/100/538; of 12 September 2000, K 1/00. OTK ZU 2000/185/976.

[29] Sentence of the Constitutional Tribunal of 24 February 2010, K 6/09, OTK-A 2010/2/15; of 27 January 2010, SK 41/07, OTK-A 2010/1/5; of 13 December 2007, SK 37/06, OTK-A 2007/11/157; 20 November 2006, file no. SK 66/06, OTK ZU no. 10/A/2006, item 152.

[30] Sentences of the Constitutional Tribunal of: 8 May 2000, file no. SK 22/99, OTK ZU no. 4/2000, item 107; 3 July 2006, file no. SK 56/05, OTK ZU no. 7/A/2006, item 77; of 27 January 2010, SK 41/07, OTK-A 2010/1/5.

[31] The conception was broadly discussed by K. Ślebzak, *Ochrona emerytalnych praw nabytych* [Protection of acquired rights], Warszawa 2009, pp. 262–304.

social security. Such narrow contents of the social right would guarantee respect for human dignity, which shall be inviolable (Article 30 of the Constitution of the Republic of Poland), and would make it possible to execute the right. It would also determine the minimum standard of the protection of an individual at the constitutional level.

A FEW COMMENTS ON THE CHARACTER OF THE RIGHT TO SOCIAL SECURITY IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

Summary

In the event of the regulation of the right to social security at the constitutional level, one of the most interesting theoretical and practical issues is the question about the possibility of claims on the grounds of the provision of the Constitution that lays down the right to benefits at a determined level. Thus, in the above-cited constitutions, there is either the constitutional right to social security or only reference is made to provisions regulating this right precisely. In the latter case, there is no doubt that the specific contents of the given right are to be developed in the future secondary regulations. On the other hand, in the situation when the right to social security is laid down in a constitution directly, a question is raised about its material (definite) substratum. It usually results in many controversies in literature as well as in judicial decisions. The issue also concerns the right to social security regulated by the Polish Constitution of 1997. The aim of the article is to present the controversies over the above-mentioned issue in the Polish constitutional system.

KILKA UWAG NA TEMAT CHARAKTERU PRAWA DO ZABEZPIECZENIA SPOŁECZNEGO W ŚWIETLE POLSKIEJ USTAWY ZASADNICZEJ

Streszczenie

W przypadku jurydyzacji prawa do zabezpieczenia społecznego na poziomie konstytucyjnym, jednym z bardziej interesujących zagadnień teoretycznych, jak i praktycznych, jest pytanie o możliwość domagania się na podstawie przepisu konstytucji wyrażającego przedmiotowe prawo świadczenia w określonej wysokości. Stąd też w powoływanych w tekście porządkach konstytucyjnych mamy do czynienia albo z konstytucyjnym prawem podmiotowym albo wyłącznie z odesłaniem do przepisów konkretyzujących to prawo. W tym drugim przypadku nie ulega żadnej wątpliwości, że

konkretna treść danego prawa ma być dopiero ustalona w aktach prawnych niższego rzędu. Natomiast w sytuacji, gdy prawo do zabezpieczenia społecznego wyrażone jest w konstytucji wprost, pojawia się pytanie o jego materialny (konkretny) substrat. Jest to zazwyczaj źródłem wielu kontrowersji w piśmiennictwie, jak i w orzecznictwie. Problem ten dotyczy również prawa do zabezpieczenia społecznego uregulowanego w polskiej konstytucji z 1997 r. Celem artykułu jest przedstawienie kontrowersji związanych z powyższym zagadnieniem w polskim porządku konstytucyjnym.

QUELQUES REMARQUES CONCERNANT LE DROIT DE LA SÉCURITÉ SOCIALE DANS LE DROIT PRINCIPAL POLONAIS

Résumé

Dans le cas de juridiction du droit de la sécurité sociale au niveau constitutionnel, un des sujets les plus intéressants aussi bien théorique que pratique est une question sur la possibilité d'exiger le droit objectif de témoigner au montant défini à la base de l'article de la constitution. De cette manière dans les textes cités sur l'ordre constitutionnel nous avons à faire ou bien avec le droit constitutionnel du sujet ou bien uniquement avec l'envoi au règlement qui concrétise ce droit. Dans ce deuxième cas, il n'y a aucun doute que le contenu concret du droit donné doit être fixé dans les actes légaux du rang inferieur. Toutefois dans la situation où le droit de la sécurité sociale est exprimé dans la constitution directement, il apparait une question sur son substrat matériel (concret). D'habitude, c'est une source de plusieurs controverses dans l'écriture et aussi dans la jurisprudence. Ce problème touche également au droit de la sécurité sociale réglé dans la constitution polonaise de 1997. Le sujet de l'article est une présentation des controverses à cette question dans l'ordre constitutionnel polonais.

НЕСКОЛЬКО ЗАМЕЧАНИЙ ПО ПОВОДУ ХАРАКТЕРА ПРАВА НА СОЦИАЛЬНОЕ ОБЕСПЕЧЕНИЕ В СВЕТЕ ПОЛЬСКОГО ОСНОВНОГО ЗАКОНА

Резюме

В случае юридизации права на социальное обеспечение на конституционном уровне, одним из наиболее интересных вопросов теоретического и практического характера является вопрос о возможности определения запроса на основе конституционного положения, выражающего объективное право обеспечения в определённом размере.

В связи с этим в рассматриваемых в тексте конституционных положениях мы имеем дело либо с конституционным объективным правом, либо исключительно со ссылками к положениям, конкретизирующим закон об этом праве. Если речь идёт о втором случае, не подлежит сомнению, что конкретное содержание данного права только в ближайшее время будет определено в нижестоящих правовых актах. В то же время в ситуации, в которой право на социальное обеспечение выражено в конституции в непосредственном порядке, возникает вопрос о его предметном (конкретном) субстрате. Обычно это служит источником многочисленных разногласий как в литературе, так и в судебной практике. Данная проблема касается также права на социальное обеспечение, урегулированного в польской конституции от 1997 г. Целью статьи является рассмотрение разногласий, связанных с вышеупомянутым вопросом в польском конституционном праве.

Uroš Ćemalović

NOTIONS OF 'LIKELIHOOD OF CONFUSION' AND OF 'TRADEMARK WITH A REPUTATION' IN THE HARMONIZED EU TRADEMARK LAW

Introduction

For more than a quarter of a century, the general conditions for the registration of a national trademark[1] have been harmonized at the level of the European Community/Union. The Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008, hereinafter referred to as the Directive) defined the nature of signs of which a trademark may consist. However, even if a sign fulfils all the conditions required by the Directive, the registration may be refused or invalidated if it conflicts with a prior right. In other words, a sign can perfectly meet the requirements related to its nature (Article 2 of the Directive) and validity (Article 3 of the Directive), without being available because of a pre-existing right. General grounds for refusal or invalidity do not include the situation that could be defined as unavailability of sign, the consequence of which is also invalidity. The severity of this consequence is even more striking if one considers that in the absence of a prior conflicting right the way to the full validity of the registered sign would be wide open. For this particular reason, the provision of the Directive related to the grounds for refusal or invalidity concerning conflicts

[1] Directive 2008/95/CE of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (*Official Journal of the European Union* L 299, 08.11.2008, pp. 25–33), as well as the Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (*Official Journal of the European Union* L 78, 24.03.2009, pp. 1–42) are referring to "Community trade mark" and not "trademark". However, due to its widespread presence in theory, the latter term will be used in this article. See also: G.B. Dinwoodie, M.D. Janis, *Trademark Law and Theory – A Handbook of Contemporary Research,* Edward Elgar Publishing Limited, Cheltenham 2008; A.L. Brookman, *Trademark Law – Protection, Enforcement and Licensing*, Wolters Kluwer, New York 2014; B. Barton, *The Semiotic Analysis of Trademark Law*, "University of California Law Review" 51/2003, pp. 621–640; M. Bartholomew, *Advertising and the Transformation of Trademark Law*, "New Mexico Law Review" 38/2008, pp. 1–48; R.H. Hu, *International Legal Protection of Trademarks in China*, "Marquette Intellectual Property Law Review" 1/2009, pp. 71–99.

with earlier rights is very detailed, while its interpretation by the Court of Justice of the European Union (CJEU)[2] is quite abundant. More precisely, Article 4 of the Directive consists of two main groups of provisions: on the one hand, its paragraphs 1 to 3 introduced the rules that are mandatory in its entirety for all Member States; on the other hand, its paragraphs 4 to 6 completed those rules with some optional solutions that the national legislators may or may not transpose in their national legislation. Recital (8) of the Directive specified that: "the grounds for refusal or invalidity concerning […] conflicts between the trademark and earlier rights, should be listed in an exhaustive manner, even if some of these grounds are listed as an option for the Member States". However, some of the grounds for refusal or invalidity do not generate any substantial difficulties of interpretation. Taking into consideration their importance for the good application of harmonized trademark law at the level of the EU, this paper will focus on the likelihood of confusion with an earlier trademark (Chapter 1) and on the notion of a trademark with reputation Section 2).

1. The likelihood of confusion with an earlier trademark

There is a general consensus in jurisprudence[3] and theory[4] that trademark's main function is to guarantee the origin of the product or service, to certify that: "the products covered by the mark originate from the proprietor's establishment"[5]. This function of a trademark is, in many ways, linked with its distinctive character, given that it guarantees "that the product or service in respect of which the trademark is registered, when it is acquired by the consumer, keeps the characteristics it had when the trademark owner has put it on the market […] this function of the trademark is sufficient to justify the need for its distinctive character"[6]. However, a trademark can fully meet the criteria of distinctiveness – as it was defined by the Directive and the jurisprudence of the Court of Justice of the EU – without being able to represent the guarantee of its origin, since it is identical or similar to an earlier trademark. Some authors also underline that "a distinctive character is not a constant quality"[7]

[2] In this article, the previous denominations of the CJEU will not be taken into consideration.

[3] See, for example, the judgments of the Court of Justice of the EEC of 22 June 1976 in case *Terrapin v Terranova* (119/75), 1049 and of 23 May 1978 in case *Hoffmann-La Roche & Co. v Centrafarm* (102/77), 1145.

[4] See, for example, L.G. Grigoriadis, *Trade Marks and Free Trade: A Global Analysis*, Springer 2014, p. 150.

[5] Judgment of the Court of Justice of the EEC of 22 June 1976 in case *Terrapin v Terranova* (119/75), 1049.

[6] G. Bonet, A. Bouvel, *Distinctivité du signe*, Jurisclasseur Marques, dessins et modèles, Paris 2008, fasc. 7090, 1.

[7] T.J. Cohen, C. Van Nispen, T. Huydecoper, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law*, Kluwer Law International, Alphen aan den Rijn 2010, p. 127.

because "a mark may also initially have little or no distinctive character but nevertheless acquire this through use in practice"[8]. Moreover, a trademark can be fully distinctive *in abstracto* (because it meets all the requirements imposed by points (b) to (e) of Article 3, paragraph 1 of the Directive), but *in concreto* the same trademark can be non-distinctive compared to another earlier national or Community[9] trademark. Therefore, the theoretical concept of the availability of a sign loses much of its autonomy in favour of the distinctiveness: a sign is not available because it is non-distinctive in respect of the trademark that is already validly registered. In other words, a trademark does not satisfy the function of the guarantee of the identity of origin of the product or service not only if it is non-distinctive *in abstracto*, but also if the registration can be refused or declared invalid for one of the following reasons:

> "(a) if it is identical with an earlier trademark, and the goods or services for which the trademark is applied or is registered are identical with the goods or services for which the earlier trademark is protected;
> (b) if because of its identity with, or similarity to, the earlier trademark and the identity or similarity of the goods or services covered by the trademarks, there exists likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark"[10].

Teleological and textual interpretation of this provision leads to the conclusion that in two aforementioned situations the Directive imposes one double and one triple requirement: in point (a) it is the identity of both trademarks and products or services, while point (b) requires that the following three conditions be met: (1) identity or similarity between the trademark application and the registered mark; (2) identity or similarity of the goods or services covered by the trademarks and (3) existence of the likelihood of confusion that includes the likelihood of association with the earlier trademark. It is clear that the requirements of point (a) – identity of both trademarks and products or services for which the earlier trademark is protected – cannot raise major problems of interpretation and enforcement that would be independent of those of point (b). Given the extraordinary completeness and precision of Article 4, paragraph 2 of the Directive, the same conclusion is applicable to the definition of the notion of "earlier trademarks". On the other hand, the interpretation of point (b) of the first paragraph requires, firstly, the analysis of the context in which the likelihood of confusion can occur (title 1.1) and, secondly, imposes the necessity to propose a definition of the notion of such likelihood (title 1.2).

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[8] *Ibid.*

[9] Notwithstanding the fact that, according to the Lisbon Treaty (2009), the European Community (EC) has ceased to exist and was replaced by the European Union, the Community Trademark has kept this name.

[10] Article 4, paragraph 1 of the Directive.

1.1. Context of the problem: identity or similarity of trademarks and goods or services

The principle of speciality has for long been recognized as the cornerstone of trademark law: the sign that constitutes a trademark is protected only for the products and services listed in the application for registration. In other words, this rule "allows the scope of protection offered to the trademark to be restricted to certain designated goods or services"[11] and it means "that the mark is only distinctive as part of a competitive relationship"[12]. Article 4 of the Directive has introduced the principle of speciality in the harmonized EU trademark law; however, the proper application of this principle also requires a harmonized definition of the notions of identity and similarity of the goods or services. In the same vein, the relationship between the trademark application and the earlier mark has also to be clarified, even if it does not concern the principle of specialty *stricto sensu*. The jurisprudence of the CJEU is an ideal starting point for setting up the criteria of identity or similarity. However, to define the scope of application of the two points of Article 4, paragraph 1, it is first necessary to specify the conditions of their application.

For the reason of its identity/similarity with an earlier trademark registered for identical/similar goods or services, an application for trademark registration may be refused – or a trademark that is already registered may be declared invalid – only if the three conditions specified in point (b) of Article 4, paragraph 1 of the Directive are met cumulatively. This requirement clearly follows from the wording of the provision in question. However, the problem of interpretation of the relationship between the requirement of identity or similarity of trademarks and the requirement of identity or similarity of goods or services cannot be solved by relying exclusively on the combined reading of points (a) and (b) of Article 4, paragraph 1 of the Directive and its recital 11. On the one hand, "the protection afforded by the registered trademark, the function of which is in particular to guarantee the trademark as an indication of origin, should be absolute in the case of identity between the mark and the sign and the goods or services"[13]; therefore, one could conclude[14] that, *a contrario*, the protection should be relative in the case of their similarity. On the other hand, given that point (a) requires a double identity (the two trademarks and the products or services), it is clear that point (b) can be applicable in the following three cases:

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[11] P. Këllezi, B. Kilpatrick, P. Kobel Pierre (ed.), *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors*, Springer, Heidelberg 2014, p. 340.

[12] *Ibid.*

[13] Recital 11 of the Directive 2008/95/CE of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks.

[14] Moreover, this conclusion can also be made on the basis of the existence of the third condition (likelihood of confusion) specified in point (b).

(1) a trademark that was applied for and the earlier trademark are identical and the goods/services they cover are similar; (2) a trademark that was applied for and the earlier trademark are similar, while the products/services they cover are identical; or (3) both trademarks and products/services they cover are similar. Consequently, a lesser degree of proximity between the trademarks and/or products or services justifies the requirement of likelihood of confusion as a supplementary condition for the refusal or invalidity of a trademark. In other words, the provision of point (a), applicable only in case of double identity, implicitly includes a rebuttable presumption of the likelihood of confusion[15], while in the case of point (b) the existence of such likelihood must be proven. Therefore, the definition of the notions of identity and similarity of the trademarks and goods or services is crucial for good application of the harmonized EU trademark law – beyond representing the differentiation between the scope of application of points (a) and (b), it is also a precondition for the analysis of the concept of likelihood of confusion.

With regard to the question of identity between the two trademarks, the CJEU considers that "the absolute protection in the case of a sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered, which is guaranteed by Article 5(1)(a) of the Directive, cannot be extended beyond the situations for which it was envisaged"[16] and that, accordingly, "the criterion of identity of the sign and the trade mark must be interpreted strictly"[17], because "the very definition of identity implies that the two elements compared should be the same in all respects"[18]. Having thus laid the foundation of its reasoning, the Court introduced the fundamental rule for the interpretation of the notion of identity, stating that "there is identity between the sign and the trademark where the former reproduces, without any modification or addition, all the elements constituting the latter"[19]. In order to facilitate the application of this general rule, the Court specified that: "the perception of identity between the sign and the trademark must be assessed globally with respect to an average consumer who is deemed to be reasonably well informed, reasonably observant and circumspect"[20]. Of course, one can disapprove of the introduction of a relatively vague criterion of "an average consumer". However, even the most critical observer would admit that the Court's interpretation of the notion of identity greatly facilitates the application of the

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[15] A good example of explicitly defined rebuttable presumption can be found in Article 16, paragraph 1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights: "in case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed".

[16] Judgment of the Court of Justice of 20 March 2003 in case *LTJ Diffusion SA v Sadas Vertbaudet SA* (C-291/00), para50; see note 2.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*, para51.

[20] *Ibid.*, para52.

EU law by the national courts. Concerning other methods aimed at facilitating the determination of identity, some authors underlined that "the applicant has the dual obligation: to list the products or services for which the protection is demanded and to indicate the reference to the administrative classification"[21]. The reference in question concerns the International Classification of Goods and Services (ICGS) established by the Nice Agreement of 15 June 1957, revised in 1967 and 1977 and amended in 1979; the current edition of the Classification is the tenth, which entered into force on 1 January 2012[22]. However, even if this reference can be used as an indicator of a possible identity between the goods or services covered by the two trademarks, it is clear that the protection does not necessarily extend to "all the products mentioned in one class, but only for identical products and for products of a similar nature to those to which the application refers"[23]. Therefore, the information contained in the application for trademark registration and, to a lesser extent, the reference to the International Classification can provide a sufficient number of criteria to establish the identity of the goods or services. The notion of similarity between the products/services, however, still remains quite obscure. Once again, the CJEU's interpretation of the harmonized EU trademark law brings in some crucial elements: "in assessing the similarity of the goods or services concerned […] all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary"[24]. On the basis of these general standards, the national authorities can apply the provisions of the Directive in their decisions.

1.2. Content of the problem: likelihood of confusion

The fundamental function of a trademark – to guarantee the origin of the product or service – is inseparable from the perception of consumers. In other words, "what goes on in consumers' minds is crucial to both the creation of trademarks, and, in the infringement context, to the scope of trademark rights"[25]. Therefore, the need for a harmonized application of point (b) of Article 4, paragraph 1 of the Directive requires an interpretation that would be universally applicable for all EU Member States. The analysis of the context in which the existence of likelihood of confusion can occur must be accompanied

[21] J. Azéma, J-C. Galloux, *Droit de la propriété industrielle,* Dalloz, Paris 2006, p. 794.
[22] Website of the World Intellectual Property Organization, WIPO-Administered Treaties http://www.wipo.int/treaties/en/classification/nice/summary_nice.html (13.11.2014).
[23] S. Durrande, *Disponibilité des signes*, Jurisclaseur Marques, dessins et modèles, Paris 2004, fasc. 7110, 4.
[24] Judgment of the Court of Justice of 29 September 1998 in case *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer SA* (C-39/97), para23; see note 2.
[25] G.B. Dinwoodie, M.D. Janis, *op. cit.*, pp. 374–375.

by a harmonized definition of this concept. Given that, on the one hand, the likelihood of confusion “should constitute the specific condition”[26] for the protection afforded by the registered trademark and that, on the other hand, its appreciation “depends on numerous elements”[27], it is necessary to rely on the criteria set by the CJEU. However, the text of the Directive includes some basic elements that can serve as a starting point for further interpretation. Recital 11 of the Directive stresses that: “it is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion”. This requirement is transformed into the provision of Article 4, paragraph 1, point (b), laying down that this likelihood also “includes the likelihood of association with the earlier trademark”. Finally, recital 11 introduces an indicative list of factors that must be taken into consideration in determining the existence of likelihood of confusion, which shall include “the recognition of the trademark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trademark and the sign and between the goods or services identified”. These provisions represent the global normative framework laid down by the EU legislature, but its effective application needed a further interpretation by the Court.

In the interpretation of the rules of the harmonized EU trademark law, the CJEU founded its reasoning on the function of the trademark, given that “there is a likelihood of confusion within the meaning of Article 4(1)(b) of the Directive where the public can be mistaken as to the origin of the goods or services in question”[28]. In these circumstances, an additional clarification is necessary in relation to two elements. Firstly, the reference to the public is just one way to indicate all the individuals meeting the criterion of an “average consumer”, who is supposed to be “reasonably well informed, reasonably observant and circumspect”[29]. Secondly, the public can be mistaken if there is a risk that it “might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings”[30]. This assessment should always be comprehensive, since “it is not sufficient to show simply that there is no likelihood of the public being confused as to the place of production of the goods or services”[31]. Therefore, in order to identify the general principles of the global assessment of the likelihood of confusion, it is first necessary to examine the scope of the provision of the Directive on the likelihood of association; then the problem of assessing such likelihood in the case of similarity between the trademarks should be analysed. In order to

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[26] Recital 11 of Directive 2008/95/CE.
[27] *Ibid.*
[28] CJEC, judgment in case *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer SA*, *supra*, para26.
[29] CJEC, judgment in case *LTJ Diffusion SA v Sadas Vertbaudet SA, supra*, para52.
[30] CJEC, judgment in case *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer SA*, *supra*, para29.
[31] *Ibid.*

declare a trademark invalid because of the conflict with an earlier trademark, point (b) of Article 4, paragraph 1 requires that the likelihood of confusion "include the likelihood of association". Should this provision be interpreted as a double requirement? In the absence of likelihood of association, is it possible to prove the existence of likelihood of confusion? A purely logical and textual analysis of the wording of the Directive may suggest a negative answer to the second question. However, the judicial intervention of the CJEU relativized the importance of the risk of association, since this concept "is not an alternative to that of likelihood of confusion, but serves to define its scope"[32] and given that "the terms of the provision itself exclude its application where there is no likelihood of confusion on the part of the public"[33]. This reasoning of the Court leads to the conclusion that "the mere association which the public might make between two trademarks as a result of their analogous semantic content is not in itself a sufficient ground for concluding that there is a likelihood of confusion"[34]. By this series of precisions, the CJEU clearly delimited the scope of the provision of the Directive on the likelihood of association.

The problem of assessing the likelihood of confusion is both theoretical and practical. In this context, as M. Partridge remarked, "the use of confusingly similar marks for related goods or services may be sufficient to create a likelihood of confusion"[35]. In other words, the context in which this likelihood may occur cannot remain without influence on the method of its assessment. Therefore, it must involve "some interdependence between the relevant factors, and in particular a similarity between the trademarks and between these goods or services"[36]. More precisely, "a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks and *vice versa*"[37]. This reasoning of the CJEU may lead to the conclusion that the identity or similarity between the trademarks and the goods/services represent only a "factor" for assessing the likelihood of confusion. However, in its judgment in case *Vedial SA v OHIM*, the Court did not miss the opportunity to reaffirm that "those conditions are cumulative"[38]. The assessment of the likelihood of confusion requires an objective approach, which takes into account all the conditions that must be met for a trademark to be declared invalid under point (b) of Article 4,

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[32] Judgment of the Court of Justice of 11 November 1997 in case *SABEL BV v Puma AG Rudolf Dassler Sport* (C-251/95), para18; see note 2.

[33] *Ibid.*

[34] *Ibid.*, para26.

[35] M. Partrige, *Collected articles on copyright, trademarks and the Internet*, iUniverse Inc. Lincoln 2003, p. 44.

[36] CJEC, judgment in case *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer SA*, *supra*, para17.

[37] *Ibid.*

[38] Judgment of the Court of Justice of 12 October 2004 in case *Vedial SA v OHIM* (C-106/03 P), para51; see note 2.

paragraph 1. With regard to the “visual, aural or conceptual similarity”[39] of the trademarks, “the global assessment of the likelihood of confusion must […] be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components”[40], because “the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details”[41]. In the same vein, the Court added that “the more distinctive the earlier mark, the greater will be the likelihood of confusion”[42] and that it is “not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either *per se* or because of the reputation it enjoys with the public”[43]. In the context of Article 4 of the Directive, the mention of “distinctive components” and of “distinctive character” is of utmost importance. By going beyond the normative framework set by the Directive, the Court requires a systemic approach to the harmonized EU trademark law and proves the importance of its jurisprudence. Moreover, the Court’s reasoning confirms the organic link between the notions of distinctiveness and availability of the trademark.

2. Trademark with a reputation

The principle of speciality is one of the crucial notions of national trademark laws, even if, at times, its rigidity “has hampered the extension of protection to non-competing goods and services in some countries”[44]. The European Union’s harmonized trademark law represents a set of rules, the majority of which are mandatory in its entirety for all Member States. It is also the case with Article 4, paragraph 1 of the Directive, which harmonizes the grounds for invalidity in case of conflict with an earlier trademark; this provision represents a full recognition of the principle of speciality. However, the reputation enjoyed by certain trademarks, because of, for example, long-term presence in the market or substantial geographic extent, may produce an effect beyond the class (in terms of ICGS) for which they are registered. By introducing the concept of a trademark with a reputation, the EU legislation has provided, under certain conditions, the protection of a trademark for goods or services that are not similar to those for which it was initially registered. This approach represents a partial exception to

39 Order of the Court of Justice of 28 April 2004 in case *Matratzen Concord GmbH v OHIM* (C-3/03 P), para29; see note 2.

40 *Ibid.*

41 CJEC, judgment in case *SABEL BV v Puma AG Rudolf Dassler Sport, supra*, para23.

42 *Ibid.*, para24.

43 *Ibid.*

44 P.K. Yu (ed.), *Intellectual Property and Information Wealth – Issues and Practices in the Digital Age, Volume three, Trademark and Unfair Competition*, Praeger Publishers, Westport 2007, p. 272.

the principle of speciality and proves the considerable influence of international law and legal doctrine on the harmonized EU trademark law. Among the provisions of the Directive that are mandatory in their entirety, only Article 4, paragraph 3, concerns a trademark with a reputation and covers exclusively the earlier Community trademarks[45]. In addition, under Article 4, paragraph 4 (a) of the Directive, Member States can provide the invalidity of a trademark because of its conflict with an earlier national trademark with a reputation; however, this invalidity, unlike it is the case for earlier Community trademarks, may also be partial, given that the first sentence of this paragraph provides that a trademark can be "liable to be declared invalid where, and *to the extent that*". Finally, another optional provision of the Directive (Article 5, paragraph 2) related to the rights conferred by a trademark, repeats, *mutatis mutandis*, the wording of Article 4, paragraph 3. These provisions include two basic elements: on the one hand, the requirement (devoid of any additional information) that the earlier mark "has a reputation"; on the one hand, the need to demonstrate that the "use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark"[46]. Since the condition of identity or similarity between the later and the earlier trademark is part of the problem related to the misuse[47], the study of the harmonized EU trademark law firstly requires the analysis of the notion of repute of the earlier trademark (title 2.1) before focusing on the risk of improper use of the later trademark (title 2.2).

2.1. Notion of repute of the earlier trademark

There is a consensus in the doctrine that if the notion of repute "is not defined with sufficient precision, there is a risk that the injustice or unfairness in taking advantage will not be defined properly"[48]. The international conventions in the field of trademark law, as well as the legal doctrine, have developed various concepts – more or less similar to that introduced by the Directive – of a trademark with a reputation. For example, Article 6 *bis* of the Paris Convention for the Protection of Industrial Property (1883) lays down the rules that are the permission "to refuse or to cancel the registration, and to prohibit the use, of

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[45] See note 9.

[46] Article 5, paragraph 2 of Directive 2008/95/CE.

[47] This conclusion is based on the reasoning of the CJEU, given that the misuse of the later trademark is not imaginable in the absence of "a degree of similarity between the mark with a reputation and the sign", while "it is sufficient for the degree of similarity between the mark with a reputation and the sign to have the effect that the relevant section of the public establishes a link between the sign and the mark", judgment of the Court of Justice of 23 October 2003 in case *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* (C-408/01), para31; see note 2.

[48] W. Sakulin, *Trademark Protection and Freedom of Expression – An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European Law*, Kluwer Law International, Alphen aan den Rijn 2011, p. 92.

a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or the use to be *well-known* in that country". Despite its limitations, this provision was the starting point for another concept – that of a famous trademark, which is "close to the concept of a well-known trademark, but comprises an even greater reputation and introduces an additional degree of knowledge (...) sometimes defined as a trademark with an intrinsic power of attraction"[49]. On the other hand, the Agreement on Trade-Related Aspects of Intellectual Property Rights – whose definition of the well-known trademark (Article 16, paragraph 2) is based on the reference to the Paris Convention – is much closer to the provisions of the Directive. Nevertheless, it is clear that none of these international agreements provides additional details on the criteria of notoriety or fame of a trademark.

The rules of the harmonized EU trademark law related to the protection of trademarks with a reputation are not based on the requirement of likelihood of confusion. Even if this observation seems to be the logical consequence of the principle that a trademark which has a reputation is protected for goods or services which are not similar to those for which it was registered (specificity named "extended protection"[50] by the Directive), the CJEU did not fail to stress this quality: "unlike Article 5(1)(b) of the Directive, which is designed to apply only if there exists a likelihood of confusion on the part of the public, Article 5(2) of the Directive establishes, for the benefit of trademarks with a reputation, a form of protection whose implementation does not require the existence of such a likelihood"[51]. In addition, the difference in the scope of protection between trademarks with a reputation and other earlier trademarks is justified by the intention of the EU legislation to allow the Member States to grant "at their option extensive protection to those trademarks which have a reputation"[52]. This specific status can only increase the need for a judicial interpretation of the criteria for such an extended protection. Moreover, the concept of a trademark with a reputation "implies a certain degree of knowledge of the earlier trademark among the public"[53]. Therefore, finding the proper definitions of (1) the extent of this knowledge and (2) the nature of the public amongst which this knowledge exists are crucial for the effective application of the harmonized EU trademark law. Concerning the first definition, the CJEU specified that "the degree of knowledge required must be considered to be reached when the earlier mark

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[49] J. Azéma, J.-C. Galloux, *op. cit.*, p. 797.

[50] *Ibid.*

[51] CJEC, judgment in case *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.*, *supra*, para27.

[52] Recital 10 of Directive 2008/95/CE.

[53] Judgment of the Court of Justice of 14 September 1999 in case *General Motors Corporation v Yplon SA* (C-375/97), para23; see note 2.

is known by a significant part of the public concerned by the products or services covered by that trademark"[54]. Consequently, the degree of knowledge of a potentially reputed trademark depends on the part of the public, which has to be significant, while the public itself should be concerned by the products or services. It is first necessary to examine the second condition, given that the size of a non-relevant public represents no interest for the establishment of the degree of knowledge.

The public concerned by the products or services covered by an earlier potentially reputed trademark may be "either the public at large or a more specialized public, for example traders in a specific sector"[55]. In order to define these two kinds of the public, one must refer to the characteristics of the product or service being marketed; therefore, the Court's reasoning leaves an important place for interpretation by the national courts. One part of the doctrine considers that "the public to consider is not the public at large"[56], while, on the contrary, some authors point out that "the public at large is sometimes necessary for the reputation of luxury trademarks"[57], whose owners started to make "clever and intense use of all communications media, including the Internet"[58]. Whichever of these two positions is considered to be more appropriate for the national trademarks, it is obvious that the reputation of a Community trademark[59] must be assessed with reference to the EU as a whole. Concerning the condition related to the "significant part of the public", the CJEU estimated that the national courts "must take into consideration all the relevant facts of the case, in particular the market share held by the trademark, the intensity, geographical extent and duration of its use and the size of the investment made by the undertaking in promoting it"[60]. However, this non-exhaustive list of relevant factors does not include the numerical expression of the proportion of the public (a solution known in German law[61]), because "it cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined"[62]. Finally, with regard to the geographical scope of the trademark, the provisions of the Directive specified whether to take into account the EU level (for the Community trademark, Article 4, paragraph 3) or the national level ("reputation in the

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[54] *Ibid.*, para26.
[55] *Ibid.*, para24.
[56] J. Azéma, J.-C. Galloux, *op. cit.*, p. 797.
[57] V. Tharreau, *Le grand public et les marques de luxe – une relation singulière*, Cabinet Pigeon-Bormans, Paris 2002, p. 3.
[58] *Ibid.*
[59] See note 9.
[60] CJEC, judgment in case *General Motors Corporation v Yplon SA, supra*, para27.
[61] J. Pagenberg, *La détermination de la 'renommée' des marques devant les instances nationales et européennes*, Mélanges offerts à J.-J. Burst, Litec, Paris 1997, p. 409.
[62] CJEC, judgment in case *General Motors Corporation v Yplon SA, supra*, para25.

Member State" for a national trademark, Article 4, paragraph 4). Regarding the national level, the CJEU indicated that "in the absence of any definition of the Community provision in this respect, a trademark cannot be required to have a reputation 'throughout' the territory of the Member State"[63] and that, therefore, "it is sufficient for it to exist in a substantial part of it"[64]. Even if this precision brought by the Court facilitates the implementation of the Directive, the interpretation of the notion of "substantial" part of the territory may still vary in different Member States.

2.2. Risk of improper use of the later trademark

The crucial characteristics of the notion of a trademark's repute are that it represents "the positive image and the positive qualities"[65] indicated by it. However, even if all the conditions – as introduced by the Directive and interpreted by the CJEU – related to the repute of a trademark are met, the wider protection granted by such a mark remains subject to the second condition, given that, as the CJEU indicated, "the earlier trademark must be detrimentally affected without due cause"[66]. On the other hand, it is clear from the wording and the purpose of the Directive that the only risk of infringement is sufficient for this condition to be fulfilled. Consequently, the further study needs to answer the question related to the meaning of an infringement of (or a detrimental impact on) the earlier trademark. In this respect, the Directive provides for two alternative conditions: "use of (the) sign without due cause"[67] may, on the one hand, take "unfair advantage (…) to the distinctive character or the repute of the trademark"[68]. On the other hand, this use can be "detrimental" to the distinctive character or the repute of the same trademark. Concerning both situations, the CJEU underlined that "Article 5(2) applies to situations in which *the specific condition of the protection* consists of a use of the sign in question without due cause"[69]. In other words, the detrimental impact on the earlier trademark is constituted by this use and, therefore, implies the need to clarify two points: (1) the question of identity or similarity between the two trademarks and (2) the question of the goods or services for which they may be used.

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63 *Ibid.*, para28.
64 *Ibid.*
65 W. Sakulin, *op. cit.*, p. 93.
66 CJEC, judgment in case *General Motors Corporation v Yplon SA, supra*, para30.
67 Article 5, paragraph 2 of the Directive 2008/95/CE.
68 *Ibid.*
69 CJEC, judgment in case *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd., supra*, para27.

The provisions of the Directive do not impose the requirement that the later trademark is "identical with or similar to"[70] an earlier trademark[71] with a reputation. Nevertheless, the CJEU has given a valuable interpretation concerning the infringements of it by pointing out that they "are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them"[72]. Although the "connection" mentioned in this judgment – as it was already concluded in title 2.1. of this article – does not require the existence of likelihood of confusion, it can be proved by the same means and must "be appreciated globally, taking into account all factors relevant to the circumstances of the case"[73]. With regard to the question of to the goods or services covered by the two trademarks, the specificity of the legal status of a trademark with a reputation lies in the fact that such a trademark is protected for goods or services that are not similar to those for which it was originally registered. However, the risk of divergences in the application of the EU law and the doubts raised by the national courts have pushed the CJEU to clarify certain points about it. The protection of a trademark with a reputation cannot "lead to marks with a reputation having less protection where a sign is used for identical or similar goods or services than where a sign is used for non-similar goods or services"[74]. On the other hand, the protection may be greater, given that "Articles 4(4)(a) and 5(2) of the Directive are to be interpreted as entitling the Member States to provide specific protection for registered trademarks with a reputation in cases where a later mark or sign, which is identical with or similar to the registered mark, is intended to be used or is used for goods or services identical with or similar to those covered by the registered mark"[75]. Therefore, when a Member State has transposed the optional provisions of the Directive relating to the trademarks with a reputation, it is free to provide specific protection in the event of such an identity or similarity. In any case, the risk of improper use represents the specific condition of the protection of a trademark with a reputation in the harmonized EU trademark law.

[70] Article 5, paragraph 2 (in relation to the rights conferred by a trademark), but also Article 4, paragraphs 2, 3 and 4 of the Directive 2008/95/CE.

[71] Strictly speaking, the identity or similarity may exist between the later sign and the earlier trade-mark. However, the considerations of style and the need for better legibility imposed the terminological simplification leading to the mention of the two trademarks.

[72] CJEC, judgment in case *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.*, *supra*, para29.

[73] *Ibid.*, para30.

[74] Judgment of the Court of Justice of 9 January 2003 in case *Davidoff & Cie SA, Zino Davidoff SA v Gofkid Ltd.* (C-292/00), para25; see note 2.

[75] *Ibid.*, para30.

Conclusion

The harmonization of national trademark laws in the European Union, partially elaborated by the secondary legislation and complemented by its judicial interpretation, can be globally defined as a consequence of an incomplete functional approximation of national laws. The harmonization was incomplete because it was limited only to those of national legal provisions that most directly affected the functioning of the internal market. On the other hand, the approximation of national laws was functional, given that its main objectives were to facilitate the free movement of goods and the freedom to provide services, as well as to improve the conditions of competition. In 2008, upon the adoption of the codified version of Directive 89/104/EEC, the EU's legislature is indirectly praised for having achieved this objective by stating, in its second recital, that "the trademark laws applicable in the Member States before the entry into force of Directive 89/104/EEC contained disparities which may have impeded the free movement of goods and freedom to provide services and may have distorted competition within the common market". The use of past tense clearly shows that the objective of harmonization, as defined in 1988, is considered to be achieved twenty years later. However, even if some of the grounds for refusal or invalidity of a national trademark haven't generated any substantial difficulties of interpretation, the problem of the likelihood of confusion with an earlier trademark and the notion of a trademark with a reputation often necessitated a substantial interpretation by the Court of Justice of the European Union. Consequently, it was only the introduction of a Community trademark that could lead to progressive framing of a unified European trademark protection system.

NOTIONS OF 'LIKELIHOOD OF CONFUSION' AND OF 'TRADEMARK WITH A REPUTATION' IN THE HARMONIZED EU TRADEMARK LAW

Summary

The main reason for the first intervention of the EU law in the field of trademark law was to limit, as much as possible, the negative consequences of the disparities in the national legislations, which might affect the freedom of movement and the free competition in the Union's internal market. Therefore, the general conditions for the registration of a national trademark are harmonized at the level of the EU by Directive 89/104/EEC, repealed by Directive 2008/95/EC. However, the registration of a sign as a national trademark may be refused or declared invalid if it conflicts with a prior right. Interpretation of the provisions of the Directive related to the grounds for refusal or invalidity concerning conflicts with earlier rights is very

important for the effective application of the harmonized EU trademark law. This article focuses on two crucial issues: the likelihood of confusion with an earlier trademark (chapter 1) and the notion of a trademark with reputation (section 2).

POJĘCIA „PRAWDOPODOBIEŃSTWA POMYLENIA" Z INNYM ORAZ „ZNAKU TOWAROWEGO Z RENOMĄ" W ZHARMONIZOWANYM PRAWIE UNII EUROPEJSKIEJ W ZAKRESIE ZNAKÓW TOWAROWYCH

Streszczenie

Głównym powodem pierwszej interwencji prawa Unii Europejskiej w dziedzinę przepisów dotyczących znaków towarowych było jak największe ograniczenie negatywnych skutków rozbieżności przepisów prawa krajowego, mogących mieć wpływ na swobodę przepływu towarów i usług oraz wolnej konkurencji na wewnętrznym rynku Unii Europejskiej. W związku z tym, ogólne warunki rejestracji krajowych znaków towarowych na szczeblu Unii Europejskiej zharmonizowane zostały poprzez dyrektywę 89/104/EWG, uchyloną dyrektywą 2008/95/WE. Jednakże rejestracja symbolu znaku towarowego może spotkać się z odmową lub zostać unieważniona, jeśli jest w kolizji z wcześniejszym znakiem. Interpretacja postanowień dyrektywy dotyczących podstaw odmowy bądź unieważnienia rejestracji ze względu na kolizję z wcześniejszymi prawami jest niezwykle ważna dla skutecznego stosowania zharmonizowanego prawa unijnego w zakresie znaków towarowych. Artykuł niniejszy koncentruje się na dwóch najważniejszych zagadnieniach: prawdopodobieństwie pomylenia z wcześniejszym znakiem towarowym (Rozdział 1) oraz pojęciu znaku towarowego z renomą (Część 2).

LES NOTIONS DE 'PROBABILITÉ DE SE TROMPER' AINSI QUE 'LE LOGO RENOMMÉ DE MARCHANDISE' DANS LE DROIT UNIFIÉ DE L'UNION EUROPÉENNE CONCERNANT DES LOGOS DE MARCHANDISES

Résumé

La première raison d'intervention du droit de l'Union européenne dans le domaine des règlements concernant les signes de marchandises était la plus grande limitation des effets négatifs causée par les divergences des règlements du droit national qui pourraient influencer à la liberté d'échange des marchandises et services ainsi que de la compétitivité au marché intérieur de l'Union européenne. Suite à cette prudence,

les conditions générales d'enregistrer les signes des marchandises nationaux à l'échelle de l'Union européenne ont été harmonisées par la directive 89/104/EWG, dérogée par la directive 2008/95/WE. Toutefois, l'enregistrement de l'emblème du signe de marchandise peut être renoncé ou même rendu invalide s'il est en collision avec le signe antérieur. L'interprétation des règlements de la directive concernant les raisons de renoncer ou invalider l'enregistrement vu la collision des droits antérieurs est pourtant très importante pour l'application efficace du droit harmonisé de l'Union dans le cadre des signes de marchandises. L'article présent se concentre sur les deux aspects les plus importants : celui de la probabilité de se tromper avec un autre signe antérieur (Chapitre 1) ainsi que celui de la notion du signe de marchandise avec sa renommé (Partie 2).

ПОНЯТИЯ «ВЕРОЯТНОСТИ ОШИБОЧНОГО ПРИНЯТИЯ» ЗА ДРУГОЕ, А ТАКЖЕ «ТОВАРНОГО ЗНАКА ЗА РЕНОМЕ» В СОГЛАСОВАННОМ ПРАВЕ ЕВРОПЕЙСКОГО СОЮЗА В ОБЛАСТИ ТОВАРНЫХ ЗНАКОВ

Резюме

Основной причиной первого вмешательства права Европейского Союза в сферу положений, касающихся товарных знаков, было как можно большее ограничение негативных последствий расхождений в положениях внутригосударственного права, которые могут повлиять на свободу передвижения товаров и услуг, а также свободную конкуренцию на внутреннем рынке Европейского Союза. В связи с этим, общие условия регистрации внутригосударственных товарных знаков на уровне Европейского Союза были согласованы на основе директивы 89/104/EWG, в свою очередь упразднённой директивой 2008/95/WE. Однако регистрация символа товарного знака может быть отклонена либо аннулирована, если находится в несоответствии с прежним знаком. Толкование постановлений директивы, касающихся оснований для отклонения либо аннулирования регистрации из-за несоответствия прежним законам, чрезвычайно важна для эффективного применения согласованного европейского права в области товарных знаков. Настоящая статья сконцентрирована на двух важнейших проблемах: вероятность путаницы из-за прежнего товарного знака (Раздел 1), а также ошибочного принятия понятия товарного знака за реноме. (Часть 2).

Adam Olejniczak

ANTICIPATORY BREACH OF CONTRACT ACCORDING TO ARTICLE 492[1] OF THE CIVIL CODE

I. Durability and stability of legal regulations in codes is a matter of the past. The Civil Code has been in force for over half a century now but there has been no single year without amendments to that Act over the last decade. Many of them resulted from the necessity of introducing the European Union norms to the Polish legal system. It also concerns Directive 2011/83/EU of the European Parliament and the Council on consumer rights of 25 October 2011 (OJ L 304/64, 22 November 2011, p. 64), commonly called the directive on consumer rights. It amends Directive 1999/44/EC of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees and also amends Council Directive 93/13/EEC on unfair terms in consumer contracts. At the same time, the new Directive on consumer rights repeals Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts[1].

As a result of the amendments to the European Union law, it was necessary to adjust Polish legislature to the provisions of the new Directive. Thus, the act on consumer rights of 30 May 2014 was passed (Journal of Laws of 2014, item 827), which not only amended the Civil Code but also substituted the regulations in the repealed acts: Act on the protection of certain consumer rights and on liability for damage caused by a hazardous product of 2 March 2000 (uniform text: Journal of Laws of 2012, item 1225) and Act on special conditions of the consumer sale and on the amendment to Civil Code of 27 July 2002 (Journal of Laws No. 141, item 1176 with amendments that followed). The new law entered

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[1] To find more about amendments to consumer law introduced by the Act, compare *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg). Komentarz* [Act on consumer rights – Civil Code (an extract) – Commentary], B. Kaczmarek-Templin, P. Stec and D. Szostek (eds.), Warszawa 2014; A. Olejniczak, *Komentarz do zmian w kodeksie cywilnym wynikających z ustawy z dnia 30 maja 2014 r. o prawach konsumenta* [Commentary on amendments to the Civil Code resulting from Act on consumer rights of 30 May 2014], [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], A. Kidyby (ed.), vol. III, *Zobowiązania. Część ogólna* [Obligations – General issues], Warszawa 2014, pp. 19–27.

into force on 25 December 2014, after six-month *vacatio legis* from the day of its publication.

The amendments to the Polish law introduced by the Act on consumer rights substantially modified the former regulations on liabilities. The modifications concern regulations on consumer contracts, especially those negotiated in untypical circumstances (away from business premises and distance ones) in respect of the provision of information, formal requirements connected with concluding such contracts and the right to withdraw from a contract. They also regard regulations on the sale contract, especially amending the Civil Code in respect of warranty and guarantee. At the same time, the new law introduces changes to general regulations on contractual obligations (Article 383[1] of the CC was added) and regulations in respect of the fulfilment of obligations and the consequences of their non-fulfilment[2].

Not undermining the importance of the consumer protection issue, literature should also take an interest in the issue of the non-fulfilment of contractual obligations in the light of the amended Civil Code of 30 May 2014 characterised above. These are two changes in the Civil Code, i.e. the extension of the Act by the addition of Article 492[1] and the modification of the regulation in Article 494. The former is unquestionably a completely new regulation in the Polish legal system, and these are usually not free from interpretational doubts. The article aims to analyse Article 492[1] of the CC in order to answer the question about the scope of its application and to determine the rationale and consequences of the use of protection that the regulation provides for the creditor. It concerns the position of the right to withdraw from the contract in the statutory regulation on the consequences of the non-fulfilment of obligations.

II. The new regulation of the Civil Code provides the creditor with a statutory right to withdraw from the contract in case of the debtor's refusal to fulfil the obligation. It has been highlighted in literature that there is an unclear situation of the creditor whom the debtor expressly informs 'in advance', i.e. still before

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[2] To find more about amendments to the law on liabilities introduced by Act on consumer rights, compare J.R. Antoniuk, [in:] *Ustawa o prawach konsumenta, komentarz do art. 494* [Act on consumer rights, commentary on Article 494]; M. Lemkowski, *Zapowiedź niespełnienia świadczenia (protestatio) jako podstawa odstąpienia od umowy wzajemnej (art. 492[1] KC)* [Announcement of refusal to fulfil the obligation (*protestatio*) as grounds for withdrawal from the mutual contract (Article 492[1] of the CC)], MoP 2015, No. 1, pp. 9–17; A. Olejniczak, *Komentarz do zmian w kodeksie cywilnym wynikających z ustawy z dnia 30 maja 2014 r. o prawach konsumenta* [Commentary on the amendments to the Civil Code resulting from Act on consumer rights of 30 May 2014], [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], A. Kidyba (ed.), vol. III, *Zobowiązania. Część ogólna* [Liabilities – General issues], Warszawa 2014, pp. 19–27; P. Stec, [in:] *Ustawa o prawach konsumenta, komentarz do art. 492[1]* [Act on consumer rights: Commentary on Article 492[1]], K. Zagrobelny, [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], E. Gniewek and P. Machnikowski (eds.), Warszawa 2014, commentary on Article 492[1] and Article 494.

the date of the fulfilment of the obligation, that he will not fulfil his obligation[3]. The doubts concerned the consequences of the refusal to fulfil the obligation and in particular the recognition of the non-fulfilment of the obligation and that there are grounds to withdraw from the contract and to claim compensation. It has also been suggested that such a statement made by the debtor who is delayed should lift the creditor's obligation to provide the debtor with an additional time limit to fulfil the obligation[4]. Thus, the new regulation concerns an issue noticed by the doctrine and called an anticipatory breach of contract, which also covers a situation when, because of other reasons than the debtor's refusal to fulfil the obligation, it becomes clear that the obligation will not be fulfilled on time. In every case, it concerns a certain event that does not constitute the non-fulfilment of the obligation *per se* but it indicates that such a consequence will take place in the future. This creates a situation in which the creditor, bound by the obligation relationship, must assume in his economic and legal calculations that the debtor will not fulfil his obligation. Thus, passing the new regulation, the Polish legislator addresses the issue of great practical importance. Thanks to the new regulation, the creditor is given legal grounds for withdrawing from a contract, *expressis verbis* defined in the Civil Code, which creates favourable conditions for negotiating a contract with another party.

The range of application of Article 492[1] of the CC is very broad because it covers every type of **obligation in a mutual contract**. The legislator introduced a new provision to the legal regulation on the non-fulfilment and inappropriate fulfilment of obligations in mutual contracts, thus deciding that the norm will be used exclusively towards obligations from these contracts. Taking into account a broader and broader definition of a mutual contract, it is necessary to share an opinion that in some cases this is the way in which parties will try to avoid the limitation, the sense of which is not clear[5].

The new provision can be applied in ordinary, consumer and professional trade and commerce, thus regardless of the type of parties to the mutual contract, in spite of the amendment to the Civil Code introduced by the Act on the protection of consumer rights. However, in connection with the commonness of **consumer contracts**, it will undoubtedly be broadly applied in case of a trader's

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[3] Compare especially J. Napierała, *Odpowiedzialność dłużnika za nieuchronne niewykonanie zobowiązania* [Debtor's liability for the unavoidable non-fulfilment of an obligation], Warszawa 1997. Compare also A. Klein, *Ustawowe prawo odstąpienia od umowy wzajemnej* [Statutory right to withdraw from the mutual contract], Wrocław 1964, p. 73; M. Lemkowski, *Wykonanie i skutki niewykonania zobowiązań z umów wzajemnych. Komentarz do art. 487–497 Kodeksu cywilnego* [Fulfilment and non-fulfilment of mutual contracts' obligations – Commentary on Articles 487–497 of the Civil Code], Warszawa 2012, pp. 61–64; *ibid.*, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 9 and the following.

[4] Compare W. Popiołek, [in:] *Kodeks cywilny* [Civil Code], vol. II, *Komentarz do artykułów 450–1088* [Commentary on Articles 450–1088], K. Pietrzykowski (ed.), Warszawa 2011, p. 108; T. Wiśniewski, [in:] *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania* [Commentary on the Civil Code – Book III – Liabilities], vol. 1, Warszawa 2009, p. 760.

[5] Compare M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 10.

refusal to fulfil an obligation towards a consumer. The Preamble to Directive 2011/83/EU on the consumer rights and Article 18 of the Directive provide that if a trader has failed to deliver the goods at the time agreed upon with the consumer, before withdrawing from the contract the consumer shall call upon him to make a delivery within an additional period of time and shall be entitled to terminate the contract if the trader fails to deliver the goods within that additional time[6]. The provision should not be applied, however, if a trader has explicitly refused to deliver the goods. It should not be applied also in certain circumstances, in which a date of delivery is essential, e.g. in case of a wedding dress, which should be delivered before the wedding ceremony. It should not be applied also in the circumstances, in which a consumer informs the trader that the delivery on a specified time is essential. In these specific cases, if the trader fails to deliver the goods on time, the consumer shall be entitled to terminate the contract immediately after the time limit agreed upon earlier ends.

However, it is rightly noticed in literature that the new regulation also applies to a situation in which the debtor refusing to pay is a consumer; then the trader is entitled to withdraw from the contract[7].

III. According to the provision of Article 492^1 of the CC, if the party obliged to fulfil an obligation states that he will not fulfil that obligation, the other party is entitled to withdraw from the contract without specifying an additional period of time as well as before the time limit set in the contract ends. It is necessary to clarify whether the applicability of Article 492^1 of the CC concerns both **fixed-time obligations** and **open-ended** ones. It is also necessary to establish if in case of fixed-term obligations it applies only to situations in which a debtor states that he refuses to fulfil an obligation when the time limit for it has not ended yet, or also to a case of a refusal after the time limit for the fulfilment of an obligation. The wording of Article 492^1 of the CC, especially the words 'also before [sic! – A.O.] the set time to fulfil an obligation', suggests that the provision is applied not only in this situation, thus does not only concern fixed-term contracts before the time limit ends. It may be applied also when a debtor refuses to fulfil an obligation after the time limit ends and when he refuses to fulfil an open-ended obligation (before the creditor calls upon him to fulfil the obligation, Article 455 of the CC). According to Article 492^1 of the CC, the statement made by the debtor in the period when the fulfilment of an obligation is delayed is also relevant.

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[6] The Polish legislator introduced relevant legal regulation in the provision of Article 543^1 of the CC, which stipulates that in case of consumer sale, if the contract does not determine otherwise, the sales person is obliged to provide the buyer with the object without delay, not later than 30 days from the contract conclusion, and in case of the seller's delay, the buyer may give the seller additional period of time for the provision of the object, and after it passes with no effect, he may withdraw from the contract. Besides, the provisions of Articles 492, 492^1 and 494 of the CC are applied.

[7] Sic! M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 9.

Because of that, it is necessary to establish the relationship between the new regulation and the provisions on the debtor's delay and the creditor's entitlement to withdraw from the contract, especially Article 491 of the CC.

The issue is especially important as other provisions provide that, in order to withdraw from the mutual contract, the creditor must give the debtor additional time limit (e.g. Article 491 and Article 543^1 § 2 of the CC), and impose a condition for the entitlement to withdraw from the contract: the debtor's responsibility for the delay (e.g. Article 491 of the CC), or do not impose such a condition (e.g. Article 543^1 § 2 of the CC). On the other hand, the debtor having the right in accordance with Article 492 of the CC can make use of it without the necessity of giving additional time for the fulfilment of the obligation in accordance with its wording.

It must be clearly emphasised that **the legislator does not bind the new regulation and the provisions for the debtor's delay together** (Articles 491–492 of the CC), formulating a new provision the wording of which in no place mentions the debtor's responsibility. **There are also no grounds for different treatment of the situation when the refusal takes place before the time for obligation fulfilment ends and during the delay**. The legislator does not demand that the debtor's refusal to fulfil the obligation be justified by circumstances for which the debtor is not responsible. Article 492^1 of the CC does not point out any circumstances excluding the creditor's entitlement to withdraw from the contract. Based on the wording and expression of the new regulation in the Civil Code, a conclusion must be drawn that the statutory right to withdraw from the contract expressed in Article 492^1 of the CC does not depend on the debtor's responsibility for the delay in the obligation fulfilment[8]. It is not a novelty in the Civil Code because Articles 635 and 783, sentence 1 of the CC contain such rules.

The debtor's statement on his refusal to fulfil the obligation specified in the mutual contract is the conduct violating the contract of an obliging relationship between the parties, which is illegal and gives grounds for protecting the creditor. Nevertheless, if the provisions currently in force provide the debtor, in the existent circumstances, with the right to refuse to fulfil the obligation, making use of that right does not allow for protecting the creditor in accordance with Article 492^1 of the CC. As a result, it is true that most often the creditor will make use of the right to withdraw when the debtor will be responsible for the refusal to fulfil the obligation, but the lack of the debtor's responsibility for the reason of the refusal does not have to deprive the creditor of the right to terminate the contract unilaterally if he acted contrary to the obligation. On the other hand, the possible **debtor's responsibility will be an important factor in liability for damages**. Article 492^1 of the CC, however, does not define it. Article 494 of the CC does it referring (*expressis verbis* after the amendment) to general rules of liability for

[8] Differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 11.

non-fulfilment of an obligation and in this scope a contractual regulation of the consequences of non-fulfilment of an obligation is possible.

At the same time, it is necessary to emphasise that **the provision is a self-contained one** in the sense that it does not matter whether the creditor is entitled to withdraw from the contract based on other provisions. This means that the creditor's right provided by Article 492[1] of the CC to withdraw from the contract without the necessity of giving the debtor an additional period of time to fulfil the obligation can be executed regardless of the delay in the fulfilment of the obligation.

If the debtor makes a statement about the refusal after the time limit for the fulfilment of the obligation ends, the right to withdraw from the contract can be executed regardless of other regulations providing the creditor's entitlement to withdraw from the contract even if those provisions point out the necessity of giving additional time limit as a premise of the withdrawal. It is necessary to approve of the stand that if **the creditor can withdraw from the contract on various grounds** (e.g. Articles 491, 492, 492[1] of the CC), **the entitled is the party that has the choice** and it is him who should decide which entitlement he would like to be applied[9]. However, it is not applied to the case when the debtor's refusal takes place during the creditor's delay if he earlier made a statement that he is not going to accept the debtor's fulfilment of the obligation. In this case, the provision of Article 492[1] of the CC is not applied because the consequences of the creditor's delay are regulated in Article 486 of the CC and there is a lack of grounds to protect him as he breaks his obligations. Similarly, the provision of Article 492[1] of the CC is not applied if the obligation became impossible to fulfil. It is regardless of the fact whether the debtor is responsible or not for the reasons why the obligation cannot be fulfilled. If the debtor's statement that is discussed in Article 492[1] of the CC is to have sense, it must refer to the obligation that the debtor can fulfil within the existent commitment. Only then the refusal to fulfil constitutes a new situation in which the creditor deserves protection. On the other hand, if the debtor's statement is a confirmation of the fact that the fulfilment of the obligation is not going to take place because of the inability to fulfil the obligation, the situation is regulated by the provisions of Articles 493 and 495 of the CC and the circumstance of making a statement by the debtor is irrelevant from the legal point of view[10].

The aim and functions attributed to Article 492[1] of the CC suggest that it is necessary to interpret the term obligation strictly as the object of commitment. It is the debtor's behaviour towards the creditor indicated in the contents of

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[9] Compare K. Zagrobelny, [in:] *Komentarz, teza 10 do art. 492[1] k.c.* [Commentary, thesis 10 on Article 492[1] of the CC].

[10] Similarly: K. Zagrobelny, [in:] *Komentarz, teza 5 do art. 492[1] k.c.* [Commentary, thesis 5 on Article 492[1] of the CC] and P. Stec, *Ustawa o prawach konsumenta, teza 3 do art. 492[1] k.c*. [Act on consumer rights, thesis 3 on Article 492[1] of the CC].

the obligation. The concept is essential for the decision about the application of Article 492[1] of the CC if the debtor's refusal concerns the fulfilment of a part of the obligation. It is similar if the contract is the source of the commitment with a temporary obligation and the debtor's refusal does not cover all the obligations due in particular periods. It is justified to draw a conclusion that the creditor can make use of his right only when **the debtor states that he is not going to fulfil the object of his commitment, thus the whole due obligation**[11]. However, the assessment whether the debtor's refusal covered the whole due obligation towards the creditor should take into account the situation at the moment of refusal, thus with the consideration of the fact that the commitment might have been partly fulfilled. Different interpretation opens the way to infringe the debtor's interest, which is hardly protected.

IV. Some doubts occur with the assessment of the **contents and character of the debtor's statement about the refusal to fulfil the obligation**. The provision of Article 492[1] of the CC only stipulates that it refers to the situation when the debtor "states that he will not fulfil the obligation". Thus, it is necessary to explain the character of this statement because only then it will be possible to answer such questions as e.g. whether it is possible to make a statement in an implicit way or whether the debtor must do it in person, whether he can annul the statement or whether he can fulfil the obligation after having stated that he refuses to fulfil the obligation.

The declaration of intent, in accordance with the legal definition in Article 60 of the CC, should be perceived only as an element of the process of performing a legal action. It concerns "the intent of the person performing a legal action". In connection with some types of conduct, there are doubts whether they take the form of a legal action[12]. Making a payment or appropriating movables can be an example. The conduct of the entity entitled to a specified communicative sense causing the formation, change or termination of the civil law relationship should be treated as a declaration of intent. In the case we are interested in, it will concern attributing a certain meaning to the announcement of other party of the contract that he will not fulfil the obligation. Such a declaration does not constitute an element of a legal action. In the Polish doctrine, especially under the influence of Z. Radwański's research results, there is a popular stand that specifies a legal action and its core, the declaration of intent, as the regulation

[11] Concerning temporary obligations, similarly: K. Zagrobelny, [in:] *Komentarz, teza 7 do art. 492[1] k.c.* [Commentary, thesis 7 on Article 492[1]]; differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 12.

[12] Compare Z. Radwański, [in:] *System Prawa Prywatnego* [Private law system], vol. 2, *Prawo cywilne – część ogólna* [Civil law – General issues], (ed.) Z. Radwański, Warszawa 2008, p. 14 and the following.

of civil law relationships performed by civil law entities and with the fulfilment of conditions provided for by law[13].

Thus, the conduct aimed at ragulating his legal position is a declaration of intent even if the party is not aware of all the consequences of this conduct. However, if we assess the conduct of the party who refuses to fulfil the obligation specified in the commitment, it is dificult to treat this conduct as the one regulating the relationship with the other person because even in the basic scope it does not determine legal consequences it would have. In addition, in Polish law there is a dominant stand not admitting freedom to perform unilateral legal actions, even in the area of obligatory legal relationships[14]. The regulation in Article 492[1] of the CC does not constitute a legal basis for performing a legal action but only specifies some consequences of this event. As a result, **the debtor's declaration of refusal to fulfil the obligation should not be qualified as a declaration of intent as defined in Article 60 of the CC because its contents do not regulate the obligation relationship between the parties**.

The statement about non-fulfilment of the obligation in the future is transmission of information, **notification** of a certain fact. This declaration can be true or false, however, it has "no modeling influence on the development of the existing obligation relationship"[15], which is a constituent feature of a declaration of intent. Treated as notification, it **will produce legal consequences only in cases provided for in a legal provision**, as e.g. a debtor's statement that he will not accept the obligation (Article 486 § 2 *in fine* of the CC) or notification of the defects in the product sold (Article 563 of the CC)[16].

Such classification of a statement of refusal to fulfil the obligation causes that, in this case, legal norms defining the declaration of intent mode are not applicable, although there is an opinion in the doctrine that there is a possibility of using some provisions on the declaration of intent (e.g. Article 61, sentence 1 of the CC)[17] to notification, by analogy and to a certain extent. Thus, it is necessary to establish conditions that the debtor's announcement must fulfil in order to constitute strong grounds for the creditor's withdrawal from a contract.

It is beyond doubts that the right given by the legislator is special in character, protects mainly the creditor's interest and aims to conclude the obligation

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13 Compare Z. Radwański, [in:] *System...* [System...], vol. 2, pp. 33–35.

14 Compare *ibid.*, pp. 178–180.

15 *Ibid.*, p. 27.

16 Compare similar classification of a declaration of Article 492[1] of the CC, M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13 and P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492[1], teza 5* [Act on consumer rights, comments on Article 492[1], thesis 5]; differently: K. Zagrobelny, [in:] *Komentarz, teza 12 do art. 492[1] k.c.* [Commentary, thesis 12 on Article 492[1] of the CC].

17 Compare Z. Radwański, [in:] *System...* [System...], vol. 2, p. 27. Concerning declaration of refusal to fulfil the obligation, similarly: P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492[1], teza 5* [Act on consumer rights, comments on Article 492[1] of the CC, thesis 5]; differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

relationship against the basic rule that imposes the necessity of fulfilling the obligation in accordance with its wording. It is necessary to emphasise the special character of the discussed regulation, especially as the creditor already has numerous rights protecting his interests[18]. In this case, he is given one more tool, with the use of which he can act with more ease than before. Without the need to give the debtor an additional time limit to fulfil the obligation, even without the necessity of waiting until the time limit to fulfil the obligation ends, he is allowed by Article 492[1] of the CC to terminate the contract unilaterally. That is why, while determining the conditions that the debtor's declaration must fulfil in order to constitute strong grounds for the creditor's unilateral termination of a contract, it is necessary to take into account the interest of the debtor, especially as it concerns the obligation of the mutual contracts. Thus, **it is recommended that the formulation of 'boundary conditions' for communicating information by the debtor should be treated with much caution**. At the same time, the interpretation rule requiring the assumption that there is lack of the debtor's statement referred to in Article 492[1] of the CC in case of any doubts as to the character of the party's announcement of non-fulfilment of the obligation is right[19].

First of all, it must be established **whether the debtor's declaration that he will not fulfil the obligation requires its communication to the creditor. It seems that there is no such necessity**. The legislator often formulates a requirement of submitting the declaration "to the other party" but this time it has not been done[20]. This does not mean that it is irrelevant how, by whom, to whom and in what circumstances the message is submitted and how it is formulated.

The provision of Article 492[1] of the CC does not determine **any formal requirements**, which means that the debtor's declaration of refusal to fulfil the obligation submitted in any form constitutes grounds for the creditor's withdrawal from the contract. Thus, the debtor's declaration can have various forms. However, I think that the way the debtor behaves and material results of his conduct must clearly reflect his decision of the non-fulfilment of the obligation. It is rightly highlighted that the debtor must express **firm, unconditional, unambiguous refusal to fulfil the obligation**[21]. It must not be just a thought expressed in

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[18] K. Zagrobelny, [in:] *Komentarz, teza 2 do art. 492[1] k.c.* [Commentary, thesis 2 on Article 492[1] of the CC] rightly points out that the introduced solution results in further increase in disproportion between the debtor's and creditor's rights with respect to the possibility of withdrawing from the obligation. Thus, the demand that the debtor can withdraw from the contract in case of the creditor's delay is getting more and more up-to-date.

[19] Compare M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

[20] *Ibid.*

[21] Compare A. Klein, *Ustawowe prawo* [Statutory law], p. 73; M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13; J. Napierała, *Odpowiedzialność* [Liability], pp. 67–69; A. Olejniczak, *Komentarz* [Commentary]; P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492[1], teza 5* [Act on consumer rights, comments on Article 492[1], thesis 5]; also K. Zagrobelny, [in:] *Komentarz, teza 12*

a conversation assessing the general state and prospects for trade relations. It must be communicated in a clear and evident announcement expressing a negative decision, which the debtor has definitely made in the subject matter of the fulfilment of the obligation. In his declaration, the debtor should not make his refusal to fulfil the obligation dependant on certain circumstances, e.g. changes of the provisions of the contract or their specific interpretation. Only unconditional refusal can be legally relevant. On the other hand, unambiguity of the refusal consists in the lack of doubts as to the contents of the declaration[22].

Some doubts may arise in connection with the question about the admissibility of recognition of the debtor's extra-linguistic behaviour as the refusal to fulfil the obligation in accordance with Article 492[1] of the CC. In literature there is no uniform opinion about the admissibility of recognition of the refusal made ***per facta concludentia***[23] as the declaration referred to in Article 462[1] of the CC. However, I believe that a very thorough analysis of the circumstances of a particular case can make you incline to a different opinion. For example, such an opinion can concern a definitive transfer of the ownership of the object that is subject to the contact with the creditor and necessary to fulfil the contract by the debtor for the benefit of a third party. I think that similar circumstances can make you incline to classify the debtor's conduct as a refusal to fulfil the obligation.

The refusal to fulfil the obligation (the declaration) must come from the debtor. As far as notification is concerned, the legal system does not define the rules of attributing it to the subject. In case of natural persons, it is the declaration submitted by the debtor in person and in case of legal and statutory persons (Article 33[1] of the CC), the **declaration submitted by their organs or representatives is legally relevant**. The use of legal norms applicable to other forms of a trading intermediary (e.g. indirect substitution) or subcontractor is inadmissible as legal grounds to attribute the declaration to the debtor[24].

In my opinion, it is also not right to invoke the similarity to the inappropriate recognition of a claim, which breaks the course of limitation. In this case we deal with a circumstance that already exists (e.g. the accountant confirms the amount of debt in accordance with the information available). On the other hand, the refusal to fulfil the obligation does not state the fact that occurred but is a declaration

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do art. 492[1] k.c. [Commentary, thesis 12 on Article 492[1] of the CC]; however, he acknowledges that it concerns the declaration of intent.

[22] Compare more thoroughly, J. Napierała, *Odpowiedzialność* [Liability], p. 67 and the following.

[23] Against: P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492[1], teza 5* [Act on consumer rights, comments on Article 492[1], thesis 5]. For such classification: K. Zagrobelny, [in:] *Komentarz, teza 12 do art. 492[1] k.c.* [Commentary, thesis 12 on Article 492[1] of the CC]. Very prudent: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

[24] Partly differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13; the opinion indicating Article 474 of the CC as grounds for attributing the declaration to the debtor if his "employee, co-worker or another alike person" submits it, if only because it is a person "of the debtor's party, responsible for the fulfilment of the obligation", cannot be agreed with.

that specifies the debtor's conduct in the future. It expresses certain intention and only the declaration is a fact. There should not be a possibility that legally relevant declarations may be submitted by any person who is involved, indirectly or directly, in the fulfilment of the obligation on the debtor's behalf. For example, a sales department employee can submit such a message effectively, but as a messenger submitting a declaration of the legal person's organ that made a decision to refuse to fulfil the obligation. Thus, the submission of information about refusal is ineffective if the organ or representative of the debtor did not actually refuse to fulfil the obligation. Referring to the necessity of protecting a contractor "acting with confidence in the other party's conduct and in accordance with standard trading practice"[25] is not convincing. The debtor who, in such a situation, thus without an attempt to establish the debtor's actual standpoint on the fulfilment of the obligation, terminates the contract, should not be subject to protection. On the other hand, the declaration "made by the debtor's subordinates with his knowledge and consent"[26] constitutes the information about the debtor's refusal.

The adopted legal interpretation of the debtor's declaration makes it possible to establish **the inadmissibility of the withdrawal (cancellation)** of the debtor's declaration of refusal to fulfil the obligation in the future. The legislator did not institute any rules of removing the consequences of the event. However, the event once taking place (the submitted declaration) constitutes grounds for undertaking a legal action by the creditor, regardless of the intent to fulfil the obligation expressed by the debtor later. If the creditor does not exercise the right to withdraw from the contract in accordance with Article 492[1] of the CC, although in my opinion he may do this even after the debtor's offer to fulfil the obligation, and accepts it, it means that the information submitted by the debtor is false and the obligation shall be fulfilled in accordance with its wording[27].

V. According to Article 462[1] of the CC, the creditor obtains **a statutory right to withdraw from the contract**, which may be exercised without the need to give the debtor the additional time limit to fulfil the obligation in accordance with its wording. Thus, the consequence of the debtor's refusal to fulfil the obligation is the creditor's competence (entitlement) to unilateral termination of the

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[25] P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492[1], teza 6* [Act on consumer rights, comments on Article 492[1] of the CC, thesis 6].

[26] *Ibid.*

[27] Differently: K. Zagrobelny, [in:] *Komentarz, teza 11 do art. 492[1] k.c*. [Commentary, thesis 11 on Article 492 of the CC], who believes that the debtor's offer to fulfil the obligation after the prior refusal substantially changes the situation, depriving the creditor of the possibility of withdrawing form the contract. M. Lemkowski sees it slightly differently and interprets the possibility of acknowledging the withdrawal from the contract as the overuse of the creditor's right in case the debtor cancels the announcement of refusal to fulfil the obligation (*Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 14).

contract[28]. The creditor does not have to exercise his right and may demand the fulfilment of the obligation.

The creditor's declaration of the termination of the contract should be submitted to the other party to the contract. The party's declaration of withdrawal from the contract may be submitted in the way that makes it obvious and in order to establish its contents it is necessary to explain it in the way required with respect to the circumstances in which it was submitted, the principles of community life and established customs (Article 65 § 1 of the CC). Owing to the possibility of claiming damages without the withdrawal from the contract, it does not seem possible to treat the declaration the wording of which is limited only to the claim of damages as the withdrawal from the contract. The legislator does not determine **the time limit for the submission of the declaration** of the withdrawal from the contract. It should be assumed, however, that the competence expires with the limitation of the obligation to which the creditor is entitled.

The form of withdrawal from the mutual contract is regulated in Article 77 of the CC. According to this provision, if the parties had retained any special form when concluding the mutual contract, it is required that the declaration of the withdrawal should be in a standard written form for the purpose of proof (*ad probationem*). However, if the parties had not concluded the mutual contract in a special form, but for example in an oral form, the withdrawal from that contract also does not require any special form[29].

If the creditor exercises his right to withdraw from the contract according to Article 492[1] of the CC, **the mutual contract stops binding the parties**. In such a situation, Article 494 of the CC is applicable, in accordance with which the party that withdraws from the mutual contract is obliged to return the other party everything obtained based on the contract, and the other party is obliged to accept that. The party withdrawing from the contract may demand not only the return of what was provided but also compensation for damage caused by the non-fulfilment of the obligation in accordance with general regulations (Article 494 of the CC). In consumer relationships, the duty to return what is due to the consumer should be fulfilled without delay (Article 494 § 2 of the CC). The provision of Article 494 of the CC is rather laconic and does not highlight all legal consequences of such an event clearly. The analysis of the consequences of Article 494 of the CC, however, goes beyond the scope of this article's subject matter.

[28] Concerning the classification of the statutory right to withdraw from the contract as the entitlement to discretion, freedom to decide about the termination of the obligation by the submission of a unilateral declaration of intent, compare the sentence of the Supreme Court of 2 April 2008, III CSK 323/07, Lex no. 453089.

[29] Concerning the form of successive legal actions undertaken in connection with the formerly concluded contract, compare more thoroughly Z. Radwański, [in:] *System...* [System...], vol. 2, pp. 146–149.

ANTICIPATORY BREACH OF CONTRACT ACCORDING TO ARTICLE 492[1] OF THE CIVIL CODE

Summary

Polish legislator introduced a new provision to the Civil Code – Article 492[1] of the CC, which is of key practical importance for the parties to mutual contracts as it regulates the consequences of the debtor's refusal to fulfil the obligation, especially when it takes place before the time limit for the fulfilment of the obligation. In the doctrine it is called the anticipatory breach of contract and it also covers a situation when, because of reasons other than the debtor's refusal to fulfil the obligation, it becomes clear that the obligation will not be fulfilled on time. The creditor then obtains the statutory right to withdraw from the contract. The article aims to analyse Article 492[1] of the CC in order to establish the scope of its application and determine the premises and consequences of using the protection that the provision gives the creditor. It is about the establishment of the place of the new provision on the withdrawal from the contract in the statutory regulation of the consequences of the non-fulfilment of the obligation. The condition of exercising the entitlement is the debtor's declaration of the refusal to fulfil the obligation expressed in a decisive, unconditional and unambiguous way. It is inadmissible to withdraw (cancel) the debtor's declaration of refusal to fulfil the obligation in the future. If the creditor exercises his entitlement to withdraw from the contract in accordance with Article 492[1] of the CC, the mutual contract stops binding the parties. What also comes into existence is the duty to return what was obtained earlier and to compensate for the damage resulting from the non-fulfilment of the obligation.

ANTICIPATORY BREACH OF CONTRACT NA PODSTAWIE ART. 492[1] KODEKSU CYWILNEGO

Streszczenie

Polski ustawodawca wprowadził do Kodeksu cywilnego nowy przepis art. 492[1] k.c., o dużej doniosłości praktycznej dla kontrahentów umów wzajemnych, regulujący skutki odmowy dłużnika spełnienia świadczenia, zwłaszcza gdy ma ona miejsce jeszcze przed terminem wymagalności świadczenia. W doktrynie problem ten określany jest mianem nieuchronnego niewykonania zobowiązania (*anticipatory breach of contract*) i obejmuje także sytuację, gdy z innych powodów, niż odmowa spełnienia świadczenia przez dłużnika, stanie się oczywiste, że zobowiązanie w terminie nie zostanie wykonane. Wierzyciel uzyskuje ustawowe prawo do odstąpienia od umowy. Celem niniejszego opracowania jest analiza art. 492[1] k.c., aby ustalić zakres jego zastosowania oraz określić przesłanki i konsekwencje skorzystania z ochrony, jakiej ten

przepis udziela wierzycielowi. Chodzi o ustalenie miejsca, jakie w kodeksowej regulacji skutków niewykonania zobowiązań zajmuje nowe, ustawowe prawo odstąpienia od umowy. Prawo to może być wykonywane bez potrzeby zagrożenia dłużnikowi odstąpieniem od umowy i bez konieczności wyznaczenia mu terminu dodatkowego na spełnienie świadczenia. Przesłanką skorzystania z tego uprawnienia jest wyrażenie przez dłużnika stanowczej, bezwarunkowej, jednoznacznej odmowy spełnienia świadczenia. Niedopuszczalne jest cofnięcie (odwołanie) przez dłużnika złożonej deklaracji o niespełnieniu w przyszłości świadczenia. Jeżeli wierzyciel skorzysta z uprawnienia do odstąpienia od umowy, przyznanego mu na podstawie art. 492[1] k.c., to umowa wzajemna przestaje wiązać strony. Powstaje obowiązek zwrotu wcześniej dokonanych świadczeń oraz naprawienia szkody wynikłej z niewykonania zobowiązania.

ANTICIPATORY BREACH OF CONTRACT TRAITÉ À LA BASE DE L'ART. 492 DU CODE PÉNAL

Résumé

Le législateur polonais a introduit au Code civil un nouveau règlement art. 492 du code civil avec une grande importance pour les contractants des contrats réciproques qui règle les effets du refus de la part du débiteur de l'exécution de prestation surtout quand ce refus a lieu avant le terme de prétention de la prestation. Dans la doctrine ce problème est défini par le terme de non-exécution inévitable de la prestation (*anticipatory breach of contract*) et il comprend aussi la situation où en autres raisons que le refus de l'exécution de la prestation, il apparait évident que la prestation à terme ne soit pas exécuté. Le créancier obtient le droit conforme à la loi pour la dérogation du contrat. Le but de l'article présent est une analyse de l'art. 492 du code civil pour définir le cadre de son application ainsi que pour déterminer des prémisses et conséquences de profiter de la protection donnée au créancier par cet article. Il s'agit exactement de trouver la place laquelle est prise dans la régulation des effets de non-exécution de la prestation par le droit conforme à la loi de déroger au contrat. Le droit peut être exécuté sans nécessité de menacer le débiteur par la dérogation au contrat sans besoin de lui fixer la date supplémentaire pour exécuter la prestation. Les prémisses pour profiter de ce règlement doivent être exprimées par le débiteur avec une expression définitive du refus équivalent et sans conditions de l'exécution de la prestation. Il est inadmissible de retirer (déroger) par le débiteur la déclaration prise de non-exécution de la prestation à l'avenir. Si le créancier profite du droit de déroger au contrat conforme à l'art. 492 du code civil, le contrat réciproque cessera d'être obligatoire pour les deux parties. Il ne reste que le devoir de rembourser les prestations antérieures et de réparer les dommages causés par la non-exécution de la prestation.

ANTICIPATORY BREACH OF CONTRACT НА ОСНОВЕ СТ. 492[1] ГРАЖДАНСКОГО КОДЕКСА

Резюме

Польский законодатель ввёл в Гражданский кодекс новое положение ст. 492[1] УК о чрезвычайной практической важности для контрагентов двусторонних договоров, регулирующее последствия отказа должника в выполнении надлежащих действий, в особенности в случаях, когда он имеет место перед сроком требования оплаты долга. В теории данная проблема определяется как неминуемое неисполнение обязательства (*anticipatory breach of contract*) и касается также ситуации, когда – по другим причинам, кроме отказа должника исполнять обязательства, станет очевидно, что обязательство не будет исполнено в срок. Кредитор приобретает определённое законом право на отказ от договора. Целью настоящего исследования является анализ ст. 492[1] ГК, и дальнейшее определение рамок её применения, а также определение предпосылок и последствий использования защиты, которую данное положение предоставляет кредитору. Речь идёт об определении места, которое в кодексном регулировании последствий неисполнения обязательств занимает новое законное право на отказ от договора. Данное право может быть реализовано без необходимости угрозы для должника отказом от договора и без необходимости определения для него дополнительного срока исполнения обязательства. Условием осуществления этого права является выражение должником твёрдого, безусловного, однозначного отказа исполнять обязательство. Отмена (отказ) должником представленной декларации о неисполнении в будущем обязательства является недопустимым. Если кредитор воспользуется правом на отказ от договора, признаваемого ему на основании ст. 492[1] ГК, то двусторонний договор прекращает обязательства сторон. Становится актуальным обязанность возврата ранее произведённых оплат, а также возмещения ущерба, имеющего место в результате неисполнения обязательства.

Ryszard Strzelczyk

PROPERTY DEVELOPMENT CONTRACT IN THE SYSTEM OF POLISH PRIVATE LAW

Introduction

Since Act on the protection of the rights of a purchaser of a flat or a house of 16 September 2011 (Journal of Laws No. 232, item 1377), hereinafter referred to as Act on property development, entered into force, there has been a great need to determine the nature, the substance and the importance of a real estate development agreement to the current private law system in Poland.

The scope of such studies obviously includes the regulations of Act on property development, though it also ought to embrace the analysis of those regulations through the prism of the Constitution of the Republic of Poland and other Polish laws, such as the Civil Code, Act on the ownership of flats, Act on the protection of competition and consumers, Act on land and mortgage registry, Notary Law[1], Act – Banking law, Act – Construction law, Act on bankruptcy and debt restructuring and many others.

In addition, the studies should include comparative threads, which would refer to solutions adopted in the legal systems of highly developed EU countries, such as Germany, France or the Netherlands[2].

[1] See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 1–6.

[2] See H. Locher, W. Koeble, *Baubetreuungs- und Bauträgerrecht*, Düsseldorf 1985, No. 24–26; R. Kniffka, W. Koeble, *Kompendium des Baurechts*, München 2008, pp. 612–614; G. Basty, *Der Bauträgervertrag*, Köln–München 2009, pp. 6–8, 50–51; R. Strzelczyk, *Umowa deweloperska w systemie prawa prywatnego* [Property development agreement in the system of private law], Warszawa 2013, pp. 9–20; E. Hansen, V. Nitschke, H. Brock, *Bauträgerrecht*, Neuwied 2006, p. 24; B. Gliniecki, *Umowa deweloperska. Konstrukcja prawna i zabezpieczenie wzajemnych roszczeń stron* [Property development agreement – legal construction and security of parties' claims], Warszawa 2012, pp. 49–92; A. Jedynasta, *Umowa deweloperska w prawie niemieckim* [Property development agreement in German law], Rej. 2005, No. 7–8, pp. 53–57.

Property development agreement as a new type of a specified contract (*contractus nominatus*)

Firstly, the precise legal content of a property development agreement (Article 22.1) together with the presence of its legal definition (Article 3, Section 5 of the Act) determine – in my opinion – the need to classify it into a category of the so-called "named" contracts[3]. It is not a contract of sale as it does not transfer the ownership of real estate, which a sales contract – based on its definition – does.

Secondly, it is also difficult to agree with the argument encountered sometimes that the use of the term "price" in Act on property development automatically categorizes such a contract as a sales contract. Such a position would lead to the erroneous conclusion that "supply agreement", "cultivation contract" or "timeshare contract" are also not specified (named) contracts and should all be considered *in gremio* as contracts of sale, merely because the term "price" is used in them. Such a conclusion would be – in my opinion – totally unacceptable.

The need to recognize a property development agreement as a new type of a specified contract is clearly supported by the legislature. Because, if the Parliament had not intended to create a new type of a specified contract and wanted a real estate development contract to be classified as a sale of real estate, then, a property development agreement would not require the whole separate legal regulation.

In the existing legal regime, the abuse of the term "a property development agreement" is a problem It causes the risk that individuals purchasing commercial properties and legal persons acquiring real estate by signing agreements incorrectly entitled "property development agreements", may be under the mistaken belief that their rights are protected by Act on property development, while this Act does not apply to their legal situation in any manner.

The subjective scope of a property development agreement, i.e. an agreement signed in accordance with the regulations of Act on property development, is narrower than the subjective scope of an agreement signed based on Article 9 of Act on the ownership of flats. According to Act on property development, a developer may enter into an agreement only with a natural person, while the parties-to-be to an agreement under Article 9 of Act on ownership of flats are not specified as such.

However, it is worth noting that according to the formula adopted by the current Polish legislature, a property development agreement may – but does not need to – be a consumer contract. As a result, a purchaser of a flat or a house may or may not be entitled to additional consumer protection. A natural person signing a property development agreement in the course of this person's trade or

[3] See K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin–Heidelberg 1991, p. 200.

business activity, who therefore – within the meaning of Article 22[1] of the Civil Code – is not a consumer, is protected only under Act on property development. The rights of such a person will not be protected by the regulations that ensure protection to consumers.

Another conclusion that should be presented is that the comparison of the objective scope of a development agreement and the objective scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, ought to be made at two levels. On the one hand, the objective scope of a development agreement is broader than the objective scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, as it covers not only flats but also houses. On the other hand, the objective scope of a property development agreement is narrower than the object scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, because it does not refer to commercial premises.

Comprehensive analysis of civil law has led me to the conclusion that the current legal status of a construction contract and the transfer of the ownership of the object ordered may be executed in three modes, which are:

1) within the freedom to contract, which, results from Article 353[1] of the Civil Code,
2) in accordance with Article 9 of Act on ownership of flats,
3) under the terms of Act on property development.

Only an agreement indicated in the third option stated above, that is signed under the terms of Act on property development, may be classified as a property development contract.

However, it should be said that the above-mentioned classes are not separable. A property development agreement signed in accordance with Act on property development may – at the same time – meet all the conditions laid down in Article 9 of Act on ownership of flats. This would be the case of a development agreement concerning an apartment, which has been signed by the developer, who had owned the land and who – at the moment of signing the contract – had a building permit, and due to which a buyer's claim would have been disclosed in the land and mortgage registry.

Legal consequences of an omission of statutory elements in a property development contract

As far as the consequences of omissions of statutory elements in a property development contract are concerned, it is worth mentioning that Article 22.1 of Act on property development lists elements that a property development agreement "includes in particular." In my opinion, this strongly imperative wording (the legislature does not use the less assertive words "should include") leads to

the conclusion that these are the required elements of a property development contract[4].

In my view, when there is no clear statutory permission for its omission, an element must be regarded as a compulsory component of any contractual relationship imposed by law. The penalties for violation of the obligation may be diverse. It may be – among others – the invalidity of legal action, the admissibility of the withdrawal from an agreement or even the worsening of the position of the infringer in a court of law[5].

It should be noted that Article 22.1 (cited above) lists the components of a property development agreement that represents various levels of importance. On the one hand, in Section 2, it mentions "the price of the acquired flat or house" (referred to in other provisions of the Act as "cash benefits") and thus an absolutely critical part of a property development contract (*essentialia negotii*), without which the successful conclusion of an agreement is not possible. On the other hand, it requires – in Section 12 – "to determine the conditions under which the right to withdraw (referred to in Article 29) is actualised". That imposes a *de facto* obligation to transfer this regulation from Act on property development into an agreement, which is of minor importance since this regulation fully applies even if not quoted in a property development agreement.

With such a large number and variety of elements of an agreement referred to in Article 22.1, one needs to answer two fundamental questions, namely:

1) Should a development agreement include all those elements listed in that regulation?
2) What sanctions are triggered by the omission of individual components?

The answer to the first question asked above is pretty obvious. You cannot place all the elements listed in this regulation in an agreement, simply because some of them concern flats, while others cover houses. For example, if a contract relates to a house, it becomes devoid of the requirement of including information on the location of a flat in the building, referred to in Section 5. Similarly, in the case of a buyer, who is not provided by the developer with a bank guarantee or an insurance guarantee, it becomes devoid of the requirement of including information on these guarantees, laid down in Section 9 of this regulation.

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[4] See Z. Radwański, [in:] Z. Radwański (ed.), *System prawa prywatnego, t. 2. Prawo cywilne – część ogólna* [System of private law, vol. 2 – Civil law – general issues], Warszawa 2008, p. 430; J. Pisuliński, [in:] *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce* [Proceeding under private law – Professor Aleksander Oleszko commemorative book], Warszawa 2012, pp. 435–436.

[5] See R. Strzelczyk, *Obligatoryjne elementy umowy deweloperskiej w świetle ustawy o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego* [Obligatory elements of a property development agreement in the light of Act on the protection of a purchaser of a flat or a house], Rejent of 2012, No. 9, pp. 120–121; F. Schmidt, J. Eue, *Bauträgerkauf* [in:] *Münchener Vertragshandbuch*, v. V, München 2003, pp. 304–305.

This means that the components listed in Article 22.1 should be considered as the minimum level of information needed to be incorporated in a property development agreement.

It is more difficult to answer the second question asked above about penalties for the omission of individual elements in a property development agreement. While the lack of the price of the acquired flat or a house referred to in Section 2 of this regulation would – without a doubt – destroy this agreement, the omission of the statement of a buyer on receipt of the prospectus referred to in Section 15 of this regulation, would result only in the possibility of nullification of potential agreement in accordance with Article 29.2 of Act on property development.

I conclude that the sanction for the omission of elements listed in Article 22.1 in a real estate development contract will depend on which elements have been omitted. These penalties may be dependent on the particular case. A court may – on the basis of general principles of civil law – decide that an agreement is null and void, ineffective or unable to be pursued in court. Another possible way of nullification of this agreement – based directly on Article 29 – would be by a buyer's withdrawal within 30 days from the date of signing an agreement.

In my view, the legislature did the right thing by refusing to invalidate agreements automatically due to the situation in which any statutory element has been omitted. Such a solution could – in certain cases – prove disadvantageous to the buyer by cancelling an agreement against his will. It is therefore to be regarded as a justified legal structure in which a buyer is able to decide unilaterally on the possible invalidation of "deficient" real estate development contracts by the exercise of his statutory right.

Property development contract provisions laid down in Article 22.1 are not a closed list. They cover only the minimum mandatory content of this agreement, which may be extended by the will of the parties. The contracting entities have not lost autonomy in shaping the contents of a contractual relationship linking them. A contract may also include additional conditions, not stated by the regulation mentioned, provided – however – that they are not less favourable to a buyer than the regulations of Act on property development, because – otherwise – they would be null and void *ex lege* due to Article 28 of Act on property development.

Additional agreements of a real estate development contract, not listed in Article 22.1 may be constituted by, for example, a clause allowing a buyer to withdraw from a property development contract for reasons other than those mentioned in Article 29 or a clause stating the chosen way and method of payment of the costs associated with contractual disposition, such as notary fees and legal costs in the proceeding of the land and mortgage registry[6].

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[6] See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 209–210.

One should remember that a property development agreement in which a buyer is a consumer, which is a rather typical situation in practice, should not contain abusive clauses, which have been listed in the register of abusive clauses maintained by the Office of Competition and Consumer Protection.

Legal nature of a property development agreement and effects of its conclusion

One of the most important issues related to a property development agreement is the legal nature of this contract and the consequences of signing it. The research issue should be described as answering the question of whether a property development agreement constitutes an obligation to transfer ownership in accordance with Article 156 of the Civil Code or represents only a commitment to signing another agreement, which is an obligation to transfer ownership.

Before answering the question asked above, it should be reminded how contemporary Polish civil law uses the sixteenth-century concept of allocation of rights to things: (1) *iura ad rem* – understood as a contractual (obligational) right to the thing, and (2) *iura in re* – understood as a property right to the thing. Rights belonging to the first group are weaker and relative, which means their effectiveness exists only *inter partes* (only between the contracting parties), while the rights belonging to the second group are recognized as absolute, which means they are effective *erga omnes* (for all entities who are subject to Polish legislative system).

The subdivision of rights into obligational and property rights separates legal actions promising (obliging) to transfer ownership of things from legal actions transferring ownership of things. The material effect causes only the latter one, i.e. an action transferring ownership. According to the scheme adopted by Johann Apel, a German legal thinker and advocate of the above concept of allocation of rights, an agreement obliging the transfer of ownership must be understood as *titulus*, while the transfer of ownership is the *modus*.

According to the above concept, a contract that requires an obligation is a contract in which an owner of the goods agrees to (and is obligated to) the future transfer of the ownership of the goods to another person, while a contract in which an owner transfers the ownership of goods to another person, or disposes of it is a disposition.

The Polish legal system adopted the principle of causality in property agreements, which is guided by Article 156 of the Civil Code, sometimes referred to as material causality, which means that the validity of an agreement which transfers the ownership of things depends on the existence of an important – from the juridical point of view – legal basis for the transfer of the property.

A transfer agreement without a legal basis either does not exist or is invalid under law.

In my opinion, it is evident that a property development agreement does not transfer the ownership of property and – therefore – is only an independent material cause, as understood based on Article 156 of the Civil Code, to make the transfer in the future. Such a conclusion is strongly supported by the fact that on the basis of Section 7 of Article 22.1 of Act on property development, a property development agreement should provide the deadline for the signing of a future agreement transferring the ownership of the property to a buyer. Besides, Article 29.5 of this regulation grants a developer with permission to withdraw from a property development contract if a buyer evades the agreement transferring ownership. All these regulations lead to the conclusion that a property development agreement does not transfer ownership on its own.

Entry of a purchaser's claim in the land and mortgage registry

A few words of comment should be written about the essence and the nature of the legal entry of a property development contract claim in the land and mortgage registry. The considerations begin by noting that the overriding purpose of the Act is to protect the rights of buyers of flats or houses.

Undoubtedly, the intention of the legislature was to create a strong legal instrument, which protects the rights of a buyer. One of the instruments provided in Article 23 of Act on property development is the buyer's claim to entry in the land and mortgage registry. It protects a buyer from the sale of a flat or a house to a third party by allowing the buyer under Article 59 of the Civil Code to recognize such a third party agreement as ineffective against him and orders enforcement of the transfer of ownership of a flat or a house on his behalf.

Purchasers' claims on contracts with developers are entered in the land and mortgage registry based on Article 23 of Act on property development, which says that a real estate development agreement and a buyer's claims to a flat or a house are entered in the land and mortgage registry. Due to the imperative wording of Article 23.2, it should be considered obvious that the disclosure of the claim is mandatory[7].

[7] See R. Strzelczyk, *Obligatoryjność ujawnienia w księdze wieczystej roszczenia nabywcy z umowy deweloperskiej w* świetle *art. 23 ustawy z 16.09.2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego* [Obligatoriness of disclosure of a buyer's claims under a property development contract in the land and mortgage registry in the light of Article 23 of Act of 16 September 2011 on the protection of the rights of a buyer of a flat or house], PPH 2012, No. 10, pp. 20–23; H. Ciepła, [in:] H. Ciepła, B. Szczytowska, *Ustawa o ochronie praw nabywcy lokalu mieszkalnego i domu jednorodzinnego. Komentarz. Wzory umów deweloperskich i pism* [Act on the protection of the rights of a buyer of a flat or house – Commentary – Sample property developments contracts and documents], Warszawa 2012, p. 111.

In support of the above, it ought to be noted that the obligation of mandatory disclosure of entrepreneurs in the right registry is imposed upon them due to the identical wording contained in Article 43^2 § 2 of the Civil Code, according to which, a company is to be registered in the appropriate registry. If the intention of the legislature were the optional character of the disclosure of the claim discussed, the expression used would have appeared in a less imperative manner and would state that a buyer's claim "may be disclosed" in the land and mortgage registry (as it is in Article 16 of Act on the land and mortgage registry, which lists the individual rights and claims that "may be disclosed" in the land and mortgage registry.

The legislature has created Article 23 of Act on property development to an imperfect standard (*lex imperfecta*), which lacks sanctions – in particular a sanction to declare a contract null and void – which obviously does not mean that this standard is not applicable. Lack of sanctions does not allow discretion in applying the law. A collection of imperfect legal norms (*leges imperfectae*), understood as "without sanction", does not cover the set of dispositive legal norms (*iuris dispositivi*), the use of which may be excluded or limited by the will of the parties, although it must be noted that these are not separate, i.e. the rule of law can be designated to both sets.

Lack of sanctions for the parties to a property development contract for non-disclosure of a purchaser's claims in the land and mortgage registry does not absolve the notary who is drawing up a contract from the obligation to comply with the law. Besides, legal standards under Notary Law, in particular Article 80 § 2 of the Act, require that a notary ensure the proper protection of the rights and legitimate interests of the parties[8].

It is worth mentioning that Article 92 § 4 of Notary Law provides explicitly that "if the deed includes the transfer, the modification or the waiver of the rights disclosed and described in the land and mortgage registry or the establishment of the right that is subject to disclosure or if the legal action involves the transfer of the ownership of a real property, the notary who prepares a notary deed is required to include – in its content – the request for the appropriate registration in the land registry". The claim of a buyer of a property development agreement is – without a doubt – the establishment of the right that is subject to disclosure in the land registry, which is determined by Article 23.2, which states that the land registry "discloses" a buyer's claim. It has been commonly agreed in the Polish civil law jurisprudence that such a claim is one of a buyer's individual rights.

The conclusion that it is the notary's duty to include the request of the appropriate registration (in the land and mortgage registry) in a notary deed is

[8] See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 207–214.

also supported by the fact that the parties to a property development agreement cover the costs of the registration procedure according to Article 26 of Act on property development, which is dedicated to the notarial form of this agreement. The fact that the method of paying the court fees in respect of the request to the land and mortgage registry has been defined in the regulation that refers to a notary deed, proves that the legislature has established a direct connection between the payment of the court fees and the act of signing a deed, so that it is the notary who receives the payment and transfers it to the court.

The analysis of the normative material considered in this article has led me to believe that a notary who prepares a property development agreement has a statutory obligation to include, in a notary deed which documents the agreement, the request for full disclosure of the claims of a purchaser in the land and mortgage registry and to send this request to the land and mortgage court. The public character of the notary's duty means that even a buyer's explicit request to do otherwise addressed directly to the notary would not release the notary from the duty to include the above-mentioned request in a deed, although this duty exists only to protect the buyer's rights (*ius publicum privatorum pactis mutari non potest*).

To summarize, I believe that a notary who evades the duty to enclose the request to the land and mortgage register in a notary deed – even on demand of the parties – violates Article 92 § 4 and Article 80 § 2 of Notary Law and exposes himself not only to liability for damages, but also to disciplinary liability[9].

A developer's rights to land

In my opinion, a developer is entitled to sign a contract with a buyer only if he owns the land or holds the right of perpetual usufruct. The key factor in these considerations should be the normative definition of a property development agreement, according to which the developer commits himself to transfer the ownership of a flat or a house at the end of the real estate development procedure.

Also, from my point of view, the definition mentioned above clearly shows that the developer should own the land or should hold the right of perpetual usufruct. As it was already explained, a property development agreement creates the developer's obligation to transfer the ownership of a flat or a house to a buyer together with the right to the land. The signing of such an agreement concerning somebody else's property (or perpetual usufruct) would not be binding for the

[9] See M.K. Kolasiński, [in:] M.K. Kolasiński (ed.), *Civil liability of a notary and its insurance in Poland and other selected member states of the European Union*, Toruń 2012, pp. 31–48 and M. Bączyk, [in:] M.K. Kolasiński (ed.), *Civil liability of a notary and its insurance in Poland and other selected member states of the European Union*, Toruń 2012, pp. 83–114.

owner (or perpetual user), because *alterius contractu nemo obligatur*, and – therefore – it would not make him liable to a purchaser for the transfer of ownership of a flat or a house (*alteri stipulari nemo potest*).

In addition, if a developer signed such a contract, he would be unable to comply with the obligations undertaken – including the transfer of these rights to a purchaser – as he is not entitled to these rights. Of course, one can spin hypothetical discussions in which a developer might have a preliminary agreement to acquire the ownership of real estate (or the right of perpetual usufruct) to enable him to potentially comply with the obligations undertaken. Nevertheless, these reflections do not change the fact that the developer's commitment is premature, due to not having – at the moment of signing the agreement – the title to transfer these rights. Besides, if the obligation of a developer to transfer the ownership of real estate (or the right of perpetual usufruct) is a statutory element of a property development agreement, it may be implied that the legislature assumes that a developer already has a title to these rights.

The need for the contracting developer's ownership title existence or his right of perpetual usufruct of the land presence is confirmed in Article 36 of Act on property development, which has amended Act on bankruptcy and debt restructuring. The amendment adds a regulation of Article 425^{2}.1, according to which, in the case of bankruptcy of the developer, the ownership of the land or the right of perpetual usufruct of the real estate (which is object of the development project conducted) is confiscated into a separate bankruptcy estate to satisfy the buyers of apartments or houses. Also in this case, the regulation explicitly determines that the legislature considers a developer to be the owner of the land or to hold the right of perpetual usufruct to it.

What is worth noting is that a property development agreement with a developer who has no legal title to the land ought to be considered as extremely risky for purchasers of residential houses, and thus would be in evident contradiction to the primary objective of Act on property development, which has been designed to protect the rights of buyers (including providing them with a secure contractual position). A particularly high risk to a buyer would be involved in connection with signing a contract before the day when Act on property development entered into force, in which case a purchaser would be risking his investment to the developer (who does not hold any legal title to the land) as legal institutions such as the insurance of the trust account and the bank guarantee had not existed until their creation under Article 37 of Act on property development.

Besides the fact that a property development agreement must be prepared by a notary and according to Article 80 § 2 of Notary Law, a notary is obliged to ensure the sufficient protection of the rights and legitimate interests of the parties and other persons, to whom this action may result in legal consequences of any nature. In my view, a notary deed, which documents a property development

agreement signed by a developer who has no proper legal title to the land (i.e. the ownership or the right of perpetual usufruct) violates this regulation as it compromises the legitimate interests of both the buyer and the property owner (or the perpetual user), for both of whom this action results in legal consequences.

Consideration of the arguments of legal norms arising from these regulations as well as of the reasonableness of the legislature leads to the conclusion that the developer may enter into a property development agreement only if he owns the land or holds the right of perpetual usufruct. Legal norms express rules that prevent the entanglement of a buyer of an apartment or a house in a property development agreement with a party who has no legal title to the land.

To summarize, I believe that a notary should refuse to prepare an agreement in the absence of the developer's ownership of the land (or his right of perpetual usufruct). In the situation described, it is not enough – in my opinion – to inform a buyer of a flat or a house about the impossibility of the claim to the court of justice requesting the transfer of any legal rights, which has been the object of the agreement.

Due to the lack of a positive norm prohibiting a developer from building on someone else's land, Polish legal system has – in this respect – adopted German legal solutions, which have been stated by the Federal Court (*Bundesgerichtshof*), which firmly denied a developer the possibility of building on someone else's land. In my view – although it has not been confirmed by the Supreme Court of Poland – the current Polish law practice corresponds to the German one[10].

I also believe, though this is more of an issue of banking practice than the theory of law, that the lack of the title to the land on the side of a developer should result in refusal to open an escrow bank account for the development project.

Legal character and a title of a contract signed in the fulfilment of the obligation expressed in a property development agreement

The signing of a property development agreement is not an ultimate goal. The role of this contract is – in fact – to lead to a final contract, which transfers the ownership of the object ordered to a buyer after its construction. The essence of the problem is actually to determine whether the second contract is a contract of the only-tangible effect that only transfers the ownership, or a contract of double-effect that obliges the transfer of ownership and – at the same time – transfers the ownership in the performance of that obligation. As a result, the question arises whether this second agreement should be titled "The agreement

[10] See *Neuwe Juristische Wochenschrift* 1978, p. 1054.

to establish the separate ownership of an apartment and its transfer" or "The agreement to establish the separate ownership of an apartment and its sale".

For brevity of discourse, the analysis conducted here is limited to a property development agreement concerning an apartment, but the conclusions also apply to house development contracts.

In the Polish legal system, contracts of sale, exchange or donation are – according to the literal expression of the normative definitions – binding agreements. For example, Article 535 of the Civil Code, which contains the legal definition of a contract of sale, provides a conclusion that a seller "agrees to" transfer the ownership of a thing to a buyer and the buyer agrees to receive it and pay the seller the "price". According to Article 603 of the Civil Code, in a swap agreement each party "undertakes an obligation" to transfer something to the other party in exchange for "the commitment" to transfer another thing. Under Article 888 of the Civil Code, a donor in a donation agreement "commits" to a free benefit to the recipient at the expense of his estate. In these regulations, it is evident that those agreements do not transfer the ownership, but only agree on the transfer of it. Such a commitment is only a promise made by an owner, which might not be fulfilled.

On the other hand, under Article 155 § 1 of the Civil Code, if an agreement creates the obligation to transfer the ownership of a thing, which is a single-effect contract, such as a contract of sale, exchange or donation, and if it is signed provided that the cumulative fulfilment of the three conditions in that regulation – which are: (1) the object of the contract is specified as to its identity (e.g. a real estate), (2) parties to the contract have not excluded the transfer of the ownership, for instance by agreeing that the transfer of the property ownership would need a separate contract (because they have such a will), and (3) the immediate transfer of the ownership is not excluded by a specific regulation (e.g. by the statutory pre-emptive right of the municipality or the Agricultural Property Agency) – is existing, the agreement automatically transfers the ownership of property, which actually changes the character of this agreement into a double-effect contract.

Therefore, the obligation to transfer the ownership of an object specified as to its identity (such as its sale or the promise of it) by itself, automatically, transfers the ownership, unless the automatic transfer of the ownership has been excluded by a specific regulation or the parties have decided that the ownership of things would need to be transferred through a separate agreement later on. In the case of a statutory or contractual exclusion of the transfer of the ownership, a contract of sale, exchange or donation is still a single-effect contract, and it is necessary to sign an additional agreement by which the ownership-transferring effect would be obtained.

Based on the wording of the regulations referred to above, it is evident that a contract of sale may cause either a single-effect result or a double-effect result.

There is no third option (*tertium non datur*). Under Polish law, a sale contract is never just the ownership-transferring contract on its own.

As it was already mentioned above, in the Polish legal system, the principle of material causality in the real-property-ownership-transferring agreement is articulated in Article 156 of the Civil Code, which states – in a nutshell – that the validity of such an agreement depends upon the existence of a valid legal basis (reason) to enter into this agreement.

As regards the development agreement, it is evident that such an agreement requires an additional agreement to transfer the real property ownership, which of course should be concluded in the form of a notary deed. The correct title of such an additional agreement, signed in the implementation of a property development contract (first agreement), should be "the agreement to establish the separate ownership of an apartment and its transfer in the execution of a property development contract." Such an agreement should not be titled "the contract of sale", because such an inappropriate contract title would be misleading, as it suggests that the legal cause of transferring ownership is the sale, i.e. the obligation to transfer the ownership included in the second agreement (a notary deed), while – in fact – this obligation is included in the first agreement, i.e. in a property development contract, which was signed by the parties several months before[11].

Placing a wrong title in a notary deed does not invalidate a contract. The nature of the legal action is determined by its content and not by its name. There is no doubt, however, that such a misleading title should be avoided.

Developers and purchasers of apartments as members of the real estate community

The act of signing an additional agreement, i.e. an agreement that transfers the ownership of a house (together with the title to the land) to a buyer who previously signed a property development agreement, ends the developer's relationship with the buyer. The ownership of the land (or the right of perpetual usufruct) together with a house becomes a separate property, for which a new land registry entry ought to be established, in which the buyer's (or a perpetual user's) name is disclosed. After the act of signing the final agreement, the developer and the buyer usually go their separate ways.

The situation is completely different – however – in the case of residential premises, such as a flat or an apartment. In the very moment of the establishment

[11] See R. Strzelczyk, *Charakter prawny i tytuł umowy zawieranej w wykonaniu umowy deweloperskiej* [Legal character and a title of a contract signed in the fulfilment of a property development agreement], Nowy Przegląd Notarialny 2012, No. 2, pp. 16–17.

of their separate ownership, a housing association is established, of which the first members are the developer and the purchaser of a flat or an apartment. The number of members of this community increases with the gradual establishment of separate ownerships of other residential premises (flats or apartments), because – according to Article 6 of Act on the ownership of flats – the housing association comprises all the owners whose flats are located within the property (building)[12].

PROPERTY DEVELOPMENT CONTRACT IN THE SYSTEM OF POLISH PRIVATE LAW

Summary

When Act on property development of 16 September 2011 entered into force, an immediate need arose to determine the nature, substance and importance of a real estate development agreement within the contemporary private law system in Poland. The article describes a property development agreement as a new type of a specified contract (*contractus nominatus*), the legal consequences of the omission of its statutory elements, why the entry of a purchaser's claim in the land and mortgage registry is mandatory and why a notary who evades the duty to enclose the request to the land and mortgage registry in a notary deed violates the law and exposes himself not only to liability for damages, but also to disciplinary liability. The article also explains why a developer should be the owner of the land or at least hold the right of perpetual usufruct and the legal character of the contract signed in the fulfilment of the development agreement.

UMOWA DEWELOPERSKA W SYSTEMIE POLSKIEGO PRAWA PRYWATNEGO

Streszczenie

Wejście w życie ustawy z 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego wykreowało konieczność określenia charakteru prawnego oraz miejsca umowy deweloperskiej w systemie prawa polskiego. W artykule wskazano argumenty przemawiające za uznaniem umowy deweloperskiej za

[12] See A. Turlej, [in:] R. Strzelczyk, A. Turlej, *Własność lokali. Komentarz* [Ownership of flats – Commentary], Warszawa 2013, pp. 154–192.

umowę nazwaną (*contractus nominatus*), omówiono skutki prawne pominięcia w niej ustawowych elementów, wyjaśniono, z których przepisów wynika obligatoryjność zamieszczenia w akcie notarialnym dokumentującym zawarcie umowy deweloperskiej wniosku o ujawnienie roszczeń nabywcy w księdze wieczystej, także pod kątem odpowiedzialności cywilnej i dyscyplinarnej notariusza uchylającego się od dopełnienia tego obowiązku. W artykule wyjaśniono ponadto przyczyny, dla których należy przyjąć, że umowę deweloperską powinien zawierać właściciel lub użytkownik wieczysty gruntu, a także omówiono charakter prawny umowy zawieranej w wykonaniu umowy deweloperskiej.

LE CONTRAT DE PROMOTEUR IMMOBILIER DANS LE SYSTÈME DU DROIT POLONAIS PRIVÉ

Résumé

La mise en œuvre du droit du 16 septembre 2011 conforme à la protection des droits de l'acheteur de l'appartement ou de la maison unifamiliale a créé la nécessité de définir le caractère légal et la place du contrat de promoteur immobilier dans le système des droits polonais. Dans l'article on a indiqué les arguments pour respecter le contrat de promoteur immobilier comme le contrat nommé (*contractus nomiunatus*), on a parlé aussi des effets d'y négliger les éléments juridiques et on a expliqué par quelles règles résulte l'obligation de définir dans l'acte du notaire formant le document du contrat de promoteur immobilier cette conclusion qui demande de l'acheteur de démontrer toutes les prétentions dans le livre foncier aussi bien sous l'aspect de la responsabilité civile que disciplinaire du notaire qui manque à ses devoirs. Dans l'article présent on a expliqué aussi les causes par lesquelles il faut accepter le contrat de promotion immobilier par le propriétaire ou l'usager eternel de terre ainsi qu'on a caractérisé le contrat de point de vue légal pour exécuter le contrat de promotion immobilier.

ДЕВЕЛОПЕРСКИЙ ДОГОВОР В СВЕТЕ ПОЛЬСКОГО ЧАСТНОГО ПРАВА

Резюме

Вступление в силу закона от 16 сентября 2011 г. о защите прав покупателя жилого квартирного помещения либо односемейного дома привело к необходимости определения правового характера, а также места девелоперского договора в системе польского права. В статье представлены аргументы в пользу признания девелоперского

договора договором, предусмотренным законом (*contractus nominatus*), оговорены следствия упущения в нём нормативных элементов, выяснено, из какого положения вытекает требование размещения в нотариальном акте, документирующем заключение девелоперского договора, запросе о раскрытии претензий покупателя в ипотечной (поземельной) книге, также с точки зрения гражданской и дисциплинарной ответственности нотариуса, уклоняющегося от выполнения данной обязанности. Кроме того, в статье выяснены причины, для которых следует признать, что девелоперский договор обязан заключать собственник либо узуфруктуарий земли, а также оговорён правовой статус договора, предполагающего выполнение условий девелоперского договора. заключаемого в выполнении девелоперского договора.

Brunon Hołyst

CYBERSTALKING AS A FORM OF CYBERHARASSMENT

1. Legal essence of cyberstalking

The phenomenon of cyberstalking is defined as the use of the Internet or other means of communication in order to harass an individual, a group or an organisation[1]. It may include a wide range of activities having adverse effects on and detrimental to a victim[2]. Although cyberstalking differs from classic stalking as it uses electronic media, both forms of harassment often occur together and perpetrators are motivated by the need to control their victims[3]. Cyberstalking is treated as a form of cyberharassment and both forms are nowadays treated as crimes.

Cyberstalking is one of the forms of stalking. The dangers that this form of harassment carries were noticed for the first time in the USA at the early 1990s, which resulted in the regulation of a perpetrator's behaviour in both state and federal law. In 1999, Attorney General sent a special report to Vice-President A. Gore, in which he highlighted threats connected with Internet communication. The crime carries a penalty of five-year imprisonment and a fine of $250,000. Moreover, in 1998, President B. Clinton signed anti-stalking law. In addition, many governmental and non-governmental organisations were founded to provide support for victims[4]. It is essential because stalkers act more and more frequently. For example, a 50-year old security guard in California was convicted on a charge of using the Internet to rape a woman who rejected his romantic advances. The accused terrorised an almost 30-year old woman by acting on her behalf in chatrooms, on the Internet and advert boards where he published her telephone number and address. He also sent messages on her supposed desire to be raped and signed them on her behalf, which resulted in numerous intruders' visits to

[1] P. Bocij, *Cyberstalking: Harassment in the Internet age and how to protect your family*, Praeger Press, Westport C.T., 2004.

[2] B. Loader, *Cybercrime: Law enforcement, security and surveillance in the information age*, Routledge, London 2000.

[3] S. Furnell, *Cybercrime: vandalizing the information society*, Addison Wesley, London 2002.

[4] *Working to Halt Online Abuse* (www.haltabuse.org).

the woman's house. The accused pled guilty and was sentenced to six years' imprisonment. In San Diego, a stalker terrorised students via the Internet and his victims received hundreds of threatening emails, sometimes tens of them per day. The perpetrator wanted to take revenge for being laughed at, as he thought, but in fact, the victims had never even spoken to him.

Canadian anti-stalking legislation entered into force in 1993 and it envisages that "Nobody can be constantly afflicted by letters, surveillance of the dwelling or workplace, or threats against oneself or one's family that endanger their physical or psychical security". However, for the first time in history, stalking was recognised as criminal activity in California, in the US, in 1998[5]. It was decided that the law of that state should ban stalking and expressing threats against other persons if these make them feel that there is safety hazard to them and their families. In case of cyberstalking, the threats are transmitted via the Internet, email, telephone (also a cellular one), facsimile, video or any other electronic means of communication. The definition of the concept of "threat" was amended in California and now it covers a "threat transmitted in the form of an electronic transmission"[6].

The term stalking covers a series of specific behavioural activities. They include, inter alia, false accusation that aims to ruin a victim's reputation. The accusations are published in various places on the web, such as blogs, social networking sites etc. Cyberstalkers collect information on their victims, their family, friend, the surrounding etc. They look for that information online and sometimes hire specialists, e.g. private detectives. The perpetrators monitor their victims' online behaviour in real time (on line) and try to steal their personal passwords, and this way gain access to private information[7]. One of the signs of cyberstalking is encouraging other people to harm a victim; to this end, they present their victim as a person guilty of many evil deeds, provide the victim's personal data, photographs, address, telephone number, etc. They often present the victim as their stalker. Cyberstalking sometimes takes the form of infecting the victim's computer with viruses and sometimes in ordering – on a victim's behalf – various goods such as erotic gadgets or pornographic magazines subscriptions, which are then delivered to a victim's house. In case of young people, cyberstalkers often strive to arrange real-life meetings[8].

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[5] California Cyberstalking Laws (http://www.shouselaw.com/cyberstalking.html) (29.11.2013).

[6] *Cyberstalking crime research* (http://www.crime-research.org/library/Cyberstalking.htm).

[7] P. Bocij, *Cyberstalking: harassment in the Internet age and how to protect your family*, Praeger Press, Westport C.T., 2004, pp. 9–10.

[8] D. Sarzała, *Problem agresji i przemocy w multimediach elektronicznych – aspekty psychologiczne i etyczne* [Problem of aggression and violence in electronic multimedia – psychological and ethical aspects], [in:] J. Bednarek, A. Andrzejewska (ed.), *Cyberświat –możliwości i zagrożenia* [Cyberworld – possibilities and threats], Wyd. Akademickie "Żak", Warszawa, pp. 243–273; also compare B. Hołyst, *Bezpieczeństwo społeczeństwa* [Community security], vol. III, PWN, Warszawa 2015, p. 586 and the following.

According to an American website involved in the research into stalking phenomena (www.stalkingvictims.com), almost 1.5 million Americans have been affected by this problem. The perpetrators of stalking are usually men (66–90%). But both men and women look for a victim among persons representing the opposite sex, thus the background is erotic. Stalking is committed against representatives of the same sex less frequently. Perpetrators are usually middle-aged (30–50 years old), but there can also be younger persons, e.g. 15-year-olds, and in extreme situations even 9–11-year-olds[9]. Contrary to a common belief, it does not concern only stars or celebrities. The victims are also ordinary people, however, their cases are not well-known ones because the media are not interested in publicising them. In one case a stalker harassed a female colleague for four years. He was dismissed from work and ordered to refrain from intimidating her. The perpetrator ran amok, entered the workplace, shot seven persons and injured four (including the woman he used to harass). In another similar case, an emotionally disturbed woman attacked a well-known American TV showman, David Letterman of the CBS. The woman believed that the famous comedian was her husband and harassed him for a few years. In 1998, G. Dellapenta from Los Angeles published the genuine personal data on the web, including the address and telephone number of his former partner who left him. Then, pretending to be her, he announced that she was in favour of very shocking forms of sexual intercourse and started to demand them from her. Six other men responded to the encouragement. The man was brought before court and sentenced to six years' imprisonment[10].

As it was mentioned, the first American state to pass anti-stalking law was California and the reason behind that decision was a series of stalking-related murders, e.g. in 1982 attempted murder of actress Theresa Saldana, and a massacre by Richard Farley in 1988. The first regulations were laid down in the criminal law of California on the initiative of Judge John Watson of Orange County, who together with senator Ed Royce led to passing the anti-stalking bill[11]. The states of Alabama, Arizona, Connecticut, Hawaii, Illinois, New Hampshire and New York developed and implemented anti-stalking programmes. The states of Alaska, Florida, Oklahoma, Wyoming and California revised their legal regulations and introduced formal bans on stalking (especially cyberstalking) and started treating it as a crime. Texas started developing a protective system and legal regulations against cyberstalking and as a result, Electronic Communication Act was passed in 2001.

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[9] www.stalkingvictims.com

[10] J. Kosińska, *Prawnokarna problematyka stalkingu* [Legal-penal issue of stalking], Prokuratura i Prawo 2008, no. 10, pp. 33–47.

[11] *Cyberstalking: A new challenge for law enforcement and industry: A report from the Attorney General to the Vice President*, Washington DC: US Department of Justice, 1999.

In-depth research into the phenomenon was carried out in Canada[12]. The first stalking case was reported there in 1993 and it was an impulse to regulate the issue in the Criminal Code of Canada. The research conducted by the police and psychologists resulted in the development of psychological profiles of perpetrators. In Ontario, there are many organisations combating stalking and promoting the idea of anti-stalking regulations and measures to fight against the phenomenon. The organisations provide legal information with the use of a website called Ontario Women's Justice Network, which records a few hundred hits daily. New regulations on stalking were also passed in Australia in 2008. Personal & Domestic Violence Act was developed to regulate the issue of stalking as a crime. In addition, people are encouraged to have the so-called Apprehended Violence Order, which contains standards concerning the assistance to victims, necessary addresses and telephone numbers of dedicated police helplines dealing with stalking. The US Department of Justice webpage also provides a lot of information on stalking, in particular its definition and tips on how to combat cyberstalking with special attention paid to the specificity of electronic communication means such as a telephone, a facsimile, GPS, cameras, computers and Internet links[13]. The Stalking Resource Center of the National Center for Victims of Crime plays an important role in the field[14].

The crime of stalking, including cyberstalking was regulated in the Polish Criminal Code in Article 190a:

§ 1. Whoever persistently harasses another person or his next of kin, and causes in the harassed person a justified fear of danger or substantially infringes his privacy shall be subject to the penalty of up to three years' imprisonment.

§ 2. Whoever pretends to be another person, uses his image or other personal data in order to cause financial or personal damage shall be subject to the same penalty.

§ 3. If the act referred to in § 1 or 2 results in a victim's attempt to commit a suicide, the perpetrator shall be subject to the penalty of one to ten years' imprisonment.

§ 4. The prosecution shall occur on a motion of the injured person.

It is worth reminding that earlier, i.e. before the amendment to the Criminal Code was passed, Article 31 of the Constitution of the Republic of Poland constituted grounds for whatever liability of a perpetrator of stalking. There is no doubt that stalkers' activities are aimed at the legal good that is a person's freedom. With regard to the provisions of the Criminal Code that might have

[12] J. Kosińska, *Prawnokarna problematyka stalking* [Legal-penal issue of stalking], Prokuratura i Prawo 2008, no. 10, p. 43.

[13] *Cyberstalking: A new challenge..., op. cit.*

[14] J. Woźniak, *Stalking jako rodzaj uzależnienia emocjonalnego i uczuciowego od osoby* [Stalking as a type of emotional and sentimental dependence on a person], www.psychologia.net.pl.

been referred to in case of such conduct was Article 207 of the CC referring to harassment meant as activities consisting in inflicting physical or psychical suffering, using violence, threatening and insulting a victim. Harassment has the form of single- or multiple-type activities that infringe the freedom or dignity of the harassed person. Exceptionally, harassment can also be an activity that, although it is limited to a single event in terms of time or place, is very intensive in terms of physical and psychical suffering, especially one composed of many acts performed in an extended period of time. According o the Supreme Court, the verb feature "harasses" means that the misdemeanour is performed repeatedly, although in an extraordinary situation, one occurrence of this type of conduct is sufficient. The provision lays down who is subject to protection: the next of kin or other persons who are in permanent or temporary dependence relationship with the perpetrator or minors, or incapable persons because of their physical or psychic condition. Such persons are most often a stalker's victims. However, the range of people who may be victims of this crime was limited in comparison to the situations in which persistent harassment occurs, because a stalker acts against any person he knows as well as an accidental victim. Thus, protection provided by the same provision did not cover all the situations in which the earlier relationship between a stalker and a victim can be classified as being just acquaintances or when a perpetrator is a stranger.

According to J. Kosińska, the Supreme Court rightly defined the dependence relationship as a situation in which a victim is a perpetrator's dependant because he is not capable of resisting harassment on one's own and suffers it because of a fear that his present living conditions might deteriorate into, e.g. a loss of the job, income or dwelling, the separation or the severance of sex life with the perpetrator[15]. It can also result from the real-life situation creating circumstances in which a perpetrator harasses a victim using the advantage over a victim, which he gains thanks to material, personal or emotional relationship between them. A perpetrator most often refers to this relationship. Article 207 of the CC covered a too small range because it did not refer to situations when a perpetrator and a victim are just acquaintances or have no relations at all. According to the research findings, persistent harassment takes place in situations in which there was a close relationship between a perpetrator and a victim, but there is also a big percentage of cases in which, e.g. because of psychic disorder, a stalker is a complete stranger. The essence of the crime of harassment consists in a stalker's qualitatively different conduct than only insulting or physical abuse of a victim. A perpetrator's behaviour is not limited to an event that is systematic or occurs in a certain limited place or time. Most often, it is connected with the intensity, severity and excessive insult as well as the aim of single acts infringing particular goods, e.g. dignity or bodily inviolability.

[15] Resolution of the Supreme Court of 9 June 1976, VI KZP 13/75, OSNKW 1976, no. 7–8, item 86.

In every specific case, it is necessary to assess the situation from an objective point of view, using a model citizen (or an average ordinary man), i.e. a man with an appropriate level of socialisation and sensitivity to another person's harm[16]. This model citizen is necessary to interpret a perpetrator's intention. A stalker's behaviour may demonstrate the features of a crime of a punishable threat, especially in case of stalking or forcing to act in a particular way. Article 190 of the CC defines a punishable threat, which infringes a man's freedom in the psychic sphere (freedom from fear); it deals with threatening another person with a crime (a felony or a misdemeanour) harming him or his next of kin. The Supreme Court decided that a punishable threat might be expressed through any type of a perpetrator's behaviour (a verbal or written announcement or expressed in a gesture, e.g. aiming a gun at a person etc.) if it undoubtedly demonstrates a threat of a crime commission. The condition for classifying an act as a criminal one is that a threat causes justified fear that it will be fulfilled. It should be interpreted as a situation in which a victim treats a threat seriously and believes it can be really fulfilled.

A perpetrator influences the psyche of another person by presenting a threatened person the wrong that is going to happen to him/her unless he/she does what the perpetrator wants. A perpetrator does not have to really intend to fulfil his threat; it is enough that the content of his threat is passed to a threatened person. A victim's subjective conviction that there is a possibility that a threat will be fulfilled must be justified, i.e. the circumstances in which a threat was expressed as well as a perpetrator's activeness make a victim believe that a threat is serious and gives grounds to fear. The issue was discussed in court decisions that state that a crime under Article 190 takes place if it can be proved that a threat induced a subjective (perceived by a threatened person) fear that it will be fulfilled and then verified (by court) whether a threatened person could really have perceived that threat in this way in the given circumstances[17].

Article 190 of the CC lays down the means of threat that are violence towards a person or a criminal threat. Violence is such influence with the use of physical force that precludes a threatened person from taking or implementing their free will decisions, or affecting a person's motivational processes by affliction to induce a victim to take a decision desired by a perpetrator. The use of violence consists in a broadly understood physical action performed directly against the injured party, which is aimed at enslaving them and make them submit to a perpetrator's will or behave in a given way, or against another person. Violence used then, most often through a victim's emotional relationship with a perpetrator, may

[16] J. Kosińska, *Prawnokarna problematyka stalkingu* [Legal-penal issue of stalking], Prokuratura i Prawo 2008, no. 10, p. 38.

[17] Sentence of the Court of Appeal of 4 July 2002, II AKa 163/2002, KZS 2002, no. 7–8, item 44.

lead to enslavement and submission to a person using violence[18]. The Article is a useful solution in combating the discussed crime because it does not contain a requirement for a victim to be the next of kin and other conditions for the type of relationship with a perpetrator as referred to in Article 207 of the CC[19]. On the other hand, it includes only the use of violence or a criminal threat in the features determining the causative act. They are means to achieve a perpetrator's planned objective, thus a crime can be committed only in case of a direct intention. Taking into account the features of forcing a victim to act in a given way, it seems that a perpetrator corresponds to one defined in Article 191 § 1 of the CC. A stalker, intentionally, with the use of different methods, forces a given person to behave in a given way, to submit to a perpetrator's will or to give up some activities, e.g. keeping in touch with persons other than a perpetrator, and also forces a victim to accept the relationship between them by using violence or a criminal threat.

Act of 29 July 2005 on combating domestic violence[20] is an important regulation with respect to combating stalking. The statutory protection covers family members, i.e. the next of kin as well as other persons who reside together with or are members of a the same household as a person using violence. The legislator understands domestic violence as occasional or repetitive intentional activities or omissions infringing the legal and natural rights of persons specified in the statute, especially endangering these persons' life, health, dignity, bodily inviolability, freedom, especially sexual one, causing harm to their physical and psychical health as well as inflicting the feeling of suffering and moral wrong upon victims of violence. Persons whose behaviour is classified as domestic violence are subject to the use of measures aimed at preventing them from having contact with their victims and influencing them with correctional and educational methods. The statute also envisages a range of assistance measures that may be addressed to victims, including, inter alia, psychological and legal counselling, crisis intervention and a safe shelter in a specialist centre. Apart from the above-mentioned measures, the statute introduces a certain innovation in the procedure of conditional discontinuation of the criminal proceeding and in the suspension of the execution of a punishment towards a perpetrator of a crime committed with the use of violence or a criminal threat against a member of his family.

The above-mentioned statute amends the Criminal Code and envisages that a court imposing an obligation to refrain from contacting victims or other persons in a particular way and to leave the dwelling used together with a victim,

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[18] A. Barczak-Oplustil et al., *Kodeks karny. Część szczególna, t. II: Komentarz do art. 117–277* [Civil Code – Specific issues, vol. II: Commentary on Articles 117–277], Zakamycze, Kraków 2006.

[19] J. Kosińska, *Prawnokarna problematyka stalkingu* [Legal-penal issue of stalking], Prokuratura i Prawo 2008, no. 10, p. 38.

[20] Journal of Laws No. 180, item 1493.

obligatorily determines the way in which a perpetrator may contact a victim and optionally imposes a ban on approaching a victim in given circumstances. In case there are grounds for the application of temporary arrest towards the accused of a crime committed with the use of violence or a criminal threat, a court may rule intensive probation by the police provided that the accused leaves the dwelling used together with the victim until the deadline determined in the court decision and provides information about his new place of residence. The provisions of the discussed statute let a court impose an additional punishment on the accused in case he leaves the place of residence. It is worth remembering that the harassed victims suffer from the consequences of stalking for a very long time. The time when a perpetrator is in prison may be the time of peace and quiet for his victims. But there are cases when a perpetrator attempts to continue harassing his victim from prison, e.g. sending letters.

In a similar way as in American regulations, Polish Penalties Execution Code envisages a possibility of informing victims about the fact that a perpetrator has left prison. Under Article 168a of the PEC, on a motion filed by a victim, a penitentiary judge or the head of prison without delay notifies a victim, his legal representative or his legal guardian about the release of the convict after having served the punishment, about the escape of the convict from prison and also about granting the convict a pass, temporary release from prison without intensive probation or without escorting by a prison officer or another trustworthy person, a break in the execution of a punishment and conditional release. The provision plays a very important role, especially in cases of persistent harassment because a victim can get psychically prepared for the possible meeting with the former stalker. Such a notification can occur only on a victim's motion and refers also to a convict's release from prison after having served the whole punishment and a convict's escape from prison[21]. The organs obliged to notify a victim should know that a victim has been informed and has filed an adequate motion in the court that has informed him about the right. J. Kosińska emphasises that the introduction of a monitoring programme would contribute to the improvement of a victim's state of mind and the increase in the supervision of a perpetrator's conduct in the period of probation[22].

According to the cited author, it would be a good idea to introduce the so-called register of stalking cases into the daily work of law enforcement agencies. It would be used to collect information about a victim and a perpetrator's data; it would include information about witnesses, circumstances and a perpetrator's modus operandi. An introductory section would concern a victim, who would provide his/her first name, surname, sex, date of birth, address, telephone number

[21] Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Penalties Execution Code – Commentary], Zakamycze, Kraków 2008.

[22] J. Kosińska, *Prawnokarna problematyka...* [Legal-penal issue...], *op. cit.*, p. 40.

and profession. Information about a perpetrator (with a photograph) would include his/her false name, sex, date of birth, address, frequently visited places, telephone numbers used in contact with a victim, email address, profession, workplace and his/her employer's data. Moreover, it would be necessary to collect information about a perpetrator's car (registration plate number, colour, model, make) and check if he/she carries a gun or has been granted a firearms license. Important information concerns a perpetrator's past, earlier criminal record and classification of committed crimes. A description of an event may include the date, the part of the day (time), the venue, the potential witnesses and the possibility of contacting them, and the course of the event (information or evidence a perpetrator has left). Successive events can be recorded in the same way and thus evidence can be collected. The collection of all the information may be easy if a victim knows a perpetrator from workplace or private circles and it is possible they will know his/her co-workers, acquaintances etc.

2. Role of the Internet in stalking

It is highlighted that proceeding against stalkers may encounter specific problems[23]. The Internet is a means of mass communications when it is used to transfer information to strictly specified or non-specified, but numerous entities that can be attributed a name: "multiplicity of recipients". The Internet adopts this character when, e.g. the content has been entered into a forum of a given Internet service or on a website (World Wide Web). A given website is available to an unlimited number of entities that may visit that Internet site[24]. The analysis of a given actual state leading to a conclusion that in order to commit the crime of stalking consisting in defamation or insult, the Internet has been used as a means of facilitating the distribution of the content banned by the provisions to an indefinite number or a definite but substantial number of recipients results in the necessity to treat the medium in this situation as "a means of mass communication" as referred to in Article 212 § 2 of the CC and Article 216 § 2 of the CC. As a result, in such a situation, a perpetrator commits an act that has the features of an unlawful act in its aggravated form.

In the field of communication and transfer of information between people, the Internet nowadays offers possibilities of sending information by electronic mail to a single person or a limited number of people (so that it does not have the feature of being "public" as referred to in the provisions of the CC cited above), the so-called email and instant messaging systems. Electronic mail is

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[23] T. Fołta, A. Mucha, *Zniesławienie i znieważenie w Internecie* [Defamation and insult on the Internet], Prokuratura i Prawo 2006, no. 11, pp. 49–63.

[24] M. Sowa, *Ogólna charakterystyka przestępczości internetowej* [General characteristic if Internet crimes], Palestra 2001, no. 5–6, p. 31.

a system of message and data transmission between computers via the Internet links. The system can be used to send text messages as well as all types of computer files. On the other hand, instant messaging is a program that offers real-time direct online chat with another person (inter alia, GaduGadu, Tlen, AOL Instant Messenger, Hello). The conversation takes the form of short texts transmission. The transmission of the content that is defaming or insulting in character is not different form a traditional letter written on a sheet of paper and sent to a particular person or an oral transmission of that content during a face-to-face or telephone conversation[25]. One can compare the crime of defamation committed with the use of a letter sent by post and sent as an email. A keyboard substitutes for a pen, a monitor substitutes for a sheet of paper, an email address substitutes for a home address, and cables and optical fibres substitute for postmen.

Computers creating the Internet network serve as transmitters of information included in an email in the same way as the post office, which acts as a middleman in the delivery of a physical letter. Thus, the use of the above-mentioned Internet tools cannot constitute "public" transfer of information that would be an aggravated form of unlawful acts subject to the provisions of the CC cited earlier. In case this condition is fulfilled, the use of the Internet to transfer defaming or insulting information in the above-mentioned way does not make the medium "a means of mass communication" because the content transmitted is not addressed to such a group of people that would cause "public" defamation or insult. Such content, in such a situation, is addressed to a strictly defined person or a limited group of people (e.g. an email to the company board). The use of the Internet by a perpetrator as "a means of tightly closed interpersonal communication" during the commission of a crime of defamation or insult causes that this conduct has the features referred to in the above-mentioned Articles of the Criminal Code.

Thus, the Internet used for such communication does not become a tool aggravating the type of an unlawful act and its use is not a feature of the basic type of crimes discussed here. It is of great practical importance for the use of the legal classification of a given act. It directly influences the proceeding-related situation of a perpetrator because the aggravated type of crime, both defamation and insult, carries a more severe punishment. The classification of the Internet – in one of its forms – as "a means of mass communication" making it a feature of the aggravated type of an unlawful act has been dictated by the fact that it has, like such media as radio, the press, television and even posters with unlawful content displayed in commonly accessible public places, extraordinarily wide opportunities to reach practically unlimited number of

[25] T. Fołta, A. Mucha, *Zniesławienie i znieważenie...* [Defamation and insult...], *op. cit.*, p. 52.

people with the transfer of information[26]. On the other hand, the Internet provides opportunities to communicate individually without the mass character of the recipients of the transferred content. In such a situation, the medium goes beyond the term “a means of mass communication” and becomes a different type of means of communication, namely “a means of tightly closed interpersonal communication”[27].

As it was mentioned before, in case of stalking, we very often deal with defamation and insult. Both defamation and insult belong to crimes that are subject to private lawsuit and, taking into account their character, the legislator envisaged a special mode of proceeding in such cases. Its characteristic feature is that, inter alia, a victim or persons that can act on his behalf have the entitlements of a prosecutor. A victim may file and support an indictment until the time limit for a given crime limitation. There are numerous Internet services like forums, discussion groups, chat-rooms, guest books, blogs etc. where the content entered by a user (opinions, beliefs, information) become publicly accessible for an unlimited number of people[28]. Users can publish their own content in fact freely deciding on how it should be signed. Usually, they sign it with a pseudonym. It ensures being anonymous and provides the Internet users with the conviction of impunity[29]. Resulting from the general rules of the Internet connections, information included in the logfiles that can be helpful in identifying a perpetrator are retained and used by server administrators mainly for technical and administrative purposes. Data necessary to open an email account – an email address – or instant messaging are not verified whether they are genuine and they are not revealed to third parties.

All computers directly linked to the Internet have their unique IP address (Internet Protocol address) individually assigned to each device. The address consists of four 8-bit numbers, each with values ranging from 0 to 255. It is a “registration number” of a given computer and every part of the address means something different and makes it possible to establish a smaller and smaller area where a computer can be found. Thus, by using one part, a given network can be established, with the use of another one a subnet can be specified within the network, and next a computer can be located in the network. Such a structure results from the specificity of the IP. The scopes of addresses constituting the so-called classes are assigned to companies providing Internet access services.

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[26] A. Zoll, *Kodeks karny. Komentarz. Część szczegółowa* [Criminal Code – Commentary – Detailed issues], Zakamycze, Kraków 1999, p. 647.

[27] T. Fołta, A. Mucha, *Zniesławienie i znieważenie...* [Defamation and insult...], *op. cit.*, p. 54.

[28] J. Bednarek, *Teoretyczne i metodologiczne podstawy badań nad człowiekiem w cyberprzestrzeni* [Theoretical and methodological bases of research into man in cyberspace], [in:] J. Bednarek, A. Andrzejewska (ed.), *Cyberświat – możliwości...* [Cyberworld: opportunities...], *op. cit.*, pp. 23–55.

[29] J. Szwarc, *Prawne aspekty przestępczości teleinformatycznej* [Legal aspects of telecommunications crime], [in:] J. Bednarek, A. Andrzejewska (ed.), *Cyberświat – możliwości...* [Cyberworld: opportunities...], *op. cit.*, pp. 355–374.

Thanks to its uniqueness, the IP address – together with the exact time of a connection – unambiguously identifies the device on the web and the company it comes from. In order to read a particular IP address, it is necessary to have the logfiles (digital ones) of the Internet servers. A logfile is the information that a computer transfers to the server at each instance of a connection to the Internet[30]. Logfiles register data on the activeness of their clients on the web and make it possible to determine which sites on the web they linked to, where they sent messages, where from and when they received them and what kind of transactions they made. This is such information as e.g. a transfer of files (sending and downloading), participation in a discussion group or a visit to a www site. The register files are generated by the providers of access services and include data that can be an "electronic trail" of perpetrators of various crimes committed with the use of a computer, including stalking.

The discussed procedures are especially important in case of the Internet users who are not connected to the web permanently but use the so-called communication protocols enabling them a temporary connection to the Internet with the use of a modem or a telephone. Once a modem connection to the access provider starts, its server automatically assigns a subscriber an IP address from the so-called address pool available to the Internet providers for allocation to users[31]. The signal with information is sent with the use of, more or less, the same elements as a telephone conversation. Each time an owner of a modem wants to connect to the Internet, the telephone network operator assigns him an IP number. It is a number that is not assigned to a particular user forever. It is assigned to a user for the time of his activeness on the web. In order to match a computer with the IP address, it is necessary to match the date and the time with the user of the given address. Thus, any activeness of a given computer in the web is related just to its address[32].

3. Identification of stalkers

The so-called telephone billings, which contain information about the subscriber's station number, the subscriber's address, the number of telephone units used by the subscriber in a billing cycle, telephone numbers the subscriber was connected to, dates of connections, the length of the connections and their type (international, national, local ones or to the Internet). The provider is obliged to register the data concerning communications services provided in the scope

[30] M. Kliś, A. Stella-Sawicki, *Identyfikacja użytkownika komputera na podstawie logów cyfrowych* [Identification of a computer user based on digital logfiles], Prokuratura i Prawo 2001, no. 7–8, p. 52.

[31] A. Adamski, *Prawo karne komputerowe* [Criminal computer law], Wyd. C.H. Beck, Warszawa 2000.

[32] M. Kliś, A. Stella-Sawicki, *Identyfikacja użytkownika...* [Identification of a computer...], *op. cit.*, p. 53.

that is necessary to calculate the charge for the services[33]. It must be emphasised that some local computer networks use the mechanisms of dynamic allocation of the IP address, i.e. assigned for each connection to the Internet individually. This may complicate matching the given IP address with a particular computer that used it on the web. Billing data, as information about communication connections between subscribers' stations, are shrouded in communication secrecy under Act – Telecommunications Law of 16 July 2004[34]. Revealing this secret information may take place only based on a court or a prosecutor's decision, or based on other regulations.

Every web user may also create one's own website and enter it onto the web, and present whatever content he wants, including one defaming or insulting another person. The sites constitute a wide range of linked documents and other files located in other computers that are connected via the Internet and make it possible to access, use and copy the information, data and programs. In order to be used by other web users, they must be saved in a form of a computer file on a server's hard disc, i.e. a computer that, in most cases, is not owned by the owner of the site. A space on a server is offered by many firms for a fee but also free of charge. A victim may on one's own try to detect a perpetrator of a crime of defamation of insult. However, choosing this way, from the very start, he is doomed to failure because a victim harassed by another web user may only know his Internet pseudonym, email address or the number of instant messaging system. In order to obtain an IP address or personal data of a given IP address user who with the use of the Internet committed a crime referred to in Article 212 of the CC or Article 216 of the CC, a victim must apply to the administrator of the server on which there is a forum where an insulting message was entered and demand the release of the IP address matching the given content. Due to the fact that in most cases a server administrator does not have other personal data (a first name, a surname, an address) of the user, it is necessary to apply to the Internet services provider of the established IP address to provide the information. However this information is protected by Act on the protection of personal data of 29 August 1997[35].

According to law, personal data may be provided to third parties only if they justify the need to have these data in a trustworthy way and their provision does not violate the rights and freedom of a person they concern. The data are provided based on a written, substantiated motion that should contain information that make it possible to find the data as well as indicate their scope and purpose they are to serve. However, one of the articles of the discussed statute entitles the administrator of personal data to refuse to provide them.

[33] A. Lach, *Dowody elektroniczne. Pojęcia i klastyfikacja* [Electronic evidence: Concepts and classification], Security Magazine 2001, no. 4, p. 24.
[34] Journal of Laws of 2004, No. 171, item 1800.
[35] Journal of Laws of 1997, No. 133, item 883.

It must be added that the refusal does not have the form of an administrative decision or a ruling[36]. It is a written reply that is not an act or action within public administration procedures that concern granting, determining or recognizing an entitlement or an obligation resulting from legal regulations. In case of such a refusal, a victim may initiate a proceeding before the Inspector General for Personal Data Protection, which is a special and the only mode of adjudicating in the field of personal data. In case of a negative decision of the IGPDP, a victim may file a complaint to the Voivodeship Administrative Court. A much more serious problem arises when a cyberstalker slandering a victim's good name connects to the web with the use of a modem or a telephone and is assigned a temporary IP address. In such a case, it is necessary to apply to the telecommunications operator in order to obtain billing data, however, these are protected by communication secrecy. In such a case, a victim may only have an IP address, which is not sufficient to file a simplified indictment. In accordance with the provisions, such an indictment must contain at least the determination of the accused, a description of an act he is charged with, and the indication of evidence supporting the indictment. The determination of the accused should provide an opportunity to individualise him to deliver him a summons, thus it should contain the accused's given name, surname and address[37]. Both an IP address and email address are not such an individualisation of the accused, which results in ineffectiveness of such an indictment.

In case a victim chooses a different way of vindicating his rights and files a complaint to the police, unlike in case of a simplified indictment, this complaint does not have to contain the data of the perpetrator of an unlawful act as establishing them is the role of the police. To this end, the police do not initiate a formal preparatory proceeding, an investigation or an inquiry, they do not conduct a proceeding in the indispensable scope or an explanatory proceeding, but start procedures, complying with all envisaged rigours, aimed at protecting evidence. Protecting evidence may be connected with looking for evidence and activities aimed at detecting a perpetrator of a crime. It is emphasised that the Criminal Procedure Code does not directly determine what activities the police should undertake within their entitlements. Taking into account the system interpretation, it seems that the legislator introduced some kind of agencies' authority gradation depending on the type of the proceeding before a trial starts.

The broadest proceeding entitlements are connected with an investigation, a little smaller in case of an inquiry, and there are numerous objective restrictions in case of an explanatory proceeding. The objective scope of the police activities is narrower and includes checking the identity documents of a person indicated by

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36 T. Fołta, A. Mucha, *Zniesławienie i znieważenie...* [Defamation and insult...], *op. cit.*, p. 57.

37 T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Zakamycze, Kraków, 2004, p. 1245.

a victim, establishing his name and address, scene of crime or body examination, establishing names and addresses of witnesses, interviewing witnesses, especially those who will not be able to appear before court, e.g. because they are going abroad[38]. It is worth emphasising that the police can do things that are in the scope of their competence and that a victim cannot do. In case the injured party, i.e. a victim, decides to file a complaint directly to the police, whatever action of a prosecutor is excluded from the activities aimed at detecting a perpetrator of a crime pursued based on a private accusation. A prosecutor may join in if he finds social interest in his interference. The essence of this proceeding is the lack of whatever type of a prosecutor's participation. If it were assumed that a prosecutor could take any steps in this proceeding (e.g. issue a decision on a search or release from official secrecy), it would have to be connected with his recognition of a social interest in this kind of intervention. Even a single act like this would express that there are prerequisites of his interference. This would change the proceeding into *ex officio* one and would go beyond the scope of the proceeding.

Accepting a prosecutor's interference would lead to a situation, in which a proceeding intended to be fast and not formalised would become a real proceeding restricted only by the statute of limitation, in which almost every activity might be performed[39]. From this perspective, not only a victim but also the police, after a complaint has been filed in the discussed mode, have no procedural possibilities of obtaining the communications traffic data (a billing), and as a result determining personal data of an internaut who uses a modem and a telephone protected by the communication secrecy. Only a prosecutor may exempt someone from that secrecy, but his participation is excluded from the proceeding and he cannot perform any activities in it. It must be stated that an IP address, an email address, a number of instant messaging program and a number of the telecommunications subscriber in case of a connection to the Internet through a modem are data that may be really useful evidence in the criminal proceeding, which – in case of this kind of proceeding – due to their specificity, in most cases are practically the only way leading the identification of a perpetrator. The establishment of the subscriber's station number or the identification of a server from which a connection was initiated or a message was sent is not always sufficient to identify a person making a connection and it does not prejudge the true address of the sender of a message emailed. There are unlimited ways of manipulating the data in the header fields and the impersonating techniques in electronic mail are commonly known[40].

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[38] R.A. Stefański, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Warszawa 2004, p. 403.

[39] T. Fołta, A. Mucha, *Zniesławienie i znieważenie...* [Defamation and insult...], *op. cit.*, p. 59.

[40] P. Bocij, *Cyberstalking: harassment...*, *op. cit.*

The use of the so-called anonymous email programs available on the web that delete the original address from the message header makes it possible to remain totally anonymous. In some situations it is necessary to match other evidence to identify a perpetrator. A method of obtaining other evidence may be a search of venues and a seizure of computers or data storage devices in order to read the disc memory data[41]. Problems with the identification of a stalker may also occur in case a computer system is composed of many workstations, servers and devices used for archiving data, e.g. in case of business activities, or when they are in places where many people use computers connected to the Internet. Quite often, in complex corporate networks where a big number of computers are connected, the most frequent method of ensuring data security is separating the internal computer network from the web with the use of a firewall. It is a computer with an IP address recognisable outside and all the communication between the computers protected this way with the web takes place via a proxy server. A direct result of this configuration is both inability to unauthorised access to the internal network and the lack of detailed information in the server's logfiles about the IP address of the computer a cyberstalker used, e.g. entering a defaming content on a forum. This is because the IP address of the firewall server will only be registered in the logs[42]. If a company employee or a user of the network hidden behind a firewall wants to connect to the Internet website, the server of that website registering the IP address of the computer connecting with it is going to register the IP of the proxy and not a computer of an employee or a user. The true address will remain unrevealed. In each such case, all the computers under the proxy server should be examined. The seizure of many computers, although technically possible, violates the principle of proportionality and the examination of their contents is costly and time consuming. Copying the contents of a hard disc for further forensic examination is an alternative to a computer seizure. It is worth remembering that the operating system logfile identifying a computer IP address does not constitute evidence if it had been used by an anonymous cyberstalker as an intermediary to an unlawful activity, which makes the detection of a perpetrator even more difficult. The Criminal Procedure Code restricts the decision on the seizure of things and a search to a court or a prosecutor's competence and allows only for indispensable activities by the police or another agency in urgent cases.

A stalker may be aggressive at the beginning or after some time of harassing a victim. The situation may develop gradually, sometimes with intervals; sometimes a victim may succeed in liberating from stalking, which depends on various circumstances and personality features. Stalking may also result in other

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[41] A. Adamski, *Prawo karne komputerowe* [Criminal computer law], Wyd. C.H. Beck, Warszawa 2000, p. 198.

[42] T. Fołta, A. Mucha, *Zniesławienie i znieważenie...* [Defamation and insult...], *op. cit.*, p. 61.

crimes as a burglary, an injury, a rape and even a murder. That is why victims' fears must be treated seriously as this may be an introduction to a serious crime. It is important that a perpetrator seeks contact with victims against their will and attempts to do that with great determination. In many situations his aim is to have a sexual intercourse or a love affair with a victim. Some stalkers, including cyberstalkers, derive satisfaction from the fact that they have influence on a victim's life, may control it, evoke fear by appearing suddenly etc. Their motivation may evolve and trying to win a victim's favour faced with a rejection may change into threats and severe forms of harassment[43].

Intensity and long-lasting nature of activities are typical of a stalker's conduct. Intensity may occur as multiple calls at night, waiting in front of a victim's house every day for hours, repeated puncturing of car tyres, visiting a victim at workplace regularly etc. It was established that harassment of victims in the USA takes from four weeks to eight years (an average of 1.75 years); there was a case in which it took 20 years. Stalkers are sophisticated in pursuing their goals, really inventive and having all kinds of manipulations ready. This is why it is difficult to predict their behaviour although their aim to have contact with a victim shows a high level of perseveration. A sample of 74 stalkers registered by the Police in Los Angeles was divided into three sub-groups: (1) people suffering from erotomania with delusion disorder who have no relationship with a victim, (2) people suffering from obsessional love with psychic disorder (and erotomania) who have no relationship with a victim either, and (3) people with an obsession who have contacts with a victim[44]. Only seven persons (10%) were classified as erotomaniacs and 35 persons (47%) were classified as ordinary obsessional stalkers having contact with their victims. Psychotic symptoms that stalking is often connected with, and that are most important from court and clinical perspective are, apart from erotomanic ones, delusions based on jealousy. The number of perpetrators with jealousy-related disorder ranges from non-psychotic morbid jealousy to delusional jealousy and the state is believed to be quite common stalkers' motivation.

The relationship between jealousy, psychosis and severe acts of violence was described in psychological literature. Inter alia, 46 delusional jealousy-related murder perpetrators were examined[45]. It turned out that 20 of them followed their spouses before the assault. Other research confirmed that most victims had been followed or spied on by the assaulters. 30% of perpetrators vandalised their victims' property. Delusional jealousy is also strengthened by psychotic and non-psychotic symptoms as well as environmental factors that can play an important

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[43] S. Furnell, *Cybercrime: vandalizing the information society*, Addison Wesley, London 2002.

[44] M. Zona, K. Sharma, J. Lane, *A comparative study of erotomanic and obsessional subjects in a forensic sample*, Journal of Forensic Sciences 1993, 38, pp. 894–903.

[45] R.R. Mowat, *Morbid jealousy and murder: A psychiatric study of morbidly jealous murders at Broadmoor*, Tavistock, London 1966.

role in perpetrator's behaviour[46]. Long before committing the crime of stalking, future perpetrators demonstrated the behaviour consisting in controlling and insulting their partners[47]. Former partners who committed stalking, more often than others, demonstrated the following behaviour: they found it difficult to look at things from the partner's point of view (87.7% of partners versus 57.8% of spouses); they tried to provoke quarrels (83% vs. 45.3%); they were jealous or possessive (83.7% vs. 46.3%); they tried to limit their victims' contact with family and friends (77.1% vs. 32.2%); they insisted to know where their partners were all the time (80.7% vs. 34.4%); they felt underestimated (85.5% vs. 40.9%); they shouted at their partners or insulted them (88.5% vs. 44.5%); and they threatened their victims (92.2% vs. 33.1%).

A term "obsessional harassment" was proposed to refer to the key characteristics of stalking[48]. There were three reasons for that: (1) to support clinical examinations with the use of a clearly defined label, free of sensation; (2) to identify the most commonly occurring unlawful acts committed by stalkers; and (3) to explain obsession, which is an important cognitive and motivational component of stalking. An obsessional stalker is a person getting involved in abnormal or long-term harassment or threatening of a given person. A review of research into the issue of obsessional harassment by almost 200 perpetrators recorded by the police was conducted[49]. Obsessional stalkers demonstrated a much lower level of anti-social personality disorder than other convicts. A hypothesis was formulated that such people develop "narcissistic fantasies" linking them with objects, which is typical of exclusion from the real world and leads to shame and humiliation. They demonstrated various types of anti-social behaviour. The research confirmed earlier hypotheses that the people had had unsuccessful heterosexual relations for at least ten years before aberrational behaviour occurred. Perpetrators often abuse drugs and get addicted, and often show state of mind disorder. The occurrence of anti-social personality disorder established in earlier research was also confirmed.

There are hypotheses that stalking is connected with the styles of attachment people develop based on childhood experience. Healthy relations based on appropriate attachment do not cause inappropriate behaviour or actions in adult life. People with narcissistic and borderline types of personality are more likely to become stalkers because they get irritated easily[50]. At the same time, it is

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[46] R. Tjaden, N. Thoennes, *Stalking in America: Findings form National Violence Survey*, National Institute of Justice, Washington 1998.

[47] N.S. Jacobson, J.M. Gottman, *Violent relationship*, Psychology Today 1998, no. 3–4, pp. 60–65.

[48] J.R. Meloy, S. Gothard, *Demographic and clinical comparison of obsessional followers and offenders with mental disorders*, American Journal of Psychiatry 1995, 152, pp. 258–263.

[49] J.R. Meloy, *Stalking (obsessional following). A review of some preliminary studies*, Aggression and Violence Behavior 1996, no. 1, pp. 147–162.

[50] W. Petheric, *Cyberstalking: obsessional pursuit and digital criminal*, http://www.trutv.com/library/crime/criminal_mind/psychology/cyberstalking/3.html (10.12.2013).

highlighted that in case of stalking, one cannot speak of psychopathologies but only about personality types. As a result, nobody has described a personality profile of a typical stalker yet. The analysis of primary differentiation (making a nuisance in general) shows that such behaviour may be defined as stalking if it is intentional, occurs for at least thirty days and results in boundless fear. Analysis of secondary differentiation makes it possible to define stalking as a phenomenon that causes consequences in the psyche and relations with others (anxiety, sleep disorder, necessity of changing a telephone, work or place of residence) and "involves" the next of kin, family, friends, acquaintances and colleagues.

The analysis of a perpetrator's activities makes it possible to select a few types of stalkers' personality (psychological profiles). There are such types as: a rejected stalker – who harasses his victims in order to change or improve the state of rejection, e.g. as a result of divorce, separation or the end of a relationship with a partner; a resentful stalker – who harasses victims because of the feeling of harm, resentment and bitterness to a victim; he wants to induce fear and make a victim suffer; an intimacy seeker – who seeks close contact with a victim, wants to develop an intimate, close and loving relation with a victim who is, in his view, a long searched for kindred spirit and is convinced that it was their destiny to meet and be together; an incompetent suitor – who, despite poor social skills and in making advances to women, has an obsession or entitlement to develop an intimate relation with a victim who attracted his love interest; a predatory stalker – who spies on a victim in order to prepare a plan of a sexual assault; a simple obsessional stalker – who had a personal, close relationship with a victim before; although they had a short-term contact, e.g. a 'blind date', he acquires an obsessional conviction that he will be either with a person who does not want him or with nobody else; erotomaniac – who is convinced that a victim is fascinated with him and loves him, and even if the other person recedes, it is because of strong affection to him; a love obsessional stalker – who develops a love obsession to a victim and knows that the other person does not love him; most often such perpetrators suffer from a mental disorder, e.g. schizophrenia or mania and even try to combat the problem[51]. According to the National Organisation for Ending Violence Against Women, every stalker's activity resulting in a victim's feeling of fear and horror, and lost security belongs to the catalogue of stalking activities – conscious and malicious harassment of the beloved.

[51] J. Kosińska, *Prawnokarna problematyka stalkingu* [Legal-penal issue of stalking], Prokuratura i Prawo 2008, no. 10, pp. 45–46.

4. Stalkers' motives behind their activities

Stalking may be classified with the use of various criteria, e.g. taking into account stalkers' motives and psyche or the relationship between a perpetrator and a victim[52]. The following types of relationship are distinguished:

1. Victims having a close relationship with a perpetrator in the past. The contacts they had initiated obsessional behaviour in a stalker's psyche. They are mainly former partners or participants of sexual scandals but also a patient-doctor relationship.
2. A victim comes from a stalker's broader social circle or had an accidental contact with a perpetrator. For example, a man meets a woman he has not known in his company yet and since that moment he complements her in the mistaken belief that they are meant for each other.
3. A victim is a public person who thanks to a medial image becomes a stalker's target.

Research into stalking and cyberstalking was also conducted among university students and with respect to children and youth. The research took into account both perpetrators' and victims' features and types of stalking in a sample of 13 persons in the age of 9–18[53]. The research results confirmed many findings concerning adults, including those that most young stalkers are males, most victims are females and about half of all stalking cases included threats towards victims. The share of cases with the use of violence was about 31%, the most common methods used by perpetrators were: physical contacts, letter writing and telephone calls. An examination of files carried out in a court in Massachusetts showed that 757 restrictive orders were issued in the period of only ten months towards young criminals in cases of threats, stalking and harassment. Other research into sexual harassment in American schools conducted by the American Association of University Women provides proofs that also schools are not free from stalking. Among 81% of students reporting sexual harassment at school, 7% were spied on, 37% were victims of gossiping and 23% avoided venues where they had been harassed[54]. Cyberstalking plays more and more important role in all the harassment activities[55]. Research may provide important information on factors preceding the occurrence of inappropriate behaviour and may facilitate early detection, combating, prevention and decreasing the risk. The research conducted so far made it possible to establish many victims' features and victim-

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[52] B. Hołyst, *Psychologia kryminalistyczna* [Forensic psychology], Wyd. Prawnicze LexisNexis, Warszawa 2004, p. 636.

[53] J.T. Mc Cann, *Subtypes of stalking (obsessional following) in adolescents*, Journal of Adolescence 1998, 21, pp. 667–675.

[54] American Association of University Women, *Hostile hallways: the AAUW Survey on sexual harassment in American schools*, Washington DC, 1999.

[55] S. Kozak, *Patologie komunikowania w Internecie* [Pathologies of communicating on the Internet], Wyd. Difin, 2011, pp. 207–212.

perpetrator interactions. Research into a bigger sample would make it possible to establish differences between the psychosexual development of adolescents and adults and formulate hypotheses concerning young stalkers' behaviour when they become adults.

5. Stalking prevention

For over ten years in the USA, there have been attempts to have control over stalking with the use of special forms of crisis management. In 1990, a special operational group of officers was established, which at first specialised in the protection of stars and then also ordinary citizens against stalking. The officers of Los Angeles Threat Management Unit cooperate with the scientists in the field of social sciences[56]. Efficient fight against stalking and its prevention require forensic, psychological and legal actions. Prevention is mainly to minimise the areas of assaults committed by obsessional fans. That is why the first step is the protection of anonymity of workplace and privacy in order to decrease the attractiveness of a person in the eyes of a perpetrator. It can be achieved, inter alia, by planning a certain way of presenting a prominent person in the media and specific strategies concerning contacts with fans. As celebrities receive a lot of emails, a special correspondence filtering programs should be installed to select email letters. In the first stage of correspondence analysis, special checklists are used to review the incoming mail. They should take into consideration special features of a vulnerable group, e.g. the fact that entertainment industry celebrities are sent love letters, and politicians – complaints and requests for help as well as letters with various political opinions of their authors. An example of a risk factor is the author's identification with a well-known criminal. There was a cyberstalking case in which a man with a sexual murderer personality harassed a woman. In the second stage of the analysis, it is recommended to thoroughly examine the motives behind the activities, personal features and possible alternative activities of a perpetrator. The motive behind a violent act may be a wish to draw the attention of the admired prominent person.

The victims of stalking, including cyberstalking, most often seek protection in the legal system, but legal measures, including court orders and police warnings, prove to be inefficient because perpetrators often ignore them. It was also established that the perpetrators who had demonstrated negative emotions and used violence when the obsessional tendencies intensified, posed the highest risk of committing acts of aggression towards their victims. The hypothesis of higher probability of acts of aggression on their part was also confirmed by the research

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[56] L. McFarlane, P. Bocij, *An exploration of predatory behavior in cyberspace: Towards a typology of cyberstalkers*, http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1076/996 (1.09.2003).

conducted by P. Mullen, M. Pathe, R. Purcell and G. Stuart[57]. The discussed research made it possible to draw many conclusions concerning stalkers, inter alia, that:

– stalkers do not constitute a uniform group and only personal features of a given person may be important for the assessment of possible aggressive behaviour;
– victims' strategy most often consists in seeking legal assistance; ignoring stalkers is more common among young, courageous victims;
– 1/3 of victims decided to be confronted with stalkers but the method resulted in intensification of harassment rather than giving it up;
– although most stalkers use threats towards victims, this does not mean that they will be fulfilled. Similarly, indication of perpetrators' mental or personality disorder does not constitute the forecast of the use of violence by stalkers.

Unlike in cases of harassment in real world, cyberstalking leaves many more traces that can constitute grounds for conviction. Keeping logfiles by victims, an archive of messages, emails and short text messages, and billings confirming persistent attempts to have contact make it possible to establish guilt quickly and apply one of the above-mentioned regulations. Tips recommending that victims collect proofs of stalking are really valuable. They should record facts concerning venues and time of harassment, witnesses of these events, store texts and recordings on data collection devices, facsimiles, letters, emails etc.[58] There are also other possibilities of protecting against cyberstalking, e.g. by searching messages with particular content sent to particular people. It is very important to be careful when exchanging information via the Internet. As it was mentioned earlier, a stalker leaves an "electronic trail" on the Internet, but detecting it requires adequate police training. However, the most important thing for efficient prosecution is the development of good legal grounds. The information obtained in recent years indicates that it is possible to deal with stalking in a professional way and achieve good results in combating this crime. It is certainly necessary to continue research into this issue. The acquired knowledge should also be used in these countries where the phenomenon of stalking did not use to be classified as a crime. It is also essential that well designed law regulate such an important sphere of interpersonal relations as communication in cyberspace, where millions of people contact each other using their genuine names and other personal data.

It is especially important to find an answer to the question how the threat of becoming a victim of cyberstalking can be prevented or eliminated. The question is especially important in case when an indefinite threat lurks around a potential victim and a perpetrator appears suddenly and disappears. One cannot forget that

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[57] P. Mullen, M. Pathe, R. Purcell, G. Stuart, *A study of stalkers*, American Journal of Psychiatry 1999, 156, pp. 1244–1249.

[58] G.E. Wattendorf, *Stalking – investigating strategies*, FBI Law Enforcement Bulletin, March 2000, pp. 10–14.

one's own activities ensure, apart from increasing security, many psychological advantages, at least the reduction of the feeling of helplessness. Many activities against cyberstalking refer to the increased protection of the so-called sensitive data: keeping an address, a telephone number etc. secret[59]. It is emphasised that it is essential to collect facts that are important for court and documenting the occurrences of stalking and their details: time, venues, witnesses, messages on telephones (voice mail), facsimiles, letters, emails etc.

CYBERSTALKING AS A FORM OF CYBERHARASSMENT

Summary

The phenomenon of cyberstalking refers to the use of the Internet or other means of electronic communication in order to harass a person, a group of people or an organisation. It can cover a wide range of various types of activities having adverse effect on victims and harming them. Cyberstalking constitutes a form of stalking. Dangers that this form of violence carries were noticed for the first time in the USA in the early 1990, which resulted in the development of state and federal provisions regulating a series of a perpetrator's activities. Behaviour that is called cyberstalking relates to many different activities. They include, inter alia, false accusations aimed at ruining a victim's good name. These accusations are often published in various places on the web, such as blogs, social networking sites etc. Cyberstalkers collect different information about their victims and their families, friends, the surrounding etc. They search for this information on the Internet and sometimes hire specialists, e.g. private detectives. They monitor the behaviour of their victims on the web in real time (online), often attempt to steal their personal passwords and this way get access to personal information[60]. One of the manifestations of cyberstalking is encouraging other people to harm a victim – to this end, stalkers present a victim as a person guilty of many evil deeds, display a victim's personal data, photographs, address, telephone number etc. Cyberstalkers often present a victim as a person harassing them. Sometimes cyberstalking is expressed through infecting a victim's computer with viruses, and sometimes ordering – on a victim's behalf – various goods, such as erotic gadgets or pornographic magazines subscriptions, which are then delivered to a victim's house. In case of young people, cyberstalkers often seek to arrange real-life meetings with them.

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[59] P. Bocij, *Cyberstalking: harassment in the Internet age and how to protect your family*, Praeger Press, Westport C.T., 2004.

[60] *Ibid.*, pp. 9–10.

CYBERSTALKING JAKO FORMA CYBERPRZEMOCY

Streszczenie

Zjawiskiem cyberstalkingu określa się wykorzystywanie Internetu lub innych środków komunikacji elektronicznej w celu nękania jednostki, grupy osób lub organizacji. Może obejmować szeroką gamę różnego rodzaju działań niekorzystnych dla ofiary i szkodzących jej. Cyberstalking stanowi jedną z form stalkingu. Niebezpieczeństwa, jakie niesie ze sobą ta forma przemocy, zostały dostrzeżone po raz pierwszy na początku lat dziewięćdziesiątych ubiegłego wieku w USA, w efekcie czego ciąg zachowań sprawcy został tam uregulowany zarówno w przepisach stanowych, jak i regulacjach federalnych. Zachowania określane mianem cyberstalkingu obejmują wiele specyficznych czynności. Należą do nich m.in. fałszywe oskarżenia, których celem jest zniszczenie dobrego imienia ofiary. Oskarżenia te bardzo często publikowane są w różnych miejscach sieci, takich jak blogi, serwisy społecznościowe itp. Cyberstalkerzy zbierają różnorodne informacje o swoich ofiarach, ich rodzinach, znajomych, otoczeniu itp. Poszukują tych informacji w Internecie, a niekiedy wynajmują w tym celu specjalne osoby, np. prywatnych detektywów. Sprawcy monitorują zachowania swoich ofiar w sieci na bieżąco (online), próbują często odkryć ich osobiste kody i w ten sposób zyskać dostęp do bardzo osobistych informacji. Jednym z przejawów cyberstalkingu jest zachęcanie innych osób do wyrządzania krzywdy ofierze – w tym celu przedstawia się ofiarę jako osobę winną wielu różnych negatywnych działań, prezentuje jej dane osobowe, fotografie, adres, numer telefonu itp. Bardzo często cyberstalkerzy przedstawiają ofiarę jako prześladowcę ich samych. Cyberstalking wyraża się niekiedy w zarażaniu oprogramowania komputerowego ofiary wirusami, a czasami w zamawianiu – rzekomo w imieniu ofiary – różnych dóbr, takich jak gadżety erotyczne, czy subskrybowanie pism pornograficznych, które są potem dostarczane do mieszkania ofiary. W przypadku ludzi młodych, cyberstalkerzy dążą często do aranżowania z nimi spotkań w świecie realnym.

L' HARCÈLEMENT ÉLECTRONIQUE EN TANT QUE LA FORME DU CYBER-VIOLENCE

Résumé

Le phénomène de l'harcèlement électronique est défini par emploi de l'Internet ou d'autres moyens de communication électronique afin d'oppresser un individu, un groupe de personnes ou une organisation. Il peut comprendre une large gamme de différentes actions difficiles pour la victime et nuisibles pour elle. L'harcèlement électronique est une des formes de l'harcèlement. Les dangers suivis par cette forme

d'oppression ont été remarqués pour la première fois au début des années 90 du siècle passé aux Etats Unis et en effet, la suite du comportement de l'actant y a été réglée aussi bien dans les droits d'états que dans les règlements fédéraux. Le comportement défini par le nom d'harcèlement électronique comprend plusieurs activités spécifiques. Y appartient entre autre les accusations fausses afin de détruire le bon nom de la victime. Ces accusations sont très souvent publiées dans les places différentes en ligne, comme par exemple les blogues, les réseaux sociaux etc. Les harceleurs électroniques ramassent les informations différentes sur leurs victimes, leurs familles, connaissances, entourage, etc. Ils cherchent ces informations à l'Internet et parfois même louent à ces fins des personnes spéciales, par exemple les détectives privés. Les exécuteurs suivent le comportement de leurs victimes en ligne, ils essaient souvent de découvrir leurs mots de passe personnels pour avoir accès aux informations très personnelles. L'un des exemples d'harcèlement électronique est l'invitation des autres pour faire des outrages à la victime – et pour acquérir ce but on présente la victime comme une personne qui a commis plusieurs actes négatifs, on publie ses données personnelles, les photos, l'adresse, les numéros de téléphone etc. Très souvent les harceleurs électroniques présentent la victime comme un oppresseur d'eux-mêmes. L'harcèlement électronique s'exprime parfois par la contamination du hardware de l'ordinateur de victime par le virus, ou parfois par commander – au nom de la victime soi-disant – de différents biens comme par exemple les gadgets érotiques ou l'abonnement de la presse pornographique qui sont livrés à domicile de la victime. Au cas des jeunes gens les harceleurs électroniques mènent très souvent à arranger leurs rencontres dans le monde réel.

КИБЕРСТАЛКИНГ КАК ФОРМА КИБЕРНАСИЛИЯ

Резюме

Явление киберсталкинга связано с использованием Интернета или других средств электронной коммуникации с целью преследования отдельного лица, группы лиц либо организации. Может охватывать широкую гамму разнообразных действий, нежелательных для жертвы и причиняющих ей вред. Киберсталкинг представляет собой одну из форм сталкинга. Опасности, вызываемые данной формой насилия, были замечены впервые в начале девяностых годов прошлого столетия в США, в результате чего ряд действий преступника был урегулирован как в положениях отдельных штатов, так и федеральных законах. Тип поведения, определяемый как киберсталкинг, предполагает совершение множества специфических действий. К ним относятся, в частности, ложные обвинения, целью которых является нанесение урона доброму имени жертвы. Подобные обвинения часто публикуются в различных сетевых локализациях, таких, как блоги, социальные сети и т.п. Киберсталкеры

собирают разнообразную информацию о своих жертвах, их семьях, знакомых, окружении и т.п. Ищут эту информацию в Интернете, а нередко нанимают для этой цели специальных людей, например, частных детективов. Преступники круглосуточно наблюдают за поведением своих жертв в сети (online), часто взломать их коды и тем самым получить доступ к сугубо личной информации. Одним из проявлений киберсталкинга является побуждение третьих лиц к нанесению вреда жертве как лицу, которому вменяется вина в виде совершения различных негативных поступков, представление её личных данных, презентация фотографий, адреса, номера телефона и др. Довольно часто киберсталкеры представляют свою жертву как своего же преследователя. Киберсталкинг нередко проявляется в заражении компьютерного программирования жертвы вирусами, иногда в реализации заказов – якобы от имени жертвы – различных товаров и услуг, таких, как эротические гаджеты, или подписка на порнографические журналы, которые затем доставляются по месту жительства жертвы. Если речь идёт о молодых людях, киберсталкеры часто стремятся к организации встреч в реальной действительности.

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BAN ON DRIVING MOTOR VEHICLES IN THE POLISH CRIMINAL LAW

I. Introduction

A ban on driving motor vehicles has existed in the Polish criminal law for over 55 years now and over the period it has evolved substantially and played an important role of a repressive measure towards those who committed crimes in road traffic. It was regulated for the first time in Act of 10 December 1959 on fighting against alcoholism[1], in which it was a penalty additional in character. There were two types of the penalty: (1) a loss of the right to drive motor vehicles (Article 31 § 1) and (2) a ban on awarding someone the right (Article 31 § 6). The ruling on the penalty was obligatory in case a driver was found guilty of a crime committed in connection with the infringement of a vehicle driver's duties being in the state of insobriety. It was ruled for a period from six months to ten years.

The Criminal Code of 1969 laid down an additional penalty of a ban on driving vehicles that could be adjudicated in case of a conviction of a driver for a crime against the safety in land, water or air traffic (Article 43 § 1) and the ruling on the ban was obligatory if the perpetrator of the above-mentioned crime was in a state of insobriety at the moment of committing the crime (Article 43 § 2). The penalty was adjudicated for a period of one to ten years (Article 44 § 1). Act of 10 May 1985 amending some provisions of the criminal law and the law on petty offences[2] laid down "an additional penalty of a ban on driving motor vehicles or other vehicles", broadening the objective scope of the right to driving non-motor vehicles.

The Criminal Code of 1997 changed in the catalogue of penal measures and included a ban on driving vehicles (Article 39 point 3), which was in the form of a ban on driving specified types of vehicles (Article 42 § 1), a ban on driving all types of vehicles or a certain type of motor vehicles (Article 42 § 2). Its adjudication was possible in the event the person participating in road traffic had been convicted for a crime against the safety in traffic, especially when the

[1] Journal of Laws No. 60, item 434.
[2] Journal of Laws No. 23, item 100.

circumstances of the crime indicated that driving a vehicle by that person created danger in traffic (Article 42 § 1), and obligatory in the event the perpetrator was in a state of insobriety, under the influence of another intoxicating substance at the moment of the crime or fled from the scene of crime (Article 42 § 2). It was a fixed-time measure ruled for a period of one to 10 years (Article 43 § 1).

Act of 14 April 2000 amending Act – the Criminal Code[3] introduced a possibility or obligation of ruling a ban on driving all vehicles forever (Article 42 § 3 and 4 of the CC). Its adjudication was possible in the event the perpetrator of a crime referred to in Article 173 or 174, which resulted in the victim's death or serious damage to health, or at the moment of the crime referred to in Article 177 § 2 or in Article 355 § 2 was in a state of insobriety or under the influence of another intoxicating substance or fled from the scene of crime (Article 42 § 3 of the CC), and the ruling was obligatory in the event of the next conviction of the driver for driving a motor vehicle in the above-mentioned conditions (Article 42 § 4 of the CC).

Act of 12 February 2010 amending Act – the Criminal Code[4], Act – the Penalties Execution Code and Act – the Law on the protection of the environment[5] repealed the optional ruling on a ban forever and substituted it for an obligatory one unless it was an extraordinary case justified by special circumstances (Article 42 § 3 of the CC).

Act of 25 November 2010 amending Act – the Criminal Code laid down a broader objective scope of the fixed-time ban on driving vehicles ruled obligatorily introducing a ban on driving all vehicles or the specified types of vehicles (Article 42 § 2 of the CC).

Act of 20 March 2015 amending Act – the Criminal Code and some other acts[6] raised the minimum ban on driving ruled obligatorily to three years (Article 41 § 2) and the maximum ban in all cases to 15 years, and a ban ruled forever was substituted for a ban for life (Article 42 § 3 and 4 of the CC) and a crime under Article 178a § 4 of the CC was added to crimes carrying the obligation to rule it for life.

II. Legal character of the ban

A ban on driving vehicles is laid down in the Criminal Code in point 3 of Article 39 containing the catalogue of penal measures (Article 39 point 3), which decides about its character; it is a penal measure. The Criminal Code does not treat penal measures as punishments/penalties but quite the opposite, attributes a different importance to them. However, like a punishment/penalty,

3 Journal of Laws No. 48, item 548.
4 Journal of Laws of 2011, No. 17, item 78.
5 Journal of Laws No. 40, item 227.
6 Journal of Laws of 2015, item 541.

they are a response to a crime and constitute afflictions for the perpetrator[7]. Sometimes the affliction of the penal measure exceeds that of a punishment/penalty. Penalties as well as penal measures fulfil the same function[8]. It is rightly highlighted in the doctrine that the division of the means of response to crime into punishments/penalties and penal measures is erroneous from both the linguistic and the logical point of view. The superior concept of 'penal measures' and a subordinate concept of 'punishment/penalty' do not constitute a dichotomy[9].

Apart from that, a ban on driving has characteristic features of:

a) a preventive measure towards a perpetrator who committed a forbidden act being in the state of insanity. Its application in this character is admissible under Article 99 § 1 of the CC – in the event the perpetrator committed a forbidden act in the state of insanity (Article 31 § 1 of the CC) and other prerequisites for stating that are met;
b) a probation measure in case of conditional discontinuation of the criminal proceeding. Its ruling as such may be made for a period of two years (Article 67 § 3 of the CC). The argument for treating it as a probation measure is the legal basis for adjudicating it, that is Article 67 § 3 of the CC, which lays down probation measures and different applications. The ruling of it is always optional, also in a situation when its adjudication as a penal measure is obligatory and may be ruled for a considerably shorter period. The Supreme Court rightly stated: "A ban on driving motor vehicles in a situation when the criminal proceeding is conditionally discontinued remains optional. Article 67 § 3 of the CC *in fine* in the scope of adjudicating this measure is a special provision in relation to Article 42 § 2 of the CC and exempts the application of the latter in the scope it covers, thus in case of conditional discontinuation of the proceeding"[10];

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[7] M. Szewczyk, *System środków karnych w projekcie nowego kodeksu karnego* [System of penal measures in the new Criminal Code Bill], [in:] S. Waltoś (ed.), *Problemy kodyfikacji prawa karnego. Księga ku czci Prof. M. Cieślaka* [Criminal law codification issues – Book to honour Professor M. Cieślak], Kraków 1993, p. 153; A. Błachnio-Parzych, *Samoistny środek karny jako instrument racjonalnej polityki karnej* [Independent penal measure as an instrument of rational criminal policy], [in:] J. Jakubowska-Hara (ed.), *Alternatywy pozbawienia wolności w polskiej polityce karnej* [Alternatives to imprisonment in the Polish criminal policy], Warszawa 2009, p. 143.

[8] M. Szewczyk, *Kilka uwag na temat funkcji środków karnych na tle obowiązującego kodeksu karnego* [A few comments on the function of penal measures against the background of the Criminal Code in force], [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (ed.), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci prof. A. Wąska* [In the circle of theory and practice – Book to commemorate Professor A. Wąsek], Lublin 2005, p. 355.

[9] T. Bojarski, *Nowe środki karne i formy załatwiania spraw karnych. Uwagi na tle nowego prawa karnego* [New penal measures and forms of dealing with criminal cases – Comments against the background of the new criminal law], [in:] T. Nowak (ed.), *Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Prof. Wiesława Daszkiewicza* [New criminal procedure law – Selected issues – Book in honour of Professor Wiesław Daszkiewicz], Poznań 1999, pp. 134–135.

[10] Ruling of the Supreme Court of 29 January 2002, I KZP 33/01, OSNKW 2002, No. 3–4, item 15, with a gloss of approval by M. Gajewski, Monitor Prawniczy 2003, No. 15, pp. 708–710 and comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego mate-*

c) an educational measure referred to in Article 6 point 7 of Act of 26 October 1982 on the proceeding in cases against minors[11].

A ban on driving vehicles may also be adjudicated simultaneously with a penalty or in case of a renouncement of inflicting a punishment, and then it plays the role of a penalty.

Adjudicated additionally to a penalty, it supplements its aims, especially with respect to general or specific prevention. The type of the ruled penalty does not matter; it may be ruled together with a fine, a non-custodial sentence, imprisonment, 25 tears' or life imprisonment.

Its application, like the renouncement of inflicting a punishment, is admissible in every case a court decides to use this measure, but the Criminal Code sometimes requires that the decision of a renouncement of inflicting a punishment should depend on the adjudication of a penal measure. Thus:

– a court may renounce inflicting a punishment if the crime carries up to three years' imprisonment or a more lenient penalty, and the social harmfulness of the act is not high; it also adjudicates a penal measure, and the aim of the penalty will be met due to the use of this measure (Article 59 of the CC);
– if the act carries more than one penalty, i.e. a fine or a non-custodial sentence or imprisonment, the extraordinary mitigation of punishment consists in the renouncement of inflicting a punishment and adjudicating a penal measure (Article 60 § 7 of the CC);
– in the event a motion to issue a sentence during the sitting (Article 335 of the CPC) or to issue a sentence without the evidentiary proceeding (Article 338a and Article 387 § 1 of the CPC), the court may decide to renounce inflicting a punishment and adjudicate only a penal measure, a forfeiture or a compensational measure if the misdemeanour the accused is charged with carries a punishment of up to five years' imprisonment (Article 60a of the CC).

The renouncement of inflicting a punishment, regardless of the adjudication of a penal measure, may take place in cases laid down in the statute and towards a minor if there are educational reasons to do that (Article 60 § 1 of the CC) and towards a perpetrator cooperating with other persons in the commission of a crime if he revealed and provided the law enforcement agency with information about the persons participating in the commission of the crime and other essential circumstances of its commission (Article 60 § 3 of the CC), especially when the role of the perpetrator in the commission of the crime was minor and the information provided contributed to the prevention of another crime (Article 61

rialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2002 r. [Review of resolutions of the Criminal Chamber of the Supreme Court on criminal material law, penalty execution law, penal fiscal law and petty offences law of 2002], Wojskowy Przegląd Prawniczy 2003, No. 1, pp. 70–72.

[11] Journal of Laws of 2014, item 382; see R.A. Stefański, *Zakaz prowadzenia pojazdów* [Ban on driving vehicles], Warszawa 1990, pp. 33–36.

§ 1 of the CC). In the last case, the renouncement of inflicting a penal measure is also possible even if its adjudication were obligatory (Article 61 § 2 of the CC).

Such a measure must be – in accordance with Article 56 in connection with Article 53 of the CC – adequate to the level of guilt and social harmfulness of the act, and implement preventive and educational aims, which it is to achieve towards the accused and in the scope of developing the legal awareness of the society.

III. Prerequisites of ruling a ban

A ban on driving vehicles – in accordance with Article 42 § 1 of the CC – may be ruled *verba legis* "in case a person taking part in the traffic is convicted for a crime against the safety in transport". This means that its adjudication depends on two conditions, i.e. firstly, the convict must take part in the traffic, and secondly, the convict must commit a crime against the safety in transport.

1. Person participating in traffic

A person participating in traffic is not only the one that drives a vehicle but also the one that takes part in traffic in another way, e.g. a pedestrian[12]. A phrase used in Article 42 § 1 *in fine* of the CC: "especially if the circumstances of the committed crime indicate that driving a vehicle by the person is a threat to the safety in transport," constituting a directive on the adjudication of this measure, may suggest that the provision refers to a driver[13]. This supposition is not right because a threat to the safety in transport that may be inflicted by driving a vehicle by a person who is another participant of traffic. The justification for the Criminal Code Bill explains that it refers to such circumstances as a lack of skills to drive a vehicle, a flagrant negligence in following the rules of safety precautions, a chronic condition or collapse in connection with age[14]. These may refer not only to a driver. The historic interpretation, which cannot be disregarded, supports this opinion. In Article 43 § 1 of the CC of 1969, the additional penalty in the form of a ban on driving motor vehicles or other vehicles was limited *verba legis* to "a person driving a motor vehicle or another vehicle". The legislator, having

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[12] Z. Sienkiewicz, *Niektóre zagadnienia nowej regulacji zakazu prowadzenia pojazdów* [Some issues of a new regulation of a ban on driving vehicles], [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego* [New codification of criminal law], vol. II, Wrocław 1998, p. 52; R.A. Stefański, *Podmiot zakazu prowadzenia pojazdów* [Subject to a ban on driving vehicles], Prokuratura i Prawo 1999, No. 7–8, pp. 113–117; K. Łucarz, *Nowa regulacja podmiotu zakazu prowadzenia pojazdów* [New regulation on the subject to a ban on driving vehicles], [in:] L. Bogunia (ed.), *Nowa kodyfikacja karna prawa karnego* [New codification of criminal law], vol. VII, Wrocław 2001, p. 16.

[13] A. Marek, *Prawo karne* [Criminal law], Warszawa 2009, p. 282.

[14] *Nowe kodeksy karne – z 1997 r. z uzasadnieniami* [New Criminal Codes of 1997 with justification], Warszawa 1998, p. 144.

decided not to use the phrase "a person driving a vehicle", did it consciously and the interpretation of the phrase "a person participating in traffic" as the one carrying the same meaning would be in conflict with the legislator's intention.

The Supreme Court rightly decided that: "The present legal state does not require that a perpetrator towards whom a penal measure in the form of a ban on driving all vehicles or special types of motor vehicles (Article 42 § 2 of the CC) is to be ruled should be a person driving a motor vehicle. It requires, however, that a perpetrator should be a person participating in traffic. In accordance with the Law on road traffic, these are pedestrians, drivers and persons in or on a vehicle that is on a road"[15].

The adjudication of a ban on driving vehicles does not depend on whether the perpetrator possesses a driving licence or not. The binding standpoint of the Supreme Court is that a ban "cannot be limited only to persons who have a permission to drive but must also refer to persons who at the moment of committing a crime did not have such a permission. Such persons should be deprived of the possibility of obtaining such a permission for a period ruled by court"[16]. The latest decision is confirmed in Article 12 item 1 point 2 of Act of 2 January 2011 on persons driving vehicles[17] laying down a ban on issuing a licence for a person who was convicted and banned to drive motor vehicles for a period and in the scope specified in the valid sentence.

2. Crimes against the safety in transport

A ban on driving vehicles may be ruled only towards such a participant of traffic that committed a crime against the safety in transport. It does not refer to crimes laid down in Chapter XXI of the CC entitled the same but other crimes committed with the use of a motor vehicle.[18] The crimes specified in Article 42 § 1 of the CC

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[15] Sentence of the Supreme Court of 16 January 2007, V KK 415/06, Prokuratura i Pawo 2007, No. 5, item 4, sentence of the Supreme Court of 8 February 2007, III KK 478/06, KZS 2007, No. 6, item 19, sentence of the Supreme Court of 1 December 2004, IV KK 277/04, Prokuratura i Prawo 2005, No. 7–8, item 1, sentence of the Supreme Court of 21 November 2001, III KKN 280/02, unpublished; M. Leciak, *Obowiązek orzeczenia zakazu prowadzenia pojazdów mechanicznych wobec nietrzeźwych pieszych sprawców wypadków* [Obligation to adjudicate a ban on driving motor vehicles towards drunk pedestrians – perpetrators of accidents]. Gloss to the sentence of the Supreme Court of 1 December 2004 file no. IV KK 277/04, Paragraf na Drodze 2006, No. 10, pp. 5–12.

[16] Resolution of the full Criminal Chamber of the Supreme Court of 28 February 1975, V KZP 2/74, OSNKWW 1975, No. 3–4, item 33, thesis 24, sentence of the Supreme Court of 6 January 1977, N 20/76, OSNKW 1977, No. 3, item 31; T. Leśko, *Środki karne w projekcie kodeksu karnego z 1968 r.* [Penal measures in the Criminal Code Bill of 1968], Wojskowy Przegląd Prawniczy 1968, No. 4, p. 451; A. Dziergawka, *Zakaz prowadzenia pojazdów a cofnięcie uprawnień do kierowania nimi* [Ban on driving vehicles vs. withdrawal of authorisation to drive them], Paragraf na Drodze 2008, No. 4, p. 6.

[17] Journal of Laws of 2015, item 155.

[18] Sentence of the Court of Appeal in Krakow of 5 August 1999, II AKa 102/99, Prokuratura i Prawo 2000, No. 1, item 18, with a critical gloss by J. Kulesza, Przegląd Sądowy 2000, No. 9, pp. 138–142, resolution of the Supreme Court of 24 August 1972, VI KZP 19/72, OSNKW 1972, No. 11, item 167 with a gloss by K. Buchała, Nowe Prawo 1973, No. 4, pp. 614–617 and comments by H. Rajzman, *Przegląd orzecznictwa*

are defined as a collective subject to protection, i.e. the safety in transport that is endangered by a crime. The contents of Article 42 § 1 of the CC includes a general clause making it possible to classify crimes referred to in Chapter XXI of the CC as well as other crimes that endanger the safety in transport as crimes against the safety in transport[19]. In the doctrine, it is rightly indicated *mutatis mutandis* that Article 42 § 1 of the CC does not refer to the specified types of crimes but to the actual acts that, because of their consequences and circumstances of their commission, are crimes in traffic[20]. The characteristic feature of these crimes is the fact that they are connected with the safety in land, water or air traffic[21]. The element that enacts a given crime as a crime against the safety in traffic is the violation of the principles of safety in traffic. Any crime committed as a violation of the principles of safety in traffic may be treated as a crime against the safety in transport, e.g. a manslaughter committed with the use of a vehicle[22]. The objective part of a road accident – as it is emphasised in the doctrine – consists in the violation of administrative norms regulating the flow and safety in traffic resulting from technical conditions, experience and the situation on a road[23]. The commission of a crime against the safety in transport as such is not enough to adjudicate a ban on driving. The perpetrator's conduct must indicate that he disregards the principles of safety in traffic and due to that creates a threat to traffic[24].

Sądu Najwyższego w zakresie prawa karnego materialnego [Review of rulings of the Supreme Court in the field of criminal material law] (2nd half of 1972), Nowe Prawo 1973, No. 7–8, p. 1059; sentence of the Supreme Court of 6 April 1970, RW 265/70, OSNKW 1970, No. 7–8, item 79 with comments by K. Mioduski, *Przegląd orzecznictwa Izby Wojskowej Sądu Najwyższego w zakresie powszechnego prawa karnego materialnego za rok 1970* [Review of rulings of the Military Supreme Court in the field of common criminal material law of 1970], Wojskowy Przegląd Prawniczy 1971, No. 2, p. 246; resolution of the Supreme Court of 6 August 1970, VI KZP 9/70, OSNKW 1970, No. 11, item 139 with comments by H. Rajzman, *Przegląd orzecznictwa Sądu Najwyższego w zakresie prawa karnego materialnego* [Review of rulings of the Supreme Court in the field of criminal material law] (2nd half of 1970), Nowe Prawo 1971, No. 3, p. 394, resolution of the full Criminal Chamber of the Supreme Court of 28 February 1975, V KZP 2/74, OSNKW 1975, No. 3–4, item 33

[19] J. Waszczyński, *Kary dodatkowe w nowym kodeksie karnym* [Additional penalties in the new Criminal Code], Państwo i Prawo 1969, No. 10, p. 533; M. Leonieni, *Kary dodatkowe w kodyfikacji karnej z 1969 r.* [Additional penalties in the criminal codification of 1969], Nowe Prawo 1969, No. 11–12, p. 1625; J. Bafia, *Kodeks karny. System kar* [Criminal Code – System of penalties], Warszawa 1970, p. 33; R.A. Stefański, *Zakaz…* [Ban…], p. 89.

[20] K. Buchała, Gloss to the resolution of the Supreme Court of 24 August 1972, VI KZP 19/72, Nowe Prawo 1973, No. 4, p. 616.

[21] K. Buchała, *Przestępstwa przeciwko bezpieczeństwu w komunikacji drogowej* [Crimes against the safety in road transport], Warszawa 1973, p. 18.

[22] This kind of case really took place (L.K. Paprzycki, *Zabójstwo, samobójstwo, czy wypadek drogowy?* [Manslaughter, suicide or road accident?], Paragraf na Drodze 2009, No. 2, pp. 44–56; A. Grześkowiak, K. Grześkowiak-Gracz, *Analiza zamiaru ewentualnego na przykładzie jednej sprawy* [Analysis of an eventual intention exemplified by one case], Palestra 2010, No. 1–2, pp. 24–39).

[23] T. Cyprian, *Ocena strony przedmiotowej wypadku drogowego* [Assessment of the subjective aspect of a road accident], Palestra 1961, No. 5, p. 53; A. Bachrach, *Przestępstwa drogowe w projekcie kodeku karnego* [Road crimes in the Criminal Code Bill], Państwo i Prawo 1969, No. 1, p. 88.

[24] Sentence of the Supreme Court of 10 October 1988, V KRN 217/88, OSNPG 1989, No. 4, item 52. Also R.A. Stefański, Gloss to the sentence of the Supreme Court of 25 August 1989, V KRN 195/89,

3. Prerequisites of the adjudication of a ban for life

The condition for adjudicating a ban on driving motor vehicles for life – in accordance with Article 42 § 3 of the CC – is:

1) a commission of a crime of driving a motor vehicle in the land, water or air traffic being in a state if insobriety or under the influence of an intoxicative substance (Article 178a § 1 of the CC):
   a) by a perpetrator who was earlier convicted for driving a motor vehicle being in a state of insobriety or under the influence of an intoxicative substance (Article 178a § 1 of the CC) or for the crimes of: causing a catastrophe in transport (Article 173 of the CC), causing the direct danger of a catastrophe in transport (Article 174 of the CC), which results in a person's death or a severe damage to health, causing an accident in transport (Article 177 § 2 of the CC) or an accident in transport committed by a soldier driving an armed motor vehicle (Article 355 § 2 of the CC), committed in a state of insobriety or under the influence of an intoxicative substance (Article 178 § 4 of the CC); crimes under Article 177 § 2 and Article 355 § 2 of the CC resulting in a person's death or severe damage to health;
   b) in the period of a binding ban on driving motor vehicles adjudicated in connection with the conviction for a crime (Article 178a § 4 in fine of the CC); or
2) that a perpetrator who at the time of committing a crime of causing a catastrophe in transport (Article 173 of the CC), a crime of an accident in transport (Article 177 § 2 of the CC) or an accident in transport committed by a soldier driving an armed motor vehicle (Article 355 § 2 of the CC), which resulted in a person's death or severe damage to health, was in a state of insobriety or under the influence of an intoxicative substance or fled from the scene of crime.

The commission of a crime of causing the direct danger of catastrophe (Article 174 § 1 or 2 of the CC), which results in a person's death of a severe damage to health does not constitute a prerequisite of the adjudication on a ban on driving for life. The lack of such a provision in Article 42 § 3 of the CC leads to absurd situations. In the event a perpetrator unintentionally caused a danger of a catastrophe, in which another person died or was seriously injured, the act is classified in accordance with Article 174 § 2 of the CC and thus cannot constitute grounds for the adjudication on a ban on driving all types of vehicles for life, and if he did not cause a danger of a catastrophe but just a road accident under Article 177 § 2 of the CC, the adjudication of the ban would be obligatory. Thus, causing a direct danger of a catastrophe, which undoubtedly constitutes a more dangerous consequence, is a more favourable classification.

Problemy Praworządności 1990, No. 10–12, p. 159; A. Marek, *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2010, p. 145.

IV. Objective scope of the ban

Article 42 of the CC clearly determines the prerequisites of the adjudication on the discussed ban and refers it to driving specified types of vehicles (Article 42 § 1 of the CC), driving all vehicles or specified types of vehicles (Article 42 § 2 of the CC) or driving all motor vehicles (Article 42 § 3 and 4 of the CC).

The objective scope of the optional ban is determined in Article 42 § 1 of the CC in general terms as a ban on driving specified types of vehicles, which means that it may refer to various types of vehicles. There are no statutory restrictions on adjudicating on e.g. a ban on driving motor vehicles, which would cover all types of motor vehicles in all types of traffic zones[25]. One cannot approve of the statement that all motor vehicles cannot be treated as specified types of vehicles[26]. The shape of the objective scope of the ban can be the result of a far-reaching differentiation based on a narrower or a broader criterion for differentiating specific types of vehicles. The objective scope of the ban depends on the danger that a perpetrator may cause in traffic as a driver. The scope should be proportional to the danger, i.e. the higher level of danger, the broader scope. The limitation of the objective scope differentiation in road traffic to a group of vehicles that require that a driver be in possession of a specific category of licence does not have a normative justification[27]. In the event a ban does not cover all entitlements the accused possesses, confirmed in a licence, he loses only those referred to in the ban. The Supreme Court rightly judged that: "a court adjudicates on a ban on driving vehicles determining what types of vehicles are banned and this court ruling constitutes the basis for an administrative organ to withdraw the authorisation to drive them in the scope determined by the court. The organ cannot broaden or narrow the ban ruled by the court"[28]. Undoubtedly, the ban should refer to the vehicle the perpetrator drove when the crime was

[25] R.A. Stefański, *Zakres przedmiotowy zakazu prowadzenia pojazdów* [Subjective scope of the ban on driving vehicles], Prokuratura i Prawo 1999, No. 11–12, p. 14; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo* [Criminal Code – Commentary – Rulings], Warszawa 1997, p. 102.

[26]

[27] J. Błaszczyk, *Orzekanie środka karnego w postaci zakazu prowadzenia pojazdów mechanicznych (art. 42 KK). Uwagi krytyczne* [Adjudicating a penal measure in the form of a ban on driving motor vehicles (Article 42 of the CC) – Critical comments], Paragraf na Drodze 2002, No. 1, p. 6; W. Zalewski, [in:] J. Długosz, M. Królikowski, J. Lachowski, A. Sakowicz, R. Skarbek, A. Walczak-Żochowska, W. Zalewski, R. Zawłocki, S. Żółtek, *Kodeks karny. Część ogólna. Komentarz do artykułów 32–116* [Criminal Code – General issues – Comments on Articles 32–116], (ed.) M. Królikowski, R. Zawłocki, vol. II, Warszawa 2010, p. 142.

[28] Ruling of the Supreme Court of 26 February 2014, I KZP 29/13, OSNKW 2014, No. 7, item 52 with a gloss of approval by M. Zbrojewska, LEX/el. 2014 and a partially critical gloss by R.A. Stefański, WPP 2015, No. 1, pp. 131–138.

committed[29]. It would be irrational to exempt the vehicle the perpetrator drove when he committed a crime from the ban.

The opinions of the judicature and in literature are unanimous that a ban on driving vehicles may be ruled even if the authorisation to drive them is not obligatory. According to the Supreme Court, "Based on Article 42 § 1 of the CC, it is admissible to adjudicate on a ban on driving a specified type of vehicle, the driving of which does not require the possession of authorisation confirmed in a document issued by an administrative organ"[30]. It is an inapt standpoint. The essence of the ban is to prohibit a driver who creates danger in traffic participating in it from driving a vehicle. Thus, it refers to vehicles that require that the drivers have adequate theoretical knowledge and practical skills. A competent organ may confirm this. The lack of an obligation to possess such authorisation *eo ipso* means an acknowledgement that driving them does not constitute a threat to traffic. Moreover, also pragmatic arguments speak for the limitation of a ban on vehicles that require that a driver have authorisation to drive. The control of the execution of a ban on driving can be efficient only in situations when a driver is obliged to have a document confirming the authorisation to drive it.

The objective scope of an obligatory ban is determined in a different way. Adjudicated in this mode, it may have the form of a ban on driving "all vehicles" or "specified types of vehicles" (Article 42 § 2 of the CC). The ban on driving all vehicles covers all the vehicles in all the traffic zones. Choosing the other option, a court may narrow the ban to driving one type of vehicles, e.g. motorcycles, or a few types, e.g. motorcycles and cars.

A ban on driving vehicles for life refers to driving all types of vehicles (Article 42 § 3 and $ of the CC); a court cannot exempt authorisation to drive any particular types of motor vehicles from the ban.

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[29] Sentence of the Supreme Court of SN 10 June 1991, II KRN 57/91, with a gloss by R.A. Stefański, PS 1994, No. 3, pp. 83–91; sentence of the Supreme Court of 20 January 2010, IV KK 395/09, Legalis, Sentence of the Supreme Court of 14 January 2009, V KK 364/08, OSNwSK 2009, item 167, sentence of the Supreme Court of 7 January 2008, II KK 225/07, OSNwSK 2008, item 6, sentence of the Supreme Court of 1 April 2008, V KK 33/08, Prokuratura i Prawo 2008, No. 9, item 17. J. Błaszczyk, *Orzekanie* [Adjudication], p. 6; W. Zalewski, [in:] M. Królikowski, W. Zalewski, R. Zawłocki, *Kodeks karny* [Criminal Code], vol. II, 2010, p. 141; A. Dziergawka, *Zakaz prowadzenia pojazdów a cofnięcie uprawnień do kierowania nimi* [Ban on driving vehicles vs. a withdrawal of the authorisation to drive them], Paragraf na Drodze 2008, No. 4, pp. 14–16.

[30] Resolution of the Supreme Court of 26 September 2002, I KZP 20/02, OSNKW 2002, No. 11–12, item 92, with a critical gloss by Z. Sienkiewicz, Przegląd Sądowy 2003, No. 10, pp. 143–151 and a gloss of approval by W. Marcinkowski, Prokurator 2003, No. 1, pp. 93–97 and critical comments by R.A. Stefańskiego, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2002 r.* [Review of resolutions of the Criminal Chamber of the Supreme Court in the field of criminal material law, penalty execution law, penal fiscal law and petty offences law of 2002], Wojskowy Przegląd Prawniczy 2003, No. 1, pp. 66–69, resolution of the Supreme Court of 22 November 2002, I KZP 34/02, Biuletyn SN 2002, No. 11, p. 17.

V. Adjudication mode

A fixed-term ban on driving is adjudicated in the optional or obligatory mode. A ban on driving all vehicles for life is adjudicated in the obligatory mode. However, it may be relatively obligatory and absolutely obligatory. The adjudication on a ban is relatively obligatory in case a perpetrator at the moment of committing a crime referred to in Article 173 of the CC, which resulted in a person's death or severe damage to health, or at the moment of committing a crime referred to in Article 177 § 2 or Article 355 § 2 of the CC was in a state of insobriety or under the influence of an intoxicative substance or fled from the scene of crime (Article 42 § 3 of the CC). The obligatoriness of its adjudication is alleviated by a clause that lays down that a court may renounce inflicting this measure for life if *verba legis* "there is an extraordinary situation justified by special circumstances". The absolutely obligatory adjudication on a ban on driving occurs in the event the perpetrator commits a serious crime against the safety of transport being in a state of insobriety or under the influence of an intoxicative substance or fees from the scene of crime for the second time (Article 42 § 4 of the CC).

The circumstances resulting in an obligatory adjudication on the fixed-term ban include the commission of a crime in a state of insobriety or under the influence of an intoxicative substance or fleeing from the scene of crime (Article 42 § 2 of the CC).

1. State of insobriety

A state of insobriety is a legal category defined in Article 115 § 16 of the CC and Article 46 item 3 of Act of 26 October 1982 on upbringing in sobriety and preventing alcoholism. According to these regulations, a state of insobriety takes place when: (1) the content of alcohol in blood exceeds 0.5 per mille or leads to the concentration exceeding that level; or (2) the content of alcohol in 1 dm^3 of the exhaled air exceeds 0.25 mg or leads to the concentration exceeding that level.

A state of insobriety must be distinguished from a state after the consumption of alcohol, which is defined in Article 46 item 2 of the cited Act. A state after the consumption of alcohol occurs when: (1) the content of alcohol in blood is from 0.2 to 0.5 per mille; or (2) the content of alcohol in 1 dm^3 of the exhaled air is from 0.1 to 0.25 mg.

The definition of a state of insobriety indicates two alternative criteria, i.e. the content of alcohol in blood and the content of alcohol in the exhaled air. The examination of the exhaled air is an indirect analysis of blood flowing through pulmonary alveoli. The consumed alcohol is resorbed from the human gastrointestinal tract to blood, and with it to all the tissues and body fluids. In the pulmonary alveoli, biological gas-exchange with the blood takes place following

the principles of physics. The amount of alcohol in the exhaled air is strictly connected with its proportional content in blood; the higher level of alcohol in blood, the higher level of alcohol in the exhaled air[31].

The legislator totally disregards the influence of alcohol on a human organism; it is absolutely unimportant for the determination of a state of insobriety[32]. As the Supreme Court noticed: "Individual tolerance to alcohol does not justify the adoption of different sobriety thresholds. Alcohol tolerance depends on so many imperceptible and changeable factors that defining it by court in every individual case is not possible. There is also no argument for treating persons driving a vehicle being in a state after the consumption of alcohol in a privileged way, especially as these persons cannot be sure whether in a given situation their organism will not be affected by the consumed alcohol"[33]. What is important is the fact of reaching or exceeding the above-mentioned thresholds. It is not right to express an opinion that the influence of alcohol on a human body cannot be disregarded[34] because the legislator stipulated that introducing the minimum content of alcohol for the state after the consumption of alcohol. "When a state after the consumption of alcohol, having exceeded a certain limit, changes into a state of insobriety, it does not mean – as the Supreme Court rightly noticed – it stops being a state after the consumption of alcohol"[35].

2. State under the influence of an intoxicative substance

A state under the influence of an intoxicating substance, unlike a state of insobriety, is not defined in the context of the Criminal Code, neither is it defined in Act of 29 July 2005 on preventing drug addition[36]. It results in substantial

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[31] J. Markiewicz, *Alcomat Siemensa — nowe rozwiązanie dla doraźnej kontroli trzeźwości* [Siemens' breath alcohol tester – a new solution for an instant sobriety check], Zagadnienia Wykroczeń 1985, No. 3, p. 16; W. Gubała, *O alkohologii sądowej (uwagi biegłego)* [On court alcohology (expert witness' comments)], Palestra 1991, No. 1–2, p. 4; *ibid.*, *Toksykologia alkoholu. Wybrane zagadnienia* [Alcohol toxicology – Selected issues], Kraków 1997, pp. 42–46; J. Markiewicz, W. Gubała, *Kilka uwag w sprawie analizy stężenia alkoholu w powietrzu wydychanym w związku z glosą dr W. Grzeszczyka* [A few comments on the analysis of the concentration of alcohol in the exhaled air in connection with a gloss by W. Grzeszczyk, PhD], Problemy Praworządności 1990, No. 4–5, p. 55.

[32] R.A. Stefański, *Stan nietrzeźwości w ustawie* [State of insobriety in a sttute], Problemy alkoholizmu 1983, No. 4, p. 10.

[33] Resolution of the full Criminal Chamber of the Supreme Court of 28 February 1975, V KZP 2/74, OSNKW 1975, No. 3–4, item 33, thesis 7.

[34] A. Skowron, *Wokół stanów związanych z użyciem alkoholu* [On the state connected with the use of alcohol] (Part 1), Paragraf na Drodze 2007, No. 2, p. 18.

[35] Ruling of the Supreme Court of 7 June 2002, I KZP 14/02, Prokuratura i Prawo 2002, No. 9, item 16, with comment of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2002 r.* [Review of resolutions of the Criminal Chamber of the Supreme Court in the field of criminal material law, penalties execution law, penal fiscal law and petty offences law of 2002], Wojskowy Przegląd Prawniczy 2003, No. 1, pp. 122–123.

[36] Journal of Laws of 2012, item 124 as amended.

interpretational difficulties, especially as referring to the state connected with the use of intoxicative substances, the Petty Offences Code uses a concept of "a state under the use of another substance" (Article 70 § 2, Article 86 § 2, Article 87 § 1 and 2 of the POC) and "a state under the influence of another intoxicating substance" (Article 33 § 4 of the POC), and in the Law on road traffic "a state after the use of another substance acting in a way similar to alcohol" (Article 45 item 1 point 1, Article 129 item 2 point 8 letter a, item 4b point 1 and Article 135 item 1 point 1 letter a), in the Criminal Code "a state under the influence of an intoxicative substance" (Article 42 § 2 and 3, Article 47 § 3, Article 178 § 1, Article 178a § 1 and 4, Article 179, Article 180). Interpreting "a state under the influence of an intoxicative substance", it is necessary to distinguish it from "a state after the use of another substance acting in a similar way to alcohol" and indicate the criteria differentiating the two. It is difficult because there is no indicator similar to the content of alcohol in a human body measured per mille or in mg/dcm^3. There are opinions in literature that the complexity of alterations that intoxicative substances undergo in a human body and the consequences of addiction in the form of tolerance and symptoms of withdrawal do not allow for establishing a threshold for the concentration level or a range of thresholds for the concentration of the active compound ingredients of these substances in blood.[37] The current state can change because the participants of the conference entitled "Substances acting similarly to alcohol – Interpretation of drivers' blood tests for the needs of court proceeding" in Cracow on 28–29 November 2012 were for establishing thresholds for a state under the influence of some intoxicating substances[38]. During another conference, analytical limits and thresholds values for a state after the use and a state under the influence of substances were established in a way similar to alcohol for the need of developing opinions for courts[39].

The meaning of the concept of an intoxicative substance is not clear either. There are two standpoints in the doctrine in this area:

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[37] M. Kała, *Środki podobnie działające do alkoholu. Zagadnienia analityczne i interpretacyjne świetle prawa* [Substances resulting in effects similar to alcohol – Analytical and interpretational issues in the light of law], [in:] *Wypadki drogowe. Vademecum biegłego sądowego* [Road accidents – Expert witness' handbook], Kraków 2006, p. 1048.

[38] M. Kała, *Rozpowszechnienie używania środków psychoaktywnych przez kierowców w Europie i prawne kryteria regulujące obecność tych środków w organizmie kierowcy* [Spread of psychoactive substances use among drivers in Europe and legal criteria for regulating the presence of these means in a driver's organism], [in:] *Konferencja:* Środki podobnie działające do alkoholu. *Interpretacja wyników badań krwi kierowców dla potrzeb sądowych* [Conference on Substances acting similarly to alcohol – Interpretation of drivers' blood tests for the needs of court proceeding], Kraków, 28–29 November 2012, pp. 15–27.

[39] M. Kała, *„Wizja zero" w bezpieczeństwie ruchu drogowego* [Vision Zero in the road traffic safety], [in:] *30th Conference of Polish Court Toxicologists on Środki działające podobnie do alkoholu w praktyce toksykologa sądowego* [Substances acting in a way similar to alcohol in a court toxicologist's practice], Augustów, 15–17 May 2013, Conference materials, pp. 15–17.

1) Intoxicating substances are ones that are defined in Act on preventing drug addiction[40]. In accordance with Article 4 point 26 of Act on preventing drug addiction, an intoxicative substance is any substance of natural or synthetic origin that affects the central nervous system defined in the list of intoxicative substances in Annex 1 to the Act. The substances include, inter alia: acetorphine, anileridine, fentanyl, heroine, coca leaves, poppy straw concentrates, poppy straw extracts, morphine, nicomorphine and normorphine. The assumption of the coherence of the legal system is to be an argument for the adoption of this interpretation because, if the legislator defines a concept, it should be binding for its interpretation in other legal regulations unless the legislator decides otherwise.
2) These are not only substances defined in Act on preventing drug addiction but also all kinds of substances of natural or synthetic origin that have a negative impact on the central nervous system, resulting in a state of stupor, e.g. psychotropic substances or substances substituting for intoxicative substances[41].

The Supreme Court rightly assumed that "the concept of an intoxicative substance as referred to in Article 178a of the CC covers not only intoxicative substances specified in Act of 29 July 2005 on preventing drug addiction (uniform text, Journal of Laws of 2012, item 124 as amended), but also other substances of natural or synthetic origin affecting a central nervous system, the use of which results in the reduction of skills in driving a vehicle"[42].

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[40] M. Dąbrowska-Kardas, P. Kardas, *Odpowiedzialność za spowodowanie wypadku komunikacyjnego w świetle regulacji nowego kodeksu karnego z 1997 r.* [Liability for causing an accident in transport in the light of the new Criminal Code of 1997], part II, Palestra 1999, No. 3–4, p. 42; K. Krajewski, *Pojęcie środka odurzającego na gruncie kodeksu karnego*, Państwo i Prawo 2003, No. 11, pp. 33–35; K. Buchała, *Zbiegnięcie kierującego pojazdem mechanicznym z miejsca zdarzenia* [Fleeing of a driver from the scene of accident], [in:] *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Prof. A. Ratajczaka* [Criminal law considerations – Book commemorating Professor A. Ratajczak's 70th birthday], (ed.) A.J. Szwarc, Poznań 1999, p. 48; E. Kunze, *Przestępstwo prowadzenia pojazdu w stanie nietrzeźwości lub pod wpływem środka odurzającego (art. 178a KK)* [Crime of driving a vehicle in the state of insobriety on under the influence of an intoxicating substance (Articlle 178a of the CC)], [in:] *Nauka wobec współczesnych zagadnień prawa karnego w Polsce. Księga pamiątkowa ofiarowana Prof. A. Tobisowi* [Science towards contemporary issues of criminal law – Commemorative book presented to Professor A. Tobis], (ed.) B. Janiszewski, Poznań 2004, p. 155.

[41] R.A. Stefański, *Prawna ocena stanów związanych z używaniem* środków *odurzających w ruchu drogowym* [Legal evaluation of the states related to the use of intoxicating substances in road traffic], Prokuratura i Prawo 1999, No. 4, pp. 19–20; K. Łucarz, A. Muszyńska, *Pojęcie środka odurzającego w prawie karnym* [Concept of an intoxicating substance in criminal law], Państwo i Prawo 2008, No. 6, pp. 91–126.

[42] Resolution of the Supreme Court of 27 February 2007, I KZP 36/06, OSNKW 2007, No. 3, item 21, with glosses of approval by R.A. Stefański, Państwo i Prawo 2007, No. 8, pp. 130–135; T. Huminiak, Paragraf na Drodze 2007, No. 6, pp. 5–12; R. Małek, Wojskowy Przegląd Prawniczy 2007, No. 4, pp. 96–100; K. Wojtanowska, Prokuratura i Prawo 2008, No. 12, pp. 141–153; K. Łucarz, A. Muszyńska, Przegląd Sądowy 2008, No. 3, pp. 122–128; J. Dąbrowski, Wojskowy Przegląd Prawniczy 2009, No. 2, pp. 128–133, a partly critical gloss by G. Kachel, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 2008, No. 2, pp. 139–142 and a critical gloss by A.T. Olszewski, Prokuratura i Prawo 2008, No. 12, pp. 154–159 and comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego i prawa wykroczeń za 2007 r.* [Review of resolutions of the Criminal Chamber of the

The recognition of the presence of an intoxicative substance or its metabolite is not sufficient to assume that it caused trouble with psychic actions in the same way as the content of alcohol in blood exceeding 0.5 per mille. Although any dose of opiates, tetrahydrocannabinol, amphetamine and cocaine affects a human organism in a negative way, the intensity of the influence depends on the amount of the substance administered. Only the amount of the substance causing trouble with psychic actions that is characteristic of the state of insobriety makes it possible to state that we deal with a state under the influence of an intoxicative substance. Intoxicative substances, depending on the type, show different influence on a human organism, but the more of the substance administered, the stronger its influence because of the higher concentration. The burden of proof, unlike in case of insobriety, is transferred onto the external symptoms of being under the influence of an intoxicative substance. In order to state that a person is in the state under the influence of an intoxicative substance it is necessary to recognise the presence of a particular intoxicative substance in the organism and external trouble with psychic actions, similar to those caused by the amount of alcohol defined as a state of insobriety. The Supreme Court rightly judged that a state under the influence of an intoxicative substance is such a state that results – in terms of the influence on the central nervous system, especially trouble with psychomotor actions – in the same effects as the consumption of alcohol resulting in a state of insobriety[43].

3. Fleeing from the scene of incident

Starting with the linguistic meaning of the word 'to flee', it is rightly indicated in the doctrine that 'fleeing from the scene of incident' means "a person's intentional activity aimed at leaving a certain place in order to escape from something"[44]. The Supreme Court rightly interpreted this concept stating that "fleeing from the scene of incident as referred to in Article 145 § 4 of the CC of 1969 (Article 178 of the new CC) takes place when a perpetrator leaves the scene of accident in order to avoid responsibility, especially prevent or hamper the establishment of his identity, the circumstances of the accident, including the state of insobriety (in the light of Article 178 of the CC as well as a state under the influence of an intoxicative substance)[45].

Supreme Court in the field of criminal material law and petty offences law of 2007], Wojskowy Przegląd Prawniczy 2008, No. 1, pp. 133–137, ruling of the Supreme Court of 28 March 2007, II KK 147/06, KZS 2007, No. 9, item 9.

[43] Sentence of the Supreme Court of 7 February 2007, V KK 128/06, KZS 2007, No. 6, item 39, with a gloss by R.A. Stefański, Przegląd Sądowy 2008, No. 6, pp. 152–158, ruling of the Supreme Court of 31 May 2011, V KK 398/10, Prokuratura i Prawo 2011, No. 12, item 3.

[44] M. Dąbrowska-Kardas, P. Kardas, *Kryminalizacja ucieczki sprawcy wypadku drogowego z miejsca zdarzenia w świetle nowelizacji k.k. z 12 lipca 1995 r*. [Incrimination of fleeing of a perpetrator of a road accident from the scene of accident in the light of the amended Criminal Code of 12 July 1995], part I, Palestra 1996, No. 3–4, p. 23.

[45] Sentence of the Supreme Court of 15 March 2001, III KKN 492/99, OSNKW 2001, No. 7–8, item 52, with glosses of approval by J. Satko, Orzecznictwo Sądów Polskich 2001, No. 12, pp. 639–640;

VI. Time limits for a ban

A ban on driving vehicles is adjudicated for a period from one to 15 years Article 43 § 1 of the CC), but – as it was indicated earlier – obligatory ban (Article 42 § 2 of the CC) cannot be ruled for a period shorter than three years (Article 43 § 2 and Article 43 § 1 of the CC).

A court may, after half of the period for which the measure was adjudicated, treat it as served if the convict complied with the legal order and the penal measure was executed for at least a year (Article 84 § 1 of the CC). This is not applicable to the ban adjudicated in the obligatory mode (Article 84 § 2 of the CC) and ruled for life, because in such a case the prerequisite of serving half of the period cannot be met.

In case of a ban for life, a court may – based on Article 84 § 2a of the CC – treat it as served if the convict complied with the legal order and there is no threat of committing a crime similar to that for which the measure was adjudicated and the penal measure was executed for at least 15 years.

As far as a ban adjudicated for life is concerned (Article 42 § 3 and 4 of the CC) and one ruled in the obligatory mode (Article 42 § 2 of the CC), it is possible to mitigate the ban within the penalties execution proceeding. In accordance with Article 182a § 1 of the PEC, if a ban on driving vehicles was executed for at least half of the adjudicated period, and in case of a ban forever or for life for a period of at least 10 years, a court may adjudicate the execution of a penal measure in the form of a ban on driving vehicles that are not equipped with a breath alcohol ignition interlock device if the perpetrator's attitude, characteristic features and condition as well as conduct during the execution of the penal measure convince the court that driving vehicles by the person does not inflict danger for transport (Article 182a § 1 of the PEC). The convict may drive a vehicle for which the driving authorisation was covered by the ban but only with the installed BAIID.

A ban modified in this way does not refer to vehicles used to learn to drive and take driving examinations if the convict is a learner or an examinee subject

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S. Hoc, Wojskowy Przegląd Prawniczy 2002, No. 1, pp. 147–150 and K.J. Pawelec, Jurysta 2002, No. 1 and approving comments by S. Zabłocki, *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna* [Review of rulings of the Supreme Court – Criminal Chamber], Palestra 2001, No. 7–8, pp. 191–192, sentence of the Supreme Court of 30 March 2005, WA 3/05, OSNwSK 2005, No. 1, item 639, rulings of the Supreme Court of 27 August 1968, RW 948/68, OSNKW 1968, No. 12, item 143, with a gloss of approval by A. Bachrach, Państwo i Prawo 1969, No. 10, pp. 703–708, sentence of the Supreme Court of 18 May 2009, III KK 22/09, Krakowskie Zeszyty Sądowe 2010, No. 10, p. 12, with a gloss of approval by R.A. Stefański, Paragraf na Drodze 2010, No. 10, pp. 21–25, ruling of the Supreme Court of 21 October 2009, V KK 176/09, Prokuratura i Prawo 2010, No. 3, item 4, with a gloss of approval by R.A. Stefański, Przegląd Sądowy 2010, No. 6, pp. 115–121, sentence of the Supreme Court of 1 March 2011, V KK 284/10, OSNKW 2011, No. 5, item 45, with glosses of approval by R. Małek, Ius Novum 2011, No. 3, pp. 156–161, R.A. Stefański, Prokuratura i Prawo 2011, No. 11, pp. 176–182, W. Kotowski, Paragraf na Drodze 2011, No. 11, pp. 5–15, sentence of the Supreme Court of 17 January 2012, V KK 389/11, Prokuratura i Prawo 2012, No. 4, item 2.

to the regulations of Act of 5 January 2011 on persons driving vehicles or Act of 6 September 2001 on road transport[46] (Article 182a § 2 of the PEC).

If the convict had flagrantly violated the legal order with regard to the safety of road traffic, especially committed a crime against the safety in transport, a court may quash the execution mode for the ban on driving vehicles not equipped with BAIID (Article 182a § 3 of the PEC).

BAN ON DRIVING MOTOR VEHICLES IN THE POLISH CRIMINAL LAW

Summary

The article discusses the issue of a penal measure of a ban on driving vehicles in the Polish criminal law. It analyses such issues as the evolution of the ban, its legal character, ways of adjudicating, prerequisites, objective scope, optional and obligatory adjudication modes, a fixed-term ban, a ban for life and rationale for shortening the ban or limiting its objective scope.

ZAKAZ PROWADZENIA POJAZDÓW W POLSKIM PRAWIE KARNYM

Streszczenie

Przedmiotem artykułu jest środek karny zakazu prowadzenia pojazdów w polskim prawie karnym. Analizie zostały poddane takie zagadnienia jak: ewolucja tego zakazu, jego charakter prawny, sposoby orzekania, przesłanki, zakres przedmiotowy, tryb orzekania fakultatywny i obligatoryjny, okres terminowego zakazu, zakaz dożywotni, a także przesłanki ich skrócenia lub ograniczenia ich zakresu przedmiotowego.

[46] Journal of Laws of 2013 item 1414, as amended.

L'INTERDICTION DE CONDUIRE LES VOITURES DANS LE DOIT PÉNAL POLONAIS

Résumé

Le sujet de l'article concerne le moyen pénal de l'interdiction de conduire des voitures dans le droit pénal polonais. On a analysé les questions suivantes: l'évolution de cette interdiction, son caractère légal, les façons de décider, les prémisses, le cadre du sujet, le mode de décider facultatif et obligatoire, le temps de l'interdiction, l'interdiction à vie, ainsi que les prémisses de raccourcir ou de limiter leur cadre du sujet.

ЗАПРЕТ НА ВОЖДЕНИЕ ТРАНСПОРТНЫХ СРЕДСТВ В ПОЛЬСКОМ УГОЛОВНОМ ПРАВЕ

Резюме

Предметом статьи является уголовная мера в виде запрета на вождение транспортных средств в польском уголовном праве. Анализу подвергнуты такие вопросы, как: эволюция данного запрета, его правовой характер, способы вынесения приговоров, предпосылки, пределы действия закона в отношении объектов, факультативный и облигаторный порядок вынесения приговоров, срок временного запрета, пожизненный запрет, а также предпосылки для их сокращения либо ограничения их пределов действия в отношении объектов.

Blanka J. Stefańska

ERASURE OF THE CONVICTION FROM CRIMINAL RECORD IN THE AMENDMENTS TO THE CODE OF 2015

I. Introduction

Act of 20 February 2015 amending Act – the Criminal Code and some other acts[1] introduces substantial changes to the scope of erasure of a conviction from criminal record. This is the first amendment to the Criminal Code concerning this institution. It consists in:

1) Mitigation of the conditions for erasure of a conviction from criminal record in case of adjudication of a fine or a non-custodial sentence (Article 107 § 4 and 4a of the CC);
2) Differentiation of the conditions for erasure of a conviction from criminal record in case of being sentenced to imprisonment with the conditional suspension of the execution of a punishment depending on the consequences of unsuccessful fulfilment of the probation period (Article 76 § 2 of the CC);
3) Extension of the conditions limiting erasure of a conviction from criminal record (Article 76 § 2, Article 107 § 6 of the CC);
4) Re-regulation of erasure of a conviction from criminal record in connection with a sentence issued by another member state of the European Union (Article 114a § 2 point 2 of the CC);
5) Limitation to the exemptions of erasure of a conviction from criminal record (Article 84 § 2a of the CC).

II. Erasure of a conviction from criminal record in case of a non-custodial sentence

Before the above-mentioned amendment, erasure of a conviction in case of a non-custodial sentence was applied *ipso iure* (Article 107 § 4 of the CC) or was based on a court ruling (Article 107 § 4 *in fine* of the CC).

[1] Journal of Laws of 2015, item 396, hereinafter also cited as the amended statute.

Erasure of a conviction *ipso iure* took place after a period of five years from the execution or remission of a punishment, or the limitation of the execution of a punishment. The time limit required for erasure of a conviction in case of this penalty was by half shorter than that required in case of being sentenced to imprisonment (Article 107 § 4 of the CC).

Erasure of a conviction based on a court ruling could take place after the period of three years from the moment of the execution or the remission of a punishment, or the limitation of the execution of a punishment on condition that the convict filed a motion for it.

At present, erasure of a conviction in case of this punishment takes place only *ipso iure* after three years from the execution or the remission of a punishment, or the limitation of the execution of a punishment (Article 107 § 4 of the CC[2]), i.e. a period that was earlier required for the erasure of a conviction based on a court ruling.

Shortening of the period required for erasure of a conviction is connected with the fact that the legislator prefers non-isolation punishments. The justification for the Bill indicates that "the discussed priority of non-detention punishments is also connected with the amendment to Article 107 § 4 of the CC, which now lays down a shorter, six-month period – from the moment of the execution, the remission or the limitation of the execution of a punishment – required for erasure of a conviction *ipso iure*"[3]. The Bill planned that period to take six months[4], but in the course of legislative proceeding in the Sejm, it was determined to take three years.

III. Erasure of a conviction from criminal record in case of the adjudication of a fine

Originally, the Criminal Code stipulated the same conditions for erasure of a conviction in case of the adjudication of a fine as in case of a non-custodial sentence. Erasure of a conviction in case of a fine took place *ipso iure* after five years from the execution or the remission of a punishment, or the limitation of the execution of a punishment, and on the convict's motion a court could rule it already after three years (Article 107 § 4 of the CC). The Bill proposed the same mode and conditions for erasure of a conviction in case of a fine as was laid down in case of a non-custodial sentence, i.e. only *ipso iure* after six months

[2] The provision entered into force on 21 March 2015 (Article 29 point 1 of the amended statute)

[3] The justification for the Bill amending Act – the Criminal Code and some other acts (Sejm's printout no. 2393), p. 14, http://www.sejm.pl/Sejm7.nsf/druk.xsp?nr=2393.

[4] Article 1 point 64 letter a of the governmental Bill amending Act – the Criminal Code and some other acts (Sejm's printout no. 2393), http://www.sejm.pl/Sejm7.nsf/ PrzebiegProc.xsp?id= AE8BCC6CA-5B2782EC1257 CDE003CC471.

from the execution or the remission of a punishment, or the limitation of the execution of a punishment (Article 1 point 64 letter a of the Bill). The six-month period was justified by the need to maintain proportionality because in case of a sentence to imprisonment with the conditional suspension of the execution of a punishment, erasure of a conviction takes place after six months from the end of the probation period, thus the punishment is subject to faster erasure of a conviction than the punishment of a fine or a non-custodial sentence. It was proposed to lay down a period of six months as for erasure of a conviction in case of imprisonment with conditional suspension of the execution of a punishment[5]. It was pointed out in the course of the legislative proceeding that "the idea behind the proposal is the introduction of a gradation of the periods required for erasure of a conviction in relation to different punishments. We want to limit the periods required for erasure of a conviction in relation to a fine to six months, and in relation to a non-custodial sentence to three years. Taking into account that renouncement of inflicting a punishment takes place after one year, it seems that such gradation, in comparison with the severity of the punishments, would be justified"[6].

Act of 15 January 2015 amending Act – the Criminal Code and some other acts[7] adopted the proposal for the time limits, but then Resolution of 7 February 2015 of the Senate on Act amending Act – the Criminal Code and some other acts proposed to raise the period to one year[8].

The Sejm approved of this amendment and, currently, erasure of a conviction in case of the adjudication of a fine takes place *ipso iure* after a year from the execution or the remission of a punishment, or the limitation of the execution of a punishment (Article 107 § 4a of the CC). Undoubtedly, it is reasonable to differentiate the periods required for erasure of a conviction with regard to the type of the punishment adjudicated. Justifiably, various periods were laid down for erasure of a conviction in case of a fine and in case of a non-custodial sentence. However, the asymmetry of the solutions concerning erasure of a conviction was not eliminated.

The same yearly period is required for erasure of the conviction in case of a court's ruling on the renouncement of inflicting a punishment (Article 107 § 5 of the CC). It does not need justification that a sentence to a fine is more severe

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[5] The statement made by the Secretary of State in the Ministry of Justice, J. Kazdroń, at the sitting of the Working Committee for amending codification (no. 83) on 14 January 2015, Bulletin No. 4174/VII, http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnr/NKK-83.

[6] The statement made by a senior specialist in the Ministry of Justice, P. Rogoziński, at the sitting of the Working Committee for amendments in codification (no. 78) on 6 November 2014, Bulletin No. 3939/VII, http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnr/NKK-78.

[7] Passed to the Senate http://orka.sejm.gov.pl/opinie7.nsf/nazwa/2024_u3/$file/2024_u3.pdf.

[8] Point 14 of the Resolution of the Senate of the Republic of Poland of 7 February 2015 on Act amending Act – the Criminal Code and some other acts (printout no. 3131), http://www.sejm.pl/Sejm7.nsf/druk.xsp?nr=3131.

than the renouncement of inflicting a punishment. In fact, the renouncement of inflicting a punishment is connected with a conviction and a clear statement that the accused is guilty of a crime he was charged with but the court decides to renounce inflicting a punishment[9]. That is why the period after which erasure of a conviction from criminal record should be shorter.

IV. Erasure of a conviction from criminal record due to the successful probation period in relation to conditional suspension of the execution of a punishment

In case of a sentence with conditional suspension of the execution of a punishment, erasure of a conviction – in accordance with Article 76 § 1 of the CC – takes place *ipso iure* after six month from the end of the probation period. The provision remained unchanged, but because of the introduction of new solutions in relation to the breach of conditions for the probation (Article 75a of the CC), it was necessary to determine conditions for erasure of a conviction in case a court uses them.

A court is obliged to rule the execution of a punishment:

– if, during the period of probation, the convict committed a similar crime with intent, for which he was validly sentenced to imprisonment without conditional suspension of the execution of a punishment (Article 75 § 1 of the CC);
– if a person convicted of a crime committed with the use of violence or unlawful threat towards a close relation or a minor residing with him once again flagrantly breaches the legal order during the probation period, uses violence or unlawful threat towards a close relation or a minor residing with him (Article 75 § 1a of the CC);
– if the convict, during the probation period, flagrantly breaches the legal order, especially if he commits a crime that is different from a similar crime committed with intent, for which he was validly sentenced to imprisonment without conditional suspension of the execution of a punishment, or if he evades a fine, surveillance, imposed duties or ruled penal or compensatory measures or forfeiture, if the circumstances referred to in § 2 take place after a court probation officer admonished him in writing, unless there are special reasons to act alternatively (Article 75 § 2a of the CC);
– if the convict, despite the probation officer's written admonition, during the probation period flagrantly violates the legal order, especially if he commits a crime that is different from a similar crime committed with intent for which he was validly sentenced to imprisonment without conditional suspension of

[9] P. Gensikowski, *Odstąpienie od wymierzenia kary w polskim prawie karnym* [Renouncement of inflicting a punishment in the Polish criminal law], Warszawa 2011, p. 331.

the execution of a punishment, or if he evades a fine, surveillance, imposed duties or ruled penal or compensatory measures or forfeiture, unless there are special reasons to act alternatively (Article 75 § 2a of the CC).

A court may rule the execution of a punishment:

– if in the probation period a convict flagrantly violates the legal order, especially if he commits a crime that is different from a similar crime with intent for which he was validly sentenced to imprisonment without conditional suspension of the execution of a punishment, or if he evades a fine, surveillance, imposed duties or ruled penal or compensatory measures or forfeiture (Article 75 § 2 of the CC);
– if a convict, after the sentence has been issued but before it comes into force, flagrantly violates the legal order, especially if he commits a crime during this period (Article 65 § 3 of the CC).

In spite of the circumstances justifying an optional ruling on the execution of a punishment as referred to in Article 75 § 2 of the CC, it is possible not to rule the execution of it and exchange it into a non-custodial sentence to supervised unpaid community service or a fine. It is possible when, because of the weight and type of the unlawful act the perpetrator is charged with, the purpose of the punishment is served this way. In such case it is assumed that one day of imprisonment equals two days of non-custodial service, and one day of imprisonment equals double daily fine rate. Non-custodial punishment cannot last longer than two years and a fine cannot exceed 810 daily rates (Article 75a § 1 of the CC). The determination of these rates means that such an operation is possible only in case of a convict sentenced to imprisonment with conditional suspension of the execution of a punishment, but is not applicable to convicts sentenced to a statutory fine or a non-custodial punishment with conditional suspension of the execution of a punishment, which was possible earlier.

The exchange can be ruled on a convict's motion in cases, in which (before the amendment comes into force, i.e. before 1 June 2015):

1) a convict has been validly sentenced to imprisonment with conditional suspension of the execution of a punishment and the execution of a punishment was not ruled, if the purposes of the punishment are served this way, but:
   a) the exchange into a fine may take place only when the income of the convict, his property ownership status or his income opportunities are sufficient to let him pay the fine, and it is established that one day of imprisonment equals double daily fine rate and the total fine cannot exceed 810 daily rates;
   b) the exchange into a non-custodial supervised unpaid community service may take place when the convict's income, his property ownership status or his income opportunities are not sufficient to let him pay the fine; it is established that one day of imprisonment equals two days of non-custodial punishment provided that a non-custodial punishment cannot last longer than four years (Article 16 item 1 of the new CC);

2) a court, based on Article 75 § 2 of the CC, has validly ruled on the execution of a punishment of one year's imprisonment with conditional suspension of the execution of it and because of the weight and type of a crime the convict was charged with, the purposes of the punishment will be served this way; but the punishment of imprisonment can be exchanged into non-custodial supervised unpaid community service provided that one day of imprisonment equals two days of non-custodial punishment (Article 17 item 1 of the new CC).

The exchange of a punishment is inadmissible in case the convict fails to comply with the obligation of the 'no contact' provision, i.e. to refrain from contacting the victim or other persons in a determined way, or the 'stay away' provision, i.e. to refrain from approaching a victim or other persons, or the 'support' provision, i.e. support the victim, or the 'restitution' provision, i.e. fully or partly compensate for damage caused by a crime committed (Article 75a § 2 of the CC, and Article 16 item 1 and Article 17 item 2 of the new CC). Moreover, the exchange is inadmissible in case of conditional suspension of the execution of a punishment ruled towards the so-called 'to turn state's evidence' (Article 60 § 5 of the CC, Article 16 item 1 of the new CC) or under Article 75 § 7 of the CC because of the conviction made at the sitting or without the conduction of evidential proceeding (Article 335, Article 338a or Article 387 of the CPC).

In the event of such an exchange, a doubt might arise when erasure of the conviction should take place, namely, whether according to the principles determined for erasure in relation to a non-custodial sentence or a fine, and when the new punishments are served as they substituted for the ones with conditional suspension of the execution of a punishment. The last solution is strongly justified in the current legal state, where the possibility of applying conditional suspension of the execution of a punishment is limited to imprisonment (Article 69 § 1 of the CC) The legislator adopted the first solution and laid down in Article 76 § 1 of the CC that 'erasure of a conviction from criminal record takes place with the end of periods laid down in Article 107 § 4 and 4a", and thus is applied *ipso iure* in case of a non-custodial sentence – after three years' time, and in case of a fine – a year's time from the execution or the remission of a punishment, or the limitation of its execution (Article 76 § 1 *in fine* of the CC, Article 16 item 3, Article 17 item 3 of the new CC).

In case a perpetrator is convicted of two or more non-concurrent crimes and it is after the start of but before the end of the period required for erasure of a conviction from criminal record when he commits a crime again, only erasure of all convictions is admissible (Article 108 of the CC). In such a situation, the possibility of erasure of only the exchanged punishment is excluded by reference made in Article 76 § 1 *in fine* of the CC to use the provision of Article 108 of the CC directly.

V. Limitation to erasure of a conviction from criminal record

Erasure of a conviction from criminal record under general conditions (Article 107 of the CC) depended on the execution or the remission of the penal measure, or the limitation of the execution of the penal measure – if adjudicated – with the exception of the penal measure of remedy for the damage or redress for the distress. Erasure of a conviction did not depend on a fine adjudicated in addition to a punishment[10] (Article 107 § 6 of the CC). Due to the separation of a distinct group of penal measures from the penal measures existing earlier, i.e. a group including forfeiture of objects directly originating from a crime (Article 44 of the CC) and forfeiture of profits obtained from the commission of a crime (Article 45 of the CC) as well as compensatory measures including the obligation to remedy or compensate the damage (Article 46 § 1 of the CC) or redress the distress (Article 47 of the CC), erasure of a conviction was made dependent on the remission or the limitation of the execution of these measures (Article 107 § 6 of the CC). The use of a general term 'compensatory measures' without the exclusion of whichever of them means that – unlike it was before – erasure of a conviction depends on the fulfilment of the obligation to remedy the damage and redress the distress.

Moreover, erasure of a conviction is not possible before the execution of the preventive measure (Article 107 § 6 *in fine* of the CC). Article 107 § 6 *in fine* of the CC does not lay down a preventive measure, which means it can be any measure of this kind referred to in Article 93 of the CC, i.e. (1) electronic tagging, (2) therapy, (3) addiction treatment, (4) referral to a psychiatric clinic as well as (5) ban on holding a given post, doing a given job or doing specific kind of business, (6) ban on being involved in upbringing, treatment and education of children or providing daycare for them, (7) ban on staying in particular places or in company with particular persons, approaching and contacting particular persons and leaving a particular place without a court's consent, (8) ban on participating in mass events, (9) ban on entering gambling facilities and on getting involved in gambling, (10) obligation to temporarily leave the place of residence used together with the victim, and (11) ban on driving vehicles.

Due to the fact that from the moment the new statute enters into force the adjudicated measure constitutes an obstacle for erasure of a conviction till the moment of its execution, a question arises whether the condition must be fulfilled also in case of a conviction adjudicated before the date.

Failure to serve the preventive measure is an obstacle to erasure of a conviction in case of a fine or a non-custodial sentence adjudicated in exchange for imprisonment with conditional suspension of the execution of a punishment that was not ordered to be carried out although the sentence was valid before

[10] B.J. Stefańska, *Zatarcie skazania* [Erasure of a conviction], Warszawa 2014, pp. 273–274.

the new CC entered into force (Article 16 item 1 of the new CC) and in cases in which a court, based on Article 75 § 2 of the CC validly ruled the execution of a punishment with conditional suspension of the execution of a punishment of under one year's imprisonment (Article 17 item 1 of the new CC). The new CC clearly indicates that erasure of a conviction is admissible also before the execution of the preventive measure (Article 16 § 4, Article 17 item 4 of the new CC).

In the field of erasure of a conviction ordered in a valid sentence before the new CC enters into force – under its Article 21 – the provisions of the new CC shall be applied, except for cases in which the period required for erasure of the conviction expires before the new CC enters into force. This means that after the new CC enters into force, erasure of a conviction is not possible if a preventive measure has not been executed; erasure of the conviction is not possible although it would be possible in accordance with the statute before the amendments. However, if in accordance with the statute after the amendments the period required for erasure of a conviction expired before the new statute enters into force, erasure shall come into force simultaneously with the statute (Article 21 of the new CC). The new CC introduced a principle of direct application of the new statute regardless of the fact whether it is favourable for the perpetrator or aggravates the former conditions for erasure of a conviction from criminal record, except for the situations in which the conditions for erasure have been fulfilled before the new CC enters into force. In such case, Article 4 § 1 of the CC stipulating compliance with the former statute if it is more favourable for the convict is not applicable. Article 21 of the new CC is an interpolar provision and as a special provision in the scope of erasure of a conviction excludes the application of Article 4 § 1 of the CC. The provision independently stipulates the use of the amended statute if the period required for erasure of the conviction has not expired under the force of the former statute.

As far as erasure of a conviction from criminal record is concerned, due to a successful probation period under conditional suspension of the execution of a punishment, it earlier depended – if adjudicated – on the execution or remission of the punishment, or the limitation of the execution of a punishment of a fine or a penal measure, with the exception of a penal measure in the form of obligation to compensate the damage or redress the distress (Article 76 § 2 of the CC). At present, similarly to erasure of a conviction based on general provisions, due to the exclusion of forfeiture and compensatory measures, the possibility was limited by these measures, including the obligation of remedy and redress.

VI. Erasure of a conviction from criminal record in case of a sentence issued in another member state of the European Union

Erasure of a conviction from criminal record can be applied to adjudications of Polish courts. A Polish court cannot erase a conviction from criminal record in case of a sentence issued by a court of another state. It is due to the fact that a sentence is valid in the state of issue and executed by that state. Foreign sentences are not executed in Poland because in compliance with the Roman principle *par in parem non habet imperium*, each state has an exclusive right to execute its powers towards its citizens and other sovereign entities of international relations must not implement whatever imperious acts on the territory of another state[11].

Due to the fact that in the period before the amendment to the Criminal Code, valid sentences rendered in other member states of the European Union were recognised in some criminal proceedings in Poland and a convict was treated as guilty of a crime committed in a case other than the one being subject to the Polish criminal proceeding (Article 114a of the CC), Article 107a of the CC clearly excluded erasure of such a conviction by a Polish court. The amendment repeals the provision, which may suggest that it is possible now. The conclusion like that is not justified because at present the issue is regulated in Article 114a § 2 point 2 of the CC. In accordance with this provision, a valid conviction for a crime issued by a competent criminal court in a member state of the European Union is a conviction recognised in Poland, with the exception of an act that is not a crime in Poland in which case the perpetrator is not subject to punishment or the punishment is not known under the statute. However, with respect to erasure of a conviction from criminal record resulting from such a sentence *verbal legis* "the statute that is in force in the place of conviction is applied" (Article 114a § 2 point 2 of the CC). This means that the erasure of conviction adjudicated in a member state of the European Union takes place under the conditions and in the mode stipulated in the law of the country where the sentence was issued. This is a logical solution because erasure of a conviction from criminal record is incorporated in the legal system of a given state and applying foreign regulations would interfere in the coherence of the given system. Thus, a Polish court is not competent to erase convictions from criminal record, and in case of convictions rendered in other European Union member states, erasure does not take place by virtue of law even if the requirements for that laid down in Polish criminal law were met[12]. It might seem that the clear exclusion of erasure of a conviction

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[11] A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim* [Principle *ne bis in idem* in criminal law – Pan-European approach], Białystok 2011, p. 134.

[12] B.J. Stefańska, *Zatarcie skazania wynikającego z wyroku państwa obcego* [Erasure of a conviction rendered in a foreign country], PiP 2011, No. 10, p. 104.

rendered in another European Union country from the proceeding carried out in accordance with Polish regulations may *a contrario* lead to a conclusion that there is such a possibility in case of non-European Union countries' convictions. Such a conclusion is in conflict with *ratio legis* of Article 114 § 2 point 2 of the CC. The exclusion *expressis verbis* of such a possibility is connected with the requirement to take into account during a criminal proceeding valid convictions in criminal cases adjudicated in other European Union states. The provision refers to such sentences that were rendered and executed in another European Union state.

The wording of Article 114a § 2 of the CC: "in case of a conviction rendered by a court referred to in § 1, in relation to (…) erasure of a conviction – the statute that is in force in the place of issue is applied" indicates that the organ competent to erase a conviction is the competent organ of the state where the conviction was rendered. The law of the country of the sentence issue determines the requirements for erasure of convictions as well as organs authorised to take the decision and the mode of proceeding[13].

The provision excludes erasure of a conviction in accordance with any mode: by virtue of law and based on a court's decision. However, it is rightly highlighted that the exclusion is not applicable in case of erasure of a conviction as a result of the amendment to the Polish Act – the Criminal Code, which de-penalises an act that the perpetrator was convicted for. The same consequence results from de-penalisation of an act, for which a perpetrator was convicted in Poland, in another country and it does not matter that the act remains illegal in Poland[14]. A Polish court cannot take into account a conviction rendered by another member state of the European Union that, in accordance with the law of the country, has been erased from criminal record. It also does not matter what the mode of erasure of conviction in another European Union country was, i.e. whether it was by virtue of law or based on a court's decision, and whether Polish law admits erasure of a conviction in such case. A Polish court is not competent to examine the grounds for erasure of a conviction as well as the compliance of that legal solution with the Polish regulations. It is laid down in Article 114a § 2 of the CC, which *expressis verbis* excludes the use of Article 108 of the CC, which lays down collective erasure of two or more convictions. If in another European Union country erasure of one of a few convictions takes place, although it would be impossible in accordance with Article 108 of the CC, a Polish court is obliged to acknowledge erasure of one conviction.

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[13] B.J. Stefańska, *Zatarcie skazania…* [Erasure of a conviction…], p. 211.

[14] G. Bogdan, [in:] G. Bogdan, Z. Ćwiąkalski, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, W. Wróbel, A. Zoll, *Kodeks karny. Komentarz* [Criminal Code – Commentary], vol. I, Warszawa 2012, p. 1279.

VII. Limitations to the exclusion of erasure of a conviction from criminal record

Not all convictions are subject to erasure from criminal record regardless of the time passed. The Criminal Code explicitly or tacitly excludes erasure of a conviction in some circumstances.

According to Article 106a of the CC, erasure of a conviction is not applicable in case of a sentence to imprisonment without conditional suspension of its execution for a crime against sexual freedom and morality of a victim being a minor under 15 years of age. The amended statute did not repeal this exclusion, neither did it limit it, although it was criticised in literature[15] and the Bill of 10 December 2013 on amending Act – the Criminal Code and some other acts contained a proposal to repeal this exclusion of erasure of a conviction and to substitute it with a requirement for a 30-year period from the execution or the remission of a punishment, or the limitation of the execution of a punishment (Article 106a of the CC Bill)[16].

It was a rule in the past that – because of the inability to fulfil the prerequisite of time to pass from the execution of a penal measure or the limitation of its execution, which in accordance with Article 107 § 6 of the CC is the requirement for erasure of a conviction – erasure of a conviction could not be applied in case of an adjudication of a penal measure forever (tacid exclusion). It referred to the adjudicated forever: ban on holding posts and doing all or some types of jobs or being involved in activities connected with upbringing, education and treatment of minors as well as providing daycare for them (Article 41 § 1a and 1b of the CC), obligation to refrain from staying in company with certain circles and in certain places, ban on contacting specified persons or ban on leaving a given place of residence without a court's consent (Article 41a § 3 of the CC), and ban on driving all motor vehicles (Article 42 § 3 and 4 of the CC). It is the exception, not the rule that erasure of a conviction could take place in case of adjudication on refraining from staying in company of some circles and in some places, a ban on contacting some persons or a ban on leaving he place of residence without a court's consent, should a court – based on Article 84a § 1

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[15] S. Szyrmer, *Nowelizacja prawa karnego w świetle ustawy z dnia 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego i ustawy – Kodeks karny wykonawczy (Dz.U. Nr 163, poz. 363)* [Amendments to criminal law in the light of Act of 27 July 2012 amending Act – the Criminal Code, Act – Criminal Procedure Code and Act – the Penalties Execution Code (Journal of Laws No. 164 item 363)], CZPKiNP 2006, No. 1, pp. 64–65; A. Marek, *Nieprzemyślane zaostrzenie kar z pedofilię* [Not well-thought aggravation of punishments for paedophilia], Rzeczpospolita of 14 August 2005, p. C 3; *ibid.*, *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2010, p. 295; P. Stępniak, *Środki penalne we Francji i Polsce. Doktryna, legislacja, praktyka* [Penal measures in France and Poland – doctrine, legislation, practice], Warszawa 2012, p. 405.

[16] See B.J. Stefańska, *Zmiany w zakresie zatarcia skazania* [Change in the scope of erasure of a conviction], [in:] *Reforma prawa karnego* [Criminal Code reform], (ed.) I. Sepioło-Jankowska, Warszawa 2014, pp. 422–425.

of the CC – recognise them as executed. It could do that, after taking opinions of expert witnesses whether the convict's conduct after the commission of crime and during the punishment execution justified a belief that after the quashing of the ban or obligation the convict would not commit a crime against sexual freedom or morality of a minor, and after the ban or obligation was executed for at least ten years (Article 84a § 1 and 2 of the CC).

The amended statute introduced substantial changes with respect to that area, allowing for the shortening of the period of applying a penal measure adjudicated forever and defined it as a measure for life. In accordance with Article 84 § 2 a of the CC, if a penal measure is adjudicated for life, a court may recognise it as executed if the convict complies with the legal order and there is no threat that he will commit a crime similar to that for which he was convicted and for which he was sentenced to a penal measure, which was executed for at least 15 years. Shall a court recognise the penal measure as executed, erasure of a conviction may take place. Thus, the amendment indirectly extended the objective scope of erasure of a conviction and the limitation to the exclusion of erasure of a conviction from criminal record.

VIII. Conclusions

The amended statute decreased the required time limits for erasure of a conviction in case of the adjudicated punishment of a fine and a non-custodial sentence, but the period required for erasure of a conviction in case of imprisonment should have been made dependent on the length of the adjudicated imprisonment. It was highlighted in literature that a convict sentenced to three months' imprisonment should not be treated in the same way as a convict sentenced to 25 years' imprisonment because the convictions are for crimes of a different weight and the perpetrators are different, too. It was suggested that erasure of the conviction by *ipso iure* take place after 20 years from the end of the execution or the remission of a punishment, or the limitation of the execution of a punishment – in case of 25 years' imprisonment, after 15 years – in case of over five years' imprisonment, and after ten years – in case of under five years' imprisonment[17].

There is no justification for the same period required for erasure of a conviction in case of the adjudication of a fine and the renouncement of inflicting a punishment.

The introduction of an opportunity to recognise a penal measure adjudicated for life as executed made it possible to erase a conviction with regard to such a measure, which was earlier a substantial drawback of the statute.

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[17] B.J. Stefańska, *Zatarcie skazania*… [Erasure of a conviction…], p. 282.

ERASURE OF THE CONVICTION FROM CRIMINAL RECORD IN THE AMENDMENTS TO THE CRIMINAL CODE OF 2015

Summary

The article discusses the changes introduced by the amendments of 20 February 2015 to the Criminal Code with respect to erasure of a conviction from criminal record. It analyses the shortening of the periods required for erasure of a conviction in case of the adjudication of a fine or a non-custodial sentence, the differentiation of the conditions for erasure of a conviction in case of imprisonment with conditional suspension of the execution of a punishment depending on the consequences of the unsuccessful probation period, the extension of the conditions limiting erasure of a conviction in case of the adjudication of all compensatory measures, and the re-regulation of erasure of a conviction rendered in another member state of the European Union and the limitation of the exclusion of erasure of a conviction from criminal record.

ZATARCIE SKAZANIA W NOWELIZACJI KODEKSU KARNEGO Z 2015 R.

Streszczenie

Przedmiotem artykułu są zmiany wprowadzone nowelą z dnia 20 lutego 2015 r. do kodeksu karnego w zakresie zatarcia skazania. Analizowane są zmiany polegające na skróceniu okresów wymaganych do zatarcia skazania na grzywnę lub karę ograniczenia wolności, zróżnicowaniu warunków zatarcia skazania na karę pozbawienia wolności z warunkowym zawieszeniem jej wykonania w zależności od skutków niepomyślnego upływu okresu próby, rozszerzeniu warunków ograniczających zatarcie skazania na wszystkie środki kompensacyjne, ponownym uregulowaniu zatarcia skazania wynikającego z wyroku innego państwa członkowskiego Unii Europejskiej oraz graniczeniu wyłączeń zatarcia skazania.

L'EFFACEMENT DE LA CONDAMNATION DANS LA NOVÉLISATION DU CODE PÉNAL DE 2015

Résumé

Le sujet de l'article concerne les changements introduits par la nouvelle du 20 février 2015 au Code pénal dans le cadre de l'effacement de la condamnation. On analyse les changements concernant la minimalisation de période exigée pour effacer la condamnation contre une amende ou la punition de la privation de la liberté, la diversification des conditions de l'effacement de la condamnation contre la punition de la privation de la liberté en sursis conditionnel à l'exécution d'une peine dépendante des effets défavorables du temps de période d'essai, l'élargissement des conditions limitant l'effacement de la condamnation contre tous les moyens compensatoires, le règlement réitéré de l'effacement de la condamnation décidé par la sentence d'une autre Etat-membre de l'Union européenne ainsi que la limitation des exclusions de l'effacement de la condamnation.

ПОГАШЕНИЕ СУДИМОСТИ В НОВЕЛЛИЗАЦИИ УГОЛОВНОГО КОДЕКСА ОТ 2015 Г.

Резюме

Предметом статьи являются изменения, внесённые новеллой от 20 февраля 2015 г. в уголовный кодекс по вопросу погашения (снятия) судимости. Проанализированы изменения, заключающиеся в сокращении сроков, необходимых для погашения судимости, касающейся штрафа либо наказания в виде лишения свободы, дифференцировании условий погашения осуждения на наказание в виде лишения свободы с условным приостановлением его исполнения в зависимости от последствий неблагоприятного истечения испытательного срока, расширении условий, ограничивающих погашение судимости, касающейся всех компенсационных мер, повторном урегулировании погашения судимости, являющейся следствием судебного постановления другого государства – члена Европейского Союза, а также ограничения исключений погашения судимости.

Jacek Kosonoga

PRESUMPTION OF INNOCENCE AS AN ELEMENT OF A FAIR TRIAL

1. Essence and legal character of the presumption of innocence

Presumption of innocence is one of the fundamental rules regarding the procedural situation of the accused and constitutes the canon of the contemporary criminal procedure. Its procedural essence consists in the assumption that the accused is considered to be innocent unless his guilt is proved and confirmed in a valid court judgement (Article 5 § 1 of the CPC). In comparison with the former code, the principle laid down in this provision has been reformulated in order to strengthen the position of the accused. As it was raised in the justification for the Criminal Procedure Code of 1997, the aim was to formulate the principle in the most positive way (the accused is considered to be innocent) unlike in the CPC of 1969, which specified the presumption of innocence in a weaker, negative way (the accused is not considered to be guilty)[1].

The principle of the presumption of innocence is a fundamental human right. It was also laid down in Article 6 (2) of the European Convention on Human Rights (ECHR), under which every person accused of committing a punishable crime is considered to be innocent unless his guilt is proved in accordance with the statute. It was also formulated in Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR)[2]. Presumption of innocence

[1] *Nowe kodeksy karne – z 1997 r. z uzasadnieniami* [New criminal codes of 1997 with justification], Warszawa 1997, pp. 396–397.

[2] On the principle of the presumption of innocence in the Strasburg judicial decisions see P. Hofmański, A. Wróbel, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* [Convention on the Protection of human Rights and Fundamental Freedoms], Warszawa 2010, vol. **???**, pp. 385–406; C. Nowak, *Prawo do rzetelnego procesu sądowego w świetle EKPC i orzecznictwa ETPC* [Right to a fair trial in the light of the ECHR and the judgements of the ECtHR], [in:] P. Wiliński (ed.), *Rzetelny proces karny* [Fair criminal trial], Warszawa 2009, pp. 118–122; P. Kruszyński, *Zasada domniemania niewinności w świetle najnowszego orzecznictwa Europejskiego Trybunału Praw człowieka w Strasburgu* [Principle of the presumption of innocence in the light of the latest judgments of the European Court of Human Rights in Strasburg], [in:] M. Płachta (ed.), *Aktualne problemy prawa i procesu karnego. Księga ofiarowana Profesorowi Janowi Grajewskiemu* [Current issues of criminal law and procedure – Book presented to Professor Jan Grajewski], GSP 2003, vol. XI, pp. 119–124.

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is also a constitutional principle regulated in Article 42 (3) of the Constitution of the Republic of Poland, under which everybody is considered to be innocent unless his guilt is pronounced in a valid court judgement. Thus, the Constitution treats presumption of innocence in a little broader way, not only as an objective principle in criminal proceeding but also as a guarantee of rights that 'every' person is entitled to being accused of committing a crime carrying a repressive penalty. Under the Constitution, the principle of innocence is not applied only to persons who have the formal status of the accused, which means that the legislator did not narrow it to the criminal proceeding (the so-called external aspect of the principle of innocence)[3].

The broad understanding of the principle of innocence is commonly adopted in judicial decisions of the Constitutional Tribunal. It has been highlighted many times that because of the function to provide a guarantee, the principle of innocence is formulated in a special way; from the constitutional perspective it is not just a rule of proving guilt but a manifestation of one of the general assumptions that are the basis of legal order. This is why it is necessary to be particularly responsible when establishing limits for the application of this presumption. The principle constitutes one of the fundamental and commonly accepted principles of a democratic state; it is one of the essential elements determining the position of a citizen in the society and in relation to the authorities, guaranteeing appropriate treatment, especially in case of suspicion of committing a crime. This presumption is strictly connected with personal immunity and the protection of human dignity and freedom, which are considered to be inherent and inalienable goods (Article 30 of the Constitution)[4].

The principle of innocence in the internal meaning (Article 5 § 1 of the CPC), however, represents the statutory assumption of innocence of the accused that is in force in a given trial until his guilt is proved and pronounced in a valid court judgement. It is a legal assumption that is rebuttable (*praesumptio iuris tantum*), which means that it stops working when it is proved to be wrong. Otherwise the accused should be considered innocent. Thus, the acquittal must be pronounced both when the accused is proved innocent and when his guilt is not proved[5].

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[3] For more see: W. Wróbel, *O dwóch aspektach konstytucyjnej zasady domniemania niewinności* [On two aspects of the constitutional principle of the presumption of innocence], [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70 rocznicy urodzin Prof. A. Gaberle* [Penal science towards the problems of contemporary criminality – Professor A. Geberle's 70th birthday jubilee book], Warszawa 2007, p. 332.

[4] Judgement of the Constitutional Tribunal of 16 May 2000, P 1/99, OTK 2000, no. 4, item 11; also see judgement of the Constitutional Tribunal of 27 February 2001, K 22/00, OTK 2001, no. 3, item 48, judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK-A 2004, no. 10, item 103, judgement of the Constitutional Tribunal of 29 January 2002, K 19/01, OTK-A 2002, no. 1, item 1.

[5] For more see: A. Murzynowski, *Istota i zasady procesu karnego* [Essence and principles of the criminal proceeding], Warszawa 1994, p. 247 and the following; also see: P. Kruszyński, *Zasada domniemania niewinności w polskim procesie karnym* [Principle of the presumption of innocence in the Polish criminal proceeding], Warszawa 1983, pp. 43–48; J. Nelken, *Domniemania w procesie karnym* [Presumptions in the

The doctrine distinguishes three basic theoretical conceptions of the discussed principle. The first one, the so-called subjective one, expresses the obligation imposed on the proceeding organs to assume – until a valid judicial decision is issued – that the accused is innocent and to treat him according to this assumption. It emphasises the assessment made by the proceeding organ. According to the second conception, the accused shall be treated as an innocent person regardless of personal opinions of the officer of the proceeding organ. The objective expression of the principle of innocence results from the statutory obligation to regard the accused to be innocent even if the proceeding organ were convinced of his guilt. On the other hand, the third conception – the so-called humanistic scepticism – is based on two assumptions. Firstly, it assumes the obligation to treat the accused as an innocent person, i.e. treating him in such a way that would emphasise that he has not been found guilty. But this results from the statutory obligation, not the organ's internal conviction. Secondly, it is necessary to meet a requirement of critical attitude to the accusation against him. The proceeding organ should be critical enough to doubt – until guilt is proved – if the accused is guilty; it should be open to the possibility of accepting the conception that is favourable for the accused[6].

The first interpretation may raise some doubts. It does not seem to be possible to regulate the proceeding organ's sphere of psychical feelings[7]. Moreover, such a solution would limit the possibility of analysing the issue of guilt and the proceeding organ's conviction of the guilt of the accused – although not equivalent to proving it – accompanies many proceeding-related decisions that are prior to the valid court judgement, as e.g. temporary arrest. This is why the last conception, which is an extension of the objective attitude, seems to be most appropriate. It best expresses the essence of the principle because – simplified – requires that the presumption of innocence should be treated relatively not only

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criminal proceeding], NP 1970, no. 11, p. 1590 and the following; L. Schaff, *Problematyka domniemanie niewinności w postepowaniu przygotowawczym* [Presumption of innocence in the preparatory proceeding], NP 1954, no. 9, p. 16 and the following.

6 S. Waltoś, *Proces karny. Zarys systemu* [Criminal proceeding. System outline], Warszawa 2005, p. 244; Ł. Wożniak, *Zasada domniemania niewinności – zagadnienia podstawowe* [Principle of innocence – basic issues], [in:] J. Czapska, A. Gaberle, A. Światłowski, A. Zoll (ed.), *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia* [Principles of the criminal proceeding vs. challenges of our Times. Book in honour of Professor Stanisław Waltoś], Warszawa 2000, p. 357; for more see P. Kruszyński, *Zasada domniemania niewinności w polskim…* [Principle of the presumption of innocence in the Polish…], p. 11 and the following, A. Tęcza-Paciorek, *Zasada domniemania…* [Principle of the presumption…], p. 63 and the following; also see M. Cieślak, *O „zasadzie domniemania winy", czyli splot nieporozumień* [On the 'principle of the presumption of guilt', i.e. conjunction of misunderstangs], NP 1955, no. 3, p. 64 and the following; L. Schaff, *Problematyka domniemania niewinności w postepowaniu przygotowawczym* [Issue of the presumption of innocence in the preparatory proceeding], NP 1954, no. 9, p. 16 and the following; *ibid.*, *W obronie domniemania niewinności* [In defence of the presumption of innocence], NP 1955, no. 7–8, p. 89 and the following; M. Szerer, *O niepotrzebie domniemania niewinności. Uwagi w związku z artykułem prof. Schaffa* [On the unnecessity of the presumption of innocence – Comments in connection with Professor Schaff's article], NP 1955, no. 3, p. 69 and the following.

7 See S. Waltoś, *Proces karny…* [Criminal proceeding…], p. 243.

towards the accused but also towards the act that is subject to the accusation. The objective conception is also adopted in court decisions[8].

2. Scope of the principle of innocence

The presumption of innocence is applied with the start of the proceeding against a given person. Otherwise, it is conducted in connection with a certain act, which means that no person has become subject to the presumption. In other words, there must be a perpetrator between an act and guilt. In Article 5 § 1 of the CPC, a term 'the accused' is used, in a broad sense (Article 71 § 3 of the CPC), which means that the term refers to a suspect in the preparatory proceeding. However, the specification made by the legislator in Article 5 § 1 of the CPC is of secondary importance in the context of the broad formulation of the principle of innocence in Article 42 (1) of the Constitution. This provision lays down that the principle of innocence is applied to "everyone", regardless of his proceeding-related status, which makes it possible to assume that it is also applied to a suspect.

The moment at which the presumption of innocence stops being applied raises fewer doubts. Both Article 42 (3) of the Constitution and Article 5 § 1 of the CPC require that the guilt be pronounced in a valid judgement. This means that the presumption of innocence is also applied in the appeal proceeding. However, it is justifiable to notice that the presumption of innocence protects the accused at this stage only when guilt is under discussion. In case the criminal proceeding concerns only the issue of punishment, the judgement pronouncing guilt is already in force, thus the presumption has already been rebutted[9].

The protection resulting from the presumption of innocence expires in the proceedings taking place when the judgement in which the guilt was pronounced comes into force; however, it is applied again in case the judgement is annulled as a result of a special appeal or resumption of the proceeding until the new valid pronouncement of guilt[10]. The moment of the annulment of the valid judgement is taken into account, not the fact that a special appeal was filed[11].

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[8] Judgment of the Supreme Court of 18 March 2009, IV KK 380/08, OSN Prokuratura i Prawo 2009, no. 10, item 14.

[9] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2011, p. 65; also see judgement of the Supreme Court of 13 November 2007, IV KK 359/07, Legalis, judgement of the Supreme Court of 26 September 2000, V KKN 325/00, Legalis.

[10] W. Grzeszczyk, *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2012, p. 24; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*… [Criminal Procedure Code…], pp. 65–66; P. Kruszyński, *Zasada domniemania niewinności w polskim*… [Principle of the presumption of innocence in the Polish…], p. 191.

[11] See Z. Gostyński, S. Zabłocki, [in:] R. Stefański, S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2003, pp. 210–211; Ł. Woźniak, *Zasada domniemania niewinności*… [Principle of the presumption of innocence…], p. 358.

3. Presumption of innocence from the proceeding perspective

3.1. Presumption of innocence functions

The presumption of innocence principle has several functions in the criminal proceeding, including guaranteeing, protective, compensational and activating ones[12]. The presumption of innocence principle results especially in, inter alia:
- the obligation to treat the accused as an innocent person until the valid judgement is made;
- the obligation to make an effort to prove the guilt of the accused and acquire evidence;
- letting the accused be passive in the proceeding with no negative legal consequences for him;
- the obligation to issue an acquittal in case insufficient evidence confirming guilt of the accused or doubtful evidence;
- a requirement to limit the indispensable minimum of restrictions on the rights and freedoms of the accused at trial;
- the obligation to respect the good reputation of the accused[13].

It is also assumed that the presumption of innocence principle imposes on the proceeding organ an obligation to examine all possible circumstances of the case connected with the accountability of the accused in an objective way, regardless of the evidence incriminating him, and the subjective conviction of his guilt[14]. Although the relation between the presumption of innocence and the principle of objectivism is evident, the rules cannot be identified with one another. The obligation to take into account circumstances that are and are not to the advantage of the accused results directly from Article 4 of the CPC.

3.2. The material burden of proof

The presumption of innocence results in a series of procedural consequences. One of them is that the so-called material burden of proof is the obligation imposed on the public prosecutor[15]. Judicial decisions are right to emphasise

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[12] For more see P. Kruszyński, *Zasada domniemania niewinności w polskim…* [Principle of the presumption of innocence in the Polish…], p. 31 and the following; A. Tęcza-Paciorek, *Zasada domniemania niewinności w polskim procesie karnym* [Principle of the presumption puff innocence in the Polish criminal proceeding], Warszawa 2012, p. 74 and the following, p. 428.

[13] A. Tęcza-Paciorek, *Zasada domniemanie niewinności…* [Principle of the presumption of innocence…], p. 428; also see A. Murzynowski, *Istota i zasady procesu karnego* [Essence and the principles of the criminal proceeding], Warszawa 1994, pp. 254–255; P. Kruszyński, *Zasada domniemania niewinności w polskim…* [Principle of the presumption of innocence in the Polish…], p. 29 and 102.

[14] A. Murzynowski, *Istota i zasady procesu karnego…* [Essence of the criminal proceeding…], p. 255.

[15] For more on the burden of proof see M. Klejnowska, *Wyjątki od reguł ciężaru dowodu w procesie karnym* [Exceptions to the rules of the burden of proof in the criminal proceeding], Ius et Administratio, 2004, no. 1, p. 45 and the following; J. Skorupka, *Ciężar dowodu i ciężar dowodzenia w procesie karnym* [Burden of proof and burden of proving in the criminal proceeding], [in:] T. Grzegorczyk (ed.), *Funkcje*

that it is not the accused that must prove his innocence, but it is the prosecutor who must prove that the accused is guilty. At the same time, to prove means to confirm by providing direct or indirect proofs in a way that does not raise doubts[16]. The proof of guilt must be complete, certain and undoubted[17].

There is an exception, however. The material burden of proof is the obligation imposed on the accused in defamation cases. In order to be made exempt from punishment, the defamer must prove that the statement he has made is true. The burden of proof is not the obligation of the complainant who has been defamed[18]. The reversed burden of proof is also envisaged in Article 45 § 2 of the CC with respect to proving that the possessed property does not constitute income obtained as a result of crime[19]. However, there are justified doubts whether this solution is in compliance with Article 42 (3) of the Constitution of the Republic of Poland[20].

Thus, the principle of innocence results in the necessity of proving a thesis that the accused is guilty of committing an act he was charged with in order to be approved of as a fact and constitute grounds for conviction. On the other hand,

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procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana [Functions of the criminal proceeding – Professor Janusz Tylman jubilee book], Warszawa 2011, p. 123 and the following; P. Girdwoyń, *Rozkład ciężaru dowodu w procesie karnym a taktyka obrony. Uwagi na tle polskiego i niemieckiego stanu prawnego* [Distribution of the burden of proof in the criminal proceeding vs. the defennce tactics. Comments iagainst the background of the Polish and German legal state], Studia Iuridica 2004, vol. XLIII, p. 25 and the following; J. Nelken, *Ciężar dowodowy w procesie karnym* [Burden of proof in the criminal proceeding], NP 1969, no. 6, p. 880 and the following.

16 Judgement of the Court of Appeal in Lodz of 25 May 1995, II AKr 120/95, OSN Prokuratura i Prawo 1996, no. 7–8, item 20.

17 Judgement of the Supreme Court of 24 February 1999, V KKN 362/97, OSN Prokuratura i Prawo 1999, no. 7–8, item 11.

18 For more see inter alia M. Skwarzyński, *Charakter prawny przepisu art. 213 kodeksu karnego* [Legal character of the provision of Article 213 of the CC], Prokuratura i Prawo 2008, No. 7–8, p. 198 and the following; G. Artymiak, *Rozłożenie ciężaru dowodu w sprawach o zniesławienie* [Distribution of the burden of proof in cases of defamation], Palestra 1995, no. 1–2, p. 63 and the following; W. Kulesza, *Zniesławienie i zniewaga. Ochrona czci w polskim prawie karnym – zagadnienia podstawowe* [Defamation and insult – Protection of honour in the Polish criminal law – basic issues], Warszawa 1984, p. 86; P. Kruszyński, *Materialny ciężar dowodu w procesach karnych o zniesławienie i oszczerstwo* [Material burden of proof in the criminal proceeding in cases of defamation and slander], PiP 1980, vol. 8, p. 77; also see K. Daszkiewicz, W. Daszkiewicz, *Nie ma wyjątku od zasady domniemania niewinności oskarżonego* [There is no exception to the principle of the presumption of innocence of the accused], NP 1976, no. 11, p. 1574 and the following; L. Gardocki, *Dowód prawdy czy dowód nieprawdy* [Proof of the truth or proof of untruth], NP 1975, no. 12, p. 1619 and the following.

19 For more see inter alia M. Prengel, *Odwrócenie ciężaru dowodu z art. 45 k.k.* [Reverse of the burden of proof under Article 45 of the CC], GS 2003, no. 7–8, p. 39 and the following; A. Bulsiewicz, *Domniemania z art. 45 k.k. przy zabezpieczeniu majątkowym w procesie karnym* [Presumptions under Article 45 of the CC with the security on property in the criminal proceeding], [in:] V. Konarska-Wrzosek, J. Lachowski, J. Wójcikiewicz (ed.), *Węzłowe problemy prawa karnego kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana prof. A. Markowi* [Crucial issues of criminal law, criminology and criminal policy – Commemorative book presented to Professor A. Marek], Warszawa 2010, p. 559 and the following; C. Kulesza, P. Starzyński, *Powrót konfiskaty mienia?* [Return of the seizure of property?], Prokuratura i Prawo 2008, No. 3, p. 35 and the following.

20 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*… [Criminal Procedure Code…], p. 65.

the condition for acquittal is not proving the thesis of the accused's innocence. The acquittal should take place in the event the accused's innocence has been proved as well as in case, although it has not been proved, his guilt has not been proved either. Presumption of innocence does not require proving; this is the refutation of the presumption of innocence that requires proving[21]. It must be emphasised that for many reasons the legal virtue of acquittal is the same because Polish criminal procedure law does not envisage the so-called indirect sentences, i.e. retaining a person in a state of constant suspicion (*absolutio ab instantia*)[22].

We should fully approve of the opinion that, in the proceeding in connection with claims for damages and redress for undeserved temporary arrest, while establishing facts whether there are grounds for recognising arrest as undoubtedly undeserved, one cannot differentiate acquittal sentences that are bases for claims. Due to the principle of innocence, sentence validity and the liability of the State Treasury as a risk, it is unimportant whether the sentence resulted from the lack of commission or guilt, or is a result of indelible doubts or a lack of sufficient proofs to prove the liability of the accused[23].

According to the principle *nemo se ipsum accusare tenetur*, the accused does not have to prove his innocence nor is he obliged to provide the proofs of his innocence (Article 74 § 1 of the CC). Thanks to the protection provided by the principle of innocence, the mode of defence and the level of activeness in this respect are subject to his choice. The accused must not be made to provide evidence incriminating him. Its detection and procedural protection is the responsibility of law enforcement agencies and the prosecutor. The principle results in the right to refuse to answer interrogation questions (Article 175 § 1 of the CPC) or ban on the use of means of control of unconscious organism reactions as well as force or unlawful threat in the course of interrogation (Article 171 § 4 of the CPC)[24].

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[21] Judgement of the Court of Appeal in Krakow of 29 December 2006, II AKa 234/06, KZS 2007, no. 2, item 32.

[22] Judgement of the Supreme Court of 28 March 2008, III KK 484/07, OSN Prokuratura i Prawo 2008, no. 9, item 10.

[23] Judgement of the Supreme Court of 13 June 200, V KKN 125/00, OSNKW 2002, no. 9–10, item 80, with a gloss by A. Bulsiewicz, OSP 2003, no. 5, item 63.

[24] T. Grzegorczyk, *Kodeks postepowania karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2014, p. 329; also see Z. Sobolewski, *Samooskarżenie w świetle prawa karnego (nemo se ipsum accusare tenetur)* [Self-incrimination in the light of criminal law (*nemo se ipsum accusare tenetur*)], Warszawa 1982; A. Lach, *Granice badań oskarżonego w celach dowodowych. Studium w świetle reguły nemo se ipsum accusare tenetur i prawa do prywatności* [Limit for the accused's examination for the purpose of evidence collection. A study in the light of the rule *nemo se ipsum accusare tenetur* and the right to privacy], Toruń 2010; P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym* [Principle of the right to defence in the Polish criminal proceeding], Kraków 2006, p. 354 and the following; A. Wąsek, *O kilku aspektach reguły nemo se ipsum accusare tenetur de lege lata i de lege ferenda* [On a few aspects of the rule *nemo se ipsum accusare tenetur de lege lata* and *de lege ferenda*], [in:] J. Skupiński, J. Jakubowska-Hara, *Standardy praw człowieka a polskie prawo karne* [Human rights standards and the Polish criminal law],

If the accused, however, undertakes active defence, providing a version that is contrary to the prosecutor's, he accepts the burden of proving its credibility, or at least making his version relatively credible and thus, supporting it with evidence or information at least indirectly showing that it is possible that the actual course of events was like that[25].

Since the assumption of innocence that is a binding principle in the area of criminal proceeding is to be undermined by the prosecutor proving the guilt of the accused, the court is not ex officio obliged to look for evidence supporting prosecution when that provided by the prosecutor is not sufficient to convict the accused, and he himself does not try to supplement that evidence[26].

The distribution of the burden of proof does not influence, of course, general rules of evidence assessment. As a result, it is not possible to refer to the supposedly upset distribution of the burden of proof in the criminal proceeding (Article 5 § 1 of the CPC and Article 74 § 1 of the CPC) when the court's adoption of a version that is different from the one provided by the accused results from the fact that his version was not credible enough and other evidence provided in the case was in accordance with the so-called free assessment of evidence[27]. On no account can the court's statements providing critical assessment of the accused's explanations be interpreted as "a characteristic attempt to shift the obligation to provide evidence of his innocence onto the accused"[28].

Taking into consideration the principle of the presumption of innocence and the rule *in dubio pro reo*, the adoption of a broader perspective is justified. Thus, such is the generalisation that not only the issue of guilt but all the other circumstances and adequate findings unfavourable for the accused must be proved, however, the fact that the evidence of unfavourable circumstances was not proved may constitute grounds for the recognition of circumstances favourable for the accused[29]. On the other hand, the judicial decisions indicate that deficiencies of incriminating evidence cannot be treated in the same way as the deficiencies of acquitting evidence. Due to the fact that the condition *sine qua non* of the conviction of the accused is the proof that he committed the crime,

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Warszawa 1995, p. 239 and the following; B Nita, *Konstytucyjne zakorzenienie zasady nemo tenetur se ipsum accusare* [Constitutional roots of the principle *nemo tenetur se ipsum accusare*], [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy* [Fair trial – Professor Zofia Świda jubilee book], Warszawa 2009, p. 220 and the following.

[25] Judgement of the Court of Appeal in Warszawa of 28 May 2012, II AKa 122/12, KZS 2012, no. 10, item 63.

[26] Judgemment of the Court of Appeal in Katowice of 8 March 2007, II AKa 33/07, OSN, Prokuratura i Prawo 1007, No. 11, item 23.

[27] Judgement of the Supreme Court of 24 March 2003, V KK 197/02, LEX no. 77450, decision of the Supreme Court of 20 September 2006, II KK 327/05, Lex no. 202149, decision of the Court of Appeal in Lublin of 29 April 2009, II AKa 63/09, KZS 2009, no. 7–8, item 90.

[28] Decision of the Supreme Court of 4 February 2002, IV KKN 430/01, Lex no. 53032.

[29] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish criminal procedure – Basic theoretical assumptions], Warszawa 1984, p. 351, also see decision of the Supreme Court of 18 December 2008, V KK 267/08, Lex no. 485030.

the discrepancies in the sphere of acquitting evidence is never balanced by the discrepancies in the scope of incriminating evidence. If the latter are internally contradictory, it is of basic and spontaneous importance whether, *in concreto*, the scope and character of these contradictions does not exclude the possibility of recognizing this evidence as grounds for conviction.[30].

3.3. Use of coercive measures towards a person who is subject to the principle of the presumption of innocence

The principle of the presumption of innocence cannot be identified with a ban on the use of whatever proceeding-related coercive measures before the court issues a valid judgement pronouncing guilt. Such an assumption would repeatedly paralyse the criminal proceeding. From a clearly pragmatic point of view, the proceeding entities cannot be deprived of legal measures enabling them to efficiently conduct the proceeding, especially if the accused unlawfully impedes its course. It concerns not only such preventive measures as temporary arrest but also other actions interfering in the sphere of the rights and freedoms of the accused, such as detention (Article 244 of the CPC), psychiatric observation (Article 203 § 2 of the CPC), supervision and recording of telephone conversations (Article 237i of the new CPC) or security on property (Article 291i of the new CPC)[31].

Temporary arrest may raise most controversies because it consists in depriving a person of the right to freedom while the guilt has not been yet proved and pronounced in a valid court sentence, i.e. – in the light of the principle of the presumption of innocence – when the person is innocent. Court judgements justifiably state that the principle of the presumption of innocence does not contradict the use of temporary arrest towards the accused as its constitutional sense of recognizing everybody as innocent unless their guilt is pronounced in a valid court sentence is expressed in fact in the shift of the obligation to prove it onto the prosecutor in the course of the criminal proceeding, which is not the same as the requirement to show that there is a big probability of having committed a crime being a condition for the use of a particular preventive measure[32]. Thus, because of pragmatic reasons, the principle of the presumption of innocence is limited in connection with temporary arrest. Because if the measure were not used, the substantial issue for the proceeding – the substantiation of the indictment – would not be possible to get examined. The accused would have

[30] Decision of the Supreme Court of 1 March 2004, II KK 271/03, OSNwSK 2004, item 425, judgement of the Supreme Court of 28 September 1995, III KRN 88/95, OSNKW 1995, vol. 11–12, item 77.

[31] On this issue see judgement of the Constitutional Tribunal of 6 September 2004, SK 10/04, OTK – A 2004, no. 8, item 80.

[32] Decision of the Court of Appeal in Katowice of 2 April 2003, II AKz 268/03, OSN Prokuratura i Prawo 2004, no. 1, item 22.

opportunities to freely and without consequences hamper the proceeding, which is prevented with the use of temporary arrest[33].

Temporary arrest cannot, however, constitute criminal penalty anticipation and should be used *ultima ratio*, and not as a repressive measure. The legislator unambiguously exposes the extraordinary character of isolation as a preventive measure and introduces the so-called directive of moderation (Article 257 § 1 of the CPC); defines negative rationale behind its use (see Article 259 of the CC, Article 264 of the CPC) and imposes on the proceeding entity an obligation to constantly revise the grounds for maintaining the measure (Article 253 § 3 of the CPC). Psychiatric observation was treated similarly, in which case the maximum detention period was determined and isolation when it concludes is inadmissible (Article 203 of the CPC). The decision to make courts competent to decide on the use of this measure as well as the constitutional requirement of supervision of other detention decisions by courts (Article 41 (1) of the Constitution of the Republic of Poland; see Article 246 of the CPC) are important guarantees in this field. These regulations take into consideration the need to minimise the interference of criminal procedures into the sphere of human rights and freedoms of the person who is subject to the presumption of innocence.

3.4. Cancellation of a probation measure because of crime commission vs. presumption of innocence

In the context of the principle of the presumption of innocence, there can be some doubts in connection with the re-launch of the proceeding that was conditionally discontinued, the order to execute the conditionally suspended penalty or the cancellation of the former exemption form the execution of the rest of penalty. The situation when the grounds for the cancellation of further use of a probation measure are constituted by a violation of law that is a crime raises most controversies (Article 68 § 2 of the CC, Article 75 § 2 of the CC, Article 160 § 1 point 4 of the Penalty Execution Code – PEC). The controversies concern the issue whether the rationale for this decision requires a valid verdict on crime commission.

In the literature on criminal law, there is a polarisation of opinions on this matter. According to some experts, the commission of crime, as a type of manifestation of the violation of the legal order, must be stated in a valid verdict[34].

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[33] Decision of the Court of Appeal in Krakow of 23 July 2003, I AKz 300/03, KZS 2003, no 7–8, item 60, decision of the Court of Appeal in Katowice of 16 July 2008, II AKz 514/08, KZS 2008, no. 9, item 62, decision of the Court of Appeal in Katowice of 16 July 2008, II AKz 514/08 KZS 2008, no. 9, item 62, decision of the Supreme Court of 3 August 2011, III KK 79/11, Lex no. 955018.

[34] J. Skupiński, *Rażące naruszenie porządku prawnego jako podstawa odwołania środka probacyjnego* [Serious violation of legal order as grounds for cancellation of a probation measure], [in:] A. Michalska-

Other authors support the opposite thesis. This standpoint is mainly based on the linguistic interpretation. The discussed provisions – unlike other regulations of the CC (e.g. Article 68 § 1 of the CC, Article 75 § 1 of the CC, Article 148 § 3 of the CC) – do not lay down a requirement of validity. It is also mentioned that because the lengthiness of proceedings, it is unrealistic to obtain a valid sentence in case of crimes committed during the probation period. Another argument that is also quoted is jurisdictive independence that a criminal court has[35].

These are serious and quite important arguments. However, it seems the guarantee role of the principle of the presumption of innocence, especially in its constitutional and international aspect, allows for going beyond the borders of the linguistic interpretation[36]. It is necessary to approve of the opinion that if a court wants to make use of the possibilities laid down in Article 68 § 2 of the CC, Article 75 § 2 of the CC and Article 160 § 1 point 4 of the PEC, it cannot classify an act as a crime on its own, however, it must determine on its own if that act constitutes a serious violation of the legal order. Otherwise, such a court would expose itself to an accusation of the violation of the principle of the presumption of innocence from the constitutional point of view (Article 42 (3) of the Constitution of the Republic of Poland). One cannot, however, speak about the infringement of the internal aspect of the principle of the presumption of innocence in such a case because the cancellation of the decision to use probation measures does not mean it is the proceeding aimed at proving the guilt of the perpetrator. That is not connected with the use of repressive measures but with the verification of the former forecast and a statement whether the administered measures were justified[37]. Another argument against the conception that the valid verdict is not necessary for the recognition of a crime is the fact that such as assumption can result in a valid acquittal verdict in the criminal case that made grounds for the cancellation of the probation measure. This would mean that penal consequences were administered towards a person who in the prospect criminal proceeding in connection with a crime committed at the time of probation was found innocent.

-Warias, J. Nowikowski, J. Piórkowska-Flieger (ed.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana profesorowi Tadeuszowi Bojarskiemu* [Theoretical and practical problems of the contemporary criminal law – Jubilee book for Professor Tadeusz Bojarski], Lublin 2011, p. 316 and 319; T. Kozioł, *Warunkowe umorzenie postępowania karnego* [Conditional termination of the criminal proceeding], Warszawa 2009, p. 231 and the following. A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code – General issues – Commentary], vol. I, Warszawa 2012, p. 973.

[35] K. Indecki, A. Liszewska, *Prawo karne materialne. Nauka o przestępstwie, karze i środkach karnych*, [Criminal material law – The study of crime, penalty and penal measures], Warszawa 2002; R. Skarbek, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Komentarz. Część ogólna* [Criminal Code, Commentary, General Issues], vol. II, 2010, p. 446 and p. 474; P. Hofmański, L.K. Paprzycki, [in:] M. Filar (ed.), *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2012, pp. 406–407; A. Marek, *Kodeks karny. Komentarz* [Criminal Code – Commentary], Warszawa 2010, p. 225, p. 240; A. Tęcza-Paciorek, *Zasada domniemania niewinności…* [Principle of the presumption of innocence…], pp. 284–285, p. 288.

[36] Compare resolution of the Supreme Court of 20 June 2000, I KZP 14/00, OSNKW 2000, no. 7–8, item 59.

[37] W. Wróbel, *O dwóch aspektach…* [On two aspects…], p. 330.

3.5. Infringement of the presumption of innocence

The infringement of the principle of the presumption of innocence may result in serious consequences for the criminal proceeding. It is justifiable to say that the statement made by the court issuing the sentence that the accused did not prove his claims, which in case they were sufficiently substantiated would quash criminality of his conduct, and thus the recognition of the version of circumstances unfavourable for the accused, constitute a serious infringement of criminal procedure provisions that have influence on the contents of the judgement as referred to in Article 463a of the former CPC and Article 523 of the CPC, because it means the shift of the burden of proof and proving innocence onto the accused, which is in contradiction to the principle of the presumption of innocence and the related principle of the burden of proof, which in the Polish criminal proceeding is the prosecutor's obligation[38].

Another infringement of the principle of the presumption of innocence is the assumption that sentencing is also influenced by acts other than only those the accused was charged with and that were not the subject matter of the valid sentence. Although it is true that sentencing may be influenced by the circumstances that characterize the perpetrator and not only the act being the subject of the proceeding, attributing to the accused – with unfavourable consequences for sentencing – other acts with criminal features that are not the subject of the proceeding and were not pronounced in other verdicts constitutes an attempt to bypass the principle of the presumption of innocence[39].

The infringement of the principle of the presumption of innocence may be also connected with the institution of peremptory challenge of judge for cause of bias (Article 41 § 1 of the CPC). Court judgements highlight that if in a particular case judges, against the principle of the presumption of innocence, adjudicated earlier in the separate proceeding carried out in accordance with Article 387 of the CPC that drugs had been trafficked in cooperation with the convict who definitely denied committing the acts he was accused of, the adjudicating judges should demand exclusion from the current case. As it did not happen, as well as it was not done ex officio – in the opinion of the Supreme Court – the judges' involvement in the first instance proceeding sentencing was a serious infringement of Article 41 § 1 of the CPC[40].

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[38] Judgement of the Supreme Court of 13 October 1999, II KKN 297/97, OSN Prokuratura i Prawo 2000, no. 3, item 15.

[39] Judgement of the Supreme Court of 23 July 2009, III KK 39/09, Lex no. 518144.

[40] Judgement of the Supreme Court of 16 January 2008, IV KK 392/07, OSN Prokuratura i Prawo 2008, no. 5, item 9.

4. Presumption of innocence in a non-trial context

Taking into account general importance of the principle of the presumption of innocence for the legal system, especially its broad treatment in Article 42 (1) of the Constitution of the Republic of Poland, there are no grounds for narrowing the scope of its influence only to the proceeding-related aspects. There is no doubt that the principle of the presumption of innocence is addressed to the entities involved in the criminal proceeding. These include not only courts but also prosecutors, Police and other law enforcement officers conducting the preparatory proceeding. Guarantees resulting from the presumption of innocence should be understood, however, in a broader sense and be also applied at a non-trial level. From this point of view, the presumption of innocence should be applied to every person, institution, organisation and even broader – the whole society, which is obliged to treat the accused as innocent until his guilt is proved and pronounced in a valid sentence.

4.1. Presumption of innocence in press laws

Broad treatment of the principle of the presumption of innocence is especially important in connection with press activities. Trial reporting is of key importance. It concerns compliance with the principle of the presumption of innocence in press reports, articles and columns as well as radio and television discussions concerning given trials. It is connected with the necessity to use adequate terminology (e.g. arrest, suspect, accessed, convicted, not yet valid sentence etc.) and avoid terms that prejudge the guilt or are pejorative.

The provisions of Act of 26 January 1984 on the Press Laws[41] guarantee that to a certain extent. In accordance with Article 13 (1) of the PL, it is forbidden to express opinions on the adjudication in the criminal proceeding before the issue of the first instance sentence. This does not mean a ban on the provision of information about the trial but on the judgement, which – in accordance with the dictionary definition – should be understood as expressing conviction, opinion about something, speaking about a person's or an object's values, virtues[42]. Thus, it is inadmissible to speculate about the guilt of the accused in press texts before the first instance sentence is issued. It is rightly highlighted that the ban laid down in Article 13 (1) of the PL is not violated in case a trial report informs about serious defaults in the court proceeding, e.g. the lengthiness of the proceeding, the judge being unprepared, a lack of culture, an omission of some evidence, however under the condition that highlighting these and similar

[41] Journal of Laws No. 5 item 24 as amended.

[42] S. Dubisz, *Uniwersalny słownik języka polskiego* [Universal Dictionary of the Polish Language], Warszawa 2003, vol. III, pp. 237–238.

facts a journalist refrains from expressing his opinions concerning the result of the trial[43].

The violation of the ban on expressing press opinions on the judgment in the criminal proceeding before the first instance court sentence is issued may constitute grounds for demanding that the journalist publish a correction notice under Article 31 of the PL. Apart from that, every accused is protected by civil law with respect to personality rights, including mainly such virtues as honour, a name or a pseudonym, or an image (Article 23 of the Civil Code)[44].

Regardless of the above-mentioned issues, it is also inadmissible to publish personal data and the image of persons against whom a preparatory or court proceeding is carried out unless the persons give their consent to do that (Article 13 (2) of the PL) or the prosecutor or court give their consent to do that because of an important social reason (Article 13 (3) of the PL). There must be sufficiently important reasons for the consent to publish personal data and an image. These can e.g. include the need to prevent further criminal activity of the accused, the establishment of new fact by law enforcement agencies or obtaining evidence, as well as the implementation of the educational function of the criminal proceeding or warning and appeasement of public opinion[45].

The evident strengthening of the position of the accused in this area resulted from Act of 19 August 2011 amending Act on the Press Laws[46]. The amendment to the Press Laws resulted from the judgement of the Constitutional Tribunal of 18 July 2011[47] and concerned the introduction of a possibility of filing a complaint to court about the prosecutor's consent to reveal personal data and an image of persons against whom a preparatory proceeding is carried out[48].

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[43] J. Sobczak, *Dziennikarz – sprawozdawca sądowy. Prawa i obowiązki* [Journalist – Court reporter – Rights and duties], Warszawa 2000, p. 184.

[44] For more see A. Szpunar, *Ochrona dóbr osobistych* [Protection of personality rights], Warszawa 1979, p. 162 and the following. Human honour and dignity are also subject under the protection of criminal law (see Article 212 of the CC and Article 216 of the CC).

[45] J. Sobczak, *Prawo prasowe. Komentarz* [Press Laws – Commentary], Warszawa 2008, pp. 525–526; A. Augustyniak, [in:] B. Kosmus, G. Kuczyński, *Prawo prasowe. Komentarz* [Press law – Commentary], Warszawa 2011, p. 228.

[46] Journal of Laws No. 205, item 1204.

[47] K 25/09, OTK-A 2011, no. 6, item 57.

[48] For more on the topic of the relations between the principle of the presumption of innocence and the media see J. Sobczak, *Dziennikarz – sprawozdawca sądowy. Prawa i obowiązki* [Journalist – Court reporter – Rights and Duties], Warszawa 2000; D. Dölling, K.H. Gössel, S. Waltoś (ed.), *Relacje o przestępstwach i procesach karnych w prasie codziennej w Niemczech i w Polsce* [Reports on crime and criminal proceedings in the daily press in Germany and in Poland], Kraków 1997; S. Waltoś, *Prasa a wstępne stadium procesu karnego* [Press and the indicial stage of the criminal proceeding], Zeszyty Prasoznawcze 1968, No. 1, p. 30 and the following; *ibid.*, *Domniemanie niewinności w świecie mediów* [Presumption of innocence in the world of media], [in:] C. Kulesza (ed.), *System wymiaru sprawiedliwości a media* [System of justice administration vs. the media], Białystok 2009, pp. 9–22; P.K. Sowiński, *Zasada domniemania niewinności a wolność słowa* [Presumption of innocence vs. the freedom of speech], [in:] C. Kulesza (ed.), *System wymiaru sprawiedliwości…* [System of justice administration…], pp. 139–147; P. Starzyński, *Media a zasady procesowe i cele postępowania przygotowawczego* [Media vs. principles of proceeding and the aims of preparatory proceeding], [in:] C. Kulesza (ed.) *System wymiaru sprawiedliwości…*

4.2. Presumption of innocence and employment relationship

The commission of a crime can influence employment relationship. Under Article 52 § 1 point 2 of the Employment Code, an employer may terminate an employment contract without notice by fault of an employee in case the employee within the period of employment commits a crime that precludes the continuation of his employment on the same post if the crime is obvious or was pronounced in a valid verdict. As the above information shows, a person who still has the right to the presumption of innocence may face employment consequences.

The grounds for the provision are challenged in the doctrine and there are suggestions that only a valid court sentence pronouncing the guilt shall constitute grounds for the termination of an employment contract. There are opinions that an employer should not have the freedom to assess whether a crime was committed and who committed it; there should not be such a possibility of bypassing the principle of the presumption of innocence[49]. However, the issue is probably more complicated. Firstly, the possibility of terminating an employment contract under Article 52 § 1 of the EC does not provide the employer with a freedom to take decisions. The commission of crime must be obvious, which is defined in a dictionary as without doubt, unquestionable, certain[50]. Thus, it is inadmissible to terminate employment relationship in ambiguous situations. Secondly, in the criminal proceeding, a much lower level of probability of committing a crime constitutes grounds for the use of much more painful measures, including arrest. For example, obviousness of crime commission is not required in order to apply temporary arrest; high probability is sufficient (Article 249 § 1 of the CPC in connection with Article 258 of the CPC). Thirdly, the introduction of the above-mentioned limitation would misrepresent *ratio legis* of the discussed institution. It is harmoniously emphasised in the doctrine that it concerns an accelerated mode of employment contract termination, which is not realistic in case of the requirement of a valid sentence pronouncing the commission of a crime[51]. It must also be noticed that in order to apply Article 52 § 1 point 2

[System of justice administration…], pp. 83–94; R. Broniecka, *Relacje prasowe a zasada obiektywizmu* [Press report and the principle of objectivism], [in:] C. Kulesza (ed.), *System wymiaru sprawiedliwości…* [System of justice administration…], pp. 237–246; M. Mozgawa, *Odpowiedzialność karna za przestępstwa prasowe* [Liability for press crimes], [in:] A. Siemaszko (ed.), *Prawo w działaniu* [Law in action], Instytut Wymiaru Sprawiedliwości, No. 5, Warszawa 2008, pp. 11–73; M. Bransztetel, *Zasada domniemania niewinności a media* [Principle of the presumption of innocence and the media], Prokuratura i Prawo 2006, no. 9, p. 54 and the following; P. Daniluk, *Konstytucyjność braku sądowej kontroli zezwolenia prokuratora na ujawnienie danych osobowych i wizerunku podejrzanego* [Constitutionality of the lack of court control over the prosecutor's consent to reveal personal data and the image of the accused], Ius Novum 2010, no. 3, p. 73 and the following.

[49] A. Tęcza-Paciorek, *Zasada domniemania niewinności…* [Principle of the presumption of innocence…], p. 73.

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

[51] See e.g. W. Muszalski, [in:] W. Muszalski (ed.), *Kodeks pracy. Komentarz* [Employment Code – Commentary], Warszawa 2009, s. 201; W. Sanetra, [in:] W. Sanetra, J. Iwulski, *Kodeks pracy. Komentarz*,

of the LC, a conjunction of two conditions is required. Apart from obviousness of a crime, it is necessary to determine that its commission precludes his employment on the same post. From the point of view of guarantees for employees, claims in connection with the employment contract termination are also an important issue (Article 56 of the LC).

The solution adopted in Article 52 § 1 point 2 of the EC does not mean the system is incoherent[52]. The consequences resulting from the obviousness of a crime commission originate also from other provisions. For example, under Article 135 (2) of Act of 20 June 1997 on Road Traffic Code[53], a police officer seizes a driving licence in case of justified suspicion that the driver committed a crime or offence for which a court may ban him from driving. The document may also be seized in case of justified suspicion that the driver is under the influence of alcohol or another substance acting in a similar way (Article 135 (1) point 1 letter a) as well as in case of suspicion that the driving licence was falsified or altered (Article 135 (1) point 1 letter c). The procedure may be applied towards a person who has not been even charged with the commission of a crime. On the other hand, a series of legal acts regulating the system give grounds for suspending a police officer in case a proceeding is initiated against him[54], that is when there is no sufficiently substantiated suspicion that a given person performed the act, which obviously is not the same as obviousness of a crime commission. Moreover, as a rule, the suspension of a police officer for a fixed period constitutes grounds for his dismissal unless the reasons for the suspension have disappeared (see e.g. Article 41 (1) point 9 Act on the Police). Based on Act on the Police, an opinion dominates administrative court decisions that Article 41 (2) point 9 does not make the initiation of the officer's dismissal proceeding depend on the result of the criminal proceeding against him, and the assessment of the organs and the court does not concern the crime he is charged with but statutory reasons for dismissal from the Police. Thus it is not possible to refer to the principle of the presumption of innocence in connection with the reasons and procedure of dismissing officers. The principle of the presumption of innocence cannot be identified with the ban on the use of whatever legal measures until a valid sentence in the criminal proceeding is issued[55].

Warszawa 2012, s. 431 and the following; K.W. Baran, *Zatrzymanie pracownika* [Retaining an employee], PiZS 1986, no. 4, p. 48 and the following; for more see T.J. Rybicki, *Rozwiązanie umowy o pracę bez wypowiedzenia na skutek popełnienia przestępstwa przez pracownika* [Employment contract termination without notice as a result of a commission of a crime by the employee], Warszawa 1977.

52 Sic! A. Tęcza-Paciorek, *Zasada domniemania niewinności*… [Principle of the presumption of innocence…], p. 73.

53 I.e. Journal of Laws of 2012 item 1137 as amended.

54 E.g. Article 103 item 1 of Act of 27 August 2009 on the Customs Service (i.e. Journal of Laws of 2013, item 1404 as amended); Article 39 item 1 of Act of 6 April 1990 on the Police (Journal of Laws of 2011, No. 287 item 1687 as amended).

55 Judgement of the Supreme Administrative Court of 16 February 2011, I OSK 1410/10, Lex no. 1070759, judgement of the Voivodeship Administrative Court in Kielce of 14 November 2007, II SA/

4.3. Presumption of innocence vs. infringement of personality right

As it was already mentioned in the non-trial context of the principle of the presumption of innocence, the protection of personality rights become especially important. The issue is often connected with parallel proceedings: the criminal and the civil one. It is rightly noticed that a court conducting a civil proceeding in accordance with the Code of Civil Procedure is not competent to adjudicate whether the plaintiff is guilty of causing an accident in which a man was killed. Only a criminal court is competent to examine the case. Thus, until the plaintiff is pleaded guilty of causing that accident in the course of the criminal proceeding and that guilt is pronounced in a valid sentence issued by a criminal court, a civil court conducting a case in the infringement of personality rights, is obliged to treat the plaintiff as innocent under Article 42 (3) of the Constitution of the Republic of Poland[56].

PRESUMPTION OF INNOCENCE AS AN ELEMENT OF A FAIR TRIAL

Summary

The article discusses the issue of the presumption of innocence in the context of a fair criminal proceeding. The issue is analysed from two perspectives: the proceeding-related one and the non-proceeding-related one. Within the former aspect, the role of the presumption of innocence in the criminal proceeding and the material burden of proof are discussed. The use of coercive measures towards a person who is subject to the presumption of innocence and the legal consequences of the violation of the presumption of innocence are analysed too. As far as the latter is concerned, the issues connected with the Press Laws, employment relationship and personality rights are under analysis.

DOMNIEMANIE NIEWINNOŚCI JAKO ELEMENT RZETELNEGO PROCESU KARNEGO

Streszczenie

W opracowaniu poruszono problematykę domniemania niewinności w kontekście rzetelnego procesu karnego. Zagadnienie to zostało przeanalizowane z dwóch perspektyw: procesowej oraz pozaprocesowej. W pierwszym aspekcie odniesiono się do

Ke 568/07, Lex no. 484944, judgement of the Voivodeship Administrative Court in Warszawa of 7 October 2009, II SA/Wa 746/09, Lex no. 573903.

[56] Decision of the Court of Appeal in Warszawa of 12 October 2011, I ACa 326/11, Lex no. 1120113.

funkcji domniemania niewinności w procesie karnym oraz problematyki materialnego ciężaru dowodu. Przeanalizowano także kwestię stosowania środków przymusu wobec osoby objętej domniemaniem niewinności oraz konsekwencji prawnych naruszenia domniemania niewinności. W ujęciu pozoprocesowym przedmiotem analizy była m.in. problematyka prawa prasowego, stosunku pracy oraz dóbr osobistych.

LA PRÉSOMPTION DE L'INNOCENCE COMME UN ÉLÉMENT DU PROCÈS PÉNAL HONNÊTE

Résumé

L'auteur touche à la problématique de la présomption de l'innocence dans le contexte du procès pénal honnête. Cette question a été analysée de deux perspectives: procédurale et extra procédurale. Dans ce premier aspect on a démontré la fonction de la présomption de l'innocence dans le procès pénal et la problématique du poids matériel de la preuve. On a analysé aussi la question d'appliquer les moyens de force auprès la personne sous la présomption de l'innocence ainsi que les conséquences juridiques de violer la présomption de l'innocence. Dans le cadre des éléments extra procéduraux on a analysé en autres la problématique du droit de presse, la relation du travail et des biens personnels.

ПРЕЗУМПЦИЯ НЕВИНОВНОСТИ КАК ЭЛЕМЕНТ ПРИНЦИПИАЛЬНОГО УГОЛОВНОГО ПРОЦЕССА

Резюме

В исследовании затронута проблематика презумпции невиновности в контексте принципиального уголовного процесса. Данный вопрос проанализирован с двух точек зрения: процессуальной и внепроцессуальной. Первый аспект предполагает обращение к функции презумпции невиновности в уголовном процессе, а также проблематике отягчающего обстоятельства в виде вещественного доказательства. Проанализирован также вопрос о применении принудительных мер в отношении лица, на которое распространяется презумпция невиновности, а также правовых последствий нарушения презумпции невиновности. С внепроцессуальной точки зрения предметом анализа была, в частности, проблематика Закона о печати, трудовых отношений, а также личных благ.

Zbigniew Kwiatkowski

EXAMINATION OF A COURT'S COMPETENCE AND JURISDICTION IN THE CRIMINAL PROCEEDING

The court competence constitutes the guarantee of the constitutional principle of the right to a fair trial, i.e. "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court" (argument from Article 45 item 1 of the Constitution of the Republic of Poland). The European Convention for the Protection of Human Rights and Fundamental Freedoms[1] also guarantees the right to a hearing of a case before a court established by a statute in Article 6 item 1, which states that the right may only be guaranteed by a competent court[2].

Thus, the examination of the competence of a court is crucial for the criminal proceeding. It makes it possible to establish which court is entitled and obliged to hear a given category of cases and undertake action in the course of a trial.

The Criminal Procedure Code that is currently in force regulates the examination of the competence of courts in Article 35 § 1. According to the provision "a court examines its competence and in case it recognises that is not competent, it transfers a case to a competent court or another organ". Thus, the cited provision obliges every court *ex officio* to examine its competence and it concerns the matter, the territory as well as the function[3]. A court has the right to act in accordance with the norm of Article 35 § 1 of the CPC only in case it determines it is not competent based on the unambiguous and undoubted circumstances of an act and not concluded based on the examination

[1] Convention for the Protection of Human Rights and Fundamental Freedoms drafted on 4 November 1950 in Rome (Journal of Laws of 1993, No. 61, item 284).

[2] P. Hofmański, A. Wróbel, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18* [Convention for the Protection of Human Rights and Fundamental Freedoms – Comments on Articles 1–18], (ed.) L. Garlicki, vol. 1, Warszawa 2010, p. 311 and the following.

[3] J. Bratoszewski, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code – Commentary], vol. 1, Warszawa 2003, p. 387; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Warszawa 2012, p. 75; also see ruling of the Court of Appeal in Gdańsk of 13 January 1999, II AKo 216/98 (KZS 1999, no. 7–8, item 84).

and evaluation of evidence, which are immanently part of the evidence hearing stage of a trial[4].

It is worth mentioning that the Criminal Procedure Code also obliges a public prosecutor to examine the competence of a court before filing an indictment. Formulating an indictment and filing it in court, a public prosecutor should indicate the court competent to hear the case and the type of procedure (argument from Article 332 § 1 point 5 of the CPC). Next the president of the court (the head of the chamber or an appointed judge) examines the appropriateness of the indication in the course of checking the indictment (argument from Article 337 § 1 of the CPC). The president of the court refers the case to the sitting also in case there is a need of adjudication that goes beyond the competence of the court, especially if it is necessary to take the decision on non-competence of the court or the change of the type of procedure indicated in the indictment (argument from Article 339 § 3 point 3 of the CPC)[5]. A court is not bound by the public prosecutor's description of the act charged so it can evaluate the appropriateness of the description of the act and its legal classification, and as a result, transfer the case to another court that is competent (Article 35 § 1 of the CPC) also before trial (Article 339 § 3 of the CPC). However, a decision like this should be limited to an unambiguous situation, thus it should not be taken as a result of the examination or evaluation of evidence, which are subject to examination during a trial. Before a trial, a court cannot assess evidence, except for an obvious situation. A court cannot prejudge matters that are subject to adjudication. Thus, a court is obliged to verify its competence and type that a public prosecutor specified in the indictment. The Supreme Court confirmed it in its ruling of 2 October 2006, V KK 211/2006[6], stating that: "regardless of the prosecutor's erroneous classification of an act and inappropriate referral of the indictment, a court is obliged *ex officio* to examine its competence and this must be done at every stage of the proceeding (Article 35 § 1 of the CPC). In accordance with the opinions established in judicial decisions[7], the aim of a criminal proceeding is to establish criminal liability for an unlawful act treated as an actual event. The scope of an indictment does not depend on the description of an act, the time of its commission or legal classification proposed in the indictment, which

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[4] See ruling of the Court of Appeal in Warszawa of 21 January 2003, II AKz 5/03 (OSA 2003, no. 12, item 117), sentence of the Supreme Court of 9 January 2013, V KK 382/12, (LEX no. 1289073).

[5] 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, no. 10, p. 20.

[6] (OSNwSK 2006, no. 1, item 1855); also see sentence of the Supreme Court of 22 April 1986, IV KR 129/86 (OSNPG 1986, no. 12, item 167).

[7] See sentence of the Supreme Court of 23 May 2000, IV KKN 580/99 (LEX no. 51089); sentence of the Supreme Court of 17 April 2013, IV KK 351/12 (KZS 2013, no. 6, item 42); also see sentence of the Supreme Court of 2 February 2009, V KK 427/08 (OSNwSK 2009, no. 1, item 291); ruling of the Court of Appeal in Poznań of 28 April 1992, II AKz 112/92 (OSA 1992, no. 9, item 51).

a court not only can but is obliged to change if the actual findings that must be established based on the results of the court proceeding indicate that". It is obvious that if the evidence provided in the course of the proceeding justifies legal classification of an act, which implicates the change of competence, a court is obliged to consider the above-mentioned issues and take adequate procedural decisions taking into account the fact that the court's competence with respect to the matter in the course of the jurisdictive proceeding is affected by the offence the accused is charged with, what it looks like in the light of the whole evidence collected, and not its inappropriate legal classification that a public prosecutor adopted in an indictment.

It must be emphasised that the provision of Article 35§ 1 of the CPC is applicable in every proceeding conducted before court, thus including a situation in which a court *ex officio* examines its competence to adjudicate on the matter of a trial, i.e. on the legal-penal liability of a perpetrator charged with a criminal act as well as on accidental matters, e.g. on a motion to give consent to telephone tapping or on a complaint.[8]

This means that a court is obliged to examine its competence without delay after a prosecutor files an indictment or a motion for conditional discontinuance of a proceeding or temporary arrest, or a complaint is filed. The obligation to examine its own competence *ex officio* does not exclude the possibility of taking a decision on this matter as a result of a motion filed by the parties or other persons directly interested (Article 9 § 2 of the CPC). In connection with the contents of Article 9 § 2 of the CPC, a question arises whether and what procedural decision a court should take in case of a motion to state or no grounds to state its non-competence filed by the parties in accordance with Article 9 § 2 of the CPC. There are different opinions of the doctrine on this issue. There is an opinion that in case "a motion filed by the parties based on Article 9 § 2 of the CPC, a court is not required to issue a ruling on the matter of the non-allowance for the filed motion under Article 9 § 2 of the CPC"[9]. The dominating opinions are[10], however, that "in case a party, based on Article 9 § 2 of the CPC, applies to a court to examine its competence within the constitutionally guaranteed right to a hearing before a competent court (Article 45 item 1 of the Constitution), it obliges a court to issue a ruling on the matter of competence, which the parties have the right to appeal against". This opinion is worth approving of since it is obvious that the parties' motion

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[8] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Komentarz do artykułów 1–296* [Criminal Procedure Code – Comments on Articles 1–296], (ed.) P. Hofmański, vol. 1, Warszawa 2011, p. 299.

[9] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299.

[10] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Warszawa 2013, p. 206 and opinions and doctrines cited there.

to establish non-competence of a court constitutes a form of typical notification that there is a need to carry out the procedure *ex officio*. The filing of such a motion by the parties is therefore a procedural action because it constitutes the behaviour laid down in the provisions of the criminal procedure law. Thus, in case a motion filed based on Article 9 § 2 of the CPC, a court may state its non-competence and transfer the case to another court or another organ in compliance with their competence. Thus, a court must allow such a motion[11].

It is obvious that a court's competence in the matter in the course of the proceeding also depends on the criminal act committed by the accused as it is seen in the light of circumstances and not its erroneous legal classification made by a prosecutor in an indictment[12]. The obligation to examine the competence and transfer a case if non-competence occurs (except for cases under Article 35 § 2 of the CPC) is binding at every stage of the proceeding. Normative determination of a court's competence by referring to a type of chamber that is to hear a case, even if the chamber were defined as a 'court', does not make it a court in the procedural sense as referred to in Article 35 § 1 of the CPC[13]. As a result, it means that if a given case is wrongly filed to a given chamber of a court, it should be transferred to another chamber of the same court not based on the decision on its non-competence but based on a decision that is organisational in character[14]. Thus, in case of a dispute, the above-mentioned issue – being part of a given court's internal organisational matter – is solved by the president of the court who – based on § 55 item 2 of Ordinance of the Minister of Justice of 23 February 2007 – Rules and regulations of common courts operation[15] – issues an adequate decision that cannot be appealed against[16].

It may happen that the reason for non-competence of a court to adjudicate occurs in the course of the court proceeding. A court is still obliged to *ex officio* take that fact into account and rule on the matter of its non-competence[17]. Thus, if during the first instance hearing a court establishes that it has no territorial

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[11] K. Marszał, *Badanie właściwości sądu w sprawach o przestępstwa* [Examination of court competence in murder cases], [in:] *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi* [Complaint-related model of a trial – Book presented to Professor Stanisław Stachowiak], Warszawa 2008, pp. 246–247.

[12] See sentence of the Supreme Court of 1 December 2010, III KK 224/10 (OSNwSK 2010, no. 1, item 2391).

[13] See ruling of the Supreme Court of 27 January 2011, I KZP 26/10 (KZS 2011, no. 4, item 8).

[14] See resolution of the Supreme Court's bench of 7 judges of 14 March 1989, III PZP 45/88 (OSNCP 1989, no. 11, item 167); see resolution of the Supreme Court of 22 1994, III CZP 87/94 (OSNC 1995, no. 1, item 5).

[15] Uniform text, Journal of Laws of 2014, item 259.

[16] J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. 2, Warszawa 2013, p. 175.

[17] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299; also see sentence of the Supreme Court of 23 February 2000, IV KKN 596/99 (LEX no. 51132); ruling of the Court of Appeal in Krakow of 3 February 2000, II AKz 2/00 (KZS 2000 no. 2, item 21); ruling of the Court of Appeal in Krakow of 4 June 2002, II AKz 204/02 (KZS 2002, no. 6, item 17).

jurisdiction or that a lower instance court may hear the case, it may transfer it to another court but only if the trial must be adjourned (argument from Article 35 § 2 of the CPC). It is worth mentioning that in case of territorial jurisdiction, the establishment of it before a trial starts, obliges a court to transfer a case to a court that has territorial jurisdiction (argument from Article 35 § 1 of the CPC) and the conditions for transferring a case because of territorial non-competence are applicable in case of a court of a lower instance as well as of a higher instance. In case it is revealed after a trial starts, a court is obliged to transfer a case only if the trial must be adjourned (argument from Article 35 § 2 *in fine* of the CPC). As a result, this means that although territorial non-competence has been established in the course of a trial, a court does not transfer a case to another court if another court of the same or a lower instance is competent to adjudicate and a trial does not have to be adjourned. Thus, the transfer of a case cannot take place because of a court's territorial non-competence if a court continues a trial and issues a verdict or discontinues a trial (argument from Article 402 § 1 of the CPC). The necessity to adjourn is not the same as the fact of adjournment but actual existence of circumstances indicating a lack of rationale for the recognition of a break in the proceeding as a sufficient one[18]. Thus, just the fact of adjournment does not constitute sufficient grounds for transferring a case to another court that has territorial jurisdiction or a court of a lower instance if the arguments for trial economics are against such a decision. Court proceeding economics should be understood in such a case as the speed of proceeding and social costs of the administration of justice. It is obvious that the speed of proceeding lowers social costs of the administration of justice, not to speak about other advantages of such a proceeding, especially with respect to adjudication on a case in a reasonable period of time, which is the implementation of the principle of the right to a fair trial. Before taking a decision in accordance with Article 35 § 2 of the CPC, a court should always follow the principle of adjudicating in a reasonable period of time, which is expressed in the Constitution of the Republic of Poland, the Convention for the Protection of Human Rights and the Fundamental Freedoms as well as the Criminal Procedure Code. This makes the above-mentioned principle a basic one in the light of taking proceeding decisions, including those resulting in transferring a case to another court[19].

Based on Article 35 § 2 of the CPC, the judicature[20] draws attention to the fact that "Even if there is a need to adjourn – a court's decision to transfer

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[18] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz. Wydanie 6. Tom I. Artykuły od 1–467* [Criminal Procedure Code – 6th edition – Volume 1 – articles 1–467], Warszawa 2014, p. 167.

[19] See ruling of the Court of Appeal in Gdańsk of 20 November 2013, II AKz 717/13, Prokuratura i Prawo 2014 – pull-out, no. 11–12, item 29.

[20] See ruling of the Court of Appeal in Katowice of 23 June 2010, II AKz 402/10 (OSA 2010, no. 3, item 1); see ruling of the Court of Appeal in Katowice of 14 January 2004, II AKz 16/04 (KZS 2004, no. 6, item 64).

a case is optional. This does not mean arbitrariness – a helpful criterion for evaluating whether transferring a case to a lower instance court is justified is in such a situation the examination of the level of the trial's performance, efficiency of the proceeding – i.e. the analysis of the elements of the broadly understood trial economics, which should prevent undue lengthening of the proceeding. These reasons should be taken into consideration especially if the accused is temporarily arrested […]"[21]. The fact that Article 35 § 2 of the CPC refers to a situation in which a court states during the first instance hearing that "it is not territorially competent", which means that another court of the same instance or "a lower instance court is competent", results in the conclusion that, although it concerns different competence, it is always within the same structure of common or military courts[22].

"Territorial competence of the first instance court that arises with the filing of an indictment – resulting from the Criminal Procedure Code (a statute) and then established during the course of a trial – cannot be changed in the course of a trial based on a provision of a lower rank that is administrative-organisational in character. This means that a change of the territorial jurisdiction of a court established by Ordinance of the Minister of Justice of 16 October 2002 on courts of appeal, district courts and the establishment of their location and territorial jurisdiction (Journal of Laws No. 180, item 1508 as amended) does not authorise a court to examine its territorial competence in the course of a trial and to apply Article 35 § 2 of the CPC"[23]. The Court of Appeal in Katowice presented a different standpoint in this matter and in its ruling of 20 June 2001, II AKo 98/01[24], states that "There are no grounds for the assumption that a given court's competence starts with the filing of an indictment and is established in the course of the further proceeding, and cannot be changed in connection with the establishment of a new court and the change of territorial jurisdiction of the same level courts. The date of filing an indictment does not ultimately decide on the territorial jurisdiction of a given court, which also refers to a situation in which in the later period, based on adequate provisions, the territorial jurisdiction of courts changes".

A different situation takes place when a court during the first instance hearing states that it is not competent to adjudicate the given matter. Then, there are the

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[21] See ruling of the Court of Appeal in Katowice of 14 February 2001, II AKz 122/01 (OSA 2001, no. 7, item 43).

[22] See ruling of the Supreme Court of 13 December 2002, WZ 42/02 (OSNKW 2003, no. 3–4, item 38).

[23] See ruling of the Court of Appeal in Lublin of 4 August 2010, II AKz 350/10 (LEX no. 628244); also see ruling of the Court of Appeal in Warsaw of 17 November 2000, II AKz 602/00 (OSA 2001, no. 4, item 25).

[24] (KZS 2001, no. 11, item 63); also see ruling of the Court of Appeal in of 20 June 2001, II AKo 106/01 (KZS 2001, no. 11, item 64); ruling of the Court of Appeal in Katowice of 27 June 2001, II AKo 113/01 (KZS 2001, no. 11, item 65).

following procedural solutions. Firstly, if a court of a higher instance or a special court is competent to hear a case, regardless of the stage of the course of a trial, a court that is not competent shall transfer a case to a competent one. Otherwise its verdict would be subject to definite quashing (argument from Article 439 § 1 point 3 and 4 of the CPC). If a court competent to hear a case is a court of a lower instance, an adjudicating court may transfer a case to that court but only when a trial must be adjourned[25]. This is because the legislator uses a phrase 'may transfer a case' in Article 35 § 2 of the CPC, and not 'transfers a case' as in Article 35 § 1 of the CPC. Thus, in the discussed procedural situation, transferring a case is not obligatory but adjourning a trial, a court should take into consideration also trial economics before it takes a decision on transferring a case, especially whether the performance of the course of the proceeding is an argument for transferring a case to a competent court of a lower instance.

If, after a trial starts, it occurs that the act the accused committed is an offence, a court does not transfer a case to a competent court but the same bench of the court hears it applying the provisions of the Code of Procedure in Petty Offences (argument from Article 400 § 1 of the CPC).

However, if a regional court, after the hearing of evidence during the first instance hearing decides that the act that the accused is charged with is a misdemeanour that is subject to this court's competence and states in the sentence that the act is a misdemeanour other than referred to in Article 25 § 1 point 2 and 3 of the CPC, then a problem may arise to which court the court of appeal should transfer the case for re-examination in case it approves of the appeal in the adjudicated case filed by whichever party. T. Grzegorczyk[26] rightly notices that "the transfer of a case under examination from a court of appeal to a district court is a judgement concerning the competence of that court, and in case of determining during a trial that an act constitutes a misdemeanour referred to in Article 25 § 1 point 2 or 3 of the CPC, results in the transfer of a case to a regional court, which lengthens the proceeding". Thus, as a result, after the transfer of a case, the indication made in an indictment concerning the legal character of a crime as subject to the competence of a regional court is updated. From this point of view, the transfer of a case from a court of appeal to a regional court is justified. Therefore, re-examining a case, a regional court may establish the character of an act the accused is charged with differently than before, taking into account the appeal approved of that resulted in the quashing of the former verdict and passing a case back to the first instance court for re-examination (Article 443 of the CPC). Thus, it is rightly assumed in the doctrine[27], that if a court re-examining a case, however, reached the same

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[25] T. Grzegorczyk, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 166.
[26] *Ibid.*, p. 167.
[27] *Ibid.*

conclusion as formerly, it would not constitute a procedurally faulty act under Article 439 § 1 point 4 of the CPC. However, if the classification of an act adopted by a regional court, excluding the features of the matter, a case should be transferred to a district court and the indication made by a court of the second instance would be binding (argument from Article 442 § 3 of the CPC)[28].

The determination of non-competence of a court requires that a ruling be issued. It is rightly assumed in the doctrine[29] and the judicature[30] that "it is not enough to predict the possibility of stating such a fault, but [sic – Z.K.] this fault must be established. Then, a court transfers a case to a competent court or another organ (argument from Article 35 § 1 of the CPC). As a result, his means that a court must not only establish its non-competence but also establish which court or organ is competent to hear a given case[31]. If a regional court establishes its non-competence and transfers a case to a district court, this court is bound by the decision made by a court of the higher instance unless in the course of a trial new important circumstances occur[32]. The Supreme Court expressed a similar standpoint in its ruling of 18 December 2002, II KO 61/02[33], stating that "Although the scope of the regulation of Article 35 § 1 of the CPC does not cover the situation in which a court of appeal has already issued a binding ruling in the matter of competence, however, in case in the course of further proceeding new important circumstances occur and may be decisive for the establishment of the competence in the matter, a court should state its non-competence and transfer a case to a competent court". This interpretation is followed in other rulings[34]. In this case it does not concern a re-examination of the former prerequisites as if they had been inappropriately considered but

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28 *Ibid.*

29 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299 and opinions of the doctrine cited there.

30 See ruling of the Supreme Court of 29 April 1978, VII KZP 49/77 (OSNKW 1978, no 6, item 61).

31 W. Grzeszczyk, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 75.

32 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299; also see resolution of the Supreme Court of 29 April 1978, VII KZP 49/78 (OSNKW 1978, no. 6, item 61).

33 (LEX no. 74416); see ruling of the Court of Appeal in Gdańsk of 13 January 1999, II AKo 216/98, [in:] W. Cieślak, T. Kopoczyński, W. Wolański, *Zestawienie orzecznictwa Sądu Najwyższego i sądów apelacyjnych dotyczącego k.k. i k.p.k. z 1997 r. za okres: wrzesień 1998 r. – luty 1999 r.* [Specification of rulings of the Supreme Court and courts of appeal concerning the Criminal Code and the Criminal Procedure Code of 1997 for the period of September 1998 – February 1999], Warszawa 1999, p. 24; also see ruling of the Court of appeal in Krakow of 5 May 1999, II AKa 151/99 (KZS 1999, no. 11, item 41); ruling of the Court of Appeal in Lublin of 29 December 2010, II AKz 585/10 (KZS 2011, no. 5, item 88); resolution of the Supreme Court of 10 October 1991, I KZP 24/91 (OSNKW 1992, no. 1–2, item 9); ruling of the Court of Appeal in Wrocław of 19 January 2005, II AKz 25/05 (KZS 2005, no. 9, item 46).

34 See sentence of the Supreme Court of 15 November 2013, III KK 320/13 (LEX no. 1393797); sentence of the Supreme Court of 9 January 2013, V KK 382/12 (LEX no. 1289073); also see ruling of the Court of Appeal in Krakow of 17 October 2013, II AKz 375/13 (LEX no. 1386097); ruling of the Court of Appeal in Krakow of 28 February 2013, II AKz 52/13 (LEX no. 1286551); ruling of the Court of Appeal in Lublin of 29 December 2010, II AKz 585/10 (KZS 2011, no. 5, item 88).

the occurrence of new circumstances justifying *rebus sic stantibus* a different ruling. Parties have the right to expect that an opinion of a court (every court) expressed in a valid adjudication will be complied with by all the participants of the proceeding, including other courts, because – not to speak about the indispensable authority of courts – only in this way can procedural order be ensured, especially can a case be examined instead of being transferred from one court to another[35]. The Court of Appeal in Warsaw expressed a different opinion on this matter and in its ruling of 4 January 2008, II AKz 841/07[36], stated that "The adjudication of a court of appeal quashing a verdict and transferring a case to a specified first instance court for re-examination initiates a proceeding from the beginning and confirms that the court to which a case has been transferred has competence in the matter".

The decision on the issue of competence may be passed both at the sitting and during a trial (argument from Article 95 of the CPC). If a sitting on this matter is arranged, the notification of the parties is not necessary. However, they may take part in such a sitting if they appear (argument from Article 96 § 2 of the CPC).

It is rightly raised in the doctrine[37] that "the establishment of non-competence of a court and the resulting transfer of a case cannot concern the subjective elements of a case referring to particular accused persons or the objective elements of a case referring to particular charges". If it were possible, the regulations concerning the subjective conjunction (Article 33 § 1 of the CPC) and the objective conjunction (Article 34 § 1 of the CPC) would be deprived of any sense. It must be assumed, however, that if based on Article 34 § 3 of the CPC, there are grounds for the exclusion of some cases from among the accused persons or matters with respect to some particular acts for separate hearing, then the issue of transferring the cases excluded for separate hearing to a competent court based on Article 35 § 1 of the CPC[38] is updated. There are also alternative opinions on this matter both in the doctrine[39] and in the judicature[40].

The establishment of non-competence of a court, which has already been explained, cannot take place when a case has been transferred in accordance with Article 36 of the CPC and Article 37 of the CPC because in both procedural

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[35] See ruling of the Court of Appeal in Krakow of 2 September 2009, II AKo 97/09 (KZS 2009, no. 12, item 66).

[36] (KZS 2009, no. 1, item 91).

[37] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 301.

[38] See ruling of the Court of Appeal in Katowice of 3 March 2004, II AKz 158/04 (KZS 2004, no. 9, item 73); also see the justification for the sentence of the Supreme Court of 20 February 2008, V KK 306/07 (OSNKW 2008, no. 6, item 47).

[39] D. Kaczorkiewicz, *Właściwość z łączności spraw karnych* [Features resulting from the conjunction of criminal cases], PS 2009, no. 11–12, p. 187.

[40] See ruling of the Court of Appeal in Wrocław of 11 April 2007, II AKz 178/07 (OSA 2007, no. 11, item 57).

situations referred to in the quoted provisions, the issue of competence has already been examined by a court of a higher instance and a decision of a court of a higher instance to transfer a case is binding for a court to which a case has been transferred for hearing[41]. In the literature on criminal proceeding[42] attention is drawn to the fact that "a situation in which a higher instance court transfers a case to a lower instance court should be treated in the same way as a situation in which a higher instance court refuses to hear a case transferred to it from a lower instance court under Article 35 § 1 of the CPC.

The issue of the possibility of appealing against the ruling on the matter of competence must be discussed separately. The issue is regulated in Article 35 § 3 of the CPC, according to which "parties are entitled to appeal against the ruling on competence". The cited provision *expressis verbis* indicates that a court hearing a case issues a decision on its competence concerning the matter, the territory and the function. In Article 35 § 3 of the CPC, the legislator gives the parties the right to appeal against the decision issued based on Article 35 § 3 of the CPC or Article 35 § 2 of the CPC. The decision on 'the issue of competence' as understood in Article 35 § 3 of the CPC is a decision in which a court *ex officio* states its non-competence as well as a decision on not allowing the motion filed by a party based on Article 9 § 2 of the CPC concerning the issue of a court's competence examination in view of the constitutionally guaranteed right to hearing of a case before a competent court (argument of Article 45 item 1 of the Constitution of the Republic of Poland)[43]. The Supreme Court expressed a similar standpoint in its ruling of 20 September 2007, I KZP 25/07[44], deciding that "the ruling on the competence of a court referred to in Article 35 § 3 of the CPC is such a ruling issued in accordance with Article 35 § 1 or 2 of the CPC, in which a court states its non-competence or does not allow a motion to state it". The standpoint is approved of in literature[45]. W. Jasiński[46]

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[41] K. Marszał, *Proces karny. Zagadnienia ogólne* [Criminal trial – general issues], Katowice 2013, p. 201; K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.) – (kilka uwag)* [Features of transferring a case (Article 36 of the CPC) – a few comments], [in:] *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy* [Fair trial – Professor Zofia Świda jubilee book], Warszawa 2009, pp. 340–341.

[42] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 302.

[43] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 206.

[44] (OSNKW 2007, no. 11, item 78).

[45] W. Grzeszczyk, *Przegląd uchwał Izby Karnej Sądu Najwyższego (prawo karne procesowe – 2007 r.)* [Review of resolutions of the Criminal Chamber of the Supreme Court (criminal procedure law – 2007)], Prokuratura i Prawo 2008, no. 4, p. 62; R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2007 r.* [Review of resolutions of the Criminal Chamber of the Supreme Court with respect to the criminal procedure law for 2007], WPP 2008, no. 2, p. 87; K. Marszał, *Glosa do postanowienia Sądu Najwyższego z dnia 20 września 2007 r., I KZP 25/07* [Gloss to the ruling of the Supreme Court of 20 September 2007, I KZP 25/07], PS 2008, no. 10, p. 149.

[46] W. Jasiński, *Kilka uwag na temat gwarancji prawa do rozpoznania sprawy przez sąd właściwy w polskim procesie karnym* [A few comments on guarantees of the right to the hearing of a case by a compe-

expresses an opinion that "a decision on competence is a decision in which a court states it is not competent to hear a case and transfers it to another court that is competent, or in which it states it is not competent to hear a case transferred from another organ". However, this opinion should be treated as isolated. Its consistent approval would mean that in practice an appeal would be admissible only against the decision in which a court decides both *ex officio* or on a motion that it is not competent and when a case has been transferred to it from another same level court or another organ, and it establishes it is not competent. However, in case a court establishes its competence, although a party believes it is not competent, a decision would not be subject to appeal. Analysing the contents of Article 35 § 3 of the CPC, one must notice that the legislator uses a phrase that there is right to appeal against "the decision on the issue of competence". Such normative wording means that both parties have the right to appeal against the decision, the party that believes a court is not competent (while a court decides that it is) and the party that believes a court is competent and is not right to transfer a case to another court for hearing. Both decisions are "decisions on the issue of competence", which can be appealed against in a higher instance court unless the Supreme Court has adjudicated on the case (Article 426 § 2 of the CPC)[47]. The statement that the possibility of appealing against the decision on the issue of competence referred to in Article 35 § 3 of the CPC is one of the situations in which, in accordance with Article 426 § 2 *in fine* of the CPC, "the statute stipulates alternatively" cannot be approved of. If this assumption were adopted, all the rulings issued by the Supreme Court as the first instance decisions could be appealed against if the legislator laid that possibility down in a statute. It would obviously be in conflict with the principle that the rulings of the Supreme Court cannot be appealed against[48].

The decision on transferring a case to a competent court is one of the decisions that shall be executed once they enter into force. Thus, after the ineffective expiry of a deadline for appeal or keeping the decision appealed against in force, a case should be transferred to a competent court[49].

It is worth mentioning that an opinion is expressed in the doctrine[50] that a decision on the issue of competence should not be subject to appeal at all, and a court would only notify the parties about refusal to establish its non-competence.

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tent court in the Polish criminal proceeding], [in:] *Nowa kodyfikacja prawa karnego* [New codification of criminal law], (ed.) L. Bogunia, vol. 21, Wrocław 2007, p. 202.

47 See ruling of the Supreme Court of 28 April 2008, I KZP 7/08 (OSNKW 2008, no. 6, item 43).

48 See ruling of the Supreme Court of 15 July 2010, VI KZ 3/10 (LEX no. 1223736).

49 D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 208 and the opinions of the doctrine cited there.

50 K. Marszał, *Badanie właściwości sądu w sprawach o przestępstwa* [Examination of a court's competence in criminal cases], p. 248.

EXAMINATION OF A COURT'S COMPETENCE AND JURISDICTION IN THE CRIMINAL PROCEEDING

Summary

The article presents the examination of a court's competence in the criminal proceeding. The issue is regulated in the provision of Article 35 § 1 of the CPC, according to which a court examines *ex officio* its competence and in case it establishes its non-competence, it transfers a case to a competent court or another organ. If during the first instance hearing a court establishes that it is not territorially competent or that a lower instance court is competent, it can transfer a case to another court but only in case a trial must be adjourned (argument from Article 35 § 2 of the CPC). This means that despite the establishment of its territorial non-competence, not earlier than during the first instance hearing, a court does not transfer a case to another court or another organ if a competent court is of the same level or a lower instance court and the trial does not have to be adjourned. The necessity for a trial adjournment is not the same as just the fact of its adjournment, but it is the actual existence of circumstances indicating the lack of rationale for establishing that a break in a trial is sufficient. Thus, the fact of a trial adjournment does not constitute a sufficient reason for transferring a case to another court that is territorially competent or a court of a lower instance if there are reasons against such a decision based on trial economics.

The decision on the issue of competence may be taken at the sitting and during the course of a trial (argument from Article 95 of the CPC).

The decision on the issue of competence can be appealed against (argument from Article 35 § 3 of the CPC).

BADANIE WŁAŚCIWOŚCI SĄDU W PROCESIE KARNYM

Streszczenie

W artykule przedstawiono badanie właściwości sądu w procesie karnym. Zagadnienie to reguluje przepis art. 35 § 1 k.p.k., według którego sąd bada z urzędu swą właściwość, a w razie stwierdzenia swej niewłaściwości przekazuje sprawę właściwemu sądowi lub innemu organowi. Jeżeli sąd na rozprawie głównej stwierdza, że nie jest właściwy miejscowo, lub że właściwy jest sąd niższego rzędu, może przekazać sprawę innemu sądowi jedynie wtedy, gdy powstaje konieczność odroczenia sprawy (arg. *ex* art. 35 § 2 k.p.k.). Oznacza to, że mimo stwierdzenia swej niewłaściwości miejscowej dopiero na rozprawie głównej, sąd nie przekazuje sprawy innemu sądowi lub innemu organowi, jeżeli do rozpoznania sprawy właściwy jest sąd równorzędny lub

sąd niższego rzędu, a nie jest konieczne odroczenie rozprawy. Konieczność odroczenia rozprawy to nie sam fakt jej odroczenia, lecz realne istnienie okoliczności wskazujących na brak przesłanek do uznania za wystarczającą przerwę w rozprawie. Sam fakt odroczenia rozprawy nie stanowi zatem wystarczającej przesłanki do przekazania sprawy innemu sądowi miejscowo właściwemu lub sądowi niższego rzędu, jeżeli przeciwko takiej decyzji przemawiają względy ekonomiki procesowej. Postanowienie w przedmiocie właściwości może być wydane zarówno na posiedzeniu, jak i na rozprawie (arg. *ex* art. 95 k.p.k.). Na postanowienie w kwestii właściwości przysługuje zażalenie (arg. *ex* art. 35 § 3 k.p.k.).

L'EXAMEN DES QUALITÉS DU TRIBUNAL DANS DE PROCÈS PÉNAL

Résumé

L'article présente l'examen des qualités du tribunal dans le procès pénal. Cette question est réglée par le contexte de l'art. 35 § 1 du code de la procédure pénale d'après lequel le tribunal examine sa qualité à titre d'office et quand il remarque des éléments inconvenables il transmet l'affaire à un autre tribunal ou à un autre organe. Si le tribunal décide à la séance principale qu'il n'est pas convenable à cause de la place ou le tribunal de moins importance est plus convenable, il peut transmettre cette affaire à un autre tribunal uniquement au cas de nécessite de remettre l'affaire (arg. *ex* art. 35 § 2 du code de la procédure pénale). Ce qui veut dire que malgré la confirmation de la situation inconvenable concernant la place à la séance principale, le tribunal ne transmet pas l'affaire à un autre tribunal parallèle ou celui de moins importance si l'ajournement de l'affaire n'est pas nécessaire. Toutefois la nécessité de remettre l'affaire n'est pas identique au fait de son ajournement mais uniquement des circonstances réelles montrant le manque des prémisses pour prouver la pause suffisante à la séance. Alors le fait de remettre l'affaire ne constitue pas une prémisse suffisante pour transmettre l'affaire à un autre tribunal convenable par sa place ou au tribunal de moins importance si contre cette décision il y a quelques éléments de l'économie du procès. La décision concernant les qualités peut être prise aussi bien au débat qu'à la séance (arg. *ex* art. 95 du code de la procédure pénale). A la décision concernant la qualité il y a la procédure de plainte (arg. *ex* art. 35 § 3 du code de la procédure pénale).

ИССЛЕДОВАНИЕ КОМПЕТЕНЦИИ СУДА В УГОЛОВНОМ ПРОЦЕССЕ

Резюме

В статье представлено исследование компетенции суда в уголовном процессе. Данный вопрос регулируется положением ст. 35 п. 1 УПК, согласно которому суд рассматривает по должности свои компетенции, а в случае определения отсутствия своей компетенции передаёт дело компетентному суду или другому органу. Если суд во время основного разбирательства определит, что не обладает компетенцией по территориальному признаку, либо компетентный суд является нижестоящим судом, может передать дело другому суду только тогда, когда возникнет необходимость отсрочки рассмотрения (арг. *ex* ст. 35 п. 2 УПК). Это означает, что, несмотря на определение отсутствия своей компетенции только в ходе основного разбирательства, суд не передаёт дела в другой суд либо другой орган, если перед ознакомлением с делом компетентный суд является равностоящим либо нижестоящим судом, а отсрочка рассмотрения дела не является необходимой. Необходимость отсрочки судебного разбирательства ещё не является самим фактом его отсрочки, а лишь реальным наличием обстоятельств, свидетельствующих об отсутствии предпосылок для признания достаточным перерыв в разбирательстве. Сам факт отсрочки разбирательства, таким образом, не представляет собой достаточной предпосылки для передачи дела другому суду, компетентному по территориальному признаку, либо нижестоящему суду, если против такого решения свидетельствуют интересы процессуальной экономии. Постановление о компетенции может быть выдано как на заседании, так в ходе разбирательства (арг. *ex* ст. 95 УПК). Постановление по вопросу о компетенции предусматривает возможность опротестования (арг. *ex* ст. 35 п. 3 УПК).

Ius Novum
2/2015

Jerzy Skorupka

TEMPORARY ARREST AFTER AMENDMENTS TO THE CRIMINAL PROCEDURE

1. As from 1 July 2015 Polish criminal procedure will undergo substantial changes resulting from the introduction of Acts of 27 September 2013[1] and of 20 February 2015[2] amending the Criminal Procedure Code (hereinafter referred to as the CPC). The two Acts introduce substantial changes into the existing model of temporary arrest (arrest awaiting trial), especially in determining the prerequisites, directives, bans and terms of using temporary arrest as well as in determining the procedure of using this measure and the parties' right to appeal.

The above-mentioned changes do not refer, however, to the entities using temporary arrest, thus continually, the only entity authorised to take a decision on temporary arrest is a court. In the preparatory proceeding (before trial starts), temporary arrest is ruled on the prosecutor's request by a district court where the proceeding is being carried out, or in urgent cases any other district court in the region.

The purpose of the application of temporary arrest has not been changed either. It is because of the character of the measure, which may be used only in order to meet specified statutory purposes that are safeguarding a proper course of the proceeding and prevention of the commission of another serious crime by the accused (a suspect) (Article 249 § 1 of the CPC)[3]. As far as this is concerned, the quoted provision is compatible with Article 5 § 1 letter c of the ECHR, which stipulates that temporary arrest may take place only in order to implement three purposes: (1) bringing the arrested person before the competent legal authority, (2) to prevent committing an offence and (3) to prevent fleeing after having committed an offence. The use of temporary arrest in order to meet other purposes is inadmissible.

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1 Journal of Laws 2013 item 1247 as amended.

2 Journal of Laws 2015 item 396.

3 See S. Waltoś, *Proces karny. Zarys systemu* [Criminal procedure – System outline], Warszawa 2008, p. 422.

Thus, temporary arrest plays a protective role as it protects the criminal proceeding against unlawful impediment to it and, at the same time, a preventive role as it prevents unlawful influence on the proper course of the proceeding, and a safeguarding role as it safeguards the legal order and the public against the commission of a new serious crime. Preventive arrest (in order to implement the safeguarding role) may be used only in extraordinary situations. The threat of the commission of a new serious crime by the accused must be real in the circumstances revealed in the case. The extraordinariness of preventive arrest is emphasised in Article 258 § 3 of the CPC.

2. Important amendments were made to determining prerequisites[4] of temporary arrest (Article 258 of the CPC) and restrictions (bans) on the use of this measure (Article 259 § 3 of the CPC), including fixed-term restrictions (Article 263 § 4b of the CPC).

High probability of the commission of a crime by the accused is still a general prerequisite of temporary arrest. Thus, we may use the measure when the collected evidence indicates high probability that the accused (a suspect in the preparatory proceeding) has committed the crime he is charged with[5]. In the adjudication of Polish courts, it is assumed that establishing 'high probability' of the commission of a crime as referred to in Article 259 § 1 of the CPC, the party conducting the proceeding must be in possession of such evidence that constitute a state close to certainty[6]. High probability that the accused has committed a crime he is charged with justifies his conviction in an invalid sentence[7].

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[4] Prerequisites are actual or legal circumstances that constitute conditions for the application or lengthening of the use of preventive measures, and grounds are statutory provisions that constitute the legal basis for the use or the lengthening of the use of preventive measures.

[5] See K. Dąbkiewicz, *Tymczasowe aresztowanie* [Temporary arrest], Warszawa 2012, p. 90; J. Skorupka, *Stosowanie i przedłużanie tymczasowego aresztowania w postępowaniu przygotowawczym* [Application and lengthening of temporary arrest in the preparatory proceeding], Prokuratura i Prawo 2006, No. 12, p. 111; *ibid.*, Gloss to the judgement of the Court of Appeal in Wroclaw of 19 October 2005, II Akz 453/05, OSP 2007, vol. 2; J. Grajewski, *Przebieg procesu karnego* [Course of criminal proceeding], Warszawa 2012, p. 113; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceeding], Warszawa 2011, p. 587; S. Waltoś, *Proces karny…* [Criminal trial…], pp. 424–425. See judgement of the ECtHR of 27 May 2003 in case 44115/98 *Wedler v. Poland*, in accordance with which the legitimacy of suspicion of a punishable act constitutes the basic condition of the protection against arbitrary arrest, which is referred to in Article 5 item 1 letter c of the ECHR. The existence of "justified suspicion" assumes that there are data that can convince an objective observer that the given person could have committed a punishable act. The standard laid down in in Article 5 item 1 letter c of the ECHR does not require, however, that at the moment of an arrest the law enforcement agencies have evidence necessary to make an indictment.

[6] See judgment of the Court of Appeal in Warszawa of 11 August 2009, II AKz 1006/09, OSA 2012, No. 1, item 2; sentence of the Administrative Court in Warszawa of 1 June 2009, II AKa 98/09, OSA 2012, No. 2, item 9). It is also assumed that the issue of the EAW exempts the detention court from verifying the evidentiary grounds for temporary arrest – see decision of the Court of Appeal in Gdansk of 29 November 2011, II AKz 794/11, KZS 2012, No. 4, item 64; decision of the Court of Appeal in Bialystok of 23 August 2012, II AKz 261/12, KZS 2012, No. 11, item 95.

[7] See judgement of the Court of Appeal in Krakow of 27 July 2005, II AKz 288/05, KZS 2005, No. 7–8, item 87.

Moreover, the real grounds for temporary arrest must result from evidence that have already been collected in the course of the proceeding. The evidence must indicate that the crime has been committed and that the person who is subject to the use of the discussed preventive measure has committed it[8]. If there is no probability of a crime commission, the preventive measure must not be applied (a negative prerequisite)[9].

A court adjudicating in the matter of temporary arrest is obliged to confront evidence with the prosecutor's legal classification with respect to the indication of high probability of the existence of subjective and objective features of the act the accused is *in concreto* charged with[10]. To tell the truth, court judgements express the opinion that in the proceeding with respect to temporary arrest, the grounds for legal classification should not be assessed as this is subject to an adjudicating court's decision after an indictment is filed[11]. However, one is right to express a different opinion that adjudicating at the stage of the preparatory proceeding whether to apply or lengthen the use of temporary arrest, the court is obliged to assess the grounds for the prosecutor's legal classification of the act the accused is charged with. This assessment should be made in accordance with the statutory prerequisites of temporary arrest[12].

The provision of Article 249a of the CPC added by the amendment of 27 September 2013 formulates new evidence-related grounds for temporary arrest. Under the quoted provision, only findings based on evidence revealed to the accused and his barrister should constitute grounds for the application or lengthening of temporary arrest. Routinely, the court also takes into account circumstances that the prosecutor did not reveal earlier after they have been revealed at the court sitting if they are favourable for the accused. The quoted provision is strictly related to the solution laid down in Article 156 § 5a of the CPC, which envisages a requirement of providing the accused and his barrister

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[8] Compare decision of the Supreme Court of 15 April 1983, II KZ 31/83, OSNKW 1983, No. 10–11, item 90; decision of the Court of Appeal in Krakow of 23 November 1993, II AKz 327/93, KZS 1993, No. 11, item 23.

[9] Compare decision of the Court of Appeal in Krakow of 10 May 2000, II AKz 97/00, KZS 2000, No. 5, item 43; sentence of the Court of Appeal in Lodz of 25 March 2014, II AKa 6/14, Legalis.

[10] Compare M. Pacyna, *Duże prawdopodobieństwo popełnienia przestępstwa jako przesłanka stosowania środków zapobiegawczych* [High probability of a crime commission as a prerequisite of the application of preventive measures], CzPKiNP 2008, no. 2, p. 133; decision of the Court of Appeal in Krakow of 28 April 2008, II AKz 210/08, KZS 2008, No. 6, item 45.

[11] See decision of the Supreme Court of 1 December 2003, WZ 62/03, OSNwSK 2003, No. 1, item 2597; decision of the Court of Appeal in Katowice of 8 June 2005, II AKz 337/05, KZS 2005, No. 12, item 62; decision of the Court of Appeal in Krakow of 17 December 2008 r., II AKz 632/08, unpublished; decision of the Court of Appeal in Katowice of 5 September 2008, II AKz 661/08, KZS 2009, No. 7–8, item 93; decision of the Court of Appeal in Katowice of 18 February 2009, II AKz 110/09, KZS 2009, No. 3, item 61; decision of the in Katowice Court of Appeal of 10 February 2010, II AKz 76/10, KZS 2010, No. 9, item 67; decision of the Court of Appeal in Krakow of 29 august 2013, II AKz 338/13, KZS 2013, No. 9, item 85.

[12] See resolution of the Supreme Court (7) of 27 January 2011, I KZP 23/10, OSNKW 2011, No. 1, item 1.

with the case files containing the evidence being grounds for the temporary arrest motion. However, the possibility of fulfilling real (effective) defence in the proceeding connected with temporary arrest depends on, inter alia, the possession of information about evidence indicating the commission of a crime the accused is charged with and the circumstances indicating the threat of unlawful obstruction of the proceeding by the accused. The scope of the information limits the defence of the accused at the temporary arrest proceeding stage. Thus, access to the preparatory proceeding files is of crucial importance for the accused and his barrister. That is why the amended Article 156 § 5a of the CPC introduces a solution that in case of filing a motion to apply or lengthen temporary arrest in the course of preparatory proceeding, the accused and his barrister is, without delay, provided with the case files relating to the evidence included in the motion. The prosecutor may provide the files in an electronic form[13].

Since commencing on 1 July 2015, only findings based on evidence revealed to the accused and his barrister may be grounds for the decision to apply or lengthen temporary arrest, the court will not be able to use evidence that has not been revealed to the accused and his barrister as real grounds for temporary arrest, which is possible at present. The evidence that has not been revealed to the defence will not constitute grounds for determining general and specific prerequisites of temporary arrest. However, Article 249a sentence 2 of the CPC obliges the court to routinely take into account also such circumstances that have not been revealed to the other party but are favourable to the accused. In such case, the court will be obliged to reveal them at the sitting, which will enable the accused to defend adequately and the prosecutor to refer to the circumstances. Thus, the quoted regulation obliges the court to carefully analyse not only the prosecutor's motion but also the case files provided together with that motion. The barrister may draw the court's attention to the evidence in the files that has been omitted by the prosecutor but is favourable for the accused.

3. Other conditions for the application of temporary arrest are defined by the prerequisites laid down in Article 258 § 1–3 of the CPC. According to them, temporary arrest may be applied under the condition that: (1) there is a justified concern that the accused could flee or hide, especially when his identity cannot be established or he does not have permanent residence; (2) there is a justified concern that the accused will induce witnesses to give false evidence or explanations or in any other way hinder the criminal proceeding.

In general, the quoted prerequisites have not been amended in comparison with the legal state before 1 July 2015. Thus the criminal procedure law doctrine

[13] See Article 6 point 1 letter b of Act of 20 February 2015 amending Act – Law on the system of common courts and some other acts.

representatives' and Polish courts' statements regarding their interpretation[14], including the one that as from 1 July 2015 it will be necessary to take into account that the accused will no longer be obliged to participate in the court trial. Under Article 374 § 1 of the CPC, the accused has the right to take part in the trial. Only in cases of felony, the presence of the accused at the trial is obligatory but only during the presentation of charges by the prosecutor, the provision of information about his rights and the consequences of not making use of some of them and during his testimonies and explanations. Thus, the above-mentioned regulation should to a great extent limit the application of temporary arrest used to ensure the presence of the accused in the course of the court proceeding.

The next specific prerequisite laid down in Article 258 § 2 of the CPC has been subject to a substantial amendment. The change resulted from a polarisation of opinions about the meaning of the cited provision[15] and "the faulty practice of the automatic application of temporary arrest based on the ruled or imminent penalty without an analysis whether there are any concerns for the proper course of the proceeding when the purpose of preventive measures is to ensure the proper course of the proceeding" by eliminating or limiting the threat (risk) that it will be carried out in an improper way[16]. Under the amended Article 258 § 2 of the CPC, the concerns that the accused who was charged with felony or crime that carries at least eight years' imprisonment or whom the court of the first instance sentenced to more than three years' imprisonment could hinder the proper course of the proceeding, which are referred to in § 1 and justifying the application of temporary arrest, may also result from the severity of the punishment he may be subject to.

First of all, it must be indicated that in Article 258 § 2 of the CPC, the thresholds for imprisonment have been raised because in case of the first instance court's (still invalid) sentence it should be "more than three years", unlike "not less than three years" formerly. However, the possible imprisonment as penalty for a misdemeanour has remained the same. Now, there is also a clear link between the prerequisite of temporary arrest as referred to in § 2 of Article 258 of the CPC and concerns indicated in § 1 of Article 258 of the CPC. Formerly, the application of temporary arrest under Article 258 § 2 of the CPC could be justified by an expected severe penalty. Now the amended § 2 of the provision stipulates that the application of temporary arrest can be justified by concerns referred to in § 1 of Article 258 of the CPC, i.e. that the accused might flee or

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[14] See K. Dąbkiewicz, *op. cit.*, pp. 96–194 and literature cited there and judgements of the Polish courts and the ECtHR; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceeding], Warszawa 2011, pp. 590–592.

[15] See K. Dąbkiewicz, *op. cit.*, pp. 116–127.

[16] See, for example, judgement of the Court of Appeal in Krakow of 6 December 2012, II AKz 500/12, Prokuratura i Prawo 2013/7–8/39.

hide, or prevent the course of justice, or act in another way to obstruct the criminal proceeding, which can also result from the severity of possible punishment.

Thus, charging the accused with a crime or a given misdemeanour and the severity of the punishment they carry constitute the only circumstances (facts) justifying the concerns referred to in § 1 of Article 258[17]. The prerequisite of the application of temporary arrest is not the circumstance that the accused may be severely punished, but the concern arising from that fact that he might unlawfully obstruct the proper course of the proceeding as referred to in § 1 of Article 258 of the CPC.

There is no amendment to the contents of the prerequisite of temporary arrest under Article 258 § 3 of the CPC. Therefore, the circumstances providing grounds for the application of the discussed measure under the quoted provision is a concern that the accused who was charged with the commission of a crime or a deliberate misdemeanour will commit a crime against life, health or public security, especially if he had threatened to do that.

4. Apart from the prerequisites of the circumstances that must occur for temporary arrest to be admissible, criminal procedure also envisages norms that are directive-like, requiring that some circumstances must be taken into account when the measure is to be applied. As from 1 July 2015, two directives are in force, i.e. on adaptation – laid down in Article 253 § 1 of the CPC, and on minimisation of temporary arrest laid down in Article 257 § 1 of the CPC. With the amendment of 27 September 2013, in Article 258 § 4 of the CPC another directive is laid down, which can be called a directive on adequacy (proportionality) of preventive measures, including temporary arrest. In accordance with it, taking a decision to apply a given preventive measure, the type and character of concerns referred to in § 1–3 being grounds for the application of a given measure as well as the growing threat for the proper course of the proceeding at a specified stage should be taken into consideration. Thus, the quoted directive requires that, before the application of temporary arrest, it should be taken into consideration what type of concerns are the prerequisite of it, i.e. that the accused could: flee (Article 258 § 1 point 1), hide (Article 258 § 1 point 1), prevent the proper course of justice (Article 258 § 1 point 2), in another unlawful way hinder the criminal proceeding (Article 258 § 2), hinder the proper course of the proceeding as referred to in § 1 (Article 258 § 2), commit a new crime against life, health or public security (Article 258 § 3 of the CPC). The discussed directive also requires that the increase of the threat for the given concerns about the proper course of the proceeding at a given stage be taken into account. The movement of the proceeding within the given stage and passing from one stage to another cause that the increase in threats for the proceeding may differ. Typi-

[17] See K. Dąbkiewicz, *op. cit.*, p. 118 and literature quoted there.

cally, over time the risk of unlawful hindering of the course of the criminal proceeding as a result of these concerns is decreasing. The proceeding organs taking a decision to apply temporary arrest should therefore take into account the type and character of the concerns and refer to the stage of the criminal proceeding in the given case. Temporary arrest must be, however, adequate (proportional) to the level of risk of an improper course of the proceeding. The measure will be adequate (proportional) to the level of existing threats if it is purposeful, i.e. will aim to ensure the proper course of the proceeding by eliminating or limiting the threats; if it is necessary, and thus applied only in case there is a well-grounded risk for the proper course of the proceeding, and proportional in the strict meaning of the term when it ensures the proper course of the proceeding in a way adequate to the level of existing threats. It must be highlighted that in its judgements, the ECtHR demonstrates – it seems – the standpoint that in order to prove that imprisonment is not arbitrary in accordance with Article 5 item 1 of the European Convention, it is not enough to apply the preventive measure in accordance with the national law. Such a measure must be necessary in the circumstances of the given case[18].

The directives on the adequacy (proportionality) under Article 258 § 4 of the CPC, minimisation of temporary arrest under Article 257 § 1 of the CPC and adaptation of preventive measures to the procedural situation of the accused under Article 253 § 1 of the CPC constitute the expression of respect to the normative principles of proportionality of the limitation of an individual's rights and freedoms that are referred to in Article 31 item 3 of the Constitution of the Republic of Poland. With the use of the directive on the minimisation of temporary arrest and the directive on the adaptation of preventive measures to the procedural situation of the accused, expressed in permanent and routinely performed control by the court and the prosecutor whether the sacrificed good of personal freedom is at every stage of the proceeding proportional to the aim referred to in Article 249 § 1 of the CPC, the legislator tries to ensure that the consequences of the limitation of the freedom of the accused are proportional to the burdens imposed on him. This way the requirements of necessity and proportionality *sensu stricte* are met because the provisions of Article 253 § 1 and 2 of the CPC and Article 257 § 1 of the CPC require that temporary arrest and other preventive measures are lifted without delay if they prove to be no longer necessary to protect the proper course of the criminal proceeding. In other words, if it is found that there is no need to protect the proper course of the criminal proceeding because the state of concerns about its unlawful hindering ended or it is found that the protection of the proper course of the criminal proceeding or preventing the commission of a new serious crime by

[18] See, for example, ruling of the ECtHR of 30 June 2013 in case 49872/11 Tymoshenko v. Ukraine, Lex number 1306207.

the accused may be obtained with the application of less strenuous measures (interfering into the sphere of the rights and freedoms of the accused), it is necessary to, without delay, withdraw the application of preventive measures or a more 'lenient' measure should substitute for a more 'severe' one[19].

5. The construction of the so-called conditional temporary arrest under Article 257 § 2 of the CPC remains unchanged. It is applied in order to overcome the difficulties arising in connection with the substitution of bail for temporary arrest[20]. In order to make it effective, it is necessary to deposit some property (Article 266 § 1 of the CPC). Quashing temporary arrest before the property has been deposited results in a risk that the property will not be deposited at all. In such a situation, conditional temporary arrest is a pragmatic solution. Applying conditional temporary arrest, the court rules when the given property must be deposited. Once the property is deposited, the ruling on temporary arrest is invalid *ex lege* and the accused cannot be kept in prison any longer. At the same time the execution of bail starts[21].

The application of temporary arrest with a reservation that the measure will be changed for bail until the prescribed time means that there are still prerequisites of temporary arrest, but bail is a sufficient means of ensuring the proper course of the proceeding if the given property is deposited in due time. Alternatively, temporary arrest will continue[22].

The amendment of 27 September 2013 to the contents of Article 257 § 2 of the CPC consists in the addition of a provision that on the well-grounded request of the accused or his barrister, filed at the latest on the last day of the prescribed period, the court may postpone the deadline for depositing the given property. This amendment is of great importance for the accused. He now has an opportunity to lengthen the period necessary to deposit the given property. Thus, in the event of collecting the means for the deposit after the prescribed deadline, it is necessary to start another bail proceeding and then one more to annul temporary arrest.

6. Amendments also refer to the provisions determining bans on temporary arrest. As from 1 July 2015, there is a ban on temporary arrest in cases of misdemeanour carrying less than one year's imprisonment (Article 259 § 3 of the

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[19] For more see J. Skorupka, *Limitacja tymczasowego aresztowania w polskim procesie karnym* [Limitation of temporary arrest in the Polish criminal trial], Prokuratura i Prawo 2012, z. 3, p. 55.

[20] See A. Szymacha-Zwolinska, *Kompetencje sądu w zakresie stosowania środków zapobiegawczych w toku postępowania przygotowawczego* [Competence of court in the application of preventive measures in the course of the preparatory proceeding], PS 1997, no. 2, p. 37.

[21] See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2007, p. 1159.

[22] See judgement of the Court of Appeal in Wroclaw of 28 November 2006, II AKz 598/06, OSA 2007, No. 9, item 45.

CPC). The ban is relative in character because it is not applicable to a person who has been caught red-handed or directly after the commission of crime. As from 1 July 2015, temporary arrest shall not be applied in case of a crime carrying less than two years' imprisonment (amended Article 259 § 3 of the CPC). Thus, the threshold of the penalty has been raised from one year to two years and the negative prerequisite of the ban, i.e. the apprehension of the perpetrator red-handed or directly after the commission of crime has been withdrawn. After the amendment, the discussed circumstance shall not be important for the application of the ban on temporary arrest. The regulation aims to limit the possibilities of applying temporary arrest in petty offences. However, in the new legal state, there are still exceptions to the ban under § 3 of Article 259 of the CPC resulting from § 4 of the same provision, which, in case of hiding, persistent failure to appear or other unlawful (but actual, not hypothetical) hindering of the course of the proceeding or the lack of possibility of determining the identity of the accused, result in the application of temporary arrest although the crime the accused is charged with carries less than two years' imprisonment.

Article 269 § 1 of the CPC was also amended. It indicates that temporary arrest may be executed not only in the form of referral to the adequate medical institution, but also a psychiatric facility or drug rehabilitation institution.

7. In general, there are no amendments to the time limits for the application of temporary arrest. Arrest awaiting trial in the preparatory proceeding is applied for no longer than three months. Provided that the preparatory proceeding cannot be finished in three months' time because of some extraordinary circumstances, temporary arrest may be lengthened to a period that totally cannot exceed 12 months, but only in case of necessity. The total period of temporary arrest until the first instance court sentence is issued cannot exceed two years although the limitation is relative in character. The terms of 12 months and two years of temporary arrest may be lengthened by the court of appeal in case there are extraordinary prerequisites as referred to in Article 263 § 4 of the CPC. Under the new Article 263 § 4b of the CPC, temporary arrest should not be applied for a period longer than 12 months if the accused is charged with a crime carrying up to three years' imprisonment, and two years when the accused is charged with a crime carrying up to five years' imprisonment unless the necessity of that lengthening results from the protraction of the proceeding caused by the accused. Lengthening the time limit for temporary arrest in the preparatory proceeding to more than a year (12 months), the legislator introduced a ban on further lengthening when a crime carries a penalty *in concreto* that does not exceed three years' imprisonment, and during the court trial to over two years if the penalty does not exceed five years' imprisonment. The discussed bans would not work, however, if the necessity to lengthen the arrest resulted from intentional protraction of the proceeding by the accused. The solution is to prevent longer

arrest of the accused in cases that are less serious in nature, i.e. situations when after the conviction and deduction of the period of temporary arrest, the convict is to serve only part of the penalty as well as cases when, in spite of a relatively low harmfulness of an act, the ruled penalty is rather severe because of the long temporary arrest and the need to treat it as part of the penalty, otherwise damages for obviously undue arrest would have to be taken into account.

8. Amendments are made to the provisions determining the mode of proceeding in the application of temporary arrest. According to Article 249 § 2 of the CPC, temporary arrest may be applied only towards a person who has a status of a suspect or the accused. That is why the formal condition for the application of the measure is the former decision to press charges[23]. Prior to the application of temporary arrest, a court questions the accused (Article 249 § 3 of the CPC). The use of the measure is not possible without that hearing. The provision of Article 249 § 3 of the CPC allows for the use of temporary arrest without the prior hearing only when the accused hides in the country or has left the country and also when it is necessary to look for him and bring him before court by force (Article 278 of the CPC and Article 247 § 2 of the CPC), and also when law enforcement agencies apply for extradition of the wanted from abroad (Article 594 § 1 of the CPC) or for rendition in accordance with EAW (Article 607a of the CPC). Court rulings[24] rightly indicate that the necessity to hear the arrested person (Article 249 § 3 of the CPC) is not in conflict with the use of arrest and arrest warrant without the hearing but only based on written information. However, when he is apprehended, he should be heard without delay and decision should be taken whether arrest should be continued even if the arrested person did not demand that himself. Every detained or arrested person shall appear before court without delay (Article 5 item 3 of the ECHR)[25].

Filing a motion to apply a temporary arrest in the preparatory proceeding, the prosecutor should provide evidence indicating high probability that the accused committed a crime and circumstances confirming specific threats for the proper course of the proceeding or a possibility that the accused will commit a new serious crime and circumstances indicating that there are grounds for the use of this preventive measure and a necessity to do that.

Thus, the quoted provision determines the requirements that must be met by the justification of the prosecutor's motion to apply temporary arrest, provided

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[23] Compare P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2007, p. 1121; T. Grzegorczyk, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2014, p. 892.

[24] See decision of the Court of Appeal in Krakow of 6 January 2000 r., II AKz 304/99, KZS 2000, No. 1, item 29.

[25] See J. Matras, *Standard „równości broni" w postępowaniu w przedmiocie tymczasowego aresztowania* [Standard of 'equality of arms' in connection with temporary arrest], Prokuratura i Prawo 2009, no. 3, p. 5.

that the prosecutor should: (1) list the evidence that indicates the existence of the – required by Article 249 § 1 of the CPC – prerequisite of high probability that the accused committed a crime that he is charged with; (2) indicate circumstances that indicate a justified concern that the accused will unlawfully hinder the proceeding or commit a new serious crime (Article 258 § 1–3 of the CPC); (3) prove that there are legal ground for the use of temporary arrest and a necessity to use it, which is connected with taking into account the directive on minimising temporary arrest referred to in § 1 of the Article 257 of the CPC, under which temporary arrest shall not be applied if another preventive measure is sufficient and taking into account the directive on adequacy (proportionality) referred to in the new § 4 of Article 258 of the CPC that requires that the level of the increase in the concern at the given stage of the proceeding should be taken into consideration.

It must be added that the elements of the prosecutor's motion listed in § 2 of Article 250 of the CPC must be based only on the evidence revealed to the accused or his barrister. Moreover, it must be taken into consideration that court rulings and the doctrine unanimously assume that lengthening of temporary arrest is also its application, but only a further one, thus the requirements laid down in Article 250 § 2a of the CPC also refer to the prosecutor's motion to lengthen this preventive measure[26].

The introduction of Article 250 § 2a of the CPC resulted in the amendment to Article 251 § 3 of the CPC, determining formal requirements for the court decision to apply temporary arrest. Under Article 251 § 3 of the CPC, the justification of the decision to apply temporary arrest should contain: (1) the evidence indicating that the accused committed a crime; (2) circumstances indicating that there are certain threats for the proper course of the proceeding; or (3) a possibility that the accused will commit a new serious crime in case the preventive measure is not used; (4) circumstances indicating the existence of specific grounds for its application; and (5) the need to use a given measure; as well as (6) explanation why the application of other measures is not recognised as sufficient.

As from 1 July 2015, a court in its decision concerning temporary arrest, like the prosecutor in his motion to apply temporary arrest, will have to take into account the directives on: minimisation of temporary arrest and adequacy (proportionality) of preventive measures.

9. In the arrest procedure, the principle of 'the equality of arms' between the parties to the proceeding, i.e. the prosecutor and the accused, is applied, which is clearly laid down in the Act of 27 September 2013 amending Article 156

[26] See K. Dąbkiewicz, *op. cit.*, p. 167 and the following, and literature and court judgements cited there.

§ 5a and Article 249 § 5 of the CPC and adding Article 249a of the CPC. In accordance with them, the accused and his barrister should have access to preparatory proceeding files to the extent that is necessary to effectively challenge the grounds for and legality of temporary arrest[27]. It is emphasised in literature that the sense of the guarantee of the equality of arms, which is used in every proceeding before court, regardless of the stage of the proceeding, consists in the fact that none of the parties can be in a situation clearly worse than the other party as far as the possibility of presenting their arguments is concerned[28]. The right to contradictory trial means that both the prosecution and the defence must be guaranteed the possibility of learning and next responding to the allegations and evidence presented by the opponent.

Although there is no statutory regulation, a court is obliged to deliver the prosecutor's motion to apply temporary arrest to the accused and his barrister, because this results from the established judgements of the ECtHR[29]. The accused (a suspect) and his barrister can therefore file a request for the provision of the prosecutor's motion in accordance with Article 156 § 1 of the CPC. The discussed motion constitutes part of the trial files[30]. The copy of the motion should be delivered in time that would enable the accused to prepare the defence and counterarguments.

The obligation under Article 249 § 3 of the CPC to let the barrister take part in the interrogation of the accused (both in the preparatory and court proceeding) is implemented when the barrister has been appointed before the interrogation starts. It should be interpreted broadly as including the appointment of a public defender[31]. The defender's failure to appear does not stop the course of the proceeding in the sense that interrogation is possible without the defender's presence. In accordance with § 3, the obligation to let the defender take part in the interrogation is binding when he appears to do so[32].

The accused (a suspect) under arrest, who has no appointed defender, should be notified about the time of the court's sitting in connection with the motion to lengthen temporary arrest (Article 249 § 5 of the CPC) in the same way as the

[27] Compare M. Wąsek-Wiaderek, *Zasada równości w polskim procesie karnym w perspektywie prawnoporównawczej* [Principle of equality in the Polish criminal proceeding from legal-comparative perspective], Kraków 2003, p. 199.

[28] See P. Hofmański, S. Zabłocki, Gloss to the sentence of the ECtHR of 25 Maech 1998, p. 6; C. Nowak, *Zasada równości w europejskim i polskim postępowaniu karnym* [Principle of equality in the European and Polish criminal proceeding], Prokuratura i Prawo 1999, vol. 3, p. 38.

[29] See sentence of the ECtHR of 5 July 2005 in case 207/23 Osvath v. Hungary, Lex number 154374; sentence of the ECtHR of 6 November 2007 in case 22755/04 Chruściński v. Poland, Lex number 318593; sentence of the ECtHR of 15 January 2008 in case 28481/03 Łaszkiewicz v. Poland, Lex number 336949.

[30] See P. Kardas, *Z problematyki dostępu do akt sprawy w postępowaniu w przedmiocie zastosowania tymczasowego aresztowania* [Issues of access to files of the proceeding in case of the application of temporary arrest], CzPKiNP 2008, No. 2, p. 5; J. Skorupka, Gloss to the decision of the Court of Appeal in Wrocław of 12 September 2011, II Akp 18/11 and II Akp 19/11, WSS 2012, No. 1, p. 64.

[31] See P. Hofmański, *KPK. Komentarz* [CPC – Commentary], vol. I, 2007, p. 1123.

[32] See *ibid.*

prosecutor[33]. On the other hand, according to the amendment of 27 September 2013, on the request made by the accused (a suspect in the preparatory proceeding) without a defender appointed earlier, a public defender is appointed. The court clerk may also take a decision in this matter. The adopted solution is in compliance with Article 80a § 2 of the CPC added to the Act of 27 September 2013, under which the president of the court, the court or the court clerk may appoint a defender for the accused who has no one chosen on his own in order to fulfil some procedural tasks. The accused (a suspect) must appear at each sitting that is referred to in Article 249 § 5 of the CPC. Thus, the quoted provision ensures only formal defence at the stage of lengthening temporary arrest and dealing with the appeal against the decision to apply or lengthen this measure.

10. According to new Article 261 § 2a of the CPC on the application of temporary arrest, the court notifies the organ conducting the proceeding against the accused in another case, provided it knows about the proceeding. The court also informs the accused about the contents of Article 75 § 1 of the CPC (a duty to appear and notify about the change of place of residence or stay longer than seven days). Thus, the amendment to Article 261 § 2 of the CPC consists only in broadening the range of entities notified on the request of the accused about the application of temporary arrest and the addition of organs that conduct the criminal proceeding against him in another case.

11. The amendments to the application of temporary arrest must be approved of. They respond to numerous opinions expressed by the representatives of the doctrine of the criminal procedure law as well as the standpoint of the UCtHR on the necessity to respect the standard of *habeas corpus*, which means the automatic taking of the detained person before court in the course of criminal proceeding, which was expressed in the amendment to Article 279 ensuring the 'equality of arms' during the sitting concerning temporary arrest (Article 156 § 5a, Article 249a, Article 251 § 3, Article 250 § 2a and Article 249 § 5 of the CPC) and the time limit for temporary arrest (Article 263 § 4b, Article 264 § 3 and Article 258 § 4 of the CPC).

[33] Compare J. Matras, *Standard równości*… [Standard of equality…], p. 5.

TEMPORARY ARREST AFTER AMENDMENTS TO THE CRIMINAL PROCEDURE

Summary

The article discusses the model of temporary arrest after the amendments to the criminal procedure. It is still a purpose-related measure used only to ensure the proper course of the proceeding and prevent a commission of a new serious crime. The prerequisites of and bans on temporary arrest have been changed a little. A new directive on adequacy (proportionality) has been introduced and together with the directives on minimisation and adaptation it creates a coherent series of circumstances that must be taken into consideration while taking the decision to apply or lengthen temporary arrest. Although the maximum time limits for temporary arrest have not been laid down, the possibility of lengthening the use of this measure has been substantially limited.

TYMCZASOWE ARESZTOWANIE PO ZMIANACH PROCEDURY KARNEJ

Streszczenie

W artykule omówiono model tymczasowego aresztowania po zmianach procedury karnej. W dalszym ciągu jest to środek celowy, stosowany wyłącznie dla zabezpieczenia prawidłowego toku postępowania oraz zapobieżenia popełnienia nowego ciężkiego przestępstwa. Nieznacznie zmieniły się przesłanki i zakazy tymczasowego aresztowania. Dodano zaś nową dyrektywę w postaci adekwatności (proporcjonalności), która wraz z dyrektywami minimalizacji i adaptacji tworzy spójny zespół okoliczności, które muszą być uwzględnione przy podejmowaniu decyzji o zastosowaniu i przedłużeniu tymczasowego aresztowania. Pomimo, że nie zdecydowano się na wprowadzenie maksymalnych terminów tymczasowego aresztowania, znacznie ograniczono możliwości przedłużania tego środka.

L'ARRESTATION PROVISOIRE APRÈS LES CHANGEMENTS DE LA PROCÉDURE PÉNALE

Résumé

Dans l'article l'auteur parle du modèle de l'arrestation provisoire après le changement de la procédure pénale. Elle reste toujours comme moyen final, appliqué uniquement pour continuer la suite de la procédure et prévenir d'accomplir un nouveau délit

plus grave. Les prémisses et l'interdiction de l'arrestation provisoire ont changé insensiblement seulement. Une nouvelle directive sous la forme de l'adéquation (proportionnelle) a été ajoutée ce qui forme avec la directive de minimalisation et d'adaptation un ensemble cohérent des circonstances qui doivent être respectés si on prend la décision de l'application et du prolongement de l'arrestation provisoire. Malgré le manque de l'introduction des dates maximales de l'arrestation provisoire, on a limité la possibilité de prolonger ce moyen.

ВРЕМЕННОЕ ЗАКЛЮЧЕНИЕ ПОД СТРАЖУ ПОСЛЕ ИЗМЕНЕНИЙ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ

Резюме

В статье рассматривается модель временного заключения под стражу после изменений уголовной процедуры. Это по-прежнему целенаправленная мера, применяемая исключительно в целях обеспечения правильного осуществления судопроизводства, а также предотвращения совершения нового тяжкого преступления. В незначительной степени изменились предпосылки и запреты временного заключения под стражу. Добавлена новая директива в качестве адекватности (пропорциональности), которая наряду с директивами минимизации и адаптации образует новый круг обстоятельств, которые следует учитывать при принятии решений о применении и продлении временного заключения под стражу. Несмотря на то, что не принято решение о введении максимальных сроков временного заключения под стражу, возможности продления данной меры значительно ограничены.

Adam Taracha

ON THE ADEQUATE APPLICATION OF ARTICLE 393 § 1 SENTENCE 1 OF THE CPC TOWARDS MATERIAL OBTAINED AS A RESULT OF SURVEILLANCE OPERATIONS

Low-key detection actions (surveillance operations) provide law enforcement agencies with essential information that cannot be acquired in another way. Because of that, it seems understandable that their direct use in the criminal proceeding is desirable. For many years, however, there has been a dominating opinion and a practical criminal proceeding rule, according to which the use of that operational knowledge was only possible with the application of adequate procedures (e.g. an interrogation, a search etc.) in accordance with all the rules of evidence law. It was called 'transformation' ('processing') of operational actions into criminal procedure actions[1]. The change of the rule resulted from the adoption of the regulations in the so-called policing acts of 1990[2] and amendments to the Acts of 1995[3], which directly point out situations when surveillance material may be used in the criminal proceeding. In the literature on this issue, there are also opinions about the admissibility of surveillance results in the criminal proceeding without the need to 'transform' them.[4] However, they do not

[1] See, inter alia, J. Widacki, *Kryminalistyka. cz. I* [Forensic science, Part I], Katowice 1980, p. 143; M. Kulicki, *Kryminalistyka. Zagadnienia wybrane* [Forensic science, Selected issues], Toruń 1988, pp. 73–83; T. Hanausek, *Kryminalistyka. Zarys wykładu* [Forensic science, Lecture outline], Kraków 1996, pp. 96–97; A. Bulsiewicz, A. Lach, *Procesowe i pozaprocesowe uzyskiwanie billingu telefonicznego* [Procedural and extra-procedural acquisition of telephone billings], [in:] *Procesowo-kryminalistyczne czynności dowodowe. Materiały pokonferencyjne* [Evidence acquisition activities in criminal proceeding – conference material], (ed.) M. Lisiecki, M. Zajder, Szczytno 2003, p. 20; A. Żebrowski, *Czynności operacyjno-rozpoznawcze, Regulacje prawne* [Surveillance operations, Legal regulations], Kraków 2000, p. 17.

[2] Acts on the Minister of the Interior, on the Police and on the Office of State Protection of 6 April 1990 (Journal of Laws No. 30, items 179, 180 and 181) and Act on the Border Guard of 12 October 1990 (Journal of Laws No. 78, item 462).

[3] Act of 21 July 1995 amending Act on the Minister of the Interior, on the Police, on the Office of State Protection, on the Border Guard and some other acts (Journal of Laws No. 104, item 515).

[4] A. Taracha, *Wykorzystanie informacji uzyskanych w wyniku czynności operacyjno-rozpoznawczych w procesie karnym* [Use of information obtained as a result of surveillance operations in the criminal proceeding], [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego. Zagadnienia węzłowe* [New criminal codification, Criminal Procedure Code, Key issues], Warszawa 1997, pp. 129–143; T. Grzegorczyk,

end the controversy over the scope and ways of introducing the material to the criminal proceeding.

The fact that neither the policing acts after the amendments of 1995 nor the CPC determine how to introduce such evidence to the criminal proceeding undoubtedly does not help to solve the problem[5]. The issue is much broader in character because it would be very difficult (even at present) to point out a provision of the CPC regulating the area directly with respect to not only surveillance operations but to all material evidence and documents collected before the start of a trial in general. The way of introducing evidence to a trial based on the prosecutor's decision on 'the inclusion in the evidence material' is based more on the rule of practice than on any specific legal norm.

The change in this area resulted from the amendments to the policing legislation in 2001–2003[6], when a rule was introduced that with respect to material collected as a result of surveillance operations such as operational control (tapping), a control buy and a controlled delivery, the provisions of Article 393 § 1 sentence 1 of the CPC are applied in the court proceeding. S. Waltoś approved of this change highlighting that only the introduction of the provision allows for the use of information obtained as a result of unconventional investigative methods[7] and recognised them as probably the optimum solution[8]. In another statement, he assessed the same provision in a more critical way raising the fact that based on the provision, police officers' notes may be read during a trial, which would violate the ban on substituting testimonies and explanations with written documents and notes[9].

It is difficult to agree with the opinions of S. Waldoś. The regulation in the policing law creating a possibility of using in court the documents developed during police operations should be recognised as really right. The regulation should undoubtedly be included in the Criminal Procedure Code and not in the policing law. The provisions of the CPC are the ones that regulate the course of the criminal proceeding. Thus, if the legislator had wanted the material (docu-

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Wykorzystywanie i przekształcanie materiałów operacyjnych w materiał dowodowy w postępowaniu karnym [Use and transformation of surveillance operational material into evidence in criminal proceeding], [in:] *Przestępczość zorganizowana* [Organised criminality], (ed.) E.W. Pływaczewski, Zakamycze 2005, pp. 221–231.

[5] S. Waltoś drew attention to this circumstance (S. Waltoś, *Śledztwo to odpowiedzialność* [Investigation is responsibility], Gazeta Wyborcza of 18 January 1996, p. 5).

[6] See amendments to Act on the Border Guard of 11 April 2001 (Journal of Laws No. 45, item 498), amendments to Act on the Police of 27 July 2001 (Journal of Law No. 100, item 1084), amendments to Act of 24 August 2001 on the Military Police and other military organs keeping order (Journal of Laws No. 123, item 1353), Act on the Internal Security Agency and the Intelligence Agency of 24 May 2002 (Journal of Laws No. 74, item 676) and Act of 9 July 2003 on the Military Intelligence Agencies (Journal of Laws No. 139, item 1326).

[7] S. Waltoś, *Wizja procesu karnego XXI wieku* [Vision of a criminal trial of the 21st century], Prok. i Pr. 2002, No. 1, p. 15.

[8] S. Waltoś, *Proces karny. Zarys system* [Criminal trial. System outline], Warszawa 2003, p. 398.

[9] *Ibid.*, p. 372.

ments) obtained as a result of surveillance operations to be presented during a trial in accordance with other rules than other evidence, an adequate provision of the CPC should stipulate that. In the current legal state, the situation is a little complicated because the provision of Article 393 § 1 sentence 1 of the CPC regulating the proceeding before court is to be adequately applied in the proceeding when it concerns material collected during police operations. And the policing law (e.g. Article 19 (15), Article 19a (7) and Article 19b (5) of the Act on the Police) creates this undoubtedly strange configuration.

The issue of the use of information obtained as a result of surveillance operations and recognised as unconventional investigative methods (operational control, a controlled buy, a controlled submission or receipt of financial benefits and a controlled delivery) in the criminal proceeding concentrates on determining whether they constitute material evidence or documentary evidence.

Undoubtedly, part of the material – such as money and other assets obtained as a result of a controlled bribery and narcotics or other objects the possession of or trafficking in which is forbidden and which were seized during such operations as a controlled buy or a controlled delivery – will be classified as material evidence (in its strict meaning). The material will be introduced to the criminal proceeding in accordance with Article 395 of the CPC (it will be examined).

On the other hand, other material often constitutes information recorded on a digital data storage device (in the past a magnetic or VHS tape). This kind of information in the form of a recording of the course of a criminal act (the recording of the sound, the picture, or the sound and the picture) will be of special importance. The decision determining the character of the evidence obtained as a result of the above-mentioned surveillance operations will be a key problem to be solved. Should it be classified as material evidence, which is introduced to the criminal proceeding in accordance with Article 395 of the CPC or as documentary evidence, which is introduced to the criminal proceeding in accordance with Article 393 § 1 sentence 1 of the CPC?

Evidence that is a recording of the picture (a photograph, a silent film, another recording of the picture, e.g. a VHS tape without the sound track) should be classified as material evidence and examined. As T. Nowak rightly notices, the idea of classifying this evidence as documentary evidence may be rejected straight away because it lacks "basic characteristic features differentiating documents from objects – the recording of human thoughts on a given object. A picture and a film do not constitute an illustration of a person's thought but the features of a place and a thing, i.e. the features of objects as well as human actions"[10]. Also

[10] T. Nowak, *Dowód z dokumentu w polskim procesie karnym* [Documentary evidence in the Polish criminal proceeding], Poznań 1994, p. 148.

Z. Kegel points out that "a photograph and a film are not a recorded thought, an inscription or a note, but only an illustration of objects (things)"[11].

It seems that the standpoint should not raise any doubts. However, K.J. Jakubski believes that the recording of a certain state of things in the form of a photograph or a film should not be the reason for excluding this kind of data storage device from the group of documentary evidence. In his opinion, it is essential that the choice of a place, time and circumstances of the recording depends on the will of a person being the equipment operator and the recorded picture in the form of a photograph or a film is many times more communicative than a classic written description[12].

The view that the picture in the form of a photograph or a film (without the sound) may be classified as documentary evidence is absolutely unacceptable. If we followed K.J. Jakubski's point of view that a picture is often a storage device of more contents than a written document (which is of course possible), material evidence would disappear from the criminal proceeding because every human product has certain contents.

It seems that there is a more difficult problem with the recording of the sound or the picture and the sound. Determining in what cases the evidence should be classified as material evidence and in what cases as documentary evidence is essential. Material evidence is introduced to the criminal proceeding without any restrictions and is based on the decision of the proceeding organ to include the given material in the evidence. Documentary evidence may be introduced to the criminal proceeding when it meets a series of requirements (similar to the restrictions with regard to personal evidence).

In the Polish literature on criminal proceeding, S. Śliwiński's opinion prevailed for many years. According to it, a document was treated as material evidence only in a situation when its physical and chemical features were examined. However, when its conceptual contents were examined, it was treated as documentary evidence[13].

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[11] Z. Kegel, *Dowód z ekspertyzy pismoznawczej...* [Evidence of graphology expert examination…], p. 38; S. Kalinowski also believes that, according to the provisions of criminal procedure law, the statement of thoughts or the author's will in the written form is a document. The form of recording and the type of material used to record the statement is not important. (S. Kalinowski, *Dowody, postępowanie dowodowe* [Evidence, hearing of evidence], Warszawa 1971, p. 14).

[12] K.J. Jakubski, *Komputerowy nośnik informacji jako dokument w polskim procesie karnym* [Computer information storage device], Przegl. Pol. 1997, no. 3, p. 12. K. Dudka follows the opinion of K.J. Jakubski justifying the classification of a magnetic tape as documentary evidence (which should be read according to Article 393 § 3 of the CPC). See K. Dudka, *Podsłuch prywatny i dziennikarski a proces karny* [Personal and journalistic tapping vs. criminal proceeding], [in:] *Problemy stosowania prawa sądowego, Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi* [Application of court procedure law. Book presented to Professor Edward Skrętowicz], (ed.) I. Nowikowski, Lublin 2007, pp. 104–119.

[13] S. Śliwiński, *Polski proces karny przed sądem powszechnym* [Polish criminal trial before a common court], Warszawa 1948, p. 678 and the following; T. Nowak, *Dowód z dokumentu w polskim procesie karnym* [Documentary evidence in the Polish criminal proceeding], Poznań 1994, p. 139 and literature cited there; K. Kalita, *Taśma magnetofonowa jako dowód rzeczowy w postępowaniu karnym* [Magnetic tape as mate-

Concerning the use of conceptual contents of a document in the criminal proceeding, the ruling of the Supreme Court of 10 March 1961 (III K 49/61)[14] was absolutely a breakthrough decision. The Supreme Court stated in this ruling that the magnetic tape on which the course of crime was recorded should be treated as material evidence (and thus the evidence should be examined), also when it concerns the perception of the conceptual contents recorded on the tape[15]. The Supreme Court emphasised that the magnetic tape as a proof of crime commission (material evidence) cannot be subject to restrictions referred to in criminal procedure law that limit other evidence (especially personal evidence) and regulate its use (hearing of evidence) in the course of the whole criminal proceeding[16]. Discussing the ruling, M. Cieślak stated that the classification of a magnetic tape with the recorded course of crime commission as material evidence does not raise any doubts[17]. The documents being the object of crime (e.g. processing or forgery) and recording the course of crime (defamation, insult etc.) will be treated as material evidence, not documentary evidence, and must be examined (not just read). Inter alia R. Kmiecik[18], A. Taracha[19], D. Karczmarska[20],

rial evidence in the criminal proceeding], Problemy Kryminalistyki 1963, no. 42 p. 218; P. Szustakiewicz, *Dokumenty z postępowania kontrolnego jako dowody w postępowaniu karnym* [Audit documents as evidence in the criminal proceeding], Kontrola Państwowa 1998, no. 5, p. 35 and the following; K. Marszał, *op. cit.*, p. 283.

[14] Ruling of the Supreme Court of 10 March 1961, III K 49/61, OSN – Izba Karna 1962, no 1, item 8, pp. 22–25.

[15] The case concerned the sermon given by Father Józef Tadeusz Osiadło, a monk of the Order of Saint Paul the First Hermit in Leśna Podlaska during a church fair held there on 5 June 1960. The Voivodeship Court in Lublin sentenced Józef Tadeusz Osiadło on 20 October (file reference no. IV K 239/60), in accordance with Article 8 § 1 and Article 13 of the Decree of 5 August 1949 on the protection of the freedom of religion, in connection with Article 47 § 2 of the CC and Article 52 § 3 of the CC for three years' imprisonment and the forfeiture of rights for three years for misusing the freedom of religion for purposes hostile towards the Polish People's Republic by providing false information during his sermon at the church fair on the persecution of the Church and Church institutions in Poland and accusing the worshipers of taking passive role in the situation, and calling them to fight against that persecution. Evidence material was a secret recording made by an officer of the Security Service of the Ministry of the Interior.

[16] L. Schaff used a similar argument earlier (*Dowód z taśmy magnetofonowej w polskim procesie karnym* [Evidence from the magnetic tape in the Polish criminal proceeding], Problemy Kryminalistyki 1959, no. 17, pp. 28–29), whose opinion was cited in the discussed Supreme Court judgement.

[17] M. Cieślak, *Przegląd orzecznictwa SN (Prawo karne procesowe – 1963)*, Nowe Prawo 1964, no. 11, p. 1083.

[18] R. Kmiecik, *Oględziny w procesie karnym. Niektóre zagadnienia formalno-dowodowe* [Examination in the criminal proceeding. Some formal and evidence-related issues], Annales UMCS, sec. G, vol. XXXI, Lublin 1984, p. 92.

[19] A. Taracha, *Dokument jako dowód rzeczowy* [Document as material evidence], [in:] *Kryminalistyka wobec sprawy sądowej. Księga pamiątkowa ku czci Profesora Zdzisława Kegla* [Forensic science vs. a trial. Book in honour of Professor Zdzisław Kegel], Wrocław 2005, pp. 527–536.

[20] D. Karczmarska rightly highlights that electronic recording acquires the features of material evidence when it can be attributed the meaning of a 'trail' of an action the accused is charged with even if this 'trail' contained conceptual contents, e.g. such a trail (in case of insult) is the recording of an insulting utterance preserved on a information storage device. The use of such evidence shall take the form of examination, not reading. The contents of the information are part of the same crime and thus constitute an object of evidence and not the source of evidence, which is the electronic recording alone.

and partially W. Daszkiewicz[21] present such an opinion. The standpoint that such documents should be examined during the criminal proceeding (Article 395 of the CPC) also when it concerns their conceptual contents (when they constitute the recording of events *tempore criminis*) and not just read (in accordance with Article 393 § 1 of the CPC) has not been questioned in the literature on this issue so far (for over fifty years).

On the other hand, other documents collected by the Police and other law enforcement officers and by means of operational control, police entrapment (a controlled buy and a controlled bribery) and a controlled delivery should be introduced to the criminal proceeding in the same way as any other official documents provided their contents do not substitute testimonies and explanations or reports on actions, which require such recording. Thus, the adequate application of Article 393 § 1 sentence 1 of the CPC is not necessary here because the provision should be applied directly. It might be stated with no risk that the introduction of an expression "adequate application of Article 393 § 1 sentence 1 of the CPC" to the policing legislation (the provisions on operational control, police entrapment and a controlled delivery) is absolutely useless. The lack of reference to this provision of the CPC does not hamper the introduction of documents developed in the course of surveillance operations to the criminal proceeding provided they do not substitute testimonies or explanations. Article 393 § 1 of the CPC directly allows for reading these documents at trial and this constitutes sufficient grounds. If the prosecutor had been given the documents together with a motion to initiate the proceeding (as the material to be included in the material evidence), the part of the provision of Article 393 § 1 sentence 1 of the CPC that lays down the possibility of reading "all official documents submitted in the preparatory proceeding" would be grounds for reading them. For other documents that were not submitted in the preparatory proceeding but during the court proceeding – Article 393 § 1 sentence 1 *in fine* of the CPC with regard to reading documents submitted "in another proceeding referred to in the statute" might be grounds for reading them. The provision of Article 393 § 1 sentence 1 *in fine* provides strong grounds for reading official documents. Another proceeding may certainly mean such a surveillance operation as operational control, a controlled buy, a controlled bribery or a controlled delivery[22].

See D. Karczmarska (reviewer), A. Lach, *Dowody elektroniczne w procesie karnym* [Electronic evidence in the criminal proceeding], Toruń 2004, Palestra 2005, p. 267.

[21] W. Daszkiewicz, *Przegląd orzecznictwa SN* [Court rulings review] (Prawo karne procesowe [Criminal procedure law] – 1962), Państwo i Prawo 1964, no. 5–6, pp. 877–879.

[22] It is not the only case when the policing legislation with no need at all refers to the CPC. We have a similar situation in Article 15 (1) point 2 and 4 of Act on the Police, which authorises police officers to make an arrest and a search in the mode laid down in the CPC. The lack of such provisions in Act on the Police does not mean that the Police may not perform such actions. The provisions of the CPC are sufficient because they define the Police as an agency preparing the criminal proceeding (Article 311 and Article 325a of the CPC), thus authorised to conduct procedural actions, including an arrest and

It is true that the documents collected in such a proceeding should be given to the prosecutor together with a motion to initiate the criminal proceeding but if this had not been done either before the initiation or during the preparatory proceeding, the provision of Article 393 § 1 sentence 1 *in fine* provides an opportunity to correct the error at the stage of the court proceeding. It must be remembered, however, that reading these documents is possible only unless another provision of the CPC clearly forbids it[23].

The provisions of the policing acts with regard to the adequate application of Article 393 § 1 sentence 1 of the CPC to the material collected during operational control, entrapment and a controlled delivery do not constitute grounds for reading police officers' notes because the provisions of the policing acts do not repeal the provisions of the CPC that forbid to substitute testimonies and explanations with the contents of documents and notes (Article 174 of the CPC) and the ban on reading notes concerning actions that are required to be reported (Article 393 § 1 sentence 2 of the CPC)[24]. The ban referred to in Article 393 § 1 sentence 2 of the CPC also covers notes that have features of "official documents"[25]. Due to the same reason, it does not seem possible to read officers' notes concerning surveillance interception of correspondence or delivery (performed within operational control). There is no doubt that these are actions that, in accordance with the CPC, must be reported (Article 143 § 3 point 7).

A. Gaberle is of a similar opinion and states that operational control is not performed as part of trial, thus actions performed in its course are recorded in the form of officers' notes (they cannot be written official reports on). Thus, the introduction of the material concerning such actions (consisting in surveillance interception of correspondence and delivery as well as recordings of communications) as requiring writing official reports (Article 143 § 1 point 7 of the CPC) faces essential difficulties. According to this author, "Article 19 (15) sentence 2 of Act on the Police, which lays down that the provision of Article 393

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a search. These provisions constitute real grounds for the conduction of these procedures by the Police, and not Article 15 (1) point 2 and 4 of Act on the Police.

[23] The Court of Appeal in Lublin in the sentence of 3 October 2005 rightly states that the adequate application of the provision of Article 393 § 1 sentence one of the CPC cannot provide for a possibility of reading such documents that were developed in the form that is in conflict with the provisions of the CPC. Thus, in case of such forms of documenting operations as cipher texts, surveillance messages or tapping scripts, it is obvious that reading them directly in the course of trial would mean avoiding evidentiary restrictions and the provisions regulating the form of evidentiary procedures.

[24] A different opinion is presented by D. Karczmarska, *Notatka urzędowa w procesie karnym i w postępowaniu w sprawach o wykroczenia* [Official note in the criminal proceeding in petty offences cases], [in:] *Oblicza współczesnej kryminalistyki, Księga jubileuszowa Profesora Huberta Kołeckiego* [Contemporary forensic science nature. Professor Hubert Kołecki jubilee book], (ed.) E. Gruza, Warszawa 2013, pp. 128–132; D. Szumiło-Kulczycka, *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego* [Surveillance operations and their relationship with the criminal proceeding], Warszawa 2012, pp. 185–187.

[25] See R. Kmiecik, *Dokumenty prywatne i ich „prywatne gromadzenie" w sprawach karnych* [Private documents and 'private retention' of them in criminal cases], Państwo i Prawo 2004, no. 5, p. 14.

§ 1 sentence 1 of the CPC with regard to material collected in the course of operational control must be adequately applied in the court proceeding, is only a seeming solution because the provision does not repeal the bans on evidence that are referred to in Article 174 of the CPC and Article 393 § 1 sentence 2 of the CPC”[26].

On the other hand, with regard to S. Waldoś's opinion that only the indication made by the policing law provision that Article 393 § 1 sentence 1 of the CPC is adequately applied to the material collected as a result of some surveillance operations allows for the introduction of the material to trial, it is necessary to point out that the provision refers only to reading official documents. However, most of the material obtained as a result of operational control, a controlled buy and a controlled delivery, which allow for the initiation of the criminal proceeding, will constitute either the material evidence in the strict sense of the term (assets, narcotics etc.) or a recording of the course of crime (e.g. the handing of a bribe, an order to commit crime or pass information in order to hamper the criminal proceeding). Thus, the material will be classified as material evidence, to which Article 393 of the CPC is not applied.

M. Chrabkowski negates the possibility of admitting any material obtained as a result of operational control as material evidence and states that the only way to introduce this material to the criminal proceeding is the adequate application of Article 391 § 1 sentence 1 of the CPC. He believes the opinion that there is a possibility to apply Article 395 of the CPC (regarding material evidence) to the material resulting from operational control is wrong and in conflict with the provision of Article 19 (15) of Act on the Police (allowing for the adequate application of Article 391 § 1 sentence 1 of the CPC – A.T.)[27]. The author seems not to notice that operational control can result in obtaining not only documents but also material evidence, and the mode and way of reading evidence in the criminal proceeding depends on the CPC (see Article 1 of the CPC) and not the policing legislation. D. Miszczak rightly notices that while all kinds of magnetic recordings collected during operational control and preserving trails of crime (other than memories) may be directly used as evidence on trail in accordance with Article 395 of the CPC (as material evidence subject to examination – A.T.) or with the use of an appropriate phonoscopy expert analysis, officers' notes and other official documents similar in character developed during operational control with respect to the current CPC do not have such grounds. In the author's opinion, the regulations of the CPC are detailed in character because of the nature of the Act, which – as a 'code' – is to lay down possibly most complete

[26] A. Gaberle, *Dowody w sądowym procesie karnym* [Evidence in the criminal proceeding in court], Kraków 2007, p. 331.

[27] M. Chrabkowski, *Wykorzystanie materiałów kontroli operacyjnej w postępowaniu przygotowawczym* [Use of material obtained as a result of operational control in the preparatory proceeding], Szczytno 2009, p. 188.

norms of the criminal procedure matters. Cases of conflict between the provisions of the Act and the norms of the policing acts, which do not regulate the criminal proceeding (operational control is not part of the criminal proceeding) should be solved in accordance with the rule: "*lex specialis derogat legi generali*" or "*lex posteriol generali non derogat legi priori speciali*"[28].

M. Chrabowski, however, believes that the deletion of the sentence 2 of the provision of Article 393 1 of the CPC by the legislator (in Article 19 (15) of Act on the Police – A.T.) results in non-application of a ban on the substitution of the contents of documents and notes for testimonies and explanations (Article 174 of the CPC) and the ban on reading notes concerning actions that require writing an official report[29]. This standpoint cannot be accepted. Such interpretation of "the deletion of sentence 2 of the provision of Article 393 1 of the CPC" is in conflict with all the rules of interpreting law. If the legislator's intention had really been "non-application" of restrictions resulting from the provision, after having directly laid down that the material obtained during operational control are subject to the provision of Article 391 § 1 sentence 1 of the CPC, he would have had to add a phrase that "Article 391 § 1 sentence 2 of the CPC is not applicable". The lack of any statement made by the legislator in the policing legislation with regard to Article 391 § 1 sentence 2 of the CPC means that the provision is applied directly and with no restrictions towards the material obtained during operational control. The adoption of M. Chrabkowski's unjustified opinion would change the application of one of the basic principles of the criminal proceeding – the principle of directness – in a considerable way.

An example of the use of the so-called telephone billing in a criminal proceeding best illustrates the importance of a decision whether the material (documents) obtained as a result of surveillance operations constitutes material evidence or documentary evidence. Polish law allows for the acquisition of communications data in two ways: in a procedural way (Article 217 of the CPC) and with the use of surveillance operations[30]. While the use of communications traffic information (data) obtained in a procedural way does not raise any doubts, the possibility of introducing traffic data obtained with the use of surveillance methods to the criminal proceeding is continually the subject matter for dispute.

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[28] D. Miszczak, *Dopuszczalność i sposoby wykorzystania w postępowaniu karnym „dokumentów sprawozdawczych" sporządzonych w toku kontroli operacyjnej* [Admissibility of 'reporting documents' developed in the course of operational control and ways of using them in the criminal proceeding], (discussion article), Wojskowy Przegląd Prawniczy 2008, no. 3, p. 18.

[29] M. Chrabkowski, *Wykorzystanie materiałów kontroli operacyjnej w postępowaniu przygotowawczym* [Use of operational control material in the criminal proceeding], Szczytno 2009, p. 188.

[30] See Article 20c of Act on the Police, Article 28 of Act on the Internal Security Agency and the Intelligence Agency, Article 10b of Act on the Border Guard, Article 30 of Act on the Military Police and military policing agencies, Article 36b of Act on fiscal control, Article 32 of Act on the Military Counterintelligence Service and the Military Intelligence Service, Article 18 of Act on the Central Anti-Corruption Bureau.

According to A. Bulsiewicz and A. Lach, the acquisition of telephone billings is possible with the use of surveillance operations but they can only be used as information to obtain other evidence in a procedural way (i.e. by the procedural 'transformation' of surveillance findings). The authors believe that such a billing cannot be used directly during the trial. They draw the conclusion from the contents of Article 20c (1) of Act on the Police, which lays down that communications traffic information may be used "only in order to prevent or detect crime" contrary to Article 19 of Act on the Police, which clearly speaks about "preserving evidence"[31]. It is difficult to agree with that standpoint because the possibility of using evidence in the criminal proceeding is subject to the provisions of the CPC, not of the policing acts. Legally obtained evidence may be introduced to the criminal proceeding directly (in accordance with Article 395 of the CPC) without the need to transform it in a procedural way[32].

On the other hand, K. Boratyńska asks a question whether billing data obtained with the use of surveillance operations methods may be directly introduced to the criminal proceeding in accordance with Article 393 § 1 of the CPC. She highlights that the legislator did not make reference in Article 20c of Act on the Police to Article 393 § 1 sentence 1 of the CPC. Assuming the legislator's rationality, it must have been done on purpose. The author believes that the regulation is a result of the diversity of entities that take decisions to launch operational control and procedural acquisition of traffic data (a court in case of operational control and the Police in case of a communications traffic billing – A.T.). Moreover, she highlights that in accordance with the policing legislation, the obtained billing data are to serve the purpose of preventing or detecting crime and not preserving evidence. In her opinion, such a restriction certainly results in practical limitations; nevertheless, billing data obtained with the use of surveillance methods will be an impulse to acquire evidence in a procedural way, i.e. after the initiation of the criminal proceeding[33]. Thus, the author deprives billing data obtained with the use of surveillance methods of the evidential value during the trial and classifies them as "information on evidence"[34].

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[31] A. Bulsiewicz, A. Lach, *Procesowe i pozaprocesowe uzyskiwanie billingu telefonicznego* [Procedural and non-procedural acquisition of telephone billings], [in:] *Procesowo-kryminalistyczne czynności dowodowe. Materiały pokonferencyjne* [Criminal proceeding evidential procedures. Conference material], (ed.) M. Lisiecki, M. Zajder, Szczytno 2003, p. 20.

[32] Thus, the decision whether the telephone billing should be classified as material evidence or documentary evidence will be a basic issue.

[33] K. Boratyńska, *Wokół problematyki związanej z wykorzystaniem dowodowym materiałów operacyjnych* [Around the issue connected with the evidential use of operational material], [in:] *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna* [Practical elements of fighting against organised crime and terrorism. Modern technologies and operational work], (ed.) L. Paprzycki and Z. Rau, Warszawa 2009, p. 151.

[34] That means information indicating the existing sources of evidence, from which, after the use of adequate procedures, evidential means may be obtained.

The whole reasoning presented by K. Boratyńska should be recognised as an abortive attempt. While analysing the possibility of introducing billing data obtained with the use of surveillance methods (Article 20c of Act on the Police) to the criminal proceeding in accordance with Article 393 § 1 sentence 1 of the CPC, K. Boratyńska erroneously classifies such evidence as documentary evidence (only such evidence is subject to Article 393 of the CPC – A.T.). There is no doubt, however, that billing data should be recognised as material evidence, which in the criminal proceeding is used (proved) in the course of examination (Article 395 of the CPC), and not by reading (Article 393 of the CPC). The difference in the classification of a telephone billing as material evidence and not documentary evidence is very important from the practical point of view because material evidence is not subject to restrictions laid down for documentary evidence (Article 174 of the CPC and Articles 391–393 of the CPC).

In the literature on the subject matter, it is assumed that a document as evidence from the criminal proceeding perspective has 'conceptual' contents contained in every object and recorded on it graphically (or in another, e.g. magnetic way), which may be important evidence in the criminal proceeding and is not excluded as evidence in the light of restrictions and evidentiary rules[35]. The document alone (treated as an object or another information storage device), where there are contents, is a source of evidence[36].

A telephone traffic billing comes into being as a result of automatic registration of telephone connections (time, place etc.), which takes place without human participation, thus it would be difficult to find "the preservation of human thought" in it[37]. Thus, it is the recording of some facts, events that consist in given human activeness demonstrated in the performance of a simple mechanical activity (one subscriber's connection or an attempt to make a connection with another user of the network), and not his verbalised thought (utterance)[38].

The arguments for the classification of 'a billing print-out' as material evidence and not documentary evidence are the same as those that exclude from a concept

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[35] R. Kmiecik, [in:] *Prawo dowodowe* [Evidence law], (ed.) R. Kmiecik, Warszawa 2008, p. 159.

[36] As Z. Kegel rightly states, because a document as a source of evidence must be classified as material evidence source, such sources should be divided into documents, i.e. material evidence with conceptual contents (which other objects do not contain) recorded with the use of writing, and other material evidence (which do not contain writing element). Z. Kegel, *Dowód z ekspertyzy pismoznawczej w polskim procesie karnym* [Evidence from graphology expert opinion in the Polish criminal proceeding], Wrocław–Warszawa–Kraków–Gdańsk 1973, p. 36.

[37] There is no doubt that billing data should be classified as strictly transmission data, i.e. ones generated automatically by the system. See more: A. Adamski, *Retencja danych o ruchu telekomunikacyjnym – polskie rozwiązania i europejskie dylematy* [Retention of communications data – Polish solutions and European dilemas], Przegląd Prawa i Administracji, vol. LXX, Wrocław 2005, p. 179.

[38] According to the definition laid down in Article 1d of the Convention on Cybercrime of the Council of Europe, 'traffic data' are all the data processed electronically, related to the transfer of information with the use of telecommunication systems that are generated by that system and constitute an element of the communication process, indicating the communication's origin, destination, route, time, date, size, duration or type of underlying service.

of a document (in a procedural sense) the evidence that is only a recording of a picture (a photograph, a silent film or another form of recording picture, e.g. a magnetic tape without the recording of the sound), which should be classified as material evidence and examined[39]. It seems that such a standpoint should not raise doubts. As a result, the information included in the telephone billing can be excluded from the group of documents. Traffic data, a series of figures (sometimes also iconographic signs or names of telephone companies), are nothing but a mechanical registration of human activities (in the form of information, inter alia, about time and place of the conducted telephone conversations or attempts to conduct them) and not the preservation of human thoughts.

It must be remembered that a document is a certain type of material evidence (material evidence *sui generis*)[40]. The opinion was already expressed in the first Polish criminal code. The Criminal Procedure Code of 1928, after the provisions regulating the reading of documents during the trial (Article 339–342), laid down in Article 343 of the CPC that "other evidence, provided the size and features of an object are not an obstacle, shall be brought to the court room and presented to the judges and the parties"[41]. The conceptual contents are an essential but insufficient condition for classifying a given object as documentary evidence and not material evidence[42]. Because of that, in accordance with the Polish criminal procedure, a communications billing printout should be classified as material evidence and not documentary evidence. In conclusion, it must be stated that

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[39] The opinion dates back to the interwar period. Based on the CPC of 1928, the Supreme Court in the judgement of 13 June 1930 (file SN no. II 2 K. 184/30) stated that the legislator, failing to lay down a definition of a document in the CPC, refers to legal concepts commonly recognised in theory and law interpretation. According to the Supreme Court, a document in the strict sense of the term is "an object in which by means of writing (graphically) human thought, as it were human *vox mortua*, is materialised". Zbiór Orzeczeń Sądu Najwyższego, Orzeczenia Izby Drugiej (Karnej) [Collection of judgements of the Supreme Court, Judgements of the Criminal (Penal) Chamber], Warszawa 1930, item 99, p. 19.

[40] M. Cieślak (*Zagadnienia dowodowe w procesie karnym* [Evidence related issues in the criminal proceeding], vol. I, Warszawa 1955, p. 72) classifies as material evidence the one, the source of which are things *sensu largo* (contents of documents and features of places or objects in their strict sense). Also see Z. Kegel, *Dowód z ekspertyzy pismoznawczej…* [Evidence of graphology expert opinion…], p. 36; T. Nowak, *Dowód z dokumentu...* [Documentary evidence…], pp. 38–42; W. Daszkiewicz, *Proces karny. Część ogólna* [Criminal proceeding. General issues], Warszawa–Poznań 1994, p. 277.

[41] This suggests that the legislator clearly located a document in material evidence, not personal evidence, treating it as *sui generis* material evidence that is different from others because of it conceptual contents. The grounds for distinguishing this category of evidence (within other material evidence – A.T.) are not the quantity of its contents, nor the form of device used for recording it, but the fact that it is conceptual contents.

[42] It should be noticed that, in the procedural sense, a document as 'documentary evidence' might be understood in a narrower way than from the forensic or criminal-material point of view. It may happen that an object with conceptual contents will be – in procedural sense – classified as material evidence and examined, and not as documentary evidence (evidential documents) and it may even be when the perception will concern conceptual contents and not physical features of the document. To find more about a document as material evidence see A. Taracha, *Dokument jako dowód rzeczowy* [Document as material evidence], [in:] *Kryminalistyka wobec prawdy sądowej. Księga pamiątkowa ku czci Profesora Zdzisława Kegla* [Forensic science vs. court truth. Book in honour of Professor Zdzisław Kegel], Wrocław 2005, pp. 527–536 and literature cited there.

the direct introduction to the criminal proceeding (of the use) of information included in the telephone billing and obtained with the use of surveillance operations cannot be analysed from the perspective of the adequate application of Article 393 § 1 sentence 1 of the CPC because the provision refers to proving documentary evidence and not material evidence.

The Supreme Court expressed similar doubts (as K. Boratyńska) towards the possibility of introducing material obtained as a result of surveillance operations to the criminal proceeding in case the provisions of the policing law do not include a statement about an adequate application of Article 393 § 1 sentence 1 of the CPC. In its judgement of 19 March 2014, the Supreme Court states: "*Nota bene*, it must be highlighted that with respect to material obtained with the use of the so-called video-surveillance, i.e. an action referred to in Article 14 (1) point 6 of Act on the Central Anti-Corruption Bureau, the legislator did not decide to introduce it to the trial 'directly' as was done in connection with the actions referred to in Article 17 (15) or Article 19 (5) of the above-mentioned Act. Thus, a conclusion might be drawn from that 'lack' that the issue of whether this material and what part of the material and under which regulations might be used 'directly', and what material should be 'transformed' so that it might become evidence that should be used, remains an open question"[43]. The answer seems to be simple – Article 395 of the CPC shall constitute grounds for the introduction of that material to the criminal proceeding (all material that is a recording of the picture and with the recording of the sound, provided it is a recording of the course of crime) and thus, there is no need for a procedural 'transformation' of the material. If it is possible to use the material recording the course of crime (also the sound if the crime was committed 'verbally') obtained independently of the criminal proceeding by a natural person as material evidence, such evidence obtained by authorised law enforcement officers should be admissible too.

There is no doubt that introducing the material obtained as a result of surveillance operations to the criminal proceeding, it is first of all necessary to determine whether it will constitute material evidence or documentary evidence. Depending on that decision, either Article 395 of the CPC or Article 393 § 1 of the CPC will constitute grounds for the introduction of the material to the criminal proceeding. Material evidence should include this part of material obtained as a result of surveillance operations that recorded the course of crime (also a recording of the sound). The adjudication practice used so far, in which the only grounds for the introduction of material obtained as a result of unconventional investigative methods are found in Article 393 § 1 sentence 1 of the CPC, should be treated as mistaken because a big part of that material will constitute material evidence, which will be introduced to the criminal proceeding in accordance with Article 395 of the CPC.

[43] Ruling of the Supreme Court of 19 March 2014, II KK 265/13.

ON THE ADEQUATE APPLICATION OF ARTICLE 393 § 1 SENTENCE 1 OF THE CPC TOWARDS MATERIAL OBTAINED AS A RESULT OF SURVEILLANCE OPERATIONS

Summary

The author discusses the issue of evidential features of surveillance operations, focusing on legal grounds for the introduction of the results of these actions to the criminal proceeding. He is critical about the conception of adequate application of Article 393 sentence 1 of the CPC adopted in the policing legislation with respect to the material obtained as a result of such surveillance operations as operational control, entrapment and a controlled delivery. The author presents an opinion that a big part of the material obtained as a result of surveillance operations constitute material evidence that should be introduced to the criminal proceeding in accordance with Article 395 of the CPC. He believes that the courts' adjudication practice in which Article 393 § 1 sentence 1 of the CPC used to be the only grounds for the introduction of the material obtained as a result of the so-called unconventional investigative methods is erroneous.

O ODPOWIEDNIM STOSOWANIU ART. 393 § 1 ZD. 1 K.P.K. W STOSUNKU DO MATERIAŁÓW UZYSKANYCH W WYNIKU CZYNNOŚCI OPERACYJNO-ROZPOZNAWCZYCH

Streszczenie

Autor omawia problematykę prawnodowodową czynności operacyjno-rozpoznawczych, koncentrując się na podstawach prawnych wprowadzania wyników tych czynności do procesu karnego. Krytycznie ocenia przyjętą w ustawodawstwie policyjnym konstrukcję odpowiedniego stosowania art. 393 zdanie pierwsze k.p.k. do materiałów uzyskanych w wyniku takich czynności operacyjno-rozpoznawczych, jak: kontrola operacyjna, prowokacja policyjna i przesyłka niejawnie nadzorowana. Prezentuje pogląd, że znaczna część materiałów uzyskanych w wyniku tych czynności operacyjno-rozpoznawczych stanowią dowody rzeczowe, które powinny być wprowadzane do procesu karnego na podstawie art. 395 k.p.k. Dotychczasową praktykę orzeczniczą, w której jako jedyną podstawę wprowadzenia materiałów uzyskanych w wyniku tzw. niekonwencjonalnych metod śledczych sądy stosują, art. 393 § 1 zdanie pierwsze k.p.k. uważa za błędną.

DE L'APPLICATION CONVENABLE DE L'ART.393 § 1 PH.1 DU CODE DE LA PROCÉDURE PÉNALE PAR RAPPORT AUX MATÉRIAUX DES ACTIVITÉS OPÉRATIONNELLES ET INDICATIVES

Résumé

L'auteur parle de la problématique législative et démonstrative des activités opérationnelles et indicatives, et il se concentre sur les bases juridiques de l'introduction des résultats de ces activités au procès pénal. Il critique la construction acceptée par la jurisprudence policière de l'application convenable de l'art.393 ph.1 du code de la procédure pénale aux matériaux ramassés après les activités opérationnelles et indicatives comme le contrôle opérationnel, la provocation policière et l'envoi surveillé clandestinement. Il présente l'idée que la plupart des matériaux ramassée grâce aux activités opérationnelles et indicatives est constituée par des preuves qui devraient être introduits au procès pénal à la base de l'art.395 du code de la procédure pénale. Et l'auteur trouve la pratique actuelle de jurisprudence comme fautive surtout quand les tribunaux appliquent l'art.393 § 1 ph.1 du code de la procédure pénale comme base unique pour introduire des matériaux ramassés après quelques méthodes non conventionnelles d'enquête.

О СООТВЕТСТВУЮЩЕМ ПРИМЕНЕНИИ СТ. 393 П. 1 ФР. 1 УПК В ОТНОШЕНИИ МАТЕРИАЛОВ, ПОЛУЧЕННЫХ В РЕЗУЛЬТАТЕ ОПЕРАТИВНО-ОПОЗНАВАТЕЛЬНОЙ ДЕЯТЕЛЬНОСТИ

Резюме

Автор рассматривает доказательно-правовую проблематику оперативно-опознавательной деятельности, концентрируясь на правовых основах введения результатов этой деятельности в уголовный процесс. Подвергает критической оценке принятую в полицейском законодательстве систему соответствующего применения ст. 393 (первая фраза) УПК в отношении материалов, полученных вследствие следующей оперативно-опознавательной деятельности: оперативный контроль, полицейская провокация и негласно контролируемая посылка. Представлена точка зрения, что значительную часть материалов, полученных в результате данной оперативно-опознавательной деятельности, представляют вещественные доказательства, которые должны быть введены в уголовный процесс на основе ст. 395 УПК. Прежняя судебная практика, в которой в качестве единственного основания для введения материалов, полученных в результате так называемых нетрадиционных следственных методов, применяется судами ст. 393 п. 1 (первая фраза).

Ius Novum
2/2015

Maciej Rogalski

ARE THE REGULATIONS WITH RESPECT TO THE RETENTION AND PROVISION OF COMMUNICATIONS DATA APPROPRIATE IN POLAND? PROPOSALS FOR CHANGES

Introduction

In 2014 in Poland, the number of requests for communications data addressed to the telecommunications companies increased again. According to the Office of Electronic Communications (UKE), there were 2,177,916 such requests in 2014, which was an increase by 7% over the last year[1]. Thus, statistics show a constant growth of requests. Moreover, the number of requests is much bigger than in other European countries.

The issue of acquiring communications data is not only connected with the actions of the law enforcement agencies and entities obliged to provide them, but also intrudes into a very sensitive area of human rights and freedoms. A series of problems come into existence. The basic one is the necessity of fighting against crime, which is often connected with the state organs' interference in the citizens' rights. The assurance that there will not be too much interference is of key importance. Thus, the legal regulations constituting the grounds for the actions of the authorised and obliged entities in the area play a key role. It especially concerns legal regulations with respect to the provision of telecommunications messages and data. A question is raised whether the regulations are appropriate or allow for the acquisition of data inadequately to the objectives they serve with respect to both the amount and the range of telecommunications messages and data, especially the so-called billings. Another issue is the practical application of the regulations in force, i.e. whether they are proper, especially in connection with the co-called authorised entities' actions as referred to in Article 179 (3) of Act of 16 July 2004: Telecommunications Law[2], hereinafter TL, or whether they should also be amended. There is a related problem of supervising the

[1] Gazeta Wyborcza of 19 March 2015, No. 65, p. 4.
[2] Journal of Laws of 2004, No. 171, item 1800 with amendments that followed.

entities authorised to acquire communications data. Therefore, it seems that the present legal mechanisms and organisational solutions do not ensure sufficient supervision of the provision of telecommunications messages and data.

Legal regulations with respect to the collection and provision of communications data in Poland

1. In the Polish law, the issues connected with the provision of communications data for the needs of pending court and prosecution proceedings are regulated by the criminal procedure (Articles 218–218b of the Criminal Procedure Code[3], hereinafter CPC). The provision of Article 218 § 1 of the CPC obliges telecommunications companies to provide a court or a public prosecution office, on demand contained in the decision, with data specified in Articles 180c and 180d of the TL if they are important for the pending legal proceeding. The obligation is imposed on entities involved in telecommunications business regardless of their legal and organisational form and who their owner is, i.e. whether the entity is a private of a public company. The data to be provided are specified in Articles 180c and 180d of the TL, under the condition that they are essential for the pending legal proceeding. In practice, the grounds for the decision obliging to their provision shall be the circumstance that the communications data may be relevant for the procedure[4]. Moreover, the grounds for the request for communications data are the acts regulating operations of the so-called authorised entities. They are specified in the provision of Article 180d of the TL in connection with Article 179 (3) point 1 letter a) and (3) point 2 of the TL. They are, apart from the already mentioned courts and prosecution offices, the Police, the Border Guard, the Internal Security Agency, the Military Counterintelligence Service, the Military Police, the Central Anti-Corruption Bureau, the Customs Service and the Fiscal Intelligence Office. Apart from courts and prosecution offices, there are eight entities altogether that are authorised to obtain communications data in Poland.

The discussed issues concern only the provision of communications data and do not cover the surveillance and recording telephone conversations, i.e. the so-called telephone tapping. The issue is regulated in Chapter 26 of the CPC entitled *Surveillance and recording conversations* (Articles 237–242 of the CPC). The provisions of the CPC determine cases when surveillance and recording conversations may take place, entities authorised to apply those measures and the mode of applying them. On the other hand, the provisions of the Telecommunications Law determine the duties of the telecommunications

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[3] Act of 6 June 1997: Criminal Procedure Code, Journal of Laws of 1997, No. 89, item 555 with amendments that followed.

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

companies in the area. In theory, there is a so-called proceeding-related tapping (the provisions of Chapter 26 of the CPC) and there is tapping that is not related to the proceeding (called 'operational control' tapping)[5], which is regulated in special acts, e.g. Act on the Police. The proceeding-related tapping includes both "surveillance and recording the contents of telephone conversations" (Article 237 § 1 of the CPC) as well as "the contents of other conversations or information transmissions, including correspondence transmitted by electronic mail" (Article 241 of the CPC). Acquiring the billings of telephone conversations or other information transmissions is laid down in Article 218 § 1 of the CPC. On the other hand, acquiring data from the IT systems and data storage devices, including electronic mail is laid down in Article 236a of the CPC.[6]

2. The practice of applying the provisions regulating the acquisition of communications data showed a range of problems connected with this acquisition. It is necessary to discuss the most important of them.

The first problem concerns the types of cases in which communications data may be acquired. In other words, are courts allowed to demand billings in cases different than criminal ones? It mainly concerns requests for data in family law cases, especially a divorce, without the telephone subscriber's consent, which is necessary in such cases. In practice courts have often requested the provision of short messages' contents in civil law cases. It is, however, not allowed to provide the contents of short messages without the prior ruling on surveillance and recording of telephone conversations as referred to in Article 237 of the CPC in order to pursue only some most serious types of crime. Due to the lack of legal grounds, communication data cannot be requested in civil law cases. In practice civil courts referred to Article 248 of the Code of Civil Proceeding (CCP), which stipulates the obligation to provide documents requested by court if it is a proof essential for the adjudication. The provisions of Article 248 of the CCP, unlike Articles 218, 218a or 237 of the CPC, do not repeal the confidentiality of communications. They are mainly procedural in character. This is an obstacle to the application of Article 248 of the CCP as grounds for civil courts' requests for the provision of data that are protected by the confidentiality of communications[7]. Court decisions also emphasise

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[5] J. Bratoszewski, L. Gardocki, Z. Gostyński, S. Przyjemski, R. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code. Commentary], vol. I, Warszawa 2003, pp. 1017–1018; K. Marszał, *Podsłuch w polskim procesie karnym de lege lata i de lege ferenda* [Tapping the line in the Polish criminal trial *de lege lata* and *de lege ferenda*], [in:] *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok* [Penal law science issues. Works presented to Professor Oktawia Górniok], Prace Naukowe Uniwersytetu Śląskiego, Katowice 1996, No. 150, p. 343.

[6] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code. Commentary], Zakamycze 2005, p. 590.

[7] Compare P. Barta, P. Litwiński, *Dane objęte tajemnicą zawodową* [Official secret data], [in:] *Prawo reklamy i promocji* [Law on advertising and promotion], (ed.) E. Traple, Warszawa 2007, p. 607; also see

that telephone billings are subject to the confidentiality of communications as referred to in Article 159 (1) point 1 and 3 of the TL. With the exception of cases referred to in the Act or other provisions, revealing and processing the contents or data that are confidential violates the obligation to keep them secret and is, as a rule, prohibited (Article 159 (2) and (3) of the TL)[8].

The provision of communications data in cases concerning offences raises many more doubts. Communications data are requested by law enforcement agencies pursuing perpetrators of offences in order to detect and punish them. Exemption from official and professional confidentiality in case of offences is regulated exclusively in Article 41 § 3 of Act of 24 August 2001: Code of Procedure in Petty Offences[9] (CPPO), which is very general in character as it refers to all types of professional confidentiality and does not meet the criteria for exemption from the obligation to keep communication secret, i.e. the requirement of definiteness and thoroughness, in accordance with Article 49 of the Constitution. First of all, however, it cannot constitute grounds for requesting telephone conversations billings by exemption from official and professional confidentiality because in cases concerning petty offences, Article 218 § 1 of the CPC is not applied, neither directly nor by analogy. The provision stipulating exemption form communication confidentiality in criminal cases cannot be applied to petty offences because in accordance with Article 1 § 2 of the CPPO in the petty offences procedure the provisions of the CPC are applied only when the CPPO stipulates that. Thus, the provision of billing data cannot be requested based on Article 41 § 3 of the CPPO because it would infringe the law allowing for the exemption of the witness from official confidentiality obligation[10].

Many problems result from the interpretation of the provisions of Act of 29 August 1997 on the protection of personal data (hereinafter APPD) and acts defining the organisation and authorisation of state agencies and organs in the field of the provision of mobile telephone subscribers' data in connection with legal proceedings against them resulting from offences they committed[11]. However, the lack of grounds for the application of Article 23 of the APPD should not raise any doubts because it stipulates broader access to personal data than Article 159 (1) point 2 of the TL. According to Article 5 of the APPD, if the provisions of other statutes referring to data processing stipulate stricter protection than Act on the protection of personal data does, the provisions of these statutes should be applied. Thus, the provision of Article 159 (1) point 1

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ibid., *Ustawa o ochronie danych osobowych. Komentarz* [Act on the protection of personal data. Commentary], Warszawa 2009, p. 85.

[8] See the sentence of the Court of Appeal in Białymstok of 6 April 2011, I ACz 279/11, Orzecznictwo Sądów Apelacji Białostockiej 2011, No. 1, item 36.

[9] Journal of Laws of 2001, No. 106, item 1148 with the amendments that followed.

[10] Compare the sentences of the Voivodeship Administrative Court in Warsaw of 30 August 2006, II SA/Wa 809/05, LEX No. 283565; of 10 October 2006, II SA/Wa 643/05, unpublished.

[11] Journal of Laws of 2002, No. 101, item 926, with amendments that followed.

of the TL excludes the application of the provisions of Act on the protection of personal data in this area.

The current wording of Article 20c of Act of 6 April 1990 on the Police[12] also raises doubts. The provision of Article 20c of Act on the Police that stipulated that the data referred to in this provision may be provided for the Police and processed only in order to prevent or detect crime was repealed. Thus, the authorisation of the Police referred to in this provision concerned crime exclusively and could not be applied in petty offences cases. On the other hand, there is no provision in Act on the Police clearly stipulating that communications data may be acquired for the needs of the proceeding in petty offence cases[13]. The problem might be unambiguously solved by the introduction of a clear provision in Act on the Police, e.g. in place of the repealed Article 20c (1), stipulating that the provision of communications data for the Police is possible only for the need of pending criminal proceedings and not petty offences proceedings.

3. Another problem is connected with the length of time communications data shall be stored; at present it is 12 months. In practice, the authorised entities quite often request the provision of communications data for a period of time that is longer than the statutory one. The problem concerns especially the relation between the provision stipulating the maximum legal period of 12 months for storing retention data (Article 180a (1) point 1 of the TL) and the provisions stipulating longer periods of storing data, e.g. the provision of Article 168 (2) of the TL, allowing for a period longer than 12 months necessary to deal with a complaint. It seems that in the legal system in force, the only interpretation possible to be accepted is the interpretation allowing for the storage of communications data by the telecommunications companies for a period longer than 12 months only in cases clearly determined by the provisions of the TL, and – what is essential – only for purposes determined in these provisions, e.g. Article 168 of the TL. For the needs of criminal proceedings, on the request of a court or a prosecutor, in accordance with Article 180a (1) point 1 of the TL, communications data may be stored for no longer than 12 months.

Thus, considering doubts what the telecommunications services providers should do in case they possess the subscriber's data in accordance with Article 168 of the TL, which are also referred to in Article 180c of the TL, after a period of 12 months from the moment of their registration, if the authorised state organ requests the provision of the possessed data referred to in Article 180c and 180d of the TL, i.e. whether the service provider should in this situation refuse to provide the organ with the data on the grounds that Article 180a (1) point 1 of

[12] Uniform text: Journal of Laws of 2007, No. 43, item 277 with amendments that followed.

[13] B. Opaliński, M. Rogalski, P. Szustakiewicz, *Ustawa o Policji. Komentarz* [Act on Police. Commentary], Warszawa 2015, p. 157.

the TL entitles state organs to request data that are not older than 12 months or whether the communications company should provide the authorised organ with the data possessed in accordance with Article 168 of the TL and stored longer than for 12 months, it must be stated that the communications company should refuse to provide the data. It must also be added that the standpoint is not common. There are also opinions that if a company possesses communications data, in spite of the termination of the 12-month period, the data should be provided on the request made by the authorised entities. The interpretational doubts presented above indicate that there is a need to make amendments to Act on the Telecommunications Law that would unambiguously eliminate the discussed doubts. Although the issues were indicated to legal institutions, there was no initiative to amend the regulations in order to eliminate doubts and, as a result, reduce the amount of enquiries addressed to telecommunications companies.

De lege ferenda, a new provision should be added to the Telecommunications Law unambiguously indicating that in case the company possesses communications data for a period longer than 12 months, the authorised organs cannot be provided with them. The principle should be binding regardless of the reason why the data are stored for a period longer than one year. The storage may be longer on the grounds of other provisions of the TL, e.g. for the needs of dealing with a complaint, as well as simply because of the neglected duty to delete the data after a year's period. The truth is that in practice the process of deleting communication records and data is not always appropriately performed.

4. The provisions of the TL in the field of retention and provision of communications data constitute the implementation of the decisions of Article 6 of Directive 2006/24/EC of the European Parliament and 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[14] (hereinafter Directive 2006/24/EC). Directive 2006/24/EC was implemented in the national law by the amendments to TL of 24 April 2009. The Directive was a response to the varied conditions of retaining transmission data in the EU member states in connection with detecting and pursuing crime. Directive 2006/24/EC standardized the range of data that are subject to retention for the landline and cellular telephone services, access to the Internet, email services and Internet calling. In its decision of 8 April 2014, the European Court of Justice (the Grand Chamber) in combined cases C293/12 and C594/12 declared Directive 2006/24/EC[15] to be null and void. In the justification to this judgement, the Court indicated, inter alia, that Direc-

[14] L 105/54 PL, Official Journal of the European Union 13.4.2006.
[15] Official Journal of the EU L 105, p. 54.

tive 2006/24/EC refers in general to all the entities, means of electronic communications and traffic data on, but without any differentiation, limitation or exception made with regard to the aim to fight against serious crime (thesis 57 of the judgement). The Court noticed that on the one hand Directive 2006/24/EC covers, in a generalized manner, all persons using electronic communications services whose data are retained. It even applies to persons for whom there are no grounds, actual or legal, for initiating a criminal proceeding. Moreover, the Directive does not provide for any exceptions to any persons. This means that it is also applied to persons whose contacts and information obtained during those contacts are subject to protection of professional secrecy in accordance with national laws (thesis 58 of the judgment). The court also indicated that Directive 2006/24/EC not only fails to lay limits to its application scope but also does not provide for any objective criterion that would ensure access of the competent national authorities to the data and their use only for the purpose of prevention, detection and criminal prosecution. On the contrary, Directive 2006/24/EC simply refers to the concept of 'serious crime' in Article 1 (1), defined in national law of every member state (thesis 60 of the judgment). Finally, the Court indicated that Directive 2006/24/EC does not lay down any objective criterion by which the number of persons entitled to access and subsequently use the data retained is limited to cases when it is strictly necessary for obtaining the objective. The Court noticed that access by the competent national authorities to the data is not made dependent on the prior review of a court or an independent administrative organ. A court or an independent administrative organ should supervise access to and use of data so that it is limited to cases when it is strictly necessary for obtaining the objective pursued. A court or a competent administrative organ should adjudicate or decide, exclusively on a justified request made in connection with the pending proceeding for the purpose of prevention, detection and criminal prosecution. The Directive does not lay down any obligations on member states to establish such mechanisms (thesis 62 of the judgement).

As the Court declared Directive 2006/24/CE to be null and void, a problem appeared as to how the Court's judgement should be interpreted and understood. Despite the fact that Directive 2006/24/EC was repealed, it must be assumed that the retention of data is admissible and constitutes a limitation of human rights and freedoms that is justified by public interest. The model of data retention laid down in the Directive is defective and requires amending. In the present situation, telecommunications companies should apply national legislation until it is repealed or amended by the legislator directly or following the judgement of the Constitutional Tribunal. However, the amendment to the regulation will be necessary when a new data retention directive is passed. The application and compliance with the TL does not generate any serious legal risks for telecommunications companies in the analysed situation. Their attempts to

interpret the provisions of the TL in the light of the Court's judgement on their own, especially the refusal to apply the provisions of the TL on the data retention, may pose a risk for telecommunications companies of being fined and even excluded from the register of telecommunications companies.

Proposals for model solutions

1. The purposes of communications data retention should be precisely defined in particular statutes. Too general specification of the purpose of acquiring data allows for requesting them from the obliged entities in numerous cases. The catalogue of situations in which authorised agencies may request the provision of communications data should be precisely determined. It is of key importance for the assessment whether the provisions in force do not infringe the principle of proportionality, and thus, are admissible in the light of current regulations protecting human rights and freedoms.

2. The principle of subsidiarity should be binding. There should be legal guarantees safeguarding the application of the principle. In accordance with the provisions in force, authorised entities may request the provision of communications data in every case, and not only when "other means used in order to meet the statutory objectives proved to be ineffective". Thus, the provisions that lay down grounds for requesting the provision of communications data as well as the adequate provisions of the TL determining telecommunications companies' duties should be amended. Therefore, the provisions of the TL (Articles 179–180g, Articles 192 (1) point 5b and 5c of the TL) should be amended with respect to their effectiveness in the creation of conditions for the implementation of the principle of subsidiarity in the field of communications data acquisition by authorised entities.

3. Solutions creating additional guarantees in case of persons doing the job of public trust should be introduced. The provisions that are currently in force do not lay down the category of persons, from whom communications data cannot be acquired because their jobs' professional secrecy must be respected. The legislator did not exclude any category of persons from the group of entities whose data may be acquired although the data may be covered by e.g. the solicitor's professional secrecy, which may be only exempted if it is indispensable for the good of justice administration and the particular circumstance cannot be established on the grounds of another proof. There should be legal solutions ensuring additional guarantees for those persons, especially a legal mechanism that would make the acquisition of data dependent on the court's consent.

4. In practice, the acquisition of communications messages and data with the use of IT systems already exists. It constitutes an element of unavoidable changes resulting from technological progress. The technological solutions adopted and introduced in practice do not always ensure full control of the scope and quantity of communications data provided by the obliged telecommunications companies. As practice shows, errors and inaccuracy take place quite often and cannot be eliminated. In practice, telecommunications companies provide data in a wider scope than that specified in the request for them. That happens because some telecommunications companies' systems generate data in a wider scope than it is necessary from the perspective of the requests. It is a violation of Article 160 (1) in connection with Article 159 (1) points 3–5 and Article 159 (3) of the TL, and Article 218 § 1 of the CPC. The provisions of the TL should clearly lay down when and according to what principles automatic systems may be used. The legal provisions currently in force do not lay down such detailed regulations. *De lege ferenda*, it is necessary to call for the adoption of such regulations to Act on the Telecommunications Law and make a delegation to issue an ordinance defining technical requirements for the use of such systems.

5. The provision of data should be partially charged for. At present, in accordance with the TL in force, the provision of communications data is free of charge. The introduction of fees might reduce the number of requests made by the authorised entities. It would also result in more careful specification of requested communications data by the authorised entities.

6. Apart from the already presented solutions in the field of amending the proceeding provisions or the provisions determining grounds for the authorised entities' requests, legal solutions that are organisational and institutional in character should be introduced. A mechanism of effective control of the acquired communications data should be established. At present, there is no entity in the legal system that would supervise the use of the authorised entities' entitlements to request and use communications messages and data. The establishment of a legal mechanism ensuring the deletion of the acquired data when they are no longer necessary should be part of the presented solutions. A reporting mechanism ensuring detailed information on the scope of the acquired communications data, e.g. the number of persons whose data were acquired or the number of the established personal data of telephone users, should also be introduced.

Conclusions

1. The invalidity of Directive 2006/24/EC of the European Parliament and 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 declared by the Court of Justice of the European Union (Grand Chamber) in joined cases C293/12 and C594/12 results in the necessity of starting work on the amendments to the Telecommunications Law with respect to the retention and provision of communications data.

2. It is necessary to work out new model solutions with respect to the retention and provision of communications data that must be dependent on the following assumptions:
- precise determination of the purpose of data collection;
- applicability of the subsidiarity principle;
- introduction of guarantees for persons doing the jobs of public trust;
- adoption of new regulations with respect to the acquisition of communications messages and data with the use of IT systems;
- introduction of partial payment for the provision of data;
- introduction of legal organisational and institutional solutions assuring effective control over the acquisition of communications data.

ARE THE REGULATIONS WITH RESPECT TO THE RETENTION AND PROVISION OF COMMUNICATIONS DATA APPROPRIATE IN POLAND? PROPOSALS FOR CHANGES

Summary

The article deals with the issue of the provision of communications data in Poland on demand made by authorised entities, especially courts and public prosecution. The article discusses interpretational doubts both with respect to the regulations giving authorised entities grounds for demanding communications data and the provisions regulating the telecommunications companies' duties with respect to the provision of these data. The article presents problems connected with the application of the provisions in practice. It contains a range of proposals for changes of the provisions regulating the sphere, aimed at eliminating the existing interpretational doubts and practical problems.

CZY UREGULOWANIA W ZAKRESIE GROMADZENIA I UDOSTĘPNIANIA DANYCH TELEKOMUNIKACYJNYCH W POLSCE SĄ PRAWIDŁOWE? PROPOZYCJE ZMIAN

Streszczenie

Przedmiotem artykułu jest problematyka udostępniania danych telekomunikacyjnych w Polsce na żądania podmiotów uprawnionych, w szczególności sądu i prokuratora. Artykuł omawia wątpliwości interpretacyjne zarówno w zakresie stosowania przepisów stanowiących podstawę do żądania danych telekomunikacyjnych przez uprawnione do tego podmioty, jak i przepisów regulujących obowiązki przedsiębiorców telekomunikacyjnych w zakresie udostępniania tych danych. Przedstawione są problemy w stosowaniu tych przepisów w praktyce. Artykuł zawiera szereg propozycji zmian przepisów regulujących omawianą problematykę, zmierzających do wyeliminowania istniejących wątpliwości interpretacyjnych i problemów praktycznych.

LES RÈGLEMENTS DU RAMASSAGE ET DE L'ACCÈS AUX DONNÉES DE TÉLÉCOMMUNICATION SONT-ILS RÉGULIERS EN POLOGNE? LES PROPOSITIONS DES CHANGEMENTS

Résumé

Le sujet de l'article concerne l'accès aux données de télécommunication en Pologne à la demande des services autorisés, en particulier le tribunal et la procurature. L'article parle des doutes de l'interprétation dans le cadre de l'application des règlements formant la base pour demandes des données de télécommunication par des services autorisés ainsi que des règlements qui régularisent les devoirs des entrepreneurs de télécommunication dans le cadre de l'accès à ces données. Les problèmes sont présentés à l'application de ces règlements en pratique. L'article contient plusieurs propositions des règlements qui régularisent la problématique pour éliminer les doutes actuels de l'interprétation et les problèmes pratiques.

ЯВЛЯЮТСЯ ЛИ УРЕГУЛИРОВАНИЯ В ОБЛАСТИ СБОРА И ДОСТУПА ТЕЛЕКОММУНИКАЦИОННЫХ ДАННЫХ В ПОЛЬШЕ ЗАКОНОМЕРНЫМИ? ПРЕДЛОЖЕНИЯ ИЗМЕНЕНИЙ

Резюме

Предметом статьи является проблематика предоставления доступа телекоммуникационных данных в Польше по запросу уполномоченных субъектов, прежде всего суда и прокурора. Статья рассматривает интерпретационные сомнения как в области применения положений, служащих основой для запроса телекоммуникационных данных уполномоченными субъектами, так и для положений, регулирующих выполнение обязанностей телекоммуникационных предпринимателей по предоставлению доступа к этим данным. Представлены проблемы, касающиеся применения этих положений на практике. Статья содержит ряд предложений, регулирующих обсуждаемую проблематику, направленных на устранение существующих интерпретационных сомнений и проблем практического характера.

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