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Ius Novum

2024, vol. 18, no. 1, pp. 54–79

FORMATION OF SOME ELEMENTS OF THE RIGHT TO DEFENCE IN MISDEMEANOUR PROCEEDINGS

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DOI 10.2478/in-2024-0004

Abstract

The text analyses normative solutions concerning the right to defence in Polish proceedings in cases of offences. It discusses the formation of selected elements of the right to defence, from the pre-war solutions to modern times. The author highlights the autonomy of the solutions in force in the 2001 Code of Proceedings in Misdemeanour Cases, and their similarities to the right to defence in criminal cases, constituting the most comprehensive model of this right.

Keywords: defence, defendant, defence counsel, procedural guarantees, offenders, misdemeanour proceedings, criminal proceedings

The right to legal defence is widely recognised by Polish legal scholars as an essential element of a fair criminal process,[1] and the principles underpinning this right are among the most crucial procedural safeguards.[2] Without these safeguards, the proper

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1 Tylman, J., in: Grzegorczyk, T., Tylman, J., Świecki, D. (ed.), Olszewski, R. (ed.), Małolepszy, A., Rydz-Sybilak, K., Misztal, P., Kasiński, J., Kurowski, M., Błoński, M., *Polskie postępowanie karne*, Warszawa, 2022, p. 183; Skowron, A., 'Rzetelny proces karny w ujęciu Karty Praw Podstawowych Unii Europejskiej oraz Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności', *Prokuratura i Prawo*, 2017, No. 11, p. 9; Kardas, P., 'Prawo karne w świetle standardów konstytucyjnych', *Państwo i Prawo*, 2022, No. 10, p. 93; Vitkauskas, D., Dikov, G., *Protecting the right to a fair trial under the European Convention on Human Rights – A handbook for legal practitioners*, Strasbourg, 2012, pp. 87ff.

2 Wiliński, P., in: Wiliński, P. (ed.), Stachowiak, S., Gerecka-Żołyńska, A., Janusz-Pohl, B., Karlik, P., Kusak, M., *Polski proces karny*, Warszawa, 2020, p. 347.

functioning of a democratic state governed by the rule of law would be impossible.[3] The current structure of misdemeanour procedures and the associated institutions has evolved over many years, reflecting the concept of how such proceedings should be conducted, whether they should adhere to the traditional path of criminal-administrative proceedings or adopt the characteristics of a court procedure, effectively extending the reach of criminal justice. Considering the second option viable leads to further questions: should these judicial proceedings be categorised as another specialised type of proceedings governed by the criminal procedure code, or should they constitute an independent proceeding with its own legislation? When pondering the potential structure of these procedures, the first significant aspect is the shift from labelling them as 'criminal-administrative',[4] as was the case in the 1970s, towards a gradual 'judicialisation'. This transition initially took the form of a separate Chapter 46 within the no longer binding 1969 Code of Criminal Procedure and has since evolved into an entirely independent process, encompassing legal institutions that extend far beyond what can be considered within the scope of judicial criminal justice. The intention of the article's author is to illustrate the evolution that certain aspects of the right to defence in misdemeanour cases have undergone in the 20th and 21st centuries. However, a comprehensive discussion of all components of this right would necessitate a different format of presentation, potentially resulting in a monograph.[5]

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The right to defence, a fundamental principle in misdemeanour procedures, distinguishes itself from various other principles inherent in the process.[6] It does not originate from the provisions of the 1997 Polish Code of Criminal Procedure (hereinafter referred to as 'PCCP') but is instead based on Article 4 of the 2001 Code of Misdemeanour Procedure.[7] In this respect, it represents an autonomous solution, albeit with some limited originality.

The autonomous nature of the right to defence in misdemeanour cases is a consequence of the unique characteristics of these cases. Misdemeanours involve acts with lower social impact and simpler procedures compared to most other

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[3] Jabłoński, M., Węgrzyn, J., 'Prawo do obrony i domniemanie niewinności', in: Jabłoński, M. (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław, 2014, p. 109; Stefański, R.A., 'Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 roku', in: Kolendowska-Matejczuk, M., Szwarc, K. (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 17.

[4] On the incompatibility of this term, see Waltoś, S., *Postępowania szczególne w procesie karnym (Postępowania kodeksowe)*, Warszawa, 1973, pp. 302–303.

[5] Similarly, Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1994, p. 272.

[6] Like the principle of: substantial truth (Article 2 PCCP), objectivism (Article 4 PCCP), presumption of innocence (Article 5 PCCP), free assessment of evidence (Article 7 PCCP), jurisdictional independence of courts (Article 8 PCCP), acting of processual authorities *ex officio* (Article 9 PCCP), the initiation of proceedings upon the request of a prosecutor (Article 14 PCCP) or the principle of processual loyalism, that is a duty to provide information to those involved in the proceedings on their rights and duties (Article 16 PCCP).

[7] Act of 24 August 2001 – the Code of Misdemeanour Procedure (consolidated text: Journal of Laws of 2022, item 1124), hereinafter referred to as 'CMP 2001' or the '2001 Code'.

criminal cases. As a result, procedural institutions are simplified, time limits are shortened, and the number of participants in the process is reduced, potentially leading to a weakening of certain procedural safeguards. It is essential to note that individuals enjoying this right in misdemeanour cases differ from those in typical criminal proceedings. Nonetheless, similar to the typical criminal process, these individuals also face penalties specified by the law and/or penal measures. The current form of the 2001 law may serve as a prime example of the wisdom that cautions against using excessive force for minor issues, similar to firing cannons at sparrows. Despite this, some scholars advocate for further simplification of the procedure, even to the extent of involving administrative authorities in adjudicating the most trivial misdemeanours while maintaining the current standards appropriate for such cases.[8] However, reducing the safeguards provided to the charged person in terms of their right to defence may not be advisable, given that misdemeanours are categorically recognised as a 'criminal offence', as mentioned in Article 6 of the Convention on Human Rights, making it applicable to misdemeanour cases.[9]

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The distinct nature of misdemeanour procedures, in terms of legislative separation, can be considered somewhat of an 'inherited' feature. This is evident when we consider that the current Code of Misdemeanour Procedure succeeded the 1971 Code of Misdemeanour Procedure,[10] which, in turn, followed the 1951 Law on Penal and Administrative Adjudication.[11] Both of these laws contained core provisions that were to be applied to misdemeanour cases. It is worth noting that the 1951 Law, unless it had contrary provisions (it read 'unless the provisions of this Law provide to the contrary'), mandated the respective application of provisions related to the administrative procedure. These provisions covered exclusion of individuals (members of authorities) from hearing specific cases, filing of petitions, minutes, case file notes, orders to appear before administrative authorities as well as service of documents, time limits, and evidence (Article 60 of the 1951 Law on Penal and Administrative Adjudication).[12] In contrast, the 1971 Code did not contain a similar reference to separate legal provisions. This gave the impression of greater complexity and independence compared to the former law. However, the assumptions on which the 1971 Law was based proved

[8] See Ryszard A. Stefański's conference speech on the reform of misdemeanour law; citation based on: Czarnecki, P., 'Sprawozdanie z konferencji nt. "Postępowanie w sprawach o wykroczenia – w poszukiwaniu optymalnego modelu" (Dębe, 19–21 października 2014)', *Prokuratura i Prawo*, 2015, No. 6, p. 186.

[9] Światłowski, A., 'Komentarz do art. 1', in: Sakowicz, A. (ed.), *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa, 2020, p. 11.

[10] Act of 20 May 1971 – the Code of Misdemeanour Procedure (Journal of Laws No. 12, item 116, as amended), hereinafter referred to as 'CMP 1971'.

[11] Act of 15 December 1951 on Penal and Administrative Adjudication (consolidated text: Journal of Laws of 1966, No. 39, item 233, as amended), hereinafter referred to as 'PAA 1951'.

[12] Initially, this entailed applying the provisions of the President of the Republic's Decree of 22 March 1928 on administrative proceedings (Journal of Laws, No. 36, item 341, as amended), and as of 1 January 1961, Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text: Journal of Laws of 2022, item 2000, as amended).

inadequate in practice. The brevity of the law and its failure to address 'numerous detailed issues', including the interpretation of procedural principles, necessitated the analogous application of the closest provisions of the Code of Criminal Procedure.[13] To avoid such issues, the 2001 Code directly stipulated the subsidiary application of provisions contained in the Code of Criminal Procedure[14] but only in a strictly specified scope,[15] as reflected in Article 1 § 2 CMP 2001. This approach, according to S. Stachowiak, prevents the analogous application of procedural provisions, except for those that are explicitly specified.[16] Consequently, the procedure in misdemeanour cases is governed by 'the provisions of this Code'. Although a similar idea may have been expressed in Article 1 of the 1971 Code, the current legislator, as evident from the 2001 Code, seems to be much more resolute in this regard.[17] While there are numerous references to the Code of Criminal Procedure in the 2001 Code (nearly 300), they are detailed and unambiguous,[18] rather than taking the form of a general clause. Additionally, the provisions within the 2001 Code are more precise and internally consistent, which does not discourage some legal scholars from referring to it as a 'conglomerate'.[19]

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What is significant is that among the multiple fundamental principles of the criminal procedure[20] that were applied to the procedure in misdemeanour cases, there was no specific 'right to defence' principle. In this regard, the 2001 Law establishes its own rule, which is quite similar to the equivalent rule in criminal procedure. Specifically, it grants the right to defence to the passive party in the procedure. In criminal procedure, the passive party is the suspect[21] or the accused.[22] However, the statutory

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[13] Marek, A., *Prawo wykroczeń*, Warszawa, 1996, p. 158.

[14] Decision of the Polish Supreme Court of 12 June 2007, Case No. V KZ 29/07, LEX No. 569378.

[15] The reference to the appropriate application is a 'widely used legislative technique' aimed at ensuring greater conciseness and coherence throughout the entire legal system or within legal institutions; see Chauvin, T., Stawecki, T., Winczorek, P., *Wstęp do prawoznawstwa*, Warszawa, 2009, p. 91. Legislators commonly resort to this method when formulating legal texts. especially when creating procedural rules; cf., Wójcicka, E., 'Odpowiednie stosowanie przepisów kodeksu postępowania administracyjnego do rozpatrywania petycji', *Zeszyty Prawnicze UH-P w Częstochowie*, 2021, No. 20(3), p. 267.

[16] Stachowiak, S., 'Wniosek o ukaranie w ujęciu kodeksu postępowania w sprawach o wykroczenia', *Prokuratura i Prawo*, 2002, No. 12, p. 34.

[17] Grzegorczyk, T., *Kodeks postępowania w sprawach o wykroczenia. Komentarz,* LEX 2012, commentary 1 on Article 1 [accessed on 25 February 2023].

[18] Kotowski, W., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2003, commentary 2 on Article 1 [accessed on 25 February 2023].

[19] Światłowski, A.R., 'Rozdział 2.2. Postępowanie w sprawach o wykroczenia', in: Hofmański, P. (ed.), *System Prawa Karnego Procesowego. Tom I. Zagadnienia ogólne*, LEX 2013 [accessed on 3 March 2023].

[20] The Code of Misdemeanour Procedure was originally intended to include a catalogue of specific principles; however, those plans were ultimately abandoned during the works on the bill; cf. Grzegorczyk, T., *Kodeks postępowania w sprawach o wykroczenia*, Warszawa, 2002, p. 85.

[21] Baj, A., 'Czy osoba podejrzana jest stroną postępowania przygotowawczego?', *Prokuratura i Prawo*, 2016, No. 10, p. 86.

[22] Marszał, K., *Proces karny*, Katowice, 1997, pp. 135–137; Steinborn, S., Wąsek-Wiaderek, M., 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej

interpretation of the concept of 'accused' deviates from its colloquial interpretation due to Article 71 § 2 PCCP. In the procedure in misdemeanour cases, initially, only the charged person (*obwiniony*) was considered the passive party.[23] However, in 2015,[24] there was a significant expansion of the subjective limits of the right to defence in misdemeanour cases. This expansion granted this right to individuals to whom Article 54 § 6 CMP 2001 applied. Regrettably, this change was not a result of the legislator's self-reflection. Instead, it was brought about through a decision made by the Constitutional Court, which found[25] the original text of Article 4 CMP 2001 to be inconsistent with Article 2, Article 42(2), and Article 31(3) of the Polish Constitution.[26] In the past, the charged person could be considered the subject of the right to defence under Article 8 CMP 1971 and, under Article 24(1) PAA 1951, only as the subject of the right to receive the assistance of an attorney. The 1951 Law did not explicitly express the principle of the right to defence but instead specified a range of separate rights granted to the charged person. These rights constituted individual components of the right to defence, making the law in question casuistic and incomplete. The discussed right included, in addition to the aforementioned right to receive the assistance of an attorney, the right to be heard (Article 21(2) PAA 1951), the right to initiate evidence collection (Article 21(3) PAA 1951), the right to be informed of the charge (Article 26(1) PAA 1951), and the right to the 'last word' (Article 31 PAA 1951).

The inclusion of the charged person as a passive party in the procedure is not merely a scholarly endeavour to categorise and dissect the legal framework; it carries significant practical implications. Indeed, we cannot expect the passive party to undertake any actions that might compromise the fundamental guarantees of the right to defence. The fundamental significance of the right to defence itself is a natural consequence of its elevation to the status of a constitutional right (Article 42(2) of the Polish Constitution). It is functionally linked with the right to access the court and recognised as a precondition for a fair criminal trial.[27] This right is also acknowledged as 'an elementary standard of a democratic state governed by the rule of law'.[28] In constitutional law, the right to defence, both in substance

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i międzynarodowej', in: Rogacka-Rzewnicka, M., Gajewska-Kraczkowska, H., Bieńkowska, B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa, 2015, p. 447.

[23] Dąbkiewicz, K., *Kodeks postępowania w sprawach o wykroczenia*, LEX 2017, commentary 2 on Article 20; Skowron, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz,* LEX Warszawa, 2010, commentary 2 on Division III [accessed on 25 February 2023].

[24] Article 1(1) of the Act of 15 May 2015 amending the Code of Misdemeanour Procedure (Journal of Laws, item 841).

[25] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, OTK-A 2014, No. 6, item 60. See also Rogalski, M., in: Kiełtyka, A., Paśkiewicz, J., Rogalski, M. (ed.), Ważny, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa, 2022, p. 41.

[26] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

[27] Judgment of the Voivodship Administrative Court in Szczecin of 10 September 2020, Case No. II SA/Sz 359/20, LEX No. 3100523; judgment of the Voivodship Administrative Court in Warsaw of 26 November 2019, Case No. I SA/Wa 230/19, LEX No. 2944945; judgment of the Court Appeal in Poznań of 5 October 2017, Case No. II AKa 35/17, LEX No. 3008993.

[28] Sarnecki, P., 'Komentarz do art. 42', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* LEX 2016, commentary 12 [accessed on 25 February 2013].

and in form, serves 'each individual in relation to whom the criminal proceeding is conducted'. This suggests that, given the legal separation of misdemeanour proceedings from general criminal proceedings, the right in question falls outside the scope of Article 42(2) of the Polish Constitution. Without exploring this discussion further, it should be emphasised that the linguistic similarity between Article 42(2) of the Polish Constitution and Article 4 CMP 2001 (and Article 6 PCCP) should not dictate an interpretation of Article 42(2) of the Constitution as if it had a 'procedural' nature. Such an interpretation could distort the framework found in the former provision.[29] It is generally undisputed among legal scholars[30] that the term 'criminal proceedings' in Article 42(2) of the Polish Constitution encompasses all proceedings in which there is a risk of legal responsibility. This includes both criminal proceedings *sensu stricto* and misdemeanour cases as well as disciplinary proceedings. This interpretation ensures the systemic coherence of proceedings that can be categorised as court proceedings, as required by Article 177 in connection with Article 175(1) of the Polish Constitution. The model of the right to defence embedded in the Constitution is far superior to that shaped by the infamous 1952 Constitution,[31] which granted the aforementioned right only to the accused.

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Legal scholars emphasise that Article 4 CMP 2001 is equivalent to Article 6 PCCP. This equivalence is both obvious and expected when we consider that both of these rights to defence serve the same fundamental purpose: to counter criminal charges accompanied by the potential risk of criminal responsibility. Considering that the right to defence model in Polish criminal proceedings is the broadest and most comprehensive model found in Polish law, the question is whether a rational legislator should seek alternative solutions. The legislator of 2001 draws many solutions from the models found in the Code of Criminal Procedure, doing so thoughtfully and deliberately. We can observe a certain mirroring of such models by the legislator, particularly at the textual level. In both procedures, we encounter the 'right to defence' or a 'defence lawyer' as a legal assistant to the charged person. Furthermore, there are convergent situations in which these individuals participate (for example, see Article 21 § 1(1) CMP 2001 and Article 79 § 1(2) PCCP, or Article 22 CMP 2001 and Article 78 § 1 PCCP).

Both Article 4 CMP 2001 and Article 6 PCCP establish the right to defence principle for the proceedings they encompass.[32] However, it is essential to distinguish that within the scope of criminal procedure, this principle is rightly acknowledged as a fundamental one,[33] holding significance for the very structure of the criminal

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[29] Kardas, P., 'Prawo…', op. cit., p. 94.

[30] Florczak-Wątor, M., 'Komentarz do art. 42', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX 2021, commentary 4 [accessed on 25 February 2023].

[31] The Constitution of the People's Republic of Poland, adopted on 22 July 1952 (consolidated text: Journal of Laws of 1976, No. 7, item 36, as amended).

[32] Lewiński, J., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2011, commentary 2 on Article 4 [accessed on 23 February 2023].

[33] Kil, J., 'Prawo do obrony jako publiczne prawo podmiotowe', *Zeszyty Prawnicze*, 2022, No. 22(1), p. 203.

process.[34] In contrast, the pre-war Code of Criminal Procedure remained silent on this aspect, despite granting the accused a comprehensive set of procedural rights, including the right to be assisted by a defence lawyer (Article 84 of the 1928 Code of Criminal Procedure).[35] The introduction of the right to defence principle in criminal proceedings occurred with the enactment of Article 63(2) of the 1952 Constitution, followed by the introduction of Article 9 of the 1969 Code of Criminal Procedure.

The similarity between the right to defence in misdemeanour cases and its original counterpart in criminal procedure suggests that the former can coexist with the presumption of innocence[36] and *in dubio pro reo* principles, as outlined in Article 5 PCCP (applied in accordance with Article 1 § 2 in conjunction with Article CMP 2001). While the application of this provision should be 'respective'[37] rather than direct when it comes to the presumption of innocence principle, it does not necessitate fundamental adjustments to align with the specifics of misdemeanour procedures. As noted in scholarship, a 'respective application' does not always require modifying existing provisions;[38] it may involve minor adjustments, like using appropriate terminology that reflects the unique aspects of the misdemeanour procedure for which the term was not originally intended.

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As mentioned earlier in this paper, the initial focus of the right to defence in the 2001 Code was exclusively on the charged person. The 1971 Code of Misdemeanour Procedure, as outlined in Article 8, did not clearly define the subjective limits of this right. However, it was evident even then that these limits were too restrictive, and the right should have extended to individuals summoned (*osoby wezwane*) in accordance with Article 19(1) of the 1971 Code to provide explanations. Although this provision allowed for 'gathering necessary data to draft a request for punishment', 'supplementing' such a request, or 'verifying facts mentioned in the request', it did not specify who should provide these explanations. This omission was explained in the scholarship of that time, citing Article 34 § 3(3) CMP 1971, which explicitly associated

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[34] Waltoś, S., *Proces karny. Zarys systemu*, Warszawa, 1996, p. 196.

[35] Decree of the President of the Republic of Poland of 19 March 1928, Code of Criminal Procedure (Journal of Laws No. 33, item 313, as amended).

[36] Legal scholars rightly observe that both principles, namely the right to defence and the presumption of innocence, 'in a particular manner define the [model] of criminal procedure, mutually complementing each other' – see Jamróz, L., 'Konstytucyjne prawo do obrony przed sądem RP', in: Matwiejuk, J. (ed.), *Konstytucyjno-ustawowa regulacja stosunków społecznych w Rzeczypospolitej Polskiej i Republice Białoruś*, Białystok, 2009, p. 264.

[37] However, see Article 22 *in fine* CMP 2001, which refers to Article 78 § 2 PCCP which applies 'directly' rather than 'in an appropriate manner'. The direct application of Article 78 § 2 PCCP is mandatory because the word 'applies' has been used. Similarly, Article 27 § 5 CMP 2001 refers to Article 55 § 3 PCCP, Article 66 § 4 CMP 2001 refers to Article 613 § 2 PCCP and Article 92a(5) CMP 2001 refers to Article 177 § 1a PCCP.

[38] Korzeniewska-Lasota, A., 'Odpowiednie stosowanie przepisów kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część 1. Zagadnienia ogólne', *Palestra*, 2013, No. 9–10, p. 73.

'explanations' with the charged person.[39] This explanation was risky, given that the status of the charged person under Article 29 of the 1971 Code was not contingent on 'drafting the request for punishment' but on 'submitting the request for punishment', which, in turn, served as the 'basis for initiating proceedings in a misdemeanour case' (as per Article 20 of the 1971 Code). This implied that during the explanatory phase, the person called upon to provide explanations lacked a clearly defined procedural status, and the terms used to describe such individuals were not determined. This situation was similar to that of a person referred to in Article 54 § 6 CMP 2001, where the legislator hesitated to use the term 'suspected of a misdemeanour' or a similar phrase.

The person mentioned in Article 54 § 6 CMP 2001 remained excluded from the right to defence[40] for a significant period, lasting until 1 August 2015.[41] Initially, Article 4 CMP 2001 granted this right exclusively to the charged person, as defined in Article 20 § 1 of the same code. This definition was in line with the prevailing understanding of the term at that time. However, the situation changed after the Constitutional Court criticised the original version of Article 4 CMP 2001 and found it to be in violation of Article 2 and Article 42 § 2, in connection with Article 31 § 3 of the Polish Constitution.[42] The 2015 amendment transferred the previous content of Article 4 to the newly created § 1 of that article. Simultaneously, in § 2 of the same article, it was made explicit that the right to defence, including the right to be assisted by a defence lawyer, was granted to the person referred to in Article 54 § 6 CMP 2001. This right was acquired 'upon the initiation of the interrogation of that person, after presenting the charges, or when calling that person to provide a written explanation'. Expanding the scope of the right to defence was a desired change, but it came relatively late. This is because, since 2003, explanatory activities had become a mandatory component of misdemeanour proceedings,[43] and the person referred to in Article 54 § 6 CMP 2001 is, in fact, an individual suspected of committing a misdemeanour, even though such a clear designation was absent in the Code itself.[44]

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[39] Siewierski, M., in: Siewierski, M., Lewiński, J., Leoński, Z., Gościcki, J., *Komentarz do kodeksu postępowania w sprawach o wykroczenia oraz do ustawy o ustroju kolegiów do spraw wykroczeń*, Warszawa, 1979, p. 34.

[40] However, this did not apply to situations in which explanatory actions were taken on the court's order issued under Article 60 § 1(6) CMP 2001 for the purpose of 'performing [by the Police or another authority] specific evidentiary actions'. Among such 'evidentiary actions' we could distinguish interrogations conducted under Article 54 § 6 CMP 2001, but in this case, it was an action conducted in relation to charged persons (Article 55 § 3 CMP 2001). Such persons, even though 'Article 54 § 6 applies accordingly' to their interrogation, acquire the right to defence not by virtue of Article 4 § 2 CMP 2001 but through its § 1. This is so because they maintain their status of charged persons during such interrogation, as indicated by Article 55 § 3 in conjunction with Article 20 § 1 CMP 2001.

[41] Article 1(1) of the Act of 15 May 2015 amending the Code of Misdemeanour Procedure (Journal of Laws, item 841).

[42] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, OTK-A 2014, op. cit.

[43] Article 1(8) of the Act of 22 May 2003 amending the Code of Misdemeanour Procedure (Journal of Laws, No. 109, item 1031).

[44] Stefański, R.A., 'Czynności wyjaśniające w sprawach o wykroczenie', *Prokuratura i Prawo*, 2001, No. 12, p. 103.

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The right to defence, as defined in the 2001 Code, is just as complex as the right to defence specified in Article 6 PCCP. This complexity exists even though neither of these provisions refers to other sections of the Code. In both cases, we are dealing with a collection of rights rather than a single, uniform legal concept. The complexity of the right to defence becomes apparent when we examine Article 42 § 2 of the Polish Constitution, which encompasses both the substantive and procedural aspects of this right.[45] Similarly, Article 4 CMP 2001 follows a similar structure for this right. This framing of the right to defence is generally acceptable; however, in misdemeanour cases, this framework only emerged with the adoption of the 1971 Code of Misdemeanour Procedure. The prior 1951 Law on Penal and Administrative Adjudication did not explicitly address this matter. It only briefly mentioned 'the right to use the assistance of a defence lawyer' in Article 24 § 1, while the remainder of the article focused on defence lawyers themselves and the procedures for authorising them to act (subsections 2–4). This minimalistic approach to the right to defence appears relatively advanced when compared to the 1928 Decree on Penal and Administrative Proceedings,[46] hereinafter referred to as the '1928 Decree'. It only mentioned the right to defence in the context of an order issued to the charged person to bring witnesses to court and provide additional evidence necessary for their defence.[47] It is unclear whether this was an oversight by the legislator or if it was based on the belief that the semi-administrative nature of the case did not require the strict procedural safeguards usually applied to participants in legal proceedings. In the 1928 Decree, the charged person, after receiving a penalty through the penal-administrative procedure, could request that their case be transferred to a court procedure (Article 34 of the 1928 Decree, the first sentence). This court procedure was governed by the 'provisions governing the procedure before the court of first instance', with modifications specified in Articles 40–44 of the 1928 Decree (Article 39 of the 1928 Decree). The significance of referencing the provisions governing penal procedure was that the charged person (*obwiniony*) now became the accused (*oskarżony*), and 'the decision of the administrative authority in the court procedure replaced the indictment' (Article 36 of the 1928 Decree, third sentence). This subjective transformation also extended to the 'administrative authority' responsible for 'administering the punishment'. This authority or any other body substituting it within the jurisdiction of the regional court could file an indictment instead of or alongside the public prosecutor (Article 38 of the 1928 Decree). As a result of referencing the 'provisions governing the procedure before the court of first instance',[48] the charged person (now the accused) became subject to

[45] Florczak-Wątor, M., 'Komentarz…', op. cit., commentary 4 on Article 42 [accessed on 1 March 2023].

[46] Decree of 22 March 1928, on Penal and Administrative Proceedings (Journal of Laws 38, item 365, as amended).

[47] Or it 'alternatively' required that the charged person should 'indicate that evidence, in writing or orally, to the authority to be used by that authority at the trial'.

[48] Upon the request of the administrative authority or prosecutor, the case could, however, be subject to simplified proceedings under Articles 845^{1}–845^{10} of the 1864 Code of Criminal Procedure, with the appropriate application of Articles 34–42 of the 1928 Decree. Cf. Act of 25 February 1921 on

the provisions of the right to defence contained in the Code of Criminal Proceedings. This undoubtedly strengthened the accused's procedural rights, including measures such as the right to receive assistance from a defence lawyer and the right to remain silent (see Articles 81 and 84 of the pre-war Code of Criminal Procedure).

Before the Code's implementation, Article 60 of the 1951 Law on Penal and Administrative Adjudication made reference to the 'provisions on administrative proceedings' for various aspects of misdemeanour cases, including the exclusion of individuals from specific cases, filing petitions, maintaining case records, orders to appear before administrative bodies, and the service of documents, time limits, and evidence. As a result, the applicable provisions for misdemeanour cases were initially those of the 1928 Decree of the President of the Republic of Poland,[49] and from 1 January 1961, the provisions of the Code of Administrative Procedure.[50] The 1928 Decree recognised the rights of the charged person, referred to as a 'party' in the proceedings, to file petitions regarding witnesses (Article 57(1)) and experts (Article 62(1) in conjunction with Article 63). It also contained provisions regarding the participation of parties in the examination of witnesses and experts (Article 66). The subsequent Code of Administrative Procedure introduced additional elements, including the initiative as to evidence (Article 72[51] [78]) and active participation in the collection of evidence procedures (Article 73 [79] § 2). It also affirmed the charged person's rights to speak about the evidence presented and to explain their perspective[52] (Article 73 [79] § 2 and 62 [67] § 2(2)). However, it is worth noting that the provisions on hearing explanations from parties to the proceedings were quite brief. None of the provisions in the then-existing Code of Administrative Procedure referred to the hearing of witnesses, although they did so in relation to experts (Article 78, second sentence). As of 1999, changes were made, and provisions relating to parties to the proceedings

changes in criminal legislation, applicable in the former Russian partition (Journal of Laws No. 30, item 169).

[49] Decree of the President of the Republic of Poland on Administrative Procedure of 22 March 1928 (Journal of Laws No. 36, item 341, as amended).

[50] Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text: Journal of Laws of 2022, item 2000, as amended).

[51] These are the original article numbers. The current numbers are indicated in [brackets].

[52] However, it should be remembered that administrative law scholars denied explanations from the party any significance as evidence, and giving those explanations was intended to determine the content and scope of the request, as well as the factual circumstances requiring determination. Cf. Siedlecki, W., *Postępowanie cywilne w zarysie*, Warszawa, 1972, p. 344; Adamiak, B., in: Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2011, pp. 361, 368. Z.R. Kmiecik also opposes including explanations as evidence. See Kmiecik, Z.R., 'Rozdział V. Przesłuchanie strony', in: *Przesłuchanie świadka i strony w postępowaniu administracyjnym*, LEX 2022, available at: https://sip.lex.pl/#/monograph/369526874/46?tocHit=1 [accessed on 5 March 2023]. While this matter falls outside the scope of our current discussion, it is important to highlight that the exclusion of explanations from the category of evidence and the diminishment of their evidentiary significance pose challenges when considering the amended Article 86 of the Administrative Procedure Code in 1980. This provision permits the 'examination of the parties', 'after exhausting other means of evidence' or in cases of 'inability to clarify essential facts', precisely for the purpose of establishing such facts. Therefore, explanations may be regarded as part of the evidentiary process, as supported by their placement within the 'proceedings' and their regulation under Chapter 4, Section II, dedicated to 'Evidence'.

were amended based on Article 86.[53] This amendment did not significantly affect individuals charged with a misdemeanour since they had long been governed by the provisions of the 1971 Code of Misdemeanour Procedure. The Code approached this topic in a complex and systemically autonomous manner, which did not require the subsidiary application of administrative developments. At most, it might have required the analogous application of provisions from criminal procedure, which were more closely related to misdemeanour cases.

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The 1971 Code, which addresses the right to defence in a broad sense, primarily granted charged persons the right to seek the assistance of a defence lawyer (as mentioned in Article 8 CMP 1971). However, in contrast to the current Article 4 § 1 CMP 2001, it did not require that charged persons be informed of the right to defence or the right to use the assistance of a defence lawyer, which was a component of the latter. When we compare the provisions governing the procedure in misdemeanour cases with those for criminal cases, it becomes clear that the requirement for informing the charged person or the absence of that requirement was a shared characteristic of the two simultaneous codifications. The 1971 legislator followed a similar approach to the one taken by the 1969 legislator, just as the 2001 Code aligned with the former 1997 Code. In both of these Codes, the legislator not only used the same terminology, 'the right to use the assistance of a defence lawyer', but also applied an identical phraseological structure, specifying that the charged person 'should be informed of that'. What distinguishes the information covered by Article 4 § 1 CMP 2001 from that referred to in Article 6 PCCP is that the former specifies the maximum number of defence lawyers, while the latter information is contextual in nature: it must be provided when the accused is found to be in violation of Article 77 PCCP (as stated in Article 16 § 2 PCCP).

The inclusion of the duty to inform the charged person about their rights in the provisions governing misdemeanour cases serves the purpose of aligning this procedure with the principles of fairness.[54] This can be considered a 'fair' process, particularly when it comes to upholding the principle of procedural fairness,[55] especially regarding the fundamental guarantees afforded to the charged person.

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[53] Article 86 amended by Article 2(5) of the Act of 29 December 1998 amending certain laws in connection with the implementation of the structural reform of the state as of 1 January 1999 (Journal of Laws of 1998, No. 162, item 1126).

[54] It was untenable to consider conducting judicial proceedings for both crimes and misdemeanours based on differing standards. Such an approach would run counter to the principles outlined in Article 45 § 1 of the Constitution of the Republic of Poland, which mandates fair and prompt adjudication by a competent, impartial, and independent court, without allowing for deviations.

[55] Gostyński, Z., 'Obowiązek informowania uczestników postępowania o ich obowiązkach i uprawnieniach jako przejaw zasady uczciwego (rzetelnego) procesu', in: Czapska, J., Gaberle, A., Światłowski, A., Zoll, A. (eds), *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, Warszawa, 2000, p. 364; Kulesza, C., 'Komentarz do Article 16', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX 2020, commentary 1 [accessed on 3 March 2023].

This is the rationale behind the reference to Article 16 PCCP in Article 8 CMP 2001, which establishes a respective application. Article 16 PCCP, in the context of § 1 of that article, provides protection to the charged person against the lack of essential information or incorrect information, specifically in situations described in Article 4 CMP 2001 (concerning the right to defence and the right to seek the assistance of a defence lawyer). It also safeguards the charged person in situations described in:

– Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP (the right to provide an explanation and the right to refuse answers to individual questions or to decline explanations).
– Article 67 § 2 (first sentence) CMP 2001 (the right to decline explanations or answers to questions, the right to use the assistance of a defence lawyer, the right to bring witnesses to a courtroom and present evidence for defence, or the right to indicate that evidence, the right to view case files, and the right to make a petition referred to in Article 58 § 3 CMP 2001).
– Article 67 § 2 (second sentence) CMP 2001 (the right not to appear in court and the right to be tried in absentia).
– Article 67 § 3 CMP 2001 (the right to send explanations to court in writing).
– Article 81 CMP 2001 in conjunction with Article 386 PCCP (the right to provide explanations, the right to refuse answers to individual questions or to decline explanations, the right to ask questions to persons in interrogation at the trial, and the right to provide explanations concerning each piece of evidence conducted).
– Article 38 § 1 CMP 2001 in conjunction with Article 100 § 6 PCCP (the right to appeal, the time limit for the appeal, and the mode of bringing the appeal).

Additionally, the person mentioned in Article 54 § 6 CMP 2001 must be instructed on:

– Article 4 § 2 (second sentence) CMP 2001 (the right to defence, including the right to use the assistance of one defence lawyer).
– Article 54 § 6 (second sentence) CMP 2001 (the right to decline explanations and the right to petition for evidence).
– Article 54 § 7 (second sentence) CMP 2001 (regarding the charge itself[56] and the possibility to send explanations in writing when oral interrogation has been waived).
– Article 54 § 9 CMP 2001 in conjunction with Article 23a PCCP (the right to initiate mediation, its purpose, and the principles by which it is governed).

The 2001 legislator appears to be more concerned about some of the aforementioned rights, as the charged person must receive instructions on the right to make explanations, the right to refuse answers to questions, and the right to refuse explanations on several occasions throughout misdemeanour proceedings, similar to criminal proceedings. The first instruction occurs during explanatory activities (as per Article 54 § 6 CMP 2001), the second is provided when the charged person

[56] This can, in turn, be easily associated with the right to procedural information, and more specifically, the right to know the charges, which is a necessary condition and perhaps the most important aspect of a comprehensive criminal defence. See Daszkiewicz, W., 'Taktyka kryminalistyczna a procesowe gwarancje jednostki i prawa obywatelskie', *Państwo i Prawo*, 1985, No. 3, p. 58.

is notified of the trial date, and the third is given just before the examination of the charged person during the trial. The duty to instruct the charged person on these rights is also stipulated in Article 20 § 3 CMP 2001 in connection with Article 175 § 1 PCCP. However, the latter provision does not specify the moment at which the instruction should occur, and it serves as a model of instruction that has no equivalents in the instructions that take place during misdemeanour proceedings. The inconsistency between the contents of instructions according to Articles 54 § 6 CMP 2002, 67 § 2 CMP 2001, 81 CMP 2001 in conjunction with Article 386 PCCP, and the contents based on Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP, is due to the failure to consider in these provisions that both 'the refusal to answer questions' and 'the refusal of explanations' do not require any reasons to be given when the right to refuse is exercised ('without giving reasons'). This omission essentially distorts and diminishes the existing model of instruction, especially when it comes to an element that may influence the charged person's attitude. This issue is also noticeable in criminal proceedings. However, it should not be considered an excuse for the legislator.[57] Fortunately, this omission has been rectified by the Minister of Justice in delegated legislation based on Article 67 § 6 CMP 2001, as the instruction template (referred to in Article 67 § 2 CMP 2001) mentions 'the right to make explanations, the right to refuse explanations, and the right to refuse to answer individual questions, without the need to provide reasons for such refusals' (see item 1 of the template).[58]

The range of instructions given in accordance with Articles: 54 § 6 CMP 2001, 67 § 2 CMP 2001, and 81 CMP 2001 in conjunction with Article 386 PCCP is certainly sufficient for situations in which those instructions must be provided since they precede the examination of a person against whom there is a well-founded ground for making a petition for punishment (as per Article 54 § 6 CMP 2001) or the charged person (as outlined in Article 67 § 2 CMP 2001 and Article 81 CMP 2001 in conjunction with Article 386 PCCP), not to mention that there may be doubts regarding the incompleteness of the former instruction. In the first situation, the instruction is limited to informing the individual of their 'right to refuse explanations',[59] while information about the 'right to answer a question' is not required. This limitation raises the question of whether it might be considered a violation of Article 16 § 1 PCCP in conjunction with Article 8 CMP 2001. It should be noted that such a limitation could potentially lead to disregarding explanations given by a person who is unaware of their procedural rights.

The broadest scope of rights, which collectively constitute the right to defence, is enjoyed by the charged person. This is expressed in Article 20 § 3 CMP 2001, which provides for the respective application of the provisions of the Code of Criminal

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[57] Cf. the interpretations of Articles 175, 300, and 386 PCCP as presented by P.K. Sowiński in his work, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego i organów procesowych*, Rzeszów, 2012, pp. 85–86.

[58] Regulation of the Minister of Justice of 13 April 2016, specifying the template for informing on the rights and obligations of the charged person in misdemeanour proceedings (Journal of Laws, item 511).

[59] And of the right to 'submit requests as to evidence'.

Procedure mentioned in that article to the charged person. Among these provisions are Article 72 § 1 and 2,[60] Article 74 § 1 and 2, Article 75, Article 76, and Article 175 of the Code of Criminal Procedure. Each of these provisions independently grants the charged person an additional right, which Article 4 CMP 2001 does not address. Together, these provisions form an extended system of procedural safeguards owed to the charged person for the sake of their right to defence. While it is clear why these additional rights are granted to the charged person, it is less clear why the same rights are not extended to the person referred to in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001, not to mention the person suspected of committing a misdemeanour (Article 54 § 5 CMP 2001).[61] One question that arises is whether the reason these persons do not have the right to be assisted by a translator or interpreter (as outlined in Article 72 § 1 and 2 PCCP) is that, according to the literature,[62] the explanatory activities (as per Article 54–56 CMP 2001) in which these persons participate are not considered part of the misdemeanour procedure but are instead categorised as 'procedural activities remaining out of the official procedure'. Furthermore, we might question whether there are valid reasons why out of the two persons who have the right to be assisted by a defence lawyer (Article 4 § 1 and 2 CMP 2001), only the charged person may be assisted by a translator/interpreter, while the person referred to in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001, may not have this privilege as they are not directly mentioned as 'the charged person' in Article 20 § 3 CMP 2001 in conjunction with Article 72 § 1 and 2 of the Code of Criminal Procedure.[63] There is no indication that the provisions covering the charged person should be applied, at least respectively, to persons described in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001. This assertion, which is far from optimistic, may be challenged, at least in part, by the fact that Article 42 § 3 CMP 2001 refers to Articles 204–206 of the Code of Criminal Procedure.[64] While this reference pertains to the position of translators/interpreters only ('to translators […] should be applied'), it implies that Article 204 § 1(1) or (2) PCCP will enforce the involvement of a translator/interpreter in those explanatory activities in which deaf or speech impaired persons (Article 54 § 5 or 6) participate, where written communication with these individuals is insufficient (item 1), or if they do not have a command of the Polish language (item 2). However, even the reference found in Article 42 § 3 CMP 2001 to Article 204–206 PCCP to be applied respectively to translators does not mandate their involvement in consultations between persons

[60] A reference to Article 72 § 1 and § 2 PCCP which was added to Article 20 § 3 CMP 2001 on 1 July 2015, by Article 18(4) of the Law of 27 September 2013 amending the Code of Criminal Procedure and some other laws (Journal of Laws, item 1247, as amended).

[61] However, persons suspected of committing a misdemeanour are governed by, Article 74 §§ 3 and 3a, and Article 308 § 1 PCCP (Article 54 § 5 CMP 2001), applied respectively.

[62] Grzegorczyk, T., *Kodeks…*, op. cit., LEX 2012, commentary 1 on Article 20 [accessed on 3 March 2023].

[63] T. Grzegorczyk appears to share this position, when he contends that 'Article 20 § 3 [CMP 2001] requires Article 74 § 2 [PCCP] to the charged person, that is an individual against whom a request for punishment has been filed.' Cf. Grzegorczyk, T., *Kodeks…*, op. cit., commentary 4c on Article 20 [accessed on 3 March 2023].

[64] None of the provisions contained in the 1971 CMP governed translators/interpreters, nor did it refer to the then-binding Article 159 PCCP 1969.

described in Article 54 § 6 CMP 2001 and their defence lawyers. The aforementioned right to be assisted by translators/interpreters is governed by Article 72 § 3 PCCP, which applies solely to charged persons.

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The reference found in Article 20 § 3 CMP 2001 results in the charged person being governed by, among other provisions, Article 175 PCCP, which will apply respectively. This solution has both advantages and disadvantages. One of the disadvantages is the limitation on the application of the aforementioned provision to only one of the two persons who are the subjects of the right to defence, namely the charged person. Since the 2016 amendment of Article 4 § 2 CMP 2001, there is another subject of the right in question, namely the person described in Article 54 § 6 CMP 2001. Given that the latter person may be subject to interrogation, it was necessary to find a separate basis for the right to remain silent for that person. This basis is currently provided in Article 54 § 6 (second sentence) CMP 2001. However, within the relevant scope, the aforementioned article provides only for 'the refusal to make explanations' and does not address the 'right to refuse answers to individual questions', a right that is governed by Article 175 PCCP when applied to the charged person. This omission would make sense in the case of a withdrawal from an oral examination of a person referred to in Article 54 § 6 CMP 2001, followed by the summoning of that person to 'send explanations to the relevant authority within 4 days' from the date of the withdrawal. In such a case, the explanations are, in fact, an uninterrupted report from that person, not 'fuelled' by questions asked by the interrogator. However, the situation is different when the oral examination takes place in accordance with the typical rules of the process, with the interrogator assuming an active role in the proceedings and having the legal and factual position allowing for asking questions that might shape the final contents of the explanations given.

Both solutions, namely the one contained in Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP, and the one contained in (though far from perfect) Article 54 § 6 CMP 2001, at least directly express the rights of the persons mentioned in those provisions to give explanations and to refuse such explanations. This contrasts with the 1971 Code, the wording of which compelled legal scholars at the time to exert interpretive efforts to imply the aforementioned rights from the broadly understood right to defence and/or the presumption of innocence principle (Article 7 § 1 of the 1971 Code). M. Siewierski, who reflected on the topic, considered the right to remain silent as being 'obvious' and an achievement of 'progressive legal thinking'. He did not entertain the thought that 'in the socialist system it would be possible to contradict the binding force of that principle.'[65] In a more forgiving assessment of the then 'achievements of the people's political system', it could be observed that the same socialist lawmaker was not as optimistic since in criminal procedure, the right to make explanations and the right to refuse explanations were expressly secured in the law, to be precise in Article 63 of the 1969 Code of Criminal Procedure. It seems that

[65] Siewierski, M., in: Siewierski, M. et al., *Komentarz…*, op. cit., pp. 12, 53.

the popularity of the assertion regarding the broader scope of rights of the charged person, which claimed that those rights were to encompass not only those 'reflected in the bundle of legal provisions contained in the 1971 Code', but also those which 'were not clearly specified in the Code, but otherwise evident, considering the procedural situation of the charged person', was an attempt to cover up the legislator's reluctance toward those committing misdemeanours, the majority of whom were the subject of political games during the challenging and turbulent times of communism.[66]

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Article 30 § 1 of the 1971 Code, which is not currently in force, made it admissible to serve as a defence lawyer in misdemeanour cases, not only for persons entitled to serve as defence lawyers under the law governing the structure and regime of the Bar, but also for 'other reliable persons' and those 'admitted by the president of the adjudicating authority or the adjudicating panel'. The use of a phrase 'other reliable persons' demonstrated that members of the Bar were inherently considered 'reliable' by the legislator, as was the case with other individuals mentioned in that Article, such as 'representatives of a trade union or a social organisation in which the charged person participated'. It should be noted that only these 'other persons' were subject to additional verification by the authority. The verification did not take place based on legal education, as at that time, such a criterion was unknown in legislation. The assessment was conducted individually because it did not concern the entire organisation in which the potential defence person belonged but the individual person themselves. The lack of any statutory indications as to who could be this person led A. Gubiński to assert that the person in question should be 'an individual representing positive personal and social values', against whom 'it would be impossible to make charges that would disqualify them in the eyes of the public' or 'not punished for an act committed out of morally questionable motives'.[67] Depriving the charged person of any legal measures that could aim at challenging the decision on the non-admittance of that 'other person' as a defence lawyer turned the charged person into a hostage of the authority, which at that time might serve (and indeed served) some extra-procedural purposes. Leaving aside the fact that extending the right to defend persons charged with misdemeanours to non-professionals stemmed from the view that misdemeanour cases were considered less complicated and that such cases should be heard with the broadest possible participation of the public. This concerned not only the composition of adjudicating panels but also other participants in the proceedings.

Article 30 § 1 of the former Code of Misdemeanour Procedure abolished the restriction referred to in Article 24 § 1 of the 1950 Law on Penal and Administrative Adjudication, subject to exceptions specified in sub§ 3.[68] The restriction implied the

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[66] Gubiński, A., *Prawo wykroczeń*, Warszawa, 1980, p. 405.

[67] Ibidem, p. 410.

[68] A person authorised to appear before a court based on the provisions governing the Bar could act as defence counsel in misdemeanour cases specified in Article 9 § 1 (3)(a) and (3)(c), as well as in cases covered by other special laws for which the collegiate authorities (*kolegia*

inadmissibility of defending charged persons by professional defenders without a license. The 'other reliable person' admitted to be a defender in misdemeanour cases pursuant to Article 30 § 1 CMP 2001, considering the then Article 59 § 1 of the Code of Misdemeanours,[69] could not accept remuneration for being a defender. This was because the latter Article penalised 'the performance of professional activities' by persons 'without relevant licenses or exceeding the license'. The defence performed by that 'other reliable person' was, in fact, a voluntary service, which did not constitute a source of sustenance for them.

The non-professional defender lost their reason for existence upon the entry into force of the 2001 Code. This change was in line with the prevailing trend at the time to professionalise legal assistance. However, this professionalisation did not extend to cases involving violations of public finance discipline. For such cases, based on Article 170 of the public finance law[70] in conjunction with Article 3(2) of the introductory provisions to the new Code of Misdemeanour Procedure,[71] Article 30 of the 1971 Code continued to apply until June 2005.[72]

The current legal framework only allows 'advocates or legal advisors' to serve as defenders for both charged persons and individuals mentioned in Article 54 § 6 CMP 2001. It should be emphasised that Article 24 § 1 CMP 2001 is significant in this context. Unlike Article 82 PCCP, it doesn't use the phrase 'person authorised to defend pursuant to the advocacy or legal advisors law', which might suggest that Article 82 restricts the scope of individuals authorised to be defenders to those holding professional titles. However, such an interpretation is incorrect for systemic reasons. In more complex cases, considering both legal and factual complexity, the legislator permits other individuals to act as defenders, albeit to a limited extent, specifically, trainees under advocates and legal advisors. Trainees are allowed to act as substitutes for advocates and legal advisors in the performance of the relevant procedural function, as specified in Article 77 of the Advocacy Law[73] and Article 351 of the Law on Legal Advisors.[74] As T. Grzegorczyk observed, the explicit mention of 'advocates' and 'legal advisors' in Article 24 § 1 was intended to eliminate any doubts about the permissibility of non-members of these two professions acting as defenders. This clarification was not meant to modify the rules governing the

ds. wykroczeń) were empowered to impose the prison sentence. In all other cases heard by district collegiate authorities, this authorisation began from the filing of an appeal.

[69] Act of 20 May 1971 – the Misdemeanours Code (consolidated text: Journal of Laws of 2022, item 2151, as amended).

[70] Act of 26 November 1998 on Public Finance (consolidated text: Journal of Laws of 2003, No. 15, item 148, as amended).

[71] Act of 24 August 2001 introducing provisions for the Code of Misdemeanour Procedure (Journal of Laws, No. 106, item 1149, as amended).

[72] Article 198 of the Act of 17 December 2004 on Liability for Violation of Public Finance Discipline (consolidated text: Journal of Laws of 2021, item 289, as amended) repealing Article 170 of the Public Finance Act as of 1 July 2005.

[73] Act of 26 May 1982 – Advocacy Law (consolidated text: Journal of Laws of 2022, item 1184, as amended).

[74] Act of 6 July 1982 on Legal Advisors (consolidated text: Journal of Laws of 2022, item 1166).

substitution of advocates and legal advisors by trainees.[75] Trainees do not become 'defenders'; they merely substitute for advocates and/or legal advisors to the extent defined by the relevant laws. In my opinion, Article 24 § 1 CMP 2001 reflects an example of enforced autonomisation of procedural solutions. It emphasises that it governs the right to perform defence 'in misdemeanour cases', an issue already apparent from Article 1 § 1 of that Code. The same legislator from 2001 deserves credit for extending the right to perform defence in misdemeanour cases to legal advisors. This extension not only opened up the market for these services but also, in the long run, weakened the arguments of those who opposed the unification of tasks performed by members of the two legal professions even with respect to criminal offences, which happened 15 years later.[76] Given the equalisation of responsibilities between advocates and legal advisors as stipulated in Article 24 § 1 CMP 2001, it seems redundant to specify in § 3 of the same article that whenever defence lawyers or advocates are referred to in provisions of the Code of Criminal Procedure applied pursuant to Article 1 § 1 CMP 2001, these terms should also be understood as including 'legal advisors'. Article 24 § 3 seems to be a holdover from a period when defence in criminal matters could only be performed by members of the Bar (advocates).

The Constitutional Court's view on the inconsistency of Article 4 CMP 2001 with several provisions of the Polish Constitution[77] led to the inclusion of defence lawyers in the process of explanatory activities. This change was prompted by recognising the person mentioned in Article 54 § 6 CMP 2001 as a subject of the right to defence on par with the charged person. Prior to 2016, individuals described in Article 54 § 6 CMP 2001 had the right to contact an advocate or legal advisor,[78] but members of these professions did not have the status of a defence lawyer. Furthermore, this right only applied when the individual in question was actually arrested, as per Article 46 § 4 CMP 2001. In this specific situation, it was not problematic that the legal status of advocates or legal advisors was left unspecified. However, this selective and imperfect provision regarding legal assistance was unsatisfactory. It did not align with the model of criminal defence outlined in Article 42(2) of the Polish Constitution. The Constitutional Court's intervention and the subsequent changes were aimed at rectifying these issues.

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[75] Grzegorczyk, T., *Kodeks…*, op. cit., LEX 2012, commentary 2 on Article 24. Similarly, Świecki, D., *Metodyka pracy sędziego w sprawach o wykroczenia*, LEX 2007, p. 37; Kiełtyka, A., in: Kiełtyka, A., Paśkiewicz, J., Rogalski, M. (ed.), Ważny, A., *Kodeks postępowania…*, op. cit., commentary 1 on Article 24; Skowron, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2010, commentary 2 on Article 24; Lewiński, J., *Kodeks postępowania…*, op. cit., commentary 2 on Article 24 [accessed on 3 March 2023].

[76] Article 82 PCCP was amended by Article 1(27) of the Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended), changing this provision as of 1 July 2015.

[77] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, op. cit.

[78] Skowron, A., 'Udział obrońcy w postępowaniu w sprawach o wykroczenia', *Przegląd Sądowy*, 2005, No. 3, p. 91.

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The concept of public defenders was not recognised in the 1971 Code, and the legislation was quite unclear about this. It seemed that the legislator suggested that charged persons could appoint a reliable person as their defender.[79] It might have been assumed that in cases where non-professionals provided defence, the issue of expenses did not arise since these non-professionals were not compensated. At that time, none of the legal scholars seemed to think about the problem of inequivalence between the defence provided by professionals and that provided by 'other reliable persons'. This inequivalence resulted from the different educational backgrounds and a lack of relevant procedural experience among the non-professional defenders. The situation changed significantly with the enactment of the 2001 Code, which abolished non-professional defence and introduced the concepts of public defence and mandatory defence, aligning these concepts more closely with their counterparts in criminal procedure.

According to Article 22 CMP 2001 and Article 78 CMP 2001 in conjunction with Article 378 PCCP, a public defender may be appointed for individuals facing charges who have not chosen a defence attorney for themselves. This implies that public defence, much like in criminal cases, is considered a secondary option. It comes into play when the charged person has not selected their own defence attorney and does not fall under mandatory defence.[80] In cases not covered by Article 21 § 1 CMP 2001, public defence is optional and hinges on the fulfilment of three key conditions: (1) A request from the charged person; (2) A demonstration that the person cannot afford the expenses of the defence without causing significant harm to themselves or their family; (3) Alignment with the interests of justice. While the first two conditions are identical to those in criminal cases, the third condition introduces a new dimension not previously seen in national law. It ties the availability of public defence to the broader interests of justice. In certain situations, the use of this criterion could potentially hinder a charged person's access to public defence, as it introduces an element of subjectivity.[81] However, it should be emphasised that the use of this criterion does not violate the fair trial standard. In fact, it is in line with Article 6(3)(c) of the European Convention on Human Rights.[82] Additionally, the decision of the court president to refuse the appointment of a public defence attorney can be appealed, reflecting the principle that such decisions may only

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[79] Siewierski, M., in: Siewierski, M. et al., *Komentarz…,* op. cit., p. 56; Gubiński, A., *Prawo…,* op. cit., p. 410.

[80] Sowiński, P.K., *Prawo oskarżonego do obrony w procesie karnym. Obrona formalna*, Rzeszów, 2022, p. 48.

[81] According to Article 22 (second sentence) CMP 2001, the basis for refusing to appoint a defence counsel *ex officio* cannot be the defendant's use of free legal aid or free civil advice services as provided for in the Act of 5 August 2015 on Free Legal Aid, Free Civil Advice, and Legal Education (Journal of Laws of 2021, item 945). This is an identical limitation to the one mentioned in Article 78 § 1 (second sentence) PCCP.

[82] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

be contested in specific situations as outlined by the law. It is worth mentioning that the absence of this third condition in the official template of the instructions provided to charged persons can be confusing, making the template incomplete,[83] and should be assessed in accordance with Article 16 § 1 PCCP in conjunction with Article 8 CMP 2001.

The admissibility of challenging the refusal to appoint a public defender has apparently been overlooked by A. Kiełtyka,[84] who, despite the amendment to Article 23 § 3 CMP 2001 more than seven years ago, still mistakenly asserts that the decision in question may not be challenged in court.[85] In reality, even a decision to refuse appointment, issued by a referendary operating in the court with jurisdiction over the case, can be challenged. Although Article 23 § 3 CMP 2001 does not explicitly mention this admissibility, the general principle of contestability of referendary's decisions (amounting to the nullification of such decisions), as expressed in Article 103 § 3a CMP 2001, applies in such cases. What might be considered questionable in both cases is the overly broad group of individuals who have the right to contest the refusal to appoint a public defender. Instead of limiting this group to the charged persons, who are most affected by the refusal, both Article 103 § 3 (in its second sentence) and § 3b (in its first sentence) point out that the parties to the proceedings have the right to contest. The rule that the president of the court or a court's referendary appoints the *ex officio* defender is subject to exceptions. Article 78 CMP 2001 in conjunction with Article 378 § 2 PCCP assigns this authority to the court. This occurs when the court releases the current defender during the trial, which can happen either at the defender's request or upon the petition of the charged person. Furthermore, the court appoints new *ex officio* defenders if it observes during the proceedings that there is a conflict of interests among charged persons represented by the same *ex officio* defender. This is stipulated in Article 24 § 1 CMP 2001 in conjunction with Article 85 § 2 PCCP.

The decision to appoint an *ex officio* defender is not permanent. This is due to Article 22 (third sentence) CMP 2001 allowing for the direct application of Article 78 § 2 PCCP, which grants the court the authority to revoke the appointment if it determines that 'the circumstances on which the defender's appointment was based no longer exist.' Additionally, the decision to withdraw the appointment of a defender can be subject to appeal. It is worth noting that the authority to hear such an appeal lies with another panel of judges, rather than a higher court.

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[83] The model information regarding the appointment of a defence counsel *ex officio* is as follows: 'If the charged person demonstrates that he or she cannot afford a defence counsel, the court may appoint a defence counsel *ex officio* (Article 22).'

[84] Kiełtyka, A., in: Rogalski, M. (ed.), *Kodeks…*, op. cit., commentary 4 on Article 23.

[85] Article 23 § 1 was amended by Article 2(1) of the Act of 12 June 2015 amending the Code of Criminal Procedure and the Code of Misdemeanour Procedure (Journal of Laws, item 1186), amending the Code of Misdemeanor Procedure as of 17 September 2015. This change was prompted by the judgment of the Constitutional Tribunal of 8 October 2013 (K 30/11, OTK-A 2013, No. 7, item 98), establishing the unconstitutionality of the provision denying the right to judicial review of the refusal to appoint a defence counsel *ex officio* under Article 81 § 1 of the Polish Code of Criminal Procedure due to a contradiction with Article 42 § 2 in conjunction with Article 45 § 1 and Article 78 of the Constitution of the Republic of Poland.

The 'circumstances' referred to in Article 22 (first sentence) CMP 2001 primarily encompass the charged person's financial status but also include factors that influenced the determination that the appointment of a public defender is necessary in the interest of justice. A renewed request for the appointment of a public defender based on the same circumstances is left unexamined (Article 23 § 1a CMP 2001). Unlike in criminal proceedings, a public defender cannot be appointed 'for the purpose of performing a specific procedural act' in misdemeanour proceedings. This is because Article 78 § 1a PCCP was not incorporated into misdemeanour proceedings, and the 2001 Code itself does not provide an autonomous solution in this regard.

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It is rather surprising that mandatory defence in misdemeanour proceedings only appeared with the adoption of the current Code of Misdemeanour Procedure.[86] The previous legislation did not recognise mandatory defence, despite the excessive emphasis at the time on the significance that the socialist state attached to the realisation of the right to defence and other procedural guarantees aimed at the proper application of the law. Whether this omission was intentional from a legislative standpoint or constituted a kind of 'encouragement' to apply the relevant provisions of criminal procedure by analogy, the then legal scholars remained silent on this matter. The issue is now addressed by Article 21 § 1 CMP 2001, which provides for mandatory defence for the charged person in cases brought before a court in misdemeanour matters.[87] Mandatory defence is required if the charged person is deaf, mute, or blind (point 1) or if there is reasonable doubt about their sanity (point 2). Similar to criminal proceedings, mandatory defence in misdemeanour proceedings is a permissible restriction on the decision-making autonomy of the passive party, who is not obliged to seek such assistance actively but cannot decline it when offered.

The absence of a reference point in the form of previously applicable misdemeanour regulations necessitates a comparison of Article 21 CMP 2001 with Article PCCP, which is the counterpart of the former. A preliminary analysis alone reveals that mandatory defence in misdemeanour cases is a significantly diluted version of this form of representation known from the Code of Criminal Procedure. Presumably, due to the lowering of the minimum age of criminal responsibility to 17 years by Article 8 of the Misdemeanours Code (*Kodeks wykroczeń*),[88] the legislator did not decide to extend mandatory defence to offenders who 'have not reached the

[86] However, the issue of mandatory defence had to be assessed in light of the provisions applicable in simplified proceedings (Article 455 of the former Code of Criminal Procedure) at the moment the case was referred to the 'judicial procedure' at the request of the charged person made under Article 86 CMP 1971.

[87] As a result, the scope of mandatory defence was defined more narrowly than in criminal proceedings, and it did not cover procedural activities undertaken before the president of the court issued an order to initiate proceedings (Article 59 § 2 CMP 2001).

[88] Act of 20 May 1971 – the Misdemeanours Code (consolidated text: Journal of Laws of 2022, item 2151, as amended).

age of 18', as has been the case since 2015,[89] in Article 79 § 1(1) PCCP. This legislative decision likely aimed to avoid a surge in such cases. However, it also signifies that, in this instance, lofty principles have yielded to harsh reality and simple economics.

The three types of physical impairments mentioned in Article 21 § 1(1) CMP 2001 are identical to those used in Article 79 § 1(2) PCCP, and should be interpreted in a similar manner.[90] However, there is a notable difference concerning the condition for mandatory defence outlined in Article 21 § 1(2) CMP 2001, which is 'reasonable doubt about the [charged person's] sanity'. Despite the unquestionable autonomy of the 2001 Code, it is concerning that the legislature adheres to a concept that does not align with procedural realities and fails to address the urgent need for the modification of the concept in line with the provisions specified in Article 79 § 1(3) and (4) PCCP. Adhering to the existing language of Article 21 § 1(2) CMP 2001 results in this provision not being well harmonised with its § 2. The latter provisions mention the expert opinion regarding 'the exclusion or significant limitation of the ability to understand the significance of one's actions or to direct one's conduct' at the time the act was committed as well as the expert opinion on the charged person's 'mental condition' assessed based on his ability to 'participate in the proceedings and defend himself reasonably and independently'. The latter situation, however, does not equate to the charged person's 'sanity'. The psychiatric opinion drawn up by one (and not two experts, as required by Article 202 § 1 PCCP) is not binding on the court, however, the mere consideration of this opinion as justified leads to the termination of mandatory defence for such an accused and should result in the release of the defender from their duties. As a result, unlike in criminal proceedings, the court 'relieves' the defender of the charged person, as per Article 21 § 2 (second sentence) CMP 2001.

Article 21 § 2 CMP 2001 initially contained the same error as Article 79 § 4 PCCP prior to 2013. Both provisions created the illusion of the court being 'bound' by the content of the psychiatric opinion (the 'obligation to use the assistance of defence counsel if the appointed expert confirms…'), which contradicted the principle of the court's freedom to assess all evidence in a case.[91] Amended in 2013, Article 21 § 2 CMP 2001 finally establishes the correct sequence of events: presenting the psychiatric opinion to the court, the court's evaluation of this opinion, and the court's ruling on the issue of formal defence. This better reflects the court's paramount position and its role in determining legally relevant circumstances, including those that impact decisions on purely procedural matters. The same amendment deprived the court of the ability to make an alternative decision regarding the continuation of formal defence, as allowed by Article 21 § 2 CMP 2001 before its amendment. However, it did not specify whether such a decision should make the defence mandatory for

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[89] Before that date, there was no need to provide such a defence for the individuals mentioned in Article 79 § 1 point 1 as 'minors', as they were not held responsible for misdemeanours. See Grzegorczyk, T., *Kodeks…*, op. cit., commentary 2 on Article 21.

[90] See more on this, Sowiński, P.K., *Prawo…*, op. cit., pp. 105–113; Stefański, R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012, pp. 107–122.

[91] Article 18(5) of the Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended), amending this provision as of 1 July 2015.

a longer period, which seems impossible given the normative nature of mandatory defence, or to the continuation of formal defence as non-mandatory representation, as Article 79 § 4 *in fine* PCCP does in criminal cases (where 'other circumstances suggest that the accused should have a defence counsel appointed *ex officio*'). The lack of an option for the court in this regard has been justifiably criticised by legal scholars.[92] In turn, the opposing view, which suggests that the court can still decide differently and maintain the obligation of formal defence, 'despite the expert's opinion confirming the accused's sanity',[93] appears to be incorrect.

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Article 4 § 1 CMP 2001 indicates that in misdemeanour proceedings, it is permissible for only one defence counsel to represent the charged person (or the person referred to in Article 54 § 6 CMP 2001) simultaneously. This resembles the mechanism applied in criminal cases under Article 77 PCCP, but with the difference that the limit set there is higher, allowing for simultaneous representation by up to three defence counsels. It's worth noting that in the 1997 version of the Code of Criminal Procedure, this limitation was given a separate editorial unit, while in the 2001 Code of Misdemeanour Procedure, the issue was addressed somewhat incidentally within the provision granting the charged person the right to defence. The 1971 CMP, on the other hand, did not have a clear limitation on the number of defence counsels. Some interpreted this from the fact that Article 8 of that Code used the word 'defence counsel' in the singular form, not in the plural.[94] Furthermore, there was a debate about whether it was necessary to apply, by analogy, Article 68 of the 1969 Code of Criminal Procedure, which increased this limit to three defence counsels. This was seen as a solution specific only for criminal cases, matching their legal and evidentiary complexity.[95]

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The law now mandates that defence counsels must act solely in the interest of the charged person. This is the result of Article 24 § 2 CMP 2001 referring to Article 86 PCCP to be applied in misdemeanour proceedings.[96] It appears that, even without specific legal regulations in the Code, the orientation of professional defence counsel's activities can be inferred from the provisions governing advocates and legal advisors. This is because Article 1 § 1 in conjunction with Article 4 § 1 of

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[92] Dąbkiewicz, K., *Kodeks*…, op. cit., commentary 9 on Article 21 [accessed on 7 March 2023].

[93] See, however, Kiełtyka, A., in: Rogalski, M. (ed.), *Kodeks*…, op. cit., commentary 6 on Article 21 [accessed on 7 March 2023].

[94] This argument falls short when one considers that the use of the singular number is often an expression of a linguistic convention employed by the legislator, who prefers this grammatical form.

[95] Siewierski, M., in: Siewierski, M. et al., *Komentarz*…, op. cit., p. 56; Marek, A., *Prawo*…, op. cit., p. 201.

[96] Judgment of the Regional Court in Gliwice of 7 April 2015, Case No. VI Ka 138/15, LEX No. 1831992.

the Advocacy Act as well as Article 2 in conjunction with Article 4 of the Legal Advisors' Act specify that the primary scope of their professional activities is the provision of 'legal assistance'. Legal assistance is a special type of help, which in the Polish language means 'support to another person'[97] or 'actions for the benefit of another person'.[98] Despite the absence, in the former Code of Misdemeanour Procedure, of specific indications about where the activities of a defence counsel should go, legal scholars questioned the legality of defence actions that ran counter to the interests of the charged person, and even the goal of 'revealing the truth' did not justify such actions.[99]

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While the 2001 Code regulates the principle of the right to defence autonomously, borrowing all other principles from the 1997 Code of Criminal Procedure, the way in which the principle and the components of the right to defence are regulated does not make them significantly new or fundamentally different from their counterparts found in the 1997 Code. There are differences between these principles and the content of the right to defence, but these are more quantitative than qualitative. Perhaps it was precisely the number of these deviations that made it impossible to transplant the right to defence into misdemeanour proceedings in its form known from the 1997 Code. This would have resulted in applying Article 6 PCCP in a convoluted manner, relying on numerous exceptions. However, it is clear that under both procedures, the right to defence is not an absolute right[100] and can be subject to numerous, albeit not fundamental, limitations. This right serves the passive party, and recent legislative actions have also granted the right to defence to a 'suspected person',[101] bringing it closer to the constitutional standard set by Article 42 § 2 of the Polish Constitution. This proximity is also emphasised by Article 4 § 1 CMP 2001, which recognises the right of the charged person to the assistance of a defence counsel, an action almost identical to those undertaken by both those who created the Constitution and the 'ordinary' legislator in Article 6 *in fine* PCCP. There is no doubt that the current form of the right to defence for the charged person (and the person defined in Article 54 § 6 CMP 2001) may undergo further changes, even if they are not directly aimed at this participant in the proceedings, but the right to defence is realised in particular procedural contexts. As a result, even changes in those contexts can influence the content of the right in question; it appears to be highly sensitive and susceptible to even indirect influences.

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[97] https://sjp.pl/pomoc [accessed on 3 March 2023].

[98] https://sjp.pwn.pl/slowniki/pomoc%20.html [accessed on 3 March 2023].

[99] Gubiński, A., *Prawo…*, op. cit., p. 409; see also Siewierski, M., in: Siewierski, M. et al., *Komentarz…*, op. cit., p. 55. The mention of the defence lawyer's actions being taken solely for the benefit of the charged person sometimes occurred without specifying any basis for such an inference. Cf. Marek, A., *Prawo…*, op. cit., p. 200.

[100] Wiliński, P., in: Wiliński, P. (ed.), et al., *Polski…*, op. cit., p. 351.

[101] Janusz-Pohl, B., in: Wiliński, P. (ed.) et al., *Polski…*, op. cit., p. 790.

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Cite as:

Sowiński P.K. (2024) '*Formation of some elements of the right to defence in misdemeanour proceedings*', Ius Novum (Vol. 18) 1, 54–79. DOI 10.2478/in-2024-0004