

PART III

**STANDING IN CRIMINAL MATTERS**

Chapter 1.

SUPPORTING JUSTICE – SOCIAL REPRESENTATIVE  
IN THE POLISH CRIMINAL PROCEEDINGS

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The principle of participation of the citizenry in a criminal trial can be divided into the following scopes<sup>2</sup>:

- 1) the principle of participation of the citizenry in a narrow (or strict) sense, which is defined as the direct participation of citizens in the administration of justice (lay judges in the Polish criminal proceedings),
- 2) the principle of participation of the citizenry in a broad sense, which includes, in addition to the above-mentioned direct participation in the justice system, also some forms of indirect participation, i.e. (that is) cooperation in the criminal proceedings in other roles, e.g. a social representative or a social guarantor,
- 3) the principle of participation of the citizenry in the broadest sense, which embraces the above-mentioned forms but also

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2 B. Janusz-Pohl, *Zasada udziału czynnika społecznego*, [in:] P. Wiliński (ed.), *System prawa karnego procesowego. Tom III. Cz. 2. Zasady procesu karnego*, Warszawa 2014, pp. 1429-1433, 1456-1459 and references therein.

includes the participation as the audience at the main hearing or as citizens cooperating in criminal prosecutions.

A social representative is placed in the second of the above categories. This entity is an example of participation of social organisations in a criminal trial.

A social organisation in a criminal trial may appear in the three following roles:

- 1) the entity delegating a representative to participate in court proceedings (Articles 90-91 of the Code of Criminal Procedure<sup>3</sup>),
- 2) the entity offering mediation services and acting as a mediation centre (Article 23a of the ccrp.),
- 3) the entity providing the social guarantee for the suspect or the accused as a coercive measure (Article 271 of the ccrp.).

The institution of a social representative has been present in the Polish criminal trial since the entry into force of the former Code of Criminal Procedure of 1969. Despite a marginal role of a social representative in the judicial practice under the then ccrp. and proposals to abolish it<sup>4</sup>, a separate Chapter 10 which contains laconic regulations on a social representative was finally included in the ccrp., which was adopted on 6 June 1997. Only two articles were devoted to the representative of a social organisation.<sup>5</sup>

In the doctrine the social representative is defined as a representative of the public interest, i.e. an entity obliged to maintain impartiality and

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3 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997, No. 89, item 555, as amended), hereinafter referred to as ccrp.

4 See M. Jakubik, *Przedstawiciel społeczny w postępowaniu karnym*, Poznań 2014, pp. 34-40 and references therein.

5 Article 90 of the ccrp. § 1. In court proceedings, until the beginning of the judicial examinations of the case, a representative of a social organisation may declare participation in the proceedings if a community interest or important individual interest so requires, provided that the protection of such interest, in particular that of freedom and human rights, belongs to the statutory duties of that organisation. § 2. In its application, a social organisation must indicate its representative, who submits to the court a letter of authorisation. § 3. The court admits the representative of a social organisation if it is in the interest of the administration of justice. Article 91 of the ccrp. A representative of a social organisation admitted to participation in court proceedings may participate in the trial and make oral and written statements.

objectivity and to represent a social organisation, and not one of the parties of the proceedings.<sup>6</sup>

Three conditions for the admission of a social representative to the criminal trial result from the contents of Article 90 of the ccrp.:

- 1) the representative represents a social organisation, the statute of which provides for the implementation of tasks related to the protection of the public interest or important individual interest, in particular the protection of freedom and human rights,
- 2) there is a need to protect such formulated interest in the criminal proceedings,
- 3) the participation of a representative of a social organisation in the criminal trial is in the interest of justice.

The Polish legislator allowed a social organisation to delegate a representative but neither the ccrp nor other Acts define the term “social organisation” in the way which would raise no doubts. A legal definition of a social organisation is included only in the Act of 14 June 1960 – the Code of Administrative Procedure<sup>7</sup>, which indicates in Article 5 § 2 point 5 that social organisations are professional organisations, self-government organisations, cooperatives and other social organisations. The ambiguity of such a defined concept is counteracted by the judicature of the Supreme Administrative Court, which pointed out that a social organisation is an association (corporation) formed by citizens to ensure their active participation in political, social, economic and cultural life.<sup>8</sup>

A generally formulated catalogue of social organisations is contained in Article 12 of the Polish Constitution<sup>9</sup> which states that the Republic of Poland shall ensure freedom for the creation and functioning of trade

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6 See, e.g.: W. Daszkiewicz, *Przedstawiciel społeczny w procesie karnym*, Warszawa 1976, p. 81; T. Grzegorzcyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2011, pp. 389-390; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do artykułów 1-296*. Tom I, 2nd ed., Warszawa 2004, p. 449; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2013, p. 198; J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Tom I. Komentarz do art. 1-424*, Warszawa 2013, p. 333.

7 Consolidated text – Journal of Laws of 2013, item 267, as amended.

8 Decision of the Supreme Administrative Court of 12 January 1993, I SA 1762/92, ONSA 1993, No. 3, item 75. See also the resolution of the Supreme Administrative Court of 12 December 2005, II OPS 4/05, ONSA 2006, No. 2, item 37.

9 Journal of Laws of 1997, No. 78, item 483, as amended.

unions, socio-occupational organisations of farmers, societies, citizens' movements, other voluntary associations and foundations.

The term “social organisation” is increasingly displaced – also in the legal acts – by more “modern” or more “western” term “NGO” (non-governmental organisation). An example of such a legal act is the Act of 24 April 2003 on Public Benefit and Volunteer Work<sup>10</sup> which in Article 3 section 2 lists which entities are regarded as such organisations. Non-governmental organisations are: 1) entities which do not form part of the public finance sector as defined in the Act on Public Finance; 2) which do not operate for profit – corporate and non-corporate entities which, according to separate legal provisions, have capacity to perform acts in law, such as foundations and associations. The term “NGO” also replaced a social organisation in the Act of 17 November 1964 – the Code of Civil Procedure.<sup>11</sup> As it seems, both terms can be used interchangeably.

Another element that decides on the admission of the representative of a social organisation to a criminal trial is the ability to carry out tasks related to the protection of public interest or important individual interest which should be enshrined in the statute or other appropriate acts underlying the activities of the organisation. The ccrp lists the protection of freedom and human rights as an example (as it seems most important) of such interest. However, it certainly is not sufficient to include the general imprecise clause in the statute as, for example, “the task of the organisation is to protect the public interest and an important individual interest”. The statute should clearly indicate the goals and objectives as far as the ways of their implementation are concerned, and it is the court that assesses whether that specific task falls under the category of public interest or the protection of important individual interest.

The Polish Supreme Court took the view that a social representative points to the facts or circumstances which are relevant from the point of view of public interest defended by him and which may coincide in whole or in part with the interests of the accused, may be neutral

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10 Consolidated text – Journal of Laws of 2010, No. 234, item 1536, as amended.

11 Consolidated text – Journal of Laws of 2014, item 101, as amended.

or oppose to these interests.<sup>12</sup> Ultimately, however, the court ruling in a specific case and taking a decision on the admission of a social representative is burdened with the responsibility to establish what the public interest or important individual interest is.

Another condition which also belongs to the category of undefined general clauses in the legal system is the existence of the interests of justice in the participation of a representative of a social organisation in a criminal trial. Again it is the court that has the power and at the same time is obliged to assess whether the admission of a social representative is in the interests of justice. According to the Supreme Court, the court cannot refuse to admit to participate a representative of a social organisation in the hearing, taking into consideration the reason that his speech will be restricted only to the submission of statements favourable to the accused, since such statements shall not be detrimental to the interests of justice.<sup>13</sup>

The mode of joining of a social representative to the trial is regulated in very general terms in Article 90 of the ccrp. The first step which is not regulated by the ccrp. is the appointment of a specific person as a social representative by a social organisation. The appointment should be done on the basis of an act of the appropriate authority of the organisation, usually the executive body (typically a board or council with regard to collective bodies or president, chairman or general secretary). It is important that the power to designate a social representative by the authority of an organisation should result from the statute, resolution, regulation, or any other act defining the system of powers of the organisation. The competence of the executive authority reserved in the relevant statutory regulation is most often presumed, although it is possible that the act of designation could be performed by legislative body as, for example, general assembly, unless the statute constitutes an exhaustive catalogue of competence of such a body. The problem may arise if the organisation has an extended internal structure and apart

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12 *Wytyczne wymiaru sprawiedliwości i praktyki sądowej w sprawie udziału przedstawiciela społecznego w postępowaniu przed sądami wojskowymi*, Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa 1980, No. 10-11, item 79.

13 Judgment of the Supreme Court of 25 November 1976, Rw 408/76, Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa 1977, No. 1-2, item 15.

from the supreme authorities it also possesses local units or branches (sometimes with a legal personality) with their own authorities. It may occur that more than one competent authority would make the act of designation to the same criminal proceedings (e.g. the main board and the board of one of the branches or the boards of two or more branches of the organisation). As the ccrp does not limit the number of social representatives designated by the same organisation as well as the number of organisations entitled to designate a representative to the same trial, therefore, the admission of representatives delegated by various authorities of the same organisation must be considered as permissible, especially when various bodies of the same organisation or individual social organisations point to the protection of different public interest or important individual interest.

The act of designation should take the form of a written resolution (in the case of a collegial body) or decision (in the case of one-man body). It does not matter whether the resolution will constitute a separate document or be recorded in the minutes of the meeting, but in any case the document with the signatures of persons authorized by the statute should be submitted to the court. Personal details of a social representative should clearly result from the act of designation. Theoretically one can imagine an oral act of designation (if it is not excluded by the statute or any other act of the organisation) for one-man body but an appropriate statement simultaneously with the application of a social representative would have to be made in a trial or a hearing by the entitled authority of the organisation and put on record. Although the majority of the doctrine agrees with the view that notification of the representative required by Article 90 § 2 of the ccrp. should be made in writing while retaining the elements specified in Article 119 § 1 of the ccrp.<sup>14</sup>, no provision of the ccrp excludes an oral notification provided that it would be done by an entitled person in a trial or a hearing before

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14 See P. Hadrych, *Warunki dopuszczenia przedstawiciela społecznego do udziału w postępowaniu sądowym*, Prokuratura i Prawo 2002, No. 2, p. 68; T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne...*, p. 390. The elements of a writ indicated in Article 119 § 1 of the ccrp are: 1) the identity of an agency to which it is addressed and the case with which it is concerned, 2) the identity and address of a person submitting a writ, 3) a request or statement with substantiation, if necessary, 4) the date and signature of a person submitting the writ.

a trial and put on record.<sup>15</sup> As in the case of the act of designation, the application of a social representative should also include an indication of a specific person (Article 90 § 2 of the ccrp.).

The third *sine qua non* condition for the admission of a social representative to the trial is the written authorization issued by the appropriate body of a social organisation and submitted to the court by the designated social representative. The provisions of the ccrp. do not limit the circle of people who may be designated by the organisation only to its members or to the members of its bodies.

Pursuant to Article 90 § 1 of the ccrp., a social representative submits his participation in the judicial proceedings until the commencement of the main hearing. Participation of a social representative in criminal proceedings is limited only to the proceedings before the court. Participation in preparatory proceedings and judicial proceedings in which there is no main trial (for example penal order proceeding) is excluded. The notification must therefore take place after the filing of indictment at the earliest and by the start of the trial, that is, the start of reading of the indictment in the trial at the latest. In the literature, albeit not unanimously, one indicates that in the case of filing an application in the preparatory proceedings, such a writ should be attached to the files and the decision should be made by the court after the commencement of judicial proceedings in a hearing pursuant to Article 339 § 3 of the ccrp.<sup>16</sup> The ccrp. does not specify whether it refers to the commencement of the first trial in all criminal proceedings in the case or to the commencement of any trial, so also in the retrial (when the appellate court reverses the judgment and refers the case to the court of first instance for the purpose of re-examination), or in the appeal proceedings. It seems the second option should be accepted as it is difficult to assume that the public interest, important individual interest or the interest of justice would be put into effect depending on the stage of the proceedings.

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15 Oral application is admitted by Z. Gostyński, [in:] Z. Gostyński (ed.), *Kodeks postępowania karnego. Komentarz*. Tom I, Warszawa 2000, p. 353.

16 See A. Wierciński, *Przedstawiciel społeczny w polskim procesie karnym*, Poznań 1978, p. 66; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...*, p. 450. The contrary view was expressed in: T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne...*, p. 390.

The court conducting the case is empowered to decide on the acceptance or refusal of the admission of a social representative. The decision is issued in a hearing before the main trial or in the main trial before the opening of the judicial process. The most appropriate moment to submit the request and written authorization by the representative of a social organisation as well as to hear the request by the court is the phase of a main trial when the presiding judge after verifying the presence of the parties asks for formal motions. The decision cannot be subject to interlocutory appeal as pursuant to Article 459 § 1 of the ccrp., it does not preclude the possibility of delivering a judgment, it does not pertain to a preventive measure and it is not a decision indicated by the law as possible to be appealed.

A social organisation may replace its representative by another person (who shall submit a new written authorization issued on the basis of a new resolution of the competent authority indicating a new representative) at any time without examining that fact by the court. The court examines the admissibility of a representative of the organisation only in *abstracto*, not in *concreto*. A social organisation may also withdraw its representative from the proceedings at all. No provision of the ccrp entitles the court to remove a social representative from the proceedings, even if the court finds that previously there was no interest in the admission of the representative to the proceedings. The court, however, would be entitled to change a decision if there was no formal basis for the admission of the representative from the outset, for example non-existence or liquidation of an organisation during the proceedings, the lack of proper resolution or application coming from the competent organisation authority or falsification of such a document, protection of certain interests is not the task of a particular organisation.<sup>17</sup>

The most important powers of a social representative are listed in Article 91 of the ccrp. He or she may participate in the trial and make oral and written statements. Conversely a representative cannot participate in other activities as a hearing or activities outside the courthouse exercised by a delegated judge. As any other authorized entity, a social representative should be notified of the date of a trial, and if the court

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17 T. Grzegorzcyk, J. Tylman, *Polskie postępowanie karne...*, p. 391.



decided on the secrecy of hearing, a representative may be designated by the parties as the so-called man of trust and remain in the courtroom (Article 361 § 1 of the ccrp.) unless there is a risk of disclosure of information classified as “secret” or “top secret”. The access to case files may be granted upon the consent of the president of the court pursuant to Article 156 § 1 sentence 2 of the ccrp. The above principles also apply to the appeal trial.

The right of a social representative to submit oral statements can be realized only at the main trial. It is not synonymous with the possibility to ask questions during examination of witnesses and experts.<sup>18</sup> A social representative cannot file evidentiary motions or appeals. In turn, the right to submit oral statements is extended with the opportunity to participate in the phase of closing arguments, which depends on the discretion of the presiding judge who, if needed, can give a voice to a social representative before a defence counsel and the accused (Article 406 § 1 of the ccrp.).

The third right – to make written statements – can be exercised throughout the entire judicial proceedings (also outside the main hearing). As it seems, an adequate written statement may be made also in connection with a hearing of the court.

The range of oral as well as written statements made by a social representative at the main trial should be consistent with his role in criminal proceedings.<sup>19</sup> The statements should also contain information relevant to the case and the course of the proceedings.<sup>20</sup> They may include a point of view of a social representative as to the adjudicated matters as well as the suggestions for decisions to be taken out by the court.<sup>21</sup> Statements and declarations do not have to be neutral or impartial. Although a social representative is not formally a representative of any of the parties, however, since he can be admitted to the proceedings

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18 See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...*, p. 453.

19 Z. Gostyński, [in:] Z. Gostyński (ed.), *Kodeks postępowania karnego...*, p. 354.

20 K. Dudka, *Formy udziału organizacji społecznej w procesie karnym*, *Ius Novum* 2007, No. 4, p. 46.

21 P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...*, p. 453; the judgment of the Supreme Court of 23 January 1978, *Rw 452/77*, *Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa* 1978, No. 2-3, item 30.

because of the need to protect the important interest of the individual, he has the right to act on behalf of a social organisation in favour of a specific party.<sup>22</sup>

A specific type of a written statement provided for in Article 91 of the ccrp. is the opinion of the so-called friend of the court (*amicus curiae* opinion), which is a kind of a legal opinion of the NGO that is interested in particular proceedings due to the statutory objectives pursued by that organisation. Such an opinion presents a particular view of the NGO on the issue examined by the court. It has to help the court in a comprehensive examination of the case, including arguments and views that may not necessarily be submitted by the parties in the proceedings.<sup>23</sup> The *amicus curiae* opinion may be presented in criminal proceedings not only by the authorized representative of a social organisation but also by a social organisation as a result of observation of the trial carried out by its representatives or as a means of expressing the position of the organisation.<sup>24</sup> In the latter case, the opinion may be submitted also to a body conducting preparatory proceedings. It is assumed that the opinion should be based upon three elements: a description of the facts of the case, an indication of doubts concerning the conduct of the evidence or the assessment of their merit with legal justification, a description of standards of the right to a fair trial if it is relevant to the case.<sup>25</sup>

Although the ccrp. does not prohibit to examine a social representative as a witness, this issue raises some divergences in the doctrine.<sup>26</sup> The opponents argue that in order to maintain objectivity by a social representative, if he or she was called as a witness, an authorized

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22 See P. Hadrych, *Warunki dopuszczenia...*, pp. 63-64. Engaging a social representative on the side of both the accused and the victim is also admitted by P. Hofmański, E. Sadzik, K. Zgrzyzek, *Kodeks postępowania karnego...*, p. 451. The contrary view was expressed by K. Wilamowski who makes an assumption that a social representative does not favor any side and represents the only organisation which delegated him. His or her purpose is to assist the court in searching for the truth and the protection of violated rights – K. Wilamowski, *Obserwacja procesu karnego jako instrument działania organizacji pozarządowej w sprawach indywidualnych. Podręcznik*, Warszawa 2006, p. 25.

23 M. Bernatt, *Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich*, [in:] Ł. Bojarski (ed.), *Sprawny sąd. Zbiór dobrych praktyk. Część druga*, Warszawa 2008, p. 184.

24 K. Wilamowski, *Obserwacja procesu karnego...*, p. 22.

25 *Ibid.*, pp. 22-23.

26 See M. Jakubik, *Przedstawiciel społeczny...*, pp. 78-79 and references therein.

body of a social organisation should revoke his mandate and possibly designate another representative.<sup>27</sup>

A social organisation may also carry on monitoring (observation) of criminal trials thanks to the commitment of its representatives. The main purpose of monitoring is to assess the correctness and fairness of the proceedings. Admittedly, the provisions of the ccrp. do not expressly provide for this type of action but the principle of openness of the proceedings in its external aspect, also known as the principle of the audience, does not exclude the presence of independent observers in the courtroom.<sup>28</sup>

The described model of participation of NGOs in criminal proceedings would seem quite attractive from the point of view of society as well as justice system itself. A social representative, although disposing of few powers, has the opportunity to watch over the proper course of proceedings as well as expose their position in an extended way. Unfortunately, participation of social representatives in criminal proceedings is statistically less than negligible at present. Social organizations become involved primarily in the trials that attract a lot of attention, forgetting that the public interest or important individual interest also deserve protection even in mundane cases which primarily affect local communities. Hopefully, the reform of criminal procedure, which entered into force on 1 July 2015, will make us aware of the need for greater involvement of NGOs in criminal proceedings because strong emphasis on the adversarial principle may endanger the principle of truth and cause disparities between the parties of the proceedings and unfair and unjust judgments.

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27 See K. Wilamowski, *Obserwacja procesu karnego...*, p. 26.

28 About the monitoring of criminal proceedings extensively see: K. Wilamowski, *Obserwacja procesu karnego...*, p. 26; Ł. Bojarski, *Obserwacja procesów sądowych jako metoda działania organizacji pozarządowych – cele i rodzaje obserwacji*, [in:] Ł. Bojarski (ed.), *Sprawny sąd. Zbór dobrych praktyk. Część druga*, Warszawa 2008, pp. 190-194; M. Ejchart, *Program „Courtwatch – obserwator sądu”*, [in:] Ł. Bojarski (ed.), *Sprawny sąd...*, pp. 194-202.