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Detention in petty offense cases

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The right to liberty and security of a person is a fundamental right of every human being. Liberty and safety of an individual are guaranteed both by international and domestic laws and are subject to legal protection. The very notion of liberty does not have a basis in the statutory definition. What was understood by the term "liberty" in the broadest sense of the word? Was independence of an individual under any conditions? In a narrower sense, the concept of liberty is sometimes limited to external liberty, that is, the state in which a free individual does not experience violence, obstacles or coercion on the part of others in his or her pursuit of a goal, also, having the means allowing for the executing of his or her intentions[1].

On the one hand, provisions of law guarantee the liberty of each citizen, on the other hand point to the limitations arising therefrom, which means that the right to liberty is not an absolute right.

Here, important is also Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 19th January 1993[2] which stipulates that everyone has the right to liberty and personal security and that no person can be deprived of liberty with the exception of the following cases and in the manner prescribed by law:

[1] W. Sobczak, [in:] R. Wieruszewski (ed.), *Międzynarodowy Pakt Praw Obywatelskich (osobistych) i Politycznych. Komentarz*, Warsaw 2012, p. 223.

[2] Journal of Laws 1993, No. 63, item. 284 and 285.

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his or her committing an offense or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his or her lawful detention for the purpose of bringing him or her before the competent legal authority;

e) the lawful detention for prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his or her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Similar normalization is reflected in provisions of Article 31 section 3 of the Constitution of the Republic of Poland[3], where the legislator stressed that "any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". The possibility to limit personal freedom cannot, therefore, be treated arbitrarily, but must be clearly indicated by law.

Z. Świda emphasizes that the lawful limitation of the right to liberty is also found in criminal proceedings in relation to means of coercion which, after all, ensure the execution of the objectives of criminal proceedings[4], including petty offense proceedings. It is legal provisions, in-

[3] Journal of Laws 1997, No. 78, item 483.

[4] Z. Świda, *Prawo do wolności i bezpieczeństwa osobistego a stosowanie zatrzymania i tymczasowego aresztowania w procesie karnym*, [in:] B. Banaszak, A. Preisner, *Prawa i wolności obywatelskie w Konstytucji RP*, Warsaw 2002, p. 747.

cluding provisions of criminal law, that are to prevent any occurrence of arbitrary and unlawful deprivation of liberty — not only arrests but also detention — a preventative measure, directly referring to criminal proceedings. Liberty of an individual should be understood as freedom from arrest and detention; and personal security as protection against arbitrary interference with the liberty[5].

A means of coercion, related to the deprivation of liberty, obviously limited in time, is the above mentioned detention. This study is limited to detention as specified in the Petty Offenses Procedure Code, although detention and arrest are referred to by a number of acts of domestic law beginning with the Act of 6th June 1997 Code of Criminal Procedure[6], the Police Act of 6th April 1990[7], the Act on Juvenile Delinquency Proceedings of 26th October 1982[8], the Act of 26th October 1982 on Upbringing in Sobriety and Counteracting Alcoholism[9]. Detention is the only means of coercion in the proceedings in petty offense cases invading the human right to liberty.

Given the objective that must be met by detention in the proceedings in petty offense cases, detention types are as follows:

a) judicial detention, aimed at ensuring the proper conduct of proceedings (Article 45 § 1 of the Petty Offenses Procedure Code and Article 52 of the Petty Offenses Procedure Code.);

b) disciplinary (preventive) detention, aimed at maintaining order and security of the public (e.g. Article 15, section 1, item 3 of the Police Act of 6th April 1990, Article 12 of the Act of August 29th, 1997 on Municipal Police[10], Article 11, section 5 of the Act of 12th October 1990 on Border Guards[11]);

c) administrative detention, aimed at carrying out different types of procedures, e.g. placement in a Sobering Station or psychiatric hospital (e.g. Article 40, section 1 of the Act of 26th October 1982 on Upbring-

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[5] *Ruling Engel and others v The Netherlands*, of 8.06.1976, A. 22, par. 58.
[6] Journal of Laws 1997 No. 89, item 555.
[7] Journal of Laws 2011, No. 287, item 1687.
[8] Journal of Laws 1982, No. 35, item 228, as amended.
[9] Journal of Laws 1982, No. 35, item 230 as amended.
[10] Journal of Laws 2013, item 628.
[11] Journal of Laws 1990, No. 78, item 462.

ing in Sobriety and Counteracting Alcoholism, Article 32 of the Act of 19th August 1994 on Mental Health Protection[12]).

Regarding the proceedings in petty offense cases a dispute over whether judicial detention is a means of coercion of a separate and independent character, or whether it constitutes a preventive measure, is irrelevant[13]. Indeed the legislator placed the subject of detention in part VI of the Petty Offenses Procedure Code entitled "Coercive measures". One must bear in mind that the main purpose of detention is to ensure the proper conduct of proceedings. The main feature of the measure in question is eliciting a particular behavior, in this case related to temporary deprivation of liberty concerning a person suspected of committing an offense, the aim of which is to prevent the evasion of justice by hiding or removing the traces of the offense or to bring such a person before the body carrying out proceedings[14]. Therefore, detention will not refer to short deprivation of freedom not connected with the real deprivation of liberty, consisting even in bringing a given person to a police station for the purpose of investigation, e.g. to determine the person's identity or to carry out specific proceedings to take evidence[15]. Such behavior is closely connected with the need to compel a person to participate in certain legal proceedings after which the person is free[16].

Detailed rules for the application of judicial detention in petty offense cases are stipulated in Article 45 of the Petty Offenses Procedure Code and Article 52 of the Petty Offenses Procedure Code. According to Article 45 § 1 of the Petty Offenses Procedure Code "the police have the right to detain a person caught in the act of committing an offense or immediately thereafter if:

1) there are grounds to apply the accelerated procedure in relation to such a person,

2) it is impossible to establish the identity of the said person".

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[12] Journal of Laws 2011, No. 231, item 1375.

[13] Cf. A. Skowron, *Prawa i wolności obywatelskie w Konstytucji RP*, Gdańsk 2006, p. 202.

[14] Cf. R. Stefański, *Tymczasowe aresztowanie i związane z nim środki przymusu w nowym kodeksie postępowania karnego,* New Penal Codification. Brief Commentaries, issue 6, Warsaw 1997, p. 126.

[15] Resolution of the Supreme Court of 21.06.1995, I KZP 20/95, OSNKW 1995, No. 9–10, item 59.

[16] R. Stefański, op. cit., p. 126.

This provision lists the conditions of admissibility of detention in petty offense cases, expanding the conditions of admissibility of detention of a person arrested in the act of committing an offense or immediately thereafter in relation to the former Petty Offenses Procedure Code by a situation where at the moment of arrest it is not possible to determine the identity of this person. Article 72 § 1 d of the Petty Offenses Procedure Code of 1971 stipulated that detention of an "offender" is possible only in a situation where the person is caught in the act of committing the offense or immediately thereafter, however, only if the offense with respect to which the detention occurred was subject to examination in the course of accelerated procedure. The purpose of the detention was to bring the offender before the court. Besides the police, another body entitled to bring an offender before the court is one whom specific acts and assigned tasks are related to ensuring public order and security. Apart from this, only the police, following the decree on the compulsory bringing of the accused or a witness before the court, had the right to detain a given person, but only when it was essential, and only for the time necessary to execute the order (Article 141 of the Petty Offenses Procedure Code)[17]. It seems that the solution currently adopted is reasonable, since it allows for the proper continuation of preliminary investigation in the situation where at the moment of detention it is impossible to determine the identity of the person detained in the act of committing an offense or immediately afterwards.

One should note that the legislator does not require that the police executing the detention have evidence showing beyond all doubt that a given person has committed an offense. Information about the possibility of committing an offense by a particular person is sufficient. At the same time such an assumption cannot be arbitrary, but must be based on specific circumstances[18].

It should be noted that the basis for detention under Article 45 § 1 of the Petty Offenses Procedure Code is apprehending a person in the actual act of committing an offense or immediately afterwards. Thus, in order for the justified detention to take place in this way, there must be reasonable suspicion that the person detained is the perpetrator (substan-

[17] A. Skowron, op. cit., p. 203.

[18] K. Stocka, *Zatrzymanie w k.p.k. i ustawie o Policji*, NKPK XI, Wrocław 2002, p. 243.

tive condition) and the other condition (formal condition) stipulated by the legislator as an alternative — the basis for the application of the accelerated procedure, or the inability to identify the perpetrator. The legislator does not require the police executing detention to possess evidence showing beyond all doubt that a given person has committed the offense. Information about the assumed committing of an offense by a particular person is sufficient. At the same time, the assumption cannot be arbitrary, but must be based on specific circumstances[19]. Also with respect to formal conditions it is necessary to possess reasonable assumptions that are not arbitrary but that result from specific circumstances at the moment of detention. While the first condition — the basis for the application of the accelerated procedure — is easy to verify since it directly refers to Chapter 15 of the Petty Offenses Procedure Code where provisions of Article 90 list the conditions for the application of this type of procedure, the other condition — the inability to establish the identity of the perpetrator is more difficult to verify.

It seems reasonable to agree with the view that detention can also occur when the perpetrator is attempting to commit an offense. Law enforcement authorities do not have to wait until people at a sports stadium bring the intention of destroying seats into action. They can start the process of detention when the circumstances indicate that the so-called pseudo-fans will soon begin destroying the stadium facilities[20].

According to Article 45 § 1 of the Petty Offenses Procedure Code, the police are entitled to detain an offender. However, it should be noted that Article 45 § 2 of the Petty Offenses Procedure Code approves the execution of detention by another person through the application of provisions of Article 243 of the Code of Criminal Procedure on the grounds of provisions regarding petty offense cases. Thus, "everyone has the right to detain a person in the act of committing an offense, or to undertake a pursuit immediately after the commission thereof, if there is a possibility that this person will hide or if it is impossible to establish his or her identity". It is, therefore, permissible to temporarily capture a person until the arrival of police officers. The person effecting such an arrest

[19] Ibid.

[20] A. Skowron, op. cit., p. 204.

must, therefore, take all possible measures enabling the handing of the offender over to the police — he or she should thus call the police, inform third parties about the need for the arrival of the police to a given place, or must go with the offender to the nearest police station so that they could not be accused of unjustly depriving another person of his/her liberty. Unjustified detention of a perpetrator or his or her confinement longer than required may result in prosecution of the person doing so under Article 189 of the Penal Code or 191 § 1 of the Penal Code[21]. A citizen's arrest referred to above requires, however, the immediate handing over of the person arrested to the police. The time of the confinement is not included in the period of detention under Article 46 § 6 of the Petty Offenses Procedure Code.

The time of detention of a person suspected of committing an offense cannot exceed twenty-four hours or, with respect to the condition of the admissibility of applying in relation to the person detained in the accelerated procedure, the detention time cannot exceed forty-eight hours and is counted from the moment of arresting the person suspected of committing a given offense. It must be noted, which is often forgotten by courts adjudicating in criminal matters, that in accordance with Article 82 § 3 of the Petty Offenses Procedure Code the period of detention is credited against the term of imprisonment, restriction of personal liberty or fine imposed on the accused.

It should be noted that deprivation of liberty connected with detention as a legally permissible deviation from the constitutional principle of the inadmissibility of deprivation of liberty of a person, must result in the application of standards guaranteed inter alia by the Constitution, the Petty Offenses Procedure Code, the Police Act, and the Code of Criminal Procedure. The decision to detain occurs in the form of an order accompanied by a statement of reasons which is served upon the person detained. A police officer executing an arrest must advise the person arrested of his or her obligations, but also the rights the detained person is entitled to. The person arrested must mainly be informed about the reasons for the arrest and he or she must be heard out. It is important to remember to notify of the detention the persons closest to the per-

[21] Also K. Stocka, op. cit., p. 241.

son detained and their employer. This action is to be performed only at the request of the person detained, which follows from the wording of Article 46 § 3 of the Petty Offenses Procedure Code. This provision does not, however, relieve the officer effecting the arrest from furnishing the person arrested with due instruction about this right. The right to defense is not only enjoyed by the accused, but also by a person arrested who is subjected to this operation, after all, in connection with the necessity to carry out activities aimed in the near future at a possible presenting the person detained with charges. The very essence of detention implies the suspicion of committing an offense by a particular person. Thus, the detained person has the right to contact a lawyer — in petty offense cases — an advocate or a legal counsel, and to have a personal conversation with him or her, however, the police officer may demand his or her presence during their conversation. It must also be noted that at this stage the person suspected of committing an offense — the detained person — also has the right to a court-assigned attorney. Thus, the Chief Judge of the court having jurisdiction over the place of the offense at the request of the person detained, if he or she proves that he or she is not able to bear the costs of defense without prejudice necessary for him or her, or the family, designates a court-assigned attorney who is obliged to contact the person detained and grant him or her legal aid. A person detained on the grounds of suspicion of having committed an offense is also entitled to file a complaint to the district court having jurisdiction over the place of detention against the detention in which he or she may require the examination of the grounds for the detention, its lawfulness and correctness of the execution of detention procedures. The court examines the complaint forthwith at a meeting whose date is communicated to the person detained.

Also, a person unjustly detained is entitled to claims against the Treasury. Undoubtedly, unjust detention would be one that the court hearing the appeal considers unreasonable or illegal. Damage must result from the fact of detention. Economic losses are losses suffered by the injured party (*damnum emergens*) and benefits that he or she could have gained had he or she not been detained (*lucrum cessans*). The said losses may also result from bodily harm or a health disorder. In contrast, non-economic losses are connected with injury in the area of mental sensa-

tions of the person detained. It can be expressed in the feeling of humiliation and loss of reputation[22]. Naturally, the person detained may pursue his or her claims on the basis of civil procedure regarding protection of personal rights. Should the detention be judged as undoubtedly wrongful, the person detained is entitled to compensation and redress for sustained harm (Article 114 § 2 of the Petty Offenses Procedure Code). The deadline for filing the claims is six months from the date of release of the person detained and the court having jurisdiction to examine cases in this regard is the district court in the district where the release of the person detained was effected (Article 115 § 2 of the Petty Offenses Procedure Code). Claims for wrongful arrest are subject to limitation after one year from the date of release. The legislator defined a group of persons entitled to pursue claims arising from wrongful detention. The right to this claim is granted to unduly detained persons who were subsequently acquitted by a legally binding court decision or proceedings against whom were finally discontinued, and in the case of their death, their rights are transferred to their spouses, children and parents. Thus the group of persons entitled is, evidently, very limited.

To sum up, the right to liberty may be restricted, but the restrictions must necessarily arise from the content of the law and the provisions concerning restriction of the right to liberty cannot be construed broadly. Undoubtedly, detention under provisions of the Petty Offenses Procedure Code constitutes a legally permitted restriction of liberty of a person. However, it should be remembered that if the law allows the use of other means of coercion, the means that should be applied in the first instance are those that least offend human liberty. The assessment of admissibility of detention should always be made with regard to the dispositions of the act, when conditions to use these means of coercion are filled, and always on the basis of the analysis of circumstances of an individual case and personal circumstances of the person suspected of committing a given offense. Only in this way can the liability for violation of liberty — one of the fundamental human rights — be avoided.

[22] Ibid., p. 250.

Summary

The right to freedom is one of the fundamental human rights. However, the said right to freedom, guaranteed by national and international laws, is subject to specific restrictions. One of the forms of restriction of human freedom is detention of a person suspected of having committed an offense applied in the law on petty offenses as a means of coercion. The legislator emphasizes that the application of this measure calls for compliance with basic principles — necessity and minimization, and the conditions for its use must be strictly fulfilled without the possibility to use the broad interpretation in this case.

Keywords: liberty, fundamental human rights, offense, detention, coercive measures.