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THE SIGNIFICANCE OF NOTIFYING THE LEGAL
QUALIFICATION OF AN OFFENCE AND ITS REVISION
DURING CRIMINAL PROCEEDINGS
FOR THE DEFENCE OF THE ACCUSED

INTRODUCTION

By way of introduction, we should note that the observations made below relate mainly to the preparatory proceedings and first-instance judicial proceedings. It is at this stage that an act is qualified for the first time and where the fundamental dispute between the public prosecutor and the accused develops. In the provisions regulating the issue of criminal proceedings, the phrase “legal qualification [of an act—P.S.]” crops up all too often. This concept is addressed by Article 110, Article 251 § 1, Article 303, Article 313 § 2, Article 322 § 2 and Article 413 § 1 point 4 and § 2 point 1 of the Polish Code of Criminal Procedure.¹ Legal classification accompanies not only acts directly relevant to attribution of criminal liability but also those which “cope with” incidental issues (see: Article 244 § 3 first sentence and Article 251 §1 of the Code). The legislator does not justify the idea of legal classification in any special way, allowing us to interpret this notion as denoting an inclusion of a committed act in a specific category of offences or misdemeanours after the facts of the case have been determined and the act has been assessed in terms of the statutory characteristics of the type of prohibited act, found in a specific provision or provisions of one or even several

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¹ Act of 6 June 1997—The Code of Criminal Procedure, Journal of Laws of 2017, item 1904 as amended [henceforth abbreviated as CCP].

acts, with a simultaneous application of the rules concerning the possible concurrence of these provisions.

I. FROM FACT FINDING TO SUBSUMPTION

As duly noted by the Supreme Administrative Court in its judgement of 13 April 2010, it is not possible to equate fact finding with subsumption itself, the latter meaning an attribution of a specific legal norm to the established facts.² The establishment of facts must precede a decision to qualify an act under one or even several provisions of the law. Even if the authority conducting an investigation or inquiry initially considers a particular legal qualification of the act at hand, this is a preliminary consideration and usually not documented by any procedural decision. Sometimes a basic legal qualification that is considered “initial” is also modified in line with the qualified type as new facts are discovered allowing the motivation or manner of the perpetrator’s conduct to become apparent (e.g. change of qualification from under Article 148 § 1 to § 2 point 1 or point 3 of the Penal Code).³ Fact finding takes place prior to the process of so-called subsumption. In its decision of July 5, 2006, the Supreme Court⁴ points out that the correct establishment of facts is a condition for a correct subsumption, which, in my opinion, does not guarantee its correctness every time.⁵ Interestingly, a situation is possible in which, although the facts cannot be questioned, the legal assessment of the act is subject to error. However, it is difficult to imagine a situation in which, based on incorrectly established facts which are fundamentally important for the case, a proper legal assessment of the facts will be made. In the ruling mentioned above it is pointed out that a charge brought only in connection with an offence against material law must be accompanied by an acceptance of the factual findings to date because this infringement “boils down to a defective *subsumption* of a certain legal norm to an

² Judgement of the Supreme Administrative Court of 13 April 2010, file ref. II FSK 2006/08, Accessed June 4, 2018, <http://orzeczenia.nsa.gov.pl/doc/3863F8186A>.

³ Act of 6 June 1997—The Penal Code, Journal of Laws No. 2018, item 1600.

⁴ Decision of the Supreme Court of 5 July 2006, file ref. V KK 138/06, LEX no. 188367.

⁵ This was addressed by the Supreme Court in the justification of its decision of January 12, 2015, file ref. no. III KK 290/14, LEX no. 1622322—to the extent in which the court competent to examine the case did not apply the legal qualification under Article 178a § 4 CCP, despite its correct finding that the accused, being in a state of intoxication, drove a motor vehicle in land traffic despite having been punished for an act under Article 178a § 1 of the Penal Code [henceforth referred to as PC].

indisputable factual state.” On the other hand, if the facts of the case are established incorrectly, this kind of “defect” will “anticipate” a assessment under criminal law, for which one employs appeal proceedings and demonstration of gross procedural defects that can have a significant impact on the content of the judicial decision.⁶ Similarly, in its judgement of December 7, 2016,⁷ the Court of Appeal in Warsaw noted that the questioning of the factual findings does not enable a charge to be brought on the grounds of an offence against substantive law, whereas a charge of a fact-finding error requires the court adjudicating at first instance to demonstrate deficiencies in the examination of case evidence such as disregard for the principles of logic, knowledge and life experience and all of the circumstances revealed in the case.

Subsumption is the penultimate stage in the application of law, and its purpose is to issue an individual decision in relation to the accused who identified by name and surname, being a party to the criminal procedure. This stage is preceded by the so-called validation phase, which requires that the normative basis be established (the regulations in force on the date of the act and/or on the date of adjudication), and the so-called interpretative phase, which requires that a particular regulation is understood and the constructs and notions used in it are elucidated, and finally, an appropriate norm derived from this provision.⁸ In normative terms, subsumption takes the form of an activity defined by the legislator as a “qualification of an act,” which can be seen both in the first sentence of Article 314 and in Article 399 § 1 CCP, or in the “determination of legal qualification under Polish law,” which is in turn provided for in Article 611c § 1, Article 611tl § 1 and Article 611ue § 3 CCP.

The authority which performs subsumption in the course of criminal proceedings is the entity responsible for the proceedings. However, since this authority includes people with a similar education but different levels of knowledge and experience, the assessment they provide will be largely derived from these individualising elements. Although the legal qualification of an act is this agency, it does not mean at all that the legal qualification does not concern other parties to the criminal process, who are likely to subject the assessment to severe criticism. In many cases, it is the objection to a legal qualification that forms the substance of legal remedies used.

⁶ Decision of the Supreme Court of 5 July 2006, file ref. V KK 138/06.

⁷ Judgement of the Court of Appeal in Warszawa of 7 December 2016, file ref. II AKa 377/16, LEX no. 2174834.

⁸ T. CHAUVIN, T. STANECKI, and P. WINCZOREK, *Wstęp do prawoznawstwa* (Warszawa: Wydawnictwo C.H. Beck, 2009), 203.

However, if subsumption performed by procedural authorities proceeds from an ascertainment of the factual and legal situation towards a legal assessment of the act, the actions undertaken by the accused and his defence counsel run counter to it and consist in reducing the elements providing for the statutory attributes of the offence until a result is obtained enabling the legal assessment to be challenged in its entirety.

II. LEGAL QUALIFICATION OF AN ACT VERSUS THE LIMITS OF ACCUSATION, AND SCOPE OF THE RIGHT OF DEFENCE

From the prosecutor's perspective, a precise description of the alleged act indicating the time, place, manner and circumstances of its perpetration and the consequences, in particular the amount of damage involved (Article 332, § 1 point 2 of CCP), together with an indication of the penal law provisions addressing the alleged act (Article 332 § 1 point 4 CCP)—apart from the data concerning the accused himself (Article 332 § 1 point 1 CCP)—makes “delimitation of accusation” possible.⁹ These limits in turn enable an indication of the limits of the judicial examination of the case. In principle, the court may not go beyond those limits. However, that is possible under Article 398 § 1 CCP by way of exception; however, even in this case an extended examination of the case is contingent upon be the prosecutor's declaration of will, who decides to bring a different accusation on the accused or add a new accusation to the existing one.¹⁰ The doctrine presents an otherwise correct view that the limits of judicial examination of a case circumscribe an area covered by the court's cognizance in the context of circumstances indicated in Article 2 § 1 point 1 CCP and delimit an area smaller than the limits of the criminal process itself. The latter also covers incidental issues, which are important but not necessarily related to issues relevant to the criminal liability of the accused.¹¹ From the perspective of the accused person, the data mentioned above determine the limits of defence, while the legal qualification of the alleged act determines the severity of the consequences. In a sense, therefore, the legal qualification gives the accused an idea of the gravity of the situation and is a factor making his attitude during

⁹ S. KALINOWSKI, *Postępowanie karne. Zarys części ogólnej* (Warszawa: Państwowe Wydawnictwo Naukowe, 1966), 80–81.

¹⁰ E. KRUK, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym* (Lublin: Wydawnictwo UMCS, 2016), 57–58.

¹¹ Ibid.

the proceedings more dynamic. Sometimes criminal defence can be reduced to a struggle not for a complete acquittal but to the reduction of legal consequences of an offence, which is preceded by an attempt to mitigate the legal classification of the act to a “milder” one. The latter situation is not a sign of submission to the accusation, but rather a realistic approach to the basis of the accusation. At this point, however, we should point out that neither the Polish legislator nor the judicial practice envisage any arrangements made between the defence and the prosecution as to the legal qualification of the act, let alone any bargaining, although criminal-process agreements have been a fixture in Polish criminal proceedings for almost two decades (Article 335 §§ 1 and 2 and Article 338a and Article 387 § 1 CCP).

III. THE RIGHT TO KNOW THE CHARGES AND THE INDICTMENT

Wiesław Daszkiewicz believes that a knowledge of the charges determines the feasibility of defence,¹² whereas Maria Lipczyńska grants the accused the right to demand a clarification of the act imputed to him.¹³ Although it is difficult to question the existence of a corresponding right on the part of the accused, he makes such a request very rarely as actions which satisfy this right are initiated *ex officio* by authorities involved in the proceedings (see Articles 313 and 314 and Article 338 § 1 CCP). The exception is an activity intended to present to the suspect the “grounds for charges” and the drafting of a written justification for them (Article 313 § 3 first sentence, CCP) as these are actions undertaken by a party to the proceedings only at the request of the suspect, which can be submitted “until he is notified of the date when the investigation materials are made available to his review.” The superiority of the adversarial process over its inquisitorial version is reflected in the fact that, for example, the accused has the right to know what he is being accused of. The right of the accused person to be informed “of the nature and cause of the accusation against him” is guaranteed by Article 6(3)(a) of the European Convention on Human Rights,¹⁴ which

¹² W. DASZKIEWICZ, “Taktyka kryminalistyczna a procesowe gwarancje jednostki i prawa obywatelskie,” *Państwo i Prawo* 3 (1985), 58.

¹³ M. LIPCZYŃSKA, “Prawo do obrony w postępowaniu przygotowawczym w ustawie i praktyce,” *Nowe Prawo* 7–8 (1958): 75.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284 [henceforth quoted as CPHR].

sets a minimum standard in this respect, from which there is no turning back. The provision of the Convention guarantees not only the mere receipt of “information,” but also “its promptness” and “intelligibility.” The latter is accomplished by editing the charge and/or the indictment “in a language which the suspect and/or accused understands.” The latter requirement is implemented more than sufficiently by Article 72 § 3 CCP, ordering in relation to the accused who “does not have a sufficient command of Polish” (Article 72 § 1 *in fine* CCP) a service of, among other things, a decision on presenting, supplementing or amending the charges and the indictment “together with a translation.”

The “nature and cause of the accusation” referred to in Article 6(3)(a) ECHR covers the legal classification of the act imputed to the accused and the facts underlying the accusation. Consequently, the knowledge of charges encompasses both their factual and the legal bases. Except for certain cases provided for in the second sentence of Article 218 § 2 CCP and 329 § 1 *in fine* CCP, in principle no procedural steps will be taken against an individualised entity. Let us hope that the legislator will not revert to the highly controversial solution used in the provision of Article 237 § 3 of the CCP of 1928, which consisted in limiting—with the consent of the public prosecutor—the time of making the charges available to the suspect “for 14 days at the longest.” Although that solution was used by way of exception, only if a prompt publication of that decision “would seriously impede criminal proceedings,” it was still an example of a flagrant restriction of the suspect’s rights of defence in cases where the legislation in force at the time did not ban questioning the suspect in the period preceding his acquaintance with the undisclosed charges.

The step-wise nature of the criminal process means that in each of its successive stages the problem of legal qualification of an offence is dealt with by a different authority, with the first one carrying out an appropriate assessment, in accordance with the chronology of procedural activities—the one running preparatory proceedings. Moreover, this chimes in with one of the specific aims of this procedure, addressed by Article 297 § 1 point 1 of the Code of Criminal Procedure, namely the determination “whether a prohibited act has been committed and whether it constitutes an offence.” In order to achieve this aim it is necessary to examine whether there are necessary prerequisites for criminal liability to be attributed to the perpetrator, including “reconstruction of the attributes, principles of attributing criminal liability, violation of the rules of conduct in good faith and determination of

the illegality of an act and the degree of social harm, and finally, determination of whether there are circumstances excluding criminality.”¹⁵ These actions are taken in conjunction with the content of a criminal provision or provisions which are considered to be potentially infringed by the offender.

IV. THE LEGAL QUALIFICATION OF AN ACT IN PRE-TRIAL PROCEEDINGS AND NOTIFICATION OF THAT FACT TO THE SUSPECT

The necessity to qualify an act constituting the subject of preparatory proceedings is already provided for at the beginning of Article 303 CCP, which prescribes institution of preparatory proceedings in the event of a “reasonable suspicion of a crime.” In the decision which initiates the proceedings, issued *ex officio* or as a result of a criminal offence being notified, the relevant party is obliged to “specify the act which is the subject of these proceedings and its legal qualification.” An investigation is instituted¹⁶ when the party entertains a subjective feeling—albeit provoked by objective information—that a crime is likely to have occurred. Similar subjectivity will characterise the description of the act itself and the legal qualification. It transpires from the above considerations that the taking of evidence in the strict sense is not carried out at this stage, but the “reasonable suspicion” mentioned in Article 303 CCP is characterised by a lack of certainty whether the act or its components were committed. This suspicion is nothing more than a certain degree of probability. By its very nature, the degree of authenticity does not need to be verified, but the said abstention is of a temporary nature. Such an approach not doubt streamlines proceedings, without obviating the need to prove the factual circumstances of the act afterwards. Jacek Izydorczyk indicates that the degree of probability referred to in Article 303 CCP “does not have to be high, just a little is enough.”¹⁷ It seems that this view is correct, but such a considerable reduction in the expectation that an occurrence [read: a prohibited act] has taken place cannot involve

¹⁵ *Kodeks postępowania karnego. Komentarz*, ed. A. Sakowicz (Warszawa: Wydawnictwo C.H. Beck, 2015), 652.

¹⁶ Article 303 CCP is applied *mutatis mutandis* to investigation, see Article 325a § 2 CCP.

¹⁷ J. IZYDORCZYK, “Prawdopodobieństwo popełnienia przestępstwa oraz jego stopnie w polskim procesie karnym na podstawie k.p.k. z 1997 roku,” in *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, ed. T. Grzegorzczak (Warszawa: Oficyna Wolters Kluwer, 2011), 175–82.

law enforcement authorities in every case. This is to be prevented by the institution of the so-called verification procedure, which is conducted under Article 307 § 1 CCP in order to supplement or verify the data submitted in the offence notification within the prescribed time limit. Preparatory proceedings are instituted when they are justifiable and legally permissible, but the qualification under provision of Article 303 CCP is “preliminary” and may be changed considerably. In a sense, this qualification is dynamic. The “actual legitimacy” mentioned here is reflected in the fact that the suspicion of a criminal offence is to be “justified,” which the doctrine associates with the existence of specific information pointing to this very fact. On the other hand, “legal admissibility” is connected with an assessment of the situation in terms of Article 17 § 1 CCP. Quite validly, the doctrine considers the elements relating to the definition of a prohibited act and its legal classification to be the most important among the constituent elements of an order to institute an inquiry it is precisely.¹⁸ At the same time, these elements are required to be indicated in judicial orders, in accordance with a general provision, that is Article 94 § 1 points 3 and 4 CCP (“indication of the question and the matter which the decision concerns” and “statement of the legal basis”).

Indication of the legal classification of the offence under inquiry required by Article 303 CCP is not binding and may evolve as the proceedings unfold. This “instability” of the said designation and act and its qualification does not deprive qualification of its legal significance, as Hofmański, Sadzik and Zgryzek note in the doctrine.¹⁹ At the same time, those same authors argue that, even if the extension of the proceedings in question or the conclusion that the act should have a qualification different to that stipulated in the order to initiate an investigation, there is no need to amend this order. This significance of legal qualification made at the outset of preparatory proceedings is reflected in the fact that it determines the permissible form of such proceedings (see Article 325b § 1 and the exclusions from the investigation set out in § 2 of this provision, as well as Article 309 point 1 in conjunction with Article 25 § 1 points 1–3, and Article 309 point 4 CPC). However, qualifying an offence in a category of acts prosecuted *ex officio* also has the effect that—in accordance with the principle of legalism expressed by Article 10 § 1 CCP—the authority established to prosecute criminal offences will be obliged to initiate and conduct preparatory proceedings.

¹⁸ M. KUROWSKI, *Komentarz do art. 303 k.p.k.*, LEX 2017, Proposition 6.

¹⁹ P. HOFMAŃSKI, E. SADZIK, and K. ZGRYZEK, *Kodeks postępowania karnego. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2007), 30.

It is definitely more important for the sake of the accused that the legal qualification done in a judicial order on presenting charges be indicated (Article 313 §§ 1 and 2 CCP) or in an order amending this order under Article 314 CCP, which also concerns the indication of the legal qualification of the act as “information on the content of the charge” preceding the hearing of the suspect under Article 308 § 2 CCP and in the order which in fact “approves” this hearing on the basis of Article 308 § 3 CCP. Due to the fact that the information provided under Article 308 § 2 CCP is somewhat volatile, we should accept the view endorsed by Stanisław Stachowiak that the content of the charge (including its legal qualification) should be reflected in the record of the hearing.²⁰ The assurance that this qualification will be indicated is considered in the doctrine as playing an “absolutely essential role in a fair trial.”²¹ From the moment when the charge(s) is/are presented, the person subject to such an order or interviewed under Article 308 § 2 CCP acquires the status of a party to proceedings with all related consequences (Article 71 § 1 in conjunction with Article 299 § 1 CCP).

Due to the need to determine the limits to the recognition of a criminal case and the scope of the defence itself, the description of an act provided by the order issued under Article 313 § 1 CCP must be “accurate” and the legal qualification of the act thus described must have a similar degree of precision. This observation also applies to a description and legal qualification of an offence, which are amended under 314 CCP. While it may seem that, for the sake of the right of defence, any change in the description and qualification of must be communicated to the suspect, the legislator strikes a compromise here between the efficiency and guarantee of the process, in other words it is required that a new order on a charge (charges) be issued only if the suspect is charged with “an act not covered by a previous order,” or “qualification of this act under a more stringent provision.” The need for such a new order does not therefore arise if the qualification of an act is modified in a manner that does not meet the criterion of “relevance” and if the act is qualified under a more lenient provision of law. While there is no doubt that there is no need to issue a new order in the event of an insignificant change in the description of the act, the failure to issue such a order if the legal qualification is revised appears to be an oversimplification that infringes the right of defence.

²⁰ S. STACHOWIAK, “Przedstawienie zarzutów w kodeksie postępowania karnego,” *Prokuratura i Prawo* 2 (1999): 28.

²¹ HOFMAŃSKI, SADZIK, ZGRYZEK, *Kodeks postępowania karnego*, 2: 65.

In the situation referred to in Article 314 § 1 CCP, apart from issuing a new order, it is also necessary to communicate it to the suspect and hear him for that reason. The provision of Article 313 §§ 3 and 4 CCP is applied *mutatis mutandis*, which means that, as in the case of the “original” order on presenting the charges, if a “new” order is issued, the accused may also demand an oral presentation of the grounds for the charges (§ 3) and/or a written statement of reasons (§§ 3 and 4). The statement of the “grounds for charges” mentioned in Article 313 § 3 CCP is nothing more than the facts underlying the suspicion. It is also pointed out in the doctrine that Article 313 §§ 3 and 4 CCP are not about the statement of reasons for the entire order on the presentation of charges but the statement of reasons for the objections.²² Admittedly, Article 314 § 4 CCP provides that the statement of reasons specify “what facts and evidence have been used to formulate the charges,” this statement is merely an illustration and does not rule out making reference to matters directly related to the legal qualification. The latter possibility is confirmed by the provision of § 138 subsection 4 of the Internal Regulations of the Public Prosecutor’s Office of 2016,²³ which limits the qualification to situations where such a need arises. Commenting on § 138 of the Regulations, it should be noted that this provision applies both to an order issued under 313 § 1 CCP and to an order issued pursuant to the provisions of Article 314, first sentence, CCP, but the Minister of Justice, for his own reasons, distinguishes between “orders on the supplementation of charges” and “orders on the change of charges,” although Article 314, first sentence, CCP provides only for the “new” order without further specifying it or using any special terminology. In a sense, the Minister’s activity is therefore an action which goes beyond the statutory legitimacy granted to this body.

Acts under Article 313 and 314 CCP, as well as the subsequent service of an indictment, are a manifestation of the right of the suspect/defendant to know procedural information. Although the right to obtain procedural information, under Article 16 CCP, can be successfully applied to other participants of criminal proceedings, especially in the case of a person who is threatened by criminal liability. Of course, this information also includes a number of minor pieces of information, but the notification of the

²² T. GRZEGORCZYK, *Kodeks postępowania karnego. Komentarz* (Warszawa: Oficyna Wolters Kluwer, 2008), 670–71.

²³ Ordinance of the Minister of Justice of 7 April 2016. Rules of the internal functioning of common organisational units of the Public Prosecutor's Office, *Journal of Laws* of 2017, item 1206 as amended.

charge(s) and the accusation is one of the most important indicators for fairness of a trial. A certain shortcoming of Article 314 § 1 CCP is the omission of the requirement to “promptly” announce a new decision to the suspect, although such an order was formulated in relation to the previous order (Article 313 § 1 CCP). This gap does not imply consent to have this action delayed, for instance for tactical reasons, as this would be difficult to reconcile with the standard set by Article 6(3)(a) ECHR.²⁴ “Promptness” refers to the presentation of the order under Article 313 § 1 CCP rather than its service.²⁵ The suspect may not, therefore, request that this order be served on him before the date of the first hearing, although this would undoubtedly allow him to prepare for it better. However, a copy of this order is handed to the suspect, except that under Article 157 § 1 CCP, which grants him the right to one complimentary certified copy of “every decision,” a possibility which should be communicated to him, which occurs at his request.

Such a delay is also inadmissible with respect to the service on the accused of a copy corresponding to the formal conditions of the indictment, and that should be performed “immediately.” At this point, we need to note that the indictment is served on the accused after its substantive and formal verification (Article 338 § 1 CCP), which is likely to extend the waiting time, but at the same time ensures that the accused person can acquaint himself with the non-defective document. Exceptionally, the service of indictment together with a penal order is permitted (Article 505, first sentence, CCP), however, given the defendant’s right to use an objection for cassation, it does not seem that this manner of proceedings result in a serious limitation of his right of defence, although I believe that the moment preceding the referral of the case to the penal order proceedings presented a good opportunity to serve the indictment. It should be remembered, however, that the legislator’s unwillingness to apply properly the provision of Article 338 § 1 CCP also in this case is caused by the fear that the accused would be willing to submit motions to admit evidence to the court, whereas case examination in order proceedings is based on the premise that the material submitted to the court together with the indictment by the public prosecutor is sufficient to determine the case (“redundancy of a hearing”—Article 500 § 1 CCP) and that there is no doubt as to the case status (“on the basis of the evidence

²⁴ SOWIŃSKI, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności organów procesowych oraz oskarżonego* (Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego, 2012), 71.

²⁵ Decision of the Court of Appeal in Kraków of 10 January 2002, file ref. II AKz 425/01, KZS of 2002, no. 1, item 22.

gathered, the circumstances of the act and the guilt of the accused do not raise any doubts”— Article 500 § 3 CCP). Meanwhile, the motions to admit evidence submitted before the order hearing not only need to be examined, but they could also distort the perception of the case, eliminating the possibility of its quick examination. The practice of the judiciary provides numerous examples of the fact that quick adjudication sometimes affects the quality of the system.

In the longer run, the said principle of legality imposes on the public prosecutor the obligation to bring and sustain the prosecution. The qualification may be subject to revision, either spontaneously or in succession. The first change may be the result of self-monitoring or a deeper reflection, the second one is due to changes in the perception of the act itself and the accompanying factual circumstances. Qualification is accompanied by the requirement to “describe the act,” and typically with enough accuracy. Although the legislator does specify degrees of this accuracy, it is obvious that the aim is to describe the act as accurately as possible, and the measure of this “possibility” is the amount of information obtained from the evidence gathered by the agency in charge of the judicial proceedings at the time when the act is being described. The need for a precise definition of a criminal act is also provided for in Article 332 § 1 point 2 CCP, which relates to the indictment brought by the public prosecutor, but also, via Article 55 § 2 CCP, to the auxiliary (subsidiary) prosecutor.

If the duty of a public prosecutor—and also of an auxiliary prosecutor under Article 55 § 2 in conjunction with Article 332 § 1 points 2 and 4 CCP—is to “precisely define the alleged act” and “indicate the provisions of the penal act under which the alleged act can be subsumed,” it would seem that this prosecutor is exempted from taking further action to describe the act and qualify it after the date of filing the indictment. Such reasoning, in spite of apparently hinging on the content of Article 332 § 1 points 2 and 4 CCP, cannot be reconciled with the function of accusation, the principle of accusatorial procedure, but first of all with that aspect of the principle of legalism which obliges the public prosecutor to “support the accusation of an act prosecuted *ex officio*.” Although this “support” concerns first of all an accusation in the form given to this accusation in the complaint under Article 332 CCP, this does not mean that it cannot evolve within the scope of the classification of the act, and can sometimes be even extended, as reflected in Article 398 § 1 CCP. Since from the linguistic point of view the word “to support”

means “to express approval for something or someone,”²⁶ the prosecutor can hardly be expected to publicly support a position which has lost its relevance in the course of further legal proceedings. I believe that the prosecutor, as part of his prosecuting function, retains the right to respond flexibly and adequately to the evolving perception of the act, up to the point of withdrawing the indictment pursuant to Article 14 § 2 CCP. Such “independence” of the public prosecutor was also advocated by the Supreme Court, which in a situation where the qualification is revised by the public prosecutor relieved the court *meriti* from having to warn the parties under Article 399 § 1 CCP.²⁷ There is no consensus in the doctrine as to whether the public prosecutor can in fact change his legal classification independently. Ryszard A. Stefański believes that the prosecutor must not do it alone and should therefore submit a reasoned request to the court to warn the parties of such an eventuality pursuant to Article 399 § 1 CCP.²⁸ In turn, Stanisław Stachowiak opts for the opportunity to change the legal classification of an act before the court given also to the prosecutor, as this will allow him to adapt the accusation to the information he has already acquired at an earlier stage of the proceedings.²⁹ The granting of such a prerogative to the public prosecutor before the court not only activates him, making him a sensible and rational participant of the procedure, but also allows him to maintain objectivity, which is demanded by Article 6 of the new law on the public prosecutor’s office.³⁰ Therefore, it appears that the public prosecutor should be granted the right to independently modify the legal qualification, and Article 399 does not apply in this respect. This view is also accepted by Piotr Rogoziński,³¹ who believes that if the prosecutor makes an amendment, the court has no grounds for notification under Article 399 § 1 CCP, since in such a case this circumstance is notified clearly enough by the prosecutor himself, and this provision serves to bring the attention of the parties to a possible change in the legal assessment of the court, rather than someone else. The change of legal classification made by the public prosecutor within

²⁶ [wyrzącać aprobatę dla czegoś lub kogoś—Translator’s note], *Słownik Języka Polskiego* (PWN 2018), accessed July 21, 2018, <https://sjp.pwn.pl/slowniki/popiera%C4%87.html>.

²⁷ Judgement of the Supreme Court of 12 June 1996, file ref. II KKN 25/96, LEX no. 26356.

²⁸ R.A. STEFAŃSKI, “Prokurator w postępowaniu karnym przed sądem I instancji,” *Prokuratura i Prawo* 1 (1997): 65–66.

²⁹ S. Stachowiak, “Głosa do wyroku SN z dn. 12 czerwca 1996 r., II KKN 25/96,” *Prokuratura i Prawo* 6 (1997): 97–102.

³⁰ Act of 28 January 2016—The Law on the Public Prosecutor’s Office, *Journal of Laws of 2017*, item 1767 as amended.

³¹ M. ROGOZIŃSKI, *Komentarz do art. 399 k.p.k.*, LEX 2018, Proposition 8.

the limits of the accusation causes that “the subject matter of the proceedings is the question of the criminal liability of the accused for the alleged act under a new legal assessment and not according to the legal qualification indicated in the indictment.”³²

V. LEGAL QUALIFICATION OF AN ACT MADE BY A PRIVATE PROSECUTOR

A private prosecutor is under no obligation to “accurately” describe the alleged conduct of the accused, being required only to “identify the alleged act [of the accused person—P.S.],” with any degree of precision, also less than **precise**. In Article 488 CCP, the legislator clearly limits the list of requirements for cases based on a private complaint, thus excluding it from the group of so-called “typical, ordinary or full indictments,”³³ which are characterised by a high degree of formalism and complexity. A private indictment, including a bill of indictment drawn up by the Police or the authority mentioned in Article 325d CCP, an oral complaint registered by the aggrieved party with the Police under Article 488 § 1 CCP, and the extension of the public prosecutor’s accusation at a trial pursuant to Article 398 § 1 CCP, is a good example of the so-called simplified indictment. Apart from the so-called substitutes or surrogates of the indictment, C. Kulesza classifies these acts as special indictments.³⁴ A private indictment is distinguished from other specific indictments (shortened indictments and their surrogates) not only by the above-mentioned simplification of the description of the offence incriminated against the defendant. Unlike most of these indictments and their surrogates, a private indictment does not have to include an indication of the legal qualification of the act. Such reduced formalism is understandable considering the fact that it originates from the wronged party, who often does not have the means to accurately reproduce the course of the event incriminated against the accused or sufficient legal knowledge to conduct a correct subsumption. The first legal qualification of an act in the case based on a private complaint comes from the adjudicating court, and the ac-

³² Ibid.

³³ T. GRZEGORCZYK, “Wniosek o rozpoznanie sprawy w postępowaniu przyspieszonym jako surrogat aktu oskarżenia,” in *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, ed. P. Wiliński (Warszawa: Oficyna Wolters Kluwer, 2008), 97.

³⁴ *Wykład prawa karnego procesowego*, ed. P. Kruszyński (Białystok: Wydawnictwo Temida 2, 2003), 338–39.

cused, having received a copy of the indictment, has to either be patient in this respect, or make his own legal assessment of the act constituting the indictment. Ewa Kruk points out that the reduction of formalism used in the case of a private accusation has this effect that if the victim wished to supplement the indictment with other elements, he could not be subsequently requested by the court to improve them beyond the scope specified in Article 487 CCP.³⁵ This of course also applies to an incorrect legal classification of an offence. Although it is true that the reduction in formalism discussed here is due to the fact that a private indictment is more like a “simplified pleading,”³⁶ the mere fact that the legal classification has been licitly omitted does not invalidate this device. Moreover, it still contains an element substantiating need to initiate and conduct proceedings before the court, namely a relevant statement of a private prosecutor, which is a manifestation of the will to prosecute indicated in the indictment. Also this indictment, although devoid of a legal qualification, is an essential component of the principle of accusatorial procedure expressed in Article 14 § 1 CCP. Looking at it from the perspective of the prosecutor, it can be treated as an expression of the prosecution function which, as Kalinowski believes, consists in initiating a process, collecting evidence against the accused, and supporting and proving the legitimacy of the accusation before the court.³⁷

VI. LEGAL QUALIFICATION OF AN ACT IN JUDICIAL PROCEEDINGS AND THE NOTIFICATION TO THE ACCUSED OF THE CHANGES IN THE LEGAL ASSESSMENT OF THE ACT

The legal qualification of the act adopted by the prosecutor in the indictment is used by the court as reference,³⁸ and both the description of the act and its legal assessment are somewhat hypothetical, an aspect which gets verified during the trial. This is pointed out by the Strasbourg Court, arguing that charges brought by the prosecutor “become crystallised only at the trial,” which should take place on the basis of evidence requested by both parties in the proceedings.³⁹ This condition is also fulfilled by the Polish

³⁵ KRUK, *Skarga oskarżycielska*, 143.

³⁶ R.A. STEFAŃSKI, *Komentarz do art. 487 k.p.k.*, LEX 1998, Proposition 1.

³⁷ KALINOWSKI, *Postępowanie karne*, 80–81.

³⁸ *Kodeks postępowania karnego. Komentarz*, ed. M. Mazur (Warszawa: Wydawnictwo Prawnicze, 1976), 482.

³⁹ Judgement of the ECHR of 13 September 2016, Application No. 50541/08 in the case of Ibrahim and Others v. the United Kingdom, LEX no. 2106805.

legislator, allowing adjudication only on the basis of the entirety of circumstances revealed during the trial (Article 92 and Article 410 CCP), that is circumstances established both on the basis of evidence examined at the request of the parties and *ex officio* (Article 167 CCP). The legal assessment presented by the public prosecutor is not binding on the court, which can be seen already during the initial stage, when the court examines its jurisdiction *ex officio*, taking actions under Article 35 § 1 or § 2 CCP and referring the case to a competent court if it transpires that, as a result of a different legal assessment of the act, that court is found to be an inappropriate forum.

The content of the accusation and the legal qualification presented therein gain additional importance for the defence of the accused when the object of the accusation is a felony. A felony charge is one of the prerequisites for mandatory defence provided for by the legislator in Article 80 CCP, but only while the case is being examined.⁴⁰ The fundamental criterion for this defence is the content of the indictment, which is shown by the use of the term “if charged” in Article 80 CCP, and which is also accepted in the doctrine by Hofmanski, Sadzik and Zgryzek.⁴¹ Although the legal qualification of the act contained in the indictment has an impact on the type of formal defence appointed by virtue Article 80 CCP, it should be remembered that a change in the qualification will trigger a change in the defence. This will happen when the regional court, acting pursuant to Article 399 § 1 CCP, warns the accused during the hearing, of the possibility of changing the qualification of the act within the limits of the accusation. For the mandatory defence to cease, the change of the legal qualification under Article 399 § 1 CCP must consist in dropping the charge of crime and relaxing the existing qualification towards that of an offence. Such a change is possible and should have the effect described herein, but the court incurs the risk of performing a faulty act under Article 439 § 1 point 10 CCP. It seems that the view presented here is not endorsed by Ryszard A. Stefański, who believes that, in such a case, the court merely informs of a “hypothetical possibility” which cannot in any way alter the content of the accusation.⁴² If we assume that the *ratio* of the defence conducted under Article 80 CCP is based not on the complexity of the case but on the seriousness of the charge and the severe

⁴⁰ S. STEINBORN, *Kodeks postępowania karnego. Komentarz do art. 80*, LEX 2018, Proposition 1.

⁴¹ P. HOFMAŃSKI, E. SADZIK, and K. ZGRYZEK, *Kodeks postępowania karnego. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2007), 1: 450.

⁴² R.A. STEFAŃSKI, *Obrona obligatoryjna w polskim procesie karnym* (Warszawa: Oficyna Wolters Kluwer, 2012), 185–86.

punishment the accused faces,⁴³ then the need for such a defence is obviated if the assessment of the case is relaxed while it is being examined. As a rule, courts usually decide to notify under Article 399 § 1 CCP when they are already convinced of there being serious arguments for such a change.

Article 399 CCP we mentioned above is to some extent modelled on Article 346 of the Code of Criminal Procedure of 1969, no longer in force, but in contrast to its “predecessor,” it does make a due notification contingent upon the court’s having to reflect on whether such a notice “is of significance for the parties, and in particular for the accused.” The legislator rightly assumes that at the examination stage each modification of the legal qualification has such significance, hence the ultimate character of the current Article 399 § 1 CCP, whose function is to prevent “the parties from being surprised by a revised criminal-law evaluation of the perpetrator’s conduct.”⁴⁴ A notification is made regardless of the direction of the expected change in the legal qualification. A notice may be given for all or part of the qualification that has changed. From the defendant’s point of view, such a solution has significance strictly as a guarantee and better fits into the principle of procedural loyalty and the right of the accused to obtain information about his current procedural situation. Considering the fact that the accused person need not have the knowledge of legal regulations, and that he is not always accompanied by a professional counsel, therefore, the action taken under Article 399 § 1 CCP constitutes primarily an attempt to compensate for his ignorance and to even out the opportunities of the parties at dispute, with the public prosecutor—due to his education and professional experience—having the most privileged position by all accounts. However, the obligation of information under Article 399 § 1 CCP is also fulfilled if the accused is represented by a defence counsel. In this case, the beneficiary of the notification is also the defence counsel, who is thus given the opportunity to review the existing line of defence and adapt it to the new realities of the case.

The said change of legal qualification may consist in taking into account a new provision of the penal law or in rejecting a provision considered previously by the prosecutor in the indictment. The situation under Article 399 § 1 CCP is at the same time a situation provided for by Article 16 § 1 CCP, but it is significant as the content of the notification includes a material rather than procedural norm. The warning made under Article 399 § 1 CCP

⁴³ STEINBORN, *Kodeks postępowania karnego*, Proposition 1.

⁴⁴ Judgement of the Court of Appeal in Kraków of 4 November 2016, file ref. no. II AKa 175/16, LEX no. 2287992.

does not need to be accompanied by a detailed justification, as such behaviour, in the opinion of the Supreme Court, could give the wrong impression that the case has already been resolved.⁴⁵ This position is shared in the doctrine by Tomasz Grzegorzczak⁴⁶ and Ryszard Ponikowski.⁴⁷ As the expected change of legal qualification is notified within the existing limits of accusation, there is no need to formulate new charges.⁴⁸ It is also noted in the doctrine that the reference made in Article 399 § 1 CCP with regard to “not going beyond the limits of the accusation” is a kind of statutory *superfluum*, as adjudication made outside those limits is not compatible with the principle of accusatorial procedure.⁴⁹

The right of the court to provide—within the limits of the accusation—its own autonomous legal assessment of the prohibited act presented by the prosecutor remains within the limits of the jurisdiction of common courts and is without prejudice to the European standards in this area as set out in Article 6 ECHR, as long as the accused person is provided adequate conditions for defence against the revised charge.⁵⁰ The court’s failure to warn under Article 399 § 1 CCP of the expected change in legal classification always infringes the right of defence, but will not always affect the substance of the judgement. Such an influence will be exerted only by a gross infringement of Article 399 § 1 CCP.⁵¹

In judicial practice, an extensive interpretation of Article 399 § 1 CCP is carried out for the benefit of the accused person, under which the disposition of this provision also includes a revised description of an act if it concerns any of its essential elements.⁵² The court’s revision of this description does not prejudice the principle of accusatorial procedure; the court is required to

⁴⁵ Judgement of the Supreme Court of 22 September 1983, file ref. no. I KR 162/83, OSNKW of 1984, nos. 7–8, item 82.

⁴⁶ T. GRZEGORCZYK, “Głosa do wyroku SN z dn. 10 marca 1989 r. (WR 74/89),” *Wojskowy Przegląd Prawniczy* 3 (1990): 343–44.

⁴⁷ *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka (Warszawa: Wydawnictwo C.H. Beck, 2015), 1028.

⁴⁸ See the Judgement of the Supreme Court of 22 September 1983, file ref. no. I KR 162/83.

⁴⁹ HOFMAŃSKI, SADZIK, and ZGRYZEK, *Kodeks postępowania karnego*, 2: 494.

⁵⁰ Judgement of the ECHR of 8 October 2013, Application no. 29864/03, LEX no. 1372616.

⁵¹ Judgement of the Court of Appeal in Warszawa of 26 April 2013, file ref. II AKa 84/13, LEX no. 1322735.

⁵² Judgement of the Court of Appeal in Kraków of 17 March 2015, file ref. II AKa 24/15, LEX no. 1796995. For a different interpretation, however, see the Judgement of the Court of Appeal in Szczecin of 5 June 2014, file ref. no. II AKa 85/14, LEX no. 1477320 and the judgement of the Court of Appeal in Lublin of 21 November 2002, file ref. no. II AKa 232/02, *OSN Prokuratura i Prawo* (2004), no. 2, item 26.

establish “all the factual characteristics of [...] the event.”⁵³ However, a minor or editorial change to this description does not require notification, unless it is relevant to the defence of the accused,⁵⁴ which implies that this issue should be carefully examined in each case. However, for example, changing the description in respect of a changed date of the act does matter.⁵⁵

The law does not specify the form of the warning made pursuant to Article 399 § 1 CCP, however, it seems an order is not necessary in such a case. However, this possibility is endorsed by Kazimierz Marszał,⁵⁶ which in the doctrine is criticized by Ryszard A. Stefański,⁵⁷ who argues that here we are dealing with signalling rather than a substantive decision. The assessment included in the warning made under Article 399 § 1 CCP is not binding on the court.⁵⁸ It is not without reason that the act uses the verb “warn” in Article 399 § 1 CCP, not “assure” [*uprzędzić* and *zapewnić*, respectively—Translator’s notes]. A “warning” is a form of “information about something” supplied in good time but without a guarantee that the event will occur. The accused, and consequently the other parties, cannot be certain that the “new” legal qualification will also be a “final” assessment. If, however, during the working session of the judges it transpires that such a change becomes likely, the court should give an additional warning to the parties present at the hearing, also resuming the court proceedings pursuant to Article 409 CCP.⁵⁹ In a sense, this solution is inherited from the provision of Article 362 § 2 of the pre-war Code of Criminal Procedure, amended in 1932.⁶⁰ The court is required to give notice of any further change in the legal qualification of the act, even if that change meant going back to the original classification, that is the one made by the prosecutor in the indictment, and thus known to the accused. The question is not whether the defendant knew the qualification but whether he was aware of the validity of the legal assessment.

⁵³ Judgement of the Supreme Court of 30 September 2014, file ref. II KK 234/14, OSNKW of 2015, no. 2, item 14.

⁵⁴ Judgement of the Court of Appeal in Kraków of 31 January 2001, file ref. II no. Aka 160/00, KZS of 2001, no. 2, item 29.

⁵⁵ Judgement of the Supreme Court of 19 March 1997, file ref. IV KKN 14/97, *Wokanda* 9 (1997): 15.

⁵⁶ K. MARSZAŁ, *Proces karny* (Katowice: Wydawnictwo Volumen, 1997), 385.

⁵⁷ J. Bratoszewski et al. *Kodeks postępowania karnego. Komentarz* (Warszawa: Dom Wydawniczy ABC, 1998), 2:319.

⁵⁸ This view is endorsed in S. STACHOWIAK, “Glosa do wyroku SN z 12.06.1996 r. (II KKN 25/96),” *Prokuratura i Prawo* 6 (1997): 97.

⁵⁹ GRZEGORCZYK, *Kodeks postępowania karnego*, 851.

⁶⁰ In the course of subsequent amendments, the provision was numbered variously, i.e. as Article 364 § 2, Article 333 § 2 or Article 324 § 2.

Although Article 399 § 1 CCP provides for a warning given to the parties in the course of a hearing of a modification to the legal qualification it seems reasonable to apply this provision also to the entirety of judicial proceedings, that is actions made outside the trial, as long as the parties participate in it. The Supreme Court is therefore in favour of its application to meetings designated by Article 399 CCP as regards the substance of the proceedings⁶¹ but also meetings of the courts of appeal⁶² and cassation.⁶³ It does not seem, however, that such a modification could be made by the court at the penal order sitting. The lack of this possibility is a consequence not only of the fact that the order sitting is held “without the participation of the parties” (Article 500 § 4 CCP), which excludes the possibility of effectively warning the parties about the direction of the anticipated modification, but mainly the fact that when issuing a penal order the court considers the circumstances of the act and the guilt of the accused to be beyond doubt. Thus, a possible change in the legal assessment of an offence, be it original or consequential, seems to contradict the existence of this condition for penal order proceedings.

An “exact” description of the act, as required by Article 332 § 1 point 2 CCP, consolidates the information gathered by the public prosecutor in the course of preliminary proceedings, and at the same time constitutes a balancing factor. Indeed, this does not apply to a situation referred to in Article 398 § 1 CCP, that is when, given the circumstances which came to light during the trial, the prosecutor charged the defendant with an act other than that covered by the indictment, as this step does is not preceded by pre-trial proceedings. The need for proceedings concerning a “new offence” will be one of the obstacles preventing the court from quickly examining the extended charge. A public prosecutor, wishing to have a new charge examined, should bring an accusation covering the new act, which requires him to present both its factual and legal aspects. Admittedly, Article 398 § 1 CCP does not provide for the degree of precision with which the prosecutor should do so, but it seems that he cannot use only generalisations, and this description should not differ too much from the one required under Article 332 § 1 point

⁶¹ Proposition 2 of the ruling of the Supreme Court of 16 November 2000, file ref. I KZP 35/00, OSNKW of 2000, nos. 11–12, item 92.

⁶² Judgement of the Supreme Court of 16 March 1984, file ref. no. RNw 2/84, OSNKW of 1984, nos. 11–12, item 115; Judgement of the Supreme Court of 17 July 2002, file ref. no. III KKN 485/99, *Prokuratura i Prawo* (2003), no. 2, item 7; Judgement of the Supreme Court of 8 April 2003, file ref. no. V KK 268/02, LEX no. 77008.

⁶³ Judgement of the Supreme Court of 27 January 1993, file ref. II KRN 244/92, OSNKW of 1993, nos. 3–4, item 20.

2 CCP The consent of the accused, upon which the presentation of this new charge at the same hearing depends, concerns the accusation in the form in which it was presented by the prosecutor at the trial, which does not rule out an action against this accusation under Article 399 § 1 CCP. The assurance of the defendant's right to give the consent in question demonstrates the subjective treatment of this party to the proceedings and has the characteristics of an important procedural guarantee of the right of defence. The consent also covers an extended accusation if the latter takes the form of a new indictment or an additional accusation brought by the prosecutor if the case is adjourned pursuant to Article 398 § 2 CCP. The first of these indictments is an instrument covering the previous and the extended accusations, while the additional indictment is an instrument covering only the new accusation. In each of these cases, the description of the act must meet the requirement of Article 332 § 1 point 2 of the Code of Criminal Procedure. The adoption of an extended indictment for examination sets new boundaries for the criminal process and new scope of the defence.

If an "additional indictment" is presented, we will be dealing with a fairly rare situation when a criminal process will take place against the same defendant on the basis of two separate indictments ("old" and "additional"). Each of these indictments may also become a separate object of activities under Article 14 § 2 CCP, with consequences described in the third sentence of this provision with regard to the act covered by the indictment withdrawn by the public prosecutor. The legislator does not specify which indictment, be it "new" or "additional," should be filed by the public prosecutor in case the hearing is adjourned, but certainly the use of the word "shall file" in Article 398 § 2 CCP indicates that it is impossible for the court to hear an extended indictment without the prosecutor making one of the complaints described therein. The result of such an examination is that the defence exposes itself to a complaint under Article 17 § 1 point 9 CCP in relation to that "other act" whose "circumstances came to light in the course of the hearing." Finally, it seems that an "additional" indictment is more appropriate in a situation where the extended accusation covers an act which does not have any other links with the accusations previously made by the prosecutor—except the accused person—while the "new" indictment is appropriate for acts which show connection with the existing accusation and therefore require to be included in it. The filing of a "new" or "existing" indictment imposes on the court an obligation to examine them jointly (Article 33 CCP). However, as is aptly noted in the doctrine, Article 398 § 2 CCP does not apply to

a situation in which “the same act should be classified under another provision,” in which case a change in the legal qualification of an act is at stake within the limits of the accusation and not a new act.⁶⁴

FINAL REMARKS

To recapitulate, although the object of criminal process is not to describe the act and qualify it legally and the act itself is understood as a kind of legacy, the indication of a legal qualification is of fundamental importance for the defence of the accused. Except for cases referred to in Article 80 CCP, this does not affect the line of defence, but the defence itself—besides the description—sets the limits for the examination of the case and thus for the defence itself under criminal law. In view of the above, no wonder that the legislator attaches so much importance to a precise determination of the elements constituting the charge(s). This is evidenced by both the regulation contained in Article 313 § 2 and Article 332 § 1 point 2 CCP, which require that the alleged act and its legal classification be specified. In the latter case, the goal is to indicate the provisions of the general and specific parts of the Penal Code and the provisions of other penal laws.⁶⁵ Among the provisions of the general part of the Penal Code, the following are usually mentioned: Article 11 § 2 PC (cumulative qualification of an act), Article 12 PC (continuous act), Article 13 § 1 or § 2 PC (attempt), Article 18 § 2 or § 3 PC (instigation or aiding and abetting), Article 31 § 2 PC (significant reduction in sanity), Article 57a § 1 PC (hooliganism) and Article 64 § 1 or § 2 PC (basic or multiple special recidivism).⁶⁶ The natural consequence of the prosecutor's indication of a specific legal qualification of an act will be a referral of the case to the competent court to be examined in an appropriate manner. Legal qualification is a factor influencing the possibility of using certain procedural solutions, as evidenced, among others, by the third sentence of Article 335 § 1 and § 2 and Article 387 § 1 CCP.

A request to change the legal qualification is often the essential element of appellate measures, typically accompanied by a charge related to a breach of provisions of substantive law involving a defective subsumption⁶⁷ (Article

⁶⁴ ŚWIECKI, *Komentarz do art. 398 k.p.k.*, LEX 2018, Proposition 4.

⁶⁵ *Kodeks postępowania karnego*, ed. J. Skorupka, 824

⁶⁶ *Ibid.*

⁶⁷ An offence against a provision of substantive law may consist in its incorrect interpretation, the use of an inappropriate provision, or non-application of a provision which is mandatory in

438 point 1 CCP) or a charge error in factual findings underlying the decision, if it could have influenced the content of the decision⁶⁸ (Article 438 point 3 CCP). The defective nature of the qualification when a charge made pursuant to Article 438 point 1 CCP is of an independent nature, while in the case of a charge formulated under Article 438 point 3 CCP has a derivative character. The relativity of those charges stems from the evaluative character of the legal qualification itself and the examination of the underlying facts. A legal assessment of an act made by the prosecutor is not binding on the court, which has not only the right but also the duty to verify and correct it as appropriate, which cannot ruin the identity of the alleged and incriminated act. The above can also be seen in the example of Article 455 CCP, which obliges the appellate court to correct an erroneous legal qualification while the factual findings are unchanged, a situation which may happen regardless of the limits of the appeal and the charges raised.⁶⁹ According to the Supreme Court,⁷⁰ the components facilitating the definition of an identity framework for a “historical event” are: the sameness of the object of attack, the sameness of the entities accused of participating in the event, the sameness of the aggrieved parties, and finally the sameness of the time and place of the event, and in the case of a different identification of that date and place than in the indictment, the analysis of the objective and subjective aspects of the act in the context of the causal link between the defendant’s specific behaviour and the resultant conduct or omission.

a particular situation—this view was presented by the Court of Appeal in Łódź in its judgement of December 12, 2016, file ref. no. II AKa 258/16, LEX no. 2250090. See also the following judgements of the Supreme Court: 28 March 2017, file ref. no. III KK 498/16, LEX no. 2300158; 21 March 2017, file ref. no. III KK 74/2017, LEX no. 22790023; and 5 January 2017, file ref. no. IV KK 430/17, LEX no. 2255367.

⁶⁸ This type of error usually results from infringement of the rules concerning the collection and evaluation of evidence and involves a breach of Article 7 or Article 410 CCP—see also the Judgement of the Court of Appeal in Warszawa of 16 December 2016, file ref. no. II AKa 371/16, LEX no. 2225472.

⁶⁹ However, an amendment of the legal qualification to the disadvantage of the accused may occur only if an appellate measure has been used against him (Article 455, second sentence, CCP).

⁷⁰ Proposition 3 of the judgement of the Supreme Court of 5 September 2006, file ref. no. IV KK 194/06, OSNWSK of 2006, no. 1, item 1987.

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THE SIGNIFICANCE OF NOTIFYING THE LEGAL QUALIFICATION
OF AN OFFENCE AND ITS REVISION DURING CRIMINAL PROCEEDINGS
FOR THE DEFENCE OF THE ACCUSED

Summary

The article presents issues concerning the legal qualification of a criminal act by the prosecutor, including the public prosecutor, the legal qualification of the fact, and the significance of this procedural act for the defendant's ability to defend himself effectively. The relationship between the limits of accusation and the limits of examination of a criminal case and the scope of defence were presented. The author discusses the indication of changes in the legal qualification to the suspect or defendant and the court's authorisation in this respect, with particular emphasis on the regulation provided by Article 399 § 1 of the Code of Criminal Procedure. Doubts about the application of Article 80 of the Code are discussed as well as its influence on the use of the institution of obligatory defence.

Keywords: legal qualification; subsumption; legal assessment; legal description; indictment; hearing; defence; obligatory defence; public prosecutor; fairness of the criminal trial.

Translated by Tomasz Pałkowski



The preparation of the English version of *Roczniki Nauk Prawnych (Annals of Juridical Sciences)* and its publication in electronic databases was financed under contract no. 836/P-DUN/2018 from the resources of the Minister of Science and Higher Education for the popularization of science.