

Karol Jarzabek

Search in the Polish criminal procedure – dogmatic, comparative and empirical perspective

Summary

The search is of considerable importance for the course and outcome of the criminal process, and at the same time constitutes one of the most commonly used instruments of interference in the legally protected rights and freedoms of the individual. As a sensitive evidence procedure, it encroaches on the constitutionally guaranteed right to privacy, inviolability of the home and personal integrity, which are also protected under the European Convention on Human Rights. At the same time, it is a classic procedure, which provides effectiveness of many criminal proceedings and is most often undertaken in its initial phase. The conflictual nature of these values should encourage the legislator to seek a balance between the effectiveness of preparatory proceedings and the protection of individual rights.

The main objective of the work is therefore to analyze the shape of the search institution in the Polish criminal process, to answer the question whether the balance between the interests of law enforcement entities and the protection of civil liberties is currently maintained, to indicate possible shortcomings in this area and to propose an optimal model of the search institution that would implement a balance between competing values. For this purpose, not only the Polish legal system was analyzed, but also a comparative and empirical method was used, presenting the results of file research in the field of the practice of the authorities of proceedings.

The individual chapters of the work reflect, as far as possible, the process of making decisions about conducting a search, its implementation and, finally, the inspection of it. It is divided into eight chapters.

The first of them was devoted to the introductory theme, i.e. the concept and types of search. In this part of the work, an analysis of individual elements defining a search was carried out, considering in particular its procedural nature, search as a coercive measure and analyzing the actual actions taken in the course of the search, distinguishing this action from other, similar evidence procedures.

The second chapter presents the constitutional and convention search template, which provides a framework for further considerations in the context of the implementation by Polish legislation of model assumptions in the field of guaranteeing individual rights and freedoms.

The third chapter is devoted to the fundamental issues concerning the foreground of interference with the property of the individual as part of the search operation. It analyses the purpose and function of the search, the conditions for carrying out the search (both in the basic procedure and in the exigent circumstances), the evidence base for this act and its scope. These are key elements from the perspective of deciding whether to conduct a search.

The fourth chapter discusses the issue of search directives, based on the concept of coercive measures directives, presenting both directives addressed to the legislator and law enforcement authorities. These considerations constitute an important point of reference for further analysis as a programmatic norms.

The fifth chapter, on the other hand, deals with the issue of the authority authorised to carry out the search. It presents model assumptions to be met by the decision-making authority in this area. An analysis of the elements that should make up the correct decision to order and approve a search was also carried out. It also presents broad considerations regarding the results of qualitative empirical research on the justifications for the prosecutor's decision to approve the search.

The considerations in Chapters I to V focus mainly on issues related to the foreground of interference with the rights and freedoms of the individual as part of the search, and thus – assuming a certain simplification – the stage of making a decision about its execution. In the sixth chapter, however, an analysis was made in terms of the stage of the search activity, presenting the manner of its conduct depending on the type of search. Particular attention was paid to the method of conducting searches of places benefiting from additional legal protection, including the method of securing documentation containing legally protected information.

Finally, after considering the legal framework of the search, Chapter Seven provides an analysis of the consequences of the various procedural infringements connected with the search and examines the mechanisms for monitoring that activity.

The last chapter presents a comparison of the search with other evidentiary activities (seizure of things, inspection of a device containing electronic data, visual inspection of the body and body examination of the accused, inspection of the scene) and extra-procedural activities similar to a search. The search bears a significant resemblance to both procedural and extra-procedural activities. Due to the difference in standards of protection of rights and

freedoms within these activities, an attempt was made to define criteria that will allow to draw a line between them.

The whole consideration is summarised in the section containing conclusions and postulates *de lege ferenda*. The basic shortcomings of the institution were diagnosed, including particularly all the insufficient precision of the regulations regarding the purpose and grounds of the search, the lack of regulation ordering the authorities to assess the need to undertake a search depending on specific criteria determining its proportionality (e.g. the type of crime committed, the person against whom the search is to be conducted), and finally the lack of adequate institutional guarantees to protect individual rights. The latter relates, inter alia, to the failure to entrust the decision on the search to a judicial authority. A proposal was also presented to solve the research problem, at the same time formulating *de lege ferenda* postulates, the implementation of which would lead to the removal of identified shortcomings and ensure a balance between the interests of law enforcement authorities and the protection of individual rights.

Wrocław, 13. 04. 2013r.

Janusz Kowalski