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APPEAL PROCEEDINGS PERTAINING TO THE SO – CALLED CONSENSUAL VERDICTS FROM THE PERSPECTIVE OF THE PRINCIPLE OF FAIR TRIAL

The term "fair trial," as used in the Polish criminal procedure, is defined in art. 14 of the International Covenant on Civil and Political Rights (ICCPR)[2] and art. 6 (1) of the European Convention on Human Rights (ECHR)[3] which define the so – called minimum standards of a due political process, namely the right of every person to a fair and open hearing of his or her case in a reasonable time by an independent and impartial court of law, established by a statute, which is to determine the person's rights and civil duties or the validity of each charge in the case brought against him or her.[4] Both the Polish literature on this subject and the verdicts of the Supreme Court and the European Court of Human Rights (ECtHR) indicate that the right to defence constitutes a special element of the right to a fair trial of law. On the other hand, an important guarantee of effective defence is the right to appeal court

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2 International Covenant on Civil and Political Rights, United Nations, 1966. Poland ratified it in 1977. Journal of Laws of 1977, No. 38, *item* 167.

3 European Convention on Human Rights of 1950. Poland signed the Convention on 26 November 1991, the day of its accession to the Council of Europe, and ratified it on 19 January 1993. It became effective in Poland on the same day. Poland recognize the jurisdiction of the European Court of Human Rights on 1 May 1993. Journal of Laws of 1993, No. 61, *item* 284.

4 B. Bieńkowska, P. Kruszyński, C. Kulesza, P. Piszczek, Wykład prawa karnego procesowego [A lecture on criminal procedure law], Białystok 2003, p. 104 ff, C. Nowak, Prawo do rzetelnego procesu sądowego w świetle EKPC i Orzecznictwa ETPC [The right to fair trial in the light of the ECHR and the decisions of the ECtHR], in: A. Błachnio–Parzych, J. Kosonoga, H. Kuczyńska, C. Nowak, P. Wiliński, eds., Rzetelny proces karny [Fair trial], Wolters Kluwer 2009, p. 126 ff; J. Skorupka, ed., Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy [Fair trial. Anniversary book for Professor Zofia Świda], Warsaw 2009, p. 126 ff.

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verdicts.[5] In its decision no. 26168/95 of 16 October 1996[6], the European Commission of Human Rights emphasized that the guarantees provided for in art. 6 (3) of the Convention, to include the right to defence (sensu largo), are particular aspects of the general principle of fair trial established in art. 6 (1). In its verdict of 28 April 2009, no. P 22/07[7], the Constitutional Tribunal stated that the reformationis in peius prohibition is grounded in the constitutional right to defence, but does not constitute a part of the essence of this right.[8] It must be emphasized, however, that this right cannot be derived from the wording of art. 6 of the ECHR. On the other hand, in accordance with art. 14 (5) of the ICCPR, every person convicted of a criminal offense has the right to appeal to a court of higher instance for a review of the verdict regarding the guilt and the penalty in accordance with the statute. The right to appeal against verdicts in criminal cases was established in art. 2 (1) of Protocol no. 7, dated 22 November 1984, to the European Convention, which has been

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5 B. Bieńkowska, P. Kruszyński, C. Kulesza, P. Piszczek, Wykład prawa karnego procesowego [A lecture on criminal procedure law], *op. cit.,* p. 104 ff.; C. Kulesza, R. Starzyńska, Obowiązek uzasadniania orzeczeń sądowych a prawo do obrony [The duty to substantiate court verdicts and the right to defence], Prokuratura i Prawo 2010, no. 5, p. 15 ff, and the verdicts of the ECtHR and literature referred to therein; ETPC 27715/95, decision of 18 January 2001 in the case *Berliński v. Poland*, LEX no. 45215, ETPC 23103/93; verdict of 25 March 1998 in the case *Belziuk v. Poland*, LEX no. 40781, ET 26168/95; decision of 16 October 1996 in the case *Kubon v. Poland*, LEX no. 40982.

6 Decision of the European Commission of Human Rights no 26168/95 dated 16 October 1996, LEX no. 40982.

7 OTK ZU no. 4A/09, item 55, concerning the *reformationis in peius* prohibition and the right to defence defined in art. 42 (2) of the Constitution of the Republic of Poland.

8 In the opinion of the Constitutional Tribunal, the concept of the essence of constitutional law is based on the assumption that it is forbidden to breach the basic, minimum content of a given constitutional law that results in its destruction. The prohibition to issue verdicts that are disadvantageous to the defendant if an appeal has been made solely to the defendant's advantage is clearly connected with the defendant's right to appeal against verdicts issued in his or her case in a criminal trial. The basic purpose of this prohibition is to eliminate the psychological barrier taking the form of concern or fear of the person lodging an appeal that the appeal of a verdict made solely to his or her benefit may put him or her in a worse situation in the trial. Thus, in the opinion of the Constitutional Tribunal, the result of the application of the *reformationis in peius* prohibition, both before the court of appeals and in the repeated procedure (art. 434 § 1 and art. 443 of the CCP) is that the defendant basically bears no risk connected with an appeal against a verdict issued in his or her case, as the court may not issue a verdict against the direction of the appeal. However, due to the fact that the *reformationis in peius* prohibition is not absolute and is subject to automatic preclusion in situations where, when an appeal that is disadvantageous to the defendant has been lodged simultaneously with an advantageous appeal or only a disadvantageous appeal has been issued, the prohibition cannot be considered to be a part of the essence of the constitutional right to defence, i.e. such an element of this right without which the right cannot exist. Thus, in conclusion, the *reformationis in peius* prohibition in principle can be limited, as it does not constitute a part of the essence of the constitutional right to defence.

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in force in Poland since 1 March 2003.[9] According to this regulation, every person, whom a court has found guilty of a criminal offense, has the right to have his or her case tried by a court of higher instance, with regards to both the guilt and the penalty. On the other hand, according to art. 2 (2), the exceptions to the right to an appeal can be applied in the case of petty offenses, which are enumerated in the statute, or in cases where the court of the first instance for the person was the Supreme Court or where the person was found guilty and sentenced as a result of an appeal to an acquitting verdict issued by a court of first instance. The use of this right and its bases are regulated by a statute. In its verdict no. 29731/96 dated 13 February 2001 in the case Krombach v. France, the ECtHR indicated that the Agreeing States have, in principle, a wide margin of freedom in deciding about the way the rights guaranteed by art. 2 of Protocol no. 7 are to be exercised. In the ECtHR's opinion, a review of verdicts of a first–instance court with regards to guilt and penalty by a higher – instance court may pertain to both factual and legal findings, or may be limited solely to the issue of violation of the law; also, the defendant who wants to appeal the verdict may, in some situations, be forced to obtain a permission to do so. Nevertheless, all legally admissible limitations established in national legislation concerning the right to file an appeal, as defined in art. 2 of Protocol no. 7, similarly to the right to access to court defined in art. 6 (1) of the Convention, must serve a legally – justified purpose and conform to the very essence of this right.[10] On the other hand, in its verdict no. 61406/00 of 6 September 2005 in the Gurepka v. Ukraine case, taking into account for possible statutory limitations of the right to appeal court verdicts, the ECtHR emphasizes that the right of appeal must not each time be subject to approval by the national authorities.

The possibility to appeal a court verdict depends, most of all, on the reformationis in peius prohibition, i.e. the prohibition to worsen the legal situation of the defendant if an appeal is filed solely to the

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9 Journal of Laws of 2003, no. 42, item 364; see also Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory report, at: http://conventions.coe.int/Treaty/en/Reports/Html/117.htm, pkt 17, accessed on 18 May 2011.

10 Verdict of the ECtHR no. 29731/96 of 13 February 2001 in the case *Krombach v. France*, LEX no. 76286; see also verdict of the ECtHR no. 61406/00 of 6 September 2005 in the case Gurepka v. Ukraine, LEX no. 156569.

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advantage of the defendant. Without such a limitation on verdicts of the court of appeals, the right of the defendant to appeal court verdicts, and the related right to defence, would be illusory.

The term "plea bargains," which is exchangeable with "consensual forms of ending of criminal proceedings,"[11] "guilty plea bargains,"[12] or "deals"[13] is defined as legal provisions concerning agreements between the defendant and the public prosecutor or the court in relation to the legal consequences of the conviction in the Polish criminal process.[14]

The Polish legislator's intent, when the consensual forms of ending of criminal proceedings were introduced into the Polish criminal process, was to simplify the procedure in criminal cases, to speed up the verdicts, to give the parties greater influence on the course of the proceedings and on their final result, and, consequently, to enhance the effectiveness of the judiciary in criminal cases. Nevertheless, the implementation of the institution of plea bargaining originating from a different legal system (common law), despite being in line with the Polish legislator's intent, has resulted in a change in the structure and balance of the so – called classic criminal process in Poland by shifting the "center of gravity" to the preparatory proceedings stage. Moreover, it has lead to a modification of the axiological assumptions of criminal proceedings.

11 According to the literature, consensual forms of ending of penal proceedings (sensu largo) also include mediation (art. 23a of the CCP); B. Bieńkowska, C. Kulesza, P. Kruszyński, eds.; P. Piszczek, Wykład prawa karnego procesowego [A lecture on law of criminal procedure], Białystok 2003, p.; A. Bulsiewicz, M. Jeż–Ludwichowska, D. Kala, D. Osowska, Przebieg postępowania karnego [The course of criminal proceedings], Toruń 1999, p.; S. Waltoś, Proces karny. Zarys systemu [The criminal process. An outline of the system], Warsaw 200, p.; T. Grzegorczyk, J. Tylman, Polskie postępowanie karne [Polish criminal proceedings], Warsaw 200, p. BRAK STRON

12 See: S. Waltoś, Proces karny... [The criminal process...], *op. cit.*, Warsaw 200 (ROK?), p. .

13 J.R. Kubiak, Wytargowanie się przyznania się do winy (plea bargaining) w procesie karnym USA, Kanady i Anglii [Plea bargaining in the criminal proceedings in the USA, Canada, and England], NP 1980, no. 10.

14 In the Polish legal system the institution of agreement had been known even before the criminal procedural regulations were introduced. An example is the institution of voluntary submission to responsibility which was present in the criminal fiscal proceedings (art. 17–18 and art. 142–148 of the Criminal Fiscal Code) and under the criminal fiscal law of 26 October 1971 was referred to as voluntary of submission to a penalty; another example is the institution of immunity witness, regulated in the Act on immunity witness of 25 June 1997.

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The basic advantage for the public prosecutor and for the court resulting from the use of the consensual modes is the fact that exhaustive explanations of the offender can be obtained, the evidential proceedings can be shortened, and the procedure and some procedural activities can be simplified and partly made informal. The defendant also enjoys measurable advantages from participating in such agreements with the entities conducting the criminal procedure. This is because the defendant participates in the decision concerning the type and degree of the penalty or the penal measure, and the course of the proceedings and their shortening, thus gaining certainty as to the way the proceedings will end and the verdict that will be issued. As far as the decisions made as a result of providing exhaustive explanations are concerned, the defendant obtains extraordinary mitigation of the penalty, temporary suspension of its execution, or use of a penal measure as the only penalty. The legislator also protected the interests of the victim by formulating two conditions that must be met for making agreements in accordance with art. 335 and art. 387 of the CCP in the case of both a motion for conviction without trial (art. 335 and 343 of the CCP) and a motion for a voluntary submission to a penalty (art. 387 of the CCP). The first condition is that is must be determined that the circumstances of the perpetration of the crime, i.e. the occurrence of a prohibited act, the fact that the defendant is the perpetrator, and the defendant's guilt, may raise no doubts. The second condition is the determination that the defendant's attitude indicates that the objectives of the proceedings will be met. The objectives in questions are those objectives of the criminal process that are regulated in art. 2 § 1 of the CCP, to include in item 3, i.e. the observance of the legally protected interests of the victim. Such a statutory provision translates into the practice of application of these modes, as for example shortening of preparatory proceedings by not conducting further actions aimed to gather evidence is not permissible until it is determined whether the perpetrator of a criminal offense has caused a damage by perpetrating the offense and what is the extent of the damage.

One can conclude that the implementation of the consensual institutions in the Polish legal system has been successful, as they

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are used in approx. 60% of all criminal cases.[15] Nevertheless, they are still the subject of research and discussions among academics and practitioners.[16] Because of the more and more extensive experience in their practical application, their forms defined in the statute are subject to necessary amendments. It should be emphasized that the institution of plea bargaining in the Polish legal system is different from the plea bargaining present in common law systems. The main difference is the principle of substantive truth (art. 2 § 2 of the CCP), which requires that all verdicts must be based on true factual findings, and the principle of legalism (art. 10 of the CCP), which requires that an entity charged with prosecuting crimes must initiate and conduct preparatory proceedings and public prosecutors also must file and support indictments for acts prosecuted ex officio. What this means is, most of all, that unlike, for instance, in a civil process, where the duty to discover the material truth does not apply and, consequently, it is more focused on the parties' evidential activities, the criminal court, which is responsible for the outcome of the process, is independent as far as making decisions concerning the consensual agreements made by the parties in the process. Unfortunately, due to the strictly defined boundaries of this chapter, a detailed discussion of the aforementioned matters is not possible; nevertheless, the matter of impact of plea bargaining on appeal proceedings should be discussed here, with particular focus on the reformationis in peius prohibition.

An appeals procedure in the Polish criminal process, regulated in chapter IX of the CCP, constitutes implementation of the constitutional principle that a court trial must be at least a two – instance procedure (art. 176 (1) of the Constitution)[17]. This way, the principle of appeals

15 C. Kulesza, ed., K. Boratyńska, E. Kowalewska–Borys, D. Kużelewski, A. Sakowicz, Porozumienia karnoprocesowe w praktyce wymiaru sprawiedliwości [Plea bargains in the practice of the administration of justice], Białystok 2010, p. 58 ff.

16 See, for example: C. Kulesza, ed., K. Boratyńska, E. Kowalewska–Borys, D. Kużelewski, A. Sakowicz, Porozumienia karnoprocesowe... [Plea bargains...], *op. cit.*; P.Hofmański, E.Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz [Code of criminal procedure. A commentary], vol. I–II, Warsaw 1999, p. 582 ff; J. Grajewski, L.K. Paprzycki, Kodeks postępowania karnego z komentarzem [Code of criminal procedure with a commentary], Sopot 2000; T. Grzegorczyk, Kodeks postępowania karnego. Komentarze Zakamycza [Code of criminal procedure. Commentaries by Zakamycze], Kraków 2004, p. 1116 ff.

17 Constitution of the Republic of Poland – text adopted on 2 April 1997 by the National Assembly. The text of the Constitution of the Republic of Poland was promulgated in Journal of Laws of

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proceedings is implemented for all verdicts issued by a court of first instance that have not become final and for decisions made by the public prosecutor or another entity conducting the preparatory proceedings. Appeals proceedings cover material flaws, procedural flaws, and flaws concerning factual findings. The so – called relative grounds of appeal regulated in art. 438 of the CCP cover flaws in the area of substantive law (error iuris), procedural law (error in procedendo), and factual findings (error facti). They can result in a rescission or change of a verdict or decision only when the flaw made an impact on the contents of the verdict or decision. On the other hand, the so – called absolute grounds of appeal, defined in art. 439 of the CCP, concerned the most serious flaws in the area of procedural law and one flaw in the area of substantive law (imposition of a penalty, a penal measure, or a protective measure that is not mentioned in a statute). These grounds of appeal always result in rescission of the appealed verdict or decision, regardless of their possible influence on the content of the verdict or decision, or a lack thereof. Moreover, the court of appeals must consider the absolute grounds of appeal regardless of whether the party appealing a given verdict or decision has mentioned them in the appeal and regardless of the limits of the appeal. Because of the further discussion in this chapter, what should also be mentioned is the provisions of art. 445 of the CCP which regulates the modification of an erroneous legal qualification of an act in appeals proceedings. As an exception to the principle that decisions must remain within the limits of the appeal, this regulation allows for changing the legal qualification of an act, regardless of the limits of the appeal and the claims made. This is because under art. 445 of the CCP, while not changing the factual findings, the court of appeals corrects an erroneous legal qualification regardless of the limits of the appeal and the claims made. Correction of the legal qualification to the defendant's disadvantage is possible only when the appeal was filed against the defendant. It should be noted that the legislator defined two conditions that must be met for the court of appeals to change the legal qualification of the act to the

1997, no. 78, item 483; amendments were published in Journal of Laws of 2001, no. 28, item 319 on 26 March 2001, Journal of Laws of 2006, no. 200, item 1471 on 7 November 2006, Journal of Laws of 2009, no. 114, item 946 on 21 October 2009.

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defendant's disadvantage. The first condition is that the factual findings have not changed; the second – that the appeal has been filed against the defendant.

One of the most important characteristics of the Polish appeals proceedings is the application of the reformationis in peius prohibition, i.e. the prohibition to issue verdicts to the defendant's disadvantage, in the appeal trial. This prohibition is especially important in appeal trials concerning the so – called consensual verdicts. In its verdict of 8 October 2009 (V KK 29/09), the Supreme Court concluded that "in principle, the code of criminal procedure does not contain regulations that exclude or limit the rights of the parties in litigation to appeal convicting verdicts issued in accordance with art. 387 of the CCP. Even though the degree of the penalty is adjudicated as a result of the court's approval of the defendant's motion and with the public prosecutor's and the victim's consent, each party may appeal the verdict and claim that the penalty is grossly non – commensurate. Thus, such verdicts are subject to appeal proceedings in accordance with the general principles. (...) This does not modify in any way the principles of the appeal proceedings concerning the verdict from the point of view of the grounds of appeal defined in art. 438 of the CCP."[18] Of course, it is so when the limitations defined in art. 434, 443, and 454 § 2 of the CCP are taken into account (added by the Author).

In accordance with art. 434 § 1 of the CCP, the court of appeals may issue a verdict that is disadvantageous to the defendant only when the appeal has been filed against the defendant and only within the limits of the appeal, unless the statute provides otherwise. If the appeal is filed by the public prosecutor or the attorney, the court of appeals may issue a verdict that is disadvantageous to the defendant only if it finds the flaws mentioned in the appeal or those that must be considered ex officio to be true. Of note is the fact that the second sentence of art. 434 § 1 of the CCP narrows down the possibility to issue verdicts that are disadvantageous to the defendants in the case of appeals filed by the so – called professional entities, i.e. the public prosecutor or the party's attorney, so as to confirm only the flaws mentioned in the

18 Verdict of the Supreme Court of 8 October 2009, V KK 29/09, LEX no. 529673.

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appeal or considered ex officio. In 2003[19], art. 434 was supplemented with § 3, according to which the prohibition to issue verdicts that are disadvantageous to the defendant, defined in §1, does not apply in cased defined in art. 60 § 3 and § 4 (extraordinary mitigation of penalty) of the Penal Code and in cases where the conviction was made in accordance with art. 343 (motion for conviction without trial) or 387 (voluntary submission to a penalty) of the CCP. This regulation also applies to summary conviction in a hearing, based on the defendant's motion made under art. 474a of the CCP. In this amendment, art. 443 of the CCP[20] was supplemented too, because, if the case is returned to be tried again, the verdict issued in the subsequent trial can be more severe than the annulled one only if the verdict was appealed to the disadvantage of the defendant or if the conditions defined in art. 434 § 3 of the CCP are met. Generally speaking, such a statutory regulation, which precludes the reformationis in peius prohibition in the case of the so – called consensual verdicts, means that the defendant's right to defence, which is a fundamental constitutional right, is violated by allowing, in the majesty of law, even if the appeal was made to the defendant's advantage, to worsen his or her legal situation, which makes appeal proceedings illusory.

The solutions adopted in art. 434 § 3 of the CCP have always been considered as controversial.[21] The provisions of § 3 have raised fundamental doubts concerning the constitutional guarantee of appeal proceedings against a convicting verdict, defined in art. 176 § 1 of the Constitution and in art. 2 of Protocol no. 7 to the ECHR, and concerning the defendant's constitutional right to defence, defined in art. 42 (3) of

19 Art. 434 § 3 of the CCP was added by art. 1 (176) of the Act of 10 January 2003 on amending the Code of Criminal Procedure, the act on Regulations Introducing the Code of Criminal Procedure, the act on immunity witness, and the act on protection of classified information; Journal of Laws no. 17, *item* 155.

20 Under art 1 (181) of the amending act.

21 S. Zabłocki, in: P. Hofmański, K. Zgryzek, eds., Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała [Contemporary problems of the criminal process and the administration of justice. A commemorative book in honor of Professor Kazimierz Marszał], Katowice 2003, p. 490; S. Zabłocki, Postępowanie odwoławcze… [Appeal proceedings...], Warsaw 2003, p. 100, 102; S. Steinborn, Porozumienia w polskim procesie karnym. Skazanie bez rozprawy i dobrowolne poddanie się odpowiedzialności karnej [Agreements in the Polish criminal process. Conviction without trial and voluntary submission to criminal responsibility], Kraków 2005 r., p. 422, 425 ff.

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the Constitution (also in art. 6 of the CCP, art. 14 (3) (b) and (d)–(e) of the UN ICCPR and art. 6 (3) (b)–(d) of the ECHR). The need for this regulation was justified by the concern that defendants, in hope of more lenient treatment, would express their consent to certain penalties and then would appeal the verdicts knowing that when the verdicts are annulled and the cases are returned to be tried again the court would be limited by the prohibition mentioned in art. 443 of the CCP in connection with art. 434 § 3 of the CCP.[22] Attention has also been brought to the fact that protection against such instrumental behavior of defendants is not possible by way of limiting the constitutional right to appeal consensual verdicts and at possible difficulties related to proof in the repeated trials after the consensual verdicts are rescinded due to the limitation of the scope of the evidential proceedings.[23] Thus, the basic objective of precluding the application of the reformationis in peius prohibition, in cases where extraordinary mitigation of the penalty was adjudged in the first instance in situations defined in art. 60 § 3 and § 4 of the CCP and in cases where a convicting verdict issued in accordance with art. 343 and 387 (474a) of the CCP is appealed, was to legally assure the loyalty of the defendants who have reached an agreement with the judiciary and to discourage them from lodging groundless appeals against consensual verdicts.[24] "Apparently, in

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22 The opinion of the National Council of the Judiciary of Poland of 14 March 2000 regarding the draft act on amending the Penal Code, the Code of Criminal Procedure, the Criminal Executive Code, and some other acts; S. Zabłocki, Procesowe aspekty instrumentalnych zachowań tzw. małego świadka koronnego, ze szczególnym uwzględnieniem zakazu *reformationis in peius* [Procedural aspects of instrumental behavior of the so – called "small" immunity witness, with particular focus on the *reformationis in peius* prohibition]. in: red P. Hofmański, K. Zgryzek, eds., Współczesne problemy procesu karnego i wymiaru sprawiedliwości... [Contemporary problems of the criminal process and the administration of justice...], *op. cit.*, Katowice 2003, p. 503.

23 See the arguments given by S. Zabłocki and A. Kryże during the session of the Extraordinary Committee for amendments in codes held on 8 October 2002, in: Biuletyn Komisji Sejmowych, no. 1027/IV.

24 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz [Code of criminal procedure. A commentary], Warsaw 1999, p. 582, A. Blusiewicz, M. Jeż–Ludwichowska, D. Kala, D. Osowska, Przebieg postępowania karnego [The course of criminal proceedings], Toruń 2003, p. 196; P. Kruszyński, ed., B. Bieńkowska, C. Kulesza, P. Piszczek, Wykład prawa karnego procesowego [A lecture on criminal procedural law], Białystok 2003, p. 421; D. Nowocień, Wybrane zagadnienia dotyczące porozumień w procesie karnym będących podstawą instytucji uregulowanych w art. 335 i art. 387 k.p.k. [Selected issues concerning agreements in the criminal process constiting a basis for the institutions regulated by art. 335 and art. 387 of the CCP], in: L. Bogunia, ed., Nowa kodyfikacja prawa karnego [The new codification of the criminal law], vol. X, Wrocław 2002, p. 226 ff; D. Wysocki, Instytucja porozumienia

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the legislator's opinion, a defendant who has agreed to a deal should not question the deal later and demand, in an appeal against it, to get more than he or she got in the trial before the first instance court."[25] This idea is certainly right, except that the provision of art. 434 § 3 of the CCP, if construed literally, violates mostly the constitutionally guaranteed defendant's right to defence (art. 42 (2) of the Constitution) and the constitutional right to appeal convincing verdicts (art. 176 (1) of the Constitution). One must not speed up the criminal process to the detriment of the fundamental rights of individuals."[26] Consequently, various constructions of this controversial regulation have appeared in the judicial decisions. As an example, in its verdict of 11 January 2005 (IV KK 435/04), the Supreme Court stated that the court of appeals may not use art. 434 § 3 of the CCP and, as a result, is bound by the reformationis in peius prohibition defined in art. 434 § 1 of the CCP, if the verdict issued by the first instance court was appealed to the disadvantage of the defendant and the defendant was not advised, after the first instance court read its verdict, of the content of art. 434 § 1 of the CCP.[27]

Thus, given the lack of an unanimous interpretation of the provisions of art. 434 § 3 of the CCP and art. 443, first sentence, in fine, of the CCP, the Department of Criminal Procedure of the University of Białystok conducted a survey aimed to present the practical functioning of consensual resolution of conflicts, i.e. voluntary submission to a penalty (art. 387 of the CCP), conviction without trial (art. 335 and 343 of the CCP), and mediation (art. 23a of the CCP), as well as to indicate the problems encountered by practitioners when using the legal solutions adopted by the Polish legislator, which come from a completely different legal system. The survey comprised very general questions, so as to allow the participating practitioners of the Polish administration of justice system, to express their opinions regarding the

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w postępowaniu karnym [The institution of an agreement in a criminal procedure], Prokuratura i Prawo 2000, book 10, p. 99.

25 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Komentarz [Code of criminal procedure. A commentary], vol. I–II, Warsaw 1999, p. 586 ff.

26 T. Grzegorczyk, Kodeks postępowania karnego. Komentarze Zakamycza [Code of criminal procedure. Commentaries by Zakamycze], Kraków 2004, p. 1117;

27 Verdict of the Supreme Court of 11 January 2005, IV KK 435/04, LEX no. 146238.

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interpretation and the practical use of the provisions of art. 434 § 3 and art. 443 of the CCP. The key objective of the survey[28], within the defined limits, was to determine:

1. whether, in the opinion of judges, art. 434 § 3 of the CCP precluded the reformationis in peius prohibition in situations where the defence lodged an appeal claiming wrong legal classification of the act (art. 455 of the CCP);
2. whether, in the opinion of judges, an appeal of the defence based on the claim defined in art. 439 of the CCP results in preclusion of the reformationis in peius prohibition;
3. whether, and if so – to what extent, the first instance court trying the case again is bound by the verdict of the first instance court issued based on art. 343 of the CCP and then rescinded, with the case being returned to be tried again; and
4. the criteria for evaluating the interpretations of the new provisions of art. 434 § 3 of the CCP.

An analysis of the results of the survey has demonstrated a polarization of the opinions of the participating judges and the lack of an unanimous opinion on this matter. It must be noted that the provision of art. 434 § 3 and art. 443, first sentence, in fine, of the CCP could be used only in situations where the consensual verdicts had been appealed to the defendant's advantage, as in situations where an appeal is made fully or partly to the disadvantage of the defendant, the reformationis in peius prohibition does not apply (in principle)! Consequently, it must also be said that the direction of the appeal influences the type of claims made in the appeal lodged to the advantage of the defendant. After all, the objective is to change the verdict being appealed in the most advantageous way. The defendant's efforts to change his or her legal situation for the better must not, if the verdict was based on an agreement, automatically be interpreted as his or her intent to cheat the administration of justice system and to extort rights that are not

28 The addressees of the survey were judges, public prosecutors, and advocates and was conducted as a part of the research project conducted by the Department of Criminal Procedure of the University of Białystok titled "Porozumienia w polskim procesie karnym w ocenie praktyków" [Agreements in the Polish criminal process in the opinion of practitioners].

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due to him or her, taking the form of an ever more lenient penalty. As an example, in the event of a justified claim under art. 439 of the CCP (absolute grounds for appeal)[29], the appealing defendant must not be burdened in the majesty of law with the responsibility for the errors made by the court in the course of the trial.

An analysis of the surveys demonstrated that in the opinion of most judges (51.3%), art. 434 § 3 of the CCP precludes the reformationis in peius prohibition if the defence files an appeal claiming that the legal qualification of the act is wrong. An opinion to the contrary is shared by 36.2% judges – they believe that if the defence files an appeal claiming that the legal qualification of the act is wrong, art. 434 § 3 of the CCP does not preclude the use of art. 434 § 1 of the CCP. 4.9% of all surveyed judges pointed at the provisions of art. 455 or 443 of the CCP or had no opinion in this regard. Such a polarization of the opinions of the judges participating in the survey and the lack of an unanimous opinion on the matter in question justifies the de lege ferenda proposition to amend the provisions of art. 434 § 3 of the CCP and art. 443, first sentence, in fine, of the CCP.

35.2% of participating judges gave a positive answer and 47.7% – a negative answer to the question of whether the defence's appeal based on art. 439 of the CCP results in preclusion of the use of the reformationis in peius prohibition. Again, of note is the polarization of the opinions expressed by the judges. 5.8% of respondents pointed at the provision of art. 439 § 2 of the CCP, according to which a verdict can be rescinded only for reasons mentioned in § 1 (9)–(11) only if it is advantageous to the defendant. It turns out that in the case of absolute grounds for appeal defined in art. 439 of the CCP the judges participating in the survey pointed at the fact that the grounds pertain to the most serious violations of the procedural law, for which the appealing defendant must not be held responsible.

29 Absolute grounds for appeal are the most grave violations of the procedural law (to include one material violation) that always result in a rescission of the verdict, regardless of whether they were mentioned in the appeal by a party or were considered ex officio. Of no importance is also whether the violations could have influence or did influence the content of the verdict.

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35.2% of the participating judges gave a positive answer and 47.75% – a negative answer to the question of whether, and if so – to what extent, the first instance court trying the case again is bound by the verdict of the first instance court issued based on art. 343 of the CCP and then rescinded, with the case being returned to be tried again. Again, of note is the polarization of the opinions expressed by the judges.

On 28 April 2009, the Constitutional Tribunal issued a verdict (file no. P 22/07[30]) concerning compliance with the provisions of art. 42 (2) and art. 176 (1) of the 1997 Constitution of the Republic of Poland of the provisions of art. 434 § 3 and art. 443, first sentence, in fine, of the CCP, to the extent that they allow for verdicts to the disadvantage of the defendants if verdicts issued under art. 387 of the CCP are appealed solely to the defendants' advantage. Having examined the legal matter in question, the Constitutional Tribunal concluded that:

1. The provisions of art. 434 § 3 and art. 443, first sentence, in fine, of the CCP, to the extent that they allow for verdicts to the disadvantage of the defendants if verdicts issued under art. 387 of the CCP are appealed against solely to the defendants' advantage, based on claims:
   a) connected with a sentence issued in accordance with art. 387 of the CCP – are compliant with art. 42 (2) of the Constitution;
   b) not covered by an agreement concluded in accordance with a procedure defined in item 1 (a) above – are not compliant with art. 42 (2) of the Constitution.
2. The provisions of art. 434 § 3 and art. 443, first sentence, in fine, of the statute referred to in item 1 above are not compliant with art. 176 (1) of the Constitution.

As for the conclusion of the Constitutional Tribunal, it must be mentioned that the subject of the legal matter to be reviewed is limited to only one of the situations mentioned in art. 434 § 3 of the CCP, i.e. to a situation where the defendant is convicted in accordance with

30 The sentence was pronounced on 6 May 2009 in Journal of Laws, no. 68, item 585.

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art. 387 of the CCP, i.e. based on the consensual situation of voluntary submission to a penalty, which constitutes a clear interpretation guidance for the remaining situations mentioned in art. 434 § 3 of the CCP.

Moreover, it must be emphasized that the Constitutional Tribunal rightly observed that the complete penal law norm, whose constitutionality was studied, is derived not only from the provision of art. 443, first sentence, in fine, of the CCP, which refers to art. 434 § 3 of the CCP, but also from the provision of art. 434 § 3 of the CCP.

One must agree with the opinion of the Constitutional Tribunal that the reformationis in peius prohibition, both the one derived directly a contrario from art. 434 § 1 of the CCP and the indirect one, expressed a contrario in art. 443, first sentence, of the CCP, are closely connected with the defendant's right to defence. The Constitutional Tribunal found that this is not an absolute right and it is subject to certain limitations whose permissibility must be evaluated in relation to the principle of proportionality expressed in art. 31 (3) of the Constitution. On the other hand, the reformationis in peius prohibition is not essential to this constitutional right and, consequently, may be subject to limitations justified by values defined in art. 31 (3) of the Constitution, which, nevertheless, in the Tribunal's opinion, do not lead to a breach of the essence of the constitutional right to defence. The constitutionality of the limitation of the application of the reformationis in peius prohibitions in the event of a conviction in accordance with art. 387 of the CCP, i.e. the consensual institution of voluntary submission to a penalty, is justified by the very essence of consensual procedural institutions, whose general objective is to speed up and make more efficient the criminal proceedings and, consequently, to minimize the need for review by courts of appeal. The idea is to prevent the defendants, by using a psychological barrier, from ungrounded appeals against consensual verdicts and, consequently, from instrumental use of the guarantees established by the reformationis in peius prohibition. In this sense, such a limitation is necessary to achieve this objective.

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In its verdict of 8 October 2009 (V KK 29/09)[31], the Supreme Court stated that preclusion of the application of art. 434 § 1 of the CCP in situations where the defendant was convicted in accordance with art. 334 or 387 of the CCP constitutes a certain effort to keep the defendant from filing an appeal if he has reached an agreement with the administration of justice agencies concerning the penalty. This is because one can expect a defendant who has decided to voluntarily submit to a penalty to be consistent and to act rationally, especially that the other party agreed to end the process without presentation of evidence on the terms proposed by the defendant.

What is questionable is the so – called proportionality sensu stricto of the limitation to the reformationis in peius prohibition, i.e. the matter of appropriate proportion compared with the burden placed on the defendant, i.e. in situations where the verdict is rescinded due to reasons attributable to the court. The matter in question is justified claims of breach of substantial law (art. 438 (1) of the CCP), and procedural law (art. 438 (2) of the CCP), albeit to an extent that is not covered by an agreement concluded in accordance with art. 387 of the CCP, or justified claims of faults that constitute the so – called absolute grounds of appeal – art. 439 of the CCP which are attributable to the court. Thus, there is no doubt that preclusion, to the aforementioned extent, of the application of the reformationis in peius prohibition is not permissible under art. 31 (3) of the Constitution, as it limits the constitutional right to defence.

One must also agree with the opinion of the Constitutional Tribunal that, if the court fails to observe the plea bargain agreement concluded in accordance with art. 387 of the CCP, the verdict cannot be considered as consensual and the reformationis in peius prohibition cannot be precluded.

One must also agree with the opinion of the Constitutional Tribunal that art. 434 § 3 and art. 443, first sentence, in fine, of the CCP, which provide for preclusion of the application of the reformationis in peius prohibition in appeal proceedings against a convicting verdict issued

31 Verdict of the Supreme Court of 8 October 2009, V KK 29/09, LEX no. 529673.

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in accordance with art. 387 of the CCP and in repeated trials after the convicting verdict issued in accordance with art. 387 of the CCP is rescinded, do not in any way violate the principle of a two–instance court process, expressed in art. 176 (1) of the Constitution. In the opinion of the Constitutional Tribunal, art. 434 § 3 and art. 443, first sentence, in fine, of the CCP most importantly introduce a limitation on the constitutional right to defence, expressed in art. 42 (2) of the Constitution, to include the right of every person to appeal against verdicts and decisions issued by the first instance court. Preclusion or limitation of the application of the prohibition to issue verdicts to the disadvantage of the defendant does not in any way affect the principle of two – instance court proceedings.

The de lege ferenda postulate to the legislator made by the Constitutional Tribunal, concerning the need to introduce amendments with regards to the permissible limitations of the reformationis in peius prohibition, both in proceedings before a court of appeals (art. 434 § 3 of the CCP) and in repeated trials (art. 443 of the CCP), in all cases mentioned in art. 434 § 3 of the CCP (prior to the revision) has resulted in the new phrasing32 of art. 434 § 3, § 4, and § 5 of the CCP. According to the new wording of art. 434 § 3 of the CCP, the court of appeals may issue a verdict that is disadvantageous to the defendant also if the defendant has been convicted in accordance with art. 343 or art. 387 of the CCP, or art. 156 of the Criminal Fiscal Code, if the appeal was filed to the advantage of the defendant and the subject of the appeal is the guilt or the penalty or penal measure defined in the agreement. On the other hand, according to the new art. 434 § 5 of the CCP, the provision of § 3 does not apply in cases where the court of appeals has discovered grounds for rescission of the verdict defined in art. 439 § 1 of the CCP. It must be noted here that the new wording of the aforementioned regulations has a direct impact on the content and the meaning of art. 443 of the CCP.

As far as the changes to art. 434 § 3 and § 5 of the CCP, and the resulting change of the meaning of art. 443 of the CCP, are concerned, it must be said that these changes are relevant, as they take into account

32 Amendment of 2010, Journal of Laws of 2010, no. 106, *item* 669.

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the de lege ferenda postulates made in the doctrine.[33] The new wording of art. 434 § 3 of the CCP does not contain the absolute preclusion of the reformationis in peius prohibition in the event of a conviction in accordance with art. 343 or art. 387 of the CCP. However, the legislator precisely indicated both the direction of the appeal and the grounds for the appeal regarding the guilt or the penalty or penal measure that are covered by the agreement and inseparably connected with conviction in accordance with art. 343 or art. 387 of the CCP as ones that demonstrate the defendant's intent to breach the plea bargain agreement. This optional possibility to issue verdicts that are disadvantageous to the defendant in the case of conviction in accordance with art. 343 or art. 387 of the CCP is pointed at in various court decisions. In its verdict of 10 September 2009 (II Aka 227/0934), the Court of Appeals in Katowice emphasized that in situations where the defendant who has been convicted in accordance with art. 343 of the CCP lodges an appeal but does not break the agreement involving quick conviction, then a limitation of the reformationis in peius prohibition, defined in art. 434 § 3 of the CCP, violates the defendants' constitutional protections.

On the other hand, art. 434 § 5 of the CCP introduces the necessary correction concerning further application of the reformationis in peius prohibition in situations where the rescission of the verdict is due to the court's fault and not the defendant's fault. Unfortunately, the Polish legislator found only the so – called absolute grounds for appeal (art. 439 § 1 of the CCP) to be justified.

However, in its verdict of 8 October 2009 (V KK 29/0935), the Supreme Court stated that preclusion of the reformationis in peius prohibition is justified in situations where the defendant has voluntarily submitted to a penalty, provided that the conditions mentioned in art. 387 of the CCP are met, and then the defendant has questioned the verdict issued based on his or her motion and in accordance with the

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33 W. Kociubiński, Wyłączenie stosowania zakazu *reformationis in peius* w wypadkach określonych w art. 60 § 3 i 4 kodeksu karnego oraz art. 343 lun 387 kodeksu postępowania karnego [Preclusion of the use of the *reformationis in peius* prohibition in cases defined in art. 60 § 3 and §4 of the penal code and in art. 343 or 387 of the code of criminal procedure], p. 151.

34 Lex no. 553849.

35 OSNPG, 4/10, *item* 9.

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proposal included in the motion. However, the reformationis in peius prohibition does apply if the reasons for rescinding the verdict are attributable not to the defendant but to the court. This pertains mainly to situations where the defendant makes reasonable claims concerning breach of substantive law and procedural law to the extent that is not covered by art. 387 of the CCP, or concerning the occurrence of faults constituting absolute grounds for appeal under art. 439 of the CCP. This interpretation is the closest to the changes recommended in the literature on the subject.

Given the revision of art. 434 § 3 and § 5 of the CCP, it should also be noted that, according to art. 443 of the CCP, the aforementioned scope of the legal possibility of issuing a verdict that is disadvantageous to the defendant in a situation where the so – called consensual verdict was appealed against solely to the advantage of the defendant, applies also in the repeated trial. On the other hand, in its verdict of 8 October 2009 (V KK 29/09), the Supreme Court found that a consensual verdict issued by the first – instance court is possible before the court of appeals if the parties express again their agreement to the imposition of a penalty (this time a commensurate one) under new terms. A lack of such an acceptance, in situations where the court of appeals has found the arguments presented in the public prosecutor's appeal motion to be reasonable, should lead to rescission of the verdict of the first–instance court and to the transfer of the case to be tried again in accordance with the general principles.[36] The negotiated terms of conviction without presentation of evidence can be withdrawn from only in the event of a repeated trial before the first–instance court in accordance with the general principles or after a new consensual agreement is concluded before the court of appeals.

In conclusion, it must be emphasized that the opinion of the Constitutional Tribunal on the matters in question constitutes an important interpretation guidelines, also with regards to art. 440 of the CCP (gross injustice of the verdict) and art. 455 of the CCP (wrong qualification of the act). It must be noted that a recognition of the sense of limiting the legal possibility to appeal against the so – called

36 Verdict of the Supreme Court of 8 October 2009, V KK 29/09, LEX no. 529673.

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consensual verdicts issued in accordance with art. 343 or art. 387 of the CCP in order to prevent the defendant from "extorting" a more lenient penalty must not equate to approval of violation of fundamental rights of individuals (the most grave violation concerns the right to defence) or the procedures that have become an integral part of our system (mostly those pertaining to the application of the reformationis in peius prohibition in appeal proceedings and repeated trials). The solutions adopted in art. 434 § 3 and § 5 of the CCP constitute an expression of the Polish legislator's intent to achieve a normative form of the institutions of criminal process bargain agreements that is as compatible with the Polish legal system as possible.[37]

Last but not least, we must mention the alteration of the Polish criminal process that is being prepared by the Criminal Law Codification Committee. The keynote of the proposed changes is to make the contemporary criminal procedure more effective, faster, less formal, and less costly. It must be mentioned, however, that the proposed changes do have an impact on the Polish model of criminal process. This can be clearly seen in art. 434 § 3 of the CCP, discussed here, and the related art. 443 of the CCP. This is because in the amended version of the regulations, under art. 1 (106) and (108) of the Act on amending the Code of Criminal Procedure and certain other statutes38, § 3 and § 5 in art. 434 are to be deleted and the words "3 or" (after the words "art. 434 §") are to be deleted in art. 443. Also, art. 434 §1 is to have the following wording:

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37 The country–wide research of voluntary submission to penalty (art. 387 of the CCP) and conviction without trial (art. 343 of the CCP in the light of the practice, conducted in 2005 by the Administration of Justice Institute (Instytut Wymiaru Sprawiedliwości] demonstrated that in none of the studied cases an appeal was lodged or even planned. A. Ważny explains it by saying that perhaps the effective barrier is the solution adopted in art. 443 of the CCP which precludes the *reformationis in peius* prohibition with regards to verdicts issued as a result of agreements; A. Ważny, in: A. Siemaszko, ed., Instytucja dobrowolnego poddania się karze (art. 387 kpk.) i skazania bez rozprawy (art. 343 kpk.) w świetle praktyki. Rezultaty badań ogólnopolskich [The institutions of voluntary submission to a penalty (art. 387 of the CCP) and conviction without trial (art. 343 of the CCP) in the light of the practice. Results of Poland–wide research], Instytut Wymiaru Sprawiedliwości, Prawo w Działaniu, 3 Sprawy karne. [Administration of Justice Institute. Law in Action. 3 criminal cases], Warsaw 2008, p. 135.

38 http://bip.ms.gov.pl/pl/dzialalnosc/komisje–kodyfikacyjne/komisja–kodyfikacyjna–prawa–karnego/projekty–aktow–prawnych/

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"§ 1. The court of appeals may issue a verdict that is disadvantageous to the defendant only when an appeal has been lodged to the disadvantage of the defendant and also only within the limits of the appeal and only in the event that the faults mentioned in the appeal are confirmed, unless a statute requires a verdict regardless of the limits of the appeal and the claims made."

– § 2 is to have the following wording:

"§ 2. An appeal lodged to the disadvantage of a defendant may also result in a verdict that is advantageous to the defendant if the conditions defined in art. 440 have been met."

– § 4 is to have the following wording:

"§ 4. In the event of a conviction in accordance with art. 60 § 3 or § 4 of the Penal Code or art. 36 § 3 of the Penal Fiscal Code, the court of appeals may issue a verdict that is disadvantageous to the defendant, regardless of the limits of the appeal and the claims made, also when the appeal has been lodged to the advantage of the defendant who, after the verdict was issued, withdrew or significantly changed his or her explanations or testimony. However, this does not apply to cases of justified claims of violation of substantive law or of confirmation by the court of appeals of the presence of circumstances that justify rescission of the verdict, defined in art. 439 § 1."

Thus, it must be noted that the fact that § 3 and § 5 of art. 434 of the CCP are to be deleted in the amended Code does not lead to any valid conclusions. What is of key importance is the totality of the proposed changes pertaining to the whole Polish appeal procedure.

In the substantiation of their proposals, the authors of the new draft evaluated the most recent amendments to art. 434 of the CCP and the related art. 443 of the CCP. In their opinion, "the efforts made in the amendment of 9 April 2010 to adjust the content of art. 434 of the CCP, in the parts formulating the so – called preclusions of the application of the reformationis in peius prohibition, to meet the standards imposed by the Constitutional Tribunal in its verdict of 28 April 2009 (P 22/07) and in the substantiation of the Constitutional Tribunal's decision of 1 July 2009 (P 3/08), were, unfortunately, not carried out correctly. (...)

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Prevention of instrumental behavior of persons on whom a consensual verdict was imposed (in accordance with art. 343, 343a, or 387 of the CCP) is effected by using a model that is completely different than the model defined in the January amendment and which has been considered by the Tribunal to be in violation, in some circumstances, of the constitutional model. The new model does not define complex conditions for preclusion of the use of the reformationis in peius prohibition against such persons (this is why art. 434 § 3 of the CCP was deleted) and, instead, it introduces a clear limitation of the grounds for appeal (art. 447 § 5 of the CCP). A person who has been convicted in accordance in any of the consensual modes may not, under the solution introduced as a part of this amendment, base his or her appeal on an error in factual findings or gross incommensurableness of the penalty, which are related to the content of the agreement concluded by the person. An appeal based on such grounds, as one that questions the very essence of a voluntary agreement concluded by the person, will be considered as inadmissible, with all the procedural consequences. On the other hand, a party may lodge an appeal against a verdict issued in accordance with any of the consensual modes if the grounds for the appeal is any other claim (e.g. breach of substantive law, to include one that results not only in w wrong legal qualification of the act but also in imposition of a penalty outside of the statutory limits of the sanction, as well as a breach of procedural law which may influence the content of the verdict, to include one that is connected with violation of the statutory conditions for ending of a case in a consensual mode) and then, the person is protected by the reformationis in peius prohibition, without any preclusions."

To conclude, as has been demonstrated, the proposed amendment will undoubtedly affect the Polish model of criminal process, to include the matters discussed here. The authors of the draft intend, most of all, to increase the contradictoriness of both first – instance proceedings and appeal proceedings, among others by increasing the evidential initiative of the parties. This will evidently lead to a shift in the burden of responsibility for the outcome of the process onto the parties. On the other hand, this will reduce the inquisitiveness related to the court's (ex officio) clarification of facts and examination of evidence at the court

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proceedings stage. Thus, of note is the new art. 447 § 4 of the CCP which provides that "in the appeal, one may not claim that the court did not examine certain evidence, if the party had not made any evidential motions in this regard, or that certain evidence was examined despite the lack of the party's motion to that effect," and § 4, according to which "an appeal must not be based on the claims defined in art. 438 (3) and (4), which are related to the content of the agreement mentioned in art. 343, 343 a, and 387."

It appears that such normative formulation of the Polish appeal procedure, with regards to the issue of the defendants' right to appeal the so – called consensual verdicts, is in line with the axiological assumptions presented in the above discussion.

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STRESZCZENIE

W niniejszym opracowaniu skoncentrowano się na zakazie reformationis in peius stanowiącym conditio sine qua non prawa do odwoływania się od orzeczeń w sprawach karnych, również wyroków zapadających w trybach konsensualnych. W związku z tym analizie poddano rozwiązanie przyjęte w 2003 r. w przepisie art. 434 § 3 oraz art. 443 kpk., które budziło zasadnicze kontrowersje w zakresie konstytucyjnej gwarancji do instancyjnej kontroli wyroku skazującego, zawartej przede wszystkim w art. 176 § 1 Konstytucji RP, a także w zakresie konstytucyjnego prawa oskarżonego do obrony, zawartego w art. 42 ust. 3 Konstytucji RP. Wskazano argumentację „za i przeciw" zaproponowanej przez polskiego ustawodawcę regulacji. Odwołano się zarówno do orzecznictwa polskiego Sądu Najwyższego, Trybunału Konstytucyjnego, jak i EKPCz w Strasburgu. Zaprezentowano też badania ankietowe, przeprowadzone przez Katedrę Postępowania Karnego UwB obrazujące funkcjonowanie tej regulacji w praktyce procesowej. Analiza wyników badań zwróciła uwagę na polaryzację poglądów ankietowanych sędziów i brak jednolitego stanowiska w badanym zakresie. Omówiono również nowelizację przepisów art. 434 § 3 kpk. oraz art. 443 kpk. z 2010 r., a także dokonano oceny przygotowywanej przez Komisję Kodyfikacyjną Prawa Karnego nowelizacji procesu karnego w zakresie objętym przedmiotowymi rozważaniami.

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