



**WYDZIAŁ PRAWA  
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*Przymus adwokacko-radcowski w polskim postępowaniu karnym.*

*Analiza dogmatyczno-prawna*

*(Lawyer's duress in Polish criminal proceedings. Dogmatic-legal analysis)*

**SUMMARY**

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A construction of lawyer's duress has not been the subject of broader investigations into the doctrine of procedural criminal law yet. In the literature, it is often associated with the legal analysis of the complaint, the appeal against the verdict of the district court, or the extraordinary appeals. The institution is closely and directly related to the profession of advocate and solicitor. The author of this dissertation is a member of the Bar. It was an important stimulus to investigate this issue and to carry out a detailed analysis in this area.

This paper is both theoretical and empirical. It consists of an introduction, seven chapters, a conclusion, a bibliography and a list of judgments. Its structure was prepared in order to verify the main hypothesis of dissertation. The main hypothesis is formulated as follows: lawyer's duress in an indispensable element of a fair criminal trial.

The first chapter is devoted to the issues of the essence of the legal structure of lawyer's duress. The lawyer's duress must be distinguished from other form of compulsory representation- mandatory defense. The construction of duress is directly connected with the following institutions of criminal procedure: subsidiary indictment, appeal against a district court judgment, cassation appeal, a complaint against the judgment of the court of appeal and a motion of resumption of proceedings. Above pleadings shall be prepared and signed by a defender or attorney. The professional is obliged to draw up and sign these pleadings. This is an obligation prescribed by law. Defender or attorney is not under obligation to take further activity in a criminal trial.

The author focus on definition of such construction. This institution has no legal definition. In the literature, it is seen in two ways. First of all, duress is a special, formal requirement of pleading. It is a manifestation of formalism required by law. The effectiveness of actions depends on the fulfilment of this requirement. On the other hand, duress is a form of compulsory representation. The second definition is not complete, because it does not distinguish between duress and obligatory defence. It should be interpreted on both of these sides.

This part also contains a comparison with other forms of compulsory representation in other branches of Polish law as well as regulations in some European countries. The study shows mutual differences and similarities between them. Lawyer's duress is not unique to the Polish criminal trial. A similar legal structure appears in the Republic of Albania, the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Spain.



The second chapter deals with the role and importance of duress in the Polish criminal trial. The author presents *ratio legis* of duress, functions of these construction of law. The author focuses on *ratio legis* of institution of duress. Due to the formal and complex nature of pleadings party must be represented by a professional. Only a professional is able to fulfil such high legal requirements. Expert has necessary qualifications (knowledge and professional experience) to undertake such actions. It is commonly known that defender or attorney write pleading better than a party who has not any legal knowledge and experience. It is worthy to express that such construction is really essential. The institution is in compliance with the principles of adversarial proceedings. It is the best instrument for the protection of procedural guarantees of the parties and the entire justice system. It is noticeable that this special law requirement causes to speed up the proceedings. Furthermore, pleadings are addressed to high rank procedural bodies. The presence of a professional ensures the essential discourse between the parties to the proceedings and procedural body. Only lawyers have necessary qualifications to undertake such activities.

Professional has a legal and moral obligation to act with due diligence. From the point of view of a fair criminal trial construction of lawyer's duress is an indispensable instrument for the protection of procedural safeguards. It protects against a situation in which the case could not be recognized due to improper "programming" by a party. A solicitor is obliged to show that the case should be resolved in a consistent manner. Thanks to his or her legal knowledge of the current case line, opinions expressed by the doctrine, he/she guarantees the appropriate preparation of the pleading. This is some kind of presumption of proper representation.

What is more in this part of thesis author tries to prove that construction is not a limitation of the right to fair trial, right to defence. Lawyer's duress is extremely important for the protection of procedural guarantees. It is not a restriction of the right to defend or a right to a court, but it determines their implementation.

Chapter three describes the evolution of the institution over the years 1928-2016. It was indicated that the institution is firmly rooted in the tradition of the Polish criminal trial. The structure has been analysed since the entry into force of the Code of Criminal Procedure of 1928 up to the current regulation. This part contains a detailed description of the regulations.

Chapter four consists of three essential parts. The first part deals with the essence and importance of the legal structure before the formal initiation of proceedings. The second



section describes the scope of the institution under the criminal procedural law. Every subsection refers to other constructions which is connected with duress. Under the current legal state institution is connected with subsidiary indictment, appeal from the judgment of the district court, the cassation, the request for reopening of the proceedings, the complaint against the judgment of the appellate court. The legislator sees the need to expand the catalogue of the duress. The scope of this legal structure is broad and covers both procedural steps before formal proceedings, during the course of the proceedings, and after the final proceedings. The last part presents a situation where this particular representation requirement applies *mutatis mutandis* to disciplinary proceedings

The fifth chapter describes entities who are authorized to prepare the pleadings. It should be noted that only a person entitled to represent accused pursuant to statute may be engaged as a defence counsel. Lawyers who are able to take such procedural actions in polish criminal trial are divided into two types, advocates and solicitors. The accused could designate a defence counsel. A party other than the accused may designate an attorney. Only a solicitor or advocate may be appointed to act as an attorney. A party may request to appoint a lawyer *ex officio*. It is not free of charge. An accused or victim should prove that he or she has not enough money to hire defence counsel or attorney. The special form of legal aid at the stage of drafting and signing the pleadings obliges specialists to act with due diligence. When the advocate signs pleading, it means that the action has been done with the best will and knowledge.

The lawyer's duress is absolute. No one can be exempted from this legal obligation. This institution is an exception to the principle that a party can independently perform all procedural actions on his or her behalf. Action made by the party has no legal force in the criminal process. Representation refers to a small segment of the reality of the criminal proceedings and only in this scope deprives the parties of the possibility of independent actions. This requirement applies to every party, even if the participant to the proceedings is a lawyer. When professional is a party in criminal trial he/she is not able to make pleading in his/ her own case. The ban is intended to prevent emotional engagement of a participant and provide necessary objectivity. Participants are not under obligation to maintain objectivity. This kind of requirement refers only to procedural bodies. In light of the above if the lawyer has the necessary knowledge and experience he or she should be able to take such actions when he or she is a party. This view is based on the roman principle of "*volenti non fit iniuria*".



This section also compares the scope of entities who are entitled to act at the stage of drafting and signing pleadings of lawyer's duress with a group of persons authorized to perform the function of defender or attorney.

Chapter six describes the issue of dismissal from the obligation to perform extraordinary appeals. The professional is obliged to draw up and sign the pleading, unless the case referred to article. 84 § 3 k.p.k.. The lawyer becomes the first authority in the process of verifying the correctness of pleadings. It protects the parties from unnecessary fiscal and non-fiscal costs. This section of the paper presents a number of critical remarks on the normative content of art. 84 § 3 k.p.k.. This article raises many controversies as to the scope of the institution, the form of such pleading. A defence counsel or attorney appointed *ex officio* in extraordinary proceedings, should prepare pleading, or inform authority of court proceedings that he or she had not found grounds for submitting a motion. When there are no legal or factual basis to write main pleading defender or attorney appointed *ex officio* may be released from this legal obligation. However, professional must draw up a legal opinion which shows that the creation of pleading is not justified in a particular case.

The author declares also *de lege ferenda* to expand the catalogue contained in this provision. The lawyer should have the right to refuse to write an appeal against a district court judgment and a subsidiary complaint under the same conditions as a defender or an attorney appointed *ex officio* to make an extraordinary appeal.

Chapter seven is empirical. It shows the results of research conducted among lawyers. The author has conducted a survey *via* internet among 1400 polish professional. The poll was anonymous. It was held from 26 February to 26 April 2016 and it was representative. The author has conducted a poll to find out what professional think about this construction of law. In order to complete the scientific project, a written request was sent to the highest authority of the Bar. Online survey is a pioneer and is a valuable source of information. Detailed and comprehensive analysis of research shows that construction of professional duress is an important part of a fair criminal trial. According to lawyers, lawyer's duress is not a restriction of the right to defend or a right to a court, but actually determines its implementation. Due to the need to achieve an accurate criminal response, legal aid must be real, not apparent.

The final part of the dissertation includes a summary of the research and the conclusions of the analysis.

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