

Formalization and Conventionalization as Instruments of an Analysis of Procedural Acts in Criminal Proceedings in Polish Law

Summary

Legal theory of conventional acts in law enriched with ideas of conventionalization and formalization has become a basis for interpretation and ordering of procedural acts in criminal proceedings issues. A monograph consists of five chapters. The first Chapter is devoted to a formation and evolution of theory of conventional acts developed in Poznań-Szczecin's school of jurisprudence. The essentials of Austin's concept of performativity and J.R. Searle's theory of constitutive rules were also framed in this chapter. It is the first time that the most recent modifications of theory of conventional acts in law that included the ideas of conventionalization and formalization have been used.

These two constructs have a special impact on shape of procedural acts in criminal proceedings, which are characterised by a limited autonomy when compared to other, more complicated courses of penal proceedings. Conventionalization and formalization create favourable conditions for an assessment of procedural acts in criminal proceedings, specifically for a clear division between the futility and validity of procedural acts in criminal proceedings and their correctness and non-futility. Conventionalization and formalization reinforced with specific methodological assumptions make it possible to outline and arrange the issues of defectiveness of procedural acts in criminal proceedings. It has to be emphasized that application of theory of conventional acts in law reveals some imperfections, especially with regard to interpretation of procedural acts in criminal proceedings.

In Chapter two an attempt was made to contrast the definitions and typology of procedural acts developed in penal law theory with the criteria of distinguishing procedural acts in criminal proceedings treated as formalized conventional acts which are relevant in law. The following issues were considered: the basic criteria formulated for material substratum of a conventional procedural act; the attempt was made to relate so-called theory of act to procedural acts in criminal proceedings; the description of the effect of a procedural act in criminal proceedings was put forward based on the illocution theory as well as a distinction between the illocutionary effect of a given conventional act and its procedural consequences (procedural outcomes). Procedural act in criminal proceedings was also juxtaposed with its product. This approach has some significant consequences with regard to so-called durable products, especially to the sentences, which are considered products of procedural acts consisting in issuing imperative declaration of intention. This chapter covers also the issue of importance of procedural acts in criminal proceedings for the process

of developing the criminal proceedings relationships. This part of considerations refers to the conception of legal norm developed by Z. Ziemiński and is an attempt to broaden the descriptive perspective of legal relationships. Moreover, the reference to the construct of a procedural relationship allowed to emphasize the conventional feature of procedural acts in criminal proceedings, namely their sequence.

Chapter three is dedicated to constitutive rules and formalization rules that enable to describe a subject of a procedural act in criminal proceedings. General propositions were made with regard to typology and the distinction was made between «institutional» and «non-institutional» participants in the criminal proceedings. Conducted research ended up in an attempt to redefine some of the criminal proceedings institutions, such as «a person not able to rule» (Article 439 § 1 p. 1 of Code of Penal Procedure). An attempt was made to clarify the notion of postulatory ability. This chapter is dedicated also to the relations between the rules determining the competence of a subject of a formalized conventional act in criminal proceedings and the constructs *legitimatío ad casum* and *legitimatío ad actionem*, which relate specifically to some of the participants of criminal procedure. The rule stated in an Article 7 of the Constitution of the Republic of Poland is of vital importance when establishing the competence range of government bodies, so this rule was considered on the conventionalization and formalization plane. The question of a subject of a procedural act in criminal proceedings with regard to constitutive rules is troublesome on the ground of formal control of procedural acts of giving the postulatory declaration of intention, where one of the issues to be determined is a procedural act done by «a non-eligible person». Some inadequacies of a current conception of conventional acts has become apparent when considering collective acts (i.e. performed by group agencies). The distinction was made between homogeneous and non-homogeneous collective acts and it was decided whether and in what situations the rules that shape a plural subject of a formalized conventional act in criminal proceedings have a status of constitutive rules.

Chapter four concerns selected subjective issues and modal aspects of procedural acts in criminal proceedings analysed from the point of view of their conventionalization and formalization. Multi-layered considerations that could have been included in this chapter undoubtedly exceed the size of a few monographs, yet it was decided that some elements of such analysis need to be presented as they are connected with the main considerations presented in chapter five, mainly legal assessment of procedural acts in criminal proceedings. Some issues regarding subjective and temporal rules for procedural acts in criminal proceedings are closely connected with their inadmissibility construct, especially in so-called theoretical perspective. Therefore, chapter four covers only remarks concerning visible dualism of subjective and temporal rules of performing procedural acts in criminal proceedings, on the one hand with regard to acts performed by the bodies in the proceedings, on the other hand with regard to acts performed by the parties and other participants in the proceedings. The language of procedural acts and the place of their performance was analysed with regard to modal rules. As far as temporal rules are concerned – their character was described and special attention was given to preclusion rules. This chapter concerns also issues of so-called conditionally legal acts.

Chapter five is a climax of this dissertation. A perspective of defectiveness of procedural acts in criminal proceedings was proposed (by means of highlighting *sensu largo* defectiveness) which includes: invalidity act (*negotium nullum*) and legal non-existence (*negotium non existens*) meaning defectiveness resulting in contravening constitutive rules for a given procedural act in criminal proceedings. It was concluded that conventional «nature» of procedural acts in criminal proceedings and criteria given their material substratum (behaviour) determine the necessity to distinguish the construct of *negotium nul-*

lum (in case of lack of elimination or disqualification procedure of invalid acts – one has to refer to *negotium non existens* construct). Defectiveness *sensu stricto* alludes to contravention of formalization rules, a mechanism that absolutely dominates in criminal proceedings. Formalization by means of obligation clearly determines the question of correctness/incorrectness of a formalized conventional act in criminal proceedings, whereas formalization by means of consequences allows to assess a given act as non-futile or futile (conditionally or unconditionally).

Three theses were fundamental for this dissertation: a thesis on a sequence of legal assessment of conventional acts, a thesis on distinguishing a conventional act from its product and finally a thesis on a sequence of procedural acts in criminal proceedings. **Thesis I** on a sequence of legal assessment of conventional acts states that a conventional act, unlike a psychophysical act, can be assessed as valid or invalid. Additionally, as far as legal assessment is concerned, one has to determine whether a given conventional act is valid or invalid in the first place (conventionalization plane), and then to determine whether a given valid conventional act is non-futile/futile (formalization plane). **Thesis II**, adopted after K. Twardowski, relates to distinguishing a conventional act from its product, wherein a product of an act belongs to a different ontic category than an act and is a “being” existing in objective reality (a being of different degree of durability). Products can be existing or non-existing, and additionally, products of conventional acts can be valid or invalid. Only procedural acts can be assessed with regard to being non-futile/futile (assessment done on a legal plane, as opposed to assessment done on a praxeological plane). **Thesis III** on a sequence of procedural acts in criminal proceedings states that a given act is a conventional one in law because its performance lies within the range of competence norm that influence the imperative to perform a subsequent act in a sequence.

The development of thesis I allows to determine the notions of validity/invalidity and non-futility/futility of conventional act. This perspective legitimizes the doctrinal construct of the invalidity of conventional act, as it is a result of conventional nature of procedural acts, as opposed to being a result of a sanction imposed by a legislator for contravention of performance rules of conventional act. The conducted research proved that imposing such a sanction (invalidity sanction) with regard to procedural acts in criminal proceedings is unnecessary, being in fact in conflict with the thesis on their sequence. The adopted perspective enabled to frame a proposition on the issue of defectiveness of procedural declarations. Since every conventional act has to be legitimized with a definite material substratum in the form of behaviour (act) of a criminal proceedings party/parties, some basic conditions for the recognition of material substratum of conventional act need to be proposed. Consequently, it was concluded that the material substratum of conventional act has to be induced by a conventional act’s subject intention, and its realisation has to be free of influence of exogenous measures. The essential condition for conventional act to be valid is the fulfilment of the realisation criteria of material substratum perceived as an act. It is an initial condition for conventional act to be completed in a valid way, wherein conventional act is understood here in compliance with so-called final concept of an act. A subject of conventional act performs conventional act’s material substratum (behaviour) aiming at completion of conventional act (direct aim). Depending on the type of conventional act’s subject, the subject, by performing conventional act, aims (additionally) at completion of its consequences (final outcomes of conventional act), defined in criminal proceedings, although the subject does not always take into account all its consequences. It was proposed that the intellectual and volitional aspect of the subject of conventional act was studied with the means of its material substratum analysis. Taking into account the conventional nature of procedural acts in criminal proceedings, where a clear distinction

can be made between material substratum of conventional act and its constructive rules, has allowed to order, in compliance with adopted assumptions, the issues of typology of procedural acts in criminal proceedings and procedural relationships.

The development of thesis II on distinguishing a conventional act from its product is of vital importance for the durable products, including sentences. Assumptions of thesis II allowed to distinguish the conventional nature of acts performed by bodies in proceedings, material substratum of which consists in issuing imperative declaration of intention, and their product (sentence) is considered valid (presumption of validity) because the moment it is completed the legislator makes the product – an individual and specific norm – legally binding. Distinguishing an act from its product gave rise to an analysis of the construct of declaration of invalidity of a sentence and indicating the type of constitutive rules (assumed by a legislator) for passing a sentence according to current regulations (global and selective model of constitutive rules). The issues of products of acts could also be successfully developed with regard to products of evidentiary proceedings. In this dissertation it was concluded that the recording of product of evidentiary proceedings in physical form (written or recorded on data storage device) is in fact a separate dependant act.

The development of thesis III, mainly the thesis on a sequence of procedural acts in criminal proceedings, has resulted in conclusion that the conventionalization of procedural acts is based above all else on the thesis on their sequence, as opposed to being related to the exposition of constitutive rules for all sorts of acts. The procedural acts in criminal proceedings are characterised by limited autonomy therefore constitutive rules that can be decoded from legal articles were only generally outlined. The procedural acts in criminal proceedings seen as formalized conventional acts of legal relevance show different status than autonomous conventional acts in substantive law, and procedural conventional act is a conventional act mainly because it serves as a link in a definite course of criminal proceedings. It can be stated that the legislator assumes some kind of presumption of validity of procedural act in criminal proceedings in a specific procedure (within the considered sequence), which is clearly recognised with regard to these acts, which material substratum consist in issuing declaration of intention (both imperative and postulative). This is why the constructive rules of procedural conventional act in criminal proceedings involve formalization.

It is formalization that is the most important aspect of research of procedural law. This was the reason to put “formalization” first in the title of this monograph, before “conventionalization”, which is of fundamental importance, yet it is much more difficult to “grasp” within the area of procedural law acts. Formalization of procedural conventional act in criminal proceedings is always a formalization by means of obligation, rarely formalization by means of consequences, the most severe one being futility of conventional act. Formalization can be also perceived from the angle of sequence of procedural acts, thus being of indirect nature. If a study on contravention of formalization rules of conventional act (treated separately or in a sequence of acts) takes place within the mechanism of appeal proceedings and is relativized to the product of the final act (a sentence that ends criminal proceedings), then formalization takes the indirect and conditional form. When manifestations of formalization of conventional act were subjected to scrutiny, attention was drawn to high level of formalization by means of obligation within acts of bodies of criminal proceedings and its lower level with regard to procedural acts of parties and other participants in the proceedings. The level of formalization by means of negative consequences is replaced by formalization by means of obligation. It is differential in relation to different sets of subjects of conventional act (these regularities are developed in Chapter three and four).

The central element of the conducted considerations is a systematics of legal assessment of procedural acts in criminal proceedings related to methodological and theoretical and legal basis. Formalization includes issues of validity of procedural act and validity of product of act (sentence). Constitutive rules partly relate to construct of inadmissibility of procedural act *ex lege*. Contravention of formalization rules results in incorrectness of procedural act, which is connected with formalization by means of obligation and in futility, which is connected with formalization by means of negative consequences. Based on the assumption that valid conventional act has to be *ab initio* characterised by a minimum range of relevance in a given legal system, the hypothesis was put forward that a model formula of futility of conventional act takes form of futility *ex nunc*. Some authors distinguish futility *ex tunc*, which means absolute defectiveness of a given procedural act at the very moment of its performance (considering lack of statutory invalidity sanction relating to procedural act). It should be considered in relation to conventionalization of conventional act, thus it was treated as a sanction for contravention of constitutive rules of construction of procedural act.