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Is “Public Interest” a Conceptual Category of Contemporary Polish Procedural Criminal Law?

1. Preliminary remarks

The question posed in the title of this study is only seemingly simple, as is the answer that comes to mind. After all, procedural criminal law, which belongs to the sphere of public law, is somehow embedded in the broadly conceived “public interest”.

Public interest in the context of procedural criminal law may be discussed by taking into account several aspects. For the purposes of this analysis, two areas of considerations have been distinguished.

The first one is the normative sphere² or, to be more precise, the normative text and the manner in which it is edited in accordance with the principles of legislative technique. It is in this area that one may ponder on the legislator’s use of specific terms, including those vague and indefinite ones, as well as general clauses, and evaluate their significance in the interpretation process. The concept of “public interest”, which is the subject of this analysis, is treated as an indefinite term functioning as a general clause, the task of which is to render a legal text more “flexible”³ by referring to a set of values outside of the system.

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² It ought to be noted that, following the initial intensive research conducted by Marian Cieślak in the 1950s, studies on rules in criminal cases undoubtedly became less numerous, and the notion of rules in criminal cases has remained largely indefinite ever since, both with regard to the dogmas of criminal procedure and with respect to studies on general and specific notions related to procedural institutions (where the notion of principles has not been widely employed), as pertinently noted by Piotr Hofmański and Piotr Kardas. P. Hofmański, P. Kardas, *Elementy składowe systemu procesu karnego* [Eng. *Elements of the Criminal Procedure System*], in: P. Hofmański (ed.), *System prawa karnego procesowego* [Eng. *Procedural Criminal Law System*], Warszawa 2013, p. 66ff. Cf. M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Eng. *Polish Criminal Procedure. Fundamental Theoretical Premises*], Warszawa 1984; M. Cieślak, *Normy celowościowe i ich rola w procesie karnym* [Eng. *Purposive Norms and Their Role in the Criminal Trial*], in: M. Cieślak (ed.), *Zagadnienia prawa karnego i teorii prawa. Księga pamiątkowa ku czci profesora Władysława Woltera* [Eng. *Problems in Criminal Law and Legal Theory. Commemorative Volume in Honour of Professor Władysław Wolter*], Warszawa 1959 (reprinted in: M. Cieślak, *Dzieła wybrane* [Eng. *Selected Works*], S. Waltoś (ed.), Vol. 2, Kraków 2011, p. 96ff). On the scope of applicability of competence norms cf. M. Zieliński, O. Bogucki, *Zasada bezstronności – art. 4 k.p.k. a podstawy środka odwoławczego* [Eng. *The Impartiality Rule – Article 4 of the Code of Criminal Procedure and the Grounds for Appeal*], in: L. Gardocki, J. Godyń, M. Chudzik, L.K. Paprzycki (eds.), *Aktualne zagadnienia prawa karnego materialnego i procesowego* [Eng. *Contemporary Problems in Substantive and Procedural Criminal Law*], Krasieczyn–Lwów 2009, p. 28.

³ A. Malinowski, *Redagowanie tekstu prawnego. Wybrane zagadnienia logiczno-jezykowe* [Eng. *Editing a Legal Text. Selected Logical and Linguistic Issues*], Warszawa 2006, pp. 38–42; M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Interpretation of Law. Principles, Rules, Guidelines*], Warszawa 2002, pp. 126, 170–171.

The second area of considerations is an axiological matter: a direct reference to the objectives of a given regulation and its underlying values. In this aspect, the spectrum of considerations on public interest in criminal trial appears to be very broad, as it encompasses issues relating to the objective and model of criminal trial, including its structure and course. The criminal trial paradigm is also determined by the principles of criminal procedure perceived as the ideas that it ought to follow. The imperative values of this paradigm are truth and justice, which constitute the axiological foundation of procedural criminal law and criminal trials in the normative, actual, and specific senses, while also delineating the boundaries of procedural activity as a whole⁴. The model of criminal trial that merely serves to implement the norms of procedural criminal law and acts as an instrument of their execution is no longer considered acceptable, be it with regard to the resolution of a conflict caused by a criminal offence⁵, or with respect to the attainment of other goals specified in Article 2(1) of the Polish Code of Criminal Procedure (hereinafter: “CCP”)⁶. As aptly indicated in legal literature⁷, the goal of the criminal trial is the cumulative achievement of the values of truth, justice, and the rule of law, without prioritizing one over another. Such an approach to the problem is not endemic to Poland⁸. The goals of the criminal trial should be achieved regardless of the individual goals of the parties to it, which may remain mutually exclusive. In particular, the aforementioned approach concerns the goal of the criminal trial which expresses the public interest by holding those in violation of legally protected values accountable for their actions; the individual interest of the defendant, who strives to avoid accountability for criminal offense; and the individual interest of the aggrieved party, who expects to be duly compensated and reimbursed for the losses and injuries resulting from the committed offence. For this reason, for the purposes of this study, the considerations will be limited to indicating solely those regulations that relate to the participation in criminal proceedings of the so-called public interest advocates (Polish: *rzecznicy interesu publicznego*), in particular the state prosecutor acting in this role.

2. “Public interest” as a general clause in the CCP

The Polish legislator does not shy away from using various devices aimed at rendering the text of the CCP act more “flexible”. In this branch of the law, however, the results of such actions are not very clear, as evidenced by a somewhat arbitrary use of certain terms contained in the normative material. This remark also applies to indefinite terms, used in general clauses, which are intended to ensure that in the process of interpreting provisions of procedural criminal law a reference is made to a set of judgements indicating specific values that lie outside of the legal system. It is noted these days that such

⁴ J. Skorupka, *O sprawiedliwości procesu karnego* [Eng. *On Fairness in the Criminal Trial*], Warszawa 2013, p. 331.

⁵ Cf. A. Murzynowski, *Refleksje na temat kształtu procedury karniej w XXI wieku* [Eng. *Reflections on the Shape of Criminal Procedure in the 21st Century*], “Prokuratura i Prawo” 2001/7–8, p. 25ff. Also cf. S. Waltoś, *Wizja procesu karnego XXI wieku* [Eng. *The Vision of the Criminal Trial in the 21st Century*], “Prokuratura i Prawo” 2002/1, p. 26.

⁶ Polish title: Ustawa z 6.06.1997 r. – Kodeks postępowania karnego, tekst jedn.: Dz. U. z 2020 r. poz. 30.

⁷ J. Skorupka, *Cele procesu karnego* [Eng. *The Goals of Criminal Procedure*], in: P. Hofmański (ed.), *System procesu karnego. Zagadnienia ogólne* [Eng. *Criminal Procedure System. General Problems*], Vol. 1, Warszawa 2013, p. 154ff.

⁸ Cf. K. Volk, *Grundkurs StPO* [Eng. *Basic Course of Criminal Procedure*], München 2010, pp. 4–5; M. Lippman, *Criminal Procedure*, Los Angeles–London–Delhi–Singapore–Washington (DC) 2011, p. 3; P. Roberts, *Groundwork for a Jurisprudence of Criminal Procedure*, in: R.A. Duff, S.P. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford 2011, p. 400ff.

general clauses⁹, contained in the provision of a legal instrument, point to convictions that are sufficiently strongly held within the community or within a certain social group and refer to certain facts (events or behaviours) and values assigned to them. Under this approach, the referents of such general clauses as "public interest", "social interest" or "interest of the aggrieved party" are judgements that are taken into account by the entity applying the law in connection with a certain fact¹⁰. In the literature on criminal procedure the dominant view is that the term "public interest" is synonymous with the term "social interest". In the case of the latter term, when interpreting the provision containing it, one is also required by the legislator to refer to certain judgements. The interpreting entity taking such judgements into account is one of the elements determining the conditions and criteria related to the inclusion of specific facts in the scope of application or scope of regulation of a given legal norm. Assuming, therefore, that both of these general clauses are meant to refer to a non-legal system of values, it is necessary to determine what values the lawmaker had in mind and consider whether the lawmaker deliberately uses different references (terms) or actually refers to the same set of values, despite using a different wording. Noting the doubts regarding the scope of the terms "public interest" and "social interest", one should at the outset agree with the view that the set of values referred to in both of these general clauses is at least a similar (and partly overlapping)¹¹. The "social interest" clause is used by the legislator in the CCP on several occasions. Scholars have noted that it is a complex concept, without a legal definition, even though it is an evaluative criterion that is objective and independent of one's discretion. Its application in the CCP is fairly precise and raises no doubts as to what legal norm should, through the use of this general clause in the specific act, be decoded and, thus, which judgements and values lying outside of the legal system are referred to by the legislator.

However, the situation is when it comes to the concept of "public interest". Until 5.10.2019 the legislator used this clause in only one provision (Article 21(2) CCP), and abandoned it as a part of the latest amendment to the law¹². In older commentaries to that provision, not much effort was made to explain what content outside of the act was intended by the legislator to supplement the provision in which "public interest" was referred to, and which was required to be taken into account when applying that provision. A limited number of scholars equated "public interest" with upholding the

⁹ Agnieszka Choduń aptly argues that it is necessary to distinguish between poorly-defined terms contained in legal provisions and general clauses, which always refer to judgements, i.e. determinations of a semantic nature, the sense of which is not created by the meanings of the words forming them, and also points out that such terms are interpreted in a different manner. See: A. Choduń *Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym. Wybrane zagadnienia teoretyczne* [Eng. *General Clauses and Indefinite Terms in Tax and Administrative Laws. Selected Theoretical Issues*], in: A. Choduń, A. Gomułowicz, A. Skoczyła (eds.), *Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym. Wybrane zagadnienia teoretyczne i orzecznicze* [Eng. *General Clauses and Poorly-Defined Terms in Tax and Administrative Law. Selected Theoretical and Case Law Issues*], Warszawa 2013, pp. 21ff and 38ff. General clauses are covered more extensively in: A. Szot, *Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa* [Eng. *General Clause as a Multi-Branch Legal System Construction*], *Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius)* 2016/2, p. 291ff and the literature quoted there.

¹⁰ Cf. A. Choduń, *Klauzule generalne...*, p. 29.

¹¹ A. Żurawik, „Interes publiczny”, „interes społeczny” i „interes społecznie uzasadniony”. *Próba dookreślenia pojęć* [Eng. *“Public Interest”, “Social Interest” and “Socially Justified Interest”. An Attempt to Specify the Notions*], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2013/2, pp. 57–69.

¹² Act of 19 July 2019 Amending the Act – Code of Criminal Procedure and Certain Other Acts (Polish title: *Ustawa z 19.07.2019 r. o zmianie ustawy – Kodeks postępowania karnego i niektórych innych ustaw*, Dz. U. poz. 1694).

rule of law¹³. Regarding the views formulated outside of the procedural criminal law, one should agree with statements emphasizing that it is impossible or even unreasonable to put forward an absolute, unchanging and uniform definition of public interest. It is characterised by its relative nature¹⁴, which means that, on each occasion, in determining what values are covered by this term account has to be taken not only of the current social context, but also its susceptibility to change over time¹⁵. One should note the broad spectrum of values to which the legislator refers in the context of procedural criminal law using various general clauses. In the act regulating the criminal procedure, use is made of poorly-defined terms such as: interest of the aggrieved party (Article 11(1) CCP), interest of the justice system (Articles 90(3), 590(1), 591(1) and 592(1) CCP), legitimate interest of the parties (Article 161 CCP), an important interest of the Republic of Poland (Article 589c(1)(5) CCP), interest of the investigation (Article 317(2) CCP), private interest (Article 360(1) CCP) – or explicitly refers to a legal interest (Article 152 CCP).

In the literature on criminal procedure, no attempt has been made to define the term “public interest”, and therefore it is difficult to determine the relationships in which this term remains with the above-mentioned indefinite terms used in the act as general clauses. Since those clauses require the interpreting entity to reach for judgements, which, in turn, refer to specific values, it seems that a simple juxtaposition of the public interest category and that of individual interest cannot occur in the context of procedural criminal law. Moreover, it is not possible to separate the values incorporated in those concepts from them, as public interest may be derived from values associated with individual interests of particular persons. They may be persons participating in a criminal trial in a procedural role as defined in the provisions of law (e.g. the defendant, the aggrieved party, a witness), as well as those conceived as the general public (e.g. community), whose legitimate and generalized interests constitute the public interest category. Such an approach to the issue under discussion indicates the need to render this term more precise, taking into account not only the specific nature of the branch of law where it is used, but also the normative context in which it exists. The term “public interest”, being a general clause, was treated in procedural criminal law in a specific manner. In order to clarify this, one must remember the context in which it was used.

Article 21(2) CCP, in the wording prior to the July 2019 amendment, imposed on the state prosecutor a duty to make a notice of the commencement of pre-trial proceedings in a case concerning an offence against a specific person. The circle of such persons was specified and it included employees of a state, local government or community institution, school pupils, students of a university or college, and soldiers. The addressee of such a notice was to be the superior of such a person and the note was to be sent if required by “an important public interest”. The provision in which this term was used was not crucial from the perspective of the existence or course of criminal proceedings and did not address issues as significant as those the other “interests” referred to. When comparing the use of both these terms in the CCP, one may conclude that the legislator attaches a much greater weight in the context of procedural criminal law to the “social

¹³ A. Sakowicz, *Art. 21* [Eng. *Article 21*], in: A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz* [Eng. *Code of Criminal Procedure. A Commentary*], LEX/el. 2018.

¹⁴ Ł. Żelechowski, *Kolizja interesu prywatnego i publicznego w prawie własności przemysłowej* [Eng. *Conflict of Private and Public Interests in Industrial Property Law*], in: T. Giaro (ed.), *Interes publiczny a interes prywatny w prawie* [Eng. *Public Interest and Private Interest in Law*], Warszawa 2012, pp. 46–47.

¹⁵ M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym* [Eng. *The Concept of Social Interest in Administrative Law*], Warszawa 1986, p. 45.

interest" clause, which is indicated by both the frequency of its use in the text of the act and the importance of the provisions in which it was used. Another fact which also seems to support this view is that the legislator abandoned the public interest clause while amending the CCP in July 2019. The change ultimately resulted in an extension, with regard to the personal and substantive scope, of the state prosecutor's duty to notify the superiors of certain persons of the commencement of criminal proceedings against them¹⁶. However, having abandoned the requirement to determine, before making the notice, whether it is required by public interest, the legislator has not introduced in place of the removed clause another clause containing any other supporting term (a legally defined one or a poorly-defined one). This should most probably be viewed as a complete abandonment of the public interest clause in the CCP. Other general clauses referring to differently conceived or differently formulated interests and, consequently, to judgements concerning specific values have remained in the CCP.

Should any special significance be attached to this change and, in particular, can the above-mentioned amendment to the act give rise to the claim that an axiological change has occurred in procedural criminal law? Such far-reaching conclusions seem unjustified. Removing the imperative to take into account public interest from Article 21(2) CCP is not tantamount to the intention of disregarding the values expressed with the help of this concept in a criminal trial. This change should be perceived as being aimed at tidying up and consolidating the normative text. A reservation needs to be made here, however. The fact that the legislator has abandoned the use of this general clause does not mean that public interest is insufficiently taken into account or protected during a criminal trial. The legislator seems to still approve of the values to which this general clause refers, albeit using other legislative techniques. First of all, legal provisions are still worded in a way that makes it possible to use them to decode norms that require specific entities to uphold the rule of law. The new wording of Article 21 CCP clearly confirms this thesis. A further specification of the scope of this provision means that it is no longer necessary to use general clause referring to a system of values lying outside of the legal system. These values are, in fact, protected directly by a specific regulation being part of the procedural criminal law system, in this case contained in Article 21 CCP.

3. Public interest as a legally undefined value in procedural criminal law

As already mentioned, the removal of the "public interest" clause from the normative text does not mean that the procedural criminal law legislator has abandoned the imperative of referring in the process of interpreting legal provisions to socially approved judgements expressing certain values. On the contrary, one may conclude that, although the set of these values is not closed or legally defined, it may nevertheless be reproduced through analysing the model and objectives of a criminal trial, as indicated in Article 2(1) CCP.

¹⁶ After the amendment of the aforementioned provision, which created a duty to notify superiors of the commencement of criminal proceedings, even though its essence has been preserved, the range of persons with respect to whom such a notice is required to be made changed (was extended). The scope of that duty has also been made more specific, i.e. it currently concerns a notice of the commencement and conclusion of proceedings conducted *ex officio*, and therefore proceedings initiated without a request from the aggrieved party.

Bearing in mind that these considerations are limited to the issue of protecting the values encapsulated in the public interest clause formula within a criminal trial, it should be noted that procedural criminal law provides for the institution of ombudsmen or advocates whose task is to protect, respectively, public interest and social interest in the course of criminal proceedings. The very separation of the scope of powers of entities acting as ombudsmen or advocates, through the imposition on them of the duty to safeguard certain values expressed as social interest or public interest, indicates that, firstly, the legislator does see a difference between both of these sets of values and, secondly, considers their protection necessary. The protection of public interest and social interest is effected by means of the proper shaping of procedural institutions.

The category of public interest advocates is not distinguished in the act, in particular in the group of provisions dedicated to participants of the criminal trial (Chapter III of CCP). There is, however, no doubt that the legislator envisages such participants in the proceedings, specifies their tasks and indicates in what type of cases they are to undertake their procedural role. While the roles of such entities are not explicitly regulated in the provisions, scholars have no doubt at all that they are real participants in criminal proceedings, having a specific role to fulfil and a fairly concrete procedural status.

A public interest advocate is an entity whose task under specific provisions is to uphold the rule of law by means of initiation of proceedings intended to correct a defective ruling¹⁷ or other actions aimed at protecting public interest¹⁸. An entity acting as a public interest advocate does not represent any parties in the criminal trial. Their principal task is to respond to law violations and to exercise the procedural rights conferred upon them in order to restore legal order. Public interest advocates include, according to scholars, a state prosecutor, the Attorney General, the Ombudsman and the Children's Ombudsman.

These entities have the right, *inter alia*, to undertake specific procedural activities. The diversity of the entities whose task is to protect public interest in a criminal trial indicates a somewhat complementary nature of the legislator's concept. It namely assumes that, within the scope of their statutory powers, individual entities being state authorities will take into account the objectives of criminal proceedings and will react in case their attainment is threatened. This is how one should see the powers of the Attorney General and the Ombudsman to initiate cassation proceedings against any final decision of the court concluding the proceedings (Article 521(1) CCP) or the Children's Ombudsman's right to lodge a cassation against any final decision of the court concluding the proceedings if the issue of that decision led to a violation of a child's rights (Article 521(2) CCP)¹⁹. These entities are not restricted by the time limit for filing this appellate measure, are not required to pay a fee and have the right to inspect court files and state prosecutor's files, as well as the files of other law

¹⁷ K. Dudka, in: K. Dudka, H. Paluszkiewicz, *Postępowanie karne* [Eng. *Criminal Procedure*], Warszawa 2018, 4th ed., p. 139.

¹⁸ Cf. Article 3(1)(3) of the Act of 28 January 2016 on State Prosecutors (Polish title: Ustawa z 28.01.2016 r. – Prawo o prokuraturze, tekst jedn.: Dz. U. z 2019 r. poz. 740), which indicates that upholding the rule of law consists in, *inter alia*, taking measures provided for by law, aimed at ensuring correct and uniform application of law in judicial proceedings.

¹⁹ In Poland a cassation may be filed with the Supreme Court solely on the grounds of violations constituting absolute causes for an appeal or any other flagrant breach of law if such a breach might have had a significant effect on the contents of that decision (Article 523(1) CCP). In cases concerning felonies, the Attorney General may even file a cassation solely on the grounds of the incommensurability of the punishment imposed by the court to the offence (Article 521(1) and (1a) CCP).

enforcement authorities after the proceedings have been concluded and the ruling has been issued (Article 521(3) CCP).

The state prosecutor is also mentioned as one of public interest advocates. The state prosecutor's status requires some explanation, because he or she is a criminal trial participant who also plays the role of an authority in charge of the pre-trial proceedings and appears before the court in the capacity of a public prosecutor²⁰. In consequence, the prosecutor has a clearly defined role to play as a party to the criminal proceedings and clearly defined related tasks. The prosecutor's office is a law protection authority burdened not only with the task to prosecute offences but also to uphold the rule of law²¹. The tasks related to the prosecution of offences are pursued, without limitation, by means of: conduct of or supervision over pre-trial criminal proceedings and performance of the function of a public prosecutor before courts²². In the context of an analysis of the protection of public interest in a criminal trial, it would be worthwhile, however, to note an additional aspect of the state prosecutor's activities. The state prosecutor's remit to act in a criminal trial in the capacity of a public interest advocate is directly provided for in the Act on State Prosecutors, where a state prosecutor is required by Article 2 to uphold the rule of law. In consequence, there are no express regulations concerning the obligation to uphold the rule of law in the provisions of the Code of Criminal Procedure. There is, however, no doubt that, by the prescriptive formation of certain procedural institutions, that task within the context of a criminal trial has been assigned to the state prosecutor. The state prosecutor is obliged (or authorized) to undertake certain activities as defined by the act, which, however, do not result from his or her function as a law enforcement authority or a public prosecutor, as performed in such proceedings. The legislator's intention to make the state prosecutor a public interest advocate can be seen e.g. in appropriate phrasing of the applicable legal regulations. While the term "authority conducting the pre-trial proceedings" or its equivalents, or the term "public prosecutor" are used in the CCP, when it comes to stressing the role of a guardian of the rule of law, the term "state prosecutor" is used consistently. It is used each time a state procurator is assigned specific tasks that are beyond the remit of the prosecution. By way of illustration, Article 425(4) CCP stipulates that a state prosecutor may file appeals for the benefit of the accused (it is, thus, a procedural action with an effect contrary to prosecuting).

One of the purposes of a criminal trial is to secure the legally protected interests of the aggrieved parties (Article 2(1)(3) CCP). It is, thus, consistent with the concept of the rule of law, the upholding of which has been entrusted to the prosecutor's office and to state prosecutors. The state prosecutor has also the power to motion the court to impose on the accused an obligation to redress the damage suffered by the aggrieved party (Article 46 CCP); the right to make such a motion is provided for in Article 49a CCP. The axiological ground for that regulation are obvious. If the aggrieved party cannot take care of their own interest, this role should be taken over by the public interest advocate – the state prosecutor as part of his or her duty to uphold the rule of law.

²⁰ R. Olszewski, *Role prokuratora w procesie karnym* [Eng. *State Prosecutor's Role in a Criminal Trial*], "Prokuratura i Prawo" 2014/1, pp. 43–60.

²¹ Article 2 of the Act of 28 January 2016 on State Prosecutors.

²² Cf. R. Stefański, *Role prokuratora jako organu procesowego* [Eng. *State Prosecutor's Role as a Judicial Authority*], in: Z. Kwiatkowski (ed.), *System prawa karnego procesowego* [Eng. *System of Procedural Criminal Law*], Vol. 5, pp. 831–840 and the literature quoted there.

In case the accused was convicted, the court, applying the provisions of civil law, may award – and, if the prosecutor files a motion, has to award – redress (in whole or in part) of the damage caused by the offence or to compensate the aggrieved party for any wrong suffered in result of a prohibited act committed by the accused. The state prosecutor’s right to make such a motion does not result from his or her role as a public prosecutor. It is conferred on the state prosecutor but does not concern any other public prosecutors. One may, then, conclude that this power is an example of an instrument to uphold the rule of law, which is a task of the state prosecutor’s office as per the above-mentioned Article 2 of the Act on State Prosecutors.

The remit of the state prosecutor as a public interest advocate comprises also the exercise of rights of a deceased aggrieved party in case their closest relations or dependants are absent or cannot be found (Article 52(1) CCP). Article 52(1) CCP is unambiguous – the rights of the aggrieved party which they would otherwise have may be exercised after their death by their closest relatives. This means that after the death of an aggrieved party their closest relatives may generally replace them in the exercise of such rights and not only when the aggrieved party had exercised any of them before their death in any scope as provided for by the law²³. The group of closest relatives should be determined on the basis of Article 115(11) CCP²⁴. The persons who may exercise the rights an aggrieved party has in criminal proceedings in case of their death, apart from the closest relatives, also includes their dependants, i.e. persons the aggrieved party had a legal duty to maintain as well as persons actually maintained by them during their lifetime. In a situation when, during a criminal trial, information has been obtained about the existence of a relation closest to the deceased aggrieved party but it is not possible to determine their whereabouts and to effectively serve on them the statements of the case, in particular those providing guidance on their rights (Article 52(2) CCP), that state of affairs should be deemed equivalent to a situation when the closest relatives “are absent or undisclosed” within the meaning of Article 52(1) *in fine* CCP. This, in turn, entitles the state prosecutor to exercise the rights of the aggrieved person, including also the right to submit a motion for criminal prosecution in case of offences prosecuted upon motion²⁵. The rights of the aggrieved party referred to in Article 52(1) CCP are not hypothetical. They do not constitute a set of rights a potential aggrieved party enjoys in a model criminal trial, but they are treated as a sum of rights held by a specific aggrieved party (a private prosecutor) in a criminal trial they are a party to. It is, therefore, imperative from the point of view of the rule of law that the exercise of such rights be assured.

The prosecutor acting as the public interest advocate may join the prosecution (opt in) if the case has been withdrawn by a subsidiary private prosecutor (Article 57(2) CCP), upholding the case and allowing the court to rule as to the criminal responsibility of the accused, despite the aggrieved party who initiated the judicial proceedings by filing the indictment (so-called subsidiary indictment) resigning from prosecution. This concerns such a procedural situation when, for lack of a public action due to double refusal to institute pre-trial proceedings or discontinuation of such proceedings, the

²³ Judgment of the Warsaw Court of Appeal of 7 April 2014 (II AKa 74/14), LEX No. 1459083.

²⁴ The closest relations are: spouses, ascendants (parents, grandparents, great-grandparents), descendants (children, grandchildren, great-grandchildren), siblings, relatives by marriage in the same line or degree, person in adoptive/adoption relationships and their spouses as well as cohabitants (life partners).

²⁵ Judgment of the Supreme Court of 21 January 2014 (V KK 247/13), OSNKW 2014/6, item 48.

aggrieved party within the prescribed time submits to the court their own (subsidiary) private bill of indictment, thus becoming a subsidiary private prosecutor and acquiring a prosecutor's rights. A state prosecutor who originally refrained from taking a public action may, however, join the judicial proceedings and take charge of the indictment, in which case the aggrieved party who instituted the proceedings by their own action will become an accessory auxiliary private prosecutor (acting in the trial alongside the state prosecutor who assumes the role of the public prosecutor). If, during the proceedings, the accessory prosecutor has abandoned the prosecution and the public prosecutor had not taken part in such proceedings, the court notifies the state prosecutor in his or her capacity of a public interest advocate about a possibility to opt in and take over the prosecution. Failure on the part of the state prosecutor to join the proceedings within 14 days of the notification results in their discontinuation. The legislator has provided a possibility for the court to hear the case and rule about the accused party's criminal liability if the state prosecutor in his or her capacity as the public prosecutor does not take action, provided that the aggrieved person has made their own subsidiary indictment in a correct manner²⁶. Secondly, the law provides – in the public interest – for an opportunity to continue the trial if the aggrieved party (already acting as a subsidiary auxiliary private prosecutor) resigns from the prosecution. Continuation of the trial is possible only when a state prosecutor has taken over the prosecution and, in accordance with the accusatorial principle, will perform the function of a public prosecutor. The said regulation shows very clearly the multitude of roles played by a state prosecutor in a criminal trial. The dominant role is the role of a public prosecutor but, in accordance with his or her task to uphold the rule of law, a state prosecutor should allow the court to administer justice and to rule on the criminal law consequences of a prohibited act. In the Polish model of criminal trial a court does not act *ex officio*. No action (e.g. no bill of indictment) on the part of an authorised prosecutor is a condition barring any legal action in court that would necessarily result in discontinuation of criminal proceedings (Article 17(1)(9) CPP). The principle of adversarial procedure embedded in that model is reflected in the separation of the trial functions (prosecution, defence, and adjudication) performed by the parties to the proceedings – to the trial (a state prosecutor, the accused) and the court. Lack of a prosecuting party makes it impossible to conduct or continue the proceedings, because the tripartite structure of a criminal trial becomes disrupted.

4. Social interest as a legally undefined value in procedural criminal law

Assigning to a state prosecutor as a state authority the role of a public interest advocate and imposing on him or her the duty to uphold the rule of law does not conflict with the prosecutor's role of a social interest advocate. In literature, even in the case law, those two concepts are frequently confused, just as the criminal trial functions they refer to. The social interest advocates, unlike the public interest advocates, have the right to participate in criminal proceedings and their purpose is clearly defined, i.e. to protect the social interest or an important individual interest. That function is performed by three entities, namely the state prosecutor (however only in private

²⁶ E.g. prepared in an appropriate form, within the prescribed deadline and meeting the obligation requiring the party to be represented in a court of law by a lawyer. See: Articles 55 and 330 CCP.

action proceedings: Article 60(1) CCP), a representative of a community organization (Article 90 CCP) and pursuant to the latest Supreme Court Act²⁷, a social interest advocate in proceedings instituted in an extraordinary action (Article 89(1) in conjunction with Article 93(1) of the Supreme Court Act). The determination of the scope of cases and persons that are accorded protection under the “social interest” banner indicates that the two concepts are different. As far as the edition and interpretation of a legal text are concerned, we are undoubtedly dealing with an indefinite term, a general clause. It is used, for example, in the provision allowing the state prosecutor (in his or her role as the social interest advocate) to take up public prosecution in cases otherwise requiring private action. This may take place by means of both initiating pre-trial proceedings with regard to such an act or by joining proceedings instituted by the aggrieved party who, having made a private indictment, obtained the status of a private prosecutor (Article 60 CCP). What allows the state prosecutor to intervene and join private action proceedings is the condition that a social interest requires so²⁸. The court has no authority to assess such circumstances and, if a state prosecutor in his or her role of a social interest advocate has decided to take over a private prosecution case, the proceedings become a public action and the state prosecutor acquires the right of a public prosecutor, the private prosecutor becoming an accessory auxiliary prosecutor. A judgement to the contrary, i.e. a conclusion that no social interest requires protection, results in mandatory self-recusal of the state prosecutor from the trial and his or her abandonment of the indictment. In consequence, an intervention of the state prosecutor is a duty and not a right, as long as there is a need to protect a set of values described to by the legislator as social interest. In the procedural law literature, there is no consensus as to what set of values can be covered by that clause and what difference there is compared to public interest. Kazimierz Marszał identified three groups of factors making an intervention of a state prosecutor in private action proceedings necessary. These are all circumstances related to the *actus reus* of the offence or the perpetrator (e.g. hooliganism, exceptionally vexatious *modus operandi* of the perpetrator, significant damage etc.), circumstances related to the aggrieved party, as long as they go beyond the *actus reus* of the offence (e.g. helplessness, disability, dependence on the perpetrator), and violation of relevant provisions in pending private action proceedings²⁹. The starting

²⁷ Act of 8 December 2017 on the Supreme Court (Polish title: Ustawa z 8.12.2017 r. o Sądzie Najwyższym, tekst jedn.: Dz. U. z 2019 r. poz. 825).

²⁸ Article 69(1) of the Polish Code of Criminal Procedure of 1928 made the intervention of a state prosecutor in private action proceedings dependent on whether the case concerned **public interest**. In the contemporary context, the Supreme Court has ruled that “interest” means an existing or future material good or personal good or else an “ideal good” related to the organization and correct functioning of community life. “Public” was the collective interest of a public organization, the state or the local self-government or – in more general terms – the community life; “private” was a synonym of “specific individual”. Cf. judgment of the Supreme Court of 31 May 1933 (2 K 285/33), OSN (K) 1933/8, item 157. Article 50(1) of the Code of Criminal Procedure of 1969 justified the intervention of a state prosecutor similarly as the current code does, by reasons of social interest.

²⁹ K. Marszał, *Ingerencja prokuratora w ściganie przestępstw prywatnoskargowych w polskim procesie karnym* [Eng. *State Prosecutor's Intervention in the Prosecution of Offences Prosecuted in Private Action Proceedings in the Polish Criminal Trial*], Warszawa 1980, p. 32. Similarly: K. Dudka, M. Mozgawa, *Ingerencja prokuratora w przestępstwa prywatnoskargowe. Raport Instytutu Wymiaru Sprawiedliwości* [Eng. *State Prosecutor's Intervention in Offences Prosecuted in Private Action Proceedings. Report by the Institute of Justice*], Warszawa 2010, unpubl. Views of other legal scholars are quoted by: A. Matusiak, *Pojęcie interesu społecznego jako przesłanka udziału prokuratora w postępowaniu* [Eng. *Concept of Social Interest as an Indication for the State Prosecutor's Participation in the Proceedings*], “Zeszyty Prawnicze” 13/3, pp. 147–164. The author attempts to compare the poorly-defined terms of social interest and public interest and to assess the scope of their meaning; however in the conclusion of her analyses, she confines herself to the statement that if a rational legislator uses those two concepts, they must have different meanings, without taking a clear position on this matter.

point for understanding the phrase “social interest” is the common good, which is often opposed to the good of an individual. However, the values protected as social interest are, in essence, those that relate to many non-individualized addressees, who in this approach are treated as a collective entity. It is, therefore, difficult to assert that in the event of a conflict of values, overriding importance should be given to those protected in the context of social interest. The legislator clearly notices this fact by referring in the CCP to the categories of “interest of the parties”, “interest of a participant in the proceedings” or “important individual interest” (to name a few).

5. Conclusions

In conclusion, it should be affirmed that currently, under the Polish procedural criminal law, the set of values covered by the term “public interest” only seemingly is not reflected in the provisions of the CCP. In that statute, the legislator no longer uses that indefinite term, although many general clauses are still used, including the “social interest” clause. An analysis of cases in which reference is made to judgements that relate to a set of values outside of the legal system and concern the social interest demonstrates that, in fact, these two conceptual categories may not be equated and should not be used interchangeably. They are certainly not synonymous terms. Although the term “public interest” is no longer a statutory term under the CCP, given the fact, however, that it expresses values such as respect for the law and the rule of law, it should be assumed that by proper shaping of the criminal trial model and ensuring that entities performing the role of public interest advocates participate in it, these values are – at least potentially – protected. The goals of the criminal trial identified by the axiological determinants specified in this study are strictly tied to the premises and ideas of criminal justice³⁰, which, in turn, serve not only to combat crime but also to uphold the rule of law. Key importance must be attributed here to state prosecutors who, in their capacity of public interest advocates and in order to properly discharge their duty to uphold the rule of law, should maintain organizational independence and procedural impartiality, a fact which should be particularly remembered nowadays, in the times of intensive regulatory changes.

Is “Public Interest” a Conceptual Category of Contemporary Polish Procedural Criminal Law?

Abstract: This study aims at presenting conceptual category named “public interest” under the Polish procedural criminal law. The concept of “public interest”, which is the subject of this analysis, is treated as an indefinite term, functioning as a general clause, whose the task of which is to render a legal text more “flexible” by referring to a set of values outside of the system.

The term “public interest” is no longer used in the provisions of the Code of Criminal Procedure. The legislator still uses many other general clauses, including the “social interest” clause. The analysis of cases in which this clause is used shows that, in fact, these two conceptual categories may not be equated, should not be used interchangeably, and are not synonymous.

³⁰ A. Murzynowski, *Istota i zasady procesu karnego* [Eng. *The Essence and Principles of the Criminal Trial*], Warszawa 1994, p. 61.

Although the term “public interest” is no longer a statutory term under the Code of Criminal Procedure, given the fact that it expresses values such as respect for the law and the rule of law, it should be assumed that by proper shaping of the criminal trial model and ensuring that entities performing the role of public interest advocates participate in it, these values are – at least potentially – protected. State prosecutors, in their capacity of public interest advocates and in order to properly discharge their duty to uphold the rule of law, should maintain organizational independence and procedural impartiality.

Keywords: procedural criminal law, general clause, public interest, public interest advocate, social interest advocate, state prosecutor

BIBLIOGRAFIA / REFERENCES:

- Choduń, A. (2013). Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym. Wybrane zagadnienia teoretyczne. In A. Choduń, A. Gomułowicz, A. Skoczylas (Eds.), *Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym. Wybrane zagadnienia teoretyczne i orzecznicze*. Warszawa: Wolters Kluwer,
- Dudka, K., Paluszkiewicz, H. (2018). *Postępowanie karne*. Warszawa: Wolters Kluwer Polska.
- Dudka, K., Mozgawa, M. (2010). Ingerencja prokuratora w przestępstwa prywatnoskargowe. In *Raport Instytutu Wymiaru Sprawiedliwości*. Warszawa: unpublished.
- Malinowski, A. (2008). *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*. Warszawa: LexisNexis
- Marszał, K. (1980). *Ingerencja prokuratora w ściganie przestępstw prywatnoskargowych w polskim procesie karnym*. Warszawa: Wydawnictwo Prawnicze
- Matusiak, A. (2013). Pojęcie interesu społecznego jako przesłanka udziału prokuratora w postępowaniu. *Zeszyty Prawnicze* 13/3, 151–164.
- Olszewski, R. (2014). Role prokuratora w procesie karnym. *Prokuratura i Prawo* 1, 43–60.
- Stefański, R. (2018). Role prokuratora jako organu procesowego. In Z. Kwiatkowski (Ed.), *System prawa karnego procesowego, t. 5*. Warszawa: Wolters Kluwer Polska.
- Szot, A. (2016). Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa. *Annales UMCS G/LXIII*, 291–293.
- Wyrzykowski, M. (1986). *Pojęcie interesu społecznego w prawie administracyjnym*. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.
- Zieliński, M. (2006). *Wykładnia prawa. Zasady, reguły, wskazówki*. Warszawa: LexisNexis.
- Żelechowski Ł. (2012). Kolidzja interesu prywatnego i publicznego w prawie własności przemysłowej. In T. Giaro (Ed.) *Interes publiczny a interes prywatny w prawie*. Warszawa: Wydawnictwo Stowarzyszenia Absolwentów WPiA Uniwersytetu Warszawskiego.