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A measure of coercion involving the deprivation of liberty in the form of detention – on the example of the provisions of art. 243 CCP and art. 244 CCP

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Summary: The publication deals with the issue of the use of detention in criminal proceedings. It was discussed on the example of provisions of art. 243 CCP and art. 244 CCP, the first of which concerns the so-called "civil approach" and other concerns the so-called "process detention". Bearing that in mind, the issue of detention as a means of coercion was discussed firstly and foremost, and then the specific prerequisites of the codex, which determine the legal application of this coercive measure were presented.

The publication also discussed the issue of judicial review of the legitimacy, legality and regularity of the trial detention and the issue of possible claims of the detained to the Treasury in connection with manifestly unjustified detention. The last issue addressed in this article is the question of deduction of trial detention from criminal punishment of a sentenced.

Key words: detention, custody, process detention, suspect, detention report, suspect's statement, manifestly unjustified detention, deduction.

Środek przymusu polegający na pozbawieniu wolności w postaci zatrzymania – na przykładzie przepisów art. 243 k.p.k. i art. 244 k.p.k.

Streszczenie: Publikacja dotyczy problematyki stosowania w postępowaniu karnym instytucji zatrzymania. Omówiono ją na przykładzie przepisów art. 243 k.p.k. i art. 244 k.p.k., z których pierwszy dotyczy tzw. „ujęcia obywatelskiego", a drugi tzw. „zatrzymania procesowego". Mając powyższe na uwadze w pierwszej kolejności omówiono ogólnie kwestię zatrzymania, jako środka przymusu procesowego, a następnie przedstawiono kodeksowe przesłanki szczególne, jakie warunkują legalne zastosowanie tego środka przymusu.

W publikacji poruszono także kwestię sądowej kontroli zasadności, legalności i prawidłowości zatrzymania procesowego i kwestie ewentualnych roszczeń zatrzymanego do Skarbu Państwa w związku z oczywiście bezzasadnym zatrzymanie. Ostatnim zagadnieniem,

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jakiego dotyczy artykuł jest kwestia zaliczenia zatrzymania procesowego na poczet wymierzonej skazanemu kary kryminalnej.

Słowa kluczowe: zatrzymanie, ujęcie obywatelskie, zatrzymanie procesowe, osoba podejrzana, protokół zatrzymania, oświadczenie osoby podejrzanej, oczywiście bezzasadne zatrzymanie, zaliczenie.

1. Introduction

The criminal process is a legally regulated activity aimed at detecting and determining a criminal act and its perpetrator, to judge him for that act and, possibly, to enforce a penalty and other means of criminal reaction. Its primary subject is the question of criminal liability, sometimes the civil one, of the accused (of a suspect) with a criminal act[2]. The aim of the criminal process is, however, the implementation of the rules of substantive criminal law[3]. Two basic objectives of the criminal process can be distinguished, that is the achievement of state of material justice by rightful application of the norm of substantive criminal law and sometimes substantive civil law, and achieving procedural fairness, which involves making the person, against whom the process is being held, believe that trial organs did everything to ensure that justice has been served[4].

The necessity to ensure the proper administration of justice in the field of criminal matters requires securing a proper and organized course of criminal proceedings, enabling the court and law enforcement authorities to carry out all necessary procedural steps to detect (according to the material truth) the offender and to punish his act justly. Both the entire criminal proceeding and a series of individual procedural acts performed in its course by necessity, to a greater or lesser extent, enter the field of personal or property rights of persons covered by the proceedings. The criminal procedural law establishes a number of legal means by which the court and law enforcement authorities can, by applying a certain legal compulsion[5], secure the proper conduct of the criminal trial and perform all necessary activities in it[6].

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2 W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne* [Criminal law. General issues], Vol I., Bydgoszcz 1999, p. 16.

3 M. Cieślak, *Postępowanie karne. Zarys instytucji* [Criminal proceedings. Outline of the institution], Warsaw 1982, p. 8.

4 S. Waltoś, *Proces karny. Zarys systemu* [Penal process. Outline of the system], 9th edition, Warsaw 2008, p. 16-17.

5 „[…]Coercive measures are mainly used: a) when searching, obtaining and securing evidence (searching, collecting items, stopping correspondence, and shipments, etc.); b) as a means of securing the suspect/accused person for the administration of justice (search, detention, preventive measures); c) in order to enable performing (execution) of a fine, forfeiture, penalty for securing claims [...] (temporary seizure of movable property, security on property); d) in order to ensure the appearance of the persons summoned and fulfill all the procedural obligations (compulsory enforcement, punitive measures applied to a witness, expert, interpreter, etc.); e) in order to maintain the authority of the court (expulsion from courtroom, punishment with procedural penalty, etc.)". (T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceedings], 7th edition, Warsaw 2009, p. 523).

6 A. Murzynowski, *Areszt tymczasowy oraz inne środki zapobiegawcze uchylaniu się od sądu* [Pre-trial detention and other preventive measures against evasion], Warsaw 1963, p. 11-12.

The form and type of coercive measure depend on specific tasks which are to be implemented in a given proceeding[7].

The provision of art. 31 par. 1 of the Constitution of the Republic of Poland[8] indicates that human freedom is subject to legal protection. Everyone is obliged to respect the freedoms and rights of others. No one can be forced to do what the law does not command him. Restrictions on the use of constitutional freedoms and rights may be established only in law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morals, or the rights and freedoms of others. These limitations can not affect the substance of freedoms and rights.

By personal freedom the doctrine of constitutional law understands "... the ability of the individual to freely determine his behavior, both in public and private life, unlimited by any other human factors"[9]. [...] its manifestation is the possibility of the individual to change their place of residence freely[10].

The right to personal freedom is one of the most important human rights. Personal freedom has no absolute dimension[11]. For this reason, the legislator has made its constitutionalization, but also introduced the detailed regulations regarding the protection of this right, and listed in what circumstances it may be limited[12]. According to art. 41 par. 1 of the Constitution of the Republic of Poland, everyone is guaranteed personal inviolability and personal freedom. Deprivation or restriction of liberty may only take place under the terms and in the mode specified in the Act. The right to personal freedom of man (Article 5, 31 paragraph 1 of the Constitution of the Republic of Poland) is therefore not a supreme and absolute category. It is subject to limitations that are necessary in a democratic state because of public security interests, protection of public order or protection of rights and freedoms of other people. These restrictions are specified in the Constitution of the Republic of Poland (Article 31 paragraph 3 and Article 41 paragraph 1 of the Constitution of the Republic of Poland), and also in the provisions of international law ratified by Poland, i.e. the International Covenant on Civil and Political Rights[13] (Article 9) and the European Convention for the Protection of Human Rights and Fundamental Freedoms[14] (Article 5). The abovementioned provisions allow deprivation of liberty or its limitation, though only on terms and in the mode specified in the Act[15].

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7 T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceedings], op. cit., p. 525.

8 "Journal of Laws" 1997, No. 78, item 483 with changes.

9 P. Sarnecki, *Commentary to the art. 42 of the Constitution of the Republic of Poland*, [in:] L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Comment], Warsaw 2003, p. 110.

10 P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Commentary to the Constitution of the Republic of Poland of April 2, 1997], Warsaw 2000, p. 60.

11 Constitutional Court's judgment of 11.06.2002, SK 5/02, OTK ZU 2002, No. 4 / A, item. 41.

12 Constitutional Court's judgment of 10.07.2000, SK 21/99, OTK ZU 2000 No. 5, item. 144.

13 Journal of Laws from 1997, No. 38, item 167.

14 Journal of Laws from 1993, No. 61, item 284.

15 A. Ważny, *Przeludnienie w jednostkach penitencjarnych a naruszenie Konstytucji* [Overcrowding in penitentiary units and violation of the Constitution], "Prokurator" 2008, nr 1, p. 91.

Coercive measures in the applicable Code of Criminal Procedure[16] were primarily regulated in Section VI of the Act (Articles 243-295 of the CCP), which included provisions regarding: detention, preventive measures, search for a suspect/accused and arrest warrant, writ of protection, penalties for breach of order and property security.

Detaining a person is a procedural means of coercion consisting in the actual short-term deprivation of liberty. "[...] As an institution of criminal procedural law, detention enters the field of civil rights and freedoms protected in Poland not only by law, but above all by constitution. The provision of art. 41 par. 1 of the Constitution of the Republic of Poland stipulates that deprivation or restriction of liberty may only take place under the terms and in the mode specified in the Act. [...] The Code of Criminal Procedure is one of those laws that specifies the circumstances on the basis of which a person may be detained, the procedure for the use of this coercive measure and the rights and guarantees of a detainee"[17].

2. Detention: definition and types

Detention, regulated in Chapter 27 of the Code of Criminal Procedure, belongs to the means of coercion of criminal process, which results from the location of the provisions of this chapter in Section entitled "Coercive measures". Detention is a temporary, short-term deprivation of liberty of a suspect by a person or authority authorized to do so[18]. At the time of detention, there is a relationship of dependence between the person who performs this activity and the detainee, since the latter one must comply with the orders related to the detention up until the release[19].

Detention serves a clear procedural purpose by "securing" the suspected person for criminal proceedings. This proceeding function of detention has caused some representatives of the doctrine to define it as a preventive measure in the broad sense[20] or as a special measure of a provisional nature and subsidiary to other preventive measures[21]. This position does not seem to be correct. It should be emphasized that the Code of Criminal Procedure clearly distinguishes detention (Chapter 27) from

[16] Journal of Laws from 2016, item 1749.

[17] B. T. Bieńkowska, *Instytucja zatrzymania w rosyjskim procesie karnym – wybrane zagadnienia. Rozważania na tle polskiego Kodeksu postępowania karnego* [Institution of detention in the Russian criminal trial - selected issues. Considerations against the Polish Code of Criminal Procedure], [in:] Problemy współczesnego prawa karnego [Problems of contemporary criminal law], Part I, Beck C.H. 2016, Legalis; R. A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego* [Detention according to the new Code of Criminal Procedure], "Prok. i Pr." 1997, No 10, p. 33.

[18] Order of the Supreme Court of 26.02.2004, I KZP 44/03, OSNKW 2004, No. 3, item 34; judgment of the Court of Appeal in Białystok of 23.02.2016., II 221/15, Lex 2,016,261.

[19] Judgment of the Supreme Court of 29/04/1983, Rw 327/83, OSNKW 1984, No. 1, item 14; R. A. Stefański, *Glosa to the Supreme Court decision of 30 April 2004*, WK 8/04, WPP 2004, No. 4, p. 139.

[20] S. Waltoś, *Proces karny. Zarys systemu* [Penal process. Outline of the system], op. cit., p. 374; A. Murzynowski, *Areszt tymczasowy oraz inne środki zapobiegawcze uchylaniu się od sądu* [Pre-trial detention and other preventive measures against evasion], op. cit., p. 217.

[21] M. Cieślak, *Polska procedura karna* [Polish criminal procedure], Warsaw 1984, p. 401; K. Amelunga, K. Marszał (ed.), *Stosowanie środków przymusu w procesie karnym* [The use of coercive measures in a criminal trial], Katowice 1990, p. 53.

preventive measures (Chapter 28), providing as well separate procedure for appeal against the detention contained in Article 246 CCP.

This coercive measure should also be distinguished from sanctions for non-compliance with procedural obligations to which various participants of the criminal proceedings are subject and which may also consist of temporary, usually short-term deprivation of liberty. Measures enforcing the fulfillment of procedural obligations are the exclusive competence of the court, and in the preparatory proceedings - of the prosecutor. Limiting the matter to the accused person (suspect), it should be pointed out that in accordance with the regulation contained in art. 75 § 1 of the Code of Criminal Procedure, the accused (suspect) who remains at liberty, is obliged to attend every summons in the course of criminal proceedings and notify the authority conducting the proceedings of any change of his place of residence or a longer stay, all of which should be anticipated at the first hearing. Failure to comply with the abovementioned procedural obligations by unjustified contumacy may result in compulsory bringing (Article 75 § 2 CCP).

The measure enforcing compliance with the procedural obligation is also provided by the provision of art. 382 CCP, since in the event of unjustified failure of the accused to appear for the trial, whose presence is obligatory, the chairman orders the immediate bringing or interruption of the hearing for this purpose, or the court adjourns it. It is obvious that in situations provided for in art. 75 CCP and art. 382 CCP it may lead to a short-term deprivation of liberty (detention for the bringing of the suspect or accused)[22].

The trial detention is performed on the basis of art. 243 - art. 248 CCP to apply a preventive measure in the strict sense (in particular, temporary detention) or forcibly bring the suspect to the trial body in connection with the justified assumption of them having committed a crime[23].

As far as retention is concerned, the entitlements analogous to those held by the police, are held, within their properties, by officers of the Internal Security Agency[24] and the Border Guard[25]. In relation to persons subject to military jurisdiction, the right to detain, pursuant to art. 663 CCP and art. 664 CCP, was entrusted to the Military Police, military superintendent and military order authorities.

In the group of non-trial detentions, the following are distinguished:

- orderly (preventive) detention, used by the police on the basis of the Act of 6 April 1990 on the Police[26] towards persons who manifestly pose a threat to life, human health and property;
- penitentiary detention, provided for in art. 15 par. 1 point 2a of the Act on the Police in relation to persons deprived of their liberty by a court decision who, on the basis of an authorization, left the detention center or prison and did not

[22] Resolution of the Supreme Court of 19.07.1995, I KZP 24/95, OSNKW 1995, no. 9-10, item 56.

[23] S. Waltoś, *Proces karny. Zarys systemu* [Penal process. Outline of the system], op. cit., p. 405.

[24] Article 23 par. 1 point 3 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Journal of Laws of 2002, No. 74, item 676, amended).

[25] Article 11 par. 1 point 5 of the Act of 12 October 1990 on the Border Guard (Journal of Laws of 2002, No. 171, item 1399, amended).

[26] Journal of Laws from 2002 No. 7, item 58 with changes.

return to it within the prescribed period;
- administrative detention (so-called "sobering up"), used by the police pursuant to art. 40 par. 1 of the Act of October 26, 1982 on Upbringing in Sobriety and Counteracting Alcoholism[27] for a period of up to 24 hours against persons whose behavior gives cause for an offence in a public place or a workplace, and are in circumstances that threaten their lives or health or threaten the life or health of others;
- detention for a period not longer than 48 hours of a foreigner, applied on the basis of art. 394 par. 1 of the Act on Foreigners[28] by the Border Guard or the Police, in relation to a foreigner who is subject to circumstances justifying the decision to return, or who fails to fulfill the obligations set out in that decision, or fails to comply with the obligations set out in the order referred to in Article 3987 par. 3 of that act;
- detention, applied pursuant to art. 15 par. 1 point 1 of the Police Act, in order to determine the identity of the person;
- stadium detention, applied on the basis of 20 par. 1 point 5 of the Act on the Safety of Mass Events[29] by the law enforcement of the organizers at a mass event in order to immediately hand over persons posing a direct threat to the property entrusted to the protection and persons committing acts to the Police.

3. Capture of a suspect

According to the provision of art. 243 § 1 CCP anyone has the right to capture a person in the act of committing a crime or in a pursuit taken immediately after committing a crime, if there is a fear of their hiding or their identity cannot be determined. "[...] It can be assumed that the disposition resulting from art. 243 CCP is the right and moral duty of everyone who finds themselves in a specific factual situation. This regulation cannot be reduced to shifting the burden of prosecution of offenses to private persons, since the capture has a subsidiary character in regard to the actions of state bodies. The rationale of the legislation's provisions is to provide the citizen with the possibility of reacting to the violation of the legal order and securing the proper implementation of the criminal process"[30].

The act of capturing a person is common in nature. Any individual or a group of such individuals who has an objective possibility of detaining the offender is entitled to such action, regardless of their relationship to him or her, his or her nationality, function or profession[31].

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[27] Journal of Laws from 1982, No. 35, item 230 with changes.

[28] Journal of Laws from 2016, item 1990 with changes.

[29] Journal of Laws from 2015, item 2139 with changes.

[30] J. Kosonoga, *Przejawy udziału czynnika społecznego w procesie karnym – zagadnienia wybrane* [Showing the participation of the social factor in the criminal trial - selected issues], [in:] Studia i analizy Sądu Najwyższego [Studies and analysis of the Supreme Court], Vol IV, Ślebzak K. [ed.], Lex/2012; A. Mogilnicki, E. S. Rappaport E.S., *Kodeks postępowania karnego, Część II. Motywy ustawodawcze* [Code of Criminal Procedure, Part II. Legislative motives], Warsaw 1929, p. 196.

[31] W. Smardzewski, *Z problematyki ujęcia na gorącym uczynku* [From the issue of catching in the act], „Nowe

For the legitimacy of the concerned institution's application, the premises mentioned in the provision under consideration must be cumulative, i.e. the action against a detainee must be carried out in the act of committing a crime[32] (in flagranti crimine comprehensi), or in attempt to do so[33], or in a pursuit taken directly after committing a crime (quasi in flagranti crimine comprehensi). One can talk about catching in the act in a situation when the act of "capturing" begins when the perpetrator is in the process of committing the prohibited act or immediately after the end of the prohibited action, still in the moment when he or she is physically in the crime scene[34]. Chase, in terms of art. 243 § 1 CCP, should be understood as following the perpetrator whose criminal behavior was noticed in order to prevent him from getting away. The requirement of immediacy is also met when the perpetrator was not noticed at the crime scene, but it is possible to determine the direction of fleeing of the offender, whom the captor will have caught. The same will be the case when the eye contact with the perpetrator is lost during the chase. The chase time is not limited, it can last for several seconds or several minutes, or several days[35]. The pursuit, however, must be continuous and uninterrupted[36].

The condition for the legal capture of a person in the act of committing a crime or in a pursuit taken immediately after the commission of a crime is additionally one of two statutory premises in the form of fear of hiding of a person or inability to establish their identity.

The fear of hiding of a suspect must be justified, in such sense that it can be read from their behavior that their intention is to leave the crime scene suddenly and directly in order to prevent themselves from being brought to justice[37].

The inability to determine the identity of a suspect occurs when they are not known to the captor and do not carry documents on the basis of which it would be possible to determine their personal data (e.g. identity card, passport, driving license,

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Prawo" 1980, No 3, p. 46; T. Grzegorczyk, *Komentarz do art. 243 k.p.k.* [Commentary to art. 243 of CCP], [in:] Kodeks postępowania karnego. Komentarz [Code of Criminal Procedure. Comment], Vol I, Lex/2014.

32 „[…]In art. 243 of CCP it is about committing a crime, not a forbidden act. Therefore, the situation may be doubtful whether the act constitutes a crime because of the age of the perpetrator or his / her mental state. The action of the person who caught the suspect should then be assessed through the prism of art. 29 of CC, that is, a mistake whichm depending on the circumstances, may be justified or not." (J. Kosonoga, *Przejawy udziału czynnika społecznego w procesie karnym – zagadnienia wybrane* [Showing the participation of the social factor in the criminal trial - selected issues], op.cit., Lex/2012).

33 A. Bafia, J. Bednarzak, M. Fleming, S. Kalinowski, H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Comment], Warsaw 1971, p. 244.

34 K. L. Paprzycki, *Komentarz do art. 243 k.p.k.* [Commentary to art. 243 of CCP], [in:] Kodeks postępowania karnego. Komentarz [Code of Criminal Procedure. Comment], Vol. III, K. L. Paprzycki, J. Grajewski (ed.), Lex/2003; J. Kościerzyński, *Zatrzymanie lub tymczasowe aresztowanie sprawcy przestępstwa ujętego na gorącym uczynku a dopuszczalność rozpoznania sprawy w postępowaniu uproszczonym* [Detention or temporary arrest of the perpetrator in the act of committing an offense and admissibility of considering the case in simplified proceedings], „Prok. i Pr." 2005, No 2, p. 38.

35 Judgment of the Court of Appeal in Szczecin of 03.07.2008, II AKa 78/08, OSA 2010, No. 6, p. 3.

36 R. A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego* [Detention according to the new Code of Criminal Procedure], op. cit., p. 32.

37 Order of the Supreme Court of 17 April 2008, WZ 27/08, OSNwSK 2008, No. 1, pos. 926; A. Bulsiewicz, *Środki przymusu polegające na pozbawieniu wolności uczestników procesu karnego na tle przemian ustrojowych w Polsce (1989-1990)* [Coercive measures involving the deprivation of liberty of participants in the criminal process in the light of political changes in Poland (1989-1990)] "St.Iur.Torun" 2001, No 1, p. 200.

etc.)[38]. "[...] if it turns out that a perpetrator caught in the act or during a chase is a local resident, settled, with a permanent occupation and by his social position provides even a relative warranty, that he will not hide, the private persons who capture him, lose the basis to continue the capture and should immediately release him, limiting themselves by a check-in with the police or the prosecutor"[39].

The legislator did not directly settle the duration of the actual deprivation of liberty of a captured person until he/she is handed over to the police. The guarantee norms of art. 248 § 1 and 2 CCP, which explicitly specify the period of detention by authorized services, do not apply to the "capture". In § 2 of the provision of art. 243 CCP the obligation to immediately hand over the detainee to the police was imposed. "Immediately" should be understood as "without unreasonable delay" and not "instantly." Therefore, it is possible to procrastinate with the handing over an offender to a police officer, but there must be a strong basis for it (for example, capturing a suspect in a place where direct contact with the nearest Police unit was prevented). Otherwise, the detainer may be prosecuted under Art. 189 CC (deprivation of liberty) or art. 191 CC (forcing).

In the case where the detainee is resisting the "capture", it is permissible to apply physical strength to an extent that does not exceed the need to detain them. The situation, on the other hand, when a suspect resists the capture, cannot be classified as a justification for necessary defense[40].

After handing over the detainee to the police, in case of coming about of the premises of art. 244 § 1 CCP, they are being detained, in the absence of such premises they should be released immediately. In the first case, the capture transforms into a proper detention. The refusal of the police to receive the detainee should be treated as an immediate order to release them[41].

The "capture" is not a procedural act and therefore cannot be appealed to the court on the basis of art. 246 CCP. Only when the police "maintains the state of detention", the detainee has the right to lodge a complaint - for detention by this body, but not for the pre-emptive capture, which is subsidiary in relation to a proper trial detention[42].

4. Procedural detention

Detention is a means of criminal processing coercion. It boils down to the temporary deprivation of liberty of a person suspected of committing a crime for

[38] K. Eichstaedt, *Czynności sądu w postępowaniu przygotowawczym w polskim prawie karnym* [Court actions in preparatory proceedings in Polish criminal law], Warsaw 2008, p. 299.

[39] R. A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego* [Detention according to the new Code of Criminal Procedure], op. cit., p. 40.

[40] Judgment of the Court of Appeal in Krakow from June 22, 2006, II AKa 87/06, Lex No. 208179.

[41] R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna* [Criminal trial. The general part], Warsaw 2009, p. 247.

[42] A. Zachuta, *Wybrane relacje pomiędzy KPW i KPK w zakresie procesowych zatrzymań uczestników postępowania karnego i postępowania w sprawach wykroczeń (po nowelizacji obu porządków procesowych)* [Selected relations between the CCM and CCP in the scope of trial detention of participants in criminal proceedings and proceedings in cases of misdemeanors (after the amendment of both procedural orders)], op. cit., p. 24.

a period not exceeding 72 hours and is to serve the purpose of the proceedings by "securing" them for the criminal trial[43]. In this regard, '[...] detention fulfills [...] a function similar to that of pre-trial detention, because it prevents [the suspect – author's note] in the earliest stage of the procedure of contacting other persons and transferring or accepting any objects without permission of the procedural authorities; thus, it protects the correct course of the proceedings"[44].

It should be pointed out that the legislator has endowed certain groups of entities with procedural (formal) immunity, which means that they cannot be detained or arrested without the consent of the competent legally authorized body. These are deputies and senators, general court judges, military court judges, Supreme Court judges, Supreme and Provincial Administrative Court judges, State Tribunal judges, Constitutional Court judges, prosecutors, Ombudsman, Supreme Chamber of Control President, Vice President and Supreme Chamber of Control Directors supervising or exercising control activities in relation to acts committed while performing official duties, the Inspector General for Personal Data Protection, the President of the Institute of National Remembrance, the Commission for the Prosecution of Crimes against the Polish Nation and entities possessing diplomatic immunity.

According to art. 41 par. 3 of the Constitution of the Republic of Poland, every detainee should be promptly and in a manner comprehensible to him/her informed of the reasons for detention. They should be handed over to the court within 48 hours of being detained. The detainee should be released if, within 24 hours after being transferred to the disposal of the court, they are not served with the court's decision on their detention along with the charges presented. In the case of detention in the mode of art. 244 CCP, handing over of a detainee to the court's disposal takes place along with the prosecutor's request for pre-trial detention[45]; in the case of accelerated proceedings from the moment of filing to the court the application for the recognition of a case in this mode, which replaces the indictment (Article 517b § 9 CCP). An alternative in both cases is the release of detainee after 48 hours from detention[46].

In the legal literature, certain types of "detention" are distinguished, primarily due to the criterion of the "purpose" which it is to serve. For the sake of terminological clarity (in view of various "arrest" classifications due to this criterion) it should be

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[43] J. Grajewski, *Przebieg procesu karnego* [The course of the criminal process], Warsaw 2008, p. 122; R. Zdybel, *Zatrzymanie procesowe w świetle kodeksu postępowania karnego oraz praktyki organów ścigania* [Detention in the light of the Code of Criminal Procedure and the practice of law enforcement agencies], "PS" 2003, No 9, p. 86; S. Waltoś, *Proces karny. Zarys systemu* [Criminal trial. Outline of the system], op. cit., p. 374; A. Murzynowski, *Areszt tymczasowy oraz inne środki zapobiegawcze uchylaniu się od sądu* [Pre-trial detention and other preventive measures against evasion], op. cit., p. 64-65, 217-231; M. Cieślak, *Polska procedura karna* [Polish criminal procedure], Warsaw 1984, p. 401; K. Amelunga, K. Marszał (ed.), *Stosowanie środków przymusu w procesie karnym* [The use of coercive measures in a criminal trial], op. cit., p. 53.

[44] K. Witkowska, *Gwarancje zatrzymanego* [Guarantees of the detainee], „Prok. i Pr." 2011, No 9, p. 81.

[45] P. Sarnecki, *Komentarz do art. 41 Konstytucji Rzeczypospolitej Polskiej* [Commentary to art. 41 of the Constitution of the Republic of Poland], [in:] L. Garlicki, M. Zubik (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Comment,], Vol. III, Lex/2016.

[46] „[…] From this regulation [Art. 41 par. 3 of the Constitution of the Republic of Poland in conj. from art. 248 § 1 CCP – author's note] it appears that:

assumed that detention is divided into procedural, preventive and administrative[47]. Detention in procedural terms consists in a temporary deprivation of liberty of a person, in the manner specified in the provisions of criminal procedure (Article 244 CCP and 45 of Code of Conduct in Offense Cases), in order to apply a preventive measure or enforced bringing of a suspect to the procedural body. Preventive custody prevents possible threats to public order and safety (takes place in accordance with Art. 15 par. 1 point 3 of the Police Act), and administrative custody serves to eliminate a specific threat posed by an intoxicated person to themselves or to public order (Article 40 of the Act on Upbringing in Sobriety and Counteracting Alcoholism) [48]. Short-term deprivation of liberty of a person not connected with the actual deprivation of liberty is not considered to be a trial detention, even if consisting in bringing them to the police unit in order to carry out an explanatory action, for example, establishing an identity or a specific evidential act[49].

According to art. 244 § 1 sentence 1 CCP "Police has the right to detain a suspect", this provision should be read in conjunction with art. 312 CCP pursuant to which the police's rights are also entitled to Border Guards, Internal Security Agency and Central Anticorruption Bureau, in the scope of their competence and to the other bodies provided for in specific regulations. In connection with the above, these authorities will also be able to make effective detentions within their jurisdiction.

Detaining a suspect will be a legally relevant act only if the following conditions are cumulatively met:

- reasonable assumption of a crime;
- there is a fear of the person escaping or hiding or smearing the evidence of the crime or its identity cannot be determined;
- there are indications for conducting accelerated proceedings against that person;
- there is a reasonable suspicion that they committed a violent crime to the detriment of a person living together with the offender and there is a risk that the

a) the detention should last no longer than the reasons for it; the detainee should be released immediately if the cause of detention ceases to exist (eg already after 2 hours);
b) if the detainee is not transferred to the court, his release must take place no later than in 48 hours;
c) the maximum period of full detention (including court detention) may not exceed 72 hours;
d) the law clearly distinguishes non-judicial and judicial detention, which means the inadmissibility of exceeding 48 hours by a retaining non-judicial body with the view that this occurs "at the expense" of subsequent judicial detention, which would then be shortened; similarly to another arrangement - it is unacceptable to exceed the deadline of 25 hours placed at the court's disposal, with reference to the fact that non-court detention lasted less than 48 hours in a given situation - even if in total the total deadline of 72 hours would not be exceeded; therefore, there may be situations where, for example, the transfer of a detainee before the end of 36 hours of detention will cause that the total detention time will not be longer than 60 hours " (T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceedings], op. cit., p. 530).

47 T. Bulenda, Z. Hołda, A. Rzepliński, *Prawa człowieka a zatrzymanie i tymczasowe aresztowanie w polskim prawie i praktyce jego stosowania [Human rights and detention and temporary detention in Polish law and the practice of its application] in Zatrzymanie i tymczasowe aresztowanie a prawa człowieka* [Detention and temporary detention and human rights], Hołda Z., Rzepliński A. (ed.), Lublin 1992, p. 27-31; S. Waltoś, Proces karny. Zarys sytemu [Criminal trial. Outline of the system], op. cit., p. 407.

48 Order of the Supreme Court of 26.02.2004, I KZP 44/03, OSNKW 2004, No. 3, item 34.

49 R. A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego* [Detention according to the new Code of Criminal Procedure], op.cit., p. 40.

person will again commit a violent offense against that person, especially if they threatened with such an offence before.

Only a "suspect" may be a subject to detention, i.e. a person who was not charged against or who was not questioned as a suspect, however, the law enforcement officer making the arrest, at the time of that act, has the scope of data which indicates a justified supposition that the suspect has committed a specific crime[50]. A suspect should be categorized as a participant in a criminal process who has a certain scope of rights and obligations, but is not a party of the trial[51].

The "supposition" is a subjective state, based on the possessed data, from which one can logically deduce that it is possible that what has been assumed has had occurred (in this case, that the person committed a crime). To be reasonable, it must be based on legitimate grounds (e.g. direct observation of a law enforcement official, testimonies of witnesses of the incident, evidence previously collected in the course of pending proceedings, etc.), and not only on unsupported guesses which cannot create the likelihood of committing a crime; in this way there must be real information that creates a presumption that a crime that could be qualified from a specific provision of the Criminal Code or another criminal act has actually been committed[52]. This concept therefore means the existence of data that would convince any objective observer that a person could have committed a criminal act[53].

Circumstances showing the "fear of escape or concealment" of a suspect appear primarily in the course of detention when the alleged offender attempts to escape or makes it impossible to identify himself[54]. A similar behavior should be applied to the behavior consisting in the lack of reaction of the suspect to the demands of the law enforcement body to comply with other orders. It should also be pointed out that the circumstance that makes the fear of escaping or hiding more likely is the lack of a permanent place of residence of the suspect or their nomadic lifestyle[55]. According to art. 248 § 1 CCP it should be stated finally that the possible reason for the detention due to the fear of escape or concealment will also be a severe

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[50] Decision of the Supreme Court of November 5, 2013, III KK 170/13, Legalis; P. Czarnecki, *Czy osobie podejrzanej przysługuje prawo do obrony? – przyczynek do krytycznej analizy zagadnienia w kontekście obowiązku poddania tej osoby badaniu alkomatem* [Is the suspect entitled to defense? - contribution to the critical analysis of the issue in the context of the obligation to subject the person to the test with a breathalyzer], [in:] A. Światłowski (ed.), Prawo do obrony: teoria a rzeczywistość [The right to defense: theory and reality], Krakow 2012, p. 85; S. Steinborn, *Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP* (uwagi de lege lata i de lege ferenda) [Status of a suspect in a criminal trial from the perspective of the Constitution of the Republic of Poland (comments de lege lata i de lege ferenda)], [in:] P. Kardas, T. Sroka, W. Wróbel (ed.), Państwo prawa a prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla [The rule of law and criminal law. Book of Jubilee of Professor Andrzej Zoll], Vol. 2, Warsaw 2012, p. 1757.

[51] B. Błoch, *Osoba podejrzana i podejrzany* [A suspect and a suspected person], [in:] P. Czarnecki, M. Czerwińska (ed.), Uczestnicy postępowania karnego w świetle nowelizacji procedury karnej po 01.07.2015 r. Komentarz praktyczny [Participants of the criminal proceedings in the light of the amendment of the penal procedure after 01/07/2015. Practical commentary], Legalis/2015.

[52] A. Bafia, J. Bednarzak, M. Fleming, S. Kalinowski, H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Comment], Warsaw 1971, p. 295.

[53] Judgment of the ECHR of 19 October 2000, case 27785/95 of Italy v. Poland, Lex No. 42800.

[54] Resolution of the Court of Appeal in Katowice of March 10, 2010, II AKz 145/10, Lex No. 603304.

[55] Ł. Cora, *Zatrzymanie osoby w polskim procesie ka*rnym [Detaining a person in a Polish criminal trial], Legalis/2015.

punishment for the alleged perpetrator of the crime[56].

The basis for detaining a suspect, due to the inability to establish their identity, occurs only when the law enforcement agency, after using all technical means possible to it (e.g. via a fingerprint database), will not be able to establish the details of the alleged offender[57]. This premise must therefore be of a lasting nature[58].

The premise of the fear of suspect illegally erasing the traces of the crime is to protect the good of the future or ongoing trial and any behavior of the detainee realize this premise, even of a concluding nature, which would indicate his willingness to create this effect (e.g. removing crime tools, removing fingerprints from them, hiding things from the crime scene)[59].

The specific prerequisite for the use of a procedural detention is the existence of grounds to conduct accelerated proceedings against the suspect[60]. According to art. 517b § 1 CCP accelerated proceedings can be applied to investigated cases in which the offender was caught in the act of committing the offense or immediately afterwards and within 48 hours was brought by the police and handed over to the court with an application to hear the case in expedited proceedings. The possibility of considering a case in an expedited procedure constitutes lex specialis in relation to the prerequisites for detention regulated in art. 244 § 1 CCP. Therefore, in order to detain this provision, there must not be a premise in the form of the fear of escaping or hiding of the suspect, as well as of the impossibility of establishing their identity[61]. By virtue of art. 6 of the Act of 10 June 2010 amending the Act on Counteracting Domestic Violence and certain other acts[62], another special detention[63], conditions were introduced in the Code of Criminal Procedure that apply to a suspect if they committed a violent crime to the detriment of a co-resident[64]. According to § 1a art. 244 CCP, the police has the right to detain a suspect if there is a reasonable suspicion that he or she has committed a violent crime to the detriment of a co-resident and there is a fear that he or she will again commit a violent crime against that person, especially if they have threatened with such an offense. The provision of art. 244 § 1b CCP constitutes, on the other hand, that police arrests a suspect if the offense referred to in § 1a has been committed using a firearm, knife or other dangerous object, and

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56 K. Eichstaedt, *Czynności sądu w postępowaniu przygotowawczym w polskim prawie karnym* [Court actions in preparatory proceedings in Polish criminal law], op. cit., p. 34.

57 T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceedings], op. cit., p. 527.

58 It should be emphasized that a short-term deprivation of liberty of a person not connected with real deprivation of liberty, even consisting in bringing a person to the Police unit for the purpose of an explanatory action, eg establishing its identity or a specific evidential act, such as taking a blood sample, is not a detention. (so the resolution of the Supreme Court of 06.21.1995, I KZP 20/95, OSNKW 1995, No. 9-10, pos. 59).

59 B. Hołyst, *Kryminalistyka* [Criminology], Warsaw 2004, p. 465.

60 K. Eichstaedt et al., *Postępowanie przyspieszone* [Accelerated proceedings], „Prok. i Pr." 2007, No 6, p. 73

61 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Comment], Warsaw 2011, p. 1338.

62 Journal of Laws of 2010, n. 125, item. 842.

63 The circumstances set out in § 1 of art. 244 CCP are not required for detaining a suspect under § 1a or § 1b of this provision. In this respect only the existence of a reasonable assumption of an offense committed by an established person with the use of violence and to the detriment of a person living with them is sufficient.

64 R. A. Stefański et al., *Zatrzymanie sprawcy przemocy w rodzinie* [Detaining the perpetrator of domestic Violetce], „WPP" 2010, No 4, p. 50.

there is a fear that he or she will again commit a violent crime against a co-resident, especially if they have threatened with such an offense.

"Crimes involving violence" are not only crimes that include the use of violence, but also such acts in which violence is used outside the scope of its constituent elements, but in fact they have been realized in terms of just such a course of action[65]. According to art. 2 par. 2 of the Act on Counteracting Domestic Violence, violence is a one-time or repeated intentional action or omission violating the rights or personal rights of family members, in particular exposing those persons to the risk of loss of life, health, violating bodily integrity, sexual freedom, damaging their physical or mental health, as well as causing suffering and moral harm to people affected by violence.

To apply a detention under art. 244 § 1a CCP the aggrieved party must be a person (permanently or temporarily) living together with the alleged perpetrator, in one residence. It should be noted, however, that the aggrieved party does not have to keep a joint household with the suspect[66]. Moreover, at the time of detention there must be a formal premise in the form of a justified fear that the detainee will again commit a crime using violence to the detriment of the same victim. This circumstance may stem, first of all, from the fact that the detainee has threatened the offended party to commit such an act. The detaining authority may also take it on other grounds, e.g. the aggressive behavior of the alleged offender.

The circumstance determining the Police's use of an obligatory detention of a suspect is that they committed a violent offense to the detriment of a co-resident using a firearm, knife or other dangerous object. Committing a crime, in the context of the provision of art. 244 § 1b of CCP should be understood as "high probability" of committing a crime, which is based on evidence that creates a state of probability close to certainty[67].

According to art. 7 par. 1 of the Act of 21.05.1999 on Firearms and Ammunition[68], firearms are any portable barrel weapons that shoot, intended for throwing or can be adapted to throw one or more bullets or substances as a result of the action of a propellant. In accordance with par. 1a of this provision, an adaptable to throwing object - within the meaning of this Act – which can shoot one or more bullets or substances as a result of the action of a propelling material is an object which, due to its structure or material from which it is made, can be easily converted into for throwing.

The Act considers battle weapons, hunting weapons, sporting weapons, gas

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[65] Judgment of the Supreme Court of 30.06.2009, V KK 71/09, Lex No. 512076; Judgment of the Court of Appeal in Wrocław of 08/10/2014, II AKa 282/14, Lex No. 1545003.

[66] T. Grzegorczyk, *Komentarz do art. 244 k.p.k.* [Commentary to art. 244 of CCP], [in:] Kodeks postępowania karnego. Komentarz [Code of Criminal Procedure. Comment], Vol. I, Lex/2014; R. A. Stefański, *Środek karny nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym* [Criminal order to leave the locality occupied jointly with the aggrieved party], „Prok. i Pr." 2011, No 2, p. 13.

[67] Resolution of the Court of Appeal in Warsaw of 01.06.2009, II AKa 98/09, "Prok. and Pr." 2010, No. 9, item 26; decision of the Court of Appeal in Warsaw of August 11, 2009, II AKz 1006/09, OSA 2012, No. 1, item 2; S. Pikulski, K. Szczechowicz, *Zatrzymanie i tymczasowe aresztowanie w świetle praw i wolności obywatelskich* [Detention and temporary detention in the light of civil rights and freedoms], Olsztyn 2004, p. 67.

[68] Journal of Laws of 2012 item 576 with changes.

weapons, alarm and signal weapons as firearms (art. 4 par. 1). Signal firearms are (as provided in art. 7 par. 2 of this Act) a reusable device which, as a result of the action of compressed gases created from the burning of propellant, is capable of firing from a barrel with a caliber of not less than 25 mm of substance in form of a pyrotechnic charge in order to create a visual or acoustic effect, while alarm firearms (according to the wording of Article 7 par.3 of this Act) is a multiple use device, which as a result of the action of compressed gases created from the burning of propellant, has an acoustic effect, and when fired from the barrel or the element replacing it, the substance strikes the target at a distance of no more than 1 m.

In the scope of the notion of "another object" similarly dangerous as a knife or firearm, it should be pointed out that this is not about the similarity of this other object to a knife or firearm, but the similarity of the danger resulting from the property of the object inherent in it. These would certainly be cutting objects (ax, cleaver, broken bottle, etc.), as well as objects with physical properties that can damage by their "ordinary" use (especially hitting or punching), e.g. crowbar, knuckle-duster, barbed wire, chain[69]. Thus, the danger potential of an object is limited to its properties, but only such that its normal, ordinary use directly threatens the danger to life. As the basis for the analysis of whether we are dealing with the subject referred to above, one should always take into account only the effects associated with the normal, ordinary use of the object, and not its use in a dangerous way. So it concerns only objects, normal use of each always creates a real threat to life[70].

The provision of art. 244 § 1b CCP applies to situations when a suspect uses an item listed in it. "Use" is a narrower concept than the "handling" of such objects[71]. The use of the object is actual application of the object (e.g. hitting with it), while the "handling" may be both the use and threatening with the object (demonstrating the readiness to use a weapon, knife or other dangerous object to overcome the resistance of the victim)[72].

As in the case of art. 244 § 1a CCP, the formal condition for the admissibility of the use of mandatory detention pursuant to § 1b of this provision, is the objective existence of a state of fear of a repeated offense by a detainee using violence against a cohabiting person. The above concern is about the likelihood of committing any violent crime, not just the use of firearms, knives or "other objects" similarly dangerous.

According to art. 244 § 2 - 4 CCP, a detainee should be informed immediately about the reasons for detention and his rights, including the right to use the help of a lawyer or legal advisor, to use the free assistance of an interpreter, if they do not speak Polish sufficiently, to make a statement and refuse to submit a statement, to receive a copy of the retention protocol, have access to first medical help and the

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69 Judgment of the Court of Appeal in Krakow of December 5, 2001, II AKa 269/01, Lex No. 56684.

70 Judgment of the Court of Appeal in Katowice of 13.12.2007, act II AKa 370/07, Lex No. 431046; judgment of the Court of Appeal in Wrocław of 21/03/2012, II AKa 33/12, Lex No. 1162854; judgment of the Court of Appeal in Katowice of 29.09.2011, II AKa 352/11, Lex No. 1102920.

71 Judgment of the Court of Appeal in Warsaw of 25/03/2015, II AKa 244/14, Lex No. 1843289; judgment of the Court of Appeal in Białystok of 09.10.2003, II AKa 266/03, KZS 2004, No. 2 item 44.

72 Judgment of the Supreme Court of September 30, 1975, VI KRN 33/75, OSNKW 1976, No. 1, item 3; judgment of the Supreme Court of 09.12.2002, II KKN 373/00, Lex No. 56921.

rights referred to in Article 245 CCP, art. 246 § 1 CCP and art. 612 § 2 CCP, as well as the content of art. 248 § 1 and 2 CCP, and also to be heard out (§ 2). A report is made out of detention in which the name, surname and function of the person performing the activity should be provided, the name and surname of the detained person, and in the case of impossibility of identifying - their description and day, time, place and reason for detaining with a crime the detainee is suspected of. The "hour of detention" should be understood as the moment of actual detention, and not the moment of bringing to the police station, and it seems to be not only about indicating the full hour, but also the minutes, since the detention time counts "from the moment of detention", and not "from the hour" during which it occurred (Article 248 § 1 CCP). The statements made by the detainee should also be included in the record with noting that he has been given information about his rights. A copy of the report is given to the detainee (§ 3). Immediately after detaining the suspect, the necessary data should be collected and the prosecutor should be notified. In case of the grounds referred to in art. 258 § 1-3, it is necessary to apply to the prosecutor regarding addressing the application for pre-trial detention to the court (§ 4). In addition, it should be immediately possible, at the request of the detainee to make contact with an attorney or legal counsel in an accessible form, as well as to enable direct talks with them; in exceptional cases, justified by special circumstances, the detainee may stipulate to be present at it (Article 245 § CCP).

Resulting from art. 244 § 2 CCP the information obligation on the part of the detaining authority towards the detained person has a significant guaranteeing character, which may affect the actual implementation of his defense rights. The essence of this right is obtainment of the information by the detainee provided for by law, and secondly, it is important, from the point of view of the ratio legis of this right, whether it will be effected by handing a written instruction, based on a formula specified in the executive regulation or by verbal instruction. In the latter case, the fact of detaining the detainee should be recorded in the report.

It should be emphasized that the detaining person, implementing the information obligation under Art. 244 § 2 CCP each time should take into account such circumstances as the psychological and physical state of the detainee, his intellectual development, or the extent of his knowledge of the Polish language. Therefore, the detainee's instruction about his rights and obligations should be carried out in such a way that is understandable to him and allows him to acquire all necessary knowledge in this regard, also with the use of the services of an interpreter[73]. The procedural rules governing detention impose on the detaining authority also the obligation to hear the detainee[74].

From the moment of detention, the suspect must have freedom of expression

[73] Ł. Cora, *Zatrzymanie osoby w polskim procesie karnym* [Detaining a person in a Polish criminal trial], Legalis/2015.

[74] „[…]Hearing a detainee and accepting a statement from him is not a trial hearing, which, in the light of art. 308 would mean not only initiation of criminal proceedings (if it was not already initiated earlier), but also initiation (referral) of proceedings against a specific person (detainee) who, from the start of the hearing, should be considered a suspect" (T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceedings], op. cit., p. 527).

as to the act with which he is being associated. According to art. 244 § 3 CCP the detention report must contain the statement made by the detainee. These statements are not explanations, because the detainee for whom the actions indicated in the provision of art. 71 § 1 CCP were not carried out, is not a suspect[75]. However, there are no contraindications to disclose them at the hearing in accordance with art. 393 § 1 of the Code of Criminal Procedure, which provides that it is allowed to read protocols of inspection, search and detention of things, opinions of experts, institutes, establishments or institutions, criminal records, the results of the social inquiry and all official documents submitted in preparatory or court proceedings or other proceedings provided for by law. Indisputably, the retention report is an official document submitted to the files of the pre-trial investigation. On the basis of this evidence, however, it is not allowed to make factual findings contrary to the defendant's explanations or witnesses against whom detentions have been carried out, as it would legitimize informal evidence or testimony in a situation where its conduct in the form prescribed by the law of proof is strictly required as a legal basis for the settlement of criminal responsibility[76]. On the other hand, there are no procedural obstacles to use the detainee's statement in the record of detention, to use evidence alongside the witness's accusations or testimonies in order to confirm and supplement explanations or testimonies provided that he does not deny these explanations or testimony, or to verify that explanation or testimony if there is a need to explain the differences between their content[77].

The detainee's statements made in the course of the hearing, which are included in the detention report, cannot result in him being held responsible for false confessions[78]. Like a suspect, a detainee has no obligation to provide evidence to his disadvantage - nemo se ipsum accusare tenetur (Article 74 § 1 CCP in fine)[79].

Judicial review of the application of the detention was introduced by the Act of 29 May 1989 with the amendment of some criminal law provisions[80]. Currently, the provision of art. 246 § 1 CCP states that the detainee is entitled to appeal to the court. A complaint about detention is lodged within 7 days[81], through the authority that ordered or detained, and if the detainee is no longer deprived of liberty - directly

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75 A. Murzynowski, *Faktycznie podejrzany w postępowaniu przygotowawczym* [The actually suspected person in preparatory proceedings], „Pal." 1971, No 10, p. 36.

76 Judgment of the Supreme Court of 06.10.2009, II KK 83/09, Lex No. 532383.

77 Order of the Supreme Court of 22.02.2007, V KK183 / 06, OSNwSK 2007, No. 1, item 487; the Supreme Court judgment of 06.10.2009, II KK 83/09, Lex No. 532383.

78 K. Witkowska et al., *Gwarancje zatrzymanego* [Guarantees of the detainee], op. cit., p. 80.

79 Resolution of the Supreme Court of 20.06.1991, I KZP 12/91, OSNKW 1991, z. 10-12, item 46. M. Szewczyk, *Komentarz do art. 233 k.k.* [Commentary to art. 233 of CC], [in:] Kodeks karny. Komentarz [The Criminal Code. Comment], Zoll A. (ed.), Vol. II, Kraków 1999, p. 804-805; Z. Sobolewski, *Samooskarżenie w świetle prawa karnego* [Self-incrimination in the light of criminal law], Warsaw 1982 p. 68-69, 99-101.

80 Journal of Laws of 1989, n. 34, item. 180.

81 The time limit for lodging a complaint for detention should be counted from the time the detention report is delivered to the detainee (so [in:] K. Eichstaedt, *Komentarz do art. 246 k.p.k.* [Commentary to art. 246 of CCP], [in:] D. Świecki (ed.), Kodeks postępowania karnego. Tom I. Komentarz aktualizowany [Code of Criminal Procedure. Volume I. Comment updated], Lex/2018; differently [in:] R. A. Stefański, *Środki zapobiegawcze w nowym kodeksie postępowania karnego* [Preventive measures in the new Code of Criminal Procedure], op. cit., p. 261).

to the competent district court. Both the transfer[82] of the complaint by the detaining authority and its examination by the court should take place immediately.
The competent court to hear the complaint is the district court of the place of detention or of conduct of the proceedings. The latter can be taken into account in the event of a person being arrested during the pre-trial investigation[83].

The recognition of a complaint takes place in a closed session (Article 95 CCP Article 95b § 1 CCP). The district court recognizes a complaint by a single judge (Article 30 § CCP). The court entitled to hear the complaint is an appeal court within the meaning of the Code of Criminal Procedure. For this reason, the rules regarding the proceedings before the court of appeal also apply to the recognition of complaints. Judgments rendered by the court of appeal are not subject to appeal (article 426 § 1 CCP). A detainee cannot, therefore, challenge a court decision issued as a result of a lodged complaint.

In the light of art. 464 § 1 CCP parties, advocates and procurators have the right to participate in the sitting of the court of appeal recognizing a complaint against a termination order, against a decision on a preventive measure other than provisional arrest, a decision on property security and detention.

According to art. 246 § 1 CCP in fine in a complaint against detention a person deprived of liberty may demand to examine the legitimacy, legality and regularity of detention. The legality and legitimacy of detention are connected with the existence of a detaining authorities' right to detain, the admissibility of detaining a given person (e.g. immunity) and the existence of grounds for doing so, including data justifying the suspicion of a crime and the fears that indicated the need to detain[84]. The correctness of detention, in turn, is the correctness of the individual actions required by the Act related to detention, i.e. information and instructions indicated in art. 244 § 2 CCP, whether preparation of a protocol was conducted with compliance with its requirements specified in art. 244 § 2 CCP, including the delivery of a copy to the detainee, as well as the manner in which the detaining person did so (e.g. unnecessary use of physical force, insulting the detainee, causing damage to his property, etc.)[85].

In the event of unreasonable or illegal conduct being recognized, the court orders immediate release of the detainee (Article 246 § 3 CCP). This is the primary purpose of the court's detention control, justifying the above-mentioned requirements of immediate referral and consideration of the complaint. This is particularly important when the person lodging a complaint is still deprived of liberty; accepting a complaint

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[82] The use of the phrase "transfer" by the legislator means that the complaint is lodged through the individual who has made the detention. Nevertheless, the practice allows a situation in which the detainee himself, after being released, files a personal complaint directly to the competent district court.

[83] R. A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego* [Detention according to the new Code of Criminal Procedure], op. cit., p. 55; R. A. Stefański, *Problematyka kontroli zatrzymania w nowym kodeksie postępowania karnego* [Problems of detention control in the new code of criminal procedure], „Prok. i Pr." 1998, No 11-12, p. 43.

[84] J.Grajewski, *Przebieg procesu karnego* [The course of the criminal process], op. cit., p.123; J. Grajewski, S. Steinborn, *Nowelizacja kodeksu postępowania karnego z 10.01.2003 r., Część I* [Amendments to the Code of Criminal Procedure of January 10, 2003, Part I], „EP" 2003, No 8, p. 14.

[85] A. Ludwiczek*, Problematyka kontroli zatrzymania w nowym kodeksie postępowania karnego* [Problems of detention control in the new code of criminal procedure], „Prok. i Pr." 1998, No 11-12, p. 31.

results in her immediate dismissal. The second parallel objective of judicial review is a comprehensive assessment of the correctness of the detention and, if legal infringements are found, they are being highlighted and the relevant official consequences being drawn[86]. According to art. 246 § 4 CCP, in the case of finding unfairness, illegality or irregularity of detention, the court notifies the prosecutor and the authority superior to the authority that made the arrest. If the person lodging the complaint is no longer actually deprived of liberty, the court (eventually) may state post factum that the detention was unjustifiably detrimental or violated the law during its execution[87].

It should be emphasized that the further possibility of claiming compensation from the Treasury for undoubtedly wrongful detention doesn't depend on the court's decision on the complaint of a suspect for detention (Article 552 § 4 CCP). The existence of a court decision issued in the mode specified in art. 246 CCP is not a condition for pursuing claims for undoubtedly wrongful detention. The detained person does not have to make a complaint for detention, so that he can then claim damages, referred to in art. 552 § 4 CCP. After all, the criteria for examining a complaint referred to in art. 246 § 1 CCP (legality, legitimacy and regularity of detention) and the claim provided for in Article 552 § 4 CCP (undoubted wrongness of detention) are not identical, and thus the recognition of the detention in a complaint procedure as groundless does not necessarily determine the legitimacy of a claim for compensation and redress[88].

Responsibility of the Treasury, as referred to in art. 552 CCP is based on the principle of risk, not guilt[89]. This means that when examining undoubted unfairness of detention, the assessment ex nun is necessary, that is, assessment through the prism of the entirety of circumstances from the moment of adjudication of the application for compensation and redress due to that detention[90]. Establishing that the authority wrongly accepted the existence of grounds for detention as a result of such an assessment means that there were no such grounds, regardless of whether the detainee was aware of their absence or not, relying, for example, on unreliable,

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86 A. Ludwiczek, *Problematyka kontroli zatrzymania w nowym kodeksie postępowania karnego* [Problems of detention control in the new code of criminal procedure], op. cit., p. 31.

87 Judgment of the Constitutional Tribunal of 06.12.2004, SK 29/04, OTK-A 2004, No. 11, item 114; Resolution of the Supreme Court of 04.07.1991, WZP 1/91, OSNKW 1992, No. 1-2, item 10.

88 Resolution of the Supreme Court of 23.05.2006, I KZP 5/06, OSNKW 2006, No. 6, item 55; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Code of Criminal Procedure. Comment], op.cit., p. 303; differently [in:] judgment of the Court of Appeal in Warsaw of 17.12.2003, II AKa 344/03, KZS 2004, No. 1, item 33; R. A. Stefański, S. Zabłocki (ed), *Kodeks postępowania karnego. Komentarz*, [Code of Criminal Procedure, Commentary], 2nd edition, Warsaw 2004, Vol. III, p. 768.

89 Resolution of the Supreme Court of 15.09.1999, I KZP 27/99, OSNKW 1999, item 11-12, item 72; Stachowiak S., Odszkodowanie za niesłuszne skazanie, tymczasowe aresztowanie lub zatrzymanie w kodeksie postępowania karnego [Compensation for wrongful conviction, temporary arrest or detention in the Code of Criminal Procedure], PiPr. 1999, No 1, p. 59.

90 Z. Świda, *Prawo do wolności i bezpieczeństwa osobistego a stosowanie zatrzymania i tymczasowego aresztowania w procesie karnym* [The right to liberty and security and the use of detention and temporary detention in a criminal trial], [in:] A. Banaszak, A. Preisner (ed.), Prawa i wolności obywatelskie w Konstytucji RP [Civil rights and freedoms in the Constitution of the Republic of Poland], Warsaw 2002, p. 760-761.

incomplete or unverified information[91].

Unlawful detention will primarily take place when it was used in violation of the provisions of the Code of Criminal Procedure regarding this preventive measure. Therefore, compensation for the undoubtedly unjustified detention is due if:

- the detention occurred in the absence of the conditions indicated in art. 244 § 1 or other provisions of the Code of Criminal Procedure allowing it, or
- these premises ceased during the detention, and yet it was continued, or
- the time of detention has been exceeded (argumentum ex from Article 248 § 1 and 2 CCP) or
- the person was detained again after their release on the basis of the same facts and evidence that existed before release (argumentum ex Article 248 § 3 CCP).

Only those adverse consequences for the detainee, which were caused by an unjustified detention could constitute the subject of claims made on the basis of art. 552 § 4 CCP. This does not mean, of course, that the damage must take place during the period of detention. It is important, however, that damage to assets or loss of benefits be the consequences of applying this coercive measure[92].

The Code of Criminal Procedure does not define the concept of "redress". The provisions of substantive civil law, in particular art. 445 § 1 of the Polish Civil Code, from which it follows that reparation should be "appropriate". The "appropriate sum" referred to in these provisions is a value that fulfills the compensatory function set for it, but at the same time is not a way to obtain excessive financial benefits, and is determined individually based on the type, duration of physical and mental suffering, their intensity, i.e. the degree of ailments associated with the use of detention, and thus moral anxiety resulting from it, including loss of reputation, environmental ostracism, the need to submit to the rigors associated with the use of this measure, adverse reactions after release from detention, the applicant's state of health during the time of executing the measure and after being released from detention. At the same time, it concerns compensation for the harm suffered, resulting from the deprivation of liberty. Even the most negative experiences related to the accusation, the ongoing trial or the threat of severe punishment do not matter in this respect[93].

Compensation referred to in art. 552 § 4 CCP has a civil-legal character. Therefore, in the light of the regulation expressed in art. 6 CC, the aggrieved party should prove the basis as well as the size of the claims[94].

According to art. 553a CCP, when determining the amount of compensation, the court considers the deduction of the period of unjust application of penalties, protective measures, detention or arrest of an accused for whom compensation is sought when setting penalties or protective measures imposed in another proceeding. Therefore, the damage will be compensated in all cases where the period of detention

[91] Resolution of the Supreme Court of 23.05.2006, I KZP 5/06, OSNKW 2006, No. 6, item 55; judgment of the Court of Appeal in Kraków of 09.04.2008, II AKa 46/08, KZS 2008, No. 6, item 48; judgment of the Court of Appeal in Lublin of 05.05.2008, II AKa 83/08, KZS 2008, No. 12, item 68.

[92] Resolution of the Supreme Court of 15/03/2018, II KK 72/18, Lex No. 2487647; judgment of the Supreme Court of 17.10.2007, WA 43/07, OSNwSK 2007, No. 1, item 2246.

[93] Resolution of the Supreme Court of 15.09.1999, I KZP 27/99, OSNKW 1999, No. 11-12, item 72.

[94] Judgment of the Court of Appeal in Warsaw of 22/09/2017, II AKa 278/17, Lex No. 2376946.

(not only deprivation of liberty) was applied or in another case, pursuant to art. 63 § 1 CC and art. 417 CCP.

A claim for damages should be filed in the district court competent in regards to the place where the detainee was released. On that request, the district court rules in a single judge and the proceedings are free from court costs.

The provision of art. 555 CCP constitutes that the claims provided for in Chapter 58 of the Code of Criminal Procedure shall expire one year from the date on which the decision giving grounds for compensation and redress becomes final and binding, and in the event of provisional arrest - from the date on which the decision ending the proceedings in the case becomes final, and in the case of detention - from the date of exemption. It is assumed that the time limits for pursuing claims set out in Chapter 58 of the Code of Criminal Procedure are limitation periods within the meaning of art. 117 § 1 of the Civil Code, with all the consequences specified in the Civil Code[95]. This means that the court must take into account the plea of limitation, unless it considers that reporting it in the circumstances of a specific case amounted to an abuse of law within the meaning of art. 5 CC. Consideration of the time-barred claim by the court is exceptionally possible when an individual assessment of the circumstances in the case under consideration indicates that the delay in the recovery of a time-barred claim is caused by special circumstances justifying this delay and is not excessive[96].

The persons entitled to claim damages for unjustified detention, referred to in art. 552 § 4 CCP could only be detainees[97]. In the event of their death, they do not pass to the persons indicated in the provision of art. 556 § 1 CCP[98].

According to art. 63 CC the penalty shall include the period of actual deprivation of liberty in the case, rounding up to the full day, with one day of actual deprivation of liberty equal to one day of imprisonment, two days of penalty of restriction of liberty or two rates of daily fine (§ 1). When counting the period of actual deprivation of liberty in terms of a fine, it is assumed that one day of deprivation of liberty corresponds to an amount equal to twice the daily rate determined in accordance with art. 33 § 3 CC (§ 2). However, the legislator in art. 417 CCP accepted that the period of detention can also be deducted from the sentence passed on the part of the accused in another case, in which the proceedings were pending at the same time, and the final acquittal was passed, or the proceedings were discontinued, or the

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95 Resolution of the Supreme Court of 19.02.1997, I KZP 38/96, OSNKW 1997, item 3-4, item 18; judgment of the Court of Appeal in Katowice dated 28.07.2011, II AKa 230/11, Lex No. 1001367.

96 Judgment of the Supreme Court of 14.12.2011, I CSK 238/11, Lex No. 1129070.

97 Renouncement of the immediate drawing up of a detention report, taking a statement from a person along with giving instructions about their entitlements within the meaning of art. 244 § 3 CCP, or placing them in a location that is usually not used as a typical place of detention, e.g. in a hospital during hospitalization for health reasons under the guard of police officers, places that limit their freedom, contacts with other people, including from the outside, or the possibility of movement, entitles the court to recognize such a detention as having a procedural character, if the conditions referred to in the provision of art. 244 § 1 CCP are fulfilled, and provides a person with a claim for damages and compensation for the harm suffered, if such detention from the point of view of the overall circumstances of the case meets the requirements covered by the regulation resulting from the provision of art. 552 point 4 CCP. (judgment of the Court of Appeal in Katowice of 27/08/2014, II AKa 230/14, Lex No. 1647771).

98 Resolution of the Court of Appeal in Katowice of 30/04/2014, II AKz 200/14, Lex No. 1487577.

sentence was not imposed. Analyzing the two above-mentioned regulations, one can come to the conclusion that they are not compatible with each other. This hypothesis may turn out to be risky based on the principle of rationality of the legislator and the presumption of comprehensive legal provisions regulating specific issues. In connection with the above, citing the case law of the Supreme Court, it should be stated that any deprivation of liberty by the authority in connection with the criminal proceedings against the accused should be subject to the penalty imposed on them under Art. 63 CC[99]. It is necessary to agree here with the jurisprudence that if the literal interpretation of the provision leads to discrepancies, one should be guided by the functional interpretation. In this case, it should be stated that in accordance with the principle of humanitarian punishment (Article 3 CCP) and specific provisions of the Criminal Code regarding the sentence (Article 53 CC), the legislator's goal was to adjust the penalty to a specific act of a specific person, wherein the punishment is not supposed to fulfill repressive functions only. In such a case, it should include all cases of legal imprisonment of the accused in preparatory and judiciary proceedings in order for the punishment for which he was convicted to be just.

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[99] Judgment of the Supreme Court of 13.04.1973, III KR 39/73.

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