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The right to court in Polish penal proceedings since 1989

Key words: fair trial, open case inquiry, access to information

1. Introduction

One of the major rights of every person residing in the area of Polish state jurisdiction is the right to court. It relates not only to the civil law protection or court and administrative proceedings but also to the right and penal proceedings or penal liability. The right to court in Polish penal proceedings is closely connected with an open case inquiry and access to information. The subject of this article is the right to court and fair trial, and access to the information arising from not only the basic law and procedural guarantees but also from the penal proceedings' regulations.

The right to court is included in the Constitution of 2nd April 1997[1], however it was earlier placed in the Polish legal system. It was one of the elements of international agreements ratified by Poland, such as International Covenant on Political and Civil Rights of 19th December 1966 (J.L. of 1977 No 38, item 167 with amendments) and in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November 1950 (J.L. of 1993, No 61, item 284 with amendments). Such law was one of basic elements of democratic state standards and was supposed to become one of directives for lawmakers establishing constitutional rules, which ought to become an interpretive guideline in interpretation of provisions.

It hasn't been so over the past decades that the accused and the victim had a series of rights in the penal proceedings.

Within the scope of the right to court the Constitution of 1921 (J.L. of 1921, No. 44, item 267)[2] assured the Polish citizens the assertion of their rights and freedoms, which were violated in the course of the court proceedings. The Constitution has guaranteed the compensation of damage caused by the unlawful acts of the state organs. It stated that it is the state and its administrative organs or self-government and its units who are the culprits. Constitution of 1935 (J.L. of 1935 No. 30, item 227)[3] was to guarantee (as the previous one) a basic measures intended to protect the constitutional rights and freedoms of an individual and the primary

[1] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. z 1997 r., Nr 78, poz. 483.

[2] Ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej (Dz. U. Nr 44, poz. 267).

[3] Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r. (Dz. U. Nr 30, poz. 227).

measure supposed to be the exertion of violated rights before the court, it didn't guarantee, however, the right to compensation for damages caused by the unlawful official actions of state, civil or military organs. The Constitution of 1952 (J.L. of 1952 No. 32, item 232 as amended)[4] did not constitute any institutional measures protecting the constitutional rights and freedoms. It has to be mentioned that the Constitution did not provide citizens with any rights when dealing with state's organs, which would guarantee them the independent control over the constitutionality and giving the power to monitor the legality of acts of law issued by the state. The citizen was deprived of the basic law measures allowing him to investigate his rights. Only in the break of 80s and 90s the political changes occurred resulting in improvements in the fields of individual freedoms and rights, which the Constitution of 1997 was a pinnacle of. One of the most significant measures of the freedom and rights protection has become unlimited, common and unrestrained access to court in order to pursue the rights which were abused, as well as the right to challenge the court sentences of the first instance.

A right to compensation for damage sustained and inflicted through the unlawful acts of state organs has become obvious.

Elementary regulations of all Constitutions have been evolving, gaining shape in various socio-political systems. They reflected concepts of many creators shaping up the Constitution. It included the doctrine concepts of political and ideological accents but also the concepts which had nothing in common with political context and were free from political ideologies.

It was only the penal codes issued in 1997 which gave the unrestrained access to the court and only after the 1989 the victim's and defendant's charged in the penal proceeding actions had been recorded[5].

2. Right to court as a subjective right

Deliberating the issue of importance of the right to court for an individual in practice it ought to be clarified above all the term "to have a right to sth".

Joanna Człowiekowska notifies that expression that an individual „has a right" has various meanings. "To have a right" may stand – as per the author – for "bilateral freedom" which means indifference of performance, which means that we have to deal with such situation where the law maker either did not forbid or impose the duty of performing of certain act, giving the individual a right to choose, either to do or withstand from doing so.

She notifies also that „having a right to sth" may be understood as „entitlement" or „competence". Subsequently this may indicate the circumstance in which there are minimum two subjects, where one of them bears the duty and to this duty relates „entitlement" which is possessed by the latter subject. The source of such "entitlements" indicated by Joanna Człowiekowska may be one provision, they may exercise the right to impose on one subject a certain performance towards the other subject. In such case the entitled subject will be the one in relation to which the other subject bears the duty of certain performance. If the lawmaker establishes such circumstance, which is described as entitlement, it should expect that in the provisions the addressee of a norm will be indicated, which means an identified subject, onto which a duty to perform certain activities is imposed, towards the other subject which holds the entitlement. Expression that "a person has a right" may indicate also legally complex circumstances based on multiple entitlement connections or competences or freedoms and duties. Such legally complex situations which are indicated by the existing norms directed to different subjects and acknowledged as subject's interests and which are socially justified are described as subjective rights. It is also - otherwise named – such legal status of an individual, in which he/she may demand a certain performance or refusal of performance for his/ /her favour from other subject, and when such subject has a legal obligation to perform in such favour.

Subjective right describes relation between the individual and other individuals or the state. When the public law indicates such subjective rights which the natural person possesses before the state, we are facing the public subjective right, source of such rights are normative acts which in art. 87 item 1 and 2 of Constitution is expressed as existing common law. Joanna Człowiekowska rightly points out that the Constitution is a primary source of such rights, and it includes rights, freedoms and obligations of each human and citizen. She says that there is an inseparable bond between the public subjective rights and a claim, examined in substantive and formal contexts. It is aimed

[4] Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 r. (Dz. U. Nr. 33, poz. 232, z późn. zm.).

[5] R. Stawicki, Prawa i wolności obywatelskie w Polsce po 1918 r. w świetle rozwiązań konstytucyjnych – zarys historyczno-prawny, Warszawa 2011, http://www.senat.gov.pl/gfx/senat/pl/senatopracowania/25/plik/ot-607.pdf [20.10.2014].

at not only execution of certain behaviour, arising from the subjective law, but also realization of such claim must be performed in the formally expressed way.

The right to court may be treated as the right to a public subjective right. The subject possessing such right maintains the right to demand an access to court from his state. It means that a natural person has a possibility to initiate certain court proceedings (civil, penal or administrative), in which legally binding trial guarantees should be observed, in the case when its rights protected by law were abused[6].

The doctrine of penal law widely expresses, how the subjective right in penal code is understood[7].

Marek Siudowski underlines that in the Constitution of 1997, the right to access to court is expressed in the art. 45 which says "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court"[8]. He rightly notifies that this provision is included in the chapter of Constitution devoted to freedoms, personal rights of a human and citizen, which means that it is a source of individual's subjective right. The author also points out that this right has an autonomous nature, which means that it is not merely an instrument allowing the execution of other constitutional rights and freedoms but also itself is a subject of legal protection regardless of whether the other subjective rights were abused.

Marek Siudowski also directs the attention to other Constitution provisions shaping up the right to court in Polish legal system. He recalls the importance of art. 77 item 2 of Constitution, forbidding the lawmakers to establish such provisions which would seal off the access to court proceedings in case of violated freedoms or rights, and also art. 173 of Constitution, which says about the independence of courts and tribunals as well as art. 177 of Constitution on presupposition of properties of common courts and finally art. 178 of Constitution regulating the issue of independence of the judiciary[9]. The right to access to court is one of the major rights of a human and citizen and ought to be one of basic guarantees of rules of law in the law abiding state.

Constitutional Tribunal in its ruling of 9 June 1998 (K. 28/97, OTK 1998/4/50) expressly declares that „the right to court is one of basic rights of an individual and one of core virtues of the rule of law. (…) The constitutional right to court includes above all: right to court, which means the right to open a court proceedings before the court of certain characteristics (independent, impartial, free), right to a properly established court proceedings, according to the rule of justice and transparency and a right to a sentence, which means the right to the binding ruling of the case examined by the court. (…) All above mentioned features should stand as the inherent virtues of the court organ[10]. The Constitutional Tribunal in its earlier recalled ruling has pointed out at another important issue. In its opinion "the subject of constitutional right to court expressed in art. 45 (1) and art. 77 (2) is everyone, which means, every individual and also legal persons of private law. From the sense (…) of constitutional provisions emerges the fact that the right to court embodies also cases related to other subjects of this law (…)". The Constitutional Tribunal also recalls another justification on art. 175 (1) of Constitution underlining that: "judiciary system in the Republic of Poland consists of: Supreme Court, common courts, administrative courts and military courts. In terms with dominating doctrine, the core feature of the administration of justice is to settle the legal disputes (disputes of legal relations)". Constitutional Tribunal in its ruling indicates that the term "case" ought to be related to legal disputes arising between the natural persons and legal persons and notifies that the right to court is not concerning disputes which relate to the subjects of private law, while objective scope of the right to court relates to the arguments of civil law, administrative and is concerning the criminal responsibility as well[11].

It is widely underlined in the doctrine, that this right has a common nature and is applicable not only for Polish citizens but also for foreigners, stateless persons, legal persons, subjects without the civil law subjectivity, natural persons and other subjects taking part in the

[6] J. Człowiekowska, *Prawo do sądu jako publiczne prawo podmiotowe*, ZNUJ 2006/5, p. 175–184, on-line version: http://www.lex.pl/akt/-/akt/prawo-do-sadu-jako-publiczne-prawo-podmiotowe [20.09.2014].

[7] P. Hofmański, *Podstawowe prawa jednostki i ich ochrona sądowa*, Warszawa 1997.

[8] S.f.: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[9] M. Siudowski, *Prawo do sądu, Raport z monitoringu ochrony praw podstawowych w Polsce*, http://panstwowa.org/site_media/storage/files/2011-04/d953a2943b0a-4f2560e4cbc351da68b41902.pdf, [18.09.2014].

[10] Wyrok Trybunału Konstytucyjnego z 9 czerwca 1998 r., K. 28/97, OTK 1998/4/50.

[11] Ibidem.

legal circulation. According to Hanna Pawluszkiewicz universalism of this right has also objective measure, as this right is applicable in all cases regardless of the branch of law to which it belongs. Equally important guarantee is mentioned in the art. 77 (2) of Constitution, that guarantees that nobody can be refused in pursue to court proceedings, and that any limitations to right to court have to be expressed in the Constitution[12]. It is confirmed by the court rulings. Constitutional Tribunal in the above mentioned citation of ruling of 9 June 1998 says: „the limitation of the right to court is evident in the art. 81 of Constitution, according to which the rights mentioned in this provision may be pursued only within the scope described in the law. In certain exclusive cases a collision of right to court with another constitutional norm may occur, the norm surrendering under its protection the values at equal or even higher importance of state functioning or development of an individual. Such limitations are acceptable only within the certain absolutely necessary scope, if the materialisation of constitutional values is not available otherwise. They may be established only through the law and only if they are needed in democratic state for the sake of its security or public order or for the purpose of environment, health or public morale protection or freedoms and other people's rights. They cannot affect the nature of these freedoms and rights they are to limit[13].

As per the lawmaker's assumption "the right to court should fulfill a guarantee function and serve as protection for other subjective rights and freedoms. The sense of subjective right to court should assign such entitlements: to transparent and just trial, to case examination without undue delay, and by the adequate, independent, impartial and free court, interdiction of prohibiting a court proceedings, entitlement to raise and continue the court proceedings and to appeals procedure.

With the right to court a rule of an open case investigation is closely linked.

Art. 45 of Constitution says about the plain and just case inquiry, implies the open court proceedings. Cautions, however, that transparency of court proceedings may be excluded only in exceptional circumstances and its exclusion may be caused only by the :moral issues, security of the state, public order, privacy of parties involved and other serious private interest. It is essential to state that publication of sentence must be done in public[14].

3. The accussed

The right to court is particularly important to everyone facing the alleged crime counts.

Under the art. 71 §2 of the Code of Penal Procedure (J.L. No. 89, item 555, as amended) (later quoted as: c.p.p.)[15] this right is assigned to every person facing charges by prosecutor or other public prosecutor or against which an appeal for conditional closure of the case was brought up (art. 336 §1 c.p.p.), and also towards which a private indictment was brought up (art. 488 §1 c.p.p.). A suspect, in the court proceeding accused, has the right to have his/her charge to be a subject of proper, independent, free and impartial court proceedings and that court will establish eventually his/ /her guilt and criminal liability[16].

Under art. 4 c.p.p. the organs responsible for investigation are obliged to examine and include evidence favourable and unfavourable for the indicted. Under art. 5 §1 c.p.p. „accused maintains the innocence status as long as the guilt will not be proven and confirmed by legally valid sentence", and according to art. 5 §2 c.p.p.." any doubts that cannot be challenged settle the case in favour of the accused".

Defendant, during the hearing, before the opening of court proceedings may file against the private prosecutor, allegedly a victim, a counter prosecution for the act he is accused for from the private prosecution. This act must be linked with the accusation against the defendant (art. 497 §1 c.p.p.).

4. The victim

There is a group of certain crimes for which the investigation is commenced after complaint filed by the victim (i.e. bodily harm, triggering of illness lasting

[12] H. Paluszkiewicz, *Prawo do sądu a wyrokowanie poza rozprawą*, (in:) *Pierwszoinstancyjne wyrokowanie merytoryczne poza rozprawą w polskim procesie karnym*, H. Paluszkiewicz, LEX no. 83481.

[13] Wyrok Trybunału Konstytucyjnego z 9 czerwca 1998 r., K.28/97, OTK 1998/4/50.

[14] W. Skrzydło, *Komentarz do art. 45 Konstytucji RP*, (in:) *Konstytucja Rzeczypospolitej Polskiej*, W. Skrzydło (ed.), VII, LEX no 8778.

[15] Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Dz. U. Nr 89, poz. 555, z późn. zm).

[16] H. Paluszkiewicz, op. cit., LEX no. 83841.

for more that 7 days – art. 157 §5 penal code (later quoted as: p.c)[17], punishable threat – art. 19 p.c., involuntary exposure to imminent danger of loss of life or damage to health – art. 160 §5 p.c. or rape – art. 197 p.c. The victim has a right to report a crime and file for prosecution of a perpetrator. It may be done also by the state institution, self-governmental or social. Either the victim and also the state, self-government or social institutions has a possibility to place a complaint for decision on refusal of prosecution or investigation, and the parties have also right to file a complaint in case of dismissal of preliminary proceedings (art. 306 §1 c.p.p.).

In the course of preliminary proceedings the victim acts as a party in proceedings, so is authorized to act in its own name and according to its interest (art. 299 §1 c.p.p.). If the victim is a juvenile or totally of partially incapacitated person its rights are executed by the statutory guardian or other person upon which the victim remains dependant of (art. 51 §2 c.p.p.). In the case of death of the victim, its rights may be pursued by the close ones or by the prosecutor (*ex officio*) in case of lack of such persons.

Under the art. 60 c.p.p. the victim, before the commencement of main court proceeding, may file for civil case in order to pursue in penal proceedings property claims arising from the committed crime. However, if the civil case has not been filed for, under the art. 49a c.p.p., the victim may, before the first hearing at the main court session, file an application for partial or full damage compensation.

Such right is applicable also for the close ones of the victim in case of the victim's death (art. 63 §1 c.p.p.). If the public interest demands that, such civil case on behalf of the victim may be filed by the prosecutor (art. 64 c.p.p.).

Every victim of a crime has a right to commence the penal proceeding by filing the private claim indictment (art. 59 §1 c.p.p.) or subsidiary indictment in case of the repeated refusal to commencement or dismissal of proceeding announced by the prosecutor (art. 55 §1 c.p.p.). If the indictment is placed by the public prosecutor, the victim is eligible to declare its wish to act as an auxiliary prosecutor (art. 53 and 54 c.p.p.), until commencement of the main court proceedings or act as a civil plaintiff (art. 62 c.p.p.). If such claim will be filed during the preliminary proceedings, the victim may demand its reassurance and has a right to file a complaint with the court concerning the provision on claim reassurance (art. 69 §2 and 3 c.p.p.).

Hanna Paluszkiewicz points out at the fact that during the court proceedings the victim may file a declaration that he/she wishes to act as an auxiliary, private prosecutor or civil plaintiff and through this acquires the rights of a party in proceedings, which results in various eligibilities and possibilities along the course of the court proceedings and subsequently is able to influence the course of the proceedings and have an influence in the final sentence. The victim may file evidence conclusions, ask questions, direct activities of other proceeding organs. Hanna Paluszkiewicz notifies that during the penal proceeding there is a rule of equality of parties applied, which emerges from the rule of contradictoriness of penal proceedings and as the author rightly continues it is the courts authority to safeguard such practice[18].

As it was mentioned above each party has a right to have its case investigated by an impartial jury. I fully agree with thesis of Paweł Wilczyński reflecting on this provision, that the jury's actions cannot be based on exterior suggestions, as it is obliged to objectiveness, and must refute any prejudices towards any party involved in the proceedings. Also indicates that the law maker has implemented in Polish law order the institution of exclusion of judge[19].

Under the art. 41 §1 c.p.p. „the judge is a subject of exclusion if there is a circumstance that his impartiality concerning the specific case is justifiably doubtful. The art. 42 §1 c.p.p. indicates that only that specific judge is eligible to file for such exclusion (request in writing for exclusion from the proceedings, which is attached to the case files – art. 42 §2 c.p.p.), moreover, such motion may be delivered by other party in the proceedings. The victim may also file for exclusion of the prosecutor and other persons involved in preliminary proceedings or other public prosecutors (art. 47 §1 c.p.p.)

5. Lengthiness of proceedings

Justifiably Paweł Wiliński says that the right to court includes a right to proceed with the case without

[17] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz. U. Nr 88, poz. 553, z późn. zm.).

[18] H. Paluszkiewicz, op. cit., LEX no. 83841.

[19] P. Wiliński, *Prawo do bezstronnego, niezawisłego, niezależnego i właściwego sądu*, (in:) *Proces karny w świetle Konstytucji*, P. Wiliński (ed.), LEX no. 135588.

undue delay. Notifies that in the current legal system such proceeding without delay is a major obstacle affecting the legal system. It comes out as a result of organizational and functional factors, understaffing, and as a major flaw, the over-bureaucratic procedures in power. I agree with P. Wiliński, that too strict following of procedures causes blockage or even paralysis of court proceedings, including those of penal nature. Paweł Wiliński notifies that penal proceeding should be continued effectively, which means, in time required for a proper case investigation[20].

Similar flaw in Polish court proceedings is recalled by Marek Siudowski, in a report devoted to monitoring of essential rights in Poland. Out of the report comes the conclusion that legally the right to court in Poland is guaranteed in harmony at the level of resolutions included in laws, there are still obstacles, however, in factual implementation of such right to court in practice.

Lengthiness of proceedings is also, as per the report, a result of transferring onto the authority and competence of common courts new duties and cases, which used to be resolved within the scope of other judiciary organs (i.e. extension of court competences after cancellation of courts for petty offences).

The report says that lawmakers have made common courts responsible for such duties as running the registries, overseeing of preliminary proceedings and eligible to run investigations in fiscal crimes and offences. Another remark is related to judges' staffing in courts. Despite the substantial increase in courts' competences and increase in number of cases followed, there is a slight increase in number of active judges and directs attention to fact that it causes the number of unsolved cases and undue delays in proceedings. Another reasons for delays in court proceedings are, as per the report, ineffective, even meticulous, long lasting execution processes and the lack of rightly institutionalized legal help for those who are not able to establish their legal representative or defence counsel. The report continues and points out another reason for prolonged court proceedings in Poland. It recalls relatively poor office standards, bad financing and lack of attention to material and organizational needs.

As per the report conclusions, one of potential solutions to such problem would be a new law – Law on the system of common courts which was introduced on 1st October 2001[21], a regulatory law to essential issues of common courts' functioning. Major changes the law has brought to the system are: open disciplinary proceedings against the judges, establishment of judiciary self-government, changes to judges' nominations, introduction as a duty, information on vacancies in posts for judges (this would ease the access to profession and increase the competitiveness), tighten the control over administrative activities of courts and monitoring of the effectiveness of court proceedings. New judiciary organs have been established, supposed to focus on administrative issues of courts, i.e. finances and technical issues have been transferred to financial directors or managers. Such motion would release judges from activities other than proceedings and sentencing and result in faster court proceedings. The new law has also brought up new solutions resulting in faster expert witness opinion release as well as in elimination of procedures seen as too formal and causing delays in proceedings. In order to ease too formal procedures: the scope of cases eligible for simplified procedures has been extended, flexible jurisdiction of courts has been introduced, allowing the district court to pass the proceeding to regional court acting as a court of the first instance in particularly complex and difficult cases and the scope of cases qualified as proceedings with mediator has been widened under the condition that victim and defendant agree on it, Police and its organs have received the power to investigate cases earlier reserved for prosecutor, the number of cases qualified to investigation has been increased, and introduced a limited form of plea bargaining for defendant, so called institution of voluntary submission to penalty, courts have been given the power to dismiss evidentiary motions which might delay the court proceedings, it has been introduced the facility of distance hearing, for witnesses living in distant locations, with the use of audio-video technologies and possibility of delivering of trial correspondence via fax or electronic mail service. In the conclusion of the report there is a notion of a slow but systematic improvement in the issue of lengthiness of court proceedings[22]. There is the institution of complaints against the lengthiness of proceedings in Polish law. The act of 17 June 2004 on the complaint on breach of rights of a party to investigate a case in

[20] P. Wiliński, op. cit., LEX no. 135588.

[21] Ustawa z dnia z dnia 27 lipca 2001 roku – Prawo o ustroju sądów powszechnych (t.j. Dz. U. z 2013, poz. 427 ze zm.).

[22] M. Siudowski, loc. cit.

preliminary proceeding either supervised or run by the prosecutor and on court proceeding without the unreasonable delay (J.L. of 2004 No. 179, item 1843 with amendments)[23] regulates the rules and procedure of filing and investigating the complaints of a party, whose right for case examination without undue delay has been breached as a result of wrongdoing or idleness of court or prosecutor in charge or supervising the preliminary proceedings. Obserwator Konstytucyjny website recalls the resolution by the Supreme Court and states that: „a court which is processing a complaint on breach of rights of a party to examine a case without unreasonable delay should have considered the run of court proceeding from the moment of filing for it up until the final judgment, regardless of the fact of filing a complaint at any of the stages of the proceeding. At the same time it says that the Supreme Court in the same resolution has stated that "a complaint on undue delay of proceedings is eligible for examination solely within the scope of allegations raised in it and may encompass as a whole only such part of the proceeding which concludes with final judgement issued by the court"[24].

Such statement is confirmed by Kraków Court of Appeal ruling, which rightly states, that about lengthiness of proceeding we may say when the proceeding lasts for very long, is lengthy and lasts much longer than it is necessary to investigate all circumstances – factual and legal, due for final sentencing in the case and are in causal relation to activity or idleness of the court[25].

However, the Supreme Court of Appeal rules in its statement that "the principle of speed and efficiency cannot collide with the rule of thoroughness and requirement for proper evaluation of all documents filed regarding the case investigated. A party which is filing pleadings wrongfully prepared, failing to follow a timeframe required for filing of appeal measures and subsequently bringing up another request to reinstate the deadline for its filing, is causing delays in proceedings itself. In such case it is not justified to state the breach of rights of a party to examine a case without undue delay, while the case is solved in merit and the party is filing new appeals or complaints in majority of the cases overdue or inadmissible[26].

Art. 3 (4) of the abovementioned law says that a party and victim may file a complaint on undue delay in proceedings in penal proceeding even if it is not a party itself. As it was mentioned earlier, the right to court is linked with the open proceeding principle.

6. An openness of proceedings

Talking about an open court proceedings we may understand it in two contexts, as openness in proceeding before the court and as an public sentence announcement. We may identify the external openness (public) and internal (regarding parties and their representatives). Internal and external apply during the whole proceeding, while the internal one, in general, means the information on the schedule of proceedings, its results at every stage, availability of evidence and accessibility to all activities during the proceedings, when the external one is limited to main court hearing[27].

Art. 355 c.p.p. says that: „court hearing is bound to be open".

The law about the common courts system (l.c.c.) says, that courts are to investigate and rule on cases in an open proceeding, while the cases of secret nature or with exclusion of openness may proceed only within the scope of law (art. 42 §2 and 3 l.c.c.). Such openness is related to the fact of external openness called also the rule of public hearing. This means that the court hearing has to be open for public, which is, the place of court proceedings must be easily accessible to the public and that public has a right to obtain information about the date and place of hearing.

The law is supposed to protect the parties from such activities by administration of justice which would be described as confined and for this reason would disallow the public or social control, which is one of important factors of society's trust towards the justice organs and for the purpose of illustration of the fact, that committed crime is met with an adequate punishment.

[23] Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki (Dz. U. z 2004 r. Nr 179, poz. 1843 z późn. zm.).

[24] Obserwator Konstytucyjny, 7 judges of Supreme Court on the issue of Complaints on delays in proceedings, www.obserwatorkonstytucyjny.pl/panstwo/7-sedziow-sadu-najwyzszego-o-skardze-na-przewleklosc, [14.09.2014].

[25] Orzeczenie SA w Krakowie z dnia 22 marca 2007, II S 1/07, KZS 2007, z. 3,poz. 42.

[26] Orzeczenie NSA z dnia 19 stycznia 2005, FPP 4/04, niepubl.

[27] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2011, p. 163–164, 778–779.

A public control over the court proceedings is run by the media: press, radio or TV. Thanks to their presence, reports commenting on court hearings, the public nature of court proceeding is strengthened. Media ought to be an important and trustworthy source of information about the proceedings. Openness of the court hearing is important mostly at the first instance stage, though[28].

Articles 356 §1, 2 and 3 c.p.p. precise which persons, apart from those taking part in proceedings and media representatives, are allowed to be present in the court room during the hearing. Code of penal proceedings (c.p.p.) indicates such persons: adult persons, not armed, under the approval of the judge presiding the hearing, the presence of juvenile persons is allowed or persons authorized to carry arms. Forbidden is the presence of persons in the state contradicting the dignity of the court.

Exclusion of open case hearing may also apply in case of witnesses. Not examined witnesses are not allowed in the court room before their hearing (art. 371 §1 c.p.p.)

Under the 361 §1 c.p.p. despite the status of exclusion from open hearing, during the hearing are allowed to be present apart from the parties involved, also 2 persons selected by the public prosecutor, auxiliary prosecutor, private prosecutor and defendant.

Approved subjects (parties in proceedings) have a right to file for exclusion of openness of proceedings (art. 360 §2 c.p.p.). Such application may also be filed by the witness. It is his/her right in case if such public hearing would endanger his/her dignity, or dignity of closest ones (art. 183 §2 c.p.p.). Specific rights apply to a person under the crown witness status. Under the art. 13 (1) of the law on crown witness[29], such witness has a right to file a request for hearing with exclusion of openness, of which such witness has to be informed about (law of 25th June 1997 on crown witness – uniform text J.L. of 2007, No 36, item 232).

Art. 364 §1 c.p.p. relates to the sentence publication. It says that the sentence announcement has to be open. As per Krzysztof Nowicki the open court sentencing stands as an important element of society's control over administration of justice, because the public may deliberate on whether the sentence reflects the public sense of justice. The public taking part in the hearing may control whether the proceedings are thorough and whether the public interest is protected as well as of the victim.

Krzysztof Nowicki further explains, that open case proceedings will influence the public's legal conscience and legal culture and play important educational role. It may also encourage the persons witnessing the proceedings to care for higher quality of proceedings observed, and may cause the equal treatment of parties involved. Krzysztof Nowicki admits that the openness plays very important role for defendant. Such openness may help in his/hers social rehabilitation, particularly if the charges were disclosed to the public, it also influences authenticity of testimonies given by witnesses and defendant's itself. [30]

Only consultations and voting are not done in open, which is supposed to protect the judge's independence. The reason for such closed-door consultation and voting is to prevent the influence of other persons or pressure by the society on judges. Only recording clerk apart from the jury is allowed into the court room during the closed-door consultations. Members of the jury are eligible to file a separate opinion questioning the whole or part of the sentence during such closed-door session[31].

According to the art. 360 §1 c.p.p. the court may, in the whole or in part, to decide on confidentiality of proceeding. Such provision is applied in case when the open hearing might result in:

- provoking public order's disturbance,
- offending the good habits,
- disclosing such circumstances which have to be kept secret for the state interest reason,
- causing harm to the social interest.

The court may also exclude the openness of proceeding after petition filed by the person placing it, and in the case when defendant is a juvenile person or for the under 15 years of age witness hearing (art. 360 §1 and 2 c.p.p.).

Internal openness of proceeding is reduced to the right of party to access the files of the criminal case and right to receive the information about the proceedings undertaken by the court, as well as possibility to initiate such actions by the parties involved.

Art. 16 §2 c.p.p. says: „the organ leading the

[28] J. Skorupka, *Prawno międzynarodowe i konstytucyjne podstawy jawności procesu karnego*, (in:) *Jawność procesu karnego*, J. Skorupka (ed.), Warszawa 2012, p. 61–65.

[29] Ustawa z dnia 25 czerwca 1997r. o świadku koronnym – t.j. Dz. U. z 2007 r. Nr 36, poz. 232 ze zm.

[30] K. Nowicki, *Jawność zewnętrzna postępowania sądowego*, (in:) J. Skorupka (ed.), *Jawność procesu karnego*, Warszawa 2012, p. 313.

[31] Ibidem, p. 346–348.

investigation should also, whenever necessary, provide the participating parties with information about the obligations and eligibilities leaning on participants, even if the law is not clearly stating such duty.

Lech Paprzycki in his comment on art. 16 c.p.p. says, that the principle of information stands as a duty at every stage of proceeding. All participating groups (trial organs, parties, spokesmen of public interest and individual, trial representatives, trial assistants, personal evidence), have a right to receive admonition on duties and rights they are subject of[32].

Under the art. 72 §1c.p.p. defendant may demand a presence of interpreter during the penal proceeding, if he/she is not fluent enough in Polish language, and as per the art. 72 §3 c.p.p. defendant, which is not proficient in Polish language ought to receive a decision on presentation, change or replenishment of charges, lawsuit and sentence which concludes the proceeding together with its translation.

The art. 390 c.p.p. says that defendant may be present during all the proceedings, with exception of situation when his/her presence may embarrass the victim, or influence testimonies of witness and expert witness. In such case, the court, may order the hearing to proceed without the presence of defendant (art. 390.c.p.p.)

According to the principle of verbal proceedings which is linked with the openness of proceeding and in connection with art. 367 c.p.p. parties of proceeding have eligibility to express itself on all questions bound to be resolved. The rule of equality and contradictoriness is in power, if one of the parties is expressing itself on one of the issues, other party of dispute has also right to answer on the same issue.

As per Wojciech Jasiński the access to case files is granted to public prosecutor, defendant, victim under the auxiliary prosecutor status, private or civil plaintiff, defenders and plenipotentiaries, as well as the statutory representatives of parties. The victim, which is not acting in the case as an auxiliary prosecutor or civil plaintiff, is not deprived of the possibility of accessing the case files, as he/she is allowed to do so upon the permission issued by the president of the court. Subjects having the right to access the case files may exercise it from the moment of filing these with the court, until the conclusion of proceedings, and also after the validation of the judgment.

Subjects during the preliminary proceedings have a right to access to case files after receiving such permission from the organ leading the proceeding. Subjects have a right to access the files only in the seat of the court or in the seat of the organ responsible for proceeding, in such context, they have a right to review these in the place convenient for them (with exception for confined persons who have a right to review the files also in the place of their imprisonment or confinement in the presence of the prison service officer).

Justly, the lawmakers have introduced the legal regulation, allowing the prosecutor on the course of preliminary proceedings, to refuse the access to certain parts of evidence, which, in case of reviewing it by the defendant would have resulted in endangering life or health of a victim or in the case of arising of suspicion, that would have led to damage or hiding of the evidence or to the creation of false evidence, or due to the other important reasons described in the law. [33]

Art. 156 §1 and 2 of c.p.p. says, that: „to parties, subject described in art. 416, defenders, plenipotentiaries and statutory representatives, the court case files are accessible and allowed is creation of write-offs. With the permission of the president of the court these files may be accessed by other persons"(art. 156 §1 c.p.p.), and upon the application to defendant or his/her defender and also to other parties, subject described in art. 416, plenipotentiaries and statutory representatives paid copies of case files are delivered (art. 156 §2 .p.p.)

The provision of art. 158 §1 says, that the prosecutor may demand the court case files delivery in order to review it, however, only if this will not affect the proceeding and in any case would not disturb the access to files for defendant and defender.

Art. 156 §4 c.p.p. relates to the sole principle, which limits the access to the files. It admits that if there is any danger of disclosure of confident information with the clause of secrecy "secret" or "top secret", the reviewing of files and creation of its copies or write-offs is approved only in accordance with regulations described by the president of the court or court itself, and the release of confirmed copies or write-offs is not observed.

According to the earlier mentioned report on monitoring of essentials rights in Poland by Marek Sudowski „obviously the factor influencing the access to advocates or counsellors is the number of persons authorised to provide such services".

[32] L. Paprzycki, *Komentarz do art. 16 ustawy Kodeks postępowania karnego*, (in:) *Kodeks postępowania karnego*, L. Paprzycki, J. Grajewski, S. Steinborn (eds.), vol. I, comment on art. 1–424, LEX no 8787.

[33] G. Grzegorczyk, J. Tylman, op. cit., p. 164–165.

The report, recalling the data provided by the Polish Bar Council indicates that on every 5,5 thousand inhabitants there is only 1 lawyer and further states that: „the right to court in the penal court case is closely related to the defendant's right to defend. According to presented (…) and approved by the Constitutional Tribunal definition, the right to court means also right to the rightly developed court procedure, meeting the justice requirements. During the penal proceeding, tailored according to the above mentioned criteria from the defendant's perspective it may be guaranteed „de facto" by the presence of defender. Either in the International Covenant on Civil and Political Rights or in the Convention for the Protection of Human Rights and Fundamental Freedoms the right to defense has been included in the penal case minimal standard, which is a value that guarantees the proper proceeding according to requirements of justice[34].

Formal and substantive defenses are emphasized, claiming that from the point of guaranteed right to court, more important is the formal defense, which stands as a possibility to utilize the services of professional, expert lawyer, while the right to defense executed by defendant allows to apply provisions which regulate contradictoriness of proceeding, this way giving the defendant a right to disagree in order to obtain the favourable result of proceeding, and this given by the full right to court.

It has to be highlighted that defender (contrary to defendant) is more active party in proceeding, an potential lack of such activeness has been sanctioned by the lawmaker (art. 20 §1 c.p.p.). Marek Siudowski indicates in his report another important issue, that in democratic state of law, which should execute the principle of social justice, the social status should not stand as an obstacle in the right to court and defense and rights of all citizens. The author, recalling later the ruling by the European Court of Human Rights says: „the good of the justice administration demands the free of charge legal service provided to defendant, particularly where his/hers imprisonment is at stake. Such complimentary legal assistance should be provided even if the probability of sentence resulting in defendant's confinement is unlikely". Use of such norm in practice as per M. Siudowski, is met with difficulties though.

[34] M. Siudowski, loc. cit.

7. Conclusions

One of the most important rights is the right to court. Under this law Polish citizens are entitled to a court access, a public hearing by a competent, independent and impartial court, a right to correct penal proceedings, a fair trial, and a right to a judgment. There is a difference between this right and constitutional principle of the right to court. Together with the right to court a rule of open court proceeding and access to information is observed, and explained, what rights and under which provisions such rights are applicable for subjects taking part in penal proceedings. Majority of the penal proceedings are open. It ought to be mentioned about the one very important issue related to the right to court and its execution. It is about the eligibility to access the professional legal assistance, because the right to court is linked with it inseparably. It is crucial in the penal procedure in particular as the law – according to art. 42 (2) of the Constitution – is granted to everyone who is the subject of penal proceeding, at every stage of the proceeding. It is particularly vital for the confined persons, which has been detained under the temporary arrest warrant. There are some difficulties of Polish courts and justice administration within the scope of execution of right to court and also regarding the issues which ought to be legally regulated as a priority. Most problematic issue of Polish penal procedure is its lengthiness.

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