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CONTROVERSY OVER THE REFORM OF CRIMINAL PROCEDURE INTRODUCED BY THE ACT OF 19 JULY 2019

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Summary. An extensive reform of criminal procedure entered into force on 4 October 2019, implementing numerous changes to all of its stages. The changes were justified by a few goals, amongst which the one considered the most important was creating conditions for quicker resolution of cases in court proceedings, i.a. by counteracting the possibility of the obstruction of justice as well as preventing unnecessary repetition of evidentiary procedures. The legislator also aimed to remove the redundant formalisms occurring in the proceedings as well as designed mechanisms with the purpose of accelerating the preparatory proceedings and strengthening the position of the aggrieved in the criminal procedure. Undoubtedly the legislator's intentions were legitimate and solved some of the fundamental problems that occur in the contemporary criminal procedure, particularly in regards to its extensive length. Solutions adopted in the Act, as a rule, deserve praise, particularly when it comes to removing unnecessary formalisms of the criminal procedure. However, despite the declaration of respect and compliance with the required procedural guarantees, especially those connected to the protection of the rights of the parties as well as the principle of the fairness of a criminal trial, the legislator was not able to fully maintain the standard of the guarantees, as it was reduced to accelerate the proceedings. In this aspect the discussed amendment can raise serious concerns. This article attempts to analyse the solutions adopted in the amendment, particularly those that cause the biggest controversies, especially concerning their compliance with the requirements of the Polish Constitution, European Convention on Human Rights, as well as the minimal standards relating to the subject set by the European Union.

Key words: criminal law, criminal procedure, reform of the criminal procedure, evidence, rules of evidence

On 4 October 2019 an extensive novelization of the Code of Criminal Procedure entered into force, introduced by the Act of 19 July 2019 amending the Code of Criminal Procedure Act and other Acts.[1] The changes are numerous and concern all stages of criminal procedure, including both introductory measures taken by authorities in charge of the criminal proceedings, as well as the courts' jurisdiction, also referring to the rights of the parties, counsels and their procedural actions, the rules of evidence, coercive measures, preparatory proceedings, proceedings before the first instance court, appeal proceedings and special proceedings. The novelization also concerns extraordinary measures of appeal, as well as the proceedings after the judgment has become final and binding, procedure in criminal cases in international relations and costs of court proceedings, it also sets

[1] Journal of Laws of 2019, item 1694.

up the implementation of new enforcement procedure.

Such a wide scope of the reform of criminal procedure was justified by a few goals, amongst which the one considered the most important was creating conditions for quicker resolving of cases in judicial proceedings, including counteracting the possibility of the parties perpetrating obstruction of justice as well as preventing the unnecessary repetition of evidentiary procedures. The legislator's goal was to remove the redundant formalisms occurring in the procedure as well as to create mechanisms of accelerating the preparatory proceedings and strengthening the position of the victim in the criminal process. The legislator also introduced facilitations for the participants of the proceedings that could have crucial practical significance, resulting particularly from adapting the existing regulations to the current social conditions, as well as impacting the enhancement of the protection of public interest by specifying the authority participating in the trial conducted for the purpose of awarding compensation for wrongful imprisonment, whose task would be to protect the financial interest of the state.[2]

Undoubtedly, the legislator's intensions are justified and lead to solving basic problems associated with the contemporary criminal procedure, particularly concerning its excessive length. This excessive length leads to the violation of one of the most basic human rights, i.e. the right to court, which has been guaranteed by Art. 45, sect. 1 of the Constitution of the Republic of Poland,[3] according to which everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court, which in recent years has been generating more and more costs for the State Treasury. The current Act, which came into effect in 2004, aims to counteract the excessive length of proceedings and is an effective instrument of claiming compensation by the citizens if this law has been violated.[4] It is the role of the State to organize the legal system in a way that allows the courts to fulfil all conditions stemming from that law, including the hearing of the case within a reasonable time.

The right to the hearing of a case without undue delay also fits into the concept of the right to a fair trial provided for in Art. 6 of the ECHR,[5] the violation of which has repeatedly lead to the necessity of paying damages to the aggrieved citizen, whose criminal case wasn't heard within a reasonable time.

The solutions adopted in the Act generally deserve credit, particularly for the way they eliminate redundant formalisms occurring in the criminal procedure.

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[2] See the Explanatory Memorandum to the government's project of the Act amending the Code of Criminal Procedure Act and other Acts, Polish text available at: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3251 [henceforth cited as: explanatory memorandum].

[3] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: Polish Constitution].

[4] Law of 17 June 2004 on complaints about a breach of the right to an investigation conducted or supervised by a prosecutor and to a trial within a reasonable time, Journal of Laws of 2018, item 75 as amended, Art. 2.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Journal of Laws of 1993, No. 61, item 284 as amended [henceforth cited as: ECHR].

However, despite the declaration included in the explanatory memorandum of the Act amending the Code of Criminal Procedure, which expressed the will to respect and ensure the observance of the required procedural guarantees, particularly connected to the protection of the rights of participants of proceedings and the rule of due diligence of the criminal procedure, the legislator wasn't able to fully maintain the guaranteed standard, because it was reduced in favour of accelerating the proceedings. This aspect of the amendment can raise serious concerns. Due to the extensiveness of the changes and limited scope of this article, it will expose solutions which arouse the most controversy, particularly concerning their compliance with the requirements of the Polish Constitution, ECHR and minimal standards relating to the subject set by the European Union.

The discussed reform implemented an entirely new solution, i.e. it introduced time limits for filing the evidentiary motions, the so called evidentiary preclusion (Art. 177, para. 1, sect. 6 of the Code of Criminal Procedure[6]). The provision introduces to the criminal procedure the possibility of the authority in charge of the criminal proceedings setting a time limit for filing an evidentiary motion, after the passing of which the motion will be dismissed. The effects of the evidentiary preclusion are to be mitigated by Art. 170, para. 1a CCP, according to which an evidentiary motion cannot be dismissed on the basis of para. 1, sect. 5 or 6, if the fact that is to be proven has an important meaning for determining whether or not a prohibited act has been committed, whether it is a crime and what crime it is, whether the prohibited act has been committed in conditions specified in Art. 64 or 65 of the Criminal Code[7] (thus the conditions of recidivism or committing offences professionally, in an organized group or a terrorist group) or under conditions that allow for the placing of the offender in a psychiatric in accordance with Art. 93g CC.

This solution in itself constitutes a radical change to the foundations of the evidentiary proceedings conducted during a criminal trial. The purpose of this provision is to enable the dynamization of the procedure and to prevent the excessiveness of its length. This goal, a lofty one at its core, cannot however be achieved at the expense of making a breach in respecting the foremost principle of the criminal procedure, that of the material truth, which requires that all judgments made in the course of criminal proceeding be based on true factual findings (Art. 2, para. 2 CCP). This principle is a structural element of the Polish model of criminal procedure, thus one has to accept the view of the doctrine, according to which it is hard to accept legislative proposals that aren't consistent with the principle, and therefore implementation of the evidentiary preclusion to the Polish criminal procedure should be referred to critically [Jeż–Ludwichowska 2011, 551]. The principle of material truth binds all authorities in charge of the criminal

[6] Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2020, item 30 as amended [henceforth cited as: CCP].

[7] Act of 6 June 1997, the Criminal Code, Journal of Laws of 2019, item 1950 as amended [henceforth cited as: CC].

proceedings, regardless of the stage of the proceedings and irrespective of the will of the parties [Sakowicz 2015, 17]. It is aptly considered to be the supreme principle of the criminal proceedings, described as the superior, highest, central and key, the one to which all other procedural principles are subordinate [Jodłowski 2013, 33]. The detection of material truth as the supreme goal of the criminal proceedings is also respected by jurisprudence. It is after all the court, as the main holder of the attribute of judging a person that has to endeavour to learn the truth, regardless of the positions of the parties. It is not subject to discussion that it is the duty of the court dealing with the case to examine the evidence in its entirety and make the final assessment.[8]

Every breach in respecting the principle of material truth, the importance of which is established and accepted both in the doctrine of the criminal procedure law and in case-law, should thus have a particular, exceptional and fully justifiable cause. In the case-law it is aptly pointed out that the pursuance of the realization of the principle of material truth cannot be abandoned solely in favour of fulfilling the postulate of the speed of proceedings, and in cases of conflict between the two principles it is the pursuit of the truth with all available procedural measures that should take precedence.[9] Acceleration of the proceedings cannot lead to factual findings inconsistent with reality, because it is the principle of speed that should serve the implementation of the principle of material truth, and not the other way around [Hofmański 2005, 57]. Hearing the case without undue delay is undoubtedly one of the aspects of the right to court provided for in Art. 45, sect. 1 of the Polish Constitution, as well as of the fair trial, that goal, however, cannot lead to unjustifiable limitations in pursuing the truth [Skrętowicz 2009, 23].

The possibility of the undisturbed pursuit of truth is to be ensured by Art. 170, para. 1a CCP, which stipulates that an evidentiary motion covered by the preclusion cannot be dismissed if the fact that is to be proven has an important meaning for the determination of criminal responsibility. This guarantee cannot, however, be considered sufficient. This regulation precludes the possibility of mitigating the consequences of dismissing the evidentiary motions recognized as late if they concern other significant factors, e.g. determining the scope and amount of damage caused by the crime, or facts that impact the penalty, the importance of which cannot be downplayed.

Additionally it has to be taken into consideration that the defendant, when using privileges connected to the statutory presumption of innocence, doesn't have an obligation to explain or prove any facts. The particular position of the defendant requires respecting their right to remain silent, which may be a part of their defence, and shouldn't be in any way used against them. In the process of the proceedings the defendant as well as their counsel can decide to pursue an active de-

[8] See judgement of the Appellate Court in Kraków of 22 October 2013, II AKa 181/13, Lex no. 1433587.

[9] See judgement of the Appellate Court in Łódź of 22 January 2001, II AKa 249/00, OSProk. i Pr. 2002, No. 10, item 190.

fence, including denying the claims of the prosecutor, or depreciating the facts that the prosecutor indicates as significant. Thus, failure to file the evidentiary motions by the defence before the time limit set by the court may lower the standard of effective defence of the defendant. Under the threat of dismissal, and thus provided with a *sui generis* procedural sanction, the time limit for filing evidentiary motions can also create a certain need for the defendant to cooperate with the judicial authorities, which can be considered an interference in their right to defence. The defendant in the criminal proceedings doesn't have an obligation to actively cooperate with law enforcement in order to lead to a conviction [Hofmański and Wróbel 2010, 245].[10] In the assessment of the European Court of Human Rights the right to remain silent and the right to not incriminate oneself are widely recognized international standards, creating the framework of the right to a fair trial. This right presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[11]

The provision of Art. 170, para. 1, point 5 CCP should also be mentioned, as it is, in practice, an effective instrument for achieving the goals set by the amendment – the efficiency of the proceedings, the concentration of evidence, counteracting the excessiveness of the length of proceedings and the abuse of their rights by the parties to the proceedings. This provision allows the authority in charge of the proceedings to dismiss an evidentiary motion when it is obvious it was filed to extend the proceedings. This norm enables the disciplining of the parties without in any way violating the guarantees of their rights, in particular without limiting the fundamental right to defence, and at the same time allowing for the elimination of motions filed only for the sake of obstructing the proceedings. This institution fully complies with the standards of the evidentiary proceedings before a criminal court, worked out by the European Court of Human Rights, according to which Art. 6 ECHR does not regulate the rules of admissibility of evidence in criminal proceedings, leaving the regulating of this matter entirely to the domestic law.[12] The ECtHR understands its task as an assessment of the proceedings as a whole in regards to their fairness, which should include verifying whether the defendant had the possibility of disputing the credibility and authenticity of the evidence.[13] The ECtHR also permits the dismissal of an evidentiary measure if it is of no importance to the resolving of a case, provided that such a decision will be carefully examined and justified by the court.[14]

[10] See the ECtHR judgement in the case of Eckle, para. 82 and in the case of Zan, para. 79.
[11] Compare i.a. to the ECtHR judgement of 17 December 1996 in the case of Saunders v. United Kingdom, 19187/91, para. 68.
[12] See i.a. the ECtHR judgement of 9 June 1998 in the case of Teixeira de Castro v. Portugal, 25829/94, para. 34.
[13] The ECtHR judgement of 11 July 2006 in the case of Jalloh v. Germany, 54810/00.
[14] See e.g. the ECtHR judgement of 22 April 1992 in the case of Vidal v. Belgium, 12351/86, para. 33; the ECtHR judgement of 19 April 1993 in the case of Kraska v. Switzerland, 13942/88, para. 30; the ECtHR judgement of 18 December 2018 in the case of Murtazaliyeva v. Russia, 36658/05.

Serious concerns are raised by the solution introducing the possibility of conducting the evidentiary proceedings in the absence of the defendant or their counsel (Art. 378a CCP). In accordance with the legislator's intentions, it is supposed to prevent judicial obstruction. As was indicated in the explanatory memorandum of the Act the necessity to postpone and interrupt trials because of unjustified absence of the defendants or their counsels is an important problem in the judiciary practice of the courts, a problem which impacts the length of the proceedings.[15] This provision is supposed to change the practice due to the fact that it provides for the possibility of conducting the evidentiary proceedings, particularly examination of witnesses, in the absence of the defendant or their counsel, despite there being no proof of delivery of a notification or a subpoena or if there is a reasonable assumption that the absence was caused by life obstacles or other exceptional causes or if the defendant properly justified their absence (Art. 378a, para. 1 CCP).

Taking into consideration the justified need to improve the procedure and to counteract its excessive lengthening, the legislator decided to introduce to the legal system provisions that enable conducting the proceedings (particularly the examination of witnesses) in the absence of the defendant – even in case of the absence being justified. It is also in this regard that the amendment arouses most controversies. Adopting such a solution is quite meaningful, as it requires changing the way a hearing is conducted in the absence of the defendant by limiting the scope of Art. 117, para. 2 CCP, which stipulates that some trial procedures, including evidentiary ones, are not conducted in the absence of a concerned party.

This change certainly may lead to the acceleration of the proceedings as well as counteract their excessive lengthening, one cannot, however, forget the necessity of respecting the procedural guarantees to which the parties are entitled, as well as a proper standard of respecting the defendant's right to defence. A guarantee in this matter would be ensured by providing the defendant with a right to file a motion for the supplementary examination of evidence conducted earlier during their absence. This measure requires the defendant or their counsel to file the motion, with the possible sanction being the forfeiture of this right, no later than during the next hearing, that they were correctly subpoenaed to, while there were no procedural obstacles to their appearance (Art. 378a, para. 3 CCP). Failure to file such a motion within the prescribed time precludes the possibility of raising any objections against the violation of procedural guarantees, particularly the right to defence, due to the examination of any evidence in the absence of the defendant or their counsel (Art. 378a, para. 4 CCP).

It should thus be considered whether the right of the defendant or their counsel to file a motion for the supplementary examination of evidence would fulfil the standard of abiding by the procedural guarantees if its character was unconditional, i.e. it obliged the court to repeat the examination of evidence in the presence of the interested parties. The legislator introduced new prerequisites that mean

[15] See the explanatory memorandum, p. 42.

the motion has to be assessed by the court and thus can be used only within a limited scope. According to Art. 378a, para. 5 CCP, the defendant or their counsel, when filing a motion for the supplementary examination of evidence, would be obliged to demonstrate that the way of conducting the examination of evidence in their absence violated the procedural guarantees, particularly their right to defence (Art. 378a, para. 6 CCP). What is more, in the case of accepting the motion, the court examines the evidence in a supplementary way, only within the scope of the demonstrated violation of the procedural guarantees, particularly the right to defence (Art. 378a, para. 6 CCP) Thus, the implementation of the aforementioned provisions has caused the defendant or their counsel who has justified their absence to be able to fill a motion for the supplementary examination of evidence, only within the scope in which they substantiated the violation of the defendant's right to defence.

The very solution allowing the court to conduct the evidentiary procedure in the absence of the defendant or their counsel violates the procedural guarantee of the right to a fair and public hearing before a competent, impartial and independent court. The substance of this guarantee, which has been repeatedly indicated in literature and jurisprudence, is the right of the defendant to give free explanations, both after the reading of indictment and regarding each piece of evidence examined during a hearing. It is thus hard to assume that the defendant, by being absent during a hearing (with the absence being justified) voluntarily gives up this right, a condition required by the provision of Art. 378a CCP, which should be considered ineffective because either each time a violation of procedural guarantees of the defendant will occur, which in turn will contribute to the excessive length of the proceedings, or it will put the Polish State at risk of liability for violating the established standard of the right to court.

The right of the defendant and their counsel to participate in the evidentiary proceedings, particularly during the main trial, constitutes a basic guarantee of the right to actual defence, which can be infringed only in exceptional situations, e.g. Art. 390, para. 2 CCP (inhibition of a witness by the presence of the defendant). Basing the realization of this guarantee only on the familiarization with the contents of a transcript or other documents containing the account of evidentiary statements is insufficient and limits direct access of the defendant and their counsel to the evidence. Direct participation of the defendant and their counsel in, e.g., the interrogation of a witness, gives them the ability to react as well as construct a defence strategy, also based on impressions or observations connected to the examined evidence. For the full possibility of exercising the right to defence it may be important to see how a witness communicates with the environment, what is their reaction to the questions asked, which gives the defendant or their counsel specific instruments of reaction allowing for an efficient defence, e.g. by pointing out to the court that a witness makes eye contact with a person from the audience. The threat of criminal responsibility of the witness for giving false testimony also isn't irrelevant in the context of choosing an appropriate interrogation technique

as well as interactions occurring during its execution. Additionally, if those matters were entirely without importance, the whole judicial evidentiary proceedings could just as well be based on testimonies or explanations recorded in the transcript during the preparatory proceedings. On the contrary, the fundamental principle setting the standard of criminal procedure in a democratic state based on a rule of law is the pursuit of direct examination of evidence, particularly if that evidence is examined against the defendant, and thus it should be deviated from only in completely exceptional cases.

What is also completely unconvincing is the argumentation presented in the explanatory memorandum, according to which a similar construction proved correct in the misdemeanour procedure (Art. 71, para. 2 and 3 of the Misdemeanour Procedure Code[16]). The rank of the actions prohibited by those two codes, judged by their social harmfulness as well as different goals of the regulations and thus different formal standards of proceedings in cases of misdemeanours, doesn't justify comparing these institutions, particularly regarding the aspect of weakening procedural guarantees of the parties.

The adopted construction of Art. 378a CCP should also be looked at through the lenses of its compliance with Art. 45, sect. 1 of the Polish Constitution, as it undoubtedly leads to limiting the right of the defendant to a correctly conducted procedure of evidentiary proceedings, and in consequence to the worsening of their procedural position at the cost of the efficiency of proceedings. Art. 77, sect. 2 of the Polish Constitution is also weakened by the fact that in reality, it can lead to circumventing the prohibition of barring any person from the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights. The defendant whose absence is unjustified cannot in reality respond to the testimony of witnesses or ask them any questions, which constitutes a manifestation of violating the right to a fair and public hearing of his case before a competent, impartial and independent court, and the subsequent procedure of supplementary examination of evidence significantly limits the possibility of exercising this right, and partly completely eliminates it. The Constitutional Tribunal[17] repeatedly pointed out, e.g. on the basis of Art. 42, sect. 3 of the Polish Constitution, that the constitutional right to defence is a fundamental principle of the criminal process and should be understood broadly so that it can have a real and effective character, and not an illusory and abstract one.[18]

Conducting the evidentiary proceedings in the absence of the defendant can also constitute a violation of the right to a fair trial, described in Art. 6, sect. 1 and 3 ECHR. According to the accepted substance of this right the defendant has, i.a., the right to examine or have examined witnesses on his behalf under the same

[16] Act of 24 August 2001, the Misdemeanour Procedure Code, Journal of Laws of 2018, item 475 as amended [henceforth cited as: MPC].
[17] Henceforth cited as: CT.
[18] See the judgement of the Constitutional Tribunal of 28 November 2007, 38/07, OTK–A 2007, No. 10, item 129.

conditions as witnesses against him. In the context of this norm the case-law of the European Court of Human Rights repeatedly presented the opinion that there is a necessity of ensuring that the defendant has a possibility of challenging and questioning witnesses, particularly those testifying against him, either when he makes his statements or at a later stage.[19] Aside from that, if the conviction was based either solely or to a decisive extent on statements which the defendant has not been able to challenge, it should be assumed that their right to defence is restricted to an extent that is incompatible with the guarantees provided by Art. 6 ECHR.[20] In yet another judgment it was pointed out that the personal attendance of the defendant during the trial hearing before the court of first instance is of crucial significance, particularly during the evidentiary proceedings.[21]

The provision of Art. 378a CCP remains in collision with Art. 8 of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[22] This provision stipulates that a trial can be held in the absence of the defendant, provided that they have been informed, in due time, of the trial and of the consequences of nonappearance; or that the defendant is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. For those reasons the provision of Art. 387a CCP was criticised by the majority of Polish doctrine specializing in the law of criminal procedure [Zagrodnik 2020a, 143; Mierzwińska–Lorencka 2020, 172; Zagrodnik 2020b].

Serious doubts are also raised by other solutions adopted by the amendment in question, which concern limitations on examining witnesses during a trial. In accordance with Art. 350a CCP, the presiding judge may refrain from summoning witnesses residing abroad or those whose testimonies would only confirm circumstances and these circumstances are not of such an importance as to make the examination of witnesses at the trial necessary, particularly those that the defendant did not deny in his explanations.

This provision leaves determining which circumstances of the case are not important enough for it to be possible to refrain from fully realizing the principle of directness (Art. 410 CCP) to the judge's discretion. This power is connected to the judge making a sui generis pre-judgment, as they have to grade facts connected to the incriminated occurrence, evaluate the evidence concerning its usefulness before examining it, which raises questions of the compliance of this solution not only with the principle of directness, but also the principle of objectivism (Art. 4 CCP). It should also be taken into consideration that the dynamics of a trial require a big dose of carefulness when formulating an opinion on what circum-

[19] See ECtHR judgement of 19 June 2007, 21508/02, Legalis no. 122353.
[20] ECtHR judgement of 10 may 2011, 17354/04, Legalis no. 332636; ECtHR judgement of 17 April 2012, 43609/07, Legalis; ECtHR judgement of 3 April 2012, 18475/05, Legalis.
[21] See ECtHR judgement of 19 December 1989, 9783/82, Legalis.
[22] O.J. EU L 65, 11.03.2016.

stances are relevant to the case. It particularly concerns facts obtained from human sources. It is impossible to assume or predict correctly what the witness is going to testify in court, even if some part of the testimony is known from the preparatory proceedings. Aside from the possibility of the witness remembering facts that may be considered important, one should also take into account that testimony given in court often differs from the testimony that the authority in charge of the proceedings already possesses, which can be influenced by a number of factors, e.g. the possibility of asking questions by the counsel as well as the defendant, the way the questioning is conducted, or even the dignity and authority of the court.

The current provision of Art. 333, para. 2 CCP, according to which the prosecutor may request the release from summons and reading out the testimonies of the witnesses residing abroad be released from summons or those witnesses whose testimonies would only confirm circumstances, which the accused did not deny in his clarifications, and these circumstances are not of such an importance as to make the examination of witnesses at the trial necessary, allows for the selection of witnesses who should be questioned before the court, but it leaves the decision on whether or not to fill such a motion to the authority in charge of the preparatory proceedings. The prosecutor's motion does not require a justification. The prosecutor has the power to make the request for the witnesses to be released from summons and their testimonies be read out at the trial not only in the indictment, but also during the course of the main trial, depending on the progress of the evidentiary proceedings [Sakowicz 2018, 725]. Based on the safeguarding character of the principles governing the criminal procedure this solution should be considered justified and more advantageous than the implemented amendment, which leaves the decision in this regard to the presiding judge, who acts *ex officio*. It has to also be mentioned that the contents of Art. 350a CCP were assessed negatively by the Board of Legislature that serves as an advisory body to the Prime Minister of Poland.[23] Thus even at the legislative stage it was pointed out that the proposed change poses a high risk of violating Art. 45, sect. 1 of the Polish Constitution.

Another important change to the principles of criminal procedure concerns limiting the application of the *ne peius* principles by amending Art. 454, para. 1 and 3 CCP. Those principles are first and foremost a manifestation of the privileged position of the defendant, guaranteeing them the right to be convicted by two instances, which in practice means that the defendant cannot be convicted for the first time by the appellate court, and the judgment made by the second instance court takes into consideration only an appeal submitted against the defendant. The *ne peius* rules do not limit the appellate court in regards to the appellate control, they do, however, narrow down the possibility of judgment unfavourable to

[23] See Opinion of 25 January 2019 on a bill to amend the Act – Code of Criminal Procedure and some other acts, the Legislative Council of the Prime Minister, RL–033–6/18; text available at: https://radalegislacyjna.gov.pl/dokumenty/opinia-z-25-stycznia-2019-ro-projekcie-ustawy-o-zmie-ustawy-kodeks-postepowania# ftn21 [accessed: 20.09.2019].

the defendant, because they eliminate the possibility of a reformatory judgment (that is changing the gist of the judgment) in case of the court finding the appeal submitted against the defendant to have merit. In consequence the appellate court may only reverse the appealed judgment and refer the case to the court of first instance for the purpose of re-examination [Świecki 2020]. Introducing these provisions to the CCP should thus be connected to safeguarding the criminal procedure's principle of two instances in its material aspect connected to the limitation of the power of the appellate court to issue judgments on the merits of the case.

The aim of the implemented changes is to limit the prohibition of sentencing a defendant with regard to whom the proceedings before the court of first instance were discontinued or conditionally discontinued by appellate courts (Art. 454, para. 1 CCP). This solution is justified by the acceleration of the proceedings by avoiding conducting another trial before the court of first instance – according to the legislator such a solution does not infringe the procedural guarantees of the defendant.[24] It is impossible to agree with this stance.

Conditional discontinuation of the proceedings is a probational measure, which can be used in accordance with Art. 66 CC if the guilt and social harmfulness of an action are not significant, there are no doubts about the circumstances under which it was committed, and if the attitude of the offender, who has not previously been penalised for an intentional offence, as well as his or her personal characteristics and way of life to date, provide reasonable grounds to assume that even if the proceedings are discontinued, he or she will observe the legal order, and particularly that they will not commit an offence (Art. 66 CC). This measure involves discontinuation of the criminal procedure, i.e. abandoning the conviction and punishment of the defendant that has been found guilty of committing the crime, while simultaneously obliging them to fulfil certain probational duties (Art. 67 CC). Using this probational measure requires the court to be sure that using it in itself is enough of an indisposition to the perpetrator, because being aware that they are on probation ensures they will not commit any other crime, which complies with the goals of criminal policy [Hypś 2019, 526].

What also needs to be pointed out is that although the judgment of the first instance court that conditionally discontinues criminal proceedings determines the defendant's guilt, from a formal standpoint it is not, as the originator of the bill points out, it is not a conviction.[25] Such a change to Art. 454, para. 1 CCP meant not only enabling change of a first instance judgment to the disadvantage of the defendant, but also, primarily, their conviction in one instance [Koper 2018, 33]. This situation is a violation of the right of the defendant to substantive defence, expressed in their ability to benefit from two instance proceedings [Drajewicz 2017, 114]. The change of a judgment of a first instance court pertaining to the conditional discontinuation of proceedings against the defendant should thus take

[24] See explanatory memorandum, p. 65.
[25] Ibid.

place during a full course of the instance.

This change constitutes a regress of guarantees as far as the defendant is concerned, and furthermore, it doesn't fulfil the guarantees stemming from the constitutional principle of two-instance procedure specified in Art. 176, sect. 1 of the Constitution, the substance of which was correctly reflected in the case law of the CT. The Tribunal specified that the principle is expressed in granting the parties appropriate measures of appellation, giving them real control over issued judgements, entrusting the ruling of a case in the second instance – as a rule – to the court of a higher level, resulting in the appellate measure acquiring a devolutive character, as well as shaping the procedure governing the proceedings before the court of second instance – which enables comprehensive examination of a case and issuing of a substantive judgment.[26] Limitations of the principle of a two-instance procedure also violate the right to court, both when it comes to the right of access to a court, i.e. to the full course of the instance, as well as to the correctly conducted appellate procedure. Moreover, as the literature rightly points out, such a procedural situation deprives the defendant of the possibility of contesting the judgement as it concerns the penalty in the course of inter-instance control – which obviously violates Art. 45 of the Polish Constitution as well as the principle of a two-instance procedure expressed in Art. 78 of the Polish Constitution [Mierzwińska–Lorencka 2020, 221].

A slightly different objection can be formed against the change in Art. 454, para. 3 CCP, which provides for the elimination of the prohibition of aggravating the punishment by the appellate court by imposing the penalty of life imprisonment on the defendant. The penalty of life imprisonment is the most severe of penalties included in the catalogue contained in Art. 32 CC and as a rule, it has an eliminating character. Additionally, its imposition is possible only on people convicted of committing the most serious of felonies. As is underlined in case-law, the penalty can be imposed only when the level of guilt is accordingly high, and *in concreto* no other penalty applicable in the case would fulfil the individual or general preventive goals. Thus, the penalty of life imprisonment can be adequate only for the perpetrators whose actions can be characterized as exceptional in comparison to other crimes of the same type. Determining whether the level of guilt and social harmfulness of a particular felony is very high is a prerequisite necessary, but not sufficient to impose the penalty of life imprisonment. Even the highest level of social harmfulness and guilt does not justify imposing this penalty if the consideration of all circumstances impacting the severity of the penalty shows that the less severe penalty would be sufficient to shape the legal awareness of the society, as well as fulfil the educational and preventive goals pertaining to the perpetrator.[27]

[26] See judgement of the Constitutional Tribunal of 31 march 2009, SK 19/08, OTK–A 2009, No. 3, item 29.

[27] See judgement of the Appellate Court in Katowice of 25 January 2006, II AKa 436/05, OSAK 2006, No. 2, item 14.

Due to its exceptional character, the severity of the penalty of life imprisonment and circumstances that usually accompany its imposition, it is hard to consider forgoing the full course of instance to be reasonable, as it was introduced in Art. 454, para. 3 CCP. Especially because the appellate court will base its decision on the same factual findings that constituted the basis of the judgment under appeal. Another examination of such a case seems to be a fairer solution, especially because the penalty of life imprisonment is imposed extremely rarely in Poland, and thus such proceedings would not significantly impact the fulfilment of the goal set by the legislator, i.e. reducing the excessive length of court proceedings in Poland. Thus, the adopted solution has to be assessed negatively.[28]

The reform of the Code of Criminal Procedure implemented by the July amendment is very broad and introduced a lot of justified and anticipated solutions – most of the changes will positively impact the functioning of the justice system in Poland. The legislator's goal was to accelerate and improve the criminal proceedings, a goal that was anticipated by both the parties to the proceedings and the representatives of the justice system. This legitimate idea should nevertheless respect all procedural guarantees that the parties are entitled to as well as meet the standards of a democratic state base on the rule of law. It nevertheless seems that, unfortunately, not all of the solutions introduced in the amendment fully respect those concepts. Amongst the solutions that cause the most controversy, particularly concerning their compatibility with requirements set by the Polish Constitution, ECHR, and the minimal standards relating to the subject set by the European Union, one should point out introducing a time limit for filing an evidentiary motion, the so called evidentiary preclusion (Art. 170, para. 1, point 6 CCP), the possibility of conducting evidentiary proceedings in the justified absence of the defendant or their counsel (Art. 378a CCP) as well as expanding the possibility of limiting the examination of witnesses during a trail (Art. 350a CCP) and limiting the usage of the *ne peius* principles (Art. 454 CCP). It seems that in practice there is a violation of the division of procedural roles in court proceedings, with a noticeable accent of increasing the impact of the materials collected in the preparatory proceedings on shaping the basis for the evidentiary assessment in the sentence. This shift may undermine the fairness of the proceedings, as well as the actual right of the defence. A thesis can be made that the changes are systemic, distinctly going beyond the previous limits of the existing model of criminal procedure.

Other changes do not raise as many concerns, although it has to be underlined that some of them should be considered unequivocally positive (e.g. Art. 57, para. 1a CCP; Art. 132 CCP; Art. 137 CCP; Art. 185a CCP; Art. 185c CCP; Art. 394, para. 2 CCP; Art. 368, para. 2 CCP; Art. 427, para. 3a CCP; Art. 505 CCP), but there are also those that only practice and reality can verify, because at this point it is hard to determine whether they will be positive or not (e.g. Art. 12, para. 3

[28] A similar position is consistently presented in the doctrine: Zagrodnik 2020a, 219.

CCP; Art. 51, para. 2a CCP; Art. 424, para. 4 CCP) as well as those that, from the point of view of the legislative technique, are a sui generis legal *superfluum* (e.g. Art. 438, point 1 and 1a CCP).

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KONTROWERSJE WOBEC REFORMY POSTĘPOWANIA KARNEGO WPROWADZONEJ USTAWĄ Z DNIA 2 LIPCA 2019 ROKU

Streszczenie. W dniu 4 października 2019 r. weszła w życie obszerna reforma postępowania karnego, która wprowadziła liczne zmiany na wszystkich jego etapach. Zmiany zostały uzasadnione kilkoma celami, wśród których jako najważniejszy uznano stworzenie warunków do szybszego załatwiania spraw w postępowaniu sądowym, w tym przeciwdziałanie możliwości obstrukcji procesowej stron oraz zapobieganie zbędnemu powtarzaniu czynności dowodowych. Ustawodawca

postawił sobie za zadanie także zlikwidowanie zbędnych formalizmów występujących w postępowaniu oraz założył stworzenie mechanizmów przyspieszenia prowadzenia postępowań przygotowawczych i wzmocnienia pozycji pokrzywdzonego w procesie karnym. Niewątpliwie zamierzenia ustawodawcy były słuszne i prowadziły do rozwiązania podstawowych problemów, jakie występują we współczesnym postępowaniu karnym, w szczególności w zakresie jego przewlekłości. Przyjęte w ustawie rozwiązania co do zasady zasługują na uznanie, szczególnie w aspekcie wyeliminowania zbędnych formalizmów występujących w postępowaniu karnym. Pomimo jednak wyrażonej w uzasadnieniu deklaracji woli poszanowania i zapewnienia przestrzegania wymaganych gwarancji procesowych, zwłaszcza związanych z ochroną uprawnień uczestników postępowania oraz zasadą rzetelności procesu karnego, prawodawcy nie do końca udało się utrzymać standard gwarancyjny, gdyż został on zredukowany na rzecz przyśpieszenia postępowania. W tym aspekcie omawiana nowelizacja może budzić poważne zastrzeżenia. Artykuł podejmuje próbę analizy przyjętych rozwiązań, zwłaszcza tych, które budzą najwięcej kontrowersji, w szczególności co do ich zgodności z wymaganiami stawianymi przez Konstytucję RP, Europejską Konwencję Praw Człowieka oraz minimalnymi standardami obowiązującymi w tym zakresie w Unii Europejskiej.

Słowa kluczowe: prawo karne, postępowanie karne, nowelizacja postępowania karnego, dowód, prawo dowodowe

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