
The Position of Petty Offence Perpetrators Receiving Penalty Notices – Drafted amendments: Analysis in the Prism of the Pro-Constitutional Interpretation of the Law of Petty Offences as an Instrument of Human Rights Protection

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Abstract:

Purpose: The drafted amendments to the Act – the Code of Petty Offences Procedure conflict with national and international law by radically transforming the model of petty offences procedure and considerably worsening the position of perpetrators receiving penalty notices have many far-reaching consequences as regards to the constitutional order and the human rights protection. The purpose of this article is to present the issue of the drafted amendments that repeal one's right to refuse to accept the penalty notice and require that the fined person pay the fine immediately before a final decision is adopted.

Design/Methodology/Approach: In this article, we take note that the amendments completely shift the burden of initiating legal proceedings onto the fined person and, in the case of their appeal, they introduce several procedural limitations excluding the prohibition of reformationis in pius, which are intended to effectively discourage the fined person from appealing.

Findings: This thesis is corroborated by the statement of reasons to the drafted amendments. It clearly indicates that the changes primarily stem from the need to relieve officers of filing many motions for penalty and to reduce the number of petty offence cases submitted to courts.

Practical implications: The appropriate standard of the pro-constitutional interpretation of the law of petty offences could be seen an instrument of human rights protection.

Originality/value: The article is based on a legal analysis indicating the formal and interpretative weaknesses of the amendments.

Keywords: Petty offence, perpetrator's human rights, standard of the pro-constitutional interpretation.

JEL codes: K1, K4.

Paper type: Research study.

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1. Introduction

Human rights constitute the framework of every system and serve to evaluate the legality of legal regulations in force as well as potential changes to national legal systems (Łętowska, 2020). In the context of the issue at hand, human rights will serve us as an instrument for critical scrutiny and as a concept used to understand the structure and essence of legal security, which is expressed in legal certainty and respect for constitutional rules (Bieńkowska, 2020). It is worth noting that in the Polish legal doctrine a constitutional rule is such a norm of the Constitution that is in accordance with international human rights standards, which is a logical basis for a relatively instrumental group of constitutional norms, and which regulates particularly relevant characteristics of an institution, or which ‘has been regarded particularly significant especially due to its expressing one of the fundamental values’ (Zieliński, 1997). Therefore, following Marcin Szwed, in this paper constitutional rules will constitute a set of all the cornerstones of the legal system of a given country. Respect for these rules is necessary for the safety of individuals and the society at large, which is a *sine qua non* condition for legal certainty (Szwed, 2020).

Whether the changes introduced to the Polish legal order are legal and legitimate is determined by whether the rules are observed, as well as by the ability to interpret them in a specific hierarchy and order, and to adopt the vantage point of the Preamble to the Constitution, which contains a generous message reflecting several currents of thought of the Polish jurisprudence (Brodecka, 2016). Particularly noteworthy is *Invocatio Dei*, which refers to respect for human dignity, rights and freedoms, obligation of solidarity, and acting towards the common good. Thus, the constitutional paradigm of the common good was also accentuated. It draws on human rights standards and expresses the idea of respect for inherent rights and all other constitutional rules. In this sense, Article 1 of the Constitution correlates with Article 5 and ‘shapes “the conscience of the legal system” and determines its “axiological sensitivity”’ (Brodecka, 2016) which should influence legislative bodies.

2. The Unconstitutionality of the Drafted Amendments

On 8 January 2021, an MPs’ draft resolution (parliamentary paper 866) amending the Act – the Code of Petty Offences Procedure was submitted to the Sejm⁴. The proposed amendments refer to two major issues. One concerns the introduction into petty offences procedure of a new type of ruling, i.e. a penalty order, which would be issued by a court clerk when a reprimand or fine would suffice. The other, which will constitute the subject of our deliberations, abrogates a person’s right to refuse to accept the penalty notice and replaces it with the right to appeal to the court.

⁴*The Act of 24 August 2001 – the Code of Petty Offences Procedure (Journal of Laws of 2020, items 729, 956, 1423 and 2112).*

According to the statement of reasons of the draft, the proposed solution ‘(...) aims to streamline the petty offences procedure and relieve common court judges of duties related to the examination of petty offence cases, while preserving the constitutional and conventional safeguard of the right to a fair trial in petty offence cases’⁵. The presented opinions on the draft resolution⁶, aside those submitted by its proponents⁷, strongly and unanimously contradict the above and highlight its unconstitutionality.

3. The Consensual Nature of the Fine Procedure

The fine procedure constitutes a special type of procedure and follows different rules than proceedings before a court. It is not a procedure ruling on the guilt and penalty in petty offence cases⁸. Its purpose is to cause the immediate reaction of the state to a petty offence committed by a perpetrator, which is also intended to serve preventive and educational functions. The nature of this procedure is expressed in its maximum shortening and simplification. Thus, the legislator has provided for its conditional character. Its implementation is dependant on the consent of the perpetrator⁹. By accepting a penalty notice, the perpetrator voluntarily accepts the penalty and forfeits their right to the case being heard before a court¹⁰. Then, the

⁵Statement of reasons for the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866).

⁶Opinions on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866), prepared by: The Supreme Court Research and Analyses Office, dated 15 February 2021 No. BSA-021-12/21; The Supreme Bar Council, dated 13 January 2021 NRA.12-12-SM-1.1.202; The Centre for Research, Studies and Legislation of the National Council of Legal Advisers, dated 26 January 2021, 60/OBSiL/2021; The Commissioner for Human Rights, dated 19 January 2021. No. II.510.48.2021.MT; Opinions submitted by external experts: delivered by the office of prof. dr hab. Marek Chmaj Kancelaria Radcowska Chmaj i Wspólnicy Sp. k. Warsaw dated 14 January 2021; by dr hab. Teresa Gardocka - Assistant Professor at SWPS University of Social Sciences and Humanities in Warsaw; by prof. dr hab. Piotr Kruszyński with the Faculty of Law and Administration of the University of Warsaw, dated 2 February 2021; and by dr hab. Marcin Matczak, Assistant Professor at the University of Warsaw, dated 3 February 2021.

⁷Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866), prepared by the Bureau of Research of the Chancellery of the Sejm, dated 12 January 2021, No. BAS-WAPM-35/21.

⁸See T. Grzegorzczak, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa 2003, p. 64.

⁹Cf. A. Sakowicz (ed.), *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa 2018, *Legalis* [accessed on: 22.06.2021]; P. Gensikowski, *Postępowanie w sprawach o wykroczenia. Komentarz*, Warszawa 2016, *Legalis* [accessed on: 22.06.2021]; W. Kotowski, B. Kurzępa, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, 3rd edition, Warszawa 2016, *Legalis* [accessed on: 22.06.2021].

¹⁰Judgement of the Constitutional Tribunal of 30 September 2014, U 4/13, OTK-A 2014, No. 8, item 97; Judgement of the Constitutional Tribunal of 18 May 2004, SK 38/03, OTK-A

penalty notice comes into force and has *rei iudicate* effects which preclude legal proceedings concerning the same matter (Article 5 § 1 (8) of the Code of Petty Offences Procedure)¹¹. A penalty notice can be revoked if a fine was imposed for an act that is not a prohibited act classified as a petty offence (Article 101 of the Code).

The finality of the penalty notice means that the matter of responsibility for the petty offence is legally resolved in a somewhat “substitute” way¹². The refusal to accept a penalty notice is usually observed when the perpetrator challenges the decision of the authority issuing the notice. Such a decision is of a cassation nature and results in the public prosecutor filing a motion for a penalty to the court. The individual receiving the notice then becomes the defendant and may appear before an independent court as a party to the dispute. It is also worth highlighting that, under the current law, the substantive burden of proof rests with the body alleging the petty offence.

Therefore, it becomes clear that the specific nature of the penalty notice procedure is justified by its consensual nature, i.e., accepting a penalty notice is a form of pleading guilty and voluntarily submitting oneself to punishment, and waiving judicial review. This solution is in line with constitutional requirements, following the Constitutional Tribunal indicating ‘The right to a fair trial means that the legislator shall establish a legal regulation which ensures that, at the request of the person concerned, the case will be heard by a court’¹³.

4. The Position of Petty Offence Perpetrators after a Fine Has Been Imposed by Way of a Penalty Notice as per the Draft Act

The proposed amendment, by eliminating the perpetrator’s right to refuse to accept a penalty notice, radically transforms the model of petty offence procedure and completely changes the perpetrator’s position.

Under the drafted Article 97, Section 2 of the Code of Petty Offences Procedure, which gives the fined individual the right to refuse to accept a penalty notice, shall be repealed. As a result, the fined person who wishes to contest the decision of the authority issuing the penalty notice, will need to first pay the fine on the spot (in the case of a penalty notice paid in cash) or within 7 days (in the case of a penalty notice

2004, No. 5, item 45; See J. Lewiński, *Mandat karny*, Warszawa 2003, p. 12; M. Gałzka, A. Sadło-Nowak, *Postępowanie mandatowe*, Szczytno 2021, p. 7.

¹¹ See Judgement of the Constitutional Tribunal of 18 May 2004, SK 38/03, OTK 2004, iss. 5, item 45; Judgement of the Constitutional Tribunal of 15 April 2008, P 26/06, OTK 2008, issue 3, item 42; T. Grzegorzczak, *Kodeks postępowania w sprawach o wykroczenia*. Komentarz Warszawa 2003, p. 64, 329.

¹² Statement of reasons for the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866).

¹³ Judgement of the Constitutional Tribunal of 18 May 2004, SK 38/03, OTK-A 2004/5/45.

to be paid within a set deadline) or be subject to enforcement proceedings (except for a penalty notice issued in the absence of the fined individual). Then, also within 7 days, the fined individual will have the right to file an appeal to a district court of local jurisdiction for the place of the offence. An officer imposing the fine by way of a penalty notice will be obliged to inform the perpetrator not only of the right to appeal and of the consequences of failing to pay the fine in time, but also of the possibility of the court of appeal ruling against them. If the punished perpetrator, aware of the prohibition of *reformationis in pius*, decides to appeal, they shall identify the penalty notice appealed against and state whether they appeal as to guilt or as to penalty, and present all supporting evidence. They shall not be able to submit other evidence except that which was not known to them at the time of filing the appeal.

In consideration of national and international legal provisions, the amendments in question should be strongly criticised. Their proponent, in amending the act regulating the petty offence procedure, should bear in mind that this procedure lies within the framework of quasi-criminal or *sensu largo* criminal proceedings (Kotowski and Kurzępa, 2016). For this reason alone, it is necessary to ensure that fundamental rights related to criminal procedure, stemming from the Constitution of the Republic of Poland or international agreements binding on the Republic of Poland, are upheld. Furthermore, the legislator clearly indicated which provision of the Code of Criminal Procedure should apply in petty offences procedure, e.g. Article 8 of the Code of Petty Offences Procedure¹⁴, Article 20 (3)¹⁵. Unfortunately, one can find it justified to state that the proponents failed to take note of these.

5. Disregard for Constitutional Rules

The removal of the perpetrator's right to refuse to accept a penalty notice, as proposed in the drafted provisions, has several effects. The first one, which needs to be disapproved concerns the burden of proof and evidence preclusion (Article 99a § 1 of the Code of Petty Offences Procedure) Under the current state of law, if a perpetrator refuses to accept a penalty notice, the public prosecutor submits a motion for a penalty to a district court and it is the prosecutor's responsibility to collect evidence (Article 57 § 2 (3) of the Code of Petty Offences Procedure). The individual against such a motion for a penalty was issued (defendant), is regarded as innocent until proved guilty by way of the final decision of a court. The draft provisions shifting the burden of proof onto the perpetrator and evidence preclusion consisting in their inability to present evidence other than the evidence identified in

¹⁴Article 8 Article 2, Article 4, Article 5, Articles 7-9, Article 13, Article 14, Article 15 § 2 and 3, Article 16, Article 18 § 2, Article 20, Article 23 and Article 23a of the Code of Criminal Procedure shall apply to the procedure regulated herein.

¹⁵Article 20 § 3 of the Code of Petty Offences Procedure The following provisions of the Code of Criminal Procedure shall apply to the defendant Article 72 § 1 and 2, Article 74 § 1 and 2, Article 75, Article 76 and Article 175.

the appeal, except that which was not known to them before, run counter to the constitutional principle of the presumption of innocence expressed in Article 42 (3) of the Constitution of the Republic of Poland, in Article 5 of the Code of Criminal Procedure, and in Article 8 of the Code of Petty Offences Procedure.

In accordance with the above, ‘Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court’. This provision expresses, among other things, the principle of the right of defence, the principle of *nullum crimen sine culpa* (there is no crime without fault), and the principle of *nulla poena sine culpa* (no punishment without proof of fault). These principles are absolute (Sarnecki, 2016). According to the Constitutional Tribunal ‘(...) the presumption of innocence means that the fact of committing an offence and committing it in a culpable manner must be proved, i.e. convincingly presented to the authority adjudicating on the penalty. This presumption covers several elements, including the burden of proof resting on the entity which presents the charges. It is, at the same time, part of the right of defence’¹⁶. The right of defence is vested in persons from the very beginning of proceedings being instigated until the enforcement procedure. Defence needs to take place with safeguards for sound procedure (Wiliński, 2010)¹⁷.

Moreover, it is worth underlining that ‘(...) evidence preclusion in penal proceedings poses a risk of the substantive truth not being pursued for the benefit of the formal truth, which increases the risk of an unfair judgment which is not grounded in the truth’¹⁸.

Finally, it should be noted that the prohibition of adopting decisions to the detriment of the defendant (*reformationis in pius*), while not lying in the essence of the right of defence, it is deeply rooted in this right and constitutes an important safeguard of the procedural rights of the defendant in criminal proceedings. The Constitutional Tribunal highlighted that it secures the defendant’s freedom to appeal the judgment and relieves it of concerns about or risk of judgement to their detriment¹⁹. According to prof. dr hab. M. Matczak, ‘(...) its absence can effectively discourage individuals from appealing penalty notices, resulting in a chilling effect and deteriorating the

¹⁶Judgement of the Constitutional Tribunal of 3 November 2004, File Ref. No. K 18/03, OTK ZU 2004 series “A”, No. 10, item 103; See P. Sarnecki, *Komentarz do art. 42 Konstytucji*, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, 2nd edition, Wydawnictwo Sejmowe, Warszawa 2016, [LEX/el.];

¹⁷See Judgement of the Constitutional Tribunal of 28 April 2009, File Ref. No. P 22/07, OTK ZU 2009 series “A”, No. 4, item 55 and Judgement of the Constitutional Tribunal of 28 November 2007, File Ref. No. K 39/07, OTK ZU 2007 series “A”, No. 10, item 129.

¹⁸Cf.: *Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866)*, prepared by: the Legislative Commission of the Supreme Bar Council, p. 7.

¹⁹Judgement of the Constitutional Tribunal of 28 April 2009, P 22/07, OTK-A 2009, No. 4, item 55.

legal situations of the person receiving a penalty notice'²⁰. The need to prove perpetration and culpability also stems from European law binding on Poland. Pursuant to Article 6 (1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,²¹ 'Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution'. One should note that the Directive does not provide for exemption from its applicability in petty offences cases²².

Another issue which raises doubts is the enforceability of penalty notices before the case is resolved by a court. As per the drafted amendments, penalty notices are to be paid in 7 days. Under Article 99a of the Code of Petty Offences Procedure, the fined individual will have the right to file an appeal to a district court of local jurisdiction for the place of the offence within the same deadline. Such an appeal, however, does not suspend the enforceability of the penalty notice. In such a case the penalty for the act is executed before a final judgement of the court is passed²³.

These provisions run against Article 42 (1) and (3) of the Constitution, which express the *nulla poena sine culpa* principle, the essence of which lies in the prohibition of punishment before fault is legally proven, and contradict Article 9 (2) of the Executive Penal Code under which a judgement becomes enforceable after becoming final. While the proponents provided for the possibility of optional suspension of the penalty (Article 99a § 4 of the draft Code of Petty Offences Procedure), given the time needed to deliver correspondence and the system in which the administration of justice works, the implementation of this provision appears impossible. The drafted provisions also contradict the right to a fair trial. Pursuant to Article 45 (1) of the Constitution, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court (Kamińska-Nawrot, 2020, pp. 212 and 220)²⁴. Furthermore,

²⁰Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866), prepared by dr hab. Marcin Matczak, Assistant Professor at the University of Warsaw, dated 3 February 2021, p. 11.

²¹OJ EU L 65 of 1 March 2016, p. 1.

²²Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866) prepared by the Commissioner for Human Rights, dated 19 January 2021, No. II.510.48.2021.MT, p. 15.

²³Cf.: Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866), prepared by: the Legislative Commission of the Supreme Bar Council, p. 9.

²⁴See A. Kamińska-Nawrot, Gwarancje sądowej kontroli legalności działania organów Policji podczas przeszukania osoby i kontroli osobistej, [in:] D. Bieńkowska, R. Kozłowski (red.), Prawa człowieka i zrównowaczony rozwój. Konwergencja czy dywergencja idei i polityki, Warszawa, pp.212 and 220.

statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights (Article 77 (2) of the Constitution).

These provisions should correspond with the wording of Article 175 (1) of the Constitution, which indicates that the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts. The drafted amendments constitute a real risk that ‘imposing a fine’ will constitute a quasi-judgement on one’s fault and penalty. Giving officers of the uniformed services the right to issue penalty notices without the right to refuse to accept them, in conjunction with their enforceability prior to binding judicial review²⁵, constitutes an infringement of Article 10 (1) and (2) of the Constitution, which sets the principles of the separation of powers, and confers on officers the competences which the Constitution reserves to common courts (Article 175 (1) and Article 177) (Laskowska, 2016, pp. 1689-1690).

6. Conclusion

In conclusion, the proposed amendments have a significantly adverse effect on the procedural situation of perpetrators against which penalty notices were issued, discouraging them from taking any appeal initiative. The changes also fail to meet their objective listed in the statement of reasons, which is to reduce the inflow of petty offence cases to courts, and to relieve officers of the need to file many motions for penalty, by transferring to the court the materials of the case instead. As justly noted by the Legislative Commission of the Supreme Bar Council, ‘in a democratic state under the rule of law, its authorities may not restrict citizens’ existing procedural safeguards for the sake of reducing the workload of state institutions’²⁶. The proposed draft amendments also violate the principle of citizen’s confidence in the state and its laws, the principle of legitimacy of good legislation, the principle of legality, and the principle of proportionality (Article 2 of the Constitution of the Republic of Poland). The proposed restrictions of constitutional rights and freedoms are not justified by other constitutional values, and violate the essence of these rights and freedoms, conflicting Article 31 (3) of the Constitution²⁷.

The CHR, in his criticism of the draft cautioned that the amendment ‘(...) will probably undermine the confidence of the general public in the state and its laws, and create the feeling of a police state in the making, a conviction that the law is applied arbitrarily by law enforcement authorities, a feeling of the sovereignty of the

²⁵Pursuant to Article 9 § 2 of the Executive Penal Code judgement becomes enforceable after it has become final.

²⁶Cf.: *Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866)*, prepared by: the Legislative Commission of the Supreme Bar Council, p. 6.

²⁷*Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866)*, prepared by prof. dr hab. M. Chmaj, dated 14 January 2021, pp. 17-18.

will be infringed and doubts as to the possibility of proving one's innocence before a court of law. This is because instead of the burden of proof which so far rested on state authorities, it is the citizen who will be forced to prove their innocence'²⁸.

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²⁸*Opinion on the draft act amending the Act – the Code of Petty Offences Procedure (parliamentary paper 866) prepared by the Commissioner for Human Rights, dated 19 January 2021, No. II.510.48.2021.MT, p. 10.*