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THE RIGHT OF A PRE-TRIAL DETAINED PERSON TO LEGAL AID (ARTICLE 245 § 1 OF THE CODE OF CRIMINAL PROCEDURE)

According to the doctrine, the term pre-trial detention means, in principle, only an act carried out pursuant to Art. 244 § 1, § 1a and § 1b CCP[1], i.e. an action directed against a suspected person, if there is a reasonable suspicion that he or she has committed an offense, and there is an apprehension of flight or hiding, blurring traces of the crime, or the person's identity cannot be determined, or there are premises to conduct expedited procedure against that person (§ 1), or if there is a reasonable suspicion that a suspected person has committed a violent crime to the detriment of a co-resident, and there is a fear that he or she will commit a violent crime against that person again, especially when a suspected person is threatening to commit such an offense (§ 1a), or against a person suspected of committing an offense mentioned in § 1a with using a firearm, knife, or other dangerous object, and there is a fear that he or she will commit a violent crime against a co-resident again, especially when a suspected person is threatening to commit such an offense (§ 1b). This understanding of the institution of the pre-trial detention does not exhaust doctrinal views in this regard, as there are claims in favor of including the detention and compulsory bringing under Art. 247 § 1 CCP[2] as the pre-trial detention, though R.A. Stefański and S. Zabłocki consider the detention and compulsory bringing only in terms "close to the pre-trial detention"[3]. Simi-

[1] The Act of 6 June 1997, Code of Criminal Procedure (Dz.U. 2018, Item 1987 as amended).

[2] A. Zahuta, *Wybrane relacje pomiędzy KPW i KPK w zakresie procesowych zatrzymań uczestników postępowania karnego i postępowania w sprawach o wykroczenia*, „Monitor Prawniczy" 2004, no. 1, p. 2–27.

[3] Similarly, the detention and compulsory bringing pursuant to Art. 74 § 3a, Art. 75 § 2, Art. 285 § 2, Art. 376 § 1, Art. 377 § 3 and Art. 382, R.A. Stefański, S. Zabłocki, Code of Criminal Procedure. Volume II Commentary on Art. 167–296, LEX 2019, thesis 2 to Art. 244, https://sip.lex.pl/#/commentary/587781760/579200 915.05.2019).

larly, J. Skorupka seems to consider the pre-trial detention as only the one that is made pursuant to Art. 244 CCP, treating the pre-trial detention in the category of "the proper detention"[4]. Without going into a closer analysis of this issue, bearing in mind the subject of this paper and solely for its use – the pre-trial detention will be understood narrowly, i.e. as the detention carried out pursuant to Art. 244 CCP.

The separation of the detention regulation and its inclusion in a separate 50th chapter of Section VI of the Code of Criminal Procedure makes it an independent coercive measure, but also shows features that make it similar to preventive measures for which it plays a subsidiary role[5].

The pre-trial detention is reduced to short term imprisonment, however, limited functionally and temporarily by Art. 248 § 1 CCP. The detained person should be released when the reason for detention ceases, and also if, within 48 hours of the arrest made by the authorized body, he or she is not put at the disposal of the court together with the application for detention on remand. The same regulation requires a detainee to be released per order of the court and the prosecutor. Concerning those decisions, the act does not specify their grounds. It seems that in the first place the order will be given to the Police due to the cessation of the reason for the detention and the expiry of the maximum period of application of this measure, but also due to the fact that the detention was carried out without a sufficient reason. The order issued to the Police may be the result of some kind of self-control on the part of the authority conducting the criminal proceedings, but it may also be a consequence of the examination of the complaint about the detention by the court (Art. 246 § 1 first sentence CCP) and the finding that the measure was used in violation of the law ("illegality") or for no reason ("lack of legal basis"). In the last two cases, the court orders "the immediate release" of a detainee (Art. 246 § 3 CCP). The release of a detained person may be a derivative of the prosecutor's decision to apply a preventive measure other than detention on remand (Art. 247 § 5 *in principio* CCP). Finally, a detainee should be released if, within 24 hours of being put at the disposal of court, he or she has not been served with a decision of detention on remand (Art. 248 § 2 CCP).

Until the release, a detainee remains at the disposal of the Police or the authority conducting the criminal proceedings, which ordered the detention. Detention is a form of coercion[6], resulting for the detained person in isolation, deprivation of the right to move freely and to communicate with other people, it also

[4] J. Skorupka, *Zatrzymanie procesowe osoby podejrzanej*, „Prokuratura i Prawo" 2007, no. 11, p. 16.

[5] M. Cieślak, *Postępowanie karne. Zarys instytucji*, Warszawa 1982, p. 45.

[6] A. Kordik, *Wyjątki od konstytucyjnej zasady nietykalności osobistej*, „Acta Universitatis Wratislaviensis – Prawo" 1990, no. 73, p. 59.

includes prohibition to accept and transfer any items without the permission of an authorized body, as well as the obligation to comply with the instructions of the authority[7].

Both R.A. Stefański and B. Hołyst agree that, besides the deprivation of liberty, limitation of communication of a detained person with other people should be classified as the most serious of the inconveniences that affect detainees[8]. For the sake of the negative impact of detention on the sphere of personal freedom, J. Skorupek[9] postulates that individual prerequisites for detention should be interpreted in a manner consistent with Art. 41 section 1 in connection with Art. 31 section 3 Constitution and Art. 5 section 1 subparagraph c in connection with Art. 8 section 2 ECHR[10].

The aforementioned limitation of the detainee's ability to communicate with other people is a natural consequence of placing a detained person in an isolation, but it is also a derivative of the need to maintain confidentiality as to the information that relates to pre-trial proceedings or preliminary proceedings, in which application of the measure, referred to in Art. 244 CCP, occurred. Limitation of communication with other people is not absolute because a detainee retains the right to seek the assistance of an attorney or legal advisor. A detainee is notified at the start of detention about that right (Art. 244 § 2 CCP) and also about the right to use the free assistance of an interpreter if he or she does not speak Polish sufficiently. Although the legislator in Art. 244 § 2 CCP uses the verb "to inform", and the statement is defined as "information" (Art. 244 § 3 second sentence CCP), still it is undoubtedly an act that meets all the criteria of the instruction referred to in Art. 16 § 1 CCP, with all the consequences if the instruction is omitted or carried out incorrectly. The guarantee of contact of a detainee with an attorney, and obtaining legal advice in this way was provided to a detainee only by the current codification. The previous Code of Criminal Procedure of 1969 (Art. 205–208) did not provide a detainee such a possibility. This state of affairs was, however, a component of a broader and oppressive legal system.

A detainee is informed about the right to legal aid, but the obligation to provide such instruction was only precisely articulated in 2009[11]. Earlier, the instruction was covered by a collective and quite vague order to instruct a detainee

[7] E. Skrętowicz, *Zatrzymanie jako środek przymusu*, „Problemy Praworządności" 1970, no. 9–10, p. 5; A. Kordik, *Wyjątki*…, p. 59; S. Waltoś, *Problemy niektórych wolności osobistych w świetle art. 74 Konstytucji*, „Państwo i Prawo" 1967, no. 8–9, p. 270.

[8] R.A. Stefański, *Zatrzymanie według nowego kodeksu postępowania karnego*, „Prokuratura i Prawo" 1997, no. 10, p. 33; B. Hołyst, *Kryminalistyka*, Warszawa 1996, p. 305.

[9] J. Skorupka, *Zatrzymanie procesowe*…, p. 23.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950., subsequently amended by Protocols No. 3, 5 and 8 supplemented by Protocol No. 2 (Dz.U. 1993 No. 61, Item 284 as amended).

[11] Art. 1 point 1 of the Act of 24 October 2008 amending the Act – Code of Criminal Procedure (Dz.U. No. 225, Item 1485), amending this code on January 22, 2009.

"of his/her rights", which gave the possibility of any abuse in this respect. The current solution is more precise. And the extracting the right to use the assistance of an attorney or legal advisor from the "instruction about the rights [of a detainee]" raises this regulation to the rank of fundamental rights, equating it with other literally mentioned rights, i.e. to use free help of an interpreter if he or she does not speak Polish sufficiently, to refuse or to make a statement, to receive a copy of the detention report, to access first aid, as well as to exercise of the rights referred to in Art. 245, Art. 246 § 1 and Art. 612 § 2.

The legislator seemingly does not regulate the form of instruction under Art. 244 § 2 CCP, which could lead to an attempt to perform this activity orally. However, oral instruction, when a detainee is in a stressful situation, would be hardly guaranteed, especially given that, a detainee is provided with extensive information. In addition to the instruction on the aforementioned rights, a detainee is also informed about the content of Art. 248 § 1 and 2 CCP, i.e. circumstances justifying his/her release, as well as the reasons for detention. The above could lead to a hasty conclusion *de lege ferenda* to apply the written form of instruction even in the case of a detainee, as provided for in Art. 300 § 1 CCP concerning a suspect and Art. 300 § 2 CCP concerning a victim. However, there is no such need because Art. 244 § 5 CCP grants the Minister of Justice a delegation to develop a template of instruction on the rights of a detainee in criminal proceedings, which the Minister fulfilled by issuing a regulation dated 3 June 2015[12]. Thus, although the legislator does not direct to the detaining authority an explicit order to make this instruction in writing, however, the existence of such an order can be inferred from the fact that such a model was developed. So it seems that, even with the absence of Art. 244 § 5 CCP, the need to preserve a written form of instruction could be inferred from the fact that an arrest report is compulsory (Article 244 § 3 CCP). Such form of documentation of the detention is an obligatory and exclusive form. It is also the case advised by Art. 143 § 2 CCP, as a situation in which the preparation of a protocol requires a special provision. The protocol cannot be replaced by another form, since both Art. 143 § 2 first sentence CCP, and 244 § 3 CCP categorically instruct in this regard ("to write down" and "to write out"). The situation discussed in Art. 244 § 3 CCP is not "a different case" (Art. 143 § 2 second sentence CCP), in which it would be possible to replace the protocol with a less formalized form of consolidation, i.e. an official note, the content of which depends on the discretion of the authority preparing the note. Having determined that a report is the only form documenting the detention, one can return to the issue of the guarantee of the instruction mentioned in Art. 244 § 2 CCP. The protocol, the content of which is mentioned in Art. 244 § 3 first and second sentence, shall be served to a detain-

[12] Ordinance of the Minister of Justice of 3 June 2015 on specifying a template of instruction on the rights of a detainee in criminal proceedings (Dz.U. Item 835).

ee, as stated in the third sentence of the same provision. The copy provided to a detainee, besides the data known to a detained person like his or her name, includes personal data and the function of the person performing the activity of detention, and in case of the impossibility of establishing the identity of the detained person – his/her description, as well as the day, time, place, reason for detention, and the information what crime he or she is suspected of. Statements made by a detained person shall be added to the same report. It shall also be "marked" that a detainee was provided with the information about his/her rights.

In the current legal status, the phrase "to mention/to mark" used in Art. 244 § 3 second sentence CCP should be decoded as an indication that the instruction was given. It is unnecessary to extend the protocol with information about the content of the instruction, as the scope of this instruction is indicated by a detainee's signature below the information, prepared in accordance with the ministerial template. However, the situation would look different if the content of the Code lacked the provision of Art. 244 § 5 CCP, in this case, it seems that in fear of an allegation of incomplete instruction, the authority making the detention would understand the "mentioning/marking" as the basis for listing in the protocol those rights, which the detained person had been informed.

The legislator maintains the principle of professionalization in regard to legal assistance provided to a detainee within the criminal trial, i.e. the assistance can be provided only by representatives of one of two legal professional corporations, i.e. an attorney or a legal adviser. Legal assistance to a detained person may be provided only by an attorney or a legal adviser, which results directly from Art. 244 § 2, Art. 245 § 1 and Art. 178 point 1 CCP and harmonizes with the analogous solution applied by Art. 82 in connection with Art. 6 CCP in regard to a suspect (accused), as well as by Art. 87 § 1 in connection with Art. 88 CCP in regard to other parties of proceedings and by Art. 87 § 2 in connection with Art. 88 CCP in regard to those listed there. In all those cases, the legislator emphasizes the need for the defenders/attorneys to identify themselves with appropriate professional documents. A defender may be only a person authorized to defend according to the provisions of the constitution of the bar or the act on legal advisers (Art. 82 CCP), while the defender may be an attorney, legal adviser or counsel of the General Prosecutor's Office of the Republic of Poland (Art. 88 § 1 first sentence CCP), which is dictated not so much by the desire to impede the access to entities providing legal assistance, but by the determination of the legislator to provide such assistance at a sufficiently high substantive level[13]. However, while a defender can be only a legal adviser who is not in an employment relationship, with the exception of the employment of scientific re-

[13] See also: P.K. Sowiński, *Uzawodowienie podmiotów świadczących w procesie karnym pomoc prawną na rzecz stron tego procesu* [in:] *Role uczestników postępowań sądowych – wczoraj, dziś i jutro*, eds. D. Gil, E. Kruk, Lublin 2015, p. 109–129.

searchers and teachers (Art. 8(6) of the Act on legal advisors[14]), this limitation does not affect in any way any legal adviser acting in the foreground of the defense pursuant to Art. 245 § 1 CCP. Among the activities carried out by a legal adviser acting pursuant to Art. 245 § 1 and within the limits of Art. 82 CCP, there are differences only in quantitative and not qualitative matter, hence this existing state of affairs seems to prove a certain deficiency of the solution adopted in Art. 8(6) of the Act on legal advisers.

A detained person has the right to legal assistance from an attorney or legal adviser. Initially, Art. 244 § 2 CCP only mentioned attorneys, which was based on the misconception that the criminal defense should be the domain of only one professional corporation. In 2013, the two professional corporations were equalized, which was the result of a broad reform of the criminal trial that aimed to its contradictory purposes[15]. Actions taken by attorneys or legal advisers on the detainee's initiative are within their tasks set out in Art. 1, clause 1 in connection with Art. 4, paragraphs 1 and 2 of the Act on the Bar[16] and Art. 2 in connection with Art. 4 of the Act on legal advisors; both of those normative acts refer to "legal aid".

The Act, regarding the right of a detainee under Art. 245 § 1 CCP in regard to persons whom he or she may contact to obtain legal aid, uses their professional titles. Therefore, this provision refers to "an attorney" and "a legal adviser", not to "a defender" or "a representative". On one hand, this solution harmonizes with the content of Art. 6 in connection with Art. 71 § 3 CCP and Art. 87 § 1 and 2 CCP, but on the other hand it seems to indicate certain helplessness of the legislator, who is unable to determine the procedural position of the legists without reference to corporate laws.

Linking the defense, in the penal law procedure stage, with a suspect and an accused means that a detainee, who has not yet acquired such status, is not entitled to the assistance of an attorney, and *eo ipso* an attorney granting him/her legal assistance cannot be a defender[17]. The same detainee, due to the content of Art. 299 § 1 CCP, cannot be classified as a party to the preparatory proceedings, as this provision quite narrowly outlines the group of entities to whom this status is granted. Apart from a suspected and an aggrieved party, no other entity is a party to such proceedings, which implies the impossibility of treating an attorney or legal adviser cooperating with a detained person as legal representatives, as they may be appointed for parties other than the accused (Art. 87 § 1 CCP). It does not seem that a detained person who is not a suspect could be clas-

[14] Act of 6 July 1982 on legal advisers (i.e., Dz.U. 2018, Item 2115 as amended).

[15] Art. 1 point 54 of the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and some other acts (Dz.U. Item 1247 as amended).

[16] Act of May 26, 1982, Law on the Bar (i.e., Dz.U. 2018, Item 1184 as amended).

[17] J. Skorupka [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2015, p. 574.

sified according to Art. 87 § 2 CCP, which would allow him or her to appoint a legal representative, but also would make the relevant authorization conditional on the assessment of the procedural authority, as to whether this is required by the legal interest in the pending proceedings. If one looks at an attorney and legal adviser mentioned in Art. 245 § 1 CCP in the context of the situation and through the prism of the fate of a detainee, it must be said that both of the abovementioned legists act on the foreground of criminal defense proceedings, not the representation. The argument stated above authenticates Art. 178, point 1 CCP, which puts the secrecy of an attorney and legal adviser on a par with the defense secrecy. The extension of the absolute prohibition of evidence provided in this provision gave rise to the determination of the secrecy of an attorney and legal adviser acting pursuant to Art. 245 § 1 CCP called a quasi-defense secret. It should be assumed that this term is correct not only because of the formal equalization of both mentioned in Art. 178 point 1 CCP secrets, but due to the nature of the circumstances disclosed by a detained during the consultation with an attorney and the functional relationship with the defense case. The nature of those circumstances is similar to the circumstances disclosed in the course of consultations of a suspect (accused) with a defense counsel, but it does not resemble the circumstances entrusted to a representative.

To conclude this part of considerations, which concerns the entity with whom a detainee has the right to contact pursuant to Art. 245 § 1 CCP, one should consider the situation of a detainee who has previously acquired the status of a suspect (Art. 313 § 1 or Art. 308 § 2 CCP). Such a detainee, as a person who meets the criterion of Art. 6 in connection with Art. 83 § 1 *in principio* CCP, will have the opportunity to contact his/her attorney or, not yet having an attorney, a legist to whom during the contact, in accordance with Art. 245 § 1 CCP, he or she will grant the applicable defense authorization. However, it should be remembered that the provision of Art. 245 § 1 CCP, which uses the terms "an attorney" and "a legal advisor" in no way limits the right of a detainee, who is a suspect, to contact an attorney other than the one he has previously appointed as his/her defender[18].

According to P. Hofmański and other commentators, although a suspect has the right to use the assistance of three defenders, a person who has been detained pursuant to Art. 245 § 1 CCP cannot request to contact each of them individually, or even with three at a time because this provision guarantees contact with only one attorney, not three[19].

[18] A. Ludwiczek, *Sytuacja prawna adwokata udzielającego pomocy prawnej w trybie art. 245 § 1 k.p.k.*, „Problemy Prawa Karnego" 2001, no. 24, p. 107; *Kodeks postępowania karnego. Komentarz do art. 1–196*, vol. I, ed. P. Hofmański, Warszawa 2007, p. 1096.

[19] *Kodeks postępowania karnego. Komentarz do art. 1–196*, vol. I, ed. P. Hofmański, Warszawa 2007, p. 1096.

Although the phrase "contact of a detained person with an attorney" used in Art. 245 § 1 CCP, from the linguistic point of view, means "direct contact"[20], the statutory requirement is also fulfilled by the communication of the entities via a telecommunications device, i.e. indirect contact. K. Eichstaedt even suggests a form of an email[21]. Allowing other than direct forms of "contact" is justified, given the fact that the legislature in Art. 245 § 1 CCP allows the contact to be established in a manner possible in a given situation, i.e. "in an available form". The Supreme Court considers that, indicated in Art. 245 § 1 CCP term, must be interpreted as "taking into account the realities of a particular case, and above all the technical possibilities and conditions arising from applicable legal regulations, including the appointment of a public defender"[22].

In order to counteract the unauthorized restrictions on the detainee's right to contact an attorney or legal advisor, which may lead to "shallowing" that contact, the legislator develops the law in order to ensure that a detainee – in regard to "contact" with any of the attorneys – also has the right to "direct conversation with them". As a result of the above, accidental or brief contact of a detained person with an attorney or a legal adviser, is seen as not fulfilling its role, and should be considered contrary to the instruction of Art. 245 § 1 CCP, which guarantees a detainee a situation to "exchange words or views"[23], i.e. taking part in a deepened and focused conversation.

Due to the fact that the phrase "in an available form" refers to the act referred to as "establishing (…) contact" with an attorney or legal adviser, and not to the subsequent "direct conversation with one of them", hence it can be concluded that in the latter case a detainee should be allowed to use the form of contact with the legists that he or she requests. For practical reasons, such categorical approach to the form of conversation is difficult to accept, hence it is believed that the conversation can also take place via telephone links[24]; so it does not have to be a face-to-face conversation.

According to Art. 245 § 1 CCP, a person who carries out the detention may stipulate his/her presence during the conversation with an attorney, which in the literature is considered a circumstance to counteract attempts to obstruct the preparatory proceedings[25]. In its original version, this provision did not contain any preconditions, which came across justified criticism from the Constitutional Tribunal, which in its judgment of 11 December 2012 found it incompatible with Art. 42 section 2 in connection with Art. 31 section 3 of the Constitution of the Republic

[20] Dictionary of the Polish language, available on https://sjp.pl/kontakt (1.08.2019).

[21] K. Eichstaedt [in:] *Kodeks postępowania karnego. Komentarz*, vol. 1, ed. D. Świecki, Warszawa 2013, p. 742.

[22] Order of the Supreme Court of 13 October 2011 (III K 64/11), OSNKW from 2012, No. 1, Item 9.

[23] Dictionary of the Polish language, available on https://sjp.pl/rozmowa (16.08.2019).

[24] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 426.

[25] R.A. Stefański, *Zatrzymanie*…, p. 58.

of Poland in the part, in which the provision does not indicate the existence of any premise that would entitle the authority to be present during the conversation of a detained person with an attorney[26]. The argument mentioned above prompted the legislator to amend Art. 245 § 1 CCP[27], which occurred by indicating that the presence of authority during a conversation between a detained person and an attorney may take place only "in exceptional cases, justified by special circumstances". Although both conditions are stated as a form of "uniqueness" of a given case (see, among others, in Art. 156 § 5, Art. 357 § 5 and Art. 618fa § 1 CCP), as well as "special circumstances" (Art. 263 § 2 and Art. 607l § 1a CCP)[28] and were written in the Act, yet they still only simulate the concretization of the circumstances to control a conversation of a detained person with an attorney or legal adviser (until 2013), than they actually secure it. For the sake of accuracy, it should be noted that the changes made under Art. 245 § 1 CCP bring this provision closer to the solution known from Art. 73 § 2 CCP, which entitles the prosecutor to make reservations in preparatory proceedings "in particularly justified cases, if the presence of the prosecutor or a person authorized by the prosecutor during meetings and conversations between a detained (accused) and a defender is required by the good of the preparatory proceedings".

The indication in Art. 245 § 1 CCP, that a person who carries out the detention may reserve his/her presence during a conversation with an attorney or legal adviser means that this reservation of the right is optional and does not have to take place[29]. On the other hand, the provision of Art. 245 § 1 CCP, giving a detainee the right to contact an attorney or legal adviser, depends on the application of an authorized person. In other words, the detaining authority does not have to make *ex officio* any effort to help a detainee to obtain such contact. However, if the request has been clearly formulated by a detainee, the person who carries out the detention is obliged to provide a detainee the opportunity to contact any of the indicated attorneys. However, the authority is not responsible for whether an attorney or legal adviser will provide such assistance.

The doctrine also states that a detainee may complain regarding the presence of the person who carried out the detention during the conversation between a detainee and an attorney[30]. Although this view was not sufficiently substantiat-

[26] Judgment of the Constitutional Tribunal of 11 December 2012 (K 37/11), OTK-A of 2012, No. 11, Item 133.

[27] Compare with Art. 1 point 2 of the Act of 27 September 2013 (Dz.U. 2013, Item 1282) amending the nineteen acts from 20 November 2013.

[28] These conditions – beside Art. 245 § 1 – are applied jointly only in Art. 618fa § 1 of the Code of Criminal Procedure.

[29] T. Grzegorczyk, *Kodeks postępowania karnego*, vol. I: *Artykuły 1–467. Komentarz*, LEX 2014, vol. 2 to Art. 245, https://sip.lex.pl/#/commentary/587631363/428803 (16.08.2019).

[30] J. Skorupka [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2015, s. 574. Unlike: T. Grzegorczyk, *Kodeks postępowania*…, vol. 2 to Art. 245, https://sip.lex.pl/#/commentary/587631363/428803 (16.08.2019).

ed by the author proclaiming it, i.e. J. Skorupka, it seems that it is based on the provision of Art. 246 § 1 CCP, which gives the court the opportunity to review the legitimacy and legality of detention, as well as its correctness[31]. However, if one considers the detention as a functional whole, consisting of a series of related activities, then the stated above view should be considered. As a result of a complaint made pursuant to Art. 245 § 1 CCP, of course the court will not order a detainee to be released, but will signal to the prosecutor and the superior authority over the authority which made the detention about the complaint found in the course of the examination of irregularities, which will have a preventive mark and which in the long run may become the basis for separate disciplinary action against the officer, who committed an offense against the detainee's right.

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[31] Similarly to: M.G. Węglowski, *Zatrzymanie procesowe – uwagi polemiczne*, „Prokuratura i Prawo" 2008, no. 9, p. 38.

Summary

The aim of the paper is to discuss the issue of detainee's access to legal assistance provided by an attorney or legal adviser, i.e. representatives of two equivalent legal professions. The author analyzed the restrictions related to access to such assistance, as well as the conditions enabling the detaining authority to reserve its presence during a detained person's conversation with one of the abovementioned legists. The paper also points out the doubts regarding the legal status of the consultant, i.e. whether he or she should be treated as a *sui generis* defender or a legal representative.

Keywords: detention, detained person, legal aid, attorney, legal adviser, defender, reservation of presence, defense secrecy, *quasi*-defense secrecy

PRAWO OSOBY ZATRZYMANEJ PROCESOWO DO POMOCY PRAWNEJ (ART. 245 § 1 K.P.K.)

Streszczenie

Przedmiotem opracowania jest kwestia dostępu zatrzymanego do pomocy prawnej świadczonej przez adwokata lub radcę prawnego, tj. przedstawicieli dwóch równorzędnych zawodów prawniczych. Omówiono ograniczenia związane z dostępem do takiej pomocy oraz przesłanki umożliwiające zastrzeżenie przez organ zatrzymujący jego obecności w trakcie rozmowy zatrzymanego z którymś z ww. prawników. Wskazano na wątpliwości związane ze statusem prawnym prawnika udzielającego konsultacji, tj. czy należy traktować go jako *sui generis* obrońcę, czy też pełnomocnika procesowego.

Słowa kluczowe: zatrzymanie, zatrzymany, pomoc prawna, adwokat, radca prawny, obrońca, zastrzeżenie obecności, tajemnica obrończa, tajemnica quasi-obrończa.