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THE PUBLIC CHARACTER OF CRIMINAL PROCEEDINGS IN THE LIGHT OF LEGAL SECURITY AS PROVIDED FOR IN AMENDED ART. 357 OF THE CODE OF CRIMINAL PROCEDURE OF 10 JUNE 2016

INTRODUCTION

On August 5, 2016, the so-called "openness package" entered into force, consisting of a number of legal regulations related to the actual realisation of the constitutional principle of the public character of criminal proceedings. The reinforcement of the openness principle captured by the Polish Constitution[1] with respect to criminal proceedings was achieved by, among others, a statutory guarantee of the possibility to record and broadcast the course of judicial proceedings, enhancing in this way the transparency of criminal proceedings and affecting the external openness of criminal proceedings.

The aim of the presented article is to address the principle of openness of criminal proceedings in terms of external openness, in connection with the amendment of art. 357 of the Code of Criminal Procedure,[2] and in the light of legal security. This article, as intended by the Author, should form a contribution to the discussion of the measure of legal security in the Polish legal order that has been achieved with respect to the above-mentioned amendment.

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[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

[2] Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws No. 89, item 555 as amended [hereafter CCP].

The presented research is based on the assumption that the person is an important subject of legal security in a democratic state governed by the rule of law. The person has a right to pursue his or her life goals in an atmosphere that is free from the sense of threat, and the protection of the person's interests is provided in a comprehensive and effective manner. It is essential to assume that the most effective mechanism serving to safeguard subjective goods and interests of an individual is law, whereas the degree of certainty of this law depends, among others, on the fulfilment of the postulate that this law be transparent.

1. LEGAL SECURITY AND CERTAINTY

Looking at the question of security from a general perspective, we arrive at the conclusion that natural striving for safety is characteristic for every sphere of human activity. The issue of security concerns people's both physical (biological) and psychical (mental) domains. The maintenance of security, undisturbed development and attainment of a physical and psychical balance hinges on certain objective circumstances in which the values that determine the attainment and maintenance of well-being will be realised. One of the essential values which deserve legal protection is the right to life free from fear or anxiety, the latter conceived as both uncertainty of tomorrow, the lack of guarantees of survival in the biological sense, as well as the lack of predictable responses and conduct of the State or other citizens towards an individual. The question arises then: can the state of absolute security be achieved? It seems that a positive reply is impossible, for example on account of there existing many aspects of human life and a multitude of hazards in the sense stated above, as well as the fact that security is taken to be a subjective value. It is subjective in the sense that a person's state of security implies the fulfilment of certain specific postulates, the criteria of which he or she has determined for themselves. Likewise, the list of goods subject to safety is extremely long and is characterised by a high degree of individualisation. It is commonplace to say that there exist certain objective criteria which permit one to say whether in a given situation one will declare that a state of security has (not) been achieved. Such nuances, though, can determine one person's sense of security, the sense which in a given situation may not coincide with another person's feeling of security who, objectively speaking, is in an identical life situation.

Law, after all, is inseparably tied to functioning in social life, and the assurance of security both to the public and individual persons should underlie this law, since apparently there is no better mechanism which is capable of increasing the level of security than positive law.

The very category of personal or collective security finds its manifestation in social, political, economic or juridical sciences. For the purposes of this research, we need to focus on the aspect of security related to law in the subjective dimension, making reference to the definition of security proposed by K. Karolczak: "a subjective sense of security (being safe) is a state of awareness of the existence of protection against any activity (physical, social, political, economic, psychological, etc.) which would restrict or entirely abolish the rights of an individual, both natural and those derived from the law made by the State"[3] and the definition by J. Stańczyk, who expressed the essence of the notion of security along the following lines: "Captured synthetically, security can be [...] defined as an objective certainty of the guarantee of inviolable survival and freedoms of development.[4] In order to further specify the objective scope related to the question of security by making reference to certain legal matters, I adopt the definition of legal security formulated by J. Potrzeszcz as: "a condition achieved by means of codified law in which the life goods of people and their interests are safeguarded as completely and efficiently as possible."[5] One of the essential attributes of this definition is a reference to a human as a subject of legal security – one which as a matter of fact is a beneficiary of legal security.[6]

The notion of legal security is featured in doctrine interchangeably with the notion of legal certainty. This state of affairs may be due to the way the works of G. Radbruch were translated by Cz. Znamierowski. When translating the German term *Rechtssicherheit*, which did not have a Polish equivalent, Znamierowski used the terms "security" (*securitas*) and "certainty" (*certitudo*) of law.[7]

In a relatively new publication, H. Filipczyk adopts a definition of legal certainty after T. Spyra and T. Gizbert-Studnicki: "Legal certainty [...] should be conceived solely as the citizen's ability to foresee the legal consequences of his or her conduct and the response of the State to this conduct"[8]; "I shall construe legal certainty as

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[3] K. Karolczak, "Bezpieczeństwo jednostki i narodu – mrzonka czy realność w XXI wieku," in *Bezpieczeństwo w XXI wieku. Asymetryczny świat*, ed. K. Liedel, P. Piasecka, and T.R. Aleksandrowicz (Warszawa: Difin, 2011), 15.

[4] J. Stańczyk, *Współczesne pojmowanie bezpieczeństwa* (Warszawa: Instytut Studiów Politycznych Polskiej Akademii Nauk, 1996), 19.

[5] J. Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa* (Lublin: Wydawnictwo KUL, 2013), 272.

[6] Idem, "Podmiot bierny a podmiot czynny bezpieczeństwa prawnego," *Teka Komisji Prawniczej PAN Oddział w Lublinie* 8 (2015): 76.

[7] Idem, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, 15–16.

[8] T. Spyra, *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni* (Kraków: Wolters Kluwer SA, 2006), 192.

a possibility of predicting the consequences of real, measured or possible factual states."[9] H. Filipczyk claims that "legal certainty is a feature of law consisting in that a subject of law (recipient of a norm, a citizen, a tax payer) is able to anticipate the legally determined effects of facts (states of affairs), including deeds (actions and cases of nonfeasance) of their own or others. Therefore, predictability is central for legal certainty, and it is achieved if law is made public, definite, clear and stable (that is immutable, durable, continuous or ensuring legal peace) with respect to its enactment and application."[10]

Now the question arises whether the certainty of law and legal security are synonymous, or perhaps they could be distinguished. The lawyers (practitioners) asked by me often stated that such a distinction is pointless. A thesis which is formulated so definitively, however, calls for a rational justification. Yet, another question arises: is the interchangeable use of the term "legal certainty" and "legal security" purposeful or does it result from a lack of a more serious reflection on this issue?

Certainty of law entails predictability. Unquestionably, the features of "certain law" include the attributes which guarantee security: openness, definitiveness, clarity, stability, immutability, permanence[11] and recognisability, accessibility, measurability, continuity, concentration, codification, positivity, promulgation, social effectiveness, reliability, practicality, non-contradictoriness, coherence, systemic transparency, lack of excessive complexity of laws and their overabundance, uniformity of the judicial application of law, and non-retroactivity.[12] These are elements whose realisation is intuitively linked with the realisation of legal security. It would be instructive to consider J. Wróblewski's view, who claims that "legal security is a certainty viewed in terms of rights of an individual being protected."[13] This observation demonstrates the special significance of a distinction drawn between legal certainty and legal security. J. Potrzeszcz sees the need for such a distinction like follows: "I claim that the distinction between legal security and legal certainty is immensely important because thanks to it it is possible to define values connected with the application of positive law which are relevant for the protection of human rights."[14]

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[9] T. Gizbert-Studnicki, "Postulat jasności i zrozumiałości tekstów prawnych a dostęp do prawa," in *Prawo i język*, ed. A. Mróz, A. Niewiadomski, and M. Pawelec (Warsaw: Lingua Iuris, 2009), 9–10.

[10] H. Filipczyk, *Postulat pewności prawa w wykładni operatywnej prawa podatkowego* (Warsaw: Wolters Kluwer SA, 2013), 21–22.

[11] Ibid., 22.

[12] Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, 276.

[13] J. Wróblewski, *Wartość a decyzja sądowa* (Wrocław–Warszawa–Kraków–Gdańsk: Ossolineum, 1973), 95.

[14] Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, 17.

A lack of the said distinction can lead to the blurring of differences between a value deserving to be protected as a value in itself (legal security) and a value deserving to be protected as an instrumental value (legal certainty), especially when the legalist attitude determines total subjection to law. Hence positive law, instead of ensuring an adequate level of protection, can become a threat to the citizens, which will reflect the warped sense of law as such.[15]

J. Potrzeszcz proposes that the relationship between legal security and legal certainty be defined as a relationship between the aim and the means. The aim is to ensure legal security, and this can be achieved using positive law, which possesses traits that contribute to legal certainty. While the list of traits, or means contributing to legal certainty, is open-ended, it cannot be random but it must be derived from natural predispositions and circumstances of a person (perception, in particular). Quite apart from that, a definition of elements of legal certainty must be in harmony with the ultimate goal of law – where certainty fosters legal security.[16]

My view is that the use of the principle of means and aim as the basis for the relationship between legal certainty and legal security creates a comprehensive tool for assessment of the real level of legal security in any branch of law, in particular a tool which can be used in research in criminal law, and in research that is primarily practical rather than theoretical.

2. EXTERNAL OPENNESS OF CRIMINAL PROCEEDINGS AS A CONDITION FOR LEGAL CERTAINTY

The public character of criminal proceedings is guaranteed by the Constitution of the Republic of Poland as a permanent and characteristic component of the Polish legal culture.[17] Both the Constitution of 1921 and the Constitution of the People's Republic of Poland of 1952 regulated this question.[18] The open court principle is connected with the so-called right to a fair trial and constitutes an essential element

[15] Ibid., 277.

[16] Ibid., 268.

[17] R. Koper, *Jawność rozprawy głównej, a ochrona prawa do prywatności w procesie karnym* (Warszawa: Wolters Kluwer Polska Sp. z o.o., 2010), 33.

[18] Act of 17 March 1921 – Constitution of the Republic of Poland, Journal of Laws No. 44, item 267 as amended: "trials before the court adjudicating both civil and criminal cases are public unless they require otherwise in this respect" (art. 82); Constitution of the Polish People's Republic, enacted by the Sejm on 22 July 1952, Journal of Laws No. 33, item 232 as amended: "cases in all courts of the Polish People's Republic are heard in public. The law may specify exceptions to this principle" (art. 53).

of this right. Article 45 of the Polish Constitution of 1997 provides: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court." The principle thus formulated constitutes a consequence of the rule that solely the court is authorised to make a final decision in respect of freedoms, rights and obligations of an individual.[19]

J. Skorupka distinguishes three aspects of meaning related to the provisions laid down in article 45 of the Constitution:

1) the right to a fair trial – the emphasis is on the right to have one's case examined by the court;

2) indication of features that should characterise the court – competence, impartiality and indpendence;

3) indication of the criteria that should characterise the proper examination of a case – fairness, **public character** [emphasis by K.K.], and lack of undue delay.[20]

The public character of the functioning of courts, as a principle enshrined in the Constitution, stands for "the opportunity offered to both the interested parties and all others to directly follow the course of the proceedings and inform the public via the mass media, which applies to both public and non-public stages of the proceedings."[21]

The fact that the attributes of an open trial are enumeratively included in the list of criteria which should characterise a proper examination of a criminal case demonstrates the weight of the issue. The constitutional guarantees as regards the public nature of proceedings are given prominence through their inclusion in the Basic Law. Apart from the fact that the principle of openness of judicial proceedings is enshrined in art. 45 of the Polish Constitution, thus manifesting its autonomy, this principle is inherently subject to constitutional protection, independently of the regulations provided in the CCP and other laws.[22]

However, the public character of judicial proceedings is not absolute. The Basic Law outlines the limits of openness, enumerating situations in which a trial may have a closed character. The special reasons which under the Constitution exclude such openness are: morality, State security, public order, protection of the private life of parties to a trial or other important private interest, with a proviso that judgments are announced publicly (see art. 45 para. 2 of the Constitution).

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[19] W. Skrzydło, *Komentarz do art. 45 Konstytucji Rzeczypospolitej Polskiej*, Legal Information System LEX (2013), accessed September 20, 2016.

[20] J. Skorupka, "Prawnomiędzynarodowe i konstytucyjne podstawy jawności procesu karnego," in *Jawność procesu karnego*, ed. J. Skorupka (Warsaw: Wolters Kluwer Polska Sp. z o.o., 2012), 88–89.

[21] Ibid., 91

[22] Ibid.

The realisation of the principle of openness is associated with the objectives of criminal proceedings, which are juridically defined as "a set of activities regulated by law, whose goal is to detect crime and its perpetrator, bring him or her to justice and enforce a penalty, punitive or precautionary measures, if any.[23] These goals are realised by means of legal instruments, which are applied based on cardinal rules of proceedings, the latter constituting directives of a general character, which determine the norms of conduct with respect to criminal proceedings.[24] Such norms should be consistent with the goals of proceedings; they should relate to the key aspects of trial organisation as well as the essential entitlements of parties to a case, guaranteed in the name of the ideals of a democratic state of law. Besides the rule of openness, provided expressly in art. 355 CCP ("The hearing shall be held in open court. Limitations thereof shall be specified by law"), the CCP also distinguishes such principles as: the substantive truth principle (art. 2 §2), objectivity principle (art. 4), presumption of innocence (art. 5 §1), the in *dubio pro reo* principle (art. 5 §2), the principle of right to one's own defence (art. 6), the rule of free assessment of evidence (art. 7), the *ex officio* prosecution principle (art. 9), the principle of legality (art. 10), the principle of purpose (art. 11), or the uncodified principle of direct evidence. The form and content of the principles underpinning criminal proceedings sets a pattern for them and defines the rights that a party to the judicial process is granted by state authorities to ensure a fair and transparent trial based on equality of parties. It can be argued that, to a large extent, the actual conduct of an authority affects the degree to which these entitlements are put into practice, both in the objective sense and from the subjective perspective of a party.

Openness, a feature of criminal proceedings referred to in art. 355 CCP, can be either internal (with regard to the parties) or external (with regard to the general public). The actual reason why the principle of open criminal proceedings was introduced was to update the public on the progress of ongoing criminal proceedings, which can, say, review the process itself and the operation of the court.[25]

If we consider the external aspect of the public character of judicial proceedings, we need to take into account the following: (a) those interested directly in the judicial decision (the parties), i.e. the defendant and the aggrieved party), (b) third

[23] J. Skorupka, "Paradygmat współczesnego polskiego procesu karnego – próba ujęcia," in *Współczesne tendencje rozwoju procesu karnego z perspektywy dogmatyki oraz teorii i filozofii prawa*, ed. J. Skorupka and I. Hayduk-Hawrylak (Warsaw: Wolters Kluwer Polska Sp. z o.o., 2011), 17; see also S. Waltoś, *Proces karny. Zarys systemu* (Warsaw: Wolters Kluwer SA, 2009), 20.

[24] A. Choromańska and M. Porwisz, *Wybrane zagadnienia prawa karnego procesowego* (Szczytno: Wydawnictwo Wyższej Szkoły Policji w Szczytnie, 2015), 15.

[25] Ibid., 27.

persons, i.e. those who have a right to be in the court room during a trial, e.g. audience, and (c) a separate category of subjects, that is representatives of the public media. Both the parties to a case and other persons attending a hearing have their own respective interests, which are at conflict at times. What is the purpose or why is it necessary for parties to a case to be in the court room exceeds the scope of this article. However, the question of the possibility of audience and representatives of the mass media physically attending a hearing calls for a comment, because the matter is not totally clear in terms of the legislator's intent. As W. Jasiński points out, the common goals that are realised through the satisfaction of the open court principle in its external aspect, are unquestionable: supervision of the progress of judicial proceedings, emphasis on the court's impartiality, mobilisation of the judicial bodies involved to pursue a case in an honest and diligent manner.[26] The said supervision has the form of social control.[27] Every judge who sits on the judicial panel is guided by certain values and has his or her world view and convictions. The judge is constantly under some kind of pressure exerted by society, the professional group, persons from the immediate environment, and ultimately the media. These are obviously unofficial and frequently subjective means of pressure, yet so significant that they can exert a tangible influence on the attitude of the judge.[28] The participation of audience, however, but also the fact that the course of a hearing is being recorded, may encourage a judicial body to enhance the realisation of the norms of substantive and procedural law, and – in the negative sense – prevent them from being disregarded.[29] The realisation of the open court principle in respect of each procedure, not only criminal, constitutes a "barrier to corruption" and has an influence on political culture.[30]

The realisation of the openness of criminal proceedings takes place in this respect not by making the files of a case available to third persons but by letting audience or representatives of the media, whose main task is to inform the public of matters that are relevant to social norms and values present in a given group, into the court room.

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[26] W. Jasiński, "Jawność zewnętrzna posiedzeń sądu (nawiązanie do artykułu M. Rogackiej-Rzewnickiej," *Prokuratura i Prawo* 4 (2010): 29.

[27] Apart from judicial and administrative supervision, see: S. Waltoś and P. Hofmański, *Proces karny. Zarys systemu* (Warsaw: Wolters Kluwer SA, 2016), 327.

[28] P. Sztompka, "Teoria kontroli społecznej: próba systematyzacji," *Kultura i Społeczeństwo* 3 (1967): 135.

[29] Waltoś and Hofmański, *Proces karny.* 314.

[30] A. Dylus, "Aksjologiczne podstawy jawności i jej ograniczenia. Perspektywa etyki politycznej," in *Podstawy aksjologiczne*, vol. 2 of *Jawność i jej ograniczenia*, ed. Z. Cieślak (Warsaw: Wydawnictwo C.H. Beck 2013), 31.

3. THE SIGNIFICANCE OF THE PROVISIONS OF ART. 357 CCP IN THE LIGHT OF LEGAL SECURITY

Today the judiciary is facing a challenge consisting in an adaptation to the demands of an information society. Thanks to new technologies, citizens are able to fully participate in social life. The demand for reliable information and the openness of the judiciary or law enforcement authorities to the need to keep the public informed about their activities is demonstrated by the large number of press conferences with the participation of police officers or prosecutors, organised spontaneously during proceedings concerning matters of special significance or outrageous to society. When following media reports, we notice that the more sensational trials were broadcast, in a large measure, live, in whole or in part, which I believe has impact on the legal awareness of the public and social trust, shaped by the wide availability of reliable information and transparency of criminal proceedings carried out by state bodies at all stages. This fact also contributes to the positive image of these organs. Information conveyed by the media in connection with criminal cases, not only ongoing case but also ones from many years before in which the perpetrator was not found, can increase the efficiency of these law enforcement authorities by encouraging citizens to cooperate with them. Moreover, both a judicial body and an honest journalist pursue the same goal: to establish and reveal the truth about the entirety of a committed or not committed crime.

The amendment of art. 357 CCP, introduced in 2016, unquestionably touches the core of external openness of criminal proceedings. The provision of the said article enables representatives of the media to record the progress of a hearing in a criminal case, which is a manifestation of the principle of external openness of the trial. Currently, the court is obligated to grant permission to representatives of the media to "make video and sound recordings from the course of the trial by means of equipment" (art. 357 §1 CCP). The court's decision affects only the conditions of such participation in a trial (art. 357 §2) and restrictions, if any, as to the number of these representatives present in the court room if, for organisational or technical reasons, the presence of media representatives disrupts the course of a trial (art. 357 §3). Moreover, the legislator envisages the possibility of the court ordering to remove media representatives from the court room should they disturb the course of the trial (art. 357 §4), and the possibility of the presiding judge ordering media representatives to leave the court room for the duration of the questioning of a particular witness in rare cases when there is a fear that their presence could make the witness feel uneasy, with a proviso that their removal may be required only for the time when the witness is examined (art. 357 §5).

The amendment to article 357 of the Code of Criminal Procedure removes the legal barrier which in fact made the question of audio and video recording of a non-closed hearing dependent on an arbitrary decision of the judge. The literal interpretation of article 357 before it was amended it transpires that the possibility of registering the course of a trial used to be a privilege granted by a judicial decision. Now, as a rule, media representatives have this right. However, there are certain risks which in the light of the above considerations of legal security with respect to subjects thereof can appear as very significant. The amended provision resulting from art. 357 §5 CCP literally goes as follows: "In exceptional cases where there is a fear that the presence of representatives of the mass media may cause the witness to feel embarrassed, the presiding judge may order that the representatives of the mass media leave the court room for the duration of the examination of this person." The introduction of this provision concerning witnesses reflects concern for such citizen rights as the right to privacy, but simultaneously the wording of this provision may give rise to some doubts concerning its application. The understatement perceptible in such imprecise phrases as "exceptional case" and "there is a fear" may directly threaten the security of law and definitely undermines its clarity, definitiveness, and practicality. In extreme cases, it may lead to a distortion of the purpose of the amendment if judicial practice relies on making reference by the court rather than a party to a trial or a witness to an unspecified "exceptional case" or fear only to prevent the media representatives from recording a witness being examined.[31]

Apart from that, restricting the possibility of recording the course of this essential stage of the entire proceedings solely on account of the well-being of the witness (as well as the victim), seems hard to justify in the light of the idea of legal security and the principle of equality of parties to a case. In the current state of law, the said provision applies exclusively to a witness. The purpose of this regulation was to ensure the freedom of speech to witnesses, while the subjective opinions of the parties to the case and their potential consequences, for example, the defendant's refusal to provide explanation due to the presence of audio and video recording equipment, are formally irrelevant. In reality, the core idea behind legal security is to provide protection of the goods and interests of all persons involved (regardless of their citizenship, life situation or role in the proceedings). Since legal protection, under the said provision, extends to the interests of the witness, I find it hard to

[31] In this context, we need to note that the said regulation applies solely to the time when the examination of a witness is in progress, while there are not formal reasons for excluding the presence of representatives of the media during other proceedings, for example, while the indictment is being pronounced or during the confrontation or statements by the counsels for the defence or prosecution.

justify the lack of comparable protective measures with regard to the defendant. It goes without saying that the parties to a criminal case have a right to motion for a closed hearing due to their considerable private interest; however, the degree of such protection is dubious due to the simple fact that the prosecutor may object to a closed hearing and the trial is public (art. 369 §1 CCP).

Bearing in mind the necessity to equalise the status of the parties to a criminal case, we could postulate that the legislator introduce restrictions as to the possibility of recording the explanations of the defendant to the extent that it now applies to witnesses. A motion brought by the defendant or his/her defence counsel in this respect in writing or put on record would be examined by the court. We should also consider a potential guarantee of the possibility for the court or the presiding judge of issuing an order to exclude the presence of representatives of the media in the court room for the duration of the witness examination in whole or in part.

The underspecified expressions that are now included in the Code, with respect to the highly onerous consequences triggered by the application of criminal law which a person may incur, in practice constitute a very serious problem from the perspective of legal certainty, and legal security as a result. Hence the need for a very scrupulous formulation of legal provisions in the areas of both substantive law and procedural law in order to instil in the general public the sense of legal security, and to realise the guarantees inherent in an equitable state based on the rule of law, which taken all together constitute indisputably a condition for the implementation of criminal law. Only those legal provisions that are, on the one hand, comprehensive, and clear and definite on the other do satisfy the standards required for the realisation of the idea of legal security.

CONCLUSION

Criminal proceedings constitute a unique procedure, with respect to which legal security is a sensitive issue because there happens a conflict of values under criminal law. Here, values protected by criminal law as well as contradictory postulates concerning the legal protection of the aggrieved party are at conflict with those of the defendant, whereas the public is not merely a passive observer in this configuration but rather a party whose goods have been infringed by the offence. Another conflict of values occurring under criminal law relates to the protection of rights proper to both the victim and the defendant, which is intended to guarantee an equal status to both parties.

The legislator's steps to reinforce the open court principle should be assessed as positive. The enlargement of the range of entitlements given to media representatives reflects the legislator's willingness to facilitate access to information for the public through relevant legislation. However, the content of the legal provisions contained in art. 357 §5 CCP provokes serious doubts with respect to legal security. The legislator leaves the presence of representatives of the media during the examination of a witness to the sole discretion of a judge. The content of the provisions suggests only implicitly that the witness has a right to submit a motion to have the representatives of the media removed from the court room while the the witness is being examined. On a literal analysis of the above-mentioned provision, we can conclude that a judge may restrict access of these representatives to the content of the hearing on his own initiative and using his own subjective judgement, whenever he or she becomes convinced that given circumstances could make the witness feel embarrassed. Such a wording of the provision encourages judicial fairness and assumes the judge's capability of making an objective and sensible judgement of particular circumstances. Nonetheless, threats arising from the way the provision is formulated may call into question the main purpose of the reform. In extreme cases, it may turn out that judges, for various (also subjective) reasons, will be ill-disposed towards the idea of having representatives of the media in the court room and will literally construe the provisions contained in art. 357 §5 only to maintain the solutions used prior to the amendment with respect to the public nature of examination of witnesses. The hypothetical aim of the provision is to protect the witness's interest, which also affects the effectiveness of measures leading to the ascertainment of the substantive truth during criminal proceedings. Yet, it is inexplicable why this protection should not be extended to apply to the defendant, too, in a situation when the application of the closed hearing principle is up to the court or the prosecutor, while from the defendant's perspective it may be also unfounded.

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THE PUBLIC CHARACTER OF CRIMINAL PROCEEDINGS IN THE LIGHT OF LEGAL SECURITY AS PROVIDED FOR IN THE AMENDMENT TO ART. 357 OF THE CODE OF CRIMINAL PROCEDURE OF 10 JUNE 2016

Summary

This article discusses external openness of criminal proceedings in respect of legal security. The realization of such openness is done through the statutory permission to record and broadcast a hearing

which is granted to representatives of the mass media. The article also attempts to assess amendments to article 357 of the Code of Criminal Procedure (2016) in terms its realization of the idea of legal security. The author gives a positive assessment of the direction of changes in the Polish law; however, she also tries to identify the legislation which could undermine legal certainty, and thereby negatively affect the possibility of realising the concept of legal security in the context of criminal law.

Key words: legal security; legal certainty; external openness; internal openness; public character of criminal proceedings; criminal trial.

Translated by Tomasz Pałkowski

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