UNIVERSITY OF BIAŁYSTOK
FACULTY OF LAW

BIAŁOSTOCKIE STUDIA PRAWNICZE

BIAŁYSTOK 2017 VOLUME 22 nr 1

Creation of the English-language versions of the articles published in the „Białostockie Studia Prawnicze" [Białystok Legal Studies] funded under the contract no. 548/P-DUN/2016 and 548/1/P-DUN/2016 from resources of the Minister of Science and Higher Education dedicated to the popularisation of science.

Stworzenie anglojęzycznych wersji wydawanych publikacji w „Białostockich Studiach Prawniczych" finansowane w ramach umowy 548/P-DUN/2016 i 548/1/P-DUN/2016 ze środków Ministra Nauki i Szkolnictwa Wyższego przeznaczonych na działalność upowszechniającą naukę.

BIAŁOSTOCKIE STUDIA PRAWNICZE

VOLUME 22 nr 1

ISSN 1689–7404

Language Editors: Ewa Brajczewska (Polish), Richard Tykocki-Crow (English)
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Cover Design: Bogusława Guenther
Publisher: Faculty of Law, University of Białystok; Temida 2
All volumes can be purchased from Wydawnictwo Temida 2, address ul. A. Mickiewicza 1, 15-213 Białystok, e-mail: temida2@uwb.edu.pl, tel. 85 745 71 68

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Introduction

Volume 22(1) of "Białostockie Studia Prawnicze" [Białystok Legal Studies] focuses on the models of disciplinary proceedings regarding selected professions in the light of the standards of a fair trial. Articles published herein are the effect of statutory research pursued by the Chair of Criminal Procedure at the Faculty of Law of the University of Białystok since 2013. As part of the research project, a national scientific seminar titled "Models of disciplinary proceedings in the light of fair trial principles" was held on 17 March 2014. In the aftermath of scientific deliberations and discussions, representatives of the criminal trial doctrine from leading Polish scientific centres as well as university staff and PhD students of the Chair of Criminal Procedure submitted articles for publication herein.

The subject matter presented in this volume is significant since disciplinary liability is, on the one hand, a manifestation of autonomy of individual professional groups, while on the other hand, as a form of repression, it has always been perceived from the constitutional perspective and through the prism of requirements of a fair trial determined in Art. 6 of the European Convention on Human Rights. Furthermore, it should be emphasized that disciplinary procedures have evolved considerably in recent years as a result of either direct changes of relevant provisions of law regulating them, or indirect impact thereon of the Code of Criminal Procedure's amendments effected between 2015 and 2016.

The subject matter of scientific articles focuses on substantive or procedural aspects of models of disciplinary liability adopted in legal corporations of prosecutors, legal advisors and attorneys at law. From this perspective, the article devoted to the procedure of disciplinary liability of Internal Security Agency officers analyzed in the light of the concept of a fair trial appears particularly interesting. Moreover, evolution of selected disciplinary procedures has been thoroughly analyzed herein in the light of conventional and constitutional standards of the right to a trial. Deliberations presented in the article on the regulation of a minor disciplinary breach in the Polish law are of a universal nature. The issue of coincidence of criminal and disciplinary proceedings in the context of the provisions of the Law on Higher Education has also been considered herein.

Research methods adopted by the authors in their studies are not merely limited to a dogmatic analysis. Since most of them are members of specific professional groups, their deliberations also include practical aspects of disciplinary proceedings adopted in corporations.

We dare to hope that this volume of "Białostockie Studia Prawnicze" and articles contained herein will considerably contribute to the scientific discussion on the consistency of disciplinary procedures with the requirements of a fair trial while evoking a profound scientific reflection thereon in the readers.

Cezary Kulesza, Dariusz Kużelewski
Volume Theme Editors

Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.01

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Evolution of the Models of Disciplinary Procedures in the Light of the Conventional and Constitutional Standards of the Right to a Trial[1]

Abstract: The article focuses on the evolution of one of the most vital elements of disciplinary proceedings, i.e. judicial control (audit) of disciplinary decisions. Regarding this issue, the article discusses jurisprudence of the European Court of Human Rights and the Polish Constitutional Tribunal. The presented historical and functional analysis of model disciplinary proceedings across many different professions distinguishes basic restrictions of the right to a trial and their character in disciplinary proceedings. With reference to appealing against decisions of disciplinary bodies, the article emphasizes that the lines between civil and penal procedures are blurred. Finally, the article addresses the influence of amendments made in the Polish penal procedure and the Act on Prosecution between 2015 and 2016 on the application of disciplinary proceedings.
Keywords: models, disciplinary proceedings, judicial control, Supreme Court, ECHR

1. Introduction

Basis elements of disciplinary proceedings may encompass:
1) functions fulfilled by these proceedings[2]: repressive, protective and integrative;

1 This article was written within the framework of the project under the title: „Czy polski model postępowania odwoławczego w sprawach karnych jest rzetelny?" (Is the Polish model of the the appeal proceedings in criminal matters reliable?") (programme „OPUS 8") founded by the National Scientific Centere, according to the the agreement no. UMO-2014/15/B/HS5/02689.

2 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej w zawodach prawniczych, (in:) A. Bodnar, P. Kubaszewski (eds.), Postępowania dyscyplinarne w zawodach prawniczych. Model ustrojowy i praktyka, Warszawa 2013, pp. 65-67

2) substantive bases of disciplinary liability[3];
3) investigative bodies and procedures applied by them (in particular the scope of provisions of the Code of Criminal Procedure applied therein);
4) judicial review (control) of disciplinary tribunals' rulings.

In the light of the subject literature, it is undeniable that disciplinary law is strictly connected with criminal law (sometimes with administrative law too); it may also be classified as a widely understood repressive law[4]. Nevertheless, what differs disciplinary law from criminal law are the sanctions applied therein and a lack of common binding force since it solely refers to specific professions. The Constitutional Tribunal's case law underlines that this function provides corporation members with due freedom and independence in the practice of their profession. The Tribunal also discerned in its case law a distinct role of courts in disciplinary cases against professionals enjoying public trust and in cases on disciplinary liability of other professions. Insofar as judicial review (control) of disciplinary tribunals' rulings guarantees the protection of constitutional rights and freedoms of the punished persons in the latter case, in the previous one it fulfils two equal functions. On the one hand, it provides members of Professional Associations with indispensable freedom and independence to practice profession, while on the other hand, it is an instrument of State supervision over Professional Associations[5].

It appears that contrary to criminal law, disciplinary law cannot be attributed with a compensatory function. As a rule, victims may take part in disciplinary procedures and yet they do not envisage any form of satisfaction of civil claims of a victim harmed in effect of a disciplinary tort.

It is worth indicating that disciplinary liability in all professional groups is universally based on the violation of professional ethics and dignity. With regard to disciplinary proceedings against prosecutors , we should pay attention to the Supreme Court's ruling concerning infringed dignity of the office of a prosecutor (who was reading a book in a courtroom during the Defence Counsel's speech) as a ground of disciplinary liability: "Dignity of the office of a prosecutor should be understood as a certain standard of conduct in various official and unofficial situations, the standard

3 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej w zawodach prawniczych, pp. 60-64.

4 K. Dudka, Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich (in:) P. Hofmański (ed.), Węzłowe problemy procesu karnego, Warszawa 2010, pp. 354-355. See also the Judgment of the Supreme Court of 23 September 2016, SDI 44/16, http://www.sn.pl/orzecznictwo (accessed: 23 November 2017).

5 See the judgment of the Constitutional Tribunal of 8 December 1998., K 41/97, OTK 1998, No. 7, item 117.

establishing stricter requirements towards prosecutors so that they are role models for other officials"[6].

As far as the grounds of judges' disciplinary liability are concerned, we should pay attention to the interesting judgment of the Supreme Court on the limits of judicial independence, according to which "(…) constitutionally enshrined judicial independence is not of an absolute nature insofar as it permits every and any legal interpretation and its application by the judge. If such understood independence was assumed, it would generate a system of absolute arbitrariness of sentencing, void of a sense of stability and certainty of law or predictability of court actions, in extreme situations leading to anarchy. The judge's right to his or her own independent interpretation of legal provisions does not vest in them a competence to shape their content freely; it does not exempt them from a reflection when their interpretation differs from the uniform interpretation made by the Supreme Court or Appellate Court (…)[7].

This study will mainly focus on the evolution of the right of the accused to appeal against Disciplinary Tribunals' rulings to common courts or the Supreme Court as a guarantee of procedural and substantive justice.

2. A conventional standard of judicial review (control) of disciplinary proceedings

Article 6 par. 1 of the European Convention on Human Rights is of fundamental importance in defining a conventional standard of the right to a trial; it sets forth in the first sentence that: "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".

As far as the constitutional standard of disciplinary procedures' assessment of reliability is concerned, it is generally found in Art. 45 par. 1 of the Constitution, according to which every citizen shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

The ECHR's case law ensues a general conclusion according to which sentencing in disciplinary cases by authorities (bodies) not satisfying a requirement of an "independent and impartial court" does not violate the conventional standard[8].

6 The decision of the Supreme Court of 27 July 2016, SDI 6/16, http://www.sn.pl/orzecznictwo (accessed: 23 November 2016).

7 The judgment of the Supreme Court of 16 June 2016, SNO 21/16, Lex No. 2064239.

8 So in the case of disciplinary courts; Le Compte, Van Leven and De Meyere v. Belgium of 3 June 1981, applications No. 6878/75; 7238/75); Frankowicz v. Poland of 16 December 2008 (application No. 53025/99) and in the judgment of 18 October 2011 r. in the case of Sosinowska v. Poland

An interesting example here is, e.g., the ECHR's judgment of 27 January 2004 in the case of Kyprianou vs. Cyprus (Application No. 73797), where the Court decided there was no impartiality of the first-instance court which sentenced the applicant to imprisonment for contempt of court. The Court considered that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance of lawyers' duties as defence counsel. The same conclusion was reached by the Grand Chamber of ECHR in the judgment of 15 December 2005 in the same case, yet it was more focused on the fact that the Supreme Court failed to reverse the lower court's judgment even though it had the power to do so. The Supreme Court did not remedy the defect in question (lack of impartiality) in the appeal because the Court did not re-examine the case.

3. A constitutional standard of judicial review (control) of disciplinary proceedings

Pursuant to well-established Constitutional Tribunal's case law, the activities of the bodies (authorities) established to resolve legal disputes other than State courts, including disciplinary tribunals formed within corporate organizational structures, are admissible within the binding legal order. Under Art. 45 par. 1 of the Constitution, the Constitutional Tribunal repeatedly ruled, e.g. in the judgment of 11 September 2001[9], that judicial review (control) of disciplinary proceedings' decisions guarantees respect of the rights and freedoms of the accused. "In all proceedings of a repressive nature the right to a fair trial fulfils a special role assuring control over respect of civil rights and freedoms by an independent, impartial and sovereign court"[10]. Emphasizing that the court's control must be limited by its very nature because it does not involve resolving cases "from the very beginning", the Tribunal also stressed the actuality (reality) and efficiency of the right to a fair trial in disciplinary proceedings and noticed that: "(…) the right to a fair trial is satisfied under such regulations which assure judicial control of a ruling, decision or other individual act determining a legal situation of the subject – by initiating proceedings before a common court or administrative court"[11].

(application No. 10247/09). See the analysis of this judgment (in:) A. Bodnar, Postępowania dyscyplinarne w wolnych zawodach prawniczych w kontekście orzecznictwa ETPC (in:) Postępowania dyscyplinarne w zawodach prawniczych, pp. 23-24.

9 SK 17/2000, Journal of Laws of 2001, item 1129.

10 See the judgemnt of the Constitutional Tribunal of 19 May 2003, K. 39/2003 r., OTK-A 2005, No. 3, item 27 and and the case-law cited there.

11 The judgemnt of the Constitutional Tribunal of 4 March 2008, SK 3/07, OTK-A 2008, No. 2, item 25; see also the judgemnt of the Constitutional Tribunal of 17 November 2009, SK 64/08, Lex, OTK-A 2009, No. 10, item 148.

Concurrently, the Constitutional Tribunal noticed that in the Polish legal system disciplinary liability concerns many professions and yet it does not envisage any uniform procedure to be applied in order to establish this liability for all professions, including legal ones[12].

4. Evolution of the models of disciplinary procedures in the context of the right to a trial

Carrying out a historical and functional analysis of disciplinary procedures in different professional corporations, it may be generally claimed that basic limitations of the right to a trial were of the following nature: 1) subjective (a limited group of entities entitled to appeal against disciplinary tribunal's decisions to a court); 2) objective (limited types of matters subject to appeal to a court) – non-binding or binding decisions; 3) a type of appeal measures and the ensuing scope of cognition of an appellate court hearing them. All these restrictions forming different configurations were subject to gradual evolution that was strictly correlated with the changes of the common criminal procedure and the need to adapt disciplinary procedures to the Constitution of 1997. Comparing the above comments related to legal professions, it is worth considering the Act on Advocates of 26 May 1982 (hereinafter referred to as the AA)[13], which originally granted the right to an extraordinary appeal against a binding decision of disciplinary tribunals solely to special entities (Minister of Justice, Prosecutor and President of the National Bar Council – Art. 91 par. 1 of the AA). The Act on Legal Advisors of 6 July 1982[14] originally envisaged objective limitations in Art. 65 par. 3 too. Pursuant to it, the punished person may appeal to the Supreme Court solely against a disciplinary decision suspending or depriving him or her of the right to practice a profession (but not against a caution). Furthermore, the Act on Prosecutors of 20 June 1985 originally[15] did not envisage judicial control of decisions issued in disciplinary proceedings.

Models of judicial control of disciplinary proceedings in these corporations were made uniform by the regulations of respective Acts of 2000 by the introduction of

12 The judgemnt of the Constitutional Tribunal of 25 June 2012, K. 9/2010, OTK ZU 2012/6A, item 66.

13 The Act of 26 May 1982 – the Law on the Bar (consolidated text Journal of Laws of 2016 item 615) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (tekst jedn. z dnia 6 maja 2015, Dz.U. z 2015 r. poz. 615)].

14 The Act of 6 July 1982 on the Legal Advisors' (consolidated text Journal of Laws of 6 July 1982, [ustawa z dnia 6 lipca 1982 r. o radcach prawnych (tekst jedn. z dnia 25 marca 2016, Dz.U. z 2016 r. poz. 233)].

15 The Act of 20 June 1985 – the Law on the Public Prosecutor's Office (Journal of Laws of 1985, No. 31, item 138, as amended), [Ustawa z dnia 20 czerwca 1985 r. Prawo o prokuraturze (Dz.U. z 1985 r. Nr 31, poz. 138 ze zm.)].

"extended" cassation to the Supreme Court, which may be grounded both on "gross violation of law" and "gross incommensurability of disciplinary penalty". These regulations were found in compliance with Art. 45 par. 1 of the Polish Constitution by the Constitutional Tribunal in the above quoted judgment of 25 June 2012[16]. Nevertheless, it is worth noticing that the term of gross incommensurability of disciplinary penalty as the grounds of cassation is quite restrictively treated in the Supreme Court's case law because according to it, the application of Criminal Code's norms within this scope would be impossible due to the specificity of disciplinary penalties and other measures of response to disciplinary offences determined in Art. 81 of the AA, i.e. particularly due to their inconclusive nature in most cases[17].

With regard to the Act on Advocates (and the Act on Legal Advisors respectively), the Supreme Court's opinion expressed in the ruling of 27 September 2012[18] has become outdated. It set forth that the accused advocate was not allowed to bring cassation against Higher Disciplinary Tribunal's judgment issued in his case because it would circumvent the requirement envisaged in Art. 526 § 2 of the Code of Criminal Procedure[19]. Pursuant to the Constitutional Tribunal's judgment[20] passed in the context of disciplinary proceedings against the advocate, Art. 526 § 2 of the CCP is inconsistent with Art. 45 par. 1 of the Polish Constitution within the scope of excluding a possibility of drafting and signing cassation in their own case by advocates or legal advisors.

Current Supreme Court's case law on disciplinary proceedings against advocates underlines that these proceedings are similar to criminal proceedings while the legislator decided that standards and guaranties similar or identical to those functioning in criminal proceedings should be applied in disciplinary proceedings. According to the Supreme Court, it means, among others, that the accused takes advantage of procedural solutions assuring him or her with the fulfilment of the right to defence while the rule of immediacy is in force in the proceedings themselves[21].

The most recent Supreme Court's case law referring to disciplinary proceedings against legal advisors is also worth noticing. It has rightly recognized that *ne peius* ban specified in Art. 454 § 1 of the CCP is in force before Higher Disciplinary Tribunal of National Chamber of Legal Advisors, and it prohibits a disciplinary tribunal to

16 K. 9/2010, OTK ZU 2012/6A item 66.

17 The decision of the Supreme Court of 17 November 2015, SDI 67/15, Lex No. 1849091.

18 VI KZ 12/12, Lex No. 122100.

19 See alaso the decision of the Supreme Court on the criminal case conducted by a lawyer as a private prosecutor of 15 June 2016., II KZ 16/16, Lex No. 2054092. This view of the Supreme Court was broadly consistent with the views of the commentators on the provisions on the disciplinary proceedings of advocates. See K. Kanty, T. Kanty, Komentarz do przepisów o postępowaniu dyscyplinarnym adwokatów, Warszawa – Gdańsk 2013, p. 234-235.

20 SK 2/15, OTK-A 2016.

21 The judgment of 27 July 2016, SDI 28/16.

sentence the accused legal advisor in the appeal proceedings if he or she was acquitted in the first instance[22].

The Supreme Court's case law has pointed out significant relations between criminal procedure and disciplinary proceedings many times[23]. In the Resolution of Seven Judges of 28 September 2006[24] the Supreme Court decided that disciplinary proceedings are carried out independent of criminal proceedings including the subjective and objective identity of these proceedings. However, disciplinary tribunals should suspend disciplinary proceedings until criminal proceedings are closed if there is a need to apply Art. 108 § 4 of the Act on the Common Courts Organization (hereinafter referred to as ACCO)[25], Art. 88 par. 2 of the AA and Art. 80 par. 3 of the ALA.

The second issue concerns aggravation of removal in appeals by the second instance disciplinary tribunals. The notion of removal should be understood as a disbarring penalty, i.e. deprivation of the right to practice a profession of a legal advisor. The second instance court cannot aggravate penalty by imposing a life imprisonment. Therefore if the provisions of the Code of Criminal Procedure are applied to disciplinary proceedings, removal cannot be imposed. Discrepancies in the Supreme Court's case law were resolved by the Resolution of Seven Judges of 30 June 2008[26] which stipulated that "this provision does not apply to disciplinary proceedings". According to the Supreme Court, an appellate court may impose a penalty of deprivation of the right to practice a profession in a criminal case. It is not embraced by the ban and therefore it would be paradoxical if such a penalty could be imposed in a criminal case while it could not be aggravated in disciplinary proceedings.

Referring to the issue of appeal against disciplinary authorities' decisions to common courts or the Supreme Court, we can notice **effaced terminology and deformed legal nature of appeal measures adopted in the criminal and civil procedure**.

As far as the Act of 27 July 2005 on Higher Education is concerned (hereinafter referred to as AHE)[27], Art. 146 par. 4 stipulates that the parties are entitled to appeal

22 The judgment of the Supreme Court of 23 September 2016., SDI 44/16, http://www.sn.pl/orzecznictwo- (accessed: 23 November 2016).

23 See W. Kozielewicz, Postępowania dyscyplinarne w wolnych zawodach prawniczych w praktyce orzeczniczej SN (in:) Postępowania dyscyplinarne..., pp. 39-45 and the same Author in this publication: Rola Sądu Najwyższego w postępowaniu w sprawach dyscyplinarnych.

24 I KZP 8/06, I OSKW 10/2006, item 87.

25 The Act of 21 July 2001 – the Law on the Organisation of Common Courts (consolidated text Journal of Laws of 2015, item 133), [Ustawa z dnia 21 lipca 2001 r. Prawo o ustroju sądów powszechnych (tekst jedn. Dz.U. z 2015 r. poz. 133)].

26 I KZP 11/08, OSNKW 2008, item 57.

27 The Act of 27 July 2005 – the Law on Higher Education (consolidated text Journal of Laws of 2016, item 1842) [Ustawa z dnia 27 lipca 2005 r. Prawo o szkolnictwie wyższym (tekst jedn.

against a binding decision of a disciplinary committee mentioned in Art. 142 par. 1 point 2 to the Court of Appeal in Warsaw – Labour and Social Security Chamber. The appeal is subject to the provisions of the Code of Civil Procedure referring to appeals. The appellate court's ruling is not subject to cassation but, as underlined in the comments, it is possible to complain to the Supreme Court about the acknowledgment of inconsistency of the valid ruling of the Court of Appeals in Warsaw with the law[28].

The Act on Higher Education does not determine the grounds of an appeal. Yet, pursuant to Art. 368 of the Code of Civil Procedure, an appeal should satisfy the requirements envisaged for pleadings. Moreover, it should contain a number of the judgment it has been appealed against indicating whether it is appealed against fully or partially, a brief presentation of charges and their reasoning, a quotation of new facts and evidence if necessary, and confirmation that they could not be invoked before the first instance court or that the need to quote them arose later, as well as a motion for changing or reversing the judgment indicating the scope of the requested change or reversal.

The comments to the Act on Higher Education emphasize that submission of an appeal entails that the case is handed over from the academic environment to independent, sovereign and impartial judicial authority while the accused academic teacher is provided with a possibility of exercising the constitutional right to a trial – one of the foundations of a democratic state of law[29].

It should be noticed that appropriate application of the provisions on appealing would enforce the use of suspensory effect of a civil appeal with regard to valid (binding) judgments, i.e. to terminate enforcement of the judgment under appeal. However, par. 5 Art. 146 of the AHE envisages that a disciplinary committee conveys information about a valid judgment in cases of infringements mentioned in Art. 144 par. 3 points 1-5 (i.e. cases connected with copyright and scientific research) to a body providing funds to science, that is a competent minister of science.

The thesis about a lack of suspensory effect of an appeal to the Court of Appeal in Warsaw is further confirmed by the Regulation of Minister of Science and Higher Education of 17 October 2014 on a special course of explanatory and disciplinary proceedings against academic teachers and manners of enforcing and effacing disciplinary penalties[30]. § 42 thereof stipulates that immediately after receiving a valid judgment of a disciplinary committee, Rector orders the enforcement of a disciplinary penalty envisaged by the sentence and attachment of the judgment's

Dz.U. z 2016 r. poz. 1842)].

28 H. Izdebski, Prawo o szkolnictwie wyższym. Komentarz, Lex/el 2015.

29 See for example the decision of the Supreme Court of 22 October 1999, I PKN 216/99, OSNAPiUS 2001, No. 5, item 165. P. Wajda, A. Wiktorowska (in:) W. Sanetra, M. Wierzbowski (eds.), Prawo o szkolnictwie wyższym. Komentarz, Lex/el 2013.

30 Journal of Laws of 2014, item 1430 (Dz.U. z 2014 r. poz. 1430).

copy to the academic teacher's personal file as well as serving it with the Minister and supervising Minister.

What is more, information about employment relation terminated due to imposed disciplinary penalty in the form of deprivation of the right to practice a profession of a teacher is permanently attached to the academic teacher's employment certificate (§ 43 of the above Regulation). Only when a judgment of a disciplinary committee on deprivation of the right to practice a profession of a teacher is changed by the Court of Appeal and another, more lenient disciplinary penalty is imposed or acquittal, the grounds for the confirmation of the expiry of employment relation are dropped and it is re-commenced without the need to submit a declaration of will by an employer. An academic teacher, on the other hand, is entitled to be admitted to work[31].

It seems that the model of appealing against disciplinary authorities' judgments to common courts also depends on the legislator's trust in legal qualifications and prestige enjoyed by a given legal profession, judges in particular. First instance disciplinary tribunals to handle judges' cases are locally competent courts of appeal whereas the Supreme Court is the court of appeal (Art. 110 par. 1 of the ACCO). As far as procedural issues are concerned, attention should be paid to Art. 121 § 1 of the ACCO stipulating that the accused, Disciplinary Ombudsman , National Council of the Judiciary and Minister of Justice are entitled to appeal against first instance disciplinary tribunals' judgments as well as decisions and regulations terminating the procedure to pass a verdict.

The appeal should be heard within two months from the day it was received by a second instance disciplinary tribunal (Art. 121§ 2 of the ACCO). Furthermore, the appeal is subject to the provisions of criminal procedure as to the appeal's form and manner of submission. In particular, the appellant should quote the settlement or decision under appeal and determine his or her claims. The comments to Art. 121 of the ACCO underline that although the accused judge is in principle a highly qualified lawyer, it appears that he or she should not be subject to obligations burdening Disciplinary Ombudsman and defence counsel resulting from Art. 427 § 2 of the Code of Criminal Procedure, which involve indication of charges brought against the settlement and drafting reasoning to the appeal. Too many formalities within the above scope could limit the right to defence[32]. However, according to the Supreme Court's case law, failure to quote in the appeal not only the scope of the first instance disciplinary tribunal's settlement under appeal but also appeal conclusions and, in fact, even charges (Art. 425 § 2 and Art. 433 § 1 of the CCP) impedes the examination of "the measure of appeal" by the Supreme Court[33]. The appellant may also quote

31 E. Ura (in:) Akademickie prawo pracy. Komentarz do art. 107-158 oraz 196-201a i 226 ustawy Prawo o szkolnictwie wyższym, K.W. Baran (ed.) SN, Lex/el 2015 and the case-law provided there.

32 J. Sawiński (in:) A. Górski (ed.), Prawo o ustroju sądów powszechnych. Komentarz, Lex 2013.

33 The resolution of the Supreme Court of 10 January 2008, SNO 85/07, OSNSD 2008, item 19.

new facts or evidence but only if he or she was not able to quote them before the first instance court (Art. 427 § 3 of the CCP in the reading in force since 15 April 2016).

An appeal on the issue of guilt challenges the entire judgment whereas an appeal on the issue of penalty challenges the entire settlement on punishment and penal measures. An appeal may refer to charges which did not or could not be the object of complaint (Art. 447 of the CCP). Due to the appropriate application of the Code of Criminal Procedure in disciplinary proceedings against judges, it should be recognized that both absolute grounds of appeal under Art. 439 § 1 of the CCP and relative grounds of appeal under Art. 438 of the CCP may be the grounds of appeal.

The Supreme Court hears a case within the limits of challenge (equivalent to appeal) unless the Act envisages a wider scope thereof[34]. The Supreme Court is obliged to consider all conclusions and charges quoted in the appeal (Art. 433 of the CCP); it may render a verdict against the accused only if the appeal was submitted against him or her but still solely within the limits of the appeal. If the appeal has been submitted by Disciplinary Ombudsman (of the National Council of the Judiciary or Minister of Justice), the Supreme Court may render a verdict against the accused only if defaults quoted in the appeal have been confirmed or they are subject to be included *ex officio*. The appeal submitted against the accused may also result in a verdict in his or her favour[35]. The Supreme Court may limit the appeal's examination only to individual defaults raised by the party or subject to be included *ex officio* if the examination within such a scope is sufficient to pass a verdict while the examination of other defaults would be premature or groundless for further proceedings (Art. 436 of the CCP).

5. The impact of criminal procedure's reforms on the models of disciplinary proceedings

The study has been limited to a quite controversial thesis according to which the so called great reform of the CCP's provisions of 1 July 2015 applied solely and respectively to disciplinary proceedings did not significantly affect the course of proceedings before disciplinary tribunals (at least due to a short period of the amendment – until 15 April 2016). The above conclusion is justified by the fact that between 2015 and 2016, no considerable changes were introduced to these procedures; in particular, the principle of enhanced adversarial proceedings of a main hearing envisaged by Art. 167 of the CCP in the version of 1 July 2015 was not included therein. Referring to the subject matter of the study, only changes within the scope of appealing against disciplinary tribunals' judgments to the Supreme Court or under

34 The judgemnt of 29 June 2007, SNO 37/07, OSNSD 2007, item 54.

35 Art. 434 CCP; judgemnt of 12 November 2003, SNO 70/03, OSNSD 2003, No. 2, item 64.

cassation or appeal (with regard to judges) should be found important. Limitation of prosecutors' disciplinary liability resulting from the new Act on Prosecutors[36] should also be mentioned here.

As far as criminal procedure is concerned, the impact of the amended criminal procedure embracing the period from 2013 to 2016 on disciplinary proceedings should be discussed at two different levels. With regard to disciplinary proceedings against judges, we should notice that changed Art. 434 § 2 of the CCP was upheld by the amendment of 15 April 2016 (and implemented since 1 July 2015). Pursuant to this Article, a measure of appeal submitted against the defendant may effect in the judgment in his or her favour too under the circumstances determined in Art. 440 or Art. 455 of the CCP. What is more, it is necessary to include the institution of the so called relative limitation of evidence in appeal proceedings envisaged by the currently valid Art. 427 § 2 of the CCP.

Furthermore, we should pay attention to the amended regulation of Art. 452 of the CCP extending the scope of hearing evidence (including the essence of the case – repealed Art. 452 § 1 of the CCP) and a limited possibility of returning the case by the appeal court to be re-examined (Art. 437 § 2 of the CCP). Generally, the above considerations do not directly refer to members of corporations who are not judges and who are solely entitled to an extraordinary measure of appeal in the form of cassation to the Supreme Court, that is to say they may be applied in disciplinary proceedings only respectively – within the scope envisaged by Art. 518 of the CCP.

With regard to the regulation of disciplinary liability in the new Act on Prosecutors of 12 January 2016[37], as far as procedural matters are concerned, Art. 163 of the above Act envisages in § 1 that the parties and General Prosecutor are entitled to appeal against the judgment of the Appeal Disciplinary Tribunal in the form of cassation to the Supreme Court. Cassation may be submitted due to the gross violation of law or gross incommensurability of disciplinary penalty. The parties must bring cassation within thirty days whereas General Prosecutor – within three months from the service of the judgment with reasoning to the party or General Prosecutor, respectively.

The party brings cassation through the disciplinary tribunal which passed the judgment under appeal whereas General Prosecutor submits cassation directly to the Supreme Court (Art. 163 § 3 and 4 of the Act on Prosecutors). The Supreme Court examines cassation in a hearing in the bench composed of three judges (Art. 163 § 5 of the Act on Prosecutors).

Within the context of substantive law bases of disciplinary liability of prosecutors, regulation of Art. 137 par. 2 of the above quoted Act on Prosecutors of 2016 appears

36 The Act of 28 January 2016 – the Law on the Public Prosector's Office (Journal of Laws of 2016, item 178) [Ustawa z dnia 28 stycznia 2016 r. – prawo o prokuraturze (Dz.U. z 2016 r. poz. 178)].

37 Journal of Laws of 2016, item 177.

essential. It stipulates that an act or omission of an act undertaken by a prosecutor solely in public interest is not a disciplinary offence. It appears that due to a broad and blurred scope of the term "public interest" evoking a lot of controversy in the doctrine and whose advocate is, among others, a prosecutor[38], this specific countertype of disciplinary liability may be interpreted too broadly, eventually weakening the protection of the rights of other participants of a criminal trial.

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38 On the subject of the concept of social interest and the role of the prosecutor as a spokesman for the social interest see: L. Mazowiecka, Prokurator Generalny jako rzecznik interesu społecznego, (in:) System prawa karnego procesowego P. Hofmański (ed.), vol. VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warszawa 2016, pp. 1163-1186 i R.A. Stefański, Prokurator jako rzecznik interesu społecznego, *Ibidem*, pp. 1189-1247 and the literature given there.

Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.02

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A Minor Disciplinary Breach in the Polish Legal System

Abstract: The aim of the article is to present four models of "a minor disciplinary breach" in some normative acts of the Polish legal system. The author concludes that the interpretation of the concept of "a minor disciplinary breach" should derive from the concept of "a less serious crime" and include components of the term "social harmfulness of an act". The thesis is to prove that the interpretation of the concept of disciplinary minor offences uses the interpretation of the concept of a less serious crime and includes the components of the term "social harm of the act". The legislator requires to impose this measure when it is unnecessary to apply stricter sanctions and disciplinary proceedings should not be initiated. In this case, the guilty party should be punished with the mildest disciplinary sanction and he or she may appeal against admonition. The conclusions propose solutions *de lege ferenda* relating to the interpretation of the term of "a minor disciplinary offence" and explain problems associated with appealing against rulings rendered in disciplinary proceedings in the context of some rules of the criminal procedure.
Keywords: minor disciplinary breach, disciplinary sanction, admonition, disciplinary proceedings, the accused, principle of two instances

1. Introduction

Legal procedure experts generally agree that a purpose of criminal proceedings is the requirement to hold a perpetrator criminally liable for a prohibited act he or she has committed. Disciplinary proceedings are generally treated in the literature as criminal proceedings *sensu largo*. For the above reason, referring to the object of disciplinary proceedings, it may be claimed that it is just the requirement to hold a person disciplinary liable for a disciplinary offence he or she has committed. In many Acts envisaging disciplinary liability[1], the Polish legislator most often only

1 There is no comprehensive normative act regulating disciplinary proceedings in the Polish legal system, but this responsibility is provided for in several dozen acts and normative acts of a fundamental rank. It is estimated that the number of such acts is almost 70, and the ordinances

generally regulates disciplinary provisions as they are, in principle, solely limited to a definition of a disciplinary offence, specification of a catalogue of disciplinary penalties and disciplinary authorities and rules of procedure. Other aspects of disciplinary liability are merely regulated by the reference to the appropriate application of the provisions of the Code of Criminal Procedure or, much more seldom, to the provisions of the Criminal Code. Specificity of disciplinary law and scattered sources impede a formulation of categorical statements. Nevertheless, it appears that we may find in disciplinary law the institutions whose sources and inspiration are solutions elaborated in substantive and procedural criminal law.

Furthermore, similar to procedural provisions contained in the Code of Criminal Procedure (CCP) which envisage different ways of criminal liability enforcement, the legislator provides disciplinary law with various ways of disciplinary liability to be borne by a perpetrator. One of them is a penalty imposed under a minor disciplinary breach. Even though this procedure applies to many disciplinary Acts, it is not a subject of profound analysis of the doctrine representatives. Considerations thereon appear only occasionally – to accompany the analysis of a regulation drafted for concrete disciplinary proceedings by the authors of comments to a selected normative act without a specific connection being made to the system of disciplinary and criminal proceedings in the Polish law. Although this study should not be treated as a fully comprehensive work thereon, it still attempts to look at the problem from the perspective of both substantive and procedural disciplinary law[2].

The article will present the structure of a minor disciplinary offence in selected normative acts. The author attempts to prove that due to conciseness of provisions on minor breaches, one should take advantage of the criminal law representatives' output or achievements while reconstructing the above notion. Moreover, a purpose of the study is to depict the legislator's inconsistency in regulating the proceedings at the moment of implementing the course of a minor disciplinary breach from the perspective of the principle of two-instance proceedings and the ban on worsening a legal status of the accused. The conclusions will propose *de lege ferenda* solution both within the scope of interpretation of the term "a minor disciplinary breach" and explain doubts concerning appealing against rulings rendered under this course.

almost 60. See the enumeration in the work: P. Czarnecki, Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego, Warszawa 2013, pp. 487-525.

2 See also P. Czarnecki, Model postępowania dyscyplinarnego w polskim systemie prawa, (in:) P. Czarnecki (ed.), Postępowanie karne a inne postępowania represyjne, Warszawa 2016, pp. 253-264.

2. Models of minor disciplinary breaches – a normative aspect

Despite the fact that sources of disciplinary liability are scattered to a large extent, it may be noticed that apart from disciplinary penalties imposed under an ordinary (principal) course, the Polish legislator introduced a possibility of sentencing to disciplinary penalties imposed under the so called simplified course. Apparently, four basic models of disciplinary proceedings may be distinguished: first instance, second instance, judicatory and disciplinary.

The first model (first instance) operating in uniformed services envisages the application of a minor disciplinary breach by a superior who, as a rule, does not initiate disciplinary proceedings but interviews the inferior. The content of the interview is recorded in the form of a note enclosed to the files. The punished person most often may not appeal under the provisions on disciplinary proceedings.

An example of such a regulation is Art. 132 par. 4b of the Act on the Police[3], pursuant to which in case of a minor disciplinary offence, the disciplinary superior may renounce from launching proceedings and carry out a disciplinary interview with a perpetrator of a disciplinary offence recording its content in an official note. This note is enclosed into the personal files for one year. Identical regulations bind Border Guard officials (Art. 134a of the Act on Border Guard)[4], Prison Service officials (Art. 230 par. 6 of the Act on Prison Service[5]) and Customs Service officials (Art. 168 par. 1-3 of the Act on Customs Service)[6]. In the last case, the official note is destroyed after the lapse of six months from the day of a disciplinary interview; whilst upon the perpetrator's request the note can be destroyed even after the lapse of three months.

The doctrine rightly underlines that even though it is common for all above cases to subordinate the officials to the disciplinary superior's authority while individual disciplinary regulations vary only in minor details, or a catalogue of penalties, or courses of procedure in relevant Acts, "minor breaches" are still disciplinary torts within disciplinary liability[7].

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3 The Act of 6 April 1990 on the Police (Journal of Laws of 2016, item 1782, as amended) [Ustawa z dnia 6 kwietnia 1990 r. o Policji (tekst jedn. Dz.U. z 2016 r. poz. 1782 ze zm.)].

4 Act of 12 October 1990 on the Border Guards (consolidated text Journal of Laws of 2016, item 1643, as amended) [Ustawa z dnia 12 października 1990 r. o Straży Granicznej (tekst jedn. Dz.U. z 2016 r. poz. 1643 ze zm.)].

5 The Act of 9 April 2010 on the Prison Service (consolidated text of 2016, item 713 as ameded) [Ustawa z dnia 9 kwietnia 2010 r. o Służbie Więziennej (tekst jedn. Dz.U. z 2016 r. poz. 713 ze zm.)].

6 The Act of 7 August 2009 on the Customs Service (consolidated text Journal of Laws of 2016, item 1799, as amended) [Ustawa z dnia 27 sierpnia 2009 r. o Służbie Celnej (tekst jedn. Dz.U. z 2016 r. poz. 1799 ze zm.)].

7 T. Kuczyński, Odpowiedzialność funkcjonariuszy służb zmilitaryzowanych za przewinienia dyscyplinarne mniejszej wagi, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 6, p. 27.

In **the second instance model**, a specified one-man authority also imposes a penalty in case of a minor offence after listening to the accused. However, it differs from the first model in that one may appeal against admonition issued by this authority to the collegiate disciplinary body. In this case information about the penalty is also enclosed to the personal files of a perpetrator of a given disciplinary offence.

The above model has been adopted, among others, with reference to academic teachers because pursuant to Art. 141 par. 1-3 of the Act on Higher Education, Rector shall impose admonition for a minor breach after listening to a teacher. Rector may also admonish a teacher at his or her discretion. An academic teacher admonished by Rector may appeal to the University Disciplinary Committee for Academics. An appeal must be submitted within fourteen days from the day a notice of admonition was served while the Committee may not impose a stricter penalty[8]. Similar regulations bind university students and PhD students.

Pursuant to Art. 118 par. 1-2 of the Act on the State Fire Service, the disciplinary superior may impose a written admonition against a fireman for a minor breach not justifying the launch of disciplinary proceedings but not later than before the lapse of three months from the moment he or she became aware of the offence. The punished person may appeal against admonition imposed by the disciplinary superior to a competent disciplinary committee while the committee may not rule against him or her[9].

The second instance model is also applied to attorneys. Pursuant to Art. 85 par. 1-2 of the Act on the Advocacy[10], if admonition is a sufficient disciplinary measure to punish an attorney or attorney trainee without the need to impose a disciplinary penalty in the light of the circumstances or in case of a minor breach, Dean of District Bar Council may reduce penalty imposed on an attorney or attorney trainee to dean admonition upon Disciplinary Ombudsman's request. Disciplinary Ombudsman may also submit such a motion after the decision refusing to open disciplinary proceedings or discontinuing such proceedings has become final. Dean may not impose punishment *ex officio*. Imposing dean admonition, Dean may concurrently oblige the attorney or attorney trainee to apologize to the injured party or to another appropriate conduct. Pursuant to Art. 85 par. 3 of the Act on the Advocacy in connection with Art. 48 of the above quoted Act, one may appeal against dean

8 The Act of 27 July 2005 – the Law on Higher Education (consolidated text Journal of Laws of 2012, item 572, as amended) [Ustawa z dnia 27 lipca 2005 r. Prawo o szkolnictwie wyższym (tekst jedn. Dz.U. z 2012 r. poz. 572 ze zm.)].

9 The Act of 24 August 1991 on the State Fire Service (Journal of Laws of 2016, item 603, as amended) [Ustawa z dnia 24 sierpnia 1991 r. o Państwowej Straży Pożarnej (tekst jedn. Dz.U. z 2016 r. poz. 603 ze zm.)].

10 The Act of 26 May 1982 – the Law on the Bar (consolidated text of 2015, item 615, as amended) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (tekst jedn. Dz.U. z 2015 r. poz. 615 ze zm.)].

admonition to a competent disciplinary tribunal within seven days from the day on which the admonition was awarded. Almost analogical solution was envisaged in Art. 66 par. 1-3 of the Act on Legal Advisors[11]. Furthermore, Art. 53 par. 1-2 of the Act on Research Institutes stipulates that Director imposes admonition for minor disciplinary offences after listening to a research worker or research technician while the employee may appeal to a disciplinary committee within fourteen days from the day on which a notice of punishment has been served whilst the committee may not impose a stricter penalty[12]. The same solution has been adopted in Art. 109 par. 1-3 of the Act on the Polish Academy of Sciences[13].

Nearly analogical solution has been applied in Art. 55a par. 1-2 of the Act on the General Counsel to the Treasury[14]. President of the General Counsel may issue a written caution for a minor disciplinary offence not justifying the launch of disciplinary proceedings after listening to a legal advisor. A legal advisor may request the Employment Tribunal competent according to the main seat of the General Counsel to repeal the caution. One is not entitled to cassation against the second instance tribunal's decision. A certain modification of this solution has been applied in Art. 97b of the Act on the Supreme Audit Office[15].

The third model (judicatory) is to reduce discomfort experienced by the accused who committed a minor disciplinary offence even though a collegiate authority – most often a disciplinary committee – is then to decide about it.

This solution was applied to doctors because pursuant to Art. 82 par. 2, Medical Court may discontinue proceedings in case of a minor breach or if the penalty imposed by the ruling was apparently futile due to the type and seriousness of the penalty imposed by a valid judgment for the same act in other proceedings envisaged by the Acts in so far as the injured party's interest does not preclude this[16]. In this case,

11 The Act of 6 July 1982 on Legal Advisors (consolidated text Journal of Laws of 2015, item 615, as amended) [Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (tekst jedn. Dz.U. z 2015 r. poz. 615 ze zm.)].

12 The Act of 30 April 2010 on Research Institutes (consolidated text Journal of Laws of 2016, item 371 as amened) [Ustawa z dnia 30 kwietnia 2010 r. o instytutach badawczych (tekst jedn. Dz.U. z 2016 r. poz. 371, ze zm.)].

13 The Act of 30 April 2010 on the Polish Academy of Sciences (consolidated text Journal of Laws of 2016, item 572, as amended) [Ustawa z dnia 30 kwietnia 2010 r. o Polskiej Akademii Nauk (tekst jedn. Dz.U. z 2016 r. poz. 572 ze zm.)].

14 The Act of 8 July 2005 on the General Counsel to the Treasury (consolidated text Journal of Laws of 2016, item 1313, as amended) [Ustawa z dnia 8 lipca 2005 r. o Prokuratorii Generalnej Skarbu Państwa (tekst jedn. Dz.U. z 2016 r. poz. 1313 ze zm.)].

15 The Act of 23 December 1994 on the Supreme Audit Office (consolidated text Journal of Laws of 2015, item 1096, as amended) [(Ustawa z dnia 23 grudnia 1994 r. o Najwyższej Izbie Kontroli (tekst jedn. Dz.U. z 2015 r. poz. 1096 ze zm.)].

16 The Act of 2 December 2009 on Chambers of Physicians (consolidated text Journal of Laws of 2016, item 522) [Ustawa z dnia 2 grudnia 2009 r. o izbach lekarskich (tekst jedn. Dz.U. z 2016 r. poz. 522)].

discontinuation of disciplinary proceedings due to "a minor breach" is analogical to the discontinuation of criminal proceedings because pursuant to Art. 414 § 1 of the CCP, the court is obliged to discontinue proceedings if it finds "the case to be trivial" (Art. 17 § 1 point 3 of the CCP).

An interesting institution has been envisaged in Art. 109 § 5 of the Act on Common Courts Organization. It stipulates that a disciplinary tribunal may reduce penalty without restriction in case of a disciplinary offence or a minor offence[17]. An analogical solution has been envisaged with regard to proceedings against patent agents (Art. 62 par. 3 of the Act on Patent Agents)[18] and prosecutors (Art. 142 § 5 of the Act on Prosecutors)[19]. According to these regulations, reducing penalty without restriction, a disciplinary tribunal finds that a perpetrator committed a disciplinary offence but imposing any disciplinary penalty from the binding catalogue of penalties is futile.

In **the fourth model**, the legislator does not formally qualify a minor breach as a disciplinary punishable tort but rather as a manifestation of disciplinary liability. Therefore penalty in this model is not a disciplinary penalty but a sanction for a specified trivial offence. A measure of this response is admonition, i.e. the least painful measure in the system of disciplinary liability.

An example the above model are provisions concerning judicial probation officers. Pursuant to Art. 53 par. 1-2 of the Act on Judicial Probation Officers, President of the Regional Court imposes a disciplinary sanction in the form of admonition on a district probation officer and his or her deputy while President of the District Court – on other probation officers. A probation officer may appeal to Minister of Justice or President of the Regional Court, respectively, within three days from the day he or she was notified about the above punishment. Penalty is imposed in a written form and enclosed to the files. A similar regulation binds civil servants (Art. 35 of the Act on Civil Servants)[20] and a certain modification of this solution has been envisaged in Art. 72 of the Act on National Labour Inspectorate[21]. According to Art. 72 par. 1-2 of

17 The Act of 27 July 2001 – the Law on the Law on the Organisation of Common Courts (consolidated text Journal of Laws of 2015, item 133 , as amended) [Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (tekst jedn. Dz.U. z 2015 r. poz. 133 ze zm.)].

18 The Act of 11 April 2001 on Patent Attornies (consolidated text of 2016, item 221, as amended) [Ustawa z dnia 11 kwietnia 2001 r. o rzecznikach patentowych (tekst jedn. Dz.U. z 2016 r. poz. 221 ze zm.)].

19 The Act of 28 January 2016 – the Law on the Public Prosecutor's Office (Journal of Laws, item 177, as amended) [Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze (Dz.U. poz. 177 ze zm)].

20 Act of 16 September1982 on Employees of State Offices (consolidated text Journal of Laws of 2016, item 1511) [Ustawa z dnia 16 września 1982 r. o pracownikach urzędów państwowych (tekst jedn. Dz.U. z 2016 r. poz. 1511)]. See E. Baran, K. Baran, Status prawny urzędników prokuratury, „Prokuratura i Prawo" 2001, No. 11, p. 102, who indicate that the perpetrator must be heard.

21 Act of 13 April 2007 on the National Labour Inspectorate (consolidated text Journal of Laws of 2015, item 640, as amended) [Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy

the above Act, written admonition is imposed by Chief Labour Inspector or Regional Labour Inspector by the Chief Labour Inspector's authorization. The punished employee may challenge the admonition with Chief Labour Inspector within seven days from the day this punishment was imposed on.

The above quoted Acts do not enumerate cases involving minor breaches; they have been merely presented here to indicate the models applied in the Polish legal system. Mutual similarities between these regulations trigger attempts at these provisions' unification. Although the creation of at least one model of minor disciplinary offences appears possible, it is not an easy task still requiring legislative initiative[22].

3. Criteria for determining minor offences

The legislator has not answered the question which criteria qualify a case as a "minor breach" in any of the above presented normative acts. We should remember that disciplinary proceedings belong to the group of repressive proceedings whilst criminal liability in the meaning of Art. 42 par. 1 of the Polish Constitution is the notion embracing disciplinary liability[23]. Due to similarities between criminal law and disciplinary law, it is apparently worth invoking criminal law structures such as "a trivial case" (Art. 115 § 2 of the Criminal Code), or "a minor case" occurring in numerous provisions of the CC, or even the definition of a minor case included in Art. 53 § 8 of the Criminal Fiscal Code, to establish the meaning of a minor disciplinary offence. Pursuant to Art. 115 § 2 of the CC, it should be noticed that "assessing triviality of an act, the court shall consider a type and character of infringed rights, the size of infliction or threatened infliction of harm, a manner and circumstances of the committed act, perpetrator's motifs, a type of violated principles of precaution and a degree of their violation". It is assumed that even though the catalogue of these circumstances is closed, triviality of cases is subject to gradation. Yet, the assessment itself cannot be limited to generalizations and it is necessary to indicate concrete criteria even though they should not be identified with a set of circumstances included in sentencing[24].

On the other hand, a "minor" offence in the meaning of the Criminal Code occurs when the case is «trivial»[25] due to "subjective and objective circumstances

(tekst jedn. Dz.U. z 2015 r. poz. 640 ze zm.)].

22 See the proposals in this respect in the cited work: P. Czarnecki, Postępowanie dyscyplinarne, pp. 389-472.

23 K. Mamak, Konstytucyjne wyznaczniki postępowania represyjnego, (in:) P. Czarnecki (ed.), Postępowanie karne a inne postępowania represyjne, Warszawa 2016, p. 4.

24 W. Wróbel, A. Zoll, (eds.), Kodeks karny. Część ogólna. Tom 1. Komentarz, Warszawa 2016, pp. 946-949.

25 T. Bojarski (ed.), Kodeks karny. Komentarz, Warszawa 2016, p. 390.

of a given factual state", or "subjective and objective circumstances of an act"[26], or "subjective and objective features of an act with particular inclusion of these elements that are characteristic of a given offence"[27].

Comparing the definition of "triviality" and "minor breach", it should be emphasized that the above mentioned gradation may be accomplished only on the basis of the features of a concrete offence; all circumstances must not be provided in an abstract manner, i.e. separated from the circumstances of a given offence being committed. There are no reasons to differentiate this situation on the basis of disciplinary provisions other than strictly criminal provisions. What is more, it seems that a repressive function of disciplinary liability, and sometimes even a reference to apply provisions of the CC and CCP, allow to use the directives of sentencing under Art. 53 of the CC while assessing a minor breach. A large number of these criteria is identical with the criteria of Art. 115 § 2 of the CC. A minor offence occurs when a specified authority believes that admonition or disciplinary interview with a perpetrator shall be sufficient discomfort and formalized proceedings do not have to be initiated.

It appears that a minor disciplinary offence is "such a disciplinary offence (disciplinary tort) which on account of subjective and objective circumstances in a concrete case is characterized by a relatively lower degree of violation of deontological rules, or provisions of law binding representatives of professions where disciplinary or professional liability has been distinguished in relation to a disciplinary offence". Yet it should be assumed that a nature of an offence is not affected by the circumstances external to the act (e.g. the perpetrator's previous criminal record or conduct after committing the act).

Sometimes along official practicality of the doctrine or case law, determinants of a minor breach are attempted to be reconstructed. An example thereof may be the Supreme Court's judgment on judges, according to which "it involves situations where mitigating elements of a subjective and objective nature prevail, particularly if they are trivial for the maintenance of judicial service, whereas a degree of guilt is insignificant. Circumstances external to the act (…) do not affect qualification of a disciplinary offence as a minor breach. A degree of triviality impacts the alleged disciplinary offence too"[28]. With regard to police officers, it has been pointed out that: "Disciplinary offences which are incidental, objectively unintentional and do not result from the police officer's malice, as in the above case, may be qualified as minor breaches; hence the Police authorities should treat them accordingly in relation to

26 R.A. Stefański (ed.), Kodeks karny. Komentarz, Warszawa 2015, p. 1679.
27 M. Filar (ed.), Kodeks karny. Komentarz, Warszawa 2016, p. 1496-1497.
28 The judgment of the Supreme Court of 10 October 2014, SNO 38/14, Lex No. 1537566.

the applicant's complaint"[29]. A minor offence is a peculiar type of a warning for the perpetrator not to continue specific conduct because more painful measures may be enforced in the future. Furthermore, one of the recent rulings acknowledged that "treating a case as a minor breach settles the act's legal qualification, which cannot be connected with or depend on the accused person's personality, his or her attitude, conduct before and after the committed act as well as other circumstances affecting sentencing but external to the act"[30].

It can be claimed that if a one-man authority (Rector, Superior or Dean) issues admonition, they also decide whether a given offence is a minor breach or not. Such authorities are not formally bound by any provisions, i.e. their decisions are taken arbitrarily. However, it should be assumed that they should follow the above mentioned criteria including specificity of a disciplinary offence's description adopted for a given professional group. Thus a minor offence shall be a point located on the axis between quite trivial offences and aggravated offences. However, if a one-man authority decides that the criteria are fulfilled, then it is bound to apply provisions on a minor breach. Hence, even though its decisions are discretionary, they are by all means not random. Moreover, they shall most often be subject to control in the appeal.

4. The course of proceedings in case of a minor disciplinary offence

It should be concluded from the above considerations that sanctions for a minor breach are imposed in special disciplinary proceedings. Therefore it can be claimed that sentencing by a one-man authority for the above offence is a disciplinary procedure. Two questions arise here: firstly, whether principles of ordinary (model) disciplinary proceedings should apply to such a procedure and, secondly, whether a ruling issued in the course of a minor breach may be appealed against.

Referring to the first of the above issues, it should be acknowledged that even though relevant provisions are in so far concise, it seems that such rules will generally be binding, yet not fully. For instance, a person who shall be admonished will have to be heard first; that is to say he or she has the right to defence and to counteract the accusation brought by a Disciplinary Ombudsman. Furthermore, he or she may be supported here by Defence Counsel as it is not forbidden by the law since admonition is most often issued after the closure of investigative proceedings. The authority imposing admonition is obliged to follow the principle of objectivism and assumed innocence.

29 The judgment of the Regional Administrative Court in Warsaw of 9 February 2012, II SA/Wa 2173/11, Lex No. 1121552.

30 The judgment of the Supreme Court of 1 October 2015, SNO 58/15, Lex No. 1813482.

On the other hand, the issue of an appeal against the ruling issued under the course of a minor breach is much more complicated because disciplinary provisions scattered all along the Polish legal system envisage various solutions thereon. Generally, it may be recognized that the first instance model does not envisage appeals. Yet it results from the fact that punishment under the course of a minor breach is not treated in this model as disciplinary proceedings but rather as a form of the corporate power or a requirement to subordinate to the superiors.

In the remaining three models, control in the form of an appeal has been envisaged. Yet it is generally a form of control within disciplinary proceedings. Therefore disciplinary admonition may be appealed against to the court/tribunal (disciplinary committee) which, in principle, may not aggravate a disciplinary ruling. Finding the appeal justified (reasonable), it may uphold a decision of the authority issuing a minor breach. If it finds this decision to be too hasty, it may acquit the person.

Nevertheless, another question arises here: may the ruling issued by a disciplinary committee in the case of admonition imposed by a one-man authority be appealed against? The legislator has not offered one solution. It is most often not implied *expressis verbis*, or provided very rarely. For instance, in the regulations on attorneys (Art. 85 par. 4 of the Act on the Advocacy) or legal advisors (Art. 66 par. 4 of the Act on Legal Advisors), the legislator has straightforwardly indicated that "Disciplinary Tribunal's ruling on the appeal mentioned in par. 3 may not be challenged at all". Unfortunately, in most cases the legislator remains silent. For instance, it does not result from the content of Art. 140 of the Act on Higher Education if academic teachers are entitled to the appeal even though it is deemed admissible in practice[31].

It should be mentioned in a side note that this issue has been very divergently interpreted in the courts' case law with regard to firemen. Nevertheless, it has been eventually assumed that rulings issued by the committee with regard to admonition may be appealed against to an administrative court[32]. How can this dilemma be resolved if the legislator remains silent?

On the other hand, it may be claimed that due to the constitutional right to a trial in disciplinary cases (the standard under Art. 42 par. 1 and Art. 45 par. 1 of the Polish Constitution apply to these cases), court control over minor breaches should be admitted even if admonition has been verified by the collegiate authority. If admonition imposed for a minor disciplinary offence and admonition issued under an ordinary course evoke the same effects, the same rules of appealing against these decisions should be binding.

31 H. Izdebski, J. Zieliński, Prawo o szkolnictwie wyższym. Komentarz, Warszawa 2015, p. 418.

32 The resolution of the Supreme Administrative Court (7) of 10 January 2011, I OPS 4/10, „Orzecznictwo Sądów Polskich" 2011, No. 7-8, item 73.

On the other hand, it may be argued that if a one-man authority may impose solely the most lenient penalty and sometimes be satisfied with listening to a perpetrator, control before a common court should be refused. It should be remembered that revising one-man authority's ruling, the appeal committee may not aggravate the penalty imposed by and thus worsen the accused person's legal status. Moreover, if an appeal against the ruling to a common court is admitted, the accused person will, in principle, have more instances (by one) to challenge the settlement than in the ordinary course of proceedings. Paradoxically, the accused is invalidly provided with an additional measure of appeal in a less serious case. For these reasons, the second opinion should rather be approved of.

5. Conclusion

In the light of the above considerations, the ensuing conclusions can be treated as a general summary of the discussed subject matter.

First of all, a minor disciplinary offence is an institution embracing one of the alternative ways (courses) of disciplinary liability enforcement; yet in cases that are generally more trivial (less socially harmful). The provisions on minor offences may be solely applied to conduct or behaviour satisfying features of a disciplinary offence. It refers only to such minor offences where a degree of violation of obligations or duties by a representative of a given profession is slight, or professional dignity of the practiced job has not been seriously breached. Although the above mentioned stipulations are evaluative and unspecified, a disciplinary authority is obliged to consider whether given conduct is characterized by such a minor breach in the course of pursued proceedings.

Secondly, minor disciplinary offences express the legislator's trust in disciplinary authorities which may qualify a given conduct as an example of such a minor breach in the context of the freedom of requested or imposed penalty. It should be strongly emphasized that even though disciplinary authorities are free to decide about the qualification of a given conduct as a minor case, they do not enjoy full discretion in this respect. The legislator has clearly defined a degree of a disciplinary response to a given category of an act whilst disciplinary authorities should qualify minor disciplinary offences on the basis of all subjective and objective circumstances of a given disciplinary offence taking into account the directives of sentencing referring to them.

Thirdly, although not all disciplinary Acts contain a formulation of the appropriate application of provisions of the Criminal Code or Code of Criminal Procedure, remembering that disciplinary law derives from a wide stream of repressive law, interpreting the term of "a minor breach", it is worth relying on the achievement of criminal law science in the context of such institutions as social

harm of an act, triviality of an act (slight social harm), directives of sentencing, or minor cases. Disciplinary law's discomfort interferes with civil rights by applying disciplinary sanctions; it is generically close to criminal law, or it even partly is its special branch. Nevertheless, specificity of disciplinary law should be taken into account in each case even though the circumstances of the structures of typical criminal law institutions are generally identical.

Fourthly, analyzing the structure of a minor disciplinary offence, we cannot forget about procedural consequences of this institution. Since the discussed notion is a manifestation of peculiarly interpreted opportunism and, additionally, it can be applied to such attitudes that are not characterized by a serious degree of social harm, the right to challenge decisions to a common court may be limited. The above mentioned inconsistencies within this scope should be resolved by the legislator who should determine the conditions of instances in the discussed context more accurately.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.03

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The Model of Disciplinary Proceedings Against Prosecutors – Selected Issues

Abstract: The article discusses possible models of disciplinary proceedings against prosecutors in Poland. In the first, the so-called "corporate" model, disciplinary commissions of both instances are composed only of prosecutors. In the second, the so-called "mixed" model, in the first instance the disciplinary commission, composed only of prosecutors, delivers a judgment and the appeal goes to the court. The last model introduces single disciplinary proceedings for judges, prosecutors, advocates, legal advisors and notaries. In this model cases are heard by courts with the right to appeal the judgment to the Supreme Court. The article seeks to answer the question which model is best adjusted to disciplinary proceedings against prosecutors in Poland.
Keywords: disciplinary proceedings, prosecutor, investigating authority

Introduction

Disciplinary liability of prosecutors is a type of a quasi-criminal legal liability rooted in the sphere of repressive law[1]. A possibility to hold a prosecutor liable in disciplinary proceedings for acts related to his or her functional role is one of the guarantees of the Prosecution Service independence[2]. Although the new Act of

1 See P. Czarnecki, Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego, Warszawa 2013, pp. 61-158 – comprehensively on the definition of the disciplinary responsibility and considerations regarding the relationship between disciplinary responsibility and other forms of liability of legal practitioners. See also in general about the responsibility of prosecutors: W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy, Warszawa 2012.

2 T. Demendecki, (in:) J. Bodio, G. Borkowski, T. Demendecki, Ustrój organów ochrony prawnej. Część szczegółowa, Warszawa 2013, p. 231.

2016[3] came into force, apart from certain positive exceptions[4], changes within the scope of disciplinary proceedings ensuing from it have not responded to fundamental reservations about the shape of prosecutors' disciplinary liability already formulated on the basis of previously binding provisions[5].

The new Act has not changed regulations on the model of disciplinary jurisdiction in the context of investigating authorities merely copying the previous model of disciplinary jurisdiction operating under the Act of 1985[6]. As different solutions within this scope have been proposed in the past, it is worth examining them more closely. A possibility of introducing a different shape of disciplinary jurisdiction continues to incite a lot of controversy mostly due to the fact that prosecutors may be deprived of exclusive competence of disciplinary sentencing in the first and second instance in cases pertaining to them while these powers could be fully or partially handed over to common courts' jurisdiction. For this reason, a purpose of this study will be to present possible models of disciplinary proceedings against prosecutors with regard to the criterion of investigating authority carrying out disciplinary proceedings and answer the question which model is most suitable to address the existing problems of disciplinary proceedings against prosecutors. Other elements that are equally important for the model of disciplinary proceedings such as, among others, competence of Disciplinary Ombudsman , limitation period, or a possibility of challenging disciplinary rulings through cassation or re-opening of the proceedings as well as the issue of transparency of proceedings will not be discussed herein for editorial limitations.

1. Models of disciplinary jurisdiction – general comments

According to the criterion of authorities (panels) adjudicating in these proceedings, three models of disciplinary proceedings may be distinguished for the needs of this study. The first one, which is currently valid, hands over the second

3 Act of 28 January 2016 on the Public Rpsecutir's Office (Journal of Laws of 2016, item 178) [(Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze, Dz.U. poz. 178), hereinafter referred to as Act on Prosecutors.

4 The main point is to ensure, postulated for a long time, publicity for the prosecutor's disciplinary proceedings – see K. Kremens, Jawność prokuratorskich postępowań dyscyplinarnych, „Prokuratura i Prawo" 2015, No. 5, p. 128-142.

5 See for instance: P. Kardas, Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego. Kilka uwag o przesłankach determinujących założenia projektu ustawy o prokuraturze, „Prokuratura i Prawo" 2012, No. 9, p. 44; P. Czarnecki, Postępowanie dyscyplinarne…, *op. cit.*, p. 435 oraz K. Kremens, Odpowiedzialność zawodowa prokuratorów, Warszawa 2010, pp. 18-19.

6 The identical model of disciplinary proceedings was in force pursuant to the Act of 20 June 1985 on the Public Prosecutor's Office (consolidated text Joural of Laws of 2011, No. 270, item 1599, as amended). The new Act on the Public Prosecutor's Office has not changed in this resepct.

instance disciplinary jurisdiction to "corporate" authorities[7], which are solely composed of prosecutors, with a possibility of bringing cassation against the second instance ruling to the Supreme Court.

The second model, conventionally called as "mixed" and described in one of the previously proposed drafts of the Act on Prosecutors of 20 February 2014[8], assumed examination of disciplinary cases in the first instance by the "corporate" court, and in the second instance – by the common court (or the Supreme Court). Subsequently, cassation against the ruling could be submitted to the Supreme Court.

The third model contained in the drafted Act on Disciplinary Proceedings against Individuals Practicing Some Legal Professions of 2013[9] assumed the introduction of uniform disciplinary jurisdiction for judges, prosecutors, attorneys, legal advisors and notaries. According to this model, specially established disciplinary divisions in appellate courts were to sentence in the first instance while in the second instance – the Supreme Court. Cassation against second instance rulings was not admitted[10].

Examples of other solutions, which can be called as sub-models, may also be found in other Acts. For instance, disciplinary proceedings against court executive officers (see the Act of 29 August 1997 on Court Executive Officers and Execution, uniform text: Journal of Laws of 2011, No. 231, item 1376) envisage examination of the case in the first instance by a disciplinary committee whereas in the second instance – by the regional court competent according to the official seat of the accused court executive officer (Art. 75 par. 1-2). At the same time, cassation against the ruling of the second instance is not admitted at all. On the other hand, disciplinary proceedings against tax advisors (the Act of 5 July 1996 on Tax Advisory Services, uniform text: Journal of Laws of 2011, No. 41, item 213) envisages handing over second instance disciplinary proceedings to "corporate" courts and a concurrent possibility of appealing to the common court, i.e. the Court of Appeals – the Court of Employment and Social Security competent according to the place of residence of the accused (Art. 75 par. 1 of the Act on Tax Advisory Services). Cassation to the Supreme Court has not been admitted here too.

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7 The author is aware of the conventionality and certain inadequacy of the use of the term "corporate" in the disciplinary courts of both prosecutors and judges. However, due to the common understanding of this phrase, it will be used as a shorthand for the purposes of this study.

8 The draft of the Act on the Public Proscutor's Office of 20 February 2014 (hereinafter reffered as to the draft of 2014), avaialable at http://legislacja.rcl.gov.pl/docs//2/52748/52767/dokument102521.pdf (accessed: 6 December 2016).

9 Druk sejmowy nr 1202 (dalej jako: proj. jsd.) dostępny na stronie internetowej: http://orka.sejm.gov.pl/Druki7ka. nsf/0/3B6C514FACAC465AC1257B35005DBAED/%24File/1202.pdf (accessed: 6 December 2016).

10 See. Art. 26 par. 1 of the draft of a uniform disciplinary court. Paragraph 2 of this provision allows only the cessation of the Ombudsman from any final decision of a disciplinary court terminating disciplinary proceedings.

2. The "corporate" model of disciplinary jurisdiction against prosecutors

Pursuant to the currently valid regulation, in the first instance, disciplinary proceedings are carried out before Disciplinary Tribunals while in the second instance – before Appellate Disciplinary Tribunals (Art. § 1 of the Act on Prosecutors). A number of disciplinary tribunals and a general number of members of disciplinary tribunals are established by the National Council of Prosecutors (Art. 43 § 3 of the Act on Prosecutors). Disciplinary judges themselves are elected among all prosecutors by the Assembly of Prosecutors, i.e. collegiate authorities located in Appellate Prosecutors' Offices, and the Meeting of Prosecutors in the National Prosecution General Service (Art. 45 and 47 of the Act on Prosecutors). The composition of a disciplinary tribunal is designated by the Chairman according to the list of all judges of a given tribunal in the order the cases are submitted, but the composition of the tribunal is always made of at least one prosecutor from the organizational prosecution unit equal to the one where the accused was employed or performed official activity at the moment of the commission of an act (Art. 147 § 1 of the Act on Prosecutors)[11].

A full "corporate nature" of prosecutors' disciplinary jurisdiction has been broken by a possibility of bringing cassation against a final and valid disciplinary ruling passed in the second instance to the Supreme Court (Art. 163 § 1 of the Act on Prosecutors). The scope of cassation is wider than the one envisaged in the provisions on criminal proceedings[12]. According to the Constitutional Tribunal, such a state of affairs does not arise doubts and is considered to be a sufficient judicial control of disciplinary rulings passed against prosecutors by Prosecutors' Disciplinary Tribunals[13].

11 Derogation from the order in which cases are brought to court is possible only in case of illness of a member of the court or for another important reason, which should be indicated in the order on the appointment of the hearing or the meeting.

12 In criminal proceedings, cassation may be brought only because of the deficiencies listed in art. 439 CCP. (the so-called absolute reasons for appeal) or other gross violation of law, if it could have a significant impact on the content of the decision, but it can not be brought solely because of the disproportionate penalty (Article 523 par. of the CCP). Art. 163 para. 1 of the Act on Prosecutors, on the other hand, states that cassation may be brought both because of a gross violation of the law and a gross incommensurability of the disciplinary penalty.

13 In the judgment of the Constitutional Tribunal of 25 June 2012, sygn. K 9/10, OTK-A 2012, No. 6, item 66, the Constitutional Tribunal held that "the scope of the judicial control proceedings in disciplinary matters designated by the challenged provisions is in line with art. 45 para. 1 of the Constitution. The Court considered that the adoption of a control model in which cassation can be brought only because of "gross violation of law" and "gross incommensurability of a disciplinary sanction" falls within the limits of freedom of law by the ordinary legislature and does not violate the principle of fair hearing and resulting from it an obligation of a proper shape of the court procedure."

3. The "mixed" model of disciplinary jurisdiction

The reasoning to the draft of 2014 underlined that a purpose of the "mixed" model endeavours to achieve "objectivization of first instance disciplinary tribunals' rulings by the introduction of appellate courts' cognition" because the "corporate" model of disciplinary jurisdiction has been exhausted[14]. This draft assumed serious changes in disciplinary jurisdiction against prosecutors whilst its most vital element was entrusting the second instance disciplinary jurisdiction with appellate courts or the Supreme Court. Disciplinary Tribunal in the Prosecution General and disciplinary tribunals in appellate prosecutors' offices were to become first instance courts in disciplinary cases (Art. 169 § 1 of the draft of 2014) depending on the accused[15]. Furthermore, the changes were to embrace decentralization of the first instance disciplinary jurisdiction and modification of a manner of election of disciplinary tribunals' members. The second instance disciplinary jurisdiction against prosecutors was to be transferred to the Supreme Court with regard to cases heard in the first instance by the Disciplinary Tribunal in the Prosecution General and appellate courts with regard to cases heard in the first instance by disciplinary tribunals in appellate prosecutors' offices (Art. 169 § 2 of the draft of 2014). A competent appellate court according to the venue of the second instance disciplinary tribunal was to be the court within the jurisdiction of the first instance disciplinary tribunal (Art. 172 § 1 of the draft of 2014).

Disciplinary Tribunal in the Prosecution General was to be composed of prosecutors of the Prosecution General[16] (Art. 171 § 1 of the draft of 2014). The composition of disciplinary tribunals in appellate prosecutors' offices was to include prosecutors of the appellate prosecutors' office as well as prosecutors from competent regional prosecutors' offices according to the relevant appellate prosecutors' office in a number reflecting the number of prosecutors of the appellate prosecutors' office as well as prosecutors from competent regional prosecutors' offices according to the relevant appellate prosecutors' office in the same number elected by the Assembly of

14 The reasons of the draft of 2014, p. 71.

15 The Supreme Court was to be appointed to hear cases against the Prosecutor General, prosecutors of the General Prosecutor's Office, Chief Executive Officer, Director of the Main Commission, Director of the Lustration Office, appellate prosecutors and their deputies, district prosecutors and their deputies, as well as prosecutors delegated to the General Prosecutor's Office, Ministry of Justice, National School of Judiciary and Public Prosecution, if the disciplinary offenses were committed during the period of delegation. In turn, disciplinary courts established in the appellate prosecutor's offices were to conduct proceedings against other prosecutors (Article 170 para. 1 of the draft of 2014) in accordance with the local jurisdiction corresponding to the place of committing the act which was the subject of proceedings before the disciplinary court (Art. 170 para. 2 of the draft of 2014).

16 The Prosecutor General and his deputies as well as the disciplinary spokesman were excluded from this group.

Prosecutors in the appellate prosecutors' office (Art. 171 § 2 of the draft of 2014)[17]. Moreover, the draft introduced a mixed adjudicating panel in every case, which meant that a disciplinary tribunal had to be randomly appointed each time so that it included a prosecutor of the appellate prosecutors' office, a prosecutor of the regional prosecutors' office and a prosecutor of the district prosecutors' office (Art. 171 § 10 of the draft of 2014). The composition of the second instance disciplinary tribunal was to be randomly selected from the list of all judges of a given court; it had to include at least one judge who sentenced in criminal cases on permanent basis (Art. 171 § 4 of the draft of 2014).

This model appeared to meet the requirements formulated in supranational legal regulations in the best way. Although the UN's Guidelines of 1990 on the Role of Prosecutors[18] did not stipulate which authority should carry out disciplinary proceedings against prosecutors[19], already the Council of Europe Recommendation of 2000[20] and the so called Explanatory Memorandum enclosed to Recommendation[21] assumed that rulings in the first instance disciplinary proceedings should be examined by the tribunal composed of prosecutors while the second instance was to be independent and sovereign, which apparently may only be assured by a court.

17 Moreover, the prosecutors of the Institute of National Remembrance, in number corresponding to the number of appellate prosecutors, jointly elected by the General Assembly of the Chief Prosecutors and the Assembly of Prosecutors of the Lustration Office. The head of the Main Commission appoints one of the selected prosecutors to disciplinary courts in individual appellate prosecutor's offices.

18 Art. 21 and 22 Wytycznych dotyczących roli prokuratorów (Guidelines on the Role of Prosecutors) przyjęte na VIII Kongresie Organizacji Narodów Zjednoczonych o zapobieganiu przestępczości i traktowaniu przestępców, Hawana 27 sierpnia – 7 września 1990 r., available in English at http://www.ohchr. org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx (accessed: 6 December 2016).

19 One of the giudes states that disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision, which is in favor of conducting prosecutor disciplinary proceedings by judges who guarantee the most far-reaching objectivism because of the value of iindependence assigned to this office. Another statement of the Guidelines inicates that the decision shall be subject to independent review which also should be interpreted that also in this case it should be a judicial body.

20 Zasada 5e Rekomendacji Rec (2000) 19 przyjętej przez Komitet Ministrów Rady Europy 6 października 2000 r. Rola prokuratury w systemie wymiaru sprawiedliwości w sprawach karnych (The Role of the Public Prosecution in the Criminal Justice System), https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM# (accessed: 6 December 2016).

21 Memorandum wyjaśniające (Explanatory Memorandum) do Rekomendacji RE Rec (2000)19, p. 7, https://wcd. coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1465390&SecMode=1&DocId=838058&Usage=2 (accessed: 6 December 2016) (wskazano, iż obowiązek rozpoznania sprawy dyscyplinarnej w drugiej instancji przez niezależny i niezawisły organ nie dyskwalifi kuje w żaden sposób możliwości rozpoznania sprawy w pierwszej instancji przez organ o charakterze administracyjnym albo hierarchicznym).

4. The model of uniform disciplinary jurisdiction for individuals practicing some legal professions

The draft of uniform disciplinary jurisdiction (hereinafter – udj.) should be explained in more details here. It was initially submitted in the Fifth Term Sejm as a governmental draft in 2006[22]. It spurred discussion in the legal world evoking a lot of controversy and crushing critique[23]. The main objection against the draft was its unconstitutionality, i.e. inconsistency with Art. 17 of the Constitution and the ensuing principle of entrusting local governments with the charge of public confidence professions. Works on this draft were interrupted because the Fifth Term Sejm came to an end. The draft returned, however, on 29 August 2012 as a private members' bill of the Parliamentary Club Solidarity Poland during the Seventh Term Sejm[24] to be withdrawn by the applicant on 4 February 2013[25] only to be resubmitted four years later as the draft registered under Parliamentary Paper No. 1202. It was then referred to first reading. The draft contained the identical model of proceedings, system of authorities and principles of procedure as the original one; yet it failed to include comments and observations raised to the draft and did not stand a larger chance to become an Act[26]. Support for the draft was withdrawn on 14 December 2014 before second reading[27].

22 Zob. druk sejmowy nr 970 V Kadencji Sejmu, http://orka.sejm.gov.pl/Druki5ka.nsf/0/CCCC0111D05A3488C12571EF004C5803/$fi le/970.pdf (accessed: 6 December 2016).

23 P. Czarnecki, Postępowanie dyscyplinarne…, *op. cit.*, pp. 404-417 – zbiorczo prezentuje stanowisko przedstawicieli wszystkich zawodów prawniczych wobec projektu. Zob. także niektóre głosy w dyskusji nad projektem: A. Bojańczyk, W sprawie dwóch rozwiązań procesowych projektu ustawy o nowym ustroju dyscyplinarnym niektórych zawodów prawniczych, „Palestra" 2007, No. 9/10; K.K. Świeczkowski, Postępowanie dyscyplinarne wobec osób wykonujących zawody prawnicze, „Prokurator" 2006, No 3. See also the opnions on the draft of 2006 inter alis P. Winczorek, T. Stawecki, Opinia prawna w sprawie zgodności z Konstytucją RP projektu ustawy o postępowaniu dyscyplinarnym wobec osób wykonujących niektóre zawody prawnicze z dnia 7 marca 2006 r. and A. Bojańczyk, Opinia do projektu ustawy o postępowaniu dyscyplinarnym wobec osób wykonujących niektóre zawody prawnicze (druk sejmowy nr 970) z dnia 14 sierpnia 2007 r. http://orka.sejm.gov.pl/IEKSBAS.nsf/0/C125728000417C20C125734600430931?OpenDocument (accessed: 6 December 2016).

24 See druk sejmowy nr 1048, http://orka.sejm.gov.pl/Druki7ka.nsf/0/3B6C514FACAC465AC1257B35005DBAED/%24File/1202.pdf (accessed: 6 December 2016).

25 See Informacja Marszałka Sejmu RP do druku nr 1048 z dnia 6 lutego 2013 r., http://orka.sejm.gov.pl/Druki7ka. nsf/0/075720DD229758FBC1257B0F00390B9A/%24File/1048-001.pdf (accessed: 6 December 2016).

26 See on the project P. Czarnecki, Postępowanie dyscyplinarne…, *op. cit.*, pp. 423-424. See also Stanowisko Rządu z 14 czerwca 2013 r. wobec poselskiego projektu ustawy o postępowaniu dyscyplinarnym wobec osób wykonujących niektóre zawody prawnicze (druk nr 1202), http://orka.sejm.gov.pl/Druki7ka.nsf/0/6F48CFBB29F497E7C1257B8F00362019/%24File/1202-s.pdf (accessed: 6 December 2016).

27 See Informacja Marszałka Sejmu RP do druku nr 1202 of 16 December 2014. http://orka.sejm.gov.pl/Druki7ka.nsf/0/1A453B8F8ED93860C1257DB20031A269/%24File/1202-005.pdf (ac-

Despite an apparent lack of a possibility to introduce such a solution now due to serious constitutional doubts[28], this draft is still worth analyzing. It proposed to introduce a uniform mechanism of sentencing in disciplinary cases involving legal professions such as common court judges and prosecutors of common organizational units of prosecution service including the retired ones, as well as prosecutor's assessors, attorneys and attorney trainees, legal advisors and legal advisor trainees, court executive officers, court executive officer's assessors and trainees, notaries, notaries' assessors and trainees (Art. 1 of the draft of udj.). At the same time, the draft envisaged to maintain existing prerequisites of disciplinary liability separate for each legal profession in individual Acts (Art. 2 of the draft of udj.)[29].

Pursuant to the draft, appellate courts were to become first instance disciplinary tribunals while disciplinary divisions were to be established for this purpose within appellate courts; the Supreme Court was to become the second instance disciplinary tribunal (Art. 4 of the draft of udj.). The competence of the first instance tribunal was to be designated by the official venue of service in case of prosecutors and judges, or a seat – in case of attorneys, legal advisors, notaries and court executive officers (Art. 5 of the draft of udj.). Legitimate disciplinary judges were to become judges of a given appellate court except its President and Deputy Presidents (Art. 6 par. 2 of the draft of udj.).

A lot of criticizing arguments were raised against the draft both in 2006 and after it was resubmitted; yet they were not absolute[30]. It was even argued that the effect of

cessed: 6.12.2016 r.).

28 Although this issue does not seem to be as obvious as it recognizes the environment (see the statement of Deputy Minister of Justice M. Królikowski during the debate on the project, reported by "Gazeta Prawna" of 18 April 2013, which, however, clearly contradicts the government's position expressed in response to the bill of 14 June 2013), this is clearly pointed out by A. Bojańczyk. See. A. Bojańczyk, Opinia do projektu…, *op. cit.* See also the judgment of the Constitutional Tribunal of 25 June 2012, K 9/10, OTK-A 2012, No. 6, item 66 (The proceedings before the Tribunal took place abecause of the request submitted by the Ombudsman to examine the constitutionality of provisions regulating the scope of judicial review of disciplinary proceedings of lawyers, legal advisors, notaries and prosecutors. In the opinion of the Tribunal, the current form of cassation proceedings enables a real and effective control of judgments of disciplinary courts, which is why judicial review of judgments issued in disciplinary proceedings by advocates, legal advisers, notaries and prosecutors held by the Supreme Court should be considered as a control that meets both constitutional and convention standards).

29 In the opinion of the draftsman, "[in] this way, the specifity of performing a given legal profession will be respected and the standards of professional ethics specified by particular groups will be respected. Also, constitutionally entrusted to professional self-governments, custody over the performance of the profession will be preserved (see Uzasadnienie projektu jednolitego sądownictwa dyscyplinarnego).

30 A. Bojańczyk pointed out in 2006 that "both from the technical and legal point of view, unifying the model of the disciplinary proceedings and creating a uniform act of disciplinary proceedings undoubtedly makes sense and deserves approval" – A. Bojańczyk, W sprawie…, *op. cit.*, pp. 97-98. See also Stanowisko Rządu z dnia 14 czerwca 2013 r…, *op. cit.*, p. 2 (It was indicated, firstly,

uniformity in the form of the liquidation of differences between separate disciplinary proceedings was likely to permit development of uniform disciplinary practice in the future[31]. Undeniably, it would certainly benefit all legal professions. However, the shape of solutions itself proposed by the drafters was seriously criticized. According to A. Bojańczyk, "disciplinary jurisdiction is an element of «custody over a due performance of a profession» of public trust"[32]. Moreover, the Constitution Tribunal's case law was invoked, according to which a task of the professional self-government is "the observance of the right quality – substantially and legally – of the activities composing «the performance of professions»"[33]. Yet the submitted draft fully abolished the participation of self-government from disciplinary proceedings. The government's opinion on the draft, on the other hand, emphasized that even if all constitutional and purposeful aspects were ignored, the introduction of uniform jurisdiction for individuals practicing some legal professions would have to trigger serious social consequences resulting from the transfer of entire disciplinary jurisdiction to common courts and Supreme Court's cognition[34]. It would inevitably entail an increased case load of these authorities whilst a number of cases carried out annually is not insignificant at all[35].

Conclusion

The current model of disciplinary proceedings against prosecutors based on the "corporate" model apparently requires further changes. Apart from some defects thereof as, e.g., prolonged proceedings often resulting in the limitation of disciplinary offences, one of the problems is the structure of disciplinary tribunals criticized for their "corporate nature", which may evoke certain doubts in the context of objectivism of the rulings they pass. This model, which was upheld by the new Act on Prosecutors

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that "this proposal is not consistent with the interpretation of art. 17 of the Constitution of the Republic of Poland and the principle of entrusting local governments with custody over the performance of public trust professions", and secondly that corporate disciplinary courts have ethical behavior patterns related to the jurisdiction of a given legal profession and "are much more able to understand and distinguish ethical behavior, which should characterize her member").

31 *Ibidem*, p. 98.

32 *Ibidem*, p. 102.

33 See the judgment of the Constitutional Tribunal of 18 February 2004, P 21/02, ZU/OT K-A 2004, No. 2, item 9.

34 Stanowisko Rządu z dnia 14 czerwca 2013 r…, *op. cit.*, p. 2.

35 There were only 51 disciplinary proceedings against notaries in 2011, but against attorneys in the same period 1337 (Stanowisko Rządu z dnia 14 czerwca 2013 r…, *op. cit.*, p. 5-6). The possible increase in the burden of ordinary courts was pointed out also by W. Marchwicki, Adwokackie postępowania dyscyplinarne – postrzeganie w opinii publicznej oraz propozycje zmian, (in:) A. Bodnar, P. Kubaszewski (eds.), Postępowania dyscyplinarne w wolnych zawodach prawniczych, Warszawa 2013, p. 52.

of 2016, may be contrasted with the model of uniform disciplinary jurisdiction for individuals practicing some legal professions. However, this proposal, which has been widely criticized for its unconstitutionality, arises serious doubts too. They are connected with a possible excessive case load of appellate courts which could be burdened with trivial disciplinary cases that are now heard by corporate disciplinary committees. Despite these arguments, although this proposal is interesting and may even be prospective, it cannot be preserved due to diversity of legal trainings for individual legal professions and, most of all, distinctiveness of their duties and ethical models they should follow[36]. It obviously does not mean that uniform disciplinary jurisdiction (for example in the USA) guarantees that disciplinary proceedings against prosecutors are actually carried out frequently and effectively. Just the opposite, they are absolutely rare, which is often criticized[37]. Hence it appears that the establishment of uniform disciplinary jurisdiction is not in itself a remedy for the problems of disciplinary proceedings carried out against prosecutors in Poland. Therefore the answer to the necessary reform of disciplinary jurisdiction of prosecutors and at least partial objectivization of the case law appears to be the "mixed" model of disciplinary jurisdiction submitted in 2014, according to which "corporate" disciplinary tribunals would sentence in the first instance whereas appellate courts (or the Supreme Court) would sentence in the second instance. Perhaps we should return to this idea. Such a structure of disciplinary jurisdiction of prosecutors would also better fulfil postulates expressed in acts of international law referring to prosecutors.

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36 Although the author of this study in the past expressed hope about the possibility of considering the adoption of such a model (K. Kremens, Odpowiedzialność..., *op. cit.*, p. 18-19 and continues to believe that this idea should arouse interest and lead to discussion on the model of disciplinary liability of legal practitioners in Poland, and consequently also on the shape of legal education and the legitimacy of maintaining separate training for representatives of various legal professions, currently on the ground content of art. 17 of the Constitution, it seems that there is no possibility of introducing such a model.

37 See inter alia D. Keenan, D.J. Cooper, D. Leibowitz, T. Lerer, The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, The Yale Law Journal Online 2011, No. 121, pp. 203-265, a także o problemach z odpowiedzialnością dyscyplinarną prokuratorów w odniesieniu nie tylko do Stanów Zjednoczonych Ameryki Północnej: R.F. Wright, M.L. Miller, The Worldwide Accountability Defi cit for Prosecutors, „Washington & Lee Law Review" 2010, vol. 9, No. 4, pp. 1587-1620.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.04

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Disciplinary Procedure in Polish Special Services in the Light of the Concept of a Fair Trial Exemplified by the Disciplinary Procedure of the Internal Security Agency

Abstract: The incentive for contributing this paper is the planned great reform of Polish Special Services. The study attempts to formulate some requirements that should be met by disciplinary procedure. This goal is achieved by analyzing the effective disciplinary procedure in the Internal Security Agency (ABW), the largest branch of Polish Special Services, in the prism of the concept of a fair trial. The assessment of the disciplinary procedure in ABW leads to the conclusion that the effective law has many shortcomings. Major drawbacks are a lack of establishment of the supreme rule of disciplinary procedure and lack of a clear definition in the application of the general rules of criminal law within the domain of disciplinary procedure. The paper concludes that the shortfalls illustrated herein should be eliminated as fast as possible in order to adjust the disciplinary regime to modern standards.
Keywords: disciplinary procedure, special services, fair trial

Special services are specific institutions in a democratic state. The nature and burden of tasks special services are entrusted with empowers them with several rights whose exercise implies significant interference in the civil rights and freedoms. At the same time, statutorily determined tasks of special services entail that officers on duty encounter the most dangerous manifestations of crime, very often supported by organized crime groups, and sometimes (as in the case of spying) even foreign and hostile countries. The above facts imply that fulfilling operational, reconnaissance and procedural activities, officers of special services are subject to extremely intense and diverse pressure. In extreme cases such pressure may lead to the breach of their official oath and eventually result in the violation of law, improper performance of their duties or conduct contrary to the professional ethics.

The above mentioned circumstances imply that maintenance of discipline and respect of the law by special services officers are of incredibly considerable importance. One of the basic mechanisms assuring the observance of the rule of law

within the sphere of special services are provisions creating the system of disciplinary liability[1]. Disciplinary norms must be formulated in a way which will make the ensuing model of liability an efficient and effective mechanism strengthening the rule of law in the operation of special services. At the same time, the envisaged solutions must respect general principles in force in a democratic state of law.

The media have recently informed about the plan of a profound reform of special services[2]. For this reason, it appears necessary to analyze valid disciplinary provisions referring to the largest special service unit, i.e. Internal Security Agency (hereinafter ABW). A purpose of the analysis is to draw attention to the existing imperfections of the current system of disciplinary procedure so that these flaws could be eliminated from the provisions on new services.

In the current legal status, disciplinary liability referring to ABW has been specified in Chapter 10 of the Act of 24 May 2002 on the Internal Security Agency and Intelligence Service[3]. Special procedural issues are contained in the Regulation of Prime Minister of 20 December 2004 on Granting Awards and Pursuing Disciplinary Proceedings against Officers of the Internal Security Agency[4]. In the face of this status,

1 Due to the functions and powers exercised by the special services, the issue of control over these institutions is an issue of particular importance in a democratic state of law. The model of controlof of special services that are currently in force in Poland is a multi-entity and multi-dimensional system. The control competencies over the operational and procedural activities of special services were entrusted to various entities that perform their activities in the field of different aspects of the activities of special services. Some control entities and their mechanisms are internal and located within a given service – undoubtedly this is a character of a system of disciplinary responsibility. More about the control of special services: A. Taracha, Czynności operacyjno-rozpoznawcze aspekty kryminalistyczne i prawnodowodowe, Lublin 2006, pp. 292-317; J. Gryz, Teoretyczne aspekty funkcjonowania służb specjalnych RP, "Studia i materiały" 2012, No. 1, p. 86; D. Pożaroszczyk, Prawne mechanizmy służące zapewnieniu przestrzegania praworządności w wojskowych służbach specjalnych, (in:) M. Karpiuk, M. Czuryk (eds.), Prawo wojskowe, Warszawa 2015, pp. 271-284. Zagadnieniu kontroli nad służbami specjalnymi w perspektywie międzynarodowej poświęcona jest praca W.K. Smidt, U. Poppe, W. Krieger, H. Müller-Enbergs (eds.), Geheimhaltung und Transparenz: demokratische Kontrolle der Geheimdienste im internationalen Vergleich, Berlin – Münster 2007.

2 It seems that currently, two solutions are competing: the first assumes merging the Internal Security Agency with the AW and establishing the National Security Agency, the second transfer of all special services to the new Ministry of State Protection see: http://www.gazetaprawna.pl/artykuly/995010,kaminski-zreformuje-sluzby-specjalne-ministerstwo-ochrony-panstwa.html (accessed: 26 November 2016).

3 Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency (Journal of Laws of 2015 item 1929, as amended) [Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu (tekst jedn. Dz.U. z 2015 r. poz. 1929 ze zm.).

4 Regulation of the President of the Council of Ministers of 20 December 2004 on the awarding of distinctions and conducting disciplinary proceedings against officers of the Internal Security Agency (consolidated text Journal of Laws of 2014, tem 60) [Rozporządzenie Prezesa Rady Ministrów z dnia 20 grudnia 2004 r. w sprawie udzielania wyróżnień i przeprowadzania

the first requirement that should be considered in the provisions on the new special service is a postulate to abolish regulation of the issues concerning disciplinary liability in the sub-statutory act[5]. The legitimacy of statutory regulation of disciplinary law is supported by the fact that even though the disciplinary system does not create a strictly criminal liability, it indeed completes and strengthens it in a specific way confirming the circumstance that punishment is not limited to the sphere of the state criminal law[6]. Disciplinary liability is by all means repressive liability[7]. Disciplinary provisions undeniably impose specific burdens on the persons involved, which may result in the restriction of civil rights and freedoms. Due to their severity, some disciplinary sanctions considerably surpass discomfort or pain of penalties and penal measures envisaged in the Criminal Code[8]. At the same time, in a democratic state of law, each normative regulation which permits interference in the civil rights and freedoms must have a status of an Act. It is explicitly and unanimously stipulated in Art. 31 par. 1 of the Constitution, according to which any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute.

Another problem ensuing from the valid disciplinary provisions referring to ABW is a lack of the supreme principle establishing the ABW officers' disciplinary liability. The fact that no structural principle of disciplinary law has been contained in the provisions on ABW while only prerequisites of this liability[9] have been indicated, i.e. under Art. 144 and 145 of the Act on ABW, committing a crime or offence and

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postępowań dyscyplinarnych wobec funkcjonariuszy Agencji Bezpieczeństwa Wewnętrznego (tekst jedn. Dz.U. z 2014 r. poz. 60)].

5 The same postulates S. Maj, Odpowiedzialność dyscyplinarna w służbach mundurowych. Możliwość uchwalenia wspólnej procedury, (in:) P. Jóźwiak, K. Opaliński (eds.), Węzłowe problemy prawa dyscyplinarnego w służbach mundurowych. II seminarium z cyklu „Odpowiedzialność dyscyplinarna w służbach mundurowych", „Biblioteczka Kwartalnika Prawno-Kryminalistycznego" 2012, No. 2, p. 40 and 42. In this direction the draft (not enacted) of the new Internal Security Agency Act was also going in this direction, see: the draft of the Act on the Internal Security Agency of 1 August 2013, p. 86, avaibale on the website http://bip.msw.gov.pl/bip/projekty-aktow-prawnyc/2013/22385,Projekt-ustawy-o-Agencji-Bezpieczenstwa-Wewnetrznego.html (accessed: 26 November 2016).

6 It is worth mentioning an opinion of M. Cieślak, who recognized the disciplinary law as a special branch or a generic version of criminal law, M. Cieślak, Polskie prawo karne. Zarys systemowego ujęcia, Warszawa 1994, pp. 22-23.

7 L. Gardocki, Prawnokarna problematyka sędziowskiej odpowiedzialności dyscyplinarnej, (in:) J. Giezek (re.), Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka, Kraków 2006, p. 191, see laso the judgmenet of the Regional Administrative Court in Poznań of 1 April 2009, IV SA/Po 475/08, Lex No. 533530.

8 P. Jóźwiak, Instytucja ułaskawienia – refleksje na płaszczyźnie odpowiedzialności dyscyplinarnej w służbach mundurowych, (in:) P. Jóźwiak, K. Opaliński (eds.), Węzłowe problemy…, *op. cit.*, pp. 29-33.

9 On the distinction between the principle of responsibility and its premises, see. A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, Zobowiązania, Warszawa 2004, pp. 206-207.

breaking service discipline as well as other cases stipulated in the Act, ensues the question whether disciplinary liability referring to ABW is based on the principle of guilt, or whether it is objectivised liability based on the civil law structures of risk or equity[10]. It should be noticed here that disciplinary liability in uniformed services based directly on the principle of guilt has been enshrined by the Act on the Police[11], State Fire Service and Prison Service[12]. On the account of the above solutions, a failure to determine in Art. 144 and 145 of the currently valid Act on ABW and AW (Intelligence Agency) the rule establishing disciplinary liability may imply that disciplinary liability of ABW officers does not depend on guilt thus bearing a status of objective liability entailing specific negative consequences solely on the basis of the existence of a causal connection between human conduct and the ensuing effect. The conceded justification of the claim according to which disciplinary liability could be based on the objective principle may be found in the intention to aggravate disciplinary provisions, which is motivated by the argument that a nature of threats being combated and assigned tasks whose fulfilment is of fundamental importance for Poland's security decide about the fact that liability within the ABW structures should be more severe than liability of police officers, firemen or prison service officers. Not negating the need for particularly harsh discipline in special services, it should be noticed that the purposively justified interpretation permitting objective attribution to the effect within the disciplinary system is absolutely inacceptable for axiological reasons. It has already been mentioned that disciplinary liability is a repressive liability which imposes on liable individuals specific burdens that by their very nature enter into the sphere of constitutionally protected rights and freedoms. The same as criminal sanctions, interference resulting from the application of the disciplinary system affects the most personal rights. This fact unequivocally supports subordination of disciplinary liability to the principle of guilt. In the judgment of 19 March 2007 rendered in connection with the restriction of the right to defence, the Constitutional Tribunal[13] unambiguously decided that "Art. 42-45 as well as Art. 78 of the Constitution shall be applied to assess not only strictly criminal regulations but, respectively, also other repressive regulations including disciplinary liability. Similar to criminal proceedings, the legislator is obliged to formulate provisions

10 It should be emphasized that in civil law, in relation to the liability of the ex-tort, the reference to the principles of risk and equity plays a complementary role. The guiding principle of the liability regime for tort is the principle of guilt, which is clearly expressed in art. 415 of the Civil Code. See more A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *op. cit.*, pp. 206-208.

11 Act of 6 April 1990 on the Police (consolidated text Journal of Laws of 2016, item 1782) [Ustawa z dnia 6 kwietnia 1990 r. o Policji (tekst jedn. Dz.U. z 2016 r. poz. 1782)].

12 Act of 9 April 2010 – on the Prison Service (Journal of Laws of 2016, item 713) [Ustawa z dnia 9 kwietnia 2010 r. o Służbie Więziennej (Dz.U. z 2016 r. poz. 713)].

13 The judgment of the Constitutional Tribunal of 19 March 2007, K 47/05 (Journal of Laws of 2007, No. 57, item 390).

regulating any type of disciplinary proceedings in a manner assuring appropriate level of the right to defence in the substantive and formal aspect"[14]. Referring to the principle of proportionality, the Constitutional Tribunal also noticed in the above mentioned judgment that "with regard to uniformed services (as well as in other cases), limitation of the rights of individuals must be appropriately justified, in other words – it must be proportional". In the face of the invoked judgment, a repressive nature of ABW officers' liability decides about the application of guarantees and principles that are fundamental to the entire repressive law, including the principle of guilt, to this liability[15]. For this reason, evaluating disciplinary law referring to ABW, it should be claimed that a lack of explicitly regulated structural principle of this liability is by all means a defect of the currently valid Act. This evaluation is not changed by the content of Art. 28 par. 1 of the Regulation of Prime Minister of 20 December 2004 determining circumstances that should be taken into account when disciplinary penalty is imposed and restricted without reservation. This provision clearly points out to a degree of guilt as one of the circumstances that should be taken into account while imposing disciplinary penalty. This solution satisfies standards of contemporary repressive law assuming that severity of disciplinary penalty should not exceed a degree of guilt. Only punishment proportional to a degree of guilt, including the entire complexity of the situation in which the act ensuing disciplinary liability has been committed, and imposed on the basis of the analysis of all circumstances supporting both aggravation and mitigation of liability may be recognized as fair. However, pointing to guilt as a circumstance that should be taken into account in imposing penalty is not univocal with founding the disciplinary system on the principle of individual liability and culpability, and it is not sufficient as such. Considering that unambiguity of the principle of guilt as the basis of disciplinary liability in the light of literary, systemic and historical interpretation is not self-evident at all and, at the same time, including the fact that for guarantee reasons, disciplinary liability may only be based on this principle, the issue of the structural principle of disciplinary law should be univocally regulated.

A failure to unambiguously base the disciplinary system referring to ABW on the principle of guilt is naturally connected with a lack of reference to the fundamental principle of contemporary criminal law, i.e. the principle of assumed innocence[16]. The principle of assumed innocence is considered to be an immanent element of

14 An identical position regarding the validity under the disciplinary regime of all guarantees provided for in the second chapter of the Contitution was taken by the Constitutional Tribunal in the judgment of 8 December 1998, K 41/97 (Journal of Laws of 1998, No. 158, item 1043).

15 See also D. Korczyński, Wina jako przesłanka odpowiedzialności dyscyplinarnej funkcjonariuszy służb mundurowych, (in:) P. Jóźwiak, K. Opaliński (eds.), Węzłowe problemy…, *op. cit.*, p. 14 and 30.

16 The principle of assumed innocence as a standard of the discplinary proceedings was indicated in the disciplinary proceedings applicable for the police, where art. 135g § 2 semtence 1 of the Act

a democratic state of law connected with the principle of inalienable and inherent human dignity expressed in Art. 30 of the Polish Constitution. The guarantee to be treated as an innocent person has been expressed both in the Polish Constitution and binding acts of international law[17]. It is one of the fundamental principles designating individuals' position in the society and their relations to the authorities. Analyzing the operation of the principle of assumed innocence within the area of disciplinary law, we should pay attention to the judgment of the Constitutional Tribunal of 29 January 2002[18], according to which "regulation of the principle of assumed innocence in the Constitution among provisions on freedoms and human and civil rights means the extended scope of application of the principle beyond the framework of criminal proceedings".

A failure to specify the principle upon which liability in disciplinary law referring to ABW is based on and, consequently, a failure to include the principle of assumed innocence therein, are derivatives of a general defect of current provisions manifested in a failure to regulate the issue of appropriate application of substantive criminal law regulations in disciplinary proceedings[19]. In the judgment of 5 November 2003[20], analyzing provisions specifying the disciplinary system referring to common court judges, the Supreme Court decided that a lack of univocal regulation of the application of substantive criminal law regulations in disciplinary proceedings is an actual loophole of the legal system which must be filled in by interpretative endeavours. In the above invoked judgment, the Supreme Court decided that the application of the principle of accurate response[21] codified in Art. 2 § 1 point 1 of the Code of Criminal Procedure within the area of disciplinary law depends on the observance

of 6 April 1990 on the Police stipulates that the accused is considered innocent until his guilt is proved and confirmed by a valid decision.

17 The principle of assumed innocence was stipulated in 42 § 3 of the Constitution, art. 14 of the International Covenant on Civil and Political Rights of 19 December 1966 (Journal of Laws of 1977, No. 38, item 167) and in art. 6 he Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome of 4 November 1950 (Journal of Laws of 1993. No. 61, item 284).

18 Jugdement of the Constitutional Tribunal of 29 January 2002 r., K 19/01 (Journal of Laws of 2002, No 10, item 107).

19 On the need for according application of substantive law in the course of disciplinary proceedings see A. Herzog, Odpowiedzialność dyscyplinarna prokuratorów – co trzeba zmienić, „Prokuratura i Prawo" 2013, No. 12, p. 7; W. Kozielewicz, Stosowanie prawa karnego materialnego i procesowego w postępowaniu dyscyplinarnym w sprawach sędziów (zarys problematyki), (in:) L. Leszczyński, E. Skrętowicz, Z. Hołda (eds.), W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska, Lublin 2005, p. 464.

20 The judgment of the Supreme Court of 5 November 2003, SNO 67/03, Lex 471880.

21 The principle of accurate response is valid also in the disciplinary law applicable to the Internal Security Agency. § 53 of the Prime Minister's Regulation of 20 December 2004 on the awarding of distinctions and conducting disciplinary proceedings against officers of the Internal Security Agency states that in matters not regulated in the regulation, with regard to the disciplinary

of fundamental principles of criminal law in disciplinary proceedings. According to the Supreme Court, the fulfilment of the fundamental principle of accurate response, which within the area of disciplinary law takes a form of the principle ordering to hold disciplinary liable only a person who has committed an act ensuing disciplinary liability, requires the observance of basic principles of criminal law. It is also necessary to appropriately apply solutions determining the time when a prohibited act has been committed, the provisions on the form of an act and the form of its commission as well as principles specifying circumstances excluding liability. Being guided by the importance of appropriate application of criminal law provisions within the area of disciplinary law, the Supreme Court indicated a manner of using substantive law regulations in connection with a disciplinary case deciding that "during disciplinary proceedings, solutions envisaged in the Criminal Code should be referred to under the principle of *analogia iuris*. Obviously, the provisions of substantive criminal law must be appropriately applied in disciplinary proceedings, i.e. *they must be: a) applied directly, b) applied with suitable modifications, or c) refused to be applied due to specific difference while particular prudence is necessary*"[22]. The necessity to apply the provisions of substantive criminal law appropriately in disciplinary proceedings was confirmed by the Supreme Court in the judgment of 14 July 2009[23]. In this judgment the Supreme Court rightly noticed that the issue of applying the provisions of substantive criminal law in disciplinary proceedings is not self-evident. Considering the guarantee nature of criminal law and structures envisaged therein, a lack of obviousness with regard to the application of these regulations within the area of disciplinary system the Supreme Court has emphasized may entail far-reaching, negative consequences. For this reason, new regulations thereon should be unambiguous.

A peculiar derivative of the insufficient inclusion of the criminal law structure in disciplinary law referring to ABW is the catalogue of disciplinary penalties contained in Art. 146 of the Act on ABW. Qualification of a warning (caution) of insufficient professional suitability to service as the most severe punishment, which is more

proceedings, the provisions of the Act of 6 June 1997. r. – Code of Criminal Procedure shall be applied accordingly.

22 Similar opinion about according application of the provisions of the Code of Criminal Procedure in the disciplinary proceedings was expressed by the Supreme Court in the Resolution of the Composition of the Seven Judges of 28 September 2006, I Kzp 8/06, Lex 193136, OSNKW 2006/10/87.z dnia 28 września 2006 r., I Kzp 8/06, Lex 193136, OSNKW 2006/10/87.

23 The judgment of the Supreme Court of 14 lipca 2009, SNO 42/ 09, Lex 575812, OSNKW 2010/5/44. Also the Regional Administartive Court in Warsaw in its judgment of 4 October 2006, II SA / Wa, 908/06, Lex 284495, declared that the appropriate application of substantive criminal law in the disciplinary proceedings was acceptable and held that "There is no reason to use other interpretations of unintentional guilt for the purposes of disciplinary proceedings against a Police officer than that which is set out in criminal law." Some doubts about this ruling was expressed by D. Korczyński, Wina jako przesłanka…, *op. cit.*, pp. 15-16.

lenient only from the dismissal from service, should be found inadequate. It seems that a much more painful penalty is stripping an officer off his rank. This penalty is more aggravated than a caution of insufficient professional suitability not only in the aspect of honour[24] as it additionally entails more painful financial consequences. Pursuant to the Regulation of Prime Minister of 7 October 2002 on perks (allowances) to ABW officers' salaries[25], the allowance for a Private amounts to PLN 600 whereas the allowance for the lowest rank in the Officer Corps, i.e. the allowance for a Second Lieutenant, amounts to PLN 980. With regard to higher ranks, the allowances are still higher. The allowance for a Colonel amounts to PLN 1160 whereas Brigadier General receives PLN 1270. At the same time, obtaining an officer rank under the ordinary course takes from eight to ten years.

Analyzing disciplinary law referring to ABW in the context of a fair trial, we should also draw attention to one of the fundamental elements of this concept, i.e. the right to effective measures of appeal and their exercise within the disciplinary system. Pursuant to § 7 point 2 of the Regulation of Prime Minister of 20 December 2004, ABW Chief Security Officer is competent to impose disciplinary penalty involving degradation to a lower rank, caution of insufficient professional suitability and the most severe disciplinary penalty – dismissal from service. At the same time, § 32 par. 4 stipulates that one is not entitled to appeal against the decision of ABW Chief Security Officer passed in disciplinary proceedings whereas the punished person may only apply for re-examination of his or her case. It should be noticed here that a repressive nature of disciplinary liability ensues that a strictly administrative application for re-examination of the case[26] is not an adequate instrument of the rights protection within the area of disciplinary law. Discussing a profound reform

24 It should be noted that the deprivation of the rank of officer is also one of the consequences of imposing a criminal measure in the form of deprivation of public rights, which is a punitive measure pursuant to art. 40 § 2 of the Penal Code and it may be ordered in the event of a sentence of imprisonment for a period not shorter than 3 years for an offense committed because of an incentive deserving special condemnation. The doctrine emphasizes that the penal measure in the form of deprivation of public rights derives from those penalties which resulted in deprivation of legal protection, expulsion, loss of worship and rights. In the Code of 1932, the equivalent of deprivation of public rights were additional penalties in the form of the loss of civil and civic rights of honorary rights. D. Szeleszczuk, Komentarz do art. 40, (in:) A. Grześkowiak, K. Wiak (eds.), Kodeks Karny. Komentarz. Warszawa 2012, p. 301.

25 Regulation of the President of the Council of Ministers of 7 October 2002 on allowances for the salary of officers of the Internal Security Agency (consolidated text Journal of Laws of 2016, item 1025) [Rozporządzenie Prezesa Rady Ministrów z dnia 7 października 2002 r. w sprawie dodatków do uposażenia funkcjonariuszy Agencji Bezpieczeństwa Wewnętrznego (tekst jedn. Dz.U. z 2016 r., poz. 1025)].

26 On the application for re-examination of the case see G. Łaszczyca, (in:) G. Łaszczyca, Cz. Martysz, A. Matan (eds.), Kodeks postępowania administracyjnego: Komentarz, Tom I do art. 1-103, Warszawa 2010, pp. 185-187.

of special services, it is also worth considering postulates[27] reported in the doctrine about transferring disciplinary jurisdiction from administrative courts to common courts, and more absolute (complete) subordination of disciplinary proceedings to the procedural criminal law[28]. The argument for leaving cases embracing disciplinary liability in the jurisdiction of administrative courts is a formal nature of disciplinary settlement which takes a form of an administrative decision[29] as well as an administrative nature of service relationship[30] arising in the course of appointment (promotion), which is characterized by a considerable degree of subordination and inequality. On the other hand, subordination of disciplinary cases to the jurisdiction of common courts is mainly supported by a repressive nature of disciplinary liability. Taking into account the above mentioned arguments, it should be held that the emphasized purpose of disciplinary proceedings, i.e. imposing a penalty for the committed offence, seems to be an argument deciding about determination of a proper procedure to resolve a disciplinary case. Even though disciplinary liability stems from a professional (service) administrative relationship, it finally becomes self-contained (self-reliant), and due to its focus on penalty, it becomes closer to a criminal law relationship. For this reason, a final decision on disciplinary liability should be made on the basis of the provisions of criminal procedure applied by a common court. Such a solution, including an autonomous nature of disciplinary liability, will permit to resolve disciplinary cases by the use of procedure which is better adjusted to this purpose and assures more guarantees.

Summing up the above presented comments on selected solutions of disciplinary law referring to ABW, which have been inspired by the planned reconstruction of the system of Polish Special Services, it should be held that the regulation of

27 Statements of this content were also submitted during the nationwide conference "Models of the disciplinary proceedings in the light of the principles of a fair trial" organized by the Department of Criminal Proceedings of the Faculty of Law of the University of Białystok on 17 March 2014.

28 S. Maj, Odpowiedzialność dyscyplinarna..., *op. cit.*, p. 41.

29 On the relationship between between the material nature of the case and the mode of its hearing see T. Romer, Właściwość sądów administracyjnych i sądów powszechnych w sprawach z zakresu prawa pracy, (in:) M. Błachucki, T. Górzyńska (eds.), Aktualne problemy rozgraniczania właściwości sądów administracyjnych i sądów powszechnych, Warszawa 2011, p. 59 and 64.

30 The view that the nature of a legal relationship is an argument for subjecting disputes arising from this relationship to the appropriate type of proceedings is expressed, inter alia, in: W. Sanetra, Właściwość sądów powszechnych (sądów pracy i ubezpieczeń społecznych) i sądów administracyjnych w sprawach z zakresu ubezpieczeń społecznych, (in:) M. Błachucki, T. Górzyńska (eds.), Aktualne problemy..., *op. cit.*, p. 77. The real nature of the dispute in defining the proper procedure for its resolution requires to consider also M. Jaśkowska, Konstytucyjno prawne podstawy sądownictwa powszechnego i administracyjnego oraz delimitacja właściwości tych sądów, (in:) M. Błachucki, T. Górzyńska (eds.), Aktualne problemy..., *op. cit.*, p. 26. At this point, it should be noted that following the postulate mentioned above, the Author expresses doubts about subjecting disciplinary matters to the jurisdiction of administrative courts, *ibidem*, p. 29.

disciplinary system currently operating in ABW is far from being perfect[31]. Due to this, it should be postulated that creating new regulations on special services and establishing disciplinary provisions therein, the legislator should pay more attention to the requirements ensuing from the concept of a fair trial because only appropriate reference to this idea will allow to remove currently existing flaws of disciplinary law and adapt it to the standards a repressive regulation should satisfy in a democratic state of law.

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31 In addition to the doubts discussed in the presented text, other issues concerning the disciplinary law of uniformed services are also raised in the literature on the subject. A series of questions regarding individual solutions of disciplinary regimes of uniformed services raises S. Maj, Odpowiedzialność dyscyplinarna..., *op. cit*., p. 41.

Maj S., Odpowiedzialność dyscyplinarna w służbach mundurowych. Możliwość uchwalenia wspólnej procedury, (in:) P. Jóźwiak, K. Opaliński (eds.), Węzłowe problemy prawa dyscyplinarnego w służbach mundurowych. II seminarium z cyklu „Odpowiedzialność dyscyplinarna w służbach mundurowych", "Biblioteczka Kwartalnika Prawno-Kryminalistycznego" 2012, No. 2.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.05

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Disciplinary Liability of Legal Advisors and Legal Advisor Trainees in the Face of the Principle of a Fair Trial

Abstract: The legal advisory service is a liberal profession, a profession of public trust. The aim of this paper is to analyze the related disciplinary procedure and its specifics. The disciplinary liability of legal advisors regulates norms of conduct in a way that respects the rules of a fair trial. Full regulation of disciplinary responsibility is achievable through corporate law, in which reference is made to the Code of Criminal Procedure. Judicial authorities and self-governing bodies within the profession supervise the correct conduct of legal advisors. We also have to mention international law regulations whose standards of a fair trial are reflected in the Polish legislation.
Keywords: legal advisor, disciplinary liability, procedure, Act

A legal advisor is a liberal legal profession of public trust. According to some authors, "a purpose of strict principles of disciplinary liability – applicable to the professions of public trust respectively – is mainly focused on clients' interest"[1]. As far as the fulfilment of the above is concerned, provisions regulating disciplinary liability of the members of legal advisors' self-government are particularly important. According to a dictionary definition, responsibility is readiness to accept the consequences. Depending on a degree of subordination of an individual or some community (legal advisors' self-government) to the requirements of specific regulations, discipline may be higher, lower or none. A source of every discipline as well as the executor and source of sanctions are external factors[2]. Legal provisions are to guarantee an appropriate standard of client services and provide legal advisors and legal advisor trainees with an outlined nature of consequences connected with giving legal aid. Legal advisors and legal advisor trainees may be subject to different

1 H. Izdebski, P. Skuczyński (eds.), Etyka prawnicza: stanowiska i perspektywy, Warszawa 2013, p. 277.
2 S. Jedynak, Mały słownik etyczny, Bydgoszcz 1994, p. 52.

systems of liability. The assessment of collected sources and materials on the basis of which this article has been written allows to formulate a thesis according to which Polish provisions exhaustively regulate disciplinary liability of legal advisors. Valid regulations embrace guidelines on including specificity of the profession of a legal advisor. The observance of legal advisors' rights is additionally guaranteed by the inclusion of criminal procedure principles in disciplinary proceedings and compliance with the principle of disciplinary liability's independence of other systems of liability. A purpose of the study is to analyze disciplinary proceedings including their specificity, establish the extent of disciplinary liability's independence of other possible systems of liability, and find out what mechanisms within these proceedings allow to observe the principles of a fair trial.

Fulfilling their official duties, legal advisors and legal advisor trainees are subject to legal provisions creating different bases of liability, namely: civil, criminal, corporate (professional) and disciplinary. The Act on Legal Advisors of 6 July 1982 (hereinafter referred to as the ALA) regulates a special nature of liability connected with the profession of a legal advisor or legal advisor trainee. A corporate regulation of disciplinary liability starts with the indication of offences activating this liability. Above all, the catalogue of acts is open and embraces an extremely wide range of all culpable acts undermining the profession's interest and dignity and resulting in its improper performance[3]. Art. 64 par. 1 of the ALA stipulates that legal advisors and legal advisor trainees are subject to disciplinary liability for culpable and improper performance of the legal advisor's profession as well as for acts contrary to the legal advisor's oath or principles of legal advisor's ethics. Since 2004, the above mentioned provision has distinguished disciplinary liability for a failure to conclude a mandatory insurance agreement – this obligation is applicable solely to legal advisors. Apart from positive prerequisites, the Act also indicates exclusions of disciplinary liability. Namely, it does not embrace acts breaching regulations on professional order and discipline covered by employee's corporate liability regulated in Art. 108 of the Employment Code and special Acts[4].

Apart from indicating prerequisites of the liability, the above invoked provision of the ALA also denotes subjects disciplinary liability applies to. Respectively, a legal advisor and legal advisor trainee bear disciplinary liability after being entered into relevant lists – of legal advisors and legal advisor trainees. The Supreme Court's decision of 1 October 2004 SDI 7/40 confirms a group of entities subject to disciplinary liability and explains that "it is a natural effect of the assumption according to which corporate authorities such as Regional and Higher Disciplinary Tribunal cannot sentence in the case of subjects who are not members of the corporation. Hence

3 R. Tokarczyk, Etyka prawnicza, Warszawa 2007, p. 191.

4 Z. Klatka, Ustawa o radcach prawnych: komentarz, Warszawa 1999, p. 356 and n.

a person crossed out from the list of legal advisors may not be held liable before the above mentioned corporate authorities of the legal advisors' self-government"[5].

Furthermore, a legal advisor bears liability for an act committed when he or she was entered in the list of legal advisor trainees[6]. The invoked opinion of Z. Klatka is supported by the valid case law, i.e. "when the accused person is already not a legal advisor trainee but a legal advisor, the catalogue of disciplinary penalties is not subject to any limitation. Then a choice of a penalty does not depend on the accused person's status at the moment of the act's commission because the moment of sentencing is decisive. The Act introduces only one exception – sentencing to disciplinary penalty is excluded in the form of the suspended right to practice a profession of a legal advisor if during sentencing the accused person is still a legal advisor trainee. Yet such a restriction is not envisaged if the accused person is already a legal advisor"[7].

Significantly enough, disciplinary liability for undermining profession's dignity refers not only to conduct during official or public activity. An attitude of a legal advisor or legal advisor trainee in their private life is very important too[8]. A legal advisor may practice his or her profession within the framework of various contractual relations, that is on the basis of an employment agreement or in an employment relationship established on the basis of a unilateral act of a state body. Moreover, legal advisors and legal advisor trainees may pursue a business activity and provide legal services within this framework. Taking into account various forms of performed duties which are connected with a highly differentiated range of subordination, the scope of disciplinary liability is also distinct. The self-government itself undoubtedly plays the most important role in exercising custody over the performance of the profession in the form of private law firms. In other contractual relations, apart from the self-government, there is an additional supervisory authority – an employer or superior who may, for example, hold an employee liable for conduct inconsistent with mandatory provisions being in force in a given entity[9]. For this reason, Z. Klatka expressed his opinion about the form of practicing the profession and its importance for the nature of a liberal profession underlying that regardless of the form in which the profession is performed, it must always be free and independent[10].

The principle of statutory definiteness, which is characteristic of criminal law, is of limited importance in disciplinary proceedings due to the lack of a closed catalogue

5 Lex No. 568870.
6 Z. Klatka, Ustawa…, *op. cit.*, p. 356
7 Decision of the Supreme Court of 29 January 2013, SDI 38/12, Lex No. 1297721.
8 Z. Klatka, Ustawa…, *op. cit.*, p. 357.
9 P. Przybysz, Prawo do sądu w sprawach dyscyplinarnych, „Państwo i Prawo" 1998, No. 8, p. 68.
10 Z. Klatka, Aktualne problemy etyki radców prawnych a struktura wolnych zawodów prawniczych, (in:) H. Izdebski, P. Skuczyński (eds.), Etyka prawnicza: stanowiska i perspektywy, Warszawa 2013, p. 96.

of disciplinary offences[11]. Taking into account only generally outlined prerequisites of liability, their assessment is not always uniform. The judicature proposes certain clues saying, for example, that disciplinary proceedings "*may assess legal advisor's conduct in performing a given professional activity, e.g. meeting deadlines and formal requirements or failure to attend court hearings*"[12]. According to the case law, we may distinguish conduct that is subject to disciplinary liability depending on the factual state. For instance:

"Unreasonable conviction of the party's professional attorney about a motion for reasons to the judgment submitted in due time during time limits opened for the appeal resulting from Art. 369 § 2 of the Code of Criminal Procedure (CCP) confirms a failure to maintain due diligence and care about the party's interest (Art. 168 § 1 of the CCP)"[13].

"A legal advisor is subject to disciplinary liability for culpable failure to pay contributions for the legal advisors' self-government (Art. 64 par. 1 of the Act of 6 July 1982 on Legal Advisors – Journal of Laws No. 19, item 145). On the other hand, a legal advisor is not subject to the above liability for a failure to submit an employment questionnaire upon the request of a self-government body"[14].

A legal advisor trainee bears liability for improper performance of his or her official duties and acts committed contrary to the legal advisor trainee's oath[15]. In the decision of 29 January 2013 the Supreme Court ruled that "The profession of a legal advisor, a legal advisor trainee is preparing to practice, is a profession of public trust; therefore legal advisor trainees are bound by the principles of professional ethics as well. Due to the above, it may be held that a legal advisor trainee should observe ethical and moral principles not only in connection with the performance of a legal advisor trainee's duties. This particularly refers to the sphere of a legal activity"[16].

Minister of Justice plays an important role in disciplinary proceedings because he or she supervises the activity of the legal advisors' professional self-government within the scope and forms specified by the Act. Since 2007 Minister of Justice has additionally been entitled to order initiation of proceedings against a legal advisor or legal advisor trainee[17]. Moreover, Disciplinary Ombudsman serves Minister of Justice with the official copies of decisions on the initiation of proceedings, and informs him or her about submission of a motion to launch disciplinary proceedings in a disciplinary tribunal, or referral of a motion for punishment to the Dean of the Regional Council of Legal Advisors' Association. Minister of Justice has the right

11 P. Przybysz, Prawo do sądu…, *op. cit.*, p. 68.
12 The Decision of the Supreme Court of 11 May 2009, I UZ 12/09, OSNP 2011/3-4/42.
13 *Ibidem*.
14 The Resolution of the Supreme Court of 26 April 1990, III PZP 2/90, OSNC1990/12/142.
15 Z. Klatka, Ustawa…, *op. cit.*, p. 360.
16 The Decision of the Supreme Court of 29 January 2013, SDI 37/12, Lex No. 1297720.
17 Journal of Laws of 2010, No. 10, item 65, as amended [Dz.U. z 2010 Nr 10, poz. 65 ze zm.].

to appeal against rulings terminating proceedings, access case files and request information about the results of disciplinary proceedings at every stage thereof. Moreover, Minister of Justice has the right to request final disciplinary rulings or decisions together with the attached case files to be handed over to him or her. Disciplinary Tribunal immediately sends the official copy of a final ruling to notify Minister of Justice.

Regulation of Minister of Justice on the Principles of a Course of Disciplinary Proceedings against Legal Advisors and Legal Advisor Trainees[18] was in force for a relatively long time, i.e. from 1984 to 2007. At present, disciplinary proceedings are also carried out under the provisions of the Code of Criminal Procedure (hereinafter referred to as the CCP)[19]. Due to the provision ordering appropriate application of the CCP, however, the procedure should include differences resulting from the Act on Legal Advisors. In cases not regulated in the Act on Legal Advisors, provisions on criminal procedure must be applied appropriately[20]. To be more precise, under and in connection with Art. 741 of the ALA, examining appeals against decisions of disciplinary ombudsmen on the refusal to initiate disciplinary proceedings or discontinue already launched proceedings, regional disciplinary tribunals should apply the provisions of the Code of Criminal Procedure, respectively, i.e. Art. 306 § 1 of the CCP in connection with Art. 325a § 2 of the CCP, Art. 329 of the CCP, or Art. 521 of the CCP[21]. On the other hand, there is a decisive opinion of the Supreme Court ordering application of some provisions of the CCP directly. For example, according to the judgment of the Supreme Court of 25 July 2018, SDI12/13, "the provisions of Art. 433 § 2 of the CCP and Art. 457 § 3 of the CCP should be applied directly in disciplinary proceedings against legal advisors". The Court underlined that it is justified by the content of the quoted provisions, namely: "The first of the above provisions obliges the appellate court to consider all conclusions and charges indicated in the appeal whereas Art. 457 § 3 of the CCP specifies the required content of the grounds to the appellate court's judgment stipulating that it should include the reasons for the court's judgment and explanations why the charges and conclusions of the appeal were found reasonable or unreasonable by the court"[22]. Furthermore,

18 Regulation of the Minister of Justice on the Procedure and Rules of Disciplinary Proceedings in Relation to Legal Advisers and Trainee Legal Advisers of April 6, 1984 (Journal of Laws of 1984, No. 27, item 138, as amended) [Rozporządzenie Ministra Sprawiedliwości w sprawie trybu i zasad postępowania dyscyplinarnego w stosunku do radców prawnych i aplikantów radcowskich z dnia 6 kwietnia 1984 r., Dz.U. Nr 27, poz. 138].

19 W. Bujko, Postępowanie dyscyplinarne, (in:) A. Bereza (ed.), Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania, Warszawa 2011, p. 239.

20 Art. 741 of the Act on Legal Advisors (Journal of Laws of 2010, item 133, as amended) [Ustawa o radcach prawnych (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.)]

21 W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy, Warszawa 2012, pp. 296-297.

22 The Judgment of the Supreme Court of 25 July 2013, SDI 12/13, Lex No. 1363207.

in the part devoted to disciplinary liability of not only legal advisors, W. Kozielewicz specifies which Articles of the CCP are applied respectively in disciplinary proceedings and provides their list. What is more, the author indicates which CCP's regulations should absolutely be not applied in disciplinary cases[23].

The repealed paragraph 2 of Art. 67 of the ALA set forth that initiation and pursuit of disciplinary proceedings depended on the circumstances excluding prosecution under the CCP. Since 2007, however, only paragraph 1 of Art. 67 of the ALA has been binding, which lays down optional suspension of proceedings until the end of criminal proceedings. The judicature points out that disciplinary proceedings should be suspended pending the outcome of criminal proceedings. Such an opinion is justified due to the functions of a criminal judgment, which may rebut the principle of assumed innocence. Two pursued proceedings may effect in an undesirable result, i.e. discrepant decisions on guilt. Nevertheless, according to the opposite opinion, which is coherent with the principle of separateness of disciplinary proceedings, pending criminal proceedings are not an obstacle justifying suspension of disciplinary proceedings under Art. 22 § 1 of the CCP[24].

There are also opinions saying that disciplinary proceedings may be re-instated through the application of criminal procedure provisions, however, "the application of the institution of re-opened proceedings regulated in the CCP due to the lack of any regulation thereof in the corporate Act is possible only if this necessity was a result of the need to assure a further course of the proceedings and to pass a decision. On the other hand, it is inadmissible to award the party with extraordinary rights aimed at the withdrawal of a final ruling"[25].

Disciplinary proceedings are divided into three stages: investigation, proceedings before a disciplinary tribunal and enforcement proceedings[26].

There are the following parties to disciplinary proceedings:

– Prosecutor – before Regional Disciplinary Tribunal it is Disciplinary Ombudsman, and before Higher Disciplinary Tribunal – Chief Disciplinary Ombudsman ;
– the accused – a legal advisor or legal advisor trainee against whom disciplinary proceedings have been launched. If the accused person dies before the end of disciplinary proceedings, they will be continued upon the request of his or her spouse, relatives in the direct line, or brother or sister within two months

23 W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów…, *op. cit.*, pp. 71-72.

24 I. Bogucka, Odpowiedzialność dyscyplinarna, (in:) P. Skuczyński, S. Sykuna, Leksykon etyki prawniczej. 100 podstawowych pojęć, Warszawa 2013, p. 264.

25 The Decision of the Supreme Court of 15 November 2012, VI KZ 14/12, Lex No. 1228526.

26 Art. 671 of the Act of 6 July 1982 on the Legal Advisors (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.) [Journal of Laws of 2010, No. 10, item 65, as amended)].

from his or her death. The accused person may have a defence counsel, legal advisor or attorney;
– the injured party – a person whose legal interest has been directly infringed by the legal advisor or legal advisor trainee's conduct.

Article 70 of the ALA regulates limitation of penalty for disciplinary offences. Pursuant to this provision, disciplinary proceedings cannot be launched after the lapse of three years from the moment the act has been committed. With regard to the violation of the freedom of speech within legal limits and substantive need, the above time limit is shortened to six months. Significantly, punishment for a disciplinary offence is fully ceased after the lapse of five years from its commission while with regard to the violation of the freedom of speech under Art. 11 par. 2 of the ALA – after two years. We may come across opinions in the literature according to which limits of punishment are absolutely too short. Punishable persons may undertake activities aimed at a delay of disciplinary proceedings. For instance, such activities may involve a failure to pick up pleadings or inform about a new address of residence. On the other hand, invalid service entails a possibility of effective limitation of punishment. In result, effective avoidance of liability may entail that counting from the day on which the act has been committed, the required limitation of punishment will actually take effect[27]. Activities of Disciplinary Ombudsman or Chief Disciplinary Ombudsman undertaken in a given case interrupt running of limitation. A purpose of this regulation is to efficiently prevent avoidance of liability for committed offences. Pursuant to the Supreme Court's decision: "Limitation of a disciplinary offence specified in Art. 70 par. 1 point 2 of the Act of 6 July 1982 on Legal Advisors starts running on the day on which the Ombudsman learnt about the offence committed by a specific person first time"[28]. The above decision of the Court further indicates that serving the accused person with a decision on initiating investigative proceedings and bringing charges is an activity which interrupts the limitation period[29] . This may have a mobilizing impact on the resolution of disciplinary cases in a reasonable time.

The limitation of punishment of offences which concurrently satisfy the features of crimes regulated in the Criminal Code is either less likely or more difficult to achieve. Pursuant to Art. 70 par. 2 of the ALA, such offences are statute-barred after the lapse of time indicated in the Criminal Code.

Disciplinary liability envisaged in the ALA is a mechanism of care (custody) assuring a proper performance of the profession. It reflects the self-government's duty contained in Art. 17 of the Polish Constitution[30]. The Legal Advisors' Self-

27 W. Sarnowski, Postępowanie dyscyplinarne, "Radca Prawny" No. 4, 2004, p. 25.
28 The Decision of the Supreme Court of 24 October 2003, III DS 1/03, OSNP 2004/14/253.
29 *Ibidem*.
30 Z. Klatka, Aktualne problemy…, *op. cit,* p. 96.

Government is composed of different bodies which must fulfil specific tasks. The authority competent to hear a case connected with a disciplinary offence is Regional Disciplinary Tribunal of the Regional Bar Association the accused person is a member of at the moment of launching disciplinary proceedings[31]. Article 702 par. 2 of the ALA specifies which authority is competent when the offence examined in one case has been committed by two or more perpetrators entered in the list of legal advisors or legal advisor trainees in different Associations. In the above described situation, a competent authority is Disciplinary Tribunal of the region where the offence has been committed. On the other hand, if the venue where the act has been committed cannot be established, a competent authority is Regional Disciplinary Tribunal of the region where disciplinary proceedings have been first initiated. Under circumstances not envisaged by the law whereby there is a dispute about the jurisdiction, Higher Disciplinary Tribunal is authorized to resolve this issue.

Disciplinary Tribunal is composed of legal advisors adjudicating in a collegiate body. Under the Constitution, which refers the notion of a court solely to authorities operating within the judicial power, disciplinary tribunals are not courts. For this reason, the principle of the right to a trial is fulfilled exclusively through the control exercised by state courts[32]. Disciplinary tribunals are qualified differently under Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[33]. Considering the opinion held in the European Court of Human Rights' case law[34], which is further depicted by, among others, M. Nowicki in the comments to Art. 6 of the Convention, a substantive meaning of the notion of a court itself is actually vital. Accordingly, the court fulfils a judicial function, i.e. it resolves cases within its jurisdiction in compliance with the rule of law in the proceedings carried out pursuant to the legally established procedure. In the meaning of the above mentioned legal base, the court should satisfy specific requirements[35]. One of them is autonomy (sovereignty). Lack of dependence on the executive power and the parties to the proceedings is guaranteed under Art. 73 of the ALA. In the light of the above quoted regulation, the court is solely subject to the Acts whereas the control of the validity of judgments is exclusively vested in another court – indicated directly in the corporate Act. On this basis, one may appeal against the judgment of a regional disciplinary tribunal to Higher Disciplinary Tribunal. The fact that disciplinary proceedings are carried out independent of criminal or other disciplinary proceedings whose results – similar to the rulings rendered by civil courts and administrative bodies – are not

31 Art. 702, par. 1 of the Act on the Legal Advisors (Journal of Laws of 2010, No. 10, item 65, as amended) [(Ustawa o radcach prawnych (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.)].

32 W. Bujko, Postępowanie dyscyplinarne…, *op. cit.*, p. 242.

33 Journal of Laws of 2010, No. 90, item 587, as amended [Dz.U. z 2010 r. Nr 90, poz. 587 ze zm.]

34 The Judgment of ECHR of 29 April 1988 r.10328/83 Belilos v. Switzerland, Lex No. 81048.

35 M. Nowicki, Komentarz do art. 6 Konwencji o ochronie praw człowieka i podstawowych wolności, Lex, 2013.

binding therein, emphasizes disciplinary proceedings' autonomy and independence of entities administering justice. The fact that disciplinary tribunals' members are not professional judges is not an obstacle in recognizing this authority as a court. Another condition is a sufficiently long term of office of this authority's members – the term of office of disciplinary tribunals' members amounts to three years. They may fulfil their functions maximum for two consecutive terms of office. Next, courts should apply the procedure including guarantees appropriate for a given type of a case. Here, the corporate Act perfectly meets the above condition since the valid ALA's norms include specificity of a legal advisor's profession. The content of this Act contains substantive law prerequisites of disciplinary liability, bodies competent to hear cases and the most important principles of procedure applicable to a limited group of subjects, i.e. legal advisors and legal advisor trainees.

The European Court of Human Rights in Strasburg decided that in the meaning of Art. 6 par. 1 of the Convention, the notion of a court also covers disciplinary authorities such as professional bodies of liability[36]. The comments to Art. 6 of the Convention underline that members of a court may be persons who are not professional judges. Nevertheless, the court must be autonomous and impartial because a fair trial cannot be guaranteed without these features[37]. Furthermore, Art. 73 of the ALA secures autonomy and independence of entities administering justice because they are solely subject to the provisions of law with regard to sentencing.

The provisions on disciplinary liability of legal advisors reflect basic principles resulting from the criminal procedure (enshrined by the Constitution), i.e. two-tiered jurisdiction, openness and the right to defence[38]. An open nature of disciplinary proceedings is manifested in Art. 705 of the ALA, which stipulates that Minister of Justice and other persons authorized by him or her may access case files and request information about the results of disciplinary proceedings at every stage of the proceedings as well as request valid disciplinary rulings or decisions together with the attached case files. Moreover, an open and public nature of the proceedings is further expressed in Art. 703 of the ALA, pursuant to which judgments may only be rendered in a hearing.

The principle of two-tiered jurisdiction expressed in Art. 704 of the ALA implies that the parties and Minister of Justice are entitled to appeal against rulings and decisions terminating the proceedings within fourteen days from the day of serving the official copy of the ruling or decision together with the reasons and instructions on the course and term of appealing. This regulation is reflected in the case law. Namely, "a legal advisor whose sentence was suspended by the first instance

36 The Judgment of ECHR of 23 June 1981, Le Compte, Van Leuven and De Meyere A. 43, p. 23.

37 M. Nowicki, Komentarz do art. 6…, *op. cit.*, Lex 2013.

38 A. Korzeniewska-Lasota, Zróżnicowanie modeli postępowania dyscyplinarnego, (in:) H. Izdebski, P. Skuczyński (eds.), Etyka prawnicza: stanowiska i perspektywy, Warszawa 2013, p. 129.

disciplinary tribunal or who was deprived of the right to practice a profession has the right to appeal to the second instance disciplinary tribunal ; if such a penalty was imposed by the second instance disciplinary tribunal, the punished person has the right to appeal to the Supreme Court"[39]. The same opinion was held by the Supreme Court in the Resolution of Seven Judges of 20 July 1987, III PZP 25/87, and thus a legal principle was established[40].

Disciplinary and criminal law belong to the same group of repressive law, which implies that their rules are common to all branches contained therein. With regard to the above, a closed catalogue of disciplinary penalties expresses the legislator's approval of the *nullum crimen sine lege* principle[41]. Art. 65 of the ALA enlists penalties that may be imposed for disciplinary offences. The most lenient one is admonition, to be followed by a slightly painful reprimand with a caution. Both penalties may be imposed both on a legal advisor and legal advisor trainee. Only a legal advisor may be punished by the suspension of the right to practice a profession from three months to five years. The next sanction is pecuniary penalty, which may not be lower than half average monthly salary in national economy for a month preceding the date of the ruling and not five times higher than this salary. The literature holds a reasonable opinion thereon, according to which the execution of this penalty may arise justified doubts as to the possibility of enforcing the imposed dues – their enforceability may be considerably impeded the same as the costs of disciplinary proceedings[42]. It may be problematic due to a lack of a uniform and explicit regulation indicating according to which provisions the execution should be carried out. A valid legal status does not determine whether provisions on administrative execution should be applied or norms ensuing from the Code of Civil Procedure[43].

Apart from a reprimand with a caution and pecuniary penalty, a legal advisor may be optionally punished by a patron ban from one to five years. A mandatory form of this ban amounts from two to ten years beside a penalty of a suspended right to practice a profession of a legal advisor[44]. The harshest penalty that may be imposed for a disciplinary offence is deprivation of the right to practice a profession of a legal advisor; in relation to legal advisor trainees – it is an expulsion from apprenticeship. The expulsion from apprenticeship entails crossing out of the list of trainees without the right to reapply for the entry to the list of legal advisor trainees or entry to the

39 The Decision of the Supreme Court of 7 September 1995, I PA 1/95, Lex No. 23564.

40 The Resolution of the High Court of 20 July 1987, III PZP 25/87, OSNC1988/5/54.

41 I. Bogucka, Odpowiedzialność…, *op. cit.*, p. 254.

42 W. Sarnowski, Postępowanie dyscyplinarne…, *op. cit.*, p. 26.

43 http://prawo.rp.pl/artykul/948825.html?print=tak&p=0, (publication from 5 November 2012, consulted: 30 January 2017).

44 Art. 65 par. 2a and 2b of the Act of 6 July 1982 (Journal of Laws of 2010, No. 10, item 65, as amended) [Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.)].

list of legal advisors for ten years from the day on which the ruling became final and valid[45]. The regulation related to legal advisors was far more restrictive because crossing out of the list of legal advisors entailed a permanent ban on reapplying for another entry. The above invoked regulation was reflected in rulings. For instance: "A legal advisor shall lose a possibility of practicing his or her profession permanently as of the day on which a disciplinary tribunal's ruling depriving him or her of the right to practice this profession became final and valid. Crossing him or her out of the list of legal advisors is of merely formal nature and the punished person shall not practice the profession of a legal advisor until it is effected"[46]. However, shortly after the issue of the above quoted decision, point 2c of Art. 65 of the ALA was examined by the Constitutional Tribunal. In effect of the launched proceedings, the Constitutional Tribunal found the expression contained in the above mentioned provision "without the right to reapply for another entry" inconsistent with Art. 65 par. 1 in connection with Art. 31 par. 3 of the Constitution[47].

The Act on Legal Advisors also envisages the occurrence of minor breaches in relation to which the above mentioned penalties would be too painful. For this reason, Art. 66 of the ALA vested Dean of Regional Council of Legal Advisors Association with legal power to punish for minor breaches. Pursuant to the above invoked provision, Dean is entitled to impose penal measures in the form of a warning which may be applied both against legal advisors and legal advisor trainees. These subjects have the right to appeal against Dean's warning. A competent body to hear the appeal is Regional Disciplinary Tribunal. On the other hand, a ruling issued in result of the appeal shall not be withdrawn[48]. A factual state and individualism of assessors may differentiate the situation of a person accused of a minor breach to a large degree. Thus the commentator's opinion thereon appears right. He draws attention to the fact that Dean's decision and his or her opinion on the assessment are not subject to control. That is why Dean should take into account a degree of the perpetrator's guilt, a burden of the breach and size of inflicted harm while deciding about the application of warning[49].

It should be underlined here that a lack of statutory subordination of individual penalties to specific disciplinary torts provides disciplinary authorities with greater

45 Art. 65 par. 2d of the Act on Legal Advisors (Journal of Laws of 2010, No. 10, item 65, as amended) [Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.)].

46 The Decision of the Supreme Administrative Court in Warsaw of 7 April 2010, II FSK 1929/08, http://www.orzeczenia-nsa.pl/postanowienie/ii-fsk-1929-08/egzekucja_swiadczen_pienieznych_odrzucenie_skargi_kasacyjnej/178f6e7.html.

47 The Judgment of the Constitutional Tribunal of 18 October 2010, K 1/09, OTK s. A 2010 Nr 8, item 76.

48 Art. 66 of the the Act of 6 July 1982 (Journal of Laws of 2010, No. 10, item 65, as amended) [Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (Dz.U. z 2010 r. Nr 10, poz. 65 ze zm.)].

49 Z. Klatka, Komentarz do ustawy…, *op. cit.*, p. 368.

freedom while assessing any circumstances related to the act, perpetrator and their social context in order to assure that imposed penalty is adequate to the committed act. A type of imposed penalty should depend on a type of breach and its weight (burden), an extent of social harm of the act, a degree of the perpetrator's guilt as well as mitigating and incriminating circumstances. A disciplinary authority imposes penalty envisaged in the Act at its discretion. Punishment must be suitable on account of developing legal awareness of the professional environment and a socially protected role of the profession[50]. The judicature embraces court opinions indicating when punishment is not adequate to the committed offence. An example of the above is the decision of the Supreme Court of 14 January 1999, III SZ 3/98 implying that deprivation of the right to practice a profession of a legal advisor imposed for notorious failure to pay contributions for the Legal Advisors' Self-Government is grossly disproportionally severe. A key expression here seems to be the term "in the light of previous decisions" because in the court's opinion there are circumstances which decide about such and no other attitude[51]. However, the court may decide *a contrario* that imposing a given penalty is the most reasonable. For instance, appropriation of money to the client's detriment justifies deprivation of the right to practice a profession imposed on a legal advisor"[52].

Disciplinary proceedings' nature is by all mean repressive towards the accused person because they must force him or her to perform their duties properly. Discipline in the professions of public trust fulfils a preventive function and protects citizens against unprofessional legal aid. The author believes that a guarantee function of disciplinary proceedings safeguards the accused person's main interest whose rights should be respected in the proceedings before a corporate self-government authority. Moreover, the assessors' objectivism, who practice the same professions as the accused, may positively affect adequate punishment. It is of fundamental importance due to the fact that disciplinary liability of legal advisors and legal advisor trainees is independent[53] of other possible systems of liability. It is important that the provisions of the ALA do not exclude liability of a different type, which may lead to the concurrence of proceedings.

Legal advisors and legal advisor trainees may also be subject to corporate liability. Nevertheless, the fact that corporate disciplinary liability takes priority herein is of vital importance to protect legal advisor's independence. Pursuant to the Supreme Court's opinion: "One cannot be held corporately liable for the conduct that is "consistent with the order or ban, or authorization of the valid Act" even if such conduct formally infringed norms of professional ethics contained in the code

50 I. Bogucka, Odpowiedzialność…, *op. cit.*, p. 260.
51 The Judgment of the Supreme Court of 14 January 1999, III SZ 3/98, Lex No. 1239054.
52 The Judgment of the Supreme Court of 24 September 1997, III SZ 2/97, Lex No. 33004.
53 Z. Klatka, Komentarz do ustawy…, *op. cit.,* p. 355.

of professional ethics adopted by a given professional corporation"[54]. In the above situation disciplinary liability before authorities of Legal Advisors' Self-Government takes precedence. Furthermore, the comments to Art. 67 of the ALA imply that a legal advisor practicing the profession on the basis of an employment relation may be subject to disciplinary liability envisaged in official service pragmatics regardless of corporate liability. The scopes of these two liabilities do not have to overlap. The author underlines that the ALA comprehensively regulates the performance of a legal advisor's profession in every legal form. Hence it should be held that it takes precedence before pragmatics of official service regulations. On the other hand, if there are no such regulations in the corporate Act, a legal advisor bears disciplinary liability according to the principles determined in the binding official service pragmatics[55].

Legal advisors (the same as legal advisor trainees) may take civil liability – ensuing from a contract and tort. Subordination to the above mentioned models of disciplinary liability does not collide with disciplinary liability regulated in the ALA at all. Even though the principles and sanctions are distinct, the same act may be subject to civil and disciplinary liability. Although the ALA's provisions do not envisage regulations connected with the need to suspend disciplinary proceedings for the duration of a civil case, a decision of a disciplinary tribunal finding the accused liable as charged may be used as evidence in a civil trial. Opposite to the corporate Act, the Code of Civil Procedure indicated in Art. 177 § 1 point 4 an optional possibility of suspending civil proceedings "if criminal or disciplinary establishment of an act coming to light could affect the case's resolution"[56].

Legal advisors and legal advisor trainees are held criminally liable for an act satisfying features of a crime envisaged in the Criminal Code. Under the ALA, legal advisors have been granted immunity exempting them from criminal liability for insult or defamation – Art. 11 par. 2 of the ALA. Even though criminal liability for the above mentioned offence has been excluded, it is still possible to enforce civil and disciplinary liability[57]. For the needs of this study, attention should also be paid to a possibility of holding a legal advisor liable for the violation of the Act on Counteracting Money Laundry and Financing Terrorism. Legal bases of the above liability are determined in the Criminal Code and Act on Counteracting Money Laundry and Financing Terrorism.

54 The Judgment of the Supreme Court of 27 Sepbember 2012 r. SDI 24/12.

55 Z. Klatka, Komentarz do ustawy…, *op. cit*., p. 369.

56 The Act of 17 Nobember 1964 – Code of Civil Procedure (consolidated text, Journal of Laws of 2016, item 1822, as amended) [Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego, tekst jedn. Dz.U. z 2016 r. poz. 1822].

57 W. Bujko, Zawód radcy prawnego i samorząd zawodowy radców prawnych w orzecznictwie Trybunału Konstytucyjnego, (in:) A. Bereza (ed.), Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania, Warszawa 2011, p. 282.

Summing up, disciplinary liability of legal advisors and legal advisor trainees is regulated in compliance with the principles of a fair trial. Complete regulation of legal advisors and legal advisor trainees' disciplinary liability in the Polish legal system is provided by reference to the appropriate application of the provisions of the Code of Criminal Procedure contained in the corporate Act in relation to matters not regulated by it. The fulfilment of tasks assuring proper performance of the legal advisor's profession is safeguarded by the authorities of Legal Advisors' Self-Government and judicial bodies. We must also remember that Polish regulations reflect norms of international law on the standards of a fair trial.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.06

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The Analysis of Some Problems Associated with the Application of Substantive Disciplinary Law Referring to Advocates within the Scope of a Fair Trial for the Accused

Abstract: The text is dedicated to the analysis of the function and normative status of ethical and deontological principles concerning advocates' professions. It presents a normative status of the advocates' ethical code and its relationships with existing law regulations. It also includes some remarks on a fine and the issue of guilt in disciplinary proceedings.
Keywords: disciplinary law, professional ethics, deontological norms, responsibility, guilt, fine

Considerations on disciplinary proceedings in the context of the principles of a fair trial *ipso facto* focus on possible procedural problems. With regard to disciplinary proceedings against advocates, the above issues will result both from the application of solutions ensuing from the Act on the Advocacy (AA)[1] and appropriately applied provisions of the Code of Criminal Procedure. On the other hand, equally important problems of substantive disciplinary law recede into the background in the subject literature. This state of affairs may, in turn, lead to a wrong assumption that these problems either do not occur in practice, or their importance is insignificant. Meanwhile, legal solutions providing a possibility of pursuing disciplinary proceedings satisfying the standard of a fair trial and requirements of procedural justice will be of little avail without appropriate substantive legal bases guaranteeing the assurance of substantive justice despite more and more noticeable autonomy of procedural law[2].

1 The Act of 26 May 1982 on Bar (Journal of Laws of 1982, No. 16, item 124, as amended) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (Dz.U. z 1982 r. Nr 16, poz. 124 ze zm.).

2 J. Skorupka, O sprawiedliwości procesu karnego, Warszawa 2013, p. 77 and following.

From the very beginning, it should be noticed that Rules of Advocates' Ethical Conduct and Professional Dignity (the Code of Advocates' Ethics – KEA), which is often an essential part of the grounds of disciplinary assessment of advocates and advocate trainees' conduct, do not contain any general solutions regulating the principles of disciplinary liability, forms of disciplinary tort's perpetration or exclusion of disciplinary liability; whereas Art. 95n point 2 of the AA refers the above scope to the appropriately applied provisions of Chapters I-III of the Criminal Code but only since 25 December 2014. Insofar as it is a correct legislative solution, the fact that the Rules adopted by the Polish Bar Council that have been elevated to the status of a code do not actually contain solutions typical of such a type of a legal act, i.e. general, defining and mandatory[3], should be negatively assessed. The provisions of the Code of Advocates' Ethics included in the Chapter titled "General Provisions" refer not to the principles of disciplinary liability and related matters, as it could be expected, but formulate general types of disciplinary offences whose commission may imply the launch of disciplinary proceedings. Hence one may gain a justified impression that there is a lack of legal acts exhaustively regulating some issues connected with a substantive legal basis of disciplinary liability. What is more, even if such an autonomous regulation does appear somewhere, it may more often than not arise doubts.

Hence not attempting to comprehensively discuss substantive aspects of disciplinary law related to advocates, which would considerably exceed the framework of this article, I will only focus on selected issues.

An absolutely basic issue evoking certain doubts is a definition of the grounds of advocates' disciplinary liability. It is undeniable that the exclusive statutory base within this matter is Art. 80 of the AA stipulating that advocates and advocate trainees are subject to disciplinary liability for conduct contrary to the law, principles of ethics or professional dignity, or a breach of their professional duties; while advocates are further liable for a failure to conclude a civil liability insurance agreement.

Four autonomous bases of disciplinary liability contained in the above invoked norm constitute a closed catalogue. This does not change the fact that each of the

3 Also the Higher Disciplinary Court (pl. *Wyższy Sąd Dyscyplinarny*, in short WSD) in its decision of April 26, 2014 (WSD 63/10), also expressed doubts as to the accuracy of adopting the "codex" status of the regulation of a set of ethical principles, indicating that the task resulting of Art. 3 par. 1 point 5 of Law on Bar of the professional self-government to set the rules of professional ethics cannot be equated with the obligation of their codification. The codification of the principles of ethics is, as the WSD observes, objectively impossible because of the inability to describe a closed catalog of all behaviors that can be assessed as ethically inappropriate. Despite the sigificantly misleadingly name of the second part of the resolution of the Supreme Bar Council, it is not a code – as the WSD notices – in the sense that it does not regulate the whole field of advocates' recommended or forbidden behaviors in a comprehensive and exhaustive manner, which is determined by the provisions of § 1 point 1 and 2 and § 2 KEA.

above quoted grounds of disciplinary liability may be extremely capacious except clearly and separately specified tort of a failure to conclude a civil liability insurance agreement. Nevertheless, despite a broad catalogue of conduct which may objectively fulfil the features of a disciplinary tort involving conduct either contrary to the law or breaching professional duties, their codification on the basis of valid legal acts should not cause major problems. These provisions are, of course, scattered in many legal acts but finding them is not only possible but also necessary in order to attribute a disciplinary tort thereto.

Advocacy Higher Disciplinary Tribunal accurately noticed that the ground of advocates' disciplinary liability must be Art. 80 of the AA, which defined conduct of advocates and advocate trainees subject to disciplinary liability. As it was further perceived by the AHDT, the same as in the case of every repressive liability, substantive legal grounds attributing disciplinary liability must be based on the statutory provision and possibly only completed by sub-statutory provisions, or those included in the resolutions of corporate authorities. Among the grounds of disciplinary liability enlisted in Art. 80 of the AA, the first three are of a flat-rate nature, i.e. they do not permit to independently establish whether specific conduct fulfils statutory features of a disciplinary offence. To accept disciplinary liability, it is not only necessary to specify in which of the above listed forms a disciplinary tribunal perceives the grounds of the accused person's liability, but also indicate the norm giving specific expression thereto. Hence, with regard to conduct contrary to the law, a concrete provision of law infringed by an advocate must be provided, whereas in the case of the second and third basis – a principle or duty regulated in the KEA or in another internal corporate regulation, yet also resulting from a historically developed custom confirmed by the uniform and consistent line of disciplinary tribunals' case law. Regulations contained in the KEA do not constitute self-contained, substantive legal grounds of disciplinary liability of a repressive nature[4]. Therefore formal violation of the rules included in the KEA itself is not a ground of disciplinary liability of advocates but conduct which is contrary to the law, principles of ethics or professional dignity, or breaching professional duties[5].

4 The WSD Order of 26 April 2014 r., WSD 17/14. In this order, the WSD also reminded that the first written Code of Ethics for Barristers and Dignity of the Profession was passed by the Supreme Bar Council in 1961. Until then, there was no formal collection, list or catalog of offenses against the principles of barrister's ethics or the dignity of a lawyer. Nevertheless, the legal acts constituting the constitutional system provided for disciplinary liability for these types of offenses. See also the Judgment of the Supreme Court of 15 July 2010 r., SDI 12/10, OSNKW 2011, No. 3, item 25; the Judgment of the Supreme Court of 29 October 2009, SDI 22/09, OSN-SD 2009, item 132.

5 The Judgment of the Supreme Court of 27 September 2012, SDI 25/12.

Hence descriptions of desired or unlawful conduct subject to tort liability are of an exemplary nature[6]. The catalogue constructed in such a way is to facilitate advocates and advocate trainees to appropriately recognize conduct which may expose them to disciplinary consequences due to activities breaching the principles of ethics and professional dignity. Thus the validity of KEA in this or another reading is not necessary to attribute disciplinary liability under Art. 80 of the AA if it turns out that advocate's conduct is unethical or undermining professional dignity. However, since KEA was adopted, I believe it is necessary to ask two basic questions: firstly, about the statutory grounds of its issue and competence of advocacy's authority in this matter and secondly, about binding disciplinary tribunals by the KEA provisions.

Neither KEA itself nor amendments thereto[7] depict statutory grounds of their issue while the authority enacting them – the Polish Bar Council – does not refer to such a base too. Of course, it does not decide at all about a lack of the norm of competence to issue this legal act if it was, obviously, established in the AA itself. The problem is that the above norm is difficult to find for the Polish Bar Council itself. An adequate legal base could be here Art. 58 of the AA, which contains a closed catalogue of tasks of this authority. It does not envisage a possibility of enacting principles of professional ethics. It is beyond any doubts that even the most favourable reading of the quoted norm of Art. 58 of the ACC does not allow to assume that the Polish Bar Council has been appointed to fulfil itself a task imposed on the entire advocates' self-government in Art. 3 par. 1 point 5 of the AA, i.e. establishing and promoting principles of professional ethics and caring about their observance. Hence it appears that the only advocacy authority competent to establish principles of professional ethics is the National Congress of the Bar whose powers, opposite to the Polish Bar Council, have not been enlisted in Art. 56 of the ACC in a closed catalogue. Thus the Congress is vested with exclusive statutory power to enact principles of professional ethics, which on no account may be transferred into the Polish Bar Council.

The legislator entrusted the Congress, the highest authority of the Advocacy, with the power to establish principles of professional ethics not accidently. By all means, it is one of the most important tasks of the advocacy if we take into account its autonomous position ensuing from Art. 17 par. 1 of the Constitution. It should be added that in relation to another task the professional self-government has been entrusted with, i.e. professional improvement of advocates and education of advocate trainees (Art. 3 par. 1 point 4 if the AA), the legislator has already directly vested

6 See the WSD Order of 26 April 2014 r., WSD 17/14 and the rearks presented in the footnote No. 198.

7 See e.g. the Resolution No. 64/2016 of the Supreme Bar Council of 25 June 2016 on the modification of art. 58 of the Of the Code of Ethics for Barristers and Dignity of the Profession (consolidated text – the announcement of the Presidium of the Supreme Bar Council of 14 December 2011) – www.nra.pl (consulted: 28 January 2017).

the Polish Bar Council with the obligation to enact regulations concerning the fulfilment of the professional duty imposed on advocates with regard to professional improvement and powers of self-government bodies assuring the observance of this duty by advocates (Art. 58 point 12 letter m of the AA)[8]. Hence it cannot be assumed that a failure to entrust the Polish Bar Council with the power to establish principles of professional ethics is mere legislative omission which may be removed in the course of a correct interpretation of the norm of competence. Anyway, the interpretation which would extend the rights of the Polish Bar Council beyond those ensuing from the closed catalogue of Art. 58 of the AA would be inadmissible. This general rule concerns all authorities of public power including the Polish Bar Council. On the other hand, the Act on Legal Advisors[9] entrusts the National Congress of Legal Advisors with a closed catalogue of tasks, which is opposite to the National Congress of the Bar. Yet Art. 57 point 7 of the Act on Legal Advisors directly entrusts this Congress with the power to enact principles of legal advisors' ethics; that is to say it shall be done by the authority adequate to the National Congress of the Bar.

Therefore, since doubts about the establishment of currently valid principles of advocates' ethics by a relevant and competent body are reasonable, we should also ask a question about the consequences of this state of affairs.

Assuming that KEA has not been enacted by a competent body, it cannot exert legal effects in relation to all advocates and advocate trainees too. In other words, quoting KEA's provisions in disciplinary tribunals' rulings is also doubtful while an independent base of possible punishment should be here the norm of Art. 80 of the AA exclusively.

However, the above presented attitude does not mean that current KEA may be disregarded both in a daily practice of advocates and in disciplinary case law. Undeniably, it is an extremely important point of reference for the interpretation of Art. 80 of the AA within the scope of description of conduct which could breach the principles of ethics and professional dignity.

Furthermore, the above evokes another question. If pursuant to Art. 3 par. 1 point 5 of the AA, a role of advocates' self-government (its competent bodies) is to establish but not enact principles of professional ethics, it is still possible that such establishment will not correctly decode models of proper conduct. If so, is a disciplinary tribunal still bound by such establishment in the form of an internal corporate legal act even already adopted by a competent body of the advocates' self-government?

Answering this question, we should consider the content of Art. 89 par. 1 and 2 of the AA, which stipulates that a disciplinary tribunal is independent within the

8 See also the Decision of Supreme Court of 13 December 2016, SDI 60/16.

9 The Act of 6 July 1982 r. on Legal Advisors [(Journal of Laws of 1982, No. 19, item 145, as amended) [Ustawa z 6 lipca 1982 r. (Dz.U. z 1982 r. Nr 19, poz. 145 ze zm.)].

scope of sentencing. Moreover, it independently resolves occurring legal issues. If a disciplinary tribunal examining a case finds principles of advocates' ethics established in the KEA to be in contradiction with Art. 80 of the AA, i.e. a potential breach of the principles of advocates' ethics indicated by the KEA does not essentially exhaust this feature of disciplinary liability specified in Art. 80 of the AA (in other words, the principle of advocates' ethics has been wrongly established), the disciplinary tribunal may be then in a very difficult situation.

Independence and autonomy of sentencing would require a pursuit of the autonomous interpretation of Art. 80 of the AA contrary to the reading of a given KEA's provision or another internal corporate legal act the advocate is obliged to apply under § 63 of the KEA. What is more, a disciplinary tribunal is not entitled to submit a legal question to the Constitutional Tribunal under Art. 193 of the Constitution and Art. 33 par. 3 of the Act on the Organization and Course of Proceedings before Constitutional Tribunal[10]. Although disciplinary tribunals, including those related to advocates, perform activities belonging to the sphere of widely understood public tasks, they cannot be recognized as courts resolving cases in the constitutional meaning. Moreover, their rulings are subject to various forms of judicial control – in the constitutional meaning – during which a legal question may be asked[11].

Hence a disciplinary tribunal has no tools allowing to dispel its possible doubts with regard to the compliance of the model established in the KEA with the interpretation of the content of Art. 80 of the AA made by this tribunal. Under such circumstances, although rather unlikely indeed, I believe that following the principle of its own independence and autonomy, a disciplinary tribunal should autonomously resolve any doubtful issues it encounters while not being bound by the very content of KEA itself but only Art. 80 of the AA.

If recently proposed changes in the KEA, which are further described herein, come into force, they, unfortunately, imply that such jurisdictional doubts may be experienced by many judges. According to a new proposal, § 66a would be added to the KEA in the following reading: "An advocate who has been charged in criminal proceedings that are carried out against him or her shall immediately inform about it Dean of the Regional Bar Council competent according to the professional seat of the RBC"[12].

If a new solution came into force, it would put the advocate charged in criminal proceedings in a very difficult procedural situation. He or she could inform Dean

10 The Act of 30 November 2016 on the Organization and Procedure before the Constitutional Tribunal (Journal of Laws of 2016, item 2072, as amended) [Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym (Dz.U. z 2016 r., poz. 2072)].

11 M. Safjan, L. Bosk (eds.), Komentarz do art. 193 Konstytucji RP, Warszawa 2016, Legalis.

12 Bill of 15 December 2016, NRA-018-SEK-1/7/16 providing adding new § 66a KEA, not published.

about this fact, which in practice may mean a launch of disciplinary proceedings against this advocate. Dean is not competent to assess whether a possible commission of an offence by the advocate does not concurrently constitute a disciplinary tort. Thus he or she *nolens volens* must hand over the case to Disciplinary Ombudsman, which already implies a likely consequence in the form of repressive proceedings against the advocate. On the other hand, if the advocate conceals the information about his or her charges before Dean, he or she will risk autonomous disciplinary liability under § 66a of the KEA.

Hence the new § 66a of the KEA would be in direct contradiction with the reading of Art. 74 § 1 of the CCP and the constitutional principle of the right to defence expressed in Art. 42 par. 2 of the Polish Constitution, which is inextricably connected not only with the right to avoid self-incrimination in pending criminal (disciplinary) proceedings but also the right to avoid such proceedings. Raising such serious objections to the proposed § 66a of the KEA, it must be clearly said that such a change in the code of ethics would introduce liability for an act which cannot be recognized as a tort, on account of which disciplinary tribunals should refuse to apply it.

Yet the interpretation of substantive provisions of disciplinary law is even more complicated. P. Skuczyński rightly draws attention to the fact that a variety of expressions contained in the provisions that are substantive grounds of disciplinary liability is not appropriate because it has no substantial justification. This rather reflects the fact that the provisions have been drafted at different times and by different authors. They apparently lack an intention to develop distinct bases of disciplinary liability while in practice the interpretation of these provisions is similar and does not include various terminological expressions contained therein[13].

The problem of legislative imperfection of internal corporate legal acts means, however, that the interpretation of disciplinary law provisions plays an extremely important role here, which is apparently emphasized by P. Skuczyński as well. Only then will it be possible to recurrently rationally decode the content of orders ensuing from disciplinary provisions of substantive law. It seems that a decisive role in designating the subjective scope of disciplinary liability of advocates and advocate trainees should be attributed to the purpose of disciplinary law, i.e. guaranteed observance of basic rules and principles of professional practice in order to protect the highest standards of legal aid provided by advocates performing a profession of public trust.

The interpretation of substantive law should also lead to the resolution of a potential conflict between orders ensuing from internal corporate disciplinary

13 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej zawodów prawniczych, (in:) A. Bodnar, P. Kubaszewski, Postępowania dyscyplinarne w wolnych zawodach prawniczych. Model ustrojowy i praktyka, Warszawa 2013, p. 62.

law and orders that are internally contradictory or contradictory to the provisions of ordinary law. If existing collisions between the provisions of internal law and commonly applicable law cannot be removed, the provisions of internal corporate law with regard to the principles of ethics and professional dignity should generally prevail. On the other hand, possible consequences that should be suffered by an advocate or advocate trainee due to the above are a different problem, i.e. if in the situation of a conflict between orders ensuing from the provisions of ordinary law forcing conduct contrary to the principles of professional ethics, advocates or advocate trainees decide to follow the first solution in order to avoid potential punishment or other types of sanctions or repressions. This is a subject requiring a separate study. Nevertheless, I believe that even though such conduct would exhaust the features of a disciplinary tort, a possibility of punishing the advocate remains questionable.

The Supreme Court held a similar opinion thereon assuming that an advocate cannot be held professionally liable for conduct in compliance with the order or ban, or authorization of the valid Act even if it formally violated norms of professional ethics contained in the code of professional ethics adopted by a given professional corporation[14]. Although the Supreme Court assumes that conduct contrary to the order ensuing from the internal corporate law but consistent with the order resulting from the Act is not a tort, in my opinion, this thesis is too far-reaching. With regard to its effects, it implies danger of effacing clear and plain principles of practicing the profession of an advocate and deontological norms when they are contrary to ordinary (common) positive law. On the other hand, assuming that given conduct remains a tort not always means it was culpable, which, in turn, excludes a possibility of disciplinary punishment.

Finally, the interpretation of the provisions of disciplinary law should not disregard the fact it involves repressive law. In other words, it should be narrow and close even if it is assumed that the catalogue of conduct included within the scope of conduct breaching principles of ethics and professional dignity (Art. 80 of the AA) is open. Moreover, the fact that disciplinary law belongs to the category of repressive law implies the need to interpret it in accordance with the accused person's guarantees.

Problems connected with the interpretation of the provisions of substantive disciplinary law are more than apparent in practice. Four situations can be presented here as examples thereof.

The advocacy consistently emphasizes the importance of advocates' professional secrecy. During the National Congress of the Bar of 2016 it was assumed that a foundation of practicing the profession of an advocate is just advocates' professional secrecy. Furthermore, advocates cannot be exempted from it under the Act determining the system of advocates' self-government and basic principles of

14 The Judgment of the Supreme Court of 27 September 2012, SDI 24/12, www.wsd.adwokatura.pl (accessed: 28 January 2017).

practicing this profession. It has been assumed that advocates' professional secrecy is a guarantee not only for advocates but, above all, for their clients. This protection assures them fundamental rights to a fair trial and privacy protected not only by the Polish Constitution but also under international obligations. Finally, the opinion of the Human Rights Committee of the Polish Bar Council was approved of, according to which disclosure of advocates' professional secrecy threatens citizens' trust in the State and leads to a loss of a sense of security undermining credibility and legitimacy of the system of justice[15].

The *in extenso* invoked opinion of the advocacy is accurate, yet with one reservation – it is admissible to exempt advocates of professional secrecy and interrogate them subsequently even under Art. 180 §2 of the CCP. If an advocate refuses to testify already after being exempted from the duty to keep professional secrecy, such a refusal will be found unreasonable under Art. 287 § 1 of the CCP which, in turn, opens the way to punish the advocate by a fine or even custody in an extreme situation. On the other hand, even the exemption of an advocate from the obligation to keep secrecy on the basis of commonly valid law does not free him or her from the liability for breaching it under § 19 par. 1 of the KEA.

Can we then require the advocate who could actually be fined for unreasonable refusal to testify to consciously accept this liability? If he or she decides to resolve this evident conflict in favour of a testimony, it seems that such conduct will exhaust the features of a disciplinary tort. Yet, taking into account potential consequences he or she could suffer, it is possible to consider his or her release from disciplinary liability assuming that the advocate acted under mental duress which, in turn, excludes attribution of his or her guilt.

A slightly different situation, which also requires interpretation, occurs with regard to the obligation imposed on advocates in Art. 118 § 5 of the CCP. Pursuant to the above quoted provision, if an advocate or legal advisor appointed in connection with cassation or procedure in action for the unlawfulness of a valid ruling does not find any grounds to submit an appeal, he or she is obliged to immediately inform the party and court about this in a written form not later than within two weeks from the day he or she was notified about such an appointment. The advocate or legal advisor attaches to such a notice an opinion he or she has drafted about no grounds to submit an appeal. Such an opinion is not enclosed to the case files and is not served to the opposite party.

On the other hand, an internal corporate legal act imposes a slightly differently formulated obligations on advocates in this respect. An advocate appointed *ex officio* to draft an appeal or complaint for the unlawfulness of a valid ruling and constitutional appeal may refuse to draft it if he or she decides there are no prerequisites justifying

15 The Resolution No. 15/2016 of the National Congress of the Bar of 26 November 2016, www.adwokatura.pl (accessed: 29 January 2017).

its drafting. The case should be immediately examined in order to assess whether there are prerequisites justifying drafting an appeal. A refusal to draft an appeal must be made in the form of a written opinion served without unreasonable delay to the client and Dean of a competent Regional Bar Council. The advocate is also obliged to immediately inform the court about drafting such an opinion and sending it to the client and Dean of the Regional Bar Council[16].

The resolution itself has many terminological flaws. Its wording seems to suggest that it refers exclusively to the principles of drafting an opinion about a lack of grounds to submit an appeal or complaint for the unlawfulness of a valid ruling and constitutional appeal. Literal interpretation of such wording in point 1 of the resolution would trigger a wrong conclusion that the catalogue of extraordinary measures of appeal is *numerus clausus* leaving beyond the scope of the resolution's validity even a possibility of a refusal to draft an appeal or application for revision of a judgment in criminal proceedings which, in fact, existed in the Polish criminal procedure on the day the resolution was adopted while the content of Art. 84 § 3 of the CCP also in 2007 permitted an advocate appointed to submit an appeal or application for revision of a judgment to refuse to draft them due to their groundlessness. Therefore functional interpretation allows to contain in the resolution both the above mentioned appeal or application for revision of a judgment as well as an appeal against the appellate court's judgment reversing the first instance court's judgment and referring the case for revision (Chapter 55a of the CCP), which was introduced to the Code of Criminal Procedure as of 15 April 2016.

However, comparing the content of Art. 118 § 5 of the CCP, although it was introduced as of 19 April 2010[17], with the content of the resolution, two basic differences may be distinguished. Art. 118 § 5 of the CCP does not order to serve Dean of a competent Bar Council with the above mentioned opinion whereas the resolution just straightforwardly introduces such an obligation. On the other hand, insofar as Art. 118 § 5 of the CCP orders to serve the court with a copy of this opinion, although the resolution does not directly ban serving the court with the opinion, its interpretation must lead to such a conclusion. The reason for it is the fact that in point 3 of the resolution the court has been omitted as an entity to be served with the opinion while other entities have been indicated. Moreover, point 4 of the resolution set forth that an advocate is obliged to immediately notify the court about drafting the opinion and sending it to the client and Dean of the Bar Council, i.e. serving the court

16 The Resolution of the Supreme Bar Council 61/2007 of 15 September 2007 on the procedure of advocates appointed ex officio to assess the legitimacy of preparing and filing cassation proceedings, complaints about non-compliance with the law of a final judgment and a constitutional complaint, www.nra.pl (accessed: 29 January 2017).

17 See. K. Pachnik, Odmowa sporządzania nadzwyczajnych środków zaskarżenia wymaga aktualizacji, http://www. adwokatura.pl/ogolnoprawne/odmowa-sporzadzania-nadzwyczajnych-srodkow-zaskarzenia-wymaga-aktualizacji/ (accessed: 29 January 2017).

with it has not been envisaged. Such a solution seems to be justified by the protection of client's interest and sometimes even the necessity to protect information covered by the advocates' professional secrecy. The opinion which is essentially contrary to the party's expectations and accepts a judgment that is not in their favour due to no grounds for a further appeal should not be revealed to the court even if it is enclosed to the documents other than main files. By all means, it does not liquidate but merely limits a risk connected with disclosing the opinion to the third parties, including the opposite party.

Hence the question arises how to settle undeniable collisions between the commonly valid law and the resolution of the Polish Bar Council. Insofar as it is not too difficult to achieve with regard to serving Dean of a competent Bar Council with a copy of the opinion, yet the issue connected with the obligation to serve the courts with this opinion under Art. 118§ 5 of the CCP may evoke doubts.

In the first case we deal with an additional, internal corporate duty established on the basis of internal law provisions consistent with the provisions of the Act. Therefore it appears that an advocate should fulfil this obligation. Yet in relation to the collision between the order ensuing from Art. 118 § 5 of the CCP and the ban resulting from the Polish Bar Council's resolution, which concerns serving the court with the opinion, it seems that this time, contrary to the problem of colliding provisions within the scope of releasing advocates from professional secrecy, advocates should be expected to respect the provisions of the resolution. This may obviously put them at risk of the court's refusal to award them with the cost of unpaid legal aid given *ex officio* they are entitled to. Nevertheless, this consequence is not as severe as possible fines imposed under Art. 287 § 1 of the CCP. Hence in this case, taking into account the fact that the proposed interpretation does not infringe the advocate client's interest since he or she receives the opinion whose quality may be controlled by the competent authorities of professional self-government, and information covered by the professional secrecy is protected, it appears that internal corporate provisions should prevail.

In the light of the above, it can be seen that the resolution of collision between ordinary law and self-government law is not guided by one model of interpretation but depends on the consideration of a concrete case and function of disciplinary law including guarantees, which are essential from the accused person's perspective.

The problem of interpretation of disciplinary law provisions does not only regard collision between statutory norms and self-government-made law. Equally serious problems may emerge in the case of applicability of the principle of guilt in disciplinary law. The provision of § 65 of the KEA may lead to a wrong conviction that a tort of failure to pay a corporate contribution, which is exclusively determined in this provision, is based on the principle of guilt just because KEA refers directly to the issue of culpability only in this provision. And yet it would not be a correct opinion. The reading of § 65 of the KEA is another example of legislative imperfection within the scope of internal corporate legal acts. Nevertheless, it seems that under Art. 95n

point 2 of the AA in connection with Art. 8 and 9 § 1and 2 of the Criminal Code applied respectively in disciplinary law, no other solution may be adopted but the one according to which the principle of guilt is a base of disciplinary liability. The solution where disciplinary liability entailing serious consequences for advocates and advocate trainees could be based on the principle of risk or objective liability independent of culpability is simply inconceivable. On the other hand, the above quoted provisions of the Criminal Code should be appropriately applied in disciplinary law, i.e. with certain changes and modifications. Disciplinary torts do not know a division similar to the one referring to offences divided into misdemeanours and crimes. In other words, we should adopt one model of liability based on the principle of guilt – either unintentional and intentional or only intentional.

Disciplinary torts are similar to misdemeanours with regard to sanctions. For this reason, an adequate model here may be Art. 5 of the Code of Misdemeanours envisaging that a misdemeanour may be committed both intentionally and unintentionally unless the Act stipulates liability only for intentional misdemeanour. Looking at the problem of guilt in disciplinary law also from the perspective of the accused person and his or her guarantees, the solution included in Art. 5 of the Code of Misdemeanours seems to be the one that could be applicable in disciplinary law by the appropriate application of the provisions of Art. 8 and 9 § 1 and 2 thereof. The same, it should be found that a disciplinary tort may be committed both intentionally and unintentionally unless the provisions either stipulate directly an intentional nature of a disciplinary tort, or it results from its essence.

The last problem regarding the scope of interpretation of disciplinary law provisions I would like to pay attention to is a combined sentence imposed under Art. 84 par. 2 point 3 of the AA to punish an advocate by two or more individual fines. The above invoked provision stipulates that a combined sentence cannot exceed a sum of a total number of fines and cannot be lower than the highest of them. A significant problem occurs here. Pursuant to Art. 82 par. 1 sentence one of the AA, an individual fine must be imposed within the limits – from one and a half to twelve times minimum salary as of the day on which the disciplinary tort was committed. Therefore it is a relatively designated sanction. According to the rules on a combined sentence in the Criminal Code, which cannot be respectively applied in disciplinary law due to the lack of reference in Art. 95n point 2 of the AA, imposing a combined fine and acting within the limits of a relatively designated sanction, a common court may impose it within the limits from the highest sentence for individual offences up to their sum not exceeding, however, a fine of 810 daily rates (Art. 86 § 1 of the CC). In other words, the upper limit of a combined fine in the Criminal Code may be a total sum of individual sentences not exceeding the limit of 810 daily rates. This second condition of the application of a combined sentence in the case of punishing an advocate by fines has not been included in the corporate Act. Thus the literal interpretation of Art. 84 par. 2 point 3 of the AA may imply that the upper limit of a combined sentence, which

is determined by only a total sum of individual sentences, may oblige the punished advocate to pay a fine that is grossly higher than the upper limit of an individual sentence, including a "ruinous" sentence. This is why I believe that Art. 84 par. 2 point 3 of the AA should be understood in the way according to which the upper limit of a combined sentence cannot exceed a total sum of individual fines while, concurrently, the second limit herein is the amount of the highest individual fine that may be imposed, i.e. up to twelve times minimum salary. At present, it is PLN 24.000[18], which is relatively high. An additional argument supporting the above interpretation of the provisions on a combined sentence with regard to pecuniary penalties is also the fact that a disciplinary tribunal, which actually does not administer justice, should not have a possibility to sentence to higher fines.

The above described examples of problems connected with the application of substantive disciplinary law do not exhaust this subject at all. Each above discussed issue could be more thoroughly analyzed, which is not possible here on account of absolute editorial discipline (text capacity). Apart from this, substantive disciplinary law evokes a number of other interpretative difficulties which I have not even signalled here. Nevertheless, considering the assumed model of disciplinary proceedings which must satisfy standards of a fair trial, it must be remembered that without just and fair substantive disciplinary law procedural justice becomes merely an empty slogan.

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18 The monthly minimum wage for work is PLN 2000 gross – rozporządzenie Rady Ministrów z dnia 9 września 2016 r. w sprawie wysokości minimalnego wynagrodzenia za pracę w 2017 r. (Dz.U. z 2016 r., poz. 1456) [The Regulation of the Council of Ministers of 9 Septemer 2016 on the monthly minimum wage for work in 2017 (Journal of Law of 2016, item 1456)].

Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.07

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Application of the Provisions of the Code of Criminal Procedure in Disciplinary Proceedings Against Attorneys[1]

Abstract: The paper presents the problem of applying the provisions of criminal procedure to disciplinary proceedings against attorneys. The author will present both the rules that exist under the provisions of criminal procedure and disciplinary proceedings against attorneys as well as the similarities in terms of appeal and cassation. A starting point for the evaluation of the application of the Code of Criminal Procedure to disciplinary proceedings against attorneys will be jurisprudence and achievements of the doctrine in this regard.
Keywords: disciplinary liability, attorneys, criminal procedure, assumptions

1. Introduction

The provisions of the Code of Criminal Procedure have been designated to be applied appropriately in disciplinary proceedings against attorneys. It results directly from the reading of Art. 95n of the Act on the Advocacy (AA), pursuant to which matters that are not regulated in Section VIII on advocates' disciplinary liability are subject to the provisions of the Code of Criminal Procedure (CCP) respectively. Thus the criminal procedure provisions prevail and enjoy a superior status. Hence the provisions of the CCP may be applied directly or with necessary changes, or they may be applied appropriately[2]. Yet a person interpreting the provisions will usually

1 This article is part of a research project OPUS 8 "Is the Polish model of appeal in criminal cases reliable?" financed by the Polish National Science Center in accordance accorded by aggrement No. UMO-2014/15/B/HS5/02689.

2 See e.g.: The Decision of the Higher Disciplinary Court of 1 December 2015, WSD 124/15, Legalis No. 1514873; K. Dudka, Odpowiedzialność dyscyplinarna oraz zakres stosowania przepisów kpk. w postępowaniu dyscyplinarnym wobec nauczycieli akademickich, "Studia Iuridica Lublinensia" 2007, No. 9; W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów,

decide about a narrower or wider application of the CCP provisions to disciplinary proceedings against attorneys.

We should also consider the identity of fundamental principles of proceedings that ensue directly from the provisions of the AA, among others:

The principle of objectivism is contained in Art. 4 of the CCP. Furthermore, Art. 89 of the AA has been constructed following the example of Art. 4 of the CCP. It is by all means a general principle which was previously called the principle of impartiality. According to it, in the light of the provisions of the CCP, authorities carrying out criminal proceedings are obliged to examine and include circumstances both in favour and against the defendant. A person accused in disciplinary proceedings resembles a defendant in criminal proceedings. Constitutional Tribunal's case law has developed the notion of an impartial court[3]. The right to hear a case by an impartial court also results from Art. 45 of the Polish Constitution and Art. 6 of the ECHR. In the light of the AA's provisions, the fulfilment of the principle of objectivism will be guaranteed by the institution of exclusion of concrete persons from disciplinary proceedings who may affect the result of the proceedings, which, at the same time, is an analogy to the application of *iudex inhabilis* and *iudex suspectus*.

The principle of the right to defence is contained in Art. 6 of the CCP and Art. 94 of the AA constructed subsequently. Pursuant to Art. 6 of the CCP, the defendant has to the right to a defence counsel while the defendant should be advised of this right. Comparing the content of this provision to the regulation in the AA, it should be held that the main thesis of the above principle has by all means been preserved. As it is one of the fundamental human rights, it has also been written down in Art. 42 par. 2 of the Polish Constitution and in the international law, i.e. in Art. 14 par. 3 letter b and d of the UN ICCPR as well as Art. 6 par. 3 letter c of the ECHR. It should be remembered that the discussed principle is not an obligation but a right and possibility. The right to a defence counsel is a fundamental right of formal defence. Pursuant to Art. 94 of the AA, the accused has the right to appoint a defence counsel – exclusively an attorney at law. This provision stipulates *lex specialis* in relation to the CCP provisions. It means that within the right to defence in disciplinary proceedings, the accused may both make representations and refuse to answer questions. This principle also embraces other rights of the accused person connected directly with the principle of the right to defence such as acquiring information about the case, reading case files, participating in procedural actions, submitting motions, etc.

adwokatów, radców prawnych i notariuszy, Warszawa 2012; W. Kozielewicz, Stosowanie prawa karnego materialnego i procesowego w postępowaniu dyscyplinarnym w sprawach sędziów (zarys problematyki), (in:) L. Leszczyński, E. Skrętowicz, Z. Hołda (eds.), W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska, Lublin 2005.

3 The Judgment of the Tribunal Court of 27 January 1999, K 1/98, OTK 1999, No. 1, item 3.

The principle of free assessment of evidence results from Art. 7 of the CCP. The counterpart of this provision is Art. 89 of the AA, which concerns self-contained and independent judgments reached on the basis of free assessment of the whole evidence. Free assessment of evidence means examination of all circumstances and evidence according to the principles of logic, life experience and state of knowledge. The Supreme Court's case law points out that courts may decide about credibility of some evidence and incredibility of other provided entire evidence and circumstances are disclosed and assessed according to the state of knowledge, life experience and rational reasoning[4]. Comparing the above considerations to Art. 89 of the AA, it should be held that this principle is also currently applicable to disciplinary proceedings against attorneys. In the light of this principle, evidence must not be evaluated without their prior comprehensive assessment and analysis. It means that evidence of both defence and prosecution must be assessed from the perspective of the entire evidence[5].

The principle of discretion results directly from Art. 8 of the CCP. According to this principle, the court resolves a case at its own discretion and is not bound by the resolutions of another court or authority. This principle also results from Art. 86 of the AA, according to which disciplinary proceedings are carried out independently, that is separately from other proceedings. This principle is also called the principle of autonomous sentencing not without a good reason. Art. 86 of the AA envisages, however, a possibility of suspending disciplinary proceedings until the end of criminal proceedings and a ruling on the defendant's guilt. Autonomy of disciplinary tribunal's sentencing may also be limited if a case has been returned for revision. Then a disciplinary tribunal is bound by legal opinions and recommendations of the appellate court with regard to further proceedings. Autonomy of sentencing also occurs when a disciplinary tribunal must issue an obligatory decision on the advocate's temporary suspension from duties at the moment of being informed about a temporary custody of the accused by the common court.

The principle of an open trial results from Art. 355 of the CCP and is also reflected in Art. 95a of the AA. In the doctrine, this principle is also called the principle of audience[6], and it is included both in Art. 45 par. 1 of the Polish Constitution and Art. 9 par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Art. 14 par. 1 of the International Covenant on Civil and Political Rights. According to the AA's provisions, exclusion of an open trial is possible if it threatens disclosure of advocates' professional secrecy, or if other, legally

4 The Judgment of the Supreme Court of 13 October 2010, IV KK 248/10, OSNwSK 2010, No. 1, item 1940.

5 The Judgment of the Supreme Court of 3 March 1997, II KKN 159/96, "Prokuratura i Prawo" – insert 1998, No. 2, item 7.

6 A. Murzynowski, Istota i zasady procesu karnego, Warszawa 1994, p. 191 and following.

binding reasons for the exclusion of an open trial occur. It should be emphasized that a possibility of disclosing advocates' professional secrecy belongs to evaluative categories because such a circumstance may be invoked in nearly every case. One cannot appeal against a decision of a disciplinary tribunal excluding an open trial fully or partially. Other causes of the exclusion of an open trial are indicated in the CCP provisions.

Pursuant to Art. 14 of the CCP, court proceedings are launched upon the request of the authorized prosecutor or other authorized entity. The ensuing principle of accusatorial procedure is also apparent in the content of Art. 90 of the AA. Contrary to the action *ex officio*, accusatorial procedure means that proceedings are launched if a complaint is lodged. On the other hand, Art. 90 of the AA stipulates that disciplinary tribunal initiates proceedings upon the motion of the authorized prosecutor. A complaint may take various forms. Basic complaints may include Disciplinary Ombudsman 's motion for a sentence, or subsidiary prosecutor's motion for a sentence. However, when Disciplinary Ombudsman acting as a public prosecutor withdraws from prosecution , a disciplinary tribunal or Regional Bar Council's Dean are not bound by the withdrawal. A disciplinary tribunal and Regional Bar Council's Dean are bound by the withdrawal of a complaint if a motion for a sentence has been submitted by a subsidiary prosecutor. The subject of the tribunal and Dean's examination is limited to the act the accused is alleged with. The alleged disciplinary breach should be accurately described factually and legally as a concrete act of a specific classification. The Supreme Court's case law points out that the extension of the scope of prosecution goes beyond the framework of prosecution and collides with the principle of accusatorial procedure[7].

2. Appeals in the light of the provisions of the CCP and AA

A possibility of appealing against a judgment of a disciplinary tribunal resulting from the provision of Art. 88a of the AA resembles the institution of appealing against a judgment under Art. 425 and 445 of the CCP. Disciplinary proceedings satisfy the constitutional principle of two-tiered jurisdiction by providing a possibility of challenging disciplinary authorities' decisions. Different from a criminal trial, instead of naming an appeal as a complaint or appeal, in disciplinary proceedings against advocates it will always be an appeal.

Art. 445 of the CCP applies to appeals through analogy pursuant to Art. 88a of the AA; hence an appeal against a judgment must be submitted within fourteen days from the day on which a copy of the judgment together with the reasoning has been served.

7 The Judgment of the Supreme Court of 24 April 2007, IV KK 58/07, OSNwSK 2007, No. 1, item 924.

The same as in a criminal trial, an appeal may be submitted within the time limit to lodge an application for the reasons to the judgment. In this case, regardless of the submitted application, a disciplinary tribunal drafts the reasons to the judgment *ex officio* and serves it to the party together with the judgment. Nevertheless, the content of Art. 88a of the AA is surprising as it univocally entails that the served judgment must be accompanied with instructions. Disciplinary proceedings discussed here concern a group of advocates, that is professionals who, as a rule, should know not only appeals in accordance with the CCP's provisions but also a course of appeals under provisions of disciplinary proceedings against advocates.

Such a solution in the AA's provisions is even more astonishing as the time limit to submit an appeal does not start to run without serving relevant instructions. On the other hand, if the instructions have been sent and also served at a later time, the time limit to appeal is then counted from the day on which the instructions have been served. Hence appeals in disciplinary cases appear to be more favourable in the AA's provisions than in the CCP's regulations. In the light of the above quoted provision, the parties to the proceedings, including the accused person and his or her defence counsel, the injured party and his or her attorney as well as Disciplinary Ombudsman, are entitled to submit an appeal. Pursuant to Art. 88a of the AA, Minister of Justice (who is now also Prosecutor General), who controls the activity of the advocates' self-government, is also entitled to submit a challenge. Applying the CCP's provisions to the AA respectively, it should be held that a ruling rendered in disciplinary proceedings may be challenged fully or partially, or with regard to the reasons themselves.

The occurrence of gravamen is assumed in relation to the appellant. The gravamen may be assessed not only with regard to the entire appeal but also individual claims submitted therein[8]. Yet, in case of any doubts, interest to act must be demonstrated in the challenge. In disciplinary proceedings against advocates, Disciplinary Ombudsman acts as a prosecutor, i.e. he or she may submit an appeal in favour of the accused. The same as in the CCP's provisions, an appeal in disciplinary proceedings must satisfy specific formal requirements.

Similar to the CCP's provisions, i.e. on the basis of Art. 431 of the CCP, the institution of the withdrawal of an appeal has been constructed. In the light of Art. 95g of the AA, an appeal may be withdrawn before a hearing is commenced, which then binds a disciplinary tribunal. As a rule, an appeal may be withdrawn by a person who submitted it; yet the accused may not withdraw an appeal in case of the occurrence of prerequisites under Art. 79 of the CCP. Nevertheless, the accused may withdraw an appeal of another entity submitted in his or her favour unless this entity is Disciplinary Ombudsman . Other entities who submitted an appeal in favour of the accused may withdraw it upon the accused person's consent. If, however, the prerequisites under

8 The Decision of the Supreme Court of 19 May 2011, I KZP 2/11, OSNKW 2011, No. 6, item 47.

Art. 79 of the CCP occur, the accused may not give such a consent himself or herself but through his or her defence counsel. An appeal may be withdrawn both in the form of an oral statement made to the minutes during a hearing as well as a written statement if the appeal has already been submitted. What matters here is not the moment of manifesting the withdrawal of an appeal but the moment of efficient and formal submission of the statement to disciplinary authorities.

The content of Art. 95h of the AA corresponds to the content of Art. 433 of the CCP, according to which a disciplinary tribunal shall hear a case within the limits of the appeal, and in a wider scope only if it is envisaged in the Act. Comparing the above to the provision of Art. 95h of the AA, similar applications of these two provisions are apparent with only one difference, i.e. Higher Disciplinary Tribunal takes into account the violation of substantive law and gross violation of procedural provisions *ex officio*. Furthermore, pursuant to Art. 95h of the AA, regardless of the limits of appeal, the judgment shall be changed in favour of the accused or reversed if, obviously, it is unjust. This provision is analogous to Art. 440 of the CCP. The challenge must include the challenged judgment fully or partially, i.e. indicating the part we request to change, as well as the grounds of appeal and its "favour (direction)" – whether it is submitted for or against. The doctrine does not agree as to which elements of appeal designate its limits[9].

However, the doctrine agrees that the limits of appeal are designated by the scope of challenge. According to another prevailing opinion, motions for appeal do not designate limits of appeal[10]. Therefore motions for appeal do not bind an appellate authority with regard to changing or reversing the judgment; and yet they may appear helpful in designating a "favour" (direction) of the appeal. Specified exceptions of a possible judgment beyond the limits of challenge in the light of the CCP's provisions are included in Art. 439 § 1, Art. 440 and 455 of the CCP. This is different from the provisions of the AA, where relative causes of appeal contained in Art. 438 point 1, 2 and 4 of the CCP are sufficient to hear appeals beyond the limits *ex officio*. Violation of substantive law is a relative cause of appeal specified in Art. 438 point 1 of the CCP. Gross violations of procedural provisions are analogous

9 I. Izydorczyk, Granice orzekania sądu odwoławczego w polskiej procedurze karnej, Łódź 2010, p. 156 and follwing; M. Klejnowska, Ograniczenia sądu odwoławczego orzekającego w sprawie karnej po wniesieniu środka zaskarżenia, Rzeszów 2008, p. 45 and following.

10 Z. Doda, A. Gaberle, Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz, tom II, Warszawa 1997, p. 226; T. Grzegorczyk, Kodeks postępowania karnego oraz ustawa o świadku koronnym, Warszawa 2008, p. 913; S. Zabłocki, (in:) J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Komentarz, tom III, Warszawa 2004, pp. 65-66; P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego, tom II, P. Hofmański (ed.), Warszawa 2011, p. 754; J. Grajewski, L.K. Paprzycki, S. Steinborn, Kodeks postępowania karnego. Komentarz, tom II, L.K. Paprzycki (ed.), Warszawa 2013, p. 58.

to Art. 438 point 2 of the CCP because these are undoubtedly such violations of procedural provisions that affected the content of the judgment. On the other hand, grossly unfair rulings which are specified in Art. 440 of the CCP may obviously be classified as unjust. The Supreme Court's case law emphasizes the obligation to consider all claims included in the appeal, which means not only their formal but also substantial assessment[11]. A judgment is indeed a specific decision establishing which claims have been right and which wrong. That is why if other failures, which have not been claimed by the appellant, have been discerned, they must be specially grounded. Summing up, it may be claimed that the solution concerning the limits of challenge and possible consideration beyond the request (*ultra petita*) is more beneficial in the light of the AA.

The ban on *reformationis in peius* resulting from the content of Art. 95i of the AA is based on Art. 434 of the CCP. It means that a decision adverse to the accused may not be rendered if an appellate measure has not been filed against him or her. Due to this, similar to the CCP's provisions, the ban on *reformationis in peius* is connected with the "direction" of an appeal. Higher Disciplinary Tribunal is then a peculiar appellate court which, in turn, is bound by the claims made in the appeal[12]. Nevertheless, what matters here is not the terminology itself but whether the failure actually occurred[13].

The application of the ban on *reformationis in peius* may limit possibilities of sentencing even if it collided with the principle of substantive reality. It means that submitting an appeal exclusively in favour, an appellate authority may not worsen the appellant's situation, or reverse a decision and refer the case for revision. It is undeniably connected with the issue of liability for an alleged act and factual decisions and other findings being made. For this reason, if an appeal has not been submitted

11 The Judgment of the Supreme Court of 6 June 2006, V KK 413/05, OSNKW 2006, No. 7-8, item. 76, Lex No. 188861; the Judgment of the Supreme Court of 10 August 2011, III KK 436/10, Lex No. 1044032; the Judgment of the Supreme Court of 21 October 2010 r., III KK 167/10, OSNwSK 2010, No. 1, item 2023, Lex No. 843346.

12 K. Marszał, Zakaz reformationis in peius w nowym ustawodawstwie karnym procesowym, Warszawa 1970, p. 13 and 97; K. Woźniewski, Zakaz reformationis in peius a zasada niezmienności przedmiotu procesu, (in:) Z. Ćwiąkalski, G. Artymiuk (eds.), Współzależność prawa karnego materialnego i procesowego w świetle kodyfi kacji karnych z 1997 roku i propozycje ich zmian, Warszawa 2009, pp. 163-173; P. Wiliński, Zasada prawa do obrony w polskim procesie karnym, Kraków 2006, pp. 596-603.

13 S. Zabłocki, O niektórych zmianach wprowadzonych przez nowy Kodeks postępowania karnego w zakresie postępowania odwoławczego, „Przegląd Sądowy" 1997, No. 11-12, pp. 14-15; P. Hofmański, S. Zabłocki, Niektóre zagadnienia związane z granicami orzekania w instancji odwoławczej w procesie karnym, (in:) Problemy stosowania prawa sądowego. Księga ofi arna Profesorowi Skrętowiczowi, I. Nowikowski (ed.), Lublin 2007, pp. 191-192, and the Judgemet of the Supreme Court of 14 November 2001., III KKN 250/01, „Krakowskie Zeszyty Sądowe" 2002, No. 7-8, poz. 31, LexisNexis No. 356474; the Decision of the Supreme Court of the 15 October 2003, III KK 360/02, OSNwSK 2003, item 2141.

against the appellant, an appellate court may not make new decisions because it is bound by the ban on *reformationis in peius*. On the other hand, if the defendant has been acquitted or the proceedings against him or her have been discontinued – the same as comparable disciplinary proceedings against the accused – the appellate court may not sentence him or her. It results from the *ne peius* principle which refers to these concrete situations. An appellate court which will discern failures may then only reverse a decision referring the case for revision to the first instance court.

What is more, disciplinary proceedings do not sentence to deprivation of liberty and life imprisonment. The Supreme Court expressed an opinion thereon pointing out to the provisions of the Act of 27 July 2001 on the Common Courts Organization (Journal of Laws No. 98, item 1070 as amended), which are currently important with regard to disciplinary proceedings against advocates. A submission of an appeal against the accused excludes the operation of the ban on *reformationis in peius* regulated in Art. 95i of the AA. However, it does not abolish bans resulting from *ne peius* principles[14]. Contrary to the CCP's provisions, disciplinary proceedings against advocates do not envisage exceptions from the ban on *reformationis in peius*; therefore they are more beneficial for the accused in this respect.

3. Differences and similarities of cassation

Cassation is an extraordinary measure of challenge in both AA and CCP provisions. Cassation in disciplinary proceedings of the advocates' self-government is regulated in the AA's provisions on the basis of a reference to the provisions on extraordinary measures of appeal as well as provisions concerning appeals under Art. 458 of the CCP. Pursuant to Art. 91a of the AA, the parties, Minister of Justice (Prosecutor General), Civil Rights Ombudsman and President of the Polish Bar Council have the right to submit cassation to the Supreme Court against a decision rendered by the Higher Disciplinary Tribunal in the second instance. Art. 520 of the CCP further regulates the parties' right to submit cassation. Art. 521 of the CCP enlists additional entities entitled to submit cassation including: Minister of Justice (Prosecutor General), Civil Rights Ombudsman, and Ombudsman for Children if children's rights have been violated in result of the rendered decision. In the light of the AA's provisions, cassation is admissible solely against decisions of the Higher Disciplinary Tribunal rendered in the second instance. The above is further confirmed by the Supreme Court's case law[15].

It means that in disciplinary proceedings it is not permitted to submit cassation against regulations, decisions and rulings of disciplinary tribunals of first and second instance Bar Councils as well as Higher Disciplinary Tribunal's decisions rendered in

14 The Judgment of the Supreme Court of 18 November 2004, SDI 38/04, Lex No. 568847.

15 The Judgment of the Supreme Court of 21 December 2006, SDI 28/06, Lex No. 471779.

the first instance. Moreover, Art. 520 § 2 of the CCP does not apply to these proceedings because the right to submit cassation does not depend on the circumstance of challenging the first or second instance's decision by the authorized subject. Hence despite a similar possibility of submitting cassation, it should be remembered that Art. 519 and 520 of the CCP do not apply here because both decisions that cassation may be submitted against as well as the scope of entities entitled to submit it in disciplinary proceedings of the advocates' self-government have been fully regulated; therefore there are no reasons for an appropriate application of the CCP provisions.

By the way, it should be noticed that different from the CCP provisions, disciplinary proceedings against advocates do not envisage a possibility of submitting extraordinary cassation by the privileged entities under Art. 521 of the CCP. This is a consequence of earlier considerations on the exhaustive nature of Art. 91a of the AA.

Another differences between the provisions of the AA and CCP are regulations on the enforcement of decisions before cassation is brought and obligatory payments. Pursuant to Art. 91a point 2 of the AA, a decision subject to cassation by authorized subjects shall not be enforced before cassation is submitted. Whereas according to Art. 532 § 1 of the CCP, if cassation has been filed, the Supreme Court may stay the execution of the challenged decision as well as other decision whose execution depends on the outcome of the cassation. Due to the regulation of the issue concerning stay of the execution of a decision, Art. 532 of the CCP does not apply. It is apparent that the solution of the above issues in the AA provisions is more beneficial because a decision that is subject to cassation shall not be enforced before cassation is filed, or after the lapse of time to file it as well. It is a mandatory action and not merely optional as in the CCP provisions. A decision rendered by the Higher Disciplinary Tribunal in the second instance becomes final from the time it was adopted. Its execution, however, is suspended until cassation is filed, or the time limit to submit it has elapsed.

An undeniable difference between the provisions of the AA and CCP with regard to cassation is the above mentioned mandatory payment. Art. 91d of the AA stipulates that cassation is not subject to court fees. This regulation is different from the provision of Art. 527 of the CCP, according to which a receipt of payment of court fees shall be appended to a cassation appeal. Whereas pursuant to Art. 91c of the AA, the time limit to file cassation with the Supreme Court amounts to thirty days from the day on which a decision together with the reasons thereto has been served. The issue of time limit to file cassation in the CCP provisions has been regulated in Art. 524 thereof.

Furthermore, an appropriate application of the CCP's provisions with regard to cassation is provided in Art. 522 of the CCP, according to which every entitled person may bring a cassation appeal concerning the same accused and the same decision only once. This provision introduces limited admissibility of filing cassation due

to the subjective and objective scope of a decision under challenge. What is more, an appropriate application with regard to disciplinary liability of advocates is also provided in Art. 526 of the CCP. It means that provisions which in the appellant's opinion have been violated must be specified. An essential and meaningful issue is also a requirement to sign cassation by an advocate who is not the accused[16].

It should also be added that due to the lack of regulation in the AA, provisions on the causes of appeal included in Art. 438 and 439 of the CCP apply respectively to disciplinary proceedings. For this reason, the same as in the CCP, they are divided into relative and absolute causes of appeal. Under Art. 438 of the CCP in connection with Art. 95n of the AA, relative causes of appeal include: violation of the provisions of substantive law, violation of the procedural provisions if it might have affected the content of the decision issued, an error in the determination of the facts assumed as a basis of the decision if this may have affected the content of this decision, and gross disproportion of penalty or an unfounded application of a penal measure. Bearing in mind a respective application of Art. 439 of the CCP in connection with Art. 95n of the AA, absolute causes of appeal in disciplinary proceedings embrace a decision rendered with the participation of unauthorized persons or those subject to exclusion under Art. 40 of the CCP, inconsistent composition of the panel or absence of any of its members during a whole hearing, a decision rendered by a lower instance court in a case falling under the jurisdiction of a higher court, sentencing to a penalty or penal measure not mentioned in the Act, violation of the principle of majority of votes in sentencing, or a lack of signatures, discrepancy in the content of a decision, or ruling which prevents its enforcement, a decision rendered despite the fact that disciplinary proceedings on the same act committed by the same person have already been validly closed, or if one of the circumstances excluding the proceedings specified in Art. 17 § 1 point 5, 6, 8-11 of the CCP in connection with Art. 95n of the AA has occurred.

In the light of the AA's provisions, cassation may be grounded in a closed catalogue of causes. Pursuant to Art. 91b of the AA, cassation may be filed due to the gross violation of law and gross disproportion of penalty. Undoubtedly, absolute prerequisites under Art. 439 of the CCP belong to the gross violation of law. A cause of the gross violation of law may concern violation of both procedural and substantive law provisions. The Supreme Court decided that the gross violation of law in the meaning of Art. 91b of the AA occurs in case of the violation of a provision whose importance for the correct hearing and resolving of the case could have significantly affected the content of a decision challenged by cassation[17].

16 The Decision of the Supreme Court of 29 April 2008, sygn. SDI 11/08, Lex No. 1615364; the Decision of the Supreme Court of 30 July 2008, sygn. SDI 19/08, Lex No. 1615372; the Decision of the Supreme Court of 30 September 2008, sygn. SDI 22/08, Lex No. 1615375.

17 The Decision of the Supreme Court of 16 June 2005, SDI 13/05, Lex No. 568797.

A similar assumption is made on the basis of the CCP provisions, i.e. the violation of law may be assessed as gross if a manner of judicial processing, relative interpretation of the provision assumed by the court, or a manner of law applied by the court are obviously defective[18].

A difference related to the CCP's provisions concerning the causes of appeal is a circumstance according to which in the light of Art. 91b of the AA, cassation may be filed due to the gross violation of law and gross disproportion of disciplinary penalty. Whereas in the CCP, cassation may exclusively concern absolute causes of appeals under Art. 439 of the CCP and, generally, may not be brought only due to the gross disproportion of penalty. The Supreme Court's case law underlines that proceedings on the control of disciplinary tribunals' decisions should respectively rely on the output of case law referring to cassation developed on the basis of the Code of Criminal Procedure[19].

4. Conclusions with regard to the case law

Well-established case law confirms that a role of the accused and advocate may not be combined in the light of conditions admitting cassation drafted and signed by a defence counsel[20]. In the light of an appropriate application of the CCP's provisions, it is undeniable that cassations against Higher Disciplinary tribunal's decisions brought to the Supreme Court should satisfy a special formal requirement specified in Art. 526 § 2 of the CCP constituting compulsory legal assistance. The adoption of this principle entails that despite possible practicing as an advocate and being allegedly familiar with judicial procedures, an advocate acts as the accused in disciplinary proceedings of the advocates' self-government.

What is more, the Supreme Court's case law has repeatedly emphasized that compulsory legal assistance is satisfied not only by signing but also drafting cassation by a professional defence counsel or attorney. In the light of Art. 84 § 3 of the CCP and Art. 526 § 2 of the CCP on drafting and signing cassation by a defence counsel, he or she must both draft and sign cassation. Merely an advocate's signature itself under the appeal drafted by the party does not satisfy the above requirement and the same does not fulfil the requirements of cassation. This opinion has also been

18 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Tom III. Komentarz do artykułów 468-682, Warszawa 2012, p. 233 and oraz cited Hugh Court case-law.

19 The Decision of the Supreme Court of 1 October 2004, SDI 5/04, OSNKW No. 10/2004, item 95 and sygn. akt SDI 7/04, Lex No. 568870.

20 The Decision of the Supreme Court of 27 September 2012 r., sygn. akt. VI KZ 12/12 Lex No. 1221000; The Decision of the Supreme Court of 15 December 2010, IV KZ 73/10; The Decision of the Supreme Court of 25 July 2013, SDI 16/13, Lex No. 1341704; The Decision of the Supreme Court of 25 July 2013, SDI 14/13, Lex No. 1347901.

approved of in the literature[21]. The formulation of cassation claims, which may solely concern normative issues, should then be characterized by professionalism, be devoid of an emotional attitude to the case or subjectivism. The Supreme Court ruled that the substantive law base of attributing disciplinary liability, the same as any other type of repressive liability, must be grounded in statutory provisions while only possibly completed by sub-statutory provisions, or those contained in the resolutions of corporate authorities[22]. Hence it means that Art. 80 of the AA shall be the base of disciplinary liability of advocates. Pursuant to this provision, a base of disciplinary liability is conduct contrary to the law or principles of ethics and professional dignity, a breach of professional duties, or failure to conclude a mandatory insurance agreement mentioned in Art. 8a par. 1 of the Act.

Therefore, in order to assume disciplinary liability, it is not only necessary to specify which of the above listed forms are perceived as the base of the accused person's liability by a disciplinary tribunal but to indicate an embodying norm too. Art. 80 of the AA constitutes a statutory base of advocates' disciplinary liability. Furthermore, the obligation to provide concrete descriptions of an act which should be recognized as disciplinary torts derives from the commonly embedded case law referring to disciplinary cases against judges, which applied the requirement of grounding a case on statutory provisions[23]. The Supreme Court ruled that there are no bases to apply less restrictive standards in disciplinary cases against advocates with regard to the accuracy of formulation and classification of attributed disciplinary torts. All such cases hold a similar nature of a repressive liability.

Describing and attributing a disciplinary tort against advocates on the basis of a non-statutory provision is a gross mistake. For this reason, disciplinary tribunals should, above all, be familiar with up-to-date case law of the Supreme Court. Another important decision with regard to advocates' disciplinary liability is the Supreme Court's ruling, according to which it is inadmissible to attribute an act not included in the indictment to the advocate accused in disciplinary proceedings[24]. It is directly connected with the principle of accusatorial proceedings being in force in the Polish criminal procedure. In compliance with the CCP's provisions, which undeniably apply to this case with regard to the above issue, the infringement of the

21 A. Sakowicz, (in:) K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, Kodeks postępowania karnego. Komentarz. Warszawa 2007, p. 1067; S. Steinborn, J. Grajewski, L.K. Paprzycki (eds.), Komentarz aktualizowany do art. 526 Kodeksu postępowania karnego, Lex/el. 2012, teza 13; W Kozielewicz, Odpowiedzialność…, *op. cit.*, Warszawa 2012, p. 309.

22 The Judgment of the Supreme Court of 15 July 2010., sygn. akt. SDI 12/10, OSNKW 2011/3/25.

23 The Judgment of the Supreme Court 23 January 2008, SNO 89/07, OSNKW 2008, vol. 5, issue 37; The Judgment of the Supreme Court 29 October 2009, SDI 22/09, OSN-SD 2009, item 132.

24 The Judgment of the Supreme Court of 5 January 2001, III SZ 9/00, Lex No. 48845, OSNP 2002/4/98, OSNP-wkł. 2001/18/12, „Monitor Prawniczy" 2002/7/322, „Monitor Prawniczy" 2001/19/958.

principle of accusatorial proceedings, that is convicting for an act different than has been violated, is an absolute cause of appeal under Art. 439 § 1 point 5 of the CCP in connection with Art. 17 §1 point 9 of the CCP. The same act may constitute only one offence; hence it also designates a limit of the act. A correct determination of the limits of a concrete alleged act allows to observe the principle of non-alteration, that is adequate development of a description of an alleged act as well which, in turn, means that the principle of accusatorial proceedings is respected[25].

The system of disciplinary proceedings against advocates has apparently been constructed on the basis of the model of the CCP's provisions. The Code of Advocates' Ethics and Professional Dignity and the AA's provisions constitute peculiar substantive law whereas provisions of Art. 80-95n of the AA together with the CCP's provisions constitute provisions of disciplinary proceedings against advocates. Similar reading of the content of the CCP and AA may be perceived in the entire procedure on disciplinary liability of the advocates' self-government.

The Supreme Court's case law points out to a more and more important role and impact of the CCP's provisions on the AA. Despite some distinct regulations and respective adjustment to the advocates' system, similarities between provisions are discernible. Perhaps this is why the issues not regulated in the AA are applied appropriately to the CCP's provisions, which directly results from Art. 95n of the AA. This further emphasizes the status and importance of the CCP's provisions. The principles of disciplinary proceedings against advocates as well as their similarities to criminal proceedings refer not only to advocates but also advocate trainees because in the light of Art. 2 of the AA, the advocacy is composed of all advocates and advocate trainees.

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25 The Judgment of the Supreme Court of 20 September 2002, V KKN 112/01, Lex No. 55225, „Prokuratura i Prawo" – insert 2003/2/1.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.08

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Justification of Judgments of the Advocacy Disciplinary Tribunal

Abstract: The subject of this article is jurisdiction of decisions of the Advocacy Disciplinary Tribunal. The author focuses on the independence of the Law on Advocates and the Criminal Practice Rules. Appropriate application of the provisions of Criminal Practice Rules might take one of the following forms – 1) when the appropriate provision of Criminal Practice is applied directly, without any changes, 2) when the provision of Criminal Practice is modified wherever appropriate, 3) when the provision cannot be applied. The article also discusses various different issues of minimum requirements that are met by the justification of the disciplinary tribunal.
Keywords: justification of judgment, Disciplinary Tribunal, judgment, Advocacy

Disciplinary liability is one of the types of legal liability understood as "the principle of an entity bearing negative consequences envisaged by the law for the events or state of affairs that are subject to negative normative qualification and legally attributed to a given entity in a given legal order[1].

We will not find a uniform definition of disciplinary law in the literature[2]. Some representatives of the doctrine[3] claim that disciplinary law is identical to criminal law because a legal position of a person subject to disciplinary liability is the same as a position of a citizen breaching legal order. T. Bojarski, among others, is of a different opinion thinking that disciplinary proceedings are not a part of criminal

1 W. Lang, Struktura odpowiedzialności prawnej (Studium analityczne z dziedziny teorii praw), „Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu. Nauki Humanistyczno-Społeczne" 1968, No. 31, p. 12.

2 See. P. Czarnecki, Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego, Warszawa 2013, pp. 23-24; R. Gietkowski, Odpowiedzialność dyscyplinarna w prawie polskim, Gdańsk 2013, p. 19 and following.

3 H. Kelsen, Podstawowe zagadnienia nauki prawa państwowego. Tom II, Wilno 1936, pp. 253-280.

law because there is no common disciplinary law[4] (each professional group has their own distinct regulations concerning disciplinary liability, e.g. advocates, judges, doctors, etc.).

For the needs of this study it will be sufficient to assume that disciplinary proceedings are legal provisions regulating the issues of liability for acts infringing professional duties as well as types of penalties for those acts. Above all, disciplinary proceedings fulfil a controlling function. They should also have a preventive function – protecting potential clients against unreliable or dishonest advocates and assuring moral satisfaction to injured clients. These proceedings also determine the principles and course of procedure in case of the violation of professional duties resulting from the practice of a specific profession. In other words, disciplinary liability forces a person to perform his or her profession reliably.

Pursuant to the Act on the Advocacy[5], a disciplinary tribunal of the Bar Council and Higher Disciplinary Tribunal resolve disciplinary cases against advocates and advocate trainees. A disciplinary tribunal of the Bar Council hears all disciplinary cases as the first instance court except cases against members of the Polish Bar Council and Regional Bar Councils. Higher Disciplinary Tribunal is a second instance court in cases heard in the first instance by disciplinary tribunals of the Bar Councils and a first instance court in disciplinary cases against members of the Polish Bar Council and Regional Bar Councils.

A disciplinary tribunal of the Bar Council is composed of President, Deputy President and from six to twenty three members and three deputies elected by the Bar Council's Meeting for a three-year term of office. Higher Disciplinary Tribunal is composed of President, twenty three members and three deputies elected for three years by the Polish Congress of the Bar. Disciplinary tribunals of the Bar Council and Higher Disciplinary Tribunal as a first instance court hear cases in the panels composed of three persons. Higher Disciplinary Tribunal hears appeals in a three-person panel too. The exception to this rule is hearing appeals against its own decision rendered in the first instance proceedings. Then Higher Disciplinary Tribunal hears the case in a five-person panel excluding those persons who took part in passing a decision under challenge.

A model of disciplinary proceedings may be called quasi judicial two-tiered proceedings carried out by authorities composed solely of advocates that are subject to judicial control exercised by the Supreme Court. The currently valid solution has been found in compliance with Art. 45 of the Polish Constitution by the

4 T. Bojarski, Polskie prawo karne. Zarys części ogólnej, Warszawa 2001, pp. 27-28.

5 The Act of 26 May 1982 (Journal of Laws od 1982, No. 16, item 124) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze, Dz.U. z 1982 r. Nr 16 poz. 124].

Constitutional Tribunal[6]. Disciplinary proceedings are repressive proceedings that force observation of ethical norms[7] and professional deontology.

Disciplinary proceedings are bound by the principle of jurisdictional autonomy of disciplinary tribunals. Art. 89 of the AA stipulates that a disciplinary tribunal hears cases autonomously and resolves emerging legal issues independently passing a sentence upon the conviction based on free assessment of all evidence including circumstances both in favour of and against the accused. The above quoted Art. provides "disciplinary tribunals with full independence of sentencing and exclusive subordination within this scope to the Act and to lower legal acts only if they are issued on the basis of the Act and are not contradictory to it"[8].

A fundamental source of disciplinary procedural law is the Act on the Advocacy and the Code on Criminal Procedure. Nevertheless, these are not the only legal acts regulating disciplinary proceedings. Provisions of the Code of Civil Procedure, Code of Administrative Procedure as well as internal provisions of the advocates' self-government will apply here too. The application of the provisions of the Code of Criminal Procedure results directly from Art. 95n of the AA specifying that the provisions of the Code of Criminal Procedure apply appropriately to the matters not regulated in this Section. According to L. Morawski, "appropriate application of the provision may involve its direct application, application with suitable modifications, or a refusal to apply it due to specific differences. In order to establish which of the above situations occurs, the interpreter should rely on the systemic and functional interpretation"[9]. Hence appropriate application of the provisions of the Code of Criminal Procedure may occur in three forms. Firstly, we may apply a given provision directly without any changes. Secondly, a provision may be applied with necessary modifications; and thirdly, we may deal with a situation when a provision of the Code of Criminal Procedure might not be applied in pending disciplinary proceedings (e.g. the provision on the application of temporary custody). These assumptions are also confirmed by the Supreme Court's judgment, according to which "intending to apply the provisions of the Code of Criminal Procedure appropriately, the court hearing a disciplinary case against a judge must first establish which provisions of the Procedural Act shall be "appropriately applied" in disciplinary proceedings; and secondly, their content should not be modified to adapt a concrete provision of the Code of Criminal Procedure to the proceedings' specificity whose object is

6 The Judgment of the Constitutional Tribunal of 25 Jule 2012., Sygn. akt K 9/10.

7 The Resolution No. 2/XVIII/98- A set of Principles of Barrister's Ethics and Dignity of Profession (Code of Barrister's Ethics) of 10 October 1998 r.

8 W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy, Warszawa 2012, p. 245.

9 L. Morawski, Zasady wykładni prawa, Toruń 2010, pp. 244-245.

disciplinary liability belonging to the category of repressive liability. The above principles by all means refer to disciplinary proceedings against advocates too"[10].

Furthermore, we will deal with reference to the Code of Criminal Procedure also with regard to giving reasons to a decision rendered by a disciplinary tribunal because the Act on the Advocacy does not regulate this issue.

Giving reasons is an instrument reflecting the court's opinion in the public discourse[11]. Giving reasons is "a more or less complicated mental operation finishing with a statement that according to specific criteria of finding sentences true or likely to be true that are adopted in a given environment, a certain sentence should be found legitimate. These criteria are a certain cognitive paradigm (the paradigm of legitimacy)[12].

It should be remembered that "giving reasons is a vital element of the administration of justice"[13]. It is also a decisive element of "the right to a fair criminal trial"[14] as the structurally protected right of an individual. Fairness of judicial proceedings is a guarantee of the state's rule of law and protection of both human rights and freedoms. Pursuant to Art. 45 of the Polish Constitution: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court"[15]. Moreover, the right to a fair trial is regulated in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which: "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 (…)"[16].

J. Wróblewski underlines that giving reasons to a judicial decision fulfils the following functions:

1) it fulfils a legal obligation to provide the grounds of a decision being taken,

2) it provides a base for controlling the decision's accuracy,

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10 The Judgment of the Supreme Court of 29 October 2009, SDI 22/09, OSN-SD 2009, issue. 132.

11 E. Łętowska, Udział władzy trzeciej w dyskursie społecznym – sądy i trybunały w najwyższych instancjach, (in:) R. Hauser, L. Nawacki, Państwo w służbie obywateli: księga pamiątkowa Jerzego Świątkiewicza, Warszawa 2005, p. 38.

12 M. Zieliński, Z. Ziembiński, Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie, Warszawa 1988, p. 95.

13 R. Broniecka, Uzasadnianie wyroku w polskim postępowaniu karnym, Warszawa 2014, p. 35.

14 The Judgment of the Supreme Court of 28 May 2013, II KK 308/12, Lex No. 1319257, see: A. Błachnio-Parzych, J. Kosonoga, H. Kuczyńska, C. Nowak, P. Wiliński, Rzetelny proces karny, Warszawa 2009.

15 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws od 1997, No. 78, item 483) [Konstytucja Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. z 1997 r. Nr 78, poz. 483].

16 Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993, No. 61, item 284).

3) it may play a persuasive role in relation to the decision's addressees and other entities as well as adjudicating authorities hearing appeals,
4) it fulfils further functions of comprehensive reasoning – an element affecting development of the practice of precedence and predictability of decisions as well as shaping evaluative attitudes among judges and possibly in the society; considered by the lawmaker, the reasons may constitute resources which will affect changes of the legal status,
5) its function is descriptive when it should correspond to a decision-making process by the adjudicating authority[17].

These functions, i.e. the function of adjudicating authority's self-control as well as explanatory-interpretative, controlling and legitimizing functions, have been reflected in the Constitutional Tribunal's decision of 11 April 2005[18]. In this decision, the Tribunal underlined that the above described functions of giving reasons result from the principle of the state of law, human dignity and the efficient right to a trial. The author believes that such functions should also be fulfilled by reasons given by a disciplinary tribunal, yet to the slightest extent. It would contribute to the improvement of the quality of decisions rendered by disciplinary tribunals.

The function of adjudicating authority's self-control forces self-control of judges passing a sentence in order to assure its substantive and formal accuracy[19]. This function is closely related to the principle of free assessment of evidence, which was presented in Art. 89 par. 2 of the AA: "A disciplinary tribunal resolves emerging legal issues independently and passes a sentence upon the conviction based on free assessment of all evidence including circumstances both in favour of and against the accused". The invoked Article fails to determine the meaning of free assessment of evidence; that is why we should refer here to Art. 7 of the CCP, according to which investigating authorities shall make a decision on the basis of their own conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning, state of knowledge and life experience. "Judicial bodies must explain themselves why they based their conviction on this and not other evidence and why they did not accept evidence to the contrary"[20].

17 J. Wróblewski, Sądowe stosowanie prawa, Warszawa 1988, pp. 306-308.
18 SK 48/04, OTK-A 2005, No. 4, issue 45.
19 P. Hofmański, Z. Zabłocki, Elementy metodyki pracy sędziego w sprawach karnych, Warszawa 2011, p. 271; The Judgment of the Constitutional Tribunal of 16 January 2006, SK 30/05, OTK-A 2006, No. 1, issue 2.
20 S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2013, p. 257.

The explanatory-interpretative function is closely related to Art. 424 of the CCP[21]. Reasons given to the judgment should include a brief (and not exhaustive as it was specified previously in the September amendment) reference to the facts the court has found to be proved, the evidence upon which the court has relied on in this matter, and the reasons why the evidence to the contrary has been dismissed by the court. Moreover, the reasons should specify legal bases and circumstances taken into account by the court in the process of imposing penalty, in particular in cases in which an extraordinary mitigation of penalty or preventive measures have been applied and other resolutions contained in the judgment.

The subject literature as well as courts' case law provide three concepts referring to the nature of giving reasons to a judgment. The first concept assumes that giving reasons has a reporting nature. S. Śliwiński supported this concept saying that "a document containing the reasons to a judgment is a reporting document whose task is to acknowledge (report, document) what the court was motivated by when passing a sentence"[22]. J. Wróblewski[23] held the same opinion. The above concept of a reporting nature of the reasons to a judgment is further confirmed by the Supreme Court's judgment: "The structure of the reasons, being the only reporting document allowing to find out what the court was motivated by when passing a concrete sentence, requires special precision of expressing thoughts because legal transactions are bound by not what the court intended to write down but by what the court actually wrote down"[24]. A reporting nature of giving reasons is also confirmed by the judgment of the Administrative Court in Łódź, according to which: "As a document reporting judges' deliberation on a judgment, the reasons should generally present in a well organized form facts established by the court and assessment of collected evidence indicating which evidence individual findings have been based on and explaining why other evidence cannot be the base of findings to the contrary. The established facts must be accurate enough to assure that the legal assessment of the act attributed to the defendant does not evoke any doubts in their light, especially from the perspective of substantive elements constituting this offence. Therefore it is important to present precisely the alleged event in accordance with the proved version of the chain of events. The satisfaction of the above conditions allows to avoid contractions between the judgment's conclusion, in particular in relation to the description of the accused person's act adopted therein and its reasons with regard to the factual grounds of the ruling"[25].

21 Art. 424 of the Act of 27 September 2013 (Journal of Laws of 2013, item 1247, as amended, Journal of Law of 2015, item 396).

22 S. Śliwiński, Polski proces karny przed sądem powszechnym. Zasady ogólne, Warszawa 1959, p. 509.

23 J. Wróblewski, Sądowe stosowanie prawa, Warszawa 1988, p. 308.

24 The Decision of Supreme Court of 15 June 2005, III KK 225/04, Lex No. 152469.

25 The Judgment of the Appeal Court in Łódź of 12 August 2008, II AKa 99/08, Lex No. 491929.

The second concept supports a logical meaning of giving reasons to a judgment. This concept was supported by M. Cieślak and Z. Doda[26], among others. It assumes that "reasons to a judgment should prove a logical process upon which the court found the defendant guilty or innocent. Hence the court should indicate in the reasons which facts it has found to be established, the grounds of individual findings, why it has dismissed evidence to the contrary, and what conclusions has been drawn upon the court's established findings. The content of the reasons must establish *a posteriori* the chain of reasoning which occurred during deliberation before the verdict was passed. Drafting the reasons to a judgment accordingly is of fundamental importance to the parties' procedural actions because the appellant may then oppose the claims made by the court in the reasons to the judgment in order to persuade a court of appeal that the ruling included in the judgment's conclusion is defective since it derives from defective or mistaken prerequisites. Invoking arguments against the reasons, the appellant opposes the ruling itself as a result of reasoning included in the reasons. Accuracy of the reasons to a judgment affects not only a correct formulation of claims in an appeal but also correct control of the appeal"[27].

The third concept takes a mixed form because it is a combination of the two above described concepts. Z. Świda believed that all reasons must precisely reflect arguments taken into account by the court when a sentence was passed. She also claimed that in the reasons the court could invoke motifs that were not discussed but which resulted from the Act and affected a final ruling[28]. It should be remembered that "the reasons are neither a shorthand note unfolding deliberation over a verdict nor a report on its course but a study created after passing a verdict which must depict in an organized manner arguments taken into account during deliberation as well as those dismissed but grounded in evidence, and provide a logical and exhaustive answer why such and not other verdict was passed in a given case"[29].

The function of external control *sensu strict* will depend on the stage of disciplinary tribunal's proceedings. The same as in criminal proceedings, the constitutional principle of second instance applies to disciplinary proceedings, which allows to challenge a decision of disciplinary procedural authorities (Art. 425 of the CCP in connection with Art. 95 of the AA). In disciplinary cases against advocates

26 See: M. Cieślak, Z. Doda, Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1979 roku), „Palestra" 1980, vol. 11-12, p. 103; M. Cieślak, Glosa do wyroku SN z dnia 12 listopada 1962 r., I K 568/61, „Nowe Prawo" 1963, No. 4-5, p. 601.

27 The judgment of the Appeal Court in Rzeszów of 18 March 2010, II AKa 22/10, Lex No. 1016944; compare: the judgment of the Supreme Court of 6 October 2009, WA 31/09, Lex No. 598223.

28 Z. Świda-Łagiewska, Zasada swobodnej oceny dowodów w polskim procesie karnym, Wrocław 1983, p. 303304; as also R.A. Stefański, (in:) Z. Gostyński, R.A. Stefański, S. Zabłocki (eds.), Kodeks postępowania karnego. Komentarz. Tom 2, Warszawa 2004, p. 862.

29 The judgment of the Supreme Court of 4 November 2003, V KK 74/03, Lex No. 84219.

appealing control over disciplinary tribunals' decisions is vested in one court of appeal – Advocacy Higher Disciplinary Tribunal.

Each reasons to a judgment, whether they are issued by the first or second instance court, must satisfy statutory requirements while a difference between the reasons to judgments of the first and second instance courts is a consequence of differences and type of procedure before these courts. Hearing a case "within the limits of indictment", the first instance court must justify its verdict fully in accordance with the guidelines contained in Art. 424 of the CCP whereas the court of appeal, generally hearing a case within the limits of the appeal, must justify its verdict in accordance with the rules specified in Art. 457 § 2 of the CCP by providing its motivation to pass just such a verdict, in particular motivating its attitude to the appeal's claims and conclusions (…). The Supreme Court has already many a time accurately specified standards that the reasons given by a court of appeal must satisfy in order to be recognized as meeting at least minimum requirements contained in these provisions. The Supreme Court has particularly emphasized that "the reasons cannot be a superficial response to the claims raised in the appeal; they cannot be limited to general declarations and quotes of the judicature's output concerning general procedural rules or principles of drafting reasons. The reasons must present substantial arguments providing a clear answer why concrete claims and arguments of the appeal have been assessed as unfounded; while they must present the chain of reasoning in a manner not evoking any doubts as to the fact that all vital issues have been considered and assessed (…)"[30]. "Let us finally say that when drafting reasons to judgments in appeal proceedings, we should also refrain from a too preachy tone. We should not mistake care for the quality of rulings of our younger Colleagues with cheap didactics and, most often, absolutely useless show of our possible intellectual advantage or, even less debatable, predominance of our life experience. Such a patronizing tone is especially blatant when a decision under challenge has been upheld. It just could not be then burdened with more serious defects"[31].

Yet we cannot ignore the Supreme Court's guidelines, which specified in of the SC's judgments that: "The reasons to a judgment of an appellate court should correspond to the requirements laid down in Art. 457 § 3 of the CCP, i.e. they should provide motifs upon which the court has rendered the judgment and specify why the court has found the appeal's claims and conclusions relevant or irrelevant. However, if it is a judgment altering a decision, the obligation to draft the reasons in a manner specified in Art. 424 § 1 of the CCP becomes valid, i.e. providing a brief indication which facts the court has found to be proved or unproved, the evidence upon which the court has relied on in this matter, and the reasons why the evidence to the

30 The judgment of the Supreme Court of 18 November 2004, SDI 55/04.

31 P. Hofmański, S. Zabłocki, Elementy metodyki pracy sędziego w sprawach karnych, Warszawa 2011, p. 323.

contrary has been dismissed by the court. Hence if the second instance court alters a judgment under challenge as to the essence of the case, the court is obliged not only to demonstrate in the reasons to the judgment the implementation of the order resulting from Art. 457 § 3 of the CCP but also fulfil the duty resulting from Art. 424 § 1 and 2 of the CCP (compare, e.g., the Supreme Court's judgment of 9 December 1997, V KKN 25/97, OSNKW 1998, v. 3-4, item 150). Thus when a court of appeal rules alternatively as to the essence of the case, a motivational part of its decision should include a detailed analysis and assessment of the collected evidence. It cannot be limited to the indication of fallacy of previous findings and assessments"[32].

Each judgment of the court must be duly reasoned because it determines a possibility of a proper review in judicial proceedings. A judgment whose reasons contain defects cannot be subject to a proper review, which results in repealing or referring the case for re-examination.

All reasons should "satisfy a persuasive function at least minimally, i.e. depict the reasons for a decision so that the parties could be convinced about its fairness and legitimacy (…)"[33]. The reasons should persuade each recipient, i.e. litigants as well as Advocacy Higher Disciplinary Tribunal and third parties, about the legality, legitimacy and fairness of the rendered judgment thus preventing its futile challenge. What is more, "the reasons play not only a procedural function but also enhance respect for the administration of justice and develop external conviction about the judgment's fairness"[34].

As indicated in the introduction, the functions of giving reasons to disciplinary tribunal's judgments are identical with the functions determined by the Constitutional Tribunal in the decision of 11 April 2005. Since issues related to giving reasons to a judgment are not regulated in the Act on the Advocacy, the provisions of the Code of Criminal Procedure apply thereto. However, the issue of drafting and serving the reasons to judgments evokes some doubts. Do they have to be drafted and served in accordance with Art. 88a of the AA, or under the provisions of the Code of Criminal Procedure?

Higher Disciplinary Tribunal interpreted the above scope in the decision of 15 June 2013[35]. According to it, disciplinary tribunals draft reasons to judgments *ex officio* and serve them to the parties and Minister of Justice *ex officio* too.

Such interpretation is also supported by a considerable number of doctrine representatives[36], who believe that disciplinary tribunals should draft and serve reasons

32 The judgment of the Supreme Court of 2 March 2012, SDI 4/12.

33 The decision of the District Court in Wrocław of 24 June 2013, IV Kz 470/13; as also the Decision of the Apeal Court in Kraków of 24 June 2000, II AKz 219/00, Lex No. 41740.

34 The judgment of the Supreme Court of 4 November 2003, V KK 74/03, Lex No. 84219.

35 The decision of the Higher Disciplinary Court of 15 June 2013, WSD 140/12.

36 Report from the conference of the Disciplinary Department of the Bar, 12 April 2014, Warszawa, www.adwokatura.pl.

to judgments *ex officio*. R. Baszuk disagrees with such interpretation of Art. 88a of the AA claiming he does not see a connection between Art. 88a of the AA and the obligation to give reasons to judgments and serve them *ex officio*. In his opinion, the above quoted provision does not relate to giving reasons to judgments *ex officio* and the obligation to serve them *ex officio* at all. Art. 88a of the AA sets forth that: "The parties and Minister of Justice may appeal against judgments and decisions terminating disciplinary proceedings within fourteen days from the day on which a copy of the judgment or decision together with the reasons thereto and instructions on a time limit and procedure of submitting an appeal has been served". We should agree with R. Baszuk that a ban on the application of the CCP *mutatis mutandis*, i.e. Art. 422 of the CCP, does not ensue from the words "instructions on a time limit and procedure of submitting an appeal". "The provision of Art. 422 of the CCP does not determine the norm differently from Art. 88a of the AA regulating appellate proceedings. The scope of its regulation is different; what is more, it is a provision included in the system of procedural norms concerning first instance proceedings. Provisions of the Act regulating disciplinary proceedings with regard to first instance proceedings are limited to Art. 90, 91 par. 2 and 4 first sentence, 92, 95, 95a, 95d, 95e, 95j, none of which regulates the issue of drafting and serving the reasons to judgments"[37]. Since the AA does not regulate this issue, pursuant to Art. 95n of the AA, Art. 422 § 1 of the CCP should be applied[38] – within a final time limit of seven days from the day on which a verdict was pronounced, the party and victim (if a judgment conditionally suspending proceedings was issued in a meeting) may submit a motion for drafting reasons to the judgment in writing and serving them. The above provision ensues that the first instance disciplinary tribunal drafts the reasons to a judgment exclusively upon the party's request. Under Art. 90 point 2 and 2a of the AA, Minister of Justice may also submit a motion for drafting and serving reasons to a judgment. Drafting the reasons *ex officio* does not exempt the party and victim from submitting a motion for serving the reasons. Such a motion is submitted in writing.

The issue of drafting and serving reasons to decisions terminating disciplinary proceedings looks different even though the provisions of the CCP will also apply here appropriately – Art. 94 § 1 point 5 and Art. 98, because this issue is not regulated in the Act on the Advocacy. Art. 94 § 1 point 5 of the CCP stipulates that a decision should include the reasons unless the Act exempts from this requirement. Whereas Art. 98 of the CCP sets forth that the reasons to a decision shall be made in writing together with the decision itself. "The provision assumes the obligation to give reasons *ex officio* only with regard to decisions, which is a continuation of the requirements indicated

37 The commentary to the decision of the High Disciplinary Court of the Bar of 15 June 2013, WSD 140/12.

38 K. Kanty, T. Kanty, Komentarz do przepisów o postępowaniu dyscyplinarnym adwokatów, Warszawa – Gdańsk 2013, p. 194.

in Art. 94 § 1"[39]. Drafting reasons to a decision may be postponed up to seven days if the case is complicated, or for other important causes. If the court decides to take advantage of a possibility of postponing drafting reasons to a decision, it results in: firstly, the need to provide orally the most important causes of the decision (Art. 100 § 4) and, secondly, the need to serve the parties with the decision together with the reasons thereto after drafting it (Art. 100 § 3)[40]. It should be mentioned here that "Art. 94 § 1 point 5 of the CCP and Art. 98 § 1 of the CCP do not precisely specify the conditions the reasons to a decision should correspond to. Nevertheless, according to the opinion that has been well established in the case law, it results from the essence of the reasons that they should indicate all crucial prerequisites upon which an authority issued a decision. In consequence thereof, the reasons should, above all, exhaustively explain factual grounds of a decision and provide legal prerequisites as well if necessary. (…) Hence the reasons should, as a rule, contain elements determined in Art. 424 § 1 point 1 and 2 of the CCP even though this norm relates directly only to giving reasons to a decision passed in the form of a judgment"[41].

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39 T. Grzegorczyk, Kodeks postępowania karnego oraz ustawa o świadku koronnym, Warszawa 2008, p. 300.

40 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Tom I. Komentarz do artykułów 1-296, Warszawa 2011, p. 645-646.

41 The decision of the Supreme Court of 15 February 2001, III KKN 595/00, Lex No. 51949.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.09

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Coincidence of Criminal and Disciplinary Proceedings in the Context of the Provisions of the Law on Higher Education

Abstract: The current formula of disciplinary liability is neither clear nor uniform. Built on the basis of a number of independent regulations, it is inconsistent with the general pattern of uniformity and universal use. Interesting are situations in which criminal liability and disciplinary liability become interdependent. The question then arises as to whether a crime and possible initiation of criminal proceedings by a member of a student community imposes an obligation on the authorities of the university to initiate and conduct disciplinary proceedings in parallel.
Keywords: criminal proceedings, disciplinary liability, students

1. Introductory comments

The current formula of disciplinary liability is neither clear nor uniform. Built on the basis of a number of independent legal regulations, it is inconsistent with the general pattern of uniformity and universal use. A large number of statutory regulations organizing disciplinary liability by means of different solutions evokes interest. Yet similar to any other legal liability, disciplinary liability is generally always determined by the system of interdependent norms of substantive law and formal law operating in specified Acts[1]. These legal regulations define a disciplinary act, indicate conditions of holding someone disciplinary liable, specify effacement of disciplinary punishment, disciplinary penalties, prerequisites of initiating disciplinary

1 W. Kozielewicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy, Warszawa 2012, p. 18; W. Kozielewicz, Odpowiedzialność dyscyplinarna notariuszy – problematyka materialno prawna i procesowa, „Rejent" 2006, No. 16, p. 25; R. Giętkowski, Odpowiedzialność dyscyplinarna w prawie polskim, Gdańsk 2013, p. 182.

proceedings, institutions of disciplinary procedure (Disciplinary Ombudsman, disciplinary committees) as well as appellate proceedings.

Disciplinary law and disciplinary proceedings have been even perceived for quite a long time now as a distinct and peculiar section of legal liability[2]. However, there is no agreement with regard to the question whether disciplinary law is a typically separate branch of law, or perhaps it is a specialized area of legal regulations connected to a smaller or larger degree with the currently existing areas of law such as criminal law, or maybe administrative law[3].

Signalled suppositions of disciplinary liability allow to define disciplinary law and disciplinary proceedings as well as specify generic differences of this area; yet it is strongly emphasized that the creation of a comprehensive definition is quite difficult here [4]. One may encounter proposals according to which disciplinary law and disciplinary proceedings are identical with the collection of legal provisions specifying liability for acts breaching official duties and types of penalties for these acts as well as principles and course of procedure when a breach of official duties has been ascertained[5]. Determining disciplinary liability, the focus is often placed on combining the model of diligence (professionalism) in performing professional duties with the model of an ethical and moral attitude of an individual functioning in a specific group where cherishing the group's value is as important standard as factual quality or reliability. It is also emphasized that disciplinary liability should enhance and assure prestige of a specific community, or guarantee jurisdictional independence of members of institutions or corporations acting according to specific rules[6]. Disciplinary liability is also a legal institution of self-discipline and self-control of organizationally and legally distinct social groups[7].

Hence the question arises here whether a commission of an offence by a member of a student community and possible initiation of criminal proceedings imposes on the university' authorities an obligation to bring and pursue parallel disciplinary proceedings. According to a dictionary definition, coincidence is just a simultaneous occurrence of some things, co-existence of certain relations or phenomena, or simply a concurrence of situations[8].

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2 Z. Leoński, Odpowiedzialność dyscyplinarna w prawie Polski Ludowej, Poznań 1959, p. 9.

3 P. Czarnecki, Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego, Warszawa 2013, p. 34 ff.

4 Z. Leoński, Odpowiedzialność dyscyplinarna w prawie Polski Ludowej, Poznań 1959, p. 233 ff.

5 J. Paśnik, Prawo dyscyplinarne w Polsce, Warszawa 2000, p. 8.

6 M. Zubik, M. Wiącek, O spornych zagadnieniach z zakresu odpowiedzialności dyscyplinarnej sędziów Trybunału Konstytucyjnego – polemika, „Przegląd Sądowy" 2007, No. 3, p. 70.

7 W. Kozielewicz, Odpowiedzialność dyscyplinarna i karna notariusza – wzajemne relacje, „Rejent" 2011, No. 10, p. 85.

8 S. Skorupka, H. Auderska, Z. Łempicka, Mały słownik języka polskiego, Warszawa 1968, p. 283.

2. Grounds for student disciplinary liability

Grounds for university student disciplinary liability are regulated in the Act of 27 July 2005 – Law on Higher Education (hereinafter the LHE)[9], which in Section IV titled "Studies and students" includes Chapter 6 titled "Student disciplinary liability" (Art. 211-225). Yet, Art. 224 of the LHE contains the norm according to which Minister competent for higher education shall determine in a Regulation rules of investigation and disciplinary procedure. Currently, it is Regulation of Minister of Science and Higher Education of 6 December 2006 on the rules of investigation and disciplinary procedure against students[10].

3. A disciplinary tort in the Law on Higher Education

Under Art. 211 of the LHE, a disciplinary act is an act breaching valid university regulations as well as any conduct offending student dignity for which a student shall be liable in a disciplinary action

before a disciplinary committee or a student disciplinary panel of the student self-government.

Art. 211 of the LHE does not include a definition of a student disciplinary tort; in any case, the legislator has similarly adopted here a model already known in the criminal law, which does not define an offence too, i.e. it only specifies elements thereof upon which its final form may be formulated.

The content of Art. 211 of the LHE contains two foundations necessary to attribute disciplinary liability to a university student. This Article assumes that an act committed by a student must involve a breach of valid university regulations while its significance and effects must offend student dignity.

These two statements reveal a form of a disciplinary act combining a student's duty to observe the provisions of law regulating higher education and the highest values constituting the essence of dignity of every individual even though the values exposed here are attributed mainly to the academic community.

A set of features which at the same time constitute the values of a student community are most often included, among other, in the text of a student pledge which, generally, should be made by each student during matriculation. The significance and content of the pledge are usually placed in individual regulations of individual majors. On the other hand, conduct offending student dignity is rather an open catalogue of attitudes contrary to generally accepted ethos of higher education based on a search for the truth, freedom, research, respect to others, justice, honesty

9 Consolidated text Journal of Laws of 2016, No. 164, item 1365 [Tekst jedn. Dz.U. z 2016 r. Nr 164, poz. 1365].

10 Journal of Laws of 2006, No. 236, item 1707 [Dz.U. z 2006 r. Nr 236, poz. 1707].

and public service. Any conduct breaching either valid university regulations or offending a model of respectable student conduct is the ground for treating them as disciplinary acts.

The issue of breaching valid university regulations contained in the content of Art. 211 of the LHE is quite simple to interpret. This notion embraces all internal university provisions such as, e.g., regulations, articles of association, university and faculty authorities' orders, etc.; and yet this obligation also concerns the observance of commonly valid provisions of the Law on Higher Education by students[11]. The Law on Higher Education, first and foremost, imposes on a student obligations after all directly connected with his or her study. It is directly specified in Art. 189 of the LHE, which obliges a student to act in accordance with the pledge, attend courses and institutional activities in compliance with study regulations, take examinations, undertake practical trainings and satisfy other requirements envisaged in the study programme as well as observe valid university regulations.

Taking into account the subjectivity of disciplinary liability, it should be noticed that a person who already enjoys a student status shall be subject to this liability, i.e., under Art. 2 of the LHE, it is a person enrolled to study in a first or second cycle programme or uniform master's programme offered by the authorized university who has taken a student pledge.

Hence a student shall be held disciplinary liable on the basis of the Law on Higher Education if one of the two assumptions ensued from Art. 211 of the LHE is satisfied, i.e. a commission of an act breaching valid university regulations or offending student dignity[12].

4. Coincidence of disciplinary criminal liability

If two systems of criminal and disciplinary liability overlap, the question arises whether it is possible to carry out separately two parallel proceedings: criminal and disciplinary. Firstly, situational variants with regard to the venues where these acts have been committed should be considered as it will primarily affect the occurrence of the subject coincidence of these two proceedings.

If an offence has been committed by a student within the university premises, the matter is quite obvious because valid university regulations have been infringed

11 E. Ura, (in:) W. Sanetra, M. Wierzbowski (eds.), Prawo o szkolnictwie wyższym. Komentarz, Warszawa 2013, p. 479.

12 *Ibidem*, p. 479 and the Judgmentf of the Supreme Adinistrative Court of 6 April 2006, II FSK 542/05, http://orzeczenia.nsa.gov.pl/doc/ 4B3F5E69A0, (accessed: 2 April 2014), the Judgmentf of the Supreme Adinistrative Court in Gliwice of 13 June 2008 r., III SA/Gl 1697/07, http://orzeczenia.nsa.gov.pl /doc/DB57D55D6D (accessed: 2 April 2014).

while the commission of an offence will always be a negative act clearly offending university student reputation and dignity.

On the other hand, doubts arise when a student commits an offence outside the university premises.

Regardless of its type, the commission of an offence by a student is a negative act, all the more since students oblige themselves to cherish and respect higher social values which are naturally embedded in the mission of higher education. The offence's generic burden, its effects and motifs will also have certain impact on the assessment of a student's act.

Considering this variant when deciding about the student's disciplinary liability, the moment when the authorities of a university where the student (a potential perpetrator of the offence) is studying were informed about launched, pending or terminated criminal proceedings against the student is mostly important.

In this case, attention should be paid to the content of Art. 261 § 3 of the Code of Criminal Procedure (hereinafter the CCP), according to which the court shall be obligated to promptly notify the employers, school, or university or, in the case of a soldier – his commanding officer, or if the accused is an entrepreneur or member of the entrepreneur's management who is not an employee – the CEO of the enterprise, upon his or her request, of the imposition of preliminary detention.

Thus there is no obligation to notify a university about the launch of criminal proceedings against a person who is a university student. On the other hand, if an extraordinary preventive measure is applied in the form of preliminary detention, the above mentioned immediate obligation to notify is imposed on criminal procedural authorities[13]. This obligation is implemented by the court applying preliminary detention *ex officio* regardless of the arrested person's opinion thereon even if he or she would not approve of it while the implementation of this duty is justified by humanitarian reasons[14].

Moreover, a university is informed about the student's preliminary detention in order to prevent possible perturbations connected with the study, i.e. the fulfilment of student duties such as obligatory attendance in classes, a specified number of permitted absences, taking examinations and tests, or typically institutional duties such as submission of a student book, enrolment to individual classes, etc.

Informing a university about the student's preliminary detention is also important for family reasons because the student's nearest and dearest, especially when the student does not reside in the place of studying, are not able to receive certain information about his or her unexpected absence. Experience proves that a university

13 J. Grajewski, L.K. Paprzycki, S. Steinborn (eds.), Kodeks postępowania karnego, Warszawa 2010, p. 849.

14 T. Grzegorczyk, Kodeks postępowania karnego oraz ustawa o świadku koronnym, Warszawa 2010, p. 579.

is indeed one of the first places a family would contact when they are not able to contact the student if, obviously, law enforcement agencies did not inform the family or another person designated by the arrested student earlier. It is important since "a choice of the nearest person belongs to the procedural authority which, however, should consider the suspect's wish in this respect. In special cases, particularly if there is a possibility of obstruction of justice or warning accomplices who are not detained, the suspect's wish to inform a specific person may be disregarded"[15]. A university is in this case an exceptionally objective entity.

The application of preliminary detention against a student does not automatically imply that he or she must have committed a prohibited act. Prerequisites that decided about the application of preliminary detention are also not important here.

The obligation resulting from Art. 261 §3 of the CCP is purely informational and should not be the ground for undertaking actions connected with the launch of disciplinary liability at this stage. Preliminary detention is applied at stages, and it obviously does not imply that a suspect will finally take criminal liability. The application of preliminary detention is connected with the fulfilment of specific codified prerequisites[16]. This implies a different purpose of applying preventive measures, i.e. to ensure that the course of justice is not impeded, and they may never transform into anticipation of penalty[17]. That is why criminal proceedings rightly imply that "the very fact of applied preliminary detention cannot be recognized as abolition of the principle of assumed innocence"[18]. In any case, this opinion concerns every preventive measure because the application of a lighter or harshest preventive measure (i.e. preliminary detention) does not abolish assumed innocence[19].

Specificity of preliminary detention, which is one of the preventive measures, and the stage at which it was applied do not require further action to be undertaken by a university, which is not bound by any provision imposing on it a duty to initiate disciplinary proceedings against a preliminary detained student. In any case, it would be difficult to carry out disciplinary proceedings on the basis of only scant information about the application of preliminary detention against a student. On the other hand, the principle of assumed innocence is permanently binding. Disciplinary proceedings are out of the question in such a case because preliminary isolation simply excludes even a possibility of interrogating a student as the accused in disciplinary

15 J. Izydorczyk, Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym, Kraków 2002, p. 230.

16 R.A. Stefański, Środki zapobiegawcze w nowym kodeksie postępowania karnego, Warszawa 1998, p. 13.

17 The decision of the Appeal Court in Katowice of 22 October July 2008, II AKz 793/08, „Prokuratura i Prawo" 2009, No. 9, p. 45.

18 The decision of the Appeal Court in Katowice of 16 July 2008, II AKz 514/08, „Biuletyn – Orzecznictwo Sądu Apelacyjnego w Katowicach" 2008, No. 3, p. 15.

19 S. Waltoś, Proces karny, zarys systemu, Warszawa 2003, p. 411.

proceedings and putting disciplinary charges against him or her. It is not certain at all if an offence has actually been committed and whether it has been committed by the student who is preliminarily detained. If only the university is not harmed by the student's act, the university then does not have, among others, a free access to the files of the investigation procedure because it is not a party to these proceedings and it does not enjoy any other procedural status legitimizing it to undertake actions in the investigation procedure. And yet, attention should be paid to the fact that under the principle of Art. 156 § 1 and 5 of the CCP, depending on the stage of the proceedings, first of all, the files may be accessed by other persons too upon the court President's consent; secondly, in the same meaning, the files may be exceptionally accessed by other persons during the investigation procedure upon the prosecutor's consent. In any case, if the university is not involved in criminal proceedings at least as a party thereto, a possibility of providing access to the files envisaged in the above invoked provision depends on a decision taken by a specified procedural authority indicated in Art. 156 of the CCP. The university only receives information about the student's preliminary detention without the causes of his or her detention or any circumstances thereof. That is why the form of this information under Art. 261 § 3 of the CCP coming from the court applying preliminary detention should be limited to merely a brief note possibly providing the student's place of temporary residence, a date of detention and a date of issue of a decision on the application of preliminary detention together with the duration of temporary isolation. A duty to notify burdens a presiding judge who indicates which person should be informed about preliminary detention while issuing the order [20].

A letter informing about student's preliminary detention should be sent immediately. However, it should be noticed that under Art. 252 § 1 of the CCP, a student or his or her defence counsel may submit a complaint about the decision on the application of this preventive measure. That is why it is also rational that a notice of the application of preliminary detention under Art. 261 § 3 of the CCP assumes the decision's validity. In effect of the complaint, the second instance court controlling accuracy and purposefulness of a decision on the application of preliminary detention becomes active. The information provided under Art. 261 § 3 of the CCP should include a possible decision of the second instance court, which may be identical with the ruling rendered in the first instance, or totally different.

Another situation occurs when the proceedings carried out against a student have comprehensively come to an end; yet there are arguments saying that it is unclear whether termination of proceedings should be understood here as a completion of a stage, e.g. of the investigation procedure and drafting and sending the indictment

20 D. Świecki, B. Augustyniak, K. Echstaedt, M. Kurowski, Kodeks postępowania karnego. Komentarz, Warszawa 2013, p. 802.

to a court, or whether it is complete termination of criminal proceedings by a final judgment.

Art. 21 § 1 of the CCP applies here, according to which, when official proceedings have been concluded against persons employed in state, local government and community institutions, school pupils, students of schools and colleges as well as soldiers, their respective superiors will be notified immediately.

This provision depicts a group of persons whose superiors should be notified about concluded criminal proceedings that have been earlier initiated against these persons *ex officio*. The above norm ensues that it mainly concerns proceedings carried out *ex officio*, that is subject to public prosecution. This obligation does not concern private prosecution. With regard to the above mentioned doubt about the meaning of criminal proceedings' termination, the science of criminal law rightly claims that an authority which closed the proceedings shall send a notice thereon (a prosecutor or court) while proceedings' termination is understood as final termination thereof and not just the end of a given stage of the procedure[21].

Before criminal proceedings are finally terminated, different types of rulings including a positive decision for a student may be issued therein. Thus it appears that the interpretation of the content of Art. 21 § 1 of the CCP should involve termination of a final stage of criminal proceedings, that is of a jurisdictional stage finished with a final judgment. According to this interpretation, the obligation envisaged in Art. 21 § 1 of the CCP is fulfilled if in pending proceedings a judgment has been rendered and recognized as final[22]. Certainly, the obligation under Art. 21 § 1 of the CCP does not involve informing a student's superior about individual actions effected in specific stages of criminal proceedings such as: information about the issue of a decision on the launch of investigation procedure, on the issue of a decision on charges, on suspension of investigation procedure, on sending the indictment to the court, etc.

The information about final termination of criminal proceedings under Art. 21 § 1 of the CCP is precise as to the form. It certainly should be made in writing and indicate a manner of the proceedings' termination (acquittal, conviction, conditional discontinuation of criminal proceedings, etc.), a type of a potentially imposed sanction, a prohibited deed the subject is held criminally liable for, or applied measures of probation. An official copy of a final judgment terminating criminal proceedings does not have to be enclosed.

We should consider now whether sending information in compliance with Art. 21 § 1 of the CCP containing a final judgment other than acquittal should effect in the launch of disciplinary proceedings against a student. In fact, an offence has

21 K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, Kodeks postępowania karnego. Komentarz, Warszawa 2014, p. 84.

22 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz do artykułów 1-296. Tom I, Warszawa 2011, p. 222.

been committed and already this very fact offends student dignity who, accepting obligations connected with a student community, has obliged himself or herself to simply act honestly and respectably.

With regard to the pursuit of criminal and disciplinary proceedings when a student has committed an offence and has not been preliminarily detained, it seems that criminal proceedings will take precedence here for pragmatic reasons.

Pursuant to Art. 217 § 2 of the LHE, punishing a student for the same act in criminal proceedings or proceeding on misdemeanours is not an obstacle to initiate proceedings before a disciplinary committee. The content of this norm ensues that first criminal proceedings or proceedings on misdemeanours are launched and terminated and only then disciplinary proceedings may be launched.

Undeniably, criminal proceedings' findings are more precise and a range of possibilities to check the circumstances of an act, conditions and motifs of its commission, or a final impact on a student is broader. Investigative capabilities of disciplinary ombudsmen or, later on, capabilities of taking evidence by disciplinary tribunals or committees are considerably lower than law enforcement agencies' abilities. In any case, before the final conclusion of criminal proceedings, a university may simply be unaware of the fact that the student has committed an offence unless he or she has been preliminarily detained, but this case has already been analyzed above.

Art. 217 § 2 of the LHE completes § 18 of the Regulation of Minister of Science and Higher Education of 6 December 2006 on the rules of investigation and disciplinary procedure against students[23], according to which a disciplinary committee may suspend disciplinary proceedings if criminal proceedings or proceedings on misdemeanours have been launched in the case of the same act. Furthermore , a disciplinary committee may reopen suspended proceedings at any time and should do so not later than within three months from the final termination of criminal proceedings or proceedings on misdemeanours.

We should notice here that under § 18 of the Regulation of 6 December 2006, a disciplinary committee may suspend disciplinary proceedings. This is effected only during a disciplinary hearing, that is after the conclusion of investigation procedure carried out by Disciplinary Ombudsman . On the other hand, even if a university is informed about an alleged commission of an offence by its student, it does not implicate mutual contacts between the university and law enforcement agencies in any way. There are no legal bases for the authorities pursuing investigation procedure to reveal information about an event just to a university even if a suspect is this university's student. In an opposite situation, i.e. when a student commits an offence within the university premises, then, of course, the university authorities are obliged to notify the law enforcement agencies about it; and if the university is harmed in

23 Journal of Laws of 2006, No. 236, item 1707 [Dz.U. z 2006 r. Nr 236, poz. 1707].

the effect thereof, it may take an active part in the proceedings as the injured party. It results, however, from a general provision of Art. 304 § 1 of the CCP, according to which whoever learns that a prosecuted offence has been committed shall be under a civic duty to inform the state prosecutor or the Police, as well as the provisions of Art. 49 of the CCP et seq., and Art. 53 of the CCP et seq.

A pursuit of disciplinary proceedings against a university student after a final judgment convicting him or her of an offence or misdemeanour incurs an objection of double (multiple) jeopardy, i.e. violation of the *ne bis in idem* principle, which is derived from the constitutional principle of a democratic state of law expressed in Art. 2 of the Polish Constitution[24]. The principle *ne bis in idem* is an unquestionable constitutional norm which is additionally essential to the concept of a democratic state of law and results from the provisions of Art. 2, Art. 30 and Art. 45 par. 1 of the Polish Constitution[25]. By analogy, it may be added that a ban on double (multiple) jeopardy is mentioned in Art. 4 par. 1 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms drafted on 22 November 1984 in Strasburg[26], stipulating that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. Another act of international law banning multiple jeopardy is Art. 14 par. 7 of the International Covenant on Civil and Political Rights[27], according to which, no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. A ban on the application of the principle of double jeopardy has been considered, among others, by the Constitutional Tribunal, which clearly ruled that the principle *ne bis in idem* is a ban on double jeopardy of the same person for the same act not only with reference to imposing penalties for an offence but also applying other repressive measures, including criminal and administrative sanctions[28].

5. Final conclusions

The above presented analysis revealed that present provisions of the Law on Higher Education permit the occurrence of the phenomenon of coincidence depicted

24 L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa 1997, p. 83.
25 A. Sakowicz, Zasada ne bis in indem w prawie karnym, Białystok 2011, p. 57
26 Journal of Laws of 2003, No. 42, item 364, as amended [Dz.U. z 2003 r. Nr 42, poz. 364 ze zm].
27 Journal of Laws of 1977, No. 38, item 167, as amended [Dz.U. z 1977 r. Nr 38, poz. 167 ze zm].
28 The Judgment of the Constitutional Tribunal of 29 April 1998, K 17/97, OTK ZU No. 3/1998, item 30 and the Judgment of the Constitutional Court of 4 April 2007, P 43/06, OTK ZU No. 8A/2007, item 95.

in the title of this study between the validity of legal provisions allowing to pursue disciplinary proceedings and criminal proceedings.

If university authorities are aware of the commission of a prohibited act by a student against whom criminal proceedings are carried out, they may initiate parallel disciplinary proceedings. Yet, the above mentioned shortcomings of disciplinary liability implied by the Law on Higher Education emerge here.

Criminal procedural bodies have a considerably larger scale of impact than institutions operating within disciplinary proceedings. Regardless of any definition of disciplinary law and proceedings, it is indisputable that an inseparable element of this segment of legal liability are sanctions which must not be imposed on the same person twice. Disciplinary proceedings against university students envisage a specific catalogue of sanctions for the commission of a disciplinary tort under Art. 212 of the LHE setting forth that disciplinary penalties include: admonition, reprimand with caution, suspension of specific student rights up to one year, and expulsion from a university. Hence it is apparent that disciplinary proceedings against students belong to the group of proceedings using repressiveness as a response to the violation of law. Just this type of proceedings was a subject of the above mentioned analyses of the Constitutional Tribunal's case law, which has generally approved of the ban on multiple jeopardy in any legal proceedings.

Furthermore, we must not lose sight of the fact that disciplinary law and proceedings should be reserved for other and generically more trivial acts than those which activate criminal liability. Despite partial resemblance to criminal liability, at least with regard to the model of proceedings and applying repressions, a role of disciplinary liability is diametrically different. An act itself is already distinct as its current form allows to distinguish an offence from a disciplinary offence without a problem. Disciplinary liability is envisaged only for the maintenance of order and reliability of the practiced profession, efficient organization of a community and support for specific values of a social and professional group. Disciplinary liability is not obligatory because even if a certain group of members sharing the same common goal is organized, it does not entail a mandatory creation of the structures of disciplinary liability for such entities.

It seems necessary to introduce a strict separation between disciplinary liability and criminal liability which engulfs disciplinary issues with respect to the effects. This postulate mainly concerns the above analyzed Law on Higher Education. According to the provisions of this Law, disciplinary liability of a university student should mainly determine liability for acts that are specifically connected with the academic community. To be more precise – its institutional order, substantive expectations and a typical system of values; while with regard to the venue – it should refer to the acts mostly committed within the university premises. Whenever a student's act takes the form of an action whose effects considerably exceed internal rules of the community and its territory and violate common bans and orders of reasonable conduct thus

offending public order and common values, then criminal liability is activated while disciplinary liability comes to an end.

In this regard, it would also be useful to introduce a specific provision to the Law on Higher Education, which would provide the exclusive right to carry out criminal proceedings in the presence of disciplinary proceedings. Then the argument of multiple jeopardy – punishing a person once for committing an offence and second time for committing a disciplinary offence whose source of liability is the same act – would be dismissed. If this opinion was further reinforced by the absolute directive *ne bis in idem* derived from, among others, the content of Art. 2 of the Polish Constitution, it would exclude possible objections of non-constitutionality of proceedings of disciplinary authorities initiating and pursuing disciplinary proceedings despite the fact that criminal proceedings were terminated by a final judgment.

An educational aspect of the provisions of the Law on Higher Education should also be considered. With regard to the professions of public trust, combined criminal and disciplinary proceedings are justified. In this case, mandatory maintenance of a model of diligent conduct, respect for values typical of this corporation, issues of responsibility for others, etc., must determine professionalism of a member of this community. In any case, Acts determining the organization of public trust professions often condition joining such professions upon a clean criminal record of their prospective members. On the other hand, the Law on Higher Education does not have a requirement of a student's clean criminal record, or even flawlessness of character inherent to, among others, certain professional groups (e.g. judges)[29]. Therefore educational reasons should prevail here over repressions the student has experienced anyway going through criminal proceedings or proceedings on misdemeanours and suffering the consequences of potentially imposed sanctions.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.10

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Commentary on the Judgment of the Supreme Court of 14 December 2016 (Ref. No. III KK 152/16)[1]

In the case of circumstantial prosecution, an unbreakable chain of circumstantial evidence examined in mutual connection should lead to a compelling conclusion about the defendant's perpetration despite a lack of direct evidence thereof.

I. This judgment has been rendered on the grounds of the following facts.

V.B. was tried on the charge of attempted importation of a considerable amount of intoxicated substances in the form of 93,084.52 kg of heroin on 8 March 2014 into the territory of Poland across the Polish border in Dorohusk acting jointly and in mutual cooperation with other persons. Heroin was hidden in a deliberately made cubby-hole located in the Volvo truck tractor's trailer. V.B.'s plan failed because he was rejected entry into Poland by the Border Customs Service and his car was seized by the Border Guard officers, i.e. he was charged with the commission of an act under Art. 13 § 1 of the Criminal Code in connection with Art. 55 par. 3 of the Act of 29 July 2005 on Counteracting Drug Addiction.

Regional Court in (…) found the defendant guilty as charged in the judgment of 30 January 2015 in the case IV K …/14, eliminating complicity from the description of the attributed act and sentencing him to ten years of deprivation of liberty.

The judgment was challenged in the appeal submitted by the defendant's three defence counsels.

1 Lex No. 2171117.

Without getting into details of the claims raised by the defendant's three defence counsels in the appeal (concerning mainly the violation of the principle of free assessment of evidence and error as to the established facts), it should be acknowledged that the Court of Appeal in (…) modified the judgment under appeal on 14 July 2015 in the case II AKa …/15 by reducing the defendant's sentence to seven years imprisonment upholding in force the remaining part of the judgment under appeal.

The defence counsels objected in the cassation against the above judgment of the court of appeal that the court, among others, did not examine the appeal's claims pointing to the regional court's failure to fulfil the directives of assessment of evidence and presumptive evidence in the absolutely *circumstantial* case, which lacked at least one evidence proving that V.B. had been aware of the trailer wall's reconstruction and hiding drugs there, failure to check the lapse of the defendant's ban on entry to Poland, failure to consider if the poor driver maintaining two children of an impeccable opinion, with clean criminal record and without contacts with the so called dregs of society could have so much money as to purchase a considerable amount of one of the most expensive drugs in the world and travel around Europe and Asia delivering his cargo fearing nothing and not hiding at all being totally unaware of alleged smuggling of a considerable amount of drugs and not feeling guilty of anything . Moreover, the Defence claimed that it would be impossible to establish the defendant's awareness (without complicity with the third parties, which was eliminated by the regional court from the description of the act attributed to the defendant) of building in a cubby-hole in his vehicle where drugs were hidden from the materials (the expert witness confirmed that these were plastic pipes manufactured outside the EU on the specifically established date) the defendant was not able to access.

Hearing the cassation, the Supreme Court decided it was fully grounded within the scope of gross infringement of Art. 433 § 2 of the Code of Criminal Procedure in connection with Art. 457 § 3 of the CCP claimed by the Defence. The Court decided that the appellants were absolutely right saying that the claims made by the defence counsels in the appeals were examined very superficially in a manner "pretending their consideration", that is with the gross infringement of Art. 433 § 2 of the CCP. The Supreme Court held that both the courts hearing the case and the parties to the proceedings alike had agreed that the case was *circumstantial*. In the SC's opinion, such a conclusion implied, above all, the requirement of diligence in analyzing the collected evidence. The Court underlined that it is traditionally assumed in such cases that an unbreakable chain of circumstantial evidence examined in mutual connection should lead to a compelling conclusion about the defendant's perpetration despite a lack of direct evidence thereof. Reversing the court of appeal's judgment, the Supreme Court pointed out what evidence should have been taken (among others, hearing of CBŚ officers) to assure that the case's resolution satisfied the standards of a fair trial.

II. The Supreme Court's glossed judgment evokes the analysis of opinions held by the doctrine and court case law as to the essence of circumstantial evidence and circumstantial trials.

While generally accepting this judgment's thesis, we may find there at least the following assumptions.

First of all, it defines the case of "a circumstantial nature" where direct evidence does not exist.

Secondly, the Supreme Court notices that in such a case an unbreakable chain of circumstantial evidence must lead to a compelling conclusion about the defendant's perpetration.

1. Referring to the first statement, it should be noticed that the doctrine of a criminal trial traditionally distinguishes the so called direct evidence and indirect (circumstantial) evidence in the classification of evidence. The first group embraces evidence upon which a basic fact can be proven directly through deductive reasoning, which is logically reliable, whereas circumstantial evidence relies on the method of reductive reasoning, allowing to reconstruct facts upon presumptive evidence of the actual chain of prosecuted criminal events[2].

Z. Papierkowski's definition should be recognized as still up-to-date; according to it, "presumptive evidence is constructed in such a way that certain circumstances which are not directly connected with the crime have been proved while genuineness of a basic fact being the object of prosecution may be confirmed only afterwards"[3].

In the post-war subject literature, M. Cieślak claimed that direct evidence is directly aimed at proving a basic fact. On the other hand, presumptive evidence proves a basic fact through one piece of evidence or a larger number of evidence[4]. In his opinion, presumptive evidence is closer to derivative evidence because in both cases there is some agent between evidence and a basic fact. "A difference between them is the fact that in derivative evidence an additional source of evidence is an agent whereas in indirect evidence this additional element is just a piece of evidence, i.e. presumptive evidence constituting a key notion herein. Similar to the sources of evidence in derivative multifaceted evidence, presumptive evidence may be put in a chain of subsequently linked elements thus distancing an investigator from the main fact. Due to this, with regard to indirect evidence, we may also talk about their multifaceted nature depending on a number of criminal evidence being indirect elements thereof "[5].

2 R. Kmiecik, E. Skrętowicz, Proces karny. Część ogólna, Kraków 2006, p. 360; S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warszawa 2016, p. 358.

3 Z. Papierkowski, Dowód poszlakowy w postępowaniu karnem, Studjum procesowo-prawne, Lublin 1933, p. 33.

4 M. Cieślak, Dzieła wybrane, vol. 1, S. Waltoś (ed.), Kraków 2011, p. 72.

5 M. Cieślak, Dzieła wybrane, p. 72.

M. Cieślak emphasized that a manner of reasoning in direct and indirect evidence is similar: "in both cases proving is indirect learning, reasoning going from known consequences to unknown truths while evidence is this necessary agent linking procedural body's awareness with the fact under examination. With regard to indirect evidence, a course of procedural body's reasoning, however, becomes more complicated because an addition element is introduced"[6].

2. Hence the Supreme Court's assumption that a lack of indirect evidence decides about "a circumstantial nature of a case" must be considered. In this context, it should be noticed that the post-war subject literature also discusses the essence of a circumstantial trial as proceedings based not only fully but also partially on presumptive evidence.

According to L. Peiper, a circumstantial trial may be divided into three types of proceedings with regard to presumptive evidence[7]:

1) proceedings based exclusively on the evidence provided by the eyewitnesses of an act,
2) proceedings based exclusively on presumptive evidence,
3) proceedings based both on the eyewitnesses of an act and presumptive evidence.

L. Peiper called the last type of proceedings as a mixed trial where a verdict may eventually be passed exclusively upon presumptive evidence, e.g. when a court finds witnesses' evidence uncertain or not credible for other reasons and carries out the assessment of presumptive evidence collected in the case.

3. In any case, it should be noticed that the Supreme Court's case law consistently refers the notion of a circumstantial trial solely to cases where there is no direct evidence while the defendant's perpetration and guilt is exclusively decided upon indirect evidence.

The Supreme Court's judgment of 24 April 1975, II KR 364/74[8], which was passed still under the CCP of 1969, had a considerable impact on defining the essence of a criminal trial, which was specified as follows:

"A circumstantial trial should be understood as a trial where there are no direct proofs of guilt, presumptive evidence is not complete – there are only circumstances upon which guilt may be merely speculated about; whereas explanations of co-defendants confirming specific facts proving the defendant's guilt are not presumptive evidence but direct evidence while the assessment of their credibility does not affect their nature".

6 *Ibidem*.
7 L. Peiper, Proces poszlakowy, Głos Prawa, 1930, No. 5, p. 179-180.
8 OSNKW 1975, z. 8, item 111.

Commenting this judgment, Z. Doda and A. Gaberle ascertained that the interpretation proposed by the Supreme Court accurately specifies the essence of "a circumstantial trial", but they also noticed that the SC uses the term of "presumptive evidence" to designate different things, namely "evidence" and "a piece of evidence". According to these authors, " presumptive evidence" is by all means not "evidence" because it is "a piece of evidence" implied by "indirect evidence" ("circumstantial evidence"). In respect of "the defendant's explanations", these may be both "direct evidence" and "indirect evidence" depending on the fact whether they refer directly to the basic fact, or whether their subject are merely specific pieces of evidence ("presumptive evidence")"[9].

Furthermore, the current court case law adopts a generally "classical" definition of a circumstantial trial: "A circumstantial trial lacks direct evidence (at least derivative evidence) whereas findings about the defendant's perpetration of the criminal act he or she is charged with are merely based on indirect evidence (circumstantial)"[10]. It should be noticed that in the current case law, the Supreme Court generally attempts to avoid using a "pejorative" notion of "a circumstantial trial" if apart from presumptive evidence, there is also direct evidence in a criminal case, e.g. when the defendant pleads guilty[11].

4. Although the Supreme Court used the term "a case of a circumstantial nature" and not "a circumstantial trial" in the thesis of the glossed judgment, reading the reasons thereto, one comes to the conclusion that this court accepts herein a commonly adopted essence of this trial in its case law. It seems, however, that a different opinion may be assumed in this respect, i.e. defining a circumstantial trial **as hearing of evidence embracing accidental facts (presumptive evidence).**

Hence it may be ascertained that hearing of evidence in such a trial covers both a basic fact and accidental facts while proving them is not an ultimate purpose of proving in this trial[12].

Such a definition allows to determine a circumstantial trial *in sensu largo*, where hearing of evidence is based on both proofs (evidence) referring directly to a basic fact (direct evidence) and indirect evidence permitting to reconstruct presumptive evidence as accidental facts. On the other hand, a circumstantial trial *in sensu stricto* may be determined as hearing of evidence whose direct subject are accidental facts due to a lack of direct evidence.

The above adopted definition of a circumstantial trial may be justified by J. Nelken's opinion, who claims that "on the one hand, presumptive evidence is a direct

9 Z. Doda, A. Gaberle, Orzecznictwo Sądu Najwyższego. Komentarz tom I, Dowody w procesie karnym, Warszawa 1995, p. 35.

10 The Judgment of the Appeal Court in Gdańsk of 25 July 2013, II Aka 175/13, Lex No. 1378651.

11 See e.g. Decision of the Supreme Court of 26 November 2016, IV KO 33/16, Lex No. 2110963.

12 See e.g. C. Kulesza, (in:) C. Kulesza, P. Starzyński, Postępowanie karne, Warszawa 2017, p. 188-189.

object of hearing of evidence, while on the other hand, it does not belong to the main subject of these proceedings; it is not covered by a basic fact whose establishment is an ultimate purpose of a criminal trial with regard to factual findings. Presumptive evidence "points to" the basic fact just because it is itself beyond the basic fact, somehow outside this fact. Otherwise, it would be difficult to talk about a causal connection between presumptive evidence (accidental facts) and the basic fact"[13].

This author noticed that a role of presumptive evidence is not merely limited to indirect establishment of a basic fact but it may be a base to create a version of the event and a ground for some procedural actions such as initiating investigation procedure, charging, applying preventive measures, closing investigation procedure, and bringing indictment[14].

The above presented possibility of taking advantage of presumptive evidence not only in taking a final decision on the subject of a trial but resolving incidental issues too is a certain argument for placing "a circumstantial trial" in the sphere of hearing evidence rather than extending it for the entire criminal procedure. It may happen that during the investigation procedure (in particular in the *in rem* phase) a procedural body will only have indirect evidence and, next, it will obtain evidence referring directly to the basic fact.

Thus the notion of a circumstantial trial" adopted in the procedural theory and practice should be treated as certain simplification because it is merely a type of hearing of evidence not being a special type of criminal proceedings. Opposite to special proceedings specified in Section X of the Code of Criminal Procedure, it is not characterized by any special relation with regard to the formalism of ordinary proceedings[15].

Attempting to determine a mutual relation of the terms "presumptive evidence" and "circumstantial trial", it may be not so insightfully held that a circumstantial trial is a criminal proceeding using the structure of presumptive evidence.

Presumptive evidence in this meaning cannot be identified with a proof but evidence in the meaning of the process of proving in the real and cognitive aspect, i.e. encompassing all factual and legal actions undertaken in order to retrieve, record and use evidence in order to establish accidental facts, and then conclude about a basic fact thereon.

On the other hand, in the contemporary criminal trial, arguments against distinguishing "a circumstantial trial" as a special type of a criminal trial are provided

13 J. Nelken, Dowód poszlakowy w procesie karnym, Warszawa 1970, p. 15.

14 *Ibidem*.

15 See more: P. Starzyński, (in:) C. Kulesza, P. Starzyński, Postępowanie karne, p. 372.

by the principle of free assessment of evidence to be followed in criminal proceedings including a ban on their evaluation[16].

5. The above considerations evoke the need to comment on the second assumption adopted in the thesis of the glossed judgment and referring to "the conclusive force of evidence" of a circumstantial trial.

The subject literature still from the time of validity of the CCP of 1969 pointed out that presumptive evidence must satisfy three conditions to be recognized as the grounds for factual findings[17]:

1) it must prove the existence of a chain of presumptions which will univocally imply the resolution of a basic fact because single and not mutually connected presumptions do not prove anything;
2) the chain of presumptions must be unbreakable and without loopholes, in other words, it may not allow a rational support for yet another version;
3) all presumptive evidence must be credible and all presumptions suggested by this evidence must be proved; there is no place for weak presumptions in the chain of presumptions; a presumption must be either proved or dismissed.

Although the Supreme Court included in the thesis of the glossed judgment *expressis verbis* only the two first conditions of presumptive evidence's credibility, thorough reading of the reasons thereto allows to conclude that the Court finds the requirement of certain proving of each accidental fact to be obvious as well.

Furthermore, in the light of the valid procedural law, which by abandoning a legal theory of evidence does not evaluate any evidence in advance and does not favour some evidence over other, contemporary subject literature acknowledges that guilt may solely be proven upon legally admissible presumptions. For this reason, according to R. Kmiecik, in the so called circumstantial trial, a set of presumptions necessary to prove guilt may not evoke any loopholes or doubts whatsoever, otherwise, in accordance with the principle of *in dubio pro reo,* the defendant should be acquitted. However, the author further observes that the establishment of presumptions (accidental facts important for evidence) must be formally proved[18].

In this context, the issue of "unbreakability" of a chain of presumptions as a condition of certainty of presumptive evidence built upon them should be briefly explained. The opinion of J. Nelken is worth noticing here, who righty observed that if some presumption (or some presumptions) drops off the chain and all remaining presumptions still allow to construct such a version of the event which excludes other possible versions, then the evidence derived from the presumptions may be found

16 See M. Kurowski, (in:) Kodeks postępowania karnego. Komentarz, D. Świecki (ed.), tom I, Warszawa 2015, p. 62-65.

17 S. Waltoś, Proces karny. Zarys systemu, Warszawa 1985, p. 418.

18 R. Kmiecik, E. Skrętowicz, Proces karny…, p. 361.

certain[19]. The Supreme Court's decision of 11 December 2006[20] may be referred to in the above context, where the Court considered if removal of three findings from the chain of proven facts does not, however, entail such decomposition of the set of circumstances proved without reasonable doubts that it would lead to the abolishment of the thesis of the defendant's attributed participation in the crime. The Supreme Court supported J. Nelken's extensive considerations on the essence of presumptive evidence on the above opinion noticing that everything depends on the nature of evidence which remained unchallenged and which may and should be assessed fully univocally.

6. Summing up the above considerations justifying general approval of the opinion expressed in the thesis of the glossed judgment, it should eventually be noticed that in its case law the Supreme Court does not impose on common courts its assessment of evidence in circumstantial cases but specifies certain standards and procedure of this assessment ruling that: "Facts in a circumstantial trial are proven in two stages. The first one is limited to the establishment of accidental facts on the basis of proofs directly implying their occurrence. If a court believes these presumptions are established beyond reasonable doubt, in the second stage, the conclusions on the basic fact may be made upon them if already established facts (presumptions) provide reasonable grounds for further findings"[21].

19 J. Nelken, Dowód poszlakowy, p. 87 ff.

20 V KK 131/06, OSNKW 2007/1/9.

21 The Decision of the Supreme Court of 12 May 2010, V KK 380/09, Lex No. 584781, see also the judgment of the Supreme Court of 14 May 2015, II KK 49/15, Lex No. 1745828 and od 16 December 2016 r., III KK 296/16, Lex No. 2188642.

Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.11

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Commentary on the Judgment of the Court of Justice of the European Union of 29 June 2016, case C-486/14, Criminal proceedings against Piotr Kossowski

The principle of ne bis in idem laid down in Article 54 of the Convention Implementing the Schengen Agreement read in the light of Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.

1. The judgment of the Court of Justice of the European Union (hereinafter: the Court) in the case C-486/14, criminal proceedings against Piotr Kossowski, is another opinion on final and binding discontinuation of criminal proceedings in the context of the principle of *ne bis in idem* applied in the European Union. The provision of Art. 54 of the Convention Implementing the Schengen Agreement (CISA) implies that the *ne bis in idem* principle protects an individual against a possible abuse of *ius puniendi* by a State and a possibility of charging him upon the same legal ground. It expresses not only a substantive and legal nature under the principle of *nemo debet bis puniri* (or *ne bis poena in idem*), that is a ban on subsequent punishment for the same act, but also assumes a barrier against reopening proceedings in the same

case against the same defendant. Moreover, it allows to assume that on the basis of Art. 54 of the CISA, the principle of *ne bis in idem* is of a procedural nature being closely related to three values: freedom, security and justice, which are foundations of a uniform legal area. Insofar as the analyzed principle is connected with all of these values altogether, when considered separately, it depends on the location of axiological emphasis. The previous case law explicitly emphasized that ratio legis of Art. 54 of the CISA is "to assure that no one shall be prosecuted for the same acts in several Member States due to the exercise of the right of free movement"[1]. It can be easily noticed that the right of free movement will only be guaranteed when a person against whom criminal proceedings were terminated by a final judgment is granted a possibility of free movement within the Schengen area not fearing prosecution in another State for the same prohibited act[2]. Hence it may be said that Art. 54 of the CISA fulfils a function of a guarantee implementing the achievement of the above purpose. Yet it will only become possible if judgments of judicial authorities of other Member States are treated the same as one's own while the procedure connected with the recognition or enforcement of these decisions will be devoid of formalism[3]. Nevertheless, it cannot be unnoticed that in the more recent case law, the Court refers to legal security according to which the EU citizens are provided with the space of freedom, security and justice without internal borders where free movement of people is guaranteed in relation to appropriate measures with regard to control of external borders, asylum, immigration and counteracting and combating crime. Taking into account the normative content expressed in Art. 3 par. 3 of the TEU and Art. 67 par. 3 of the TFEU, the Court ruled in the case of Spasic that the principle of *ne bis in idem* enshrined in Art. 54 of the CISA "aims not only to avoid in the sphere of freedom, security and justice impunity of persons convicted in the EU by a final criminal judgment, but also guarantee legal security through the observance of judgments of public authorities which have become final in the context of a lack of harmonization or approximation of criminal law provisions of the Member States"[4]. It is apparently exemplified by a number of judgments of the Court on Art. 54 of the

1 The Judgment of ECJ 11 February 2003 *Gözütok and Brügge*, case C-187/01 and C-385/01, E.R.C. p. I-1345, para. 38.

2 See: the judgment of ECJ of 9 March 2006 *Van Esbroeck,* case C-436/04, para. 34; the judgment of ECJ of 28 September 2006, case *Van Straaten*, C-150/05, para. 46.

3 See: K. Ligeti: Rules on the Application of ne bis in idem in the EU. Is Further Legislative Action Required?, Eucrim 2009, No. 1-2, p. 38.

4 The Judgment of ECJ of 27 May 2014 *Zoran Spasic*, case C-129/14 PPU Criminal case agianst Zoran Spasic, para. 77; the Judgment of ECJ of 10 March 2005, case *Miraglia,* C-469/03 E.C.R. p. I-2009, para. 25; Compare: M. Wasmeier, Ne bis in idem and the Enforcement Condition, New Journal of European Criminal Law 2014, Vol. 5, Issue 4, p. 541-542.

CISA[5] concerning resolutions terminating criminal proceedings before referring the case to the court. Hence it should only be reminded that:

a) in the case of Miraglia the Court decided that a court judgment rendered without the resolution of the facts of the case does not terminate proceedings against a given person by the issue of a final judgment in the meaning of Art. 54 of the CISA, i.e. it does not exclude continuation of criminal proceedings in another Member State[6];
b) in the case of Gasparini and others, the Court emphasized that the principle of *ne bis in idem* applies to a judgment of Contracting Party passed in effect of criminal proceedings in result of which criminal proceedings against the defendant have been finally and bindingly discontinued due to the limitation of the offence under prosecution[7];
c) in the case of Turanský, it has been pointed out that a decision on discontinuation of criminal proceedings rendered before the charges were brought against the suspect does not exclude initiation of new criminal proceedings for the same acts; a decision on suspension does not terminate proceedings by the issue of a final judgment justifying the application of the principle of *ne bis in idem*[8], and
d) in the case of M., the Court decided that the interpretation of Art. 54 of the CISA should entail that a decision on discontinuation of investigation procedure and not referring the case to the court to decide about criminal liability (the decision which in the Contracting Party of its issue is an obstacle preventing repeated prosecution of a person against whom this decision has been issued for the same acts unless there is new evidence making the commission of the offence by this person more probable) should be recognized as a final and binding judgment in the meaning of this Article and effecting in an obstacle preventing repeated prosecution of the same person for the same acts in another Contracting Party[9].

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5 Judgments of ECJ of 11 February 2003 in joined cases C-187/01 and C-385/01 *Gözütok and Brügge*, Rec. p. I-1345; of 10 March 2005 in case *Miraglia*, C-469/03, E.C.R. p. I-2009; of 28 September 2006 in case *Gasparini and others*, C-467/04, E.C.R. p. I-9199; of 28 September 2006 in case *Van Straaten*, C-150/05, E.C.R. p. I-9327; of 11 December 2008 in case *Bourquain*, C-297/07, E.C.R. p. I-9425; of 22 December 2008 in case Turanský, C-491/07, E.C.R. p. I-11039.

6 The Judgment of ECJ of 10 March 2005, case *Miraglia,* C-469/03, E.C.R. p. I-2009.

7 The judgment ECJ of 28 September 2006, case C-467/04 Gasparini and others, E.C.R. p. I-9199.

8 The judgment ECJ of 22 December 2008, case C-491/07 Turanský, E.C.R.. p. I-11039.

9 The judgment ECJ of 5 czerwca 2014, case C-398/12 M., E.R.C. p. I-1057; see more: B. Nity-Światłowskiej, Prawomocność orzeczenia jako element wyznaczający zakres zasady ne bis in idem w art. 54 Konwencji wykonawczej z Schengen, Europejski Przegląd Sądowy 2014, No. 5, p. 23-30; Na temat interpretacji pojęcia „prawomocny wyrok" zob. też B. Nita, Orzeczenia uruchomiające zakaz wynikający z zasady ne bis in idem w art. 54 Konwencji Wykonawczej z Schengen, Przegląd

Each of the above judgments has been passed not only in distinct procedural systems but also different normative conditions of individual Member States. Nevertheless, a lack of normative solutions in some Member States or existing differences within their shape (e.g. related to a possibility of reopening proceedings terminated by a final judgment) cannot adversely affect the individual's legal situation. They cannot adversely affect the efficiency of measures preventing and combating crime as well. It has been confirmed by the Court in the case C-486/14, which added that the interpretation of validity in the meaning of Art. 54 of the CISA should be made "in the light of not only the need to assure free movement of people but also the need to support crime prevention and combating in the sphere of freedom, security and justice"[10]. Yet the point is that in the glossed judgment the Court has analyzed not the institution of domestic law in the context of establishment of validity of judgment used in Art. 54 of the CISA, but it assessed its nature in the context of hearing of evidence during the investigation procedure.

2. Critical comments to the thesis expressed in the introduction and the above presented reasoning of the Court should be preceded by a brief reference to the factual state which evoked a doubt embraced by the prejudicial question leading to the judgment rendered in the case C-486/14. The case started on 2 October 2005 when the Prosecution in Hamburg accused the suspect of committing acts qualified in the German law as extortion with aggravating factors, but the suspect fled from the territory of Germany. He was detained in Poland on 20 October 2005 during traffic control due to the final judgment sentencing him to deprivation of liberty still to be enforced. At the same time, Prosecution in Poland launched investigation procedure against the suspect for extortion with aggravating factors under Art. 282 of the Polish Criminal Code in connection with the acts committed by him in Hamburg on 2 October 2005. Although the relevant documents were handed over in the course of a legal aid, in December 2006 District Prosecution in Kołobrzeg delivered the Prosecution in Hamburg the decision of 22 December 2006 on discontinuation of criminal proceedings against the suspect due to a lack of sufficient grounds to suspect the offence has actually been committed. The decision was justified by the fact that the suspect refused to testify. Yet according to the hearsay, the victim in the main proceedings and the witness were residing in Germany and therefore they could not be interrogated during the investigation procedure. For this reason, the information given by the suspect – partially inaccurate and contradictory – could not be verified. At the same time the referring court added that according to the instructions on inherent measures of appeal attached to the decision terminating

Prawa Europejskiego i Międzynarodowego 2008, nr 1, p. 6 ff.; A. Sakowicz, Zasada ne bis in idem w prawie karnym, Białystok 2011, p. 361-406.

10 Para. 47.

criminal proceedings, the interested parties were entitled to appeal within seven days from the date of serving this decision. It should be emphasized that on 24 July 2009 the Prosecution in Hamburg issued a European Arrest Warrant for the suspect after obtaining a domestic decision on arresting the suspect on 9 January 2006 issued by the Amtsgericht Hamburg (a district court in Hamburg). However, the Regional Court in Koszalin refused to execute the European Arrest Warrant by the decision of 17 September 2009 due to the existence of the decision terminating criminal proceedings issued by the District Prosecution in Kołobrzeg, which was found final and binding by this court in the meaning of the Code of Criminal Procedure. Despite this, P. Kossowski, who was still wanted in Germany, was detained in Berlin on 7 February 2014, and in March 2014 the Prosecution in Hamburg brought an indictment against him. Landgericht Hamburg refused to launch court proceedings claiming that the prosecutor's right to prosecute expired in the meaning of Art. 54 of the CISA due to discontinuation of investigation procedure in the case for extortion with aggravating factors in Poland. In consequence thereof, this court annulled the arrest warrant for the suspect by the decision of 4 April 2014 while the suspect was released from custody, where he had been earlier remanded. The referring court, i.e. Hanseatisches Oberlandesgericht Hamburg, which the Prosecution in Hamburg appealed to against this decision, decided that in compliance with German law, a degree of suspicion of the commission of the act by the suspect is sufficient to justify a launch of court proceedings before Landgericht Hamburg and admit the indictment unless *ne bis in idem* principle expressed in Art. 54 of the CISA and Art. 50 of the CFR impedes this. Taking the above doubts into account, the referring court decided to raise a prejudicial question whether the objection submitted by Germany under Art. 55 par. 1 letter a of the CISA is still in force, or whether *ne bis in idem* principle contained in Art. 54 of the CISA and Art. 50 of the CFR should be interpreted in such a way that a suspect must not be chased in one Member State if criminal proceedings against this person initiated in another Member State have been discontinued by the Prosecution – without the execution of obligations imposed by the sanctions and without special investigation procedure – for factual reasons in effect of the lack of sufficiently justified suspicion of the commission of an act, and whether criminal proceedings may only be reopened if significant and earlier unknown circumstances have become known while yet such new circumstances do not occur in this case.

The Court of Justice decided that "a decision terminating criminal proceedings, such as the decision in issue before the referring court – which was adopted in a situation in which the prosecuting authority, without a more detailed investigation having been undertaken for the purpose of gathering and examining evidence, did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them in the course of the investigation and had therefore not been possible to verify statements made by the victim – does not

constitute a decision given after a determination has been made as to the merits of the case"[11]. The Court decided that the application of Art. 54 of the CISA to this type of a resolution would result in impediment, or would even be an obstacle for any specific possibility of punishment for unlawful conduct the suspect is accused of in interested Member States. On the one hand, the above mentioned decision on discontinuation of proceedings would be issued by judicial authorities of one Member State without any precise assessment of unlawful conduct the suspect is accused of. On the other hand, a launch of criminal proceedings for the same acts in another Member State would become problematic because this type of the effect would contradict the very purpose of Art. 3 par. 2 of the TEU mentioned above, the Court added.

3. The Court is right that the application of *ne bis in idem* principle in connection with the judgment issued in one Member State may result in the exclusion of prosecution in another Member State even if the courts of the second Member State could reach distinct conclusions on the basis of generally the same facts or evidence. It is indeed not surprising. It is a consequence of the failure to harmonize provisions within the area of criminal law, which should be remembered about when reaching conclusions ensuing from the analysis of individual judgments of the Court related to *ne bis in idem* principle. In any case, as the Court rightly pointed out in earlier judgements: "nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonization, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred"[12].

Hence General Ombudsman Y. Bota rightly points out that *ne bis in idem* principle, which is now of a fundamental nature as a condition of the practical application of free movement, actually requires Member States to trust each other. Differences in domestic legislations cannot be an obstacle preventing observation of this principle. Even the Treaty on the Functioning of the EU itself expresses a legal base of approximation of legislations exclusively in order to facilitate the functioning of the mechanism of mutual recognition. Just by the application of the principle of mutual recognition, the EU legislator intended to overcome problems, seemingly insurmountable, due to the difficulties of a broader approximation of domestic legislations. The application of the principle of mutual recognition imposed on Member States the obligation of mutual trust regardless of the differences in their

11 Judgment of ECJ of 29 June 2016, case C-486/14, para. 48.

12 The judgment of ECJ of 11 February 2003 *Gözütok i Brügge* in joined cases C-187/01 and C-385/01, E.C.R. p. I-1345, para. 32; the judgment of ECJ of 9 March 2006 *Van Esbroeck*, C-436/04, E.C.R. p. I-2333, para. 29.

respective domestic legislations, which is particularly apparent in the example of *ne bis in idem* principle included in Art. 54 of the CISA. This assumption is correct as it allows to implement guarantees resulting from *ne bis in idem* principle despite differences between legal systems of Member States, e.g. within the scope of understanding the notion of "a final judgment" ("prawomocny wyrok" in the Polish language version) occurring in other language versions as, e.g., rechtskräft ig Abgeurteilt in German, définitivement jugée in French, or bij onherroepelijk vonnis in Dutch. The subjective scope of these notions evokes numerous disputes in the doctrine, mostly ensuing from the attempted reading of the conventional notion by referring to domestic provisions[13]. Yet, as it was rightly indicated by the EU highest judicial instance in the joint cases of Gözütok and Brügge[14], *ne bis in idem* principle "assumes that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied"[15]. In other words, a possibility of a different resolution of a case results from a lack of harmonization.

This observation should be applied to judgments terminating proceedings during *in personam* stage by the Prosecutor's decision on discontinuation due to a lack of evidence. It must be clearly said – contrary to the Court's opinion – that validity of such a decision (if it is envisaged by domestic law) does not depend on the fact whether investigation procedure has been precisely carried out, or whether the victim or all witnesses have been interrogated. The adoption of the opinion expressed in the glossed judgment would mean that guarantees resulting from *ne bis in idem* principle would depend on the assessment of evidence heard during investigation procedure carried out by a body of another Member State. However, it is undeniable that such assessment contradicts mutual trust between Member States, challenges a sense of mutual recognition and opposes the idea of the area of freedom, security and justice. In this context, it should be held that recognition of judgments of judicial authorities of one Member State by the bodies of another Member State cannot depend on the fact that in one Member State the judgment is rendered during prosecutor's proceedings and in another – court proceedings. Due to a variety of legal systems of the EU Member States, *ne bis in idem* principle must be combined

13 Compare: R.M. Kniebühler, Transnationales "ne bis in idem", p. 176-190; A. Eicker, Transstaatliche Strafverfolgung. Ein Beitrag zur Europäisierung, Internationalisierung und Fortentwicklung des Grundsatzes ne bis in idem, St. Gallen-Harbolzheim 2004, p. 159-167; J.-F . Bohnert, O. Lagodny, Art. 54 SDÜ im Lichte der nationalen Wiederaufnahmegründe – Zugleich Besprechung von BGH, Urteil vom 10. 6. 1999 – 4 StR 87/98, Neue Zeitschrift für Strafrecht 2000, Heft 12, p. 638-639.

14 The judgment of ECJ of 11 February 2003 *Gözütok i Brügge* (C-187/01 i C-385/01), E.C.R. p. I-1345, para. 33.

15 The judgment of ECJ of 11 February 2003 *Gözütok i Brügge* (C-187/01 i C-385/01), E.C.R. p. I-1345.

with the subject matter of a case and a perpetrator rather than the authority passing a judgment. The Supreme Court rightly noticed in the judgment of 2 June 2006[16] that a Member State must recognize the results of criminal proceedings in other Member States even if they differ from the results of proceedings carried out on the basis of the State's own criminal law. It is obvious that legal systems may differ and possible attempts at overcoming this problem may be futile. Anyway, they cannot affect the implementation of *ne bis in idem* principle and respect of individual's rights. It should also be emphasized that trust means a specific presumption which allows to reach a specific procedural conclusion, or trust in decisions made by the system of justice officials, or, as preferred by others, a presumption that systems of justice in all Member States satisfy a minimum standard of human rights protection designated by the ECHR together with Protocols and dynamic Strasburg case law[17]. Lord Bingham in Dabas v. High Court of Justice in Madrid invoked the latter interpretation of the principle of mutual trust claiming that Member States share common values and recognize common rights; hence nothing impedes fairness of each other's judicial institutions[18]. Besides, trust may be based on mutual recognition of reconnaissance de plein droit, ipso iure, i.e. banning "evaluation" of the system of justice of the State in which judgment was given by the authorities of the State in which judgment was enforced to prove uselessness of exequatur procedure and reduce grounds for refusal to perform an action based on a specified instrument of cooperation in criminal cases. But to make it happen, mutual recognition should demonstrate mutual trust to legal systems and legal acts[19], that is refer essentially to the Anglo-Saxon comity and

16 The judgment of the Supreme Court of 2 June 2006, IV KO 22/05, OSNKW 2006, No. 7-8, item 75.

17 See: G de Kerchove, A. Weyembergh (eds): La confi ance mutuelle dans l'espace penal européen/ Mutual Trust in the European Criminal Area, Editions de L'Universite de Bruxelles, Bruxelles 2005, passim; S. Peers: Mutual recognition and criminal law in the European Union: Has the Council got it wrong?', 41 CMLR 2004, Vol. 41, p. 5; V. Mitsilegas: The constitutional implications of mutual recognition in criminal matters in the EU, CMLR 2006, Vol. 43, p. 1277; M. Fichera, Ch. Janssens: Mutual recognition of judicial decisions in criminal matters and the role of the national judge, „ERA Forum" 2007, vol. 8, p. 177.

18 See the Judgment of the Court of Appeal of England and Wales, *Dabas v. High,* Court of Justice in Madrid of 28 February 2007, [2007] UKHL 6; AC 31, para 4 – „The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each other's judicial institutions". In other judgment King's Prosecutor (Brussels) v Cando Armas, [2005] UKHL 67; [2006] 2 A.C. 1 para. 2] „movement among the member states of the European Union.. to establish, as between themselves, a simpler, quicker, more effective procedure, founded on member states' confidence in the integrity of each other's legal and judicial systems".

19 It is aptly pointed out in German literature that the trust in foreign laws and their lawful application, constituting the dogmatic basis of the principle of mutual recognition, allows its application also in criminal cases, compare N. Kotzurek, Gegenseitige Anerkennung und Schutgarantien bei der Europäischen Beweisanordnung, ZIS 2006, p. 126; A. Sakowicz, Zasada ne bis in idem w prawie karnym, Białystok 2011, p. 206-207 and the literature given there.

extradition principle of non-inquiry according to which a court of the requested State may not examine the process of the issue of a request for extradition[20].

4. In the glossed judgment and reasons thereto, the Court omitted opinions which had appeared in earlier rulings. Both those underling that *ne bis in idem* principle "does not fall to be applied in respect of a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same act"[21], and those saying that "Article 54 of the CISA must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that finding was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State"[22].

What is more, the Court failed to notice that a decision on discontinuation of investigation procedure due to a lack of sufficient evidence in the *in personam* stage may be issued by different authorities having or failing to have the force of *res judicata*. It is enough to consider here, e.g., the decision of a judge in charge of preliminary enquiries on discontinuation of proceedings due to a lack of evidence ("ordonnance de non-lieu par des raisons de fait" – Art. 177 of the French Code of Criminal Procedure) which does not have a feature of *res judicata* [23]. Doubts also arise with regard to different decisions on discontinuation of investigation procedure in Germany (in particular if we analyze the decision issued under § 204 par. 1 of the German StPO called Nichteröff nungsbeschluss)[24]. It is similar to the Belgian

20 M. Cherif Bassiouni, International Extradition: United States: Law and Practice, Nowy Jork 2002, p. 572.

21 Judgment of ECJ of 10 March 2005 in case *Filomeno Mario Miraglia*, (C-469/03), Judgment of ECJ of 28 September 2006 in case *Van Straaten*, C-150/05), para. 60; see more: B. Nita, Artykuł 54 konwencji wykonawczej z Schengen w wyrokach Europejskiego Trybunału Sprawiedliwości z 28 września 2006 r., C-467/04, postępowanie karne przeciwko Giuseppe Francesco Gasparini i innym oraz C-150/05, Jean Leon Van Straaten przeciwko Niderlandom i Republice Włoskiej, „Europejski Przegląd Sądowy" 2007, No. 9, p. 4452; A. Sakowicz, Zasada ne bis in idem w prawie karnym, Białystok 2011, p. 384 ff.

22 Judgment of ECJ of 5 June 2014, case C-398/12 M., E.R.C. p. I-1057.

23 F.-F. Bohnert, O. Lagodny, Art. 54 SDÜ im Lichte der nationalen Wiederaufnahmegründe – Zugleich Besprechung von BGH, Urteil vom 10. 6. 1999 – 4 StR 87/98, Neue Zeitschrift für Strafrecht 2000, Heft 12, p. 638-639.

24 Por. R.M. Kniebühler, Transnationales „ne bis in idem", p. 238-244; G. Dannecker, Die Garantie des Grundsatzes „ne bis in idem" in Europa, (in:) H.J. Hirsch, J. Wolter, U. Brauns (Hrsg.), Festschrift für Günter Kohlmann zum 70. Geburtstag, Kolonia 2003, p. 608 ff., B. Nita-Światłowska, Prawomocność orzeczenia jako element wyznaczający zakres zasady ne bis in idem

decision on arrêt de de non lieu par des raisons de fait (Art. 128 of the Belgian CCP), which stipulates that investigation procedure shall be discontinued if in effect of the referral of a case to the first instance court which supervises investigation procedure carried out by a judge, it turns out that the act is neither a crime nor misdemeanour or offence, or there is no evidence implying the commission of an offence. With respect to the Belgian decision, in the case of M. the Court rightly decided that such a decision had been issued as to the essence of the case and is of a final nature because it entails "the expiry of possibilities of bringing the indictment by a public prosecutor at national level" and activates a ban on a repeated pursuit of criminal proceedings against the same perpetrator for the same prohibited act. Expressing this opinion, the Court was aware of legal regulations being in force in the Belgian system which allow to reopen a decision of arrêt de de non lieu par des raisons de fait if new evidence implying the commission of an offence emerge (Art. 246-248 of the Belgian CCP). The Court clearly underlined in this case that "the possibility of reopening the criminal investigation if new facts and/or evidence become available, as provided for in Articles 246 to 248 of the CIC, cannot affect the final nature of the order making a finding of 'non-lieu' at issue in the main proceedings. While that possibility is not an 'extraordinary remedy', within the meaning of the case-law of the European Court of Human Rights just cited, it does involve the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed. Furthermore, in view of the need to verify that the evidence relied on to justify the reopening of the proceedings is indeed new, any new proceedings, based on such a possibility of reopening, against the same person for the same acts can be brought only in the Contracting State in which that order was made"[25]. I think this opinion complies with the essence of *ne bis in idem* principle and mechanisms of cooperation in criminal cases within the EU. Therefore the interpretation of Art. 54 of the Schengen Agreement should be made within the subject and purpose of this provision while intending to assure a proper effect of *ne bis in idem* principle, and not interpreting formal procedural provisions of Member States, whose nature is not uniform if we take individual legal systems into consideration.

Summing up, it should be indicated that a similar doubt arises on the basis of the Polish CCP, i.e. when a decision on refusal to initiate or discontinue proceedings due to a lack of sufficient grounds to suspect the act has been committed is issued (Art. 17 § 1 point 1 of the CCP). Nevertheless, it should be noticed that such a decision becomes substantively valid when the time limit to challenge it has effectively lapsed or, relatively, if the course of instance control has been exhausted. A possibility of

w art. 54 Konwencji wykonawczej z Schengen, „Europejski Przegląd Sądowy" 2014, No. 5, p. 28-29; A. Sakowicz, Zasada ne bis in idem w prawie karnym, Białystok 2011, p. 384 ff.

25 Judgment of the ECJ of 5 June 2014, C-398/12 M., para. 40.

the decision's withdrawal under extraordinary circumstances, i.e. after fulfilling prerequisites indicated in Art. 327 § 2 of the CCP, does not annul the force of legal validity because it is an exceptional situation. Moreover, exceptionality of this situation is different depending on who made a decision on discontinuation of investigation procedure due to a lack of evidence – a prosecutor or court before opening proceedings (Art. 339 § 3 point 2 of the CCP). In the first situation, new significant facts or evidence previously unknown may be the grounds for further continuation of investigation procedure while legally valid discontinuation of proceedings by the court may not cause reinstitution of criminal proceedings against the defendant. This difference, resulting from our legal system, may neither limit the operation of *ne bis in idem* principle within Member States nor secure certainty of an individual's legal situation distinctly because both these decisions are legally valid and final and issued as to the essence of the case[26]. It is also known, since the judgment in joint cases of Gözütok and Brügge, that *ne bis in idem* principle expressed in Art. 54 of the CISA is also applicable to prosecutor's proceedings undertaken without the participation of a court and it definitely terminates criminal proceedings; thus the form of a decision and its source from a specific procedural authority do not conclusively matter within the scope of the analyzed principle[27].

26 Differently M. Wąsek-Wiaderek, Prawomocne umorzenie postępowania przygotowawczego jako rozstrzygnięcie kreujące zakaz ne bis in idem w Unii Europejskiej, (in:) M. Sitarz, P. Stanisz, H. Stawniak (eds.), Reddite ergo quae sunt Caesaris Caesari et quae sunt Dei Deo. Studia in honorem Prof. Josephi Krukowski Dedicata, Lublin 2014, p. 908-909.

27 B. Nita-Światłowska, Prawomocność orzeczenia jako element wyznaczający zakres zasady ne bis in idem w art. 54 Konwencji wykonawczej z Schengen, „Europejski Przegląd Sądowy" 2014, No. 5, p. 30.

Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.12

Maciej Fingas

Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym
[Powers to alter decisions under appeal in the Polish criminal trial]

Wolters Kluwer Publishing House, Warszawa 2016, pp. 366

The monograph of Maciej Fingas, PhD, titled "Powers to alter decisions under appeal in the Polish criminal trial"[1] is an interesting and comprehensive proposal presenting powers of appellate courts to alter decisions in the Polish criminal procedure.

The monograph under review is a brief and up-to-date version of the author's PhD dissertation defended by him in 2014 in the Faculty of Law and Administration of the University of Gdańsk supervised by UG Prof. dr. hab. Sławomir Steinborn.

The monograph presents a significant issue of the evolution of a possibility to alter decisions by courts in result of the amendments implemented by the legislator in 2013-2016, thanks to which the monograph is up-to-date.

Already in the introduction to his paper, the author focused on the essence of the subject matter pointing out to the need of a proper development of measures of appeal, which is now "one of the most important guarantees of the proper operation of the administration of justice" (p. 13).

The monograph under review is composed of four well thought and interesting chapters divided into sub-chapters.

The first chapter titled "Model conditions of appellate control in criminal proceedings" encompasses both historical and comparative legal issues, and refers to the model of appellate proceedings in the civil procedure.

1 M. Fingas, Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym, Warszawa 2016.

At the beginning of this chapter, the author explains terminology of notions and definitions used therein, and discusses the functions of instance control. Analyzing the model of appellate proceedings, he rightly claims that: "It may be concluded that a choice the legislator faces involves, most of all, appropriate distribution of emphases with regard to powers referring to the substantive scope of examination of cases and types of rulings rendered by appellate courts. Nevertheless, it is equally important for the court to be equipped with instruments adequate to the tasks it is entrusted with" (p. 27).

In the first chapter the author considers historical issues affecting development of the Polish appellate system. Analyzing the appellate court's powers in the pre-war system of appeal and cassation in 1928-1949, in the system of review in 1949-1989 as well as in 1989-2013 and after 2013, the author focuses on the most important and essential issues connected with, among others, the parties, taking evidence by the court and potential types of appellate court's rulings.

A part of the first chapter devoted to the structure of the system of judicial control (*sensu largo*) operating in other countries should also be paid attention to. The author depicts criminal appealing procedure within the above scope existing in France, Belgium, Italy, Germany, Russia, Great Britain, the USA and Japan (p. 42-48). As far as models of appellate proceedings in the context of comparative law are concerned, the author described those operating in France, Great Britain, Germany, Russia and Japan. The only thing that may slightly distract a potential reader is a lack of divisions between descriptions of individual models in other countries, due to which the information about a specific model is not classified and one needs "to return" to the model described earlier by the author (e.g. "Coming back to the French system…" p. 51, "It has been mentioned before that in the British procedure…" p. 53).

Characterizing models of review proceedings, the author focused on the institution of review in Germany describing the issues of appellate claims assessed by the review court quite precisely (p. 56-58). What is more, he pointed out to cassation in Russia as a typical measure of appeal in this model and, to some extent, to the Polish appeal procedure in the normative shape before 1 July 2015, as well as to the Italian appeal procedure.

The author depicted the institution of cassation in France as a standard of cassation, which "once created has then become a base of a theoretical model of cassation review imitated many a time in the systems of other countries, e.g. in Holland, Belgium, Spain, Italy and Poland" (p. 61). Furthermore, the author notices that: "In the common law systems, appellate proceedings are carried out in a special way while typical mechanisms of appellate courts' processing often bring these proceedings closer to the cassation model in respect of their nature" (p. 62). Reference to J. Dressler's research on data from the State of California is significant

and interesting. According to it, as many as 95% of appeals submitted in favour of the defendant are dismissed by a court of appeal[2].

Attention should also be paid to an extremely interesting issue of an outlined model of appellate proceedings in the civil law procedure, which closes chapter one (p. 63-72). In this respect, the author's words from the introduction should be quoted: "In any case, it seems that the shape of appellate proceedings in civil cases, which has been successfully applied for many years, may be a certain inspiration for the interpretation of valid provisions as well as considerations of their future shape. A greater impact on adversarial proceedings may indeed bring both procedures closer in certain spheres" (p. 17). In this part, the author admitted himself that he limited the above considerations to "the principal standard issues of civil appellate proceedings" (p. 65).

In the second chapter titled "Admissible limits of appellate court's powers to alter decisions in the light of the selected principles of a criminal trial", the author analyzed eight selected procedural rules, namely: the principle of two-tiered jurisdiction, the principle of substantive reality, the right to defence, direct adduction, free assessment of evidence, expeditious proceedings and the principle of adversarial proceedings.

At the beginning of the second chapter the author emphasized that "it appears that the current paradigm of a criminal trial is designated by principles understood as general directives expressing basic and typical features and regularities of a criminal trial" (p. 73). The author rightly points out to the dynamics of procedural principles which evolve over time and changing ideologies (p. 74). The author believes that the choice of individual procedural principles to be analyzed in the context of appellate court's power to alter decisions was a result of the relation between these principles and the model of appellate proceedings. The author claims that "the model of procedure must be subject to evaluation expressed through the prism of the standard of a fair criminal trial that has been mainly developed by the ECHR's case law. In this respect, however, it is not necessary to carry out a separate analysis on the level parallel to this created by fundamental principles of a criminal trial" (p. 76).

In the second chapter, the author also analyzes a relation between these selected procedural principles and elements of the model of appellate proceedings referring to the case law of the Supreme Court, Constitutional Tribunal and ECHR.

An interesting sub-chapter devoted to cassation rulings as one of the reasons for the protraction of proceedings should receive equal attention too. Statistical data of the Ministry of Justice for 2007-2012 as well as A. Zachuta's[3] research encompassing the analysis of judgments of the Regional Court in Cracow presented in this part

2 J. Dressler, Understanding Criminal Procedure, Newark-San Francisco 2002, p. 65.

3 A. Zachuta, Kasatoryjne orzeczenia w odniesieniu do wyroków wydanych w sprawach karnych przez sądy rejonowe, „Prokuratura i Prawo" 2006, No. 6, p. 67.

of the paper provide significant information about a number of cassation rulings (p. 143-145).

The author also discusses the research of case files conducted by D. Wysocki in the Regional Court in Płock[4], which imply that the abandonment of the classical model of appeal allowed to shorten an appeal trial, but in cases where cassation ruling was passed, the proceedings were noticeably prolonged (p. 146-147). Summing up this part of the paper, a quite bold statement made by the author should be quoted here, according to which "opinions claiming that the model of review proceedings prevail over the model of appeal with regard to the speed of a trial should be discarded" (p. 150). Hence the author supports the opinion of hearing a case within the limits of appeal.

The third chapter "Conditions of sentencing in the context of the power to alter a decision in appellate jurisdiction" is divided into six sub-chapters which concern relations between collected evidence in the first instance proceedings and a possibility of altering a decision, obtaining a consent for a change of the judgment passed in effect of the consensus, a type of failure of the judgment under appeal, limits of hearing a case in appellate proceedings, *ne peius* bans, and a complaint against the court of appeal's judgment.

Already at the beginning of chapter three the author states that "changes implemented within the scope of appellate proceedings ensue confrontation of old assumptions and contemporary realities as well as up-to-date trends in the development of a criminal trial, which especially encompass the idea of actual increase of adversarial proceedings and hasten proceedings while preserving necessary procedural guarantees of their participants" (p. 160-161).

In respect of the analysis of explanation of the facts of a case and a possibility of hearing evidence in appellate courts, the author righty states that "a solution known in civil appellate proceedings has been adopted" (p. 171) following the example of Art. 386 § 4 of the CCP. Further considerations in this part focus on admissibility of hearing of evidence by a court of appeal, and make interesting comparisons to a civil trial (p. 188).

Interesting but quite controversial comments are included in the sub-chapter about obtaining the parties' consent to change a judgment passed in effect of the consensus. The author made a debatable statement, according to which "the results of the above problem's analysis in the literature [within the scope of limiting grounds for appeal related to appealing against judgments passed in effect of the consensus – added by I.U.-M.] confirm that the narrowed control of appeals by the limited catalogue of the grounds for appeal may be admissible if it is strictly connected with a given procedural institution and justified by the nature of this institution. (…) The

4 D. Wysocki, Postępowanie apelacyjne w procesie karnym (de lege ferenda), "Państwo i Prawo" 2011, No. 1, p. 18.

implemented regulation satisfies the above conditions (…)" (p. 198). We should also consider right critical arguments against the author's claim – a possibility of infringing procedural guarantees of the party that withdrew from the concluded settlement and then would like to appeal against the judgment passed in effect of the consensus[5].

Another interesting sub-chapter depicts types of failures (errors of law) the judgment under appeal is affected by. At the beginning of this sub-chapter, the author underlines an important role played by the grounds for appeals reminding that "a basic function of control (audit) proceedings is their corrective function, i.e. a task to correct defective rulings by their reversal or change" whereas "the object of the court's corrective activity *ad quem* are the so called grounds for appeal defined in the doctrine as any failures (errors of law) of the first instance court which may be interesting from the perspective of control proceedings and constitute the grounds for appropriate decisions of a court of appeal" (p. 200-201). In a further part of this sub-chapter, the author quite briefly describes relative (p. 202-218) and absolute (p. 218-230) grounds for appeal. The author presents an apparently interesting opinion on the new absolute ground for appeal under Art. 439 § 1 point 1a of the CCP introduced since 1 January 2017 (wrongly indicated by the author in Art. 439 § 1a of the CCP – p. 221).

Further parts of chapter three contain important and generally detailed issues connected with the limits of hearing a case by a court of appeal (p. 230-266) and *ne peius* bans (p. 266-296) as well as a new institution of a complaint against the appellate court's judgment (p. 296-298).

In the fourth chapter titled "Powers to alter decisions in appeals", the author describes in two sub-chapters both the limits of corrections made by the appellate instance and the conditions of powers to alter decisions by the appellate authority.

Already at the beginning of this chapter the author notices that "it is beyond any doubts that issues connected with the control of judgments enjoy the highest status among procedural decisions taking the foreground of appellate control" (p. 299), and points out to the essence of limits of corrections made by the appellate authority. Moreover, considerations within this matter through the prism of norms existing in the civil procedure (e.g. p. 304) appear interesting. On the other hand, in respect of the conditions of powers to alter decisions by the appellate authority, the author refers to the Code of Criminal Procedure of 1928, which did not include regulations

5 C. Kulesza, Zaskarżanie wyroków zapadłych w trybach konsensualnych – standard europejski i prawo polskie, „Białostockie Studia Prawnicze" 2014, No. 1, p. 108; I. Urbaniak-Mastalerz, Podstawy apelacji w znowelizowanym kpk. (uwagi na tle wyników badań aktowych, (in:) Środki zaskarżenia po nowelizacji kodeksu postępowania karnego, A. Lach (ed.), Toruń 2015, p. 104, I. Urbaniak-Mastalerz, Współczesny paradygmat wykładni prawa karnego, "Monitor Prawniczy" 2015, No. 24, p. 1317; I. Urbaniak-Mastalerz, Pozycja oskarżonego w nowym modelu postępowania odwoławczego, (in:) Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań, S. Steinborn (ed.), Warszawa 2016, pp. 226-230.

indicating directly what rulings may be rendered in effect of the appellate control (p. 309).

Although chapter four may seem slightly shorter than the other chapters (it is only 29 pages long), the analysis conducted therein encompasses the most important aspects supported by coherent and explicitly formulated conclusions.

The author's conclusions (p. 329-338) contain important and interesting considerations summing up the monograph under review. The author notices that "the discussion on the current shape of appellate proceedings is considerably affected by the ideas on review proceedings, which have changed our attitude to the appeal system for many years. Normative solutions introduced by the amendment of 1949 have been in force until now while social and political reality was completely different at that time" (p. 329).

The author's *de lege ferenda* postulates closing the monograph should also be paid attention to as they enrich its merits and scientific message.

Multitude of important aspects discussed by the author, reference to numerous other regulations, many normative comparisons between a criminal and civil trial as well as extensive bibliography and the so called simple language of the work make the monograph not only interesting but also extremely helpful in solving problems connected with the prerequisites to alter a judgment under challenge by a court of appeal.

The monograph "Powers to alter decisions under appeal in the Polish criminal trial" can be absolutely recommended to every reader as it is a rich source of information about the model of appellate proceedings including extremely interesting author's considerations, ideas and opinions.

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Białostockie Studia Prawnicze
2017 vol. 22 nr 1

DOI: 10.15290/bsp.2017.22.01.13

Klaus Marxen

Weiheraum. Roman

Bouvier Verlag, Bonn 2015

Weiheraum is a novel written in Walter Scott's style by a renowned German lawyer Klaus Marxen, a retired judge and professor of Humboldt University of Berlin. In his novel Marxen tells the story of two families: Czech and German, that is set between 1880 and 1959. Distinct lots of main characters inevitably approach a tragedy. This is a leading plot, complicated and full of unexpected turning points, but historical background and authentic events occurring between 1901 and 1950 are equally important. Everything is spanned by fundamental issues related to the purpose, principles and procedure of criminal proceedings, the system of punishment and administration of justice. Distinct fortunes of the novel's characters are intertwined with real events and legal issues which decide about a final solution of the fictitious plot.

Marxen presents a nature of hearings before the Nazi People's Court in Vienna (Volksgerichtshof) in 1943. It was a special court that operated beyond the constitutional legal framework. It was "an instrument of terror to execute Nazi tyranny" while the scope of its cognition and jurisdiction was strictly connected with the protection of a national socialist state. The Court's organization and trial itself served to pursue ad hoc and single-tier proceedings. The court sentenced eighteen thousand people, most often to death penalty. Until 1945 there were app. 5200 executions. Legally valid judgments of the People's Court were annulled as late as in 1998. One of the characters depicted in the novel is Roland Freisler and his appointment to preside over the People's Court in 1942. Roland Freisler was NSDAP member and Nazi criminal. He was a jurist and attorney at law. It was just him who insisted on making the laws stricter and increasing a role of special courts as "ad hoc courts of internal frontline". As a judge he ruled in over 1200 trials of political

opponents which most often finished with death penalties. This is why he was called "the hanging judge". Trials presided by him were extremely brutal. As a rule, defendants were insulted and threatened during hearings in the People's Court. Fundamental principles of fair play of a fair trial such as presumed innocence and the right to defence were an illusion. Marxen intertwines the thread of Reinhard Heydrich's assassination in a very interesting way. A goal of this military action was assassination of Reich Protector of Bohemia and Moravia – SS-Obergruppenführer. Assassination was carried out in Prague by the soldiers of Czechoslovakia's government in exile in May 1942 under the code name Operation Anthropoid. It was extremely risky and ensued brutal German repressions against civilians. Two soldiers, who were friends, were assigned to this operation: a Slovak Gabčik and Czech Kubišz, who attacked Heydrich in Prague on 27 May 1942 as planned. SS-Obergruppenführer used to drive in Prague without military escort in his Mercedes with the registration plate SS – 3 (which meant he was the third figure after Hitler and Himmler). This hated Protector of Bohemia and Moravia was wounded. He died in hospital of septicemia a few days after the assassination.

Yet the thread of the so called Waldheimer Trials in DDR in February 1950, which started the second phase of bringing Nazi criminals to justice and making them accountable for their crimes, deserves special attention. At that time DDR and West Germany perceived one another as allies of the anti-fascist movement. In both countries Nazi criminals were arrested, detained and prosecuted. In the Soviet occupation zone in Germany, they were also often deported to Siberia. At the beginning of 1950, Soviet detention camps located in East Germany were liquidated and the criminals detained there were handed over to the DDR courts. A court competent in these cases was a special court in a small Saxon town of Waldheim, which was composed of twelve great and eight small criminal divisions. It was formally subject to the state court (Landesgericht) in Chemnitz. Until the end of June 1950, criminal divisions of this court passed verdicts in the cases of 3324 defendants. The proceedings were accelerated and closed to the public. Notwithstanding the fact whether the defendants in the so called Waldheimer Trials actually committed acts they were charged with or not, they were most often sentenced to from fifteen to twenty years of harsh imprisonment, sometimes from ten to fifteen years imprisonment, and to death penalty in thirty two cases, which was executed in twenty four of them. These court proceedings were called "trials against Nazi and war criminals".

The novel also depicts the issue of a subjective theory in sentencing during the Third Reich, which justifies the extension of penalty onto the phase preceding a commission of an act (perpetration). According to the objectives of this theory, punishable attempts were justified by a risk posed by the perpetrator's will from the moment they univocally revealed their malice. Marxen also presents German care and charity association "Lebensborn e.V.", which operated within SS organizational

structures and had an extensive network of its centres. It was established in 1936 by the order of SS Reichsführer Heinrich Himmler within the framework of demographic and political assumptions of Nazi racial policy. A main purpose of Lebensborn was "restoration of German blood" and "breed of a Nordic race of superior men" through appropriate selection of women and men designated for breeding. Moreover, Lebensborn's activity was to counteract an increasing number of abortions, which were illegal. Yet officially, it was affirmed that these charity centres were to support racial and biologically and inherently valuable large families, take care of racial and biologically and inherently valuable pregnant unmarried women, carry out the so called racial research of reproductive mothers and fathers' families (e.g. members of German police or SS), help mothers give births, and issue "legal" documents to new born children, e.g. to single mothers giving birth to illegitimate children of Wehrmacht soldiers – the so called "Besatzer-Kinder", who could this way escape revenge from their compatriots if only they satisfied racial criteria. After giving birth, these children could be adopted by SS families who wanted to adopt a child. Furthermore, Lebensborn persuaded fathers of illegitimate children to take over responsibility for the child and get married.

Marxen's novel is composed of three parts characterized by a distinct perspective but including common retrospectives spanning all of them. Already at the beginning of his novel, Marxen explains its title underlying that reality is useful only to find clues or directives while the truth must be established. Weiheraum is a room in a Vienna state court (Landesgericht) where criminal cases were tried and where 1184 victims of this Nazi, inhuman and unlawful justice were prosecuted. The room where people were deprived of life during Nazi terror. The trial before the Nazi People's Court in Vienna in 1943 connects entirely distinct fortunes of main characters and, at the same time, it is the beginning of a tragic end. The characters' lives evoke inevitable questions of a purely legal nature, and yet not only this.

Friedrich Liedke, born in Jüterborg in 1901 on the day of birth of German emperor Wilhelm II is actually a sensitive man. He works in the People's Court as a prosecutor. His superior is Oberreichsanwalt Ernst Lautz. Friedrich Liedke is not a Nazi by conviction but he wants promotion. He knows very well that his father is against him joining NSDAP as he believes that Adolf Hitler is too apodictic. Prosecutor Liedke avoids unnecessary interest in his person. He does not want to complicate his simple and organized life. Thanks to conformist attitude and despite occasional doubts, he becomes First Prosecutor and Division Chairman. He finds a sense of security and quiet being close to the power he is constantly striving for. And yet he is a common coward. Liedke believes in Hitler. He believes that the system of justice and criminal prosecution during war must be merciless, and he is doing his very best to fulfil his professional tasks of a prosecutor to achieve full satisfaction. The only thing he needs to be fully happy is a child. A decision to adopt a child for a well-organised First Prosecutor Liedke is extremely difficult. He is even more tormented

and frustrated by the thought that a mother of the adopted child is a young woman whose death he himself contributed to. He believed that pregnant Helena Cermak deserved death for helping her heavily wounded brother considered "a public enemy".

The Czech family is different from a well-organized German one. This family starts with Olga and Janek Cermak who are parents of six children including the above mentioned Helena. Janek is neither a mature husband nor father but he is doing his best, yet to little effect. Olga runs a bar. When it is hard and they are short of money, Olga's parents, who live in the countryside, help them. Her daughter Helena (Lenka) Cermakova is born in the south Moravia in Breclav near Brno in 1918, in the year when Czechoslovakia was established. Twenty years later Breclav becomes Lundenburg and Helen's identity card is issued in the name Cermak because the ending *–ova* in the Protectorate of Bohemia and Moravia created in 1939 by the German Reich was forbidden. Helena needs such an identity card very much because she wants to visit Tomasz in secret. Her older brother argued with the family and left to England, where he completed military training, and as a partisan returned to his homeland in 1942 with airborne landing force to fulfil military orders and fight against the occupier. Tomasz is a proud Czech who refuses to accept German occupation. He is heavily wounded in a guerrilla fight and Nazis want him badly. His hideout is discovered and Tomasz is executed. His mother Olga and Helena who supplied him with food and medicine are betrayed and imprisoned. The mother dies in Gestapo custody of pneumonia and Helena is sentenced to death penalty. On 23 August 1943, shortly before her death, she gives birth to a daughter. Prosecutor Liedke did not know where the child was taken. A few months later he and his wife adopted the girl from one of SS Lebensborn houses naming her Ingrid.

After the war, Friedrich Liedke was arrested and detained in Sachsenhausen camp for five years. This imprisonment is twice as hard for a former prosecutor also due to constant remorse. Was a pregnant woman he sentenced to death the mother of his adopted daughter? Was his activity legal? Or perhaps he was a criminal who failed to recognize lawlessness or ignored it adjusting himself to the predominant ideology. At that time Liedke also lost his wife, who died in 1948 in Jüterborg, where she was taken care of by his sister Elisabeth who also looked after her niece. Ingrid loves her aunt and feels good at her house. But her adoptive father, whom she actually did not get to know, is sentenced in Waldheimer trial to death penalty.

Prof. Klaus Marxen's novel is impressive and worth recommending for many reasons. Apart from undeniable historical and legal merits, it invokes reflection on human life and its most important values. The author esteems the characters' mentality, inner experience and emotions. The novel's mood and symbolic representation are created by details. Ingrid has a beloved cat Jasmin. As a child, Prosecutor Liedke also had a cat he called Jasmin. The cat is by all means a symbol of bonds between the adoptive father Liedle and his adoptive daughter Ingrid, who knows him only from her mother's stories. What is more, the cat also symbolizes

a link between the past and the future. The effects of past events befall in the future. The mother saying that the father was deported by the Soviets during the war is also very meaningful.

Marxen depicts the connection between universal values, human nature, professional life and decision-making process very clearly. In his opinion, human life is a sum of all decisions taken by man in different situations. Being a lawyer means for Friedrich Liedke unreflective application of valid legal norms. His intellectual and emotional horizon is merely limited to studying next case files. Marxen warns against such mindless or ideology-driven interpretation and application of law. He underlines that certain neutral legal solutions applied at the time of domination of a specific ideology lead to total unlawfulness. Deadened remorse return with double force. Acting as a prosecutor, Liedke defies only once in the first interrogation before the People's Court; but during a break in the hearing he is rebuked and since then he does not make any deliberations or reflections at all. "Law is Führer's word" and "obedience from top to bottom; responsibility from bottom to top". Only one case constantly bothers him. Where was the child of the convicted pregnant woman taken to after her execution? This mystery is explained at the end of the novel. A lack of thorough reflection and violation of the so called meta-values must always come to a bad end.

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