

# ATTORNEY OF A PERSON WHO IS NOT A PARTY TO PREPARATORY PROCEEDINGS

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## ABSTRACT

The subject of this study is an analysis of the current issue of refusing to allow the attorney of a person who is not a party to participate in preparatory proceedings on the basis of the evaluative and unclear grounds set out in Article 87 § 3 of the Code of Criminal Procedure, combined with the lack of any possibility of appealing to the court against the prosecutor's decision refusing permission in this respect, which does not meet constitutional and international standards. *De lege ferenda*, it is proposed that the cited provision be amended, which will eliminate the above violations.

Keywords: attorney, person not being a party, preparatory proceedings, complaint, interest in the proceedings

In preparatory proceedings, a suspect may act through an authorised defence counsel of their choice or court-appointed defence counsel. However, a party other than the accused may appoint an attorney (Article 87 § 1 of the Code of Criminal Procedure, hereinafter also referred to as the 'CCP').<sup>1</sup> Similarly, the legislature has assumed that a person who is not a party to the proceedings may also appoint an attorney. Nevertheless, in this latter case, the legislature has introduced an additional condition, namely that their interests in the ongoing proceedings so require (Article 87 § 2 CCP). *A contrario*, the court, and in preparatory proceedings the prosecutor, may refuse to

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<sup>1</sup> The provisions of Article 87 §§ 1–3 CCP also apply to parties to the proceedings other than the accused, as well as to the judicial stage of the proceedings. However, given the subject of this publication, attention will be focused primarily on the application of the aforementioned provision at the preparatory stage and on persons who are not parties to the preparatory proceedings.



admit an attorney of a person who is not a party to the proceedings to participate in the proceedings if they determine that the protection of that person's interests does not require it (Article 87 § 3 CCP).

A person who is not a party to the proceedings, under Article 88 § 1 CCP, may be represented by an advocate (*adwokat*) or legal adviser (*radca prawny*).<sup>2</sup> As is rightly emphasised in the literature, the legislature has not provided for mandatory power of attorney.<sup>3</sup> However, there are discrepancies in the doctrine as to whether a person who is not a party to the proceedings may request the appointment of an attorney *ex officio* (court-appointed). On the one hand, it is argued that the right of an indigent person to legal aid is not available to a person who, in the pending proceedings, does not have the status of a party to the proceedings.<sup>4</sup> On the other hand, it is pointed out that both an authorised party and another person may request the appointment of an attorney, since Article 88 § 1 CCP, which refers to the appropriate application of Article 78 § 1 CCP, does not differentiate between the entities submitting such a request. This means that any entity authorised to appoint an attorney may submit such a request, and, in the author's opinion, this view should be fully endorsed.<sup>5</sup>

The group of non-parties who may appoint an attorney in preparatory proceedings undoubtedly includes a detained person, the person providing property bail, the person who, during the preparatory proceedings, has the right to lodge a complaint (appeal) against a decision, order, or action violating their rights, a witness, including one questioned pursuant to Article 183 CCP, as well as an anonymous witness or crown witness (state witness), or a suspected person.<sup>6</sup> This is an illustrative list, not encompassing all cases covered by Article 87 § 3 CCP, as discussed in more detail below.

However, the above-mentioned illustrative group of non-parties who may appoint an attorney in preparatory proceedings already indicates that the role of

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<sup>2</sup> The provisions of Article 77, Article 78, Article 78a, Article 81 §§ 1a–2, Article 81a §§ 1–3, Article 83, Article 84, Article 86 § 2, and the provisions issued pursuant to Article 81a § 4 CCP apply to attorneys, as appropriate. In matters not regulated by the provisions of the Code of Criminal Procedure, pursuant to Article 89 CCP, the provisions applicable to civil proceedings apply accordingly.

<sup>3</sup> Cf. R.A. Stefański, 'Pełnomocnik w procesie karnym', *Prokuratura i Prawo*, 2007, No. 2, pp. 52–53; see also, e.g. J. Zagrodnik, M. Burdzik, in: Głogowska S., Karaźniewicz J., Klejnowska M., Majda N., Palka I., Sychta K., Żyła K., Zagrodnik J., Burdzik M. (eds), *Kodeks postępowania karnego. Komentarz*, Warszawa, LEX/el., 2024, Article 87.

<sup>4</sup> Such as K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, Warszawa, 2025, Article 87; E. Bieńkowska, 'Pokrzywdzony w postępowaniu karnym po zmianach z dnia 11 marca 2016 r.', *Prokuratura i Prawo*, 2016, No. 10, pp. 6–26.

<sup>5</sup> R.A. Stefański, 'Pełnomocnik...', op. cit., pp. 52–53, and at the same time, as the cited author points out, the president's decision regarding the granting or refusal to grant an *ex officio* attorney to a person who is not a party does not determine the conditions of Article 87 § 2 CCP, i.e. whether the interests of the person who is not a party require it, as this matter is reserved for the prosecutor and the court deciding whether or not to admit such a person's attorney to participate in the proceedings.

Regarding the institution of an *ex officio* attorney in criminal proceedings, see also the Supreme Court's ruling of 16 November 2000, I KZP 32/00, *Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa*, 2000, No. 11–12, item 98.

<sup>6</sup> Cf. more broadly, R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, Warszawa, LEX/el., 2017, Article 87.

an attorney for such persons can be of considerable importance from the perspective of protecting their rights in preparatory proceedings. An attorney may represent the interests of persons who may be, or already are, within the sphere of interest of law enforcement authorities. As emphasised in the literature, granting a specific person rights in criminal proceedings should, in itself, provide them with the opportunity to benefit from professional assistance, such as that of an attorney, which makes the exercise of those rights effective, and their involvement in the mechanisms of ongoing criminal proceedings requires the creation of optimal conditions for them to perform their role, as defined by the provisions of criminal procedural law, without fear for their interests and their protection.<sup>7</sup> In this regard, an attorney plays a crucial role during the questioning, as a witness, of a person who is not a party to the proceedings. The attorney should ensure compliance with Article 171 § 4, 4a, and 5 CCP, i.e. the prohibition on asking leading questions, interfering with protected secrets (e.g. professional secrecy), or the use of prohibited methods of questioning. To this end, the attorney may, for example, request rectification of the record (protocol) or submit statements for inclusion in the record (protocol). Importantly, a person deprived of the assistance of an attorney may be unable to exercise their rights, especially where legal knowledge is required<sup>8</sup> to exercise them, including the assessment of rights under Article 183 § 1 CCP, which provides that a witness may decline to answer a question if answering it could expose them or their closest person to liability for a criminal offence or a fiscal criminal offence. There is doubt as to whether the attorney of a non-party may ask them questions during questioning. In the author's opinion, the answer to this question should be in the affirmative<sup>9</sup> in light of the literal wording of Article 171 § 2 CCP,<sup>10</sup> which does not limit the ability to ask questions to attorneys of the parties, as Article 370 CCP does,<sup>11</sup> especially since, as the literature on the subject rightly emphasises, there is no normative justification for the view that Article 171 § 2 CCP must be read in conjunction with Article 370 CCP.<sup>12</sup> The sum of the above rights of the attorney for a person who is not a party to criminal proceedings, which determines that attorney's significant role in the criminal process, means that ensuring the presence of such

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<sup>7</sup> Such as J. Zagrodnik M. Burdzik, in: *Kodeks postępowania...*, op. cit., Article 87, and the doctrine cited therein.

<sup>8</sup> Cf. R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania...*, op. cit., Article 87.

<sup>9</sup> See, in this regard, the view of L.K. Paprzycki, who indicates that in preparatory proceedings, such a right is granted to persons authorised to participate in a procedural act and, of course, to the person conducting that act – L.K. Paprzycki, in: Grajewski J., Steinborn S., Paprzycki L.K. (eds), *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, Warszawa, 2015, Article 171.

<sup>10</sup> Under this provision, in addition to the authority conducting the questioning, the right to ask questions is vested in the parties, defence counsel, attorneys, and experts.

<sup>11</sup> During court proceedings, the person being questioned, at the request of the presiding judge, may ask questions in the following order: public prosecutor, auxiliary prosecutor, attorney of the auxiliary prosecutor, private prosecutor, attorney of the private prosecutor, expert, defence attorney, accused, and members of the adjudicating panel.

<sup>12</sup> R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, Warszawa, LEX/el., 2019, Article 171.

an attorney is perceived as one manifestation of giving effect to the constitutional principle of a democratic state governed by the rule of law.<sup>13</sup>

Meanwhile, the conditions for appointing an attorney for a person who is not a party to criminal proceedings are imprecise and thus discretionary, as they refer to the undefined notion of the 'interest' of the person who is not a party to the ongoing proceedings.

It should be emphasised that the concept of 'interest', which underlies the right of a person who is not a party to criminal proceedings to appoint an attorney, has not been statutorily defined. Such a definition cannot be found either in Article 115 of the Penal Code or in the provisions of the Code of Criminal Procedure, despite the latter using the concept of 'interest' in several provisions. For example, Article 2 § 1(3) CCP refers to the purposes of criminal proceedings, specifying that the legally protected interests of the injured party must be taken into account while simultaneously respecting their dignity, while Article 76a § CCP states that, at the request of an accused under 18 years of age, their legal representative or the person in whose care the accused remains may be present during the session or trial in which the accused participates. If the accused does not have a legal representative or a person in whose care they remain, or if the presiding judge considers that the participation of these persons may lead to a violation of the rights or interests of the accused, is unnecessary in view of their welfare, prevents the conduct of the session or trial, or significantly hinders it, the accused may designate another adult person. If the accused has not designated such a person, or if the presiding judge considers that that person's presence may lead to a violation of the rights or interests of the accused, is unnecessary in view of their welfare, prevents the conduct of the session or trial, or significantly hinders it, the presiding judge shall appoint a family assistant referred to in Article 12 of the Act of 9 June 2011 on Family Support and the Foster Care System (Journal of Laws of 2024, items 177, 742, 743, 858 and 1572); Article 85 § 1 CCP, according to which a defence lawyer may defend several accused if their interests are not in conflict; or Article 96 § 1 CCP, according to which parties and non-parties, if they demonstrate a legal interest in the outcome, have the right to participate in the session when the law so provides, unless their participation is mandatory.

There is also no judicial case law that would give content to the specified, vague criteria of Article 87 § 3 CCP, on which procedural authorities could base their decisions regarding the appointment of an attorney by a person who is not a party to criminal proceedings.

However, it should be pointed out, drawing on the holdings developed in judgments in administrative or civil law, although they may also have substantial relevance to this institution in criminal procedure, that this interest cannot be

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<sup>13</sup> M. Piech, 'Odmowa dopuszczenia do udziału w postępowaniu pełnomocnika osoby niebędącej stroną', in: Hofmański P. (ed.), *Kluczowe problemy procesu karnego*, Warszawa, 2011, pp. 323–332.

abstract; it must be real, individual, and direct.<sup>14</sup> It must have a close connection with the individual and also with the specific criminal proceedings.<sup>15</sup>

It should also be emphasised that this interest is more pronounced in the case of persons whose procedural position may change dramatically during the course of the proceedings, from the status of witness to that of suspect. An indication of such a situation may be the questioning of a witness during preparatory proceedings under Article 183 CCP. Undoubtedly, this interest becomes concrete at the moment of detention, that is, at the moment of deprivation of liberty. It should also be attributed to persons whose rights were directly violated or threatened during preparatory proceedings, for example, a person whose items were seized or on whom disciplinary penalties were imposed during the preparatory proceedings.

Finally, this interest may be more apparent in the case of persons who hold a special position in criminal proceedings due to their particular vulnerability during the preparatory proceedings. This refers to anonymous witnesses and crown witnesses, or witnesses who do not speak Polish and are unfamiliar with Polish law.<sup>16</sup> Therefore, there is a group of persons outside the circle of parties to the proceedings whose interests in the preparatory proceedings are evident under Article 87 § 3 CCP. However, it may also happen that this interest is not *prima facie* discernible; it may be known only to the witness and not to the prosecutor, and the question should be asked whether, *a priori*, it is appropriate to refuse admission of the attorney of such a person who is not a party to the proceedings to a procedural act. It is also possible that a witness may have grounds to believe, in a specific case, that they may find themselves within the prosecutor's sphere of interest in a completely different role, namely as a suspect. Thus, they request admission of an attorney to the proceedings, whose task is to protect their interests as a witness during such questioning, even though they are not being heard under Article 183 CCP. We should also ask ourselves whether such an interest may arise for purely psychological reasons, in a situation where a witness is unable to cope emotionally with being summoned to the prosecutor's office and having to testify in the case. Such examples could be multiplied, depending on the specific circumstances.

To summarise this part of the argument, the view presented in the literature should be endorsed that there are, in essence, no objective criteria by which a prosecutor<sup>17</sup> should be guided in depriving a person who is not a party to the proceedings of the opportunity to protect their interests through an attorney. This is especially so since this 'interest' may not be known to the prosecutor, but only to the person who is not a party and their attorney, as, for example, procedural tactics

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<sup>14</sup> Resolution of the Supreme Administrative Court of 22 October 2021, II GSK 900/21, LEX No. 3251800; see also, for example, K. Gajda-Roszczyńska, 'Udział podmiotów innych niż materialnie uprawnione jako stron w procesie cywilnym a kryterium interesu prawnego – zagadnienia wybrane', *Polski Proces Cywilny*, 2015, No. 3.

<sup>15</sup> See J. Lisińska, 'Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym', *Palestra*, 2014, No. 7–8.

<sup>16</sup> *Ibidem*.

<sup>17</sup> And in court proceedings, the court.

may prevent its disclosure, and therefore the prosecutor makes a decision under Article 87 § 3 CCP while, *de facto*, not knowing all the circumstances of the case.<sup>18</sup>

Thus, Article 87 § 3 CCP leaves procedural authorities excessive discretion in this respect, while

'Refusal to admit an attorney on the basis of the cited provision should be limited to obvious situations in which it is clear that the involvement of the persons listed by way of example in the course of the criminal trial does not entail any threat to their interests.'<sup>19</sup>

At the same time, if the prosecutor refuses to admit an attorney for such a person to participate in the preparatory proceedings,<sup>20</sup> the prosecutor issues an order to that effect, which is not subject to appeal to the court, but only to the prosecutor's immediate superior pursuant to Article 302 §§ 1 and 3 CCP.<sup>21</sup>

In this situation, in the author's opinion, the exclusion of judicial review of the prosecutor's rulings refusing to admit an attorney for a person who is not a party to the preparatory proceedings may appear inconsistent with Article 45(1) in conjunction with Article 77(2) of the Constitution of the Republic of Poland, because it closes off the judicial path in the event of the prosecutor issuing a negative decision, and, as indicated above, this decision is based on evaluative and imprecise grounds, referring to an undefined 'interest in the ongoing proceedings'.<sup>22</sup>

For years, successive Commissioners for Human Rights (Ombudsmen)<sup>23</sup> have been calling for amendments to the legislation so as to grant the right to challenge such decisions before a court, in their statements of 2014, 2018,<sup>24</sup> 2020, and 2024. Taking into account the previous case law of the Constitutional Tribunal, they have pointed out that a prosecutor's refusal to allow the attorney of a person who is not a party to participate in preparatory proceedings falls within the scope of the concept of a case under Article 45(1) of the Constitution of the Republic of Poland, and also interferes with constitutionally protected rights, and, in this state of affairs, the prohibition on closing off the judicial path in the event of the prosecutor issuing a decision under Article 87 § 3 CCP should apply, pursuant to Article 77 (2) of the

<sup>18</sup> R.A. Stefański, S. Zabłocki, *Kodeks postępowania...*, op. cit., Article 171. See also M. Piech, *Odmowa dopuszczenia...*, op. cit., pp. 323–332; K. Eichstaedt, *Kodeks postępowania...*, op. cit., Article 87.

<sup>19</sup> J. Zagrodnik, M. Burdzik, in: *Kodeks postępowania...*, op. cit., Article 87, and the doctrine cited therein.

<sup>20</sup> However, the admission of an attorney does not require any positive decision – see more broadly R.A. Stefański, S. Zabłocki, *Kodeks postępowania...*, op. cit., Article 171.

<sup>21</sup> It should be emphasised that, in judicial proceedings, the court issues a decision on this matter which is not subject to any appeal.

<sup>22</sup> See more broadly M. Kolendowska-Matejczuk, *Zaskarżalność rozstrzygnięć incydentalnych uregulowanych w Kodeksie postępowania karnego w świetle standardów konstytucyjnych. Rozważania systemowe*, Warszawa, 2018, pp. 430 et seq.

<sup>23</sup> The draft statements of the Commissioner for Human Rights dated 15 September 2014 and 12 October 2018 were prepared by the author of this publication.

<sup>24</sup> [https://bip.brpo.gov.pl/sites/default/files/Do\\_MS\\_ws\\_odmowy\\_dopuszczenia\\_pelnomocnika\\_osoby\\_niebedacej\\_strona.pdf](https://bip.brpo.gov.pl/sites/default/files/Do_MS_ws_odmowy_dopuszczenia_pelnomocnika_osoby_niebedacej_strona.pdf); <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: 20 March 2025).

Constitution of the Republic of Poland, especially since this decision is issued on the basis of evaluative grounds.<sup>25</sup> Additionally, the Commissioner pointed out that Article 87 § 3 CCP may simultaneously violate the provisions of Directive 2013/48/EU of the European Parliament and of the Council 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 (hereinafter referred to as 'Directive 2013/48/EU'), and the supplementary Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (hereinafter referred to as 'Directive (EU) 2016/1919'), to the extent that it applies to persons who, as witnesses, were not initially suspects or accused persons, but acquired that procedural role during questioning by the police or another law enforcement authority, which should therefore also mean constitutional protection due to the content of Article 41 and Article 42(2) of the Constitution of the Republic of Poland. According to the directives, the right of access to a lawyer should also apply to persons other than suspects or accused persons, and the appropriate remedy in the event of a violation of their rights should be a complaint to a court.<sup>26</sup>

To date, this postulate has not been taken into account, despite the positive opinion of the Codification Commission of 12 December 2014, which supported the position of the Commissioner for Human Rights in this regard. As indicated by the Minister of Justice in a letter addressed to the Commissioner for Human Rights dated 13 May 2015, the amendment to Article 87 § 3 CCP was to be considered in the course of work on a subsequent amendment to the Code of Criminal Procedure. Over the years, the Commissioner for Human Rights has emphasised that a solution should therefore be proposed as set out in the aforementioned opinion of the Criminal Law Codification Commission of 2014, which serves as a model based on the appeal against refusal to initiate and discontinuation of preparatory proceedings, involving lodging the appeal with the immediately superior prosecutor, with the obligation to forward that remedy directly to the court if the appeal is not upheld. This is a solution that accelerates incidental proceedings, while at the same time still allowing the prosecutor to remedy a defective decision, without the need to initiate judicial proceedings.<sup>27</sup>

The Supreme Bar Council (*Naczelna Rada Adwokacka*) has also recently proposed an amendment to Article 87 § 3 CCP, guaranteeing non-parties to criminal

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<sup>25</sup> It should be emphasised that this issue became the subject of proceedings before the Constitutional Tribunal in the form of a constitutional complaint under case number SK 44/15, but the Constitutional Tribunal discontinued the case for formal reasons. For the record, it should be noted that the Council of Ministers and the Prosecutor General submitted written statements regarding the constitutionality of Article 87 § 3 CCP, while the Sejm of the Republic of Poland discontinued of the proceedings – see more extensively at <https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=SK%2044/15> (accessed: 20 March 2025).

<sup>26</sup> <https://bip.brpo.gov.pl/pl/content/rpo-odwolanie-sad-odmowa-ustanowienia-pelnomocnika-osoby-niebedacej-strona-ms-odpowiedz> (accessed: 20 March 2025).

<sup>27</sup> DL-III-072-9/15/1.

proceedings – including witnesses and injured parties – the right to appoint an attorney without the need to obtain the consent of the procedural authorities. The Supreme Bar Council's arguments are therefore broadly consistent with those of the Commissioner for Human Rights, but the proposed solution to the problem presented is slightly different. The Supreme Bar Council's draft provides for an amendment to Article 87 § 2 CCP to read: 'A person who is not a party may appoint an attorney. The attorney's failure to appear at the time scheduled for a procedural act shall not prevent it from being conducted', and for the repeal of Article 87 § 3.<sup>28</sup> As the Supreme Bar Council pointed out, this amendment would guarantee a person who is not a party to the proceedings a genuine right to legal aid without the need for an arbitrary decision by the procedural authorities, by eliminating a provision that leaves significant discretion to those authorities and may lead to restrictions on the right to legal aid. The proposed amendment would remove interpretative uncertainties and eliminate the possibility of arbitrarily limiting access to an attorney, which, in turn, would lead to the full implementation of Article 47 of the Charter of Fundamental Rights of the European Union, which states that everyone has the right to legal advice and to the assistance of a representative in criminal proceedings, as well as ensuring that the provisions of the Code of Criminal Procedure are consistent with Directive 2013/48/EU and Directive (EU) 2016/1919. These changes would better protect the rights of persons who may become suspects or accused persons during the proceedings but who initially appear only as witnesses. Failure to provide them with legal assistance may lead to a situation in which their procedural status suddenly changes, leaving them inadequately prepared to defend their rights. Adopting the proposed provisions would strengthen the right to legal assistance for persons who are not parties to criminal proceedings, raise the standard of fair criminal proceedings, enable the full exercise of the right to defence, eliminate arbitrariness on the part of procedural authorities in matters concerning the admission of an attorney, and ensure the compliance of Polish law with EU standards. At the same time, the Supreme Bar Council indicated that the proposed change would not entail additional costs for the state budget.<sup>29</sup>

In the author's opinion, however, the Supreme Bar Council's draft should be assessed negatively. Referring to the change proposed by the Supreme Bar Council, it should be noted, first, that proposals in this regard have already been advanced in the literature on the subject<sup>30</sup> and, in principle, at least as regards the argument that the current solution is inconsistent with the Constitution and international standards, they do not raise any objections. However, the Supreme Bar Council's justification regarding the absence of additional costs for the state budget if the proposed change is implemented cannot be accepted. If it is accepted, as noted

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<sup>28</sup> Resolution of the Supreme Bar Council No. 623/2025 of 20 March 2025 on the submission of a petition in the public interest to amend Article 87 CCP.

<sup>29</sup> <https://www.adwokatura.pl/z-zycia-nra/nra-skierowala-projekt-zmiany-kodeksu-postepowania-karnego-w-sprawie-prawa-do-ustanowienia-pelnomocnika-dla-osob-niebedacych-stronami/> (accessed: 20 March 2025).

<sup>30</sup> M. Piech, 'Odmowa dopuszczenia...', *op. cit.*, pp. 323–332. Alternatively, the author postulates the possibility of appealing against a court decision refusing to admit an attorney at the stage of court proceedings.

above, that the provisions of Article 78 CCP apply accordingly to the appointment of an attorney under Article 87 CCP, the costs associated with appointing court-appointed attorneys for persons other than parties to the proceedings could significantly burden the state budget, which, in turn, could pose a significant obstacle to adopting the solutions proposed by the Supreme Bar Council.

Furthermore, the author believes that it is necessary to consider whether eliminating any grounds for admitting attorneys for persons who are not parties to the proceedings, on the assumption that Article 78 CCP applies to them, will not affect the length of the proceedings, while at the same time agreeing with the view that limitations on constitutionally guaranteed rights cannot be justified by the need to 'reassure judges and prosecutors against the fear of an invasion by attorneys'.<sup>31</sup> However, it is not difficult to imagine a situation in which, for example at the stage of preparatory proceedings, several dozen witnesses file motions for the appointment of *ex officio* attorneys, which could consequently even paralyse the proceedings. Therefore, the amendment proposed by the Supreme Bar Council could be adopted, supplemented by the assumption that Article 78 CCP does not apply in this situation. The proposed wording of Article 87 § 2 CCP could read: 'A person who is not a party may appoint a representative. The failure of the representative to appear on the date of a procedural act does not constitute an obstacle to its performance. Article 78 CCP shall not apply to the representative appointed under this provision', while simultaneously repealing § 3 of Article 87 CCP. Still, eliminating the possibility of appointing an *ex officio* attorney for persons who cannot afford to appoint an attorney of their own choice could, in turn, lead to a valid claim of a violation of the constitutionally guaranteed right to equal treatment, since some persons could afford such an attorney while others, although in the same or a similar procedural situation, could not. What is more, unlimited access by attorneys to the criminal process may undermine the interests of the investigation or inquiry for another reason. Preparatory proceedings are, by their very nature, covered by confidentiality, and, for the sake of the investigation or inquiry, access at this initial stage of the criminal process to certain information is severely limited or even excluded. Therefore, allowing an attorney to participate in a specific procedural activity may simultaneously constitute disclosure of information from the preparatory proceedings to that attorney. The very scope of the questions put to a witness may already reveal information from the investigation or inquiry. It cannot be ruled out that the same attorney will represent several witnesses in the case or simultaneously defend a suspect. Therefore, mechanisms must exist to prevent the institution discussed in this publication from being used in a manner that violates the principles and objectives of preparatory proceedings.

In summary, it should be noted that:

1. There are no clear criteria for admitting an attorney of a person who is not a party to criminal proceedings, as Article 87 § 3 CCP provides vague and evaluative criteria that are not defined in either the Criminal Code or the Code of Criminal Procedure.

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<sup>31</sup> Cf. R.A. Stefański, S. Zabłocki, in: *Kodeks postępowania...*, op. cit., Article 171. See also S. Waltoś, *Proces karny. Zarys systemu*, Warszawa, 1998, p. 193.

2. These criteria are determined by the prosecutor, who in practice applies the solution provided for Article 87 § 3 CCP in preparatory proceedings.
3. Decisions issued on the basis of Article 87 § 3 CCP are not subject to appeal to the court.
4. These decisions affect the constitutionally protected rights of persons under the jurisdiction of law enforcement authorities.
5. Unlimited access of attorneys for a person who is not a party to preparatory proceedings may violate the legally protected interests of the proceedings at this stage of the criminal process.
6. *De lege ferenda*, it would be appropriate to support the proposal put forward by the Commissioner for Human Rights and the Criminal Law Codification Commission to grant a right of appeal against refusal to admit an attorney for a person who is not a party to criminal proceedings, consisting in submitting the appeal to the directly superior prosecutor, with an obligation to forward that measure directly to the court if the appeal is dismissed.
7. The proposed solution will expedite incidental proceedings while still enabling the prosecutor to rectify a defective decision without the need to initiate court proceedings, and at the same time it meets constitutional and international standards, while allowing the 'interest' criterion under Article 87 CCP to be given content through judicial interpretation.

## BIBLIOGRAPHY

- Bieńkowska E., 'Pokrzywdzony w postępowaniu karnym po zmianach z dnia 11 marca 2016 r.', *Prokuratura i Prawo*, 2016, No. 10.
- Czerwińska D., *Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością*, Warszawa, 2024.
- Eichstaedt K., in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, Warszawa, 2025, Article 87.
- Gajda-Roszczyńska K., 'Udział podmiotów innych niż materialnie uprawnione jako stron w procesie cywilnym a kryterium interesu prawnego – zagadnienia wybrane', *Polski Proces Cywilny*, 2015, No. 3.
- Kolendowska-Matejczuk M., *Zaskarżalność rozstrzygnięć incydentalnych uregulowanych w Kodeksie postępowania karnego w świetle standardów konstytucyjnych. Rozważania systemowe*, Warszawa, 2018.
- Lachowski J., Laskowska-Hulisz A., 'Stosowanie przepisów obowiązujących w postępowaniu cywilnym do postępowania karnego w kwestiach dotyczących pełnomocnika oraz zabezpieczenia', *Państwo i Prawo*, 2019, No. 10.
- Lisińska J., 'Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym', *Palestra*, 2014, No. 7–8.
- Paprzycki L.K., in: Grajewski J., Steinborn S., Paprzycki L.K. (eds), *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, Warszawa, 2015, Article 171.
- Piech M., 'Odmowa dopuszczenia do udziału w postępowaniu pełnomocnika osoby niebędącej stroną', in: Hofmański P. (ed.), *Kluczowe problemy procesu karnego*, Warszawa, 2011.
- Stefański R.A., 'Pełnomocnik w procesie karnym', *Prokuratura i Prawo*, 2007, No. 2.

- Stefański R.A., in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, Warszawa, LEX/el., 2017, Article 87.
- Stefański R.A., Zabłocki S., in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, Warszawa, LEX/el., 2019.
- Waltoś S., *Proces karny. Zarys systemu*, Warszawa, 1998.
- Witkowska K., 'Strony procesowe i ich reprezentanci w postępowaniu przygotowawczym', *Prokuratura i Prawo*, 2012, No. 9.
- Zagrodnik J., Burdzik M., in: Głogowska S., Karaźniewicz J., Klejnowska M., Majda N., Palka I., Sychta K., Żyła K., Zagrodnik J., Burdzik M. (eds), *Kodeks postępowania karnego. Komentarz*, Warszawa, LEX/el., 2024, Article 87.

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