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MAŁGORZATA MANOWSKA*

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1. POLISH CIVIL PROCEDURE**

The essence of a lawsuit consists in uncovering the truth and resolving a dispute. The establishment of an actual basis is a focal point of a process (non-trial proceedings) around which all activities of a court and parties concentrate. It results from the fact that the application of substantive law makes sense only when the course of events causing a dispute is properly determined. The essence of the principle of truth that must be stuck to in civil proceedings consists in such development of procedural rules which will allow finding out the actual course of events that is the underlying cause of a dispute. Proper construction of actual grounds for a judgment requires going through a few processes.

Firstly, parties should report facts and evidence to support their statements and refute the statements of their opponents.

Secondly, it is necessary to select facts and evidence from the point of view of their significance for adjudication, admissibility and purposefulness, and next hear the selected evidence.

Thirdly, it is necessary to evaluate the evidence and logically analyse the facts that result therefrom (taking into account life experience) in order to confirm the truthfulness of the parties' statements.

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Obviously, proper establishment of the actual state alone is not sufficient for the parties. The process should be efficient and fast but have respect for procedural guarantees implementing directives resulting from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 45 of the Constitution of the Republic of Poland. Therefore, the legislator is obliged to develop procedural legal norms in such a way that ensures that citizens have the right to a fair trial, and a court is a guarantor of the appropriate enforcement of those norms.[1] The procedure ensuring respect for the rights of a party to a lawsuit by guaranteeing openness of proceedings, parties' equality, the right to be given a fair hearing, clarity of procedural rules (procedural justice), and obtaining a court judgment on a case within a reasonable time limit constitute the content of a citizen's right of access to court, i.e. the right to legal protection.[2] Ensuring that a party has the right of access to court, to collect evidence and to establish the actual state depends mainly on the proper weighing of such principles of a lawsuit as adversariness, parties' free exercise of rights, evidence concentration, and judicial management of proceedings.

The way in which the principles of adversariness and free exercise of rights are shaped decides who is responsible for the collection and presentation of evidence in a lawsuit.[3] The principle of evidence concentration and procedural formalism supplement the principle of adversariness as they ensure speed and efficiency of proceedings.[4] Although what constitutes the essence of a lawsuit is the parties' right to argue before a court and they are those who should decide, as a rule, on the

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[1] For more on the issue, compare A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, p. 78 et seq., and *eadem*, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji*, Warszawa 2013, pp. 21–22; see also J. Klich-Rump, *Podstawa faktyczna rozstrzygnięcia sądowego w procesie cywilnym*, Warszawa 1977, p. 58 and literature referred to therein.

[2] See P. Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym*, Warszawa 2005, pp. 7–16; S. Pilipiec, *Teoretycznoprawne aspekty prawa do sądu*, Annales UMCS, Sectio G, Lublin 2000, pp. 227–228; M. Wyrzykowski, *Zasada demokratycznego państwa prawa*, [in:] *Zasady podstawowe polskiej konstytucji*, W. Sokolewicz (ed.), Warszawa 1998, pp. 82–83; L. Garlicki, *Prawo do sądu (rozważania de lege fundamentale ferenda)*, Annales UMCS Sectio G, Lublin 1990, p. 60; Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 175; Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji RP (ogólna charakterystyka)*, Państwo i Prawo 11–12, 1997, pp. 15–17; *idem*, *Konstytucyjna zasada prawa do sądu a standardy europejskie*, [in:] *Prawo i prawnicy w okresie przemian ustrojowych. Zagadnienia wybrane*, Poznań 1992, pp. 100–102; M. Borucka-Arctowa, *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa*, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga Pamiątkowa ku czci Profesor Janiny Zakrzewskiej*, J. Trzciński, A. Jankiewicz (eds), Warszawa 1996, pp. 25–29; R. Tokarczyk, *Sprawiedliwość jako naczelna wartość prawna*, Państwo i Prawo 6, 1997, pp. 13–15; M. Sawczuk, *Konstytucyjne idee prawa sądowego cywilnego*, [in:] *Konstytucyjny ustrój państwa. Księga jubileuszowa Profesora Wiesława Skrzydły*, T. Bojarski, E. Gdulewicz, J. Szreniawski (eds), Lublin 2000, p. 246; *idem*, *Naruszenie prawa do wysłuchania podstawą skargi konstytucyjnej*, Annales UMCS, Sectio G, Lublin 1997, pp. 97–100.

[3] W. Berutowicz, *O pojęciu naczelnych zasad postępowania cywilnego*, Studia Cywilistyczne 1975, Vol. XXV–XXVI, p. 38.

[4] P. Pogonowski, *supra* n. 2, pp. 58–59; W. Siedlecki, *O usprawnienie i zwiększenie efektywności sądowego postępowania cywilnego*, Nowe Prawo 4, 1979, pp. 11–12; E. Wengerek, *Koncentracja materiału procesowego w postępowaniu cywilnym*, Warszawa 1958, pp. 3 and 29–32; F.X. Fierich, *Środki skupienia materiału procesowego według projektu Kodeksu polskiej procedury cywilnej*, Kraków 1928, pp. 12–16; S. Cieślak, *Zasada formalizmu przy wnoszeniu środków odwoławczych w postępowaniu cywilnym*, Przegląd Sądowy No. 4, 2001, pp. 29–35; H. Fasching, *Cele reformy w polskim*

presentation of the procedural material to a court, they should not have full freedom in this field because court proceedings might last too long and a party's right to adjudication on a case without unnecessary delay would be violated. On the other hand, formal and substantive judicial management serves proper implementation of the principle of procedural material concentration.[5]

The way in which the principles of adversariness and free exercise of rights are shaped decides about the scope of the parties' rights and obligations. On the other hand, the principle of judicial management of proceedings determines the scope of a court's rights and obligations in the process of collecting procedural material necessary to adjudicate (and this way the implementation of the principle of evidence concentration). Judicial formal management covers the organisational aspects of a lawsuit and, in general, is limited to activities connected with sittings and a hearing, i.e. opening and closing sittings and a hearing, giving and taking back the floor, determining the order of questioning witnesses, administering witnesses' oath, dismissing witnesses, encouraging settlement, preventing lengthiness caused by misusing the floor, and announcing judgments. On the other hand, substantive judicial management consists in making sure that all the important circumstances disputed are fully explained in the course of a lawsuit.[6]

With regard to the functioning of the principle of adversariness and free exercise of rights, it is the parties to a lawsuit who bear the burden of the so-called instructing a court by providing the procedural bodies with all documents that are necessary to adjudicate on the claims and statements of the defence (burden of proof).[7] As a result, the court may more thoroughly specify the burden of this instruction to be carried by the parties by ordering them to supplement or explain some circumstances so that a case can be comprehensively explained. This burden is not applicable in the cases in which a court has the discretion *ex officio* to look for necessary evidence regardless of the parties' initiative (e.g. upon the occurrence

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i austriackim postępowaniu cywilnym, [in:] *Współczesne tendencje rozwoju prawa procesowego cywilnego*, K. Warzocha (ed.), Warszawa 1990, p. 95.

[5] S. Gołąb, *Skupienie i przyspieszenie w procesie cywilnym*, Głos Prawa 5–6, Lwów 1937, pp. 13–14.

[6] J.J. Litauer, *Komentarz do Procedury Cywilnej. Kodeks postępowania cywilnego. Postępowanie sporne. Postępowanie zabezpieczające*, Warszawa 1933, p. 96, pp. 129–130; M. Waligórski, *Polskie prawo procesowe cywilne. Dynamika procesu (Postępowanie)*, Warszawa 1947, pp. 40–41; *idem*, *Proces cywilny. Funkcja i struktura*, Warszawa 1947, p. 555; for more on the issue, see also: A. Thon, *Krytyka kodeksu postępowania cywilnego ze stanowiska teorii procesu i doświadczenia praktyki. Część I. Postępowanie sporne*, Warszawa 1936, p. 85, and S. Gołąb, *supra* n. 5, pp. 13–14; J. Skąpski, [in:] L. Peiper, *Komentarz do Kodeksu postępowania cywilnego*, part 1, Kraków 1934, p. 523; M. Richter, *Kodeks postępowania cywilnego z przepisami wprowadzającemi oraz pokrewnemi ustawami i rozporządzeniami*, Warszawa, pp. 123–124; Eugeniusz Waśkowski took a different stance and stated that judicial management concerns only the formal aspect of proceedings, while the substantive (internal) aspect is subject to the regulation resulting from the principles of adversariness and free exercise of rights. The author attributed the role of a passive arbitrator to a court; see E. Waśkowski, *Podręcznik procesu cywilnego*, Wilno 1932, p. 82; *idem*, *System procesu cywilnego (Wstęp teoretyczny)*, Wilno 1932, p. 109.

[7] M. Waligórski, *Polskie prawo procesowe cywilne. Funkcja i struktura procesu*, Warszawa 1947, pp. 173–174.

of public interest).[8] The above indicates that providing the court with procedural material sufficient to explain a case comprehensively requires cooperation between the court and the parties. This cooperation may follow different models. The most common scheme also taking place in the Polish lawsuit takes into account the fact that the managerial role of the parties to the lawsuit (instructing the court) is played by means of the principles of adversariness (it decides who provides procedural material) and free exercise of rights (it decides whether a party provides procedural material). On the other hand, the court is obliged to enforce the principle of procedural material concentration with regard for a fair trial (it decides whether a party has provided the material at the right time, followed the rules of decorum and carried the burden of supporting proceedings), as well as to eliminate delayed material, provided in order to lengthen proceedings or useless for resolving the case, and to supplement this material by acting *ex officio* (judicial management).[9] Thus, the judicial substantive management focuses on activities connected with the preparation and verification as well as possible supplementation of the procedural material (concerning both facts and evidence-related spheres) in accordance with substantive law.[10] This is connected with the necessity of taking various procedural decisions by the court (a presiding judge) in relation to collection and processing of evidence serving the confirmation or refutation of the parties' statements.[11]

In the Polish civil procedure,[12] both the rules of the judicial management of evidence hearing and the principle of presenting procedural material by parties are rather thoroughly regulated. Both general and detailed rules can be distinguished. The general rules include:

(1) for the parties: the burden of supporting a lawsuit expressed in the obligation to perform procedural activities following the rules of decorum, to provide truthful explanation of the case circumstances without concealment of anything, and to present evidence (Article 3 CCP);
(2) for the parties: an obligation to quote all facts and evidence without delay so that the proceedings can be conducted efficiently and fast (Article 6 § 2, Article 232 first sentence CCP);
(3) for the parties: a ban on taking advantage of the right laid down in the procedural provisions that is in conflict with the purpose for which it was established (a ban on misusing procedural law, Article 4^1 CCP);
(4) for the court: an obligation to prevent lengthening of proceedings and striving to adjudicate during the first session if it is possible with no harm to the explanation of the case (Article 6 § 1 CCP);

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[8] *Ibid*., pp. 175–182.

[9] For more on this issue, compare M. Manowska, *Struktura sędziowskiego materialnego kierownictwa postępowaniem dowodowym przed sądem drugiej instancji, w apelacji pełnej w procesie cywilnym*, Przegląd Sądowy 10, 2018.

[10] A. Łazarska, *Rzetelny proces*, *supra* n. 1, 2012, pp. 85–86.

[11] For more on the issue, see also T. Wiśniewski, *Przebieg procesu cywilnego*, Warszawa 2009, p. 33; A. Łazarska, *Sędziowskie kierownictwo*, *supra* n. 1, 2013, pp. 85–86.

[12] Act of 17 November 1964: Code of Civil Procedure (Dz.U. 2020, item 1575); hereinafter CCP.

(5) for the court: the right to admit evidence that has not been indicated by a party (Article 232 second sentence CCP).

Special norms are placed among the provisions regulating preparation of a sitting or among the provisions regulating special proceedings. The former group includes mainly the norms authorising the court to awake an evidence-related initiative. A court can oblige parties to file pleadings presenting procedural material (Article 205^3 § 1 and § 2 CCP). However, if a preparatory sitting is set, in accordance with Article 205^{12} § 1 CCP, a party can quote statements and evidence supporting their conclusions or refuting opponents' statements until the hearing schedule is approved. Both above-mentioned procedures exclude one another within the meaning that if the court obliges parties to file pleadings in accordance with Article 205^3 § 1 and § 2 CCP, it excludes the possibility of free presentation of procedural material during the preparatory sitting (Article 205^3 § 1). On the other hand, in the case the court does not oblige parties to file pleadings before the hearing or there is no preparatory sitting, the court should awake an evidence-related initiative of the parties during the hearing and inform them at the same time about the content of Article 205^{12} § 2 CCP, unless a party is represented by a professional proxy (Article 210 § 1 and § 2^1 CCP).

In every case when a party fails to provide the court with procedural material necessary to adjudicate in the right time, further statements or evidence shall be excluded, unless the party proves that quoting them in a preparatory pleading (during a preparatory sitting or a hearing) was not possible or that the need to present them occurred later (Article 205^3 § 2, Article 205^{12} § 1 CCP). The content of the above-mentioned provisions does not raise any doubts that the exclusion of late statements and evidence is not subject to the discretional decision of the court, however, it is the court that decides whether it has been proved that a party could not quote the statements and evidence in the right time or that the need to present them occurred later. On the other hand, the circumstance concerning the fact that the evidence is late and cannot be presented by a party does not mean that the court cannot admit it *ex officio*.[13]

The above-presented model does not take into account the statutory evidence preclusion. It is due to the fact that evidence preclusion depends on whether the presiding judge orders parties to exchange preparatory pleadings and obliges them to present all statements and evidence in those documents or rules that a preparatory sitting should take place. However, taking those steps is not obligatory, which is indicated in the wording of Article 205^3 § 1 and § 2 CCP, which stipulates that a presiding judge may order parties to exchange preparatory pleadings in justified cases, especially in complicated or accounting-related cases, and if the exchange of preparatory pleadings is ordered, the presiding judge may oblige the parties to present all statements and evidence important for adjudication on the case. In turn, in accordance with Article 205^4 § 3 CCP, if the circumstances of a case indicate that a preparatory sitting will not contribute to more efficient recognition of the case,

[13] For more on this issue, compare e.g. the Supreme Court judgment of 22 February 2006, III CSK 341/05, OSNC 2006, No. 10, item 174, in the light of evidence preclusion.

a presiding judge may make the case take a different proper course; in particular, he/she may refer it for recognition, also at a hearing. In such cases, in accordance with Article 205^{12} § 2 CCP, a party may quote statements and evidence to justify their motions or to refute the other party's motions or statements until the end of proceedings, with the exception of unfavourable consequences that, according to the statutory provisions, may result from playing for time or non-compliance with the presiding judge's orders or the court's rulings. In accordance with Article 210 § 1, § 2 and § 2^1 CCP, a party not represented by a professional proxy is informed about, inter alia, the content of Article 205^{12} § 2, and should report statements and evidence as well as take a stance on the opponent's statements.

Article 235^2 § 1 CCP classifies the reasons for the exclusion of evidence. The catalogue is open. In accordance with the provision, a court may in particular exclude evidence:

(1) the hearing of which is excluded by a statutory provision;
(2) which proves an unquestionable fact that is not important for the adjudication on the case or that is proved to be in conformity with a party's statement;
(3) that is useless for proving a given fact;
(4) that cannot be presented;
(5) that is aimed at lengthening the proceedings;
(6) when a party's motion does not meet the requirements of Article 235^1, and a party fails to amend it, despite being requested to do so (it concerns the content of a motion to hear evidence, which should contain evidence marking in the way making it possible to hear it and to list facts that the evidence is to prove).

The most important reasons for excluding evidence laid down in Article 235^2 § 1 CCP from the point of view of the principle of substantive management of evidence hearing proceedings are those determined in subsections (2) and (3) above. They require that a court select parties' statements and evidence with regard to whether a given fact is important for adjudication on the case in the light of the substantive grounds for claims or defence measures (Article 227 CCP) or whether a party is able to prove a factual circumstance they have indicated or negate the circumstance reported by the opponent with the use of this evidence. If a given fact does not meet the criterion of significance, the evidence reported to prove it should be excluded. The operation requires initial substantive evaluation of the parties' statements. In case the court recognises a fact reported by a party as significant for the adjudication on a dispute, then the court should assess whether it must be proved. It will not be necessary if the parties do not question the fact or when the fact may be proved without the provision of evidence, i.e. it is classified as a commonly known fact (Article 228 § 1 CCP) the information about which is commonly available (Article 228 § 2 CCP), facts that a court knows *ex officio* (Article 228 § 2 CCP), facts clearly admitted by a party or implied (Articles 229 and 230 CCP), or facts that can be determined as a result of drawing conclusions within the presumption of a fact (Article 231 CCP) or with the use of legal presumption (Article 234 CCP). At the same time, the court should examine if the evidence motion lodged is necessary to be heard and admissible in the light of procedural law. Evidence must also be suitable to prove that a given statement is true. Thus, evidence from a witness's

testimony made in connection with circumstances that require having special information will not constitute such evidence.

Apart from the above detailed norms regulating the parties' obligation (procedural burden) to present evidence, the Code of Civil Procedure also specifies the concept of misuse of procedural law laid down in Article 4^1. The provision is formulated as a ban and stipulates that the parties and participants of proceedings must not make use of their rights laid down in procedural law for purposes that are in conflict with the aim for which they were established. The misuse of procedural rights should be interpreted as any case of such a use of civil procedure by a party (or another participant) that serves aims different from the protection of subjective rights, i.e. making use of them in the way that is objectively in conflict (or objectively unjustified) with the content of procedural provisions (including the principles of the civil procedure, especially the principle of equality and trial economy), with the obligation resulting from those provisions (as well as the Constitution of the Republic of Poland) to maintain procedural fairness and other principles of social coexistence, where the application (making use) of the procedure should be understood as any conduct (procedural activities as well as action and omission having influence on the course or result of the proceedings).[14] The legislator does not define in Article 4^1 CCP what procedural activities or conduct of the parties can be recognised as misuse of procedural law. Some of such situations are regulated in the special provisions. These include:

(1) filing a suit in the form of a pleading that does not contain a request to hear a case in court (Article 186^1 CCP);
(2) filing a groundless suit (Article 191^1 CCP);
(3) filing many complaints about the same or similar matters (Article 394^3 CCP);
(4) filing many motions to recuse a judge (Article 53^1 CCP);
(5) filing many motions to amend, supplement or interpret a judgment (Article 350^1 CCP), and to appoint a proxy *ex officio* (Article 117^2 § 2 CCP).

The above catalogue is not exhaustive and, in general, each type of a party's conduct may be recognised as misuse of procedural law, e.g. repeatedly filing the same evidence-related motions.[15] There are some doubts, however, what sanctions

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[14] For more on the issue of procedural misuse, compare M.G. Plebanek, *Wykonanie nieprawomocnego nakazu zapłaty zaopatrzonego w klauzulę wykonalności a zagadnienia nadużycia prawa procesowego i podmiotowego. Glosa do uchwały SN z dnia 7 października 2009 r., III CZP 68/09*, Polski Proces Cywilny 1, 2011, p. 159; *idem*, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, pp. 74–75; K. Flaga-Gieruszyńska, *Zastój procesu cywilnego jako skutek niewłaściwego postępowania stron*, [in:] *Jus et remedium. Księga jubileuszowa Profesora Mieczysława Sawczuka*, A. Jakubecki, J.A. Strzępka (eds), Warszawa 2010, pp. 162–167; A. Góra-Błaszczykowska, *Zasada równości stron w procesie cywilnym*, Warszawa 2008, pp. 350–353; T. Wiśniewski, *supra* n. 11, p. 25; T. Bukowski, *Rozstrzyganie o kosztach procesu cywilnego*, Warszawa 1971, p. 53; T. Cytowski, *Procesowe nadużycie prawa*, Przegląd Sądowy 5, 2005, pp. 82 and 102; T. Ereciński, *Nadużycie praw procesowych w postępowaniu cywilnym. Tezy i wstępne propozycje do dyskusji*, [in:] *Nadużycie prawa procesowego cywilnego*, P. Grzegorczyk, M. Walasik, F. Zedler (eds), Warszawa 2019, pp. 16 and 17.

[15] For more on this issue, see Ł. Błaszczak, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, T. Zembrzuski (ed.), Wolters Kluwer Polska, LEX/el, commentary on Article 4^1, theses 20–21.

the court can apply in the case it recognises that a party's activity constitutes the misuse of procedural law. The legislator laid down some sanctions in some cases (see the provisions referred to above). These are specific sanctions concerning the course of procedural activities such as retaining a pleading in the case files without taking any further steps (Article 53^1 § 2, Article 117^2 § 2, Article 350^1 § 3, Article 394^3 § 3 CCP), returning a pleading (Article 186^1 CCP), dismissing a suit during a closed sitting without notification of an opponent party and without hearing motions filed together with a suit (Article 191^1 § 3 CCP). Apart from that, the legislator enacted sanctions that can be imposed on a party that misuses procedural law (subjective sanctions). They are mainly laid down in Article 226^2 § 2 and Article 103 § 2 and § 3 CCP. The application of sanctions other than special ones concerning the course of procedural activities based on the general norm under Article 4^1 CCP, e.g. omitting an activity, dismissing evidence, is also admissible. However, the imposition of whatever sanctions on a party for the misuse of procedural law that is not laid down in the provisions of the Code of Civil Procedure is inadmissible.

2. BELGIAN CIVIL PROCEDURE

The Belgian civil procedure is constructed based on the principle of parties' free exercise of rights (autonomy), which mainly means that these are parties who determine the limits of a dispute: the limits of claims and the limits of defence. As a rule, a court cannot interfere in the objective and subjective limits of proceedings (Articles 1138 and 811 of the Belgian Judicial Code of 10 October 1967, *le Code judiciaire*, hereinafter C.j.).[16] This does not mean that a court is a passive observer of a dispute between the parties. Like in the Polish civil procedure, a Belgian judge should manage a case in such a way that ensures all necessary procedural guarantees to parties, but at the same time that a judgment is issued in a reasonable time limit. This means that the court does not only have the right but also a duty to take such managerial steps that will force parties to act in the way allowing the development of proceedings aimed at settling a dispute. The role of the court and the scope of its possibilities of interfering *ex officio* into statements made by parties are different from its role in relation to evidence that should be presented to support parties' statements.

In accordance with the general rule expressed in Article 870 C.j., each party bears the burden of proof so it is their duty to prove the facts that are grounds for claims, defence and statements made that they refer to.[17] Thus, parties bear a similar procedural burden as in the Polish system and it is parties who face negative consequences of failure to carry this burden. Parties are also obliged to present facts and evidence to support their statements or charges in pleadings. In the so-called

[16] P. Taelman, C. Van Severen, *Civil Procedure in Belgium*, Wolters Kluwer 2018, p. 25, vol. 34.

[17] The Court of Cassation, 21.01.2016, C.14.0470, unpublished, 7.05.2015, C.14.0011; P. Taelman, C. Van Severen, *supra* n. 16, p. 139, para. 438; J. Laenens, D. Scheers, P. Thiriar, S. Rutten, B. Vanlerberghe, *Hnadboek Gerechtelijk Recht*, Antwerpen–Cambridge, 2016, p. 560, thesis 1321.

conclusions included in pleadings, apart from fulfilling formal requirements concerning personal data, parties should indicate, inter alia, facts important for the resolution of a dispute, define claims, present factual and legal arguments that are grounds for the plaintiff's claims and based on which a defendant must construct their defence, and motions concerning the expected judgment (Article 744 C.j.). Failure to meet formal requirements causes that the court excludes the pleading from proceedings.[18] As a rule, parties can file documents only if they have referred to them in a pleading, unless a claim or a charge of the defence is based on them.[19]

In a situation when the court establishes the schedule of proceedings (which usually precedes a preliminary sitting) and determines the number of pleadings and the deadline for filing them, pleadings filed late are automatically excluded from the proceedings, unless both parties agree for their admission or the schedule of the proceedings or the time limit for their conclusion is changed. If there is no unanimous agreement, a party that was conscientious may demand that a judgment be issued and be recognised as an adversary one and not a judgment by default (Article 747 C.j.). The provision stipulates that if, in the period preceding the deadline for filing pleadings, a party that has already filed one discovers a new important document or fact justifying a new statement, they may apply for a new time limit for the conclusion of the proceedings but it must be done 30 days before the date assigned for the hearing of pleadings at the latest. The party must file a motion to the judge to be allowed to file an additional pleading in which they must indicate a new document or fact as well as specify its impact on the resolution of the dispute. Other parties can present their stance to the judge within 15 days from the date of notification of such a motion. If the judge approves of the party's motion, he/she determines another date of a hearing (if it is necessary to provide summing up of conclusions, which will be discussed below). Failure to meet the above deadlines results in automatic exclusion of pleadings from the proceedings.

There is a rule in the Belgian civil procedure in accordance with which parties should file final pleadings (conclusions) that are summing-up ones in nature (Article 747 C.j.). In jurisprudence, it is believed that the final pleadings substitute for all former pleadings; therefore, they must be exhaustive and contain all claims, charges and arguments that parties uphold and refer to a court for adjudication.[20] It is important because, in accordance with Article 780 para. 3 C.j., which stipulates the elements and content of a judgment, the determination of the object of the demand (motion) and the response to parties' statements concerning the circumstances important in the dispute is one of the elements of the judgment. An opinion has even been expressed in case law that a court must not adjudicate on a case concerning claims or charges of the defence which have been expressed in former pleadings and have not been repeated in the final pleading.[21]

As far as evidence hearing is concerned, in accordance with the Belgian civil procedure, a court is an administrator of this proceeding and is in charge of judicial

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18 P. Taelman, C. Van Severen, *supra* n. 16, p. 96, para. 265.
19 *Ibid.*, p. 96, para. 268.
20 *Ibid.*, p. 96, para. 266.
21 The Court of Cassation, 19.11.2015, C.15.0198.N.

management. Parties, in public interest, are obliged to cooperate with the court and with one another in order to provide the court with evidence and help resolve a dispute. Third parties are subject to the same obligation. Otherwise, the court may apply various measures (sanctions) for unjustified lack of cooperation; inter alia, it may use particular presumptions determined in the Civil Code (Article 1341 et seq. of the Belgian Civil Code), impose a fine for misuse of procedure (Article 780bis C.j.), and oblige a party to cover the cost of the proceedings. This also concerns the lack of cooperation with an expert witness (Article 972bis C.j.).[22]

The court's activity consists in supervising whether evidence and facts that must be proved are reported properly, verifying if the evidence that parties want to present is sufficient and admissible, interpreting and evaluating evidence presented, and if possibile taking investigative steps *ex officio*.[23]

The court's activity is subject to some limitations and they are even more far-reaching in case of the presentation of facts. It is due to the fact that the court is not authorised to introduce new facts to proceedings *ex officio* and cannot base on facts that have not been presented by the parties themselves. However, in particular situations the court can (sometimes is obliged to) act *ex officio* in relation to the establishment of facts as well as the presentation of evidence. However, it cannot raise issues that are not the subject matter of a dispute between parties because it is parties who determine the limits of a civil dispute.[24] Nevertheless, the court's interference into this area consists in the possibility of basing on a circumstance deduced from facts that parties have provided or a circumstance resulting from evidence that parties have presented, although the parties have not presented this fact directly and they have not drawn conclusions making it possible to establish it.[25] A more far-reaching inquisitorial court's action consists in the possibility of asking parties questions concerning the essence of the dispute and presented facts, as well as evidence connected with them, but without raising issues that have not been raised by the parties themselves. This sphere of the court's activity causes some complications and requires carefulness because the court should not ask questions

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[22] J. Laenens, D. Scheers et al., *supra* n. 17, pp. 564 and 578, theses 1330 and 1361; B. Allemeersch, I. Samoy, W. Vandenbussche, *Overzicht van Jurisdiction. Het burgerlijkevrecht, 2000–2013*, TPR 2015, thesis 640; B. Allemeersch, *Taaiwerdeling in het burgerijk process*, Antwerpen: Intersentia, 2007, pp. 348–349; R. Mougenot, *Droit des obligations. La prevue*, Bruxelles: Larcier 1997, p. 91, no. 31; G. De Leval, *L'instruction sans obstructions*, [in:] J. Van Compernolle, *La preuve*, 1987, p. 25; D. Sheers, P. Thiriar, *Het greechtelijk recht in de hoogste versnelling?*, Antwerpen: Intersentia, 2007, pp. 148–149 and 198–199; M. Castermans, *De hervorming van het deskundigenonderzoek*, Gent: Story Publishers, 2007, p. 15.

[23] J. Laenens, D. Scheers et al., *supra* n. 17, p. 565, thesis 1332; R. Mougenot, *supra* n. 22, p. 79, no. 21; M.E. Storme, *Over het gebruik van onrechtmatig verkregen bewijsmiddelen in het privaatrechtelijk procesrecht*, [in:] W. Calewaert, *Liber Amicorum*, Antwerpen: Kluwer, 1984, pp. 79–86; H.J. Snijders, M. Ynzonides, G.J. Meijer, *Nederlands burgerlijke procesrecht*, Deventer: Kluwer, 2002, p. 197, no. 217; B. Allemeersch, P. Schollen, *Bechoorlijk bewijs in burgerlijke zaken. Over de geoorloofdheidsvereiste in het burgerlijk bewijsrecht*, RW 2002–03, theses 41–60.

[24] J. Laenens, D. Scheers et al., *supra* n. 17, p. 565, thesis 1333; judgments Cass. 24.09.1982, Arr. Cass. 1982–83, 131; Cass. 5.10.1984, Arr. Cass 1984–85, 211 en RW 1985–86, 1029.

[25] P. Taelman, C. Van Severen, *supra* n. 16, p. 26, paras 37–39; also the Court of Cassation, 4.11.1994, the Cassation Court judgments 1994, no. 931; the Court of Cassation 4.12.1995, the Cassation Court judgments 1995, no. 1069.

that may raise doubts about its impartiality or that might be treated as legal advice. Still, these can be questions drawing a party's attention to a particular issue (but not suggesting anything), which may have influence on the adjudication on the matter.[26] To illustrate the issue, it seems that a court cannot directly ask a defendant if they think that the claim is statute barred or if they know when certain claims become statute barred. But a judge may ask a question when a defendant fell into debt. The court should not suggest that the plaintiff, instead of suing the defendant for failing to fulfil a contract, should sue them for unjustified enrichment, but it can ask questions that will make the plaintiff realise that a contract is invalid (without indicating that fact directly). The most far-reaching inquisitorial court's action concerns the area of providing evidence by parties in order to support their statements and conclusions or to refute opponents' statements and conclusions (Article 870 C.j.). In accordance with Article 871 C.j., a judge may order each party to the proceedings to present evidence they have. Such a procedural decision can be taken when the court decides that the evidence provided by the parties is insufficient to assess the substantive grounds for the claim or defence efficiency and to issue a judgment. This also concerns admission of evidence from witnesses' testimonies *ex officio*, in accordance with Article 916 para. 1 C.j.; however, it is possible only when facts that the evidence concerns are decisive for the resolution of a dispute.[27] Then the court may order that a supplementary evidence hearing be conducted (e.g. it can order that a document be submitted or inspection be conducted). Within these proceedings, the court may demand that the parties present all evidence they have.[28] This means that the court, like under Polish law, should not conduct an investigation in order to find evidence, but it should have the knowledge that a party has particular evidence, although they have not presented it to the court. Supplementing the evidence hearing, the court may at the same time have indirect influence on the establishment of the factual grounds for claims. It takes place when the court orders that particular evidence be heard and this results in new facts significant for the adjudication on the case. The court may then base its resolution on those facts, even when they have not been raised by any of the parties.[29] Moreover, it should be pointed out that, as a rule, parties are not obliged to present evidence that might negatively affect a claim or support charges brought by the defence. However, it is indicated in the doctrine that the principle of fair play requires that parties cooperate in good faith when they provide and collect evidence. That is why the court, when it finds that a party has evidence that might confirm or deny a fact that is significant for adjudication, may order the party to present the evidence, in accordance with Article 871 C.j., which also interferes into the establishment of the actual state.[30] It is indicated in case law that ordering a party to submit a document for the purpose of providing evidence

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[26] P. Taelman, C. Van Severen, *supra* n. 16, p. 26, paras 3–39.

[27] J. Laenens, D. Scheers et al., *supra* n. 17, pp. 578–579, thesis 1398.

[28] P. Taelman, C. Van Severen, *supra* n. 16, print.

[29] W. Van Eeckhoutte, *Schuifelen op de rechterstoel – De taak van de rechter in het belgisch privaatrechtelijk procesrecht: een kwestie van moeten of mogen*, [in:] Preadviezen 1, 2015, Boom: VVSRBN (ed.), Den Haag, pp. 289–295; P. Taelman, C. Van Severen, *supra* n. 16, p. 79, para. 204.

[30] P. Taelman, C. Van Severen, *supra* n. 16, pp. 96, 144.

is admissible only when there are serious particular reasons for establishing that the party has this document.[31]

Managing the presentation of evidence, a judge should choose the fastest and cheapest method of investigating and limit his/her action to the necessary minimum. In accordance with Article 875bis C.j., a judge should limit the choice of an investigative measure and its content to what is sufficient to resolve a dispute, taking into account the proportionality of the cost of hearing evidence and the subject matter of a dispute and the fastest, cheapest and simplest way of proving.[32]

The misuse of procedural law functions in the Belgian judicial procedure like in the Polish civil procedure. It is regulated under Article 780bis C.j. and is to prevent the misuse of procedural law in the course of proceedings. The provision was introduced to the Belgian Judicial Code by the Act of 26 April 2007 amending the Judicial Code in order to fight against court proceedings behind schedule.[33] It is also supposed to be an instrument making it possible to carefully weigh the right of access to court on the one hand, and prevent the misuse of the administration of justice on the other hand.[34]

In accordance with Article 780bis C.j., a party that uses the procedure for the purpose of delaying or another type of misuse can be subject to financial penalty from 15 to 2,500 euros without prejudice to the other party's rights to claim compensation. In such a case, the financial penalty is ruled by the same decision within the scope in which the claim for compensation will be approved to cover losses and, pursuant to a party's interest, for filing a lawsuit hastily or in bad faith. If it does not happen, parties will be requested to submit explanations, in accordance with Article 775 C.j. (If the reopening of a debate is ruled, a judge calls parties to exchange opinions and send them back by determined deadlines under threat of automatic exclusion from the debate, along with conclusions concerning a charge or defence, and justifies that. If necessary, the judge determines the day and time of hearing the parties on the subject matter he/she determines. The parties are notified thereof being served with writs and, in some cases, their lawyers are notified by standard post. A decision issued after the debate has been resumed is in every case recognised as issued with respect for the principle of adversariness, provided that the decision on the resumption has been issued with respect for adversariness). Article 780bis C.j. is not applicable to criminal and disciplinary cases.

Misuse of procedure usually means the use of procedural provisions in the way that clearly exceeds the limits of their standard (typical) application by a reasonable and conscientious person taking into account all circumstances of the case. Such circumstances include, e.g. a position held, a job, education or professional experience, or the knowledge of law. The assessment of a party's conduct from

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31 The Court of Cassation, 16.10.2015, C.14.0512.F.

32 J. Laenens, D. Scheers et al., *supra* n. 17, p. 577, thesis 1358; D. Scheers, P. Thiriar, *Potpourri 1 – Gerechtelijk recht*, Antwerpen: Intersentia, 2015, p. 126; D. Scheers, P. Thiriar, 2007, *supra* n. 22, p. 123; judgments Cass. 9.05.2005, Pas. 2005, 1, 1008; Cass. 17.11.1998, Arr. Cass. 1988–89, 321.

33 M. Stassin, *L'amende civile*, Journal des tribunaux, year 136/9, http//jt.larcier.be, 4.03.2017, p. 166.

34 P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

the point of view of procedural law misuse should be abstract in nature, based on an objective benchmark and not a subjective one taking into account individual features.[35] Of course, the above statement should be understood as follows: the assessment based on an abstract benchmark means the assessment referring to a model of a person who acts taking care of their own matters important for life. However, this benchmark is not uniform. Using contrasting examples, another benchmark should be applied, e.g. in the case of adults who have studied law and have no intellectual impairment and a different one in the case of the elderly who suffer from some impairments connected with their old age. The legal doctrine and the judicature indicate three types of situations in which parties' conduct is classified as misuse of procedural law:

(1) making use of law with an exclusive intent to cause harm;
(2) fulfilling an obligation for the purpose different from the one for which this obligation was imposed;
(3) exercising the right in the way that harms the other party or the judicial system disproportionately to the benefits resulting from this right.[36]

Article 780bis C.j., as a rule, is applicable at every stage of proceedings: at the stage of initiating proceedings, during a particular part of them as well as when other procedural steps are taken.[37]

The institution laid down in Article 780bis C.j. regulates the so-called civil fine to be paid to the state. Another instrument listed in this provision that is to prevent the misuse of procedural law is compensation to and on demand of a party for the misuse of the procedure in an inconsiderate and irritating way (*une demande de dommages et intérêts pour procès téméraire et vexatoire*), which is connected with the

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[35] M. Stassin, *supra* n. 33, p. 167 and the case law referred to therein: J.F. Romain, *Liberté, appreciation marginale (marginale toetsing), qualification du fait générateur de responsabilité et abus de droit*, [in:] *Droit de la responsabilité. Questions choisies*, F. Glansdorff (dir.) C.U.P., Vol. 157, Bruxelles: Larcier, 2015, p. 83, no. 31; P. Van Ommeslaghe, *De page: Traité de droit civil belge*, Vol. II: *Les obligations*, Bruxelles: Bruylant, 2013, p. 87, no. 31.

[36] The most apparent cases include, e.g. situations where a party files documents late with final conclusions, while the other party demanded them at the earlier stage of the proceedings (Civ. Luxembourg, div. Arlon 12 Chambre, 25.03.2015, R.G. no. 13/743/A); or when evidence from an expert witness's opinion has been admitted on the request of a party but the party has not made an advance payment to cover costs or has not presented materials necessary to develop an opinion (Civ. Brabant Wallon, 1 Chambre, 27.01.2016, Res. Jur. Imm. 2016, livre 2, p. 119); or when a party has filed a motion to rule the exchange of pleadings or documents and then failed to present such pleadings or documents (Civ. Luxembourg, div. Arlon 12 Chambre, 24.06.2015, R.G. no. 12/446/A, Liège 14 Chambre, 10.05.2012, 2011/R.G./1488); also compare M. Stassin, *supra* n. 33, p. 167 and the case law referred to therein; P. Van Ommeslaghe, *supra* n. 35, p. 86, no. 31 and pp. 89–92, no. 32–34; P. Marchal, *Principes généraux du droit*, collection: Rèpertoire pratique du droit belge, Bruxelles: Bruylant, 2014, pp. 242–250, mainly pp. 221–226; J.F. Romain, *supra* n. 35, p. 198, no. 31.

[37] M. Stassin, *supra* n. 33, p. 166 and the case law referred to therein; H. Boularbah, *Requête unilatérale et inversion du contentieux*, Bruxelles: Larcier, 2010, p. 545, no. 730; P. Taelman, B. Deconinck, *Quid pro quo omtrent de nietigheden en de sancties?*, [in:] *De wet van 26 april 2007 tot wijziging van het Gerechterlijk Wetboek met heg oog op het bestrijden van de gerechterlijke achterstand doorgelicht*, P. Taelman, P. Van Orshoven (eds), Brugge: die Keure, 2007, p. 140, no. 32.

initiation of a lawsuit hastily, thoughtlessly or in bad faith, in order to misuse the procedural law, and even maliciously and without a real cause.[38]

In addition, in the case of the misuse of procedural law, a court may raise the cost of proceedings in favour of the party whose interest has been harmed as a result of inappropriate behaviour of the other party (Articles 1022 and 1017 C.j.).[39]

The concept of the 'behaviour disrupting proceedings' is derived, according to Tijl De Jaeger, from Paul Sluijter's doctoral dissertation. He was for determining certain criteria for the quality of court proceedings the infringement of which can result in a statement that a party disrupts proceedings. The criteria include: the quality of results (the conclusion of all disputes between parties), the quality of the procedure (various procedural guarantees), length of proceedings and the cost of proceedings. The procedural activities are disrupted when the expected additional time and costs do not lead to obtaining a better result and/or procedural quality, or if that better result or procedural quality should be also obtained by less troublesome behaviour.[40] On the other hand, according to De Jaeger, destructive procedural behaviour takes place when the additional time and expected costs do not lead to a better result and/or procedural quality, or if that better result and/or procedural quality might be obtained by less troublesome behaviour.[41]

Article 780bis C.j. stipulates that the measures laid down in this provision can be applicable cumulatively. However, regardless of which of those measures (or both) a court would apply, their application must be preceded by the establishment that a party is guilty of the misuse of procedural law, which means that the party's use of the instruments to obtain legal protection or protection measures must clearly exceed the limits of using those measures (rights) by a reasonable and conscientious person acting in the same circumstances. It concerns the use of the justice system for the purposes that are clearly unlawful or to delay proceedings.[42] The infringement should be obvious and aggravated but the weight of default within the sense of the weight of a procedural action is not decisive. What is decisive is a party's attitude and the level of ill will that result in the misuse of procedural law. If the misuse is not aggravated within the above-presented meaning, a court cannot impose a fine on a party, or rule compensation to the opponent. Imposing sanctions on parties in case of every, even minor, misuse of procedural law might infringe parties' freedoms and procedural guarantees, especially when a procedural action performed by a party belongs to the measures of defence or means that a party uses to support the claim.[43]

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[38] M. Stassin, *supra* n. 33, p. 166; X. Taton, *Les irrégularités, nullités et abus de procédure*, [in:] *Le procès civil acéléré? Premiers commentaires de la loi du 26 avril 2007 modifiant le Code judiciaire en vue de lutter contre l'arriéré judiciaire*, J. Englebert (ed.), Bruxelles: Larcier, 2007, pp. 236–237; P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

[39] M. Stassin, *Les abus de procedure. Quelles sanctions pour les abus dans la conduite des procès par les parties?*, https://www.justice-en-ligne.be/-Les-abus-de-procedure, 13.04.2017, thesis 1.

[40] T. De Jaeger, *Verstorend procesgedrag: Doeltreffend snctioneren voor een effiente procesvoering*, TPR 2017, pp. 1235–1236; P. Sluijter, *Sturen met proceskosten*, pp. 22–29 (unpublished).

[41] T. De Jaeger, *supra* n. 40, p. 1238.

[42] P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

[43] It is assumed in case law that filing a groundless claim or the use of defence measures may be recognised as misuse of procedural law (e.g. Civ. Arlon, 12 Chambre, 16.10.2013, R.G. no. 10/806, unpublished; Civ. Bruxelles, 75 Chambre, 19.06.2014, R.G. no. 2011/15428/A,

As concerns parties' behaviour that the judicature most often recognises as the misuse of procedural law, both at the stage of initiating proceedings and in the course thereof, the following categories can be distinguished:

(1) The use of the procedure for the purpose of delaying proceedings by filing a lawsuit, an appeal or challenging a claim (raising arguments of the defence) if next a party does not take steps for the purpose of efficient proceedings aimed at resolving a dispute or he/she attempts to delay the proceedings (e.g. fails to appear in court).[44]

(2) Filing a lawsuit, an appeal or the application of defence measures in an obviously groundless way. The use of procedural measures alone or an attempt to raise arguments against the main trends in case law or against a justified and well-motivated judgment per se is not the misuse of procedural law, even if a party does not indicate any new legal arguments.[45] The use of such legal measures may be recognised as the misuse of procedural law only when the party uses them with intentional guilt or when it constitutes the use of law for one's own purposes in conflict with the purpose for which they were established, or the lawsuit, appeal or defence result in disproportionate negative effects to the other party (administration of justice) in relation to the desire to use the opportunity to win a lawsuit. The examples include: persistent quoting of groundless arguments that a court has already repeatedly dismissed, making use of legal assistance in order to file an obviously groundless motion, presenting an argument that clearly contradicts documents in the case files, bringing a lawsuit that is not based on any legal norm, case law or contract, or filing an obviously late motion.[46]

(3) Conducting proceedings unconscientiously (called 'incautious' court disputes). As far as these are concerned, the examples indicate parties' behaviour that consists in non-compliance with a court's orders, quoting statements and documents

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unpublished; Bruxelles, 9 Chambre, 3.04.2015 and 2.10.2015, R.G. no. 2013/AR/730, unpublished); a different opinion is expressed in the doctrine, where it is indicated that a situation in which an obviously groundless claim or a defence measure is presented cannot be recognised as misuse of procedural law (thus, X. Taton, *supra* n. 38, p. 239, no. 14; D. Vandensteen, *L'abus du droit de présenter des moyens: une atteinte aux droits de la défense*, Lettre d'Info Actualités Fiscales, 12.04.2015, no. 14.

[44] Liège, 14 Chambre, 22.03.2010, R.G. no. 2009/RG/1402, unpublished; Bruxelles, 9 Chambre, 3.04.2015 and 2.10.2015, R.G. no. 2013/AR/730, unpublished; Liège, 14 Chambre, 21.01.2010, R.G. no. 2009/RG/88, unpublished; Civ. Bruxelles, 75 Chambre, 19.06.2014, R.G. no. 2011/15428/A, unpublished; as Tijl De Jaeger indicates, the plaintiff's choice of court proceedings instead of the simplified IOS procedure (applicable to unquestionable debts) cannot be recognised as disruptive procedural behaviour, see T. De Jaeger, *supra* n. 40, p. 1241.

[45] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein; A. Decroës, *La responsabilité de l'avocat ou comment allier la prudence* à *l'audace*, [in:] *Liber amicorum Michel Mahieu*, Bruxelles: Larcier, 2008, p. 171 no. 5; J.F. Van Drooghenboeck, *Les sanctions de l'appel abusif*, R.R.D. 1998, p. 171 no. 15; Cass., 3 Chambre, 2.03.2015, R.G. no. C.14.03337.F, Juridat.

[46] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein; the author adopts a stance different from that in case law and states that the use of professional legal assistance before filing an obviously groundless motion is a circumstance making a party responsible.

that could have been presented without delay after proceedings started, filing illegible pleadings, and lack of interest in the proceedings (inaction).[47]

(4) Misusing procedural law with intentional guilt. Parties' behaviour with intentional guilt or in bad faith that leads to the misuse of procedural law includes, e.g. lying, concealing key information in unilateral proceedings, bringing a suit against a party who clearly has no legal interest in the proceedings (with no legitimacy), personal attacks on a party or their proxy, taking steps that make the proceedings more difficult, slower or more expensive without procedural justification.[48]

(5) Misuse (redirection) of the procedure. This is such a use of statutory procedural measures that makes the way of using them clearly (obviously) different from the purpose for which they were established, e.g. the use of protective measures as a form of pressure on the other party[49].[50]

As far as a fine imposed in accordance with Article 780bis C.j. is concerned, although it is called civil hardship (civil fine), it is treated in case law and the doctrine as a penal sanction. It results in the necessity of ensuring a party against whom the measure has been applied the same penal guarantees that are applicable to a person subject to criminal proceedings, in particular those laid down in the European Convention on Human Rights (e.g. the *ne bis in idem* principle, which excludes the imposition of a fine more than once for the same infringement, and the *lex retro non agit* principle).[51]

The characteristic feature of a civil fine is the fact that a court imposes it *ex officio* and it is to be paid to the State Treasury.[52] It is to compensate for the infringement of the public interest, i.e. harm to the administration of justice.[53] The minimum and maximum amounts thereof are determined. Every five years, the King of Belgium may adjust the limits to the costs of living. A court decides on the actual amount of a fine. According to the judicature, the amount mainly depends on such conditions that are connected with the infringement as the size of harm to the administration of justice (time and cost of a party's procedural activities that constitute the misuse of procedural law, the number of infringements), a party's conduct (the level of guilt and intensity of ill will, the infringement in the course of proceedings or outside thereof), the type and amount of the object of a dispute.[54] It is not excluded that

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[47] Civ. Luxembourg, div. Arlon, 12 Chambre, 15.07.2015, R.G. no. 05/672, unpublished; Bruxelles, 41 Chambre, 14.07.2016, R.G. no. 2015/FA/46, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 25.03.2015, R.G. no. 13/743/A, unpublished; Liège, 3 Chambre, 22.04.2013, R.G. no. 2011/RG/1735, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 24.06.2015, R.G. no. 13/796/A, unpublished; the case law referred to in M. Stassin, *supra* n. 33, p. 168.

[48] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein.

[49] *Ibid*., pp. 168–169 and the case law referred to therein.

[50] Also on this issue, see J.F. Van Drooghenboeck, *supra* n. 45, pp. 156–157 no. 18; G. Eloy, *La procédure téméraire et vexatoire. Droit judiciaire – Commentaire pratique*, Kluwer 2014, pp. 11–27.

[51] For more on the issue, see M. Stassin, *supra* n. 33, p. 169 and the case law referred to therein.

[52] *Ibid*., p. 166; M. Stassin, *supra* n. 39, thesis 2.

[53] T. De Jaeger, *supra* n. 40, p. 1252.

[54] On the other hand, it should be emphasised that, in accordance with the stance of the Court of Cassation, in the case a fine is imposed on a party, it is not necessary to indicate

a court will also take into account a party's individual features, e.g. his/her income.[55] A judge's discretion to take a decision on the imposition of a civil fine lets him/her abandon it, although a party has misused procedural provisions, e.g. in the case the party gives up an activity constituting the misuse of the procedure, which per se does not prevent the imposition of a fine.[56] Maxime Stassin points out that some courts refuse to impose a civil fine on a party misusing procedural provisions because they believe that it would constitute an admissible obstacle to access to court.[57]

A civil fine, as a rule, is imposed on a party in the substantive sense, not a formal one.[58] On the other hand, the Court of Cassation admits the imposition of a fine on a party's representative if the activity of disrupting a lawsuit can be associated with providing representation.[59]

The civil fine that is laid down in Article 789bis C.j. may be imposed in the judgment closing proceedings in a case, thus only when a court is competent to issue a final judgment at all.[60] This fine is adjudicated *ex officio*. In fact, an opposing party may file a motion to punish a party infringing the procedure, but it remains with no influence on the court's decision. Before the court imposes a fine, it should issue a ruling drawing parties' attention to the recognition of potential misuse of procedural law and enable the parties to explain the situation in writing and during the next hearing. Only then can a party, who has misused the procedure, be punished with a civil fine.

In accordance with Article 780bis para. 2 C.j., if in the course of a lawsuit a claim for compensation is filed and it is admitted, a court may impose a fine within the same judgment. In other cases, it should open a new debate, in accordance with Article 775 C.j., in order to enable parties to make statements concerning the application of Article 780bis C.j.[61] However, as Maxime Stassin points out, in

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intentional action and a fine can be imposed when a party files lawsuits without justified interest or in a way evidently exceeding the limits of a standard use of the procedure by a cautious party, such as the use of the administration of justice for obvious delays or unlawful purposes, which endangers the interests of the parties as well as the appropriate and efficient management of justice administration; Cass. 28.06.2013, C.12.0502.N; T. De Jaeger, *supra* n. 40, p. 1248.

55 M. Stassin, *supra* n. 33, p. 169; Civ. Hainaut, div. Charleroi, 3 Chambre, 7.01.2016, R.G. no. 12/2205/A, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 24.06.2015, R.G. no. 12/142/A, unpublished; Liège, 7 Chambre, 28.04.2015, R.G. no. 2014/RG/1133, unpublished; Civ. Bruxelles, 75 Chambre, 25.04.2014, R.G. no. 2010/12033/A, unpublished; Civ. Bruxelles, 34 Chambre, 16.06.2014, R.G. no. 2013/1688/A, unpublished; Civ. Hainaut, div. Charleroi, 3 Chambre, 29.06.2016, R.G. no. 9918/2016, unpublished; the author who drew attention to the weakness of the institution of a fine, which leaves a too large margin of arbitrariness, is Tijl De Jaeger, who proposed the substitution of a flat-rate amount for the present solution, see T. De Jaeger, in *supra* n. 40, p. 1252.

56 M. Stassin, *supra* n. 33, pp. 169–170; C.T. Bruxelles, 12 Chambre, 23.10.2012, R.G. no. 2012/AB/288, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 3.12.2014, R.G. no. 06/700, unpublished; Cass., 1 Chambre, 16.03.2012, R.G. no. C.08.0323.FetC.09.0590.F, Juridat.

57 M. Stassin, *supra* n. 33, pp. 169–170.

58 T. De Jaeger, in *supra* n. 40, p. 1254.

59 *Ibid*., p. 1255; Cass 16.02.2001, C.99.0477.N; Cass 22.04.1985, AR 4684.

60 Civ. Bruxelles, 21.11.2016, R.G. no. 16/1313/I; M. Stassin, *supra* n. 33, pp. 165–166.

61 Compare, T. De Jaeger, *supra* n. 40, p. 1248; B. Vanlerberghe, S. Rutten, [in:] *De procesrecht-wetten van 2007…revisited!* [*Les lois de procédure de 2007…revisited!*], P. Van Orshoven (ed.), B. Maes et al., Bruxelles: la Charte, 2009, pp. 106–107.

accordance with the concepts concerning the principle of adversariness, prevailing in the doctrine and the judicature, the general rule ordering that a party is ensured the right to defence is not violated when a judge bases the judgment on the circumstances that the parties could have expected the judge to take into account due to the course of a lawsuit, and the parties had an opportunity to deny them.[62] That is why, Article 780bis para. 2 C.j. should not be interpreted in a restrictive way.[63] It is not necessary to open a debate in a situation when the issue of misuse of procedural law has been discussed with the parties. In Stassin's opinion, such interpretation of Article 780bis C.j. should to some extent allow for mitigating the troublesome procedure, and the obtained economy is in conformity with *ratio legis* of the discussed provision the aim of which is to compensate the harm to the administration of justice in case of the misuse of procedural law. Formalistic following the restrictive interpretation of Article 780bis C.j. would have a diverse effect. There is no need to reopen a debate in the case when a motion concerning the procedural misuse has been filed, regardless of which party has filed it, or when the occurrence of the procedural misuse is actually the subject matter of a debate, although no motion has been filed.[64]

It is also important that if a debate is reopened for the purpose of enabling parties to present their stance on the application of Article 780bis C.j., the proceedings are limited, as a rule, to a debate on a civil fine. Filing a motion to rule compensation for bringing a thoughtless or troublesome lawsuit at this stage (*une demande de dommages et intérêts pour procès téméraire et vexatoire*) would be too late and inadmissible.[65]

The ruling on the imposition of a civil fine on a party in accordance with Article 780bis C.j. is subject to standard and extraordinary appellate measures (Article 1050 C.j.). In the case of a cassation, a cassation court may assess whether a judge, based on the facts he/she has established at his/her discretion, has drawn an appropriate conclusion that the misuse of procedural law has occurred. The misuse of procedural law belongs to the category of legal issues and, as such, is within the competence of the court of cassation.[66]

Maxime Stassin, carrying out research into case law in the light of Article 780bis C.j., drew a conclusion that theoretically this provision fulfils the aim of preventing procedural misuse by means of punishing parties who decide to take such steps with a fine, and acting as a deterrent. Pursuant to Article 780bis C.j., however, this causes a few problems. Firstly, as the author argues, the research shows that the rather rigorous wording of the discussed provision, which stipulates reopening of a debate, is troublesome and discourages from imposing a civil fine.

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62 M. Stassin, *supra* n. 33, p. 170; J. Van Compernolle, *Principes directeurs du procès civil*, [in:] *Droit judiciaire*, G. De Leval (dir.), Vol. 2: *Manuel de procédure civile*, Bruxelles: Larcier, 2015, pp. 46–48, no. 1.33–1.36; Cass. 1 Chambre, 29.09.2011, R.C.J.B., 2013, p. 202; Cass., 1 Chambre, 27.09.2013, R.G. no. C.12.0381.F, Juridat; also J.F. Van Drooghenboeck, *Faire l'économie de la contradiction?*, [in:] *Les droits de la défense*, P. Martens (dir.), Bruxelles: Larcier, p. 203.

63 M. Stassin, *supra* n. 33, p. 170.

64 *Ibid*., p. 170 and the case law referred to therein.

65 *Ibid*., p. 171; G. De Leval, *Le jugement*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 647, no. 7.18; Bruxelles, 9 Chambre, 17.10.2014, R.G. no. 2012/AR/3069, unpublished.

66 M. Stassin, *supra* n. 33, p. 171; F. Dumon, *De l'État de droit*, J.T. 1979, pp. 495–497, no. 17–19.

Secondly, the author highlights a problem with the execution of a civil fine, which also discourages from applying it. Thirdly, a civil fine as a deterrent requires that the maximum amount potentially imposed for this infringement should be raised. On the other hand, a civil fine is inefficient in the case of persons suffering from mental disorders.[67] At the same time, Tijl De Jaeger draws attention to the arbitrariness of the amount of a fine that is determined at a court's discretion in a situation when it is hard to estimate the amount of compensation for harm to the administration of justice resulting from the delay of a lawsuit and decrease in its efficiency.[68]

As a rule, and as it has been said above, the accumulation of a civil fine with other sanctions that are penal in nature is inadmissible. However, the accumulation of a civil fine with other civil hardships is admissible. Such a possibility is directly laid down in Article 780bis C.j., which makes it possible to rule compensation to and on the motion of an opponent party for the use of the procedure in a thoughtless and troublesome way (*une demande de dommages et intérêts pour procès téméraire et vexatoire*), connected with the initiation of a lawsuit hastily and in bad faith in order to misuse procedural law, sanctions for the cost of a lawsuit such as increase in compensation for an obviously irrational situation, or the obligation to cover the costs incurred uselessly or in a troublesome way.[69] Also a non-pecuniary sanction may be taken into account. It consists in the limitation of the possibility of standard use of procedural law (e.g. refusal to admit evidence, exclusion of a pleading from the proceedings).[70]

As concerns compensation for procedural misuse laid down in Article 780bis C.j., a party who has been harmed may file a motion to be awarded compensation for the damage sustained in connection therewith. Seeking such compensation is subject to general rules concerning non-contractual liabilities. This means that the party aggrieved as a result of misuse of procedural law by the opponent that consists in starting a dispute in a thoughtless and troublesome way should prove the guilt of the opponent, the amount of damage sustained and the existence of a causal relationship between the opponent's behaviour and the damage.[71] As a result, it should be assumed that the claim referred to in Article 780bis C.j. is classical

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[67] M. Stassin, *supra* n. 33, p. 171.

[68] T. De Jaeger, *supra* n. 40, p. 1249.

[69] Cass., 1 Chambre, 28.06.2013, R.G. no. C.12.0502.N, Juridat; B. Vanlerberghe, S. Rutten, *Artikel 780bis van het Gerechtelijk Wetboek en de onduidelijkheid inzake het (ver)nieuw(d)e toepassingsgebied van de nietigheidsleer herbekeken*, [in:] *Les lois de procédure de 2007…revisited!*, P. Van Orshoven (ed.), B. Maes et al., Bruxelles: la Charte, 2009, p. 95.

[70] Cass., 1 Chambre 17.10.2008, R.G. no. C.07.0214 N, Juridat; G. De Leval, *L'action en justice*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 76, no. 2.2; B. Vanlerberghe, S. Rutten, *supra* n. 69, pp. 108–109; G. De Leval, J. Van Compernolle, *Le temps dans le procès civil: réflexions sur la procrastination judiciaire*, [in:] *Le temps et le droit. Hommage au professeur Closset-Marchal*, Bruxelles: Bruylant, 2013, p. 409; J.F. Van Drooghenbroeck, *Voies de recours extraordinaires*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 1209, no. 9.120; J.F. Van Drooghenbroeck, B. De Coninck, *La loi du 21 avril 2007 sur la répétibilité des frais et honoraires d'avocat*, J.T., 2008, p. 39, no. 5; Bruxelles, 9 Chambre, 25.03.2016, R.G. no. 2013/AR/1185, unpublished, the judgment quoted after M. Stassin, *supra* n. 33, p. 169.

[71] M. Stassin, *supra* n. 39, thesis 7; J. Laenens, D. Scheers, et al., *supra* n. 17, p. 581, thesis 1372; B. Allemeersch, *Valsheid en andere leugens in burgerlijk proces en bewijs*, TPR 2004, pp. 53–54; see also T. De Jaeger, *supra* n. 40, pp. 1247–1248.

compensation that is financial in nature and not redress for harm and pain suffered because of the misuse of procedural provisions. Thus, the damage caused can include a loss of income and the cost of expert opinions or legal advice.

Another mechanism preventing the misuse of the procedure concerns adjudication on the cost of the proceedings that has the features of a sanction.

As a rule, in accordance with the Belgian law, each party to a civil lawsuit must cover their own costs of judicial proceedings, including counsels' remuneration and expenditures. Only after the judgment closing proceedings, a court decides which party and in what amount should cover the costs of the proceedings. To that end, the parties are obliged to provide the court with a detailed list of costs they have incurred in the form of a pleading (Article 1021 C.j.). If the parties do not reach an agreement on covering the costs of the proceedings (which they can do entering a separate contract) and if special provisions do not stipulate otherwise, in general the court orders the party losing the lawsuit to pay or refund the costs that the winning party has incurred (Article 1017 para. 1 C.j.). The exceptions to this rule include, e.g. cases concerning social insurance where the costs of the proceedings are always covered by a social insurance institution or situations where the costs incurred by a party have been unnecessary or incurred to be troublesome. Such costs are fully covered by the party that has caused them, even if the party wins the lawsuit. In accordance with Article 1017 first paragraph C.j., each final judgment, even an *ex officio* one, constitutes an order to pay costs incurred by the winning party, unless special provisions stipulate otherwise, and without prejudice to an agreement reached by the parties. However, unnecessary costs, including lawsuit-related compensation referred to in Article 1022 place, even *ex officio*, a burden on the party that has caused their occurrence.

The provision was amended by Article 81 of the Act of 25 December 2016 on changing the legal situation of convicts and supervision over prisons, and establishing various provisions concerning the administration of justice (which is humorously called *loi Pot-pourri IV*, after a Belgian dish made of leftover food). The amendment makes it possible to impose a specific sanction on a party that has caused unnecessary costs of proceedings (it also concerns a reduction in lawsuit-related compensation referred to in Article 1022 C.j.). The sanction consists in an obligation to cover the costs of proceedings that have been unnecessarily generated (useless costs), thus to incur them even if a party involved wins a lawsuit. It is an institution similar to the solution laid down in Article 103 CCP. The application of the sanction depends on proving that a party that has generated unnecessary costs has made a mistake. Then the court assesses whether the party has or has not acted as a reasonable and conscientious person would in the same circumstances (e.g. when having a choice between cheaper and more expensive proceedings, the party chooses the more expensive ones to harm the defendant).[72] However, it must be emphasised that the Court of Cassation took a stance that the plaintiff's choice of more expensive judicial proceedings instead of voluntary alternative and cheaper proceedings in order to recover an unquestionable debt (called IOS procedure) cannot

[72] M. Stassin, *supra* n. 39, thesis 11.

be recognised as generating useless costs.[73] The solution adopted in Article 1017 C.j. raises doubts in the Belgian doctrine. It is indicated that, in particular, the concept of useless costs is ambiguous and that it can generate new disputes.[74]

Another possibility of imposing a sanction on a party concerning costs of proceedings is laid down in Article 1022 C.j., under which the so-called proceeding-related compensation (a proceeding extra) may be increased or decreased. The costs of a Belgian lawsuit are listed in an open catalogue provided for in Article 1018 C.j. Apart from typical costs, such as fees or travelling expenses, there is also a proceeding extra defined in Article 1022 C.j., which is also called proceeding-related compensation for the cost of legal services. It is a flat-rate amount awarded by a court to a party winning a lawsuit who has been represented by a professional proxy.[75] In accordance with Article 1022 C.j., the compensation is specified in a basic minimum and maximum amounts, established in the King's decree and adopted by the Council of Ministers depending on the type of a lawsuit and the weight of a dispute. As a rule, a party winning a lawsuit is entitled to that flat-rate extra in its basic amount. On the party's request, it can be raised or reduced but only within the limits of the minimum and maximum amount determined in the decree. Raising or reducing the amount of the proceeding-related compensation to a winning party, the court may take into account one or a few criteria laid down in Article 1022 C.j. These include:

(1) the financial situation of a party losing a lawsuit as grounds for reducing the amount of compensation;
(2) the complexity of a case;
(3) the amount of proceeding-related compensation for a winner agreed upon in a contract between parties;
(4) apparently irrational (unreasonable) nature of the situation.

The sanction, applicable to situations laid down in subsection (4), is not only applied in the case of aggravated and evident misuse of the procedure in the way that exceeds the limits of its standard application by a reasonable and conscientious person, i.e. in the form that is required for the initiation of the sanction under Article 780bis C.j. The increase or decrease in the cost of a lawsuit (proceeding-related compensation) is admissible when it turns out that the exercise of the right to act or to defend in a court has been apparently groundless (procedural misuse). The increase in the cost of a lawsuit differs from the institution of compensation referred to in Article 780 C.j., mainly because the party requesting the increase or decrease in costs does not have to prove that a perpetrator has committed a procedural infringement and the fact of sustaining harm and its level. It is sufficient to invoke

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[73] Cass. 12.10.2017, C.17.0120.N; A. Wynter, *Invorderen via rechtbank in plaats van via IOS is niet per se fout*, Juristenkrant 2017, afl. 350, 2; see also T. De Jaeger, *supra* n. 40, pp. 1229–1230.

[74] For more on the issue, see T. De Jaeger, *supra* n. 40, p. 1230–1231, who presents an opinion that the useful costs can be interpreted as efficient costs, generating advantage, and useless costs are those that can be avoided, and finally, that it is not known whether this concerns costs that are useless for a party or for the administration of justice (public sphere).

[75] P. Taelman, C. Van Severen, *supra* n. 16, p. 138, vol. 436.

an 'evidently irrational situation', which has not been legally defined, though.[76] Thus, it may concern, e.g. the necessity of a proxy's stronger involvement as a result of evidently irrational charges made by the defence.

3. CONCLUSIONS

The above-presented comparison of the Polish and Belgian systems of procedural law indicates that the systems are very similar in the field of ensuring efficient judicial management of evidence hearing before a court of first instance. First of all, in both systems of procedural law it is the court that manages evidence hearing and the court's activity consists in the supervision of the appropriateness of presenting evidence and facts that are to be proved, in the verification whether evidence that parties intend to present will be sufficient and admissible, in the interpretation and evaluation of presented evidence, as well as in the possibility of taking investigative steps *ex officio*. In both legal systems, these are parties who are obliged to present procedural material. The Polish Code of Civil Procedure regulates the issue of time when this presentation should take place in a more detailed (formalistic) way. Both systems of procedural law authorise the court to admit evidence *ex officio* (only this evidence of which the court knows that the parties have). However, the Belgian Code introduces some restrictions resulting directly from the provisions, consisting in the fact that the court may order that facts decisive for a lawsuit result must be proved (Article 916 C.j. concerning witnesses), and that ordering a presentation of evidence, a judge should choose the fastest, cheapest and simplest method of fact finding, as well as limit his/her action to the necessary minimum (Article 875bis C.j. concerning the principle of proportionality). On the other hand, it is the judicature that has shaped the requirements for admission of evidence *ex officio* in both legal systems. In the Polish as well as Belgian civil procedure, there is an institution of misuse of procedural law, which carries a sanction of a fine; and in both systems, the misuse of procedural law is defined in statute (Article 4^1 CCP, Article 780bis C.j.). In the Polish system of procedural law, a court is obliged to inform parties that their behaviour can be recognised as misuse of procedural law; and in the Belgian system, it is necessary to open a debate, unless a court simultaneously admits a party's request to rule compensation for disrupting the course of a lawsuit. In both legal systems, there is a possibility of imposing a burden of increased costs of proceedings on a party misusing the procedure. In accordance with the Polish Code of Civil Procedure, claiming compensation for misuse of the procedure by an opponent in proceedings is inadmissible. However, it is a right solution because it must lead to the lengthening of proceedings.

[76] M. Stassin, *supra* n. 39, theses 8–10.

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JUDICIAL MANAGEMENT OF EVIDENCE HEARING BEFORE A COURT OF FIRST INSTANCE: POLISH SYSTEM VS BELGIAN SYSTEM

Summary

The article presents a comparison of selected aspects of the judicial management of evidence hearing before a court of first instance in the Polish and Belgian systems of procedural law. It discusses the issue of ensuring the efficient management of evidence hearing, which is one of the major principles of civil proceedings in both discussed legal systems. The main role of the court in evidence hearing consists in supervising whether evidence reported by the parties is appropriate, verifying its admissibility and usefulness, interpreting and evaluating this evidence, and finally, in the possibility of taking steps *ex officio* in this respect. In both the Polish and Belgian civil procedure, the burden of proof is on the parties; however, it is the court that, being the manager of evidence hearing, also safeguards adherence to the principles of free exercise of rights, adversariness, and evidence concentration in a lawsuit. The possibility of admitting evidence *ex officio*, which is laid down in both legal systems, is to some extent limited in the Belgian one, which is directly expressed in the provisions. On the other hand, parties' activity in the field of evidence presentation is more formalised in the Polish system. There are also major differences with respect to the misuse of procedural law.

Although it has been statutorily defined in both countries, carries the penalty of a fine and imposes similar obligations on the court towards the parties to a lawsuit, in Poland, unlike in the Belgian system, there is no possibility of claiming compensation for the procedural law misuse by an opponent within the same proceedings.

Keywords: judicial management, evidence hearing, principle of free exercise of rights, principle of adversariness, principle of evidence concentration, misuse of procedural law

SĘDZIOWSKIE KIEROWNICTWO POSTĘPOWANIEM DOWODOWYM PRZED SĄDEM PIERWSZEJ INSTANCJI: SYSTEM POLSKI – SYSTEM BELGIJSKI

Streszczenie

Artykuł stanowi porównanie wybranych aspektów sędziowskiego kierownictwa postępowaniem dowodowym przed sądem pierwszej instancji w polskim i belgijskim systemie prawa procesowego. Opracowanie porusza problematykę zapewnienia przez sędziego sprawnego kierowania postępowaniem dowodowym, które należy do jednej z naczelnych zasad postępowania cywilnego w obu omawianych systemach. Wiodąca rola sądu w prowadzeniu postępowania dowodowego przejawia się w nadzorowaniu prawidłowości zgłaszanych przez strony dowodów, weryfikacji ich pod kątem dopuszczalności i przydatności, w interpretacji i ocenie przedstawionych dowodów, a wreszcie – w możliwości podejmowania w tym zakresie działań z urzędu. Zarówno w polskiej, jak i belgijskiej procedurze cywilnej obowiązek prezentowania materiału dowodowego spoczywa na stronach, jednak to sąd, będąc zarządcą postępowania dowodowego, czuwa jednocześnie nad przestrzeganiem w procesie cywilnym zasad dyspozycyjności, kontradyktoryjności oraz koncentracji materiału dowodowego. Przewidziana w obu systemach prawnych możliwość dopuszczania dowodów z urzędu, w systemie belgijskim doznaje pewnych, wyrażonych wprost w przepisach, ograniczeń. W systemie polskim natomiast bardziej sformalizowany charakter nadano aktywności stron w przedstawianiu dowodów. Zasadnicze różnice występują także w zakresie nadużycia prawa procesowego. Choć instytucja ta w obu krajach doczekała się definicji ustawowej, obwarowana jest sankcją grzywny oraz nakłada na sąd zbliżone obowiązki względem stron postępowania, to w Polsce – w przeciwieństwie do systemu belgijskiego – nie przewidziano możliwości dochodzenia w tym samym postępowaniu odszkodowania z tytułu nadużycia prawa procesowego przez przeciwnika.

Słowa kluczowe: sędziowskie kierownictwo, postępowanie dowodowe, zasada dyspozycyjności, zasada kontradyktoryjności, zasada koncentracji materiału dowodowego, nadużycie prawa procesowego

LA GESTIÓN JUDICIAL DE LA FASE DE PRUEBA ANTE EL TRIBUNAL DE PRIMERA INSTANCIA: EL SISTEMA POLACO – EL SISTEMA BELGA

Resumen

El artículo compara algunos problemas de la gestión judicial de la fase de prueba ante el Tribunal de Primera Instancia en el derecho procesal polaco y belga. El juez ha de asegurar el transcurso ágil de la fase de prueba, es una de las reglas principales del proceso civil en ambos sistemas. El papel principal del Tribunal a la hora de llevar a cabo la fase de prueba consiste en vigilar la

regularidad de las pruebas solicitadas por las partes, verificarlas en cuanto a su admisibilidad y utilidad, interpretarlas y valorarlas y por fin – actuar de oficio cuando proceda. Tanto en el proceso civil polaco como en el proceso civil belga, las partes tienen la obligación de presentar material de prueba, sin embargo el Tribunal, siendo el administrador de la fase de prueba, vigila al mismo tiempo el cumplimiento de principio dispositivo, de contradicción y de concentración. La posibilidad prevista en ambos sistemas de admitir pruebas de oficio en caso del sistema belga está limitada a ciertos casos determinados directamente por la ley. El sistema polaco otorga el carácter más formal a la actividad de las partes a la hora de presentar las pruebas. Las diferencias principales existen también en cuanto al abuso de derecho procesal. Aunque esta institución en ambos países tiene la definición legal, sancionada con la pena de multa y el Tribunal tiene obligaciones similares frente a las partes del proceso, sin embargo en Polonia – a contrario con el sistema belga – no está prevista la posibilidad de reclamar en el mismo proceso la indemnización debido al abuso de derecho procesal por la parte contraria.

Palabras claves: gestión judicial, fase de prueba, principio dispositivo, principio de contrariedad, principio de concentración, abuso de derecho procesal

СУДЕЙСКОЕ РУКОВОДСТВО ИССЛЕДОВАНИЕМ ДОКАЗАТЕЛЬСТВ В СУДЕ ПЕРВОЙ ИНСТАНЦИИ: СРАВНЕНИЕ ПОЛЬСКОЙ И БЕЛЬГИЙСКОЙ СИСТЕМ

Аннотация

В статье сравниваются отдельные аспекты судейского руководства исследованием доказательств в суде первой инстанции в системах процессуального права Польши и Бельгии. Автор рассматривает проблемы, связанные с обеспечением судьями эффективного руководства исследованием доказательств, что является одним из основных принципов гражданского судопроизводства в обеих рассматриваемых системах. Ведущая роль суда при исследовании доказательств выражается в контроле за корректностью доказательств, представляемых сторонами процесса, проверке их допустимости и применимости, толковании и оценке представленных доказательств и, наконец, в возможности действовать в этой связи по обязанности (*ex officio*). Как в польском, так и в бельгийском гражданском судопроизводстве обязанность представлять доказательства возложена на стороны процесса. Однако, именно суд, осуществляя руководство исследованием доказательств в ходе гражданского процесса, обеспечивает тем самым соблюдение принципов диспозитивности, состязательности и концентрации процессуального материала. Хотя обе правовые системы допускают возможность принятия доказательств по обязанности (*ex officio*), в бельгийской системе это сопряжено с некоторыми ограничениями, прямо выраженными в законодательстве. С другой стороны, в польской системе действиям сторон по представлению доказательств придан более формализованный характер. Имеются также существенные различия в отношении злоупотребления процессуальным правом. В обеих странах разработано законодательное определение таких злоупотреблений, а за их совершение предусмотрено наказание в виде штрафа. Схожий характер имеют и обязанности суда по отношению к сторонам процесса. Однако, в отличие от бельгийского права, польское законодательство не предусматривает возможности требовать в рамках одного и того же процесса возмещения ущерба за злоупотребление противной стороной процессуальным правом.

Ключевые слова: судейское руководство; исследование доказательств; принцип диспозитивности; принцип состязательности; принцип концентрации процессуального материала; злоупотребление процессуальным правом

DIE RICHTERLICHE LEITUNG DES BEWEISVERFAHRENS VOR DEM ERSTINSTANZLICHEN GERICHT: POLNISCHES SYSTEM – BELGISCHES SYSTEM

Zusammenfassung

In dem Artikel werden ausgewählte Aspekte der richterlichen Leitung von Beweisverfahren vor Gerichten der ersten Instanz im polnischen und belgischen System des Verfahrensrechts verglichen. Die Studie befasst sich mit der Frage der Sicherstellung einer effizienten Führung des Beweissicherungsverfahrens durch den Richter – in beiden besprochenen Rechtssystemen eines der Grundprinzipien des Zivilverfahrens. Die führende Rolle des Gerichts bei der Beweisaufnahme kommt in der Überwachung der Richtigkeit der von den Parteien vorgetragenen Beweise, ihrer Prüfung hinsichtlich der Zulässigkeit und Relevanz, bei der Interpretation und Bewertung der vorgelegten Beweise und schließlich in der Möglichkeit zum Ausdruck, diesbezüglich von Amts wegen tätig zu werden. Sowohl im polnischen als auch im belgischen Zivilverfahren lastet die Pflicht zur Vorlage von Beweisen auf den Parteien, doch es ist das Gericht als Herr des Beweisverfahrens, das gleichzeitig die Einhaltung der Grundsätze der Verfügbarkeit, des rechtlichen Gehörs und des Prinzips der Konzentration von Beweismitteln in Zivilverfahren sicherstellt. Die in beiden Rechtssystemen vorgesehene Möglichkeit einer Aufnahme von Beweisen von Amts wegen unterliegt in der belgischen Rechtsordnung bestimmten, in den Vorschriften ausdrücklich genannten Einschränkungen. Im polnischen Rechtswesen sind die Aktivitäten der Parteien bei der Vorlage von Beweismitteln dagegen stärker formalisiert. Grundlegende Unterschiede bestehen auch hinsichtlich des Missbrauchs des Verfahrensrechts. Obwohl für diese juristische Institution in beiden Ländern eine gesetzliche Definition eingeführt wurde, sie mit einer Geldbuße belegt wird und dem Gericht ähnliche Verpflichtungen gegenüber den Verfahrensbeteiligten auferlegt werden, ist es in Polen – anders als in Belgien – nicht möglich, im selben Verfahren Schadensersatz wegen Verfahrensmissbrauch durch den Verfahrensgegner geltend zu machen.

Schlüsselwörter: richterliche Leitung, Beweisverfahren, Grundsatz der Verfügbarkeit von Beweismitteln, Grundsatz des rechtlichen Gehörs, Grundsatz/Prinzip der Konzentration der Beweismittel, Verfahrensmissbrauch

GESTION JUDICIAIRE DES PROCÉDURES DE PREUVE DEVANT LE TRIBUNAL DE PREMIÈRE INSTANCE: SYSTÈME POLONAIS – SYSTÈME BELGE

Résumé

L'article compare certains aspects de la gestion judiciaire des procédures de preuve devant le tribunal de première instance dans le système de droit procédural polonais et belge. L'étude examine la question d'assurer par le juge une gestion efficace de la procédure de preuve, qui est l'un des principes directeurs de la procédure civile dans les deux systèmes discutés. Le rôle de premier plan du tribunal dans la conduite de la procédure de preuve se manifeste dans le contrôle de l'exactitude des preuves présentées par les parties, sa vérification en termes de recevabilité et d'utilité, dans l'interprétation et l'évaluation des preuves présentées, et enfin – dans la possibilité d'entreprendre des actions d'office à cet égard. Tant dans la procédure civile polonaise que belge, les parties sont tenues de présenter des preuves, mais c'est le tribunal, en tant qu'administrateur de la procédure de preuve, qui assure en même temps

le respect des principes de disponibilité, contradictoire et de concentration des preuves dans la procédure civile. La possibilité d'admettre d'office des preuves, prévue dans les deux systèmes juridiques, est soumise à certaines limitations exprimées directement dans la réglementation du système belge. Dans le système polonais, cependant, l'activité des parties en matière de présentation de preuves est plus formelle. Il existe également des différences fondamentales en ce qui concerne l'abus du droit procédural. Bien que cette institution ait été définie par la loi dans les deux pays, elle est passible d'une amende et impose au tribunal des obligations similaires envers les parties à la procédure, en Pologne – contrairement au système belge – il n'est pas possible de réclamer des dommages et intérêts pour abus de droit procédural par adversaire dans la même procédure.

Mots-clés: gestion judiciaire, procédure de preuve, principe de disponibilité, principe contradictoire, principe de concentration des preuves, abus de droit procédural

DIREZIONE GIUDIZIARIA DEL PROCEDIMENTO PROBATORIO PRESSO IL TRIBUNALE DI PRIMO GRADO: SISTEMA POLACCO – SISTEMA BELGA

Sintesi

L'articolo costituisce un confronto di aspetti scelti della direzione giudiziaria del procedimento probatorio presso il tribunale di primo grado nel regime di diritto procedurale polacco e belga. L'elaborato tocca la questione della garanzia della buona direzione del procedimento probatorio da parte del giudice, che costituisce una delle norme primarie della procedura civile in entrambi i sistemi giuridici descritti. Il ruolo determinante del giudice nella direzione del procedimento probatorio si manifesta nella vigilanza sulla correttezza dei mezzi di prova presentati dalle parti, nella loro verifica sotto l'aspetto dell'ammissibilità e dell'utilità, nell'interpretazione e nella valutazione dei mezzi di prova presentati e infine nella possibilità di intraprendere azioni d'ufficio in tale ambito. Sia nel sistema di procedura civile polacco che in quello belga, l'obbligo di presentare il materiale probatorio grava sulle parti, tuttavia il giudice, in quanto curatore del procedimento probatorio, vigila allo stesso tempo sul rispetto, nel processo civile, del principio dispositivo, del principio del contraddittorio e del principio della concentrazione delle prove. La possibilità, prevista in entrambi i sistemi giuridici, di ammissione di prove d'ufficio, nel sistema belga è sottoposta a certe determinate limitazioni, indicate espressamente nelle norme di legge. Nel sistema polacco invece è stato attribuito un carattere più formalizzato all'azione delle parti nel presentare i mezzi di prova. Differenze essenziali si presentano anche nell'ambito dell'abuso del diritto processuale. Sebbene tale istituto in entrambi i paesi abbia finalmente ricevuto una definizione normativa, è sanzionato con ammenda e impone al giudice obblighi simili nei confronti delle parti del procedimento, in Polonia – a differenza del sistema belga – non è stata prevista la possibilità di rivendicare nello stesso procedimento un risarcimento danni a titolo di abuso del diritto processuale da parte dell'avversario.

Parole chiave: direzione giudiziaria, procedimento probatorio, principio dispositivo, principio del contraddittorio, principio della concentrazione delle prove, abuso del diritto processuale

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PROHIBITION OF EXCESSIVE FORMALISM AND JUDICIAL PRACTICE: COMMENTS BASED ON CIVIL CASE LAW OF POLISH COURTS IN THE CONTEXT OF ARTICLE 6 ECHR

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1. INTRODUCTION

This paper aims to draw attention to the fact that the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) is implemented through the correct application of the principle of formalism and the court's duty of loyalty and integrity, based on the rules of fair play.

However, this issue is not given proper consideration in the Polish judicial practice. The matter at hand remains problematic in Poland, as evidenced by the recent European Court of Human Rights (ECtHR) judgments in cases brought against Poland: *Parol v. Poland* (11 October 2018) and *Adamkowski v. Poland* (28 March 2019).[1] In both cases, the Court found a violation of Article 6 para. 1 ECHR resulting from a disproportionate restriction of access to a court.[2] The *Parol* and *Adamkowski* judgments are examples of an incorrect judicial practice concerning the application of the provisions laying down formal requirements. Admittedly, the excessively

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1 The ECtHR judgments: of 28 March 2019 in *Adamkowski v. Poland*, application no. 57814/12; and of 11 October 2018 in *Parol v. Poland*, application no. 65379/13, https://www.echr.coe.int.

2 In *Borkowski v. Poland* (application no. 67743/17), the applicant complained of violations of Article 6 ECHR on the facts similar to those of *Parol*. The Government offered to pay to the applicant EUR 3,000 under the heading of just satisfaction, the Court accepted the Government's proposal on 5 December 2019 and struck *Borkowski* off its list of cases; https://www.echr.coe.int.

formalistic approach of Polish courts is not a unique phenomenon, which is reflected, for example, in other cases recently brought before the ECtHR.[3] This issue becomes particularly important in a situation where a defective court practice leads to the deprivation of the right to a court in first or second instance exercisable by a party to the proceedings, which was the case in *Parol* and *Adamkowski*. As a consequence of the above, the standard applying to courts' obligations to communicate the form of procedural steps is crucial. However, even if such obligations are properly performed, the mere fact of passing this information to a party may not be the sole reason for making the party account for a failure to keep the required form if this would result in the party being deprived of his right to a court.

2. THE RIGHT TO A FAIR TRIAL (ARTICLE 6 ECHR)

The right to a fair trial is exercisable by every human being as a meta clause, the principle of principles and the guarantee of justice. Under Article 6 para. 1 ECHR, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Individual elements of this right, such as access to court, the definition and characteristics of the court, the guarantees of a fair hearing and the guarantee that the case should be heard without undue delay have already been discussed extensively in the case law and scholarship.[4]

The guarantees of access to a court should now be seen in correlation with Article 6 para. 1 ECHR, which gives everyone the right to present any claim concerning 'civil rights and obligations' or any criminal charge to the court. It implies the 'right to a court', an aspect of which is the possibility of access to a court.[5] In the light of the case law of the Strasbourg bodies, the concept of the right to a fair trial stemming from Article 6 ECHR also includes the right to a court, despite the said right not being explicitly expressed in this provision. It would be incomprehensible, as underlined by the ECtHR in its judgment of 21 February 1975, if Article 6 para. 1 ECHR described the procedural guarantees granted to the parties to a dispute and did not protect what makes these guarantees available in the first place, namely access to a court.[6] The principle stating that it must be possible to

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[3] For a similar case, see the ECtHR judgment of 16 February 2017, *Karakutsya v. Ukraine*, application no. 18986/06, § 53–§ 54, https://www.echr.coe.int.

[4] C.A. Miller, *The Forest of Due Process of Law. The American Constitutional Tradition*, [in:] *Due Process*, J.R. Pennock, J.W. Chapman (eds), New York 1977, pp. 8–12; D. Dörr, *Faires Verfahren*, Kehl am Rhein–Straßburg 1984, p. 7; J.I.H. Jacob, *The Fabric of English Civil Justice*, London 1987, pp. 5–6; K.H. Schwab, P. Gottwald, *Verfassung und Zivilprozessrecht*, Bielefeld 1984, pp. 61–62; L.H. Leigh, *The Right to a Fair Trial and the European Convention on Human Rights*, [in:] *The Right to a Fair Trial*, D. Weissbrodt, R. Wolfrum (eds), Berlin 1998, p. 650; J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK – Kommentar*, Kehl am Rhein 2009, p. 189.

[5] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009, p. 404.

[6] L.H. Leigh, *supra* n. 4, p. 649.

bring a civil claim to a court is deemed a basic principle of law guiding the proper interpretation of Article 6 ECHR.[7] The effective exercise of the right of access to a court is a prerequisite and necessary condition for the observance of the rights that make up the right to a fair trial. The right of access to a court is an essential component of the right to a fair trial in the broader sense. The guarantees of a fair trial would be illusory without free access to a court. Conversely, any proceedings that would indeed meet the requirements laid down in the Convention on Human Rights but would not be available to everyone could hardly be considered fair.[8]

The Convention on Human Rights guarantees not only access to a court but, above all, the right to obtain effective judicial protection.[9] Therefore, the Convention attaches particular importance to the conclusion of proceedings within the reasonable time-limits[10] and the prohibition of excessive formalism. It follows from the ECtHR case law that Article 6 para. 1 ECHR guarantees the right to effective, efficient and fair legal protection. This guarantee pertains not only to the outcome of individual proceedings but also ensures a fair course of proceedings. However, the right to a fair trial rests on the assumption that a fair judgment is primarily and ultimately a consequence of the preservation of procedural guarantees. At the same time, this right is one of the most fragile instruments: any attempt at contesting or undermining the right to a fair trial may effectively dismantle the protection of other Convention rights.

One aspect of a fair trial is the prohibition of excessive formalism or flexibility. Excessive formalism is a real threat to a fair trial and access to a court within the meaning of Article 6 ECHR.[11] The court is the guarantor of a fair trial. Its role is, on the one hand, to balance and maintain a balance between the values of certainty and foreseeability of law and, on the other, to ensure that substantive law is effectively applied.

3. PURPOSE OF THE PROVISIONS LAYING DOWN FORMAL REQUIREMENTS

Formalism is an essential feature of all procedural rights. Civil litigation cannot exist without formalism; the latter ensures that judicial proceedings are a strictly regulated duel between the parties subject to the necessary procedural guarantees, in which

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[7] The ECtHR judgment of 21 February 1975 in *Golder v. the United Kingdom*, application no. 4451/70, LEX No. 80789, § 35, https://www.echr.coe.int.

[8] C. Nowak, [in:] A. Błachnio-Parzych, J. Kosonoga, H. Kuczyńska, C. Nowak, *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, P. Wiliński (ed.), Warszawa 2009, p. 135.

[9] The ECtHR judgment of 4 July 2006, *Rylski v. Poland*, application no. 24706/02, LEX No. 187204; M.E. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, Zürich 1993, pp. 275–286; A. Haefliger, F. Schürmann, *Die Europäische Menschenrechtskonvention und die Schweiz*, Bern 1999, p. 179 et seq.

[10] T. Rauscher, [in:] *Münchener Kommentar zur Zivilprozessordnung*, T. Rauscher, P. Wax, J. Wenzel (eds), München 2008, p. 39.

[11] A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, pp. 211–212.

only authorised combat measures are permitted. The duel takes place in a strictly defined order, and the parties may fight only with the weapons listed in the inventory of law.[12] On the other hand, procedural formalism[13] is a characteristic of every legally organised human activity that involves the obligation to comply with specific requirements imposed on individual elements (manifestations) of this activity.[14]

Procedural formalism implies that parties are obliged to perform all steps in judicial proceedings in the form imposed and specified by law, at a specific place and within a specific time, and to observe a strict, declarative and formal interpretation of procedural law. The formalism is a prerequisite for the rule of law, and the strict application of pre-established rules of procedure is an essential element of procedural justice.[15] A lack of specific formal rules governing procedural law clearly impedes recourse to judicial protection. Moderate formalism introduces a certain degree of order which facilitates the conduct of procedure, prevents abuses of procedural rights and increases the certainty and foreseeability of laws.

4. ECTHR STANDARD OF FORMAL REQUIREMENTS

The ECtHR perceives the provisions on formal requirements above all as a source of guarantees. The provisions governing the formalities related to the bringing of an appeal are intended to ensure the proper administration of justice and, in particular, respect for the principle of legal certainty. Interested parties should be able to expect that laws are enforced.[16]

The ECtHR has issued many decisions setting the standards of a fair trial and prohibiting excessive formalism.[17] The notion of 'excessive formalism' may refer to a particularly strict interpretation of procedural time limits, procedural rules or rules of evidence, which may lead to the deprivation of access to a court.

According to the Court's well-established case law, courts are prohibited from adopting an approach that is excessively formalistic or excessively flexible. For example, in the context of appeal proceedings, the Court notes that the right of appeal is clearly subject to certain legal conditions, but emphasises that the courts

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[12] E. Waśkowski, *Podręcznik procesu cywilnego*, Wilno 1930, p. 80.

[13] E. Waśkowski, *supra* n. 12, p. 81; S. Cieślak, *Formalizm postępowania cywilnego*, Warszawa 2008, p. 100.

[14] S. Cieślak, *supra* n. 13, p. 100.

[15] J. Gudowski, *O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro*, [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu*, A. Nowicka (ed.), 2005, p. 1032.

[16] The ECtHR judgments: of 26 July 2007, *Walchli v. France*, application no. 35787/03, § 29; of 20 March 2008, *Alvanos and Others v. Greece*, application no. 38731/05, § 25; and of 8 December 2016, *Frida, LLC v. Ukraine*, application no. 24003/07, § 33; https://www.echr.coe.int.

[17] The ECtHR judgments: of 16 February 2017, *Karakutsya v. Ukraine*, application no. 18986/06, § 53–§ 54; of 15 December 2011, *Poirot v. France*, application no. 29938/07, § 46; of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34; of 16 November 2000, *Sotiris and Nikos Kouras ATTEE v. Greec*e, application no. 39442/98, § 22; https://www.echr.coe.int.

applying the rules of procedure must avoid both excessive formalism which could undermine the fairness of the procedure, and excessive flexibility which would result in removing procedural requirements established by law.[18]

5. ECTHR JURISPRUDENCE IN CASES AGAINST POLAND IN THE CONTEXT OF EXCESSIVE PROCEDURAL FORMALISM

The issue of excessive formalism can be analysed at two levels: one involving the actual norms on formal requirements and the other concerning the application of the provisions on formal requirements. In *Parol v. Poland* and *Adamkowski v. Poland*,[19] the cases involving the appellant's submission of a copy of the notice of appeal, the ECtHR did not find the requirements for pleadings per se to be excessively stringent.

The rule that parties must submit several copies of pleadings in the course of judicial proceedings is an accepted formal requirement. This rule originates from Article 128 § 1 of the Code of Civil Procedure (CCP), which stipulates that a pleading should be accompanied by its copies and copies of its annexes, which are to be served on participants in the case. Since this provision applies *mutatis mutandis* to appeal proceedings, it is equally applicable in proceedings before courts of both first and second instance (Article 368 § 1 CCP). However, a separate issue at the heart of the aforementioned ECtHR cases is the provision of instructions about such formal requirements to the parties.

The facts of *Parol* and *Adamkowski* were similar, and the problem was that the instructions as to when and how to lodge an appeal, which had been given to a self-represented defendant, had not contained information about the obligation to file the said pleadings in duplicate. Furthermore, the applicants were not otherwise informed of the obligation to send all pleadings to the court in duplicate. The ECtHR concluded that there had been a violation of Article 6 para. 1 ECHR resulting from a disproportionate restriction of access to a court. In the Court's opinion, the requirement for the applicant to lodge an appeal together with a copy for the other party – based on Article 368 § 1 CCP read in connection with Article 128 § 1 CCP – was not, in and of itself, excessively strict or formal. In the ECtHR's view, this requirement is to ensure the proper functioning of the justice system, as its purpose is to notify the opposing party of the appeal in order to facilitate the participation of that party in appeal proceedings.

In both cases, however, the actual reason for dismissing the applicant's notice of appeal was the absence of its duplicate. The ECtHR held that the national courts should take into account that the applicants were incarcerated and were not legally represented. While being detained, they were unable to go to court to

[18] The ECtHR judgments: of 26 July 2007, *Walchli v. France*, application no. 35787/03, § 29; of 20 March 2008, *Alvanos and Others v. Greece*, application no. 38731/05, § 25; and of 8 December 2016, *Frida, LLC v. Ukraine*, application no. 24003/07, § 33; https://www.echr.coe.int.

[19] The ECtHR judgments: of 28 March 2019, *Adamkowski v. Poland*, application no. 57814/12; of 11 October 2018, *Parol v. Poland*, application no. 65379/13; https://www.echr.coe.int.

make copies of the pleadings on their own. The court received the original of the notice of appeal, while a duplicate required by procedural provisions is nothing more than a photocopy of the original document. The manner in which the national courts proceeded in the *Parol* and *Adamkowski* cases was thus extremely formalistic, especially since each applicant asked the court to make and send a copy of their own notice of appeal. The courts denied their requests. However, even if the courts had granted their requests and sent the copies, it would still have been rather unlikely for the applicants to meet a seven-day deadline for rectifying formal deficiencies of their notices of appeal given the realities of the service of judicial documents in the prison setting. In any case, their appeal would have been dismissed on formal grounds.

6. COURT'S OBLIGATIONS TO PROVIDE PARTIES WITH RELEVANT PROCEDURAL INSTRUCTIONS

In *Adamkowski v. Poland* and *Parol v. Poland*, the ECtHR drew attention to the irregular performance of national courts in providing procedural instructions. Procedural instructions may not be used in a manner that is routine, mechanical or careless. The instructions are intended to facilitate access to the courts for individuals without the knowledge of law.

Under the Code of Civil Procedure, the court has general (Article 5 CCP) and, in certain circumstances, specific (Articles 327 § 2, 331 § 2 CCP) obligations to provide instructions to a party not represented by a lawyer.

The court's general obligation to provide procedural instructions existed as early as during the communist era. However, in the wake of the post-1989 democratic transition, the scope of this obligation was severely restricted.[20] The courts were no longer generally required to provide instructions; the performance of this obligation became discretionary. The courts could freely decide as to whether to instruct a party and to what extent. Procedural instructions were given solely in respect of the procedural steps taken by the parties and only to the extent necessary in a given procedural situation. Pursuant to the wording of Article 5 CCP, which was effective until 6 November 2019,[21] where a justified need arose, the court could provide the parties to (and participants in) the proceedings who were not represented by an advocate or attorney-at-law with necessary instructions concerning procedural steps.

The scope of, and need for, procedural instructions have therefore been significantly reduced. Moreover, the courts and scholarship developed the standard according to which instructions should only be provided in a situation where procedural steps are taken by a person who is incapable or has insufficient knowledge of the law[22] and only as regards the required procedural steps. The

[20] A. Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji*, Warszawa 2012, p. 126 et seq.

[21] On 7 November 2019, Articles 5 CCP and 327 CCP were amended by the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (Dz.U. 2019, item 1469).

[22] T. Ereciński, *Komentarz do Kodeksu postępowania cywilnego*, Vol. 1, Warszawa 2006, p. 92.

instructions used in the post-1989 period never took a more 'user-friendly' (accessible) form, despite the increasingly frequent demands for the creation of a system of straightforward judicial communication.[23] The legislator usually obliges the courts to provide information 'about the wording' of specific provisions and the courts interpret this obligation literally, providing the parties with quotes from the applicable provisions of the Code of Civil Procedure, often without any wider context. Instructions have never been given on forms. Overwhelmed by workload, the courts replaced detailed instructions for parties by letters with scanned sections of the Code. All this was possible because the Code of Civil Procedure did not specify the form in which instructions are to be given. Nor did the Code require instructions to be understandable. In consequence of the above, the courts do not even try to explain, in an accessible manner such as through diagrams or forms, how to lodge an appeal. There is no doubt that many provisions of the Code of Civil Procedure are complex. When quoted verbatim, such provisions, even using their terminology as an instruction, may be understood by a lawyer but not necessarily by a layman.

A somewhat different legislative approach to instructions is taken in the Code of Administrative Procedure. However, the Code of Administrative Procedure (CAP) does not provide for the exact tenor of instructions on the appeal against the merits of an administrative decision (Article 107 CAP). Nevertheless, Article 112 CAP provides guarantees for the party to the effect that improper instructions may not prejudice the party that has followed such instructions. This rule is a consequence of an obligation stemming from Article 9 CAP, according to which public administration bodies are required to inform the parties, in a proper and exhaustive manner, about the factual and legal background that may affect the determination of their rights and obligations covered by administrative proceedings. Public administration bodies are also required to ensure that the parties and other persons involved in the proceedings are not prejudiced by the ignorance of the law; to this end, the bodies should provide them with necessary explanations and guidance.[24]

Exhaustive instructions formulated in the criminal trial follow the models set out in a regulation of the Minister of Justice.[25] In accordance with Article 16 § 1 of the Criminal Procedure Code, in a situation where the authority conducting the

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[23] W. Świerczyńska-Głownia, *Komunikowanie z perspektywy sali sądowej*, Kraków 2019, p. 185 et seq.; J. Gwizdak, *Dlaczego media nie rozumieją sądów, a sądy nie rozumieją mediów?*, 15.10.2016, https://wszystkoconajwazniejsze.pl/jaroslaw-gwizdak-dlaczegomedia-nie-rozumieja-sadow-a-sady-nie-rozumieja-mediow/.

[24] The Supreme Administrative Court judgment of 29 January 2008, II OSK 211/07, Legalis: 'under Article 112 CAP, a party cannot suffer the negative effects of improper instructions which are an integral part of the administrative decision for a number of reasons, in particular due to the fact that the administrative law does not follow the doctrine of constructive knowledge of law, and hence does not strictly apply the *ignorantia iuris nocet* principle.' It should also be noted that Article 112 CAP plays an important role in the implementation of the principle of general protection of the trust of participants to administrative proceedings in public authorities (Article 8 CAP).

[25] For example, the Regulation of the Minister of Justice of 13 April 2016 on the determination of a model Letter of Rights and Obligations for suspects in criminal proceedings (Dz.U. 2016, item 512) or the Regulation of the Minister of Justice of 14 September 2020 on the determination

proceedings is obliged to instruct the participants in the proceedings about their rights or obligations, the absence of such instructions or the provision of improper instructions may not trigger any adverse procedural consequences for the participant or other persons concerned.

In *Parol* and *Adamkowski*, national courts failed to comply with the information obligation because upon effecting the service of a copy of the reasoned judgment on each applicant, the court did not inform the applicant about the requirement of submitting an appropriate number of copies of the notice of appeal (the instructions given by the courts were thus incomplete). In each of the above cases, the court was obliged to provide instructions, because under Article 327 § 2 CCP, if a party not represented by an advocate, attorney-at-law or trademark and patent attorney is absent at the time of the judgment being pronounced in the consequence of their detention, the court must serve *ex officio* on the party a copy of the operative part of the judgment with the instructions on when and how to file avenues of challenge, within one week from the day when the judgment is pronounced. Consequently, this type of instructions is used in a relatively rare (and exceptional) situation where a detained party is absent at the time of the judgment being pronounced. As a rule, a party present at the time of the judgment being pronounced is given these instructions verbally by the court (Article 327 § 1 CCP). In another special situation, namely where the court issues a judgment in camera, upon serving the judgment on the parties *ex officio*, the court must instruct any party not represented by a lawyer on how and when to file the notice of appeal (Article 331 § 3 CCP).

Given the above, Article 327 § 2 CCP was applicable in the national proceedings referred to in *Parol* and *Adamkowski*. The national court provided information about the type of the available avenues of challenge and time limit for lodging the appeal, while failing to provide specific instructions concerning the necessity of filing copies of the notice of appeal. Moreover, the court refused to appoint a lawyer for the applicant. The ECtHR correctly concluded that the applicant had the right to act in confidence in the court and generally rely on the information on the operative rules of procedure provided by national courts. At the same time, although the instructions were incomplete, the applicants' failure to observe formal requirements led to the courts' holding the applicants liable for these failures.

In another case, *Kunert v. Poland*,[26] the ECtHR did not find a violation of Article 6 ECHR because the applicant was informed by the court during the proceedings that all pleadings should be filed in duplicate. The ECtHR held that the provision of such instructions sufficed to avoid the violation of Article 6. In other words, no violation of Article 6 ECHR will occur if the court provides more detailed and specific instructions as to the manner of lodging a pleading, its enclosures and the required number of copies, etc.

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of a model Letter of Rights and Obligations for aggrieved parties in criminal proceedings (Dz.U. 2016, item 514).

[26] The ECtHR judgment of 4 April 2019, *Kunert v. Poland*, application no. 8981/14.

7. PROCEDURAL FORMALISM AND PARTY'S DUTY OF CARE

Procedural formalism precludes arbitrariness and discretion. It is emphasised in the ECtHR's case law that a party should exercise the utmost care and take active steps to defend their rights.[27] According to the rules of civil procedure, as well as under substantive law, the parties should exercise all reasonable care required in their case, as the law is written for the vigilant whereas the sluggish, careless and shiftless have to bear the consequences of their negligence.[28] Since Roman times, civil law has been familiar with two principles: *vigilantibus iura scripta sunt* and *iura vigilantibus non dormientibus prosunt*. The former states that 'civil law is written for the careful and vigilant', while the latter means that 'the laws serve the vigilant, not those who sleep'.[29]

In the case of *Parol v. Poland*, the ECtHR also considered what measure of due care should be applied to the applicant (who incidentally was detained) since the Government argued that the applicant knew how many copies were required, as he had already filed the statement of claim (the first pleading). In the Court's view, it could not be concluded that the applicant was aware of the requirement to lodge the notice of appeal in duplicate. Nor could adverse consequences be drawn from this fact for the applicant, since the case involved a failure to comply with a legal obligation imposed on a judicial authority under Article 327 § 2 CCP, i.e. the already discussed obligations to provide instructions on how to lodge an appeal to a detained person on whom the court serves a copy of the judgment. The ECtHR also stressed that Mr Parol was a vulnerable person on account of his incarceration. In addition, the applicant tried to follow the instructions of a regional court. Since he did not have a copy of the submitted notice of appeal, he requested the court to send him a copy of the same at his expense in order to fulfil his obligation to rectify the formal deficiencies. His request having been left unconsidered, the applicant complied with the court's obligation by making a handwritten copy of the notice of appeal. However, the copy was not identical to the original document submitted by the applicant – the applicant reproduced the wording from memory, which was not accepted by the court.

8. COURT'S OBSERVANCE OF THE RULES OF A FAIR TRIAL

Article 6 ECHR clearly establishes guarantees of a fair trial, understood, inter alia, as court proceedings conducted with respect for the rules of fair play and good manners. The right to a fair trial implies the court's obligation to conduct the proceedings in a manner anticipated by (and foreseeable to) the parties. This

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[27] The ECtHR decision of 4 October 2001, *Teuschler v. Germany (dec.)*, application no. 47636/99; the ECtHR judgment of 10 February 2005, *Sukhorubchenko v. Russia*, application no. 69315/01, § 48; https://www.echr.coe.int.

[28] M. Sawczuk, *Problem aktywności stron („vigilantibus iura scripta sunt") w postępowaniu cywilnym*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1, 1974, pp. 115–127.

[29] *Prawo rzymskie. Słownik encyklopedyczny*, W. Wołodkiewicz (ed.), Warszawa 1986, p. 155.

means that the court itself should not take any contradictory actions or surprise the parties. Moreover, the court's own mistakes or negligence may not trigger any negative consequences for the participants in the proceedings. It is unacceptable to hold the parties liable for the defective operation of the court.

However, the court's duty of loyalty is not reflected in any provision of the Code of Civil Procedure. Although Articles 3 and 4[1] CCP establish an obligation to act honestly and prohibits abuses of procedural rights, this obligation and prohibition rest on the parties.[30] The Code of Civil Procedure was originally enacted in 1964, during the period of the Polish People's Republic. The original Code was based on the principle of the court's overarching authority and took account of no good practices of building a partnership arrangement based on the principle of trust. Nevertheless, there is no doubt that the duty of fair play is imposed not only on the parties but also on the court, based on the direct normative directive stemming from Article 45 para. 1 of the Constitution.[31]

In *Parol*, the ECtHR found that, on the facts, the applicant – by sending a handwritten letter to the regional court which he considered compliant with the requirements established for a copy of the notice of appeal – has acted with a degree of care normally required of a party to civil proceedings. Moreover, it may be argued that the national court failed to perform the duty of loyalty in its procedural aspect: after all, the court had refused to send his original pleading back to the applicant, effectively preventing the applicant from fulfilling the obligation imposed. Under Article 9 § 1 CCP, the applicant was entitled to have access to the case files and to receive copies, transcripts and extracts from the same.

Consequently, it is correct to conclude that, in the circumstances of the case at hand, the national courts were responsible for a series of actions which deprived the applicant of access to a court. After all, the national court of first instance ultimately held that the applicant's appeal was inadmissible because a copy of the notice of appeal was not identical to the original document lodged by the applicant. The applicant's case was therefore not examined on the merits but dismissed on purely formal grounds. The above decision, subsequently affirmed by the court of second instance, prevented the applicant from bringing proceedings as to the merits of his case before the appellate court.

9. PROPORTIONALITY

In its case law, the ECtHR draws attention to the need for an effective appellate remedy. According to the ECtHR, the right to a court is not absolute. It may be subject to restrictions imposed by Member States which have a margin of appreciation in this respect. These restrictions must not, however, hinder access to a court in a way that would undermine the very essence of this right. The restrictions must

[30] M. Plebanek, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, p. 1 et seq.

[31] A. Łazarska, *Zaufanie jako kategoria prawa w procesie cywilnym*, Polski Proces Cywilny 2, 2011, p. 25.

be proportionate and must not affect the principle of legal certainty.[32] Moreover, any restrictions are admissible if they pursue a legitimate aim and there is an appropriate balance between the means used and that aim. If national jurisdiction guarantees a certain measure, such as the possibility of bringing a legal action, the basic guarantees set out in Article 6 ECHR must apply to that measure.[33]

Effective legal protection is most often equated with ensuring actual access to a court. The right to a court cannot be merely formal but must be guaranteed in fact.[34] Effective judicial protection means guaranteeing 'real' protection, not just 'apparent' or 'abstract' protection. Access to a court should not only mean the mere availability of legal proceedings but also the actual possibility of asserting one's rights in court.[35] The ECtHR case law obligates courts, on the one hand, to balance values and uphold formal requirements and, on the other hand, not to deprive anyone of the right of access to the courts, i.e. to maintain an appropriate balance in terms of access to a court.[36] When interpreting procedural provisions, courts should always weigh the implications of their decisions and take into account the stage of the proceedings and the guarantee of the right to a court.

When making decisions motivated by formal law, courts should take into account whether they are not actually closing access to a court. Furthermore, these restrictions are in keeping with Article 6 para. 1 ECHR only where they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the measures applied and the objective pursued.[37] In addition, when assessing the proportions, it must be borne in mind that the aim of the Convention is to protect rights that are not theoretical or illusory, but concrete and effective. This applies in particular to the guarantees laid down in Article 6, given the importance of the right to a fair trial.

In *Parol* and *Adamkowski*, the ECtHR found a violation of the Convention resulting from the closure of access to a court, noting that the applicants were, in fact, deprived of the right to an effective appellate remedy due to a decision dismissing their appeals on formal grounds. Their appeals were not examined on the merits but formally dismissed without examining their legitimacy.

The ECtHR was right in finding no analogy with the case of *Siwiec v. Poland*.[38] Both cases differ in terms of both the subject matter and on the facts. In *Siwiec*, the

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[32] The ECtHR judgment of 21 February 1975, *Golder v. United Kingdom*, application no. 4451/70, § 35, https://www.echr.coe.int.

[33] The ECtHR judgment of 2 October 2008, *Atanasova v. Bulgaria*, application no. 72001/01, LEX No. 457447; M.A. Nowicki, *European Court of Human Rights. Wybór orzeczeń 2008*, Warszawa 2009, pp. 137–138.

[34] K.H. Schwab, P. Gottwald, *supra* n. 4, pp. 38–39.

[35] H. Miehsler, T. Vogler, [in:] *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, W. Karl (ed.), Köln 2009, p. 82.

[36] The ECtHR judgments: of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34; and of 17 January 2012, *Stanev v. Bulgaria* [GC], application no. 36760/06, § 230; https://www.echr.coe.int.

[37] The ECtHR judgment of 19 February 1998, *Edificaciones March Gallego S.A. v. Spain*, § 34, *Recueil* 1998-I, https://www.echr.coe.int.

[38] The ECtHR judgment of 3 July 2012, *Siwiec v. Poland*, application no. 28095/08, https://www.echr.coe.int.

Court found that the national courts' strict interpretation of Article 128 § 1 CCP did not, in and of itself, violate Article 6 para. 1 ECHR, as the case had been examined on its merits by courts of two instances each of which had full jurisdiction and no doubts arose as to the exercise of the right of access to a court. The ECtHR also noted that in *Siwiec* the applicant did not respond to a court's request to rectify the formal deficiencies. Finally, the case of *Siwiec v. Poland* concerned civil proceedings in a commercial case, which are subject to more stringent procedural requirements than standard civil proceedings, and the court made a substance-based ruling and dismissed the applicant's requests for evidence.

Another important issue is the assessment of the content of the copy of the notice of appeal. Despite the lack of response from the national courts, the applicants took steps to draw up a handwritten copy of the document in question, whose content was not – in the court's opinion – identical to the wording of the originally submitted notice of appeal. However, the courts made only a general remark that the wording of the handwritten notices of appeal was different. They failed to examine the documents in detail to specify whether the differences related to the layout of the appeals or their wording. Meanwhile, there is no doubt that the courts should assess the merits of the appeals in accordance with the principle that 'equity looks to the intent, rather than to form'.[39]

In the context of, e.g. translation of documents, it follows from the ECtHR case law that the accused's right to be assisted by an interpreter/translator does not include the possibility of requesting the translation of all documents constituting evidence in a case or official documents from the case file.[40] This means that the role of the court is to strike the right balance between the formalism and efficiency of the proceedings.

In the circumstances of the case at hand, the courts should have assessed to what extent differences between the handwritten copy and the original would prevent the other party from defending their case, given that the written procedure is supplemented by an oral argument where the court and the parties have the opportunity to discuss and exchange their views. The fact that the copy was not identical should not lead to such a severe sanction as the dismissal of the appeal and deprivation of access to a court. The court should initially review these discrepancies with a view to guaranteeing the other party's right to a defence and respecting the principle of the equality of arms. Formal deficiencies should not lead to the dismantling of substantive rights.

10. CONCLUSIONS

The extreme procedural formalism of Polish courts results, among other things, from the excessive workload they cope with. For this reason, the courts tend to choose a formalistic (and the shortest) route to bring the proceedings to an end.

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[39] J.E. Martin, *Modern Equity*, Hanbury and Martin, 1957, p. 48.

[40] The ECtHR judgment of 19 December 1989, *Kamasinski v. Austria*, https://www.echr.coe.int.

However, the choice of such a 'shortcut' route cannot be accepted, especially when it involves excessive formalism and denial of access to a court. The ECtHR makes it clear that formalism is generally admissible but must always remain subordinate to the principle of proportionality.

Furthermore, the cases of *Parol*, *Adamkowski* and *Borkowski* reveal systemic defects in the operation of courts related to improper judicial practices regarding the provision of procedural instructions. The courts tend to apply the rules on the formal requirements in an extremely rigorous and careless manner, while disregarding the consequences of the absence of access to a court. Some judicial officers treat formal requirements as a 'dense sieve' used to dismiss cases on formal grounds: often, as soon as a case lands on a judge's docket, the judge not only checks if their court is a proper venue and has jurisdiction or if the case was properly allocated but also actively searches for formal deficiencies in the claimant's pleadings. In this way, procedural law, or rather its practical application, sometimes resembles a minefield or *trous de loup*.

Arguably, the Hippocrates' motto *primum non nocere* should apply not only to doctors but also to judges.[41] Procedural law, including the rules on formalities, is to be a means facilitating the implementation of substantive law and safeguarding substantive rights. Procedural rules are designed to keep the balance between two values: legal certainty and fairness. However, the application of procedural law must not distort the very essence of a fair trial. Moreover, procedural law should not be instrumentally used to eliminate incoming cases and prevent litigants from exercising judicial remedies.

The application of provisions on the form of proceedings must not lead to injustice. It is, therefore, necessary to maintain a proper balance between the type of established infringement and the sanction applied. A minor and negligible formal violation must not lead to a loss of the party's rights, and a 'good' right should not be defeated by the party's ineptitude.[42]

Importantly, the discussed judgments led to a legislative action taken at the national level to change the method of providing instructions in civil matters, which took the form of an amendment to the Code of Civil Procedure adopted on 4 July 2019[43]. The amended Article 5 CCP authorised the Minister of Justice to specify, in a regulation, model forms of the instructions which must be provided in writing under the Code of Civil Procedure. Such model instructions must be complied so as to ensure that their content is communicated in an accessible way.

Article 327 § 4 CCP was also amended. The new wording of this provision, set out in the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts, is as follows: 'A party receiving a judgment served *ex officio*, who is not represented by an advocate, an attorney-at-law, a trademark and patent attorney or by the General Counsel to the Republic of Poland, shall also receive instructions on the method of, and time limit for, submission of the application for the delivery

41 J. Esser, *Not und Gefahren des Revisionsrechts*, Juristenzeitungen 17, 1969, p. 515.

42 A. Łazarska, *supra* n. 11, pp. 211–212.

43 Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (Dz.U. 2019, item 1469).

of the reasoned judgment and on the conditions and method of, and time limit for, filing avenues of challenge.' Furthermore, Article 205[2] CCP, a new provision added to the Code, sets out an extensive list of instructions related to the service of initial pleadings. Such instructions concern, among other things, the possibility of resolving the dispute by settlement, obtaining a default judgment issued in camera or the right to have a legal representative appointed in the proceedings.

However, as always, a 'Convention-friendly' judicial interpretation of these rules by the courts is much more important than the rules, forms or the wording of letters with instructions. Such interpretation matters most in cases of detained persons or litigants not represented by a lawyer. It is impossible to include detailed instructions for all possible situations in the Code of Civil Procedure. Courts should provide instructions in a way ensuring a fair trial for the parties. Here, the overarching directive should be that the instructions must be accessible, clear, and transparent and that the courts should strike a proportional balance between formal requirements and the guarantee of access to a court.

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PROHIBITION OF EXCESSIVE FORMALISM AND JUDICIAL PRACTICE: COMMENTS BASED ON CIVIL CASE LAW OF POLISH COURTS IN THE CONTEXT OF ARTICLE 6 ECHR

Summary

The guarantee of the right to a fair trial (Article 6 ECHR) in the light of the Strasbourg case law implies the need for the court to fulfil all disclosure obligations that have a guarantee significance in terms of the right to a court and the prohibition of excessive formalism. The Strasbourg Court in the ECtHR judgments of 11 October 2018 in the case of *Parol v. Poland*, and of 28 March 2019 in the case of *Adamkowski v. Poland*, on the background of concurrent facts, stated that the rejection by civil courts of appeals of the applicants, persons deprived of liberty, was a manifestation of excessive formalism inadmissible under Article 6 ECHR. This decision was influenced by the fact that the applicants were not duly instructed by the court about the formal requirements related to lodging an appeal. These judgments are a clear signal to the courts that, when applying procedural law, one must make its interpretation friendly in terms of substance and in line with Convention on Human Rights so as not to violate the fair trial guarantee. Perhaps these judgments will become an important contribution to a wider discussion on the interpretation of procedural law and effective judicial protection. The problem lies not only in the law itself, but also in the lack of sufficient guarantees of its pro-Convention interpretation by the courts. Despite the upgrading of court buildings and their adaptation to the needs of clients, a meticulous attachment to the mechanical and routine application of procedural rules often prevails in courts.

Keywords: excessive formalism, fair trial, procedural instructions, obligation of loyalty, obligation of diligence, proportionality, right to a court

ZAKAZ EKSCESYWNEGO FORMALIZMU A PRAKTYKA SĄDOWA – UWAGI NA TLE ORZECZEŃ POLSKICH SĄDÓW W SPRAWACH CYWILNYCH W ŚWIETLE ART. 6 EKPC

Streszczenie

Z gwarancji prawa do rzetelnego procesu (art. 6 EKPC) na tle orzecznictwa strasburskiego wynika konieczność dopełnienia przez sąd wszelkich obowiązków informacyjnych, które mają gwarancyjne znaczenie w aspekcie prawa do sądu, oraz zakaz ekscesywnego formalizmu. Trybunał strasburski w wyrokach ETPCz z 11 października 2018 r. w sprawie *Parol przeciwko Polsce*, z 28 marca 2019 r. w sprawie *Adamkowski przeciwko Polsce* na tle zbieżnego stanu faktycznego stwierdził, że odrzucenie przez sądy cywilne apelacji skarżących, osób pozbawionych wolności, stanowiło przejaw niedopuszczalnego na gruncie art. 6 EKPC nadmiernego formalizmu. Na takim rozstrzygnięciu zaważył fakt, że skarżący nie zostali należycie pouczeni przez sąd o wymogach formalnych, związanych z wnoszeniem apelacji. Wyroki te stanowią wyraźny sygnał dla sądów, że stosując prawo procesowe, trzeba dokonywać jego materialnoprzyjaznej, prokonwencyjnej wykładni, aby nie naruszyć gwarancji *fair trial*. Być może orzeczenia te staną się ważnym przyczynkiem do szerszej dyskusji na temat wykładni prawa procesowego oraz efektywnej ochrony sądowej. Problem leży bowiem nie tylko w samym prawie, lecz także w braku dostatecznych gwarancji jego prokonwencyjnej wykładni przez sądy. Mimo unowocześnienia budynków sądowych i przystosowania ich dla potrzeb interesantów, w sądach nierzadko dominuje skrupulatne przywiązanie do mechanicznego i rutynowego stosowania przepisów proceduralnych.

Słowa kluczowe: ekscesywny formalizm, rzetelny proces, pouczenia procesowe, obowiązek lojalności, powinność starannego działania, proporcjonalność, prawo do sądu

PROHIBICIÓN DE FORMALISMO EXCESIVO Y LA PRACTICA JUDICIAL – COMENTARIOS DE SENTENCIAS POLACAS EN ASUNTOS CIVILES A LA LUZ DEL ART. 6 CEDH

Resumen

De la garantía al derecho a un proceso equitativo (art. 6 CEDH) desde la perspectiva de la jurisprudencia del TEDH nace la necesidad de cumplir por parte del Tribunal con todas las obligaciones de información que garanticen el derecho a un proceso y la prohíban el formalismo excesivo. El Tribunal de Estrasburgo en sus sentencias de 11 de octubre de 2018 en el caso *Parol contra Polonia*, de 28 de marzo de 2019 en el caso *Adamkowski contra Polonia*, en vista de similares antecedentes de hecho, ha declarado que la desestimación de apelación por parte de los Tribunales civiles, presentada por partes que estaban privadas de libertad, constituye exceso de formalismo inadmisible conforme con art. 6 CEDH. Las sentencias se basan en el hecho de que los recurrentes no fueron debidamente informados por el Tribunal sobre los requisitos formales del recurso de apelación. Estas sentencias es una señal evidente para los Tribunales, ya que a la hora de aplicar el derecho procesal hay que interpretarlo de manera pro convencional amigable, para no violar la garantía *fair trial*. Tal vez estas sentencias serán un pretexto importante para la discusión profunda sobre la interpretación de derecho procesal y la tutela efectiva judicial. El problema no está en el derecho en sí, sino en la falta de garantías suficientes de su interpretación pro convencional por los Tribunales. A pesar de

la modernización de los edificios judiciales, su adaptación a las necesidades de los ciudadanos, es muy frecuente que se apliquen los preceptos procesales de forma mecánica y rutinaria.

Palabras claves: formalismo excesivo, proceso equitativo, advertencias procesales, obligación de lealtad, deber de actuar con diligencia debida, proporcionalidad, derecho a la tutela judicial

ЗАПРЕЩЕНИЕ ЧРЕЗМЕРНОГО ФОРМАЛИЗМА И СУДЕБНАЯ ПРАКТИКА: ЗАМЕЧАНИЯ ПО ПОВОДУ РЕШЕНИЙ ПОЛЬСКИХ СУДОВ ПО ГРАЖДАНСКИМ ДЕЛАМ В СВЕТЕ СТ. 6 ЕКПЧ

Аннотация

Основываясь на судебной практике ЕСПЧ, можно сделать вывод, что из гарантированного права на справедливое судебное разбирательство (ст. 6 ЕКПЧ) следует, что от суда требуется выполнение всех обязательств по информированию обвиняемого с целью обеспечить его право на справедливое разбирательство; отсюда же следует и запрет на чрезмерный формализм. В решениях по делам «Пароль против Польши» от 11 октября 2018 г. и «Адамковский против Польши» от 28 марта 2019 г., схожим между собой с точки зрения фактической стороны дела, Европейский суд по правам человека постановил, что отклонение гражданскими судами апелляций, поданных вышеуказанными лицами, находящимися в местах лишения свободы, являлось проявлением чрезмерного формализма, противоречащего ст. 6 ЕКПЧ. Такая позиция ЕСПЧ основана на том факте, что апеллянты не были должным образом проинструктированы судом касательно формальных требований к подаче апелляции. Данные судебные решения дают судам четкий сигнал о том, что при применении процессуального права необходимо толковать его с учетом материального права и положений Европейской конвенции о правах человека с тем, чтобы не нарушить гарантию справедливого судебного разбирательства (*fair trial*). Можно ожидать, что эти решения ЕСПЧ приведут к активизации дискуссии о вопросах толкования процессуального права, а также эффективной судебной защиты. Проблема заключается не столько в самом процессуальном праве, сколько в отсутствии достаточных гарантий того, что при его толковании суды будут руководствоваться положениями ЕКПЧ. В то время как здания судов модернизируются с целью лучшего приспособления к нуждам посетителей, в самих судах зачастую превалирует слепая привязанность к механическому и рутинному применению процессуальных норм.

Ключевые слова: чрезмерный формализм; справедливое разбирательство; процессуальное информирование; обязанность защиты прав обвиняемого; обязанность проявлять надлежащую тщательность; соразмерность; право на судебное разбирательство

DAS VERBOT DES ÜBERSPITZTEN FORMALISMUS UND DIE GERICHTSPRAXIS – ANMERKUNGEN VOR DEM HINTERGRUND DER URTEILE POLNISCHER GERICHTE IN ZIVILSACHEN IM LICHTE DES ARTIKELS 6 DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION

Zusammenfassung

Aus der Garantie des Rechts auf ein faires Verfahren (Artikel 6 EMRK) ergibt sich vor dem Hintergrund der Straßburger Rechtssprechung die Notwendigkeit, dass die Gerichte allen Informationspflichten nachkommen, denen im Hinblick auf das garantierte Recht

auf gerichtliches Gehör und das Verbot des überspitzten Formalismus Schlüsselbedeutung zukommt. Der Straßburger Gerichtshof hat in den Urteilen des EGMR in der Rechtssache *Parol gegen Polen* vom 11. Oktober 2018 und der Rechtssache *Adamkowski gegen Polen* vom 28. März 2019 vor dem Hintergrund des übereinstimmenden Sachverhalts festgestellt, dass die Abweisung der von den inhaftierten Klägern eingelegten Berufung durch die Zivilgerichte Ausdruck eines nach Artikel 6 der Europäischen Menschenrechtskonvention unzulässigen, übertriebenen Formalismus war. Die Entscheidung wurde durch die Tatsache beeinflusst, dass die Beschwerdeführer nicht hinreichend über die formalen Anforderungen im Zusammenhang mit der Einlegung von Rechtsmitteln belehrt worden waren. Die Urteile senden eine klare Botschaft an die Gerichte, dass bei der Anwendung des Prozessrechts eine materiellrechtsfreundliche, konventionsfreundliche Auslegung gefordert ist, um nicht gegen das garantierte Recht auf ein faires Verfahren zu verstoßen. Möglicherweise leisten diese Urteile auch einen wichtigen Beitrag zu einer breiteren Diskussion über die Auslegung des Verfahrensrechts und einen effektiven gerichtlichen Rechtsschutz. Das Problem liegt nicht nur im Gesetz selbst begründet, sondern ist auch auf die unzureichende Garantie einer konventionsfreundlichen Gesetzesauslegung durch die Gerichte zurückzuführen. Trotz Modernisierung der Gerichtsgebäude und einer Anpassung an die Bedürfnisse der Beteiligten ist in den Gerichten häufig ein akribisches Festhalten an der mechanischen und routinemäßigen Anwendung der Verfahrensvorschriften zu beobachten.

Schlüsselwörter: überspitzter Formalismus, faires Verfahren, Verfahrensbelehrungen, Loyalitätspflicht, Sorgfaltspflicht, Verhältnismäßigkeit, Recht auf gerichtliches Gehör

L'INTERDICTION DU FORMALISME EXCESSIF ET LA PRATIQUE JUDICIAIRE – COMMENTAIRES DANS LE CONTEXTE DES JUGEMENTS DES TRIBUNAUX POLONAIS DANS LES AFFAIRES CIVILES À LA LUMIÈRE DE L'ARTICLE 6 DE LA CEDH

Résumé

La garantie du droit à un procès équitable (article 6 de la CEDH), au regard de la jurisprudence de Strasbourg, implique la nécessité pour le tribunal de remplir toutes les obligations d'information dont la pertinence est garantie au regard du droit à un procès équitable, ainsi que l'interdiction d'un formalisme excessif. La Cour européenne des droits de l'homme de Strasbourg dans ses arrêts du 11 octobre 2018 dans l'affaire *Parol c. Pologne*, du 28 mars 2019 dans l'affaire *Adamkowski c. Pologne*, sur fond de faits concordants, a déclaré que le rejet par les juridictions civiles des recours des requérants, personnes privées de liberté, était une manifestation d'un formalisme excessif, inacceptable au regard de l'article 6 de la CEDH. Une telle décision était influencée par le fait que les requérants n'avaient pas été dûment informés par le tribunal des conditions formelles liées à l'introduction d'un recours. Ces arrêts sont un signal clair aux tribunaux que lors de l'application du droit procédural, il est nécessaire d'en faire une interprétation favorable au matériel et pro-convention, afin de ne pas violer la garantie d'un procès équitable. Ces jugements deviendront peut-être une contribution importante à un débat plus large sur l'interprétation du droit procédural et une protection juridictionnelle efficace. Le problème ne réside pas seulement dans la loi elle-même, mais dans le manque de garanties suffisantes de son interprétation pro-convention par les tribunaux. Malgré la modernisation des bâtiments des tribunaux et leur adaptation aux besoins des clients, les tribunaux se heurtent souvent à un attachement scrupuleux à l'application mécanique et routinière des règles de procédure.

Mots-clés: formalisme excessif, procès équitable, instructions procédurales, devoir de loyauté, devoir de diligence, proportionnalité, droit à un procès équitable

DIVIETO DI ECCESSIVO FORMALISMO E PRASSI GIUDIZIARIA: OSSERVAZIONI SULLO SFONDO DELLE SENTENZE DEI TRIBUNALI POLACCHI NELLE CAUSE CIVILI ALLA LUCE DELL'ART. 6 DELLA CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI

Sintesi

Dalla garanzia del diritto a un equo processo (art. 6 della CEDU) sullo sfondo della giurisprudenza di Strasburgo, deriva la necessità di adempimento, da parte dei tribunali, di tutti gli obblighi informativi essenziali sotto l'aspetto della garanzia del diritto alla giustizia e del divieto di eccessivo formalismo. La Corte di Strasburgo, nelle sentenze della Corte europea dei diritti dell'uomo dell'11 ottobre 2018 nel procedimento *Parol contro la Polonia*, del 28 marzo 2019 nel procedimento *Adamkowski contro la Polonia*, sullo sfondo dei fatti convergenti, ha dichiarato che il rigetto del ricorso dei ricorrenti, persone detenute, da parte dei tribunali civili, ha costituito un'espressione di eccessivo formalismo, inammissibile sulla base dell'art. 6 della CEDU. Ha determinato tale decisione il fatto che i ricorrenti non fossero stati correttamente istruiti dal tribunale circa i requisiti formali legati alla proposizione del ricorso. Tali sentenze sono un chiaro segnale per i tribunali, che applicando il diritto processuale bisogna interpretarlo in maniera sostanziale amichevole, nello spirito della convenzione, per non violare la garanzia di equo processo. Forse queste sentenze contribuiranno significativamente a una più ampia discussione sul tema dell'interpretazione del diritto processuale e dell'efficace tutela giuridica. Il problema non è infatti nel diritto in se, ma nell'assenza di garanzie sufficienti della sua interpretazione nello spirito della convenzione da parte dei tribunali. Nonostante l'ammodernamento degli edifici dei tribunali, il loro adattamento alle necessità degli interessati, nel tribunali non di rado domina uno scrupoloso attaccamento ad una applicazione meccanica e di routine delle norme procedurali.

Parole chiave: eccessivo formalismo, equo processo, istruzioni procedurali, dovere di lealtà, dovere di sollecitudine, proporzionalità, diritto alla giustizia

Cytuj jako:

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PROPORTIONALITY OF INTERESTS AND THE PRINCIPLE OF COMMENSURABILITY OF SELF-DEFENCE IN POLISH CRIMINAL LAW

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1. INTRODUCTION

Although it has been known since the times of Roman law, the institution of self-defence or necessary defence still arouses vivid emotions in the society while, at the same time, leading to numerous difficulties in its practical application. As an example, one can invoke the very recent situation in the Lublin region, where a 17-year-old killed his father with a knife while defending his mother, who had been abused by the father for many years. In about the same period, a military prosecutor from the city of Gdańsk injured two young people by firing at them as they were allegedly attempting to enter his house. In both cases, albeit different in terms of the underlying motivation, one can clearly see the complexity of self-defence and difficulties in its application in practice.

The features of self-defence in the strict sense are set out in Article 25 § 1 of the Polish Criminal Code,[1] which states that anyone who, in self-defence, repels a direct, unlawful attack on any interest protected by law, shall not be deemed to commit a crime. This wording of the provision directly suggests that in order for justifications (i.e. defences to criminal liability) to occur at all, an attack must take place first. However, the attack does not always authorise self-defence. An attack must fulfil four prerequisites jointly: it must be direct, unlawful, oriented against any interest protected by law, as well as it must be real (while the last of these

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[1] Act of 6 June 1997: Criminal Code (consolidated text, Dz.U. 2019, item 1950, as amended); hereinafter CC.

prerequisites is not mentioned explicitly in the text of the provision, it results from the relation between self-defence and an error regarding the justifications, as defined in Article 29 CC).[2]

When an attack has exhausted the aforementioned necessary conditions, it entitles a person to take defensive action, which is not tantamount to accepting the justifications of self-defence. In fact, there are some limits of this criminal-law institution, delineated by the features of the defensive action and, in particular, by the feature of 'necessary' defence. However, the analysis of self-defence raises a number of doubts, mainly related to differences in construing this notion (i.e. the dilemma between the 'self-containedness' or subsidiarity of defence and the commensurability of defence vis-à-vis the danger posed by an attack). The prevailing view in the Polish criminal law doctrine – which the author hereby identifies with – is that self-defence is fully self-contained, which means that it is assumed that the attack itself (as long as it exhausts the aforementioned characteristics) generates the right to act under necessary defence. While I leave this issue outside the scope of this paper, I think it is necessary to look more deeply into the problem of delineating the limits of self-defence or, more precisely, the commensurability of defence actions versus the degree of danger posed by the attack.

2. PRINCIPLE OF COMMENSURABILITY OF DEFENCE WITH THE DANGER POSED BY THE ATTACK

The legal norm which seems to emanate from the content of Article 25 § 1 CC does not contain a condition as to maintaining the proportion of interests in conflict. Nevertheless, a conclusion that may be drawn from Article 25 § 2 CC is that the legislator limits self-defence by establishing its limits, also in terms of the manner of defence. Since the times of the 1969 Criminal Code,[3] the condition of commensurability of the self-defence in the face of the danger posed by an attack has been directly determined by that act (Article 22 § 3 of the 1969 Criminal Code; currently: Article 25 § 2 CC), indicating the use of an incommensurate method of defence as an example of exceeding the limits of self-defence. The phrase 'in particular' used in that provision indicates that it is not the only possible case where the limits of self-defence may be exceeded, although, as Andrzej Marek believes, this is the most important one.[4]

A problem arises when it comes to the highly subjective analysis of the manner of defence that will be commensurate with a specific attack. As Paweł Petasz rightly points out, with this construction of a legal norm, the doctrine and case law should construe and clarify the meaning of 'commensurability' of the manner

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[2] M. Mozgawa, [in:] *Prawo karne materialne. Część ogólna*, M. Mozgawa (ed.), 3rd edn, Warszawa 2011, p. 230; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2014, p. 350.

[3] Act of 19 April 1969: Criminal Code (Dz.U. 1969, No. 13, item 94).

[4] A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa 2008, pp. 88–89.

of defence. That author rightly indicates that what needs to be taken into account are, among others, circumstances such as the behaviour of the perpetrator, their physical strength, the tools used, or the predominance in the number of attackers.[5] A similar claim was also made by Marian Cieślak, who treated necessity in this respect in the humanistic sense, i.e. taking into account what can (or cannot) be reasonably required of the defending person, while considering social beliefs and feelings.[6] Therefore, from this perspective, it is justified and right to claim that every case should be examined *in concreto*, if only because the situation during an attack can change at any moment, and any defender should consider the effectiveness of their defence.

When assessing the commensurability of actions with the danger posed by an attack, Polish case law seems to favour the person who repels the attack. In its judgment of 11 July 1974, the Supreme Court ruled that 'a person acting in self-defence may use such means as are necessary to repel the attack. The use of a dangerous tool, particularly in moderation, cannot be regarded as exceeding the limits of self-defence if the defender did not have any other, less dangerous but equally effective means of defence at the time, and if the circumstances of the incident, and in particular the preponderance of the attackers and their manner of acting implied that the attack posed a threat to the life or health of the attacked person.'[7] The Supreme Court also formulated a similar claim in its judgment of 23 July 1980: '[...] the institution of self-defence allows for the use of any necessary means of defence in order to repel a direct and unlawful attack on life or health, while the kind of tool used must not determine that limits of such defence have been transgressed if the defender did not have any other, less dangerous tool at their disposal.'[8]

As rightly observed by Janusz Wojciechowski, it is therefore allowed 'to use any available means' in the defence of one's life or health, including acceptance for the use of dangerous tools. Of course, this does not preclude the essential principle whereby defence must always be commensurate with the danger posed by the attack, but it does not mean that defence must be based on a balance of powers. According to that author, the defender is entitled to defend themselves in such a way so as to gain an advantage over the attacker.[9] This claim seems to be confirmed by another position taken by the Supreme Court: 'No one can be denied the right to hold an attacker at a distance with whatever object is available, even if the attacker attacks someone with bare hands. The targeted person is not obliged to get into a brawl with the attacker and to risk blows in order to turn their defence

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[5] P. Petasz, *Glosa do postanowienia SN z dnia 27 kwietnia 2017 r., IV KK 116/17*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 3, 2017, pp. 78–88.

[6] M. Cieślak, *Polskie prawo karne: zarys systemowego ujęcia*, Warszawa 1994, p. 224.

[7] The Supreme Court judgment of 11 July 1974, VI KRN 34/74, OSNKW 1974, No. 11, item 198.

[8] The Supreme Court judgment of 23 July 1980, V KRN 168/80, OSNPG 1981, No. 6, item 60.

[9] J. Wojciechowski, *Szeroki zakres obrony koniecznej*, Monitor Prawniczy 6, 1998, pp. 213–215.

against a direct unlawful attack into a balanced duel.'[10] Therefore, as these and other examples show, the Supreme Court has already expressed a position on this issue on multiple occasions, always taking the view that the law should not give way to lawlessness.[11] This view of the judiciary is also shared by most representatives of the doctrine.[12]

3. COMMENSURABILITY OF DEFENCE AND PROPORTIONALITY OF CONFLICTING INTERESTS

The analysis of the proportionality of the interests, those that were violated by the attacker and those violated by the defender, is a separate issue. In this regard, two positions can be essentially identified in the doctrine and in case law.

The first one, which disqualifies the principle of proportionality of interests and prevailed, in particular, under the 1932 Criminal Code,[13] does not allow for any limitation of the range of interests that can be legally violated by the person repelling an unlawful attack. This view was expressed, among others, by Leon Peiper, who claimed that 'despite the insignificant value of the interests at risk, it is therefore possible to even kill the attacker if the type of attack justifies it.'[14] Also, Stanisław Śliwiński argued that 'the principle of interest weighing or the proportional value of interests does not apply [...]. In defence of a purse containing just a few coins, the targeted person may even take the attacker's life (a more valuable interest), if no other defence method can be used. [...] lawlessness should not prevail over the law, and the attacker must reckon with the fact that they may even lose their life but will not triumph over the law even for a moment.'[15] The gross disproportionality of interests was also thought to be allowable by Arnold Gubiński,[16] Juliusz Makarewicz[17] and Stefan Glaser[18].

According to the second position, which is now accepted by the dominant group of the Polish judicature, this commensurability will be determined by the value of the interest threatened by an attack. The danger of an attack results not only from the intensity and manner of action undertaken by the attacker, but also – according to Andrzej Zoll – the danger of an attack is determined, to a decisive extent, by

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[10] The Supreme Court judgment of 9 March 1976, III KR 21/76, OSNKW 1976, No. 7–8, item 89.

[11] Recently, e.g. the decision of the Supreme Court of 27 April 2017, IV KK 116/17, LEX No. 2284193.

[12] See, e.g., M. Szafraniec, *Przekroczenie granic obrony koniecznej w polskim prawie karnym*, Kraków 2004, p. 98 and 102; J. Kulesza, [in:] *System Prawa Karnego*, Vol. 4: *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, L. Paprzycki (ed.), Warszawa 2016, pp. 248–249.

[13] Regulation of the President of the Republic of Poland of 11 July 1932: Criminal Code (Dz.U. 1932, No. 60, item 57).

[14] L. Peiper, *Komentarz do kodeksu karnego*, Kraków 1936, p. 83.

[15] S. Śliwiński, *Polskie prawo karne materialne*, Warszawa 1946, p. 156.

[16] A. Gubiński, *Wyłączenie bezprawności czynu*, Warszawa 1961, pp. 21–22.

[17] J. Makarewicz, *Kodeks karny z komentarzem*, 3rd edn, Lwów 1932, pp. 77–79.

[18] S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, p. 138.

the value of the targeted interest.[19] In its judgment of 26 April 1979, the Supreme Court stated: 'In order to thwart an unlawful and direct attack on any interest protected by law, one can only use such means of defence which are in the right proportion to the imminent danger as well as the extent and the value of the interest under attack.'[20]

However, some opinions in the doctrine present a somewhat different view of the proportionality of interests in self-defence. While Andrzej Marek stated that 'in the institution of self-defence, the principle of the proportion of interests does not apply to the interest under attack and the interest violated as a result of the repelled attack,'[21] in the very next sentence he claimed that 'this does not mean that a gross imbalance is allowable in this respect'.[22]

This reasoning is also widely accepted by the judiciary, and a nearly identical justification can be found in a number of rulings issued by courts at different levels. For instance, the Court of Appeal in Kraków[23] argued on several occasions that 'Although the proportion between the interest threatened by an attack and the interest violated by repelling the attack does not apply in self-defence, this does not mean that a glaring disproportion of these interests is acceptable.'[24] The Regional Court in Poznań, in turn, decided that 'there was such a glaring disproportion between the interests attacked and those violated as a result of the defence, that the Court has found that the defendant exceeded the limits of self-defence.'[25] The Regional Court in Łódź argued that it 'fully shares the view that the assumption regarding the need to defend oneself against an unlawful attack contains a requirement of moderate (necessary) manner of defence where the defender gains an advantage necessary to repel the attack and, despite the absence of the principle of proportionality of the interest at risk of attack and the interest violated as a result of repelling the attack, also the inadmissibility of a glaring disproportion of those interests.'[26] The Court of Appeal in Szczecin stated that 'self-defence has an intrinsic character and, unlike a state of necessity, does not require a proportion between the interest under attack and the interest violated when the attack is repelled, yet any glaring disproportion is not admissible.'[27]

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[19] A. Zoll, *Art. 25, teza 53*, [in:] *Kodeks karny. Część ogólna*, Vol. I, Part 1: *Komentarz do art. 1–52*, W. Wróbel, A. Zoll (eds), Warszawa 2016, p. 563.

[20] The Supreme Court judgment of 26 April 1979, II KR 85/79, OSNPG 1979, No. 11, item 147.

[21] A. Marek, *Art. 25, teza 21*, [in:] A. Marek, *Kodeks karny. Komentarz*, 4th edn, Warszawa 2007, p. 72.

[22] *Ibid*.

[23] Judgment of the Court of Appeal in Kraków of 8 January 2019, II AKa 139/18, LEX No. 2686024; judgment of the Court of Appeal in Kraków of 13 September 2016, II AKa 83/16, LEX No. 2268986; judgment of the Court of Appeal in Kraków of 5 December 2012, II AKa 165/12, LEX No. 1312606.

[24] *Ibid*.

[25] Judgment of the Regional Court in Poznań of 26 January 2018, III K 230/17, LEX No. 2454189.

[26] Judgment of the Regional Court in Łódź of 30 May 2016, IV K 5/16, LEX No. 2129120.

[27] Judgment of the Court of Appeal in Szczecin of 29 June 2016, II AKa 84/16, LEX No. 2151552.

This view was also shared, among others, by the Appellate Courts in Gdańsk[28] and in Lublin[29]. Therefore, one can conclude that both the doctrine and case law generally accept that although the proportion of interests is not required in self-defence, a glaring disproportion between these interests cannot be accepted.

Despite the universal acceptance of this assumption, it is essential to draw attention to three important problems that emerge in this context. Firstly, when analysing such a view at the linguistic level, one notices that it seems somewhat inconsistent. Within the same sentence authors argue that, although the proportion of interests does not apply in self-defence, such proportion cannot be grossly violated. If we talk about criminal liability in the event of a glaring disproportion of interests (when the limits of self-defence have been exceeded and the defender has been attributed with a certain type of guilt), then such criminal liability can be assumed if there is an obligation to maintain the proportion of interests. What is a disproportion, or 'gross disproportion', if not a violation of the principle of proportion? If a glaring disproportion between the value of interests is the factor that determines criminal liability, then this should be understood as follows: there is a requirement to maintain the proportion of interests and a violation of that proportion – although only if 'glaring' – generates criminal liability. However, if one and the same sentence claims that 'there is no proportion of interests in self-defence, but glaring disproportion is not allowed,' then such a sentence contains an internal contradiction.

Secondly, a systemic interpretation is in favour of excluding the principle of proportionality of interests in self-defence. Besides, Tadeusz Bojarski rightly observes that it would be a mistake[30] to derive the requirement to maintain the proportion of interests from Article 25 § 2 CC, by analogy to the justifications of a state of utmost necessity. It should be noted that three consecutive criminal codes expressly introduce this principle in one provision but not in the next, which clearly indicates the position adopted in that act of law in this respect. The author rightly points out that exercising one's right to self-defence in an extreme situation, such as defending a purse with only a few coins, or a small amount of fruit, in a way that leads to bodily harm, formally fits within the limits of the justified necessary

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28 'It is accepted in the doctrine and case law that the limits of self-defence may be exceeded by breaching the requirements arising from the necessary defence, the so-called "intensive excess", [...] as a result [among others – the author's note] of a gross disproportion between the value of the interest threatened by an attack and the value of the interest of the attacker targeted by the defence action.' – judgment of the Court of Appeal in Gdańsk of 4 June 2014, II AKa 124/14, LEX No. 1511636.

29 'The principle of the proportion of the interest threatened with an attack and the interest violated as a result of repelling the attack does not apply to self-defence. This does not mean, however, that a gross disproportion of these interests would be allowed in this respect. [...] The extent to which the limits of self-defence are exceeded is determined, in particular, by the disproportion between the value of the interest attacked and the value of the attacker's interest targeted when repelling the attack, as well as by the disproportion in the intensity and manner of the attack and defence.' – judgment of the Court of Appeal in Lublin of 2 March 2010, II AKa 3/10, LEX No. 583684.

30 T. Bojarski, *Art. 25, teza 5*, [in:] *Kodeks karny. Komentarz*, T. Bojarski (ed.), 7th edn, LEX 2019, available online at: https://sip.lex.pl/#/commentary/587634447/489414 (accessed 17.1.2020).

defence.[31] However, there can be no doubt that if one balances the value of these conflicting interests (property of negligible value and the attacker's health or life), it must be recognised that they are grossly disproportionate.

Thirdly, when providing a teleological interpretation of the provisions governing self-defence under Polish criminal law, it should be stated that, given the essence of this institution, rather than contrasting the values of interests concerned, which, as already established, are characteristic of a lesser harm defence, one should assess instead the proportionality of the defence vis-à-vis the danger generated by the attacker. After all, a threat to the attacker's health or life occurs in the vast majority of cases involving self-defence: if someone attacks a specific legal interest, it is almost always the case that the defender who takes action to defend their legal interest may cause harm to the attacker's health or life because the contact-based response may entail certain health-related consequences. The point is that the method of defence used and the means employed in defence should be adequate to the level of the threat. Of course, when assessing such adequacy, one will analyse the interests concerned, but there can be no question of 'weighing' the values of interests on the basis of proportionality where, if a gross violation of values is found, this would automatically lead to the conclusion that the limits of self-defence have been exceeded. It should be stressed that this value is only one of the elements considered in the *ex ante* assessment of the commensurability of the defence with the attack, alongside other premises, such as, e.g.: (1) the circumstances of the attack, i.e. the number of attackers, time of day, location of the event, (2) the physical capabilities and health status of both parties, and (3) the dynamics of the situation and the ability of the attacked person to consciously assess it. Therefore, it seems that the aforementioned view prevailing in the doctrine and case law is difficult to be accepted.

The classic judgment described in the context of proportionality in most criminal law course books is the Supreme Court judgment of 6 September 1989, where the court stated that 'the defence is incommensurate when the offender infringes the interest of the attacker to a greater extent than necessary, or infringes the interest where it was not necessary to infringe it.'[32] One should also recall the position expressed by the Supreme Court in its judgment of 19 April 1982: 'The defence undertaken must […] be commensurate with the danger posed by the attack. This proportionality should be assessed in terms of the threat to the interest being attacked, existing at the time of the attack by the attacker, and the consequences of the attack being repelled.'[33] In this context, one should also recognise the relevance of the decision made in the judgment of 13 June 2013 issued by the Administrative Court in Łódź, which stated that 'the use of a lethal tool, such as a knife, against the perpetrators of harmless taunts, however unlawful such taunts might be, must not result in the adoption of the justifications of self-defence as this would be

[31] *Ibid*.

[32] The Supreme Court judgment of 6 September 1989, II KR 39/89, OSNPG 1990, No. 2–3, item 16.

[33] The Supreme Court judgment of 19 April 1982, II KR 67/82, Gazeta Prawna 4, 1983, p. 8.

disproportionate and, thus, unnecessary.'[34] Thus, the court does not analyse the preserved proportion of interests that remain in conflict but, instead, the adequacy of the manner of defence adopted in the face of the threat, whether at the technical implementation of the defence (the manner and method of defence used) or the instrument used for defence.

4. COMMENSURABILITY OF DEFENCE UNDER THE ECHR

In the context of the commensurability of defence with the danger posed by an attack, the legal norm arising from Article 2 para. 2(a) of the European Convention on Human Rights (ECHR) remains valid. It prohibits deliberate deprivation of a person's life where such defence is not absolutely necessary. Undoubtedly, the ratified international agreements, after they have obtained the prior consent of the Parliament expressed in an act of law, are ranked higher in the hierarchy of the sources of law in the Polish system than domestic laws or equivalent legislation. Since there is no doubt that the European Convention on Human Rights is such a ratified international agreement, all lower-ranking laws must comply with it. This also applies to the Criminal Code. In this sense, it should be recognised that Article 2 para. 2(a) – which contains specific premises not included in Article 25 PCC – imposes a certain limitation on the justifications of self-defence in the Polish Criminal Code. With regard to the necessary defence, according to this provision, no one may be deliberately deprived of their life, unless this results from the absolutely necessary use of force in defence of any person from unlawful violence.

Pursuant to Article 2 para. 2(a) ECHR, a perpetrator may be intentionally deprived of life in defence only if the attack is directed against any person and also when it is absolutely necessary. The latter premise is seen by some representatives of the Polish doctrine as an exception to the principle of self-contained nature of self-defence, but only to the extent indicated (intentional deprivation of life).[35] However, one cannot invoke this provision to conclude that there is a ban on self-defence in specific cases (which, indeed, could restrict its intrinsic nature), but only that there is an obligation to curb it, i.e. not to apply an incommensurate *manner* of defence consisting in the deliberate deprivation of human life.[36] An intentional deprivation of life can only take place when absolutely necessary, i.e. when other *means* or *manners* of defence are or will be ineffective. Moreover, it should be pointed out

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[34] Judgment of the Court of Appeal in Łódź of 13 June 2013, II AKa 85/13, OSAŁ 2013, No. 4, item 41.

[35] See J. Giezek, [in:] *Kodeks karny. Część ogólna. Komentarz*, J. Giezek (ed.), 2007, p. 218; A. Zoll, [in:] *Kodeks karny*, 2016, *supra* n. 19, p. 417; W. Zontek, *Art. 25*, [in:] *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, M. Królikowski, R. Zawłocki (eds.), 4th edn, Warszawa 2017, Legalis; decision of the Supreme Court of 1 February 2006, V KK 238/05, OSNKW 2006, No. 3, item 29.

[36] Jan Kulesza and Alicja Grześkowiak aptly expressed their views on the matter (J. Kulesza, [in:] *System Prawa Karnego*, *supra* n. 12, p. 165; A. Grześkowiak, *Art. 25*, [in:] *Kodeks karny. Komentarz*, A. Grześkowiak, K. Wiak (eds), 6th edn, Warszawa 2019, Legalis). See also the decision of the Supreme Court of 15 April 2015, IV KK 409/14, Legalis.

that the extensive case law of the European Court of Human Rights in this area indicates that the perception of effectiveness should be assessed through the eyes of the defender and their subjectively reasonable belief that other means are ineffective, even if such a belief turns out to be wrong at a later stage.[37] It is pointed out in the case law that 'a different approach would entail unrealistically high requirements imposed on the state and its personnel, which could generate a risk for the lives of officials and other persons.'[38] Therefore, also in the context of the ECHR provisions, there can be no requirement that a proportion must be maintained between the values of different interests if that would entail criminal liability in the event that such proportion is grossly violated.

5. CONCLUSION

In addition to its obvious function to ensure the protection of legal interests against those who commit an unlawful attack, self-defence is also intended to maintain public order, while the awareness of the possibility of defence measures, in accordance with the rule that 'the law should not yield to lawlessness', should be a deterrent to potential aggressors. This, of course, does not pertain to the tasks carried out to maintain domestic order and security by state services, as these tasks are reserved exclusively for state authorities. However, this does not mean that self-defence can only be applied to defend strictly individual interests, or interests with a value close to the attacker's interests that are put at risk as a result of a defensive action. In this context, the view expressed by Andrzej Zoll raises doubts. He argues that 'the relationship between the value of the interest sacrificed (the attacker's interest) and that of the interest attacked by the attacker should be considered to a greater extent.'[39] Bearing in mind that taking any defence action involving contact (pushing the attacker back, hitting hard or kicking) poses a threat to the attacker's health or, in the case of a more intensive action, even to their life, the adoption of the aforementioned view may significantly restrict the possibility of using self-defence in practice. This restriction is so significant in scope that, in fact, it distorts the idea of this justification.

Summing up, it must be said that self-defence is a particular kind of justification or defence to criminal liability because when there is an obvious collision of interests, the value of such interests – although it is not entirely irrelevant – plays a secondary role. The limits of such defence, assessed *ex ante*, depend *in concreto*

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[37] *Andronicou and Constantinou v. Cyprus*, 9 October 1997, RJD 1997-VI, § 192; *Mihaylova and Malinova v. Bulgaria*, 24 February 2015, the ECtHR (Fourth Section), application no. 36613/08, § 57; *Armani Da Silva v. the United Kingdom*, 30 March 2016, the ECtHR (Grand Chamber), application no. 5878/08, § 248. See also M.A. Nowicki, *Art. 2*, [in:] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, 7th edn, available online at: https://sip.lex.pl/#/commentary/587259723/527092 (accessed 20.1.2020).

[38] *Bubbins v. the United Kingdom* of 17 March 2005, the ECtHR (Third Section), application no. 50196/99, § 138.

[39] W. Wróbel, A. Zoll, 2014, *supra* n. 2, p. 349.

on the situation and on the behaviour of the people involved. In other words, they depend on the unique circumstances of the event. For this reason, the view that a gross disproportion between the conflicting interests results essentially in the boundaries of this justification being exceeded cannot be accepted.

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PROPORTIONALITY OF INTERESTS AND THE PRINCIPLE OF COMMENSURABILITY OF SELF-DEFENCE IN POLISH CRIMINAL LAW

Summary

This paper presents the issue of the proportionality of interests in the context of the condition of commensurability of self-defence with the danger arising from an unlawful and direct attack on a specific interest protected by law. The aim of the study is to analyse this condition of commensurability by construing the notion of the necessary defence and by determining whether this condition implies an obligation to retain the proportion of the value of interests in conflict in the case of specific defences to criminal liability. In order to achieve this goal, the author primarily employs the formal and dogmatic method as well as the method of analysing

judicial decisions. While the condition of proportionality of interests is not expressly contained in the regulations governing the institution of self-defence in Polish criminal law, such an analysis seems justified, in particular, because of the view commonly held in the doctrine and case law whereby a glaring disproportion of interests is inadmissible in self-defence. In his analysis, the author presents a critical assessment of the aforementioned view.

Keywords: self-defence/necessary defence, proportionality, commensurability, value of interests, attack, disproportion of interests, proportion of interests, justifications (defences to criminal liability)

PROPORCJONALNOŚĆ WARTOŚCI DÓBR A ZASADA WSPÓŁMIERNOŚCI OBRONY KONIECZNEJ W POLSKIM PRAWIE KARNYM

Streszczenie

Niniejszy artykuł przedstawia problematykę proporcjonalności wartości dóbr w kontekście warunku współmierności obrony koniecznej do niebezpieczeństwa wynikającego z bezprawnego i bezpośredniego zamachu na określone dobro chronione prawem. Celem opracowania jest przeprowadzenie analizy owego warunku współmierności poprzez dokonanie wykładni pojęcia konieczności obrony oraz ustalenie czy z tego warunku wynika obowiązek zachowania proporcji wartości dóbr pozostających w kolizji w danej kontratypowej sytuacji. Aby osiągnąć zarysowany cel, autor artykułu posługuje się przede wszystkim metodą formalno-dogmatyczną oraz metodą analizy judykatury. Choć warunek proporcjonalności dóbr nie jest wyrażony *expressis verbis* w treści przepisów regulujących instytucję obrony koniecznej w polskim prawie karnym, taka analiza wydaje się być zasadna w szczególności z uwagi na powszechnie funkcjonujący w doktrynie oraz orzecznictwie pogląd jakoby rażąca dysproporcja dóbr była w obronie koniecznej niedopuszczalna. Autor w swojej analizie dokonuje krytycznej oceny wskazanego wyżej poglądu.

Słowa kluczowe: obrona konieczna, proporcjonalność, współmierność, wartość dóbr, zamach, dysproporcja dóbr, proporcja dóbr, kontratyp

PROPORCIONALIDAD DE VALOR DE BIENES Y EL PRINCIPIO DE RACIONALIDAD DE LEGÍTIMA DEFENSA

Resumen

El presente artículo presenta el problema de proporcionalidad de valor de bienes en el contexto de la condición de racionalidad de la legítima defensa en cuanto al peligro resultante de agresión ilegitima que ponga en peligro bienes jurídicos. La finalidad de la obra es analizar este principio de racionalidad mediante la interpretación del concepto de la necesidad de la defensa y determinar si este principio implica la obligación de preservar la proporcionalidad de valor de bienes que están en conflicto en cada caso. Para realizar este fin, el autor del artículo utiliza sobre todo el método formal y dogmático y analiza la jurisprudencia. Aunque la condición de proporcionalidad de bienes no está *expressis verbis* prevista por los preceptos que regulan la legítima defensa en el derecho penal polaco, tal análisis resulta importante, ya

que la doctrina y jurisprudencia dicen como regla general que la desproporción flagrante de bienes es inadmisible en la legítima defensa. El autor en su análisis critica tal postura.

Palabras claves: legítima defensa, proporcionalidad, racionalidad, valor de los bienes, agresión, desproporción de bienes, proporción de bienes, contratipo

СООТВЕТСТВИЕ ЦЕННОСТИ ЗАЩИЩАЕМЫХ ИНТЕРЕСОВ ПРИНЦИПУ СОРАЗМЕРНОСТИ НЕОБХОДИМОЙ ОБОРОНЫ

Аннотация

В статье обсуждается проблема ценности защищаемых интересов в контексте условия, что меры необходимой обороны должны быть соразмерны с опасностью, возникшей в результате прямого незаконного посягательства на определенные интересы, защищенные правом. Цель работы состоит в том, чтобы проанализировать условие соразмерности путем интерпретации понятия необходимости обороны, а также установить, следует ли из этого условия обязанность соблюдать соразмерность ценности пришедших в противоречие интересов в ситуации, исключающей ответственность. Для достижения намеченной цели автор использует, прежде всего, формально- догматический метод, а также метод обобщения судебной практики. Хотя условие соразмерности защищаемых интересов и не выражено *expressis verbis* в положениях польского уголовного права, регулирующих институт необходимой обороны, такой анализ представляется оправданным, в особенности с учетом широко распространенного в доктрине и судебной практике мнения о том, что при необходимой обороне неприемлема грубая несоразмерность действий обороняющегося ценности защищаемых интересов. На основании проведенного анализа автор выражает критический взгляд на такое мнение.

Ключевые слова: необходимая оборона; пропорциональность; соразмерность; ценность защищаемых интересов; посягательство; несоразмерность защищаемых интересов; соразмерность защищаемых интересов; обстоятельства, исключающие ответственность

DIE ANGEMESSENHEIT DES WERTES VON RECHTSGÜTERN UND DAS VERHÄLTNISMÄSSIGKEITSPRINZIP BEI NOTWEHR

Zusammenfassung

In dem Artikel wird die Frage der Verhältnismäßigkeit des Wertes von Rechtsgütern im Hinblick auf die Bedingung der Verhältnismäßigkeit der Notwehr zu der Gefahr behandelt, die sich aus einem rechtswidrigen und direkten Angriff auf ein bestimmtes durch die Rechtsordnung geschütztes Gut ergibt. Ziel der Studie ist eine Analyse dieser Verhältnismäßigkeitsvoraussetzung durch Auslegung des Begriffes der Notwehr und Prüfung, ob aus dieser Voraussetzung die Pflicht erwächst, in einer betreffenden Situation, wenn Rechtsfertigungsgründe bestehen, das Verhältnis der kollidierenden Rechtsgüter zu wahren. Um sich dem umrissenen Ziel anzunähern, geht der Autor des Artikels vor allem formal-dogmatisch vor nimmt eine Judikaturanalyse der Rechtssprechung vor. Obwohl die Voraussetzung der Verhältnismäßigkeit von Rechtsgütern in den Bestimmungen zur Institution der Notwehr im polnischen Strafrecht nicht explizit ausgedrückt ist, erscheint eine solche Analyse gerechtfertigt, insbesondere mit Rücksicht auf die in der Rechtslehre und

Rechtsprechung verbreitete Ansicht, dass ein krasses Missverhältnis der Rechtsgüter bei der Notwehr unzulässig wäre. Bei seiner Analyse unterzieht der Autor die vorstehend genannte Ansicht einer kritischen Bewertung.

Schlüsselwörter: Notwehr, Angemessenheit, Verhältnismäßigkeit, Wert von Rechtsgütern, Angriff, Missverhältnis der Rechtsgüter, Verhältnis der Rechtsgüter, Rechtsfertigungsgrund

LA PROPORTIONNALITÉ DE LA VALEUR DES BIENS ET LE PRINCIPE DE PROPORTIONNALITÉ DE LA DÉFENSE LÉGITIME

Résumé

Cet article pose la question de la proportionnalité de la valeur des biens dans le contexte de la condition de proportionnalité de la défense légitime au danger résultant d'une atteinte illicite et directe à un bien spécifique protégé par la loi. Le but de l'étude est d'analyser cette condition de proportionnalité en interprétant la notion de la défense légitime et de déterminer si cette condition implique une obligation de maintenir la proportion de la valeur des biens restant dans une collision dans une situation contradictoire donnée. Afin d'atteindre l'objectif esquissé, l'auteur de l'article utilise principalement la méthode formelle-dogmatique et la méthode d'analyse de la jurisprudence. Bien que la condition de proportionnalité des biens ne soit pas exprimée *expressis verbis* dans le contenu des dispositions régissant l'institution de la défense légitime en droit pénal polonais, une telle analyse semble justifiée, en particulier en raison de l'opinion couramment utilisée dans la doctrine et la jurisprudence selon laquelle une disproportion flagrante des biens est inacceptable en défense légitime. Dans son analyse, l'auteur évalue de manière critique le point de vue susmentionné.

Mots-clés: défense légitime, proportionnalité, commensurabilité, valeur des biens, atteinte, disproportion de biens, proportion de biens, contre-type

PROPORZIONALITÀ DEL VALORE DEI BENI E PRINCIPIO DELLA PROPORZIONALITÀ DELLA LEGITTIMA DIFESA

Sintesi

Il presente articolo presenta la questione della proporzionalità del valore dei beni nel contesto della condizione di proporzionalità della legittima difesa in una situazione di pericolo derivante da un attentato diretto e illegittimo ad un determinato bene giuridicamente tutelato. Lo scopo dell'elaborato è l'analisi di tale condizione di proporzionalità attraverso l'interpretazione del concetto di legittima difesa e la determinazione se da tale condizione derivi l'obbligo di rispettare una proporzione del valore dei beni in collisione nella determinata situazione scriminante. Per realizzare l'obiettivo tratteggiato l'autore dell'articolo utilizza soprattutto il metodo dogmatico-formale e il metodo dell'analisi della giurisprudenza. Sebbene la condizione della proporzionalità dei beni non è indicata *expressis verbis* nelle norme che regolamentano l'istituto della legittima difesa nel diritto penale polacco, tale analisi può essere ritenuta giustificata in particolare a motivo della posizione, universalmente vigente nella dottrina e nella giurisprudenza, che una manifesta sproporzione dei beni sia inammissibile

nella legittima difesa. L'autore nella sua analisi esegue una valutazione critica della posizione sopra indicata.

Parole chiave: legittima difesa, proporzionalità, proporzionalità, valore dei beni, attentato, sproporzione dei beni, proporzione dei beni, scriminante

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PENAL ASPECTS OF REGAINING FREEDOM BY A PERSON LEGALLY DEPRIVED OF IT IN THE UNITED KINGDOM AND THE REPUBLIC OF IRELAND

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1. INTRODUCTION

'The act of Prison-Breaking, however natural to the inmates of those gloomy abodes, cannot be overlooked by the law, as being a violation of the order and course of justice, and a direct infringement of regulations essential to the peace and well-being of society.'[1] The words that a Scottish lawyer and historian Sir Archibald Alison said almost 200 years ago perfectly express the need to punish those who unlawfully regain liberty they were lawfully deprived of and those who help the former to liberate. However, there are opinions that punishment of self-liberation should be abolished mainly, as it should be assumed, because of the above-mentioned man's natural pursuit of liberty.[2] However, the need to punish other persons involved in an escape (accessories, instigators, etc.) is not questioned. With the development of methods of executing a penalty of deprivation of liberty and other measures connected with isolation and the introduction of permits for leaving a prison temporarily or conditionally, a problem arose of being unlawfully at large after the permit expires or is withdrawn. British law also prescribes response to this type of acts.

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1 A. Alison, *Principles of the Criminal Law of Scotland*, Edinburgh–London 1832, p. 555.

2 For more on such suggestions in Polish literature, see P. Poniatowski, *Przestępstwa uwolnienia osoby prawnie pozbawionej wolności (art. 242 i 243 k.k.)*, Warszawa 2019, pp. 366–367. The opinions resulted in the lack of liability for self-liberation in some countries (Germany, Austria or Switzerland), *ibid.*, p. 41.

In Polish criminal law, social negatives of the conduct are emanated in Articles 242 and 243 CC,[3] which are included in Chapter XXX entitled 'Offences against the administration of justice'. Basic and aggravated offences of self-liberation are classified in Article 242 § 1 and § 4, the offence of failure to return to prison is specified in Article 242 § 2 and § 3, and the offence of liberating or facilitating the escape of a person deprived of liberty is laid down in Article 243.[4]

The article aims to present the legal solutions concerning the title-related issues that are in force in the United Kingdom of Great Britain and Northern Ireland and in the Republic of Ireland. Criminal law in this part of Europe may be very interesting for a 'continental' lawyer, in particular because of the dualism of the legal system (*common law* and *statute law*) or great attention to detail in regulations (e.g. legal definitions often provided). I will try to find legal similarities and differences between particular countries of the British Isles and between them and Poland.

2. THE UNITED KINGDOM

2.1. ENGLAND AND WALES

An offence of escape from lawful custody, which is the equivalent of a prohibited act under Article 242 § 1 CC, is a common law offence in England and Wales.[5] It carries a penalty of a fine or imprisonment.[6]

It is emphasised in case law that in a case concerning escape the prosecution must prove four things: (i) that the defendant was in custody; (ii) that the defendant knew that he was in custody (or at least was reckless as to whether he was or not); (iii) that the custody was lawful; and (iv) that the defendant intentionally escaped from that lawful custody.[7] It is not important, however, whether a defendant was guilty of an offence for which he was imprisoned.[8]

To be able to say that a person is in custody, his liberty must be subject to such constraint or restriction that he can be said to be confined by another in the sense that the person's immediate freedom of movement is under the direct control of

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[3] Act of 6 June 1997: Criminal Code (consolidated text, Dz.U. 2020, item 1444, as amended); hereinafter CC.

[4] The scope of the article does not make it possible to discuss those types of prohibited acts in detail; for more on the issue, see P. Poniatowski, *supra* n. 2, *passim*.

[5] *Blackstone's Criminal Practice 2018*, D. Ormerod, D. Perry (eds), Oxford 2017, Nb B14.70. However, there are specific cases of escape regulated in statute law, which is discussed below.

[6] *Ibid*.

[7] Judgment of the Court of Appeal (Criminal Division) of 23 November 2005 in case *Regina v. Dhillon* [2005] EWCA Crim 2996, No 200500079/C2 (https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2005/2996.html; accessed 8.4.2020) and judgment of the Court of Appeal (Criminal Division) of 31 July 2007 in case *Regina v. Montgomery* [2007] EWCA Crim 2157, No 200700057/C3 (https://www.bailii.org/ew/cases/EWCA/Crim/2007/2157.html; accessed 8.4.2020).

[8] *Blackstone's Criminal Practice 2018*, *supra* n. 5, Nb B14.70.

another.[9] A person in custody is especially a person arrested by the police and placed in the police custody or in prison.[10] However, in case law there are examples of conviction for the offence of escape in a situation when a perpetrator was not under continuous and direct control.[11] It is also emphasised in literature that a given person is in lawful custody even when he is not physically constrained or directly guarded.[12]

What may help to interpret the term 'custody' is the definition laid down in section 13(2) Prison Act 1952,[13] in accordance with which a prisoner shall be deemed in legal custody while he is confined in, or is being taken to or from, any prison[14] and while he is working, or is for any other reason, outside the prison in the custody or under the control of an officer of the prison and while he is being taken to any place to which he is required to be taken, or is kept in custody in pursuance of any such requirement or authorisation.

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[9] Judgment of the Queen's Bench Division of the High Court (the Administrative Court) of 26 February 2002 in case *E v. Director of Public Prosecutions* [2002] EWHC 433 (Admin), No CO/133/2002 (http://www.bailii.org/ew/cases/EWHC/Admin/2002/433.html; accessed 8.4.2020).
In case law also a definition formulated by William Hawkins in the 18th century is quoted. In the context of prison break, he pointed out that: all such offences were felonies, if the party were lawfully in prison for any cause whatsoever, whether criminal or civil, and whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him (W. Hawkins, *A Treatise of the Pleas of the Crown; or, A System of the Principal Matters Relating to that Subject, Digested under Proper Heads*, Vol. II, London 1824, p. 183); see the above-mentioned judgment in case *Regina v. Montgomery* [2007] EWCA Crim 2157.

[10] *Blackstone's Criminal Practice 2018*, *supra* n. 5, Nb B14.70.

[11] In case *Regina v. Timmis* [1976] Crim LR 129 (citation after *Regina v. Dhillon* [2005] EWCA Crim 2996), the defendant had been stopped as a result of erratic driving and breathalysed. The test proving positive, the defendant was told that he would be taken in custody to a police station and he was placed in a police car. He was then left alone for some considerable time whereafter he got out of the car and walked into a public house on the opposite side of the road where he remained for about an hour. On the other hand, in case *Regina v. Rumble* [2003] EWCA Crim 770 (which was referred to in case *Regina v. Montgomery* [2007] EWCA Crim 2157), the appellant, having surrendered to bail, appeared at the Swansea Magistrate's Court facing charges for a number of offences. Immediately after being sentenced by the magistrates to a custodial term, he simply left the court (he jumped over the bench where he had been standing and escaped via the public exit), which had at that time no usher or security staff present. He was subsequently convicted of escape from lawful custody. On appeal, he took the point that since at the moment he walked out no one had yet sought to subject him to any restraint, there being no one in court to do so, he could not be said to have been in custody. This court rejected that submission and held that the appellant was in the custody of the court from the moment that he surrendered to his bail, whether or not any officer or member of the court staff had actually sought to constrain his movements. However, the issue of having continuous control over a detained person is controversial. In the judgment in case *Regina v. Dhillon* [2005] EWCA Crim 2996, it was indicated that continuity of control and a detained person's knowledge of that is especially significant for the liability for their escape.

[12] *Blackstone's Criminal Practice 2018*, *supra* n. 5, Nb B14.71.

[13] Source: https://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/52 (accessed 8.4.2020); hereinafter referred to as PA 1952.

[14] The provisions concerning prisons and prisoners are also applicable to remand centres, detention centres, youth custody centres and to persons detained in them (section 43(5) in conjunction with section 43(4) PA 1952).

Deprivation of liberty is unlawful when the term for which a given person was to be in custody has passed.[15] Escape in such a case is exempt from punishment. A situation in which a person has been physically restrained (e.g. handcuffed) but not legally arrested, in particular not informed that he is under arrest, does not constitute an offence of escape.[16]

It should be noticed that in order to be recognised as a perpetrator of an offence of escape from custody, an offender does not have to escape with the intention to be at large permanently or to achieve another special objective.[17]

While imposing a penalty in this class of cases, a court should consider whether there was planning or this was an impulse, whether there was violence or damage caused, what the reason for the escape was, whether the offender surrendered or made arrangements to surrender before he was caught, how long he was at large and what he did while he was at large.[18] It is indicated in case law that the escape under a certain type of mental compulsion (e.g. concern about the family, fear of co-inmates) requires a relatively more lenient penalty (in the scale of months). On the other hand, a stricter penalty (in the scale of years) should be imposed on professional criminals who are assisted in their escape (from outside the prison or sometimes from within it).[19]

Breaking prison (breach of prison) is an aggravated type of the offence of escape as it consists in breaking safeguards or using violence during the escape (the equivalent of a type of a prohibited act under Article 242 § 4 CC).[20] It can be subject to a penalty of deprivation of liberty or a fine.[21] An escape does not

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15 Judgment of the Court of Appeal (Criminal Division) of 7 November 2010 in case *Regina v. O'Connor* [2010] EWCA Crim 2842, No 201001472/3932/C3 (https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2010/2842.html; accessed 8.4.2020) and the decision of the House of Lords of 27 July 2000 in case *Regina v. Governor of Her Majesty's Prison Brockhill Ex Parte Evans* [2001] 2 AC 19 (https://www.bailii.org/uk/cases/UKHL/2000/48.html (accessed 8.4.2020).

16 Judgment of the Court of Appeal (Criminal Division) of 20 September 2011 in case *Regina v. Shaid Iqbal* [2011] EWCA Crim 273, No 201006296 B4. In this case, the accused went to a court to a hearing. The police officers who were there detained him, handcuffed and informed that he was wanted by the police on suspicion of involvement in an offence. However, he was not informed that he was under arrest. He was told that he would be arrested and that the arrest would be effected not by the officers who had detained and handcuffed him, but by other officers and that he would have to wait. On the arrival of those officers, the accused ran off. He was pursued and caught approximately 100 yards away. He was convicted of attempting to escape from lawful custody. The Court of Appeal allowed the appellant's appeal and pointed out that the officers who detained the appellant did not arrest or purport to arrest him. They anticipated that he would at some future, unspecified, time be arrested by other officers. However, the common law offence of escape from custody does not cover those who escape from police restraint or control before they are arrested.

17 Judgment in case *Regina v. Timmis* [1976] Crim LR 129 (citation after *Regina v. Dhillon* [2005] EWCA Crim 2996).

18 Judgment of the Court of Appeal (Criminal Division) of 22 June 2007 in case *Regina v. Purchase* [2007] EWCA Crim 1740, No 2007/02503/A5 (http://www.bailii.org/ew/cases/EWCA/Crim/2007/1740.html; accessed 8.4.2020).

19 The above-mentioned judgment in case *Regina v. Purchase* [2007] EWCA Crim 1740.

20 S. Ramage, *English Prison Law*, New York–Bloomington 2009, p. 295.

21 *Ibid.*, p. 295.

have to be from prison (e.g. it can consist in self-liberation from a police station through a broken window) or be connected with intentional damage caused (in one case it was recognised that unintentional movement of loose bricks while climbing a prison wall may match the features of this offence).[22] It is emphasised that the use of force during escape is significant and it does not matter whether the fugitive is imprisoned in connection with a criminal or civil case. One of the judgments states that breaking prison is a very serious offence, for which a substantial sentence of imprisonment is always to be expected because of the fear and apprehension it generates, the disruption to prison life, the violence and disorder that it may lead to, and the need to deter both the culprit and others. The court also indicated that the facts to be taken into account, in determining the length of sentence, will include: (i) the nature and the circumstances of the crime for which he was in prison; (ii) his conduct while in prison; (iii) the methods employed in effecting escape and in particular, whether any violence was involved and whether there was extensive planning and outside assistance; (iv) whether he surrendered himself and how soon; and (v) a plea of guilty.[23]

In England and Wales there is also a type of offence of remaining unlawfully at large. Simplifying, it is an equivalent of a prohibited act under Article 242 § 2 and § 3 CC. It is rightly indicated in case law that this type of conduct cannot be recognised as escape because a perpetrator is not in custody.[24]

In section 1(1) Prisoners (Return to Custody) Act 1995,[25] an offence of remaining unlawfully at large after temporary release is classified. In accordance with this

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[22] *Blackstone's Criminal Practice 2018*, *supra* n. 5, Nb B14.72.

[23] Judgment of the Court of Appeal (Criminal Division) of 19 February 1997 in case *Regina v. Coughtrey* [1997] EWCA Crim 506, No 9602786/Z4 (https://www.bailii.org/ew/cases/EWCA/Crim/1997/506.html; accessed 8.4.2020). The Court stated that if the offender is serving a determinant sentence, a consecutive sentence should almost invariably be imposed. Obviously if he is serving a life sentence the sentence for breaking prison will have to be served concurrently. In the case discussed, the appellant with his co-accused who were allocated to similar duties left the works department, burnt through the parameter fence with oxyacetylene equipment and used a ladder to scale the outside wall over which they made their escape.

[24] See the above-mentioned judgment of the Court of Appeal (Criminal Division) of 31 July 2007 in case *Regina v. Montgomery* [2007] EWCA Crim 2157, and the judgment of the Court of Appeal (Criminal Division) of 14 November 2007 in case *Regina v. O'Neil* [2007] EWCA Crim 3490, No 2007/4930/B3 (http://www.bailii.org/ew/cases/EWCA/Crim/2007/3490.html; accessed 8.4.2020). The case *Regina v. Montgomery* concerned an offender serving an imprisonment sentence in an open prison. The accused was released each morning to go to some form of employment. He was not under any form of supervision but he was obliged to return to the prison at a specific time each evening. One evening he did not return to prison. He was arrested after one and a half months and charged with escape from lawful custody. On the advice of counsel, he pleaded guilty, and he was sentenced to a term of eight months' imprisonment. He has since received advice that the admitted facts did not disclose the offence charged and he lodged an appeal against the sentence. The Court of Appeal allowed the appeal and stated that the accused cannot be said to have escaped from custody because during his period of temporary release he is not in custody as he is not in prison and not under the direct control of any representative of authority. On the other hand, in case *Regina v. O'Neil* the accused did not return to prison from a day's town leave.

[25] Source: https://www.legislation.gov.uk/ukpga/1995/16 (accessed 8.4.2020); hereinafter referred to as P(RC)A 1995.

provision, with the reservation of subsection (2), a person temporarily released based on section 47(5) PA 1952[26] is guilty of an offence if: (a) without reasonable excuse, he remains unlawfully at large at any time after becoming so at large by virtue of the expiry of the period for which he was temporarily released; or (b) knowing or believing an order recalling him to have been made and while unlawfully at large by virtue of such an order, he fails, without reasonable excuse, to take all necessary steps for complying as soon as reasonably practicable with that order. It is believed that a person remains unlawfully at large if the term for which he was temporarily released has expired or if an order recalling him has been made in pursuance of the rules (section 49(4) PA 1952 in conjunction with section 1(5) P(RC)A 1995). A person guilty of an offence under this section is liable: (a) on conviction on indictment to imprisonment for a term not exceeding 2 years or a fine (or both), and (b) on summary conviction to imprisonment for a term not exceeding 12 months or a fine (or both) (section 1(3) P(RC)A 1995).

A similar offence is classified in section 32ZA Crime (Sentences) Act 1997[27] (offence of remaining unlawfully at large after recall). The provision applies to persons sentenced to life imprisonment who have been conditionally released and then the release has been recalled (section 32 C(S)A 1997). In accordance with section 32ZA(1) C(S)A 1997, a person whose conditional release has been recalled based on section 32 commits an offence if: (a) he has been notified of the recall orally or in writing,[28] and (b) while unlawfully at large fails, without reasonable excuse, to take all necessary steps to return to prison as soon as possible. In accordance with section 32ZA(5) C(S)A 1997, a perpetrator of the offence discussed is subject to: (a) a penalty of imprisonment for two years, a fine or both (conviction on indictment), or (b) a penalty of imprisonment for 12 months, a fine or both (summary conviction). The same regulations are applicable to convicts sentenced to determinant imprisonment who have failed to return to prison after conditional release was recalled (section 255ZA Criminal Justice Act 2003[29]).

English law also recognises an offence of assisting a prisoner to escape. It is regulated in section 39 PA 1952. In accordance with this provision, a person who: (a) assists a prisoner in escaping or attempting to escape from a prison, or

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[26] Rules made under this section may provide for the temporary release of persons detained in a prison, remand centre, young offender institution, secure training centre or secure college not being persons committed in custody for trial before the Crown Court or committed to be sentenced or otherwise dealt with by the Crown Court or remanded in custody by any court. However, in accordance with section 1(2) P(RC)A 1995, subsection (1) above shall not apply in the case of a person temporarily released from a secure training centre or secure college.

[27] Source: http://www.legislation.gov.uk/ukpga/1997/43 (accessed 8.4.2020); hereinafter referred to as C(S)A 1997.

[28] A person is to be treated for the purposes of subsection (1)(a) as having been notified of the recall if: (a) written notice of the recall has been delivered to an appropriate address, and (b) a period specified in the notice has elapsed (section 32ZA(2) C(S)A 1997). A person is also to be treated as having been notified of the recall if: (a) the person's licence requires the person to keep in touch in accordance with any instructions given by an officer or a provider of probation services, (b) the person has failed to comply with such an instruction, and (c) the person has not complied with such an instruction for at least 6 months (section 32ZA(4) C(S)A 1997).

[29] Source: https://www.legislation.gov.uk/ukpga/2003/44 (accessed 8.4.2020).

(b) intending to facilitate the escape of a prisoner: (i) brings, throws or otherwise conveys anything into a prison, (ii) causes another person to bring, throw or otherwise convey anything into a prison, or (iii) gives anything to a prisoner or leaves anything in any place (whether inside or outside a prison), is guilty of an offence and subject to a penalty of imprisonment not exceeding ten years. Supplying whatever objects intended to facilitate escape constitutes a common law offence, whether it is undertaken or not.[30]

The offence discussed concerns an escape from any prison (e.g. a remand centre, a young offender institution or a youth custody centre); however, it does not cover assistance to an inmate who escapes from an escort, a court, etc.[31] As far as the above-mentioned assistance to escape from custody is concerned, it is suggested in case law that it may constitute a common law offence.[32] Also an act consisting in liberating a person lawfully deprived of liberty with the use of force is a common law offence.[33] Guards who let prisoners escape are also subject to criminal liability.[34] It is emphasised in case law that lawfulness of the detention is a necessary requirement for the conviction for such an act. The circumstance cannot be presumed, it must be proved.[35]

Finally, one more offence classified in section 1(1) Prison Security Act 1992[36] can be mentioned. It consists in taking part by a prisoner in a prison mutiny. Such a mutiny takes place where two or more prisoners, while on the premises of any prison (including a young offender institution), engage in conduct (acts or omission) which is intended to further a common purpose of overthrowing lawful authority in that prison (section 1(2) and (6) PSA 1992). A mutiny may result, for example, in prisoners' collective escape form a detention institution.

2.2. NORTHERN IRELAND

In Northern Ireland the provisions classifying offences connected with a prisoner's escape are placed in Prison Act (Northern Ireland) 1953.[37]

A basic offence of self-liberation is regulated in section 26 PA(NI) 1953, in accordance with which every person who: (a) having been convicted of an offence,

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[30] S. Ramage, *supra* n. 20, p. 295.

[31] *Blackstone's Criminal Practice 2018*, *supra* n. 5, Nb B14.76.

[32] See *ibid*.

[33] *Ibid*. and W. Hawkins, *supra* n. 9, pp. 201–202.

[34] W. Hawkins, *supra* n. 9, p. 190.

[35] Judgment of the Court of Appeal of Jamaica of 25 January 1982 in case *Roy Dillon v. The Queen* [1982] AC 484 (https://www.bailii.org/uk/cases/UKPC/1982/1982_1.pdf; accessed 8.4.2020). It was pointed out in the judgment in the case (where a police officer was accused of negligence, which resulted in the escape of two prisoners) that the principle known in British law: *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* (all things are presumed to have been rightly and with due formality unless it is proved to the contrary) is not applicable.

[36] Source: http://www.legislation.gov.uk/ukpga/1992/25 (accessed 8.4.2020); hereinafter referred to as PSA 1992.

[37] Source: https://www.legislation.gov.uk/apni/1953/18 (accessed 8.4.2020); hereinafter referred to as PA(NI) 1953.

escapes from any lawful custody, whether in prison or not, in which he may be under such conviction; or (b) whether convicted or not, escapes from any prison or lock-up in which he is lawfully confined; or (c) being in any lawful custody otherwise than as aforesaid escapes from such custody; shall be guilty of felony and shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding three years.

An aggravated type of escape is classified in section 28 'Prison breach' PA(NI) 1953, in accordance with which every person who, by force or violence, breaks any prison with intent to set at liberty himself or any person lawfully confined therein shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding seven years. On the other hand, in accordance with section 27 'Attempts to break prison' PA(NI) 1953, every person who attempts to break prison or who forcibly breaks out of any cell or other place within any prison wherein he is lawfully detained or makes any breach therein with intent to escape shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding five years.

Like in England and Wales (and, simplifying, in Article 242 § 2 and § 3 CC), in Northern Ireland, there is an offence of being unlawfully at large while under sentence. In accordance with section 25 PA(NI) 1953, every person who, having been sentenced to imprisonment, or ordered to be detained in a young offenders centre is afterwards, and before the expiration of the term for which he was so sentenced, at large without some lawful excuse, the proof whereof shall lie on him, shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding two years.

On the other hand, section 29 PA(NI) 1953 lays down a provision on an offence of assisting or permitting a person to escape from lawful custody. In accordance with section 29(1), a person who assists any person in escaping or attempting to escape from lawful custody, whether in prison or not, is guilty of an offence. According to section 29(2), also a person who: (a) is an officer of a prison in which a person is lawfully confined, or (b) is a constable having a person in his lawful custody, whether in prison or not, is guilty of an offence if he voluntarily and intentionally permits that person to escape. In accordance with section 29(3), a person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 10 years.

On the other hand, in accordance with section 31 PA(NI) 1953, every person who, by failing to perform any legal or official duty, permits any person in his lawful custody on a criminal charge or any prisoner in his lawful custody to escape therefrom shall be guilty of an offence and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months or to a fine not exceeding level 2 on the standard scale or to both such imprisonment and such fine. It is an unintentional offence.

An act classified in section 33 PA(NI) 1953 is also an offence connected with assisting in escaping. In accordance with this provision, any person who with intent to facilitate the escape of a prisoner: (a) brings, throws or otherwise conveys anything into a prison, (b) causes another person to bring, throw or otherwise

convey anything into a prison, or (c) gives anything to a prisoner or leaves anything in any place (whether inside or outside a prison), is guilty of an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 10 years.

An interesting solution can be found in section 32 PA(NI) 1953 ('Causing discharge of prisoner under pretended authority') in accordance with which, every person who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged shall be guilty of an offence and shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding five years. Any prisoner so discharged shall be deemed to have escaped.

2.3. SCOTLAND

Like in England and Wales, self-liberation in Scotland constitutes a common law offence. Two types of this prohibited act are distinguished: prison breaking and escaping from lawful custody.[38] The latter act consists in escaping from a place other than a prison, e.g. a police detention area, a hospital where a perpetrator is under control of guards, or a workplace outside prison.[39] Obviously, the requirement for conviction of escaping is the establishment that a person was in lawful custody.[40] It should be pointed out that from the point of view of matching the features of the offence of escaping it does not matter whether an offender used violence against other persons, damaged property, used a bump key or bribed a guard, etc.[41] Attempted prison breaking is also liable to a penalty.[42]

The offence of remaining unlawfully at large is classified in section 32A Prisons (Scotland) Act 1989.[43] A person commits an offence if, having been deemed to be unlawfully at large by virtue of: (a) section 17(5) or 17A(6) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, (b) section 28(7) of this Act, or (c) section 40(4) of this Act, the person remains unlawfully at large. A person who commits an offence is liable: (a) on summary conviction, to imprisonment for a term not

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[38] P. Ferguson, C. McDiarmid, *Scots Criminal Law. A Critical Analysis*, Edinburgh University Press 2014, Chapter 14.10; and *A Draft Criminal Code for Scotland with Commentary*, E. Clive, P. Ferguson, Ch. Gane, A. McCall Smith (eds), Scottish Law Commission 2003, p. 170 (https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf; accessed 8.4.2020).

[39] P. Ferguson, C. McDiarmid, *supra* n. 38, Chapter 14.10.

[40] J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, Edinburgh 1877, p. 218; A. Alison, *supra* n. 1, pp. 555–556.

[41] J.H.A. Macdonald, *supra* n. 40, p. 218; A. Alison, *supra* n. 1, p. 555; and *A Draft Criminal Code for Scotland*, *supra* n. 38, p. 170. Also see the judgment of 13 April 1837 in case *HM Advocate v. William Hutton*, in which the accused escaped because the prison gate remained open due to a guard's negligence (*Reports of Cases Before the High Court and Circuit Courts of Justiciary in Scotland: From November 1835 to December 1837*, A. Swinton (ed.), Edinburgh 1838, p. 497).

[42] See the list of common law crimes in the electronic system of the Crown Office and Procurator Fiscal Service (https://www.whatdotheyknow.com/request/476668/response/1143126/attach/2/FOI%20request%20John%20Maguire%20R018273.pdf?cookie_passthrough=1; accessed 8.4.2020). The list does not contain escaping from a place that is not a prison.

[43] Source: http://www.legislation.gov.uk/ukpga/1989/45 (accessed 8.4.2020); hereinafter referred to as P(S)A 1989.

exceeding 12 months or a fine not exceeding the statutory maximum (or both), (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both). It concerns persons released on licence, which was recalled, and persons who were temporarily released on licence to visit home, work outside or for medical purposes, which was recalled or the release period expired. The person remains unlawfully at large if the person: (a) is given notification of the matter of being deemed to be unlawfully at large, and (b) without reasonable excuse, fails to take all necessary steps in order to return to prison as soon as possible after notification of the matter is given to the person (section 32C(3) P(S)A 1989). In the case of a person whose release on licence expired, the person is unlawfully at large if the person: (a) has been, orally or in writing (i) informed of the period of temporary release that is the subject of the person's licence, and (ii) warned of the requirement to return to prison after the expiry of the period and of the offence and punishment available for failing to do so, and (b) without reasonable excuse, fails to take all necessary steps in order to return to prison as soon as possible after the period of temporary release expires (section 32C(2) P(S)A 1989).

Scottish case law also classifies an offence of assisting in escaping to a person in custody.[44] It may in particular concern breaking into prison to rescue a prisoner whether it was successful or not.[45]

Special regulations concerning assistance in escaping from custody are laid down in Police and Fire Reform (Scotland) Act 2012.[46] In accordance with section 91(1), it is an offence for a person to remove a person from custody, or to assist the escape of a person in custody. A person in custody is to be construed as (a) a person who is in the lawful custody of a police officer or a person assisting this officer, or (b) who is in the act of eluding or escaping from such custody, whether or not the person has actually been arrested (section 91(2)). A person who is guilty of an offence under subsection (1) is liable on summary conviction to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both (section 91(4)).

2.4. REGULATIONS COMMON TO ENGLAND, WALES, NORTHERN IRELAND AND SCOTLAND

Armed Forces Act 2006 is in force in the whole territory of the United Kingdom.[47] It is a legal act applicable to the armed forces and issues concerning them. Prohibited acts that interest us are classified in its chapter entitled 'Offences against service justice'.

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[44] Judgment in case *HM Advocate v. Martin* (following the opinion of 8 October 2010 issued in *HM Advocate v. Mark Harris* [2010] HCJAC 102, Appeal No: XC136/10 (https://www.scotcourts.gov.uk/search-judgments/judgment?id=65aa86a6-8980-69d2-b500-ff0000d74aa7; accessed 8.4.2020).

[45] J.H.A. Macdonald, *supra* n. 40, p. 219. Also Schedule 2 to Firearms Act 1968, apart from 'prison breaking', lists 'breaking into prison to rescue prisoners' among common law offences classified in Scotland (http://www.legislation.gov.uk/ukpga/1968/27; accessed 8.4.2020).

[46] Source: http://www.legislation.gov.uk/asp/2012/8 (accessed 8.4.2020).

[47] Source: http://www.legislation.gov.uk/ukpga/2006/52 (accessed 8.4.2020); hereinafter referred to as AFA 2006. The Act was to be abolished on 12 May 2017, however, the date is

In accordance with section 29(1), a person subject to service law[48] or a civilian subject to service discipline[49] commits an offence if he escapes from lawful custody. Moreover, section 29(2) classifies an offence which may constitute a stage of preparing or attempting to escape consisting in the fact that a person subject to service law or a civilian subject to service discipline: (a) uses violence against a person in whose lawful custody he is, or his behaviour towards such a person is threatening; and (b) he knows or has reasonable cause to believe that the custody is lawful (sections 29(2) and (3)). The above-mentioned types of offences carry penalties laid down in section 164 (inter alia, imprisonment, dismissal from Her Majesty's service or a fine); it is worth mentioning that imprisonment cannot exceed two years.[50]

On the other hand, section 30 regulates criminal liability for an offence of allowing escape or unlawful release of prisoners. In accordance with section 30(1), a person subject to service law commits an offence if: (a) he knows that a person is committed to his charge, or that it is his duty to guard a person; (b) he does an act that results in that person's escape; and (c) he intends to allow, or is reckless as to whether the act will allow, that person to escape, or he is negligent. An act should be interpreted as an action or omission (section 30(3)). On the other hand, in accordance with section 30(2), a person subject to service law commits an offence if: (a) he knows that a person is committed to his charge; (b) he releases that person without authority to do so; and (c) he knows or has reasonable cause to believe that he has no such authority. A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164 (see above), but any sentence of imprisonment imposed in respect of the offence must not exceed: (a) in the case of an offence under section 30(1) where the offender intended to allow the person to escape, or an offence under section 30(2) where the offender knew he had no authority to release the person, ten years; (b) in any other case, two years (section 30(4)).

Section 39 AFA 2006 introduces liability to punishment for an offence of attempting to commit offences discussed herein, including impossible attempts.[51] A person guilty of an offence is liable to the same punishment as he would be liable to if guilty of the offence attempted (section 39(9)). Encouraging, abetting, assisting,

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postponed based on successive orders issued by Queen Elizabeth II. In accordance with the latest order of 3 April 2020, The Armed Forces Act (Continuation) Order 2020, it should stop being in force on 11 May 2021.

[48] In accordance with section 367 AFA 2006, members of regular forces (e.g. the Royal Navy or the Royal Air Force) and in some situations members of reserve forces (e.g. the Royal Fleet Reserve, the Royal Naval Reserve or the Territorial Army) are subject to service law.

[49] A civilian is a person who is not subject to service law and is referred to in Part 1 of Schedule 15 to the above-mentioned act (e.g. a person who is on board Her Majesty's plane or ship), see section 370 AFA 2006.

[50] In accordance with section 164(2), a person guilty of a particular offence is liable to any one or more of the punishments so mentioned. Civilians and ex-servicemen are liable to a separate catalogue of punishments, however, some of them (e.g. imprisonment or a fine), and in case of ex-servicemen most of them are the same (Part 1 and 2 of Schedule 3 to AFA 2006).

[51] A person attempts to commit an offence if, with intent to commit the offence, he does an act which is more than merely preparatory to the commission of the offence (section 39(5) AFA 2006).

aiding, counselling and procuring are also subject to punishment (sections 40 and 41). A person guilty of such behaviour is liable for an offence commission (sections 40(6) and 41(4)).

It is also necessary to mention regulations laid down in Mental Health Act 1983,[52] which is in force in the United Kingdom. In accordance with section 128(2), any person who induces or knowingly assists another person who is in legal custody by virtue of section 137[53] to escape from such custody shall be guilty of an offence. Any person guilty of an offence under this section shall be liable: (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine of any amount, or to both (section 128(4)).

3. THE REPUBLIC OF IRELAND

In the Republic of Ireland escape from custody also constitutes an offence.[54] In statistics it is included in a general category of offences against the government, court procedures and connected with organised crime.[55] Breach of prison is also this type of prohibited act (connected with a criminal or civil case), which consists in escape with the use of force or violence.[56] Thus climbing a wall or going through the door shall be escape from custody and not breach of prison.[57]

A special regulation concerning escape from custody is laid down in Defence Act 1954[58]. In accordance with section 146 of this legal act, every person subject to military law who, being in arrest or confinement or in prison or otherwise in lawful custody, escapes, or attempts to escape, is guilty of an offence against military law

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[52] Source: https://www.legislation.gov.uk/ukpga/1983/20 (accessed 8.4.2020). The act concerns the proceedings in relation to persons who suffer from mental disorders. Regardless of this legal act, The Mental Health (Northern Ireland) Order 1986 is in force in the territory of Northern Ireland. In section 124, it lays down an analogous regulation (including the same punishments) as Mental Health Act 1983 (https://www.legislation.gov.uk/nisi/1986/595; accessed 8.4.2020).

[53] It is applicable to persons conveyed to any place or kept in custody or detained in a place of safety (e.g. a police station, a hospital, etc. where a person with mental disorders may be temporarily kept).

[54] The Irish Supreme Court judgment of 15 May 2019 in case *Finnegan v. Superintendent of Tallaght Garda Station* (Supreme Court No. 2017/130) states that escape from custody is an indictable offence and there is a clear public interest that convicted persons should serve a sentence of imprisonment imposed upon them (https://beta.courts.ie/acc/alfresco/ad2311f9-11d3-414f-8e3b-b9180d3fc2c4/2019_IESC_31(3).pdf/pdf; accessed 8.4.2020).

[55] *Irish Crime Classification System*, the 2017 version, https://www.cso.ie/en/media/csoie/methods/recordedcrime/ICCS_V2.0.pdf (accessed 8.4.2020). Actually, they are classified as offences while in custody and related offences, and this means, what is interesting from the point of view of Polish regulations, another sub-category than offences consisting in perverting the course of justice.

[56] S.E. Quinn, *Criminal Law in Ireland*, Irish Law Publishing 2009, p. 1699.

[57] *Ibid*.

[58] Source: http://revisedacts.lawreform.ie/eli/1954/act/18/revised/en/html (accessed 8.4.2020); hereinafter referred to as DA 1954.

and shall, on conviction by court-martial, be liable to suffer imprisonment for any term not exceeding two years or any less punishment awardable by a court-martial.

Irish law also classifies an offence of being unlawfully at large after having been temporarily released. In accordance with section 6(1) Criminal Justice Act 1960,[59] a person who, by reason of having been temporarily released under section 2 or section 3 of this Act, is at large shall be deemed to be unlawfully at large if: (a) the period for which he was temporarily released has expired, or (b) a condition to which his release was made subject has been broken. A person who is unlawfully at large shall be guilty of an offence under section 6(1) and on summary conviction thereof shall be liable to imprisonment for a term not exceeding six months (section 6(2) CJA 1960). It should be pointed out that in accordance with section 13(3) Criminal Law (Jurisdiction) Act 1976,[60] the above-mentioned punishment is also applicable to a person who escapes from any custody in which he is required to be kept in accordance with the provisions of this Act.

Offences consisting in assisting a person in escaping from lawful custody are classified in section 6(1) Criminal Law Act 1976[61]. In accordance with this provision, a person who: (a) aids any person in escaping or attempting to escape from lawful custody or, with intent to facilitate the escape of any person from lawful custody or enable a person after escape to remain unlawfully at large, or with intent to cause injury to persons or property in a place where a person is in lawful custody, conveys any article or thing into or out of such a place or to a person in such a place or places any article or thing inside or outside such a place, or (b) makes, or takes part in, any arrangement for the purpose of enabling a person to escape from lawful custody, facilitating such an escape, enabling a person after escape to remain unlawfully at large, or causing injury to persons or property in a place where a person is in lawful custody, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 10 years.

In the context discussed, an offence under section 32(2) Offences Against the State Act 1939[62] should be also mentioned. In accordance with this provision, every person who shall aid or abet a person detained under this Act to escape from such detention or to avoid recapture after having so escaped shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

In accordance with section 234 DA 1954, every person who aids any prisoner in escaping or attempting to escape from any military prison or detention barrack, or

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[59] Source: http://www.irishstatutebook.ie/eli/1960/act/27/enacted/en/print.html (accessed 8.4.2020); hereinafter referred to as CJA 1960.

[60] Source: http://www.irishstatutebook.ie/eli/1976/act/14/enacted/en/print.html (accessed 8.4.2020). The above-mentioned legal act regulates, in general, issues of mutual relations between the law of the Republic of Ireland and the law of Northern Ireland within the scope of criminal liability and criminal procedure.

[61] Source: http://www.irishstatutebook.ie/eli/1976/act/32/enacted/en/print.html (accessed 8.4.2020).

[62] Source: http://www.irishstatutebook.ie/eli/1939/act/13/enacted/en/print.html (accessed 8.4.2020). The Act concerns combating offences against public order and the state's authority.

who, with intent to facilitate the escape of any such prisoner, conveys or causes to be conveyed into any military prison or detention barrack any mask, dress or other disguise or any letter or other article or thing of whatsoever kind shall be guilty of an offence and on conviction thereof shall be liable to imprisonment for any term not exceeding two years. It is a general offence. In accordance with section 145 DA 1954, which classifies an individual offence, every person subject to military law: (a) who, without proper authority, sets free or authorises or otherwise facilitates the setting free of any person in custody, or (b) who negligently or wilfully allows to escape any person who is committed to his charge, or whom it is his duty to guard or keep in custody, or (c) who assists any person in escaping or attempting to escape from custody, is guilty of an offence against military law and shall, where a charge under this section is disposed of summarily under section 177C, 178C or 179C, as the case may be, be liable to suffer any punishment awardable thereunder or, on conviction by court-martial, be liable, in case he acted wilfully, to suffer imprisonment for a term not exceeding seven years or any less punishment awardable by a court-martial and, in any other case, to suffer imprisonment for any term not exceeding two years or any less punishment awardable by a court-martial.

Finally, it should be pointed out that an act consisting in rescuing a person from lawful custody with the use of force constitutes a common law offence.[63]

4. CONCLUSIONS

Summing up the above discussion, it is necessary to highlight what follows:[64]

(1) In all the legal orders analysed (including in Poland), escape (self-liberation) from lawful custody constitutes an offence. In some cases it constitutes a common law offence and in some a statutory offence. Conviction for escape requires that an offender was in lawful custody. The Polish Criminal Code stipulates that 'a court judgment or a legal order issued by another state body' constitutes legal grounds for isolation (Article 242 § 1). It is an obvious requirement because a person who is in unlawful custody cannot be forbidden to escape. The type of deprivation of liberty from which a person escapes is in general referred to as lawful custody. However, in Scotland escape from prison is distinguished from escape from another place. Thus, penalisation is not limited, e.g. only to escape of a convict serving an imprisonment sentence. A similarly general solution, which is in my opinion defective, is laid down in Article 242 § 1 CC. I suggest that the provision should be amended and it should concern deprivation of liberty as a result of the commission of a prohibited act matching the features of an offence or a fiscal offence.[65]

The solutions analysed in general also envisage an aggravated type of the offence of escape from custody with the use of violence or damage to property ('breach of prison/breaking prison' in England and Wales, 'prison breach' in Northern Ireland,

[63] S.E. Quinn, *supra* n. 56, p. 1699.

[64] For the purpose of simplified reference to the regulations that are in force in the United Kingdom and the Republic of Ireland (i.e. the British Isles), I will use the term 'British law'.

[65] See P. Poniatowski, *supra* n. 2, pp. 370–371.

and 'breach of prison' in the Republic of Ireland). Scotland constitutes an exception because a separate aggravated type of escape is not classified there (a standard offence of escape also covers the conduct involving the use of violence, etc.). In Polish law, the aggravated type of self-liberation is classified in Article 242 § 4 CC (acting under an agreement with other persons, use of violence or threat of using it, damage to the place of custody). What draws attention is the fact that in British law acting under an agreement with other persons is not, in general, an aggravating circumstance. Therefore, one can ask a question whether the circumstance should increase a penalty in Polish law. I doubt that. I believe that escaping under an agreement with other persons does not influence the level of social harmfulness of escape to such an extent that it should increase the maximum level of statutory punishment by half (from two to three years of deprivation of liberty); if it influences this harmfulness at all. On the other hand, the issue is marginal because there have been just several convictions annually for an offence under Article 242 § 4 CC in Poland in recent years (there are no data how many of those cases were committed under an agreement with other persons).[66]

It should be pointed out that British law also classifies a special type of escape committed only by a person who is, in general, subject to military law (Armed Forces Act 2006, which is in force in the whole territory of the United Kingdom and Defence Act 1954, which is in force in the Republic Ireland). There is a lack of such a regulation in Poland. I believe that there is no need to introduce one because it would increase the already extensive casuistry of the Criminal Code.

(2) All the legal orders analysed also classify an offence of remaining/being unlawfully at large, which consists in the fact that an offender fails to return to prison when his release expires or is recalled. In most cases (Ireland is an exception) it concerns failure to return to prison with no reasonable or lawful (in Northern Ireland) excuse. Article 242 § 2 and § 3 of Polish CC also lays down the concept of 'justified reason'. What draws attention is the construction of the offence discussed in British law. Undoubtedly, it is an offence permanent in nature (remaining unlawfully at large is penalised). In Polish case law and jurisprudence an offence under Article 242 § 2 and § 3 CC is treated similarly, which can raise doubts if the content of those provisions is considered.[67] It should be pointed out that the provisions analysed in the article do not, unlike in Polish CC, provide a period of being unlawfully at large that is not subject to penalisation. Article 242 § 2 and § 3 refers to failure to return to prison 'within three days after the assigned date at the latest'.

In addition, in England, Wales and Scotland, there is a type of offence of being unlawfully at large after the conditional release from prison has been recalled. In Poland such conduct is not penalised. It seems, however, that it is worth considering the introduction of such a type of prohibited acts. A decision on conditional release from serving the rest of the penalty of deprivation of liberty results from the

[66] *Ibid.*, p. 258.
[67] It should be treated as a one-time offence; see *ibid.*, pp. 195–211.

recognition of positive criminological forecast and constitutes the expression of trust in a convict.[68] If during the period of probation he is disloyal to the penitentiary court that placed trust in him, which resulted in recalling the conditional release,[69] the imposition of a penalty for unjustified failure to return to prison after the release has been recalled will probably not be in conflict with the principle of *ultima ratio* of criminal law. It is so because such a person successively failed to show respect for law (first time it took place when he committed an offence, which resulted in the imposition of the penalty of deprivation of liberty, and second time it happened when after the conditional release he acted in the way specified in Article 160 Penal Enforcement Code). Thus, *de lege ferenda*, one can propose the introduction of Article 242 § 3a CC in the following wording: 'A person who was released from serving the rest of the penalty of deprivation of liberty and, after the release was recalled, has failed to return to prison within three days after the assigned date shall be subject to a penalty determined in § 2 herein.' Reference made to a penalty for an offence of 'failure to return' is justified by the same nature and level of social harmfulness of the offender's act. It should be highlighted, however, that taking a criminalisation decision in this case should be preceded by research into, in particular, the scale of the phenomenon of failure to return to prison after the conditional release is recalled.

(3) Regulations that are in force in the British Isles also stipulate penalisation of assistance in escape and setting free a person in lawful custody (including with the use of force) and an individual offence of allowing a person to escape (laid down in sections 29(2) and 31 Prison Act (Northern Ireland) 1953, section 30(1) Armed Forces Act 2006 and section 145 Defence Act 1954). What is characteristic is the penalisation of aiding *sui generis* consisting in providing a convict with objects with the intent to facilitate his escape (section 39 Prison Act 1952, section 33 Prison Act (Northern Ireland) 1953, section 6(1) Criminal Law Act 1976, section 234 Defence Act 1954). Some provisions also lay down a penalty for instigating to escape (Armed Forces Act 2006, Mental Health Act 1983, Offences Against the State Act 1939). In Poland liability for setting free a person deprived of liberty and facilitating his escape is laid down in Article 243 CC. It is an intentional offence. Unintentionally allowed escape (subject to a penalty in accordance with some British provisions) can be covered by Article 231 § 3 CC. On the other hand, instigating to self-liberation is subject to a penalty in accordance with general rules as instigation under Article 18 § 2 in conjunction with Article 242 § 1 or § 4 CC.

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[68] In accordance with Article 77 § 1 CC, a court can conditionally release a person who was given a sentence of deprivation of liberty from serving the rest thereof only when his attitude, personal character and conditions, circumstances of the offence commission and conduct after it and at the time of serving the penalty justify the conviction that when released a prisoner will comply with the criminal or preventive measure imposed and will observe the legal order, in particular he will not commit an offence again.

[69] Requirements for such a decision are laid down in Article 160 § 1–§ 4 Penal Enforcement Code.

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PENAL ASPECTS OF REGAINING FREEDOM BY A PERSON LEGALLY DEPRIVED OF IT IN THE UNITED KINGDOM AND THE REPUBLIC OF IRELAND

Summary

The article presents an analysis of legal solutions that are in force in England, Wales, Scotland, Northern Ireland and the Republic of Ireland concerning an offence of self-liberation (escape) from lawful custody, an offence of unlawfully being at large after the conditional release has expired or has been recalled and an offence of facilitating escape from lawful custody, liberating or allowing a person to escape. The article aims to present the regulations and compare them with each other and the solutions adopted in the Polish Criminal Code. The research conducted made it possible to establish many similarities between regulations that are in force in the British Isles and between them and Articles 242 and 243 of the Polish Criminal Code.

Keywords: offence of self-liberation (escape), offence of liberating a person deprived of liberty or facilitating his escape, deprivation of liberty, remaining unlawfully at large, law of the United Kingdom and the Republic of Ireland

KARNOPRAWNE ASPEKTY ODZYSKANIA WOLNOŚCI PRZEZ OSOBĘ PRAWNIE JEJ POZBAWIONĄ W WIELKIEJ BRYTANII I IRLANDII

Streszczenie

Artykuł zawiera analizę rozwiązań prawnych obowiązujących w Anglii, Walii, Szkocji, Irlandii Północnej i Republice Irlandii dotyczących przestępstwa samouwolnienia (ucieczki) osoby prawnie pozbawionej wolności, przestępstwa bezprawnego pozostawania na wolności po

odwołaniu lub wygaśnięciu zezwolenia na opuszczenie miejsca izolacji oraz przestępstwa ułatwienia ucieczki osobie prawnie pozbawionej wolności, uwolnienia jej lub pozwolenia na ucieczkę. Celem opracowania jest przedstawienie omawianych regulacji i porównanie ich między sobą oraz z rozwiązaniami przewidzianymi w polskim Kodeksie karnym. Przeprowadzone badania pozwoliły ustalić wiele podobieństw między regulacjami obowiązującymi w krajach położonych na Wyspach Brytyjskich oraz między nimi a art. 242 i 243 polskiego k.k.

Słowa kluczowe: przestępstwo samouwolnienia (ucieczki), przestępstwo uwolnienia i udzielenia pomocy w ucieczce, pozbawienie wolności, bezprawne pozostawanie na wolności, prawo Wielkiej Brytanii i Irlandii

ASPECTOS PENALES DE LA RECUPERACIÓN DE LIBERTAD POR LA PERSONA PRIVADA DE LIBERTAD EN GRAN BRETAÑA E IRLANDA

Resumen

El artículo analiza las soluciones legales vigentes en Inglaterra, Gales, Escocia, Irlanda del Norte y la República de Irlanda relativas al delito de fuga de la persona privada de libertad legalmente, delito de libertad ilegal después de revocación o expiración de permiso para abandonar el lugar de aislamiento, delito de facilitar la fuga a la persona privada de libertad, liberarla o dejarla salir. La obra pretende presentar la regulación en cuestión y compararla con las soluciones previstas en el código penal polaco. La investigación llevada a cabo permite detectar muchas similitudes entre la regulación vigente en las Islas Británicas, entre ellas mismas y entre el art 242 y 243 del código penal polaco.

Palabras claves: delito de fuga, delito de auto liberación e ayuda en la fuga, privación de libertad, libertad ilegal, derecho de Gran Bretaña e Irlanda

УГОЛОВНО-ПРАВОВЫЕ АСПЕКТЫ НЕСАНКЦИОНИРОВАННОГО ВЫХОДА НА СВОБОДУ ЛИЦА, ЗАКОННО ЛИШЕННОГО СВОБОДЫ, В ВЕЛИКОБРИТАНИИ И ИРЛАНДИИ

Аннотация

В статье анализируются правовые решения, действующие в Англии, Уэльсе, Шотландии, Северной Ирландии и Ирландии в отношении преступлений, состоящих в самовольном выходе на свободу (побеге) лица, законно лишенного свободы, в незаконном пребывании на свободе после отмены или истечения срока действия разрешения на выход из места лишения свободы, а также в содействии побегу лица, законно лишенного свободы, его освобождении или позволении на побег. Целью работы является обсуждение соответствующих положений законодательства, их сравнение друг с другом и с решениями, содержащимися в Уголовном кодексе Польши. Проведенный анализ позволил установить, что между нормами, действующими на Британских островах, и положениями ст. 242 и 243 УК Польши имеется много общего.

Ключевые слова: преступление самовольного выхода на свободу (побега); преступление незаконного освобождения и пособничества в побеге; лишение свободы; незаконное пребывание на свободе; право Великобритании и Ирландии

STRAFRECHTLICHE ASPEKTE DER WIEDERERLANGUNG DER FREIHEIT DURCH EINE RECHTMÄSSIG INHAFTIERTE PERSON IN GROSSBRITANNIEN UND IRLAND

Zusammenfassung

Der Artikel beinhaltet eine Analyse der in England, Wales, Schottland, Nordirland und Irland geltenden Rechtsvorschriften in Bezug auf die Straftat der Gefangenenselbstbefreiung (Gefängnisausbruch) einer rechtmäßig inhaftierten Person, die Straftat des rechtswidrigen Aufenthalts in Freiheit nach Widerruf oder Ablauf der Erlaubnis zum Verlassen des Ortes der Verwahrung und die Straftat der Beihilfe zum Gefängnisausbruch einer rechtmäßig inhaftierten Person, der Gefangenenbefreiung oder der Billigung der Entweichung von Gefangenen. Ziel der Studie ist es, die diskutierten Regelungen vorzustellen und diese miteinander und mit den im polnischen Strafgesetzbuch vorgesehenen Maßnahmen zu vergleichen. Im Rahmen der angestellten Untersuchung ließen sich zahlreiche Übereinstimmungen zwischen den in den Ländern der britischen Inseln geltenden Vorschriften und zwischen diesen und den Artikeln 242 und 243 des polnischen Strafgesetzbuchs feststellen.

Schlüsselwörter: Straftat der Gefangenenselbstbefreiung (Flucht), Straftat der Gefangenenbefreiung und Beihilfe zum Gefängnisausbruch, Freiheitsentzug, illegaler Aufenthalt in Freiheit, Recht in Großbritannien und Irland

ASPECTS DE DROIT PÉNAL DE LA RÉCUPÉRATION DE LA LIBERTÉ PAR UNE PERSONNE QUI EN EST LÉGALEMENT PRIVÉE EN GRANDE-BRETAGNE ET EN IRLANDE

Résumé

L'article contient une analyse des solutions juridiques en vigueur en Angleterre, au Pays de Galles, en Écosse, en Irlande du Nord et en Irlande concernant le crime d'auto-libération (fuite) d'une personne légalement privée de liberté, le crime de séjour illégal en liberté après révocation ou expiration du permis de quitter le lieu d'isolement et l'infraction de facilitation de l'évasion d'une personne légalement emprisonnée, de sa libération ou d'autorisation de s'échapper. Le but de l'étude est de présenter les règlements discutés et de les comparer entre eux et avec les solutions prévues dans le Code pénal polonais. Les recherches menées ont permis d'établir de nombreuses similitudes entre les réglementations en vigueur dans les pays situés sur les îles britanniques et entre elles et l'articles 242 et 243 du Code pénal polonais.

Mots-clés: crime d'auto-libération (fuite), crime de libération et d'aide à l'évasion, privation de liberté, rester illégalement en liberté, droit de Grande-Bretagne et d'Irlande

ASPETTI PENALI DELL'EVASIONE DI UNA PERSONA DETENUTA IN GRAN BRETAGNA E IN IRLANDA

Sintesi

L'articolo contiene l'analisi delle soluzioni giuridiche vigenti in Inghilterra, Galles, Scozia, Irlanda del Nord e in Irlanda, riguardanti il reato di evasione (di fuga) delle persone detenute

per legge, il reato di illegale mancato rientro nel luogo di detenzione dopo la revoca o la scadenza del permesso di allontanamento, nonché il reato di favoreggiamento dell'evasione di una persona detenuta per legge, della sua liberazione o permesso alla fuga. L'obiettivo dell'elaborato è la presentazione delle regolamentazioni indicate e il loro confronto reciproco, nonché il confronto con le soluzioni previste nel Codice penale polacco. Gli studi condotti hanno permesso di stabilire molte analogie tra le regolamentazioni vigenti nei paesi delle Isole Britanniche nonché tra di essi e gli art. 242 e 243 del Codice penale polacco.

Parole chiave: reato di evasione (di fuga), reato di liberazione e di favoreggiamento dell'evasione, detenzione, mancato rientro nel luogo di detenzione, diritto della Gran Bretagna e dell'Irlanda

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PARTICIPATION OF THE POLICE IN INVESTIGATION OF FISCAL CRIMES AND PETTY OFFENCES

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1. TASKS OF THE POLICE AND ITS COMPETENCE BY REASON OF THE SUBJECT MATTER

The Police is a non-financial organ in fiscal crime and petty offence investigations. This category of organs also includes the Border Guard Service, the Military Police, the Internal Security Agency (ABW) and the Central Anti-Corruption Bureau (CBA) (Article 53 § 3 and Articles 118 § 1(4)–(6) and 118 § 2 of the Fiscal Penal Code[1]). Article 134 § 1(2) FPC provides that the Police, as a non-financial investigative organ, is empowered to conduct investigations in matters of fiscal crimes and petty offences discovered within the scope of its competence.

Its competence by reason of the subject matter is defined by the object and modified by the element that the discovery of a fiscal crime or petty offence falls within the scope of the organ's activities. In the case of the Police, competence by reason of the subject matter is defined by the general clause authorising it to conduct proceedings in matters of fiscal crimes and petty offences. The Police is the only non-financial investigative organ authorised to conduct an investigation in the matter of any fiscal crime or petty offence.[2]

The Police is entrusted with a number of tasks specified by the Act of 6 April 1990 on the Police.[3] These include: (1) protection of human life and health and

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1 Act of 10 September 1999: Fiscal Penal Code (consolidated text, Dz.U. 2020, item 19, as amended); hereinafter FPC.

2 J. Skorupka, [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz*, Warszawa 2018, pp. 848–849; J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz*, Warszawa 2018, p. 858.

3 Consolidated text, Dz.U. 2020, item 360, as amended.

of property against unlawful attempts; (2) protection of the public security, safety and order, including without limitation protecting the peace in the public space and on public transport, in road traffic and on waters intended for universal use; (3) initiation and organisation of activities intended to prevent the commission of crimes, petty offences and criminogenic developments, including collaboration in this regard with state and self-government authorities, as well as social organisations; (4) counter-terrorist activities within the meaning of the Act of 10 June 2016 on counter-terrorism activities;[4] (5) detection of crimes and petty offences and prosecution of their perpetrators; (6) security at cabinet members' headquarters, excluding facilities intended for the Minister of National Defence or the Minister of Justice, specified by the minister competent for internal affairs; (7) supervision of specialist defensive services indicated by separate provisions; (8) enforcement of order-keeping regulations and administrative provisions relating to public activities or applicable to public spaces; (9) collaboration with the police services of other states and their international organisations, as well as with the bodies and institutions of the European Union, on the basis of international treaties and agreements and separate provisions; (10) processing of criminal information, including personal data; (11) keeping of data sets containing information gathered by authorised bodies, concerning people's fingerprints, unidentified prints from crime scenes, and results of DNA testing.

The Police also has tasks arising from the European Union law and international treaties and agreements, on such terms and in such scope as such treaties or agreements define, as well as from the Act of 9 March 2017 on the system for monitoring of road and railway transport of goods and trade in heating fuels[5] (Article 1 paras 2–4 of the Act on the Police).

The analysis of the above task list from the perspective of fighting fiscal crime shows that no task from the list refers to offences defined by the Fiscal Penal Code. As noted by Magdalena Kołdys, the lack of the relevant distinction in Article 1 para. 2(4) of the Act on the Police (which deals with the detection of crimes and petty offences and prosecution of the offenders) does not preclude a broad construction of this provision. On the contrary, its language implies reference to crimes and petty offences defined in either the Criminal Code[6] or the Petty Offences Code,[7] but also those specified in the Fiscal Penal Code.[8] Kołdys's view appears to be somewhat isolated, though one supported by the fact that the lawmaker's intention certainly was to equip the Police with law-enforcement powers not only concerning ordinary crimes and petty offences but also those of the fiscal kind. Still, due to being ambiguous as it is, the statutory expression should be amended for clarity.

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4 Consolidated text, Dz.U. 2019, item 796.

5 Consolidated text, Dz.U. 2020, item 859.

6 Act of 6 June 1997: Criminal Code (consolidated text, Dz.U. 2019, item 1950, as amended); hereinafter CC.

7 Act of 20 May 1971: Petty Offences Code (Dz.U. 2019, item 821, as amended); hereinafter POC.

8 M. Kołdys, *Rola i zadania niefinansowych organów postępowania przygotowawczego*, Prokuratura i Prawo 3, 2017, pp. 113–114.

2. SCOPE AND MANNER OF EXERCISING THE POLICE'S POWERS IN FISCAL CRIME MATTERS

One of the ways in which the Police exercises its powers with regard to the detection of criminal and petty offences, including fiscal ones, and the prosecution of offenders involves operational-exploratory activities referred to in Article 14 para. 1(1) of the Act on the Police. The aforementioned provision narrowed this down to the purpose of 'exploration, prevention and detection of criminal offences, fiscal criminal offences and petty offences'. The provision was amended by the Act of 14 December 2018 on the protection of personal data processed in relation to prevention and counteraction of crime[9] by adding the expression 'fiscal criminal offences'. The result of the amendment is that the Police's powers in the area of operational-exploratory activities are limited to the exploration, prevention and detection of criminal offences, fiscal criminal offences and petty offences, with the exclusion of fiscal petty offences.

The literature on criminal procedure and forensics has seen various attempts to define operational-exploratory activities (*czynności operacyjno-rozpoznawcze*), as no statutory definition has been provided, yet. Writers are not unanimous on the matter. Hence, the activities are variously and interchangeably referred to as, among other expressions, operational activities, operational work, or operational-exploratory activities, as used in this article.[10]

As described by Leon Schaff, operational activities are non-evidentiary technical and tactical activities shaped by the practice of law-enforcement authorities and aimed at crime prevention.[11] According to S. Owczarski, they are a set of secret or confidential, not evidence-worthy but still lawful activities undertaken by law-enforcement bodies on the basis of confidential personal sources of information and technical measures, for which the legal basis is found in the statutes regulating the activities of the law enforcement, as well as executive regulations enacted thereunder, and the internal regulations of the various law-enforcement services.[12] Tadeusz Hanausek, on the other hand, conceives operational-exploratory activities as a separate system of confidential or secret activities of the law enforcement, undertaken outside of criminal proceedings but usually with a view to the current or future goals of those proceedings, aimed at crime prevention and the prevention and counteraction of other legally specified negative social developments. The activities serve the purpose primarily through the gathering, verification and use – for detection purposes and for the purpose of providing direction for evidentiary efforts – of information about events, environments or persons attracting legitimate interest.[13] In Stanisław Waltoś's opinion, in turn, as the expression 'operational

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[9] Dz.U. 2019, item 125.

[10] A. Łyżwa, M. Tokarski, [in:] Ł. Czebotar, Z. Gądzik, A. Łyżwa, A. Michałek, A. Świerczewska-Gąsiorowska, M. Tokarski, *Ustawa o Policji. Komentarz*, Warszawa 2015, p. 244.

[11] L. Schaff, *Zakres i formy postępowania przygotowawczego*, Warszawa 1961, p. 77.

[12] S. Owczarski, *Problematyka postępowania operacyjnego w świetle prawa i praktyki*, Przegląd Sądowy 4, 1994, p. 70.

[13] T. Hanausek, *Kryminalistyka. Poradnik detektywa*, Katowice 1993, p. 93.

activity' contains too many unknowns and lacks indisputable, tangible *designata*, no definition of it could possibly be free of risk.[14] Jan Widacki views operational-exploratory activities as the aggregate of secret (or confidential) non-evidentiary activities undertaken by the law enforcement with the goal of obtaining information for the purposes of criminal proceedings or frustrating the commission of an attempted crime.[15] Brunon Hołyst distinguishes two basic characteristics of operational-exploratory activities: confidentiality and limited scope of application due to the basis, i.e. internal provisions, and due to the actor performing the activities, i.e. the bodies of the ministry of the interior.[16]

Operational-investigative activities must always be undertaken in compliance with the applicable statutory framework. The Supreme Court is of the correct view that while the Police, for the purpose of exploration, prevention and detection of criminal offences and petty offences, and detection and identification of perpetrators, has the right to engage in operational-exploratory activities (especially those defined in Article 14 para. 1 and the beginning of Article 19 para. 1 of the Act on the Police), the use of materials obtained through such activities as evidence in criminal proceedings, to be publicised under Article 393 § 1 of the Criminal Procedure Code,[17] is conditional on a finding that such materials have been gathered in compliance with the appropriate statutory requirements for the various types of threats to the public order in connection with which the activities are undertaken.[18] Violation of legal provisions can result in abuse of powers, which may consist in acting within one's powers but outside of the legal terms governing the use of such powers.[19] Allegations of official misconduct in the form of abuse of powers or disciplinary violation must state the specific provision contravened or violated by the official in question.[20]

During the performance of operational-exploratory activities, undertaken by the Police with a view to the prevention or detection of crime or detection and identification of perpetrators, as well as the gathering and securing of evidence, in matters of publicly prosecuted intentional fiscal criminal offences, if the value of the object of the act or the diminution of the public levy exceeds fifty times the value of the lowest wage of work[21] determined on the basis of separate provisions,

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[14] S. Waltoś, *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa 1968, p. 146.

[15] J. Widacki, [in:] *Kryminalistyka*, J. Widacki (ed.), Part 1, Katowice 1984, p. 127.

[16] B. Hołyst, *Kryminalistyka*, Warszawa 2004, p. 47.

[17] Act of 6 June 1997: Criminal Procedure Code (consolidated text, Dz.U. 2020, item 30, as amended); hereinafter CPC.

[18] See the Supreme Court order of 22 September 2009 in III KK 58/09, Legalis.

[19] The Supreme Court judgment of 28 November 2009 in III KK 152/06, Legalis.

[20] B. Opaliński, M. Rogalski, P. Szustakiewicz, *Ustawa o Policji. Komentarz*, Warszawa 2015, pp. 62–63.

[21] The expression 'lowest wage of work' is defined in Article 25 of the Act of 10 October 2002 on the minimum wage of work (consolidated text, Dz.U. 2018, item 2177 and Dz.U. 2019, item 1564), which provides: 'Wherever the provisions of the law mention the "lowest wage of work" by reference to separate provisions or to the Labour Code or by reference to the Minister of Labour and Social Policy or a minister competent for matters of employment as the authority required to determine such wage pursuant to separate provisions or the Labour Code, this shall

or in intentional fiscal criminal offences under Article 107 § 1 FPC, consisting in organising and holding gambling games in violation of statute or in violation of the terms of the concession or permit,[22] if other measures have proven futile or will be of no use, a regional court may order operational control (surveillance) at the written request of the Chief Commandant of the Police, the Commandant of the Central Investigation Bureau of the Police, or the Commandant of the Police Internal Bureau, filed with the prior written consent of the Prosecutor General, or at the written request of the regional commandant of the Police filed with the prior written consent of a regional prosecutor competent by reason of the location of the applying Police organ (Articles 19 para. 1(4)–(4a) of the Act on the Police). The request for operational control should be submitted with materials supporting the need to resort to operational control (Article 19 para. 1a of the Act on the Police).

Operational control may be used in the course of the operational-exploratory activities undertaken by the Police with a view to the prevention and detection – and identification of perpetrators, and acquisition and securing of evidence – of publicly prosecuted intentional offences enumerated in Article 19 para. 1(1)–(8), including the aforementioned intentional fiscal criminal offences. Hence, operational control is restricted to those alone. The Supreme Court is correct in holding[23] that since the rational lawmaker decided to narrow the spectrum of criminal offences for which the Police can use operational control, no argument (other than teleological) can be provided in support of arbitrarily expanding that list to include other crimes. The similarity of other offences or their sentencing limits cannot justify departure from the strict, literal wording of Article 19 para. 1 of the Act on the Police. It is the legislature itself, guided – among other considerations – by the proportionality test, that has restricted the list in this manner, thus leaving the courts and law enforcement with no discretion in this respect.[24]

In summary, Article 19 para. 1 of the Act on the Police provides a closed list of criminal offences, and thus evidence obtained during lawful operational control may be used in criminal proceedings or fiscal criminal proceedings only in reference to the offences from the list. This means that evidence obtained by such control with regard to individual crimes committed within an organised criminal group (Article 258 CC) will not be admissible if those crimes are not on the list.[25]

Operational control may be ordered when other measures have proven futile or will be of no use. The order is issued by a regional court competent by reason of

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mean the sum of PLN 760.' This is different from the 'minimum wage of work' defined in the Regulation of the Council of Ministers of 10 September 2019 on the minimum wage of work and minimum hourly rate in 2020 (Dz.U. 2019, item 1778), which, since 1 January 2020, has been PLN 2,600 gross. Effective from 1 January 2021, on the other hand, it will be PLN 2,800 gross on the basis of the Regulation of the Council of Ministers of 15 September 2020 on the minimum wage of work and minimum hourly rate in 2021 (Dz.U. 2020, item 1596). The legislature should consider replacing the archaic leftover expression 'lowest wage of work' with 'minimum wage of work'.

22 The sentencing limits for this offence are up to 720 daily rates of fine or up to three years' imprisonment, or both.

23 The Supreme Court judgment of 30 January 2013 in III KK 130/12, Legalis.

24 B. Opaliński, M. Rogalski, P. Szustakiewicz, *supra* n. 20, p. 109.

25 *Ibid.*, p. 109; see the Supreme Court order of 10 October 2012, I KK 336/11, unpublished.

location for the headquarters of the applying Police organ (Article 19 para. 2 of the Act on the Police). The use of materials obtained through such activities as evidence in criminal proceedings, disclosable under Article 393 § 1 CPC, is necessarily conditional on a finding that such materials have been gathered in compliance with the appropriate statutory requirements for the various types of threats to the public order in connection with which the activities are undertaken. Where the operational control produces evidence of the commission of offences specified in Article 19 para. 1 of the Act on the Police by a person other than the target of the order issued under Article 19 para. 2 of the Act, such evidence may be used in court proceedings (first sentence of Article 393 § 1 CPC), on condition of the court's post-fact consent for operational control (Article 19 para. 3 of the Act on the Police).[26]

In cases admitting no delay, if the consequence would be the loss of information or obfuscation or destruction of evidence of crime, the Chief Commandant of the Police, the Commandant of the Central Investigation Bureau of the Police, or the Commandant of the Police Internal Bureau, or the regional commandant of the Police may, with the prior written consent of a competent prosecutor, i.e. the Prosecutor General or a regional prosecutor, order operational control simultaneously with applying to the regional court for an order in the matter. If the court fails to grant such consent within five days of the day when the operational control is ordered, the ordering body must cease the control and destroy the materials obtained, acting by a committee and on the record (Article 19 para. 3 of the Act on the Police).

The *ratio* of the mechanism adopted in Article 19 para. 3 of the Act on the Police is to make sure that the deep interference with constitutionally protected rights and freedoms, inevitably resulting from operational control ordered by a Police organ, even with a prosecutor's consent, undergoes judicial review shortly and is either legalised by the court or stopped.[27] The court cannot give its so-called post-fact consent if the authority ordering the control fails to comply with the conditions governing the case admitting no delay as referred to in Article 19 para. 3 of the Act on the Police. If the case does not meet this description, the ordered surveillance will exceed the limits of lawful operational control. Violation of these conditions (Article 19 para. 3 of the Act on the Police) will lead to refusal of the court's consent. Not only non-compliance with the time limit for requesting the consent or with the principle of subsidiarity but also the lack of a prior order by a non-judicial authority or written consent of the competent prosecutor will be tantamount to the absence of grounds to conclude that the case has admitted no delay.[28]

Where there is a need to order operational control in reference to a suspected person or a court defendant, the Police organ's request for such an order must contain a mention of the proceedings pending in respect of such a person (Article 19 para. 5 of the Act on the Police).

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[26] B. Opaliński, M. Rogalski, P. Szustakiewicz, *supra* n. 20, pp. 109–110; the Supreme Court judgment of 5 April 2012, KK 400/11, unpublished.

[27] Order of the Court of Appeal in Warsaw of 12 May 2008, II APKZ PF-2/08, Legalis.

[28] B. Opaliński, M. Rogalski, P. Szustakiewicz, *supra* n. 20, pp. 110–111; D. Drajewicz, *Zgoda następcza sądu na stosowanie kontroli operacyjnej*, Prokuratura i Prawo 1, 2009, p. 87.

The Police's operational-exploratory activities in matters of crimes set out in Article 19 para. 1 of the Act on the Police, undertaken with a view to corroborating previously obtained credible information about the crime and identification of the perpetrators and proceedings of the crime, may consist in the classified purchase, sale or takeover of such proceeds of the crime as are liable to forfeiture or prohibited from being produced, possessed, transported or traded (controlled purchase),[29] or in accepting or offering an economic benefit (controlled bribe),[30] as stipulated under Article 19a para. 1 of the Act on the Police.

It follows from this provision that operational-exploratory activities in the form of a controlled purchase or bribe may be employed against the same crimes as operational control. Bearing in mind the subject at hand, these activities are available in particular only for intentional fiscal criminal offences, where the value of the object of the act or diminution of public levy exceeds fifty times the lowest wage of work, as defined on the basis of separate provisions, or intentional fiscal criminal offences under Article 107 § 1 FPC (Article 19 para. 1(4)–(4a) of the Act on the Police in conjunction with Article 19a para. 1 of the same Act). Thus, the above operational-exploratory activities are prohibited in the case of fiscal criminal offences not found on the list.[31]

Operational activities consisting in the controlled purchase or bribe may be reduced to merely making such an offer (Article 19 para. 2 of the Act on the Police). This, however, must not be proactive by involving solicitation, threats, physical or mental coercion. The recipient of the offer must have the freedom to accept the offer or reject it. If the conduct of a Police officer or a Police collaborator violates this rule, it may lead to criminal or disciplinary liability.[32] Similarly, incitement, aiding or abetting or directing criminal activities would not be permissible in this context; they would constitute illegal provocation.[33]

While performing operational-exploratory activities undertaken with a view to documenting fiscal criminal offences defined in Article 19 para. 1(4)–(4a) of the Act on the Police or determining the identity of the participants of those offences or seizing the objects of the crime, the Chief Commandant of the Police, the Commandant of the Central Investigation Bureau of the Police, the Commandant of the Police Internal Bureau, or the regional commandant of the Police may order the undisclosed surveillance of the production, transportation, storage or trade of the objects of the crime if doing so will not endanger human life or health. A regional prosecutor competent by reason of the location of the Police organ ordering the activities must be notified without delay. The prosecutor may order the discontinuation of the activities at any time (Article 19b paras 1 and 2 of the Act on the Police).

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[29] See, more extensively: Z. Gądzik, [in:] Ł. Czebotar, Z. Gądzik et al. *Ustawa o Policji*, *supra* n. 10, pp. 252–253.

[30] See, in more detail *ibid*., p. 253.

[31] Cf. R. Lizak, *Kontrolowane przyjęcie lub wręczenie korzyści majątkowej*, Wojskowy Przegląd Prawniczy 1, 2011, p. 27 et seq.

[32] Z. Gądzik, [in:] Ł. Czebotar, Z. Gądzik et al., *Ustawa o Policji*, *supra* n. 10, p. 253; the Supreme Court judgment of 10 July 2007, II KK 387/06, OSNwSK 2007, No. 1, item 1587.

[33] M. Kołodziejczak, A. Sobiech, *Prawnie dopuszczalne postacie prowokacji*, Państwo i Prawo 11, 2010, p. 39.

3. POWERS OF THE POLICE IN INVESTIGATION OF FISCAL CRIMINAL OFFENCES

The empowerment of the Police to conduct investigations into fiscal criminal offences and petty offences arises from Article 134 § 1(2) FPC. Additionally, Article 134 § 2 FPC requires the Police to notify the financial investigative authorities without delay of any investigations by sending a copy of the order opening the proceedings. The Police may, however, avoid this obligation by limiting its activities to securing of traces and evidence of a fiscal criminal offence or petty offence and handing the case over to the financial investigative authorities for further proceedings (Article 134 § 2 FPC).

It is a common view in the literature[34] that the language of Article 134 § 2 FPC clearly allows the Police to act in two different ways in the event of discovering a fiscal crime or petty offence. Firstly, the Police may open fiscal criminal proceedings, of which it must notify the competent financial investigative authorities without delay, by sending a copy of the relevant order (Article 134 § 2 FPC). If the investigation is conducted in the more solemn form (*śledztwo*, as opposed to the simpler *dochodzenie*), the prosecutor also has to be notified by sending a copy of the order (Article 305 § 3 CPC in conjunction with Article 113 § 1 FPC). On the other hand, the Police may limit its activities to securing of the traces and evidence of a fiscal criminal offence or petty offence and hand the case over to the financial investigative authorities for further investigation (the later part of Article 134 § 2 FPC). The linguistic wording of this provision lends itself to the conclusion that the legislature has opted to leave the Police with the choice between the two ways to proceed after discovering a fiscal criminal offence or petty offence, provided that this right is limited in time to the stage of securing the traces and evidence of the fiscal criminal offence or petty offence. In principle, the decision to hand the proceedings over to the financial investigative authorities rests with a body detecting the crime or petty offence, in this case the Police. The decision may, however, also be made by a prosecutor as the supervising organ (Article 326 § 3(4) CPC in conjunction with Article 113 § 1 FPC).[35]

In some cases, the handing over of a case by the Police to the financial investigative authority is mandatory, usually after the stage of securing evidence and instituting the proceedings. This requirement arises when the perpetrator requests a plea arrangement (Article 134 § 4 FPC). To do so is a right of which one should be informed before the first interrogation. The Fiscal Penal Code only requires the financial investigative authority to provide this particular information (Article 142 § 2 FPC). The perpetrator, however, is still free to submit such a request

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[34] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks*, 2018, *supra* n. 2, p. 860; T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz*, Warszawa 2017, pp. 1202–1203; H. Skwarczyński, *Uprawnienia Straży Granicznej w postępowaniu o przestępstwa i wykroczenia skarbowe*, Wojskowy Przegląd Prawniczy 3, 2003, pp. 100–101; *idem*, *Udział Policji w postępowaniu karnym skarbowym*, Przegląd Policyjny 3, 2001, pp. 114–115; *idem*, *Udział Policji w postępowaniu karnym skarbowym po nowelizacji k.k.s.*, Przegląd Policyjny 2, 2006, pp. 75–76.

[35] H. Skwarczyński, *Udział Policji*, 2006, *supra* n. 34, p. 76; *idem*, *Udział Policji*, 2001, *supra* 34, p. 115; *idem*, *Uprawnienia Straży Granicznej*, 2003, *supra* n. 34, p. 101; J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks*, 2018, *supra* n. 2, p. 860.

to a non-financial investigative organ, including the Police. Things being so, the non-financial organ also should provide the same information, even though this is not expressly mentioned in the Code.[36] In the opinion of Hubert Skwarczyński, one could look to Article 114 § 2 FPC in conjunction with Article 16 § 2 CPC for the source of this obligation also for a non-financial organ, provided that the diminution of public levy has occurred. The obligation does not exist wherever there are bars to permitting a plea arrangement.[37]

The involvement of the Police in fiscal criminal investigations is closely connected with the construct of the ideal concurrence of offences under Article 8 § 1 FPC. The latter means that the same conduct fulfils the elements of a fiscal criminal offence or a fiscal petty offence and of an offence or petty offence defined in the Criminal Code or some other statute containing criminal provisions. It follows from Article 134 § 5 FPC that if conduct constituting a criminal offence or a petty offence defined in the criminal provisions of a different statute, belonging to the competence of the Police, simultaneously fulfils the elements of a fiscal criminal offence or a fiscal petty offence, the non-financial investigative authority competent in accordance with Article 134 § 1 FPC to conduct an investigation in a fiscal criminal matter may open proceedings, notifying without delay the competent financial investigative authority, or content itself with securing the traces and evidence of the criminal conduct and hand the case over to the financial organ within the scope of conduct covered by fiscal penal law. If the perpetrator requests a plea arrangement, such a request must be forwarded to the financial investigative authority.[38]

The powers of the Police, if conducting proceedings in the matter of a fiscal criminal offence, include the right to prepare the indictment. Approving the indictment and submitting it to the court belongs to the prosecutor (Article 331 § 1 CPC in conjunction with Article 113 § 1 FPC). If the conditions are met for an application for probationary dismissal of the proceedings, then preparing such an application and submitting it to the court in lieu of a bill of indictment belongs to the prosecutor (Article 336 § 1 CPC in conjunction with Article 113 § 1 FPC), although the Police can recommend the submission of such an application. If the investigation ends in a decision to dismiss the proceedings (Article 17 § 1 CPC and Article 322 CPC in conjunction with Article 113 § 1 FPC) or suspend the proceedings

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[36] M.R. Tużnik, *Postępowania szczególne w postępowaniu karnym skarbowym*, Warszawa 2013, p. 270; *eadem*, *Postępowanie w przedmiocie udzielenia zezwolenia na dobrowolne poddanie się odpowiedzialności w postępowaniu karnym skarbowym*, Ius Novum 1, 2012, p. 82; H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej w postępowaniu karnym skarbowym*, Wojskowy Przegląd Prawniczy 3–4, 2001, pp. 36–37; *idem*, *Uprawnienia Straży Granicznej*, 2003, *supra* n. 34, pp. 101–102; *idem*, *Udział Policji*, 2001, *supra* n. 34, p. 115; I. Zgoliński, *Dobrowolne poddanie się odpowiedzialności w prawie karnym skarbowym*, Warszawa 2011, p. 130; D. Świecki, *Dobrowolne poddanie się odpowiedzialności w kodeksie karnym skarbowym*, Przegląd Sądowy 3, 2001, p. 88; A. Skowron, *Kontrowersje wokół regulacji postępowania w sprawach o wykroczenia skarbowe*, Prokuratura i Prawo 12, 2000, pp. 69–70.

[37] H. Skwarczyński, *Udział Policji*, 2006, *supra* n. 34, p. 77; *idem*, *Uprawnienia Straży Granicznej*, 2003, *supra* n. 34, pp. 101–102.

[38] L. Wilk, J. Zagrodnik, *Kodeks*, 2018, *supra* n. 2, pp. 864–865; cf. H. Skwarczyński, *Zbieg czynów karalnych i zbieg przepisów w prawie karnym skarbowym a właściwość organów postępowania przygotowawczego*, Wojskowy Przegląd Prawniczy 3, 2005, p. 127.

(Article 22 CPC in conjunction with Article 113 § 1 FPC), the Police may issue a decision in such matters, subject to the requirement of the prosecutor's approval (Article 305 § 3 and Article 325e § 2 CPC in conjunction with Article 113 § 1 FPC). The Police's autonomy is also restricted when it comes to ordering protective measures. The available list of those, in fiscal crimes, is provided for in Article 22 § 3 FPC. The Police, however, lacks the power to apply any of them, even though investigating a fiscal criminal offence or petty offence. If a fiscal criminal investigation shows that the suspect has committed the offence while insane or in some other state of non-accountability and the grounds for the application of protective measures are met, the Police should hand the case over to the prosecutor who is the authority competent to apply to the court, after the closure of the proceedings, to dismiss the proceedings and order protective measures (Article 324 CPC in conjunction with Article 113 § 1 FPC). Nor is the Police competent to apply to the court for a forfeiture order as a protective measure under Article 323 § 3 CPC in conjunction with Article 113 § 1 FPC or an order disposing of material evidence following dismissal of the proceedings (Article 323 § 1 CPC in conjunction with Article 113 § 1 FPC). In proceedings conducted by a non-financial investigative authority, these powers are reserved for the prosecutor.[39]

The Police's powers include the use of the *in-absentia* track in proceedings in either a fiscal criminal offence or a fiscal petty offence. The required conditions are as follows: (1) the perpetrator of the fiscal criminal offence or petty offence permanently resides abroad, or (2) the perpetrator's residence in-country cannot be determined (Article 173 § 1 FPC). In cases of fiscal criminal offences proper, this track is available against the defendant and also against the entity held subsidiarily liable. In case of fiscal petty offences, by contrast, the latter does not appear here (Article 53 § 40 FPC).

The decision to conduct *in-absentia* proceedings, when issued by the Police or any other non-financial or financial investigative organ, requires prosecutorial approval in cases of fiscal criminal offences proper (Article 175 §1 FPC second sentence).[40]

When discussing the powers of the Police in investigations into fiscal criminal offences, it is necessary to emphasize that such offences can be investigated in either of the two forms of investigation available under Polish law, i.e. the more formal *śledztwo* or the more simplified *dochodzenie* (inquiry). For the investigation of a fiscal petty offence, only the latter is available (Article 152 FPC). The authority competent to conduct the investigation in the form of *śledztwo* is either a prosecutor or a financial investigative authority. The prosecutor is the primary organ of this investigation mode in fiscal criminal offences, for the financial organs may conduct it only when the prosecutor does not do so (Article 151a § 1 FPC). The following are the requirements for the application of the above-said mode to fiscal criminal offences: (1) a fiscal criminal offence is committed in conditions set out in Article 37 § 1 FPC or Article 38 § 2 FPC; (2) the suspected person is a judge, a prosecutor,

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[39] H. Skwarczyński, *Udział Policji*, 2006, *supra* n. 34, pp. 79–80.

[40] *Ibid*., p. 80; M. Tużnik, *Postępowanie w stosunku do nieobecnych w postępowaniu karnym skarbowym*, Ius Novum 2, 2011, p. 66.

a Police officer or an officer of the Internal Security Agency, the Intelligence Agency or the Central Anti-Corruption Bureau; (3) the suspected person is an officer of the Border Guard Service, the Military Police or a financial investigative authority, or the latter's superior organ; (4) the prosecutor or the financial investigative authority orders so (Article 151a §2 FPC).

The legislature has mandated that in the cases referred to in Article 151a § 2(2)–(3) FPC, the more formal mode (*śledztwo*) should be used whether or not the persons listed in those provisions have committed a fiscal crime in connection with their official duties or within the scope of cases belonging to their competence. Any fiscal criminal offence committed by persons from the list must be investigated pursuant to the more formal mode. In the above cases the prosecutor conducts what is called 'own investigation', which he/she carries out but in which specific activities may be entrusted to some other organ, including the Police. Activities that must not be delegated in such a manner include presenting, amending or supplementing the charges or closing the investigation. All of those activities mandatorily require the prosecutor's own performance (Article 151b § 2 FPC second sentence).

In those cases in which the use of the *śledztwo* mode is the prosecutor's decision, the prosecutor may entrust the Police with the entire conduct of the proceedings or a specific scope of them or specific activities therein (Article 151b § 2 in conjunction with Article 118 § 1(5) FPC first sentence).[41]

4. POWERS OF THE POLICE IN INVESTIGATION OF FISCAL PETTY OFFENCES

The investigation of fiscal petty offences is governed by many of the rules applicable to the investigation of fiscal criminal offences proper. However, due to the lower gravity of petty offences as compared to crimes, some aspects have been simplified and even some separate institutions have been introduced in order to streamline and expedite the proceedings.[42]

Firstly, as it has already been noted, in cases of fiscal petty offences the simplified *dochodzenie* (inquiry) is the only investigation mode available (Article 152 FPC second sentence), while in cases of fiscal criminal offences proper this mode is available, unless the formal *śledztwo* is statutorily required.

Here, *dochodzenie* is simplified and restricted to the interrogation of the suspect and, if needed, also other activities to the extent necessary for an indictment or some other conclusion of the proceedings (Article 152 FPC second sentence). In its activities, the procedural organ, including the Police, is obliged to comply with requirements mandatory for validity, such as the drawing up of a transcript after the interrogation of a suspect (Article 143 § 1(2) CPC in conjunction with Article 113 § 1 FPC). The

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41 See J. Skorupka, *Komentarz do wybranych przepisów Kodeksu karnego skarbowego*, LEX 2020, commentary on Articles 151a and 151b.

42 H. Skwarczyński, *Uprawnienia Straży Granicznej*, 2003, *supra* n. 34, 105–106; *idem*, *Udział Policji*, 2006, *supra* n. 34, p. 84.

ratio of these solutions is found in the need to streamline and rationalise the investigation of some minor misconduct like fiscal petty offences.[43]

As the literature tends to emphasize,[44] restrictions on formalised evidentiary activities in the investigation need to be considered solely in the categories of the possibility of limiting the investigation of a fiscal criminal offence to the interrogation of a suspect and completion of activities intended to determine whether the conditions are met for an indictment or some other conclusion of the proceedings.

Secondly, another distinction involves the duration and extension of the investigation in the form of *dochodzenie* into fiscal petty offences. The rule is that if the proceedings conducted by an investigative organ fail to conclude within two months, the superior authority may extend the proceedings by a set time (Article 153 § 3 FPC).[45] As noted by Jarosław Zagrodnik,[46] while Article 153 § 3 FPC provides for optional extensions, it does not stipulate any maximum duration. Thus, the statute of limitations is regarded as the only limit (Article 51 § 1 and § 2 FPC). In investigations conducted by a non-financial investigative authority (the Police), the ordering of extension is a power reserved to its superior authority, specified in Article 53 § 39a FPC, which means the prosecutor.

Thirdly, in cases of fiscal criminal offences, the Police may either refuse to open new proceedings or close existing proceedings where the perpetrator's single conduct has fulfilled the elements of a fiscal petty offence and a criminal offence, and criminal proceedings in the case of the latter have already been concluded with a final and unappealable conviction (Article 151 § 1 FPC). Such situations are relatively rare, due to the requirement of a final and unappealable conviction. In practice, dismissals and refusals to open new proceedings are more frequent where the same prohibited conduct fulfils the elements of a fiscal petty offence and of a criminal offence, and criminal proceedings are pending in the matter of an *ex-officio* prosecuted crime (Article 151 § 2 FPC).

Either in the case stipulated in Article 151 § 1 FPC, or in that under Article 151 § 2 FPC, such a dismissal or refusal is optional. When acting as an authority conducting the investigation of a fiscal petty offence and considering one of these two decisions, the Police should take into account the already materialised conviction for a criminal offence (§ 1) or its probability in the future (§ 2). In both scenarios, it must consider the financial interests of the State Treasury, or a unit of local self-government or other rights-holders.[47]

Next, in cases of fiscal petty offences, there is the option to proceed by penalty notice, if a perpetrator's identity and the circumstances of a fiscal petty offence do not raise doubt and there is no need for a penalty more severe than stipulated in

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[43] See J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz*, Warszawa 2014, p. 908; L. Wilk, J. Zagrodnik, *Prawo karne skarbowe*, Warszawa 2009, p. 485; F. Prusak, *Kodeks karny skarbowy. Komentarz*, Vol. II, Kraków 2006, p. 1122.

[44] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks*, 2014, *supra* n. 43, p. 909; T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz*, Warszawa 2009, p. 627.

[45] H. Skwarczyński, *Udział Policji*, 2006, *supra* n. 34, p. 85; *idem*, *Uprawnienia Straży Granicznej*, 2003, *supra* n. 34, p. 107.

[46] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks*, 2014, *supra* n. 43, p. 914.

[47] *Ibid*., p. 885; F. Prusak, *supra* n. 43, p. 1109.

Article 48 § 2 FPC, nor any of the bars specified in Article 137 § 2 FPC (Article 137 § 1 FPC). The Police, similarly to the Border Guard Service and the Military Police, is not a competent authority to issue fines by way of a penalty notice. This is the direct consequence of the wording of the Regulation of the Council of Ministers of 22 February 2017 amending the Regulation on the imposition of fines by penalty notice, enacted pursuant to Article 136 § 1 FPC.[48] The Regulation vests this power only in the financial investigative authorities, that is:

(1) authorised employees of tax offices – authorisation granted by the head of a competent tax office;
(2) authorised employees and officers of the Customs-and-Fiscal Service exercising their duties in customs-and-fiscal offices (*urzędy celno-skarbowe*) – authorisation granted by the head of a competent customs-and-fiscal office;
(3) authorised employees and officers of the Customs-and-Fiscal Service performing the tasks of the National Fiscal Administration in the organisational units of the department serving the minister competent for public finance – authorisation granted by the Chief of the National Fiscal Administration (§ 1).[49]

5. CONCLUSIONS

The study into the role of the Police in the investigations of fiscal criminal offences and petty offences has prompted the following conclusions.

(1) The competence of the Police by reason of the subject matter is delimited in such a way that, as the only organ among the non-financial investigative authorities, it is vested with the power to conduct investigations into any fiscal crime or petty offence (Article 134 § 1(2) FPC). On the other hand, the delimitation of the Police's tasks in the Act of 6 April 1990 on the Police in the area of counteracting fiscal criminal offences and petty offences is highly imprecise, since the wording of Article 1 para. 2(4) of the Act (which stipulates the detection of crimes and petty offences and prosecution of offenders) may imply that these tasks do not include fiscal crimes and petty offences. Hence, the above provision needs to be amended in order to eliminate such interpretative doubts.

(2) Within the limits of its tasks consisting in the detection of criminal offences and petty offences, including fiscal criminal ones, and the prosecution of offenders, the Police is vested with the power to carry out operational-exploratory activities as referred to in Article 14 para. 1(1) of the Act on the Police. This provision arises no interpretative doubt, as it stipulates that the Police is to perform operational-exploratory activities for the purpose of, 'exploration, prevention and detection of criminal offences, fiscal criminal offences and petty offences'. The wording of Article 14 para. 1(1) of the Act on the Police makes it clear that the powers of the Police in the area of operational-exploratory activities are limited to the exploration,

[48] Dz.U. 2017, item 401.

[49] See M.R. Tużnik, *Postępowania szczególne*, 2013, *supra* n. 36, p. 330; *eadem*, *Participation of the Military Police in Fiscal Penal Proceedings* [*Udział Żandarmerii Wojskowej w postępowaniu karnym skarbowym*], Ius Novum 3, 2018, pp. 92–93.

prevention and detection of criminal offences, fiscal criminal offences and petty offences, with the exclusion of fiscal petty offences.

In the performance of the operational-exploratory activities undertaken by the Police with a view to the prevention or detection of crime or detection and identification of perpetrators, as well as gathering and securing of evidence, in matters of publicly prosecuted intentional criminal offences, enumerated in Article 19 para. 1(1)–(8) of the Act on the Police, including fiscal criminal offences, if the value of the object of the act or the diminution of the public levy exceeds fifty times the value of the lowest wage of work determined on the basis of separate provisions, or intentional fiscal criminal offences under Article 107 § 1 FPC, operational control (surveillance) is one of the available options. It may be ordered by the regional court at a written request of the Chief Commandant of the Police, the Commandant of the Central Investigation Bureau of the Police, or the Commandant of the Police Internal Bureau, filed upon prior written consent of the Prosecutor General, or at a written request of the regional commandant of the Police filed upon prior written consent of a regional prosecutor competent by reason of the location of the applying Police organ (Articles 19 para. 1(4)–(4a) of the Act on the Police).

Based on Article 19a para. 1 of the Act on the Police, the Police is authorised to resort to controlled purchases and bribes. The analysis of the above provision prompted the conclusion that operational-exploratory activities in the form of a controlled purchase or bribe may be employed against the same crimes as operational control.

(3) The Police, having the status of a non-financial investigative body in cases of fiscal criminal offences proper or fiscal petty offences, is simultaneously under an obligation to notify financial investigative authorities without delay by sending a copy of the order opening the proceedings. The Police may, however, avoid this obligation by limiting its activities to securing traces and evidence of a fiscal criminal offence or a fiscal petty offence and handing the case over to the financial investigative authorities for further proceedings (Article 134 § 2 FPC). Where a perpetrator has requested a plea arrangement and received written guidance on the conditions of its admissibility, the Police is mandatorily required to hand the case over to the competent financial investigative authority (Article 134 § 4 FPC). The Police, being a non-financial investigative organ competent to conduct an investigation in a fiscal criminal matter, may open the proceedings, notifying without delay the competent financial investigative authority, or it may limit itself to securing the traces and evidence of a criminal conduct and hand the case over to the financial authority in the scope of conduct covered by fiscal criminal law. The above is possible only where the conduct constituting a criminal offence defined in the criminal provisions of a different statute and belonging to the competence of the Police simultaneously fulfils the elements of a fiscal crime and petty offence (Article 134 § 5 FPC).

(4) In reference to the powers of the Police in proceedings in relation to a fiscal criminal offence, it must be noted that they include the right to prepare an indictment if investigation of the offence is conducted in the less formal mode of inquiry (*dochodzenie*). On the other hand, the Police does not have the authority to impose protective measures under Article 22 § 3 FPC available in fiscal criminal

offences, even if the Police itself conducts the investigation into a fiscal crime or petty offence.

The Police's powers include the application of the *in-absentia* mode of proceedings when investigating either a fiscal criminal offence or a fiscal petty offence. However, the decision issued in this respect must be approved by a prosecutor if it refers to a fiscal criminal offence (Article 175 § 1 FPC second sentence).

A prosecutor conducting the prosecutor's own investigation (a more solemn, formal investigation referred to as *śledztwo*) may only entrust the Police, in cases referred to in Article 151a § 2(2)–(3) FPC, with specific activities in the investigation, which do not include presenting, amending or supplementing the charges or closing the investigation. In cases in which the use of the formal investigation is the prosecutor's decision, the prosecutor may entrust the Police with the entire conduct of the proceedings or a specific scope thereof or specific activities therein, on the basis of Article 151b § 2 FPC first sentence in conjunction with Article 118 § 1(5) FPC.

(5) In investigations in cases of fiscal criminal offences, the powers of the Police are accentuated in such a way that the Police may either refuse to open new proceedings or close existing proceedings where the perpetrator's single conduct fulfils the elements of a fiscal petty offence and a criminal offence, and criminal proceedings in the case of the latter have already been concluded with a final and unappealable conviction (Article 151 § 1 FPC).

On the other hand, the Police, as well as the Military Police and the Border Guard Service, do not have the authority to issue penalty notices due to the lack of a specific statutory authorisation. This should be viewed in a negative light because the prosecution of minor fiscal petty offences by the Police, the Military Police or the Border Guard Service would mean more expedited and less costly proceedings. I would recommend adding a provision authorising the Police, the Military Police and the Border Guard Service to issue penalty notices. An alternative solution would be to amend Article 136 § 1 FPC as follows: 'Proceedings by penalty notice shall be conducted by a financial investigative authority or an authorised representative thereof or a non-financial investigative organ; such proceedings shall not be barred by the prior commencement of an investigation.' This amendment, therefore, would consist in the deletion of the phrase, 'where a specific provision so provides'.

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PARTICIPATION OF THE POLICE IN INVESTIGATION OF FISCAL CRIMES AND PETTY OFFENCES

Summary

This article attempts to acquaint the reader with the activities of the Police as a non-financial investigative organ in fiscal criminal cases falling within the Police's area of competence determined by the subject matter. The composition of this contribution reflects two topics. The first concerns the tasks of the Police, its competence determined by the subject matter, and

the scope and manner of exercising its powers in fiscal criminal cases, with special emphasis placed on operational-exploratory activities and operational control (surveillance). The other topic focuses on the powers of the Police in the investigation, with differences related to fiscal criminal offences and fiscal petty offences. The article is summarised with conclusions.

Keywords: Police, powers, investigation, fiscal crimes, fiscal petty offences

UDZIAŁ POLICJI W POSTĘPOWANIU PRZYGOTOWAWCZYM W SPRAWACH O PRZESTĘPSTWA I WYKROCZENIA SKARBOWE

Streszczenie

Niniejszy artykuł stanowi próbę przybliżenia udziału Policji jako niefinansowego organu postępowania przygotowawczego w postępowaniu przygotowawczym w sprawach o przestępstwa skarbowe i wykroczenia skarbowe, ujawnione w zakresie jej właściwości rzeczowej. Publikacja składa się z dwóch obszarów tematycznych. Pierwszy stanowią rozważania dotyczące zadań i właściwości rzeczowej Policji oraz zakresu i sposobu wykonywania uprawnień Policji w sprawach o przestępstwa skarbowe i wykroczenia skarbowe, ze szczególnym uwzględnieniem dokonywania przez nią czynności operacyjno-rozpoznawczych i stosowania kontroli operacyjnej. Drugi obszar tematyczny został poświęcony uprawnieniom Policji w postępowaniu przygotowawczym wraz z ich podziałem na te przysługujące jej zarówno w sprawach o przestępstwa skarbowe, jak i w sprawach o wykroczenia skarbowe. Artykuł kończą wnioski.

Słowa kluczowe: Policja, uprawnienia, postępowanie przygotowawcze, przestępstwa skarbowe, wykroczenia skarbowe

PARTICIPACIÓN DE POLICÍA EN LA FASE DE INSTRUCCIÓN EN CAUSAS POR DELITOS Y FALTAS FISCALES

Resumen

El presente artículo es una prueba de aproximar el papel de policía como órgano no financiero de la fase de instrucción en la fase de instrucción en causas por delitos fiscales y faltas fiscales descubiertos en el marco de su competencia material. La publicación consta de dos partes temáticas. La primera incluye consideraciones sobre el papel y competencia material de policía y el ámbito y forma de ejecución de las facultades de policía en causas por delitos fiscales y faltas fiscales, teniendo en cuenta en particular las diligencias de operación y de reconocimiento y el control de operación. La segunda parte consiste en los derechos de policía en la fase de instrucción en causas por delitos fiscales y por faltas fiscales. El articulo termina con conclusiones.

Palabras claves: policía, derechos, fase de instrucción, delitos fiscales, faltas fiscales

УЧАСТИЕ ПОЛИЦИИ В ПОДГОТОВИТЕЛЬНОМ ПРОИЗВОДСТВЕ ПО ДЕЛАМ О НАЛОГОВЫХ ПРЕСТУПЛЕНИЯХ И ПРАВОНАРУШЕНИЯХ

Аннотация

В статье рассматривается участие полиции в качестве нефинансового процессуального органа в проведении подготовительного производства по делам о налоговых преступлениях и правонарушениях, обнаруженных в рамках ее материальной компетенции. Работа состоит из двух тематических разделов. В первом разделе обсуждаются задачи и материальная компетенция полиции, а также объем и порядок осуществления ею своих полномочий по делам о налоговых преступлениях и правонарушениях. Особое внимание уделено проведению оперативно-розыскных мероприятий и осуществлению оперативного контроля. Второй раздел посвящен объему полномочий полиции в ходе подготовительного производства. В частности, проводится различение полномочий полиции по делам о налоговых преступлениях и по делам о налоговых правонарушениях. В конце статьи приводятся выводы автора.

Ключевые слова: полиция; полномочия; подготовительное производство; налоговые преступления; налоговые правонарушения

BETEILIGUNG DER POLIZEI AM ERMITTLUNGSVERFAHREN BEI STEUERSTRAFTATEN UND STEUERORDNUNGSWIDRIGKEITEN

Zusammenfassung

In diesem Beitrag wird versucht, die Beteiligung der Polizei als nichtfinanzieller Ermittlungsbehörde an Ermittlungsverfahren wegen Steuerstraftaten und Steuerordnungswidrigkeiten darzustellen, die im Rahmen der sachlichen Zuständigkeit der Polizei festgestellt wurden. Die Publikation deckt zwei Themenbereiche ab. Im ersten werden Überlegungen zu den Aufgaben und der sachlichen Zuständigkeit der Polizei sowie zum Umfang und zu den Modalitäten für die Ausübung der polizeilichen Befugnisse bei Steuerstraftaten und Steuerordnungswidrigkeiten angestellt, wobei der Schwerpunkt auf die Ermittlungstätigkeiten und die operative Kontrolle durch die Polizei gelegt wird. Der zweite Themenbereich ist den Befugnissen der Polizei im Ermittlungsverfahren gewidmet, mit einer Trennung in die Befugnisse, die der Polizei jeweils bei Steuerstraftaten und bei Steuerordnungswidrigkeiten zur Verfügung stehen. Am Ende des Beitrags werden entsprechende Schlussfolgerungen gezogen.

Schlüsselwörter: Polizei, polizeiliche Befugnisse, Ermittlungsverfahren, Steuerstraftaten, Steuerordnungswidrigkeiten

PARTICIPATION DE LA POLICE AUX PROCÉDURES PRÉPARATOIRES EN CAS DE DÉLITS ET INFRACTIONS FISCAUX

Résumé

Cet article tente de présenter la participation de la police en tant qu'organe non financier de procédures préparatoires à la procédure préparatoire en cas de délits fiscaux et d'infractions fiscales révélées dans le cadre de sa compétence d'attribution. La publication comprend deux

domaines thématiques. Le premier consiste en des considérations concernant les tâches et la compétence d'attribution de la police ainsi que la portée et la manière d'exercer les pouvoirs de la police en cas de délits fiscaux et d'infractions fiscales, avec un accent particulier sur l'exercice des activités opérationnelles et d'enquête et l'application du contrôle opérationnel. Le deuxième domaine thématique était consacré aux pouvoirs de la police dans la procédure préparatoire ainsi qu'à leur séparation entre ceux auxquels elle a droit, tant en cas de délits fiscaux qu'en cas d'infractions fiscales. L'article se termine par des conclusions.

Mots-clés: Police, autorisations/pouvoirs, procédure préparatoire, délits fiscaux, infractions fiscales

PARTECIPAZIONE DELLA POLIZIA ALLE INDAGINI NEI PROCEDIMENTI PER REATI TRIBUTARI E PER CONTRAVVENZIONI TRIBUTARIE

Sintesi

Il presente articolo costituisce un tentativo di far conoscere da vicino la partecipazione della Polizia in quanto autorità di indagine non finanziaria alle indagini nei procedimenti per reati tributari e per contravvenzioni tributarie, emersi nell'ambito della sua competenza materiale. La pubblicazione è suddivisa in due ambiti tematici. Il primo è costituito dalle riflessioni riguardanti i compiti e la competenza materiale della Polizia e l'ambito e la modalità di attuazione dei diritti della Polizia nei procedimenti per reati tributari e per contravvenzioni tributarie, con particolare attenzione alle attività investigative e di sorveglianza operativa messe in atto dalla Polizia. Il secondo ambito tematico è dedicato ai diritti della Polizia nelle indagini, facendo distinzione tra i diritti che le spettano nei procedimenti per reati tributari da quelli che le spettano nei procedimenti per contravvenzioni tributarie. L'articolo si conclude con le conclusioni.

Parole chiave: Polizia, diritti, indagini, reati tributari, contravvenzioni tributarie

Cytuj jako:

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2018

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CRIMINAL PROCEDURE CODE

1. OBVIOUS EDITORIAL ERROR (ARTICLE 105 § 1 CPC)

In accordance with Article 105 § 1 of the Criminal Procedure Code (CPC), obvious editorial and calculation errors, and dates determined wrongly by mistake in a judgment or order or in justifications of those acts may be corrected at any time. As far as this provision is concerned, the Supreme Court judgments showed differences concerning the interpretation whether the discrepancy between a number determining a penalty or another measure which is transcribed in digits and in words is an obvious editorial error.

It was assumed that including two different amounts of a penalty (transcribed in digits and in words) in a sentence in fact causes that it is not possible to determine in what amount the penalty was actually imposed, which means that this way of specifying a penalty is not only in conflict with the content of Article 413 § 2(2) CPC, which stipulates that a judgment must be formulated in an understandable and unambiguous way, but also causes an internal contradiction in the sentence that prevents its execution, and this constitutes absolute grounds for an appeal in accordance with Article 439 § 1(7) CPC.[1] The Supreme Court recognised that pursuant

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[1] The Supreme Court judgments: of 21 October 2008, IV KK 316/08, LEX No. 469190; of 18 March 2010, III KK 25/10, OSNwSK 2010, item 569; of 11 April 2013, II KK 217/12, LEX No. 1298096; of 3 June 2015, III KK 79/15, OSNKW 2015, No. 10, item 87; of 22 October 2015, III KK 235/15, LEX No. 1820401; of 27 January 2016, V KK 413/15, LEX No. 1963397; of 19 January 2016, V KK 389/15, LEX No. 1959501; of 23 May 2017, III KK 186/17, LEX No. 2298279;

to Article 105 § 1 CPC, it is not admissible to amend a judgment when a court did not determine the type of a penalty, although there is no discrepancy between the description of its amount transcribed in digits and in words.[2] The Court indicated that: 'Article 105 § 1 CPC allows for the amendment to editorial or calculation errors in the form of a decision only in the case they do not concern the substantive content of a judgment and are obvious, i.e. they are apparent in the given context at first sight. An error can be made in the court symbol, number of files, number of an article in a legal act or a given name.'[3] The correction of editorial or calculation errors in a judgment is inadmissible only when their technical-editorial nature is not obvious and the correction of the error would actually lead to real interference into the substantive content of the judgment.[4] It is inadmissible to correct editorial errors concerning the substantive parts of a judgment, including those that interfere into a judgment with respect to a penalty by changing or adding the description of the type and amount of a penalty.[5]

The Supreme Court also adopted a different stance stating that: 'One cannot share the opinion that the inclusion of two different descriptions of the amount of a penalty makes it impossible to determine in what amount the penalty was actually imposed, which results in an internal contradiction that prevents the execution of a sentence. What is important are the circumstances of a given case which are always unique', and at the same time the Court approved of the correction made in its own judgment issued in appellate proceedings by substituting '100 (one hundred) daily rates' for '100 (two hundred) daily rates'.[6] The Court also admitted the correction of the date of an act commission in accordance with Article 105 § 1 CPC.[7] It assumed that: 'If the court of first instance had determined the type of punishment (deprivation of liberty) and its amount (8 – eight), and the only correction of the judgment had been the inclusion of the word "months" added as its clarification, as there are no doubts that the penalty imposed must have been determined in months and not years because an act under Article 288 § 1 CC committed by the accused carries a penalty of up to five years. Thus, an obvious editorial error was corrected, which is admissible pursuant to the provision of Article 105 § 1 CPC.'[8]

Z. Pachowicz, [in:] *Kodeks postępowania karnego. Komentarz*, J. Skorupka (ed.), Warszawa 2020, p. 290.

2 The Supreme Court judgment of 7 April 2010, IV KK 444/09, OSNwSK 2010, No. 1, item 663.

3 The Supreme Court ruling of 22 August 1970, III KZ 76/70, OSNKW 1970, No. 11, item 149.

4 The Supreme Court ruling of 17 September 2008, II KK 60/08, LEX No. 458853; the Supreme Court judgment of 3 June 2015, III KK 79/15, OSNKW 2015, No. 10, item 87; Z. Pachowicz, [in:] *Kodeks*, *supra* n. 1, p. 290.

5 The Supreme Court ruling of 22 August 1970, III KZ 76/70, OSNKW 1970, No. 11, item 149; the Supreme Court judgments: of 23 November 2005, IV KK 390/05, LEX No. 164378; of 21 October 2008, IV KK 316/08, LEX No. 469190; of 7 April 2010, IV KK 444/09, LEX No. 843704; of 4 December 2018, II KK 115/18, LEX No. 2623719; of 1 February 2018, II KK 300/17, LEX No. 2454222; of 13 December 2017, II KK 341/17, LEX No. 2408313; the ruling od the Court of Appeal in Kraków of 13 March 2018, II AKz 110/18, LEX No. 2609990.

6 The Supreme Court ruling of 29 November 2017, IV KK 391/17, LEX No. 2454225.

7 The Supreme Court ruling of 28 January 2009, II KK 206/08, LEX No. 486193.

8 The Supreme Court judgment of 4 October 2016, V KK 85/16, LEX No. 2151451.

Adjudicating on the issue, in the resolution of seven judges of 28 June 2018, I KZP 2/18,[9] the Supreme Court approved of the latter opinion and stated that:

> **Under the process of correction of an obvious editorial error (Article 105 § 1 CPC), the default that consists in a different formulation of a penalty amount (in digits and in words) prescribed in a sentence or another penal response measure may be eliminated. An editorial error may be recognised as an obvious one if, after a court analyses the content of a sentence and takes into account the legal classification of the given offence, grounds for conviction and the penalty amount, it is established that only one of the formulations of the penalty (another penal response measure) reflects the amount of penalty (another penal response measure) that could have been imposed based on the provisions of law referred to therein.**

It is a right opinion mainly for practical reasons and is not subject to unnecessary formalism. Justifying it, the Supreme Court referred to its former opinion that correction made in accordance with Article 105 CPC may concern every 'element' of a judgment or an order regardless of its procedural significance and substantive nature. However, it cannot lead to the change of the substantive content of the judgment or the order or their justification because such changes to their content can only be introduced as a result of hearing an appeal or under the process laid down in Article 420 CPC.[10]

The linguistic interpretation of the phrase 'obvious editorial error' also supports the Supreme Court's stance. An 'error', within its linguistic meaning, means: 'recognition, an opinion that is in conflict with real circumstances, inappropriate behaviour or move; a mistake, inaccuracy'; 'making of a mistake, a mistake, inaccuracy'; 'a mistake, usually a minor one'.[11] In this context, an error is a discrepancy between the actual, being in agreement with the real circumstances, state of things and the state adopted by a court in a judgment or ruling. An error is an unintended judgment that is in conflict with real circumstances, which does not result from purposeful action.[12] 'Editorial' means 'relating to text edition'; 'one that is connected with the process of transcribing'.[13] An error results from technical recording of some

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[9] OSNKW 2018, No. 8, item 54.

[10] Resolution of seven judges of the Supreme Court of 28 March 2012, I KZP 24/11, OSNKW 2012, No. 4, item 35 with a gloss of approval by D. Drajewicz, LEX/el. 2012 and similar comments by R.A. Stefański, *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie postępowania karnego za 2012 r.*, Ius Novum 2, 2013, pp. 181–186; the Supreme Court ruling of 4 January 2017, II KK 274/16, LEX No. 2203512; the Supreme Court ruling of 16 December 2009, IV KK 347/09, OSNwSK 2009, item 2572; the ruling of the Court of Appeal in Białystok of 20 January 2011, II AKz 13/11, LEX No. 1134039 with a critical gloss by B. Gadecki, GSP-Prz. Orz. 2011, No. 3, pp. 137–144; M. Kurowski, [in:] *Kodeks postępowania karnego. Komentarz*, D. Świecki (ed.), Vol. I, Warszawa 2013, p. 418; H. Paluszkiewicz, [in:] *Kodeks postępowania karnego. Komentarz*, K. Dudka (ed.), Warszawa 2018, p. 262.

[11] *Słownik języka polskiego*, M. Szymczak (ed.), Vol. 2, Warszawa 1982, p. 799; *Uniwersalny słownik języka polskiego*, S. Dubisz (ed.), Vol. 3, Warszawa 2003, p. 222; *Nowy słownik języka polskiego*, E. Sobol (ed.), Warszawa 2003, p. 599; *Inny słownik języka polskiego*, M. Bańko (ed.), Vol. I, Warszawa 2000, p. 1164.

[12] A. Lach, *Glosa do postanowienia SN z 27.02.2008 r., IV KO 21/08*, LEX 2008.

[13] *Uniwersalny słownik*, *supra* n. 11, p. 469, *Nowy słownik*, *supra* n. 11, p. 664; *Inny słownik języka polskiego*, M. Bańko (ed.), Vol. II, Warszawa 2000, p. 77.

facts in a different form, and not the process of drawing conclusions.[14] The essence of obviousness of an editorial error covers objectively recognised circumstances that take place in the course of action that unambiguously, with no effort of undertaking any interpretational steps, indicates that an error and not a purposeful activity occurred.[15] In case of doubts whether the given content of a judgment results from an error or an intended action, obviousness cannot be taken into account. At the same time, an error must be purely technical in nature, must result from carelessness or a hurry in which an author of a judgment is, including the process of copying some elements of another judgment that is recognised as a pattern in some types of cases with the use of the electronic system but without appropriate proofreading.[16]

The judicature rightly indicates that:

– 'An obvious editorial error the correction of which is admissible in accordance with Article 105 § 1 CPC consists in erroneous spelling of particular words composing a document content; thus, it is technical in nature, not resulting from the process of drawing conclusions. It constitutes unintended opinion that is not in conformity with real circumstances and that is not a result of purposeful action.'[17]
– 'An error that is subject to amendment pursuant to the provision discussed must, however, in the light of the circumstances of a given case, not raise any doubts, and be a certain, unquestionable, i.e. obvious, error concerning both the aspect of nature that is only an editorial or calculation and only technical one and the aspect of an unchallenged court's error.'[18]

In the above-mentioned resolution, the Supreme Court rightly pointed out that a different transcript of the penalty imposed in a sentence in digits and words is absolutely not a purposeful description, and thus it is an error and undoubtedly it is editorial in nature because a sentence is developed in writing (Article 412 CPC). However, the substantive content of a judgment or order cannot be changed or supplemented. The existence or the lack of conditions for amendment to the content of a sentence with a discrepancy between an amount transcribed in digits and words depends only on the content of a sentence alone and not other procedural documents, including the justification of a sentence. This is a sentence developed in writing (Article 412 CPC) that contains adjudication on punishment (Article 413 § 2(2) CPC); thus, it is carried out immediately after a discussion and voting in the form of recording a penalty imposed in writing. In the Supreme Court's right opinion, an editorial error concerning a penalty transcribed differently in digits and in words is obvious in nature when it can be determined without an analysis of the justification of a sentence or any other documents collected during a trial. The assessment is only based on an analysis of the content of a sentence, the classification of an offence attributed to the accused, which results in the level of penal response,

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[14] M. Kurowski, [in:] *Kodeks*, 2013, *supra* n. 10, p. 419.

[15] H. Paluszkiewicz, [in:] *Kodeks*, 2018, *supra* n. 10, p. 261.

[16] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz. Artykuły 1–467*, Vol. I, Warszawa 2014, p. 428.

[17] The Supreme Court ruling of 31 July 2018, II KK 431/17, LEX No. 2530664.

[18] The Supreme Court judgment of 24 April 2018, V KK 379/17, LEX No. 2490933.

grounds for conviction and a penalty amount. At the same time, it should be taken into account whether the provisions aggravating punishment (Article 64 § 1 and § 2 CC, Article 65 CC, Article 91 § 1 CC) or those mitigating it (Article 60 § 6 CC and Article 37a and b CC) have been applied or not.

The requirement of correcting such an error only during appellate or cassation proceedings would be an unnecessary waste of time and generate additional costs.

2. SCOPE OF SURVEILLANCE (ARTICLE 168B CPC)

Article 168b CPC authorises a prosecutor to take a decision on the use of evidence obtained in the course of surveillance concerning an offence prosecuted *ex officio* or a fiscal offence in criminal proceedings concerning an offence other than the one that is subject to a surveillance order, i.e. going beyond the objective scope, or concerning an offence prosecuted *ex officio* or a fiscal offence committed by a person other than the one that is subject to a surveillance order, i.e. going beyond the subjective scope. In the light of this regulation a problem occurred whether the phrase 'an offence prosecuted *ex officio* or a fiscal offence other than the one that is subject to a surveillance order' covers all offences prosecuted *ex officio* or fiscal offences or only the offences classified in Article 19 para. 1 of the Act of 6 April 1990 on the Police.[19] The problem is not unanimously solved in the doctrine, where there are opinions that a prosecutor's authorisation covers:

(1) only offences prosecuted *ex officio* and fiscal offences that can be subject to surveillance based on special provisions;[20]
(2) not only offences and fiscal offences that can be subject to surveillance based on special provisions; it is emphasised, however, that it raises considerable doubts whether this view is in conformity with the Constitution of the Republic of Poland.[21]

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[19] Dz.U. 2020, item 360, as amended.

[20] Z. Niemczyk, *Nowy kształt kontroli operacyjnej po zmianach ustawy o Policji i Kodeksu postępowania karnego*, Kwartalnik Krajowej Szkoły Sędziów i Prokuratorów 2, 2017, p. 2224; J. Skorupka, *Prokonstytucyjna wykładnia przepisów prawa dowodowego w procesie karnym*, [in:] *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, T. Grzegorczyk, R. Olszewski (eds), Warszawa 2017, p. 363; D. Gruszecka, [in:] *Kodeks*, J. Skorupka (ed.), 2020, *supra* n. 1, p. 368.

[21] T. Grzegorczyk, *Kodeksowe legalizowanie w procesie karnym, przez nowelizację z dnia 11 marca 2016 r., dowodów uzyskanych za pomocą przestępstwa lub z naruszeniem przepisów postępowania poza granicami zgody, udzielonej przez sąd na wkroczenie w sferę konstytucyjnie chronionych praw i wolności*, [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, S. Steinborn, K. Woźniewski (eds), Gdańsk 2018, pp. 333–337; S. Brzozowski, *Wykorzystywanie dowodów uzyskanych w toku kontroli operacyjnej w kontekście art. 168b Kodeksu postępowania karnego*, Palestra 6, 2016, pp. 23–25; S. Hoc, J. Kudła, *Zgoda następcza z art. 168b Kodeksu postępowania karnego. Komentarz praktyczny*, LEX/el. 2016, theses 9 and 10; P. Daniluk, *Instytucja tzw. zgody następczej po nowelizacji z 11 marca 2016 r. w świetle standardów konstytucyjnych i konwencyjnych*, Studia Prawnicze 3, 2017, pp. 93–99; B. Sitkiewicz, *Wykorzystanie dowodów uzyskanych w ramach kontroli operacyjnej oraz podsłuchu procesowego*, [in:] *Postępowanie karne po nowelizacji z dnia 11 marca 2016 r.*, A. Lach (ed.), Warszawa 2017, pp. 117–119; K. Burdziak, *Dowody uzyskane w toku kontroli operacyjnej*, [in:] *Dynamika zmian w prawie*, M. Nawrocki, M. Rylski (eds), Warszawa 2017, pp. 54–60; P. Wiliński, *Konstytucyjny standard*

In the resolution of seven judges of 28 June 2018, I KZP 4/18,[22] the Supreme Court stated that:

> **The phrase 'an offence prosecuted *ex officio* or a fiscal offence other than the one that is subject to a surveillance order' used in Article 168b CPC covers only those offences in relation to which a court can give consent to rule surveillance, including those referred to in Article 19 para. 1 of the Act of 6 April 1990 on the Police (Dz.U. 2017, item 2067, consolidated text, as amended).**

The opinion is right,[23] although it encountered criticism.[24] Justifying its stance, the Court assumed that the interpretation of Article 168b CPC must be in conformity with the Constitution of the Republic of Poland and international legal norms. Thus, the Court started the interpretation stating that the provision is not independent in nature because it concerns non-procedural control that is regulated in special provisions, inter alia, Article 19 of the Act on the Police, and is admissible in relation to offences listed in this provision. The Supreme Court is right to argue that it would be in conflict with fundamental principles of logical interpretation to assume that there are statutory restrictions on obtaining primary consent to surveillance, and in the case of the secondary surveillance, there are no restrictions of this type. With the use of reasoning based on the *argumentum a minori ad maius* principle, the Court rightly indicates that the scope of secondary surveillance cannot be broader than the scope of primary surveillance. If, in order to obtain consent to surveillance, a motion to apply it must concern offences referred to in the catalogue laid down in Article 19 para. 1 of the Act on the Police and broader surveillance is prohibited, the same catalogue should be applied to surveillance conducted in the background of this consent.

The statement made by the Supreme Court that if Poland is to be a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland), the prosecution bodies cannot have at their disposal instruments in the form of almost unlimited scope of surveillance being beyond judicial supervision deserves absolute approval.

It is significant that the Court made reference to the statement of the Constitutional Tribunal that: 'as concerns the grounds for ruling the application of surveillance, in order to be able to speak about the maintenance of the constitutional standard, the legislator should define a closed and possibly narrow catalogue of serious offences justifying this type of interference into the status of an individual,'[25] which covers

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legalności dowodu w procesie karnym, [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, S. Steinborn, K. Woźniewski (eds), Gdańsk 2018, pp. 131–314.

[22] OSNKW 2018, No. 8, item 53.

[23] C. Kulesza, [in:] *Kodeks*, K. Dudka (ed.), 2018, *supra* n. 10, p. 349; D. Czerwińska, *Problematyka zgody następczej na wykorzystanie tzw. przypadkowych znalezisk po 15.04.2016 r.*, Przegląd Sądowy 4, 2019, pp. 84–85.

[24] See glosses on this resolution by J. Skorupka, OSP 2019, No. 1, pp. 72–80; B. Gadecki, OSP 2019, No. 1, pp. 80–86; K.T. Boratyńska, P. Czarnecki, M. Królikowski, A. Lach, [in:] *Kodeks postępowania karnego. Komentarz*, A. Sakowicz (ed.), Warszawa 2020, p. 517.

[25] The Constitutional Tribunal judgment of 30 July 2014, K 23/11, OTK ZU 2014, No. 7A, item 80.

both primary and subsequent surveillance. Interference into human freedoms, the human right to privacy, cannot be unlimited, and in the context of Article 168b CPC, the catalogue of serious offences justifying the application of surveillance is the restriction. The judicature rightly assumes that:

> The catalogue laid down in Article 19 para. 1 of the Act on the Police should be developed based on strict compliance with the principle of proportionality and respect for an individual's privacy. If the legislator, who is rational, having in mind the above-mentioned issues, decided to narrow the scope of prohibited acts that could be subject to police surveillance, there are no arguments (except the purpose-related ones) for freely extending this catalogue and including other offences therein. And this means that only evidence obtained in accordance with Article 19 of the Act on the Police concerning offences laid down in the catalogue under para. 1 can be used in a court proceedings.[26]

The Supreme Court's statement that a prosecutor's decision concerning the use of evidence obtained from surveillance in criminal proceedings is effective only in the investigation phase is controversial. The Court stated as follows:

> the opinion that indicates that a prosecutor could arbitrarily decide on the use of evidence obtained from secondary surveillance in the course of the whole criminal proceedings, thus also in the court proceedings, is unacceptable. There are no doubts that the prosecutor must take a decision concerning the use of material obtained as a result of surveillance: whether it can be used in a trial and presented to a court with an indictment or not. The prosecutor's decision in the area refers to the final directive of Article 168b CPC. On the other hand, it must be regarded as obvious that at the stage of judicial proceedings, only the court may take a decision on admitting evidence, not the prosecutor. This results from the elementary rule governing this stage of criminal proceedings expressed in Article 368 CPC […] Thus, as a rule, the statement closing Article 168b CPC: 'a prosecutor takes a decision concerning the use of evidence in criminal proceedings' is technical in nature and does not bear any new entitlements for the prosecutor. It is due to the fact that the prosecutor possessing material obtained in the course of surveillance must assess its procedural usefulness. As a result of this assessment, adequate evidentiary motions will be added to an indictment or the material will be recognised as procedurally useless (due to its low evidentiary value or a defective way of obtaining it), which should result in its destruction.[27]

It is assumed in the legal doctrine that the competence that a prosecutor is awarded under Article 168b CPC is expressed in the possibility of getting acquainted with information obtained in an unlawful way and then deciding on its use for the purpose of carrying out other evidence-related activities.[28]

It might seem that a court may dismiss the evidence due to its unlawful nature.[29] It can be argued that binding a court by this decision would lead to the infringement of a court's jurisdictional independence, because in accordance with Article 8 CPC,

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[26] Judgment of the Court of Appeal in Poznań of 7 July 2017, II AKa 63/17, LEX No. 2402504.

[27] See also the judgment of the Court of Appeal in Warsaw of 13 June 2016, II AKa 133/16, LEX No. 2171252; D. Czerwińska, *supra* n. 23, pp. 83–84.

[28] J. Skorupka, *Glosa do uchwały 7 sędziów SN z dnia 28 czerwca 2018 r., I KZP 4/18*, OSP 2019, No. 1, p. 77.

[29] Thus, D. Czerwińska, *supra* n. 23, p. 85.

a criminal court independently adjudicates on factual or legal issues and is not bound by an adjudication of another court or body (§ 1), and it is only bound by valid and final court judgments that develop law or legal relations (§ 2). It is hard to recognise a prosecutor's decision on the use of evidence obtained in the course of surveillance and tapping or other forms of information in criminal proceedings as the latter.[30] It is indicated that a court is not bound by a prosecutor's decision and may refuse to admit evidence presented by the prosecutor.[31] It is believed that in the case a motion to admit evidence derived from information obtained from surveillance and tapping beyond statutory limits is lodged with an indictment, a court president should refer the case to a session to be admitted or a court should take such a decision at a preparatory session before a trial (Article 349).[32] It is stated that the adoption of the prosecutor's authoritative competence to arbitrarily impose evidentiary grounds for adjudication would lead to annihilation of procedural justice as well as would negate the guarantee function of criminal procedure norms. The reasons behind purpose-related and functional interpretation lead to a conclusion that deriving the prosecutor's authoritative competence binding the court to admit material obtained from surveillance from the content of Article 168b CPC would lead to inacceptable conclusions from the axiological point of view.[33]

The arguments are not convincing because the issue concerns admission of evidence, and a prosecutor is competent to do that in preparatory proceedings. Such prosecutor's decision causes that this evidence is presented at a trial and the court is not authorised to refuse to admit it because, in accordance with Article 170 § 1 CPC, it can only dismiss an evidence-related motion. At the same time, including evidence in an indictment, the prosecutor does not request that it be admitted but, *verba legis*, that 'it be heard at a trial' (Article 333 § 1(2) CPC). The word 'hear' means 'examine',[34] which makes it necessary to assume that the court must hear evidence and not decide whether to admit it or not.[35]

Thus, the court is bound by the prosecutor's decision to hear such evidence in criminal proceedings but assesses it independently and may refuse to take it into account as grounds for establishment of facts and adjudication due to unconstitutionality of Article 168b CPC, which allows the prosecutor to use the evidence, although it has been obtained with infringement of the provisions regulating the scope of surveillance and tapping or information transfer.[36] All public authorities, including law enforcement and justice administration bodies, in

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30 R.A. Stefański, *Węzłowe problemy kontroli i utrwalania rozmów telefonicznych*, [in:] *Kontrola korespondencji*, B. Opaliński, M. Rogalski (eds), Warszawa 2018, p. 64.

31 D. Gruszecka, *supra* n. 20, p. 367.

32 K.T. Boratyńska et al., [in:] *Kodeks*, A. Sakowicz (ed.), 2020, *supra* n. 24, p. 645; D. Gruszecka, *supra* n. 20, p. 369.

33 D. Szumiło-Kulczycka, *Dalsze wykorzystywanie materiałów z kontroli operacyjnej (uwagi na tle art. 168b k.p.k.)*, Państwo i Prawo 10, 2018, p. 111.

34 *Praktyczny słownik współczesnej polszczyzny*, H. Zgółkowa (ed.), Vol. 33, Poznań 2001, p. 429.

35 R.A. Stefański, *Pozycja prokuratora w zreformowanej procedurze karnej a standardy rzetelnego procesu*, [in:] *Ewolucja polskiego wymiaru sprawiedliwości w latach 2013–2018 w świetle standardów rzetelnego procesu*, C. Kulesza, A. Sakowicz (eds), Białystok 2019, p. 76.

36 R.A. Stefański, 2018, *supra* n. 30, p. 67.

accordance with Article 7 of the Constitution of the Republic of Poland, must act within the limits of law. The activities taken by those bodies are determined by law, which should lay down the grounds for them and their limits. The requirement of grounds for public authorities' actions is strictly connected with the necessity to undertake action within the limits of law. Going beyond those limits is classified as an action with no legal grounds, thus the action beyond the limits determined by law.[37] All activities performed in criminal proceedings should be based on the provisions of law and conducted within the limits laid down in law.[38]

The use of unlawful evidence infringes the principle of a fair trial. The judicature rightly emphasises that:

> the right to a fair trial has such an important position in the catalogue of the rights of the accused that it cannot be sacrificed for the efficiency in the prosecution of crimes. Public interest cannot justify the use of evidence obtained in an unlawful way. Using it without the evaluation whether the action is moral (when law enforcement bodies infringe the law in order to obtain evidence for another person's breach of law) makes the proceedings unfair, especially as the admission of this evidence would be decisive for adjudication on the guilt of the accused.[39]

In fact the European Court of Human Rights stated that, while Article 6 ECHR guarantees the right to a fair trial, it does not lay down any rules concerning the admissibility of evidence; that is why, the issue is subject to national law and it is not the Court's competence to adjudicate on the rules whether particular types of evidence, e.g. evidence obtained unlawfully, can be admitted or not. This competence concerns the issue whether proceedings as a whole, including the method of obtaining evidence, have been reliable and just.[40]

A prosecutor does not maintain his competence in court proceedings; this relates to a situation when the problem occurs in the proceedings. Due to the fact that the court hosts the proceedings and the prosecutor is only a party to it, there is no rational justification for granting him this right. The prosecutor may lodge a motion to admit evidence from the material obtained during surveillance and the court may dismiss this motion in accordance with Article 170 § 1(1) CPC if it decides that

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[37] T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2003, p. 231; the Constitutional Tribunal judgments: of 14 June 2000, P 3/00, OTK 2000, No. 5, item 138; of 20 October 1986, P 2/86, OTK 1986, No. 6; of 19 October 1993, K 14/92, OTK 1993, No. 35; of 15 March 1995, K 1/95, OTK 1995, No. 7; of 15 July1996, U 3/96, OTK 1996, No. 4, item 31.

[38] P. Kardas, *Problem granic legalności czynności uczestników postępowania karnego i konsekwencji ich przekroczenia*, [in:] *Granice procesu karnego. Legalność działań uczestników postępowania*, D. Gruszecka, J. Skorupka (eds), Warszawa 2015, p. 14; R.A. Stefański, *Stosunek sądu do dowodów nielegalnych*, [in:] *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, D. Kala, I. Zgoliński (eds), Warszawa 2018, pp. 45–58.

[39] The Supreme Court rulings: of 19 March 2014, II KK 265/13, OSNKW 2014, No. 9, item 71; of 14 January 2004, IV KK 200/03, LEX No. 162404; of 30 November 2010, III KK 152/10, OSNKW 2011, No. 1, item 8; judgment of the Court of Appeal in Katowice of 11 October 2012, II AKa 368/12, LEX No. 135640.

[40] The ECtHR judgments: of 12 July 1988 in *Schenk v. Switzerland*, application no. 10862/84, LEX No. 81067; of 12 May 2000 in *Khan v. the United Kingdom*, application no. 35394/97, LEX No. 76868; L. Garlicki, *Aktualne orzecznictwo Europejskiego Trybunału Praw Człowieka*, [in:] *Orzecznictwo sądowe w sprawach karnych. Aspekty europejskie i unijne*, L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds), Warszawa 2008, p. 26.

hearing this evidence is unconstitutional and inadmissible.[41] The opinion that the court is obliged to take this evidence into account because statute allows it should not be approved of.[42]

3. COMPLAINT ABOUT REPEATED DECISIONS ON REFUSAL TO INSTIGATE PREPARATORY PROCEEDINGS OR ON THEIR DISCONTINUATION (ARTICLE 330 § 2 CPC)

The Supreme Court, in its ruling of 29 November 2018, I KZP 12/18,[43] explained that:

> **Repeated decisions refusing to instigate preparatory proceedings or on their discontinuation issued by a proceeding body pursuant to Article 330 § 2 CPC are not decisions closing the way to obtaining a judgment referred to in Article 459 § 1 CPC because they do not create a procedural situation that results in an absolute decision that the sentence will not be issued. The content of Article 55 § 1 CPC and Article 330 § 2 CPC in relation to the rights of the aggrieved constitutes a statutory exception to the rule concerning the right to appeal against the decision on the refusal to instigate preparatory proceedings or on their discontinuation laid down in Article 306 § 1 or § 1a CPC in conjunction with Article 459 § 2 CPC.**

At the time of its issue the stand was right, however, it became out-of-date due to the amendment to Article 330 § 2 CPC made by the Act of 19 July 2019 amending the Act: Code of Criminal Procedure and some other acts,[44] which allowed an appeal against a repeated decision to a superior prosecutor in accordance with Article 330 § 2 CPC.

4. SPECIFIC LEGAL QUESTIONS (ARTICLE 441 § 1 CPC)

The Supreme Court expressed accurate opinions on specific legal questions. They are as follows:

– Effective submission of a request to the Supreme Court for answering a legal question in accordance with Article 441 § 1 CPC requires that three conditions occur jointly. The question must be asked about: (a) a 'legal' issue, i.e. a serious interpretational problem such as one concerning a provision (provisions) interpreted in a different way in case law or a provision that is erroneously edited or unclearly formulated making different interpretations possible; (b) an issue that needs a 'fundamental interpretation of statute', i.e. concerning a situation where a norm makes a different interpretation possible, which has a negative impact on the functioning of law in practice; (c) an issue that

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41 R.A. Stefański, [in:] *Kodeks postępowania karnego. Komentarz*, R.A. Stefański, S. Zabłocki (eds), Vol. II, Warszawa 2019, p. 84.

42 J. Machlańska, *Procesowe wykorzystanie podsłuchu w nowelizacji kodeksu postępowania karnego oraz niektórych innych ustaw z 11 marca 2016 r. w świetle prawa do obrony*, Studia Iuridica Lublinensia 4, 2016, p. 135.

43 OSNKW 2019, No. 2, item 8.

44 Dz.U. 2019, item 1694.

occurs 'in connection with hearing an appeal', i.e. is connected with a particular case so that an appeal cannot be adjudicated on until the legal issue is resolved. However, a legal issue cannot concern the way of adjudicating of a particular case, the application of regulations, confirmation or negation of a particular interpretational opinion presented by an appellate court and issues connected with fact finding.[45]

- An appellate court's submission of a legal question is effective when all the conditions laid down in the provision are fulfilled. Thus, it must be a 'legal issue' requiring 'fundamental interpretation of statute' that occurs when 'an appellate measure is heard'. It should be reminded that the institution of resolutions of the Supreme Court adopted pursuant to this provision in connection with legal questions asked by an appellate court constitutes an exception to the general rule of independent adjudication by a competent court hearing a particular case, which is laid down in Article 8 § 1 CPC. Thus, under procedural statute, the scope of those resolutions is limited to basic issues requiring interpretation of statute. The Supreme Court's stance is consistent with regard to the requirement that legal questions should be asked only in case a legal issue occurs when an appeal is heard, i.e. when a serious interpretational problem occurs in connection with a provision that is diversely interpreted or a provision that is defectively or unclearly formulated. On the other hand, a court of second instance is obliged to provide detailed justification of doubts it has and why it believes they are serious or why the explanation of the issue requires fundamental interpretation of statute.[46]
- Asking a legal question, an appellate court is obliged not only to formulate the question in a precise way, but also prove in the justification of its decision why there is a need for the Supreme Court's fundamental interpretation of a particular provision in a given case. However, if a court fails to fully meet the requirements, inappropriate fulfilment of the requirement does not exclude a possibility of adopting a relevant resolution by the Supreme Court when the presented issue clearly seems to be real, important and requiring fundamental interpretation of statute.[47]
- Asking a legal question as an exception to the rule of jurisdictional independence of a criminal court must be preceded by an attempt to eliminate interpretational doubts via operative interpretation. The subject matter of the legal question cannot concern issues connected with the establishment of facts, the evaluation of evidence or the possibility of applying a particular norm to the established actual state. The mode laid down in Article 441 CPC does not serve the need for confirming by the Supreme Court that an appellate court's interpretation is appropriate.[48]

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[45] The Supreme Court rulings: of 25 October 2018, I KZP 9/18, OSNKW 2018, No. 12, item 76; of 28 June 2018, I KZP 1/18, OSNKW 2018, No. 8, item 56; of 25 October 2018, I KZP 11/18, OSNKW 2018, No. 12, item 77; of 28 March 2018, I KZP 16/17, OSNKW 2018, No. 7, item 47.

[46] The Supreme Court ruling of 28 March 2018, I KZP 15/17, OSNKW 2018, No. 6, item 43.

[47] The Supreme Court resolution of 19 December 2018, I KZP 13/18, OSNKW 2019, No. 1, item 1.

[48] The Supreme Court ruling of 25 January 2018, I KZP 10/17, OSNKW 2018, No. 3, item 24.

5. ABSTRACT LEGAL QUESTIONS (ARTICLE 83 § 1 ACT OF 8 DECEMBER ON THE SUPREME COURT)

The so-called abstract legal questions are specified in Article 60 § 1 of the Act of 8 December 2017 on the Supreme Court[49]. They are a means of judicial supervision aimed at standardisation of case law, including the Supreme Court case law, and the subject matter of a resolution adopted in this mode is the explanation of the provisions of law the interpretation, not application, of which has led to discrepancies in case law.[50]

In the resolution of seven judges of 20 September 2018, I KZP 7/18,[51] the Supreme rightly held that:

> **In accordance with established opinions that are still up-to-date, regardless of the fact that a new Act on the Supreme Court was passed, the basic grounds for a motion referred to in Article 83 § 1 of the Act of 8 December 2017 on the Supreme Court do not consist in discrepancies in case law, especially a discrepancy resulting from a different application of law, but a discrepancy in the interpretation of law. The problem of discrepancies in the interpretation of law is not resolved in this mode in connection with a specific case, but *in abstracto*, and is to serve ensuring standardisation of case law. That is why, it is assumed that the uniform interpretation of particular legal measures adopted by courts prevents the use of this instrument.**

The opinion in the resolution of seven judges of the Supreme Court of 28 June 2018, I KZP 3/18,[52] should be assessed in the same way. It indicates that:

> **Legal provisions are not explained in this mode in connection with a particular case, but *in abstracto*, and this aims to ensure uniformity of case law (Article 83 § 1 of the Act on the Supreme Court, unlike the regulation that was in force before, indicates that directly) because the Supreme Court provides interpretation in this mode when discrepancies in case law occur.**

The opinion is right and is presented in the doctrine.[53]

6. POSSIBILITY OF QUASHING AN ACQUITTAL OR DISCONTINUATION OF CRIMINAL PROCEEDINGS AND REFERRING A CASE FOR REHEARING BASED ON THE *NE PEIUS* RULE LAID DOWN IN ARTICLE 454 § 1 CPC

In accordance with Article 454 § 1 CPC, an appellate court cannot convict the accused who was acquitted by a court of first instance or when the first instance proceedings against him was discontinued and, in accordance with Article 427 § 2 CPC, an

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[49] Dz.U. 2019, item 825, as amended.

[50] The Supreme Court ruling of 25 February 2005, I KZP 33/04, LEX No. 142537; the Supreme Court resolutions: of 17 December 2008, I KZP 27/08, OSNKW 2009, No. 1, item 1; of 28 March 2012, I KZP 24/11, OSNKW 2012, No. 4, item 35; of 29 October 2012, I KZP 15/12, OSNKW 2012, No. 11, item 111; R.A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych*, Kraków 2001, p. 145.

[51] OSNKW 2018, No. 11, item 72.

[52] OSNKW 2018, No. 8, item 55.

[53] S. Włodyka, *Przesłanki dopuszczalności pytań prawnych do Sądu Najwyższego*, Nowe Prawo 2, 1971, pp. 183–185; R.A. Stefański, 2001, *supra* n. 50, pp. 145–146.

appellate court quashes a judgment and refers a case for rehearing, inter alia, in the case laid down in Article 454 CPC.

As far as those provisions are concerned, the Supreme Court was asked the following question:

> Does the requirement laid down in Article 437 § 2 CPC in conjunction with Article 454 § 1 CPC concerning quashing of the first-instance court's decision on acquittal and referring a case to it for rehearing have to be fulfilled just when an appellate court recognises an infringement of evidence-hearing procedure that allows for recognition of acquittal, discontinuation or conditional discontinuation of proceedings as defective and opens a possibility of sentencing or only when, after this default is eliminated by supplementing the evidence--hearing proceedings, the appellate court states that there are grounds for conviction?

The grounds for this question consisted in discrepancies in the interpretation that can be found in the Supreme Court case law. The Court held that:

(1) Quashing a judgment and referring a case to the first-instance court for rehearing due to the *ne peius* rule laid down in Article 454 § 1 CPC (Article 437 § 2 second sentence CPC) is possible only when, after an appellate court eliminates recognised default referred to in Article 438 paras 1–3 CPC, e.g. by supplementing evidence-hearing proceedings in the course of appellate proceedings or evaluating evidence in these proceedings in accordance with Article 7 CPC, there are grounds for conviction.[54] A court of second instance, within the appellate proceeding model adopted, is obliged to supplement evidence in the course of appellate supervision conducted and to do it regardless of the type sentence that is subject to supervision. Only after performing this activity, the issue of the scope of the appellate court's adjudication on default recognised as relative grounds for an appeal can be discussed (Article 438 CPC). In case of acquittal or conditional discontinuation of proceedings, when there are grounds for conviction, the appellate court's judgment may only concern cassation (Article 454 § 1 CPC). On the other hand, when conviction is appealed against, the appellate court issues an amending judgment (argument under Article 437 § 2 second sentence *in fine* CPC).[55]

(2) In a situation when an appellate court notices that there were no grounds for an acquittal because some errors were made and it recognises that it is necessary to supplement the trial, it is neither justified nor purposeful to conduct its own evidence hearing within appellate proceedings. If these proceedings led to a conviction and, due to Article 454 CPC, the court would have to issue a cassation judgment, thus, the whole extended appellate proceedings would make no sense. On the other hand, there would be no grounds for conducting them in order to ensure the parties that the acquittal was right.[56]

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[54] The Supreme Court judgments: of 27 July 2017, IV KS 2/17, OSNKW 2018, No. 5, item 35; of 10 August 2017, III KS 5/17, LEX No. 2340594; of 20 September 2017, V KS 5/17, LEX No. 2389622.

[55] The Supreme Court judgments: of 14 March 2018, IV KS 4/18, OSNKW 2018, No. 7, item 51; of 23 August 2018, V KS 16/18, LEX No. 2538860; of 12 July 2017, III KS 4/17, LEX No. 2341782.

[56] The Supreme Court rulings: of 15 November 2017, IV KS 3/17, unpublished; of 21 November 2017, III KS 8/17, LEX No. 2428758; of 21 March 2018, III KS 2/18, unpublished;

In the resolution of seven judges of 20 September 2018, I KZP 10/18,[57] the Supreme Court approved of the former opinion and stated that:

> **The possibility of quashing an acquittal, discontinuance or conditional discontinuance of criminal proceedings and referring a case for rehearing due to the *ne peius* rule laid down in Article 454 § 1 CPC (Article 437 § 2 second sentence CPC) takes place only when an appellate court, as a result of eliminating default constituting one of the grounds for an appeal laid down in Article 438 paras 1–3 CPC (i.e., for instance, after supplementing an evidence-hearing, properly evaluating evidence, and establishing facts) recognises that there are grounds for a conviction, which faces an obstacle in the form of a ban laid down in Article 454 § 1 CPC. Just a possibility of issuing such a judgment alone in the course of proceedings before a court of first instance is insufficient to assume the occurrence of the *ne peius* rule laid down in Article 454 § 1 CPC.**[58]

It is a right opinion and it was thoroughly and deeply justified. Justifying it, the Court first of all referred to the stand of the Supreme Court that:

> In the case of the *ne peius* rule under Article 454 § 1 CPC, complaint-related supervision covers the evaluation of appropriate application of this provision from the point of view of compliance with the regulation stipulating that an appellate court 'cannot convict the accused'. It is required that the court prove that if the default had not been recognised, there could have been a conviction, but the issue of a sentence is inadmissible in the appellate instance due to a ban on such adjudication. Only then the sentence subject to appeal can be quashed and the case referred to a court of first instance for rehearing.[59]

The Court also drew attention to the fact that Article 427 § 2 CPC indicates that quashing a sentence appealed against and referring a case for rehearing is an exception, and the substantive adjudication by an appellate court is a rule and leads to the conclusion of this stage of criminal proceedings. According to the Supreme Court, it is not an appellate court's failure to recognise default and its impact on the content of the judgment appealed against, but only the type of judgment that could be issued in appellate proceedings that is an obstacle in the substantive adjudication by this court in case of the *ne peius* rule (Article 454 § 1 CPC). Only the need to convict the accused who was acquitted by the first-instance court, or against whom criminal proceedings were discontinued, constitutes grounds for cassation. The necessity of convicting the accused causes the update of the ban laid down in Article 454 § 1 CPC and an appellate court cannot change the judgment and convict the accused; it can only quash the judgment and refer the case to the first-

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of 11 April 2018, IV KS 7/18, LEX No. 2499850; of 16 May 2018, V KS 7/18, LEX No. 2500563; of 16 May 2018, V KS 9/18, LEX No. 2500565.

[57] OSNKW 2018, No. 11, item 73.

[58] The thesis also considers conditional discontinuation of proceedings but it is outdated because the Act of 19 July 2019 amending the Act: Criminal Code Procedure and some other acts (Dz.U. 2019, item 1694) deleted a phrase 'conditional discontinuation' from Article 454 § 1 CPC.

[59] The resolution of seven judges of the Supreme Court of 25 January 2018, I KZP 13/17, OSNKW 2018, No. 3, item 23.

instance court for rehearing (Article 437 § 2 second sentence CPC). Just a statement that the appeal is justified and the acquittal or discontinuation of proceedings that are appealed against is erroneous is insufficient to quash the judgment appealed against. If Article 454 § 1 CPC only excludes the possibility of convicting the accused, the Supreme Court continues, in such cases the appellate court should conduct proceedings until the conditions occur to issue a judgment upholding the first-instance court judgment or discontinuing proceedings, or on cassation in case of recognition of grounds for conviction.

7. SCOPE OF THE SUPREME COURT'S SUPERVISION AFTER A COMPLAINT ABOUT AN APPELLATE COURT'S JUDGMENT QUASHING FIRST-INSTANCE COURT'S JUDGEMNT AND REFERRING A CASE FOR REHEARING (ARTICLE 539A § 1 AND § 3 CPC)

In accordance with Article 539a CPC, parties have the right to complain to the Supreme Court about an appellate court's judgment quashing the first-instance court's judgment and referring a case for rehearing (§ 1); the complaint can be lodged only in case of infringement of Article 437 CPC or because of default laid down in Article 439 § 1 CPC. The regulation raises doubts concerning the scope of the Supreme Court's supervision after such a complaint is lodged, i.e. whether it covers the analysis of the default established by the appellate court but different from that laid down in Article 539a § 3 CPC, provided that it results in the infringement of Article 437 § 2 CPC within the scope of grounds for quashing the first-instance court judgment determined in this provision, or whether the scope of this supervision is limited to examination if the default recognised by the appellate court constitutes grounds for cassation.

The Supreme Court did not adopt a uniform stance on this issue. It stated that the Supreme Court:

(1) is not authorised to examine whether charges listed in the appeal are right and if the default recognised by an appellate court actually occurred, but only checks whether in the light of the default recognised it was necessary to quash the first--instance court judgment;[60]
(2) can examine grounds for admitting appeal charges if they resulted in the infringement of Article 437 § 2 CPC within the scope of the grounds for quashing the first-instance court judgment and referring the case for rehearing laid down in this provision.[61]

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[60] The Supreme Court ruling of 9 December 2016, IV KS 4/16, LEX No. 2165595; the Supreme Court ruling of 10 February 2017, IV KS 6/16, LEX No. 2204960; the Supreme Court judgment of 30 March 2017, V KS 1/17, LEX No. 2258065; the Supreme Court ruling of 5 April 2017, III KS 1/17, unpublished.

[61] The Supreme Court judgments: of 19 July 2017, V KS 7/17, LEX No. 2340622; of 12 September 2017, III KS 6/17, unpublished.

Explaining the issue in the resolution of seven judges of 25 January 2018, I KZP 13/17,[62] the Supreme Court approved of the latter of the above-mentioned opinions and rightly assumed that:

> **The scope of the Supreme Court's supervision after a complaint is filed about an appellate court's judgment referred to in Article 539a § 1 CPC is limited to the examination whether the default recognised by an appellate court constitutes grounds for cassation.**

In its justification the Court emphasised that the linguistic interpretation of Article 539a § 3 CPC leads to a conclusion that the reasons for a complaint listed in the provision in the form of the infringement of Article 437 CPC or the default laid down in Article 439 § 1 CPC have a different scope of reference to an appellate court judgment. In the case of Article 437 CPC, the term 'infringement' means inappropriate application of the provision. It takes place when it concerns a cassation judgment, although grounds for that have not occurred.

The default under Article 439 § 1 CPC referred to in Article 539a § 3 *in fine* concerns a judgment of an appellate court.[63] Its occurrence causes quashing of the judgment and referring the case for rehearing.

Article 437 § 2 CPC makes reference to Article 439 § 1 CPC, which means that such default concerns a judgment of the first-instance court subject to supervision conducted by a higher-instance court. The Supreme Court rightly excluded from its scope default laid down in Article 439 § 1(8) and (9) CPC because, due to its occurrence, an appellate court quashes a judgment appealed against and discontinues proceedings; thus, this type of judgment is not subject to complaint. Appellate control of default that belongs to the category of absolute grounds for an appeal pursuant to Article 439 § 1 CPC does not apply to the issue concerning substantive hearing of a case. As a result, the complaint-related control is limited to examination whether such default has really occurred. The Court rightly emphasised that, regardless of the grounds for cassation, complaint-related control cannot be limited to examination whether an appellate court has formally determined admissible grounds for quashing a judgment and referring a case for rehearing, but whether there have been such grounds in the real circumstances of a given case.

According to the Supreme Court, in the case a complaint brings a charge of infringement of Article 437 § 2 second sentence CPC in conjunction with Article 439 § 1 CPC, the complaint-related control requires assessment whether the default constituting absolute grounds for an appeal has really occurred, which means direct examination of the appropriateness of the first-instance court's judgment. The control of grounds for quashing a judgment connected with the default laid down in Article 438 CPC cannot, however, consist in the examination of grounds for their recognition by an appellate court, and it should be limited to whether cassation is admissible because of that. Otherwise, it would also have to cover supervision of the recognition of the essence of a case. Such a scope of the complaint-related control would be in conflict with the linguistic and systemic interpretation of the provisions on complaints.

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62 OSNKW 2018, No. 3, item 23.

63 The Supreme Court ruling of 26 May 2020, I KZP 14/19, OSNKW 2020, No. 6, item 18.

The opinion expressed in the resolution was repeated in successive case law. The Supreme Court held that:

> In proceedings initiated by a complaint about a judgment issued by an appellate court, the Supreme Court cannot assess whether there have been substantive grounds laid down in Article 454 CPC for an amending judgment, because in accordance with the provision of Article 539a § 1 CPC, it has no competence to assess evidence presented in a case; hearing a case within this scope is the competence of common courts. Interference of the Supreme Court into this scope of adjudication would be the violation of their competence to hear a case.[64]

In literature, the opinion is assessed as too general and its application may lead to inability to quash cassation judgments that are obviously defective.[65]

8. ISSUE OF A CUMULATIVE SENTENCE OF AN APPELLATE COURT (ARTICLE 568A § 2 CPC)

The issue of a cumulative sentence has caused a problem concerning the possibility of adjudicating a cumulative penalty by an appellate court for the first time or within the scope different from the one adjudicated by the first-instance court. The Supreme Court expressed the opinion that:

(1) 'In a case concerning the issue of a cumulative sentence conducted in accordance with Article 568a § 1(2) CPC, due to the necessity of guaranteeing the accused the constitutional right to appeal against a judgment of the first-instance court and implementing the right to a fair trial before an appellate court, as a rule, the possibility of issuing a judgment on a cumulative penalty by the second-instance court is excluded in a procedural situation in which the court of first instance has not adjudicated a cumulative penalty covering penalties imposed for particular offences determined in valid sentences. The right to a trial would not be infringed only if the appellate court adjudicated a cumulative penalty with the application of full absorption.'[66]

(2) Adjudicating within the above-determined scope is admissible.[67]

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[64] The Supreme Court rulings: of 8 August 2019, II KS 12/19, LEX No. 2749717; of 6 June 2019, II KS 8/19, LEX No. 2683385; of 22 May 2019, III KS 17/19, LEX No. 2671143; the Supreme Court judgment of 21 May 2019, III KS 12/19, LEX No. 2671545; the Supreme Court ruling of 23 January 2019, III KS 34/18, OSNKW 2019, No. 3, item 17; the Supreme Court judgment of 14 November 2018, IV KS 19/18, LEX No. 2585985. Thus, for the opinion presented in the doctrine, see: S. Steinborn, *Skarga na wyrok kasatoryjny sądu odwoławczego na tle systemu środków zaskarżenia w polskim procesie karnym*, [in:] *Verba volant*, T. Grzegorczyk, R. Olszewski (eds), *supra* n. 20, pp. 425–426; D. Świecki, [in:] *Kodeks*, J. Skorupka (ed.), 2020, *supra* n. 1, p. 1387; A. Sakowicz, [in:] *Kodeks*, A. Sakowicz (ed.), 2020, *supra* n. 24, pp. 1366–1367.

[65] J. Matras, [in:] *Kodeks*, K. Dudka (ed.), 2018, *supra* n. 10, p. 1236.

[66] The Supreme Court judgment of 11 April 2017, III KK 420/16, OSNKW 2017, No. 8, item 48; judgment of the Court of Appeal in Gdańsk of 13 July 2017, II AKa 186/17, LEX No. 2372257; judgment of the Court of Appeal in Gdańsk of 13 July 2017, II AKa 194/17, LEX No. 2372258; judgment of the Court of Appeal in Gdańsk of 4 October 2017, II AKa 298/17, LEX No. 2415312.

[67] The Supreme Court judgments: of 15 November 2017, IV KS 5/17, OSP 2018, No. 7–8, item74; of 30 March 2017, V KS 1/17, LEX No. 2258065.

In the resolution of seven judges of 28 June 2018, I KZP 3/18,[68] the Supreme Court explained that:

> **(1) In a case concerning the issue of a cumulative sentence, an appellate court can adjudicate a cumulative penalty for the first time when a court of first instance has issued a cumulative sentence appealed against adjudicating the penalty based on particular convictions and discontinuing proceedings in accordance with Article 572 CPC within the remaining scope. (2) Adjudication of a cumulative penalty is also not excluded based on convictions that have not been grounds for a cumulative penalty ruled by a court of first instance.**

The opinion deserves approval and arguments for that included in an ample justification are convincing. The Supreme Court highlighted that, in fact, this concerns a possibility of adjudicating on the matter by an appellate court, in particular the possibility of adjudicating on the case concerning a cumulative sentence for the first time or adjudicating it in the scope different from that adjudicated by a court of first instance in the context of the principle of two-instance court proceedings, perception of the right to a trial, as well as limitations to the scope of cassation; and the understanding of two-instance proceedings in the Polish criminal procedure is of key importance for the solution of this problem. The Court assumed that two-instance proceedings should be perceived formally in these proceedings, i.e. as guaranteeing a party a possibility of appeal against the first-instance court's judgment closing proceedings and leading to a higher-instance court's control of the appropriateness of the judgment.[69] The guarantee laid down in Article 176 para. 1 of the Constitution of the Republic of Poland, in accordance with which court proceedings must be at least two-instance ones, does not mean that every adjudication contained in an appellate court judgment which includes an element

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[68] OSNKW 2018, No. 8, item 55.

[69] The Constitutional Tribunal judgment of 11 March 2003, SK 8/02, OTK-A 2003, No. 3, item 20; the Constitutional Tribunal ruling of 11 June 2008, SK 48/07, OTK-A 2008, No. 5, item 93; the Constitutional Tribunal judgment of 13 July 2009, SK 46/08, OTK-A 2009, No. 7, item 109; the Supreme Court ruling of 28 June 2006, V KK 491/05, OSNKW 2006, No. 9, item 84; resolution of seven judges of the Supreme Court of 23 March 2011, I KZP 28/10, OSNKW 2011, No. 4, item 30; the Supreme Court ruling of 22 December 2010, II KK 288/10, LEX No. 686679; W. Hermeliński, B. Nita, *Orzekanie reformatoryjne w procesie karnym na podstawie nowych ustaleń faktycznych*, Państwo i Prawo 4, 2009, pp. 68–69; R. Kmiecik, *Glosa do postanowienia SN z dnia 26 marca 2008 r., V KK 389/07*, OSP 2009, No. 1, item 9; M. Fingas, *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym*, Warszawa 2016, pp. 89–92; D. Świecki, *Bezpośredniość czy pośredniość w polskim procesie karnym*, Warszawa 2013, pp. 274–275; M. Andrzejewska, *Reguły ne peius w myśli Profesora Mariana Cieślaka – kontynuacja czy zmierzch idei?*, [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, W. Cieślak (ed.), Warszawa 2013, p. 587; P. Wiliński, *Dwuinstancyjność postępowania karnego w świetle Konstytucji*, [in:] *Funkcje procesu karnego. Księga Jubileuszowa Profesora Janusza Tylmana*, T. Grzegorczyk (ed.), Warszawa 2011, pp. 565–580; P. Hofmański, S. Zabłocki, *Dowodzenie w postępowaniu apelacyjnym i kasacyjnym – kwestie modelowe*, [in:] *Funkcje*, *ibid*., p. 473. Differently, P. Pojnar, *Prawo sądu odwoławczego do własnych ustaleń faktycznych a zasada kontroli procesu – rozważania de lege lata i de lege ferenda*, [in:] *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, J. Czapska, A. Gaberle, A. Światłowski, A. Zoll (eds), Warszawa 2000, p. 712; M. Jeż-Ludwichowska, M. Klubińska, *Zasada bezpośredniości w postępowaniu odwoławczym w świetle nowelizacji k.p.k. z 27 września 2013 r*., [in:] *Środki zaskarżenia po nowelizacji kodeksu postępowania karnego*, A. Lach (ed.), Toruń 2015, p. 30.

of novelty in comparison with a judgment that is appealed against must open the way to higher-instance control. The Supreme Court convincingly proved that:

- regarding the issue of a cumulative sentence, the principle of two-instance court proceedings as well as the right to appeal against a judgment issued by the first-instance court do not constitute an obstacle to an appellate court's adjudicating a cumulative penalty for the first time or in the scope different from the one adjudicated by the first-instance court;
- a judgment issued by an appellate court for the first time in a case concerning the issue of a cumulative sentence, and the adjudicating it in the scope different from the one adjudicated by the first-instance court in particular, does not infringe the right to a fair trial to an inadmissible extent;
- in the case of discontinuation of proceedings concerning the issue of a cumulative sentence by a court of first instance in accordance with Article 572 CPC, the *ne peius* rule laid down in Article 454 § 1 CPC, which bans conviction of the accused by an appellate court when a court of first instance discontinues proceedings against him, is not in conflict with adjudication of a cumulative penalty by the appellate court.

PENAL ENFORCEMENT CODE

9. FEE FOR A MOTION TO APPEND AN ENFORCEMENT CLAUSE IN PENAL ENFORCEMENT PROCEEDINGS (ARTICLE 25 § 1 PEC)

A court or a court enforcement officer, in accordance with Article 107 § 1 CPC, on request of an entitled person, appends an enforcement clause to a judgment that is subject to execution. Judgments imposing an obligation to redress the wrong or compensate the harm suffered, as well as damages ruled in favour of the aggrieved are recognised as judgments concerning financial claims if they can be executed in accordance with the provisions of the Code of Civil Procedure (Article 107 § 2 CPC). The execution of civil claims adjudicated, a fine imposed, a pecuniary allowance, and court dues is conducted in accordance with the provisions of the Code of Civil Procedure, provided that the Penalty Enforcement Code (PEC) does not stipulate otherwise (Article 25 § 1 PEC). On the other hand, the provisions of Articles 776–795 of the Code of Civil Procedure are applicable to enforcement titles (Article 26 PEC).

In the context of those provisions, the Supreme Court was requested to resolve a legal issue:

> Is the content of Article 71(3) of the Act of 28 July 2005 on court costs in civil cases (Dz.U. 2018, item 300), in the face of the recognition of a blank nature of Article 794[1] of the Code of Civil Procedure, applicable by reference laid down in Articles 25 and 26 PEC to execution proceedings in criminal cases in situations when there is a request to append an enforcement clause made by a person other than the one indicated in the enforcement title to whom the right was transferred after the title occurred or, due to the lack of relevant regulation in the Act of 23 June 1973 on fees in criminal cases (Dz.U. 1973, No. 27, item 152), does a criminal court in execution proceedings not charge any other additional

fees for a motion to append an enforcement clause filed by a person other than that indicated in the enforcement title, to whom the entitlement was transferred after a title occurred apart from the one laid down in Article 19 para. 1 of the statute?

In the ruling of 25 October 2018, I KZP 11/18,[70] the Supreme Court explained that:

In the course of preparatory proceedings, in accordance with Article 71(3) of the Act of 28 July 2005 on court costs in civil cases (Dz.U. 2018, item 300), a criminal court can charge a fee for a motion to append an enforcement clause filed by a person other than the one indicated in the enforcement title to whom the entitlement was transferred after the title occurred.

Justifying this opinion, the Court emphasised that Article 26 PEC, referring to the application of the provisions of Articles 776–795 of the Code of Civil Procedure, indicated that all regulations included in those provisions are in force when procedural activities concerning enforcement titles issued in criminal proceedings are performed. It highlighted that an enforcement clause appended to an enforcement title is an institution of civil procedure, and the procedure of appending it is laid down in Articles 776–795 of the Code of Civil Procedure.[71] The problem of costs of proceedings concerning appending an enforcement clause is laid down in Article 794^1 § 1 and § 2 of the Code of Civil Procedure and stipulates that the ruling to append an enforcement clause in the part in which a creditor has been awarded the refund of the costs of proceedings is subject to execution with no need to append an enforcement clause thereto; and in case an enforcement clause is appended in accordance with Article 783 § 3 or § 3^1, the decision on awarding the creditor a refund of the costs of a proceedings is placed in an enforcement clause.

The provisions regulate the ruling of the proceeding costs refund but do not determine what should be classified as those costs and what the principles of their determining and adjudicating are. In the light of that the Supreme Court decided that the regulation is not exhaustive[72] and rightly referred to Article 13 § 2 of the Code of Civil Procedure, according to which the provisions on a trial are applied by analogy to other types of proceedings regulated in this code, unless special provisions stipulate otherwise. Due to the fact that Articles 776–795 of the Code of Civil Procedure do not lay down a different regulation in this respect, in accordance with Article 13 § 2 of the Code of Civil Procedure, inter alia Article 98 § 1 of the Code which concerns costs necessary for purposeful claiming rights and purposeful defence, and Article 98 § 3 of the Code which classifies the costs incurred by a party represented by a lawyer, his remuneration and costs connected with fees

[70] OSNKW 2018, No. 12, item 77.

[71] Resolution of seven judges of the Supreme Court of 20 December 2007, I KZP 35/07, OSNKW 2008, No. 1, item 1.

[72] A. Zieliński, *Orzekanie o kosztach postępowania cywilnego. Komentarz praktyczny z orzecznictwem*, Warszawa 2017, p. 172.

for a motion to append an enforcement clause as necessary costs of proceedings, are applicable by analogy in the clause-related proceedings.[73]

In accordance with Article 71(3) of the Act of 28 July 2005 on court costs in civil cases,[74] a fee for appending an enforcement clause against or in favour of a person other than the one indicated in an enforcement title to whom the entitlement or obligation was transferred after an enforcement title occurred or in the course of a case before a title was issued accounts for PLN 50. According to the Supreme Court, the fact that the statute concerns court costs in civil cases (Article 1) is not an obstacle to apply this statute in criminal proceedings because it concerns civil cases not only within the substantive meaning, i.e. cases resulting from relationships within the scope of civil, family and guardianship law and labour law (Article 1 of the Code of Civil Procedure), but also in the formal meaning, i.e. other cases which by force of a special provision of the statute have been referred for hearing in civil proceedings to a common court.[75] Provisions on civil court proceedings are applied as a supplementary means, e.g. in penalty enforcement proceedings to execute a fine imposed, a pecuniary allowance and court dues (Article 25 § 1 PEC).[76]

PETTY OFFENCES PROCEDURE CODE

10. ADMISSIBILITTY OF A COMPLAINT ABOUT A RULING ON REFUSAL TO ADMIT A MOTION TO DEVELOP IN WRITING AND SERVE AN APPELLATE COURT JUDGMENT JUSTIFICATION ISSUED IN PROCEEDINGS IN PETTY OFFENCE-RELATED CASES (ARTICLE 109 § 1 POPC)

In accordance with Article 81 § 1 of the Petty Offences Procedure Code (POPC), Article 422 CPC is applicable by analogy in proceedings concerning petty offences, which means that a party may file a motion to develop in writing and deliver the justification of a sentence within the final deadline of seven days from the date of the sentence announcement. Reference is made to the whole provision, which indicates that Article 422 § 3 CPC is also applicable in these proceedings and as a result: 'The president of a court shall refuse to admit a motion filed by an unauthorised person, after the deadline or if there are circumstances referred to in Article 120 § 2 CPC, and the ruling may be complained about.'

If the course of a trial is recorded with audio or audio and video recording equipment, the justification of a sentence may be *ex officio* presented only orally,

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[73] *Ibid.*, pp. 172–173.

[74] Dz.U. 2020, item 755, as amended.

[75] P. Feliga, *Ustawa o kosztach sądowych w sprawach cywilnych. Komentarz*, Warszawa 2015, p. 19; A. Górski, L. Walentynowicz, *Koszty sądowe w sprawach cywilnych. Ustawa i orzekanie*, Warszawa 2007, pp. 11–12.

[76] J. Gudowski, [in:] P. Grzegorczyk, J. Gudowski, M. Jędrzejewska, K. Weitz, *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, T. Ereciński (ed.), Vol. I, Warszawa 2016, pp. 57–58.

directly after the announcement of a sentence, and a party, within the final deadline of seven days from the date of the sentence announcement, may file a motion to develop in writing and deliver the transcript of the sentence justification presented orally. For the accused being in custody or one who has no counsel and was absent when a sentence was announced or its justification presented orally, the term starts running from the date when the sentence is delivered to him. The president of a court refuses to admit a motion filed by a person who is not entitled to file a complaint (Article 82 § 6 and § 7 POPC). In the Petty Offences Procedure Code, there is no provision regulating a motion to develop in writing and deliver a sentence justification within appellate proceedings, nor one that refers to the Criminal Procedure Code. As a result, a problem occurred whether the ruling on the refusal of a motion to develop in writing and deliver the justification of a sentence of an appellate court issued in cases concerning petty offences is subject to complaint. The judicature does not unanimously resolve the problem and there are two contradictory stands established.

According to one of them, such a ruling cannot be appealed against,[77] which results from the fact that Article 107 POPC does not stipulate such a complaint, and Article 109 § 2 POPC does not contain reference to Article 422 § 3 CPC and refers to Article 426 § 1 CPC which stipulates that a complaint *ex officio* is inadmissible.[78] Moreover, the regulation under Article 107 and Article 109 § 2 POPC prove that the legislator entirely regulated the issue of developing an appellate court's judgment justification and did not envisage reference to Article 457 CPC, which would constitute grounds for appealing against a ruling on refusal to admit a motion to develop a sentence justification.

According to the other opinion, a complaint about such a ruling is admissible and is subject to hearing before another equivalent bench of an appellate court.[79] This results from the reference made in Article 109 § 1 POPC to the application of the provisions on proceedings before an appellate court by analogy, which via Article 82 § 1 POPC stipulates full application of Article 422 § 3 CPC, thus also its last sentence concerning the entitlement to a complaint about such a ruling, in appellate proceedings in cases of petty offences. As far as the body competent to hear a complaint is concerned, it is indicated that there is a legal loophole that should be eliminated by analogy to Article 14 § 1(2) POPC, providing for the same-level instance to hear complaints about rulings and decisions not closing the way to

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[77] The Supreme Court rulings: of 30 August 2006, III KZ 44/06, LEX No. 196979; of 7 February 2013, III KZ 92/12, LEX No. 1277772; of 14 December 2016, III KZ 80/16, OSNKW 2017, No. 4, item 22; ruling of the Court of Appeal in Gdańsk of 18 October 2016, II AKz 698/16, KSAG 2017, No. 1, pp. 179–183. Thus: P. Gensikowski, *Postępowanie w sprawach o wykroczenia. Komentarz*, Warszawa 2017, p. 420; K. Dąbkiewicz, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa 2017, p. 442; P. Rogoziński, [in:] *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, A. Sakowicz (ed.), Warszawa 2020, p. 611; D. Świecki, *Metodyka pracy sędziego w sprawach o wykroczenia*, Warszawa 2012, p. 239.

[78] The Supreme Court ruling of 30 August 2006, III KZ 44/06, LEX No. 196979.

[79] The Supreme Court ruling of 23 August 2017, III KZ 38/17, LEX No. 2349403; the ruling of the Court of Appeal in Kraków of 25 February 2016, II AKz 54/16, KZS 2016, No. 3, item 48.

issue a sentence, which means that another equivalent bench of an appellate court is competent to hear a complaint in question.

In the resolution of seven judges of 25 January 2018, I KZP 12/17,[80] the Supreme Court approved of the former opinion and rightly held that:

> **There is no right to complain about a ruling on refusal to admit a motion to develop in writing and deliver an appellate court's judgment justification in cases concerning petty offences.**

Justifying this stance, the Court indicated that appellate proceedings in cases of petty offences are regulated in Articles 103–108 POPC, which directly cover appellate proceedings in petty offences and explicitly regulate some of their elements. Determining that an issue examined is entirely regulated in those provisions excludes the use of provisions beyond Part X of the Petty Offences Procedure Code. Article 109 stipulates application of the POPC provisions concerning first-instance proceedings (§ 1) and the enumerated CPC provisions (§ 2) by analogy. According to the Supreme Court, in appellate proceedings concerning petty offence cases, Article 422 CPC is applicable, which via Article 82 § 1 POPC refers to Article 109 § 1 POPC. Application of Article 422 § 3 CPC by analogy means that the president of a court issues a ruling refusing to admit a motion to develop a sentence filed by a person who is not entitled, after the deadline or if there are circumstances referred to in Article 120 § 2 CPC. This constitutes a logical and necessary supplementation of the directive laid down in Article 107 § 2 POPC, while the possibility of filing a complaint about this ruling laid down in the second sentence of Article 422 § 3 CPC does not have this nature.

ACT OF 27 SEPTEMBER 2013 AMENDING THE ACT: CRIMINAL PROCEDURE CODE AND SOME OTHER ACTS

11. TRANSITIONAL REGULATIONS CONCERNING AMENDMENTS TO PROVISIONS ON A COURT BENCH COMPOSITION

Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts[81] is an transitional (intertemporal) provision regulating the competence of courts, the court benches' composition in case of their change as a result of the entry into force of new provisions and assumes that until the conclusion of proceedings before a given instance court, a court that has been competent so far or a court's same bench adjudicates.

The content of the provision is clear and should not raise doubts. Nevertheless, the Supreme Court was asked to resolve a legal issue whether the rule articulated in this provision is general in nature, i.e. causes the establishment of the whole group of rules concerning a court bench composition in relation to court proceedings in

[80] OSNKW 2018, No. 3, item 22.
[81] Dz.U. 2013, item 1247, as amended.

progress at the moment when the Act entered into force, or concerns only those situations when a court bench composition determined by the former provisions adjudicates in given proceedings.

In its ruling of 28 March 2018, I KZP 16/17,[82] the Supreme Court expressed the right stand that:

> **Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Dz.U. item 1247, as amended), striving to ensure efficiency and economy of proceedings by stabilising cases in progress exceptionally stipulates 'continuation' of proceedings before a court competent so far without the risk of consequences resulting from Article 439 § 1(2) CPC. However, it is not possible to conclude that such consequences will not result in the conduct of proceedings before an inappropriately composed bench in accordance with the provisions that were in force before 1 July 2015 because such default was validated by the provisions that are in force at present.**

In its justification, the Court emphasised that the Supreme Court had already explained that the phrase 'a court's same bench' used in Article 30 of the statute meant a court bench determined by the provisions that were in force at the moment when proceedings started before the given instance court.[83] Moreover, the Court highlighted that the content of Article 30 unambiguously prejudges petrification of 'a court bench competent so far'; on the other hand, in relation to 'a court's same bench', there is no term 'competent' but there are no doubts that it concerns an adjudicating bench composed based on the provisions in force so far. The term 'a court's same bench' means a court determined by the provisions that were in force at the moment when the proceedings started before a given instance court. This provision indicates that if on the day when a statute enters into force a case is at a certain stage of proceedings, then, until these proceedings are concluded before a given instance, a court bench composed earlier adjudicates. However, the phrase 'a court's same bench' used in this provision should be related not to its bench that has already heard a case in the given instance, but a bench competent in accordance with the provisions that have been in force so far.[84] It concerns a court bench determined by the provisions that are in force at the moment when proceedings are started before a given instance.[85] The moment of starting proceedings before a court of first instance is the time when an indictment or its surrogate is lodged with

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[82] OSNKW 2018, No. 7, item 47.

[83] The Supreme Court ruling of 10 January 2017, II KK 183/16, LEX No. 2261738; the Supreme Court ruling of 6 February 2017, V KK 395/16, LEX No. 2255444; the Supreme Court judgment of 1 June 2017, IV KK 2/17, LEX No. 2300167; the Supreme Court ruling of 29 June 2016, II KK 180/16, LEX No. 2062819; the Supreme Court judgment of 18 October 2016, III KK 151/16, LEX No. 2142560; the Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW 2016, No. 12, item 85, with a gloss of approval by V. Niemiec, GSP-Prz.Orz. 2017, No. 2, pp. 112–120, and similar comments by R.A. Stefański, *Review of Resolutions of the Supreme Court Criminal Chamber Concerning Criminal Procedure Law for 2016*, Ius Novum 1, 2018, pp. 127–160, and a critical one by W. Jasiński, *Petrification of a Court Bench Composition in the Transitional Provisions: Comments in the Light of the Supreme Court Ruling of 29 November 2016, I KZP 9/16*, Ius Novum 3, 2017, pp. 20–35.

[84] The Supreme Court judgment of 18 October 2016, III KK 151/16, LEX No. 2142560.

[85] The Supreme Court judgment of 1 June 2017, IV KK 2/17, LEX No. 2300167.

a court instigating judicial proceedings. And the moment of starting proceedings before a court of second instance is the time when this court receives the case files together with an appeal.[86]

ACT OF 20 JUNE 1997: LAW ON ROAD TRAFFIC

12. BODY AUTHORISED TO REPRESENT AN ORGANISATIONAL UNIT THAT DOES NOT HAVE A LEGAL PERSON STATUS (ARTICLE 78 PARA. 5 LRT)

An owner or holder of a vehicle, in accordance with Article 78 para. 4 of the Act of 20 June 1997: Law on road traffic,[87] requested by an authorised body, is obliged to indicate a person to whom he gave his vehicle and let drive it in a particular period, unless the vehicle has been used against his will and without his knowledge by an unknown person, which he could not prevent. In the case the owner or a holder of a vehicle is (1) a legal person, (2) an organisational unit that does not have a legal person status that is given legal capacity by other provisions, (3) a local government unit, (4) an enterprise in formation, (5) an entity in liquidation, (6) an entrepreneur that is not a natural person, and (7) a foreign organisational unit, a person obliged to provide this information is one designated by the body authorised to represent this entity, and in case such a person is not designated, these are persons that are members of this body in accordance with the request and the method of representation adopted by the entity (Article 78 para. 5 LRT).

In practice, a doubt was raised who is obliged to provide the information in a general partnership in which each of the partners can represent it, in accordance with Article 29 § 1 of the Code of Commercial Partnerships and Companies (hereinafter Companies Code).

In the ruling of 28 June 2018, I KZP 1/18,[88] the Supreme Court held that:

> **Within the meaning of Article 78 para. 5 of the Act of 20 June 1997: Law on road traffic (Dz.U. 2017, item 1260, as amended), partners are authorised to represent a general partnership as an organisational unit that does not have a legal person status to which other provisions give legal capacity to represent it, unless the right to represent a general partnership is limited in accordance with Article 30 § 1 of the Companies Code. Thus, in accordance with Article 78 para. 5 LRT, every partner of a general partnership authorised to represent it is obliged, on an authorised body's request, to provide information referred to in Article 78 para. 4 LRT, and in case of failure to fulfil this obligation, they may be liable under Article 96 § 3 of the Petty Offences Code.**

The opinion deserves approval and has a strong foundation in Article 29 § 1 of the Companies Code, in accordance with which every partner has the right to

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[86] The Supreme Court ruling of 23 September 2016, III KK 41/16, OSNKW 2016, No. 12, item 81.

[87] Dz.U. 2020, item 110, as amended; hereinafter LRT.

[88] OSNKW 2018, No. 8, item 56.

represent a partnership. Justifying this stance, the Supreme Court emphasised that in the case of a general partnership, the scope of the right to represent is broadly determined in the Companies Code because pursuant to Article 29 § 2 of the Companies Code, the right to represent a partnership is applicable to all court and non-court related activities in which a partnership is involved. Thus, it concerns all possible activities that a partnership can perform. Therefore, representation concerns taking part in any legal relations within civil law, administrative law, labour law and any other branches of law, and can consist in, e.g. making declarations before the authorities, public administration bodies and social organisations, and appearing before adjudicating bodies.[89]

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[89] A. Kidyba, *Handlowe spółki osobowe*, Vol. I, Kraków 2005, pp. 157–158.

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2018

Summary

The article presents an analysis of the judgments of the Supreme Court Criminal Chamber passed in 2018 as a result of resolving legal issues that require fundamental interpretation of statute (Article 441 § 1 CPC), raising serious doubts concerning the interpretation of the

provisions of law (Article 82 § 1 of the Act on the Supreme Court) or causing discrepancies in case law concerning the interpretation of the provisions of law that are grounds for adjudication (Article 83 § 1 of the Act on the Supreme Court) within criminal procedure law. Resolving the legal issues referred to it, the Supreme Court held that: the correction of an obvious editorial error consisting in the different transcription of a penalty amount in words and digits is admissible (Article 105 § 1 CPC); a prosecutor may take a decision to use evidence in criminal proceedings that was obtained as a result of surveillance ordered on an authorised body's request in relation to another offence prosecuted *ex officio* or a fiscal offence other than the offence covered by the surveillance order, but only when ordering surveillance is admissible in relation to this offence (Article 168b CPC); a repeated decision on the refusal to instigate preparatory proceedings or on their termination was not subject to an appeal pursuant to the legal circumstances at that time (Article 330 § 2 CPC); the acquittal or discontinuation of criminal proceedings and referring a case for rehearing is possible based on the *ne peius* rule (Article 454 § 1 CPC); an adjudicating court that hears a complaint about quashing a judgment of the first-instance court and referring a case for rehearing is limited to examining whether the default recognised by an appellate court constitutes grounds for cassation (Article 539a § 1 and § 3 CPC); an appellate court may issue a cumulative sentence for the first time or rule it in an amount different from the one imposed by a court of first instance (Article 568a § 2 CPC); a fee is charged for a motion in penalty enforcement proceedings to append an enforcement clause filed by a person other than the one indicated in an enforcement title to whom the entitlement was transferred after the title occurred (Article 25 § 1 PEC); a complaint about a ruling on refusal to admit a motion to develop in writing and deliver an appellate court's sentence justification issued in cases concerning petty offences is inadmissible (Article 109 § 1 POPC); proceedings before a given instance court's same bench are continued in case the provisions on a court bench are amended (Article 30 of the Act of 27 September 2013); every partner of a general partnership is obliged to provide an authorised body with information who was entitled to drive or use their vehicle in a particular period (Article 78 para. 5 LRT). In addition, the Court explained the requirements that must be met in order to ask the Supreme Court legal questions on issues that need fundamental interpretation (Article 441 § 1 CPC) and cause discrepancies in case law concerning the interpretation of the provisions that are grounds for adjudication (Article 83 § 1 of the Act on the Supreme Court).

Keywords: abstract legal question, enforcement clause, surveillance, refusal to instigate preparatory proceedings, editorial error, proceedings in petty offence cases, legal question, Supreme Court, court bench composition, general partnership, quashing of a sentence, discontinuation of preparatory proceedings, cumulative sentence, complaint

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO PROCESOWEGO ZA 2018 ROK

Streszczenie

Przedmiotem artykułu jest analiza orzeczeń Izby Karnej Sądu Najwyższego, podjętych w 2018 r. w ramach rozstrzygania zagadnień prawnych wymagających zasadniczej wykładni ustawy (art. 441 § 1 k.p.k.), budzących poważne wątpliwości co do wykładni przepisów prawa (art. 82 § 1 u. o SN) lub wywołujących w orzecznictwie sądów rozbieżności w wykładni przepisów prawa, będących podstawą ich orzekania (art. 83 § 1 u. o SN), w zakresie prawa karnego procesowego. Rozstrzygając przedstawione mu zagadnienia, Sąd Najwyższy opo-

wiedział się za: dopuszczalnością sprostowania jako oczywistej omyłki pisarskiej określenia w sposób odmienny cyfrowo i słownie wymiaru kary (art. 105 § 1 k.p.k.); możliwością podejmowania przez prokuratora decyzji w przedmiocie wykorzystania dowodu w postępowaniu karnym, uzyskanego w wyniku kontroli operacyjnej zarządzonej na wniosek uprawnionego organu w stosunku do innego przestępstwa ściganego z urzędu lub przestępstwa skarbowego innego niż przestępstwo objęte zarządzeniem kontroli operacyjnej, ale tylko wtedy gdy do tego innego przestępstwa jest dopuszczalne zarządzenia takiej kontroli (art. 168b k.p.k.); niezaskarżeniem w ówczesnym stanie prawnym ponownego postanowienia o odmowie wszczęcia postępowania przygotowawczego lub o jego umorzeniu (art. 330 § 2 k.p.k.); możliwością uchylenia wyroku uniewinniającego lub umarzającego postępowanie karne i przekazanie sprawy do ponownego rozpoznania, związaną z regułą *ne peius* (art. 454 § 1 k.p.k.); ograniczeniem sądu rozpoznającego skargę na wyrok o uchyleniu wyroku sądu pierwszej instancji i przekazaniu sprawy do ponownego rozpoznania do zbadania, czy stwierdzone przez sąd odwoławczy uchybienie daje podstawę do wydania orzeczenia kasatoryjnego (art. 539a § 1 i 3 k.p.k.); dopuszczalnością wydania przez sąd odwoławczy wyroku łącznego raz pierwszy kary łącznej albo orzeczenia jej w innym zakresie niż orzekł sąd pierwszej instancji (art. 568a § 2 k.p.k.); pobraniem w postępowaniu karnym wykonawczym opłaty od wniosku o nadanie klauzuli wykonalności, złożonego przez osobę inną niż wskazana w tytule egzekucyjnym, na którą przeszły uprawnienia po powstaniu tytułu (art. 25 § 1 k.k.w.); niedopuszczalnością zażalenia na zarządzenie o odmowie przyjęcia wniosku o sporządzenie na piśmie i doręczenie uzasadnienia wyroku sądu odwoławczego, wydanego w postępowaniu w sprawach o wykroczenia (art. 109 § 1 k.p.w.); kontynuowaniem postępowania w danej instancji w składzie dotychczasowym w razie jego zmian w wyniku nowelizacji przepisów o składzie sądu (art. 30 ustawy z dnia 27 września 2013 r.); tym, że każdy wspólnik spółki jawnej jest obowiązany jest udzielić uprawnionemu organowi informacji, komu powierzył pojazd do kierowania lub używania w oznaczonym czasie (art. 78 ust. 5 p.r.d.). Ponadto organ ten wyjaśnił przesłanki przedstawiania Sądowi Najwyższemu zagadnień prawnych wymagających zasadniczej wykładni (art. 441 § 1 k.p.k.) oraz wywołujących w orzecznictwie sądów rozbieżności w wykładni przepisów prawa będących podstawą ich orzekania (art. 83 § 1 u. o SN).

Słowa kluczowe: abstrakcyjne pytanie prawne, klauzula wykonalności, kontrola operacyjna, odmowa wszczęcia postępowania przygotowawczego, omyłka pisarska, postępowanie w sprawach o wykroczenia, pytanie prawne, Sąd Najwyższy, skład sądu, spółka jawna, uchylenie wyroku, umorzenie postępowania przygotowawczego, wyrok łączny, zażalenie

COMENTARIO DE ACUERDOS DE LA SALA DE LO PENAL DEL TRIBUNAL SUPREMO RELATIVOS AL DERECHO PENAL PROCESAL EN EL 2018

Resumen

El artículo analiza las resoluciones de la Sala de lo Penal de Tribunal Supremo adoptadas en 2018 en virtud de cuestiones prejudiciales que requieran la interpretación esencial de la ley (art. 244 de código de proceso penal), que susciten dudas importantes en cuanto a la interpretación de la ley (art. 82 § 1 de la ley del Tribunal Supremo) o bien que produzcan discrepancias en la jurisprudencia sobre la interpretación de la ley que sirva como fundamento de resolución (art. 82 § 2 de la ley del Tribunal Supremo), relativas a derecho penal procesal. A la hora de resolver dichas cuestiones, el Tribunal Supremo ha estimado que: es posible rectificar como error obvio la determinación diferente de la pena en cifra y en letra (art. 105

§ 1 de código de procedimiento penal); es posible adaptar por el fiscal la decisión de utilizar la prueba en el proceso penal que fue recaudada como resultado de control de operación encomendada por el órgano competente en relación con otro delito perseguido de oficio o delito fiscal otro que delito sujeto al control de operación pero sólo cuando sea susceptible de tal control (art. 168b de código de proceso penal); no se puede impugnar el auto reiterado de denegación de apertura de investigación o sobre su sobreseimiento (art. 330 § 2 de código de proceso penal); es posible revocar la sentencia absolutoria o que sobresea el proceso penal y trasladar el caso para su conocimiento de nuevo en relación con la regla *ne peius* (art. 454 § 1 de código de proceso penal); el Tribunal que conozca el recurso contra la sentencia que revoque la sentencia de Tribunal de Primera Instancia y traslade la causa para su conocimiento queda limitado a comprobar si la falta constatada por el tribunal de apelación constituye fundamento para dictar la sentencia casatoria (art. 539a § 1 y 3 de código de proceso penal); es admisible que el tribunal de apelación dicte la sentencia conjunta por primera vez condenando a la pena conjunta o bien imponerla de otra forma que lo hizo el Tribunal de Primera Instancia (art. 568a § 2 de código de proceso penal); es posible cobrar en el proceso penal de ejecución la tasa por presentar la solicitud de otorgamiento de cláusula de ejecución presentada por otra persona que mencionada en el título ejecutivo, a la cual los derechos fueron cedidos después de otorgamiento de título (art. 25 § 1 de código penal de ejecución); es inadmisible presentar el recurso de queja contra la providencia que deniega admitir la solicitud de elaborar por escrito y entregar fundamentos de la sentencia de tribunal de apelación dictada en juicio de faltas (art. 109 § 1 de código de proceso de faltas); se puede continuar proceso en la composición de Tribunal hasta ahora en caso su composición cambie dado la reforma de normativa que regule la composición de Tribunales (art. 30 de la ley de 27 de septiembre de 2013), cada socio de la sociedad colectiva queda obligado a facilitar la información al órgano competente, a quién ha dado el vehículo para su uso (art. 78 ap. 5 de la ley derecho de tráfico vial). Además, dicho órgano jurisdiccional ha esclarecido los requisitos para presentar cuestiones legales ante el Tribunal Supremo que requieran la interpretación esencial (art. 441 § 1 de código de proceso penal) y que susciten dudas importantes en cuanto a la interpretación de la ley (art. 82 § 1 de la ley del Tribunal Supremo).

Palabras claves: cuestión legal en abstracto, cláusula de ejecución, control de operación, denegación a incoar el proceso de investigación, error obvio, juicio de faltas, cuestión prejudicial, Tribunal Supremo, composición de Tribunal, sociedad colectiva, revocación de sentencia, sobreseimiento de fase de instrucción, sentencia conjunta, recurso de queja

ОБЗОР ПОСТАНОВЛЕНИЙ УГОЛОВНОЙ ПАЛАТЫ ВЕРХОВНОГО СУДА В ОБЛАСТИ УГОЛОВНО-ПРОЦЕССУАЛЬНОГО ПРАВА ЗА 2018 ГОД

Аннотация

Статья посвящена анализу решений Уголовной палаты Верховного суда, принятых в 2018 году при разрешении юридических вопросов в области уголовно-процессуального права, которые требуют фундаментального толкования закона (ст. 244 УПК), вызывают значительные сомнения относительно толкования норм законодательства (ст. 82 § 1 Закона «О Верховном суде») либо приводят в судебной практике к расхождениям в толковании положений законодательства, являющихся основанием для принятия судебных решений (ст. 83 § 1 Закона «О Верховном суде»). В ходе принятия решений по рассматриваемым делам Верховный суд: признал допустимость исправления как очевидной опечатки несовпадения определяемой меры наказания в цифровом

и словесном выражении (ст. 105 § 1 УПК); подтвердил, что прокурор может принять решение об использовании в уголовном производстве доказательств, полученных по результатом оперативной проверки, проведенной по ходатайству уполномоченного органа в связи с иным преступлением, преследуемым в публичном порядке, либо налоговым преступлением иным, чем преступление, по которому издан приказ о проведении оперативной проверки, но только в том случае, если для такого иного преступления предусмотрена возможность проведения оперативной проверки (ст. 168b УПК); подтвердил невозможность, по состоянию законодательства на соответствующий момент, обжалования повторного решения об отказе в проведении предварительного расследования или о его прекращении (ст. 330 § 2 УПК); высказался в пользу возможности отмены оправдательного приговора или решения о прекращения уголовного дела с возвращением дела на повторное рассмотрение в соответствии с правилом *ne peius* (ст. 454 § 1 УПК); высказался в пользу того, чтобы суд, рассматривающий жалобу на решение об отмене приговора суда первой инстанции и передаче дела на повторное рассмотрение, ограничился выяснением, дает ли правовой дефект, выявленный судом второй инстанции, основание для вынесения кассационного решения (ст. 539a § 1 и § 3 УПК); признал допустимость назначения судом второй инстанции при рассмотрении апелляции на совокупный приговор первого совокупного наказания либо назначения совокупного наказания на основании приговоров, которые не являлись основанием для назначения совокупного наказания судом первой инстанции (ст. 568a § 2 УПК); высказался в пользу взимания в рамках уголовно-исполнительного производства пошлины за подачу ходатайства о вынесении решения о принудительном исполнении, поданного лицом иным, чем указанное в исполнительном листе, если данное лицо приобрело соответствующие права после выдачи исполнительного листа (ст. 25 § 1 УИК); признал недопустимость жалобы на постановление об отказе в принятии ходатайства о составлении и вручении мотивировочной части приговора суда второй инстанции, вынесенное в ходе производства по делу об административном правонарушении (ст. 109 § 1 КоАП); высказался в пользу продолжения производства в данной инстанции в прежнем составе в случае его изменения в результате внесения поправок в положения о составе суда (ст. 30 Закона от 27 сентября 2013 года, вносящего изменения в УПК и некоторые иные законодательные акты); подтвердил, что каждый из участников полного товарищества обязан предоставить уполномоченному органу информацию о том, кому он доверил управление транспортным средством либо передал его в пользование в течение определенного времени (ст. 78 п. 5 Закона «О дорожном движении»). Кроме того, Верховный суд разъяснил условия передачи ему для рассмотрения юридических вопросов, требующих фундаментального толкования (ст. 441 § 1 УПК), а также вызывающих в судебной практике расхождения в толковании положений законодательства, являющихся основанием для принятия решений (ст. 83 § 1 Закона «О Верховном суде»).

Ключевые слова: абстрактные правовые вопросы; решение о принудительном исполнении; оперативная проверка; отказ в возбуждении предварительного производства; опечатка; производство по делам об административных правонарушениях; юридические вопросы; Верховный суд; состав суда; полное товарищество; отмена приговора; прекращение предварительного производства; совокупный приговор; обжалование

ÜBERBLICK ÜBER DIE BESCHLÜSSE DER STRAFKAMMER DES SĄD NAJWYŻSZY IM BEREICH DES STRAFPROZESSRECHTS FÜR/IM JAHR 2018

Zusammenfassung

Gegenstand des Artikels ist eine Analyse der Entscheidungen der Strafkammer des Sąd Najwyższy, des Obersten Gerichts und höchsten Instanz in Zivil- und Strafsachen in Polen im Jahr 2018 im Rahmen der Klärung von Rechtsfragen im Bereich des Verfahrensstrafrechts, die

eine grundlegende Auslegung des Gesetzes (Artikel 244 der polnischen Strafprozessordnung) erfordernund die ernsthafte Zweifel an der Auslegung der gesetzlichen Bestimmungen aufkommen lassen (Artikel 82 § 1 des polnischen Gesetzes über das Sąd Najwyższy) oder die in der Rechtsprechung der Gerichte zu unterschiedlichen Auffassungen bei der Auslegung der ihnen zugrunde liegenden gesetzlichen Bestimmungen führen (Artikel 83 § 1 des polnischen Gesetzes über das Sąd Najwyższy). Bei der Klärung der ihm vorgelegten Fragen sprach sich das polnische Oberste Gericht für die Zulässigkeit der Berichtigung von Schreib- und Tippfehlern bei der voneinander abweichenden Angabe des Strafmaßes in Ziffern und in Worten (Artikel 105 § 1 der polnischen Strafprozessordnung) als offensichtlich aus und darüber hinaus für die Möglichkeit der Entscheidung des Staatsanwalts über die Verwendung von Beweismitteln in Strafverfahren, die im Ergebnis einer auf Antrag einer befugten Stelle angeordneten operativen Kontrolle in Bezug auf eine andere, von Amts wegen verfolgten Straftat oder eine andere Steuerstraftat als die von der Anordnung der operativen Kontrolle erfassten Straftat erhoben wurden, jedoch nur dann, wenn es zulässig ist, eine solche Prüfung für diese andere Straftat anzuordnen (Artikel 168b der polnischen Strafprozessordnung); die Nichtanfechtung der erneuten Entscheidung über die Ablehnung der Einleitung eines Ermittlungsverfahrens oder dessen Einstellung nach der damaligen Rechtslage (Artikel 330 § 2 der polnischen Strafprozessordnung); die Möglichkeit der Aufhebung eines Freispruchs oder der Entscheidung über die Einstellung des Strafverfahrens und Rückverweisung einer Sache zur erneuten Entscheidung im Zusammenhang mit der ne Peius-Regel (Artikel 454 § 1 der polnischen Strafprozessordnung); eine Beschränkung des mit der Klage befassten Gerichts auf die Entscheidung über die Aufhebung des Urteils des erstinstanzlichen Gerichts und Zurückverweisung der Rechtssache an dieses Gericht zur Prüfung, ob der von der Rechtsmittelinstanz festgestellte Verfahrensfehler die Grundlage für eine kassatorische Entscheidung bildet (Artikel 539a § 1 und 3 der polnischen Strafprozessordnung); die Zulässigkeit des Fällens eines Gesamturteils durch das Rechtsmittelgericht (erste Verurteilung mit Gesamtstrafenbildung) oder der Strafverhängung mit einem anderen Strafrahmen als von dem erstinstanzlichen Gericht entschieden (Artikel 568a § 2 der polnischen Strafprozessordnung); die Erhebung einer Verfahrensgebühr *f*ür den Antrag auf Vollstreckbarerklärung in einem Strafvollstreckungsverfahren durch eine andere als die im Vollstreckungstitel angegebene Person, auf die die nach Erlass des Titels entstandenen Ansprüche übergegangen sind (Artikel 25 § 1 des polnischen Strafvollstreckungsgesetzbuches); die Unzulässigkeit des Widerspruchs gegen die Ablehnung des Antrags auf schriftliche Ausfertigung und Zustellung der Begründung eines in einem Ordnungswidrigkeitsverfahren erlassenen und verkündeten Urteils der Rechtsmittelinstanz (Artikel 109 § 1 des polnischen Strafvollstreckungsgesetzbuches); die Fortführung eines Verfahrens in der betreffenden Instanz in der bisherigen Besetzung im Falle von Änderungen zu der Besetzung infolge einer Aktualisierung der Vorschriften über die Zusammensetzung des Gerichts (Artikel 30 des polnischen Gesetzes vom 27. September 2013); dass jeder Partner einer offenen Handelsgesellschaft nach polnischen Recht (Spółka jawna) verpflichtet ist, der zuständigen Behörde Auskunft darüber zu erteilen, wem er zu einem bestimmten Zeitpunkt ein Kraftfahrzeug zum Fahren oder zur Nutzung überlassen hat (Artikel 78 § 5 des polnischen Straßenverkehrsgesetzes). Darüber hinaus erläuterte das Gericht die Voraussetzungen für die Vorlage von Rechtsfragen beim Sąd Najwyższy, die einer grundlegenden Auslegung bedürfen (Artikel 441 § 1 der polnischen Strafprozessordnung) und die in der Rechtsprechung der Gerichte zu einer unterschiedlichen Auslegung der Rechtsvorschriften führen, die Grundlage für die Entscheidung sind (Artikel 83 § 1 des Gesetzes über das Sąd Najwyższy).

Schlüsselwörter: abstrakte Rechtsfrage, Vollstreckbarkeitsklausel, operative Kontrolle, Ablehnung der Einleitung eines Ermittlungsverfahrens, Schreibfehler, Ordnungswidrigkeitsverfahren,

Rechtsfrage, Sąd Najwyższy (Oberstes Gericht der Republik Polen), Zusammensetzung des Gerichts, spółka jawna, offene Handelsgesellschaft nach polnischem Recht, Urteilsaufhebung, Einstellung des Ermittlungsverfahrens, Gesamtstrafenbildung durch Urteil, Beschwerde

APERÇU DES RÉSOLUTIONS DE LA CHAMBRE PÉNALE DE LA COUR SUPRÊME DANS LE DOMAINE DU DROIT DE LA PROCÉDURE PÉNALE POUR 2018

Résumé

Le sujet de l'article est une analyse des décisions de la Chambre pénale de la Cour suprême, prises en 2018 dans le cadre de la résolution de problèmes juridiques nécessitant une interprétation fondamentale de l'acte (article 244 du code de procédure pénale), soulevant de sérieux doutes quant à l'interprétation des dispositions légales (article 82 § 1 de la loi sur la Cour suprême) ou provoquant des divergences dans la jurisprudence des tribunaux dans l'interprétation des dispositions légales servant de fondement à leur décisions (article 83 § 1 de la loi sur la Cour suprême) dans le domaine du droit de la procédure pénale. Lors de la résolution des problèmes qui lui ont été présentés, la Cour suprême: s'est prononcée: en faveur de la recevabilité de la rectification en tant qu'erreur typographique manifeste de la définition de la peine d'une manière numérique et verbale différente (article 105 § 1 du CPP); la possibilité pour le procureur de prendre des décisions sur l'utilisation d'éléments de preuve dans le cadre d'une procédure pénale, obtenus à la suite d'un contrôle opérationnel ordonné à la demande d'un organisme habilité, en relation avec une autre infraction poursuivie d'office ou une infraction fiscale autre que l'infraction couverte par l'ordonnance de contrôle opérationnel, mais uniquement si pour cette autre infraction il est permis d'ordonner un tel contrôle (article 168b du code de procédure pénale); de ne pas faire appel, dans l'état juridique de l'époque, d'une autre décision de refuser d'ouvrir une procédure préparatoire ou de la suspendre (article 330 § 2 du CPP); la possibilité d'annuler le jugement d'acquittement ou de clôture de la procédure pénale et de renvoyer l'affaire pour réexamen dans le cadre de la règle du *ne peius* (article 454 § 1 du CPP); la limitation de la juridiction saisie du grief contre l'arrêt pour annuler le jugement du tribunal de première instance et renvoyer l'affaire pour réexamen pour examen afin de déterminer si le défaut constaté par la cour d'appel donne lieu à un jugement de cassation (article 539a § 1 et 3 du CPP); la recevabilité de prononcer une condamnation commune pour la première fois par la cour d'appel ou de la juger dans un champ différent de celui de la décision du tribunal de première instance (article 568a § 2 du code de procédure pénale); la perception de frais dans une procédure pénale d'exécution sur une demande de clause exécutoire présentée par une personne autre que celle indiquée dans le titre exécutoire, à qui les droits ont été transmis après la création du titre (article 25 § 1 du code de procédure exécutive); l'irrecevabilité d'une plainte contre une décision de refus d'accepter une demande de préparation par écrit et de signification des motifs du jugement de la cour d'appel rendu dans le cadre d'une procédure en matière de délit (art. 109 § 1 du code de procédure exécutive); la poursuite de la procédure dans une instance donnée avec la magistrature actuelle en cas de modification de celle-ci suite à une modification des dispositions relatives à la composition de la juridiction (article 30 de la loi du 27 septembre 2013); chaque associé d'une société en nom collectif est tenu de fournir à l'organisme habilité des informations sur la personne à qui il a confié le véhicule à conduire ou à utiliser à un moment donné (article 78, paragraphe 5, du code de la route). En outre, l'autorité a expliqué les raisons de présenter à la Cour suprême des questions juridiques nécessitant une interprétation

fondamentale (article 441 § 1 du CPP) et provoquant des divergences dans la jurisprudence des tribunaux dans l'interprétation des dispositions légales servant de fondement à leur décisions (article 83 § 1 de la loi sur la Cour suprême).

Mots-clés: question juridique abstraite, clause d'exécution, contrôle opérationnel, refus d'engager une procédure préparatoire, erreur matérielle, procédure en matière délictuelle, question juridique, Cour suprême, composition du tribunal, société en nom collectif, révocation du jugement, abandon de la procédure préparatoire, jugement conjoint, plainte

RASSEGNA DELLE DELIBERE DEL 2018 DELLA CAMERA PENALE DELLA CORTE SUPREMA NELL'AMBITO DEL DIRITTO PENALE PROCESSUALE

Sintesi

Oggetto dell'articolo è un'analisi delle sentenze del 2018 della Camera Penale della Corte Suprema, nell'ambito della soluzione di questioni giuridiche che richiedono un'interpretazione fondamentale della legge (art. 244 del Codice di procedura penale), che evocano seri dubbi circa l'interpretazione di norme giuridiche (art. 82 § 1 della legge sulla Corte Suprema), o che determinano nella giurisprudenza dei tribunali divergenze nell'interpretazione delle norme di legge che costituiscono la base delle loro sentenze (art. 83 § 1 della legge sulla Corte Suprema), nell'ambito del diritto penale processuale. Risolvendo le questioni presentate la Corte Suprema si è pronunciata circa: ammissibilità della rettifica dell'evidente errore redazionale di indicazione diversa, a cifre e a lettere, della durata della pena (art. 105 § 1 del Codice di procedura penale); possibilità, da parte del pubblico ministero, di decisione circa l'utilizzo, nel procedimento penale, di un mezzo di prova ottenuto come risultato di un controllo operativo attuato su richiesta di un'autorità autorizzata, in relazione ad un altro reato perseguito d'ufficio o di un reato tributario diverso dal reato compreso nell'ordinanza di controllo operativo, ma solo nel caso in cui in questo altro reato sia ammessa l'ordinanza di tale controllo (art. 168b del Codice di procedura penale); non impugnazione, nell'attuale status giuridico, di una nuova ordinanza di rifiuto di avvio del procedimento di indagine o di sua archiviazione (art. 330 § 2 del Codice di procedura penale); possibilità di annullamento della sentenza di assoluzione o di archiviazione di un procedimento penale e di rinvio della causa in esame legata alla regola *ne peius* (art. 454 § 1 del Codice di procedura penale); limitazione del tribunale che esamina il ricorso avverso una sentenza di annullamento della sentenza di primo grado e rinvio della causa in esame, per valutare se l'inadempimento rilevato dal tribunale di appello costituisca la base per emettere una sentenza di cassazione (art. 539a § 1 e 3 del Codice di procedura penale); ammissibilità dell'emissione, da parte del giudice di appello, di una sentenza cumulativa di pena cumulativa per la prima volta o di sua statuizione in misura diversa da quanto statuito dal giudice di primo grado (art. 568a § 2 del Codice di procedura penale); riscossione, nel procedimento penale esecutivo, di tassa sulla domanda di apposizione della formula esecutiva, da parte di una persona diversa da quella indicata nel titolo esecutivo, alla quale sono stati trasferiti i diritti dopo l'emissione del titolo (art. 25 § 1 Codice penale esecutivo); inammissibilità del reclamo avverso l'ordinanza di rigetto della domanda di redazione per iscritto e di notifica della motivazione della sentenza di un tribunale di appello emessa in un procedimento di contravvenzione (art. 109 § 1 del Codice di procedura penale); continuazione del procedimento in un determinato grado di giudizio nella composizione precedente del tribunale in caso di modifica della composizione in seguito alla riforma delle norme di legge sulla composizione del tribunale (art. 30 della legge del 27 settembre 2013);

ogni socio di una società in nome collettivo è tenuto a trasmettere all'autorità autorizzata l'informazione su chi abbia ricevuto un veicolo da condurre o da utilizzare in un determinato momento (art. 78 comma 5 della legge sulla circolazione stradale).

Parole chiave: questione giuridica astratta, clausola di esecutività, controllo operativo, rifiuto di avvio del procedimento di indagine, errore redazionale, procedimento di contravvenzione, questione giuridica, Corte Suprema, composizione del tribunale, società in nome collettivo, annullamento della sentenza, archiviazione del procedimento di indagine, sentenza cumulativa, reclamo

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PROTECTION OF PUBLIC DECENCY IN POLISH CRIMINAL LAW OF THE PRE-PARTITION PERIOD AGAINST CONDUCT CLASSIFIED TODAY UNDER ARTICLE 140 OF THE PETTY OFFENCES CODE

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1. INTRODUCTION

The notion of 'public decency' does not easily yield to definition, and yet at the same time, from an *a priori* perspective, the protection of this particular interest ('legal good' in continental parlance) deserves to be met with approval. According to one of the views expressed in the literature, public decency is the set of behavioural patterns, across the various spheres of human life, which a given society approves of and deems desirable, which has been shaped both on the foundation of history and tradition and through the lens of the current socio-economic and cultural situation, and the compliance with which serves the purpose of making sure society can function properly, while failure to comply implies a negative societal reaction to individual conduct.[1] In this approach, the correct understanding of the notion of 'public decency' should also reflect the historical dimension, which results from one of the characteristics of this protected interest, i.e. its historical variability. Public decency within the meaning of the Polish Petty Offences Code is currently

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[1] K. Wala, *Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej,* Warszawa 2019, pp. 78–79.

protected by the provisions of this Code's Chapter XVI,[2] which, unlike those of the Criminal Code (Chapter XXV: Offences against sexual freedom and decency),[3] do not exclusively include sexually motivated conduct. Among the many infractions against public decency, Article 140 Petty Offences Code, penalising 'indecent antics', comes front and centre.[4] The statutory elements of this offence literally indicate conduct which is supposed to have the characteristic of being indecent; moreover, this provision also opens a list of infractions against public decency. Its broad conception of the *actus reus* makes it possible for this offence to cover a somewhat diverse range of conduct for which violation of public decency is the common denominator. It is necessary to concur with Tadeusz Bojarski, who asserts that the conduct defined in Article 140 Petty Offences Code belongs to the category of notions the sense of which we understand or at least intuitively feel, but which at the same time elude easy definition.[5] Without delving into the details, it seems expedient to conclude that an 'indecent antic' is any conduct which violates socially acceptable and desirable models of behaviour and is thereby objectively capable of being offensive and shocking to a person with an average sense of decency.[6] The study of case files shows this offence to be attributed, most often, to offenders committing such acts as sleeping or lying in public in a place not intended for that purpose, while being in a condition capable of causing scandal; public defecation in a place not intended for the purpose; or public exposure.[7] Other types of conduct may also be eligible, as the judgment of the District Court in Janów Lubelski of 27 April 2009 illustrates. There, an 'indecent antic' was deemed to be (and this appears to be correct) showing in public a hand gesture universally regarded as vulgar (the middle finger).[8]

In the light of the above, the protection of public decency against such type of conduct in the pre-Partition period appears to be an interesting subject. An attempt to offer a concise introduction to this matter may, on the one hand, serve as a sort of curiosity, while on the other hand, it first of all provides a closer context for understanding the notion of public decency and its importance for the society's proper functioning. The objective of this article is to trace the regulatory evolution of the range of conduct subject to liability for an 'indecent antic' and therewith to draw attention to the variable perception of public decency and the diversification of its protection under criminal law over the centuries.[9] This analysis is limited to specific solutions in Polish municipal and rural law of the pre-Partition period.

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2 Consolidated text, Dz.U. 2019, item 821, as amended.

3 Consolidated text, Dz.U. 2018, item 1600, as amended.

4 In accordance with Article 140 Petty Offences Code, whoever publicly engages in an 'indecent antic' shall be liable to the penalty of arrest, restriction of liberty, a fine up to 1,500 zlotys or reprimand. Other infractions stipulated in Chapter XVI of the Petty Offences Code include placing indecent forms of expression in a public space or using indecent words in public (Article 141) and the so-called *racolage* or soliciting, i.e. a specifically defined form of proposing to perform a lewd act (Article 142).

5 T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa 2005, p. 213.

6 For a broader treatment of this topic, see K. Wala, *supra* n. 1, pp. 101–121.

7 *Ibid.*, pp. 185–233.

8 Judgment of the District Court in Janów Lubelski of 27 April 2009, II W 71/09, unpublished.

9 For the evolution of the legal protection of public decency during the Partitions and after regaining the independence, see K. Wala, *supra* n. 1, pp. 19–54.

The publication constraints are one reason for this limitation, and the other is the assumption that legal solutions close to the present content of Article 140 Petty Offences Code can best be sought precisely in local law.

2. MUNICIPAL CRIMINAL LAW

The model and primary source for municipal criminal law was German town law. The main role in this area was played by the *Sachsenspiegel* ('Saxon Mirror') and the *Weichbild*. Some parts of the Northern Poland followed the Kulm law.[10] The identified source for criminal law, however, appears to focus mainly on liability for the most serious offences. Bogusław Sygit's analysis of offences defined in the Kulm law seems to confirm this.[11] No prescript relating to facts classifiable under the current Article 140 Petty Offences Code can be found in Bartłomiej Groicki's compilation.[12] The latter, grounded in the Articles of the Magdeburg law, based on the Latin translation of the *Sachsenspiegel* and of the *Weichbild* by Mikołaj Jaskier.[13] It ought to be added that Groicki did note that his collection of prescripts did not reflect all of the stipulations of the aforementioned collections of the Magdeburg law but only those which were of greatest practical significance.[14]

The absence of a corresponding regulation from the above-referenced source does not, however, imply that no prescripts protecting public decency against what is nowadays regarded as 'indecent antics' existed at all. It must be borne in mind that in Polish cities also *wilkierze* (from German *Willkür*), i.e. ordinances intended to supplement the aforementioned primary sources, were an important source of law. They were initially enacted by the monarch or by the city's landlord, but eventually municipal councils gained the right to pass them.[15] Among other sources of municipal law attention is drawn to urban privileges, including the founding *privilegia*, which acted as a sort of municipal constitution, as well as the guidelines on the application of the law provided by the Magdeburg court.[16] Another source of municipal law were the *ortyle* (from German *Urteil*), that is the pronouncements of the Magdeburg municipal bench. Those concerned complex cases and were provided at the request of filial municipalities (founded on the Magdeburg law), usually forming precedents.[17]

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[10] B. Sygit, *Historia prawa kryminalnego,* Toruń 2007, p. 375.

[11] Listed crimes include, without limitation, homicide, wounding, rape, theft, receiving stolen property, or the desecration of a corpse, *ibid*., pp. 375–378.

[12] B. Groicki, *Artykuły prawa majdeburskiego. Postępek sądów około karania na gardle. Ustawa płacej u sądów (reprint ze wstępem K. Koranyiego)*, Warszawa 1954; in this collection Bartłomiej Groicki includes the most serious crimes defined in municipal criminal law, such as homicide, rape or theft, pp. 38–45.

[13] *Ibid*., introduction by K. Koranyi, p. IV.

[14] *Ibid*., p. 3.

[15] W. Uruszczak, *Historia państwa i prawa polskiego,* Vol. I: *(966–1795)*, Warszawa 2013, p. 90.

[16] *Ibid*., pp. 88–89.

[17] T. Maciejewski, [in:] *System Prawa Karnego. Źródła prawa karnego*, T. Bojarski (ed.), Vol. 2, Warszawa 2011, p. 12.

Among the criminal offences defined in municipal criminal law, offences against public decency first command our attention. In the subject literature those include: adultery, bigamy, rape, fornication, incest, homosexuality, sodomy, covert prostitution, pimping or the abduction of a female.[18] This list features acts that are currently not criminalised (e.g. homosexuality) or with a different classification than one nowadays based on Article 140 Petty Offences Code. It is worth briefly discussing adultery, though. The penalty for this crime was decapitation, although as Witold Maisel suggests, the practice of municipal courts since the 16th century was to commute that punishment.[19] For 'indecent antics', it will be expedient to recall the circumstances cited by Bartłomiej Groicki as potentially indicating the commission of this crime. He noted that, due to its nature, adultery was not easy to detect, though he submitted that evidence could be found in the suspected couple's groping, kissing or even frequently holding conversation with or smiling at each other.[20] In view of the above, it is noteworthy how certain examples of conduct currently classifiable under Article 140 Petty Offences Code[21] could have previously provided evidence of a more serious crime, which was adultery, under the Magdeburg law. Also the criminalisation of fornication and homosexuality stands out. The former meant the sexual intercourse of an unmarried couple. It is noted that such conduct could consist in either occasional sexual contact or prolonged relations, provided that the judges, as Marcin Kamler recalls, showed no greater interest in such distinctions.[22] The likely cause may have been, among other things, the evidentiary difficulties entailed by the nature of the act. As regards homosexuality, the aforementioned Kamler invokes a 1633 case from Sieradz, in which a baker Marcin Gołka was accused of having had sexual relations with Wojciech of Sromotka. The men were burned at the stake, which attests to the ancient laws' severity in this matter.[23]

The aforementioned matters relating to the criminalisation of adultery, fornication and homosexuality are a reflection of the changes occurring in the society's conceptions of decency and morality. It is evident that such conduct is not, in itself, currently criminalised. However, the attention called to this topic appears to be justified by its specific link to the modern concept of 'indecent antics'. The aforementioned behaviour can, for example, fulfil the constituent elements of an offence under Article 140 Petty Offences Code, but nowadays the particulars of the sexual partners are not relevant and what matters is the public nature of the act. Such a requirement is notably absent from the criminal law of the pre-Partition era, which could suggest that the *ratio legis* of the criminalisation of the conduct was grounded not only in a desire to protect public decency. In the case of adultery

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[18] W. Maisel, [in:] *Historia państwa i prawa Polski*, Vol. II: *Dawne polskie prawo karne miejskie: Od połowy XV wieku do r. 1795*, J. Bardach (ed.), Warszawa 1966, pp. 354–355.

[19] *Ibid.*, 354.

[20] B. Groicki, *Porządek Sądow y spraw mieyskich Prawa Maydeburskiego na wielu mieyscach poprawiony*, Kraków 1562, pp. 133–134.

[21] For example, excessively passionate kissing combined with undressing the partner in a public place.

[22] M. Kamler, *Złoczyńcy. Przestępczość w Koronie w drugiej połowie XVI i w pierwszej połowie XVII wieku (w świetle ksiąg sądowych miejskich)*, Warszawa 2010, pp. 284–285.

[23] *Ibid.*, p. 298.

the intention was also to protect the institution of marriage, while fornication and homosexuality were condemned by the Church (similarly to adultery, of course), whose doctrines largely affected the shape of criminal law.

Moreover, authors focus on the existence of ordinances governing such aspects of the *mores* as playing dice, rendering assistance to excommunicates, or throwing excessively sumptuous parties.[24] The last one was within the purview of sumptuary laws. As Witold Maisel submits, the reason for the existence of such prescripts was the desire to avoid hatred incited in the nobility by manifestations of opulence among the burgher class.[25] The direct impulse, as some also claim, came from the need to implement the ethical principles developed by the doctrines of the Church on the wrongfulness of excess.[26] At least some of the enactments in this area, however, show traces of the protection of public decency. As an example cited by Stanisław Estreicher, Kraków's municipal sumptuary laws prohibited wearing excessively short gowns that were not decent enough.[27]

As Maisel writes, municipal criminal law also had a list of offences against the public order. These included such conduct as drunkenness, noise or brawls, usually involving fines.[28] The ordinance of Olsztyn of 19 August 1568 could serve as an illustration here.[29] Its Chapter XIII outlawed, under the penalty of 3 ingots (*grzywna* – nominal silver ingot), raucous screams without a just cause after nine hours or at night. Chapter XIV, on the other hand, provided that no one should be allowed unbecoming dancing after nine hours (in the evening) with servants or other vagabonds or detain people in one's house (after that hour), under such penalty as an ordinance might provide. Later, it stipulated that whoever after the last sound of the clock leaves the alehouse or goes to other houses should without any singing or screaming go back to his house rather than roaming the streets, screaming and inciting brawls. Anyone caught doing so should be punished as the Council or the mayor may see fit.[30] It seems that the *ratio* of such prescripts was mainly grounded in a desire to protect the night's rest and quiet hours, and therewith the public order and peace, rather than public decency, which is attested by the fact that the elements of the crime stipulated night time as the *tempus sceleris*. One can draw the conclusion that such conduct would nowadays be classified mainly under Article 51 Petty Offences Code.[31] In some situations, however, the

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[24] M. Bogucka, H. Samsonowicz, *Dzieje miast i mieszczaństwa w Polsce przedrozbiorowej*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1986, p. 65.

[25] W. Maisel, [in:] *Historia państwa*, *supra* n. 18, p. 352.

[26] For more about municipal sumptuary laws, see S. Estreicher, *Ustawy przeciwko zbytkowi w dawnym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898, pp. 102–134.

[27] *Ibid.*, p. 110.

[28] W. Maisel, [in:] *Historia państwa*, *supra* n. 18, pp. 352–353.

[29] For more about that particular ordinance, see D. Bogdan, *Wilkierze miasta Olsztyna 1568–1696*, Olsztyn 2016.

[30] On the basis of the Polish translation of the prescripts provided by D. Bogdan, *supra* n. 29, pp. 71–73.

[31] § 1. Whoever by screaming, noise, alarm or other antic disturbs the peace and public order or the night's rest, or gives scandal in a public place, shall be liable to arrest, restriction of liberty or a fine. § 2. If the act defined under § 1 is of a rowdy nature or the perpetrator is intoxicated by alcohol, a narcotic drug or any other substance or agent of similar effect, the

classification could also involve Article 140 Petty Offences Code (when not violating the night's rest, which Article 51 Petty Offences Code requires). Also the ordinances of other cities prohibited conduct somewhat proximate to 'indecent antics', for example, the ordinance of Giżycko, originating, as Grzegorz Białuński submits, from between 1669 and 1723.[32] Its Article 8 stipulated a penalty for any cursing, knavery or godlessness.[33] Article 7 could also be of significance in the context of protecting the public decency; it mandated oversight of one's servants and the reporting of any debauchery to the mayor and the council.[34] Section 23 in Chapter IV (Civic conduct) of the 1634 ordinance of Starogard[35] provided that no citizen or apprentice craftsman or any other person must break up tables, benches or other items in front of houses, let alone take any liberties toward a human being, under the penalty of 3 ingots. Similarly to the previous examples, such conduct is more resemblant of the modern Article 51 Petty Offences Code, provided that the aforementioned 'taking of liberties' with regard to another person appears to be broad enough to be classified as an 'indecent antic' in certain situations. Section 24 of this ordinance is also noteworthy in stipulating that an indecent and foul life should not be tolerated in any citizen or other inhabitant of the city or outside the city, which may lead to a conclusion that there is a link with 'indecent antics'. The later part of the prescript criminalised the intentional harbouring of a harlot, which potentially suggests that the whole of it may have addressed prostitution and specifically penalised that trade. Tadeusz Maciejewski invokes the example of Article 52 of the 1581 ordinance of Nowy Staw, which made a crime of lewd singing and indecent dancing.[36] It may be noted that the oldest of the preserved ordinances of Prussian cities, that is the one of the New Town of Toruń, of 1300,[37] in its § 50 punished with a fine anyone who danced indecently, sang indecently or otherwise acted in an indecent manner.[38]

Some attention should also be paid to the existence of numerous provisions concerning alcohol and especially restrictions on its consumption or trade. While these provisions do not show a direct link with the protection of public decency against conduct nowadays classified as 'indecent antics', they potentially constitute a form of preventive action. For example, Kraków ordinances prohibited innkeepers from selling beer on site ('takeaway' sale was legal) 'when the eve had twice been sounded on the town hall.'[39] Moreover, Chapter VI of the aforementioned 1568

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penalty shall be arrest, restriction of liberty or a fine. § 3. Incitement and aiding and abetting shall be penalised.

[32] For more about this document, see G. Białuński, *Nieznany wilkierz miasta Giżycka*, Echa Przeszłości 14, 2013, pp. 39–48.

[33] *Ibid.*, p. 42.

[34] *Ibid.*

[35] *Wilkierz miasta Starogardu 1634 r. (kopia wilkierza)*, Starogard Gdański 1959.

[36] T. Maciejewski, *Zbiory wilkierzy w miastach Państwa Zakonnego do 1454 r. i Prus Królewskich lokowanych na prawie chełmińskim*, Gdańsk 1989, p. 117.

[37] For more about that particular ordinance, see T. Maciejewski, *Wilkierze miasta Torunia*, Poznań 1997, pp. 31–32.

[38] G. Bender, *Die ältesten Willküren der Neustadt Thorn, Zeitschrift des Westpreussischen Geschichtsvereins*, Heft VII, Danzig 1882, p. 115.

[39] S. Kutrzeba, *Piwo w średniowiecznym Krakowie*, Rocznik Krakowski Vol. I, Kraków 1898, p. 47.

ordinance from Olsztyn made anyone who proposed to sell beer, mead or liquor on Sunday or other holiday before the Holy Mass liable to a fine paid to the city. The later part of the chapter stipulated that, on pain of forfeiting the municipal citizenship, one should not serve beer or allow drunkenness in one's house on holidays such as the Palm Sunday or the Holy Week, or on those days when the people especially celebrated the Holy Communion.[40] Similarly, a Reszel ordinance dated to 1606 prohibited the sale of alcohol on Sundays, holidays and mornings, and alcohol was not to be sold to servants after 9 p.m.[41] Considering that the majority of acts nowadays classified as 'indecent antics' are committed under the influence of alcohol,[42] it appears to be a viable hypothesis that the above-provided examples of restrictions on alcohol could in some way have involved the protection of public decency in special times such as holidays or night hours.

To recapitulate, municipal criminal law provided for the protection of public decency against conduct proximate to modern 'indecent antics', though there was a measure of diversity in this protection, and it appears often to have had a secondary character. The diversification can be explained by legal particularism, although there are perceivable common features such as the existence of a sort of prevention exhibited in restrictions on the sale of alcohol. The secondary character, on the other hand, relates to how the main goal of a large part of the above-discussed examples was the protection of the public order against various sorts of incidents, especially at night time or during holiday periods or religious celebrations. However, due to the nature of those acts, it appears to be justified also to search for the protection of decency there. Furthermore, decency was largely protected by the criminalisation of sexual conduct such as adultery, homosexuality or fornication. The protection of decency was also stipulated by detailed provisions such as sumptuary laws. Of course, the practical effectiveness of the legal provisions of the time is an entirely different matter. The literature on the subject notes that restrictions on the sale of alcohol were not always effective, as all sorts of brawls occurred at inns, arising among other reasons from the diversity of customers gathering in such places.[43]

3. RURAL CRIMINAL LAW

In the literature, rural criminal law is regarded as the aggregate of norms of customary and statutory law defining criminal offences and specifying penalties applied by council courts and by courts operated by property owners.[44] As regards the sources of this law, Józef Rafacz mentions the Magdeburg law, ordinances issued by landowners, prescripts adopted by village assemblies, as well as legal custom,

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[40] D. Bogdan, *supra* n. 29, pp. 57–59.

[41] J. Kiełbik, *Siedemnastowieczny wilkierz jako źródło regulacji życia mieszkańców Reszla*, Komunikaty Mazursko-Warmińskie 4, 2004, p. 478.

[42] K. Wala, *supra* n. 1, pp. 193–194.

[43] K. Ossowski, *Karczma – późnośredniowieczne centrum rozrywki?*, [in:] P. Tompa, *Człowiek a historia*, Vol. III, Piotrków Trybunalski 2016, pp. 27–28.

[44] R. Łaszewski, *Wiejskie prawo karne w Polsce XVII i XVIII wieku*, Toruń 1988, p. 7.

with the role of the latter having been quite significant.[45] Ryszard Łaszewski also adds precedents from village courts and 'land law' (precedents of Polish courts).[46] Considering the foregoing, the primary source of knowledge about rural criminal law should be found in rural court registers ('books' or *libri*), the analysis of which makes it possible to study the practical application of that law and illustrates the types of cases heard by village courts in this area of the law. Also the analysis of ordinances issued by landowners (*wilkierze* again) is an important matter here. Protection of public decency (in the aspect of the modern 'indecent antics') will hereinafter be discussed mostly on the basis of the analysis of the aforementioned court registers and rural ordinances.

Rural criminal law recognized multiple offences against public decency. These included, without limitation, adultery, incest, sodomy, fornication (premarital intercourse), discordant relations in marriage, tobacco smoking (though this particular prohibition was justified mainly by security reasons, i.e. concerns that a fire might break out) or careless living (e.g. playing cards or dice, incurring debts).[47] Particular attention is commanded by the crime of indecent conduct, distinctly highlighted by Ryszard Łaszewski. The author characterises this offence as consisting in frivolous behaviour, 'wicked conversation' or similar misconduct giving rise to suspicions of adultery or some other carnal sin.[48] It should be noted that the concept of this particular offence is very broad in scope. In a later part of his work, Łaszewski observes that a large number of cases tried as indecent conduct pertained to situations in which married women received other men in their houses or otherwise spent time with them (at inns or fairs). Cohabitation between an unmarried couple and other sexually coloured 'wickedness' also formed part of this group.[49] The examples, therefore, highlight the protection of decency at a sort of the forefront, i.e. a desire to prevent graver offences, such as adultery and 'carnal sin' (a sexual intercourse between unmarried partners) that were acts criminalised in the old times. However, indecent conduct was not limited to sexuality. Łaszewski also identifies excessive drunkenness as part thereof. Penalties such as flogging and small fines were the typical consequence visited on the offenders.[50]

Having dealt with the general characteristics of rural criminal law in the aspect of the protection of public decency, it is now fitting to move on to the discussion of specific examples. And so it is worth paying some attention to Michał Antoni Sapieha's ordinance of 1749 for the Tuchola district (*starostwo*).[51] This instrument, according to its own recitals, was binding on all commoners (non-nobles) of the district and was issued with a view to maintaining peace and order in the area. Attention is drawn to section 5, which stipulated as follows: 'Let everyone beware of unbecoming taking of God's name without need, or oath, or curse or malediction,

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45 J. Rafacz, *Ustrój wsi samorządnej małopolskiej w XVIII wieku*, Lublin 1922, pp. 360–361.
46 R. Łaszewski, *supra* n. 44, p. 9.
47 Z. Zdrójkowski, [in:] *Historia państwa*, *supra* n. 18, pp. 368–370.
48 R. Łaszewski, *supra* n. 44, p. 131.
49 *Ibid.*, p. 131.
50 *Ibid.*, p. 132.
51 *Archiwum Komisji Prawniczej*, Vol. 11, Kraków: Akademia Umiejętności, 1938, pp. 311–321.

under the penalty of a pound of wax; so is to be punished anyone who should omit to attend the Holy Mass on account of drunkenness.' This prescript's main purpose appears to have been to protect religion; however, the mention of indulging drunkenness in lieu of attending the mass can also imply the protection of public decency. Section 29 is also interesting. It required every inn to contain a lockbox for alms for the poor but also the money paid by those who, 'offend by cursing, malediction, unneeded oath or some other ill habit.' This solution clearly manifests a desire for compensation to be provided, among others, by the perpetrators of indecent acts.[52]

Section 23 of the ordinance for the nobiliary villages of the county (*powiat*) of Lubawa was issued in 1756 by Wojciech Leski, Bishop of Kulm and Pomesania. Under these provisions, every inhabitant of one of those villages was required to lead a virtuous, honest and modest life and avoid all evil. The later part explained this meant, among other things, avoiding the carnal sin, drunkenness, theft, receiving stolen goods and other similar offences. Any offender was to be punished, 'according to the reason of our castle office or rural office.'[53] Attention is drawn by the particularly broad concept of the *actus reus* (which appears to include modern 'indecent antics'), as well as the unspecified penalty.

A similarly moralising tone can be found in a 1628 statute for the villages of Świlcza and Woliczka, one of the prescripts of which provided: 'may no one entertain drunkenness, adultery, fornication, quarrels, treasons or homicide, or other sins.'[54] Here, too, the penalty is left unspecified.

In the context of the prevention of indecent conduct, it is also worth paying some attention to section 30 of the ordinance of 1758 for the *mensa* villages of the bishopric of Kulm: 'To prevent all excess and frivolity, it is mandated that innkeepers dare not serve drinks later on any day than that hour of the night on which everyone should come to his house and not step outside.'[55] Later, the prescript prohibited innkeepers from selling alcohol during religious services and commanded to care to prevent all excess and frivolity. Any contraventions were punished as the superior authority saw fit. This is another example of a solution apparently intended, among other things, to protect the public decency before a violation even happened. Section 93 of the same ordinance, on the other hand, addresses behaviour at weddings and christenings. Any participant of such celebrations was to act modestly and concordantly and avoid all discord, noise or beating of others under the penalty of two ingots to the village and one to the Church.[56]

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[52] The sums so collected were to be forwarded to the superior authority or spent on the poor or for the Church's purposes; similar solutions were also provided for in other ordinances. For example, a 1616 ordinance for a village belonging to the Oliwa Abbey, in its Article XXV, ordered every innkeeper to have a lockbox for collecting money from those who, 'by malediction, cursing and other ill examples and habits offend and transgress.' See: *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 70.

[53] *Ibid.*, p. 346.

[54] Cited after B. Baranowski, *Sprawy obyczajowe w sądownictwie wiejskim w Polsce wieku XVII i XVIII*, Łódź, 1955, p. 38.

[55] *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 372.

[56] *Ibid.*, 377.

Interesting examples of the protection of public decency can be found in rural court registers. And thus Anna Biernacka received 15 strokes of the birch for her intemperance showing in how she 'lifting her scarves, demanded to be kissed;'[57] Jadwiga, the wife of Oleiarz, received 30 whips for shamelessly bending over toward the foreman;[58] and Zofia Salonka was given 30 whips for 'bending over' in Antoni Kowalczyk's direction and verbally disparaging him, which, according to the text of the judgment, had been confirmed by the witnesses of the incident.[59] The imposition of penalties for such type of conduct appears to have been predicated not only on the insult offered to a specific person against whom the gesture was performed but also the offender's violation of public decency. This is emphasized by Tomasz Wiślicz, who wrote an analysis of criminal liability for insulting gestures in rural criminal law.[60] He also noted other associated examples. Particular attention is drawn to the facts in which Katarzyna Pasiutka protruded her 'shameful members' toward Michał Krasieński, whereby she scandalised the inn's visitors at the time.[61] This description clearly shows that the need to punish the offender arose, among other things, from her violation of the public decency. Wiślicz submits that the intensified protection of public decency against nudity in rural relations was the result of the activities of the clergy, aspiring to instil Catholic ethical principles in the countryside.[62]

At this point other sets of facts described in court registers should be noted that could today be described as an 'indecent antic'. And thus, in 1685, Klimek Caputa was fined one ingot and one pound of wax to the Church for how he: 'failed to act in a becoming and staid manner; namely, among the people at the inn he engaged in levity and frivolous dealings, bringing ignominy also on the office as a whole.'[63] There is also an interesting case of 1738 concerning Jakub Trzepak, Tomasz Trzepak, Tomasz Jarczak and Antoni Głaszczyński. They were accused of not attending church: 'and if any one of them came, then first he had misplaced his head in the brewery and in such state came to converse more than pray, by which they made of themselves a scandal to others.'[64] The description of the incident shows reference to the offenders' violation of decency by improper behaviour

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[57] B. Ulanowski, *Księgi sądowe wiejskie*, Vol. I, Kraków 1921, p. 736 (see no. 4290).

[58] B. Ulanowski, *Księgi sądowe wiejskie*, Vol. II, Kraków 1921, p. 295 (see no. 7167).

[59] *Ibid.*, p. 308 (see no. 7204).

[60] T. Wiślicz, *Gest obraźliwy na wsi polskiej w XVII i XVIII wieku*, Przegląd Historyczny 88/3–4, 1997, pp. 417–425.

[61] *Ibid.*, p. 424.

[62] *Ibid.*, pp. 424–425.

[63] S. Grodziski, *Księgi sądowe wiejskie klucza jazowskiego 1663–1808,* Wrocław–Warszawa–Kraków 1967, p. 44 (see no. 22).

[64] *Ibid.*, 112 (see no. 119). Jakub and Tomasz Trzepak and Tomasz Jarczak were punished with 50 strokes with a rope, and Jakub Trzepak and Tomasz Jarczak additionally had to prostrate themselves in church on Sunday for the whole duration of the Mass. Antoni Głaszczyński, on the other hand, in lieu of the whipping, had to kneel in church and give four pounds of wax to the Church. The penalties imposed on the individual offenders in this case varied because in addition to the act described they had also engaged in other illegal activities. For example, it was additionally alleged against Tomasz Trzepak that he: 'had an excessive liking for the smoking of the pipe,' that is he enjoyed his tobacco too much.

during religious services. Today, it appears such conduct could be classified under Article 140 Petty Offences Code. In a different case, Bartosia Jakobowa and Bartosia Benedyktowa stood accused of their quarrels, fights and other noises between them which caused scandal among all the common people. Both received the penalty of being flogged, respectively 30 and 20 times. Should any further quarrels have ensued between them, the penalty was to have been 100 whips.[65] Also in the context of these facts attention was called to the perception of the offenders' conduct by others (causing scandal).

As these examples show, the protection of decency in rural areas was an important matter in old Polish law. Similarly to municipal criminal law, here too legal particularism makes itself noticeable. It appears that the protection of decency, as well as its very conception were tightly linked to the religious sphere, which, for the obvious reasons, is especially visible in the examples from villages owned by the Church. This conclusion is prompted by the frequent invocations of God both in rural ordinances[66] and in the judgments of rural courts.[67] Bohdan Baranowski observed a different aspect of this phenomenon. When analysing the topic of liability for adultery in rural criminal law, he observed that the true cause for the repression of immorality in rural areas was the desire to reinforce the feudal exploitation of peasants by landowners.[68] It seems to be a viable conclusion that the protection of decency and the contents attributed to it were the product of the two causes, while the individual weight assigned to each of the two reasons depended on numerous other factors (e.g. the geographical area or the identity of the landowner enacting the document).

4. CONCLUSION

In conclusion, the legal protection of public decency against conduct that nowadays is defined as 'indecent antics' pre-existed the codification period. In Polish criminal law of the pre-Partition era, the main role in this regard was played by custom and by municipal and rural ordinances, provided that the protection of public decency was very often linked to the protection of the public order. That, in turn, resulted in many cases where conduct identifiable today as an 'indecent antic' received a classification according to prescripts the main *ratio* of which had no connection with public decency (e.g. sumptuary laws) but served as the primary protection of other legal interests. It is also perceivable that the scope of the lawmaker's interference or the scope of criminalisation were diversified, which was prompted

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[65] B. Ulanowski, *supra* n. 58, Vol. II, p. 294 (see no. 7171). The case happened in 1756.

[66] For example, the introduction to the ordinance for the village of Kozibór (confirmed in 1729 by the *starost* of Dybów, J. Niewieściński) made a clear mention that its provisions were: 'for the glory of God and for the betterment of peace and concern among the people and neighbours;' see: *Wilkierz dla Wsi Koziboru z 1719 r.*; *Archiwum Komisji Prawniczej*, Vol. 11, *supra* n. 51, p. 200.

[67] For example, the adultery committed by Jan Wadowski and Elżbieta Kolasówna (the offence defined as 'carnal sin') was referred to as a: 'grave insult to Lord God Almighty'; S. Grodziski, *supra* n. 63, p. 140 (see no. 179).

[68] B. Baranowski, *supra* n. 54, p. 45.

by the dynamic nature of the legal interest protected by those prescripts. The fact that the criminal law of old times criminalised certain conduct (e.g. homosexuality, fornication) attests to the historical transformations of the perception of public decency. The existence of legal regulation of this particular interest is an emanation of the latter's importance to the proper functioning of society.

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PROTECTION OF PUBLIC DECENCY IN POLISH CRIMINAL LAW OF THE PRE-PARTITION PERIOD AGAINST CONDUCT CLASSIFIED TODAY UNDER ARTICLE 140 OF THE PETTY OFFENCES CODE

Summary

The article presents the issues related to the protection of public decency against conduct currently classified as indecent antics (Article 140 of the Petty Offences Code) in the period until Poland lost its independence in the 18th century. The regulations in force at that time have been analysed, along with the factual cases examined by the courts.

Keywords: public decency, indecent antic, municipal criminal law, rural criminal law

OCHRONA OBYCZAJNOŚCI PUBLICZNEJ PRZED ZACHOWANIAMI KWALIFIKOWANYMI OBECNIE Z ART. 140 K.W. W POLSKIM PRAWIE KARNYM OKRESU PRZEDROZBIOROWEGO

Streszczenie

W artykule została przedstawiona problematyka związana z ochroną obyczajności publicznej przed zachowaniami współcześnie kwalifikowanymi jako nieobyczajne wybryki (art. 140 k.w.) w okresie do utraty przez Polskę niepodległości w XVIII wieku. Analizie poddano funkcjonujące w tym czasie przepisy, jak i przedstawiono stany faktyczne rozpatrywane przez sądy.

Słowa kluczowe: obyczajność publiczna, nieobyczajny wybryk, miejskie prawo karne, wiejskie prawo karne

PROTECCIÓN DE DECENCIA PÚBLICA ANTE LOS COMPORTAMIENTO CALIFICADOS ACTUALMENTE COMO ART. 140 DE CÓDIGO DE FALTAS EN EL DERECHO POLACO EN EL PERÍODO ANTES DE LAS PARTICIONES

Resumen

El artículo presenta la problemática relacionada con la protección de decencia pública ante los comportamientos calificados actualmente como excesos inmorales (art. 140 de código de faltas) hasta la pérdida de independencia por Polonia en el siglo XVIII. Se analizan las normas vigentes en aquella época, como los hechos juzgados por los Tribunales.

Palabras claves: decencia pública, excesos inmorales, derecho penal municipal, derecho penal rural

ЗАЩИТА ОБЩЕСТВЕННОЙ НРАВСТВЕННОСТИ ОТ ПОВЕДЕНИЯ, ПРЕДУСМОТРЕННОГО СТ. 140 КОАП, В ПОЛЬСКОМ УГОЛОВНОМ ПРАВЕ В ПЕРИОД ДО РАЗДЕЛОВ РЕЧИ ПОСПОЛИТОЙ

Аннотация

В статье рассматриваются вопросы, связанные с защитой общественной морали от поведения, которое в настоящее время классифицируется как непристойная выходка (ст. 140 КоАП) в период до потери Польшей своей независимости в XVIII веке. Анализируются действующие на то время законодательные акты, а также фактический материал по делам, рассматриваемым судами.

Ключевые слова: общественная мораль; непристойная выходка; городское уголовное право; сельское уголовное право

DER SCHUTZ DER ÖFFENTLICHEN SITTLICHKEIT NACH AKTUELL ARTIKEL 140 DES POLNISCHEN ORDNUNGSWIDRIGKEITSGESETZES QUALIFIZIERTEN VERHALTEN IM POLNISCHEN STRAFRECHT IN DER ZEIT VOR DEN TEILUNGEN POLENS

Zusammenfassung

Der Artikel befasst sich mit der Problematik des Schutzes der öffentlichen Sittlichkeit vor Verhaltensweisen, die in unserer Zeit als grober Unfug (Artikel 140 des polnischen Ordnungswidrigkeitsgesetzes) eingestuft werden, in der Zeit bis zum Verlust der staatlichen Unabhängigkeit Polens im 18. Jahrhundert. Einer Analyse unterzogen werden die in dieser Zeit geltenden Vorschriften und es werden die von den Gerichten geprüften Sachverhalte dargelegt.

Schlüsselwörter: öffentliche Sittlichkeit, grober Unfug, Stadtstrafrecht, Landstrafrecht

PROTECTION DE LA MORALITÉ PUBLIQUE CONTRE LES COMPORTEMENTS ACTUELLEMENT QUALIFIÉS EN VERTU DE L'ART. 140 DU CODE DES CONTRAVENTIONS EN DROIT PÉNAL POLONAIS DE LA PÉRIODE PRÉCÉDANT LE PARTAGE

Résumé

L'article présente les enjeux liés à la protection de la moralité publique contre les comportements actuellement qualifiés comme des excès indécents (article 140 du Code de contraventions) dans la période jusqu'à la perte de l'indépendance par la Pologne au XVIIIe siècle. Les dispositions en vigueur à l'époque ont été analysées et les faits examinés par les tribunaux ont été présentés.

Mots-clés: moralité publique, excès indécent, droit pénal municipal, droit pénal rural

TUTELA DELLA PUBBLICA DECENZA DAI COMPORTAMENTI ATTUALMENTE QUALIFICATI DALL'ART. 140 DEL CODICE DELLE CONTRAVVENZIONI NEL DIRITTO PENALE POLACCO DEL PERIODO PRIMA DELLE SPARTIZIONI

Sintesi

Nell'articolo viene presentata la questione legata alla tutela della pubblica decenza nei confronti dei comportamenti attualmente qualificati come atti indecenti (art. 140 del Codice delle contravvenzioni) nel periodo fino alla perdita dell'indipendenza da parte della Polonia nel XVIII secolo. Sono state analizzate le norme in vigore a quel tempo e sono stati presentati i fatti esaminati dai tribunali.

Parole chiave: pubblica decenza, atto indecente, diritto penale urbano, diritto penale rurale

Cytuj jako:

Wala K., *Protection of public decency in Polish criminal law of the pre-Partition period against conduct classified today under Article 140 of the Petty Offences Code [Ochrona obyczajności publicznej przed zachowaniami kwalifikowanymi obecnie z art. 140 k.w. w polskim prawie karnym okresu przedrozbiorowego]*, „Ius Novum" 2020 (14) nr 4, s. 155–169. DOI: 10.26399/iusnovum.v14.4.2020.41/k.wala

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CLASSIFICATION OF ACTIVITIES SUBJECT TO ENTRY IN THE REGISTER OF TELECOMMUNICATIONS ENTREPRENEURS

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1. INTRODUCTION

The judgments issued by the Court of Justice of the European Union (CJEU) in cases C-142/18[1] and C-193/18[2] unambiguously indicate that, regardless of the 18 years' period after a package of directives for the electronic communications sector of 2002 entered into force,[3] the issues concerning the legal classification of electronic communications services still raise many considerable doubts among entrepreneurs as well as regulatory authorities and courts applying the law. Modification to the legal definitions and a new category of interpersonal communications introduced

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1 Judgment of 5 June 2019 in case *Skype Communications Sàrl v Institut belge des services postaux et des télécommunications (IBPT)*, LEX No. 2677171.

2 Judgment of 13 June 2019 in case *Google LLC v Bundesrepublik Deutschland*, LEX No. 2680395.

3 The package included:

- Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108/33, 24.4.2002);
- Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108/7, 24.4.2002);
- Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108/21, 24.4.2002);
- Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108/51, 24.4.2002).

in the European Electronic Communications Code of 11 December 2018,[4] the implementation deadline of which is in December, only exacerbate the above-mentioned problems connected with the determination of the status of particular services. At the same time, the dynamic development of technology together with the broader and broader use of the Internet of Things or artificial intelligence create new challenges related to the need to determine the status of emerging services or solutions that are often and to a great extent based on communications techniques.

Taking into account the above introductory comments, it is necessary to discuss, in the context of both the above-quoted CJEU judgments and the forthcoming legislative changes, the approach to the classification of entrepreneurs' activities as telecommunications activities and the resulting obligation to obtain appropriate authorisation to conduct particular types of activities. The practical problems occurring in connection with the lack of certainty of the status of a particular activity disrupt the implementation of the principle of legal certainty and the principle of equality and non-discrimination.[5] At the same time, the situation in which an entrepreneur fails to register as a telecommunications entrepreneur, despite the obligation to do so, and the situation in which they enter a particular activity into the register, although there is no obligation to do so, have negative consequences. They are not only faced by those entrepreneurs alone but also regulatory authorities, which are obliged to create equal conditions of competition, as well as by competitors operating on the same market.[6]

2. STATE CONTROL OVER TELECOMMUNICATIONS ACTIVITY

In accordance with Article 10 of the Act of 16 July 2004: Telecommunications Law,[7] a telecommunications activity that is a business activity is subject to state control and entry to the register of telecommunications entrepreneurs. The obligation to register occurs when a given activity matches two features: it is a business activity and it constitutes a telecommunications activity. The definition of a business activity is laid down in Article 3 of the Act of 6 March 2018: Entrepreneurs' Law,[8] in accordance

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[4] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December establishing the European Electronic Communications Code (Recast) (OJ L 321/36, 17.12.2018); hereinafter Directive 2018/1972.

[5] For more on the issue of basic rules of conducting business activity, see M. Zdyb, *Podstawowe zasady (standardy) ładu gospodarczego w świetle ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, Monitor Prawniczy 13, 2018, p. 1005 et seq.

[6] The negative impact on competitors concerns in particular such situations in which an entrepreneur fails to register, despite the obligation to do so and, as a result, he is subject to less strict obligations within the requirements connected with the conducted activity (e.g. within the scope of reporting, obligations to provide information to customers, or the content of contracts for the provision of services), and he is exempt from considerable legal burdens (e.g. he does not have to pay a telecommunications fee and fulfil duties connected with defence, state security, public security and public order).

[7] Consolidated text, Dz.U. 2019, item 2460, as amended; hereinafter TL.

[8] Consolidated text, Dz.U. 2019, item 1292, as amended.

with which it is an organised income-generating activity performed on one's own behalf and in a continuous manner.

On the other hand, in accordance with Article 1 para. 1 TL, a telecommunications activity is an activity consisting in the provision of telecommunications services, telecommunications networks or associated services. Each of the above-mentioned types of telecommunications activities has its legal definition laid down in Article 2 TL. At the same time, Article 2(27) TL stipulates that a telecommunications entrepreneur having the right to conduct an activity consisting in the provision of telecommunications services is called a service provider, and an entrepreneur having the right to conduct the activity consisting in the provision of public telecommunications networks or related services is called an operator.

Particular types of telecommunications activities require specification of the features that distinguish and, at the same time, oblige an entity conducting a given activity to obtain authorisation to do it. It should be emphasised that such classification is an entrepreneur's duty because entry to the register of regulated business activities is not subject to the substantive assessment but only to the formal and legal one.[9] Frankly speaking, Article 43 para. 7 of the Act: Entrepreneurs' Law lays down a possibility of checking the fulfilment of all the legal conditions by an entrepreneur in order to conduct a regulated activity but the provision does not determine when this inspection can take place.[10] Taking into account a short time limit that the President of the Office of Electronic Communications has to enter an entrepreneur into the register of telecommunications entrepreneurs,[11] it does not seem probable that the inspection can be performed before the entry and, as a rule, it will be subsequently performed.

The entry into the register of telecommunications entrepreneurs is a substantive and technical activity that is declarative in nature.[12] It is worth emphasising that there is an established opinion in case law that a telecommunications entrepreneur status does not depend on the actual business activity conducted but only on the formal entry into the register of telecommunications entrepreneurs.[13] This leads to the situation in which an entity that actually does not conduct such an activity or has stopped to conduct it but is registered as a telecommunications entrepreneur is entitled to the telecommunications entrepreneur status. On the other hand, the entity that has failed to register but actually conducts a business activity that consists in a telecommunications activity is not entitled to this status.

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[9] Compare M. Etel, *Kontrola i odpowiedzialność jako problemy charakteryzujące regulowaną działalność gospodarczą (analiza z uwzględnieniem działalności telekomunikacyjnej)*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017, p. 22.

[10] Thus, rightly, M. Etel, *Reglamentacja działalności gospodarczej na gruncie przepisów ustawy z 6.3.2018 r. – Prawo przedsiębiorców*, Monitor Prawniczy 13, 2018, p. 31.

[11] Seven days of the date of an application made (Article 10 para. 8 TL).

[12] M. Strzelbicki, *Wpis do rejestru działalności regulowanej*, Ruch Prawniczy Ekonomiczny i Socjologiczny 4, 2005, p. 74; and A. Trela, *Aspekty materialnoprawne wpisu do rejestru przedsiębiorców telekomunikacyjnych – zagadnienia wybrane*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 495, 2017, p. 161 and case law referred to therein.

[13] Thus, the Supreme Court judgments of 20 September 2011, III SK 55/10, LEX No. 1106752; and of 4 March 2014, III SK 35/13, LEX No. 1463898.

3. PROVISION OF TELECOMMUNICATIONS NETWORKS

In accordance with Article 2(4) TL, the provision of telecommunications networks is an activity consisting in the preparation of a telecommunications network so that services can be provided via it, it can be exploited, controlled and it can make telecommunications access available. On the other hand, a telecommunications network itself is defined (Article 2(35) TL) as transmission systems and switching and routing equipment, as well as other resources, including inactive elements of the network that make it possible to broadcast, receive and transmit signals with the use of wires, radio, optical and other means of conveying electromagnetic energy irrespective of their type. Both these definitions are based on definitions laid down in Article 2 Framework Directive.

It should be emphasised that the definitions are technologically neutral in nature,[14] which is in conformity with Recital 5 Framework Directive[15] and Recital 7 Directive 2018/1972[16] that stipulate striving for uniform regulation of any telecommunications networks, regardless of which technology a given network operation is based on,[17] what transmission medium is used in a given network[18] and what information (services) is transmitted with the use of this network[19].

The definition laid down in the Framework Directive has a few components. It lists elements that compose an electronic communications network, the function that the elements play, example electronic communications networks, and it indicates the object of transmission performed in those networks. The scope of the definition in the Telecommunications Law is narrower and it partially departs from the definition laid down in the Framework Directive.

The elements that compose an electronic communications network are transmission systems[20] and, in suitable cases, switching or routing equipment as well as other resources, including inactive elements of the network. In the case of this part of the definition, one can speak about a network which within the substantive meaning covers particular objects that altogether make up the concept of a telecommunications network.

The definition laid down in the Telecommunications Law differs from the definition provided in the Framework Directive as it does not indicate the optional

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[14] Compare A. Flanagan, [in:] *Telecommunications Law and Regulation*, I. Walden, J. Angel (eds), 2nd edn, Oxford 2006, p. 176.

[15] 'The convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework [...].'

[16] 'The convergence of the telecommunications, media and information technology sectors means that all electronic telecommunications networks and services should be covered to the extent possible by a single European Electronic Communications Code established by a single Directive [...].'

[17] For instance, xDSL, GPON, or DOCSIS.

[18] For instance, copper wires, optical fibre cables or a radio band.

[19] For instance, voice services, access to the Internet, TV services, location services or packages of the above-mentioned services.

[20] For more on the concept of transmission systems, see S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Legalis 2019.

nature of switching or routing equipment and other resources but lists them as an obligatory element of each telecommunications network. In the majority of cases, the issue will not be really important because most telecommunications networks, apart from transmission systems, are equipped with other devices such as routers, signal amplifiers or other similar devices or inactive elements of telecommunications infrastructure such as wires or cables. However, a problem may concern telecommunications networks that are limited to transmission systems and do not have the remaining elements indicated in the definition laid down in Article 2(35) TL. Such a situation can take place especially in cases in which for the implementation of the transmission an operator uses the services of leased lines provided by other telecommunications entrepreneurs. Taking into account the necessity of pro-Union interpretation of the provisions of law, it seems that the purposefulness requirements prescribe the assumption that also in case of such networks, an entrepreneur is obliged to notify about the activity of providing a network.

Another element refers to the functionality of a telecommunications network and it indicates the conveyance of signals by wire, radio, optical or other electromagnetic means. As far as this is concerned, the definition laid down in the Telecommunications Law does not depart from the definition in the Framework Directive as it covers broadcasting, receiving and transmitting signals with the use of wires, radio waves and optical or other means making use of electromagnetic energy. It is worth emphasising that the definition does not require that the signal be sent or received within a given network. Also networks that transmit a signal sent from one network and switched to another network where it is to be received match the element of the definition laid down in the Telecommunications Law. In addition, the definition does not require that broadcasting take place between a transmitter and a receiver. It is sufficient to limit a network functionality to broadcasting or receiving a signal.[21]

Both the Framework Directive and the Telecommunications Law emphasise that a type of a transmitted signal is insignificant for the classification of a given network as a telecommunications one. However, the Framework Directive refers to the information transferred within a network and the Telecommunications Law to the type of signal. The use of the term 'signal' is closer to the terminology used in telecommunications where an analogue signal and a digital signal are distinguished as the object of transmission.[22] On the other hand, the concept of information seems to refer to the content that is transmitted, e.g. images, sound or files. Neutrality of the object of transmission for the classification of a network results from the assumption made in the Framework Directive that there is a need to ensure uniform legal norms for all types of networks. That is why, the definition laid down in the Framework Directive lists example networks that should be recognised as electronic communications networks. The lack of such a list in the Telecommunications Law is insignificant because based on this law each of the example types of networks listed fulfils the requirements laid down in the definition of a telecommunications network.

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[21] Similarly S. Piątek, *Prawo telekomunikacyjne Wspólnoty Europejskiej*, Warszawa 2003, p. 111.
[22] Compare G. Smillie, *Analogue and Digital Communication Techniques*, Newnes 2002, pp. 2–4.

The definition of an electronic communications network laid down in the Directive 2018/1972 is to a great extent based on the one laid down in the Framework Directive. The only important change introduced in the Directive 2018/1972 concerns the determination of transmission systems, which can be based on a permanent infrastructure or centralised administration capacity. The above-mentioned change is explained in Recital 14 Directive 2018/1972, which provides that: 'Definitions need to be adjusted so as to conform to the principle of technology neutrality and to keep pace with technological development, including new forms of network management such as through software emulation or software-defined networks.' Therefore, the amended definition stipulates that also systems based on centralised administration of resources should be treated as transmission systems.[23]

Having defined the telecommunications network, it is necessary to establish in what situations an entrepreneur conducts activities consisting in the provision of this network. In accordance with the legal definition, it is an activity consisting in the preparation of a telecommunications network so that it will be possible to provide services within it, use it, supervise it or provide telecommunications access. According to the definition laid down in the Polish language dictionary, 'preparation' means activities, endeavours, efforts made in order to achieve something intended.[24] In line with such a definition, a doubt may be raised whether the provision of a network also covers building it. It is unanimously indicated in the legal doctrine that building a telecommunications network alone does not constitute telecommunications activities within the meaning of the Telecommunications Law.[25] The above opinion should be approved of because at the stage of building a telecommunications network, which undoubtedly constitutes the stage of a telecommunications network preparation within the meaning of the above-mentioned definition, the aim of the preparation indicated in the definition has not been fulfilled yet. The provision indicates that preparation is to be done in the way making it possible to implement: the provision of services, use and supervision of a network or availability of telecommunications access. At the same time, it is sufficient to prepare a network to fulfil one of the above-mentioned aims, which is confirmed by the use of a conjunction 'or'. As far as this is concerned, the Telecommunications Law introduces some changes in comparison with the definition laid down in the Framework Directive, which defines providing a telecommunications network access as the establishment, operation, control and making available of such a network. Thus, each of the elements must be fulfilled to provide access to a network. Undoubtedly, the weakness of both definitions consists in the fact that they use indefinite concepts, which can raise interpretational doubts. Moreover, the definition in the Framework Directive is an example of a circular definition (*idem per idem*) indicating that the provision of access to a network means, inter alia, the provision of access to a network.

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[23] For instance, in a situation when various entities share the same resources.

[24] *Słownik języka polskiego*, https://sjp.pwn.pl/sjp/przygotowanie;2512060.html (accessed 10.8.2020).

[25] Compare S. Piątek, 2019, *supra* n. 20; and M. Rogalski, Art. 2, [in:] M. Rogalski, K. Kawałek, *Prawo telekomunikacyjne. Komentarz*, LEX 2010.

The above-mentioned drawbacks of the definition laid down in the Framework Directive have not been eliminated by the definition laid down in the Directive 2018/1972. This directive substitutes the concept of the provision of a network for the concept of making available of a network used in the Telecommunications Law, but in the remaining scope it copies a definition laid down in the Framework Directive, also using a circular definition, but this time the provision of a network is defined as the 'provision of this network'.

Stanisław Piątek points out that the provision of a network takes place only when the aim of the activity is to provide services and, as a result, the preparation of a network for the purpose of using it for one's own needs does not constitute the provision of a network.[26] It seems that there are no grounds for the above conclusion. Firstly, as it has been indicated above, the definition of the provision of a network, apart from the provision of services and making telecommunications access available, alternatively lists the operation and control thereof. As a result, it seems that an activity in which an operator uses a network for his own needs connected with the business activity, e.g. needs connected with the provision of other services, should be treated as the provision of a network that must be disclosed in the register.[27] At the same time, it is not important that the activity consisting in the provision of a network does not generate profits directly or it is not provided for remuneration if, in such a situation, a telecommunications network is used by an entrepreneur to conduct his main activity, e.g. one connected with the distribution of electricity. Thus, it seems that also an entrepreneur using a telecommunications network for the needs connected with a business activity that is not the provision of services in a telecommunications network should register telecommunications activity consisting in the provision of a telecommunications network.

Finally, it is also worth pointing out that apart from the definition of a telecommunications network, the Telecommunications Law also lays down the definition of a public telecommunications network, i.e. a telecommunications network mainly used to provide publicly available telecommunications services. Telecommunications activity means the provision of a public telecommunications network as well as the provision of a telecommunications network that is public in nature. This is confirmed in Recital 4 Authorisation Directive, which explicitly states that it covers authorisation of all electronic communications networks and services whether they are provided to the public or not.[28]

4. PROVISION OF ASSOCIATED SERVICES

The provision of associated services is another type of telecommunications activities that gives an entrepreneur the status of an operator. In accordance with Article 2(44a) TL, 'associated services' means 'services connected with a network

[26] S. Piątek, 2019, *supra* n. 20.

[27] For example, a telecommunications network used to manage an electricity network and provide electricity.

[28] For more, compare S. Farr, V. Oakley, *EU Communications Law*, 2nd edn, London 2006, p. 185.

or telecommunications services that enable or support the provision of services via those networks or services, or have the potential to do so, and include number translation systems or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identification, localisation and presence service.' Article 2(e) Framework Directive provides a similar definition of associated services.[29] Associated services constitute a form of associated facilities, which Article 2(44) TL defines as follows: 'associated services, physical infrastructure and other equipment or elements connected with a telecommunications network or telecommunications services that enable or support the provision of services via those networks or services, or have the potential to do so, and include buildings, entrances to buildings, building wiring systems, antennae, towers and other supporting structures, canals, cables, masts, wells and lockers.' It should be emphasised that among the above-mentioned associated facilities, only the provision of associated services is explicitly indicated as a telecommunications activity. Stanisław Piątek is right to point out that a common feature of all associated services is their immaterial nature, which distinguishes them from other associated facilities.[30] Some associated services have their legal definitions laid down in the Telecommunications Law: an electronic programme guide (Article 2(7) TL), and a conditional access system guide (Article 2(39) TL). On the other hand, number translation constitutes one of the forms of a telecommunications access indicated in Article 2(6)(d) TL. Number translation is mainly connected with appropriate direction of connections to numbers where behind a given call number, e.g. an emergency call number 112, there is a secondary emergency number of the appropriate emergency service.[31] In the case of other associated services, an operator must establish whether a given functionality matches the features indicated in the definition laid down in Article 2(44a) TL. A localisation service is an example of such an additional functionality, which is not separately defined. Such a service will be recognised as an associated service when it is connected with a telecommunications network or service.[32] The connection must consist in making the provision of a service available or supporting it. Sometimes, a few associated services may be connected with one telecommunications service as it happens in the case of the above-mentioned emergency connections. In order to properly perform an emergency connection, it is necessary to establish location of an end user making a call and then switch

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[29] In accordance with the definition laid down in the Framework Directive, 'associated service' means a service associated with an electronic communications network and/or an electronic communications service which enables and/or supports the provision of services via that network and/or service, or has the potential to do so, and includes number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence.

[30] Compare S. Piątek, 2019, *supra* n. 20.

[31] Translation rules of three-digit numbers AUS and the emergency number 112 into the secondary emergency numbers are laid down in § 4 of Annex no. 1 to the Regulation of the Minister of Administration and Digitisation of 12 December 2014 concerning detailed requirements for addressing rules for the purpose of appropriate direction of connections (Dz.U. 2015, item 15).

[32] Article 2(47) TL stipulates that a telecommunications service requiring the processing of location data constitutes a value added service.

the connection (number translation) to an appropriate emergency service and the transmission of their location data.

It is worth emphasising that associated services are practically never subject to an independent service, which directly results from their accessorial nature of supporting services or ones making it possible to provide telecommunications networks or providing telecommunications services. The CJEU adopted the same stance in relation to a conditional access system and pointed out that: 'Due to its additional nature, a conditional access system can be associated with an electronic communications service that aims to broadcast radio or television programmes; however, the service does not lose its nature of an electronic communications service. The confirmation of this conclusion can be found in Article 2(e) Framework Directive in accordance with which conditional access systems are services connected with a network or electronic communications services, which enable the provision of services via those networks or services.'[33]

5. PROVISION OF TELECOMMUNICATIONS SERVICES

The provision of telecommunications services is the last category of telecommunications activities within the meaning of the Telecommunications Law provisions. The legal definition of a telecommunications service laid down in Article 2(41) TL, which defines it as the provision of services via an operator's own network, with the use of another operator's network or selling a telecommunications service offered by another provider in one's own name and on one's own behalf. On the other hand, a telecommunications service alone is defined in Article 2(48) TL as a service consisting in the transmission of signals in a telecommunications network. The Telecommunications Law, unlike the Framework Directive, does not list a case when a service consists exclusively in the transmission of signals.[34] Another difference concerns a negative aspect of the definition laid down in the Framework Directive, which directly excludes services connected with ensuring of or performance of control over the content transmitted via a network or electronic communications services from the scope of electronic communications services. As Recital 5 Framework Directive stipulates, it is necessary to separate the regulation of transmission from the regulation of content, which is not covered by this framework.[35]

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[33] The CJEU judgment of 30 April 2014, C-475/12, LEX No. 1466236.

[34] Definition laid down in Article 2(c) Framework Directive stipulates: '"electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;'.

[35] Recital 5 Framework Directive stipulates: 'It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content

Another exclusion covers information society services,[36] provided that they do not wholly or mainly consist in the transmission of signals via electronic communications networks. This means that, as a rule, information society services do not constitute telecommunications services, unless the essence of such a service consists wholly or mainly in the transmission of signals. The distinction between information society services that are telecommunications services and those that are not is explained in Recital 10 Framework Directive, which points out that: 'Most of these activities [i.e. information society services – W.K.] are not covered by the scope of this Directive [i.e. Framework Directive – W.K.] because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example, an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.'

As a result, information society services should be divided into two groups, i.e. information society services that are also telecommunications services and information society services that do not constitute telecommunications services. At the same time, as the Framework Directive indicates, the same entrepreneur can in general provide each of those services and be subject to a separate legal regime in this field, i.e. within the scope of services constituting telecommunications services subject to the provisions of the Telecommunications Law and within the scope of information society services mainly subject to the provisions of the Act of 18 July 2002 on the provision of electronic services.[37] At the same time, most problems concerning appropriate classification of a given service occur when there is a concurrence of the provisions of those two legal acts. To a great extent, it results from the lack of precise criteria for a borderline between information society services constituting telecommunications services and those of them that do not have this nature.

The issues concerning the classification of services of broadcasting radio and television programmes are best examples of problems arising in the field of classification of the above-mentioned exclusions from the Framework Directive. In its judgment of 7 November 2013 in case C-518/11[38] the CJEU came to a conclusion that the service of supplying basic radio and television packages via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission

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of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism.'

[36] In the present legal state, the definition of 'information society service' is laid down in Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

[37] Consolidated text, Dz.U. 2020, item 344.

[38] LEX No. 1383206.

of programme content shall be recognised as an 'electronic communications service', provided that the service consists of the transmission of television content on a cable network to the end-users' receivers. Such classification of services by the CJEU also caused a change in the stance of the President of the UKE (the Office of Electronic Communications) concerning the classification of cable or satellite television services.[39] Case law of common[40] and administrative[41] courts has adopted an analogous stance.

However, in literature, Stanisław Piątek questioned the CJEU opinion and pointed out that in the case of the provision of television programme packages, the main element of the service provided is not the conveyance of a signal in a telecommunications network but providing access to the content of programmes, which are transferred with the use of those signals because the content of those programmes constitutes the biggest part of the value of this service and is the main reason for the purchase of the whole service by end users.[42] Adjudicating on the case, the CJEU did not evaluate which elements of a television service are most important and based its judgment on the purposefulness approach, which aimed to ensure that television service users have the right to the same protection as the users of telecommunications services.[43] With regard to the above opinion, it is necessary to admit that, on the one hand, the main element of a television service is really the access to its programme content. However, it seems that the CJEU analysed that aspect in its judgment and unanimously pointed out that the relevant directives, in particular the Framework Directive, the Competition Directive and the Audiovisual Media Services Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility because content and transmission are covered by different measures without referring to customers of the service supplied or to the structure of the transmission costs charged on them. In the present case, it is apparent from the order for reference and the written and oral submissions made before the Court that UPC's principal business is the transmission of radio and television programmes via cable to its subscriber customers. UPC confirmed at the hearing before the Court that it does not produce those programmes itself and that it does not exercise any editorial responsibility over their content.[44] As it seems, the CJEU was right to recognise that since the programme content is not the object of this service offered by the provider and it is not responsible for this content, it cannot be recognised that it is the main element of the service offered

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[39] Compare S. Piątek, *Rozprowadzanie programów jako usługa telekomunikacyjna*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 7(4), 2015, pp. 79–80.

[40] For example, the judgment of the Competition and Consumer Protection Court of 8 November 2013, XVII AmA 5/12, LEX No. 1720256.

[41] For example, judgments of the Voivodeship Administrative Court in Warsaw of 13 April 2016, VI SA/Wa 4267/14, Legalis No. 1584495; and of 9 April 2018, VI SA/Wa 1282/17, LEX No. 2746463, as well as the judgment of the Supreme Administrative Court of 13 March 2019, II GSK 5374/16, LEX No. 2732504.

[42] S. Piątek, 2015, *supra* n. 39, p. 79.

[43] *Ibid*., p. 79.

[44] The CJEU judgment of 7 November 2013 in case C-518/11, LEX No. 1383206.

by the provider because the main element of the service consists in the conveyance of television signal to end users concerned. Stanisław Piątek himself believes that in general there are no obstacles in the way of telecommunications services providers formally dividing a television service into two services: one of which would exclusively contain the transmission element, and the other that would only consist of the content.[45] As a result, it must be acknowledged that if both services are separated and constitute different services, a situation in which a service provider combines them in order to avoid classification of its services as telecommunications services should be recognised as groundless. It, therefore, seems that combining the two components of a service concerns such cases when a service provider is wholly responsible for both the element connected with transmission and the element of content, e.g. a financial service or content supplied to an end user.

Nevertheless, also in those cases, establishing when one deals with a telecommunications service will not be a simple task. The above-mentioned definition laid down in the Telecommunications Law indicates that an element of signal transmission and others can compose a particular service in different proportions. It is not clear how to establish whether in a given case an element of a signal transmission constitutes the major element of a service.[46] Neither of the above-mentioned CJEU judgments resolves the problem. To tell the truth, the CJEU referred to this element of the definition in its judgment in case C-138/19 (Recitals 34–35 and 37) and pointed out that:

> It is common ground that the provider of a web-based service, such as Gmail, conveys signals. [...] Nonetheless, it cannot be thus concluded that the operations performed by Google to ensure the functioning of its web-based email service constitute an 'electronic communications service' within the meaning of Article 2(c) of the Framework Directive, since that service does not consist wholly or mainly in the conveyance of signals on electronic communications networks. The fact that the supplier of a web-based email service actively participates in the sending and receipt of messages, whether by assigning to the email addresses the IP addresses of the corresponding terminal devices or by splitting those messages into data packets and uploading them to, or receiving them from, the open internet for the purpose of transmitting them to their recipients, does not appear to be sufficient to enable that service, on the technical level, to be regarded as consisting 'wholly or mainly in the conveyance of signals on electronic communications networks' within the meaning of Article 2(c) of the Framework Directive.

The above-mentioned Recitals do not explain, however, how to make a distinction between services that mainly consist in the transmission of signals and those that do not. In the doctrine, Stanisław Piątek pointed out that such evaluation may be done either based on the criterion of costs of particular elements of a service,[47] or based on usefulness-related features of a service and the needs it satisfies.[48] Undoubtedly, the subjectivity of the evaluation is a drawback of both approaches, especially the former

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[45] S. Piątek, 2015, *supra* n. 39, p. 79.

[46] There is no problem like this in the case when the transmission of signals constitutes an exclusive element of a service.

[47] Where the proportions of cost elements indicate the nature of a given service.

[48] S. Piątek, 2015, *supra* n. 39, p. 78.

one. In the case of evaluation through the prism of costs, there is another difficulty connected with the problems concerning the establishment of the above-mentioned cost proportion. A considerable proportion of costs incurred by entrepreneurs is general in nature and it is not possible to allocate them directly to a given service or it is necessary to establish the key to the system of their allocation. What is important, within the scope of retail costs that are not subject to regulatory control within the obligations imposed *ex ante*,[49] no supplier of telecommunications services is obliged to apply regulatory accounting and, thus, checking if the classification is proper may be difficult or even impossible for it, but first of all for all authorities (the President of the UKE, courts) controlling the correctness of its operations. Moreover, such an approach might lead to a different classification of the same services by different entrepreneurs if the structure of their costs were different and led to different proportions of the element of transmission and others.

It seems that the examination of a service from the point of view of its usefulness for a customer and functionality that a given service provides is a better solution. According to the definition laid down in the Polish language dictionary, the word 'mainly' means 'especially, first of all, mostly'.[50] As a result, evaluating a given service, it is necessary to examine whether the attribute of this service is mainly the conveyance of signals in a network or they are different in nature and 'the telecommunications aspect' is only secondary (incidental). Nevertheless, carrying out this evaluation, it is necessary to take into account whether a supplier of services is responsible for the entire service, including other elements thereof, e.g. for the content of the transmission, or if its responsibility is limited to transmission elements as it happens in the case of broadcasting television programmes. In order to explain this relationship, the following example can be used:

- A service supplier provides an end user with access to technical teleservices where responsibility covers both the element of transmission and the element connected with vehicle diagnostics;
- A service supplier provides an end user with access to technical teleservices where its responsibility does not cover the element of vehicle diagnostics because this is the responsibility of another entity.

Based on the above example, it seems justified to assume that in the former case an end user makes use of all additional functionalities (elements of content) provided by the supplier, where a telecommunications service constitutes only a carrier for the provision of the main service, i.e. the conveyance of telediagnostics data. In the latter case, the end user is also interested in obtaining telediagnostics data but the service supplier is not responsible for this element and its service is mainly limited to the conveyance of transmission data. The situation is analogous when the service provider offers other services the additional, secondary element of which is data transmission as in the case of the service of electronic mail. The functionality of emergency connections provided by a series of contemporary devices may be another example, e.g. vehicles or lifts which let a user make an

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[49] Which is practically a rule within the whole EU.

[50] *Słownik języka polskiego*, https://sjp.pwn.pl/sjp/glownie;2462027.html (accessed 10.8.2020).

emergency call or make it on their own in specific situations. It seems there are no doubts, however, that a user decides to buy a vehicle or use a lift not because of the possibility of making such an emergency call but because of another main functionality. It seems, at the same time, that the evaluation should be made in an objective way, i.e. by examining a given functionality from the point of view of all users and not an individual customer.

Another important aspect connected with evaluation when an entrepreneur provides telecommunications services and should register this business operation, and be subject to control over the activity of transmission of signals in a network. In accordance with the legal definition, the provision of telecommunications services takes place in three situations, i.e.:

(1) The provision of services with the use of the provider's own network;
(2) The provision of services with the use of another operator's network;
(3) Another supplier's telecommunications services are sold in the provider's own name and on its own behalf.

With reference to (1) above, i.e. the provision of services with the use of the provider's own network, the case seems to be relatively obvious and should not create any problems with proper classification of a telecommunications service because the service supplier is also an entity conveying signals in its own network (and thus its activity covers the provision of a network).

As regards (2) above, the case of providing services with the use of another operator's network is a relatively more complicated situation. It is so because it may happen that in such a case more than one entity will be a telecommunications service provider to an end user, and both entities will be responsible for the provision of a telecommunications service. Such a situation took place in case C-142/18, where in the actual state analysed, Skype Communications Sàrl made available software that enabled users who installed it on their terminal device, i.e. a computer, a tablet or a smartphone, to use the voice telephone and teleconference service between individual devices. At the same time, an internet connection was necessary to use the service, which was provided to a user by a different service supplier. The service provided by Skype Communications Sàrl was OTT (over-the-top) in nature,[51] and the transmission of signals was to a great extent performed by other entities.[52] Nevertheless, the CJEU recognised that the above-described service constitutes an electronic communications service. The justification of the CJEU judgment provides four important conclusions that help to classify a given service as a telecommunications one:

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[51] For more on the definition and nature of OTT services, see S. Żyrek, *Status usług over-the-top w prawie telekomunikacyjnym*, Europejski Przegląd Sądowy 10, 2019, pp. 46–47.

[52] The CJEU judgment indicates that: 'at the technical level, the transmission of the voice calls made through SkypeOut is in practical terms carried out, first, by the ISPs on the internet, the first segment going from the internet connection of the user making the call to the Gateway between the internet and the PSTN and, second, by the telecommunications service providers on the PSTN, the second segment going from that Gateway to the mobile or fixed connection point of the user receiving the call, the fact remains that such transmission occurs pursuant to agreements between Skype Communications and those telecommunications service providers and that it could not be made without the conclusion of such agreements.'

– the fact that users access the OTT service by an internet access provided by another service provider, which in itself constitutes an electronic communications service, does not imply that that OTT service cannot be classified as an 'electronic communications service';[53]
– the fact that given software provides a bundle of services, which are not connected with the conveyance of signals, cannot have impact on the classification of a given functionality if particular functionalities appear clearly distinct in their purpose and remain entirely autonomous in their operation;[54]
– contractual terms of exclusion of responsibility for the transmission of signals to users cannot have any bearing on the classification of the service as an electronic communications service;[55]
– the fact that a given service is also covered by the definition of 'information society service' within the meaning of Directive 98/34 in no way implies that it cannot be classified as an 'electronic communications service'.[56]

Undoubtedly, such an approach to the classification of electronic communications services broadens the scope of activities that can be recognised as telecommunications activities. In the case of the service provided by Skype Communications Sàrl analysed, it is worth taking into account the fact that if a user does not ensure access to the Internet on their own (provided by an entity that has no links with this company), the functionality of SkypeOut will not work at all and, therefore, it will not enable the conveyance of signals in a telecommunications network; nevertheless, it can still be recognised as a telecommunications service. Secondly, when it is analysed whether a given service wholly or mainly consists in the conveyance of signals, it is also necessary to examine whether a given service may constitute a separate and independent functionality for a user, which is especially important when a bundle of services is sold, in which most of them do not require the transmission of signals in a network. Such a bundle, as a whole, certainly does not fulfil the requirements laid down in the definition of a telecommunications service, but if particular elements of that bundle may function independently and meet those requirements, a given functionality may be recognised as a telecommunications service, as it happened in the case analysed.

When it comes to the situation (3) above, i.e. selling of a telecommunications service provided by another service supplier in the provider's own name and on its own behalf, an entrepreneur is not independently involved in operations that consist in the conveyance of signals in a telecommunications network, either their own or other operators' ones, and only resells a service provided by another service supplier. Model examples of this kind of activities are virtual operators which sell telecommunications services offered by another entity as their own brand.[57] The reselling of telecommunications services which raise doubts concerning their classification as telecommunications services may create more serious problems. The

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53 Recital 37 of the CJEU judgment in case C 142/18.
54 Recitals 42–43 of the CJEU judgment in C 142/18.
55 Recital 44 of the CJEU judgment in case C 142/18.
56 Recitals 46–48 of the CJEU judgment in case C 142/18.
57 In Poland, inter alia, retail networks (e.g. Carrefour) or banks as separate companies (e.g. mBank) carried out such operations.

above-mentioned services connected with the provision of functionalities offered in vehicles, where a vehicle producer buys a telecommunications service from a service supplier and the service constitutes an element of a vehicle functionality, e.g. the above-mentioned telediagnostics services, can be an example of that. One cannot exclude a situation in which the functionalities of the vehicle will include such services which will raise no doubts that they constitute telecommunications services, e.g. a given vehicle ensures a possibility of making telephone calls to any national numbers. In such cases, if the transmission of signals is ensured by a vehicle producer,[58] it should be recognised as the reselling of another service provider's telecommunications service in its own name and on its own behalf, and all the obligations of a service provider would burden it.

The Directive 2018/1972 introduces considerable changes to the definition of an electronic communications service and defines it in Article 2(4) as a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:

- internet access service defined in Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access and setting up a new retail pricing mechanism for Union-wide regulated roaming services, and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 (OJ L 310/1, 26.11.2015);
- interpersonal communications service (defined in Article 2(5) Directive 2018/1972);
- services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting.

First of all, it should be pointed out that the definition in the Framework Directive encompasses an introduction and subsection 3 from the definition laid down in para. (1) in Directive 2018/1972, with the difference consisting in the fact that the negative aspect of the new definition does not concern information society services but exclusively services connected with ensuring or exercising the control over the content transmitted with the use of electronic communications networks or services. Secondly, there are two new categories that occur within the scope of electronic communications services. In fact, it can be recognised that both these categories are covered in the former definition. There are no doubts that the service of access to the Internet is usually provided for remuneration via an electronic communications network and wholly consists in the conveyance of signals.

Similarly, interpersonal communication services[59] may also wholly or mainly consist in the transmission of signals. As a result, as it is rightly indicated in the

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[58] As a rule, in such a case, a vehicle is equipped with a SIM card ensuring transmission of signals and car users do not have to ensure transmission on their own, e.g. with the use of their own telephones connected to a vehicle.

[59] In accordance with Article 2(5) Directive 2018/1972, '"interpersonal communications service" means a service normally provided for remuneration that enables direct interpersonal

doctrine, the new definition of an electronic communications service does not eliminate the former essential doubt connected with the interpretation of the phrase: 'wholly or mainly consists in the transmission of signals in a network', and introduces additional doubts connected with the classification of interpersonal communication services, including their division into services making use of numbers and those not doing that.[60] In consequence, one can expect that the above-mentioned problems with classification of services will not be eliminated and may additionally intensify, especially if it is taken into account that general authorisation is not required in case of other than number-independent interpersonal communications services (Article 12 para. 2 Directive 2018/1972).

6. CONCLUSIONS

Summing up the above discussion concerning the classification of activities as a telecommunications activity requiring entry into the register of telecommunications entrepreneurs, it is worth quoting the introduction to the opinion of the Advocate General, Maciej Szpunar, in case C-347/14[61] concerning audio-visual media services, in which he stated: '"We all know what a horse is." That was one of the definitions contained in the first Polish encyclopaedia, published in the eighteenth century. The problem of defining an audio-visual media service in the internet context, which is the subject of the present case, might seem similar and intuitively everyone is capable of identifying such a service. However, when it comes to describing it in legal language, it is difficult to find terms which are at the same time sufficiently clear-cut and comprehensive.' The opinion fully translates into the problem of proper and clear definition of telecommunications services and their separation from other services, in particular information society services (services provided via electronic media) and audio-visual services. However, the above problem is to a great extent connected with the issue of state control over telecommunications activities and risks that entrepreneurs have to face in this respect.

It must be remembered that being involved in telecommunications activities within the scope that is not covered in the application for the entry to the register of telecommunications entrepreneurs may result in the imposition of a fine of up to 3% of that entrepreneur's revenue obtained in the prior calendar year (Article 209 para. 1(2) in conjunction with Article 210 para. 1 TL). On the other hand, the entry to the register regardless of the fact that there is no such obligation is connected not only with the necessity to comply with the regimes related to, e.g. the content of a contract on the provision of telecommunications services but also potentially

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and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service'.

[60] Compare J. Woźny, *Europejski kodeks łączności elektronicznej – kategoryzacja usług łączności elektronicznej*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 1(9), 2020, pp. 53–54.

[61] Legalis No. 1281174; ECLI:EU:C:2015:434, http://curia.europa.eu/juris.

additional burdens such as the necessity to pay a telecommunications fee (Article 183 para. 1 in conjunction with Article 183 para. 1a TL), or contribute to the net cost of common service provision by an assigned operator (Article 97 TL). At the same time, at the stage of reporting telecommunications operations, only a telecommunications entrepreneur is to evaluate whether the activities require entry to the register or not. The correctness of this evaluation will be verified by the registering authorities after the entry to the register and in the case of many types of activities, an entrepreneur cannot be sure if the evaluation has been right.

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CLASSIFICATION OF ACTIVITIES SUBJECT TO ENTRY IN THE REGISTER OF TELECOMMUNICATIONS ENTREPRENEURS

Summary

The article aims to present the issue concerning the classification of entrepreneurs' activities consisting in a telecommunications activity within the meaning of the provisions of the Act of 16 July 2004: Telecommunications Law. Despite the legal definitions of specific types of activities, determining the legal status of many services provided with the use of telecommunications networks poses significant practical problems and, consequently, increases risks for

entrepreneurs as they lack the appropriate authorisation to conduct telecommunications activities required by regulations or obtain entry into the register of telecommunications entrepreneurs for an activity that is not telecommunications. The emergence of new activities and the development of new communication techniques only increase the above-mentioned problem. Partial explanation and additional guidance on the interpretation of legal definitions of specific types of telecommunications activities are provided by case law of the Court of Justice of the European Union. However, in many cases, it is an entrepreneur who eventually has to make the appropriate decision regarding notification of his activity to the registry of telecommunications entrepreneurs. New categories of electronic communications services introduced by the regulations on the European Electronic Communications Code do not solve the problem and even increase it due to definition-related ambiguities left unresolved. The article makes an attempt to clarify interpretative doubts in order to allow defining a demarcation line between regulated activities requiring entry into the register of telecommunications entrepreneurs and activities remaining outside the scope of the provisions of the Telecommunications Law. The author applied a dogmatic approach when analysing literature and the national and also EU case law.

Keywords: telecommunications activity, entry into the register of telecommunications entrepreneurs, provision of a telecommunications network, telecommunications service, provision of telecommunications services, associated facilities, associated services

KWALIFIKACJI DZIAŁALNOŚCI PODLEGAJĄCEJ OBOWIĄZKOWI WPISU DO REJESTRU PRZEDSIĘBIORCÓW TELEKOMUNIKACYJNYCH

Streszczenie

Przedmiotem artykułu jest omówienie zagadnienia kwalifikacji działalności przedsiębiorcy jako działalności telekomunikacyjnej w rozumieniu przepisów ustawy Prawo telekomunikacyjne. Pomimo prawnych definicji poszczególnych rodzajów działalności, określenie statusu szeregu usług świadczonych z wykorzystaniem sieci telekomunikacyjnych nastręcza istotnych problemów praktycznych. Niesie to za sobą ryzyka dla przedsiębiorców związane z brakiem uzyskania stosownych uprawnień do prowadzenia działalności telekomunikacyjnej, pomimo istnienia takiego obowiązku, lub z uzyskaniem wpisu do rejestru przedsiębiorców telekomunikacyjnych dla działalności, która nie stanowi działalności telekomunikacyjnej. Pojawiające się nowe rodzaje działalności oraz rozwój nowych technik komunikacji jedynie pogłębiają powyższy problem. Częściowego wyjaśnienia oraz dodatkowych wskazówek w zakresie wykładni prawnych definicji poszczególnych rodzajów działalności telekomunikacyjnej dostarcza orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej. W wielu przypadkach to przedsiębiorca jednak musi podjąć stosowną decyzję dotyczącą zgłoszenia swojej działalności do rejestru przedsiębiorców telekomunikacyjnych. Wprowadzenie nowych kategorii usług łączności elektronicznej w przepisach Europejskiego Kodeksu Łączności Elektronicznej, przy pozostawieniu dotychczasowych niejasności definicyjnych, nie tylko nie eliminuje powyższego problemu, ale może go nasilić. Celem artykułu jest próba wyjaśnienia wątpliwości interpretacyjnych, co pozwoli nakreślić linię demarkacyjną pomiędzy regulowaną działalnością wymagającą dokonania wpisu do rejestru przedsiębiorców telekomunikacyjnych a działalnością pozostającą poza zakresem przepisów ustawy Prawo telekomunikacyjne. W pracy zastosowano metodę dogmatycznoprawną przy analizie piśmiennictwa i orzecznictwa krajowego, a pomocniczo również orzecznictwa sądów unijnych.

Słowa kluczowe: działalność telekomunikacyjna, wpis do rejestru przedsiębiorców telekomunikacyjnych, dostarczanie sieci telekomunikacyjnych, usługa telekomunikacyjna, świadczenie usług telekomunikacyjnych, udogodnienia towarzyszące, usługi towarzyszące

CALIFICACIÓN DE ACTIVIDAD SOMETIDA A LA INSCRIPCIÓN AL REGISTRO DE EMPRESARIOS DE TELECOMUNICACIÓN

Resumen

El artículo analiza la calificación de actividad de empresario como actividad relacionada con telecomunicación a la luz de la ley Derecho de telecomunicación. A pesar de numerosas definiciones legales de sectores de actividad económica, la determinación de estado de múltiples servicios prestados con el uso de red de telecomunicación ocasiona problemas importantes en la práctica. Esto conlleva riesgos para los empresarios relacionados con falta de obtener autorizaciones pertinentes para llevar a cabo la actividad de telecomunicación a pesar de que exista tal obligación o falta de conseguir la inscripción al registro de actividad de telecomunicación para la actividad que no constituya la actividad de telecomunicación. Los nuevos tipos de actividad que surgen y el desarrollo de nuevas tecnologías de comunicación sólo complican este problema. Una explicación parcial y pautas adicionales sobre la interpretación de definiciones legales de tipos particulares de actividad de telecomunicación están en la jurisprudencia del Tribunal de Justicia de la Unión Europea. Sin embargo, en numerosos casos es el empresario quien ha de tomar decisión relativa a la inscripción de su actividad en el registro de empresarios de telecomunicación. La introducción de nuevas categorías de servicios de comunicación electrónica en el Código Europeo de Comunicaciones Electrónicas, dejando al mismo tiempo las definiciones poco claras, no sólo no elimina el problema, sino puede intensificarlo. El artículo intenta explicar dudas interpretativas que permitan delimitar la actividad que requiere la inscripción en el registro de empresarios de telecomunicación y delimitar la actividad que está fuera del ámbito de aplicación de la ley Derecho de telecomunicación. El trabajo aplica el método dogmático analizando la literatura y jurisprudencia nacional y también la jurisprudencia de tribunales comunitarios.

Palabras claves: actividad de telecomunicación, inscripción al registro de empresarios de telecomunicación, suministro de red de telecomunicación, servicio de telecomunicación, prestación de servicios de telecomunicación, facilidades complementarias, servicio complementario

КВАЛИФИКАЦИЯ ХОЗЯЙСТВЕННОЙ ДЕЯТЕЛЬНОСТИ, ПОДЛЕЖАЩЕЙ ОБЯЗАТЕЛЬНОЙ РЕГИСТРАЦИИ В РЕЕСТРЕ ТЕЛЕКОММУНИКАЦИОННЫХ ПРЕДПРИЯТИЙ

Аннотация

Предметом статьи является обсуждение вопроса, какая хозяйственная деятельность должна квалифицироваться как деятельность в сфере телекоммуникаций в понимании Закона «О телекоммуникациях». Несмотря на существование юридических определений отдельных видов деятельности, определение статуса ряда услуг, оказываемых с использованием телекоммуникационных сетей, весьма проблематично. Для предпринимателей это влечет за собой

риски, связанные либо с отсутствием обязательных разрешений на осуществление деятельности в телекоммуникационной сфере, либо с регистрацией в качестве телекоммуникационного предприятия для осуществления деятельности, которая, собственно говоря, не является деятельностью в телекоммуникационной сфере. Появление новых видов деятельности и разработка новых методов коммуникации лишь усугубляют эту проблему. Частичное разъяснение и дополнительные указания по толкованию юридических определений отдельных видов деятельности в сфере телекоммуникаций предоставляет судебная практика Суда Европейского союза. Однако, во многих случаях решение об обращении за регистрацией в Реестр телекоммуникационных предприятий принадлежит самому предпринимателю. Внесение новых категорий услуг в сфере электронных коммуникаций в Европейский кодекс электронных коммуникаций в условиях, когда сохраняются прежние неясности относительно юридических определений, не только не устраняет описанную проблему, но может привести к ее усугублению. Цель статьи – попытаться прояснить сомнения в толковании определений с тем, чтобы провести разграничение между регулируемой деятельностью, требующей внесения в реестр телекоммуникационных предприятий, и деятельностью, не входящей в сферу действия Закона «О телекоммуникациях». В работе использован догматический метод с проведением анализа отечественной литературы и судебной практики и дополнительно – судебной практики ЕС.

Ключевые слова: деятельность в сфере телекоммуникаций; внесение в Реестр телекоммуникационных предприятий; предоставление доступа к телекоммуникационным сетям; телекоммуникационные услуги; предоставление телекоммуникационных услуг; сопутствующие устройства; сопутствующие услуги

DIE QUALIFIZIERUNG VON TÄTIGKEITEN, DIE DER EINTRAGUNGSPFLICHT IM REGISTER DER TELEKOMMUNIKATIONSBETREIBER UNTERLIEGEN

Zusammenfassung

In dem Beitrag wird die Frage erörtert, ob die Tätigkeit eines Unternehmens als Telekommunikationstätigkeit im Sinne der Bestimmungen des polnischen Telekommunikationsgesetzes zu qualifizieren ist. Trotz der gesetzlichen Begriffsbestimmung der einzelnen Wirtschaftszweige wirft die Bestimmung des Status einer Reihe von Diensten, die unter Nutzung von Telekommunikationsnetzen erbracht werden, erhebliche praktische Probleme auf. Dies birgt für Unternehmer Risiken im Zusammenhang dem Fehlen der entsprechenden Genehmigungen für Telekommunikationstätigkeiten trotz Bestehens dieser Pflicht oder der Eintragung in das Register der Telekommunikationsunternehmen für einen Gegenstand, der keine Telekommunikationstätigkeit darstellt. Durch die Entstehung neuer Wirtschaftszweige und die Entwicklung neuer Kommunikationstechniken verschärft sich das beschriebene Problem noch. Eine teilweise Klärung und zusätzliche Richtlinien zur Auslegung der Legaldefinitionen der einzelnen Arten von Telekommunikationstätigkeiten liefert die Rechtsprechung des Gerichtshofs der Europäischen Union. In vielen Fällen muss jedoch das Unternehmen eine entsprechende Entscheidung über die Eintragung seiner Geschäftstätigkeit im Register der Telekommunikationsunternehmen treffen. Die Einführung neuer Kategorien von elektronischen Kommunikationsdiensten in die Bestimmungen des European Electronic Communications Code (EECC) ohne Beseitigung der bestehenden Unklarheiten bei den Begriffsbestimmungen lässt das beschriebene Problem nicht nur weiterbestehen, sondern kann

dieses noch verschlimmern. Ziel des Artikels ist es, Erläuterungen zur Überwindung eventueller Interpretationsschwierigkeiten zu liefern und reglementierte Tätigkeiten, die im Register der Telekommunikationsunternehmen eingetragen werden müssen von Tätigkeiten abzugrenzen, die außerhalb des „Radars" der Bestimmungen des Telekommunikationsgesetzes liegen. Die Arbeit bedient sich zur Analyse der Rechtsliteratur und der nationalen Rechtsprechung der rechtsdogmatischen Methode und zieht außerdem auch die Rechtsprechung der Unionsgerichte heran.

Schlüsselwörter: Telekommunikationstätigkeit, Eintragung im Register der Telekommunikationsbetreiber, Bereitstellung von Telekommunikationsnetzen, Telekommunikationsdienste, Erbringung von Telekommunikationsdiensten, zugehörigen Anwendungen, zugehöriger Dienst

QUALIFICATION DES ACTIVITÉS SOUMISES À INSCRIPTION AU REGISTRE DES ENTREPRISES DE TÉLÉCOMMUNICATIONS

Résumé

L'objet de l'article est de discuter de la question de la qualification de l'activité d'un entrepreneur comme activité de télécommunications au sens des dispositions de la loi sur les télécommunications. Malgré les définitions juridiques des différents types d'activité, la détermination du statut d'un certain nombre de services fournis avec l'utilisation des réseaux de télécommunications pose des problèmes pratiques importants. Cela comporte des risques pour les entrepreneurs liés à l'absence d'autorisations appropriées pour exercer des activités de télécommunications malgré l'existence d'une telle obligation ou à l'obtention d'une inscription au registre des entrepreneurs dse télécommunications pour des activités qui ne constituent pas des activités de télécommunications. L'émergence de nouvelles activités et le développement de nouvelles techniques de communication ne font qu'exacerber le problème ci-dessus. La jurisprudence de la Cour de justice de l'Union européenne fournit une explication partielle et des indications supplémentaires sur l'interprétation des définitions juridiques de types particuliers d'activités des télécommunications. Cependant, dans de nombreux cas, c'est l'entrepreneur qui doit prendre la décision appropriée concernant l'inscription de son activité au registre des entrepreneurs de télécommunications. L'introduction de nouvelles catégories de services de communications électroniques dans les dispositions du Code européen des communications électroniques, tout en laissant les ambiguïtés de définition existantes, non seulement n'élimine pas le problème ci-dessus, mais peut l'aggraver. Le but de l'article est de tenter de clarifier les doutes d'interprétation qui permettent de tracer une ligne de démarcation entre l'activité réglementée nécessitant une inscription au registre des entrepreneurs des télécommunications et l'activité restant en dehors du «radar» des dispositions de la loi sur les télécommunications. L'étude utilise la méthode dogmatique-juridique pour analyser la littérature et la jurisprudence nationale, ainsi que la jurisprudence des tribunaux de l'UE.

Mots-clés: activité de télécommunications, inscription au registre des entrepreneurs des télécommunications, fourniture de réseaux de télécommunications, service de télécommunications, fourniture de services de télécommunications, facilités d'accompagnement, service d'accompagnement

QUALIFICA DI ATTIVITÀ SOGGETTA A REGISTRAZIONE OBBLIGATORIA NEL REGISTRO DELLE IMPRESE DI TELECOMUNICAZIONI

Sintesi

Oggetto dell'articolo è la discussione della questione della qualifica dell'attività di un'impresa come attività di telecomunicazioni, ai sensi delle norme della legge Diritto delle telecomunicazioni. Nonostante le definizioni giuridiche dei singoli tipi di attività, la definizione dello status di una serie di servizi forniti con utilizzo delle reti di telecomunicazioni suscita essenziali problemi pratici. Porta con sé il rischio per le imprese legato al mancato ottenimento delle necessarie autorizzazioni per la conduzione di attività di telecomunicazioni nonostante l'esistenza di tale obbligo, oppure all'ottenimento dell'iscrizione al registro delle imprese di telecomunicazioni per una attività che non costituisce attività di telecomunicazioni. I nuovi tipi di attività che si presentano e lo sviluppo di nuove tecniche di comunicazione approfondiscono il problema di cui sopra. Un parziale chiarimento nonché ulteriori indicazioni nell'ambito dell'interpretazione delle definizioni giuridiche dei singoli tipi di attività di telecomunicazioni sono forniti dalla giurisprudenza della Corte di giustizia dell'Unione europea. Tuttavia in molti casi è l'imprenditore stesso che deve prendere la decisione adeguata riguardante l'iscrizione della propria attività nel registro delle imprese di telecomunicazioni. L'introduzione di nuove categorie di servizi di comunicazioni elettroniche nelle norme del Codice europeo delle comunicazioni elettroniche, lasciando l'attuale poca chiarezza delle definizioni, non solo non elimina il problema di cui sopra, ma lo può aggravare. Lo scopo dell'articolo è un tentativo di chiarimento dei dubbi interpretativi che permetta di tracciare una linea di demarcazione tra l'attività regolamentata che richiede l'iscrizione al registro delle imprese di telecomunicazioni e l'attività che resta fuori dal "radar" delle norme della legge Diritto delle telecomunicazioni. Nel lavoro è stato utilizzato il metodo dogmatico-giuridico, analizzando la letteratura e la giurisprudenza nazionale, e ausiliarmente anche la giurisprudenza dei tribunali comunitari.

Parole chiave: attività di telecomunicazioni, iscrizione al registro delle imprese di telecomunicazioni, fornitura di reti di telecomunicazioni, servizio di telecomunicazioni, fornitura di servizi di telecomunicazioni, applicazioni correlate, servizi correlati

Cytuj jako:

Krupa W., *Classification of activities subject to entry in the register of telecommunications entrepreneurs [Kwalifikacja działalności podlegającej obowiązkowi wpisu do rejestru przedsiębiorców telekomunikacyjnych]*, „Ius Novum" 2020 (14) nr 4, s. 170–192. DOI: 10.26399/iusnovum.v14.4.2020.42/w.krupa

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Gloss on the Supreme Court judgment of 4 February 2020, III KK 113/19

THESIS

Extraordinary mitigation of a penalty may be applied if it is demonstrated that the case involves exceptionally justified circumstances which lead to the conclusion that even the least severe penalty for the offence in question must be considered 'grossly severe'. The occurrence of such exceptional circumstances should be accompanied by unusual circumstances of the incident or such features of the perpetrator, which characterise them in an exceptionally positive way and warrant the imposition of a penalty lesser than the least severe penalty imposable for a given offence. When imposing an extraordinarily mitigated penalty, the court is therefore obliged to present arguments supporting the belief that, on the facts of the case at hand, the grounds for mitigation exist. Moreover, there can be no doubt that the exceptionally justified circumstances referred to under Article 60 § 2 of the Criminal Code (CC) materially differ from ordinary circumstances covered by the standard sentencing directives, which offer a range of sentencing options existing within the scale of penalties for a given offence. On the other hand, if the court applies extraordinary mitigation of a penalty without demonstrating that such mitigation is indeed justified by exceptional circumstances, one may draw a legitimate conclusion that the penalty imposed in such a situation is grossly disproportionate.[1]

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[1] The Supreme Court judgment of 4 February 2020, III KK 113/19, unpublished. See also: the Supreme Court judgment of 28 March 2019, V KK 125/18, unpublished.

COMMENTARY

In the judgment discussed in this gloss, the Supreme Court referred to the legal concept of extraordinary mitigation of a penalty, a question often addressed by the courts and scholarship.[2] However, the top-level court rarely refers to the issue of other, exceptionally justified circumstances which justify the conclusion that even the least severe penalty which may be imposed for a given offence is 'grossly severe'. Whether or not an offence is grossly severe, should, in turn, be assessed on the facts of a particular case.

In the discussed case, A.W. was accused of having delivered on the victim, with the direct intention of killing the victim, multiple, violent blows (kicks and punches), which caused, inter alia, multiple injuries to the head, extensive bilateral thoracic trauma causing ecchymosis in soft tissues surrounding the fracture gaps and also massive ecchymosis on the skin of the shoulder and the adjacent upper arm areas and on the back of an upper limb, which led to the acute respiratory and circulatory failure and sudden death of the victim, more specifically of the offence under Article 148 § 1 CC.

A regional court found the accused guilty of the offence in question but ruled that A.W. had acted knowingly. On these grounds the court sentenced A.W. to six years of imprisonment, invoking Article 148 § 1 CC, Article 60 § 2 CC and Article 60 § 6(2) CC.

The prosecution appealed against the above judgment. Challenging the judgment to the disadvantage of the accused in its part related to sentencing, a prosecutor alleged that the judgment involved 'an error in the findings of facts taken as a basis for the sentence which affected the content of the sentence resulting from the conclusion that, in the case at hand, there have been exceptionally justified

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[2] Z. Ćwiąkalski, *Nadzwyczajny wymiar kary w kodeksie karnym z 1997 roku po nowelizacjach – próba oceny*, [in:] *Zmiany w polskim prawie karnym po wejściu w życie kodeksu karnego z 1997 r.*, T. Bojarski, K. Nazar, A. Nowosad, M. Szwarczyk (eds), Lublin 2006, pp. 105–122; Z. Ćwiąkalski, *Zwyczajne i nadzwyczajne złagodzenie kary po zmianach*, [in:] *Kary jako podstawowe sankcje w prawie karnym*, S. Hoc, D. Mucha (eds), Opole 2018, pp. 19–31; V. Konarska-Wrzosek, *Zwyczajny i nadzwyczajnie złagodzony wymiar kary w świetle kodeksu karnego po nowelizacji z 20 lutego 2015 roku*, [in:] *Nowa kodyfikacja prawa karnego. Księga jubileuszowa Profesora Tomasza Kaczmarka*, J. Giezek, D. Gruszecka, T. Kalisz (eds), Vol. XLIII, Wrocław 2017, pp. 255–264; J. Paśkiewicz, *Procesowe aspekty nadzwyczajnego złagodzenia kary – uwagi wybrane*, [in:] *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji zmian*, Z. Ćwiąkalski, G. Artymiak (eds), Warszawa 2009, pp. 603–614; J. Raglewski, *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego. Analiza dogmatyczna w ujęciu materialnoprawnym*, Kraków 2008, reviewed by T. Kaczmarek in Prokuratura i Prawo 6, 2010 pp. 153–161; Z. Sienkiewicz, *O podstawach nadzwyczajnego złagodzenia kary*, [in:] *Nowa kodyfikacja prawa karnego*, L. Bogunia (ed.), Vol. V, Wrocław 2000, pp. 57–68; Z. Sienkiewicz, *O niektórych projektowanych zmianach w zakresie nadzwyczajnego złagodzenia kary*, [in:] *Nowa kodyfikacja prawa karnego*, L. Bogunia (ed.), Vol. XI, Wrocław 2002, pp. 75–84; A. Ważny, *Praktyka nadzwyczajnego łagodzenia kary i odstępowania od jej wymierzenia*, Edukacja Prawnicza 6–9, 2009, pp. 25–27; R. Zawłocki, *Nowa funkcja nadzwyczajnego złagodzenia kary po reformie Kodeksu karnego,* Palestra 1–2, 2016, pp. 57–63; for a discussion on the former law, see in particular Z. Ćwiąkalski, *Nadzwyczajne złagodzenie kary w praktyce sądowej*, Warszawa 1982; J. Wojciechowska, *Nadzwyczajne złagodzenie kary w orzecznictwie sądowym 1979–1981*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1987; K. Daszkiewicz, *Nadzwyczajne złagodzenie kary*, Warszawa 1976.

circumstances which allow for the extraordinary mitigation of the accused's penalty and, consequently, which warrant the imposition of a penalty lesser than the least severe penalty for the offence in question (six years of imprisonment), whereas it appears from the evidence collected in the case that such exceptionally justified circumstances do not exist, since the first-instance court erred in assessing the gravity and relevance of the mitigating circumstances for the sentencing purposes and failed to take into account all the circumstances adverse to the accused's case.'

The prosecutor also pointed out that 'the penalty of six years of imprisonment imposed on the accused was grossly disproportionate in a situation where the analysis of the subjective and objective elements of the offence in question, and, in particular, the circumstances of the incident, the high degree of social harm presented by the offence, the characteristics and personal conditions of the accused, the way of life of the accused person in the period preceding commission of the offence and her subsequent behaviour, should have led the first-instance court to conclude that the accused does not deserve the lenient penalty of six years' imprisonment since this would not be sufficient to achieve the objectives of the penalty envisioned for the accused and, in particular, to prevent re-offending, which calls for the imposition of a 12-year imprisonment on the accused.'

A court of appeal upheld the first-instance judgment. The cassation appeal against the appellate judgment was brought by the Minister of Justice (Prosecutor General), who challenged the judgment to the disadvantage of the accused in the part concerning the sentencing, alleging a violation of laws of criminal procedure, namely Article 433 § 2 and Article 457 § 3 of the Criminal Procedure Code (CPC), which was 'gross and which materially affected the content of the judgment'. In the Minister's view, the violation consisted in 'the erroneous examination of the grounds for appeal raised in the prosecutor's appeal, an error in the findings of fact accepted as the basis for the sentence and a gross disproportionality of the sentence of six years' imprisonment imposed on the accused' for the serious offence of manslaughter. According to the cassation appeal, this error manifested itself in 'vague conclusions that the grounds for appeal were unreasonable and the repeated emphasis that the first-instance court was correct in its ruling'. According to the Minister, the appellate court failed to offer 'any concrete and evidence-based arguments why the grounds for appeal were regarded as unfounded', which resulted in the upholding of the judgment in which the regional court imposed 'a disproportionally lenient penalty, which did not adequately consider all the aggravating circumstances relevant to the length of the penalty'.

While examining the cassation appeal, the Supreme Court needed to take a closer look at the elements of the exceptionally justified circumstances test, which must be proved so that even the least severe penalty can be considered 'grossly severe'. Without question, the expression 'exceptionally justified circumstances' refers to a highly evaluative notion which includes evaluation statements linked by a conjunction.[3] Although, according to the statutory language, such circumstances

[3] Cf. judgment of the Court of Appeal in Katowice of 8 February 1991, II AKr 3/91, OSA 1991, No. 1, item 1; the Supreme Court judgments: of 29 September 1971, V KRN 338/71, LEX No. 64014; of 11 July 1975, V KR 105/75, OSNKW 1975, No. 12, item 158; of 29 July 2008, WA 27/08, OSNKW 2008, No. 11, item 93.

do not have to be *exceptional* (as referred to in Article 57 § 2 of the former Criminal Code of 1969), they must be *exceptionally justified*. It is therefore about demonstrating circumstances which are based on an objective rationale (grounds)[4] and are extraordinary and exceptional.[5] Moreover, the circumstances in question must warrant a conclusion that even the least severe penalty which may be imposed for a given offence is 'grossly severe', the latter being understood as a penalty that is clearly, obviously and apparently[6] too severe. The scholarship aptly indicates that factors decisive for the identification of a disproportionately severe penalty are the type and length of a given penalty, as well as its combination with other penalties or measures intended to influence the perpetrator. A penalty becomes disproportionately severe when its burden does not correspond to the degree of social harm (caused by the offence) and there is a serious imbalance between the two factors.[7]

The legislator gives two examples of circumstances demonstrating that the application of extraordinary mitigation of a penalty is appropriate: the compensatory attitude of the perpetrator (Article 60 § 2(1)–(2) CC) and a major detriment suffered by the perpetrator of an unintentional offence or a member of their immediate family (Article 60 § 2(3) CC). These grounds are autonomous and non-exhaustive. As the courts have rightly noted in their decisions, the view that the absence of *any* of the grounds described in Article 60 § 2 CC prevents the application of extraordinary mitigation of a penalty is incorrect. The linguistic (grammatical) interpretation of Article 60 § 2 CC leads to the unequivocal conclusion that, except for the cases set out in Article 60 § 1 CC, the court may also apply the extraordinary mitigation of a penalty in exceptionally justified circumstances, where even the least severe penalty imposable for a given offence would be disproportionately severe, i.e. if the court is satisfied that one or more factors occur which make the imposition of a sentence within the scale of penalties unjust on account of its severity. The circumstances justifying the extraordinary mitigation of a penalty may vary and differ from those listed in Article 60 § 2(1)–(2) CC. By using the expression 'in particular', the legislator made it clear that the grounds laid down in Article 60 § 2(1) to (2) are illustrative and non-exhaustive.[8] The list of circumstances justifying the application of the extraordinary mitigation of a penalty based on the above provision is developed by judicial practice on a case-by-case basis and will probably never become exhaustive.[9]

Article 60 § 2 CC does not introduce any temporal limitation as to the occurrence of factors pointing to the exceptionally justified circumstances, which means – under the *lege non distiguente* principle – that these may be circumstances occurring both

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4 *Uniwersalny słownik języka polskiego*, S. Dubisz (ed.), Vol. 4, Warszawa 2003, p. 312.

5 *Ibid.*, p. 233.

6 *Ibid.*, p. 33.

7 K. Daszkiewicz, *supra* n. 2, p. 84.

8 Judgment of the Court of Appeal in Lublin of 18 April 2002, II AKa 89/02, Prokuratura i Prawo – Orzecznictwo 2, 2003, item 19.

9 Judgment of the Court of Appeal in Kraków of 16 September 2004, II AKa 173/04, KZS 2004, No. 10, item 13; see also judgment of the Court of Appeal in Kraków of 28 December 2012, II AKa 243/12, OSN Prokuratura i Prawo 7–8, 2013, item 26.

before, during and after the commission of an offence.[10] Importantly, a decision on the extraordinary mitigation of a penalty constitutes a part of the sentencing and, as such, all the elements relevant to the severity of the penalty under Article 53 CC are also important for the extraordinary mitigation of a penalty.[11]

Since the situations that are likely to determine the extraordinary mitigation of a penalty under Article 60 § 2 CC may vary, it is impossible to create a catch-all list of the circumstances referred to in the descriptive part of the provision in question. In general, the requirement of the exceptionally justified circumstances covers situations where the scale of penalties does not correspond to an abnormally low degree of social harm caused by the offence.[12] The literature also refers to such factors as a severe, incurable illness of the accused, their old age, disability, serious financial hardship bordering on poverty, particularly difficult family or personal conditions, the perpetrator's minor role in committing an offence committed in collusion with other persons or circumstances that are clearly out of the ordinary.[13] The courts have ruled that the extraordinary mitigation of a penalty under Article 60 § 2 CC may be admissible in the aggregate presence of such circumstances as the fact that the accused limits themselves to threatened use of violence, the absence of the victim's bodily injury, the negligible value of the property stolen in a robbery (PLN 3.56), the perpetrator's clear criminal record, the fact that the perpetrator is gainfully employed and has positive references from the place of residence and work.[14]

As a rule, the courts do not consider a mere verbal admission that the accused has committed an offence to be an exceptionally justified circumstance allowing for the extraordinary mitigation of the penalty to be applied.[15] However, such mitigation is possible if one of the following grounds arise: the accused has given extensive explanations and pleaded guilty, including to the extent not covered by the case in question, which subsequently led to a conviction in another case, the accused has identified persons involved in a criminal undertaking or the accused has shown repentance (even if it was not clear whether these actions were merely elements of the accused's defence strategy).[16]

A special family situation is a factor that does not constitute grounds for the extraordinary mitigation of a penalty, as the court ruled in a case in which

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[10] K. Daszkiewicz, *supra* n. 2, p. 79.

[11] Judgment of the Court of Appeal in Gdańsk of 11 July 2013, II AKa 224/13, LEX No. 1369293; judgment of the Supreme Court of 31 May 1977, VI KRN 97/77, OSNKW 1977, No. 7–8, item 81.

[12] Cf. J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1971, p. 183.

[13] See R. Reguliński, *Wyjątkowe okoliczności w świetle orzecznictwa SN i piśmiennictwa*, Biuletyn Prokuratury Generalnej 4, 1964, p. 31 et seq.; T. Leśko, *Nadzwyczajne złagodzenie kary na podstawie art. 53 § 1 k.k.*, Wojskowy Przegląd Prawniczy 4, 1967, p. 421 et seq.; K. Daszkiewicz, *supra* n. 2, p. 79; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 114; Z. Ćwiąkalski, [in:] *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 53–116*, W. Wróbel, A. Zoll (eds), Warszawa 2016, p. 139.

[14] Judgment of the Court of Appeal in Kraków of 16 February 2011, II AKa 256/10, LEX No. 936465.

[15] Judgment of the Court of Appeal in Kraków of 16 November 2004, II AKa 192/04, KZS 2004, No. 12, item 23; cf. judgment of the Court of Appeal in Katowice of 15 May 2008, II AKa 13/08, LEX No. 447031.

[16] Judgment of the Court of Appeal in Katowice of 9 October 2003, II AKa 313/03, OSN Prokuratura i Prawo 7–8, 2004, item 25.

the accused had six children over whom she did not actually exercise her parental responsibilities arising out of the Family and Guardianship Code.[17] Likewise, the fact that both the victim and the accused were addicted to alcohol and consumed it together during the commission of the offence, as well as the fact that the accused was homeless,[18] or that the offence was prevented at the stage of attempted commission[19] are not all grounds for the extraordinary mitigation of a penalty.

In the light of Article 60 § 2 CC, only a particularly justified (and therefore exceptional) circumstances are relevant. The above requirement is not met by typical circumstances, including, for example, the convicted person having clear criminal record, a positive assessment presented in a community interview report (in other words, the characteristics that should be the norm for every member of society) or a method of production of narcotic drugs described as 'home-brew'.[20] On the facts of a specific case, a court decided that even the simultaneous existence of such circumstances as the confession of guilt, repentance, reconciliation with the victim or the accused's promise to pay for the damage caused, assessed from the point of view of the nature of the offence committed by the accused, did not suffice to establish the existence of the grounds under Article 60 § 2 CC. The court held that these circumstances were not exceptional and extraordinary and were merely a consequence of an understanding of the reprehensibility of the committed offence and an attitude completely natural in proper social relations, namely a promise of improvement or compensation for a moral loss. However, no extraordinary dimension can be attributed to any of the above factors, which, as shown by the judicial practice, are present, to a greater or lesser extent, in the majority of criminal cases. Otherwise, the exceptional benefits associated with the extraordinary mitigation of a penalty would become commonly available.[21]

Some doubts may arise as to whether a prior criminal record excludes the application of the extraordinary mitigation of a penalty. While this is undoubtedly an aggravating circumstance relevant to the sentencing, one must remember, as the courts and legal scholars rightly point out, that this factor, which, by its very nature, is a circumstance concerning a person and not an act, does not affect the assessment of the degree of the person's guilt and the social harm caused by the offence committed. Accordingly, Article 60 § 2 CC does not preclude the application of the extraordinary mitigation of a penalty to offenders that have already been punished, including repeat offenders.[22]

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[17] Judgment of the Court of Appeal in Katowice of 22 November 2001, II AKa 381/01, OSN Prokuratura i Prawo 7–8, 2002, item 19.

[18] Judgment of the Court of Appeal in Kraków of 28 December 2012, II AKa 243/12, OSN Prokuratura i Prawo 7–8, 2013, item 26.

[19] Judgment of the Court of Appeal in Katowice of 25 October 2001, II AKa 315/01, OSN Prokuratura i Prawo 7–8, 2002, item 18.

[20] The Supreme Court judgment of 28 March 2019, V KK 125/18, unpublished; see also the Supreme Court judgment of 8 May 1974, V KRN 34/74, LEX No. 479157.

[21] Judgment of the Court of Appeal in Katowice of 11 October 2012, AKa 313/12, OSN Prokuratura i Prawo 3, 2013, item 25.

[22] Judgment of the Court of Appeal in Katowice of 22 January 2004, II AKa 497/03, LEX No. 142875; as in the guidelines of the Supreme Court in its resolution of 22 December 1978 on the application of the provisions on re-offending, VII KZP 23/77, OSNKW 1979, No. 1–2, item 1.

Applying the above reasoning to the facts of the case under consideration, one should note that the view presented by the Supreme Court remains in line with the existing jurisprudence and supports the argument that the extraordinary mitigation of a penalty applicable in exceptionally justified circumstances is an extraordinary measure. The Supreme Court is correct in its holding that the occurrence of exceptional circumstances should be accompanied by unusual circumstances of the incident or such features of the perpetrator, which characterise them in an exceptionally positive way and warrant the imposition of a penalty lesser than the least severe penalty imposable for a given offence. The exceptionally justified circumstances referred to in Article 60 § 2 CC materially differ from ordinary circumstances covered by the standard sentencing directives, which offer a range of sentencing options existing within the scale of penalties for a given offence. On the other hand, if the court applies extraordinary mitigation of a penalty without demonstrating that such mitigation is indeed warranted by special circumstances leads to the correct conclusion that the penalty imposed in such circumstances is grossly disproportionate.[23]

Apart from referring to the exceptional nature of the legal concept of extraordinary mitigation of a penalty, the Supreme Court also addressed the standard of appellate review in cases of this type. In the discussed case, the Supreme Court reversed the judgment of the appellate court as grossly violating Article 433 § 2 CPC read in conjunction with Article 457 § 3 CPC, correctly pointing to the need for particularly thorough verification of the appellant's allegations regarding the assessment of the grounds for the existence of exceptionally justified circumstances within the meaning of Article 60 § 2 CC.

According to the first-instance court, the grounds described in the descriptive part of Article 60 § 2 CC have been met, as suggested by the factors such as the accused's growing sense of fatigue, emotional burnout, powerlessness and, at the same time, a sense of responsibility for the loved ones who put the accused in a difficult situation, the way in which the victim behaved and, in particular, her behaviour towards the accused, the ineffectiveness and a certain indifference of government and local government bodies in assisting the family of the accused, as well as the previous lifestyle of the accused, in particular, her involvement in voluntary work, a very positive assessment presented in a community interview report and clear criminal record. This conclusion was endorsed by the appellate court which argued that, although none of the above-mentioned factors would constitute a standalone ground for the extraordinary mitigation of a penalty, a combination of the factors constituted 'exceptionally justified circumstances', in which even the least severe penalty imposable for the offence would be disproportionately severe.

The Supreme Court aptly assessed that, since the prosecutor questioned the evaluation of the factors allegedly demonstrating the existence of exceptionally justified circumstances which were to warrant the extraordinary mitigation of

[23] Involving the fact that an error in the findings of facts alleged in the appeal was not duly examined which, in turn, in the Supreme Court's view, led to an incorrect approval of the findings made by the first-instance court as regards the existence of an exception as the grounds for the application of the extraordinary mitigation of a penalty.

the penalty, then it was necessary to present arguments demonstrating that these circumstances indeed deserve to be called 'extraordinary'. Accordingly, the court of appeal should not have limited its reasoning to a mere approval of the regional court's arguments in this regard, accompanied by references to general and broad statements intended to express the court of appeal's approval of the regional court's approach. All the circumstances described by this court referred in fact to the general grounds relevant to the length of the penalty for the serious offence charged and did not indicate the existence of the grounds for the application of Article 60 § 2 CC. Therefore, although the statement of reasons for the judgment of the court of appeal formally included deliberations in that respect, such deliberations arguably fell short of directly addressing the arguments presented in the prosecutor's appeal.

Referring to the specific elements of the reviewed judgment, the Supreme Court criticised the lower courts' assessment of the grounds for exceptionally justified circumstances within the meaning of Article 60 § 2 CC. The Supreme Court accepted that the sentenced person had been in a difficult life situation resulting from her taking over the care of her elderly mother (aged 86), who was physically disabled and unable to communicate verbally and logically as well as her sick husband, who is also physically disabled and uses a wheelchair, especially given her very modest housing conditions, but correctly concluded that such circumstances cannot constitute a defence to the taking of the victim's life. The above argument, in the Supreme Court's view, is especially valid given the fact that the sentenced person voluntarily decided to take her mother in and could have asked other family members (e.g. her sons) for assistance and could have requested the assistance of relevant government or local government bodies. Moreover, one should share the Supreme Court's argument that the accused did not commit the offence because she felt humiliated and violated by her mother, since the latter had suffered a stroke several months before she was killed and was generally unable to verbally communicate, bedridden and required around-the-clock care. As such, there is no merit in saying that, in the months immediately preceding the killing, the sentenced person's mother deliberately made her life miserable or behaved maliciously towards her.

The Supreme Court's views regarding the impact of the accused's previous lifestyle (in particular her clear criminal record and positive assessment in a community interview report) on the grounds for the extraordinary mitigation of a penalty follow the established jurisprudence. The Supreme Court correctly concludes that there is nothing special in the fact that the accused has been observing the legal order and functioned properly in the society. Such a law-abiding behaviour should be the norm for every person living in the society and it should not warrant a decision not to impose on the perpetrator a penalty which remains within the scale of penalties established for the offence of manslaughter.

The position of the Supreme Court regarding the assessment of the legal nature of the extraordinary mitigation of a penalty, as well as the factors constituting the exceptionally justified circumstances and the standard of appellate review in such cases, should be fully approved.

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GLOSS ON THE SUPREME COURT JUDGMENT OF 4 FEBRUARY 2020, III KK 113/19

Summary

The author of this gloss accepts the argument that the existence of 'exceptionally justified circumstances' within the meaning of Article 60 § 2 CC should be inferred from unusual circumstances of the incident or the features of the perpetrator which characterise them in an exceptionally positive way and warrant the imposition of a penalty lesser than the least severe penalty imposable for the offence in question. Based on a review of court decisions and scholarly works, the author identifies the key determinants guiding the assessment of whether exceptionally justified circumstances exist. Furthermore, the author endorses the call for

maintaining an appropriate standard of appellate review in cases involving the extraordinary mitigation of a penalty. Such a standard implies the need for a substantive and not merely formal revision of the grounds for the appeal challenging the legitimacy of the application of the extraordinary mitigation of a penalty.

Keywords: penalty, extraordinary mitigation of a penalty, sentencing directives, the least severe penalty for an offence, criminal law

GLOSA DO WYROKU SĄDU NAJWYŻSZEGO Z DNIA 4 LUTEGO 2020 R., III KK 113/19

Streszczenie

W glosie zaaprobowano tezę, iż wystąpienie szczególnie uzasadnionego wypadku w rozumieniu art. 60 § 2 k.k. powinno znajdować wsparcie w okolicznościach nietypowych samego zdarzenia albo w takich cechach sprawcy, które charakteryzują go w sposób wyjątkowo pozytywny i powodują, że zasługuje on na wymierzenie kary poniżej minimum ustawowego. Dokonując przeglądu orzecznictwa i doktryny, wskazano na główne determinanty oceny szczególnie uzasadnionego wypadku. Podzielono również pogląd o konieczności zachowania odpowiedniego standardu kontroli odwoławczej w tego typu sprawach, polegającego na konieczności merytorycznego a nie jedynie formalnego zweryfikowania zarzutów odwoławczych kwestionujących zasadność zastosowania nadzwyczajnego złagodzenia kary.

Słowa kluczowe: kara, nadzwyczajne złagodzenie kary, dyrektywy wymiaru kary, najniższa kara przewidziana za przestępstwo, prawo karne

COMENTARIO DE SENTENCIA DE TRIBUNAL SUPREMO DE 4 DE FEBRERO DE 2020, III KK 113/19

Resumen

El comentario aprueba la tesis que la existencia de caso excepcionalmente fundado a la luz del art. 60 § 2 de código penal ha de apoyarse en condiciones extraordinarias de hecho en sí o en tales características de autor que le describen de manera excepcionalmente positiva y por ello merece la pena por debajo mínimo legal. Analizando la jurisprudencia y doctrina se indica los principales elementos para valorar caso excepcionalmente fundado. Se comparte también la postura de la necesidad de preservar el estándar de control de recursos en este tipo de causas que consiste en la necesidad de verificar sustancialmente y no sólo formalmente las alegaciones de recurso que cuestionan la aplicación de rebaja extraordinaria de la pena.

Palabras claves: pena, rebaja extraordinaria de la pena, directivas de imposición de la pena, la pena mínima prevista por el delito, derecho penal

КОММЕНТАРИЙ К РЕШЕНИЮ ВЕРХОВНОГО СУДА № III KK 113/19 ОТ 4 ФЕВРАЛЯ 2020 ГОДА

Аннотация

В комментарии автор приводит аргументы в пользу того, что наличие «особо обоснованного случая» в понимании ст. 60 §2 УК должно подтверждаться нетипичными обстоятельствами самого события преступления либо особенностями поведения преступника, которые характеризуют его в исключительно позитивном ключе и означают, что он заслуживает наказания ниже установленного законом минимума. Анализ существующей судебной практики и положений доктрины позволил выявить основные факторы, определяющие оценку каждого конкретного случая как «особо обоснованного». Автор разделяет мнение о необходимости поддержания надлежащих стандартов апелляционного надзора при рассмотрении подобных дел. Это выражается в необходимости не только формально-правовой, но и материально-правовой проверки апелляций, оспаривающих обоснованность чрезвычайного смягчения наказания.

Ключевые слова: наказание; институт чрезвычайного смягчения наказания; положения об определении меры наказания; наименьшее наказание, предусмотренное за преступление; уголовное право

GLOSSE ZUM URTEIL DES SĄD NAJWYŻSZY VOM 4. FEBRUAR 2020, AKTENZEICHEN: III KK 113/19

Zusammenfassung

Die Autorin des Meinungsbeitrags teilt die Auffassung, dass das Vorliegen eines besonders begründeten Falles im Sinne von Artikel 60 § 2 des polnischen Strafgesetzbuches durch die außergewöhnlichen Umstände des Ereignisses selbst oder solche Merkmale des Täters belegt werden sollte, die ihn auf besonders positiv erscheinen lassen und bewirken, dass er ein Strafmaß verdient, das unter der gesetzlichen Mindeststrafe liegt. Mit Blick auf die Rechtsprechung und die Rechtslehre werden die wesentlichen Bestimmungsfaktoren für die Beurteilung eines Falles als besonders begründet bezeichnet. Es wird auch die Ansicht geteilt, dass in solchen Fällen die Gewährleistung einer angemessenen Nachprüfung und damit verbunden einer inhaltlichen und nicht nur formalen Überprüfung der Rechtsmittelgründe notwendig ist, durch die die Rechtmäßigkeit der Anwendung einer außerordentlichen Strafmilderung in Frage gestellt wird.

Schlüsselwörter: Strafe, außerordentliche Strafmilderung, Strafzumessungsrichtlinien, für eine Straftat angedrohte Mindeststrafe, Strafrecht

GLOSE DE L'ARRÊT DE LA COUR SUPRÊME DU 4 FÉVRIER 2020, III KK 113/19

Résumé

La glose approuvait la thèse selon laquelle la survenance d'un accident particulièrement justifié au sens de l'article 60 § 2 du Code pénal devrait trouver appui dans des circonstances inhabituelles de l'événement lui-même ou dans des caractéristiques de l'auteur qui le

caractérisent d'une manière exceptionnellement positive et lui font mériter une peine inférieure au minimum légal. Lors de l'examen de la jurisprudence et de la doctrine, les principaux déterminants de l'évaluation d'un accident particulièrement justifié ont été indiqués. On a également estimé qu'il était nécessaire de maintenir une norme appropriée de contrôle des recours dans ce type d'affaires, consistant en la nécessité d'une vérification de fond et pas seulement formelle des allégations d'appel mettant en cause la légitimité de l'application de la clémence extraordinaire.

Mots-clés: peine, clémence extraordinaire, directives de détermination de la peine, peine la plus basse prévue pour un crime, droit pénal

COMMENTO ALLA SENTENZA DELLA CORTE SUPREMA DEL 4 FEBBRAIO 2020, III KK 113/19

Sintesi

Nel commento si è approvata la tesi che l'insorgenza di un caso particolarmente motivato ai sensi dell'art. 60 § 2 del Codice penale deve essere sostenuta dalle circostanze insolite dell'evento stesso oppure da caratteristiche del reo, tali da caratterizzarlo in maniera particolarmente positiva e che fanno sì che meriti l'applicazione di una pena inferiore al minimo di legge. Effettuando una rassegna della giurisprudenza e della dottrina sono stati indicati i determinati principali della valutazione del caso particolarmente motivato. Si è condivisa anche la posizione circa la necessità di rispettare un adeguato standard di controllo in sede d'impugnazione in questo tipo di procedimenti, consistente nella necessità di una verifica di merito e non solamente formale delle accuse d'impugnazione che contestano la fondatezza dell'applicazione di una attenuante eccezionale.

Parole chiave: pena, attenuanti eccezionali, direttive di determinazione della pena, pena minima prevista per il reato, diritto penale

Cytuj jako:

Kosonoga-Zygmunt J., *Gloss on the Supreme Court judgment of 4 February 2020, III KK 113/19 [Glosa do wyroku Sądu Najwyższego z dnia 4 lutego 2020 r., III KK 113/19]*, „Ius Novum" 2020 (14) nr 4, s. 193–204. DOI: 10.26399/iusnovum.v14.4.2020.43/j.kosonoga-zygmunt

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Gloss on the Supreme Court ruling of 13 June 2019, III KK 280/18

THESIS

The expression 'for reasons undetermined, he drove over to the roadside and lost control of the vehicle', as referred to the convicted defendant, permits the identification of their violation of traffic rules in the form of culpable loss of control of the vehicle for no external causes but only ones imputable to the perpetrator.[1]

COMMENTARY

In the ruling under analysis, the Supreme Court once again took a position on the popular judicial practice of replacing – in the description of the conduct imputed to a defendant – of the statutory elements of a crime with a pertinent explanation of the perpetrator's conduct. The Supreme Court was correct in deciding that, in the case of a criminal traffic incident (Article 177 § 1 or 177 § 2 of the Criminal Code, hereinafter CC), in reference to the element of 'violating the rules of land traffic', any such practice must still allow the unequivocal identification of the violated rule of caution.

In a conviction, the mandatory elements of the dispositive part include, without limitation, the specific description of the act imputed to the defendant along with its legal classification (Article 413 § 2(1) of the Criminal Procedure Code, hereinafter CPC). This provision does not scale down the elements of the act description.

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[1] The Supreme Court ruling of 3 June 2019, III KK 280/18, Prokuratura i Prawo-wkł. Orzecznictwo 6, 2020, item 8.

Due to the fact that the conviction disposes of the subject-matter of the criminal proceedings, that is the convicted defendant's liability for the act imputed to them in the indictment (or an instrument substituting it), one can look for interpretative assistance to Article 332 § 1(2) CPC, which establishes the minimum requirements for the description of the act imputed to the defendant. This provision requires the description to include the time, place, manner and circumstances of the crime commission, as well as its consequences, especially concerning the value of the harm inflicted, and thus factors belonging to the essence of the criminal act. The description must expound on all relevant circumstances of the defendant's conduct, leaving no doubt as to the act they are being convicted of.[2] Thus, it must be precise, clear and not susceptible to differing interpretations.[3] However, it should be free of any circumstances not pertaining to the essence of the act, so as to avoid needless obfuscation of the matter. In particular, it will be superfluous to refer to any facts or circumstances that are neutral to the legal classification, even if they are pertinent to the application of some institutions or other of substantive criminal law to the defendant,[4] or are relevant only to the sentencing.[5] Repeating the elements of the statutory definition of the criminal offence without scaling them down and applying them to the specific event will fall short of the requirements of Article 413 § 2(1) CPC.

What is of primary significance is the obligation to demonstrate firmly that the defendant has fulfilled all of the statutory elements of the criminal offence defined in the statute (Article 115 § 1 CC), reflecting every aspect of the perpetrator's conduct.[6] No element on which the unlawfulness of the conduct depends may be omitted from the defendant's conviction.[7] Failure to satisfy this requirement and convicting

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[2] The Supreme Court judgment of 28 October 1968, IV KR 188/68, OSNKW 1969, No. 5, item 52.

[3] The Supreme Court judgment of 31 January 2018, IV KK 286/17, LEX No. 2449308; the judgment of the Court of Appeal in Wrocław of 31 October 2019, II 213/19, LEX No. 2749796.

[4] The Supreme Court ruling of 18 February 2009, IV KK 303/08, Prokuratura i Prawo-wkł. 7–8, 2009, item 23.

[5] The Supreme Court judgment of 24 March 1983, IV KK 49/83, OSPiKA 1984, No. 6, item 126.

[6] The Supreme Court ruling of 26 October 1995, II KRN 131/95; the Supreme Court judgments: of 27 January 2006, IV WK 27/05, OSNKW-R 2006, item 2234; of 9 February 2006, III KK 164/05, Prokuratura i Prawo-wkł. 9, 2006, item 12; of 9 February 2006, IV KK 228/05, LEX No. 176033; of 8 March 2006, IV KK 281/05, LEX No. 181403; of 4 April 2006, III KK 306/05, OSNKW 2006, No. 7–8, item 69; of 25 April 2006, III KK 409/05, OSNKW 2006, No. 7–8, item 72; of 30 August 2006, IV KK 262/06, LEX No. 192998; the Supreme Court ruling of 19 October 2006, IV KK 246/06, LEX No. 202125; the Supreme Court judgment of 8 November 2006, IV KK 299/06, OSNKW 2007, No. 2, item 13; the Supreme Court ruling of 1 February 2007, II KK 141/06, Prokuratura i Prawo-wkł. Orzecznictwo 7–8, 2007, item 20; the Supreme Court ruling of 28 June 2007, IV KK 101/07, LEX No. 280739; the Supreme Court judgments: of 29 May 2012, III KK 87/12, Biul.PK SN 2012, No. 5, item 22; of 22 March 2012, IV KK 375/11, OSNKW 2012, No. 7, item 78; of 26 January 2012, IV KK 326/11, Prokuratura i Prawo-wkł. 7–8, 2012, item 11; of 29 May 2012, III KK 87/12, Prokuratura i Prawo-wkł. 12, 2012, item 15; the Supreme Court ruling of 4 April 2013, II KK 71/13, OSNKW 2013, No. 8, item 65; judgment of the Court of Appeal in Poznań of 13 September 2012, II AKa 170/12, Krakowskie Zeszyty Sądowe 3, 2013, item 80.

[7] The Supreme Court judgment of 26 March 2019, IV KK 109/18, LEX No. 2647175.

the defendant for a criminal offence without completing all of the elements will lead to a violation of the constitutional principle of *nullum crimen sine lege* (Article 42 para. 1 of the Polish Constitution), repeated in Article 1 § 1 CC as the most basic precondition of any criminal liability.

The simplest way to discharge this obligation is to draft the description of an act using the statutory expressions defining the various elements of the offence, that is borrowing from the 'statutory language'.[8] The description of the offence that is a criminal incident in road traffic, whose elements include, *verba legis*, at least unintentional violation of a safety rule in land traffic, should also contain the determination of the type of culpability in the violation; the scholarship[9] and the courts[10] are unanimous about this.

It is of key importance to identify the rule of traffic safety the defendant has violated. On the other hand, the question arises whether the description of the act should always reflect the statutorily defined rules of caution on and near the road. In the ruling at hand, the Supreme Court was correct to find that the drafting of the description of the act without including the terminology of the Act of 20 June 1997: Law on road traffic[11] but sufficiently establishing the violation of the rules of road safety does not necessarily contravene Article 413 § 2(1) CPC, let alone violate substantive law (Article 177 § 2 CC) by omitting any element of the crime.

Scholars aptly point out that the court, in drafting the description of the imputed act in the judgment, is free to use one of two methods of scaling down the essence of the criminal offence. The first is repetition, that is quoting the statutory elements, followed by words such as 'and thus' or 'in particular', and then expressions scaling down the elements by description corresponding to the findings. The other is substitution, that is not quoting the statutory elements and instead pointing directly to the findings of fact.[12]

The requirement of the specific description of the crime does not, therefore, always necessitate the use of the wording of the statute establishing the offence. The conduct may be described freely, through the findings of fact, so as to point toward

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[8] The Supreme Court judgment of 28 March 2019, IV KK 198/18, LEX No. 2642724.

[9] J. Kochanowski, *Przestępstwa i wykroczenia drogowe. Komentarz*, Warszawa 1991, p. 232; K. Buchała, *Przestępstwa i wykroczenia przeciwko bezpieczeństwu w komunikacji drogowej. Komentarz*, Bydgoszcz 1997, p. 147.

[10] The Supreme Court judgments: of 19 October 1976, IV Kw 273/76, OSNKW 1976, No. 12, item 152; of 6 October 1976, Rw 327/76, OSNKW 1976, No. 12, item 154; of 3 December 1985, V KRN 929/85, OSNPG 1986, No. 6, item 75; the Supreme Court ruling of 29 April 1997, V KKN 255/96, OSNKW 1997, No. 7–8, item 60; the Supreme Court judgments: of 21 October 1973, KRN 300/73, Biuletyn Sądu Najwyższego 1973, No. 12, item 200; of 15 June 1992, II KRN 78/92; of 1 December 2005, V KK 353/05, Prokuratura i Prawo 4, 2006, item 6; judgment of the Court of Appeal in Lublin of 18 March 2008, II AKa 56/08, Krakowskie Zeszyty Sądowe 6, 2008, item 56.

[11] Consolidated text, Dz.U. 2020, item 110, as amended; hereinafter also LRT.

[12] S. Waltoś, *Akt oskarżenia w procesie karnym*, Warszawa 1963, pp. 60–61; A. Zachuta, *Opis i kwalifikacja prawna czynu z uwzględnieniem sprawczych odmian przestępnego współdziałania*, Prokuratura i Prawo 1, 2005, p. 52; the Supreme Court ruling of 5 February 2019, V KK 599/18, LEX No. 2616229; judgment of the Court of Appeal in Lublin of 12 September 2017, II AKa 178/17, LEX No. 2396878.

the fulfilment of the relevant element or elements of the crime. The meaning of the expressions used should adequately fulfil the meaning of the respective element.[13]

The Supreme Court decisions are also consistent on the fact that Article 413 § 2 CPC defining the structure of a conviction does not include a requirement of citing *expressis verbis* the statutory language describing all of the elements of the criminal offence (Article 413 § 2(1) CPC). What is required, on the other hand, is for the description of the imputed act to be specific and for the legal classification to result from the application of the findings of fact to the appropriate provision of substantive law. When considering the stylistic aspects of Article 413 § 2(1) CPC, the Supreme Court correctly observed that both facets of the provision were of equal standing, in the sense that the contents of the description of the imputed act should correspond to the semantic contents (meaning) of all of the elements defining the offence type, and each element of the offence type should be scaled down in the description of the act. That balance between the verbal definition of the act and its legal classification does not require a quotation from the words with which the statute defines the various elements of the offence type. This is because the elements delineate the boundaries of the criminalised sphere of conduct in an abstract way. The goal of the criminal proceedings at the trial stage, by contrast, is to decide whether in the imputed act the defendant has fulfilled each of the synthetically encapsulated elements of the specific offence type, and if they have, then what that fulfilment has consisted in.[14] Hence, even the omission of the statutory definition of an element of the offence in the description of the imputed act poses no obstacle to concluding that the act fulfils the elements of a specific criminal offence, as long as the description fits in the boundaries of the expressions used by the provision of substantive law to define the elements.

Normative rules of traffic are defined by the Law on road traffic and regulations enacted thereunder. They are of decisive importance to ensuring the traffic is safe. The Supreme Court defined them as, 'rules contained in the provisions specifying the order of movement in traffic routes and conduct in typical traffic situations or expressed by such signage, lighting and signal systems as may be in place.'[15] They constitute an open set of general and special norms in the nature of guarantees, defining the safety conditions of the traffic, compliance with which either precludes or significantly diminished the danger of the traffic.[16] Normative regulations

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[13] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 1363.

[14] The Supreme Court judgments: of 2 July 2015, V KK 138/15, OSNKW 2015, No. 11, item 97; of 26 November 2014, II KK 1414/14, OSNKW 2015, No. 5, item 42; of 3 December 2015, II KK 283/15, LEX No. 1938677; of 24 June 2013, V KK 435/12, LEX No. 1331400; the Supreme Court rulings: of 5 December 2013, II KK 212/13, OSNKW 2014, No. 5, item 38; of 4 September 2014, V KK 156/14, LEX No. 1532786; of 19 May 2015, V KK 53/15, OSNKW 2015, No. 10, item 84; of 20 March 2014, III KK 416/13, LEX No. 1444607; of 20 March 2014, III KK 416/13, LEX No. 1444607.

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

[16] W. Radecki, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 699; A. Bachrach, *Przestępstwa i wykroczenia drogowe w nowym prawie polskim*, Warszawa 1974, p. 288.

establish such rules of traffic participation that concern the most frequent situations and best protect the safety of the traffic.[17]

In the literature one can encounter the (correct) view that it is necessary to distinguish the general and special rules of safety in road traffic. The former category concerns, in principle, all traffic situations. These include: caution (Article 3 LRT), special caution (Article 2(22) LRT), limited trust (Article 4 LRT), and safe speed (Article 19 LRT). Writers tend to emphasize that the principles of caution and limited trust are in the nature of 'corrective principles', applied as a last resort in the absence of a special norm binding on the traffic participant.[18] The latter category concerns the enumerated range of conduct and manoeuvres. Its various individual rules are triggered only in a specific road situation and define the appropriate course of action. Those include: rules on pedestrian traffic (Articles 11–15 LRT); rules on vehicle traffic (Articles 16–34 LRT); transhumance of animals (Articles 35–37 LRT); rules for joining the traffic (Articles 17–18a LRT); rules for changing the direction or lane (Article 22 LRT); evading, avoiding, withdrawing (Article 23 LRT); overtaking (Article 24 LRT); directional intersections (Article 25–28) and more.

It remains a current view of the Supreme Court that the contents of normative regulations do not exhaust the universe of rules of which the *ratio* consists in the protection of life, health and property from traffic incidents,[19] and that safety rules in road traffic must also include, 'rules not specifically codified but arising from the aforesaid provisions and the essence of traffic safety, which must apply whenever there is no specific provision.'[20] The literature also observes that both in those cases in which there are no formalised standards for cautious conduct and those wherein no such formalisation exists, conduct consistent with the principles of caution relies also on the observance of extra-legal rules arising from the essence of safety in the relevant field.[21] The source of those is knowledge and life experience, which need not be universally applicable or require expert knowledge.[22] That is a correct view. It would be impossible to predefine all possible traffic situations. Hence, they cannot be boiled down to a single abstract rule. Conduct in such situations must be evaluated against general principles arising from the necessity of cautious and judicious behaviour,[23] i.e. the principles arising directly from the general provisions and from the variability of the traffic with its dynamics.[24] The overarching duty

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[17] Cz. Jaroszek, *Naruszenie zasad bezpieczeństwa jako znamię przestępstwa określonego w art. 145 k.k. w świetle nowego prawa o ruchu drogowym*, Problemy Praworządności 8–9, 1983, p. 51.

[18] P. Konopka, *Rażące naruszenie zasad bezpieczeństwa pojęciem pomocniczym dla przypisania skutku w art. 177 k.k.*, Czasopismo Prawa Karnego i Nauk Penalnych 3, 2010, p. 35.

[19] The Supreme Court judgment of 12 June 1973, V KRN 187/73; see in R.A. Stefański, *Przestępstwa i wykroczenia drogowe w orzecznictwie Sądu Najwyższego*, Warszawa 1997, item 248.

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

[21] M. Dąbrowska-Kardas, P. Kardas, *Przegląd orzecznictwa z zakresu części ogólnej prawa karnego materialnego (za rok 1995)*, Przegląd Sądowy 11–12, 1996, p. 129.

[22] The Supreme Court ruling of 12 July 1958, II CR 1214/57, OSPiKA 1959, No. 11, item 288.

[23] K. Wagner, *Przestępstwa przeciwko bezpieczeństwu powszechnemu i przeciwko bezpieczeństwu w ruchu lądowym, wodnym i powietrznym*, Warszawa 1970, p. 21.

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

of every participant in the traffic is to act in accordance with not only legally established rules but also equally to follow common sense[25] and general prudence, and respect the safety of others.[26] These are the criteria formulating the essence of the duty of care ('the essence of safety') in road traffic and must, as the Supreme Court underlined, be followed even in the absence of a legal provision.[27]

Cautionary principles, and this category includes the rules of safety in land traffic, should not be focused on the execution of any specific behaviour but on the achievement of the purpose that is safeguarding the protected interest.[28] In the realm of the provisions of the Law on road traffic, this principle is enunciated by the principle of base caution, which imposes a duty to avoid all such action as might endanger the safety or order in road traffic, hamper the traffic or infringe on the public peace or order or expose anyone to harm in connection with the traffic (Article 3 para. 1 LRT), stipulating the 'essence of safety in road traffic'.

In the case at hand the court of first instance – having accepted and followed the prosecutor's entire description of the act – copied the phrase according to which the defendant, among other things, 'in a straight section of the road, for reasons undetermined, drove over to the roadside and lost control of the vehicle, allowing it to crash into a tree.' The appellant-in-cassation had some doubts about the expression 'for reasons undetermined'. *Prima facie*, that part of the description can indeed cause a doubt that the conduct contains the elements of a culpable violation of the rules of traffic safety. Court decisions point out that whether the driver proceeded with caution and care cannot be decided solely by the fact that a traffic incident happened.[29] However, the disputed description also contains other markers of a lack of care in road traffic, namely the fact of driving over to the roadside and losing control of the vehicle, which led to crashing into the tree.

Indisputably, the driver of a vehicle has a duty to proceed with caution so as to guarantee that they can control its movement and direction freely. While the provisions of the Law on road traffic do not define such a requirement in express language, this course of action wholly fits in the concept – imposed on any traffic participant – of avoiding any action that might endanger the traffic safety (Article 3 para. 1 LRT). The concept of 'controlling the vehicle' also surfaces in Article 19 para. 1 LRT. To narrow down the scope of the duty incumbent on the driver of a car moving along a straight section of a national road, it indisputably must include keeping the vehicle within the intended directional lane, not veering off the road in an uncontrolled manner, and ultimately not allowing a collision to happen with

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[25] The Supreme Court judgment of 31 January 1949, K 1068/48, OSN 1949, No. 1, item 10.

[26] G. Wiciński, *Zasady bezpieczeństwa w ruchu drogowym*, Wojskowy Przegląd Prawniczy 2, 1989, p. 181.

[27] The Supreme Court judgment of 30 May 1995, III KKN 20/95, OSNKW 1992, No. 11–12, item 84.

[28] M. Rodzynkiewicz, *Określenie umyślności i nieumyślności w projekcie kodeksu karnego*, Przegląd Sądowy 5, 1995, p. 50.

[29] Resolution of the Supreme Court of 28 February 1975, V KZP 2/74, OSNKW 1975, No. 3–4, item 33; the Supreme Court judgments: of 16 June 1982, V KRN 171/82, OSNCP 1982, No. 11, item 146; of 17 January 1987, V KRN 474/86, OSNPG 1988, No. 3, item 29; of 17 November 1998, II KKN 73/97; see in R.A. Stefański, *Kodeks karny. Orzecznictwo. Piśmiennictwo*, Kraków 2000, p. 187.

another participant of the traffic or a person present in the road or nearby, or an obstacle (another vehicle, technical facilities for traffic safety and order, or a tree growing near the road). The obligations falling within the scope of this range are of primary importance to ensure the safe movement of vehicles and use of the road in general, and a duty to adapt rests primarily on the driver as a person making use of a thing which is unsafe by design. For such is the nature of a vehicle moving in the traffic with a speed that is typical outside built-up areas.

Hence, the trial court's expression 'for reasons undetermined', as read in the context of further circumstances highlighting the defendant's conduct, did not point toward any failure to determine the safety rule that was violated but only of the specific reason why the driver acted in a manner that was unsafe and manifestly incompatible with the prescribed manner of driving the vehicle in what was an uncomplicated traffic situation. This indisputably unfortunate expression ought to be understood as referring to any undetermined external cause beyond the driver's control, such as might justify a sudden manoeuvre. Taking into account the foregoing remarks concerning the careful conduct of a vehicle and the fact that the movement and direction of the vehicle are, by definition, imposed only by the driver, it is difficult to assume *a priori* that veering off the road and hitting an obstacle always has an external cause and that the failure to determine that cause in the proceedings should provide sufficient grounds to conclude that the driver's tactics and technique were correct. In other words, veering off the lane and then the road and hitting the tree, when such a chain of events was not caused or accompanied by any external circumstances, such as the conduct of a different participant of the traffic (e.g. a passenger), an animal crossing the road or the vehicle's poor technical condition, must necessarily draw attention to the driver's failure as the person, in principle, solely responsible for the vehicle's movement and direction. The driver ought to drive on the lane, the latter being the element of the road intended for vehicle traffic (Article 2(6) LRT). Hence, the driver is liable for having culpably left that area. Veering off the road defeats the presumption that the driver conducted the vehicle in a careful and proper manner; hence, the exculpation of such a driver would only enter the picture in the event of finding causes justifying them in being outside the lane, and thus external causes of danger, which in this case did not take place.

In summary, the description, provided in the dispositive part of the conviction, of the criminal traffic incident as an offence committed in consequence of the violation of the general rules of traffic safety need not solely be based on terminology borrowed straight from the Law on road traffic, since Article 413 § 2(1) CPC establishes no such requirement. In certain cases, such a limitation would fail to sufficiently highlight the liability-relevant details of the perpetrator's conduct, especially in the area of the principle of base caution (the essence of traffic safety). The primary significance in the context of the duty arising from Article 413 § 2(1) CPC must belong to the faithful reconstruction of the description of the event, though free of expressions potentially having more than one meaning. The criterion of violation of the general cautionary principle (Article 3 para. 1 LRT) is also met by culpable, not externally caused, loss of control of the vehicle combined with uncontrolled veering off the road and hitting an obstacle found in the road's immediate vicinity.

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GLOSS ON THE SUPREME COURT RULING OF 13 JUNE 2019, III KK 280/18

Summary

The gloss refers to the problem of the correct and accurate description of the act fulfilling the elements of the criminal offence of traffic incident (Article 177 § 1 or § 2 of the Criminal Code) imputed to the defendant in the conviction (Article 413 § 2(1) of the Criminal Procedure Code). The author, elaborating on the arguments supplied by the Supreme Court, takes a position in support of the admissibility of an equivalent phrasing that defines the 'violation of safety rules in land traffic', provided that its semantic value corresponds to the statutory element. The author also notes that in specific cases the description of an act based solely on expressions taken from the statutory language could even make it more difficult to present an accurate picture of the perpetrator's conduct.

Keywords: criminal procedure, substantive criminal law, conviction, description of the act, traffic incident, safety rules in land traffic

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 13 CZERWCA 2019 R., III KK 280/18

Streszczenie

Glosa dotyczy problematyki prawidłowego, dokładnego opisu czynu wyczerpującego znamiona przestępstwa wypadku drogowego (art. 177 § 1 lub § 2 k.k.), przypisywanego oskarżonemu w wyroku skazującym (art. 413 § 2 pkt 1 k.p.k.). Autor, rozbudowując argumentację przedstawioną przez Sąd Najwyższy, aprobuje możliwość posłużenia się w opisie czynu sformułowaniami równoznacznymi, potwierdzającymi „naruszenie zasad bezpieczeństwa w ruchu lądowym", o ile ich zawartość semantyczna odpowiada temu znamieniu ustawowemu. Autor wykazuje również, że w szczególnych przypadkach konstrukcja opisu czynu opierająca się wyłącznie na określeniach ustawowych może wręcz utrudniać przedstawienie rzeczywistego obrazu zachowania sprawcy.

Słowa kluczowe: postępowanie karne, prawo karne materialne, wyrok skazujący, opis czynu, wypadek drogowy, zasady bezpieczeństwa w ruchu lądowym

COMENTARIO DE AUTO DEL TRIBUNAL SUPREMO DE 13 DE JUNIO DE 2019, III KK 280/18

Resumen

El comentario versa sobre la problemática de descripción correcta y detallada de delito de accidente de tráfico (art. 177 § 1 o § 2 del código penal), imputado al acusado en la sentencia condenatoria (art. 413 § 2 punto 1 del código de proceso penal). El autor desarrolla la argumentación del Tribunal Supremo y acepta la posibilidad de utilizar en la descripción de delito las fórmulas sinonímicas que confirmen "la infracción de reglas de seguridad en el tráfico vial", siempre que su contenido semántico equivalga a este elemento legal de delito. Señala también que en casos particulares la construcción de descripción de hecho que se basa exclusivamente en términos legales puede dificultar el juicio del comportamiento real del autor de delito.

Palabras claves: proceso penal, derecho penal, sentencia condenatoria, descripción de hecho, accidente de tráfico, reglas de seguridad en el tráfico vial

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЕРХОВНОГО СУДА № III KK 280/18 ОТ 13 ИЮНЯ 2019 ГОДА

Аннотация

Комментарий касается вопроса о надлежащем и точном описании в обвинительном приговоре (ст. 413 § 2 п. 1 УПК) деяния, исчерпывающего признаки преступления, состоящего в совершении дорожно-транспортного происшествия (ст. 177 § 1 или § 2 УК). Развивая аргументацию, приводимую Верховным судом, автор статьи поддерживает точку зрения, что при описании преступного деяния можно использовать синонимичные слова и выражения, подтверждающие «нарушение правил

безопасности дорожного движения», при условии, что их смысловое содержание соответствует законодательному определению данного признака преступления. Кроме того, в статье показано, что в некоторых случаях описание деяния, основанное исключительно на формулировках, содержащихся в законе, не позволяет представить подлинную картину поведения преступника.

Ключевые слова: уголовное производство; материальное уголовное право; обвинительный приговор; описание деяния; дорожно-транспортное происшествие; правила безопасности дорожного движения

GLOSSE ZUM BESCHLUSS DES SĄD NAJWYŻSZY VOM 13. JUNI 2019 R., AKTENZEICHEN: III KK 280/18

Zusammenfassung

Mit den Anmerkungen wird auf die Problematik der korrekten und genauen Würdigung einer strafbaren Handlung eingegangen, die die Tatbestandsmerkmale eines Verkehrsunfalldelikts (Artikel 177 § 1 oder § 2 des polnischen Strafgesetzbuches) aufweist, das dem Beschuldigten bei der Verurteilung zur Last gelegt wird (Artikel 413 § 2 Ziffer 1 der polnischen Strafprozessordnung). Der Autor spricht sich – unter Erweiterung der vom Sąd Najwyższy, der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, vorgetragenen Argumentation – für die Möglichkeit aus, bei der Würdigung einer strafbaren Handlung zur Untermauerung eines „Verstoßes gegen die Sicherheitsregeln im Straßenverkehr" synonyme Formulierungen zu verwenden, sofern deren semantischer Gehalt diesem gesetzlichen Tatbestandsmerkmal entspricht. Er weist außerdem darauf hin, dass eine Konstruktion der Würdigung der strafbaren Handlung, die sich ausschließlich auf die gesetzlichen Begriffe stützt, es in besonderen Fällen sogar erschweren kann, das tatsächliche Bild des Verhaltens des Täters wiederzugeben.

Schlüsselwörter: Strafverfahren, materielles Strafrecht, Verurteilung, Würdigung des Sachverhalts, Verkehrsunfall, Sicherheitsregeln im Straßenverkehr

GLOSE DE L'ARRÊT DE LA COUR SUPRÊME DU 13 JUIN 2019, III KK 280/18

Résumé

Le commentaire porte sur la question d'une description correcte et précise d'un acte qui comporte les éléments constitutifs d'un crime d'accident de la route (article 177 § 1 ou § 2 du Code), attribué à l'accusé dans la condamnation (article 413 § 2 point 1 du Code de procédure pénale polonais). En développant les arguments présentés par la Cour suprême, l'auteur approuve la possibilité d'utiliser des expressions équivalentes dans la description de l'acte, qui confirment «la violation des règles de sécurité dans la circulation terrestre», à condition que leur contenu sémantique corresponde à cet élément constitutif prévu par la loi. Il montre également que dans des cas particuliers, la construction de la description de l'infraction fondée uniquement sur des conditions légales peut même rendre difficile la présentation de l'image réelle du comportement de l'auteur.

Mots-clés: procédure pénale, droit pénal matériel, condamnation, description de l'acte, accident de la route, règles de sécurité dans la circulation terrestre

COMMENTO ALL'ORDINANZA DELLA CORTE SUPREMA DEL 13 GIUGNO 2019, III KK 280/18

Sintesi

Il commento riguarda la questione della corretta e precisa descrizione dell'atto che costituisce un reato di incidente stradale (art. 177 § 1 o § 2 del Codice penale), attribuito all'imputato in una sentenza di condanna (art. 413 § 2 punto 1 del Codice di procedura penale). L'autore, sviluppando l'argomentazione presentata dalla Corte Suprema, approva la possibilità di utilizzare nella descrizione dell'atto formulazioni equivalenti, che confermano la "violazione delle norme di sicurezza della circolazione stradale" nella misura in cui il loro contenuto semantico corrisponda agli elementi costitutivi giuridici. Indica inoltre che in casi particolari la struttura della descrizione dell'atto basata esclusivamente sulle definizioni giuridiche può addirittura ostacolare la presentazione del quadro reale del comportamento dell'autore del reato.

Parole chiave: procedimento penale, diritto penale sostanziale, sentenza di condanna, descrizione dell'atto, incidente stradale, norme di sicurezza della circolazione stradale

Cytuj jako:

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Ius Novum
4/2020

ANETA MICHALSKA-WARIAS*

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Gloss on the judgment of the Court of Appeal in Gdańsk of 9 August 2019, II Aka 60/19

THESIS

There are no grounds for eliminating a period of incarceration from the description of the act of participation in an organised criminal group (Article 258 § 1 Criminal Code), especially if, once released, the offender relapses into crime within the same organised criminal group, since such conduct clearly establishes the offender's sustained membership in the group. For participation in an organised criminal group is a sustained offence and lasts as long as the membership in the group persists, without requiring the offender to perform any other criminal activities. This offence is also a formal one, which means that passive membership alone is sufficient, without prohibited acts being completed.

COMMENTARY

In its judgment of 9 August 2019, II AKa 60/19,[1] the Court of Appeal in Gdańsk addressed several important aspects of the interpretation of Article 258 of the Criminal Code (hereinafter CC). The Court's views, in general, merit approval, though some appear to require greater precision.

Firstly, the Court of Appeal in Gdańsk notes that the offence defined in Article 258 § 1 CC is a formal one and, as such, 'passive membership alone is sufficient, without prohibited acts being completed.' In this part of its thesis the Court of Appeal in Gdańsk repeats the view – as already set out in court decisions and not fully precise

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1 Kwartalnik Sądowy Apelacji Gdańskiej 2019/3–4/208.

– that also the so-called passive participation in a criminal group or association is criminalised as a result of this being a crime defined by formal conduct. This is how the matter was elaborated by the Court of Appeal in Lublin, whose reasoning set out in the judgment of 21 November 2013 emphasizes: 'The nature of the criminal offence under Article 258 § 1 CC is formal, and the features of membership in an organised criminal group are fulfilled by acceding to it and remaining in its structure; hence, passive membership alone without any other prohibited acts being completed is sufficient.'[2]

The formal nature of the criminal offence of participating in an organised group or association intended to commit crimes is not, in principle, met with any significant doubt in the literature.[3] However, the formal nature of this act is only determined by the fact that its commission does not require any specific consequence to be brought about by the offender's conduct (the crime for the commission of which a group or association were established certainly is not such a consequence);[4] this, however, does not in any way resolve the matter whether participation in the prohibited criminal structure may be either active or passive, as opposed to only active participation being the case. For active participation may not be identified with the commission of criminal offences as part of the group or association (although such activity will undoubtedly be evidence of such active participation) and refers only to whether the offender does anything more than accede to the group or association and declare willingness to act for it. Thus, an offender who 'only' engages in activities intended to facilitate the existence of a group or association, for example, by acting as the cook and gunsmith at the group's hideout, also takes active participation in the

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[2] II AKa 199/13, LEX No. 1419069.

[3] See e.g. M. Mozgawa, [in:] *Kodeks karny. Komentarz*, M. Mozgawa (ed.), Warszawa 2019, p. 844; A. Herzog, [in:] *Kodeks karny. Komentarz*, R.A. Stefański (ed.), Warszawa 2018, p. 1646; A. Lach, [in:] *Kodeks karny. Komentarz*, V. Konarska-Wrzosek (ed.), Warszawa 2018, p. 1173.

[4] See e.g. the Supreme Court judgment of 28 March 2017, the reasoning of which emphasizes the following: 'The act under Article 258 § 1 CC is called a formal offence, and the commission of a criminal offence being a form of implementation of the group's purpose is not a consequential element of this crime. Under Article 258 § 1 CC, the classification of the offender's conduct does not turn the criminal offences committed as part of the group into included offences. On the contrary, crimes committed within the group should be classified according to those provisions the elements of which the offender's conduct fulfils' (WK 3/17, LEX No. 2261760). The Court of Appeal in Łódź expressed a similar view in the reasoning for its judgment of 26 March 2013, also in the context of a concurrence of legal provisions and concurrence of criminal offences: 'Under Article 258 § 1 CC, the classification of the offender's conduct does not turn the criminal offences committed as part of the group into included offences, as manifestations of the achievement of the group's purpose. On the contrary, crimes committed within the group should be classified according to those provisions the elements of which the offender's conduct fulfils, and, even though undertaken as part of the group and as manifestation of the achievement of its purpose, without a cumulative classification with Article 258 § 1 CC. For this last misconduct is not one defined by consequence; hence, the commission of a criminal offence being a form of achievement of the group's purpose is not a consequence of this crime. The wrongful state, once created, persists as long as membership in the group does, and it does not require engagement in any other criminal activities. It is, therefore, a criminal office which remains in an actual concurrence with other criminal offences committed during membership in the group, including ones committed as part of the achievement of the group's purpose.' (II AKa 258/12, LEX No. 1321966).

group (if, of course, the subject-side elements are also met, that is the offender self-identifies as a member of the group and is regarded as such by its other members).

This does not change the fact that one ought to accept the interpretation, according to which Article 258 CC also criminalises the passive participation in a group or association. This, however, is a consequence of its correct interpretation and not of the nature of the crime as a formal offence. First of all, Article 254 in Chapter XXXII clearly indicates that only 'active participation' is criminalised by that provision; *a contrario*, one can infer that the absence of such a reservation in Article 258 CC means that the provision criminalises any type of participation in criminal structures.[5] Linguistic construction also appears to support this interpretation. When participating in some sort of organisation or association, either purely formal membership (expressed by a membership declaration) or participation showing clear activity is possible. It is worth noting, however, that the analysed problem appears to be of no greater practical consequence to typical organised groups: one could hardly imagine such groups accepting members only formally bolstering their ranks with no activity being required of them other than merely declaring themselves as members. This issue, however, may be of greater significance, e.g. to terrorist structures. For it does not appear impossible for such organisations to recruit members whose activity would be expected only after some time, upon receipt of specific instructions.

In the case of passive participation in a group/association, however, one must remember that such a type of involvement in the activities of a criminal structure will in principle entail a lower level of social harm in the offender's conduct limited to accession to a criminalised structure with sustained intent to act for its benefit. While expressing support for regarding such conduct as criminal and punishable, one must also clearly emphasize that, due to its specific nature, it will be necessary for the prosecution to produce strong evidence of such passive membership, and any doubt in this regard should lead to such charges being dropped. The view that under Polish criminal statute passive membership in a criminal group or association is also prosecutable prevails in the literature;[6] one can, however,

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[5] See K. Wiak, [in:] *Kodeks karny. Komentarz*, A. Grześkowiak, K. Wiak (eds), Warszawa 2019, p. 1294.

[6] See, e.g. A. Herzog, [in:] *Kodeks karny*, R.A. Stefański (ed.), 2018, *supra* n. 3, p. 1644; K. Wiak, [in:] *Kodeks karny*, A. Grześkowiak, K. Wiak (eds), *supra* n. 5, p. 1294; A. Michalska-Warias, [in:] *Kodeks karny. Komentarz. Część szczególna*, M. Królikowski, R. Zawłocki (eds), Vol. II, Warszawa 2016, p. 384; also concurring: M. Flemming, W. Kutzmann, *Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz*, Warszawa 1999, pp. 79–80; B. Gadecki, *Branie udziału w zorganizowanej grupie przestępczej*, Prokuratura i Prawo 3, 2008, p. 71; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 1998, p. 442; O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny. Komentarz*, Vol. III, Gdańsk 1999, p. 311; M. Kalitowski, [in:] *Kodeks karny. Komentarz*, Filar (ed.), Warszawa 2010, p. 1121; J. Skała, *Normatywne mechanizmy zwalczania przestępczości zorganizowanej w świetle przepisów kodeksu karnego (część 1)*, Prokuratura i Prawo 7–8, 2004, pp. 69, 65; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1997, p. 445; T. Wróbel, *Charakter zbiegu udziału w zorganizowanej grupie przestępczej oraz przestępstw popełnianych w ramach działalności takiej grupy*, e-Czasopismo Prawa Karnego i Nauk Penalnych 20, 2013, https://www.czpk.pl/dokumenty/publikacje/2013/12/20-2013-T._Wrobel-Charakter_zbiegu_udzialu_w_zorganizowanej_grupie_przestepczej_oraz_przestepstw_popelnianych_w_ramach_dzialalnosci_takiej_grupy.pdf (accessed 25.3.2010).

also encounter a view opposed to the acceptance of such a broad spectrum of criminalisation.[7]

Full approval, on the other hand, should be granted to another view presented by the Court of Appeal in Gdańsk, according to which the participation in the structure described in Article 258 § 1 is a 'sustained offence and lasts as long as the membership in the group persists, without requiring the offender to perform any other criminal activities.' Indeed, the analysed offence as though by its very nature bears the characteristic of a sustained offence:[8] for the offender's conduct (affiliation to a criminal group) triggers a state of unlawfulness which the offender alone may interrupt (by withdrawing from the group) or which may be interrupted by others (e.g. total dismantling of the group by the law enforcement agency). Thus, the time of the commission of this offence is the entire duration of the offender's membership in the group or association, which could even be decades. This is also how this offence is perceived in the subject literature.[9]

The consequence is that to some extent the following view of the Court of Appeal in Gdańsk deserves to be accepted: 'There is no basis to eliminate a period of incarceration from the description of the act of participation in an organised criminal group (Article 258 § 1 CC), especially if, once released, the offender relapses into crime within the same organised criminal group, since such conduct clearly establishes the offender's sustained membership in the group.' First and foremost, the court's interpretation is consistent with criminological knowledge about organised crime. The rule for the members of such structures tends to be that their apprehension and penalisation alone does not terminate their membership in the group but only reduces it to a passive membership, as physical opportunities to act become limited. The above, however, requires proof; hence, as the Court of Appeal is correct to infer, whether incarceration has terminated membership in an organised criminal group is to be decided on the basis of all circumstances of the case. If, once released, the offender relapses into crime as part of the same criminal group, one can conclude that the circumstances show such offender to have continued to self-identify as a member of the relevant structure and been regarded as such by its other members throughout the period of his incarceration, otherwise the offender's easy resumption of criminal activity upon being released from incarceration would have been hardly probable (albeit not impossible). Such powerful circumstantial evidence,

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[7] Z. Ćwiąkalski, [in:] *Kodeks karny. Część szczególna*, Vol. II: *Komentarz do art. 212–277d*, W. Wróbel, A. Zoll (eds), Warszawa 2017, p. 535. The following authors also take a position in favour of requiring a certain level of activity: J. Wojciechowski, *supra* n. 6, p. 454; D. Gruszecka, [in:] *Kodeks karny. Część szczególna. Komentarz*, J. Giezek (ed.), Warszawa 2014, pp. 925–926.

[8] A sustained (or 'permanent') offence, as the literature explains, 'consists in the offender's triggering of a specific state of wrongfulness, which may be terminated in accordance with the offender's will or not' (see T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2006, p. 118).

[9] The following authors, among others, discuss the offence under Article 258 § 1 CC as a sustained one: A. Lach, [in:] *Kodeks karny*, V. Konarska-Wrzosek (ed.), 2018, *supra* n. 3, p. 1174; A. Michalska-Warias, [in:] *Kodeks karny*, M. Królikowski, R. Zawłocki (eds), *supra* n. 6, Vol. II, pp. 385–386; Z. Ćwiąkalski, [in:] *Kodeks karny*, W. Wróbel, A. Zoll (eds), *supra* n. 7, p. 547; K. Wiak, [in:] *Kodeks karny*, A. Grześkowiak, K. Wiak (eds), *supra* n. 5, p. 1294; A. Herzog, [in:] *Kodeks karny*, R.A. Stefański (ed.), 2018, *supra* n. 3, p. 1644.

however, requires corroboration with suitable evidence, but for which the period of incarceration should be eliminated from the established duration of participation in the relevant criminal group. The offender's continued participation in the organised criminal group can be attested by certain additional circumstances such as contacts with other members during the period (e.g. a finding that the offender has received parcels from members of that group; that they have helped him get legal assistance or in some way have taken care of his loved ones during the time; information relevant to the evaluation of the facts of the case may come, e.g. from intercepted conversation or correspondence, showing the offender to have continued to self-identify as a member of the group and expected immediately to resume activities after leaving incarceration or taken or given orders during incarceration).

One must remember, however, that continued membership of a group or association cannot be presumed, and thus, if any doubt emerges in this regard, the better solution may be to find that the offender's membership in the group has terminated during incarceration. Especially circumstances such as prolonged isolation in prison without communication with the other members, or the total dismantling of the group by the law enforcement agency, will support the finding that the membership has ceased (even irrespective of continued self-identification as a member). Any doubt in this regard must be resolved in the offender's favour, and any attribution of passive membership in the group requires strong evidence, so as to avoid imposing punishment for a mere intention. The finding that the nature of the offender's participation in the prohibited structure has been passive must also affect the evaluation of the degree of social harm in the offender's conduct; it cannot be excluded that this degree could, in certain facts of the case, even be found to be subminimal. For while in the case of an offender who accedes to the group and his continued participation is merely formal the criminality of this may be justified by the original activity consisting in the accession to the criminal structure, imposing punishment for the mere duration of membership while staying incarcerated appears to be anything but rational, constituting in essence a form of punishment for the offender's frame of mind. Things are different if the incarceration is preceded by a period of active membership; in those cases the offender's demonstrated solidarity with the other members of the group attests to a special intensity of malice and should be reflected in the overall evaluation of the offender's conduct.

It must be kept in mind that the offender could manifest the intention of terminating the membership, and if so, even his subsequent relapse into crime in that same structure will not mean that the membership continued throughout incarceration. For one cannot exclude a situation in which the offender sincerely withdraws from membership in the group or association but, upon leaving incarceration, finds himself unable to live any other life and renews his contacts. There are also sets of facts in which the offender's membership in the group will in principle cease upon being actually deprived of liberty. This will in particular be the case of an offender who decides to cooperate with the law enforcement agencies, whether as the so-called minor immunity witness (person who turns state's evidence) under Article 60 § 3 or Article 60 § 4 CC or 'proper' immunity witness (crown witness) pursuant to the Act of 25 June 1997 on turning state's evidence[10].

[10] Consolidated text, Dz.U. 2016, item 1197.

On the other hand, as numerous examples from the history of organised crime illustrate, an incarcerated defendant needs not even confine his membership to a passive form. Sometimes, the activities can continue in prison, for example, an imprisoned kingpin can continue to pass orders to members remaining at large. It is also possible to recruit new members and even build new elements of the criminal structure. For example, as the literature notes, during the first stage of the so-called great clan war in Sicily at the beginning of the 1980s, the Corleonesi were led from prison by Luciano Leggio, represented by his lieutenant, Toto Riina.[11] The Neapolitan Camorra, according to a legend, was born in prison and only from there 'poured out' onto Naples and the rest of the Campagna.[12] The fact that the prison environment is conducive not only to sustaining criminal ties but also to establishing new ones is attested by the phenomenon of prison gangs originating inside a correctional facility from where to eventually expand their operations to the outside, e.g. monopolising the trade in a particular type of narcotic drug.[13]

The sustained nature of the offence under Article 258 § 1 CC, as well as the fact that confinement in prison (or pretrial detention) need not terminate the offender's membership in an organised criminal structure make it extraordinarily important for the courts always to specify the exact timing of the commission of such crime so that the hypothetical continuation of membership in an organised criminal group after the period specified in the judgment also could be evaluated in the future from the perspective of criminal liability.

Considering all of the above reasons, the theses of the judgment at hand should in general, though with the aforementioned reservations, be received in a positive light as an example of the practice embracing a correct outlook on the essence of the criminal offence defined in Article 258 CC.

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[11] See M.-A. Matard-Bonucci, *Historia mafii*, Warszawa 2001, pp. 195–197.

[12] See V. Paliotti, *Historia Kamorry*, Kraków 1998, pp. 18–24, 59–69; A-M. Matard-Bonucci, *supra* n. 11, pp. 234–249.

[13] To find out more about prison gangs, see e.g.: M.D. Lyman, G.W. Potter, *Organized Crime*, NJ 2000, p. 278. As those authors note, a prison gang should be defined as an, 'organization which operates within the prison system as a self-perpetuating, criminally-oriented enterprise, consisting of a select group of inmates who have established an organized chain of command and are governed by a code of conduct.' It is also emphasized that the typical prison gang, 'will usually operate in secrecy and conducts activities by controlling the prison environment through intimidation and violence toward non-members.'

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GLOSS ON THE JUDGMENT OF THE COURT OF APPEAL IN GDAŃSK OF 9 AUGUST 2019, II AKA 60/19

Summary

The commentary concerns the interpretation of the statutory features of the offence under Article 258 of the Criminal Code. The author shares the view of the Court of Appeal in Gdańsk that the period of imprisonment does not have to interrupt the offender's membership in an organised criminal group. The author also points out that the formal nature of the offence of participation in an organised criminal group does not mean that such participation may also be a passive one. However, a detailed interpretation of the very concept of 'participation' speaks in favour of accepting such a broad interpretation of this statutory feature of this offence. There is also no doubt about the sustained nature of the offence under Article 258 § 1 CC.

Keywords: organised criminal group, participation in an organised criminal group, formal offence

GLOSA DO WYROKU SĄDU APELACYJNEGO W GDAŃSKU Z DNIA 9 SIERPNIA 2019 R., II AKA 60/19

Streszczenie

Glosa dotyczy wykładni znamion przestępstwa z art. 258 k.k. Autorka podziela pogląd Sądu Apelacyjnego w Gdańsku, że pobyt w zakładzie karnym nie musi przerwać członkostwa sprawcy w zorganizowanej grupie przestępczej. Autorka zwraca też uwagę na to, że z formalnego charakteru przestępstwa brania udziału w zorganizowanej grupie przestępczej nie wynika, że udział taki może być też bierny. Za akceptacją tak szerokiej interpretacji znamion

tego przestępstwa przemawia jednak szczegółowa wykładnia pojęcia „brania udziału". Nie budzi też wątpliwości trwały charakter występku z art. 258 § 1 k.k.

Słowa kluczowe: zorganizowana grupa przestępcza, udział w zorganizowanej grupie przestępczej, przestępstwo formalne

COMENTARIO DE SENTENCIA DE TRIBUNAL DE APELACIÓN EN GDAŃSK DE 9 DE AGOSTO DE 2019, II AKA 60/19

Resumen

El comentario se refiere a la interpretación de los elementos de delito del art. 258 de código penal. La autora está de acuerdo con la postura de Tribunal de Apelación en Gdańsk que la estancia en centro penitenciario no interrumpe el hecho participar en el grupo criminal organizado. La autora subraya también que del carácter formal de delito de participación en un grupo criminal organizado no resulta que tal participación sea también pasiva. Sin embargo, la interpretación extensiva queda fundada en la interpretación detallada del verbo "participar". Tampoco suscita dudas el carácter permanente de delito del art. 258 § 1 de código penal.

Palabras claves: grupo criminal organizado, participación en grupo criminal organizado, delito formal

КОММЕНТАРИЙ К РЕШЕНИЮ АПЕЛЛЯЦИОННОГО СУДА Г. ГДАНЬСКА ОТ 9 АВГУСТА 2019 ГОДА, № II AKA 60/19

Аннотация

Комментарий касается толкования признаков преступления, предусмотренного ст. 258 УК. Автор разделяет мнение Апелляционного суда г. Гданьска о том, что пребывание в исправительном учреждении не обязательно означает, что преступник перестает быть членом организованной преступной группировки. Автор также отмечает, что из формального характера преступления, состоящего в участии в организованной преступной группировке, не следует, что такое участие может иметь пассивный характер. Однако, в пользу принятия столь широкого толкования признаков этого преступления говорит подробное толкование понятия «участие». Нет также сомнений в том, что преступление, предусмотренное ст. 258 § 1 УК, имеет характер длящегося правонарушения.

Ключевые слова: организованная преступная группировка; участие в организованной преступной группировке; формальное преступление

GLOSSE ZUM URTEIL DES BERUFUNGSGERICHTS GDAŃSK VOM 9. AUGUST 2019, AKTENZEICHEN: II AKA 60/19

Zusammenfassung

Die Glosse behandelt die Interpretation der Tatbestandsmerkmale von Straftaten nach Artikel 258 des polnischen Strafgesetzbuches. Die Autorin teilt die Ansicht des Sąd Apelacyjny in Gdańsk, dass die Mitgliedschaft eines Täters in einer organisierten kriminellen Vereinigung

durch die Strafhaftverbüßung nicht nicht unbedingt unterbrochen wird. Die Verfasserin des Beitrags weist auch darauf hin, dass das formale Merkmal der Straftat der Teilnahme an einer organisierten kriminellen Vereinigung nicht impliziert, dass eine solche Beteiligung auch passiv sein kann. Die ausführliche Auslegung des Begriffes „Beteiligung" spricht jedoch dafür, einer derart breit gefassten Auslegung der Merkmale dieser Straftat zu folgen. Keine Zweifel bestehen auch an der Dauerhaftigkeit des Delikts nach Artikel 258 § 1 des polnischen Strafgesetzbuches.

Schlüsselwörter: organisierte kriminelle Vereinigung, Beteiligung an einer organisierten kriminellen Vereinigung, formelle Straftat

GLOSE DE L'ARRÊT DE LA COUR D'APPEL DE GDAŃSK DU 9 AOÛT 2019, II AKA 60/19

Résumé

La glose concerne l'interprétation des caractéristiques d'un crime prévu à l'article 258 du Code pénal. L'auteur partage l'avis de la cour d'appel de Gdańsk selon lequel le séjour en prison ne doit pas obligatoirement mettre fin à l'appartenance de l'auteur à un groupe criminel organisé. L'auteur souligne également que la nature formelle du crime de participation à un groupe criminel organisé n'implique pas que cette participation puisse également être passive. Cependant, l'interprétation détaillée du concept de «participation» plaide en faveur de l'acceptation d'une interprétation aussi large des caractéristiques de ce crime. Le caractère permanent de l'infraction prévue à l'article 258 § 1 du code pénal est également hors de doute.

Mots-clés: groupe criminel organisé, participation à un groupe criminel organisé, crime formel

COMMENTO ALLA SENTENZA DELLA CORTE DI APPELLO DI DANZICA DEL 9 AGOSTO 2019, II AKA 60/19

Sintesi

Il commento riguarda l'interpretazione degli elementi costitutivi del reato dell'art. 258 del Codice penale. L'autrice condivide la posizione della Corte di Appello di Danzica che il periodo di detenzione possa non interrompere l'appartenenza del reo a un gruppo di criminalità organizzata. L'autrice fa anche notare che dal carattere formale del reato di partecipazione ad un gruppo di criminalità organizzata non deriva che tale partecipazione possa essere passiva. Depone tuttavia a favore di una tale ampia interpretazione degli elementi costitutivi di tale reato l'interpretazione particolare del concetto di "partecipazione". Non evoca altresì dubbi il carattere permanente del reato dell'art. 258 § 1 del Codice penale.

Parole chiave: gruppo di criminalità organizzata, partecipazione a un gruppo di criminalità organizzata, reato formale

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