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Experts, translators, professionals (Chap. 22 CCP) after amendment. Selected issue

Summary

The last big revision of the code of criminal procedure introduced many changes to chapter V of the Code of Criminal Procedure dealing with evidence. These changes also did not circumvent Chapter 22 containing regulations regarding experts, professionals and translators. They are not particularly important, but in conjunction with any changes in the general part of criminal procedure, including the rules on burden of proof, probative process, amended rules regarding the benefit of the doubt, probative preclusion and others, acquire special importance. This was also the basic issues of this publication, especially since a criminal trial is not devoted exclusively to sentencing, but rather, above all, reaching the material truth. Now, increasingly, it is necessary to use procedural authorities with the help of experts and specialists. Likewise, the parties cannot remain indifferent to the huge improvement, in all fields of knowledge, and therefore the use of expert assistance becomes a necessity for them.

Keywords Burden of proof, onus of proving, expert, specialist, principle of material truth, principle of the benefit of the doubt, unrepeatable activities, opinion

Introductory notes

The last major amendments to the Code of Criminal Procedure[1] introduced a number of changes to Chapter V dealing with evidence (Arts. 167–242 CCP). The idea of the amendment was, among others, to change the mind-set and eliminate old habits as to the acquisition of evidence and the rules associated with them, as well as their evaluation. The amendments, which entered into force on 1 July 2015 relate to an extremely important matter, a kind of skeleton of criminal proceedings. They apply alike to the general provisions (Chapter 19), as well as witnesses, experts, interpreters, autopsy, retention, storage, sales and search.

The process of command, according to the revised Art. 2 § 1 CCP has been subordinated to the general rule that criminal proceedings should be shaped in such a way that the offender be detected and prosecuted, and the person not proven guilty, should not incur such liability. Thus emphasized, the principle benefit of the doubt is also specified in the amended Art. 5 § 2 CCP. The lack of proof of guilt has been replaced by the term "innocent person", meaning no collection against such a person of uncontested and conclusive evidence by the prosecution. Art. 2 § 2 CCP contains a declaration for legislators to shape the criminal process in such a way as to match these specific demands. Its content was filled with the objectives related to the implementation of substantive criminal law, its protection and preventive function, implemented by the appropriate application of the provisions of the Code of Criminal Procedure, and that at any stage, with due regard for objectivity[2].

The amended Code of Criminal Procedure maintains for the division of personal and physical evidence. In turn, Art. 167 CPC accepts that the collection of evidence shall be carried out at the request of the parties or *ex officio*. Be aware of the need to note that the activities indicated in Art. 308 §§ 1–6 CCP

1 Dz.U. 2013, poz. 1247, Dz.U. 2015, poz. 21, Dz.U. 2015, poz. 396, Dz.U. 2015, poz. 1186.

2 Por. wyr. SA w Lublinie z 7 maja 2002 r., II AKa 5/02, Legalis; szerzej. W. Cieślak, [in:] *Kodeks postępowania karnego. Praktyczny komentarz*, W. Cieślak, K.J. Pawelec, I. Tuleja (eds.), Warszawa 2015, pp. 16–18 oraz podana literatura.

(unmodified) require intervention in all these events, in which there is a reasonable suspicion of having committed a crime. It is about so-called unique activities, carried out both on the site of the crime, i.e. visual inspection of the place, body, preliminary study of psychomotor skills[3], as well as activities related to the control and retention of conversations and other "secret" police action[4]. Not to be missed are also the verification activities[5] which are made *ex officio*, and so party to the proceedings, including those involved in the event, their conduct does not have the slightest impact. In short, the actions of prospecting, sourcing and securing evidence are carried out *ex officio*, although the parties to proceedings are entitled to evidential initiative. However, attention must be paid to the content of un-amended Article 296 § 1 item 5 CPC, which shows that the aim of an investigation is to collect, safeguard and consolidate evidence necessary to determine the merits of indictment, or another termination of the proceedings, as well as to submit an application for the admission of such evidence and the conduction of proceedings. The above obligates law enforcement authorities to submit only the necessary evidence, carried out *ex officio*, justifying a decision process. It does not mean that the pre-trial evidence was obtained in a way that is comprehensive. This creates a temptation to obtain evidence useful to the prosecution or selecting them in a way supporting their adopted arguments. It does not have much in common with fair criminal proceedings, for the exclusive host of "managed" pre-trial proceedings is the prosecutor, and any supporting evidence of the parties can be dismissed by him, without the possibility of the prosecutor's decision undergoing judicial review[6].

The amended Code of Criminal Procedure with regard to the explanation of the accused (suspect) contains no changes. Changes, and this is relevant, apply to evidence from the testimonies of witnesses (Ch. 21 CCP), defending counsel's secret (Art. 178 item 1 CCP), the prohibition on questioning a mediator as a witness (Art. 178a CCP). A person obliged to maintain the secrecy of confidential information under the classification of "restricted" or "confidential", as well as confidentiality connected with their professional or exercised function, behaves differently. Special attention has been paid to hearings of victims under 15 years of age (Art. 185a § 1–4 CCP, Art. 185b §§ 1–3 CCP), victims in cases of offences from Art. 197–199 of the Penal Code (Art. 185c §§ 1–4 CCP), as well as ensuring adequate premises for hearings of juvenile witnesses (Art. 185d § 1–2 CCP). The legislature also introduced changes to Chapter 22 concerning experts, professionals and translators, Chapter 23 – concerning examination, autopsy and crime reconstruction. There were also changes to Chapter 25, dealing with the detention of items and the performance of searches. As indicated in Chapters 22, 23 and 25 CCP, the changes are not significant, although they may have practical importance. Especially important are those concerning judicial-psychiatric or forensic expert psychiatrists about the need of ordering observation in a medical facility. These changes can have affect for the entire criminal proceedings and in it, also enforcement proceedings. The rest are in the vast majority of technical nature and ordering. They do not affect the interests of the participants of the process of the criminal proceedings, but they are not indifferent to the process[7].

General provisions

The amended Art. 167 CCP, in a way, delimits two situations. In § 1 proceedings initiated by the party are mentioned, while § 2 provides that, in other proceedings before the court other than those mentioned in § 1, and in preparatory proceedings, the evidence is taken by the judicial body conducting the proceedings. Thus, Art. 167 § 2 CCP gives priority to evidence obtained *ex officio*, while providing the opportunity to submit further evidence. This evidential initiative was recognized in the rigid framework of the un-amended provisions of Article 169 §§ 1–2 CCP and Article 170 §§ 1–4 CCP. It can therefore can be said that in acquiring evidence in the preparatory proceedings, not a lot has changed compared to its state before the amendment. A. Bojańczyk[8] pointed out that the last major amendment to the Code of Criminal Procedure has made quite a significant change in the mode of conducting evidence in legal proceedings, but not planning. After the initialization of the other unique actions, after its next steps, the accused (suspect), as well as the victim, their defenders and the agents did not get any instruments comparable to the powers of the prosecutor in acquiring, collecting, and the process of effective preservation of evidence. Even the commissioning of the so-called private expert opinion and appending it to the file does not make it proof under Art. 393 § 3 CCP. To procedurally obtain evidence from "private opinion" calls for its introduction to the process by filing for an evidentiary hearing regarding the author

3 Szerzej. K.J. Pawelec: *Czynności niepowtarzalne w sprawach o wypadki drogowe. Aspekty procesowo-kryminalistyczne*, Warszawa 2014, pp. 55–105 oraz podane orzecznictwo i literatura.

4 Szerzej. K.J. Pawelec: *Proces dowodzenia w postępowaniu karnym*, Warszawa 2010, pp. 90–93.

5 Ibidem, pp. 90-92.

6 Por. K.J. Pawelec: *Czynności...*, op.cit. pp. 167–171.

7 Szerzej. K.J. Pawelec, [w:] *Kodeks...*, op.cit. pp. 124–138 oraz podane orzecznictwo i literatura.

8 A. Bojańczyk: *Obrona a nowelizacja procedury karnej: czy nowela zmienia rolę obrońcy w postępowaniu przygotowawczym*?, „Palestra" 2014, Vol. 3–4, p. 262 i n.

as an expert and consideration of this request by the judicial body[9].

This is different to court proceedings. The party has to submit evidence as well as a request that it be carried out in support of its argument. The court in such cases is as a specific kind of arbitrator which shall assess the validity of submitted or proposed evidence in relation to the presented argument. However, in exceptional circumstances, i.e. in the case of failure to appear and the existence of "special circumstances", it may be carried out within the limits of the argument as evidence. Also, in exceptional cases, justified by the particular circumstances, the court may authorize and take evidence *ex officio*. The legislature further defining these "special circumstances" has been left to practice. Nevertheless, it should be noted from Art. 167 CCP, although they do not mention, but the detailed rules on this show, that there is evidence which can be described as 'compulsory', of which the judicial body cannot waive, despite the inaction of the parties. These include details about the criminal liability of the accused (Art. 213 § 1 CCP), information from a computer system regarding property relationships and sources of income, including those conducted and completed through proceedings (Art. 213 § 1 CCP), an environmental interview in cases of crimes and relation to the accused, who at the time of the act has not completed 21 years of age. Such evidence can also include evidence obtained from the accused and witnesses, and from their personal data (Art. 213 § 1 CCP) obtained under Art. 74 § 2 items 1–3, Art. 74 §§ 3–3a CCP and Art. 192 § 1 CCP. D. Świecki [10], for mandatory evidence, which the court should obtain *ex officio*, including the opinion of an expert or experts, if there are circumstances indicated in Art. 193 §§ 1 and 2 CCP including expert evidence psychiatrists on the mental health of the accused (Art. 202 1 § CCP). D. Świecki[10] for mandatory evidence that the court should get out *ex officio* include the opinion of the expert or experts, as circumstances described in Art. 193 §§ 1 and 2 CCP, including expert evidence psychiatrists on the mental health of the accused (Art. 202 § 1 CCP). In the case of the admission of the evidence of an expert or experts, according to the said author, it should be to obtain a supplementary opinion or a new situation in the matters referred to in Art. 201 CCP. Mandatory should also be the taking of evidence in the event of the failure to appear by a party when the request of evidence has been approved (Art. 167 § 1 second sentence CCP). The taking of evidence will also be mandatory in the event of a repeal of the judgement and the case submitted for reconsideration, on the basis of non-binding guidelines of the court of appeal concerning the taking of evidence (Art. 442 § 3 CCP)[11].

Extended argument raises no objections except the thesis of the need to obtain evidence *ex officio* in an expert's opinion the event of any circumstances specified in Art. 193 CCP and Art. 201 CCP. It seems that on the parties to the proceedings, is an obligation to disclose the sources of evidence, as well as clarification of the probative theses, including evidence demonstrating that the knowledge of a particular subject requires special knowledge, as well as the submission of arguments, that the expert opinion is incomplete, internally inconsistent or there is a contradiction between the opinions.

A new provision is Art. 168a CCP, which provides procedural consequences for evidence obtained through an offence. It is a general norm that it is unacceptable to obtain and use evidence obtained for the purposes of criminal proceedings through a criminal act, stated in Art. 1 § 1 of the Penal Code. The appointed rule, and you can express such a sentiment, is a general supplement of Art. 171 5 § CCP which illegalizes evidence obtained by 1) influencing the expression of an interrogated person by coercion or threats, 2) the use of hypnosis or chemical or technical measures affecting the mental processes of the person interviewed or to control uninformed reactions of the body in relation to the hearing. Doubts may raise an appeal to the legislator to Art. 1 § 1 of the Penal Code, which created the impression that his intention was banning so-called indirect evidence illegal in the procedure of the Anglo-Saxon model, of which numerous examples were cited by S. Waltoś in his book "Fruits of a Poisoned Tree"[12]. Believing that the legislature meant to eliminate the criminal process, everything that violates the provisions of the criminal code, defined as "criminal", which in turn can cause serious complications, and for so-called halved acts[13].

9 Por. J. Skorupka: *Wprowadzanie i przeprowadzanie dowodów na rozprawie głównej po zmianach*, [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach*, P. Wiliński (ed.), Warszawa 2015, p. 320.

10 D. Świecki: *Apelacja obrońcy i pełnomocnika po zmianach*, [in:] *Obrońca i pełnomocnik...*, op.cit., p. 445.

11 Zob. W. Grzegorczyk: *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 1534; D. Kała: *Zarzuty apelacyjne „niedopuszczenie dowodu z urzędu" lub „niedostatecznej aktywności sądu w przeprowadzaniu dowodu" w znowelizowanej procedurze karnej*, A. Lach (ed.), Toruń 2014, p. 172; inaczej A. Bojańczyk: *Czy zaniechanie przez sąd skorzystania z inicjatywy dowodowej może być przedmiotem kontroli odwoławczej w znowelizowanym procesie karnym*?, „Palestra" 2015, Vol. 5–6, pp. 201–207.

12 Szerzej. A. Bojańczyk: *Jaki jest zakres nowego zakazu dowodowego obejmującego dowody uzyskane za pomocą czynu zabronionego*?, „Palestra" 2014, Vol. 10, p. 104 i n.; S. Waltoś: *Owoce zatrutego drzewa*, Kraków 1978.

13 Szerzej. W. Jasiński: *Zakaz przeprowadzania i wykorzystania w procesie karnym dowodu uzyskanego dla celów postępowania karnego za pomocą czynu zabronionego*

K. Zgryzek[14] noted that "we are therefore clearly dealing with the regulation of the disputed issues of the so-called poisonous tree fruit (evidence examined in the process, and it may be used only lawfully, and the purpose of their introduction to the process may not constitute its legality)". Objections to this idea are expressed by A. Bojańczyk[15] stating that "use" can be understood in two ways, that is widely (of this kind of interpretation A. Zgryzek in favour of) or narrowly, i.e., taking into account the axiology of the criminal process, or coming to the truth. The lack of a precise formulation of the content of Art. 168a CCP cannot mean the prohibition of the use and implementation of proof on a so-called pre-ban on the taking of evidence, which may not mean a lack of opportunities for its use. A ban on evidence based solely on reducing the taking of evidence in practice may in fact not check out. The provision of Art. 168a CPC lists other circumstances other than those indicated in Art. 171 § 5 CPC. Referring to Art. 1 § 1 of the Penal Code, a broader concept of crime "approaches" the content of Art. 235 of the Penal Code[16].

The last provision as amended in Chapter 19 of the code of criminal procedure is Art. 171 § 2, which provides that the right to ask any questions they have, apart from the examining entity, the parties, the defenders, representatives, experts, and in exceptional cases, justified by the particular circumstances, members of the bench. Questions are directed to the person interviewed directly, unless the court or the prosecutor otherwise order. Art. 171 § 2 CCP therefore reinforces the adversarial principle and at the same time, limits the role of the court. Evaluation of these special circumstances was given for judicial review, making a temptation for the court to replace the participants of the proceedings, which previously was widespread. No doubt, in assessing these circumstances, the court should be guided by the principle of objectivity, respect for the rights of the defence, equality of the parties to the proceedings, etc. Its activity should be exceptional, it may not become the rule[17].

(art. 168 a kpk), [in:] *Obrońca i pełnomocnik...*, op.cit., pp. 360–377; por. A. Lach: *Dopuszczalność dowodów uzyskanych z naruszeniem prawa w procesie karnym*, „Prokuratura i Prawo" 2014, Vol. 10, p. 43–44.

14 K. Zgryzek: *Opinia ekspercka do projektu nowelizacji*, [in:] A. Bojańczyk, *Obrona a nowelizacja...*, op.cit., p. 105.

15 A. Bojańczyk: *Obrona a nowelizacja...*, op.cit., p. 105.

16 Szerzej. A. Bojańczyk: *Gromadzenie dowodów przez obrońcę i pełnomocnika w postępowaniu przygotowawczym*, [in:] *Obrońca i pełnomocnik...*, op.cit., p. 122–132; por. P. Kardas: *Dowody publiczne (urzędowe) a dowody prywatne*, [in:] *Obrońca i pełnomocnik...*, op.cit., pp. 324–359.

17 Por. E. Ivanowa: *Idzie totalna kontradyktoryjność*, DGP 2014, no. 77; K. Krems: *Sąd nie jest przyzwyczajony do biernej roli*, DGP 2014, Vol. 77; szerzej. K.J. Pawelec, [in:] *Kodeks...*, op.cit., p. 123.

Experts, specialists and expert activities

In section 22 and 23 of the code of criminal procedure the legislator did not make many changes. They were concerned with reviews for mental health (Art. 202 § 5 CCP), observation in a medical facility (Art. 203 § 2 CCP), the participation of an interpreter (Art. 204 § 2 CCP), as well as the conduction of an autopsy (Art. 209 § 4 CCP).

Art. 202 § 5 CCP emphasises that the opinion of expert psychiatrists should include statements about both the sanity of the accused at the time of committing the act, as well as the current state of mental health, especially in terms of his conscious participation in criminal proceedings, including conducting a defence independently and reasonably. The mentioned provision refers to the regulation contained in Art. 93 of the Penal Code, i.e. conditions justifying the placing of the examined in a medical facility. It seems that the legislature reasonably approached the issue of the mental status of the offender, for which there is a reasonable doubt as to his sanity. Imposed on the judicial body, as well as experts and psychiatrists, is the obligation to obtain knowledge about the sanity or lack thereof, limiting sanity to the extent significant to the time of committing the act, as well as an informed and reasonable participation in the hearing, although this participation and the exercise of a reasonable defence should apply to all criminal proceedings. The directive of Art. 202 § 5 CCP can connect to the premise of a mandatory defence[18]. The provision under consideration, although it was addressed to the legal authorities, also applies to expert psychiatrists. Their opinion should in fact contain the answers to the questions contained in the Art. 202 § 5 CCP, while questions relating to the circumstances set out in that regulation should be required[19].

Amended Art. 203 § 2 CCP states the need for follow-up in a medical facility by a court, specifying the place and time of observation. They are to be made in preparatory proceedings by the court in the form of an actionable decision, at the request of the prosecutor. They are found under Art. 156 § 5a CCP and Art. 249 §§ 3 and 4 CCP. This provision reflects the expert psychiatrist's initiative, on the need to continue testing the accused under observation in a closed medical facility. Undoubtedly, the circumstance justifying the inference of observation is a strong likelihood, committed by the accused, of an offense alleged

18 Szerzej. K.J. Pawelec: *Obrona obligatoryjna w nowym Kodeksie postępowania karnego*, „Radca Prawny" 2013, Vol. 144, pp. 2–5.

19 M. Kurowski, [in:] *Kodeks postępowania karnego, Komentarz*, B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed.), t. I, Warszawa 2013, p. 652; J. Pszybysz: *Psychiatria sądowa. Podręcznik dla lekarzy i prawników*, Warszawa 2003, pp. 13–77.

against himself, or the occurrence of the conditions specified in Art. 249 § 1 CCP[20].

The last change in Chapter 22 of the Code of Criminal Procedure is Art. 204 § 2 CCP. This provision provides for obligatory participation of an interpreter, if necessary translate into the Polish language a document written in a foreign language or vice versa or read the page (in the previous version only the accused) with the contents of the evidence. This provision is undoubtedly the complement of the directive referred to in Art. 204 § 1 item 2 CCP. Resignation from the participation of an interpreter will cause serious consequences as indicated in Art. 438 item 2 CCP. It is concluded because it belongs to a serious infringement of the principle of the rights of the defence, as well as a fair process. It can even be associated with the content of Art. 439 § 1 item 10 CCP. In turn, failing to establish defence of the accused, although not compulsory, but in violation of Art. 80 CCP, will constitute an absolute cause of appeal indicated in Art. 439 § 1 item 10 CCP.

Autopsy (Chap. 23 CCP) constitutes activities undoubtedly expert, although led by the judicial body, but not with the relevant special knowledge. They are extremely important both from the procedural as well as forensic point of view. Therefore, special attention should be paid to the wording of the amended Art. 209 § 4 CCP, which provides that autopsy, as far as possible, be made by a doctor specializing in forensic medicine, in the presence of the prosecutor or the court. Art. 396 §§ 1 and 4 CCP are used. This provision concerns an extremely important matter related to exploration and discovery, as well as the documentation process for securing evidence. It has a great forensic, as well as procedural, significance, because the failure to carry out autopsies or to do so ineffectively, could lead to a failure in the criminal proceedings, such as not detecting the crime of a perpetrator, inability of proving his guilt or the possibility of accusing an innocent person[21].

The legislature has declared that autopsy should be made in the presence of the prosecutor or the court. This raises the question of whether the lack of the presence of the prosecutor or the court during autopsies discredits the evidence. One must agree with M. Kurowski[22], that the absence of the prosecutor or the court does not imply the nullity of activities of the expert. Evidence in the form of an autopsy protocol, although the protocol shall be drawn up exclusively by the judicial body, and contained in its opinion, the contents can be used in its full-value in criminal proceedings. It will, of course, be subject to evaluation, as everything else[23].

Summary

Changes introduced to Chapter V of the Code of Criminal Procedure, both in terms of the general provisions, as well as for experts, specialists, translators and autopsy, strengthen and align the positions of the parties, both in the process preparatory proceedings, as well as the judicial proceedings, although they will have little effect on the acquisition of evidence at this stage of the investigation or the inquiry. It did, in fact, maintain a monopoly of the prosecutor in acquiring evidence. Thus, the adversarial model of criminal procedure suffered significant restrictions on this stage, despite the deletions of Art. 345 CCP and Art. 397 CCP. It should be noted that at this stage of the judicial proceedings, the content of the amended Art. 167 CCP, while not altering the content of Art. 2 § 1 CCP and Art. 4 CCP, may pose serious difficulties in interpretation. One must share the view of A. Bojańczyk[24] that as long as the legislature does not revise the wording of those provisions, the court will be obliged to carry out evidence *ex officio* where the probative activities of the parties shall not exceed the threshold of making findings of fact in accordance with the law, or when the court will have to deal with the lack of the necessary probative activities of one or more of the parties.

Although the changes in the specific regulations for experts, specialists, translators and autopsy are technical and more editorial than substantive[25], it gives rise to significant proposals *de lege lata* on, among others, issuing opinions. It is worth postulating that the judicial bodies as well as the parties to the proceedings, especially in certain categories of cases, e.g. road accidents, to a much greater extent exploit the opportunities of evidence related to the participation of experts in the examination sites of the body, clothing, vehicles, paying attention to possibility of evidence related to the use of records of monitoring, content information contained in computer systems of the vehicle, etc. Many times, expert special knowledge enables the proper interpretation of revealed traces

20 Por. post. SN z 30 listopada 2011r., V KK 402/10, Biul SN 2011, Vol. 9, G.S. Zabłocki, OSP 2012, Vol. 1, p. 33.

21 Szerzej. B. Hołyst: *Kryminalistyka*, Warszawa 2010, pp. 939–942; A. Gałęska-Śliwska: *Śmierć jako problem medyczno-kryminalistyczny*, Warszawa 2009, pp. 65–135; T. Jurek: *Opiniowanie sądowo-lekarskie w przestępstwach przeciwko zdrowiu*, Warszawa 2010, pp. 158-177; K.J. Pawelec: *Czynności...*, op.cit., s. 154–167.

22 Por. M. Kurowski, op.cit. s. 666; K. Witkowska: *Oględziny. Aspekty procesowe i kryminalistyczne*, Warszawa 2013, pp. 252–330.

23 Por. wyr. SA w Katowicach z 8 kwietnia 2009r., II AKa 69/09, KZS 2009, nr 9, poz. 80.

24 A. Bojańczyk: *Artykuł 167 kpk: Czy rzeczywiście podstawa dla nowego, kontradyktoryjnego modelu postępowania*?, „Palestra" 2014, Vol. 7–8, p. 226.

25 Por. K.J. Pawelec: *Czynności...*, op. cit., s. 170.

or contribute to other important findings for the reconstruction of the course of events and identify the perpetrator. It is equally important that, when inspecting a body or performing an autopsy, especially when this act is not performed by a specialist in forensic medicine, that a forensic specialist be present. It can turn out to be very helpful at revealing traces to which a non-specialist would pay no attention. Equally important is to formulate the correct questions to experts. It is that fundamental question whether collected evidence allows for an opinion, and if not, in what direction it should be completed. Questions concerning points of law are inadmissible, e.g. which of the drivers violated traffic rules or contributed to an accident. These issues do not belong to the experts but to the judicial body.

A separate problem is assuring the competent level of an opinion. I cheap opinion does not always turn out to be of full value. An incompetent expert witness, unless of course it is revealed, can do much more damage without incurring any liability, in principle, for it. This question, despite the fact that it is well known for years, still waits for a reasonable solution.

Translation Ronald Scott Henderson