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PRIVATE EXPERT OPINIONS IN CRIMINAL PROCEEDINGS – A HISTORICAL OVERVIEW[1]

Abstract

The article aims to demonstrate the evolution of criminal-proceeding legal regulations which have been in force in the Polish legislation since 1928, related to private evidence, including the so-called private expert opinions. A private expert opinion is understood as a private document submitted in a criminal proceeding by a non-institutional, private entity (e.g. a defendant or their defender, an aggrieved party or their attorney) to a judicial authority in order to be used in the proceeding and to pursue the legal interest of the entity under consideration.

The article presents the essential Polish legal regulations of the Code of Criminal Procedure of 1928, 1969, and 1997, referencing private evidence and use thereof in a criminal proceeding, as well as the status of a private expert opinion in the legal regulations under analysis; it presents the views of the doctrine and the case-law in this regard, prevalent at the time.

The conducted analysis leads to demonstrating the differences in the status and role of a private expert opinion in criminal proceedings in the aforementioned codes, as well

[1] The article prepared as part of the research grant entitled “The Impact of Private Expertise on the Detection of Material Truth in the Polish Criminal Trial” (Polish research project no. 2019/33/N/HS5/01626, https://projekty.ncn.gov.pl/index.php?projekt_id=448214).

as to showing the evolution of the use of private evidence in criminal proceedings. The study utilised such research methods as the historical comparative legal analysis of the regulations in force in the successive parliamentary acts, supported by an analysis of the case-law and doctrine.

Key words: private expert opinion, criminal proceeding, legal historical analysis

1. Introduction

The presented study shows the evolution of criminal-proceeding legal regulations which have been in force in the Polish legislation since 1928, related to private evidence, including the so-called private expert opinions. A private expert opinion (known more commonly as a private opinion) is understood as a private document submitted in a criminal proceeding by a non-institutional, private entity (e.g. the defendant or their defender, an aggrieved party or their attorney) to a judicial authority in order to be used in the proceeding and to pursue the legal interest of the entity under consideration. It should also be noted that the author of such an opinion is a person with expertise in a specific area (a private expert).

A private entity often submits an opinion of a person who acts as a court expert summoned by way of a decision by the relevant judicial authority. It is also worth adding that the possibility of submitting of a private expert opinion in a criminal proceeding, the use thereof by non-institutional parties to the proceeding as well as by judicial authorities, and the impact thereof on the decisions passed by such authorities are of substantial impact on the fulfillment of the process guarantees of the participants of the proceeding, in particular, of the right to defense.

The central research problem of this study may be formulated through the following questions: Has the Polish legislature altered its stance on the admissibility and role of private expertise as a form of private evidence? If so, how has this stance evolved over the years, and in which direction has the evolution progressed?

This thesis argues that in the earlier codes of the criminal procedure, the Polish legislature maintained a conservative stance toward the use of private expertise as evidence, while in the present legal framework the approach has evolved into a more liberal one.

In this context, it is worth examining the development of criminal-proceeding regulations for the period between 1928 and 2020, related to evidence, including private documents – which also include private expert opinions. The article presents regulations which, although not directly related to private expert opinions, made it possible, through an analysis of the literature and case-law for the given period, to present the views prevalent in the given periods concerning the use of private expert opinions in the criminal proceeding.

The possibility to use the private expert opinions in the Polish criminal procedure is provided for (albeit not directly) by Article 393(3) of the Code of Criminal Procedure, pursuant to which, "any private documents prepared out of a criminal proceeding, particularly statements, publications, letters, and notes, may be read out at a hearing." The evolution of the legal norm enabling the use of private documents and private expert opinions (private opinions) in a criminal proceeding has been demonstrated on the basis of a characteristic of the relevant provisions of the Codes of Criminal Procedure of 1928, 1969, and 1997 respectively. For this purpose, the present study utilises such research methods as the historical comparative law analysis of the regulations in force in the successive acts, supported by an analysis of the case-law and doctrine.

1. The historical evolution of regulations concerning private evidence in the Codes of Criminal Procedure of 1928, 1969, and 1997

In the first place, one should quote the relevant regulations of the Code of Criminal Procedure of 1928.[2] Pursuant to Article 339 of the former CCP: "Furthermore, it is allowed to read out reports from judicial inspections and searches, as well as expert opinions submitted to the court, criminal judgments previously passed against the defendant, *and other official or private documents enclosed in the case file.*" On the other hand, pursuant to Article 340 of the former CCP: "If relevant to the case, the documents submitted in the course of a hearing are produced by the court to the parties, enclosed in the case file and read out in full or in part."

[2] Regulation by the President of the Republic of Poland, 19 March 1928, The Code of Criminal Procedure (Journal of Laws 1928, no. 33, item 313).

Following an amendment,[3] the norm above received a new editorial unit and the following wording: Article 341 of the former CCP: "Furthermore, it is allowed to read out reports from judicial inspections and searches as well as expert opinions submitted to the court, criminal judgments previously passed against the defendant, medical certificates, crime notifications by injured parties, *as well as other official or private documents enclosed in the case file*". Article 340 of the former CCP, on the other hand, has remained unchanged.

Following a subsequent amendment,[4] the editorial unit of the legal norm above was changed once again, due to which, the new Article 299(5) of the former CCP was worded as follows: "Furthermore, it is allowed, with the consent of the parties, to read out any and all records of hearing of witnesses and defendants, prepared during the investigation or by the court, as well as *expert opinions submitted out of the court or of an investigation*," whereas Article 299(6) of the former CCP read, "With the consent of the parties, the court may choose not to read out the reports and expert opinions and include them in the evidence revealed at the hearing." The related Article 300(1)(6) of the former CCP read, "Furthermore, it is allowed, to read out *other official or private documents enclosed in the case file*." The amended Article 301 of the former CCP was also important in this regard, worded as the Article 340 of the former CCP, mentioned above.

The Code of Criminal Procedure of 1969[5] regarded the subject matter above in other editorial units, namely, in Articles 339 and 340 of the former CCP. The provision of Article 339 of the former CCP was worded as follows: "§1. At a hearing, it is allowed to read out inspection and search reports as well as opinions by institutes, establishments, institutions or experts, submitted in the course of the preparatory

3 Regulation by the President of the Republic of Poland, 23 August 1932, amending certain provisions of the criminal proceeding (Journal of Laws 1932, no. 73, item 662); Consolidated text of the Code: Announcement by the Minister of Justice of 30 September 1932 on the publication of the consolidated text of the Code of Criminal Procedure (Journal of Laws 1932, no. 83, item 725, i.e).

4 Act of 20 July 1950 on the amendment of the criminal proceeding regulations (Journal of Laws 1950, no. 38, item 348); Consolidated text of the Code: Announcement by the Minister of Justice of 2 September 1950 on the publication of the consolidated text of the Code of Criminal Procedure (Journal of Laws 1950, no. 40, item 364, i.e.).

5 Act of 19 April 1969 – Code of Criminal Procedure (Journal of Laws 1969, no. 13, item 96).

or judicial proceeding. §2. Furthermore, it is allowed to read out *other documents*, in particular, crime notifications, criminal record data, and community interview data." In turn, Article 340 of the former CCP stated, "Reports and documents subject to being read out at a hearing may be deemed disclosed in full or in part without reading out; however, they should be read out if any of the parties requests to do so."

In turn, the currently binding Code of Criminal Procedure of 1997[6] has regulated the subject matter under consideration in Article 393(3) of the CCP, whereas, according to its original wording, "Any and all private documents prepared out of the criminal proceeding *and not for purposes thereof* are allowed to be read out at a hearing; in particular, those include statements, publications, letters, and notes." Following an amendment,[7] this provision was worded as follows: "*Any and all private documents prepared out of the criminal proceeding*, in particular, statements, publications, letters and notes, are allowed to be read out at a hearing."

2. Analysis of the changes in the area of use of private evidence in a criminal proceeding

Following the short historical outline of changes of the acts and norms concerning private evidence and private opinions/expert opinions, as presented above, the evolution of the described regulations should be subject to in-depth analysis.

2.1. The Code of Criminal Procedure of 1928

The Code of Criminal Procedure of 1928 made a clear distinction between official and private documents, and allowed private documents to be read out on par with official documents (Article 339 of the former CCP of 1928), whereas reading out of documents (provided that such documents were relevant for the case) took place in such a way that the court produced the documents to the parties, included them in the case file and read them out in full or in part (Article 340 of the former CCP of 1928). Thus, it was possible to read out private expert opinions, being private

6 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997, no. 89, item 555).

7 Act of 27 September 2013 on the amendment of the Code of Criminal Procedure act as well as certain other acts (Journal of Laws 2013, item 1247).

documents, especially that the substantiation for the draft Code of Criminal Procedure act, adopted by the Codification Committee on 26 April 1926, pointed out that "written testimonies and opinions issued to the parties by experts and submitted to the court by the parties, are not of report nature and may only be admitted by the court as private documents as mentioned in the last sentence of the article under consideration".[8]

However, as rightly pointed out by M. Kusak, in spite of the legislator's liberal approach to reading out of private documents at a hearing and the lack of clear exclusion of private opinions from this scope, the judicature did not turn out favourable to admissibility of such evidence.[9] Clear exclusion of a private expert opinion from the scope of the private evidence capable of being read out at a hearing was found in rulings by the Supreme Court. Particularly one Supreme Court ruling includes extensive arguments referencing private expert opinions. On 13 June 1930, in one of its rulings, the Supreme Court stated that "written extrajudicial opinions by experts who are natural persons cannot be read out for evidentiary purposes under Article 339 of the CCP; therefore, if Article 337 of the CCP with clear reference to Article 339 of the CCP speaks of 'expert opinions submitted to the court', it should be beyond doubt that extrajudicial private opinions of experts cannot be read out under the pretense of 'other documents enclosed in the case file.'"

A logical interpretation makes it appropriate to assume, especially in connection with the necessity to use a restrictive interpretation, that the legislator, in Article 339 of the CCP, emphasises expert opinions 'submitted to the court' for the sole purpose of stressing that deviation from the principle of direct examination, is only acceptable in the event that an expert (whom the adjudicating court has not seen directly and cannot verify their reliability on the basis of direct observations) has previously submitted their opinion in a solemn manner to the court, in principle under criminal liability. In this regard, in fact, the CCP makes no distinction concerning the person

[8] Codification Committee of the Republic of Poland. Criminal Proceeding Section, draft Criminal Proceeding Act adopted by the Codification Committee on 26 April 1926, p. 57, https://bibliotekacyfrowa.pl/dlibra/publication/39673/edition/40665 (accessed: 24.04.2021); A. Sakowicz, *Rys historyczny dowodów prywatnych w ustawodawstwie polskim*, [in:] *System Prawa Karnego Procesowego. Tom VIII. Dowody*, cz. 1, p. Hofmański, J. Skorupka (eds), Warszawa 2019, p. 358.

[9] M. Kusak, *Opinia prywatna*, [in:] *System prawa karnego procesowego. Dowody*, vol. VIII, pt. 4, p. Hofmański (ed. in-chief), J. Skorupka (scientific ed.), Warszawa 2019, p. 5089.

of the expert; a doctor or a chemist of world renown and a village cobbler, tailor or blacksmith are treated identically, their extrajudicial written opinions cannot serve as evidence at a hearing […]. Written extrajudicial expert opinions, although they are documents in the general meaning of the word, do not count as the documents classified by the act as 'other documents' and mentioned in Article 339 of the CCP, since those 'other documents' should be understood as documents which do not belong to the category of those particularly mentioned in Articles 338 and 339 of the CCP.

If such 'other documents' could also include extrajudicial written expert opinions, then, consistently, they would also have to include defendant statements or witness testimonies submitted privately or before a notary, or in any other manner going beyond the framework of court records mentioned in Article 338(1) of the CCP (or beyond the framework of surrogate court records – Article 254 of the CCP and Article 20 of the provisions implementing the CCP); such extrajudicial statements or testimonies cannot be counted as 'other documents' unless the rule of Article 338(1) of the CCP is to be cancelled".[10]

The literature of the era pointed out that the term "other official or private documents enclosed in the case file" cannot be understood as documents remaining in contradiction with the rule that only "expert opinions submitted to the court" may be read out.[11] The presented approach suggested a conclusion that it was unacceptable to examine the offered evidence; a statement by a private person, documenting certain events or observations, if it was already written and issued to a party after the initiation of a criminal proceeding, specifically for a party to present it in court as evidence, was treated as testimony submitted in writing before a private person.[12] Another interpretation of this ruling was presented by A. Bojańczyk. In this author's

[10] M. Kusak, *Opinia prywatna*, [in:] *System…,* op. cit., p. 5089, and the Supreme Court Ruling of 13 July 1930, II K 184/30, Collected Rulings 1930, no. 4, item 99, as referenced therein.

[11] J. Nisenson, M. Siewierski, *Kodeks postępowania karnego z komentarzem i orzecznictwem Sądu Najwyższego do dnia 1 kwietnia 1939 r. wraz z przepisami wprowadzającymi i dodatkowymi,* Warszawa 1939, pp. 196–97, quote in: A. Sakowicz, *Rys historyczny dowodów prywatnych w ustawodawstwie polskim,* [in:] *System…,* op. cit., p. 365.

[12] A. Sakowicz, *Rys historyczny dowodów prywatnych w ustawodawstwie polskim*, [in:] *System…,* op. cit., p. 362; Supreme Court Judgment of 13 October 1936, III K 1517/36, OSN(K) 1937, no. 3, item 86; Supreme Court Judgment of 20 September 1938, II K 1099/38, OSN(K) 1939, no. 4, item 88.

opinion – with which the author of the presented study agrees – this does not mean that the Supreme Court expressed a view that extrajudicial opinions could not be used but only that it would be a threat to use such opinions in a manner omitting the considerations of direct examination, in a manner that did not guarantee that "the judge would see the expert directly," or that "the judge would be able to verify the expert's reliability on the basis of direct observations." Rather than to the fact that the criminal proceeding rejects a extrajudicial expert opinion, the problem boils down to the fact that, regardless of the expert's person and competencies, the criminal proceeding requires observation of directness in examination of such evidence, understood as a necessity of a direct contact with an expert. Therefore, in the light of the principles adopted by the Supreme Court decision of 13 June 1930, as referenced above, one can imagine using a private opinion of an expert in a criminal proceeding – provided that it would entail remaining faithful to the principle of direct examination".[13]

The amendment of 23 August 1932 renumbered the provision concerning the reading out of documents, transferred the content of the provision of Article 339 of the former CCP of 1928 into Article 341 of the former CCP of 1928, and the open catalogue of official and private documents was expanded by medical certificates and crime notifications by the injured parties.

The above deliberations concerning the principle of direct examination and the use of a private expert opinion on the basis of the former CCP of 1928 are suggested by the necessity to consider the regulation concerning whether a party had an option to summon a "private expert" or only "official" experts appointed previously by judicial authorities in a preparatory proceeding, whom the court, for certain reasons, did not wish to summon to a hearing. This was referenced by a regulation originally contained in Article 298 of the former CCP, and later, in the identical wording, upon the amendment of 23 August 1932, in Article 299 of the former CCP of 1928 (the designation "Article 299 of the former CCP of 1928" will be used hereinafter). It stipulated that "the party which has been denied summoning of witnesses or experts under Article 298 may bring them to court on its own accord." In turn, pursuant to Article 298 of the former CCP, "if the presiding judge decides that the circumstances indicated by a witness's statement cannot affect the content of the judgment, he should

[13] A. Bojańczyk, *Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej*, Warszawa 2011, p. 474.

move the case to a closed-door hearing (§1); A motion submitted after the deadline shall be brought by the presiding judge to a closed-door hearing of the court, which may adopt a negative decision if the conditions provided for in Article 332 (§2) are fulfilled; The provisions of Sections 1 and 2 do not apply to the public prosecutor (§3)".

Andrzej Sakowicz points out that the provision of Article 299 of the former CCP of 1928 "offers a temptation to deem it a criterion for distinguishing of so-called private evidence, since the norm under consideration allows a party to summon a witness or an expert to court, and unquestionably this provision allowed one to increase the adversarial nature of the proceeding, as well as to minimize the negative decisions of the court concerning summoning of witnesses."[14]

Aantoni Bojańczyk, in turn, pointed out that "on the basis of this provision, summoning of a witness or an expert to a hearing by a party meant that the party no longer had to apply to the authority conducting the criminal proceeding for examination of evidence", this was an absolute initiative to adduce evidence, independent from the court's decision in this regard.[15] However, the judicature at the time pointed out that the court was not obliged to hear the summoned witness, this provision did not impose an obligation to hear the summoned witness, summoning of the witness did not entail an automatic absolute obligation to hear them, these were only preparatory actions intended to enable the immediate examination of evidence in case of summoning thereof.[16] The referenced provision of Article 299 of the former CCP of 1928 was valid until the end of 1969 and it was not maintained in the Code of Criminal Procedure of 1969; it is also absent from the CCP of 1997.

A particularly important question from the viewpoint of this study is whether it was possible for a party to a proceeding, under Article 299 of the former CCP of 1928, to summon a "private expert" as a court expert, or if the party could only summon "official" experts, appointed previously by the judicial authorities (e.g.

14 A. Sakowicz, *Rys historyczny dowodów prywatnych w ustawodawstwie polskim,* [in:] *System…,* op. cit., pp. 363–64.

15 A. Bojańczyk, *Dowód prywatny…,* op. cit., p. 194.

16 Supreme Court Judgment of 17 March 1930, II K 1647/29, OSN(K) 1930, no. 4, item 121; Supreme Court Judgment of 10 March 1931, II K 38/31, OSN(K), 1931, no. 9, item 283; S. Śliwiński, *Polski proces*…, op. cit., p. 629; S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego. Komentarz,* Warszawa 1960, p. 285.

experts in the preparatory proceeding, whom the court had not summoned to the hearing). The provision of Article 299 of the former CCP of 1928 directly pointed out a possibility to summon an expert if the party had been previously denied summoning them to a hearing; however, the available sources do not allow a precise verification of this issue or a clear answer to the raised question. Kmiecik expressed a view that the regulation under consideration probably applied to "private experts" as well. He said that "The Code of 1928, since the moment of its entry into force until the end of 1969, contained a provision enabling the party itself, if it had been "denied summoning of witnesses or experts" (Article 259 in the post-1955 wording), to summon experts (possibly including private ones) to court, whereas the belief of the Codification Committee that the court is supposedly obliged to hear the expert in such a case had already been rejected by the Supreme Court case-law as early as the late 1930s."[17]

In the above context, it is worth citing the reasoning of the Supreme Court judgment of 25 March 1930 (II K 224/30),[18] referencing the cited regulation of the Article 299 of the former CCP. In the opinion of the Supreme Court, "The CCP, not subscribing to the formal evidence theory, does not bind the court either with certain evidence indicated beforehand, which might have statutory priority over other evidence types. Evidence may include everything which is capable of forming the belief of the judges concerning the defendant's guilt or innocence and which has been disclosed in the legal proceeding; therefore, it includes every circumstance which gives any, even most distant indication concerning the manner of committing of the given act and the defendant's person, whereas the sole restriction applied by the CCP in this regard is the prohibition of use of evidence in the written form if the court is capable of acquainting itself directly with such evidence."

The provisions of the CCP of 1928 did not foresee the documents the contents of which included extrajudicial (private) expert opinions to be read out at a hearing. This restriction was mitigated by the previously referenced amendment of 1950, when the Article 299(5d) of the former CCP of 1928 allowed "expert opinions submitted out

17 R. Kmiecik, *Kontrowersyjne unormowania w znowelizowanym kodeksie postępowania karnego*, "Prok. i Pr." 2015, no. 1–2, p. 13.

18 Supreme Court Judgment of 25 March 1930, II K 224/30, OSN(K) 1930/5/147, LEX no. 329345.

of court, investigation, or inquiry" to be read out for evidentiary purposes as well, albeit only "with the consent of the parties." Another amendment of the CCP, of 20 July 1950, not so much changed the numbering of the provision concerning documents submitted to the case file being read out by the court (Article 341 of the former CCP to Article 299 of the former CCP) as distinguished a possibility of reading out of expert opinions submitted out of court or investigation in Article 299(5) of the former CCP of 1928. A contrario, extrajudicial (private) expert opinions could not serve as evidence without the consent of the parties.[19] The disposition making the efficiency of the court's initiative to adduce evidence conditional on the consent of the parties, and the efficiency of the party's initiative – on the consent of the other party, was met with criticism of the doctrine[20] and acceptance of the practicians.[21] This amendment, in Article 300(1)(6) of the former CCP of 1928, provided for a possibility of reading out of other official or private documents submitted to the case file. That made it more difficult to answer the question whether private expert opinions might be read out at a hearing under such circumstances.

The situation was additionally complicated by a regulation contained in Article 300(1)(5) of the former CCP of 1928, which, unlike Article 299(5) of the former CCP of 1928, concerned reading out of expert opinions submitted to a court or during an investigation or inquiry. The juxtaposition of the literal wordings of those three legal regulations created an impression that it was possible for an expert opinion developed out of the proceeding to be read out at a hearing. The key aspect here seems to be the interpretation of the phrase, "expert opinions submitted out of the court or of an investigation," as used in Article 299(5) of the former CCP of 1928. This was not a private opinion drawn up at request of a non-institutional entity but an opinion submitted in a different proceeding.[22] It was an opinion being an official document, which had been developed pursuant to a ruling by a judicial authority in a different proceeding, whereas the private entity came into its possession in order to introduce it to the criminal procedure and to include it in the body of evidence. Such an opinion

19 R. Kmiecik, *Kontrowersyjne…,* op. cit., p. 13.
20 M. Cieślak, *Zagadnienia dowodowe w procesie karnym*, Warszawa 1955, p. 201.
21 J. Terpiłowski, *Zasada bezpośredniości w teorii i praktyce*, NP 1958, no. 4, p. 81.
22 M. Kusak, *Opinia prywatna,* [in:] *System*…, op. cit., pp. 5089–90.

could be read out. Concerning the opinions requested by parties, the view of their inadmissibility, based on the case-law, was still prevailing.[23]

2.2. The Code of Criminal Procedure of 1969

The Code of Criminal Procedure of 1969 contained a completely different regulation concerning reading out of private documents. Firstly, a new editorial unit was created in that code, i.e. Article 339(1) and 339(2) of the former CCP of 1969. Secondly, the provision of this article contained no distinction between the official evidence and the private evidence. It seems that the official evidence has been mentioned in §1 of this article, whereas §2, due to the use of the expression "other documents," comprises a set of both official and private documents. Therefore, a question arose if the quite liberal expression in §2, stipulating that reading out of other documents, including, in particular, crime notifications, criminal record data, and community interview data, was allowed as well, which indicated an open catalogue of documents, allowed reading out of private expert opinions. The doctrine of the criminal proceeding elaborated quite a conservative position in this regard. It was noted that the term "document" was broad and had not been narrowed down by the legislator through the examples given in Article 339 of the former CCP, related to examples of documents most commonly read out.[24]

Therefore, the literature on the subject at the time devoted much attention to the analysis of types and examples of documents which could be read out under Article 339 of the former CCP of 1969, as well as those which could not.[25] In view of the above, a position concerning reading out of private opinions was elaborated as well. In his commentary to the former Code of Criminal Procedure, Stefan Kalinowski

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23 S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego*. *Komentarz*, Warszawa 1966, p. 438, quote in M. Kusak, *Opinia prywatna,* [in:] *System*…, op. cit., p. 5090; see more broadly: L. Peiper, *Komentarz do kodeksu postępowania karnego i przepisów wprowadzających tenże kodeks*, Kraków 1933, pp. 521–522; J. Nisenson, M. Siewierski, *Kodeks postępowania karnego z komentarzem i orzecznictwem*, Częstochowa 1947, p. 341; A. Mogilnicki, *Kodeks postępowania karnego. Komentarz*, Kraków 1933, p. 646.

24 M. Lipczyńska, R. Ponikowski, *Mały komentarz do kodeksu postępowania karnego,* Warszawa 1988, p. 258.

25 See more broadly on the documents which could not be read out under Article 339 of the former CCP and on those which were acceptable: T. Nowak, *Dowód z dokumentu w polskim procesie karnym,* Warszawa 1982.

stated it was unacceptable to read out the so-called "extrajudicial" or "private" expert opinions, e.g. the opinions issued at a party's request.[26] Furthermore, in contrast to the Code of Criminal Procedure of 1928 in its wording upon the amendment of 20 July 1950, opinions by appraisers, expert teams, etc., developed in the course of another proceeding, e.g. disciplinary or service one etc., conducted by authorities or bodies other than law enforcement agencies or judicial authorities, could not be read out under Article 339 of the former CCP of 1969 either.[27]

The position of the judicature at the time was similar. The Supreme Court, in its ruling of 6 May 1985, pointed out that "pursuant to the established practice, an out-of-court expert opinion cannot serve as evidence constituting the basis of appraisal, since such evidence has not been examined in the manner provided for by the Code of Criminal Procedure and the parties were unable to respond to such evidence. However, such a document cannot be omitted in an appeal proceeding, since it contains information about evidence which is not insignificant for the proper resolution of the case."[28]

In the case law of the 1970s it was accepted that "the concept of a document in the procedural sense is broad and covers not only the documents enumerated in the statutory definition of this concept, contained in Article 120 § 13 of the Criminal Code, but also other written evidence, provided that its content may be relevant to the case. Article 120 § 13 of the Criminal Code merely specifies which documents are afforded criminal-law protection."[29] In another judgment it was emphasised that "Article 339 § 2 of the Code of Criminal Procedure is a general provision, which allows for the reading at the main trial of documents other than those listed in § 1 of that provision, in particular a notice of an offence, criminal record data, and social inquiry reports. However, in certain instances the application of this provision is subject to restrictions (in the area of evidentiary prohibitions)."[30]

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26 S. Kalinowski, *Postępowanie przed sądem I instancji*, [in:] *Kodeks postępowania karnego. Komentarz,* Warszawa 1971, p. 404.

27 S. Kalinowski, *Postępowanie*…, op. cit., p. 404.

28 Supreme Court Judgment of 06 May 1985, I Kr 105/85450, OSNpG 1986, no. 5, item 66.

29 Supreme Court Judgment of 29.11.1972, III KR 217/72, OSNPG 1973, no 6, item 82.

30 Supreme Court Judgment of 20.08.1971, IV KR 145/71, OSNPG 1971, no 11, item 218.

On the other hand, the case law also included judgments indicating that "other documents" should nevertheless bear the quality of a document issued by a state institution or authority. Thus, for example, in the Resolution of the Supreme Court of 30 September 1977 (VII KZP 32/77) it was held that, pursuant to Article 339 § 1 or § 2 of the Code of Criminal Procedure, records of inspection, medical and forensic opinions, and other documents drawn up […] by a court or another state authority of a foreign state may be read at trial.[31] The case law also provided examples showing that writings prepared during the proceedings or for their purposes by neighbours or other private persons – containing opinions on the behaviour of the accused or other participants in the criminal process – do not constitute documents and therefore cannot be read at trial under Article 339 § 2 of the 1969 Code of Criminal Procedure.[32]

Reading such writings – instead of potentially hearing the individuals concerned as witnesses – would amount to circumventing evidentiary prohibitions. They do not constitute private documents within the meaning of Article 393 of the Code of Criminal Procedure, but merely information about evidence in the form of a witness who may be examined with respect to the contents of such a writing. By contrast, a protocol containing the explanations of a suspect, given during questioning and recorded before that person's subsequent death, is considered a document within the meaning of Article 339 § 2 of the 1969 Code of Criminal Procedure and may be read by the court under that provision.[33]

On the basis of this code, less categorical conclusions were also formulated, referencing the possibility for a private expert opinion to be read out in a private-prosecution proceeding, an appeal proceeding, or a proceeding related to bringing an action in an adhesion proceeding.[34]

31 Supreme Court Judgment (7) of 30.09.1977, VII KZP 32/77, OSNKW 1977, no 10–11, item 113.

32 Supreme Court Judgment of 04.07.1974, II KRN 28/74, OSNKW 1974, no 11, item 211; Supreme Court Judgment of 20.07.1971, IV KR 145/71, OSNPG 11/1971, item 218; Supreme Court Judgment of 20.8.1971, IV KR 145/71, OSNPG 1971, no 11, item 218; Supreme Court Judgment of 15.12.1977, III KR 335/77, OSNKW 1978, no 7–8, item 87.

33 Supreme Court Judgment of 10.01.1975 r., VI KZP 22/74, OSNKW 1975 no 3–4, item 36.

34 M. Lipczyńska, *O tzw. "opinii prywatnej" biegłych w procesie karnym*, "Pal." 1976, no. 3, pp. 46–53.

The 1969 code contained no regulation equivalent to Article 299 of the former CCP of 1928 (Article 259(5) of the former CCP in the 1955 wording),[35] concerning summoning of experts to a hearing by the parties themselves. The provision allowing for reading out of out-of-court private opinions as strict evidence, even if only "with the consent of the parties" (Article 299(5) of the former CCP of 1928 in the 1955 wording), was absent as well. As pointed out by R. Kmiecik, written private opinions eventually lost their legal basis, which was recorded in the judicature and in commentaries to the CCP,[36] yet nevertheless, the literature was still making interpretation attempts aimed at determination, under new statutory conditions, of the accessorial role and admissibility of out-of-court opinions, at least in exceptional circumstances or as a part of incidental trends of criminal proceeding.[37]

2.3. The Code of Criminal Procedure of 1997

At the drafting stage of the Code of Criminal Procedure currently in force, the version of October 1990 included Article 387(3) of the CCP, stipulating that "any private documents produced out of a criminal proceeding and not for the purposes thereof, in particular, statements, publications, letters and notes, may be read out at a hearing, provided that their author is known and the authenticity of the document raises no doubts", and it was an equivalent of the current Article 393(3) of the CCP.[38] The currently binding Code of Criminal Procedure of 1997, in Article 393(1) and Article 393(3) of the CCP (in yet another editorial unit), has reinstated the distinction between the official evidence (§1) and the private evidence (§3).

It has also enabled reading out any private documents at a hearing, mentioning statements, publications, letters and notes as examples. However, before the July 2015 amendment, for 18 years (since the moment of entry into force of the current CCP), the possibility of reading out of any private documents at a hearing seems to have been more restricted than under the previous Code of Criminal Proceeding (of 1969),

35 Code of Criminal Procedure of 19 March 1928 ("Journal of Laws" 1950, no. 40, item 364, i.e.) of 13 September 1950.

36 S. Kalinowski, *Komentarz do Of the CCP*, [in:] *Kodeks postępowania karnego. Komentarz,* M. Mazur (ed.), Warszawa 1976, p. 468.

37 R. Kmiecik, *Kontrowersyjne*…, op. cit., p. 13.

38 A. Sakowicz, *Rys historyczny dowodów prywatnych w ustawodawstwie polskim,* [in:] *System*…, op. cit., p. 368.

due to the addition of a significant restricting premise. Private documents which could be read out only included those which had not been prepared for the purposes of the proceeding, which excluded the possibility of reading out of certain private documents. Therefore, this catalogue excluded the possibility to read out a private expert opinion which, due to its nature (being commissioned by a party in order to be utilised in the proceeding), was created for the purposes of the proceeding. The doctrine of criminal proceedings unambiguously pointed out a private expert opinion cannot serve as evidence in a case, due to the fact that:

1. it was not prepared at request of the authorized body, and thus it was not an opinion within the meaning of the provisions of the CCP, since Article 194(1) of the CCP required issuance of a decision on the admission of evidence from an expert's opinion,
2. it did not meet the two cumulative conditions: being prepared out of the criminal proceeding and not for its purposes.[39]

The case-law also presented a common position concerning the significance of private expert opinions. The prevailing view was that "a private opinion, or a written elaboration requested by a participant of the proceeding, rather than by an authorized judicial authority, is not an opinion within the meaning of the provisions of the CCP and may not constitute evidence in the case. An opinion developed at request of a participant of the proceeding, submitted thereby to the court, constitutes the participant's statement containing information on evidence."[40]

The case-law frequently cited the argument of the lack of reliability of a private opinion due to partiality of the expert who had prepared it. Such a thesis was presented, among others, by the Court of Appeal in Cracow in a justification of the judgment of 10 November 2012 (II AKa 107/2012): "Throughout the hitherto practice of Polish courts, a view has been consistently expressed on the inadmissibility of evidence from a private expert's opinion, i.e. an opinion commissioned by a party, out of the

39 A. Gaberle, *Dowody w sądowym procesie karnym. Teoria i praktyka,* Warszawa 2010, pp. 244–245.

40 See e.g. Supreme Court Judgment of 04 Feb 2003, III KK 494/00, LEX no. 75451; Supreme Court Judgment of 25 June 2003, IV KK 81/03, LEX no. 81193; Supreme Court Ruling of 21 August 2008, V KK 133/08, LEX no. 449097.

proceeding. Such an opinion may constitute information for a judicial authority concerning the purposefulness of admission by that authority of evidence from an expert opinion, but cannot substitute for such an opinion itself, since it could not be deemed issued by an impartial person if it has been issued at a party's request, and thus its author has been connected with the given party by a contractual tie based on a financial connection. This excludes the author from performing a function in the proceeding (Article 1969(3) of the CCP). […] The contractor feels obliged to fulfill the request so that the ordering party's goal would be achieved, they sympathize with the ordering party, establishing a kind of an emotional commitment on that party's side, the contractor is experiencing a natural pressure of the ordering party's expectations. This does not mean that the expert consciously issues a false opinion, contrary to their knowledge, but that they – even unconsciously – sympathize with the ordering party."[41]

Such an opinion could not become evidence but it was included in the case file as a private document. The case-law pointed out, however, that such a document could not be omitted completely, since it contained information which was not insignificant for the correct resolution of the case.[42] As pointed out by A. Gaberle, such a document could have been of vital importance as a substantiation of an application to summon an expert, an application to take measures aimed at removal of defects in an expert opinion, or could be treated in its own right as a motion for evidence.[43] In such cases, the court was to respond to a submitted private opinion with an instruction pursuant to Article 16(2) of the CCP, concerning the possibilities of use of such an opinion, as mentioned above. A private opinion could gain the quality of evidence if introduced into the body of evidence through hearing the authors of the opinion as experts.[44]

That situation has changed with the aforementioned July 2015 amendment.[45] In the Polish criminal procedure until 1 July 2015, a private expert opinion prepared out

41 Judgment of the Court of Appeal in Cracow of 10 November 2012, II AKa 107/2012, LEX no. 5192827.

42 Ruling of the Court of Appeal in Katowice of 22 November 2001, II AKa 395/01, OSA 2003, no. 6, item 65.

43 A. Gaberle, *Dowody*…, op. cit., p. 245.

44 Judgment of the Supreme Court of 10 June 1980, II KR 162/80, Legalis.

45 Act of 27 September 2013 on the amendment of the Code of Criminal Procedure Act as well as certain other acts (Journal of Laws 2013, item 1247).

of a criminal proceeding and for its purposes could not have constituted evidence in the case. The case-law was also quite clear in presenting the position in this regard. The amendment under consideration removed the "not for the purposes of the proceeding" premise from the content of Article 393(3) of the CCP. This has opened an option to introduce private documents prepared for the purposes of a criminal proceeding, and thus a private expert opinion as well, into a proceeding in the manner stipulated in the provision under consideration (i.e. reading out).

As pointed out in the substantiation of the July 2015 amendment, the equalization of chances of the parties requires making a certain break from the hitherto binding principle that no private documents prepared out of a criminal proceeding and for its purposes were allowed to be read out at a court hearing. Through removal of the restriction under consideration, encapsulated in the formulation, "not for the purposes thereof," it was to significantly expand the options of preparation of the parties, especially of defense, for the pending judicial proceeding.[46]

Furthermore, the substantiation pointed out that a party would have a possibility to submit a motion for evidence from an expert opinion (drawn up by an expert who has prepared an opinion for the defence) and to hear such an expert in court if the court admits such evidence; a party should also present material evidence to the court at a hearing (and to the remaining parties, as well as to witnesses and experts if necessary) if physically possible, pursuant to Article 395 of the CCP.[47]

3. Conclusions

Private expert opinions have never been prominent in the regulations contained in the Polish Codes of Criminal Proceeding. Although the legislator has expressed the subject matter of evidence, including private documents, in a diverse manner, it has never been singled out.

[46] See more broadly in the area of the legislator's motivations for the changes introduced by the amendment of July 2015. The substantiation of the draft act on the amendment of the Code of Criminal Procedure Act as well as certain other acts of 27 September 2013, Sejm of the Republic of Poland of the 7th Term, Parliamentary Paper, no. 870, p. 8.

[47] Ibidem.

The historical overview of the Polish criminal proceeding allows for a general conclusion that the examination of evidence in the form of private expert opinions prepared for the purposes of a criminal proceeding was not acceptable until 1 July 2015, as since 1 July 2015, private documents prepared out of a criminal proceeding may be read out at a hearing; those include private expert opinions which may be used in a proceeding as evidence subject to examination by the court. However, this does not mean that such documents had not been submitted in the course of criminal proceedings in the past (before 1 July 2015).

Nevertheless, they did not constitute evidence and were not examined in the course of a proceeding like other documentary evidence. They only constituted information on evidence. In spite of a liberal approach to reading out of private documents at a hearing and the lack of distinct exclusion of private opinions from this scope, the judicature did not turn out favourable to the admissibility of such evidence. This situation has changed following the July 2015 amendment of the CCP.

However, it should be stressed that a private expert opinion, although it comprises legitimate evidence in a criminal proceeding and may significantly contribute to "building" of the proceeding and the evidence, cannot substitute for an opinion by an expert summoned by a judicial authority, to which such an authority is obliged under Article 193 of the CCP.

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SUMMARY

Private Expert Opinions in Criminal Proceedings – A Historical Overview

The article aims to demonstrate the evolution of criminal-proceeding legal regulations which have been in force in the Polish legislation since 1928, related to private evidence, including the so-called private expert opinions. A private expert opinion is understood as a private document submitted in a criminal procedure by a non-institutional, private entity (e.g. a defendant or their defender, an aggrieved party or their attorney) to a judicial authority in order to be used in the proceeding and to pursue the legal interest of the entity under consideration.

The article presents the essential Polish legal regulations of the Codes of Criminal Procedure of 1928, 1969, and 1997, referencing private evidence and the use thereof in criminal proceedings, as well as the status of private expert opinions in the legal regulations under analysis; it presents the views of the doctrine and the case-law in this regard, prevalent at the time. The conducted analysis leads to demonstrating the differences in the status and role of private expert opinions in criminal proceedings between the aforementioned codes, as well as to showing the evolution of use of private evidence in criminal proceedings.

The study utilised such as research methods as the historical comparative legal analysis of the regulations in force in the successive parliamentary acts, supported by an analysis of the case-law and doctrine. A historical overview of the Polish criminal proceedings allows for a general conclusion that examination of evidence in the form of private expert opinions prepared for the purposes of a criminal proceedings was not acceptable until 1 July 2015, as since 1 July 2015, private documents developed out of a criminal proceedings may be read out at a hearing; those include private expert opinions which may be used in proceedings as evidence subject to the appraisal by the court.