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**THE RIGHTS OF A SUSPECTED PERSON GRANTED
IMMUNITY IN THE INTERPRETATION
OF THE SUPREME COURT – A CRITICAL REVIEW**

‘Laws are spider webs through which the
big flies pass and the little ones get caught.’

Honoré de Balzac

In the jurisprudence, an interpretation of law is generally a set of actions aimed to determine the meaning of a legal provision (the so-called interpretation of law in the strict sense) or the content of a legal norm contained in a specific legal provision (the so-called interpretation of law in the broad sense). In the application of the law by legal authorities, as well as in everyday life, doubts sometimes arise about the meaning of a particular provision of law or a legal norm. Most often the problems are related to language errors, faulty editing during the lawmaking process, socio-economic or political changes non-congruent to existing legal norms, or the too general or vague nature of these legal standards, allowing contrary interpretations.¹ Interpretation of law should be employed in order to remove such doubts. In the Polish criminal process, a so-called legal question addressed to the Supreme Court is vital. In accordance with article 441 of the Code of Criminal Procedure, if the diagnosis of a legal remedy results in raising an issue requiring substantial interpretation of an act, the appellate court may postpone the proceedings and refer the issue to the Supreme Court for adjudication (§ 1). Resolution of the Supreme Court is binding in the matter (§ 3). Therefore the primary function of the so-called legal question in a criminal

¹ Order of the Supreme Court – 16-06-1993, I KZP 14/93, Wokanda 11/1993, s. 8 and following; Resolution of the Supreme Court – 18-11-1998, I KZP 16/98, OSNKW 11-12/1998, pos. 48.

proceedings is to eliminate divergent legal interpretations present in the law application process, which is extremely detrimental to justice authority as a whole. On the other hand, this does not mean that a provision reviewed by the Supreme Court has been clearly and permanently modified. The idea is that if after the Supreme Court presents a particular interpretation of a provision of law and previously not included arguments arise, possibly leading to different conclusions or requiring detailed critical analysis because they may lead to different interpretations in practice, there is a possibility of fundamental re-interpretation of an act made by the Supreme Court. It is not always the case that the Supreme Court's resolution of a particular issue is adopted by the doctrine and jurisprudence with approval. Negative views and comments following an unaccepted resolution of the Supreme Court are then presented in so-called critical voices. The case of an unacceptable interpretation of law is presented in the following deliberation.²

Common knowledge of an instrument of 'disciplining the justice system' by means of a so-called complaint against the excessive length of the criminal proceedings forces one to acquaint the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in legal proceedings performed or supervised by a prosecutor and court proceedings without undue delay.³ The Act on complaint against delay is a surprisingly concise and clear piece of legislation and, as it seems, constructed of precise provisions of law. Unfortunately, reading the two orders of the Supreme Court on the said act in regard to the right of entitled parties to file a complaint against an undue delay of pre-trial proceedings introduces the reader to confusion. These are namely the order of the Supreme Court of 21 July 2009, WSP 1/09 and the order of the Supreme Court of 18 August 2009, WSP 4/09.⁴ The fundamental issue in the outlined context is the right of the suspected person, who has been granted an immunity, to file a complaint against excessive length of pre-trial proceedings. This leads to the need of answering the question of whether article 3 of the Act on complaint against delay provides a complete and closed list of parties entitled to filing the complaint against excessive length of proceedings car-

² See the critical gloss of M. Jędruszczak, Gloss to the Supreme Court ruling – 21-07-2009, WSP 1/09, Prokurator, 2010/1-2/154 and B. Janusz-Pohl, Gloss to the Supreme Court order – 21-07-2009, WSP 1/09. WPP, 2011/1/127.

³ Dz. U. 2004 No 179, pos. 1843 with later changes, referenced further as the Act on complaint against delay.

⁴ The order of the Supreme Court – 21-07-2009, WSP 1/09, OSNKW 2009, No 9, pos. 79 and the order of the Supreme Court – 18-08-2009, WSP 4/09, Prok. i Pr. – wkł. 2010 No 4, pos. 13.

ried in various procedures. Another question that arises after analysis of the above-mentioned resolutions of the Supreme Court concerns the nature of the decisions of the Court. One has to seriously analyze whether in these cases the role of the Supreme Court as an interpreter of law has not become the role of the lawmaker, creating case law. Therefore one has to express hope that the search for answers to the doubts raised will help to understand the reasons and correctly read the intentions that guided the Supreme Court issuing the resolutions in question. It should also be noted that due to the scope of the subject of this review, although the area of the orders of the Supreme Court that have caused confusion is broader, the following analysis will only concentrate on parties authorized to file a complaint against excessive length of the criminal proceedings.

At the outset it should be noted that, based on literal interpretation of article 3 of the Act on complaint against delay, one can argue that the law contains a closed catalog of parties entitled to filing the complaint in specific types of cases. This stance is supported by the fact that the legal standard not only lists specific types of procedures but also separately and specifically indicates the parties entitled to filing the claim.

In accordance with article 3 point 4 of the Act on complaint against delay in the case of criminal proceedings, the right to file the complaint accrues to the party and the victim, even if the victim is not the party. Legal definition of a victim and entities who are entitled to victim rights in specific cases can be found in article 49 of the Code of Criminal Procedure. According to § 1 of this article, a victim is a person or entity whose legal interests have been directly affected or threatened by an offense. Victims can also be state, local or social government institutions, even if they do not have a legal personality (§ 2). In turn an insurance company is a victim in regard to covered damages of a crime victim or damages it is obliged to cover (§ 3). In cases of crimes against the rights of people performing paid labor, referred to in articles 218–22 and article 225 § 2 of the Code of Criminal Procedure, the authorities of the National Labor Inspectorate may exercise victim rights, if their activities revealed a crime or they initiated proceedings (§ 3a). In cases where harm has been done to the property of state, local or social institutions, if an organ of the institution does not function, victim rights can be exercised by state control authorities who revealed the crime or initiated proceedings (§ 4).

The Act of complaint against delay also contains no legal definition of a party; therefore, in order to determine the entities entitled to file a complaint against delay in various types of procedures, one must use the definitions found in the codes that regulate the procedures in particu-

lar areas of law.⁵ Therefore, in the discussed subject, article 299 § 1 of the Code of Criminal Procedure should be consulted, which defines the term of a party of a criminal procedure in pre-trial proceedings. According to that provision, the parties of proceedings are the victim and the suspect. Pursuant to the provisions of article 71 § 1 of the Code of Criminal Procedure, a person is considered a suspect if an order has been made about presenting the charges to the person, or the charges have been presented to the person directly (without an order) in relation to interrogating him as a suspect. The analysis of article 3 point 4 of the complaint against delay in regard to article 299 § 1 of the Code of Criminal Procedure shows that the entities entitled to filing the complaint are only the suspect and the victim. One must keep in mind that article 3 point 4 of the Act on complaint against delay refers to the excessive length of the whole criminal proceedings, and therefore also to the stage of judicial proceedings in which the victim, in principle, is not a party, unless in the role of an auxiliary prosecutor, private prosecutor, or civil plaintiff. For this reason, perhaps, in order to avoid any doubt whether a victim is entitled to filing a complaint during judicial proceedings, the text of this provision indicates that a victim has the right to file the claim, even if the victim is not a party.

As mentioned earlier, the list of entities entitled to file the complaint against excessive length of pre-trial proceedings in accordance to article 3 point 4 of the Act on complaint against delay, interpreted alongside article 299 § 1 of the Code of Criminal Procedure, seems quite clear and not casting doubts; however, that is, until one becomes acquainted with the order of the Supreme Court of 21 July 2009 and the Supreme Court ruling of 18 August 2009. Both decisions were ordered regarding essentially the same matter; that is, the admissibility of filing a complaint against delay in cases occurring before the amendment to the Act on complaint of delay had been introduced,⁶ as well as the right of a suspect granted immunity to file the complaint.⁷ The matter of the rulings was also similar, because the subject

⁵ In accordance to § 9 of the Regulation of the Prime Minister, 20-06-2002, "Rules of Legislative Technics" (Dz. U. 2002 No 100 pos. 908).

⁶ The Act of 20 February 2009 on amendment of the Act on complaint against breach of a party's right to hearing a case in court without undue delay (Dz. U. 2009 No 61 pos. 498); effective as of 1 May 2009.

⁷ Although the brought rulings of the Supreme Court were related to a military court judge, in our opinion the decisions may also apply by analogy to other persons granted immunity, in respect to which it is impossible to prosecute without the permission of the relevant authority.

of both pre-trial proceedings were acts of which a judge of a military court was suspected.⁸ It should be emphasized that regardless of the differences in the adjudicated facts, both cases had an important element in common, namely the fact that in none of these investigations had the judges been accused of crimes, and the pre-trial proceedings were discontinued in the phase of *in rem*. Therefore, the judge occurred in these proceedings only as a person of interest (possible suspect), not as an actual suspect, and thus did not become a pre-trial proceedings party according to article 299 § 1 of the Code of Criminal Procedure.

According to the scope of the analysis outlined in the introduction, the most important and primary thesis of the Supreme Court that should be taken into consideration is the one according to which individuals granted immunity in specific cases are entitled to file a complaint against delay of pre-trial proceedings, even when they are formally not a party. For the sake of clearness of the deliberations, the signaled theses of the Supreme Court's rulings that cause justified confusion should be cited. In its ruling of 21 July 2009, the Supreme Court stated that 'a judge, against whom a prosecutor filed for permission to the disciplinary court to prosecute him for committing a specific crime, and then, not obtaining such permission, discontinued the *de facto* performed criminal proceedings based on article 17 § 1 point 10 of the Code of Criminal Procedure, is entitled at the very least to the rights of a suspect based on article 306 § 1 of the Code of Criminal Procedure, and therefore also the right of filing a complaint under article 3 point 4 of the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in pre-trial proceedings performed or supervised by a prosecutor and court proceedings without undue delay'.⁹ According to article 306 § 1 of the Code of Criminal Procedure, victims and institutions mentioned in article 305 § 4 of the Code of Criminal Procedure are entitled to filing a complaint against the decision to not initiate pre-trial proceedings, and the parties – against discontinuing it. Similarly, in the Supreme Court's decision of 18 August 2009, the same court, although considering a slightly different factual state, but also in the case of a judge of a military court, stated that 'a judge against whom a prosecutor – contrary to article 17 § 2 of the Code of Criminal Procedure – is running an actual

⁸ It needs to be indicated that in the first case the prosecutor issued a claim to the disciplinary court asking for permission to subject the judge to criminal liability. Having not obtained the permission, the proceedings were discontinued (ruling of the Supreme Court of 21-07-2009). In the second case the prosecutor discontinued the investigation, not applying for waiver of the judge's immunity.

⁹ Ruling of the Supreme Court – 21-07-2009, WSP 1/09, OSNKW 2009, No 9, pos. 79.

investigation, is entitled to the rights of a suspect, therefore also the right to file a complaint under article 3 point 4 of the Act of 17 June 2004 on the complaint against infringement of the right of a party to have the case examined in pre-trial proceedings performed or supervised by a prosecutor and court proceedings without undue delay (Dz. U. No 179, pos. 1843 with later changes)¹⁰.

It should be noted that the statements of the Supreme Court ‘the *de facto* performed criminal proceedings (against the judge)’ and ‘a judge against whom a prosecutor (...) is running an actual investigation’ set a new and previously unrecognized form of pre-trial proceedings – the *de facto* proceedings (or the so-called actual investigation). These statements are obviously unacceptable, but still the reasoning of the Supreme Court is interesting; that is, the set of actions performed to determine the meaning of the content of the rule of law which led to forming such a surprising position that ‘a judge, known by name and performed function, not covered by long-term criminal proceedings, is a party of these proceedings under article 3 point 4 of the Act on complaint¹¹’ even when there are no charges filed against him that would result in him becoming a suspect.

Justifying the above view in its order of 21 July 2009, the Supreme Court, among other things, stated that ‘...in the examined case the President of the Military Court (...) in Y., Colonel X., filed a complaint against the ruling of the Military District Attorney in Z. which refused to accept his complaint against the decision to discontinue the investigation. The Military District Court in Y. changed the challenged ruling and agreed to recognize Colonel X.’s complaint. In justification of the resolution it concluded that Colonel X., at least from the moment the prosecutor had filed a request to subject him to criminal liability, should have the rights of a suspected person, including the right to filing a complaint against the order of discontinuation of the investigation under article 306 § 1 of the Code of Criminal Procedure, because ‘...filing a request to subject a judge (...) to criminal justice by the prosecution, based on previously gathered facts which allow the judge suspected of offense to be identified by first and last names, results in the fact that the criminal proceedings are becoming *in personam* from this moment. (...) As a result, in the examined case, judge Colonel X. is

¹⁰ Ruling of the Supreme Court – 18–08–2009, WSP 4/09, Prok. i Pr. – wkł. 2010 No 4 pos. 13.

¹¹ It should be noted that in the order of 18 August 2009, the Supreme Court repeatedly and explicitly refers to the order of 21 July 2009, in fact repeating it, albeit in a condensed form.

a party of pre-trial proceedings, having the right to challenge the decision to discontinue the proceedings in the case. Moreover, he must be considered a party under article 3 point 4 of the Act on complaint against delay, and have the legitimization to file a complaint against delay of the pre-trial proceedings carried against him.’ One must admit that the reasoning found in the justification of the order of 21 July 2009 of the Supreme Court is even more surprising than the thesis it resulted in. It must be strongly emphasized that the Code of Criminal Procedure of 1997 does not contain an *in personam* pre-trial proceedings initiation procedure. Criminal proceedings in the *in personam* stage occur when a specific person is presented with charges. According to article 313 § 1 of the Code of Criminal Procedure, if the data existing at the time of initiation of pre-trial proceedings or gathered during those proceedings sufficiently justifies the suspicion that an act was committed by a specific person, a decision to present charges is made, which is immediately presented to the suspect, who is interrogated, unless the presentation of the decision is not possible due to the suspect’s hiding or absence from the country. The decision to present charges includes suspect identification, accurate description of the alleged offense he is charged with and its legal characterization (§ 2). ‘Mere suspicion that an offense was performed by a specified person and that it is a crime, when a suspect has been granted immunity, determines only the initiation and conduct of pre-trial proceedings in a case (article 303 of the Code of Criminal Procedure) and determines its form (article 309 point 2 of the Code of Criminal Procedure).’¹²

Absolutely surprising is the ruling of the Military District Court in Y., cited in the Supreme Court’s justification, which conceded that from the moment the prosecution had filed a request for permission to subject the judge known by first and last names to criminal liability, judge X. – a person being actually only suspected – has the right specified in article 306 § 1 to file a complaint against the decision to discontinue the pre-trial proceedings. This thesis is surprising in that the legislator explicitly stated that only the parties – that is, the suspect and the victim – have the right to a complaint against discontinuation of legal proceedings (article 299 § 1 of the Code of Criminal Procedure). A person actually suspected does not have the status of a suspect, and thus does not meet the statutory requirement and cannot effectively file a complaint against the decision to discontinue the pre-trial proceedings.

¹² B. Janusz-Pohl, Gloss to the Supreme Court ruling – 21-07-2009, WSP 1/09. WPP, 2011/1/127.

Does this mean that the Military District Court, and also the Supreme Court, which shared this position (as evidenced by referencing the order in the Supreme Court's own justification), cannot distinguish between a suspect and a person being actually suspected? This seems unlikely, since even a student of law beginning his or her adventure with criminal proceedings, is taught the difference between those two categories of participants in criminal proceedings.

Article 71 § 1 of the Code of Criminal Procedure defines the concept of a 'suspect' indicating that it is a person against whom a decision about presenting charges has been issued or the charges have been presented to the person directly (without a decision) in relation to interrogating him as a suspect. Therefore it should be noted that it is the only possible way of obtaining the status of a suspect – a party of pre-trial proceedings. In view of the lack of a legal definition of a 'person (actually) suspected', the explanation of the definition should be derived from the views of the doctrine. This allows determining that a 'suspected person' is a person being in the range of interest of law enforcement, a person being suspected of committing a crime, who has not yet been presented with charges.¹³ Basically, the person is not entitled to any procedural rights. However, the legislator has imposed specific procedural responsibilities on this person. As an example, article 74 § 3 of the Code of Criminal Procedure should be noted, under which examinations or actions can be performed against the suspected person under § 2 point 1; that is, external examination of his body and other examinations not involving any invasion of bodily integrity; in particular, the fingerprints of the accused may be taken; he may be photographed and presented to other persons, in order to establish his identity, while maintaining the requirements specified in § 2 point 2 (provided that they are effected by a person on the health-service staff, according to medical directions and do not constitute a challenge to the health of the accused; if such examinations are indispensable) and point 3 (if such examinations are indispensable, not constituting a challenge to the health of the accused or other people), take blood, hair, cheek mucus samples, and other body fluids. It is obvious that in the course of the criminal proceedings, the status of a suspected person is significantly different than the status of a suspect and, as a consequence, depending on the character they appear as, they have different duties and different privileges.

¹³ See. T. Grzegorzczuk: Code of Criminal Procedure, Commentary, Kraków 2003, p. 259. order of the Supreme Court of 22 July 2004, WZ 49/04.

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Due to the fact that the negative consequences of pre-trial proceedings principally affect the suspected person to a minimal extent in regard to a suspect (often such a person is not even aware of criminal proceedings), therefore a suspected person has fewer responsibilities. At the same time, however, a suspected person has fewer privileges.

It should be emphasized that a suspected person is not a party in the pre-trial proceedings (sic!),¹⁴ and can only be qualified as ‘other people’ present in the pre-trial proceedings. Thus, a suspected person not being a party – under article 229 § 2 of the Code of Criminal Procedure – is only entitled to certain rights stated *expressis verbis* in the Act. It can be undoubtedly noted that a suspected person does not have the right to file a complaint against a decision to discontinue pre-trial proceedings under article 306 § 1 of the Code of Criminal Procedure, as the cited provision does not grant him such rights.

Meanwhile, the regulation of article 8 paragraph 2 of the Act on complaint against delay should be taken into consideration, according to which ‘in cases not regulated by this Act, to the proceedings being performed due to a complaint against delay, the court shall apply provisions of interlocutory proceedings applicable to the proceedings the complaint is about.’ Treating the above regulation as an interpretative provision, in the Code of Criminal Procedure, one should begin seeking a legal provision, which could possibly provide means to challenge a decision to discontinue proceedings by a person (actually) suspected, while counting on the fact that such a provision could become a basis for granting a suspected person the right to file a complaint against delay of pre-trial proceedings and therefore confirm the thesis found in the order of the Supreme Court of 21 July 2009.

Analyzing the statutory provisions regarding complaints, one can point out the regulation found in article 302 § 1 of the Code of Criminal Procedure, which states that ‘persons who are not parties to the preparatory proceedings shall have the right to lodge an interlocutory appeal against the orders and rulings which violate their rights.’ Therefore, there is indeed a legal basis for appealing an order of discontinuation of pre-trial proceedings by a person who is not a party. One must remember, however, the contents of article 425 § 3 sentence 1, according to which ‘the appealing party may appeal against the resolutions or findings only if they are prejudicial to his rights or benefits’. Simply put, the appealing person must have an interest in challenging the legal decision, a so-called *gravamen*.

¹⁴ This stance was taken by the Supreme Court in its decision of 22 July 2001, WZ 49/04.

With this in mind, a conclusion can be drawn that in the case of discontinuation of pre-trial proceedings in the *in rem* stage, the suspected person does not have a *gravamen*, since such a legal decision is prejudicial to neither his rights nor benefits. On the contrary – it is a favorable decision. Issuing an order to discontinue legal proceedings in the *in rem* stage occurs, generally speaking, when evidence gathered in the course of an investigation did not provide basis to presenting charges to any person, or there was a prerequisite (so-called legal obstacle) preventing issuing an order of presenting charges against a particular person. This leads to the conclusion that under article 302 § 1 of the Code of Criminal Procedure a suspected person cannot challenge an order to discontinue pre-trial proceedings. He is not entitled to the rights of a party in this respect. As a result, he cannot be regarded as a person entitled to filing a complaint against delay of pre-trial proceedings under the Act on complaint against delay of the proceedings.

Additionally, in the passage of the justification of the Military District Court in Y., quoted by the Supreme Court, there are also other statements that must be thought through. On one hand, the Supreme Court stated that ‘judge Colonel X., at least from the time the prosecutor applied for subjecting to criminal liability, should be entitled to the rights of a suspected person’, while surprisingly expressing in the further part of the justification that ‘filing a request to subject a judge (...) to criminal justice by the prosecution, based on previously gathered facts which allow the judge suspected of offense to be identified by first and last names, results in the fact that the criminal proceedings are becoming *in personam* from this moment. (...) As a result, in the examined case, judge Colonel X. is a party of pre-trial proceedings,...’. It is difficult to decide whether the Supreme Court’s statements quoted above are a lack of consistency, indecisiveness of the Supreme Court regarding the status of judge X. in the course of the investigation into the determined factual situation, or maybe simply the lack of distinction between a ‘suspected person’ and a ‘suspect’ and assuming that these two terms are synonyms, which should not happen to judges of the Supreme Court. Although the second term was not present in the quoted passage of the justification, from the statement of the Supreme Court that as of the moment of filing the application for subjecting the judge to criminal liability, the investigation enters an *in personam* stage, one can draw a justified conclusion that, according to this Court, an application for revoking the immunity of a judge substitutes an order of presenting charges, and once it is filed in the Disciplinary Court, the judge becomes a suspect.

Criticism of the arguments of the Supreme Court is derived from the undeniable fact that criminal proceedings enter the *in personam* stage only upon issuing an order of subsection to criminal liability of a specified person, or at least interrogating him as a suspect.

This lack of consistency is unfortunately evidenced in the next part of the reasoning of the Supreme Court expressed in the order of 21 July 2009, where it was stated that ‘...in a situation where criminal proceedings are conducted in a specified act of committing which an individualized judge is suspected, it is permissible to carry out activities listed in article 14 § 2 of the Code of Criminal Procedure.¹⁵ But when the prosecutor conducting or supervising the proceedings, contrary to existing law, does not file an application to subject the judge to criminal liability, and continues to perform investigative actions, the judge in these proceedings is entitled to the rights of a suspect, regardless of further actions of the person conducting or supervising the proceedings. It may not be the case that a judge, against whom criminal proceedings are *de facto* carried, is in a worse procedural situation than a suspect only because the person conducting or supervising the proceedings flagrantly infringes the applicable law.’ After the analysis of the complete justification of the Supreme Court, one cannot clearly determine in what capacity, according to the Supreme Court, judge X. appeared in the course of the pre-trial proceedings. The Court, to determine his status, basically interchangeably uses the terms ‘suspected person’, ‘suspect’, and ‘a person entitled to the rights of a suspect’. In addition, it is reasonable to notice the fact, which is seemingly obvious, that even a violation of law by the prosecutor does not result in judge X. obtaining the status of a suspect.

In light of the above, justification of the thesis about the right to filing a complaint against delay presented by the Supreme Court in the order of 18 August 2009 is not surprising, but probably should be. In this case the Supreme Court, basing the order on the norms under article 5¹⁶, article 7¹⁷,

¹⁵ According to article 17 § 2 of the Code of Criminal Procedure, until a motion is filed or permission from an authority is obtained which has been prescribed by law as a prerequisite to prosecution, the agencies conducting the trial shall conduct only actions not amenable to delay, in order to secure traces or material evidence, and actions aimed at clarifying whether the motion is to be filed or permission obtained.

¹⁶ Under article 5 of the Constitution of Poland, Republic of Poland safeguards the independence and integrity of its territory and ensures the freedoms and rights of persons and citizens, the security of the citizens, safeguards the national heritage and ensures the protection of the natural environment pursuant to the principles of sustainable development.

¹⁷ Under article 7 of the Constitution of Poland, the organs of public authority function on the basis of, and within the limits of, the law.

and article 181 sentence 1¹⁸ of the Constitution of the Republic of Poland,¹⁹ being an implementation of a rule laid down in article 2²⁰ – the democratic country of law – declared that “‘The Republic of Poland shall (...) ensure the freedoms and rights of persons and citizens, the security of the citizens’, and ‘the organs of public authority shall function on the basis of, and within the limits of, the law’.” Further into the justification the Court states that “...the provision under article 181 sentence 1 constitutes that, ‘a judge cannot, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty’.” In light of these norms, the range of entitlements of a prosecutor carrying out or supervising a criminal investigation – *in concreto* – in the case of a judge, more broadly – a person who has been granted immunity, is described under article 17 § 2 of the Code of Criminal Procedure, which allows only the performing (emphasized by the Supreme Court) of prompt activities in order to protect tracks and evidence, and activities aimed to clarify whether a permit will be issued. The article also states that the methods of performing investigative activities of a prosecutor are limited until ‘permission from an authority is obtained’, which is the basis of criminal prosecution. Conducting large-scale and long-term means of investigation is not within the limits of rights granted to process authorities and flagrantly violates article 17 § 2 of the Code of Criminal Procedure, and therefore falls outside the remits designated in general, but narrowly and clearly, to the public authority by the article of the Constitution of the Republic of Poland. In such a situation, it is clear that a citizen, against whom there are in fact criminal proceedings carried in a manner that does not comply with applicable regulations, may not suffer negative consequences. As in the cases described in article 16 of the Code of Criminal Procedure, according to which omission of the obligation or need by an authority conducting the proceedings cannot impose negative legal consequences on the participant or any other person concerned. Next, the Supreme Court states that although ‘in a situation present in the case being recognized there is no norm even close to the one specified in article 16 of the Code of Criminal Procedure, but it is difficult to require a rational legislator to predict such a – seemingly legal – manner of conducting criminal proceedings by the processing organ and shall post an

¹⁸ Under article 181 sentence 1 of the Constitution of Poland, a judge cannot, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty.

¹⁹ Constitution of the Republic of Poland, 1997.

²⁰ Under article 2 of the Constitution of Poland, Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.

appropriate regulation giving the person, against whom the proceedings are carried, and who is not accused or an application for permission to subject him to criminal liability, a means to defend his rights. Although there is an order provided in the criminal procedure not to initiate proceedings or to discontinue those actively carried in such a case (article 17 of the Code of Criminal Procedure), the implementation of this requirement is also subject to the will of conducting the proceedings, and for the lack of one of the mentioned decisions, no way of appealing has been prescribed. (...) Use of an analogous solution to article 16 of the Code of Criminal Procedure in the described case, given the direction of extensive case law of the Supreme Court – sensitive to respecting the rights of an individual and uniform Polish legal system from the beginning of this institution in the Polish legal system, that is from 1 January 1970 and due to an identical regulation in article 10 of the Former Code of Criminal Procedure²¹ (which was lacking only a regulation found in sentence 2 of article 16 § 2 of the present Code of Criminal Procedure), which remains current, is fully justifiable, since granting the right allowing the defense the rights of a person involved in criminal proceedings fits within the existing system of procedural safeguards and is beneficial for a person to whom it is – *in concreto* – applicable. Just as importantly, it allows triggering a control mechanism forcing the authorities to respect the binding law by the process organs.’

Analysis of the grounds of the decision of the Supreme Court of 18 August 2009 leads to frustration, which can be expressed by quoting Socrates: ‘scio me nihil scire’²² but with a difference in that in this case, this statement should be taken literally and treated as an expression of despair, and not as the result of deep philosophical thought.

The above deliberations based on the grounds of the order of the Supreme Court of 18 August 2009 lead to the inevitable conclusion that the Supreme Court only seemingly performed a system interpretation, along with only seemingly using methods of deductive reasoning. In the analyzed justification of the Supreme Court only *de facto* recalled a few regulations from various acts, including – to strengthen its position – the constitutional norms, which are in no manner logically related to the subject of the case or its resolution. In fact, the Supreme Court invoked a set of general principles of the Constitution of the Republic of Poland and laws that should clarify them. In-depth analysis of the justification leads to the conclusion

²¹ The no longer binding Act of 19 April 1969, Code of Criminal Procedure.

²² Lat. I know that I know nothing.

that between the various rules there is no conditional relationship, and some of the provisions referred to are not related to the case whatsoever (i.e. article 181 sentence 1 of the Constitution or article 7 of the Constitution of Poland related to activities of organs of public authority), or at least such a relationship is difficult to see in the reasoning cited by the Supreme Court.

Also completely incomprehensible is the method of reasoning which resulted in the Supreme Court stating that the right of a person actually suspected, who had been granted immunity, to file a complaint against the delay of pre-trial proceedings carried in violation of article 17 § 2 of the Code of Criminal Procedure can be interpreted from the contents of article 16 of the Code of Criminal Procedure. It should be said, however, that, even with the aid of the deduction of the Supreme Court, it is not possible to understand how an obligation of the authorities performing proceedings to inform the participants of the proceedings about their duties and rights, creates a right for the suspected person granted immunity to file a complaint against delay of the pre-trial proceedings. In view of the above, it is impossible not to notice that endorsement of the stance of the Supreme Court would give a suspected person granted immunity more rights than a 'regular citizen', that is one that has not been granted an immunity. This in turn could give rise to legitimate allegations of violation of constitutional principals of equality and social justice.²³

According to the jurisprudence of the Constitutional Tribunal, the rule of equality enacts an order to equal treatment of legal entities in a particular class. The above results in the fact that each legal entity having a particular significant characteristic (such as the status of a suspected person) should be treated equally before law, that is by the same measure, without differences neither discriminatory, nor favoring. Interdiction to introduce unfair disparities among legal entities is also one of the elements of social justice.²⁴ It should be emphasized that 'equality in human dignity and the resulting equality of rights and responsibilities is a requirement, without which we would go downhill to barbarism. (...) Belief in this equality not only protects our civilization, but also makes us human.'²⁵

The so far raised criticism about the statements made by the Supreme Court and their justification make the arguments cited by the Supreme Court not convincing. The wording of article 3 point 4 of the Act against

²³ Article 2 and article 32 of the Constitution of the Republic of Poland.

²⁴ i.e. sentence of the Constitutional Tribunal of 7 April 2009, P 7/08. Interdiction of discrimination has been made explicit in article 32 § 2 of the Constitution.

²⁵ Leszek Kołakowski, *Mini wykłady o maxi sprawach*, Wydawnictwo Znak, 2003.

delay and other appropriate provisions of the Code of Criminal Procedure cited above evidently and clearly show that existing law does not provide a basis for granting a person actually suspected (regardless of whether he has been granted an immunity or not) the right to file a complaint against delay of the pre-trial proceedings. This comes from the assumption, based on article 3 point 4 of the Code of Criminal Procedure, that the catalog of entities entitled to filing a complaint against delay of criminal proceedings in its every phase, including the stage of pre-trial proceedings, is a closed list. The argument above leads to the conclusion that the only parties entitled to filing a complaint against excessive length of an investigation or inquiry are the victim and the suspect.

Analysis of the arguments found in in the orders of the Supreme Court of 21 July 2009 and 18 August 2009 supports the belief that issuing the aforementioned orders, the Supreme Court, instead of only interpreting the binding law, assumed the role of lawmaker and actually created a case law. Apart from the analysis of the presented provisions, which led to questioning the existence of a legal basis to entitle a person (actually) suspected, who has been granted immunity, to file a complaint against the excessive length of criminal proceedings, one forms a belief that granting privileged people such a right undermines a basic human sense of justice. This seems to confirm an increasingly prevailing opinion that the biblical principle ‘who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked’²⁶ is more and more often replaced with ‘who has been given much, will demand more; and the one who has been entrusted with much, will ask for much more’.

To conclude, one must agree with Ch. Perelman in that ‘as the operation of justice ceases to be purely formalistic, and seeks the approval of parties and the public opinion, it is not sufficient to indicate that a decision was made under the guise of the authority of a rule of law; one must prove that it is right, proper and socially useful’.²⁷

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²⁶ The Gospel According to Luke, 12:48; Holy Bible, New International Version®, NIV® Copyright © 1973, 1978, 1984, 2011 by Biblica, Inc.®

²⁷ Ch. Perelman, *Logika Prawnicza*, Nowa retoryka, PWN, Warsaw 1984, page 208.

