SENSE AND NONSENSE ABOUT POLISH EXPERT WITNESSES LAW

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Annotation

The authors very critically refer to selected Polish regulations, particularly with regard to the expert witness' position in a criminal trial. The main problems discussed in the article are as follows: absence of a consistent expert witness law in Poland – a comprehensive legal act, non-regulated status of expert witness, absence of measures for verification of expert witness qualifications, ambiguity regarding the „scientific or specialist institutions", only partial regulation of the issue of the so-called private expert testimony, extremely low hourly wages on the basis of which the expert's remuneration is calculated, introducing inadvertence as the criminal offence involving delivery of a false expert opinion, chaos regarding the maintenance of expert register, strict control of the expert's access to the case file in criminal proceedings, lack of reflection by the lawmaker *de lege lata*.

Keywords: evidence, expert witness, criminal proceedings, Polish law, expert witness law.

Introductory remark

The authors devote this work to Professor Vidmantas Egidijus Kurapka, the lecturer at the Mykolas Romeris University and a long-time University's Vice-Rector. In 2020, the University Senate granted Prof. Kurapka the title of Honorary Professor of Mykolas Romeris University for considerable achievements in the development of research in the field of forensic science and medicine. However, Prof. Kurapka's activity is not only limited to the development of Lithuanian forensics, as Professor has been maintaining a long cooperation with the Polish Forensic Association and is one of the "founding members" of the European Forensic Organization.

Introduction

Whilst reflecting on the topic of this work, we decided that expert witnesses

and expert witness testimony are the areas particularly suitable for presentation in Commemorative Book dedicated to Professor Vidmantas Egidijus Kurapka. This is not only due to the fact that the problems of expert witnesses have been widely discussed in Professor's publications, but also taking into account the historical aspect, i. e. at the time of past political changes the foundations of the expert testimony system in Poland and Lithuania were re-created; we experienced the same starting point, but later the expert witness law was formulated differently in both countries. While in Lithuania the law on expert witnesses has been developed already a long time ago, in Poland, despite several drafts being elaborated, the proper expert law has not been implemented so far. Consequently, this situation resulted in apparent deficiencies of the opinion-making practice to be presented in this paper.

At the same time, we were thinking about the title, which would duly reflect the content of this paper. Its final form would indicate that the authors see some rational elements of the current legal status of expert witnesses in Poland and critically refer to selected Polish regulations. Nothing could be more wrong. A comprehensive and general consideration of this issue, which is of key importance for the contemporary process leads to the conclusion that nonsense definitely prevails, whereas reasonable postulates submitted to previous drafts of expert witness law remain only in the sphere of expectations or dreams. The most important problems concerning the Polish expert witness law, which will be explained and discussed further in the text, are the following:

Absence of a consistent expert witness law – a comprehensive legal act (Act on Expert Witnesses),

Non-regulated status of expert witness,

Absence of measures for monitoring expert witness qualifications,

Ambiguity regarding the „scientific or specialist institutions",

Partial regulation of the issue of the so-called private expert testimony,

Dramatically low hourly rate for expert,

Introducing inadvertence as the criminal offence involving delivery of a false expert opinion,

Chaos regarding the maintenance of expert register,

Strict control of the access of expert witnesses to case files in criminal proceeding,

Lack of reflection by the lawmaker *de lege lata*.

Absence of a consistent expert witness law – a comprehensive legal act (Act on Expert Witnesses)

Until recently, outdated regulations of several decade status persisted in Poland[1], hence apparently they did not fit to contemporaneous social and economic reality.

Notwithstanding, despite the 2012–2013 introduction of amendments relating to some expert opinion-making process (mainly in principles for determining remuneration of court experts), presently we are still facing lack of systemic solutions that would take into account the role and importance of expert testimony in court, and – more importantly – that would tailor the regulation to the legal and economic situation in the area of, *inter alia*, the status of experts (including court and so-called "private" experts), their rights and obligations, expert selection and registering, identification of a reasonable regulation for functioning of institutional experts, creating a system ensuring a high level of reporting and, in general, which answers to the fundamental question whether the current mixed system (allowing for the opinions by the so-called *ad hoc* experts, i. e. the ones not listed in court registers) should be maintained or a permanent group of court experts should be introduced.

Postulates for change have been formulated persistently over the last 15 years. Initially, they mainly focused on these four common issues:

- court experts selection method,
- the way of representing the civil and criminal case opinion making community,
- ensuring the highest level of expert competence,
- maintaining impartiality of expert opinions.

These areas of interest, underpinned, to various (sometimes completely different) degree, the following four initiatives:

(1) Draft law of 2004–2005 prepared by the Ministry of Justice in consultation with the expert community (including representatives of the Polish Forensic Association and the Institute of Forensic Research),

(2) the so-called "Parliamentary project" initiated by the Polish Forensic Association,

(3) a draft prepared in 2007 by the Ministry of Justice and later referred to

[1] Decree of October 26, 1950 on the remuneration of witnesses, experts and parties in court proceedings. *Journal of Laws.* 1950.49.455 repealed only on November 5, 2012, or the Ordinance of the Minister of Justice of December 18, 1975 on the costs of hearing the evidence from experts in court proceedings. *Journal of Laws*. 1975.46.254 recognized as repealed (not formally repealed) on May 6, 2013.

in the literature as a "government draft",

(4) works on the draft act in the form of guidelines elaborated in 2008.

Regretfully, the first two drafts can be referred to as past and uncompleted, although they were best suited to the expectations of experts and the judiciary. Nevertheless, both drafts were postponed ad calendas graecas, whilst in 2007 the Ministry of Justice prepared a new draft law on experts, that would consist of the Act on court experts and a number of executive acts. This time, the legislation was elaborated without the participation of experts nor the scientific community. The draft did not take into account the opinion of the stakeholders, furthermore it proposed to change the existing regulations to the extent provoking a vivid public criticism. Experts who, in accordance with the new regulations, would hold the status of "government experts" instead of court experts, were actually subordinated to the administrative and political authority, i. e. the Minister of Justice.

The draft not only failed to take into account public opinion, but also deviated from the conservative assumptions regulating the role of experts in the trial; it intended to maintain expert registers by executive governmental agencies with a paramount discretionary power of the Minister of Justice, i. e. to conduct a meticulous, ungrounded community interview regarding the expert candidate which excessively interfered in the sphere of personal life, such as ethics, family and payment of taxes. The draft act also significantly limited the role of the procedural party in appointing an expert in a specific case. As a result of extensive criticism, that draft was rejected by the competent parliamentary committee (*nota bene* headed by the subsequent Minister of Justice) as unconstitutional and unsuitable for further progress, and – due to the dissolution of the parliament – the work on the draft law was discontinued.

In 2008, the criticized concept of the government project of the former political party was rejected, the general principles of legislation dating back to the period of 2004–2006 were restored and traditional regulations on expert witness status were referred to in line with the Acts on criminal, civil and administrative proceedings, and – most importantly – a new draft was prepared in consultations with the community of experts and theorists on law as well as academic circles. Drafting a comprehensive legal regulation reflecting the appointment rules and status of court experts was considered the main goal. The lawmakers based their approach on the benchmark analysis of European solutions (Twinnning Light Project Strenghtening the Polish Justice System). Some of the assumptions of the project are worth mentioning, such as:

- creating mechanisms for "fair" recruitment of court experts and

introducing more extensive supervision,
- increasing the requirements for candidates for court experts,
- free access of interested parties to the court experts register,
- comprehensive regulation of court experts renumeration principles,
- decentralizing the system whilst maintaining a uniform court experts register and corresponding disciplines they represent,
- measures to raise the quality of reporting.

The progress of this draft remained unknown for a very long time, and then the work on the draft was apparently discontinued; instead another government project was developed in 2018.

A new draft embraced a number of solutions that were simply bizarre from the point of view of legislation and systemic approach to law, including the law on experts in particular. It seemed to discard the real problems affecting not only the expert community, but also the justice system regarding the functioning of these entities and therefore had no chance to improve the situation in this respect. The draft provided only for the change in the authority responsible for granting the expert a certificate authorizing to issue an opinion, taking this power away from the presidents of regional courts and handing it over to the director of the Institute of Forensic Research, who does not seem to have greater competence to verify the qualifications of experts or the competence of opinion-making institutions than the presidents of regional courts currently have.

The idea of granting certificates to expert witnesses by *de facto* the entity subordinated organizationally to the Minister of Justice, i.e. the Institute of Forensic Research and its director – as a condition of having the right to issue opinions, collided with the function of impartiality of the expert and was contrary to legislation in force (especially procedural one). The new draft introduced a new institution of a certified expert (replacing the existing court expert or expert witness) and the concept of a certified institution, significantly reducing, and practically eliminating the possibility of appointing the so-called *ad hoc* experts (referred to in the draft as "single case experts") and non-certified institutions. This was contrary to the provisions of the codes of criminal and civil procedure as well as other acts, by limiting the freedom of procedural bodies (including courts) regarding the selection of court experts and decision-making.

Moreover, the draft failed to deal with the most important issues to be resolved in relation to the Polish practice of utilizing expert opinions, i.e. the status of the expert witness, not only "certified". Likewise, it did not refer to increasing practice of extra procedural opinions in Poland. The regulation did not

even provide for a framework regarding the remuneration of experts and setting the principles for the amount of hourly rates (proportionally to market values) and the principles of indexation. Therefore, such key issues as: insufficient number of experts, a relatively low level of reporting, ineffective mechanisms of expert selection and competence verification, ensuring the independence and impartiality of experts, potential certification, and finally – adaptation to other acts, remained beyond the focus of the lawmaker. The 2018 draft evoked huge criticism and, it can be said – luckily, has not been proceeded to further stages of legislative work.

Non-regulated status of expert witness

A dispute regarding the expert status has been continued in the Polish doctrine (and jurisdiction). It can be said that two options are discussed at the same time; one considers the expert as a professional entity (professionally involved in issuing opinions), whereas the other one provides for the expert as an occasional role, performed aside other activities. The procedural doctrine and attitude demonstrates that the expert witness is defined as the so-called a court "auxiliary", an independent entity, acting at the request of, first of all, a procedural authority (to some extent also judicial parties, but with the primacy of roles consistent with general procedural principles). Hence, the legal relationship between the procedural authority and the expert is, in principle, of a public-law nature, albeit with a strong civil involvement. In recent years, the courts and tribunals in Poland have consistently perceived an expert as liable (for damages) for the content of the opinion[2], which would unjustifiably bring the expert down to the role of an entrepreneur acting at his own risk. In Polish

[2] Hence the Judgment of the Constitutional Tribunal of 12.06.2008 K 50/05: "The court which orders an expert to prepare an opinion, does not take responsibility for it", Resolution of the Supreme Administrative Court of 12 January 2009, I FPS 3/08: "Activities performed by an expert in court proceedings, referred to in Art. 13 point 6 of the Act of 26 July 1991 on personal income tax (*Journal of Laws* of 2000, No. 14, item 176, as amended), constitute an economic activity within the meaning of Art. 15 sec. 2 of the Act of March 11, 2004 on tax on goods and services (*Journal of Laws* No. 54, item 535, as amended) and the exclusion referred to in Art. 15 sec. 3 of this act. [...] As a result of an order by a court (another authority) to prepare an opinion, the responsibility for the results of the actions of a court expert, who is obliged to prepare an opinion, is not transferred to the court. In the relationship between an expert and a court, there is no legal relationship similar to that between an employee and an employer, neither with regard to remuneration, nor as regards liability to third parties for the result of an expert witness. " 14: "The expert opinion is an independent statement by a specialist. Although he is obliged to take into account the indications of the court in his work, this does not override his responsibility "

legal system, the basis for remuneration is not a contract concluded with an expert, but the act of appointing him to a specific case by a judicial authority.

According to mentioned above jurisdiction, issuing the expert opinion may result in the expert's liability for damages against "third parties", and unfortunately, this type of approach was mainly related to the complex value added tax (VAT) system. The so-called private experts and their opinions commissioned by interested parties and, according to the current, imprecise regulations, entering the process as the so-called documentary evidence, remain completely beyond such control, whatever illusory it might be.

Considering the importance of expert opinions for the contemporary trial, the absence of a uniform and comprehensive regulation of the expert (including a "private" expert) status, confirmed by statutory regulation, seems to significantly hinder the functioning of the entire justice system.

Lack of an effective method to verify expert witnesses qualifications

In the current legal status, pursuant to Art. 157 of the Act: Law on the System of Common Courts the body responsible for verifying the competences of an expert witness candidate is the President of the appropriate District Court. The President evaluates both the formal grounds and the substantive qualifications of the candidates. It should be noted that due to systemic reasons only (district courts in Poland constitute both the first instance courts – in more serious cases, and the second instance courts – in low profile cases), monitoring of the substantive competences of expert witnesses at the court level is merely illusory. In fact, the so-called ad hoc experts, i. e. specialists who have not been entered on the expert witnesses register, but have specialized knowledge required for the resolution of the case, remain almost beyond any institutionalized control. The Polish system does not provide for methods of verifying the competences of such persons, apart from questions being asked during the court trial. This refers to the entire range of scientific and specialist institutions that are currently not included in any register of the entities issuing forensic opinions.

The above solution is not only far from perfect, but it can be explicitly stated that it consolidates a pathology, i. e. the façade character of verifying competences of expert witnesses and candidates for that role. At the same time, an introduction and adherence to clear rules allowing for verification of the competence of expert witness candidates constitutes the core functioning of a modern opinion-making system. In particular, it is necessary to identify the entity

responsible for such verification. With no doubt, this identification should be accompanied by finding a solution that will contribute to effective screening of candidates who fail to demonstrate a sufficiently high level of knowledge or skills. The second problem concerns the interval at which the expert license should be renewed and verified. In the current model, after being entered on the register the expert witnesses can be removed for lack of competence theoretically unless they are validly convicted of an intentional crime prosecuted by public indictment. Another problem is the unenforceable (although noticed by jurisprudence) obligation of those already entered on the expert register to continuously improve their competences and qualifications.

At this point it should also be observed that despite many flaws, the system described above functions effectively in relation to the so-called individual expert witnesses, however it is unenforceable against the so-called institutional experts ("scientific and specialist institutions" mentioned in the code of criminal proceedings/criminal code), which entities in Poland do not have to comply with any standards or proficiency tests. This is, moreover, an issue directly related to the next problem discussed below.

Problems with defining a scientific or specialist institution

Polish procedural law distinguishes between the so-called individual and institutional expert witnesses. According to the provisions of the Code of Criminal Proceedings, an opinion issued by a "scientific or specialist institution" belongs to the latter category. Despite the use of this wording by the legislator in the Code there is no legal definition of such entity. This leads to the stratification and multiplication of such institutions, which is contrary to original assumptions. According to the analysis of the provisions (and court decisions), an expert opinion issued by an institution has the same abstract probative value as an opinion elaborated by an individual expert, but due to the reference to the professional collective character of the institution, the expectations towards the quality of expert opinion are higher. Needless to say, such opinions are requested in practice and there are scientific and specialist institutions in the Polish system that ensure professionalism, such as the Institute of Forensic Research in Cracow or the Central Forensic Laboratory of the Police in Warsaw. On the other hand, however, a number of evidently commercial entities (often in the form of commercial companies or one-person company) have emerged on the market, which are named "research institutes" or similar. In some cases, no information is given about the personnel and expert qualifications, research facilities, methodology used – in fact, no data that would allow for monitoring

the qualifications of specialists issuing opinions on behalf of a given "institute" and the correctness of the formulated conclusions.

The so-called one-person companies, i. e. sole proprietorships permitted by Polish regulations as a way of settling accounts with the tax authorities, constitute another problem area. Such companies (often also operating under the name of "institute", which is a non-reserved name) certainly by definition cannot be treated on a par with traditional public laboratories or research institutes, despite the fact whether they meet the instrumentation and human resources requirements in a specific case. The chaos of the Polish legal status is expressed in the fact that, although expert witnesses register is granted to a natural person, the register of expert witnesses may include the data of sole proprietorships to facilitate both correspondence and financial settlements and accounting between the entity and the court. The expert witnesses register, in our viewpoint, should include only natural persons with proven competences in a given field, and a sole proprietorship must not be considered a specialist institution. On the other hand, some cases in Polish practice demonstrate that one-man company essentially plays only an administrative or intermediary function; the person conducting the activity does not perform any examinations but uses subcontracting to other entities (sometimes equally difficult to verify), which practically hinders the identification of responsibility, the authorship of expert opinions as well as the level of equipment or staff competences.

Partial regulation of the issue of the so-called private expert testimony

In Polish legislation, the functioning of the so-called experts appointed by the parties (as this is the case in UK or American law and practice), or even the experts whom the parties may wish to be present whilst official expert is performing duties (as is the case in German law) has been never experienced nor used. Before starting a broader discussion on this important and interesting, and at the same time, theoretically fully admissible evidence (if monitored properly, there are no reasons why the so-called private expert opinion would in any way devastate the systemic foundations of the Polish criminal procedure), a few historical remarks should be made.

As indicated before, the foundations of the Polish criminal procedures are conventionally based on the sole competence of the procedural body to appoint expert witnesses, at most after hearing the (non-binding) positions of the parties on this matter. Beginning with the adoption of the Code of Criminal

Procedure of 1997 (and even before), the reading of documents elaborated "beyond criminal proceedings and its purposes", also the so-called private opinions was not possible. On the other hand, judicial decisions of the Supreme Court in Poland demonstrated quite consistently that the so-called private expert opinion, particularly the one endorsed by a scientific authority or a person of indisputably high level aptitude, should be taken into account when resolving the case[3]. Thus, from the procedural point of view, a truly bizarre form called "the outset of evidence" or "information on evidence" was accepted, i. e. such "evidence" could not be utilized directly, but at the same time it could not be ignored.

Certain hopes regarding the possibility of regulating the practice of private expert opinions could be related to the introduction of the so-called adversarial model, which involved the extensive amendment of the code of criminal proceeding in order to genuinely activate the procedural parties[4]. It finally granted the possibility of reading the documents elaborated beyond but for the purpose of the criminal proceedings. At the same time, the so-called private expert opinions were not treated firmly, and the principle that the expert witness formally appointed by the judicial body is the only source of special information in a criminal trial persisted. A quick departure from the rules of the adversarial model and the retreat to the previous rules of procedure bypassed this regulation, which up to now has been functioning in the Polish criminal trial, as a relic of unfinished change.

In relation to the so-called of private experts, the arguments for their admission (apart from the obvious fact that it is not prohibited neither the law, nor jurisprudence, nor the tradition) are manifold. First, there is a *de facto* inequality between the parties as regards the evidence requiring relevant expertise. Law enforcement agencies have their own forensic laboratories and splendid organizational and human resources, which practically cannot be contested by the defendant (apart from asking questions and questioning the competence of experts). Admitting the so-called private expert opinion could change this situation dramatically, especially if the rights and obligations of experts appointed by a procedural body were equal to those of "private" experts, primarily in having the access to examination items. This should also entail the possibility

[3] Review of previous jurisprudence and doctrine: Kwiatkowski, Z. (2009). Glosa do postanowienia Sądu Najwyższego z dnia 24 stycznia 2008 r., sygn. II KK 290/071. *Prokuratura i prawo*. 1, 159.

[4] Ustawa z dn. 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, Dz. U. 2013.1247.

of summoning "private experts" for hearing their testimony (and not – as it is sometimes the case in Polish courts – in a witness role). The aloofness of the lawmaker in Poland against private experts may result from purely economic reasons; their appearance in court could generate additional costs of the proceedings. The solution is the reform of financing the evidence, allowing its cost to be pre-financed by the interested party, followed by a possible reimbursement of expenses for private opinion. The evaluation and monitoring of such evidence would require a wider confrontation, particularly with the possibility explicitly provided in the UK legislation[5] , i. e. case conference meaning the preparation of a statement by experts for the court of the matters on which they agree and disagree. The active role of the procedural body (adopted as the current model principle) would also have to be manifested in a more active monitoring the competence and experience of the experts providing the opinion; both court registered experts and the so-called private experts.

Problem of expert remuneration

The problem of outrageously low remuneration of court appointed experts is related to the issues discussed above, whilst expecting at the same time high, not to say – the highest possible level of competence. The hourly rate, adopted as a model solution in Poland, in principle does not raise any objections. The working hour is a measure of remuneration in many fields by duly reflecting the workload, and various competence-based rates per hour also seems to be a rational choice. However, if the amount of the basic rate nominally remained unchanged for many years and amounts to the value of a few Euros per hour of expert's work, the situation is rather embarrassing. This problem seemed unsolvable for many years, and although it has been explained by budget difficulties, no one seems to care. Meanwhile, low hourly rates (one of the lowest in Europe) not only increase the risk of frauds by both contractual sides (unlawful increase of the number of hours allegedly spent on expert opinions and underpinning the reliability of financial settlement by the judicial body), but primarily discourage experts from being entered on court expert register (low remuneration, but at the same time high-level requirements and strict liability of experts pose difficulties in finding a wide range of candidates). Additionally, they may, in fact, increase the overall cost of criminal proceedings due to the low quality of opinions issued by non-competent experts (highly qualified

5 Rule 19.6 . *The Criminal Procedure Rules*. (2015): https://www.legislation.gov.uk/uksi/2015/1490/part/19/made

experts refrain from being entered into the register due to low remuneration) and the resulting need to seek supplementary, additional, verifying opinions, sometimes consulted several times.

In relations to the matter of interest, a disturbing phenomenon of treating the expert opinion in a trial mainly from financial side could also be observed. Courts not only begin to question the number of expert-hours (to which they are not entitled, considering the fact that that sphere belongs to relevant expertise), but also – in line with amended legislation – they start to underpin certain (documented) expenses as being not essential for issuing the opinion (art. 618 f code of criminal proceeding), or they postpone the decision on reimbursement (see art. 288 § 3 civil code (after being amended in 2019)[6]. Jurisdiction is also of the opinion that „the objections of the parties to the expert opinion may lead to the need of supplementary opinion, and the expert is not entitled to additional renumeration unless it is a new opinion in a case"[7].

Faulty regulation regarding liability for delivering a false expert opinion

On April 15, 2016, an amendment to the Criminal Code was introduced to the Polish law, involving a more stringent liability of an expert for providing a false opinion and, in fact, adding a new type of crime, i.e. a false inadvertent opinion (art. 233). Since this subject has already been widely commented in a Polish doctrine, it should be briefly summarized that from a logical point of view, the legal construction of issuing a false opinion inadvertently is nonsense, a false opinion means that the expert was fully aware of that fact and acted intentionally. In other words, the expert may give a false opinion only in direct intent.

The nonsense of this regulation introduced to the Criminal Code was

[6] According to that article, if the opinion is not complete or ambiguous, the remuneration and reimbursement of costs is dealt with after it has been completed or clarified.

[7] Partyk, A., Partyk, T. *Merytoryczna zawartość opinii biegłego, a wysokość należnego biegłemu wynagrodzenia*: https://sip.lex.pl/komentarze-i-publikacje/linie-orzecznicze/merytoryczna-zawartosc-opinii-bieglego-a-wysokosc-419633228#xd_co_f=NDgwMjI3NjUtM2E5ZC-00NmZlLTg1YjItOTEyODZiM2E0ZTMy~

highlighted on numerous occasion[8], also at the level of the Ministry of Justice[9], however the status quo is still in force, which entails the suspicion of having been introduced against the rules of proper legislation and solely *ad casum*.

Absence of centralized expert register

According to the literature[10], the legal system in Europe accounts for a number of solutions regarding the issue of expert witness register: starting from the countries with no expert register maintained (UK), through a mixed system with appointed officials responsible for this role (Germany) and finally, where the expert register is maintained (France). The Polish model is contained in the last group, however is burdened with numerous and serious disadvantages. The French model provides for a single, nationwide register maintained at the high level of the judiciary. In Poland, Art. 157 of the Law on the System of Common Courts imposes this competence on the presidents of regional courts, which results in 46 registers maintained in the country[11]. This leads not only to increased costs (after all, this data needs to be managed), but also to the peculiar practice of some experts having to be entered on the register of multiple district courts. Consequently, if an expert is removed from the register of one of the

8 Vide: Budyn-Kulik, M. (2016). Kilka uwag o przestępstwie z art. 233 k.k. (składanie fałszywych zeznań) po nowelizacji z 11 marca 2016 r. *Annales Universitatis Mariae Curie-Skłodowska*. LX-III (1): "It seems that conceptually it is difficult to imagine the situation inadvertent falsification of opinions. The expert is obliged to personally prepare an opinion based on the relevant research carried out by him. A false opinion is one that confirms the untruth or conceals the truth. So it seems that falsehood requires the perpetrator's awareness of what is true and what is not. It therefore rules out an inadvertent falsehood in the form of unconscious inadvertence (negligence). It is impossible to inadvertently conceal the truth [...] One may even wonder whether typically only direct intention should be required in such a case. If the untruth is confirmed, the perpetrator must be aware that the data presented in the opinion are untrue and confirm their truthfulness, which seems typically unlikely with no intention [...]". "Since the expert himself carries out the research in the relevant scope... there is no possibility of him being wrong as to whether the data is true or not. It is about the subjective opinion of an expert. It is something else, for example, to make a mistake in calculating the results, which the expert is not aware of. The objectively obtained data are not true, but the expert is convinced that they are. Therefore, there is no preparation of a false opinion within the meaning of the Criminal Code. For such a mistake, the expert may be liable to disciplinary action, possibly also for damages, but not criminal liability for the preparation of a false opinion".

9 Budyn-Kulik, M. (2018). Opinia dotycząca wprowadzenia karalnościsporządzenia przez biegłego opinii nierzetelnej lub bez zachowania należytejstaranności: https://iws.gov.pl/wp-content/uploads/2018/09/biegli-opinia-Magdalena-Budyn-Kulik.pdf

10 More on thistopic in: Girdwoyń, P. (2011). *Opinia biegłego w sprawach karnych w europejskim systemie prawnym*.

11 https://bip.ms.gov.pl/pl/rejestry-i-ewidencje/lista-sadow-powszechnych/

district courts for disciplinary reasons, it has no effect on the registers of other courts.

Currently, there are no obstacles for introduction of a uniform, centralized and computerized database of court experts from all over Poland, to which not only procedural authorities from a given district have the access, but also the relevant information can be obtained from any location in the country. The simplicity of this solution, both in technical and organizational terms, seems evident, as being largely convenient for the procedural body and the parties. At the same time, centralizing the records could prevent certain pathology observed in national practice. The entry on the register of several or a dozen or so regional courts, as this is the case today must raise doubts as to the reliability or ethics of an expert. The situation where, for example, an expert lives in the area of one court and performs his or her activity in the district of another court (which would be understandable), or many district courts are operating on a small territory (e. g. Warsaw it has two district courts, similarly to the Silesian agglomeration) is not meant here. These are cases when the experts are entered on the registers of courts distant from the place of residence or work, which is most likely due to purely economic reasons (a larger number of requested expert opinions). The standardization and centralization of the register would allow, above all, a more efficient monitoring system of expert activity, in scope of keeping deadlines, unbiased opinion, maintaining competence, charges in criminal proceedings or in proceedings for incapacitation. At the same time it would eliminate the practice in which disciplinary removal from the register in one district court does.

Side and tangible benefits would also involve creating a uniform list of fields and disciplines the experts operate in (presently it is determined by an expert's application and assessment by the president of the regional court), a review of the number and specialization of experts in a given field in Poland (procedural authorities, as a rule, seek experts only from their district, and in no-availability cases, they rely on guesswork or unofficial sources) and finally, the possibility of reliable and profound training of experts in specific fields.

The Ministry of Justice comes up with a number of initiatives to reform Polish law, however recently the majority of these ideas has little to do with common sense and robust legislation, while the problems that are really important from the point of view of the organization of the justice system (such as the aforementioned register of experts) are still pending.

Control of the access to case files

The access of expert witness to the case files (especially the criminal ones) should not, in fact, raise any doubts. Needless to say, on the one hand, one can and should balance well the secrecy of pre-trial proceedings (protected under the Article 241 of the Criminal Code), or, in broader terms, the protection of important public and private interests, personal data, etc., however on the other hand, is should be kept in mind that the expert witness belongs to a group of court assistants in clarifying the factual findings and operates in a status similar to that of a public official, therefore, he or she should benefit from the trust of the procedural authorities.

It should be remarked at this point that in many cases (primarily psychiatric and psychological expert opinions, but also forensic opinions, including, for example, written reports) the actual and examination material is contained in the case files and the procedural authority, having no relevant expertise, is not aware of its existence. Lack of access to such materials by an expert appointed to issue the opinion, or limiting the access only to fragments of the content of the files explicitly articulated in the decision and meticulously made available to the expert, means that the expert does not have all the research material that can be used in the case or is not aware of the circumstances relevant for the opinion. It should be emphasized that the full access of an expert to information is often a *sine qua non* condition for a pertinent opinion or it often becomes the reason for diminishing the conclusiveness of the opinion.

The procedural body, although commonly referred to as the "highest authority expert", by definition does not have relevant expertise in the area where the expert knowledge is sought and therefore it is not able to identify a complete and most valuable information that might be essential for an expert. Moreover, not all experts are aware of having the rights (even if aware, not always followed) to demand the extension of the material necessary to issue opinion in a particular case. Consequently, the recent introduction of actual rationing of case files in Art. 198 of the Code of Criminal Procedure becomes not only a potential cause of faulty opinions, but also results in extension of the proceedings in time. According to the contemporary provisions (Art. 198 of the Code of Criminal Procedure) "If it is necessary to issue an opinion, the court or the prosecutor shall provide individual documents from the case files or certified copies of these documents to expert witness". Apart from the fact that certified copies often (e. g. in case of handwriting examination) may have scarce or no value for an expert, the obligation of selecting the material has been imposed on the procedural authority. The regulation according to which

"an expert appointed on the grounds that the opinion issued by another expert is incomplete or unclear, or when the opinion is contradictory in itself or there is a contradiction between other opinions in the same case, that other opinion or those other opinions are not shared before the opinion is issued. Another opinion or other opinions may be made available to the expert, to the extent necessary, only in exceptional, particularly justified cases, when the subject of the opinion of the appointed expert directly relates to the content of that other opinion or those other opinions" sounds particularly disturbing (and nonsense).

If one tries to clarify whether there is a contradiction between the opinions, wants to consult the experts on the differences between the opinions, or finally to prepare a hearing, and perhaps then order a case confrontation to demonstrate the real state of affairs, then there are no obstacles for disclosing the files to experts. Once again, it is evident that the Polish lawmaker, at least in recent years, has manifested a huge dose of distrust towards the parties in criminal proceedings, thereby losing both the effectiveness and efficiency of the proceedings.

Stagnation due to the lack of changes of law

We have already pointed out that some legal solutions in Poland cannot await being implemented (the law on expert witnesses), whereas some were introduced and frozen (the suspended issue of private experts). The nonsense discussed above is complemented by the fact that some regulations, evidently not adapted to the contemporary reality, still remain unchanged. For example, art. 200 par. 2 of the Code of Criminal Proceedings indicates the essential contents of each opinion (including the information and field of expertise of an expert, report of the activities performed, findings, conclusions, signatures of all experts involved), while there is no requirement for justification of the opinion. On the other hand, this provision lacks an explicit requirement of providing foundation for the opinion and conclusions, and despite raising such issues in the literature[12], the legal status quo has not been changed.

In turn, art. 199 of the Code of Criminal Proceeding provides for a non admissibility in evidence extending to the so-called expert secrecy. Pursuant to this provision "the statements of the accused made to an expert or to a physician providing medical assistance regarding the alleged offense cannot be used as the evidence." This principle duly allows for psychological or psychiatric

12 Vide: Tomaszewski, T. (2000). *Dowód z opinii biegłego w procesie karnym*. 81–82.

opinions, whilst granting the defendant the opportunity to present details of demeanour or circumstances that may ultimately affect the scope of criminal liability. In this context, the content of Art. 199a of the Code of Criminal Proceeding sentence II, in which the secrecy of the expert does not apply to polygraph tests (as a rule – dependent on the will of the examinee) should be noted with surprise. This provision, not only absurd in systemic terms, seems to stem from either the legislator's lack of knowledge on the essence of such examinations, lack of trust in experts, or a lack of understanding of the issue; it can also be interpreted as the intention to reduce the number of tests, which carries a significant risk. The defendant, who upon the consent (sometimes directly upon request) decides to undergo polygraph testing, would have to face the fact that the polygraph expert can be questioned regarding the content revealed during the test, but also in relation to "off-protocol" conversations. This probably effectively reduces the number of such cases.

Conclusion

To summarize, it should be concluded that the observed shortcomings of the Polish opinion-making system, hereby referred to as nonsense, should be compensated or eliminated, which would result in many positive consequences for the experts themselves, as well as for the trial parties. On the other hand, the review of the history of expert witness law and the motives of lawmakers resulting in particular reasons for amendments, does not give any hope for a soon change of this state quo.

With consideration to the above, in the first place one should opt for drafting and adoption of a comprehensive legal regulation concerning the status and appointment of court experts, replacing the current provisions of law. The proposed regulation should be rational, free from solely financial issues (in terms of negotiating the lowest possible cost of casework opinion) and take into account the viewpoints of all stakeholders, i. e. judges, prosecutors, lawyers and experts.

One of the guiding principles of the proposed law should be to maintain the independence of experts and the freedom of procedural parties in the selection of experts for particular case. Only impartial and unbiased expert will be able to issue a non-discredited and substantially relevant opinion, perhaps not always convenient in terms of prosecution thesis, but certainly leading to a decision consistent with the objectives of the criminal proceedings.

The drafted regulation should primarily aim at increasing the probative value of the opinion. The current system admits the opinions that are weak,

careless or issued by uncontrolled entities in terms of their competences (individual and institutional experts). Hence, it becomes necessary to create appropriate mechanisms for the effective recruitment of competent court experts. In reaching this goal, the method of choice should rely on the improved substantive requirements for candidates for court experts. The actual methods of qualifying candidates for court experts and the lack of certification give a way to verifying formal criteria only, whilst neglecting proper evaluation of relevant qualifications. More stringent requirements may reduce the number of experts entered on court registers, but at the same time, they will ensure a higher level of expert evidence, which should contribute to less questions in court and elimination of the need of requesting other opinions.

It is with satisfaction that the status of an expert witness is equal to that of a public official and resulting protection ensured. Nevertheless, one can get the impression that the most competent specialists do not attempt to obtain the status of a court expert. It can be assumed that the reason lies in the archaic system of remuneration of experts not tuned to the market realities. In this context, it becomes necessary to at least adjust the rates to present economic situation and clearly define the rules for appealing against the decision on the expert's remuneration (and introduce clear criteria for reducing the remuneration). The functioning of the so-called private and commercial opinions should be regulated as well. It seems necessary to introduce "a copyright" for the name "institute" or "research institution" which should be limited only to entities that actually conduct research, and not to those that will grant themselves such status. It seems advisable to introduce a self-governance of expert witnesses with the use of existing structures, organisations, associations etc. Their task, apart from cultivating improved competence by the members, should also cover disciplinary proceedings in relation to discredited experts.

A quite practical dimension, especially in view of prevailing tendency in Polish jurisprudence providing for a liability of experts for issuing a faulty opinion, involves the possibility of introducing insurance from civil liability (with resulting favourable tax write-offs), as this is the case in other professions. Subsequently, in the end the discussion on the criminal liability of an expert can be dealt with. There is no doubt that the offence of providing false opinion can and should be consistently prosecuted and possibly severely punished. However, in the first place the inadvertence should be eliminated, as being contrary to the principles of logical thinking and the taxonomy of criminal provisions of law.

TEISMO EKSPERTIZĖS ĮSTATYMO LENKIJOJE KELIAI IR KLYSTKELIAI

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Santrauka

Straipsnio autoriai kritiškai vertina aptariamus Lenkijos teisės aktus ir ypač susijusius su eksperto statusu baudžiamajame procese. Pagrindinės problemos, kurios yra aptariamos straipsnyje, tai: nuoseklaus visaapimančio kompleksinio įstatymo apie teismo ekspertus Lenkijoje nebuvimas, nesureguliuotas teismo eksperto statusas, ekspertų kvalifikacijos ir kompetencijos patikrinimo mechanizmo nebuvimas, neaiški sąvokos „mokslinės ir specializuotos institucijos“ interpretacija, tik iš dalies reguliuojama privačių ekspertų veikla, labai žemas valandinis atlygis, kuris taikomas nustatant atlyginimą už ekspertizės atlikimą, neatsargumo formos ir baudžiamosios atsakomybės už melagingos ekspertinės išvados pateikimą ypatumai, chaosas su teismo ekspertų registracijos procesu, griežti prieigos prie baudžiamųjų bylų medžiagos apribojimai teismo ekspertams, įstatymų leidėjo apmąstymų trūkumas *de lege lata*.

Raktiniai žodžiai: įrodymai, teismo ekspertas, baudžiamasis procesas, Lenkijos teisė, teismo ekspertizės įstatymas.