

**THE INVOLVEMENT OF CONSULS  
AND CONSULAR OFFICERS IN EVIDENCE  
GATHERING UNDER ARTICLES 177 § 1B(2), 586 § 1,  
AND ARTICLE 177 § 1 IN CONJUNCTION WITH  
ARTICLES 582 § 1 AND 581 § 1 OF THE POLISH  
CODE OF CRIMINAL PROCEDURE**

---

PIOTR KRZYSZTOF SOWIŃSKI\*

DOI: 10.2478/in-2023-0028

**ABSTRACT**

This article explores the involvement of members from both Polish and foreign consular posts in the process of taking evidence in criminal proceedings. Specifically, it examines the participation of Polish consular officers in the interrogation of witnesses and defendants, as outlined in Article 177 § 1b(2) of the Polish Code of Criminal Procedure. Additionally, the article discusses interrogation of these parties by consuls acting on behalf of Polish courts. Governed by both Polish and international law, this process is situated within the realm of international criminal proceedings and consular law. The article also delves into the right to decline to give evidence, a privilege granted to members of consular posts based on their official functions. In this context, we introduce the concept of ‘consular secrecy’, which can be likened to professional secrecy or secrecy associated with the official roles of certain individuals.

**Keywords:** consular officers, consular secrecy, consular immunity, declining to give evidence, criminal proceedings, interrogation, witness, defendant, expert witness

---

\* LLD hab., prof. UR, Head of Criminal Procedure Department, Law Institute, Rzeszów University (Poland), attorney at law; e-mail: psowinski@ur.edu.pl, ORCID: 0000-0003-2210-5877.



## PRELIMINARY INSIGHTS

The 1997 Polish Code of Criminal Procedure<sup>1</sup> (hereinafter referred to as 'PCCP') makes multiple references to both members and consular posts. It is important to note that these references offer a dual perspective: some provisions address them from a national standpoint, while others adopt a foreign perspective. Polish consular posts or officers are mentioned in provisions governing procedural time limits (Article 124 PCCP), their involvement in interrogating a witness who is a Polish national (Article 177 § 1b, item 2 PCCP<sup>2</sup>), and the process of serving court documents on a Polish citizen residing abroad or interrogating that individual as a defendant, witness, or expert witness at the prosecutor or court request (Article 586 § 1 PCCP). Conversely, heads of foreign<sup>3</sup> consular posts or foreign consular officers are referred to in Article 579 § 1 and 2 PCCP, which establish the subjective and objective boundaries of what is commonly known as consular immunity. Additionally, they are mentioned in Article 582 § 1, in conjunction with Article 581 § 1 PCCP, which delineate the subjective boundaries of the right to decline to give evidence. Article 581 § 2 PCCP provides for the exemption of individuals specified in Article 579 § 1 PCCP from the obligation to present correspondence and documents associated with their functions. Moreover, Article 586 § 2 PCCP outlines the subsidiary performance of an act that may not be executed by the Polish diplomatic mission or consular post (as specified in Article 586 § 1 PCCP). Competent consular posts of foreign states are also mentioned as recipients of notifications as specified in Articles 605 § 4 and 612 § 1 PCCP. Furthermore, they are recognised as authorised entities to establish contact with their own citizens in accordance with Article 612 § 2 PCCP. It is essential to note that the Code stipulates that direct communication with consular posts of foreign states in Poland can occur only in situations explicitly designated by the Minister of Justice, as stipulated in Article 613 § 2 PCCP.

None of the aforementioned provisions, however, cover the topic of the legal status of consular officers or consular posts, as these matters are governed by separate legislation. These include the Consular Law of 25 June 2015 (hereinafter referred to as the 'Consular Law'),<sup>4</sup> the Law of 21 January 2021 on Foreign Service,<sup>5</sup> the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter referred to as the 'Convention'),<sup>6</sup> as well as various bilateral agreements.<sup>7</sup> Consequently, the provisions contained in the Polish Code of Criminal Procedure deal with the subject

---

<sup>1</sup> Act of 6 June 1997, Code of Criminal Procedure (consolidated text: Journal of Laws of 2022, item 1375, as amended).

<sup>2</sup> The domestic nature of consular service members may be inferred from the context, rather than from the wording of this provision.

<sup>3</sup> In more precise terms, the law avoids using the term 'foreign' and instead uses the phrase 'foreign state', which, in the relevant sentences, functions as an attributive (adjectival) phrase.

<sup>4</sup> Consular Law of 25 June 2015 (consolidated text: Journal of Laws of 2023, item 199, as amended).

<sup>5</sup> Act of 21 January 2021, on Foreign Service (Journal of Laws of 2023, item 406).

<sup>6</sup> The Vienna Convention on Consular Relations concluded in Vienna on 24 April 1963 (Journal of Laws of 1982, No. 13, item 98).

<sup>7</sup> See, for example, the Consular Convention between the People's Republic of Poland and the People's Republic of Hungary, signed in Warsaw on 5 June 1973 (Journal of Laws of 1974, No. 5, item 28), or the Consular Convention between the People's Republic of Poland and the

matter for which they were passed, primarily governing procedural relations and the responsibilities of authorities involved in the criminal process, as well as the responsibilities of Polish external authorities<sup>8</sup> and the authorities of foreign states.

Determining whether courts or prosecutors have contact with a person who enjoys immunity based on international law follows information received from the Minister of Foreign Affairs. This is due to the fact that the Minister has the status of a governmental authority that must be notified of any fact that might affect the status of the person referred to in Article 579, § 1 PCCP<sup>9</sup> (Article 24(1) of the Vienna Convention). When relevant authorities petition the Minister, they should provide information in a concise form regarding pertinent facts and the subject matter of the case, along with their findings on the immunity of the person. The relevant procedure is outlined in detail in § 26 of the Regulation of the Minister of Justice of 28 January 2002 (hereinafter referred to as the 'Regulation').<sup>10</sup>

The subject matter of criminal procedural law of interest to members of both the Polish consular service and foreign consular services can be categorised into two groups. Firstly, their actions may be technical in character but of great significance for criminal proceedings. This includes activities such as filing a written pleading (Article 124 PCCP), serving documents,<sup>11</sup> assisting in the interrogation of a Polish citizen as a witness (Article 177 § 1b(2) PCCP), and receiving a notice of the temporary detention of a person during proceedings aimed at extradition to a foreign state (Article 605 § 4 PCCP), or in any occurrence of temporary detention (Article 612 § 1 PCCP). Secondly, there are actions pertaining solely to the collection of evidence, such as the interrogation, in the capacity of a defendant, witness, or expert witness, of a Polish citizen residing abroad (Article 586 § 1 PCCP). It is evident that the majority of provisions governing the participation of consular service members in criminal proceedings aim to improve the efficiency of those proceedings when the regular course of action fails or is impossible to take. These actions reflect the principle expressed in Article 2 § 1(4) PCCP, emphasising expeditiousness in the legal process.<sup>12</sup>

---

United Kingdom of Great Britain and Northern Ireland, concluded in London on 23 February 1967 (Journal of Laws of 1971, No. 20, item 192, as amended).

<sup>8</sup> J. Symonides, among others, considers consular posts as external authorities of a state, see Symonides, J., in: Bierzanek, R., Symonides, J., *Prawo międzynarodowe publiczne*, Warszawa, 1985, p. 173.

<sup>9</sup> The same applies to 'a person belonging to the family of a member of a consular post forming part of his household' (Article 24(1)(b) of the Convention), as well as members of the private staff (Article 24(1)(c) and (d) of the Convention).

<sup>10</sup> Regulation of the Minister of Justice of 28 January 2002, on the specific duties of courts in international civil and criminal proceedings in international relations (consolidated text: Journal of Laws of 2014, item 1657, as amended).

<sup>11</sup> Grzegorzczuk, T., in: Grzegorzczuk, T., Tylman, J., Olszewski, R. (ed.), Świecki, D. (ed.), Błoński, M., Kasiński, J., Kurowski, M., Małolepszy, A., Misztal, P., Rydz-Sybilak, K., *Polskie postępowanie karne*, Warszawa, 2022, p. 553.

<sup>12</sup> Steinborn, S., 'Komentarz do art. 2', in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX, 2016, comment 6; Grajewski, J., Steinborn, S., 'Komentarz do art. 2', in: Paprzycki, L.K. (ed.) *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015, comment 1; Kurowski, M., 'Komentarz do art. 2', in: Świecki, D. (ed.) *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023, comment 5.

An exemption from the regular course of action typically occurs when a Polish citizen who is to participate in a given procedure is abroad. In the case of citizens of the sending state, the involvement of the consular service of their home country in the criminal process is a regular mechanism, either initiated *ex officio* (Article 605 § 4 PCCP) or at the request of those citizens (Article 612 § 1 and 2 PCCP).

The nature of Article 579 § 1, Article 582 § 1 in conjunction with Article 582 § 2 PCCP is even more diverse. In reality, these provisions are procedural safeguards for the members of the consular service referred to in Article 579 § 1(1-2) PCCP. The character of Articles 605 § 4 and 612 § 1 and § 2 PCCP is similar. However, what differs is that members of consular offices are part of a system not aimed at protecting those members, but rather at safeguarding the citizens of those foreign states which have entrusted those members with the performance of consular functions. In these situations, members of consular offices are not subjects of those safeguards but their major constituting elements.

Article 579 § 1 PCCP provides significant safeguards to individuals mentioned in this provision, which, in the long run, could pose a significant obstacle to the attainment of justice.<sup>13</sup> This is because this provision, while not absolving the criminality of an act committed, renders it impossible to prosecute the perpetrator of the act ('are not subject to Polish criminal courts' jurisdiction') if they hold the position of heads of consular posts or other consular officers of a foreign state (item 1 of this Article), or if they are individuals accorded equal status pursuant to international agreements or established international customs (item 2 of the Article). Immunity, in this context, confers a privilege that places the person enjoying it in a more favourable position than those who are not subject to it.<sup>14</sup> Legal scholars commonly regard consular immunity, along with diplomatic immunity, as examples of immunities associated with foreign service,<sup>15</sup> being forms of *incomplete formal immunity*,<sup>16</sup> primarily applicable to acts committed during the performance of official functions and related to those functions.<sup>17</sup> However, this immunity may transform into *full immunity* if corresponding protection on a reciprocal basis is extended to all acts. The aforementioned immunity represents a procedural impediment,<sup>18</sup> creating

<sup>13</sup> Niewiadomska, I., Fel, S., 'Realizacja zasady sprawiedliwości w karaniu przestępców', *Zeszyty Naukowe KUL*, 2016, No. 3, p. 60; Tokarczyk, R.A., 'Sprawiedliwość jako naczelna wartość prawa', *Annales Universitatis Mariae Curie-Skłodowska*, 1997, No. XLIV, p. 154.

<sup>14</sup> Krzemiński, Z., 'Recenzja »Immunitety w polskim procesie karnym – Warszawa 1970«', *Palestra*, 1971, No. 4, p. 82.

<sup>15</sup> Sowiński, P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004, pp. 241–244.

<sup>16</sup> Augustyniak, B., 'Komentarz do art. 579', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023 [17.05.2023], comment 2.

<sup>17</sup> See Article 5 of the Vienna Convention on Consular Relations concluded in Vienna on 24 April 1963 (Journal of Laws of 1982, No. 13, item 98). The list of consular functions is open, as indicated by the letter 'm' of this Article, allowing consuls to perform any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

<sup>18</sup> Stefański, R.A., 'Immunitet prokuratorski', *Prokuratura i Prawo*, 1997, No. 2, p. 63; Herzog, A., 'Postępowanie w sprawach o uchylenie immunitetu prokuratorskiego – stan prawny i praktyka (część I)', *Prokuratura i Prawo*, 2008, No. 4, p. 5.

a subjective limitation concerning the jurisdiction of Polish courts (Article 17 § 1(8) PCCP). It is important to note that this limitation does not apply to Polish citizens or individuals with permanent residence in Poland, as long as we are discussing acts not performed during the performance of official functions and unrelated to those functions (Article 584 PCCP).<sup>19</sup> Additionally, it does not apply to individuals for whom the sending state has waived their immunity.<sup>20</sup> Article 579 § 2 and 3 PCCP introduce impediments to prosecution, prohibiting the arrest or temporary detention of heads of consular offices or other consular officers of foreign states, except in cases involving felonies. A. Dana characterises consular immunity as an exemption from the general principle of legal equality expressed in Article 31 of the Polish Constitution.<sup>21</sup> However, it should not be regarded as discriminatory, as it does not deny individuals the ability to assert their rights.

The above insights are introductory in nature; the topic of this article is not the entirety of procedural regulations in the area of criminal law affecting the members of the consular service. Instead, it will concern those laws which directly affect the evidence collection process, including those which require the participation of consular officers in the interrogation of a Polish citizen residing abroad, with the former serving as a *sui generis* warrantor of the legal correctness of the interrogation (Article 177 § 1(2) PCCP), and the latter acting as a quasi-interrogative authority (Article 586 § 1 PCCP). Additionally, the article will touch upon the participation of members of the consular service in interrogations as a personal source of evidence (Article 582 § 1 in conjunction with Article 581 § 1 PCCP).

#### ARTICLE 44 OF THE VIENNA CONVENTION AND ARTICLE 582 § 1 IN CONJUNCTION WITH ARTICLE 581, AND ARTICLE 579 §1(2) PCCP

Within the junction of criminal procedure and consular law lies Article 582 § 1 of the Polish Code of Criminal Procedure (PCCP). This article serves as a safeguarding provision, yet it does not fully align with Article 2 § 2 of the PCCP and the principle of substantial truth expressed within.<sup>22</sup> This discrepancy is a common characteristic of prohibitions concerning the collection of evidence. They are rooted in the necessity to strike a balance between strictly procedural values and other competing interests, often with the latter taking precedence.<sup>23</sup> In the case of Article 582 § 1

<sup>19</sup> See more on this, Michalski, W., *Immunitety w polskim procesie karnym*, Warszawa, 1970, pp. 57–61.

<sup>20</sup> Kulesza, C., 'Komentarz do art. 17', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz, LEX*, 2020, comment 54.

<sup>21</sup> Dana, A., 'Podmiotowy zakres immunitetu w polskim systemie prawnym', *Doctrina. Studia Społeczno-Polityczne*, 2011, No. 8, pp. 37–38.

<sup>22</sup> Grajewski, J., Steinborn, S., 'Komentarz do art. 2', in: Paprzycki, L.K. (ed.) *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015, comment 9.

<sup>23</sup> Legal scholars note that declining to give evidence is a reflection of the principle that the truth about the subject matter of the proceedings may not be collected at any price. See Mozgawa-Saj, M., 'Znęcanie się nad osobą najbliższą – aspekt karnoprocesowy', in: Mozgawa, M. (ed.), *Znęcanie się*, LEX, 2020, comment 1 [accessed on 18 July 2023].

PCCP, we encounter a prohibition understood as the exclusion of specific evidence.<sup>24</sup> This exclusion results from the prioritisation of missions carried out on behalf of another country. Effective international cooperation necessitates such safeguards.<sup>25</sup> Similarly, the 1963 Vienna Convention, to which Poland is a signatory, extensively regulates the issue of taking evidence from members of consular posts. The Convention states that members of consular posts may be called upon to attend as witnesses 'in the course of judicial proceedings',<sup>26</sup> without mentioning pre-judicial proceedings (Article 4(1) of the Convention). In contrast, Article 582 PCCP does not explicitly mention 'judicial proceedings'. However, § 29(2) of the Regulation detailing actions related to the interrogation of a member of a consular post indicates that the 'court' is the authority calling upon a person to attend as a witness. This suggests that the interrogation is intended to occur during the judicial phase of the proceedings.

Paragraph 29(2) of the Regulation referred to earlier aligns with Article 44 of the Vienna Convention, which governs the relevant mode of proceedings for individuals specified in Article 579 § 1(1) PCCP. Article 44(1) of the Convention states that 'members of a consular post may be called upon to attend as witnesses'. This category encompasses, as defined in Article 1(1)(g) of the Convention, 'consular officers', 'consular employees',<sup>27</sup> and 'members of the service staff'. Article 44(1) of the Convention, besides directly mentioning 'members of a consular post', also refers to other individuals (referred to in Article 1(1)(g) as 'members of a consular post'), namely 'consular employees' and 'members of the service staff'.<sup>28</sup> While this may seem redundant, it is important to note that 'consular employees' and 'members of the service staff' are not explicitly mentioned as individuals who may be 'called upon to attend as witnesses'.<sup>29</sup> Instead, they are individuals who are expected not to

<sup>24</sup> Kwiatkowski, Z., *Zakazy dowodowe w procesie karnym*, Kraków, 2005, p. 273. In legal scholarship, the same prohibition is understood as an 'absolute-in-part' prohibition; cf. Sutor, J., 'Składanie zeznań w charakterze świadka przez członków urzędów konsularnych w świetle konwencji konsularnych zawartych przez PRL', *Nowe Prawo*, 1977, No. 7–8, p. 1085.

<sup>25</sup> In international law, the interpretation of privileges and immunities has taken different approaches, often based on the notion that individuals representing the sending state are exclusively subject to the laws of that state, the concept of their representative function, or alternatively, on the principles of extraterritoriality and the freedom to carry out their functions (frequently referred to as the 'functional necessity' or 'theory of the interest of functions' – see more on this, Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2006, pp. 206–215. S. Sawicki is considered a proponent of the theory of function, see Sawicki, S., *Prawo konsularne. Studium prawnomiędzynarodowe*, Warszawa, 2003, p. 195. In pre-war legal scholarship, K. Stefko supported the theory of freedom, see Stefko, K., *Dyplomatyczne zwolnienie od jurysdykcji w sprawach cywilnych*, Lwów, 1938, p. 87. The latter used the Polish term 'osoby zakrajowe' (extranational persons) in reference to individuals covered by immunity, see Stefko, K., *Dyplomatyczne...*, op. cit., p. 39.

<sup>26</sup> But also in the course of 'administrative proceedings'.

<sup>27</sup> A 'consular employee' means any person employed in the administrative or technical service of a consular post (Article 1(1)(e) of the Convention).

<sup>28</sup> A 'member of the service staff' means any person employed in the domestic service of a consular post (Article 1(1)(f) of the Convention).

<sup>29</sup> This can be, however, inferred from Article 44 of the Convention (first sentence) which provides that members of a consular post may be called upon to attend as witnesses. This category encompasses both consular employees and members of the service staff (as defined in Article 1(1)(g) of the Convention, which includes consular employees and members of the service staff within the term 'members of the consular post').

decline giving evidence, except in cases mentioned in paragraph 3 of the article. From a linguistic perspective,<sup>30</sup> the phrase ‘they should not (...) decline to give evidence’ [in Polish: ‘nie powinni’] implies an expectation of specific behaviour, while also indicating that this behaviour is not mandatory. ‘Consular employees and members of the service staff’ are not obligated to decline to give evidence, but they should do so in situations specified in Article 44(3) of the Convention.<sup>31</sup> These situations are exceptions to the general rule that they must provide evidence. However, it is uncertain whether they will provide evidence due to the use of the modal verb ‘should not’ [in Polish: ‘nie powinni’] in the second sentence of § 1. Article 44(3) of the Convention makes giving evidence voluntary (‘are under no obligation to give evidence’<sup>32</sup>) for ‘members of a consular post’ if the evidence concerns ‘matters connected with the exercise of their functions’.<sup>33</sup> This implies that when evidence concerns matters unrelated to their functions, they may have an obligation to give evidence. This interpretation could be valid, but the third sentence in Article 44(1) of the Convention forbids the application of any coercive measures or penalties to a ‘consular officer’ (‘no coercive measure or penalty shall be applied to him’ [in Polish: ‘nie są obowiązani’]).<sup>34</sup> It can be argued that this prohibition extends to any situation in which consular officers decline to give evidence,<sup>35</sup> not just those specified in Article 44(3) of the Convention. This is because the third sentence in Article 44(1) of the Convention provides no exceptions or at least no indication that the prohibition applies exclusively to situations where consular officers decline to give evidence related to their functions. It suggests that any evidence provided by consular officers is unenforceable, not just evidence concerning matters connected to their functions. Providing evidence by consular officers is voluntary, but only in the situations outlined in Article 44(3) of the Convention is declining to give evidence justified.<sup>36</sup> However, it is important to note that the third sentence of Article 44(1) of

<sup>30</sup> See Polish definition of the word ‘powinno’: <https://sjp.pl/powinno> [accessed on 25 May 2023].

<sup>31</sup> Article 44(3) of the Convention also stipulates that members of a consular post are entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

<sup>32</sup> It is important to highlight that neither the Convention nor Article 582 PCCP employ a stronger normative expression, such as ‘may not be interrogated as witnesses’ or ‘may not attend as witnesses in (...)’.

<sup>33</sup> Góralczyk, W., Sawicki, S., *Prawo międzynarodowe publiczne w zarysie*, Warszawa, 2007, p. 287.

<sup>34</sup> In contrast, another perspective was voiced by Hofmański, P. (ed.), Sadzik, E., Zgryzek, E., *Kodeks postępowania karnego. Tom III, Komentarz do art. 468–682*, Warszawa, 2007, p. 461.

<sup>35</sup> A similar prohibition against the use of any means of coercion or sanctions with regard to a consular officer ‘refusing to appear or provide testimony’ is stipulated in Article 20(1)(second sentence) of the Consular Convention between the Republic of Poland and the Republic of Lithuania, signed in Vilnius on 13 January 1992 (Journal of Laws of 1994, No. 30, item 108). This provision does not specify that the prohibition, in the case of refusing to testify, only pertains to testimony related to consular secrets.

<sup>36</sup> It is necessary to emphasise that Article 44(3) through Article 58(2) of the Convention applies directly to honorary consular officers, who constitute the second category of consular officers alongside career consular officers, both of whom may head consular posts (Article 1(2)). However, according to the Convention, these two types of posts are subject to different regulations, with posts headed by career consular officers falling under Chapter II, and posts headed by honorary consular officers falling under Chapter III of the Convention. See more on this, Czubik, P., Kowal-

the Convention pertains only to 'consular officers', as defined in Article 1(1)(d) of the Convention, which includes any person entrusted in that capacity with the exercise of consular functions (including 'heads of consular posts'<sup>37</sup>). This provision does not apply to 'members of a consular post', which includes, in addition to 'consular officers', 'consular employees', and 'members of the service staff'. As such, it could be argued that, in the case of 'consular employees' and 'members of the service staff', coercive measures or penalties might be applicable, except for the right to decline to give evidence concerning 'matters connected with the exercise of their functions', as provided in Article 44(3) of the Convention.

In national law, Article 582 § 1 PCCP mandates the respective application of Article 581 PCCP, granting individuals specified in Article 579 § 1(1-2) PCCP the right to decline to provide evidence and exempting them from the duty to serve as expert witnesses. This exemption applies when the evidence or expert witness opinions pertain to the exercise of official functions by these individuals, or reciprocally, in connection with other functions. The extent to which individuals mentioned in Article 579 PCCP may be exempted from procedural duties raises questions. It is clear that the exemption is valid when evidence or opinions relate to matters connected with the exercise of official functions and, conversely, 'other' functions. However, it remains unclear whether individuals are exempted from the duty to 'serve as a translator or interpreter'. This uncertainty arises because, while 'giving evidence as a witness' and 'giving opinion as an expert' are explicitly mentioned in Article 581 PCCP (applied respectively), translation and interpretation are not explicitly mentioned in Article 582 PCCP, which refers to the former provision. Article 582 PCCP not only mandates the 'respective application' of Article 581 PCCP but also establishes the boundaries of such respective application concerning the right to decline evidence. It specifies that Article 581 PCCP is to be applied respectively when evidence or opinions relate to matters connected with the exercise of official functions, and reciprocally, to other matters. However, the omission of translation and interpretation in the context of potential modifications (resulting from respective application) implies that Article 581 § 1 PCCP should be applied without modification in this regard. Instead, the scope of individuals to whom it applies should be modified, applying it to members of the consular service rather than the diplomatic service, as originally stated. Respective application typically involves adapting a legal provision to a situation different from its original purpose. However, it does not always necessitate modifications, as is the case with exempting individuals mentioned in Article 579 PCCP from the duty to translate or interpret.

---

ski, M., *Konsul honorowy*, Kraków, 1999, pp. 98ff; Staszewski, W.Sz., *Konsul honorowy w prawie międzynarodowym i w praktyce polskiej*, Lublin, 2015, pp. 124ff; Trafas, T., 'Funkcja konsula honorowego w świetle polskich uregulowań – dylematy teorii i praktyki', in: Czubik, P., Burek, W. (eds.), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków, 2014, pp. 70ff.

<sup>37</sup> A 'head of consular post' means the person charged with the duty of acting in that capacity (Article 1(1)(c) of the Convention). Heads of consular posts are divided into four classes, namely consuls-general, consuls, vice-consuls, and consular agents (Article 9(1)(a)-(g) of the Convention). The terminology is commonly recognised, however, the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts is in no way restricted (Article 9(2) of the Convention).



Given the specific nature of consular functions, which primarily aim to protect the nationals of the sending State in the receiving State (as defined in Article 5(a) and (i) of the Convention), it is reasonable to empower procedural authorities to request individuals mentioned in Article 579 PCCP to 'serve as a translator or interpreter'. This provision is outlined in Article 582 § 1 in conjunction with Article 581 § 1 *in fine* PCCP. Who better to fulfil this role for a national of the sending State than a member of the consular service?

The fact that refusing to provide evidence under Article 582 § 1 in conjunction with Article 581 § 1 PCCP is justified by the need to maintain the confidentiality of matters related to the 'exercise of official functions by those individuals' renders this provision similar to refusing to provide evidence under Article 180 § 1 PCCP, where immunity is granted to specific groups of witnesses due to official or professional secrecy. Several analogies can be drawn between these two provisions. Both involve the right to decline to provide evidence but are limited to matters that are confidential. There are situations in which this right would apply to all facts, while in others, it would entail refusing to answer questions that would breach areas protected by Article 582 PCCP or bilateral agreements. Declining to provide evidence would be equally broad in cases where witnesses, reciprocally, use this protection for matters unrelated to 'exercising official functions'. The principle of reciprocity, extending to 'matters' not connected with the exercise of official functions ('other' matters), results in the right of individuals mentioned in Article 579 § 1(1-2) PCCP to decline to provide evidence taking on its most comprehensive form.

The use of information covered by the concept of consular secrecy, unlike secrets mentioned in Article 180 § 1 (2) PCCP, is contingent on the voluntary consent of the person obligated to maintain the secrecy. Consequently, there is no need to verify whether additional conditions for obtaining such evidence, such as 'the interest of justice' or 'the impossibility of determining a fact by other means', have been met. It also appears that individuals mentioned in Article 579 PCCP are not bound by the time limits specified in Article 186 § 1 PCCP because, legally, they are not obligated to provide evidence within the scope outlined by Article 582 § 1 in conjunction with Article 581 § 1 PCCP. Offering such evidence would be entirely voluntary since, in accordance with Article 581 § 1 PCCP (applied respectively), they can 'consent to testify'.<sup>38</sup> Neither the 2002 Regulation nor the provisions of the Code offer guidance on whether the court can set a deadline for a potential response to a summons to provide testimony. Nevertheless, if such a deadline were established, consent given after its expiration would still be fully effective, as the principle of substantial truth takes precedence over procedural expediency. However, it can be argued that the court cannot indefinitely await a response from the individual mentioned in Article 579 § 1 PCCP, and the maximum time limit may be determined by the 'proposed date of interrogation' (as per § 29(4) of the Regulation).

Article 582 § 1 PCCP applies to individuals mentioned in Article 579 § 1 PCCP. These individuals include heads of consular posts and other consular officers of foreign states (point 1), as well as those equated with them based on

---

<sup>38</sup> Or consent to attend as a witness or interpreter.

international agreements or universally accepted international customs (point 2). While Article 579 § 1 PCCP does not explicitly specify whether it refers to members of consular posts located in Poland, the overall provisions regulating their status imply that it includes members of consular posts of foreign states. It is important to note that these individuals are not necessarily nationals of those states. Article 22(2) of the Convention states that consular officers may not be appointed from among persons with the nationality of the receiving State, except with the express consent of that State. However, members of consular posts with offices in third countries can also enjoy the procedural privileges granted by Article 582 § 1 in conjunction with Article 581 § 1 PCCP, within the scope determined by Article 54(1) of the Convention. It provides that 'if a consular officer passes through or is in the territory of a third State'<sup>39</sup> (in this example, Poland), 'the third State shall accord to him all immunities provided for by the other articles of the present Convention as may be required to ensure his transit or return.'<sup>40</sup>

In accordance with Article 53(1) of the Convention '[E]very member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.' These privileges and immunities cease to apply when a member of the consular post's functions come to an end. This happens either when the person leaves the receiving State or after a reasonable period for doing so, whichever is sooner (Article 53(3) of the Convention). The question arises whether the cessation of privileges under Article 53(3) of the Convention (upon the conclusion of the consular mission) means only that individuals who are not currently performing the functions mentioned in Article 579 PCCP can be called upon to give evidence in the ordinary manner, or if it also means that the person called upon can no longer decline to give evidence under Article 582 in conjunction with Articles 581 and 579 PCCP. We are inclined to assert that the latter possibility is unlikely, as the phrase 'activities performed during and in connection with the performance of their official duties' in Article 579(1) PCCP does not necessarily imply that exercising those functions and giving evidence must coincide in time. A similar conclusion cannot, however, be drawn from Article 44(3) of the Convention or Article 582 PCCP, which require that the matters which the evidence concerns must be 'connected with the exercise of their functions', without the need for those functions to be actively exercised at the moment. Even if one were to adopt the opposing view that the expiration of privileges should be considered more broadly, encompassing the right to decline to give evidence under Article 582 in conjunction with Articles 581 and 579 PCCP, individuals whose consular mission has ended would not be in a completely disadvantaged position. Former heads of consular posts and other consular officers of foreign states could still rely on the secrecy associated with the functions they

---

<sup>39</sup> While proceeding to take up or return to his post or when returning to the sending State.

<sup>40</sup> The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State (Article 54(1)(second sentence) of the Convention).

exercised. This time, they would derive their right to decline to give evidence from Article 180 § 1 PCCP, which, after all, does not exclusively concern the 'functions' performed within the structures of the Polish State.

Procedural correspondence with members of the consular service, in contrast to representatives of foreign diplomatic missions, does not require the intermediation of the Minister of Foreign Affairs. Correspondence related to interrogating members of consular posts as witnesses or involving them as experts may be sent by the court directly to those involved (§ 29(2) of the Regulation). This process aligns with Article 44 of the Convention, unless bilateral agreements stipulate otherwise. The Convention does not specify whether obtaining consent to testify from any individuals listed in Article 579 § 1(1-2) PCCP is required. Such consent is solely governed by Article 581 § 1 PCCP. Some legal scholars argue that consent only applies to circumstances related to the exercise of official functions by these individuals and, subject to reciprocity, 'other circumstances'. In cases where the principle of reciprocity does not apply, consent is not required for these 'other circumstances', and individuals listed in Article 579 § 1(1-2) PCCP are obligated to appear and give evidence as witnesses or attend as experts, specialists, or translators and interpreters.<sup>41</sup>

Where the court requests members of the consular service for consent to give evidence or to attend as an interpreter, it must specify the subject matter of the interrogation and attach a summons<sup>42</sup> indicating the proposed interrogation date (§ 29(4) of the Regulation). The summons itself undergoes a correctness check by the court president or an authorised judge, court assessor, or judicial referendary (§ 29(4) of the Regulation), which is exceptional during such proceedings. Pursuant to § 30 of the Regulation, the interrogation date, except when urgent, is scheduled to allow sufficient time between the date of sending the summons and the intended interrogation date for the summoned person to thoroughly acquaint themselves with the contents of the summons and prepare for the interrogation.

The requirement specified in § 29(4) of the Regulation, which makes it obligatory to indicate the subject matter of the proceedings, serves a dual purpose. On one hand, it provides the summoned member of the consular service with an opportunity to understand the significance of the circumstances they might disclose while giving evidence. On the other hand, it prevents the processual authority from exceeding the limits it had set and from encompassing, by the interrogation, the subject matter not previously indicated in the summons.

Article 582 in conjunction with Article 581 § 1 PCCP does not specify the form of consent. However, given that the individual mentioned in Article 579 § 1 PCCP and the procedural authority exchange correspondence, it can be inferred that the predominant form will be in writing. These provisions also do not specify whether consent might be withdrawn, which means that general rules will apply in this

---

<sup>41</sup> Janicz, M., 'Komentarz do art. 582', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020, comment 1.

<sup>42</sup> This term is misleading because the document in question is not a strict demand; the authority simply 'requests' attendance at the trial or session – see Attachment No. 3 to the Regulation mentioned in footnote 10.

regard (or rather the no-rules principle), as the revocability of statements of will in criminal procedure raises considerable controversy in legal scholarship.<sup>43</sup> The consent itself constitutes a fully autonomous declaration of will by the individual to whom the personalised inquiry from the court is addressed. It cannot be replaced by a statement from a superior or the sending state. Even the explicit waiver of immunity by the sending state in relation to the person mentioned in Article 582 § 1 in conjunction with Article 581 § 1 PCCP does not affect the necessity of applying the procedure provided for in the above-mentioned provisions. In such a situation, Article 580 § 1 PCCP repeals the application of Articles 578 and 579 PCCP to that individual, but not Article 582 § 1 or Article 581 § 1 PCCP. This may be due to a legislator's oversight, but it can also be interpreted as a reflection of respect for the permanence of consular secrecy, which does not cease with the waiver of consular immunity.

Until the end of 2019, individuals with diplomatic or consular immunity were not required to take an oath or receive instructions regarding potential criminal liability for making false statements (§ 31 of the Regulation, currently not in force<sup>44</sup>). The interrogation of a member of a consular post may occur at the requesting court's premises, within the consular post's facility, or at the residence of the person mentioned in Article 579 § 1 PCCP.<sup>45</sup> Courtesy suggests that this choice should be left to the witness. Article 44 (2) of the Convention addresses the location of the consular officer's interrogation, emphasising the need to 'avoid interference with the performance of their functions'. The final option, and the last one mentioned, is accepting a written statement from the witness.

The majority of Poland's bilateral consular conventions contain provisions regarding the participation of consular service members as witnesses in criminal proceedings. These conventions often use similar language to describe the rights of those summoned as witnesses. They may mention the 'right to decline to give evidence' or the 'lack of duty to give evidence', linking these concepts with 'matters related to the performance of their official duties',<sup>46</sup> 'facts connected with the

---

<sup>43</sup> See more on this, Nowikowski, I., *Odwoływalność czynności procesowych stron w polskim procesie karnym*, Lublin, 2001, pp. 11ff.

<sup>44</sup> It was repealed on 28 December 2019, by § 1(18) of the Regulation of the Minister of Justice dated 14 November 2019, amending the regulation regarding specific duties of courts in matters related to international civil and criminal proceedings in international relations (Journal of Laws, item 2398).

<sup>45</sup> Similarly, Article 27(2) of the Consular Convention between the Republic of Poland and Romania, drawn up in Bucharest on 25 January 1993 (Journal of Laws of 1994, No. 29, item 104), which provides for the taking of testimony 'in the residence or in the consular office' or 'receiving (...) a written statement'.

<sup>46</sup> Article 22(3) of the Consular Convention between the Republic of Poland and the Russian Federation, drawn up in Moscow on 22 May 1992 (Journal of Laws of 1995, No. 140, item 687), also mentions the 'family of a consular post member and private staff with regard to facts related to the activity of a consular post'. A similar extension of the right to decline to give evidence is included in Article 44(3) of the Consular Convention between the People's Republic of Poland and the Italian Republic, signed in Rome on 9 November 1973 (Journal of Laws of 1977, No. 9, item 35), which grants the aforementioned right to 'families of consular posts' members' and links the right with 'circumstances concerning the activity of a consular post'. Identical provisions are contained in Article 20(3)(second sentence) of the Consular Convention between the People's

performance of their official duties',<sup>47</sup> or 'facts related to the exercise of their functions'.<sup>48</sup> While these conventions primarily address the situation of members of consular posts (which aligns with Article 579 § 1(1) PCCP, granting the right to decline to give evidence primarily to 'heads of consular posts and other consular officers of foreign states'), they often use a broader term, 'members of consular posts',<sup>49</sup> which encompasses 'consular employees' and 'members of the service staff'. Article 579 § 1(2) PCCP covers these categories as 'persons equated with them [that is with persons mentioned in Article 579 § 1(1) PCCP] pursuant to international agreements or generally accepted international customs'. In the absence of such convention-based provisions, these individuals might not be able to exercise their right to decline to give evidence in criminal proceedings. Therefore, Article 579 § 1(1) PCCP provides those mentioned in it with an independent basis for the right to decline to give evidence, while Article 579 § 1(2) PCCP requires an additional examination to establish the existence of the necessary 'agreement' or 'generally accepted international custom'.

Both the right to decline to give evidence and the exemption from the obligation to act as an expert under Article 582 § 1 in conjunction with Article 581 § 1 PCCP are in fact implementations of Article 44 (1) of the Convention. While the latter provision does not use the term 'refusal to testify' but instead refers to the exemption from the obligation to testify ('shall not ... decline to give evidence'), there is no doubt that both provisions aim to achieve the same goal, namely, to prohibit the breach of consular secrecy through testimony. In contrast to Article 582 § 1 PCCP, Article 44 (3) of the Convention also grants 'members of a consular post' the right to decline to give evidence 'as expert witnesses with regard to the law of the sending State'.<sup>50</sup> Disregarding the legal impossibility of appointing legal experts in the domestic context (based on the principle '*iura novit curia*'), these individuals

---

Republic of Poland and the French Republic, signed in Paris on 20 February 1976 (Journal of Laws of 1977, No. 19, item 76), and in Article 17(3) of the Consular Convention concluded with Mexico (mentioned elsewhere in this paper). However, the latter Convention states that the right to decline to give evidence is restricted to 'members of families of consular posts' members, if they are not nationals of the receiving State'.

<sup>47</sup> See Article 17(3) of the Consular Convention between the People's Republic of Poland and the United Mexican States, signed in Warsaw on 14 June 1985 (Journal of Laws of 1986, No. 37, item 183); Article 43(3) of the Consular Convention between the Government of the People's Republic of Poland and the Government of the People's Republic of China, signed in Beijing on 14 July 1984 (Journal of Laws of 1985, No. 8, item 24).

<sup>48</sup> See Article 20(3) of the Consular Convention between the People's Republic of Poland and the Republic of Austria, signed in Vienna on 2 October 1974 (Journal of Laws of 1975, No. 24, item 131).

<sup>49</sup> See, among others, Article 22(1) of the Consular Convention between the Republic of Poland and the Russian Federation, *op. cit.*; Article 21(1) of the Consular Convention between the Republic of Poland and the Republic of Estonia, signed in Tallinn on 2 July 1992 (Journal of Laws of 1997, No. 125, item 798); Article 20(1) of the Consular Convention between the People's Republic of Poland and the Republic of Greece, signed in Warsaw on 30 August 1977 (Journal of Laws of 1979, No. 12, item 82).

<sup>50</sup> Similar provisions as to the refusal to 'give an expert opinion on the sending State's legislation' can be found in Article 18(3) of the Consular Convention between the People's Republic of Poland and the Republic of Cuba, signed in Havana on 12 May 1972 (Journal of Laws of 1975, No. 21, item 111).

are provided with more extensive protection under the Code. This protection encompasses all situations where they are required to provide expert opinions, provided that these situations are linked to the exercise of official functions by the individuals in question. This protection also extends, subject to reciprocity, to other circumstances.

## THE INVOLVEMENT OF CONSULAR OFFICERS IN COURT INTERROGATIONS (ARTICLE 177 § 1B(2) PCCP)

When a witness is a Polish national residing abroad, Article 177 § 1b(2) PCCP stipulates that a consular officer must be present during the witness interrogation as per Article 177 § 1a PCCP. Article 177 § 1a PCCP outlines a procedure involving the use of technical devices that enable remote interrogations with simultaneous direct image and sound transmission. The participation of a consular officer acts as a substitute for the involvement of a court referendary, judge's assistant, or a court-employed official in cases where their presence is not possible due to organisational and economic constraints. The presence of a consular officer is essential for validating the conditions under which the evidence is obtained and 'ensuring the correctness'<sup>51</sup> of the evidence-taking process in accordance with Article 177 § 1b PCCP. It is, therefore, not accurate to describe this provision as solely 'organisational in character since it supplements the list of authorised individuals under § 1a to be present during remote witness interrogations'.<sup>52</sup> Nevertheless, it is true that the Code does not grant consular officers the authority to report potential violations of interrogation rules, which may imply that the legislator assumes consular officers lack the ability to identify such violations. In some sense, this position relegates consular officers to the role of observers rather than active participants in the evidence-taking process. However, I contend that this does not strip consular officers of the right to raise concerns about the proper conduct of the interrogation if they have any.

The mentioned provision does not specify the location for such an interrogation. This lack of specification can be interpreted as an indication that the participation of a consular officer is not only possible but even recommended in cases where the remote interrogation is conducted by a foreign court.<sup>53</sup> The key factor here is that the witness resides abroad, which presents a unique circumstance justifying departure from the standard practice of conducting direct interrogations. Legal scholars have long argued that moving away from the traditional method of interrogation as outlined in Article 177 § 1 PCCP should only occur in the presence of exceptional and significant circumstances, rather than mere obstacles that can be

---

<sup>51</sup> Gruszecka, D., 'Komentarz do art. 177', in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2021, p. 413.

<sup>52</sup> Kurowski, M., 'Komentarz do art. 177', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023, comment 6.

<sup>53</sup> Kulesza, C., 'Komentarz do art. 177', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020, comment 13.

easily overcome.<sup>54</sup> With the addition of Article 177 § 1b PCCP in 2020, changes were made to the Consular Law as well. Among the various consular functions enumerated in Article 26(1) of the Consular Law, a new function was introduced, specifically, the ‘presence of a consul at the location where the examination of a witness takes place, if it is conducted in the manner specified in Article 177 § 1a’ (Article 26(1)(2a) of the Consular Law). Furthermore, it explicitly stated that consuls may be present during witness interrogations ‘at the request of a court or prosecutor’.

### INTERROGATIONS CONDUCTED BY A CONSUL PURSUANT TO 586 PARA. 1 PCCP, OF CERTAIN PERSONS AS DEFENDANTS, WITNESSES, OR EXPERTS

In the context of interrogations involving certain individuals as defendants, witnesses, or experts, the involvement of a consular officer is contingent upon a request<sup>55</sup> from the court or prosecutor, as explicitly stipulated in Article 26(1)(2) of the Consular Law. However, unlike the situation described in Article 177 § 1b(2) PCCP, in conjunction with Article 26(1)(2a) of the Consular Law, where the consular officer predominantly plays a supervisory role, here, the consular officer assumes an active role, akin to that of a procedural authority, albeit with defined boundaries. While this form of interrogation is considered part of the concept of ‘legal assistance’, a member of a consular post conducting the interrogation is bound by a pre-established list of questions<sup>56</sup> and lacks the authority to ask additional questions that may become necessary during the interrogation. It is important to note that this differs from situations where one court provides legal assistance to another. Despite Article 26(2) of the Consular Law specifying that interrogations mentioned in Article 26(1)(2) should adhere to relevant provisions of Polish law, there is no explicit legal foundation empowering a member of a consular post to pose unlisted questions. Moreover, applying the pertinent provisions of Polish law requires compliance with procedural rules (e.g., Article 175 § 1 and Article 190 PCCP) and ensuring the interrogated person’s freedom of expression (Article 171 PCCP). If a defence lawyer expresses a desire to participate, the consul can permit their presence during the interrogation. However, this raises important implications. The law grants defence lawyers the right to actively partake in the evidence-gathering process, without Article 586 § 1 PCCP diminishing the right to a robust defence, nor abolishing legal norms embodied in Article 301 PCCP. In practice, though, the reality differs. The Polish Ombudsman’s report of 7 February

---

<sup>54</sup> Wiliński, P., ‘Przesłuchanie świadka na odległość w postępowaniu karnym’, *Przegląd Sądowy*, 2005, No. 6, pp. 16–18; Stefański, R.A., Zabłocki, S., *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, LEX, 2019, comment 6 to Article 177.

<sup>55</sup> Interrogating a person mentioned in Article 586 § 1 PCCP, whether initiated by the person in question or by a consular post member (an unlikely scenario), is not feasible.

<sup>56</sup> According to § 39 of the Regulation, when submitting a request to interrogate Polish citizens residing abroad, the court must include a ‘list of questions to be asked to the interrogated individuals’.

2017 (Reference No. II.510.1297.2016.MH)<sup>57</sup> indicates that consuls often deny defence lawyers (or other legal representatives) participation in interrogations conducted under Article 586 § 1 PCCP. While the consul's interrogation may not be considered identical to that of a procedural authority, it remains an act delegated to the consul, who shares a portion of the responsibility in upholding the principles of the interrogation process.

There is no consensus among legal scholars regarding whether consular interrogations can also extend to nationals of third countries. Some, like S. Steinborn,<sup>58</sup> support this possibility, while others, such as B. Augustyniak<sup>59</sup> and A. Sołtysińska,<sup>60</sup> oppose it. I firmly argue in favour of endorsing the latter position because interrogating such nationals, categorised as 'residing abroad' rather than recognised as 'persons holding Polish citizenship', falls under the purview of Article 585(2) PCCP. This means that interrogations of individuals as 'defendants, witnesses, or experts' should occur based on two different provisions, namely Article 585 § 1 and Article 586 § 1 PCCP. It is worth emphasising that only interrogations under the latter provision may be conducted by 'a Polish diplomatic mission or a consular post'.

A straightforward comparison between Article 586 § 1 PCCP and Article 26(1)(2) of the Consular Law reveals notable differences. While the former pertains to the interrogation of a 'person in the capacity of a defendant, witness, or expert', the latter covers 'parties, participants in the proceedings, witnesses, and suspects'. These distinctions may appear superficial if we categorise 'defendants' as 'parties'<sup>61</sup> and 'experts' as 'participants in the proceedings', allowing for their interrogation with consular assistance. Moreover, Article 26 of the Consular Law lacks any specific indication that it concerns the interrogation of a 'person who holds Polish citizenship',<sup>62</sup> unlike Article 586 § 1 PCCP. This can be explained by the fact that Article 2 of the Consular Law primarily mandates consular functions to be performed in the interest of the 'Republic of Poland and its citizens abroad' (as per Article 1 of the Consular Law). However, the differences between these provisions are more extensive. Article 586 § 1 PCCP mentions requesting the 'Polish (...) consular post' (in an impersonal manner), whereas Article 26(1) of the Consular Law individualises a member of that post, specifying the 'consul' as the one who 'performs the (...) activities listed in Article 26(1)(2)'. This implies that, according to consular law, only this specific member of the consular post, and no other, can handle the court's request to interrogate a person residing abroad who holds Polish citizenship. This

<sup>57</sup> See also the earlier communication from the Polish Ombudsman (I.510.1297.2016 II.510.1297.2016.MH) to the Minister of Foreign Affairs, available at <https://sprawy-generalne.brpo.gov.pl/pdf//2017/2/II.510.1297.2016/966208.pdf> [accessed on 22 May 2023].

<sup>58</sup> Steinborn, S., 'Komentarz do art. 586', in: Grajewski, J. (ed.), Paprzycki, L.K., Steinborn, S., *Kodeks postępowania karnego. Komentarz do art. 425–673 k.p.k.*, Tom II, Kraków, 2006, pp. 512–513.

<sup>59</sup> Augustyniak, B., 'Komentarz do art. 586', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023, comment 8.

<sup>60</sup> Sołtysińska, A., 'Komentarz do art. 586', in: Jaworski, G., Sołtysińska, A., *Komentarz do niektórych przepisów Kodeksu postępowania karnego*, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz*, LEX, 2010, comment 5.

<sup>61</sup> However, it appears that this particular phrase was crafted for purposes other than criminal proceedings.

<sup>62</sup> Polish citizenship of an interrogated person is also mentioned in § 39(1) of the Regulation.



conclusion is further supported by Article 39(1) of the Regulation,<sup>63</sup> which states that a request to interrogate a person should be directed 'to the consuls of the Republic of Poland to be handled within their responsibilities'. Additionally, Article 26 of the Consular Law mentions consuls as those who, at the court's or prosecutor's request, must perform specified procedural acts. The use of 'consuls' appears to differ from Article 9 of the Convention, which recognises 'consuls' as representatives of one of the several classes of 'heads of consular posts'. Nonetheless, it aligns with the nomenclature established in Article 9(2)(1-4) of the Consular Law. In this provision, 'consuls' alongside 'consuls-general', 'vice-consuls', and 'consular attachés', are considered one of the four titles conferred by the head of the consular service to consular officers.<sup>64</sup> 'Consul' in Article 39(1) of the Regulation and Article 26(1) of the Consular Law can practically be any of the heads of the consular post, even if they hold a consular title different from 'consul'. It is worth noting that Article 26 of the Consular Law inaccurately defines those who request the interrogation of 'parties, participants in the proceedings, and suspects', or those who request to be present during the procedure referred to in Article 177 § 1a PCCP, as 'public administration authorities in the Republic of Poland', although 'procedural authorities' would be a more accurate term.

Some legal scholars support the application of remote interrogation procedures to interrogations conducted under Article 586 § 1 PCCP.<sup>65</sup> However, others argue that these interrogations are exclusively intended for authorities directly involved in criminal proceedings, rather than a 'summoned authority (or) summoned court'.<sup>66</sup> If we consider a consul as an 'external' authority, this possibility may not be feasible, especially as it raises the question of who should assist the person being interrogated abroad. Unfortunately, Article 10(1) of the 2000 Convention on Mutual Legal Assistance in Criminal Matters, which permits the hearing of a person as a witness or expert by videoconference by the judicial authorities of another member state, does not provide clarity. This is because Article 586 § 1 PCCP does not encompass acts between authorities of different member states, while the Convention exclusively addresses such acts. However, a pertinent question arises: can we infer that since this 'remote' interrogation format is possible in international relations, there is no basis for treating acts conducted 'within' the Polish legal system and by Polish consuls differently?<sup>67</sup>

---

<sup>63</sup> 'Consuls of the Republic of Poland' as the 'recipients of the request to interrogate a person as a witness, in particular' are also mentioned in § 37 of the Regulation.

<sup>64</sup> In accordance with national legislation, a 'consular officer' is defined as a 'consul or any other member of the diplomatic and consular personnel performing consular functions in the receiving state' (Article 4 of the Consular Law).

<sup>65</sup> Augustyniak, B., 'Komentarz do art. 586...', op. cit., comment 9; Hofmański, P. (ed.), Sadzik, E., Zgryzek, K., *Kodeks...*, op. cit., p. 474.

<sup>66</sup> Paprzycki, L.K., 'Komentarz do art. 177', in: Paprzycki, L.K., *Komentarz aktualizowany do art. 1-424 Kodeksu postępowania karnego*, LEX, 2015, comment 8.

<sup>67</sup> The Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, concluded in Brussels on 29 May 2000, and the Protocol to the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, concluded in Luxembourg on 16 October 2001 (Journal of Laws of 2007, No. 135, item 950).

The minutes prepared by a consul are not subject to Article 587 PCCP. Instead, they fall under the purview of Articles 389, 391, 392, or 393 PCCP.<sup>68</sup> An essential condition for conducting an interrogation under Article 586 § 1 PCCP is that the person subjected to questioning must be a Polish citizen and express a willingness to participate, as the consul lacks the authority to employ coercive measures.<sup>69</sup>

Actions mentioned in Article 586 § 1 PCCP can be conducted in a foreign country if a Polish diplomatic mission or consular post is present. This is evident from the provision itself and is explicitly stated in Article 586 § 2 PCCP, which allows these actions to be performed by a foreign court, prosecutor, or another competent authority 'in case it is impossible to perform those actions in the manner specified in § 1'. The legal basis for making such a request when it's impossible to perform the actions specified in Article 586 § 1 PCCP can be an international agreement or even Article 15(1) of the European Convention on Mutual Legal Assistance in Criminal Matters.<sup>70</sup>

## CONCLUSIONS

This paper delves into the involvement of consular officers, both Polish and foreign, in the process of gathering evidence in criminal proceedings. The purpose of this text is to serve as a starting point for a more extensive discussion about the roles played by consular officers in criminal proceedings. This is especially necessary because the topic often goes overlooked by legal scholars<sup>71</sup> or is briefly mentioned, with a focus on quoting legal provisions.<sup>72</sup> However, actions performed under Article 586 § 1 of the Code of Criminal Procedure can be regarded as consular functions with a judicial nature. Even though they are subsidiary in character,<sup>73</sup> they frequently have a significant impact on the primary criminal proceedings. Entrusting judicial tasks to consular officers aligns with Article 5(m) of the Convention, which defines consular functions as including 'performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State (...)'.<sup>74</sup>

<sup>68</sup> Steinborn, S., 'Komentarz do art. 586', in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, LEX, 2015, comment 2a.

<sup>69</sup> Dąbrowski, Ł.D., 'Dowód z przesłuchania stron i innych uczestników procesu przez konsula – wybrane zagadnienia procesowe', in: Burek, W., Czubik, P. (eds.), *Polskie prawo konsularne w okresie zmian*, Warszawa, 2015, p. 37.

<sup>70</sup> The European Convention on Mutual Legal Assistance in Criminal Matters (Journal of Laws of 1999 No. 76, item 854 with amendments).

<sup>71</sup> In his discussion of professional secrecy and confidentiality related to the performance of specific functions, M. Rusinek focuses solely on Article 180 PCCP, M. Rusinek without making reference to Article 582 § 1 in conjunction with Article 581 § 1 PCCP. See Rusinek, M., *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa, 2019, pp. 165–170.

<sup>72</sup> Grzeszczyk, W., *Kodeks postępowania karnego. Komentarz*, LEX, 2012, comments 1–3 to Article 584; Prusak, F., *Kodeks postępowania karnego. Komentarz*, LEX, 1999, comments 1–4 to Article 582; Janicz, M., 'Komentarz do art. 582', in: Dudka, K. (ed.), *Kodeks postępowania karnego*, LEX, 2020, comments 1–3.

<sup>73</sup> Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2019, p. 521.

The inconsistencies between the provisions of criminal procedure and those within the Consular Law, including differences in terminology, as discussed in this article, do not fundamentally hinder the ability of consular officers to fulfil their procedural duties. However, they underscore that the regulatory framework related to these participants in criminal proceedings is not as straightforward as it may initially appear. Due to the editorial constraints, this paper has not elaborated on issues beyond the gathering of evidence. Furthermore, the discussion primarily revolved around the roles assigned to individuals mentioned in Article 579 § 1(1-2) PCCP under Article 177 § 1b(2), Article 586 § 1, as well as Article 582 § 1 in conjunction with Article 581 § 1 PCCP. However, this topic warrants a separate and comprehensive discussion.

## BIBLIOGRAPHY

- Augustyniak, B., 'Komentarz do art. 579', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023.
- Augustyniak, B., 'Komentarz do art. 586', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023.
- Bierzaniek, R., Symonides, J., *Prawo międzynarodowe publiczne*, Warszawa, 1985.
- Czubik, P., Kowalski, M., *Konsul honorowy*, Kraków, 1999.
- Dana, A., 'Podmiotowy zakres immunitetu w polskim systemie prawnym', *Doctrina. Studia społeczno-polityczne*, 2011, No. 8.
- Dąbrowski, Ł.D., 'Dowód z przesłuchania stron i innych uczestników procesu przez konsula – wybrane zagadnienia procesowe', in: Burek, W., Czubik, P. (eds), *Polskie prawo konsularne w okresie zmian*, Warszawa, 2015.
- Góralczyk, W., Sawicki, S., *Prawo międzynarodowe publiczne w zarysie*, Warszawa, 2007.
- Grajewski, J., Steinborn, S., 'Komentarz do art. 2', in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015.
- Gruszecka, D., 'Komentarz do art. 177', in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2021.
- Grzegorzczak, T., Tylman, J., Olszewski, R. (ed.), Świecki, D. (ed.), Błoński, M., Kasiński, J., Kurowski, M., Małolepszy, A., Misztal, P., Rydz-Sybilak, K., *Polskie postępowanie karne*, Warszawa, 2022.
- Grzeszczyk, W., *Kodeks postępowania karnego. Komentarz*, LEX, 2012.
- Herzog, A., 'Postępowanie w sprawach o uchylenie immunitetu prokuratorskiego – stan prawny i praktyka (część I)', *Prokuratura i Prawo*, 2008, No. 4.
- Hofmański, P. (ed.), Sadzik, E., Zgryzek, E., *Kodeks postępowania karnego. Tom III, Komentarz do art. 468–682*, Warszawa, 2007.
- Janicz, M., 'Komentarz do art. 582', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020.
- Krzemiński, Z., 'Recenzja »Immunitety w polskim procesie karnym – Warszawa 1970«', *Palestra*, 1971, No. 4.
- Kulesza, C., 'Komentarz do art. 17', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020.
- Kulesza, C., 'Komentarz do art. 177', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020.
- Kurowski, M., 'Komentarz do art. 2', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023.

- Kurowski, M., 'Komentarz do art. 177', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023.
- Kwiatkowski, Z., *Zakazy dowodowe w procesie karnym*, Kraków, 2005.
- Michalski, W., *Immunitety w polskim procesie karnym*, Warszawa, 1970.
- Mozgawa-Saj, M., 'Znęcanie się nad osobą najbliższą – aspekt karnoprosesowy', in: Mozgawa, M. (ed.), *Znęcanie się*, LEX, 2020.
- Niewiadomska, I., Fel, S., 'Realizacja zasady sprawiedliwości w karaniu przestępców', *Zeszyty Naukowe KUL*, 2016, No. 3.
- Nowikowski, I., *Odwolalność czynności procesowych stron w polskim procesie karnym*, Lublin, 2001.
- Paprzycki, L.K., 'Komentarz do art. 177', in: Paprzycki, L.K., *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015.
- Prusak, F., *Kodeks postępowania karnego. Komentarz*, LEX, 1999.
- Rusinek, M., *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa, 2019.
- Sawicki, S., *Prawo konsularne. Studium prawnomiędzynarodowe*, Warszawa, 2003.
- Sołtysińska, A., 'Komentarz do art. 586', in: Jaworski, G., Sołtysińska, A., *Komentarz do niektórych przepisów Kodeksu postępowania karnego*, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz*, LEX, 2010.
- Sowiński, P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004.
- Staszewski, W.Sz., *Konsul honorowy w prawie międzynarodowym i w praktyce polskiej*, Lublin, 2015.
- Stefański, R.A., 'Immunitet prokuratorski', *Prokuratura i Prawo*, 1997, No. 2.
- Stefański, R.A., Zablocki, S., *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, LEX, 2019.
- Stefko, K., *Dyplomatyczne zwolnienie od jurysdykcji w sprawach cywilnych*, Lwów, 1938.
- Steinborn, S., 'Komentarz do art. 586', in: Grajewski, J. (ed.), Paprzycki, L.K., Steinborn, S., *Kodeks postępowania karnego. Komentarz do art. 425–673 k.p.k.*, Tom II, Kraków, 2006.
- Steinborn, S., 'Komentarz do art. 2', in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX, 2016.
- Steinborn, S., 'Komentarz do art. 586', in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, LEX, 2015.
- Sutor, J., 'Składanie zeznań w charakterze świadka przez członków urzędów konsularnych w świetle konwencji konsularnych zawartych przez PRL', *Nowe Prawo*, 1977, No. 7–8.
- Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2006.
- Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2019.
- Tokarczyk, R.A., 'Sprawiedliwość jako naczelną wartość prawa', *Annales Universitatis Mariae Curie-Skłodowska*, 1997, No. XLIV.
- Trafas, T., 'Funkcja konsula honorowego w świetle polskich uregulowań – dylematy teorii i praktyki', in: Czubik, P., Burek, W. (eds), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków, 2014.
- Wiliński, P., 'Przesłuchanie świadka na odległość w postępowaniu karnym', *Przegląd Sądowy*, 2005, No. 6.

**Cite as:**

Sowiński P.K. (2023) 'The Involvement of Consuls and Consular Officers in Evidence Gathering under Articles 177 § 1b(2), 586 § 1, and Article 177 § 1 in Conjunction with Articles 582 § 1 and 581 § 1 of the Polish Code of Criminal Procedure', *Ius Novum* (Vol. 17) 4, 40–59. DOI 10.2478/in-2023-0028