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Privacy Protection in Polish Criminal Procedure

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1. Introduction

The law of criminal procedure serves two main functions: it provides the public authorities the legal basis to intrude upon individual rights for the purposes of investigating and prosecuting criminal activity, and at the same time limits the power of these authorities by establishing clear boundaries of such power. From the perspective of privacy, it is therefore highly interesting to examine, where the law of criminal procedure, especially in the investigation stages, establishes the boundaries of police action interfering with the right to privacy. In this report, with an aim of gaining a better understanding of privacy, different types of privacy and how their protection is conceptualized by the legislators (and judiciary) in Poland will be described. The focus will especially lie on the protection of home and things inside private home, the body and mind of persons, personal communications, things and personal data. Special focus is given to those areas where recent technological advances challenge the traditional protections and provide the law enforcement authorities with a more focused lens into the private life of individuals. As a full and comprehensive description of all privacy related aspects of the criminal procedure would be enormous in scope, certain areas will only be briefly sketched and the report is rather selective in the array of topics that are given more focus.

2. Privacy and Criminal Procedure in Poland

a. A brief overview of criminal procedure

In Polish law, the criminal procedure (*procedura karna*) determines the rules governing the criminal trial and the preparation of a criminal trial.[1] The terms of "criminal proceedings" (*postępowanie karne*) and "criminal trial" (*proces karny*) are usually used in the literature interchangeably, although some authors recognize the difference. The criminal proceedings is implied to cover all actions aiming at an execution of substantive criminal law, whereas the trial is a particular stage in this process.[2]

The Polish Constitution states, that the Constitution itself, statutes, as well as the ratified international agreements and regulations constitute the sources of the universally binding law in Poland.[3] Some of the constitutional provisions, concerning for example, the right to defense[4] and to a fair and public hearing,[5] as well as the principles of the presumption of innocence,[6] two-

[1] Kmiecik, R., E. Skrętowicz (2009), *Proces karny. Część ogólna*, Wolters Kluwer, p. 23.
[2] Grzegorczyk, T., J. Tylman (2014), *Polskie postępowanie karne*, Lexis Nexis, p. 48.
[3] Art. 87(1) Constitution
[4] Art. 42(2) Constitution
[5] Art. 45 Constitution
[6] Art. 42(3) Constitution

instance court proceedings,[7] judicial independence[8] and the independence of judges[9] are considered as the essential examples of the rules regulating, both directly and indirectly, the criminal proceedings. However, the main statute regulating such proceedings is the Code of Criminal Procedure (*Kodeks postepowania karnego*), which together with the other statues regulating the structure and rules on the operation of the trial authorities and participants in the trial (for instance, the Law on the Prosecutor's Office and the Law on the Supreme Court), as well as the various internal regulations of the courts and prosecutors, which constitute an integral part of the Polish criminal procedural law.[10]

The Code of Criminal Procedure indicates four main purposes of the criminal proceedings. Firstly, it aims at ensuring the identification of perpetrators of criminal offences and assigning criminal responsibility, whereas it prevents innocent persons from having such responsibility imposed on them. Secondly, it fulfills the tasks of the criminal proceedings – not only combating the crimes, but also preventing them from happening and enhancing the rule of law and the principles of community life – through an appropriate application of measures provided by criminal law, and through the disclosure of the circumstances that facilitated the commission of the offence. Thirdly, it secures any legally protected interests of the injured party and should lead to resolving the case within a reasonable period of time.[11]

The participants to the proceedings include: trial authorities (i.e. court, prosecutor or the Police) parties to the proceedings and their representatives (i.e. public or private prosecutor and legal representatives), advocates of public interest (i.e. Ombudsman), personal sources of evidence (i.e. accused, witness, expert witness) and helpers of the trial authorities (i.e. specialist and translators).[12]

The criminal trial can be either common (*powszechny*) or special (*specjalny*). The first one happens before the common courts (*sądy powszechne*), whereas the latter is conducted by the special courts (*sądy szczególne*). Furthermore, two types of a criminal trial can be distinguished, depending on the kind of legal responsibility being the subject of that trial. The first one, the fundamental trial (*proces zasadniczy*) resolves the matter of criminal liability of the accused. The second type is the civil action in criminal trial, so the proceedings aiming to solve the issue of the civil liability of the accused, which involves the assessments of civil claims arising directly from the crime in order to solve a conflict in a comprehensive manner. The subject of criminal trial shall not change throughout the duration of it and it shall be indivisible, meaning that ruling on parts of the same subject in different proceedings is unacceptable.[13] Furthermore, the criminal trial is divided into formal stages of the preparatory proceedings (*postępowanie przygotowawcze*), judicial proceedings (*postępowanie sądowe*) and enforcement proceedings (*postępowanie wykonawcze*).[14]

During the first stage, it is decided whether any basis for the initiation of proceedings exist or whether they should be terminated. The main tasks to be accomplished in the course of the

[7] Art. 176(1) Constitution
[8] Art. 173 Constitution
[9] Art. 178(1) Constitution
[10] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[11] Art. 2. § 1 KPK.
[12] Grzegorczyk, T., J. Tylman (2014), *Polskie postępowanie karne*, Lexis Nexis, p. 45-46.
[13] Jerzy Skorupka, *Kodeks postepowania karnego. Komentarz* (C.H. Beck 2015) 3-4.
[14] Grzegorczyk, T., J. Tylman (2014), *Polskie postępowanie karne*, Lexis Nexis, p. 56.

preparatory proceedings include the determination whether the suspected offense actually constituted a crime, detection of the offenders and their apprehension if necessary, gathering data about the accused, clarification of the circumstances and preparation of any relevant evidentiary material for the court.[15] It is usually conducted in the form of investigation or inquiry by a prosecutor or alternatively, by the Police supervised by a prosecutor.[16]

Generally, an inquiry is conducted in relation to criminal offences falling under the competence of a district court, where the penalty is not higher than 5 years and a number of other criminal offences listed in Art. 325b of the CCP. An investigation is generally conducted in cases of more serious criminal offences, when an inquiry is not conducted, and in cases of crimes committed by public officers. Furthermore, the prosecutor can decide to conduct an investigation in serious cases of criminal offences where inquiry would otherwise be conducted.[17] Manufacture of significant amount of synthetic drugs or manufacture of drugs with the aim of material benefit is a felony under Art. 53(2) of the Narcotics Act falling under the competence of a regional court. The preparatory proceedings in these cases are conducted in the form of a prosecutor-led investigation.

An investigation is conducted by the prosecutor who can delegate the whole investigation, or parts of it, to the police.[18] It has to be completed within 3 months and in reasonable cases can be extended by the prosecutor for a period of 1 year. This period can be extended only in exceptional cases for another specified period.[19]

The judicial proceedings take place after the complaint is forwarded to the court in order to examine the case and deliver the judgment. They are comprised of three phases: preparation for the main hearing (*przygotowanie do rozprawy głównej*), the main hearing (*rozprawa główna*) and the final actions (*czynności końcowe*).[20] In accordance with the principle of the two-instance court proceedings, they are divided into main (*postępowanie główne*) and appellate (*postępowanie odwoławcze*).[21] The legality and the legitimacy of the court of first instance decision may be controlled by the court of second instance during the appellate proceedings.

Finally, the enforcement proceedings start immediately after the judgment becomes enforceable.[22] Their aim is to execute the final sentences, punitive measures and security measures, as well as to control the course of the trial period of conditional discontinuance of the proceedings. They are usually conducted by the Police, which fulfills the court's commands.[23]

However, the formal initiation of criminal proceedings is not necessarily the moment when the law enforcement authorities start acting in their task to detect crime and perpetrators. Several law enforcement authorities have crime fighting powers under sectoral laws. This report will also focus on the powers of the police under the Police Act. In particular, the police is authorized to perform operational and exploratory activities aimed at uncovering, preventing and detecting

[15] Art. 297 § 1 KPK.
[16] Kmiecik, R., E. Skrętowicz (2009), *Proces karny. Część ogólna*, Wolters Kluwer, p. 20.
[17] Art. 309 CCP.
[18] Art. 311 CCP.
[19] Art. 310 CCP.
[20] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[21] Grzegorczyk, T., J. Tylman (2014), *Polskie postępowanie karne*, Lexis Nexis, p. 82.
[22] Art. 9 Kodeks karny wykonawczy
[23] Art. 10 Kodeks karny wykonawczy

criminal offences, independently of the formal criminal proceedings.[24] These powers are at the disposal of the police in the pre-procedural stage as well as concurrently with the preparatory stage and after it has been discontinued. Even though there is a degree of disagreement in the literature about the relation of the operational and exploratory activities to the criminal proceedings[25], the former are generally perceived as supplementary to the latter in the sense that the operational activity often serves as basis for initiating the criminal proceedings or for further procedural measures.[26]

The relation of investigation in the preparatory proceedings and the operational activities under the Police Act is somewhat blurred in the literature.[27] The prosecutor, who is in charge of the investigation is not authorized to conduct operational activities such as those given to the police, but only procedural measures prescribed in the Code of Criminal Procedure. Nevertheless, it seems that the police can still conduct these operational activities after formal initiation of the investigation, even though these activities lie outside criminal procedure and fulfil only a supplementary role. In any case, their effectiveness during formal criminal investigation will to a large extent vary in cases where the investigation is against a specific suspect and the cases without a specific suspect. In cases where the information at the moment of initiating the investigation or obtained during investigation create a sufficient suspicion that the act was committed by a specific person, the LEA issues a decision of presenting the accusation.[28] With this formal act, which is announced to the suspect, the suspect becomes a party to the proceedings, with certain procedural rights including the right to be present during procedural measures and file motions related to the proceedings. At this stage the use of covert operational measures aiming to detect ongoing criminal activity would likely be ineffective.

b. Main principles of criminal procedure

The criminal procedure is govern by a number of general principles stemming from constitutional and criminal law. These are socially important principles, which regulate the most crucial issues during the criminal proceedings.[29] They regulate either the initiation of the proceedings, their course, their form and the way they are conducted, the assessment of evidence, or the rights of persons accused.

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[24] Art. 14(1) PA.

[25] See e.g. Posytek, A. (2011), 'Wartość dowodowa czynności operacyjno-rozpoznawczych', Prokuratura i Prawo, iss. 3, 27; Kudla, J., P. Kosmaty (2015), 'Czynności operacyjno-rozpoznawcze i ich relacje do nowego modelu procesu karnego', Prokuratura i Prawo, iss. 12, 98; Chrabkowski, M. (2013), 'Wykorzystanie metod pracy operacyjnej w czynnościach spravdzajacych', Prawo i Prokuratura, iss. 7-8, 186-187, Kmiecik, R. (2014), 'O restryktywnym ujęciu przesłanek „prowokacji policyjnej" – polemicznie', Prokuratura i Prawo, iss. 3, 6.

[26] See e.g. Szumski, A. (2010), 'Rola czynności operacyjno-rozpoznawczych w uzyskiwaniu dowodów w procesie karnym', Nowa Kodyfikacja Prawa Karnego, Tom XXVI, 196; Posytek, A. (2011), 'Wartość dowodowa czynności operacyjno-rozpoznawczych', Prokuratura i Prawo, iss. 3, 23.

[27] See e.g. Posytek, A. (2011), 'Wartość dowodowa czynności operacyjno-rozpoznawczych', Prokuratura i Prawo, iss. 3, 27; Kudla, J., P. Kosmaty (2015), 'Czynności operacyjno-rozpoznawcze i ich relacje do nowego modelu procesu karnego', Prokuratura i Prawo, iss. 12, 98; Chrabkowski, M. (2013), 'Wykorzystanie metod pracy operacyjnej w czynnościach spravdzajacych', Prawo i Prokuratura, iss. 7-8, 186-187, Kmiecik, R. (2014), 'O restryktywnym ujęciu przesłanek „prowokacji policyjnej" – polemicznie', Prokuratura i Prawo, iss. 3, 6.

[28] Art. 313 CCP.

[29] Waltoś, S., P. Hofmański (2016), *Proces karny. Zarys system*, Lexis Nexis, p. 209.

The principle of accurate criminal response (*zasada trafnej reakcji karnej*) is established by art. 2 § 1 point 1 KPK and is considered as an expression of the principle of justice.[30] It states that every person whose guilt has not been proven should not be criminally responsible, however, everybody whose guilt has been proven should not incur responsibility either greater or lesser than they deserve, and neither should they escape such responsibility. Thus, the accurate criminal response shall take into account the purposes of punishment in respect to a perpetrator, as well as the interests of persons injured by the crime.[31]

The same provision in point 4 expresses the principle of trial's speed (*zasada szybkości procesowej*) and it has the constitutional and conventional basis under art. 45(1) K and art. 6(1) ECHR. Although the term of a "reasonable time" has not been explicitly explained in the provision, nor does it provide for any specific criteria, the general principle's aim is to ensure, that the proceedings are conducted quickly and efficiently by eliminating all the unnecessary delays. It must be emphasized, however, that the speed of proceedings cannot be achieved contrary or in a way detrimental to the purpose of criminal trial and other statutorily guaranteed interests.[32]

Art. 2 § 2 KPK provides for the principle of material truth (*zasada prawdy materialnej*), which means that the basis for any decision shall be solely the actual established facts, as only the implementation of this principle allows to achieve the trial's purpose, namely resolving the question of criminal liability by applying the provisions of substantive criminal law.[33] The actual established facts shall be regarded as such if proven, meaning that any contradictory fact against them is either impossible or highly improbable in the light of collected evidence. Since an accused is always presumed to be innocent, the duty to collect evidence covers only the evidence concerning these findings, which are unfavorable for them,[34] this however does not mean that evidence towards innocence can be dismissed, merely that innocence does not need to be proven.

Art. 4 KPK contains the principle of objectivism (*zasada obiektywizmu*), which requires from the trial authorities and preparatory proceedings agencies to consider both, the circumstances for and against the accused. The presumption of innocence principle (*zasada domniemania niewinności*) under art. 5 § 1 KPK, has its constitutional and conventional basis in art. 42 (3) K and art. 6(2) ECHR, according to which every person is to be presumed innocent until his or her guilt has been affirmed by the final judgment of the court. Furthermore, this provision in paragraph 2, contains a separate principle *in dubio pro reo*, which establishes, that "*irresolvable doubts are resolved exclusively in favor of the accused".* [35] Since the accused is treated as innocent throughout the proceedings and he is not obliged to prove his innocence, the material burden of the evidence lies with the party accusing.[36]

[30] Woźniewski, K. (2015), 'Zasada trafnej reakcji karnej – art. 2 § 1 pkt 1 K.P.K. po nowelizacji z dnia 27 wrzesnia 2013 roku', *Gdańskie Studia Prawnicze*, Tom XXXIII, p. 425.
[31] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 8.
[32] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[33] Karczmarska, D. (2016), 'Zasada prawdy materialnej po nowelizacji k.p.k. na tle innych zasad prawa karnego procesowego', *Studia Iuridica Lublinensia* vol. XXV, p. 231.
[34] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 13.
[35] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 24.
[36] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.

Art. 6 KPK ensures the right of defence (*zasada prawa oskarżonego do obrony*) of the accused including the right to use a defence counsel. This right also results from the art. 42(2) K, as well as from the international obligations under art. 6(3) ECHR and art. 14(3) ICCPR. The importance of this right lies in enabling the accused to repel the charges and challenge the evidence against them, as well as present the evidence to substantiate their claims, therefore, the accused shall always be informed about this right.[37] The right to defence is further developed in various other provisions of KPK, for example in art. 78-81, art. 439 § 1 points 10 and 11.[38]

The principle of free appraisal of evidence (*zasada swobodnej oceny dowodów*) under art. 7 KPK is addressed to all the trial authorities competent to give a judgment. Their convictions must always be based on the collected evidence, which they assess with taking into consideration the principles of sound reasoning and life experience. Although the competent authorities have discretion in assessing the evidence, in accordance to art. 424 § 1, they are obliged to indicate which facts have been found proven and which not, as well as the evidence upon which the court has relied on and the reasons why the evidence to the contrary has been dismissed.[39]

The art. 8 § 1 KPK provides for the principle of jurisdictional independence of the criminal court (*zasada jurysdykcyjnej samodzielności sądu karnego*), which states that "*the criminal court determines, at its own discretion, the factual and legal matters and is not bound by the determinations of another court or authority"*. Therefore, this principle means the autonomy for the criminal courts to rule on the case. The criminal court is, however, bound by the final judgments shaping the law or legal relationship, for example, it cannot disobey the final decision on a divorce.[40]

The art. 9 § 1 KPK formulates the *ex officio* proceedings (*zasada postępowania z urzędu*), which dominate in the stage of preparatory proceedings. This principle provides for the obligation for the law enforcement agencies to take an appropriate action on its own initiative if any reasonable suspicion of committing a crime exists.[41] It covers the situations, when the agencies initiate the actions without any application.[42] A derogation from this rule is made in favor of the complaint principle (*zasada skargowości*) governed by the art. 14 KPK which requires that the proceedings are initiated by filing an application by a specific person, institution or agency.[43]

The principle of legalism (*Zasada legalizmu*) expressed in the art. 10 KPK obliges all the trial authorities not to exempt anyone from criminal responsibility for the crime he committed. Each law enforcement authority is obliged to institute and conduct preparatory proceedings if a reasonable suspicion that a crime has been committed exists. The public prosecutor is moreover obliged to bring and support any charges. Furthermore, the principle of legalism is strengthened by the duty to denunciate, which is governed by the art. 304 KPK.[44]

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[37] Wiliński, P. (2006), *Zasada prawa do obrony w polskim procesie karnym*, Wolters Kluwer SA, p. 196–197.
[38] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[39] Kruszyński, P. (eds)(2012), *Wykład prawa karnego procesowego*, Temida, p. 63.
[40] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck.
[41] Ibid.
[42] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 48.
[43] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[44] Ibid.

The information principle (*zasada informacji*) expressed by the art. 16 KPK, establishes a duty to inform the trial participants on their rights and duties. It is distinguished in two forms: absolute (§ 1) and relative (§ 2). The first one covers the cases when an obligation to advise the parties to the proceedings of their rights and duties is explicitly stipulated by law, whereas the latter if that is not the case, but the circumstances of the situation require providing of such information. The information principle applies during all the stages of the criminal proceedings and in respect to all the participants.[45]

c. Constitutional protection of privacy

The right to privacy enjoys constitutional protection in Poland. Art. 47 protects the right to privacy and prohibits the legislator unjustified interferences in the sphere of family and private life. [46] The source of the right to privacy is human dignity, of which privacy constitutes one aspect.[47] Privacy is understood as the right to live one's own life according to one's own will with only the necessary minimum of external interference, and can also be phrased as the right to be left in peace.[48] The right to privacy is directly related to other goods, such as dignity (art. 30), parental rights (art. 48), freedom and secrecy of communications (art. 49), inviolability of the dwelling (art. 50), protection of personal data (art. 51), freedom of religious exercise and conscience including freedom from having to disclose one's religious feelings (art. 53) and freedom from unfair market practices violating privacy (art. 76).[49] Privacy is not protected by an absolute right and can be limited by statute, however, an interference which is not necessary is not allowed, i.e. a violation because of the state safety, or protection of rights and freedoms of other persons, if it violates private life relating to family bonds, contacts with close persons, as well as family integrity.[50] The necessary limitations cannot violate the essence of the right to privacy.[51] Own life and health[52], and intimate relations in the family[53], including the right to bring up children in accordance with one's beliefs[54] are considered to be in the core of the protected area where the requirements of usefulness, necessity and proportionality apply most strictly.[55]

[45] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 67-68.
[46] K 12/00 TK Judgment 24 October 2000.
[47] Chalubinska-Jentkiewicz, Korpiuk (2015), *Prawo Nowych Technologii,* Wolters Kluwer, 8:1.
[48] Chalubinska-Jentkiewicz, Korpiuk (2015), *Prawo Nowych Technologii,* Wolters Kluwer, 8:4.
[49] P 56/11 TK judgment 25.07.2013.
[50] K1/98 TK Judgment 27 January 1999.
[51] Chalubinska-Jentkiewicz, Korpiuk (2015), *Prawo Nowych Technologii,* Wolters Kluwer, 8:6.
[52] K 16/10 TK.
[53] K 18/02 TK.
[54] U 10/07 TK.
[55] Chalubinska-Jentkiewicz, Korpiuk (2015), *Prawo Nowych Technologii,* Wolters Kluwer, 8:42.

3. Protection of Places

a. Searches

The procedural actions of search (*przeszukanie*) are regulated by the Chapter XXV of the Code of Criminal Procedure. They are considered essential tools used during the criminal proceedings, as they aim at realization of the criminal trial's purpose. [56] Namely, they are undertaken in order to detect, detain or ensure compulsory appearance of a person, as well as to locate objects which may serve as evidence in criminal proceedings. Consequently, a search constitutes a means of coercion, as it interferes into the sphere of constitutionally protected rights and freedoms, such as the personal inviolability and the inviolability of home.[57] In principle, it is allowed to search people, premises and other places in every criminal case, however, in many cases it will be redundant.[58] Moreover, the provisions provide for searching in order to find any evidence, not limited to solely a significant one. However, the search should be conducted only if it is necessary, for example, if the evidence cannot be acquired in a different way.[59] The prerequisite for the initiation of a search is a justified assumption that the suspected person or the objects sought are to be located there.[60] Such justified assumptions can be based only on circumstances obtained in a procedurally sound and properly verified manner. It cannot be based on mere rumors or otherwise questionable sources.[61]

The authority competent to request a search is the court during the trial or, the prosecutor in the preparatory proceedings.[62] In order to initiate a search, issuing the relevant decision (*postanowienie*) is necessary.[63] The Terms of the Prosecutor's Office (*Regulamin Prokuratury*) require the decision to include the purpose of that search and identification of either the accused to be detected or detained, or the object which should be found or detained. Furthermore, the name, surname and address of a person subjected to these actions, as well as the authority conducting the search must be indicated. In the explanation of the decision, the evidence or circumstances giving the basis to suspect that a person accused or the sought objects are in the place indicated in the decision should be shown.[64]

The search is conducted by the prosecutor or the police authority authorized to conduct it. Moreover, in certain cases explicitly indicated in specific statutes, other authorities, such as the Border Guards, the Internal Security Agency, or the Military Police may also undertake a search.[65] In accordance with art. 143 § 1 pkt 6 KPK, a relevant authority searching a person, premise and

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[56] Koper, R. (2014), 'Przeszukanie w wypadkach niecierpiących zwłoki' *Prokuratura i Prawo* 11–12, pp. 14-31.
[57] Grzegorczyk, T. (2014), *Kodeks postępowania karnego. Tom I. Artykuły 1-467*, LEX.
[58] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 533; art. 219 KPK.
[59] ibid.
[60] ibid., 534.
[61] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz*, C.H. Beck, p. 534.
[62] ibid.
[63] Paprzycki, L.K., J. Grajewski, S. Steinborn (2013), *Kodeks postępowania karnego. Komentarz LEX. Tom I. Komentarz do art. 1-424*, LEX.
[64] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol, p. 15-16.
[65] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol, p. 16; art. 312(1) KPK in conjunction with art. 9 (1) of the Border Control Act (*Ustawa o Straży Granicznej*).

object has a duty to document these actions in the form of a protocol. Art. 229 § 1 KPK specifies further requirements for such a protocol.[66]

Search of promises is divided into the following phases: firstly, preparation and planning of the search, secondly, the entrance to the premise and realization of search and finally, documentation of that action by writing the protocol (art. 143 § 1 pkt 6, art. 229 § 1).[67]

i. Searches of the home

The inviolability of home is one of the main rights guaranteed under the European Convention on Human Rights,[68] and it is explicitly mentioned in most of the European constitutions. The Polish Constitution recognizes this right in art. 50. Not respecting the inviolability of home may lead to civil or even criminal responsibility, as it is protected under art. 23 of the Polish Civil Code and furthermore, it may constitute a criminal offense under art. 193 of the Polish Criminal Code. It may, however, be limited in certain cases, where provided by the relevant statutes.[69] The Code of Criminal Procedure contains provisions allowing for such an interference into individual's privacy during the conduct of criminal proceedings. Art. 219 KPK allows for a search of premises, including residential places such as the home, in order to detect, detain or ensure compulsory appearance of a person, as well as to locate objects which may serve as evidence in criminal proceedings.[70] Inhabited places are not only residential, but all places which are permanently or temporarily occupied by someone.[71] Consequently, it does not necessarily need to be an apartment in a one or multi-family house, but also hotel rooms, caravans, tents, hospitals, sanatoriums etc., which have been adapted as living spaces.[72]

In ordinary circumstances, in order to initiate a planned and prepared search of home, a relevant decision (*postanowienie*) must be issued by a court during trial, or by the prosecutor during the preparatory proceedings. Such a decision should be presented to a person whose place is to be searched before the initiation of it. Only in urgent cases not amendable to delay (*w wypadkach niecierpiących zwłoki*) the warrant is not necessary *ex ante*.[73] In circumstances, where no possibility of issuing the decision existed, either a permit of the head of the Police's unit, or in exceptional cases, the Police identity card of a policeman will constitute a sufficient document for conducting the search. These actions, however, will need to be later confirmed by the court or the prosecutor. In accordance with art. 220 § 3, if such confirmation has been demanded by a person whose place has been searched, it shall be delivered to them within 7 days from the date of search. It is mandatory to inform that person, that they have the right to demand it.[74]

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[66] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[67] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol, p. 15-16.
[68] Art. 8(2) ECHR.
[69] Art. 50 K.
[70] Kaznowski, A. (2010), 'Problematyka przeszukania mieszkania' *Prokuratura i Prawo* 4, pp. 64-77.
[71] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.
[72] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol; Kaznowski, A. (2010), 'Problematyka przeszukania mieszkania' *Prokuratura i Prawo* 4, pp. 64-77.
[73] Art. 308. KPK.
[74] Paprzycki, L.K., J. Grajewski, S. Steinborn (2013), *Kodeks postępowania karnego. Komentarz LEX. Tom I. Komentarz do art. 1-424*, LEX.

There are also formal requirements concerning the time when a search may be conducted. Art. 221 §§ 1-2 provides that it is not allowed to search one's home during the night time, namely between 10p.m. and 6 a.m. Therefore, it corresponds to a generally applicable rule of respecting serenity and the right to rest during the night time.[75] However, the given timeframe does not prevent a search from being continued after 10p.m., if it has been already initiated during the day time. Moreover, art. 221 does not apply in urgent cases, when conducting the search is necessary and should not be postponed until the morning, for example because of seriousness of a crime committed, or a threat of committing another crime.[76]

Art. 224 § 1, the provision of guaranteeing character, provides a duty to inform a person whose place is to be searched about the purpose of these actions and an order to issue sought objects or persons. Such order aims at avoiding entering a place, thus, interfering into an intimate sphere of an individual. However, a voluntary issuance of objects or persons will not always prevent the authorities from eventual search of the place. Furthermore, the person whose place is being searched should be present while such actions are conducted and, moreover, can appoint another person to be present there with them. If a host of that place is not present, an adult co-habitant or a neighbor should be summoned.[77]

It must be remembered that searching one's home cannot be performed without valid reasons. Even a threat by a policeman to search one's home without any basis may amount to a declaration of committing an offense of infringing the inviolability of home (art. 193 KK) connected to an offence of abusing policeman's powers (art. 231 KK).[78]

ii. Search of places of employment

The above mentioned provisions and formal requirements covered by the Chapter XXV KPK apply also to other premises, including non-residential places, such as the places of employment. Although the rigor for searching other premises is lower than in case of these residential as it interferes into privacy in a lesser degree, some persons, because of their profession, may be in possession of the documents containing data or information covered by a professional secrecy. The example of such professions include journalists, lawyers, tax advisors, doctors etc.

The KPK does not prohibit the competent authorities to order the letters or other documents containing confidential information, neither does it prohibit to conduct a search aiming at finding them. Consequently, no legal obstacles exist for conducting such actions towards, for example, a journalist in an editorial office to find his files containing a journalistic privilege. Furthermore, the criminal trial provisions concerning evidentiary material also do not limit searching actions in respect to documentation being subjected to professional secrecy.[79] The limitation, however, may concern the use of such documents in the criminal proceedings. If no circumstances indicating that the documents will be used later during the criminal proceedings exist, an initiation of a search for them is considered unfounded.

Art. 225 § 1 KPK provides for a special mode of proceedings in respect to data subjected to professional secrecy, which was found during a search, due to the necessity of ensuring an

[75] Kaznowski, A. (2010), 'Problematyka przeszukania mieszkania' *Prokuratura i Prawo* 4, pp. 64-77.
[76] ibid.
[77] ibid.
[78] II K 26/15 Sąd Rejonowy w Wągrowcu Wydział: II Wydział Karny (18.08.2015).
[79] Stefańska, B.J. (2015), 'Przeszukanie a tajemnica dziennikarska.' *Prokuratura i Prawo* 6, 60-74.

adequate protection of such information. [80] Consequently, when a person whose place is being searched will state that the documents found during a search contain professional secrecy, the authority conducting these actions shall immediately forward them to the prosecutor or the court (depending on which authority has ordered the search) in a sealed envelope without reading their content beforehand. The prohibition of reading the documents does not apply to the prosecutor.[81] Subsequently, the court assesses the forwarded documents whether they indeed contain such information containing a matter covered by professional secrecy.[82] In taking a decision whether they should be used during the proceedings, the court considers whether it is necessary for the good administration of justice, and whether it is possible to determine this fact on the basis of other evidence.[83] It must be remembered that the decision to dismiss the professional secrecy of professions covered by art. 180 § 2 KPK cannot be regarded as a mere formality. [84]

Moreover, in case of defense counsel, art. 225 § 3 is supposed to guarantee the protection of defense secrecy (*tajemnica obrończa*) , since it ensures the constitutional right to defense provided in the art. 42 (2) K, which is one of the main principle of the criminal proceedings.[85]

iii. Search of other non-residential (semi-)closed places

Other places include the premises or closed places, which belong either to the state or to local government institutions. In accordance with art. 222 § 1 KPK, such places may be searched, if the head of that institution, his deputy, or a superior authority is informed about a plan of that search. Moreover, they shall be allowed to participate in these actions.

Furthermore, a search may be conducted in non-residential places, which are occupied by persons or organizational units other than these mentioned in art. 222 §§ 1-2 KPK, such as for example a barn, a fenced yard, or a production facility.[86]

In accordance with art. 227 (3) of the Law on Higher Education (*Prawo o szkolnictwie wyższym)* the state agencies, which are responsible for public order maintenance and internal security may enter the university area, only if summoned by a rector. However, in cases threatening life or a natural disaster, such agencies may enter the university on their own initiative. In such situations they shall inform a rector. Consequently, a question arises whether a search of the university premises requires a prior permit from a rector. This, however, would be too far-reaching and it may be argued that although the Police is indeed a state agency responsible for maintaining both, public order and internal security, in the course of the criminal proceedings it acts as a law enforcement agency.[87]

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[80] ibid.
[81] Akz 37/15 Postanowienie Sądu Apelacyjnego II Wydział Karny w Rzeszowie (10.03.2015).
[82] Stefańska, B.J. (2015), 'Przeszukanie a tajemnica dziennikarska.' *Prokuratura i Prawo* 6, 60-74.
[83] I KZP 26/02 Uchwała Sądu Najwyższego - Izby Karnej (22.11.2002).
[84] Stefańska, B.J. (2015), 'Przeszukanie a tajemnica dziennikarska.' *Prokuratura i Prawo* 6, 60-74.
[85] I KZP 12/11 Postanowienie Sądu Najwyższego - Izba Karna (26.10.2011).
[86] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol.
[87] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.

iv. Public and quasi-public spaces

Public places are places which are available for an undetermined amount of persons, such as restaurants, cinemas, bars, discotheques etc. Also spaces serving at storing objects are regarded as such, for example a luggage storage at a train station. Art. 221 § 3 allows for searching these places also during the night time, unless they would be closed for the public during those hours.[88]

v. Vehicles

Art. 50 of the Constitution explicitly provides for a possibility to search vehicles to the extent mentioned in the statutes. Although art. 219 KPK omits to clearly include them, it is applicable for such situations, as a search of premises includes also vehicles.[89] The statutes regulating the actions of the Police, Internal Security Agency, Central Anticorruption Bureau and Military Police do not contain any clarification of what is regarded as a "vehicle".[90] In principle, the Police officers may search a vehicle, its trunk or luggage, solely in situations where there is a justified suspicion that a criminal offence was committed, or that a sought object is located in there. It is not permitted to conduct such a search in the course of a routine roadside inspection, or to every vehicle stopped. According to some legal opinions, the Police officers are not allowed to open a trunk of a vehicle if the driver is not nearby.[91] However, a search may be conducted if a person denies to show the documents to the Police officers. Then they are allowed to search the vehicle in order to find them. Furthermore, the police officers can search a car parked near a crime scene. [92]

vi. Computers

Computers, mobile phones, digital cameras, GPS and other hardware can on one hand serve as tool for committing a criminal offence, on the other they can store evidentiary material related to other criminal offences. Searching the content of such equipment, data carriers and e-mails is in accordance with the KPK; the same rules of searching premises and seizure of objects apply for conducting a search of information systems, and likewise, a relevant protocol must be written down after performing such actions. The search and seizure may include both, the physical object of hardware, as well as search and copying of data stored on the device. [93]

Because of specific features of computer systems, the authorities conducting such a search must always remember that hardware usually requires electricity and it can change its state, which may be the effect of a typical functioning of it (as getting a SMS), or be an effect of a planned and

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[88] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol, p. 19.

[89] Steinborn, S., P. Rogoziński, J. Grajewski (eds.)(2016), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX.

[90] Szumiło-Kulczycka, D. (2012), 'Kontrola osobista, przeglądanie zawartości bagaży, przeszukanie (przyczynek do kwestii racjonalności legislacji).' *Panstwo i Prawo* 3, 34-44.

[91] Vis Lege, 'Can the police search your car during a routine traffic stop?', available at: http://e-doradztwoprawne.com/publikacje/prawo-drogowe/25-czy-policja-moze-przeszukac-twoj-samochod-podczas-rutynowej-kontroli. [accessed 3 March 2017]

[92] Vis Lege, 'Can the police search your car during a routine traffic stop?', available at: http://e-doradztwoprawne.com/publikacje/prawo-drogowe/25-czy-policja-moze-przeszukac-twoj-samochod-podczas-rutynowej-kontroli. [accessed 3 March 2017]

[93] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol. p. 61.

intended action. Moreover, hardware may be sensitive for mechanical exposures, or magnetic and electrostatic fields.[94]

The procedures governing a search of an information system should always be considered solely as guidelines.[95] The circumstances of the case, as well as the knowledge of the authorities are the crucial aspects to make a decision, which should be taken on a case-by-case basis. [96] Unlawful search of an information system may constitute a crime of illegal access to information under art. 267 § 1 KK.[97] This is why the authorities must take detailed notes concerning every decision made and action performed in order to be able to justify them later. Although the procedures need a constant verification and actualization because of a constantly changing character of the information systems, a certain chronology of actions can be suggested. What is important, a search must be conducted in a way that does not interfere with the integrity of the system.[98]

In order to find evidence, also cloud computing, mainframes, PCs, smartphones, memory cards etc. may be searched. It is the type of a crime or the way it has been committed, which will suggest where to look for such a potential evidence. The investigation personnel must establish who is the main user of that system, as well as who had an access to it. [99] The user is a person who has had the power of disposal with the system.[100] In principle,, a search is only permitted within the computer system that is being used by the person subjected to the search and can be extended to other systems only in exceptional cases not amendable to delay.[101] Moreover, the way an access to it and connections from it have been controlled is also important.[102]

In urgent cases (art. 220 § 3 in conjunction with art. 217 § 3 KPK), a search may be extended at a distance,[103] which means that content of an information system will be investigated from a different system. Regulations in respect to that matter are not clearly contained in the KPK.[104] A search at a distance can take a form of an extended search (*rozszerzone przeszukanie*) or a remote search (*zdalne przeszukanie*). The first one takes place in situations when significant for an evidence data are in a different than primarily searched system, and accessing them is possible though the primarily searched system. The second one, however, is conducted without informing the user of that system beforehand, and it can be done for example, from a computer in the Police unit.[105] Therefore, a remote search may be conducted only during the operational control of the Police, and consequently, it cannot be regarded as a trial action.[106] An explicit regulation allowing the police to covertly access data in computer systems has been added to Art. 19 of the Police Act governing operational surveillance. Thus, safeguards binding the use of operational surveillance, which also includes visual monitoring of the home, aural interceptions from private

[94] ibid.
[95] ibid.
[96] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 534.
[97] Lach, A. (2011), 'Przeszuaknie na odleglosc systemu informatycznego', *Prokuratura i Prawo* 9, p. 68.
[98] ibid., p. 61-62.
[99] Czyżyk (n 8) 61-62.
[100] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 551.
[101] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 534.
[102] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol. p. 61-62.
[103] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 536.
[104] Lach, A. (2011), 'Przeszuaknie na odleglosc systemu informatycznego', *Prokuratura i Prawo* 9, p. 73.
[105] ibid., p.68.
[106] Czyżyk, P., M. Kaczmarczyk, J. Kosiński (2013), *Zatrzymanie rzeczy. Przeszukanie. Sprawdzenie osoby. Kontrola osobista – taktyka realizacji*, WSPol. p. 63.

places, control of parcels and letters, and wiretapping will also apply to covert computer searches. However, the specifics of how the police uses this power are classified.[107]

In case when content of a searched computer, information system, or connected computer is encrypted, which fact prevents the authorities to access the resources without previously obtaining the relevant key or password, the authorities are entitled to demand them from its holder (*dysponent*) or user. When the dispatcher or user is a person suspected, or providing such information could expose him or his close person on criminal responsibility, then he is not obliged to disclose a password. The use of tools or programs in order to break a password is allowed when it was impossible to obtain it.[108]

b. Surveillance of the home

Operational surveillance under Article 19 of the Police Act relies on covert interceptions or communications, correspondence, computer data, deliveries and the obtaining and recording of visual and aural cues of persons in dwellings, means of transport or other non-public places. The last item in the previous sentence allows the police to covertly monitor private homes of people. It creates a substantial risk of interfering with legal rights of the persons against which it is conducted. As a result, the operational surveillance is subject to stricter procedural safeguards than the powers of the police under Art. 15. Operational surveillance is limited to a list of criminal offenses (including drug-related offenses), when other measures cannot lead to the result, is subject to a three-step approval of the high ranking police officials, prosecutors and the court, and can be ordered for a period not longer than 3 months (but possibly extended). Due to being limited to visual and aural cues, it does not provide legal basis for other kinds of sensing. Such limitation is a recent development. Previously, operational surveillance was defined more generally as use of technical means that allow covert obtaining of information and evidence, as well as their recording.[109] The current provision reads (in part) as follows:

> *Art. 19. 1. In the course of exercise of operational intelligence undertaken by the police in order to secure, detect and identify perpetrators, as well as to obtain and secure evidence of publicly prosecuted intentional criminal offences:*
>
> *(...)*
>
> *where other means proved to be ineffective or would be unsuitable, the district court may order operational surveillance, on the basis of a written application of the Chief of Police or the Chief of the Main Investigation Police Bureau, filed with written approval of the Prosecutor General, or on the basis of a written application of the Chief of Provincial Police filed with written approval of the district prosecutor competent in light of the local competence of the applying police body.*

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[107] https://www.ebos.pl/wiadomosci/1770_czy_cba_stosuje_narzedzia_do_zdalnego_kontrolowania_telefonow_i_komuterow.html

[108] ibid., p.64.

[109] Pochodyla, P., S. Franc (2011), 'Kontrola operacyjna oraz zakres jej stosowania', Zeszyty Naukowe WSEI, vol. 1, no. 1, 199.

(...)

6. Operational surveillance is executed in a covert manner and consists of:

1) obtaining and preserving the content of communications conducted using technical means, including those that use telecommunication networks;

2) obtaining and preserving of the visual or audio cues of persons from private places, means of transport or places other than public places;

3) obtaining and preserving the content of correspondence, including correspondence using means of electronic communication;

4) obtaining and preserving data stored on computer memory devices, telecommunications end devices, informational and tele-informational systems;

5) obtaining access to and control of the content of shipments.

A further provision which may apply to surveillance of places, including private ones, is Art. 19b of the Police Act. This provision allows the police to conduct covert supervision of the preparation, handling, storage and trade in objects of criminal offences, for the purposes of documenting a selected list of criminal offences, or to determine the identity of persons taking part in these offences, or to acquire the objects used in these offences. This provision seems to provide a sufficient legal basis for the use of sewage monitoring. Although the provision itself is relatively vague, the manner in which it should be applied is further specified in a sub-statutory regulation of the Ministry of the Interior, as prescribed by Art. 19b(6) of the Police Act. In this regulation, it is specified that the supervision consists of observing parcels, immovable or movable property including vehicles, if a justifiable assumption exists that they are used for preparation, handling, storage and trade in objects of criminal offences.[110] The power is not limited to observation: the police can interfere with such objects of criminal offences, especially for the purposes of labeling, removing or exchanging them, or to discover and record forensic traces.[111] The police can use organoleptic methods (acting on or involving the use of sensing organs) to evaluate the traces, but can also collect samples for the analysis of physical or chemical attributes of the objects.[112] However, the provision itself lacks the mentioning of technical means that could be used for such monitoring. The Ministry Regulation and the literature mention that the observation can be conducted with the use of technical devices registering image and sound, or other technical devices[113], suggesting this is the established practice. Nevertheless, doubts can be raised whether the text of the provision can be interpreted in this way. A number of provisions in the Police Act explicitly allow the use of technical devices[114], which can be seen (using *a contrario* reasoning) as an indication that provisions that do not mention the use of technical devices cannot be understood to implicitly assume that

[110] Regulation of the (Polish) Ministry of Interior, nr. 23 nt. 239, 2002, §2(1, 1-2).
[111] Regulation of the (Polish) Ministry of Interior, nr. 23 nt. 239, 2002, §2(2, 1-2).
[112] Regulation of the (Polish) Ministry of Interior, nr. 23 nt. 239, 2002, §2(3).
[113] Opalinski, B., Rogalski, M. Szustakiewicz, P. (2015), *Ustawa o Policji, Komentarz*, C.H. Beck, p. 261.
[114] Art. 15(4a) PA; Art. 15(5a) PA; Art. 19 PA.

technical devices can be used (otherwise, the explicit mention of technical devices in the mentioned provisions would be superfluous).

4. Protection of Persons

a. Personal searches

Art. 219(2) KPK states that for the purpose of obtaining evidence, if there reasonable assumption that the person has it in their possession, a search of the person, their clothing and carried items may be conducted. Naturally, the person must first be given opportunity to surrender such items voluntarily.[115] Such search is not conditioned by the procedural standing of the person, whether they are a suspect, accused, or a person without a connection to the criminal offence.[116] The requirements set for searches of places (see Section 3 of this report) apply also to personal searches. Thus, the search can be performed in the preparatory stage by the prosecutor or a police officer authorized by the prosecutor, and the authorization can be issued *ex post* in exceptional cases not amendable to delay.

The search must be performed only for a permissible purpose, be proportionate and respect the dignity of the person, and avoid unnecessary damage or intrusions into their personal sphere.[117] A personal search shall be conducted, as far as reasonably possible, by a person of the same gender as the person being searched. This applies also to search restricted to the clothes of the person.[118]

b. Protection of behavioral privacy

The Polish Code of Criminal Procedure does not include covert surveillance powers, with the exception of telecommunication interceptions. The legal basis for covert observations of people in public spaces and private spaces are provided by the Police Act, in the context of operational-exploratory activities, which are extra-procedural powers of the police. The observations in non-public places are regulated more strictly (operational surveillance in Art. 19 Police Act), while the powers of the police to observe and record anything that occurs in public places are almost unlimited. The legal basis for observation in public spaces is provided in Art. 15 of the Police Act:

> *Art. 15. Powers of the police in the exercise of their service activities*
>
> *1. Police officers in the exercise of activities specified in art. 14, are permitted to:*
>
> *(…)*

[115] Art. 217 KPK.
[116] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 534.
[117] Art. 227 KPK.
[118] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 537.

5a) observe and register, using technical means, the image of events in public places, and in cases of operational-exploratory and administrative-order activities performed on statutory basis, also the sound associated with those events.

This provision allows the police to observe directly (with physical presence of the police officers) and at a distance (via technical means) any events occurring in the public spaces, both openly and covertly.[119] Doctrine distinguishes three types of observation:

- Observation of persons,
- Observation of objects, i.e. determining the location of a mobile phone, the route of a vehicle, or a parcel,
- Observation of places[120]

Observation under Art. 15 is not bound by strict procedural rules. It is not limited by a set of criminal offences and can be used in any operational matter. It is also not subject to approval of the prosecutor or the courts, there are no time limits in place. According to Golebiewski, since it is performed in public places, all limitations to its exercise would be redundant[121].

The only limitations, therefore, are general ones: observations can be performed to uncover, prevent, detect criminal offense or to search for missing or wanted persons,[122] and only in a manner minimizing the interference with the personal goods of the persons against which it is undertaken.[123] There is a possibility to file a complaint to the locally competent prosecutor about the manner in which the observation was performed.[124]

A. Human Observation

Human observation is covered by the general power of observation under Art. 15(5a) of the Police Act (see above). The provision allows for the use of technical devices and even visual and aural recording, with no additional requirements compared to naked-eye observation.

B. GPS tracking

There is no clear legal basis for the use of GPS trackers in Polish police law. According to Golebiewski, use of GPS is a form of observation[125] performed by the police, however, the wording of the provision in the Police Act seems more restricted, only mentioning technical means that

[119] Opalinski, B., Rogalski, M. Szustakiewicz, P. (2015), *Ustawa o Policji, Komentarz*, C.H. Beck, pp. 75-76

[120] Gołębiewski, J. (2008), *Praca operacyjna w zwalczaniu przestępczości zorganizowanej*, Wydawnictwa Akademickie i Profesjonalne, Waszawa, p. 40.

[121] Gołębiewski, J. (2008), *Praca operacyjna w zwalczaniu przestępczości zorganizowanej*, Wydawnictwa Akademickie i Profesjonalne, Waszawa, p. 39.

[122] Art. 14(1) Police Act.

[123] Art. 15(6) Police Act.

[124] Art. 15(7) Police Act.

[125] Gołębiewski, J. (2008), *Praca operacyjna w zwalczaniu przestępczości zorganizowanej*, Wydawnictwa Akademickie i Profesjonalne, Waszawa, p. 39.

allow visual and audio observation and recording. The limitation of observation to the visual and aural means is clearly expressed in other commentaries.[126]

In existing case law it was held that installing a GPS on a car is a more far-reaching interference in private life than the use of binoculars. In this case, concerning a private detective, it was decided that installing a GPS tracker on a vehicle is an operational-exploratory activity only available to the police. When comparing direct observation with GPS tracking, the District Court in Suwalki held the opinion that using a GPS tracker undoubtedly led to collecting and processing of a much larger, and more precise set of data about the places in which the observed person stayed, as well as data on how she moved in the public space, than could be obtained by direct observation. Therefore, it constituted a more far-reaching interference in private life. Additionally, the covert manner of the operation of a GPS device, combined with the way the device communicated (sending regular messages through a mobile phone network) constituted operational surveillance under Art. 19(3) which is subject to strict procedural requirements (see Section 3 pt. b for the discussion of operational surveillance).[127]

The District Court rejected the idea that the information obtained by GPS tracking could be seen as publicly available since anyone can observe the vehicle moving in public space. The court contrasted such individual bits of information which leads to no significant conclusions about the person to systematic collection of location data for a longer time which reveals where the person went, for how long, where she moved. The latter constitutes surveillance of the person and a violation of freedoms and rights of the person.[128]

Wheareas the wording of Art. 19(3) at the time of this ruling was sufficiently technology neutral: "using technical means to covertly obtain information and evidence, in particular (…)" to accommodate GPS tracking, the provision has since been split into a list of more specific powers, none of which is an easy fit for GPS tracking. We have some doubts whether there is legal basis for GPS tracking in Polish law, as long as similar reasoning is adopted in other cases.

It is, therefore, questionable whether the new wording of Art. 19 of the Police Act (operational surveillance) still allows for the use of GPS trackers by the police. If so (although it is unclear which exact provision supports it), it is subject to strict limitations: limited set of criminal offences, period of three months (can be extended), three-step approval of high police officers, prosecutors and judges, subsidiarity principle.

c. Protection of personal communications

i. Interceptions of phone conversations and other mediated communications.

Polish law contains two separate legal regimes of eavesdropping, one under the Code of Criminal Procedure and another one in the Police Act. The Code of Criminal Procedure, in art. 237 allows for the surveillance and recording of phone conversations. The provision of 237 and

[126] Opalinski, B., Rogalski, M. Szustakiewicz, P. (2015), *Ustawa o Policji, Komentarz*, C.H. Beck, p. 76.
[127] II Ka 267/13 District Court in Suwałki 19.12. 2013
[128] II Ka 267/13 District Court in Suwałki 19.12. 2013

the following are also extended to equivalently apply to any other forms transfer of information by technical means, that does not have a character of a phone conversation (such as fax, telex, telegraph, cable tv, radio communication, internet communication), as long as it is made through a telecommunication network (so through wires, radio or optical systems, or any other electromagnetic energy devices).[129]

> *Art. 237. § 1. After the initiation of the proceedings, the court can, at the request of the prosecutor, order surveillance and recording of the content of phone conversations in order to detect and secure evidence for the ongoing proceedings or to prevent commission of a new criminal offence.*
>
> *§ 2. In cases not amendable to delay, the surveillance and recording of the content of phone conversations can be ordered by the prosecutor, who is obliged, within 3 days, to apply to the court to confirm the measure. (...)*
>
> *§ 3. Surveillance and recording of the content of phone conversations is acceptable only when the ongoing proceedings or the justified fear of commitment of a new criminal offence relates to:*
>
> *(...)*
>
> **(taxative list of criminal offences)*
>
> *§ 4. Surveillance and recording of the content of phone conversations is allowed in relation to the suspect, the accused, as well as the victim or another person who is likely to be contacted by the accused or who can have a relation to the perpetrator or the criminal offence that may be commited.*
>
> *§ 5. Offices and institutions operating in the field of telecommunications as well as telecommunication operators in the meaning of the Telecommunications Act are obliged to enable the execution of the court order or the order of the prosecutor to carry out the surveillance of phone conversations as well as to ensure the registration of the fact that such control has been conducted.*
>
> *(...)*
>
> *§ 8. Use of the evidence obtained during the surveillance and recording of the content of phone conversations is allowed only in the criminal proceedings related to the criminal offence or a tax offense, in relation to which such control can be ordered.*

> *Art. 241. The provisions of this chapter apply accordingly to the surveillance and recording, using technical means, of other conversations or communication of information, including the correspondence sent though electronic mail.*

[129] Holyst, B. (2015), 'Podsluchiwanie i inwigilacja uzytkownikow mediow spolecznosciowych w kontekscie bezpieczenstwa informacyjnego', Prokuratura i Prawo 3.

Before the initiation of criminal procedure, the Police can intercept communications under Art. 19 of the Police Act by obtaining and preserving the content of communications conducted using technical means, including those that use telecommunication networks. This regulation is discussed as quite problematic in the literature. While the measure is subject to approval by a court, this authorisation process often amounts to little more than a formality. An agency filing an application for a permit to undertake an operational control is obliged to show, together with the application, materials justifying it. However, full access to their files does not have to be given to the court, and only the materials supporting the application, and not all materials collected during such an operational matter are often presented. This makes the oversight incomplete. If an applying agency may select materials and present only these, which would justify the undertaking of surveillance, but does not have to disclose such material, which could for example question the need for undertaking it, it is clear that the court while analyzing such an application does not have a full overview of the case. This results in the situation where the courts authorise almost every application to perform operational surveillance.[130] Appr. 94% of all applications have been authorised by the courts (some courts have authorised 100% of all applications).[131]

ii. Production orders issued to postal service operators and other communications service providers

Under Art. 218 of the KPK, offices, institutions and undertakings active in the field of postal service or telecommunications, customs bureaus and transportation companies are obliged to release, on the basis of a written decision, correspondence, parcels or data (specified in the Telecommunications Act) to the prosecutor or the court, if they are related to ongoing criminal proceedings. Only the court or the prosecutor can open these letters or packages. Such decision has to be delivered to the recipient of the correspondence, parcels or data. Informing these persons can, however, be postponed when necessary for the purposes of the proceedings, but only until the final decision in the case. Rogalski criticizes the current provisions as not requiring subsidiarity – the corrspondence has to be provided whenever the prosecutor requests it, not only when it is necessary, which conflicts with the general principle that covert gathering of information about individuals should only be possible, where other, less intrusive measures are not sufficient.[132] Another criticism is that any data which could be important for the proceedings can be requested, which can disproportionately affect individuals who have no connection to the criminal offence, but their data can be obtained without their knowledge.[133]

iii. Oral interceptions

The police is authorized to record unmediated oral communications in two separate provisions of the Police Act. Art. 15 authorizes the police to observe and record, using technical means, the

[130] Malgorzata Tomkiewicz, 'Podsluchy operacyjne w orzecznictwie sadowym' (2015) *Prokuratura i Prawo* 4, p. 153-171.
[131] See footnote 20 in Malgorzata Tomkiewicz, 'Podsluchy operacyjne w orzecznictwie sadowym' (2015) *Prokuratura i Prawo* 4, p. 153-171.
[132] Rogalski, M (2015), 'Udostępnianie danych telekomunikacyjnych sądom i prokuraturom', *Prokuratura i Prawo*, 12/2015, p. 68.
[133] Rogalski, M (2015), 'Udostępnianie danych telekomunikacyjnych sądom i prokuraturom', *Prokuratura i Prawo*, 12/2015, p. 68.

aural cues related to event happening in public places (see Section 4-b for further details). Recording of conversations in private places is regulated as a form of operational surveillance in Art. 19(6-2) of the Police Act (see Section 3-b for further details).

iv. Access to metadata

According to the Constitutional Court, the constitutional protection of communications includes not only the content of the communication, but also all the circumstances in which the process has taken place, including phone numbers, personal data of the communication parties, the visited websites, data about time and amount of connections, data allowing the identification of the geographical location of the communication parties, IP number or IMEI number. The collection and obtaining of these information relating to the private life of individuals by public authorities, especially if done covertly, must be limited to the set of circumstances, permissible in a democratic society solely for the protection of constitutionally protected values and respecting the principle of proportionality. Collection and processing of such data must be specifically regulated in a statute, precluding arbitrary use. [134]

The Polish provisions allowing the law enforcement access to metadata are relatively narrow and cover only telecommunication service providers. In the Law on Telecommunication they are obliged to submit the traffic, location and subscriber data to the police, state prosecutor and court at their own expense in compliance with the procedures prescribed by the Code of Criminal Procedure and the Police Act. The corresponding provision in the CCP is Art. 218:

> *Art. 218. § 1. Offices, institutions and subjects performing activity in the field of post or telecommunication activity, customs offices as well as institutions and undertakings in the field of transportation are obliged to hand over to the court or the prosecutor, upon request in the form of written decision, correspondence and parcels, as well as data, which is specified in art. 180c and 180d of the Law on Telecommunication, if they are important for the ongoing criminal proceedings.*

According to Art. 218 §2 KPK, the decision is also delivered to those persons whose correspondence, parcels or data are requested. Informing these persons can, however, be postponed when necessary for the purposes of the proceedings, but only until the final decision in the case. Rogalski criticizes the current provisions as not requiring subsidiarity – the data has to be provided whenever the prosecutor requests it, not only when it is necessary, which conflicts with the general principle that covert gathering of information about individuals should only be possible, where other, less intrusive measures are not sufficient.[135] Another criticism is that any data which could be important for the proceedings can be requested, which can disproportionately affect individuals who have no connection to the criminal offence, but their data can be obtained without their knowledge.[136]

[134] Judgement of the Constitutional Court, 30 July 2014, sign. K 23/11, OTK ZU 2014, nr 7, poz. 180.
[135] Rogalski, M (2015), 'Udostępnianie danych telekomunikacyjnych sądom i prokuraturom', *Prokuratura i Prawo*, 12/2015, p. 68.
[136] Rogalski, M (2015), 'Udostępnianie danych telekomunikacyjnych sądom i prokuraturom', *Prokuratura i Prawo*, 12/2015, p. 68.

Furthermore, under Art. 218a KPK, the prosecutor or the court can order retention of such data for a period no longer than 90 days.

The corresponding provision in the Police Act, Art. 20c, allows the police to obtain stored traffic, location and subscriber data for the purposes of detection and prevention of crime. Here, written application is not required.

According to Adamski, there is no measure consistent with Art. 20 CoC providing a possibility for real-time collection of traffic data in Polish legislation.[137]

5. Protection of data

Article 20 of the Police Act authorises the police to covertly collect information, including personal data about suspects, including for example information about their places of living, the objects they use, and their modus operandi. There are no strict requirements for such collection in general, however, if the means of collection amount to operational surveillance, requirements set out in Art. 19 of the Police Act have to be met:

> *Art. 20. 1. Police, respecting the limitations set in art 19, can obtain information, including in a covert manner, collect, verify and process it.*
>
> *(...)*
>
> *2a. Police can collect, obtain, gather, process and use information with the aim of realizing its statutory tasks, including personal data, about the following persons, even without their knowledge and consent:*
>
> *1) persons suspected of committing criminal offences subject to public prosecution;*
>
> *(...)*
>
> *2b. Information that is being referred to in par. 1, 2a, 2aa and 2ab, relates to persons referred to in par. 2a and can include:*
>
> *1) personal data referred to in art. 27 of the Personal Data Protection Act, and where this data relates to the genetic code, it includes exclusively the noncoding DNA;*
>
> *2) imprints of the papillary lines;*
>
> *3) photos, sketches and descriptions of appearance;*
>
> *4) features and special marks, pseudonyms;*
>
> *5) information about:*

[137] Adamski, A. (2015), 'Cybercrime Legislation in Poland', National Report for the International Congress on Comparative Law, p. 39.
Available at:
https://www.researchgate.net/profile/Andrzej_Adamski2/publication/279191115_CYBERCRIME_LEGISLATION_IN_POLAND/links/558d662b08aed6ec4bf34d73.pdf?origin=publication_list

a) place of living or residence,

b) education, profession, workplace and work position, as well as the financial position and property situation,

c) documents and object used by the perpetrator,

d) modus operandi of the perpetrator, his environment and contacts,

e) behaviour of the perpetrator towards the victims.

6. Protection of things

Under art. 217 KPK, objects that may constitute evidence in the case, are to be surrendered on demand of the court or the prosecutor, and in cases not amendable to delay also on demand of the police or other authorised organ. Persons having the objects subject to seizure in their possessions are invited to surrender it voluntarily. The objects that may constitute evidence in the case are in particular objects that 1) served or where designed to commit a criminal offense, 2) contain traces of the criminal offense, 3) originate directly or indirectly from the criminal offense, and 4) can serve as a means of evidence to detect the perpetrator or explain the circumstances of the criminal offense or the possession of which is unlawful.[138] If the objects are not surrendered voluntarily they may be seized, or a search may be ordered to obtain them.

7. Final remarks

T.b.a.

[138] Skorupka, J. (eds)(2015), *Kodeks postepowania karnego. Komentarz,* C.H. Beck, p. 527.