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COUNSEL FOR A PERSON WHO IS NOT A PARTY TO A CRIMINAL PROCEEDING

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Abstract
The study analyses the issue of the availability of a counsel at law to persons who are not parties to criminal proceedings. It refers not only to the catalogue of entities authorised to appoint a counsel, but also to the grounds for refusing to allow such counsel to participate in procedural activities. Separate considerations are devoted to the issue of the procedure for participation of a counsel in a proceeding. In the final conclusions, *de lege ferenda*, it is proposed that the scope of the right to a counsel should be differentiated and should be made dependent on the level of protection of the interests of persons who are not parties.

Key words: right to a counsel, counsel at law, person who is not a party, suspect, interest of a participant in a criminal proceeding

INTRODUCTION

In the recitals to the Code of Criminal Procedure of 1997, it is rightly argued that the possibility of appointing a counsel to protect the interests of a person other than a party and a party who is not the accused (Article 87 CCP) constitutes significant progress in the scope of procedural guarantees for those participants in

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the proceedings.[1] However, at least within the scope relating to the first category, the statement requires re-evaluation and reconsideration. It was expressed over a quarter of a century ago, and certainly what was considered progress then cannot stand the test of time at present, especially in the context of constitutional and international standards.

There is a widely varied rationale for the participation of a counsel in criminal proceedings, which can be reduced to several of the most important reasons. Those indicated in the literature include, *inter alia*, the reason of professionalism, because a counsel has the legal knowledge and experience necessary to be on the case, while the person represented usually does not have such skills; the reason of mental state, because a counsel is not involved in defending their own legal interests, so their attitude to the case is less emotional than that of their clients, which allows them to assess the facts and evidence realistically and adopt appropriate tactics; the reason of psychological assistance, because in principle they should be a trusted person able to arouse the activeness of the represented persons in defence of their rights and procedural interests. Moreover, a counsel has the ability to replace their clients in situations where they cannot perform all procedural activities; a counsel at law or an attorney at law has better access to procedural bodies or court secretariats, and their assistance is particularly important when, for example, due to health conditions, the persons represented are unable to perform certain activities on their own.[2]

Although entities that are not parties constitute a group of participants in the proceedings only indirectly involved in criminal cases, the essence of which is the perpetrator and their act, the actions taken with them often significantly interfere with the sphere of their rights and freedoms, and also generate specific obligations on their part. The professional assistance of a counsel may be particularly necessary in such cases, which may translate into their potential liability, including criminal liability, or concern property related issues. The role of a counsel in connection with the activity of questioning witnesses is also particularly important. Not only can they ensure the comfort of the persons being questioned by requesting that the questions referred to in Article 171 § 6 CCP be waived, but above all, they can actively support these persons in the exercise and assessment of the rights that result from, for example, Article 183, Article 184, and Article 185 CCP, or are related to the protection of legally protected secrets to which potential depositions extend.

Even though the issue of the availability of a counsel has been the subject of numerous statements made in the doctrine of criminal procedure,[3] only sporadically

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1 *Nowe kodeksy karne z uzasadnieniami*, Warszawa, 1997, pp. 401–402.

2 C. Kulesza, 'Rola pełnomocnika w ochronie praw pokrzywdzonego', in: Mazowiecka L. (ed.), *Wiktymizacja wtórna. Geneza, istota i rola w przekształcaniu polityki traktowania ofiar przestępstw*, Warszawa, pp. 118 et seq.

3 M. Adamczyk, 'Profesjonalny pełnomocnik w postępowaniu karnym jako gwarant ochrony praw stron postępowania karnego', in: Karaźniewicz J., Kuczur T. (eds), *Karnomaterialne i procesowe instrumenty ochrony jednostki przed nadużyciami władzy państwowej*, Toruń, 2015, pp. 170–181; A. Drozd, 'Analiza wybranych aspektów funkcjonowania instytucji pełnomocnika w kontradyktoryjnym procesie karnym', in: Lach A. (ed.), *Postępowanie dowodowe w świetle nowelizacji kodeksu postępowania karnego*, Toruń, 2014, pp. 135–146; Z. Kwiatkowski, 'Uprawnienia radcy prawnego w postępowaniu przygotowawczym', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga*

has an attempt been made to analyse in detail the grounds for refusing them participation in the proceedings. Incidentally, what usually also remained to be thoroughly discussed was the problem of significant differentiation of procedural interests, the protection of which is a condition for the participation of a counsel, or the prospect of *de lege ferenda desiderata*.

ENTITIES WITH THE RIGHT TO APPOINT A COUNSEL

De lege lata, a person who is not a party may appoint a counsel if their interests in the ongoing proceeding require it (Article 87 § 2 CCP). The court and, in the preparatory proceedings, the prosecutor may refuse to allow a counsel to participate in the proceeding if they consider that the defence of the interests of the person who is not a party does not require it (Article 87 § 3 CCP). In turn, a party other than the accused may appoint a counsel without any additional restrictions (Article 87 § 1 CCP).

The latter category, apart from the accused, who has the right to assistance of counsel for the defence (Article 6 CCP), includes other parties to the proceeding, inter alia, substitute parties and new parties (Article 52, Article 58, Article 61 CCP). In criminal procedure, apart from parties, there are also other persons entitled to assistance of a counsel: a statutory representative or an actual guardian of the aggrieved who is a minor or a totally or partially incapacitated person (Article 51 § 2 CCP); an actual guardian of the aggrieved who is a person helpless due to old age or health (Article 51 § 3 CCP); and the accused seeking compensation for wrongful conviction, undoubtedly wrongful temporary arrest or detention, as well as persons who are entitled to compensation in the event of the death of the accused (Article 556 § 3 CCP).[4] In the event that the judgment on a person has been found invalid or a decision on their internment has been issued, the person, as well as their spouse, children and parents in the event of the person's death, has similar rights

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jubileuszowa Prof. J. Tylmana, Warszawa, 2011, pp. 71–89; M. Flis-Świeczkowska, 'Rola pełnomocnika w świetle wzmocnienia zasady kontradyktoryjności procesu karnego', in: Wiliński P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 539–552; M. Flis-Świeczkowska, 'Wpływ udziału pełnomocnika w postępowaniu karnym na prawo pokrzywdzonego do sądu w znowelizowanej procedurze karnej', in: Gil D., Kruk E. (eds), *Reformy procesu karnego w świetle jego zasad*, Lublin, 2016, pp. 13–39; J. Lisińska, 'Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym', *Palestra*, 2014, No. 7–8, pp. 72–81; A. Małolepszy, 'Uprawnienie oskarżonego do ustanowienia pełnomocnika w postępowaniach po uprawomocnieniu się wyroku', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, pp. 438–444; M. Mańczuk, 'Rola pełnomocnika pokrzywdzonego w kontradyktoryjnym procesie karnym – uwagi na tle projektu nowelizacji z dnia 8 listopada 2012 r.', in: Wiliński P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 651–661; R.A. Stefański, 'Pełnomocnik w procesie karnym', *Prokuratura i Prawo*, 2007, No. 2, pp. 45–58; A.R. Światłowski, 'Radca prawny jako pełnomocnik w postępowaniu karnym', *Radca Prawny*, 2002, No. 4–5, pp. 30–50; P. Starzyński, 'Rola pełnomocnika pokrzywdzonego w realizacji funkcji ścigania', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, pp. 215–223.

[4] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 2017, p. 1003.

when seeking compensation from the State Treasury for the damage and harm suffered as a result of the execution of this judgment or decision.[5] In turn, the owner of an enterprise threatened with forfeiture referred to in Article 44a § 2 CC is entitled to the rights of a party within the scope of procedural actions relating to this measure (Article 91b CCP). The provision of Article 87 § 1 CCP is also applied accordingly to the entity obliged to return the benefit or the equivalent of it (Article 91a § 4 CCP). Therefore, one cannot share the view that the entities indicated in Article 91a and Article 91b CCP receive assistance from a counsel based on Article 87 § 2 CCP,[6] i.e. only when their interests require it, since in the first case the legislator directly refers to Article 87 § 1 CCP (Article 91a § 4 CCP). Although the linguistic interpretation may suggest that a counsel may also be appointed by a public prosecutor who is a party to the proceeding other than the accused, in the doctrine, for institutional reasons, such a possibility is rightly denied. A prosecutor (Article 45 § 1 CCP) shall act in person, and a public prosecutor that is another State body (Article 45 § 2 CCP) through its employees.[7]

Basically, the aggrieved is a person who is not a party to court proceedings. They may receive assistance from a counsel under the terms laid down in Article 87 § 2 CCP in order to exercise their rights in the proceeding, provided that they do not obtain the status of a party (e.g. Article 53 CCP). This concerns, *inter alia*: filing a motion to rule on the obligation to redress the damage as a compensatory measure or compensation for the harm suffered (Article 49a CCP in conjunction with Article 46 § 1 CC); filing an objection to: issue a sentence at a sitting (Article 343 § 2); issue a sentence at a sitting without carrying out evidence hearing (Article 343a § 2 in conjunction with Article 343 § 2); issue a sentence at a trial without carrying out evidence hearing (Article 387 § 2); participation of their counsel in a sitting at which a minor under the age of 15 is questioned (Article 185a § 2 and Article 185b § 1); participation of their counsel in a sitting at which the aggrieved is questioned in connection with an offence laid down in Articles 197–199 CC (Article 185c § 2); participation in a sitting on: conditional discontinuance of a proceeding (Article 341 § 1); issuing a sentence (Article 343 § 5); conviction without carrying out evidence hearing (Article 343a § 2 in conjunction with Article 343 § 5); preparation for a trial (Article 349); participation in a trial for issuing a sentence without carrying out evidence hearing (Article 387 § 2); filing a motion to draw up and serve the *ratio decidendi* for the judgment conditionally discontinuing a procedure issued at a sitting (Article 422 § 1); lodging an appeal against a judgment conditionally discontinuing

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[5] Article 8(3) of the Act of 23 February 1991 on Recognising Judgments Issued against Persons Repressed for Their Activities for the Independent Existence of the Polish State as Invalid (consolidated text: Journal of Laws of 2024, item 442, as amended); also cf. R. Szarek, 'Z problematyki pełnomocnika w procesie karnym', *Palestra*, 1972, No. 5, p. 53.

[6] J. Zagrodnik, M. Burdzik, in: Głogowska S., Karaźniewicz J., Klejnowska M., Majda N., Palka I., Sychta K., Żyła K., Zagrodnik J., Burdzik M., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2024, Article 87, p. 318.

[7] T. Grzegorczyk, *Kodeks postępowania karnego. Tom I. Artykuły 1–467. Komentarz*, Warszawa, 2014, p. 387; R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., pp. 1002–1003; P. Niedzielak, K. Petryna, in: Kryże A., Niedzielak P., Petryna K., Wirzman T.E., *Kodeks postępowania karnego. Praktyczny komentarz z orzecznictwem*, Warszawa, 2001, p. 199.

a proceeding issued at a sitting (Article 444); filing a motion to resume a conditionally discontinued proceeding (Article 549).[8]

Apart from the aggrieved, various participants who are not parties to the proceeding but are involved in the course of the criminal proceeding have the right to appoint a counsel. In the literature, it is rightly indicated that such entities as, e.g. the head of the body obliged to provide an explanation on whom a fine was imposed for failure to provide it within a specified deadline (Article 19 § 4); the dean of the relevant council on whom a fine was imposed (Article 20 § 1a CCP); a person whose rights were violated by the issuance of a decision concerning a search, seizure of things or material evidence, and by means of other activities related thereto (Article 236); a person arrested (Article 244 § 1);[9] a person posting bail (Article 266 § 1); a person who may need protection in a criminal proceeding due to potential forfeiture of the property constituting bail or collection of assets (Article 268 § 1); a person entitled to lodge a complaint about a decision or a ruling issued in connection with the application of penalties for the breach of order (Article 290 § 2); a person who, in the course of a preparatory proceeding, is entitled to lodge a complaint about a decision, a ruling or an activity breaching their rights (Article 302 §§ 1 and 2); a person entitled to file a clemency request (Article 560 § 1);[10] an expert witness or translator, e.g. in the event that they claim due remuneration from the procedural body.[11]

Witnesses constitute a separate and diversified group of participants, depending on circumstances. It is rightly indicated in the case law that the possibility of questioning a witness who is accused in another on-going case of complicity in an offence subject to a proceeding, i.e. a person who has the right to refuse to testify in accordance with Article 182 § 3 CCP, is a typical situation in which this person may, based on the provision of Article 87 § 2 CCP, appoint a counsel, because their interests in the ongoing proceeding require it;[12] the assessment may be similar in relation to the need to protect the interests of a minor, anonymous or crown witness,[13] as well as a witness whose procedural status may change into that of a suspect and then the accused (Article 183 § 1 CCP)[14] or a witness who claims reimbursement of travel costs or remuneration lost due to participation in the proceeding.[15]

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[8] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., p. 1004; R.A. Stefański, 'Pełnomocnik…', op. cit., p. 48.

[9] For more see, e.g. A. Ludwiczek, 'Sytuacja prawna adwokata udzielającego pomocy prawnej w trybie art. 245 § 1 k.p.k.', *Problemy Prawa Karnego*, 2001, No. 24, p. 108.

[10] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., p. 1004; R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 45–49; P. Starzyński, in: Kulesza C. (ed.), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, pp. 1058–1063; J. Lisińska, 'Podmioty uprawnione…', op. cit., pp. 72–81.

[11] K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, 7th edn, Warszawa, 2024, p. 430; T. Grzegorczyk, *Kodeks…*, op. cit., p. 387.

[12] Judgment of the Appellate Court in Katowice of 11 February 2013, II AKa 268/12, LEX No. 1422232.

[13] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–296*, Warszawa, 2007, p. 487.

[14] K. Eichstaedt, in: Świecki D. (ed.), *Kodeks…*, 7th edn, op. cit., p. 430.

[15] T. Grzegorczyk, *Kodeks…*, op. cit., p. 387.

The legal status of a person of interest, sometimes referred to in the doctrine as an actual suspect,[16] a potential suspect,[17] or an informal suspect,[18] may certainly require protection of their procedural interests. Leaving aside terminological issues and doctrinal differences, it is beyond dispute that the Code of Criminal Procedure does not define this term directly, despite the fact that it is used repeatedly[19] and imposes a number of obligations on these persons, as well as grants them certain rights in various procedural contexts, sometimes bringing their status closer to that of a suspect. In the literature, it is assumed that persons of interest are persons who have not been charged but in relation to whom some activities have been taken in the course of a preparatory proceeding;[20] certain procedural actions have been taken that indicate that they are treated as suspects;[21] such procedural actions as questioning, search, detention, temporary seizure of movable property or inspection have been taken, which places them in the legal situation of a suspect;[22] these are persons who remain in the sphere of interest of operational activities of law enforcement agencies.[23]

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[16] A. Murzynowski, 'Faktycznie podejrzany w postępowaniu przygotowawczym', *Palestra*, 1971, No. 10, pp. 39 et seq.; Z. Sobolewski, P.K. Sowiński, in: Artymiak G., Rogalski M., Klejnowska M. (eds), *Proces karny. Część ogólna*, Warszawa, 2012, pp. 150 et seq.; P. Kruszyński, *Zasada domniemania niewinności w polskim procesie karnym*, Warszawa, 1983, p. 143; K. Woźniewski, in: Grajewski J. (ed.), Papke-Olszauskas K., Steinborn S., Woźniewski K., *Prawo karne procesowe – część ogólna*, Warszawa, 2011, p. 295.

[17] Z. Sobolewski, 'Osoba podejrzana oraz potencjalnie podejrzana w znowelizowanym (2003) kodeksie postępowania karnego a gwarancje konstytucyjne', in: Sobolewski Z., Artymiak G., Kłak Cz.P. (eds), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 321; Z. Sobolewski, P.K. Sowiński, in: Artymiak G., Rogalski M., Klejnowska M. (eds), *Proces karny*…, op. cit., p. 151; Cz.P. Kłak, '„Osoba podejrzana" oraz „potencjalnie podejrzana" w polskim procesie karnym a zasada *nemo se ipsum accusare tenetur*', *Ius Novum*, 2012, No. 4, Vol. 6, pp. 58–60.

[18] R. Kmiecik, 'Glosa do postanowienia SN z 17.06.1994 r., WZ 122/94', *Wojskowy Przegląd Prawniczy*, 1995, No. 3–4, p. 79.

[19] See Article 74 §§ 3 and 3a; Article 189 § 3; Article 192a; Article 219 § 1; Article 225 § 2; Article 237 § 4; Article 247 § 1; Article 248 § 3; Article 278; Article 295 § 1; Article 308 § 1; Article 325g § 2; Article 517c § 1.

[20] A. Czapigo, 'Osoba podejrzana jako podmiot uprawniony do wniesienia zażalenia na postanowienie o umorzeniu postępowania przygotowawczego', *Wojskowy Przegląd Prawniczy*, 2009, No. 2, p. 45.

[21] K. Woźniewski, in: Grajewski J. (ed.), Papke-Olszauskas K., Steinborn S., Woźniewski K., *Prawo karne*…, op. cit., pp. 294–295.

[22] A. Murzynowski, 'Faktycznie podejrzany…', op. cit., p. 39; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa, 2023, p. 194; L. Schaff, *Zakres i formy postępowania przygotowawczego*, Warszawa, 1961, pp. 63–67; P. Kruszyński, *Zasada domniemania*…, op. cit., p. 143; E. Skrętowicz, 'Faktycznie podejrzany w polskim procesie karanym', in: Kruszyński P. (ed.), *Wybrane zagadnienia procedury karnej. Księga pamiątkowa ku czci Prof. A. Murzynowskiego*, *Studia Iuridica*, 1997, No. 33, p. 195; K. Grzegorczyk, 'Glosa do wyroku SN z 13.01.2000 r., III RN 116/99', *Wojskowy Przegląd Prawniczy*, 2002, No. 4, p. 137; judgment of the Supreme Court of 24 March 1970, V KRN 52/70, *OSNKW*, 1970, No. 7–8, item 77, with a gloss by J. Nelken, *Nowe Prawo*, 1971, No. 5, p. 814; the Supreme Court resolution of 23 May 1974, VI KZP 4/74, *OSNPG*, 1974, No. 8–9, item 98.

[23] K. Krasny, 'Faktycznie podejrzany w procesie o charakterze aferowym', *Problemy Praworządności*, 1978, No. 8–9, p. 7.

It is claimed that these are persons who are actually suspected of committing crime, against whom law enforcement agencies are taking procedural steps aimed at prosecuting them;[24] there are actual data indicating their participation in the crime, and their procedural status is determined by the evidence-taking procedure, which is the commencement of criminal prosecution;[25] law enforcement bodies have information that causes their action to focus on these persons,[26] or the evidence collected justifies obtaining the status of a suspect by these persons and presenting them with charges or questioning them as suspects, although they do not have this status due to deliberate or inadvertent acts of omission by the procedural bodies.[27] Taking into account the specific procedural status of a suspect, and in particular the likelihood of its change into a passive party to the criminal proceeding, the protection of their interests by a counsel seems particularly justified. At the same time, one cannot approve of the view that a person of interest can appoint counsel for the defence.[28]

From a broader systemic perspective, it should be noted that a counsel may also be appointed by an entity held liable in subsidiary cases and an intervener in fiscal penal proceedings as parties to the proceeding (Article 123 § 1 of the Fiscal Penal Code ('FPC'); Article 120 § 1 FPC) as well as a representative of a collective entity entered for the proceeding against a perpetrator at the court stage, from which grounds for this entity's liability may subsequently arise.[29] The possibility of appointing a counsel is also provided for in misdemeanour related proceedings.[30]

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[24] A. Baj, 'Czy osoba podejrzana jest stroną postępowania przygotowawczego?', *Prokuratura i Prawo*, 2016, No. 10, p. 91; S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej', in: Rogacka-Rzewnicka M., Gajewska-Kraczkowska H., Bieńkowska B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Prof. P. Kruszyńskiego*, Warszawa, 2015, p. 447.

[25] See F. Prusak, *Pociągnięcie podejrzanego do odpowiedzialności w procesie karnym*, Warszawa, 1973, pp. 165–166; F. Prusak, *Komentarz do kodeksu postępowania karnego*, Vol. I, Warszawa, 1999, p. 276; S. Pikulski, K. Szczechowicz, *Zatrzymanie i tymczasowe aresztowanie w świetle praw i wolności obywatelskich*, Olsztyn, 2004, p. 21; the Supreme Court resolution of 23 May 1974, VI KZP 4/74, *OSNPG*, 1974, No. 8–9, item 98.

[26] Z. Gostyński, S. Zabłocki, in: Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 2003, p. 513; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania…*, op. cit., p. 400; K.T. Boratyńska, P. Czarnecki, in: Boratyńska K.T., Czarnecki P., Górski A., Sakowicz A., Warchoł M., Ważny A., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2016, p. 217; K. Kremens, in: Gruszecka D., Kremens K., Nowicki K., Skorupka J. (ed.), *Proces karny*, Warszawa, 2017, p. 316.

[27] P. Nowak, 'Definicja podejrzanego i oskarżonego a konstytucyjne prawo do obrony', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2016, No. 4, p. 64.

[28] A. Murzynowski, 'Udział obrońcy w postępowaniu przygotowawczym *de lege lata*', *Palestra*, 1987, No. 12, pp. 39–41.

[29] Article 21a(2) of the Act on the Liability of Collective Entities; also see T. Grzegorczyk, 'Podmiot zbiorowy jako *quasi*-strona postępowania karnego i karnego skarbowego', *Przegląd Sądowy*, 2007, No. 2, p. 30.

[30] For more see A. Świtłowski, in: Kulesza C. (ed.), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, pp. 1064 et seq.

PROTECTION OF THE INTEREST OF A PERSON AS GROUNDS FOR ADMISSION OF A COUNSEL TO A PROCEEDING

In the event a counsel is appointed by a person who is not a party, the court and the prosecutor, in the preparatory proceeding, assess whether, *verba legis*, this is required by the interests of the person in the ongoing proceeding (Article 87 § 2 CCP). These bodies may refuse to allow a counsel to participate in the proceeding if they consider that this is not required by the protection of the interests of a person who is not a party (Article 87 § 3 CCP).

A criminal proceeding, by its nature, consists in a course of activities that repeatedly generate a conflict of mutually contradictory interests. It arises not only in relations between procedural parties, but also between them and the procedural body or other participants. Some interests, including in particular those of the accused, are protected by general procedural guarantees resulting also from the primary procedural principles. Sometimes, however, the legislator explicitly indicates certain categories of interests and orders their protection in the course of the proceeding, doing so by adopting a subjective approach (the interest of the aggrieved, the accused, a procedural party) or an objective approach (the interest of the State, society, administration of justice). A specific preference of certain procedural interests may result indirectly from the fact that the collision of various contradictory values may result in a slowdown in the proceeding or even weaken the implementation of the principle of truth. Most often, however, it concerns axiological considerations and statutory protection of values that are particularly exposed as a result of taking specific procedural steps, or whose carriers are specific entities (e.g. the interest of the Republic of Poland) or ideas (administration of justice, social interest).

It concerns the interest of, e.g. the aggrieved (Article 2 § 1(3), Article 11 § 1, Article 335 §§ 1 and 2 CCP), a suspect (Article 299a CCP), the accused (Article 76a, Article 85 § 1 CCP), a party (Article 161 CCP), a person who is not a party (Article 87 § 2 CCP), an appellant (Article 425 § 3 CCP), other (than the State or self-government) institutions or persons (Article 156a CCP), but also the interest of: society (Article 12 § 4, Article 55 § 5, Article 60 § 1, Article 661 § 2 CCP), society or an individual incorporated in the statutory tasks of a social organisation (Article 90 § 1 CCP), administration of justice (Article 90 §§ 4 and 6, Article 589z (1), Article 589zn § 1, Article 590 § 1, Article 591 § 1, Article 592, Article 592c § 1, Article 592d § 2 CCP), as well as legal interest (Article 96 § 1, Article 152, Article 404c § 2 CCP), important interest of the State (Article 100 § 7, Article 156 § 5, Article 157 § 2, Article 360 § 1(c) CCP), important interest of the Republic of Poland (Article 589c § 5 CCP), private interest (Article 360 § 1(d) CCP), including private interest of persons participating in the trial (Article 147 § 4 CCP), or the interest of the investigation (Article 317 § 2 CCP).

The level of protection of this interest is also varied. Sometimes it is ordered to take into account a given interest (Article 2 § 1(3), Article 335 §§ 1 and 2 CCP), to have regard to the fact that a given interest does not oppose it (Article 11 § 1 CCP), to state that a given interest speaks in favour of it (Article 12 § 4 CCP), the protection of a given interest requires it (Article 55 § 5, Article 60 § 1 CCP) or a given interest

(Article 87 § 2, Article 589zn § 1, Article 590 § 1, Article 591 § 1, Article 592, Article 592c § 1, Article 592d § 2, Article 661 § 2 CCP), there is a need to protect a given interest (Article 90 §§ 4 and 6 CCP), to protect an important interest (Article 156 § 5 CCP), there is a necessity of protecting a given interest (Article 76a § 2 CCP), an important reason for the protection of a given interest (Article 147 § 4 CCP), an important interest speaks in its favour (Article 156a CCP), participation of given persons may lead to the violation of the interests of specified persons (Article 76a, Article 299a CCP), or it is in someone's interest (Article 90 §§ 4 and 6 CCP), there is no conflict of interests (Article 85 § 1 CCP), it is necessary for the exercise of interests (Article 161 CCP), the interest does not require it (Article 589x (1) CCP), a given interest is against a given activity (Article 661 § 4 CCP). Sometimes a statute requires that an interest be demonstrated in order to obtain a given right, e.g. participation in procedural activities (Article 96 § 1 CCP); however, more often the assessment in this respect is left to the procedural body.

Article 87 § 2 CCP stipulates that a person who is not a party may appoint a counsel if their interests in the ongoing proceeding require it. In the analysed case, reference is made to the individual interest of persons who are not parties, assessed from the perspective of the ongoing proceeding with their participation. For obvious reasons, even of a semantic nature, it cannot be identified with general clauses and abstract interests such as, e.g. public interest,[31] the interest of administration of justice,[32] or the protection of the rule of law.[33] It is also unjustified to adopt the perspective of

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[31] For more see, e.g. K. Dudka, M. Mozgawa, 'Interes społeczny jako przesłanka prokuratorskiej ingerencji w ściganie przestępstw prywatnoskargowych w trybie art. 60 k.p.k.', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga jubileuszowa Prof. J. Tylmana*, Warszawa, 2011, pp. 55–69; B. Dudzik, 'Interes społeczny jako kryterium ingerencji prokuratora w ściganie przestępstw prywatnoskargowych', in: Korybski A., Kostycki M.W., Leszczyński L. (eds), *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy. Materiały z seminarium (Lublin, 04.2005 r.)*, Lublin, 2006, pp. 189–197; M. Czekaj, 'Ingerencja prokuratora w sprawach o przestępstwa prywatnoskargowe', *Prokuratura i Prawo*, 1999, No. 7–8, pp. 46–64; M. Cieślak, 'Interes społeczny jako czynnik warunkujący prokuratorskie objęcie oskarżenia w sprawie prywatnoskargowej', *Państwo i Prawo*, 1956, No. 12, pp. 1049 et seq. For a broader systemic approach see, e.g. M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa, 1986, pp. 11 et seq.; J. Lang, 'Z rozważań nad pojęciem interesu w prawie administracyjnym', *Przegląd Prawa i Administracji*, 1997, Vol. XXXVII, pp. 130 et seq.; H. Groszyk, A. Korybski, 'O pojęciu interesu w naukach prawnych (przegląd wybranej problematyki z perspektywy teoretycznoprawnej)', in: Korybski A., Kostycki M.W., Leszczyński L. (eds), *Pojęcie interesu*…, op. cit., pp. 8 et seq.; A. Żurawik, '„Interes publiczny", „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2013, No. 2, pp. 57 et seq.; J. Sztumski, 'Konflikt społeczny', *Studia Socjologiczne*, 1973, No. 3, pp. 178 et seq.; P.J. Suwaj, *Konflikt interesów w administracji publicznej*, Warszawa, 2009.

[32] For more see J. Kosonoga , 'Dobro wymiaru sprawiedliwości jako przesłanka dokonywania czynności procesowych', in: Cieślak W., Steinborn S. (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa, 2013, pp. 869–903.

[33] For more see J. Kosonoga, 'Ochrona praworządności oraz interes społeczny jako granice prokuratorskiej ingerencji w postępowanie prywatnoskargowe', in: Rogalski M., Kosonoga J., Dąbrowski J. (eds), *Prawo karne na przełomie wieków. Księga Jubileuszowa Profesora Ryszarda A. Stefańskiego*, Warszawa, 2025, pp. 633 et seq.; also see A. Moszerer, *Stanowisko i czynności procesowe prokuratora w postępowaniu cywilnym*, Warszawa, 1957; K. Stefko, *Udział prokuratora w postępowaniu cywilnym*, Warszawa, 1956; S. Włodyka, *Powództwo prokuratora w polskim procesie cywilnym*, Warszawa, 1957; W. Masewicz, *Prokurator w postępowaniu cywilnym*, Warszawa, 1975. In foreign

a procedural body and be guided by its interests. The provision only provides for the interest of a specific participant, regardless of whether, as a result of appointing a counsel, any interests of the procedural body may suffer, including, e.g. the need to meet deadlines and the efficiency of the conducted proceedings, or the concentration of evidence. The greater degree of formalism, which inevitably requires the participation of a professional counsel, and the risk of lodging appeals, motions or procedural statements by them are of no importance.

This is an unclear and discretionary premise creating considerable latitude in decision-making for the procedural body. However, its assessment should certainly take place on two fundamental planes: *in genere* – from the point of view of the existence of such an interest in general, and *in concreto* – from the perspective of the need to protect this interest by a counsel in a specific procedural arrangement. It must therefore be an interest, the protection of which requires the appointment of a professional counsel; i.e. a situation in which, without such participation, there would be a risk of harm to the interests of the person involved in a given activity. The scope of this assessment is also determined by linguistic interpretation. This is because it concerns a situation where the protection of interests requires it; 'to require', on the other hand, means to indispensably need something;[34] in turn, 'indispensable' is understood as one that is absolutely necessary and it is impossible to manage without it.[35] Indeed, these will be cases where the ongoing criminal proceedings require the participation of a counsel, because it may have an impact on the legal or factual situation of a given person, i.e. directly translate into the sphere of their rights and obligations.

In the content of both Article 87 § 2 CCP and Article 87 § 3 CCP, the legislator uses the term 'interest' in the plural form, which may suggest that, in order to use a counsel, it is necessary to demonstrate at least two interests of a given participant. However, this conclusion is not correct. In the case law, it is rightly assumed that the mere use of the plural form in the content of a legal norm to define the subject of direct protection, the subject of the causative action, or the means used to commit a crime does not mean that the legislator uses it within the meaning of 'at least two', i.e. in order to limit the grounds for liability. The listing by the legislator of the items specified in the content of penal norms in the plural form is not a means aimed at excluding liability in cases where the item is *in concreto* single.[36] This view, although

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literature, see J. Raz, 'The Rule of Law and Its Virtue', *Law Quarterly Review*, 1977, No. 2, pp. 211–215; R.S. Summers, 'The Ideal Socio–Legal Order. Its Rule of Law Dimension', *Ratio Iuris*, 1988, No. 2, pp. 154 et seq.; L. Fuller, *The Morality of Law*, New Haven, 1964, p. 39.

[34] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. V, Warszawa, 2003, p. 302.

[35] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. II, Warszawa, 2003, p. 1196.

[36] The Supreme Court resolution of 21 November 2001, I KZP 26/01, *OSNKW*, 2002, No. 1–2, item 4, with glosses by: O. Sitarz, *Państwo i Prawo*, 2003, No. 10, p. 127; P. Palka, M. Przetak, *Przegląd Sądowy*, 2003, No. 11–12, p. 181; M. Klubińska, *Prokuratura i Prawo*, 2003, No. 12, p. 107; W. Marcinkowski, *Prokurator*, 2002, No. 2, p. 104; also cf. judgment of the Appellate Court in Lublin of 18 December 2001, II AKa 270/01, *Prokuratura i Prawo*, 2002, No. 12, item 30; similarly judgment of the Appellate Court in Wrocław of 21 February 2003, II AKa 586/02, *OSA*, 2003, No. 5, item 45; differently, however, judgment of the Appellate Court in Lublin of 29 April 2002, II AKa 330/02, *Prokuratura i Prawo*, 2003, No. 4, item 19.

it refers to substantive law, can also be directly applied to the interpretation of Article 87 CCP.

In addition, there should be no doubt that this refers only to specific criminal proceedings involving a person who is not a party to them, and not any other, as is suggested in the literature,[37] including, e.g. administrative proceedings or proceedings conducted before an international body if it is conducted at the same time. This is supported by the linguistic interpretation. It concerns interests occurring in specific, ongoing proceedings. Apart from that, the assessment of the need for the participation of a counsel in these other proceedings may be entirely different than in the context of the circumstances of the case conducted.

The premise referred to in Article 87 § 2 CCP is subject, first of all, to the subjective assessment of the person intending to appoint counsel; secondly, to the procedural body, whose judgment should be objective. The requirement of an objective assessment, in the sense of avoiding not only an unjustified (positive or negative) attitude towards one of the parties to the proceeding, but also the overestimation of circumstances supporting one or another argument not based on the realities of the case under examination,[38] results indirectly from Article 4 CCP, as well as non-statutory regulations.[39] For guarantee reasons, it is rightly assumed in the doctrine that not only the accused, but also other participants in the proceeding, including e.g. the aggrieved party or the auxiliary prosecutor, is a beneficiary of the principle of objectivity (Article 4 CCP).[40] That is why, although observation of the practice might lead to the opposite thesis, it is impossible to share the view that the assessment of the interest of a person who is not a party, as a premise for appointing a counsel, is not subject to an objective assessment by a procedural body.[41] However, when making such an assessment, a procedural body should take into account the individual perspective of the entitled entity, which is determined, *inter alia*, by the scope of their procedural rights, the type and extent of potential procedural consequences, or their personal predispositions.

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[37] M. Piech, 'Odmowa dopuszczenia do udziału w postępowaniu pełnomocnika osoby niebędącej stroną', in: Hofmański P. (ed.), *Kluczowe problemy procesu karnego*, Warszawa, 2011, p. 328.

[38] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania…*, op. cit., pp. 40–41.

[39] For more, see J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, Warszawa, 2017, pp. 86 et seq.

[40] Z. Gostyński, S. Zabłocki, in: Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks…*, op. cit., p. 206; J. Grajewski, in: Grajewski J., Paprzycki L.K., Steinborn S., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 2010, pp. 51–52; also see judgment of the Supreme Court of 6 February 1967, VI KZP 18/67, *OSNKW*, 1967, No. 11, item 114, with a gloss of approval by S. Waltoś, *Nowe Prawo*, 1968, No. 2, pp. 317 et seq. It is also rightly noted that the statutory approach to the principle of objectivism is too narrow (S. Waltoś, 'Glosa do wyroku SN z 6.02.1967 r., VI KZP 18/67', *Nowe Prawo*, 1968, No. 2, p. 318).

[41] Thus, M. Piech, 'Odmowa dopuszczenia…', op. cit., p. 327; differently, e.g. P. Niedzielak, K. Petryna, in: Kryże A., Niedzielak P., Petryna K., Wirzman T.E., *Kodeks…*, op. cit., p. 199.

PROCEDURE FOR ADMITTING A COUNSEL TO A PROCEEDING

The scheme for introducing a counsel into the proceedings is based on their initial appointment by an entitled person (Article 87 § 2 CCP), followed by verification of this fact by a procedural body (Article 87 § 3 CCP). The appointment of a counsel means that they may act in the proceeding from the very moment of this appointment. The statute does not require a positive decision in this respect; however, a negative decision is possible if the procedural body considers that the defence of the interests of the person who is not a party does not require it. The lack of a negative decision authorises a counsel to act in the proceeding. Such regulation of the issue, as is rightly indicated in the literature, means that the statute provides for a presumption of the existence of a need to defend the interests of a person who is not a party with the assistance of a counsel.[42] The advantage of this solution is the possibility of the almost immediate appointment of counsel, while the drawback lies in the lack of knowledge of the circumstances justifying their participation in the proceedings. It is rightly deemed that they are not indicated in the power of attorney, which means that they are not known to the procedural body; for tactical reasons, a person appointing a counsel may not be interested in indicating what procedural interests specifically matter.[43] Therefore, the indication of the interest may take place on the occasion of a given activity, e.g. in connection with the appearance of a witness with a counsel in company for their interrogation. For guarantee reasons, it cannot be excluded that the justification of a premise under Article 87 § 2 CCP will be presented in a separate procedural document. However, the power of attorney itself may be granted in writing or by means of a statement for the minutes taken by the person carrying out the criminal proceeding (Article 83 § 2 CCP in conjunction with Article 88 § 1 CCP).

Refusal to allow a counsel to participate in the proceeding takes, depending on the stage, the form of a ruling issued by the prosecutor or the court (*arg. ex* Article 93 § 1).[44] The prosecutor's ruling can be appealed against pursuant to Article 302 § 1 CCP, because the refusal to admit a counsel to the proceeding violates the rights of a person entitled to appoint them. A court ruling on refusal to admit a counsel to the proceeding shall not be subject to appeal.

The issue of whether a person who is not a party to the proceeding may request the appointment of a counsel *ex officio* may raise some doubts. On the one hand, it is argued that *de lege lata* there are no grounds for the appointment of a counsel *ex officio*, because the power of attorney is based solely on choice;[45] the law of the poor does not apply to a person who does not have the status of a party to the proceeding.[46] On the other hand, it is rightly considered that Article 88 § 1 CCP, which refers to the analogous application of Article 78 § 1 CCP, does not differentiate between

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42 R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 46–47.

43 M. Piech, 'Odmowa dopuszczenia…', op. cit., p. 328.

44 A.R. Światłowski, 'Radca prawny…', op. cit., pp. 30 et seq.

45 F. Prusak, *Komentarz do kodeksu…*, op. cit., p. 314.

46 E. Bieńkowska, 'Pokrzywdzony w postępowaniu karnym po zmianach z dnia 11 marca 2016 r.', *Prokuratura i Prawo*, 2016, No. 10, pp. 6–26; K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX/el., 2025, Article 87.

entities lodging such a motion, which means that any entity entitled to appoint a counsel may submit such a request.[47] In addition, such a conclusion results from the principle of analogous application of the provisions of law. It is commonly accepted in the doctrine that this may produce three results, i.e. a situation where the provision applied by analogy will not undergo any modifications; where it will be applied after a prior change; or where it will not be applied at all.[48] Therefore, although analogous application of provisions is a construction similar to *analogia legis* and consists in 'the application of a given provision or legal norm to a similar case, but one that is not regulated by other provisions',[49] there is no room for complete discretion in its application. Each time, a choice must be made between the application of the provision directly (without modification), the application of the provision after the introduction of some changes (a modified one), and the refusal to apply a specific provision. A decision on which of the three options is appropriate should result from a systemic and functional interpretation, taking into account not only similarities, but also, and perhaps above all, differences between measures to which a referring provision and the provision referred to belong.[50] The second of the above-mentioned situations occurs most often. The modification of the provision in such a case should consist in supplementing the regulation in which the referring provision is contained in a way that takes into account the nature of this measure and in such a way that it is not contrary to the provisions to which it is to apply; it should lead to the creation, together with the referring provision, of a legal norm that will regulate a specific sphere in the provisions in which the referring provision functions, in a way that is consistent with their essence and the regulations contained therein.[51] However, in the analysed case, there are no grounds for modifying or abandoning the application of Article 88 § 1 CCP directly to the institution of the power of attorney.[52] On the contrary, there are strong reasons

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[47] R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 52–53, and at the same time, as the author indicates, the president's decision on the refusal to appoint a counsel *ex officio* for a person who is not a party does not determine whether the legal premises under Article 87 § 2 CCP are met, i.e. whether it is in the interest of the non-party individual, since this matter is reserved for the prosecutor and the court adjudicating on the admission of a counsel to the proceeding. With regard to the issue of a counsel *ex officio* in criminal proceedings, see also the Supreme Court ruling of 16 November 2000, I KZP 32/00, *OSNKW*, 2000, No. 11–12, item 98.

[48] J. Nowacki, '„Odpowiednie" stosowanie przepisów prawa', *Państwo i Prawo*, 1964, No. 3, pp. 370–371; J. Nowacki, *Analogia legis*, Warszawa, 1966, pp. 135 et seq.; J. Wróblewski, 'Przepisy odsyłające', *Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno–Społeczne*, 1964, Issue 35, p. 35; A. Błachnio-Parzych, 'Przepisy odsyłające systemowo (wybrane zagadnienia)', *Państwo i Prawo*, 2003, No. 1, pp. 43 et seq.; M. Hauser, 'Odpowiednie stosowanie przepisów prawa – uwagi porządkujące', *Przegląd Prawa i Administracji*, Vol. LXV, Wrocław, 2005, pp. 151 et seq.; resolution of seven judges of the Supreme Court of 30 January 2001, I KZP 50/00, *OSNKW*, 2001, Issue 3–4, item 16.

[49] J. Nowacki, *Analogia legis…*, op. cit., pp. 9 and 156.

[50] L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń, 2002, pp. 299–300.

[51] J. Nowacki, '„Odpowiednie" stosowanie…', op. cit., pp. 372–373, and 376; J. Wróblewski, *Pisma wybrane*, Warszawa, 2015, p. 272; A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*, Warszawa, 2008, p. 183.

[52] See the Supreme Court ruling of 16 November 2000, I KZP 32/00, *OSNKW*, 2000, No. 11–12, item 98.

for not differentiating between the situation of the accused and a person who is not a party in this respect. They primarily result from the *ratio legis* of Article 78 § 1 CCP and the need to protect the rights of impecunious people.

The same scope of procedural rights of the accused seeking the appointment of counsel for the defence *ex officio*, and of another person requesting that, is implemented in the same proceeding of examining the applications in this respect.[53] *Ex officio* counsel is appointed by the president of the court competent to hear the case, provided that a person requesting the appointment of a counsel duly demonstrates that they are not able to bear the costs of appointing one without detriment to the necessary maintenance of themselves and their family (Article 78 § 1 CCP in conjunction with Article 88 § 1 CCP).[54] It is rightly noted in the doctrine that the situation of an entity that is not a natural person is different, because the premise indicated in Article 78 § 1 CCP does not apply to such an entity, namely that they are unable to bear the costs of defence without detriment to the necessary maintenance of themselves and their family, which directly applies only to natural persons. In this respect, based on the reference from Article 89 CCP, analogous provisions of the Code of Criminal Procedure shall be applicable.[55] In appointing a counsel *ex officio*, the president of the court shall not examine whether this is required by the protection of the interests of the person applying for such appointment. Such a decision is left to the prosecutor or the court (Article 87 § 3 CCP).[56]

It is rightly pointed out that the appointment of a counsel is always optional. The legislator did not provide for a mandatory power of attorney,[57] although in the literature there were *desiderata* for the introduction of a provision obliging the procedural body to appoint a counsel *ex officio* in the event of obvious helplessness of the person entitled.[58]

A party's counsel is not limited in the direction of actions taken on behalf of their principal and therefore any action, even unfavourable for the represented person, taken within the scope of the power of attorney, produces consequences for them, including unfavourable ones. This also applies to failure to take action, and in particular to lodging an appeal or failing to meet the deadline related to this measure.[59]

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[53] Ibidem.

[54] For more see R.A. Stefański, 'Prawo do wyznaczenia obrońcy z urzędu ze względu na niezamożność', in: Gerecka-Żołyńska A., Górecki P., Paluszkiewicz H., Wiliński P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi*, Warszawa, 2008, pp. 343–358; also see J. Kosonoga, 'Appointed counsel for the defence in the Polish criminal proceeding', *Ius Novum*, 2016, No. 2, pp. 95–111.

[55] R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 53–54.

[56] Ibidem, p. 54.

[57] Ibidem, pp. 52–53.

[58] W. Posnow, 'Pełnomocnik w procesie karnym (uwagi na tle regulacji w k.p.k. z 1997 r.)', in: Bogunia L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. 2, Wrocław, 1997, p. 151.

[59] The Supreme Court ruling of 20 May 1997, V KZ 45/97, *OSN, Prokuratura i Prawo*, 1997, No. 11, item 3.

CONCLUSIONS

De lege lata the right of persons who are not parties to appoint a counsel is not assessed unequivocally in the doctrine. Critical opinions, not without reason, prevail. Not only is the use of an exceptionally vague and judgmental expression in Article 87 § 3 CCP, as a premise for not admitting a counsel, questioned, but it is also pointed out that if a person is granted a right in the proceedings, they should likewise have the possibility of using professional assistance within that scope. Such a person, deprived of the possibility of using the assistance of a counsel, may not exercise their right, especially when legal knowledge is required to do so.[60] It is pointed out that there are no objective criteria that the court or the prosecutor should apply when they deprive a person who is not a party of the possibility of protecting their interests with the assistance of a counsel, and moreover, that such a refusal may seriously jeopardise the effectiveness of the appellate measures lodged by such persons.[61]

The statement that, from the subjective perspective, the catalogue of persons entitled to use the assistance of a counsel has been very broadly defined should remain beyond dispute. As a certain simplification, it may be assumed that it includes everyone, if only their interests require it. A natural consequence of such an assumption is the fact that the type and importance of procedural interests that may require protection are very diverse. The legislator left this aspect to be assessed *in concreto*, by referring it to a specific participant and a specific procedural arrangement. However, the subjective differentiation of the legal situation of a person entitled to the use of the assistance of a counsel should be considered, and it should be done on three levels.

Firstly, *de lege lata*, the greatest deficit in the protection of procedural interests by a counsel undoubtedly occurs in the case of a person of interest, or more broadly, all the persons who are not parties, with respect to whom procedural steps have been taken aimed at their criminal prosecution. As mentioned earlier, it is indeed a statutory term, but it is not defined. The issue of the status of a person of interest is widely discussed in the literature, and – especially in the context of ensuring an effective right to defence[62] – is of such significance that the *desideratum* for its

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[60] W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Bydgoszcz, 2000, p. 282.

[61] W. Posnow, 'Pełnomocnik…', op. cit., p. 149.

[62] It is in particular essential in this case to fully implement Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1); see, in particular, Article 3(2) in conjunction with Article 2(1) of the Directive; also see the opinion of the Criminal Law Codification Commission on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 to Polish law, pp. 2–4, by S. Steinborn, available at: https://arch-bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego [accessed on 6 June 2025]; K. Oleksy, 'Bezpośredni skutek „dyrektywy obrończej" w polskim procesie karnym', *Problemy Prawa Karnego*, 2019, Vol. 3, p. 42; A. Gajda, 'Umocnienie praw jednostki w postępowaniu karnym w Unii Europejskiej a dyrektywa w sprawie dostępu do adwokata', *Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i Prace*, 2014, No. 1, p. 11; A. Klamczyńska, T. Ostropolski, 'Prawo do adwokata

regulation is becoming increasingly urgent. This would certainly also resolve the issues related to the appointment of a counsel for persons who are not parties and whose status is similar to that of a person of interest. The *desiderata* in this respect have already been reported in the doctrine. On the one hand, it was pointed out that there was a need to introduce a definition of the legal term ' person of interest' into the Code of Criminal Procedure and grant them the right to defence, including the right to use the assistance of counsel for the defence, while leaving the construction of the 'suspect' unchanged.[63] On the other hand, there were proposals to redefine the 'suspect', aimed at moving the moment of acquiring the status of a suspect to an earlier stage. The latter conception seems interesting; it assumes the conjunction of two premises:[64] a material one, in the form of a justified suspicion that a given person has committed a prohibited act, and a formal one, in the form of taking procedural actions aimed at prosecuting them, such as detention, identification parade, collection of evidence or carrying out other activities referred to in Article 74 § 3 CCP, searching the apartment they occupy or their vehicle, or procedural bugging.[65] The conception is close to the solutions of the German Code of Criminal Procedure, which does not provide a formal definition of a suspect. The status of a suspect (*Beschuldigter*) may be acquired either by means of being questioned in such a capacity or by performing activities that are permissible only against a suspect. However, the will to prosecute, in the event of a suspicion of the commission of a crime, must be objectively manifested and manifest itself in a specific action directed against a given person. It is indicated in the German literature that the local legislator deliberately waived the requirement of an explicit, formal presentation of charges, because then the law enforcement authorities could circumvent the requirement provided for in § 163a (4) StPO to inform the suspect of the charges and instruct them on their rights, by refraining

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w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy', *Białostockie Studia Prawnicze*, 2014, No. 15, http://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2193/1/BSP_15_2014_Klamczynska_Ostropolski.pdf [accessed on 6 June 2025]. In the context of the Strasburg standard, see the ECtHR judgment of 27 November 2008 in the case of *Salduz v Turkey*, application no. 36391/02; ECtHR judgment of 24 September 2009 in the case of *Pishchalnikov v Russia*, application no. 7025/04; ECtHR judgment of 14 October 2010 in the case of *Brusco v France*, application no. 1466/07; detention or temporary arrest: ECtHR judgment of 2 March 2010 in the case of *Adamkiewicz v Poland*, application no. 54729/00; ECtHR judgment of 18 January 2022 in the case of *Atristain Gorosabel v Spain*, application no. 15508/15; identification parade: ECtHR judgment of 13 September 2011 in the case of *Serif Oner v Turkey*, application no. 50356/08; on-site reconstruction of the course of the events: ECHR judgment of 19 February 2009 in the case of *Shabelnik v Ukraine*, application no. 16404/03 (all the judgments are available in the HUDOC database).

63 See e.g. R.A. Stefański, 'Prawo do obrony osoby podejrzanej', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, p. 257; G. Krysztofiuk, 'Prawo do obrony osoby podejrzanej oraz faktycznie podejrzanego – uwagi na tle uchwał SN z dnia 26 kwietnia 2007 r., I KZP 4/07 oraz z dnia 20 września 2007 r., I KZP 26/07', in: Bieńkowska B.T., Szafrański D. (eds), *Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Część druga*, Warszawa, 2009, p. 163.

64 Cf. A. Murzynowski, 'Faktycznie podejrzany…', op. cit., p. 39; F. Prusak, 'Podstawa faktyczna przedstawienia zarzutów w procesie karnym', *Palestra*, 1971, No. 6, pp. 50 et seq.

65 S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu…', op. cit., p. 447; S. Steinborn, 'Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi *de lege lata* i *de lege ferenda*)', in: Kardas P., Sroka T., Wróbel W. (eds), *Państwo prawa i prawo karne. Księga Jubileuszowa Prof. A. Zolla*, Vol. 2, Warszawa, 2012, pp. 1800 et seq.

from explicitly blaming the suspect.[66] Normative regulation of the status of a suspect and providing him with the right to formal defence would solve the existing *de lege lata* problem of the deficit of the right to a counsel faced by this category of persons who are not parties, as well as the scope of protection of their procedural interests.

This is not the only possible normative construction, of course. Similar solutions, based on French regulations, have already been reported in the doctrine, taking as a model the institution of a witness with assistance,[67] or, more precisely, the so-called 'assisted witness' (French: *un témoin assisté*).[68] In this context, it is proposed to grant the witness the right to request to be questioned as a person of interest if they are mentioned in the content of the crime report as a potential perpetrator, or if a reasonable suspicion that the person is the perpetrator of the act that is subject to the proceeding could be derived from the information contained in the case files. Such a person would have to be informed about such a right, and the decision should be made by the prosecutor by means of issuing a ruling on this matter that could be appealed against to the court. The proposal, although worth considering, is, however, imperfect because if the data existing at the time of initiation of the investigation or collected in its course sufficiently justify the suspicion that a given person has committed the act, a decision to present charges is issued, it is immediately announced to the suspect, and they are questioned.[69] Thus, the premise for acquiring the status of a person of interest would coincide with the premise for presenting charges.

Secondly, the exclusion of persons of interest from the provisions of Article 87 § 2 CCP does not close the way to identifying other categories of participants in the proceeding whose interest is so significant and obvious that leaving the current discretionary formula of its protection by a counsel seems insufficient. By way of example, cases of a minor witness or a witness with disorders (Article 185a–185c CCP),[70] one who is to be questioned on circumstances related to

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[66] See C. Roxin, B. Schünemann, *Strafverfahrensrecht. Ein Studienbuch*, München, 2009, p. 176.

[67] See K. Żyła, 'Prawo do obrony a przesłuchanie osoby podejrzanej w procesie karnym', *Folia Iuridica Universitatis Wratislaviensis*, 2021, No. 1, pp. 178–180.

[68] In French law, the status of assisted witness was introduced in 1987 and is regulated in the Presumption of Innocence Act of 2000. In turn, the detailed regulations on procedural guarantees for assisted witnesses are laid down in Articles 113–1 to 113–8 of the French Code of Criminal Procedure. This status constitutes an intermediate position between that of a witness and the accused. The investigating judge (French: *un juge d'instruction*) grants this status, when the conditions for indicting a witness have not been met, but at the same time there is a suspicion that the person has committed a prohibited act. The person concerned may acquire the status of an assisted witness, *inter alia*, if identified by the aggrieved party or a witness. Unlike the accused, an assisted witness cannot be placed in pre-trial detention or subjected to electronic monitoring. They do not take an oath that would make them liable for giving false testimony (Article 113–7 of the French Code of Criminal Proceeding). An assisted witness who has already been questioned by the judge may be subject to an investigation if serious or corroborating evidence against them emerge in the course of the investigation.

[69] For more see J. Kosonoga, in: Stefański R.A. (ed.), *System Prawa Karnego Procesowego. Tom X. Postępowanie przygotowawcze*, Warszawa, 2016, pp. 748 et seq.

[70] The legislator recognises the specific situation of these categories of witnesses not only by introducing a special mode of interrogation, but also by providing for the right of counsel to participate in the hearing concerning the interrogation. However, this does not prejudge the right of the witness to a counsel on grounds other than those laid down in Article 87 § 2 CCP, unless the witness also has the status of a party, e.g. the aggrieved party (Article 87 § 1 CPP).

the protection of classified information (Articles 179–180 CCP), or one who posts bail, in particular in connection with a sitting concerning the ruling of forfeiture (Article 270 § 2 CCP), may be given consideration.[71] Their procedural guarantees could be increased either by adding them to the catalogue of entities indicated in Article 87 § 1 CCP or by explicit indication that they have an independent right to appoint a counsel, as the legislator did, e.g. in Article 91a CCP and Article 556 § 3 CCP. A similar solution was adopted, e.g. in German criminal procedure, by allowing an attorney at law to participate in the questioning of a witness under certain rules (*Zeugenbeistand* – Article 68b of the German Code of Criminal Procedure), *inter alia*, when there are 'interests worthy of protection' (*schutzwürdige Interessen*).

Thirdly, for the remaining categories of persons, the current state *de lege lata* seems to be sufficient.

There are other solutions worth considering, such as, e.g. the *desideratum* reported by the National Bar Association (NRA)[72] to grant unlimited access to a counsel at law, with the simultaneous assumption that their absence at the date of a procedural activity does not constitute an obstacle to conducting it; or the proposal to make the refusal to admit a counsel at the stage of a court proceeding also appealable;[73] or a suggestion to grant the right to appeal against the refusal to admit a counsel to the activities of the preparatory proceeding to the prosecutor who is a direct superior, with the obligation to forward this measure directly to the court in the event the appeal is dismissed.[74]

However, it seems that subjectively differentiating the scope of the right to legal counsel, and making it dependent on the level of protection afforded to the interests of persons who are not parties, more fully reflects the idea behind the power of attorney and at the same time allows for maintaining appropriate balance between procedural efficiency and the right to counsel.

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[71] In the case of a surety, the statute provides only for their right to participate in the hearing concerning the forfeiture of the bail or the collection of the bail (Article 270 § 2 CCP).

[72] Resolution of NRA (Polish Bar Association) No. 623/2025 of 20 March 2025 concerning the submission in the public interest of a call for amendment of Article 87 of the Code of Criminal Procedure; also see P. Starzyński, in: Kulesza C. (ed.), *System Prawa…*, op. cit., p. 1063.

[73] M. Piech, 'Odmowa dopuszczenia…', op. cit., pp. 323–332.

[74] See, e.g. public address by the Commissioner for Human Rights of 12 October 2018, II.511.1613.2014.MK, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20pe%C5%82nomocnika%20osoby%20nie%20b%C4%99d%C4%85cej%20stron%C4%85%20post%C4%99powania.pdf [accessed on 6 June 2025].

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