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APPOINTED COUNSEL FOR THE DEFENCE IN THE POLISH CRIMINAL PROCEEDING

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GENERAL REMARKS

Due to the way in which the defence relation is established in the criminal proceeding, defence counsel chosen by the accused and ex officio appointed counsel for the defence may be distinguished. The former results from a contract entered into by the accused and his defence lawyer, the latter is a lawyer appointed by the court president or a judicial officer, or based on the court's decision. Counsel for the defence may be appointed in procedural circumstances strictly defined in the statute. In the preparatory proceeding, counsel for the defence is appointed if the accused proves that they cannot afford to employ a defence lawyer without prejudice to their and their family's necessary support and maintenance (Article 78 § 1 CPC). On the other hand, in the judicial proceeding, counsel for the defence is appointed on demand of the accused with no need to provide any reasons (Article 80 § 1 CPC). Regardless of that, counsel for the defence may be also appointed in the event of obligatory defence and the accused has no counsel of their choice (Article 81 § 1 CPC). The statute lays down a range of special provisions that oblige the proceeding organ to appoint counsel for the defence in connection with a given proceeding.

The right to appointed counsel for the defence is not only a complex theoretical issue but also a key practical aspect of law enforcement. First of all, however, it is an institution that has been substantially changed as a result of the latest amendment to the Criminal Procedure Code of 27 September 2013[1]. Thus the discussed subject matter is especially topical.

[1] Act of 27 September 2013 amending Act–Criminal Procedure Code and some other acts (Journal of Laws, item 1247 with subsequent amendments). The Act entered into force on 1 July 2015.

COUNSEL FOR THE DEFENCE APPOINTED DUE TO THE FINANCIAL STATUS OF THE ACCUSED

The financial situation of the accused constitutes grounds for appointing counsel for the defence only in the preparatory proceeding. At the stage of the proceeding before a court it is an unimportant circumstance. The accused who has not chosen defence counsel may demand that the court appoint counsel for the defence if they prove that they cannot afford to employ a defence lawyer without prejudice to their and their family's necessary support and maintenance (Article 78 § 1 CPC).

The financial status of the accused is subject to examination from the moment of filing an application. Counsel should be appointed when the accused has no means to cover the defence lawyer's costs as well as when the possessed means are insufficient to cover these costs and live at the subsistence level. It cannot be assumed, however, that a "hidden" source of income and potential income opportunities determine the financial situation[2]. The courts rightly decide that if the accused had spent the possessed means on something else than a defence lawyer and it had not been a necessary expenditure, Article 78 § 1 CPC cannot be applied[3].

The legislator does not settle the form in which the accused should prove their financial status being grounds for the appointment of counsel. Article 78 § 1 CPC does not require that the accused provide documents confirming their financial status but only that they prove that they cannot afford to employ a defence lawyer without prejudice to their and their family maintenance. Thus, the requirement may be met through the submission of a declaration on one's financial status in writing. These can be various certificates containing information on remuneration, pension, possession, family members as well as (one's own and family members') health condition resulting in increased expenditure[4]. There may also be some other important circumstances such as unemployment, education, being dependent on parents or guardians, liability to pay maintenance or alimony, etc.[5] Obviously, a court may withdraw the appointment of counsel if it finds that the circumstances constituting grounds for the appointment of counsel do not actually exist (Article 78 § 2 CPC). It can occur when the accused misinforms the proceeding organ or when their financial situation changes[6].

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2 Ruling of the Supreme Court of 17 July 2014, V Kz 26/14, Lex no. 1487098.

3 Ruling of the Supreme Court of 27 January 2010, II KO 117/09, OSNKW 2010 no. 4, item 38.

4 See ruling of the Supreme Court of 25 November 2010 – V KZ 70/10, Biuletyn Prawa Karnego 2010, no. 9, item 1.2.12.

5 See A. Zachuta, Bezpłatna pomoc prawna z urzędu [Ex officio appointed free legal assistance] (Article 78 § 1 CPC), *Przegląd Sądowy* 2005, no. 7–8, pp. 194–196.

6 For more see T. Grzegorczyk, [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to amendments]*, Warszawa 2015, pp. 47–48; also see J. Giezek, Obrońca i pełnomocnik z urzędu w procesie karnym – założenia a rzeczywistość [Counsel for the defence and proxy ex officio in criminal proceeding – assumptions and reality], *Jurysta* 2002, No. 7–8, p. 48 and the following; P. Kardas, Projektowany model obrony z urzędu a zasada prawdy materialnej [Designed model of defence ex officio and a principle of objective truth], *Palestra* 2013, No. 5–6, p. 9 and the following; S. Kowalski, Problematyka obrony z urzędu w postępowaniu karnym – na tle wyroku Trybunału Konstytucyjnego z dnia 8 października 2013 r., K 30/11 [Defence ex officio in criminal proceeding against the background of the sentence of the Constitutional Tribunal of 8 October 2013, K 30/11], [in:]

The opinion that depriving the accused of the right to appointed counsel for the defence in the situation laid down in Article 78 § 1 CPC is a flagrant contempt of this provision and Article 6 CPC and violates the standards of a fair trial remains up-to-date[7]. It is similar to the statement that dismissing a motion to appoint counsel for the defence without former information of the accused about the need to support the circumstances with appropriate documents (Article 16 § 2 CPC) violates a court's loyalty and results in depriving the accused of the right to defence, which can influence the adjudication[8].

What can arouse doubts is whether appointed counsel for the defence under Article 78 § 1 CPC acts only until the end of the preparatory proceeding or whether Article 84 § 1 CPC determines the temporary scope of action of the appointed counsel for the defence, i.e. whether the counsel shall act in the whole proceeding including undertaking steps after the sentence comes into force. The former idea dominates jurisprudence[9]. However, it seems that the content of Article 78 § 1 CPC neither excludes nor modifies the provision of Article 84 § 1 CPC. The former provision refers to the conditions for appointing counsel for the defence and the latter defines time limits for the counsel's acting in the proceeding. As a result, the appointed counsel for the defence in the preparatory proceeding under Article 78 § 1 CPC acts until the moment determined in Article 84 § 1 CPC. Adoption of the defence in stages would be also doubtful from the pragmatic point of view because it would mean that – in case the accused expresses the will to continue to have appointed counsel – they would be represented by different defence lawyers, which would reduce the efficiency of defence actions. The approval of such an opinion would disrupt defence. For example, a different defence lawyer would have to participate in a session regarding a motion filed under Article 335 CPC than the one who participated in developing its content. As a result, he would support a motion he had not formulated. Thus, appointing new counsel for the defence only because one stage of the proceeding has ended does not have any substantial grounds[10].

(ed.) D. Gil, *Prawo sądowe w orzecznictwie Trybunału Konstytucyjnego [Court rules in the judicial decisions of the Constitutional Tribunal]*, Lublin 2014, p. 46 and subsequent ones; R.A. Stefański, Prawo do wyznaczenia obrońcy z urzędu ze względu na niezamożność [Right of appointed counsel for the defence because of poorness], [in:] (ed.) A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński, *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi [Adversarial model of criminal proceeding: Book presented to Professor S. Stachowiak]*, Warszawa 2008, p. 343 and subsequent ones.

[7] Sentence of the Supreme Court of 29 January 2002, II KKN 386/99, OSN *Prokuratura i Prawo* 2002, No. 10, item 6.

[8] See sentences of the Supreme Court of 8 December 1996 – III KKN 67/96 Wokanda 1997, no. 2, p. 8; sentence of the Supreme Court of 18 December 2002 – II KK 326/02, unpublished; sentence of the Supreme Court of 29 January 2002 – II KKN 386/99, OSNPK 10/02 item 6.

[9] See e.g. T. Grzegorczyk, *Obrońca i pełnomocnik… [Counsel for the defence and proxy…]*, p. 63 and the following; D. Świecki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych [Procedural actions undertaken by counsel for the defence and proxy]*, Warszawa 2015, p. 50; K. Eichstaedt [in:] D. Świecki (ed.), *Kodeks postępowania karnego – Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015, p. 355.

[10] See S. Steinborn, O kilku kontrowersjach i wątpliwościach dotyczących obrońcy i pełnomocnika z urzędu wyznaczanych w postępowaniu sądowym na żądanie strony [On some controversies and doubts concerning counsel for the defence and proxy appointed on a party's demand], [in:] *Studia i Analizy Sądu Najwyższego, Materiały Naukowe [Studies and Analyses of the Supreme Court: Scientific materi-*

COUNSEL FOR THE DEFENCE APPOINTED ON DEMAND OF THE ACCUSED

The amendment to the Criminal Procedure Code of 27 September 2013 to a great extent increased the contradictoriness of a court proceeding and limited a court's paternalism towards the parties to the trial, especially towards the accused. The natural consequence of that fact was making it easier for the accused to have counsel for the defence. As a result it was assumed that at this stage – in order to maintain the principle of the equality of arms – the use of the right to appointed counsel for the defence should only result from the will of the accused. Under Article 80 § 1 CPC, following the motion filed by the accused who does not have a defence lawyer of their choice, the president of a court, a court or a judicial officer appoints counsel for the defence – unless Article 79 § 1 or 2 CPC or Article 80 CPC (obligatory defence) is applicable. In such a case, counsel for the defence must take part in the trial. Pursuant to the same rules, the accused may demand that counsel for the defence be appointed in order to perform a given procedural action in the course of a court proceeding (Article 80a § 2 CPC).

In order to avoid the possibility of overusing the rights laid down in Article 80a § 1 and first of all Article 80a § 2 CPC, a limitation was introduced and a successive appointment of counsel for the defence is allowed only in specially substantiated cases (Article 80a § 3 CPC). The bill to amend the statute did not contain this limitation and it was connected with a risk of proceeding obstruction. Under Article 80a § 2 CPC in connection with Article 80a § 1 CPC, a motion filed by the accused is binding for a court and he assesses on his own what court proceeding actions require counsel's participation. Taking into account the fact that even partial participation in a court proceeding requires time to get to know the case files, Article 80a § 2 CPC might be treated instrumentally in some situations. For example, the accused might file a motion to appoint counsel for the defence in connection with every event of interviewing successive witnesses. If the time necessary to respond to the motion, the appointment of counsel for the defence and the necessity to get to know the case files are taken into account, the behaviour of the accused – although in agreement with *favor defensionis* – might cause excessive unreasonable delay of the trial. Regardless of the above, the lack of limitation of Article 80a § 3 CPC was controversial also from the point of view of the need to maintain the adopted defence policy. In extraordinary cases, one might imagine the participation of many defence lawyers in a court proceeding and each of them implementing different defence ideas[11]. Eventually, however, the possibility was rightly eliminated and a rule was introduced that re-appointment of counsel for the defence may take place only in specially substantiated circumstances. Thus, on the

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als], vol. II, Warszawa 2015, p. 114; M. Wąsek-Wiaderek, Aktywność obrońcy i pełnomocnika na etapie postępowania przejściowego [Activenes of counsel for the defence and proxy at the preparatory proceeding stage] [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to the amendments]*, Warszawa 2015, p. 230 and subsequent ones.

[11] See J. Kosonoga, Kilka uwag na temat projektowanych zmian w kodeksie postepowania karnego [Some comments of planned amendments to the Criminal Procedure Code], *Ius Novum* 2012, no. 1, p. 10 and subsequent ones.

one hand, the accused must take decisions to what extent a defence lawyer should be involved in the trial and, on the other hand, a judicial organ must assess – in the context of a general proceeding principle (Article 6 CPC) – the grounds for re-appointment of counsel for the defence (Article 80a § 3 CPC).

A motion to appoint counsel for the defence under Article 8a § 1 should be filed within seven days from the date of serving a summons on the accused or delivery of notification of the trial. Motions that are filed after the deadline are dealt with if this does not cause a trial adjournment (Article 353 § 5 CPC).

COUNSEL FOR THE DEFENCE APPOINTED BECAUSE OF A LACK OF OBLIGATORY DEFENCE COUNSEL

Obligatory defence in the criminal proceeding takes place when the regulations impose on the accused an obligation to use the assistance provided by counsel for the defence. It constitutes an exception to the right to free-will defence and is an obligation to have counsel for the defence and their participation in strictly limited cases[12]. The accused cannot decline to have such defence or renounce their right to defence at all, or refuse to accept the appointment of counsel for the defence and their participation in trial if they do not have a defence attorney of their choice.

Thus, the appointment of counsel for the defence takes place when defence is obligatory and the accused does not have a defence lawyer of their own choice. Because of the need to prefer counsel for the defence of one's own choice as the one that is a more favourable to the accused form of developing the defence relationship, it is rightly suggested that before appointing counsel for the defence the accused or a person authorised to act on their behalf should be informed that there is an obligatory defence case requiring the appointment of counsel for the defence if the interested parties do not indicate a will to appoint one of their choice, give them an adequate short time limit and then, if the accused does not appoint defence attorney of their own choice, counsel for the defence should be appointed[13].

The procedural importance of obligatory defence is clear. It was emphasised already in the pre-war period that there are situations in which the accused is deemed to be unable to defend and that is why they need the assistance of a qualified entity[14]. There are public reasons and the need of adequate representation of the interests of the accused[15]. It is also important that it is necessary to keep balance between the parties

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[12] R. Stefański, *Obrona obligatoryjna w polskim procesie karnym [Obligatory defence in the Polish criminal proceeding]*, Warszawa 2012, p. 34.

[13] T. Grzegorczyk, *Obrońca w postepowaniu przygotowawczym… [Counsel for the defence in the preparatory proceeding…]*, p. 123.

[14] Bill to amend Act – Criminal Procedure Code with the statement of reasons, Warszawa – Lwów, 1926–1927, p. 184; also see S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1960, p. 130.

[15] S. Śliwiński, *Polski proces karny przed sądem powszechnym, Zasady ogólne [Polish criminal proceeding before a common court: Basic rules]*, Warszawa 1959, p. 195.

to the proceeding[16]. Counsel for the defence is to secure the interests of the accused and take all the necessary procedural steps. All this is aimed at creating conditions for the complete exercise of the formal and physical right to defence[17].

It is also rightly believed that obligatory defence is in the interest of justice; it is also in the public interest, which requires that individual rights should always be properly protected, and that the procedural aim should be achieved in conditions ensuring real defence feasibility[18].

In the criminal proceeding, the accused must have counsel for the defence, inter alia, when they are not 18 years old yet (Article 79 § 1 CPC). It is important how old they are in the course of the trial, which means that when the accused is 18 in the course of the proceeding, the obligation to have counsel for the defence stops being in force *ex lege*[19]. *Ratio legis* in this case is clear and accounts to a need to ensure assistance of a qualified lawyer to persons who do not have enough experience and knowledge that would let them defend themselves in a criminal proceeding. The requirement of having a defence lawyer depends on the age of the accused. It is not important whether the accused is adult but if they are 18 years old. A minor who becomes an adult as a result of marriage (Article 10 § 2 of the Civil Code) but is not 18 years old must have counsel for the defence as specified in Article 10 § 2 CPC. A person is 18 years old at the beginning of the day equivalent to the day of their birth[20].

The accused must also have counsel for the defence when they are deaf, dumb or blind (Article 79 § 1 CPC). Undoubtedly, this kind of physical impairment directly translates into disability of defending themselves, including first of all communicating with the proceeding organ. There is no need, however, to prove that in a particular case it limits the exercise of the right to defence. The fact that this kind of impairment takes place is sufficient[21].

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[16] S. Kalinowski, *Polski proces karny w zarysie [Polish criminal procedure outline]*, Warszawa 1981, p. 92.

[17] M. Siewierski [in:] M. Siewierski, J. Tylman, M. Olszewski, *Postępowanie karne w zarysie [Criminal procedure outline]*, Warszawa 1971, p. 107 and subsequent ones; sentence of the Supreme Court of 15 January 2008, V KK 190/07, OSNKW 2008, no. 2, item 19.

[18] S. Kalinowski, *Polski proces karny w zarysie [Polish criminal procedure outline]*, Warszawa 1981, p. 92; T. Grzegorczyk, *Obrońca w postępowaniu przygotowawczym [Counsel for the defence in the preparatory proceeding]*, Łódź 1988, p. 16; fore more see R. Stefański, *Obrona obligatoryjna... [Obligaatory defence…]*, p. 34 and the following; C. Kulesza, *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej [Efficiency of counsel for the defence participation in the criminal proceeding – comparative perspective]*, Kraków 2005, p. 336; P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym, Kraków 2006 [Principle of the right to defence in the Poolish criminal proceeding]*, p. 42; A. Kaftal, Z problematyki obrony formalnej i materialnej w projekcie kodeksu postępowania karnego [Issues of constitutional and statutory right to defence in the bill on criminal procedure code], *Palestra* 1968, no. 1, p. 77 and subsequent ones.

[19] T. Grzegorczyk, *Obrońca i pełnomocnik z urzędu… [Counsel for the defence and proxy ex officio…]*, pp. 51–52; R. Stefański, Obrona obligatoryjna po 1 lipca 2015 r. [Obligatory defence after 1 July 2015], [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015]*, Warszawa 2015, pp. 28–29.

[20] Compare S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna [Commentary on the Civil Code. Volume one. General issues]*, Warszawa 2011, p. 80.

[21] A. Kaftal, Glosa do uchwały SN z dnia 17 czerwca 1968 r. [Gloss on the resolution of the Supreme Court of 17 June 1968], VI KZP 26/68, Palestra 1969, no. 1, p. 116; F. Prusak, Wątpliwości co

It is the proceeding organ's responsibility to assess circumstances laid down in Article 79 § 1 CPC. The decision should be taken based on the expert opinion of a physician who is a specialist in the field, e.g. an otorhinolaryngologist or an ophthalmologist. The fact that the accused is deaf, dumb or blind can be confirmed by a document certifying their disability. A proceeding organ itself can state that the impairment exists based on the direct contact with the accused[22]. The terms used in Article 79 § 21 (2) CPC are not legal in character and, generally speaking, refer to a person's health condition. Thus, the determination of their meaning requires medical science consultation, especially in the field of ophthalmology, otorhinolaryngology and speech-language pathology[23].

Psychical health impairment constitutes another premise for obligatory defence. There should be no doubt that in fact every disability of that kind may hamper defence to some extent. Since the CPC of 1928, the legislator has been using a premise of justified doubt if the accused is free from mental disorder[24]. As a result of the amendment of 27 September 2013, the formula was given up and two separate normative circumstances were formulated. From 1 July 2015, the accused must have counsel for the defence if, firstly, there is a justified doubt whether their ability of recognising the significance of an act or controlling their conduct was limited or did not exist during the commission of the act (Article 79 § 1 (3) CPC), secondly, there is a justified doubt whether the psychic health condition of the accused allows for their participation in defence or conducting defence on their own and reasonably (Article 79 § 1 (4) CPC).

As it was raised in the statement of reasons for the amendment, the changes mainly fulfil the demands of jurisprudence and incorporate the right stand of the judicial decisions[25]. They are based on the division of the bases of obligatory defence laid down in Article 79 § 1 CPC into those resulting from premises occurring *tempore criminis* (item (3)) and *tempore procedendi* (item (4)). Thus, in the former case, unlike in the past, premises of obligatory defence do not refer to the concept of 'being free of mental disorder' that is difficult to define, but to the content of Article 31 § 1 and 2 of the Criminal Code as the basis for assessment whether there are premises for excluding

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do poczytalności oskarżonego jako podstawa obligatoryjnego udziału obrońcy w postępowaniu karnym [Doubts whether the accused is sane as grounds for obligatory participation of counsel for the defence in the criminal proceeding], *Palestra* 1969, no. 1, p. 36; H. Gajewska, Uzasadnione wątpliwości co do poczytalności oskarżonego jako przesłanka obrony niezbędnej [Justified doubts whether the accused is sane as a premise of indispensable defence], *NP* 1980, nr 3, s. 37.

[22] R. Stefański, *Obrona obligatoryjna po 1 lipca 2015 r…. [Obligatory defence after 1 July 2015…]*, p. 30; J. Satko, A. Seremet, Przesłanki obowiązkowej obrony oskarżonego głuchego, niemego lub niewidomego (art. 70 § 1 pkt 1 k.p.k.) [Premises of obligatory defence of the accused who is deaf, dumb or blind (Article 70 § 1 (1) CPC], *Palestra* 1995, no. 9–10, p. 40.

[23] For more see R. Stefański, *Obrona obligatoryjna… [Obligatory defence…]*, pp. 107–123; S. Orzechowska, Ułomności fizyczne oskarżonego jako podstawa obrony obligatoryjnej [Physical impairment of the accused as grounds for obligatory defence], *Ius Novum* 2010, no. 3, p. 84 and subsequent ones.

[24] For more see R. Stefański, Kształtowanie się obrony obowiązkowej w kodeksie postępowania karnego z 1997 r. [Development of obligatory defence in the Criminal Procedure Code of 1997] [in:] K. Dudka, M. Mozgawa (ed.), *Kodeks karny i kodeks postępowania karnego po dziesięciu latach obowiązywania. Oceny i perspektywy zmian [Criminal Code and Criminal Procedure Code after ten years of being in force: Assessment and prospects for amendment]*, Warszawa 2009, p. 208 and subsequent ones.

[25] Judgement of the Supreme Court of 29 June 2010, I KZP 6/10, OSNKW 2010, no. 8.

or mitigating criminal liability. On the other hand, the premises laid down in item (4) serve the assessment whether the accused has the possibility of exercising the right to defence in the course of criminal proceeding, to carry out the defence on one's own and efficiently. A different character of premises in the two cases, i.e. *tempore criminis* and *tempore procedendi*, decides on the necessity of defining these bases in separate editorial units and as a result a separate assessment of their occurrence[26].

A premise laid down in Article 79 § 1 (3) CPC unambiguously refers to the state of insanity (Article 31 § 1 CC) and sanity limited to a significant extent (Article 31 § 2 CC). This way, the solution eliminates the former dilemmas connected with the interpretation of the concept of "a good reason to doubt the sanity of the accused". Formerly, it was not clear whether it referred to a doubt whether sanity was non-existent or limited and to what extent. Undoubtedly, the discussed premise refers to the time of committing a forbidden act[27].

The Criminal Code lays down three reasons of insanity: mental deficiency, mental disease and other mental disturbance, which means that the circumstances constitute sources of disturbance of consciousness or will referred to in Article 79 § 1 (3) CPC. Mental state of the accused must raise serious doubts whether their ability to recognise the significance of an act or manage their conduct was non-existent or limited to a significant extent. Thus, obligatory defence is not applicable when there is a good reason to doubt that the accused could recognise the significance of a forbidden act or could manage their conduct was limited but not to a significant extent[28].

Premises of obligatory defence due to the mental state *tempore proceeded* are more complex. It is connected with a doubt whether the mental health condition of the

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[26] Statement of reasons for the Bill to amend Act: Criminal Procedure Code, Act: Criminal Code and some other acts, Sejm of VII term, Sejm Paper no. 870, p. 31.

[27] See e.g. E. Habzda-Siwek, Dylematy związane z opinią o stanie zdrowia psychicznego oskarżonego (refleksje wokół art. 202 k.p.k.) [Dilemmas in connection with the opinion on the mental health of the accused (comments on Article 202 CPC)], [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. Rocznicy urodzin Profesora A. Gaberle [Penal sciences vs. problems of contemporary criminality: Professor A. Gaberle's 70th birth anniversary jubilee book]*, Warszawa 2007, p. 188 and the following; A. Płatek, Poczytalność oskarżonego „w czasie postępowania" czy psychiczna zdolność do „rozumnej obrony"? [Sanity of the accused 'in the course of the proceeding' or 'psychical ability' to 'defend reasonably'?], *Palestra* 2009, no. 5–6, p. 70 and the following.

[28] R. Stefański, Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r. [Constitutional right to obligatory defence in the light of the amendment of 27 September 2013] [in:] M. Kolendowska-Matejczuk, K. Szwarc (ed.), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty [Right to defence in a penal proceeding: selected issues]*, Warszawa 2014, p. 22; for more see, e.g. J.K. Gierowski, L.K. Paprzycki, *Niepoczytalność i psychiatryczne środki zabezpieczające. Zagadnienia prawno materialne, procesowe, psychiatryczne i psychologiczne [Insanity and psychiatric prevention measures: substantive legal, procedural, psychiatric and psychological issues]*, Warszawa 2013; A. Golonka, *Niepoczytalność i poczytalność ograniczona [Insanity and limited sanity]*, Warszawa 2013; A. Liszewska, Strona podmiotowa czynu i wina a niepoczytalność [Perpetrator's attitude and guilt vs. insanity], [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Prof. A. Zolla [The rule of law and penal law. Professor A. Zoll jubilee book]*, (ed.) P. Kardas, T. Sroka, W. Wróbel, vol. II, Warszawa 2012, pp. 635–649; W. Kozielewicz, Pojęcie niepoczytalności w doktrynie prawa karnego i orzecznictwie Sądu Najwyższego [Concept of insanity in the criminal law doctrine and judgements of the Supreme Court], *Palestra* 2007, No. 1–2, pp. 76–85.

accused allows him to participate in the proceeding or whether the state allows them to defend themselves on their own and rationally.

The exit point in this case is the assessment of the state of mental health of the accused. It is a broad concept, which is defined in various ways. Most generally, it is understood as a state with no mental disturbances, i.e. such disturbances of mental activities that contemporary knowledge treats as sickness-related phenomena[29]. On the other hand, in psychiatric literature, mental health is described as a set of individual features and reactions that do not diverge from psychical norm, i.e. inter alia, harmonious balance of often contradictory tendencies resulting from the features of character, temperament, inclinations and intellectual activities of a given individual in order to satisfy individual and environmental needs, including social ones[30].

The concept of a person with mental disturbances is also defined in normative terms. It is a person mentally ill (demonstrating psychiatric disorders), mentally impaired or showing other disturbances of psychic activities, which in accordance with contemporary medical knowledge are classified as psychiatric disorders and the person affected needs health care or other forms of assistance and care necessary to live in a family and social environment[31]. The definition, because of its basic importance in the legal system, should constitute a normative determinant in the assessment of a premise of obligatory defence laid down in Article 79 § 1 (4) CPC[32].

To assume that a premise of obligatory defence occurs, it is necessary to state that mental state does not allow the accused to participate in the proceeding or to defend themselves on their own and rationally. In the former case, the mental state is so bad that it does not allow for active participation in the proceeding; precludes the accused from appearing before court and taking procedural steps that are part of the right to defence. In the latter case, the criteria are highly assessment-related. It is a situation where the accused is not capable of defending on one's own and rationally. The justification of the amendment points out that the aim of using the premises of "being self-reliant" and "rational" in defending oneself was to establish objective criteria but at the same time referring to a certain pattern of ordinary conduct where there is a physical possibility of assessing one's own behaviour and granted rights[33].

However, the adopted criterion is highly evaluative and unclear, especially in the context of the assessment of what conduct should be assumed as rational within the exercise of the right to defence and what conduct should be denied that feature. From the point of view of a court, the assessment may be completely different from

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[29] Compare W.S. Gomułka, W. Rewerski (ed.), *Encyklopedia zdrowia [Encyclopaedia of Health]*, vol. I, Warszawa 1992, pp. 1077–1078.

[30] L. Korzewniowski, S. Pużyński, *Encyklopedyczny słownik psychiatrii [Encyclopaedic dictionary of psychiatry]*, Warszawa 1986, p. 627; also see A. Bilikiewicz, Zakres psychiatrii oraz jej miejsce w kulturze i wśród innych dyscyplin nauki [Scope of psychiatry and its place in culture and other sciences], [in:] A. Bilikiewicz (ed.), *Psychiatria. Podręcznik dla studentów medycyny [Psychiatry: textbook for medical students]*, Warszawa 2007, p. 22.

[31] Article 3 (1) of Act of 19 August 1994 on the protection of mental health (Journal of Laws of 2011, no. 231, item 1375).

[32] R. Stefański, *Obrona obligatoryjna po 1 lipca 2015… [Obligatory defence after 1 July 2015…]*, pp. 38–39.

[33] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, p. 31.

the one from the point of view of defence or prosecution. The wording of Article 79 § 1 (4) CPC *a contrarious* suggests that the premise will not occur if the assessment of the health condition of the accused allows for the assumption that their defence will be self-reliant and rational. It seems, however, that even self-reliant defence with the participation of a professional defence lawyer may be deemed to be irrational, i.e. unwise, imprudent and incautious[34]. In this sense it would probably be a better solution, proposed in jurisprudence, to use the term "reasonable", i.e. simply speaking conducted with real discernment[35]. Such a criterion seems to be more measureable as it refers to the perception of the accused and not to the assessment of the quality of their defence actions, which is in general very subjective. Editorial simplification eliminating the discussed doubts might result in the following wording of Article 79 § 1 (4) CPC: "there is a justified doubt whether the state of psychic health of the accused allows for the participation in the proceeding or self-reliant exercise of the right to defence". Another proposal might be an assumption that the premise in fact constitutes "another circumstance hindering the exercise of the right to defence" in accordance with Article 79 § 2 CPC, which, on the other hand, would cause a necessity to give up the regulation.

Participation of counsel for the defence in criminal proceeding is also obligatory in the event a court decides it is indispensable because of other circumstances impeding defence (Article 79 § 2 CPC). The range of circumstances that match the discussed premise is very broad and its interpretation in jurisprudence is not unambiguous[36]. The wording of Article 79 § 2 CPC provides that these must be circumstances "impeding" defence, i.e. semantically, such ones that constitute an obstacle to achieve something, cause that something becomes more difficult, obstruct, complicate[37]. The level of difficulties in performing defence by the accused in person is subject to a court's discretion. The rulings rightly point out that, although the wording of Article 79 § 2 CPC lacks a term classifying the level in which defence is impeded (e.g. considerably, to a great extent etc.), it should be agreed that not every difficulty experienced in defence can give grounds for obligatory participation of counsel for the defence in the proceeding. Existence of adequate limitations should be derived from the word „indispensable, which is used by the legislator purposefully, as well as from the rules of logic and life experience, in the light of which every case of accusation causes some kind of discomfort and creates difficulties. Thus, the institution laid down in the

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[34] S. Dubisz, *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, Warszawa 2003, vol. IV, p. 188.

[35] R. Kmiecik, O poczytalności oskarżonego „w czasie postępowania" polemicznie [On sanity of the accused 'in the course of criminal proceeding' polemically], *Palestra* 2007, no. 5–6, p. 92.

[36] For more see J. Kosonoga, Przesłanki obrony obligatoryjnej w postępowaniu wykonawczym [Premises of obligatory defence in execution proceeding], [in:] I. Rzeplińska, A. Rzepliński, P. Wiktorska, M. Niełaczna (ed.), *Pozbawienie wolności – funkcje i koszty. Księga Jubileuszowa Profesora Teodora Szymanowskiego [Function and cost of imprisonment. Professor Teodor Szymanowski jubilee book]*, Warszawa 2013, p. 526 and subsequent ones.

[37] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, vol. IV Warszawa 2003, pp. 1049–1050; H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny [Practical dictionary of contemporary Polish]*, vol. 44, Poznań 2003, p. 356.

provision is extraordinary in character and it should be applied to a significant level of defence impediment[38].

The amendment of 27 September 2013 also limited premises of obligatory defence because of crime classification restricting it to persons who are accused of committing a felony (Article 80 CPC). Obligatory defence because of other crimes and "detention" of the accused was repealed. The statement of reasons provides that the decision to repeal "detention" as a premise of automatic occurrence of the state of obligatory defence expresses a belief that in practice there is a lack of grounds for obligatory defence resulting only from the fact that any form of deprivation of liberty is applied, especially regardless of its time. The discussed changes are strictly connected with the change of the model of appointing counsel for the defence of one's own choice under Article 80a CPC, letting the accused (especially the detained one) demand an appointment of counsel for the defence[39]. It is a right solution that jurisprudence called for earlier[40].

APPOINTMENT OF COUNSEL FOR THE DEFENCE IN SPECIAL CASES

Counsel for the defence is also appointed in special cases. These are various situations in which a lack of counsel for the defence would constitute an inadmissible deficit in the right to defence. It takes place in:

– the event there is a conflict of interests of the accused persons defended by the same appointed counsel for the defence (Article 5§ 2 CPC);
– if the accused notified of an interrogation of a witness under Article 185a § 1 CPC does not have a defence lawyer of their choice (Article 185a § 2 CPC)[41];
– if, in the case in which the accused must have counsel for the defence and has a retained defence lawyer of their choice, the defence lawyer or the accused revokes the respective sides of the arrangement under the power of attorney, provided that the accused has not appointed the counsel for the defence (Article 378 § 1 CPC);
– if a court does not rule the accused under detention who does have counsel for the defence be brought to the appellate trial (Article 451 § 1 CPC)[42];

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[38] Ruling of the Supreme Court of 17 February 2004, II KK 277/02, OSNKW 2004, no. 4, item 43; also see sentence of the Administrative Court in Katowice of 12 July 2001, II AKa 221/01, OSN Prokuratura i Prawo 2002, no. 5, item 21.

[39] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, p. 32.

[40] R. Stefański, *Obrona obligatoryjna…, [Obligatory defence…]*, pp. 390–391.

[41] Also see Article 185b § 1 CPC in connection with Article 185a § 1 CPC.

[42] Also see Article 439 § 3 CPC in connection with Article 451 CPC – with regard to a session concerning annulment of a ruling due to absolute appeal premises; Article 464 § 3 CPC in connection with Article 451 CPC – with regard to a session concerning a complaint about a ruling to terminate proceeding and about detention; Article 573 § 2 CPC in connection with Article 451 CPC – with regard to a hearing concerning a cumulative sentence; Article 597 CPC in connection with Article 451 CPC – with regard to a session concerning a change of ruling resulting in the execution of penalties only for the crimes in connection with which a perpetrator was transferred; Article 607e § 2 CPC in connection with Article 451 CPC – with regard to a session concerning a ruling to execute penalties only for the crimes that were grounds for a transfer of the wanted criminal.

– if the proceeding has been re-opened pursuant to a motion for the benefit of the accused and it is conducted after his death or there are grounds for the suspension of the proceeding, the president of the court shall appoint counsel for the defence unless the accused has already retained counsel for the defence (Article 458 CPC);
– if the person prosecuted in the state where a judgement has been issued does not stay in the territory of the Republic of Poland and does not have a defence lawyer (Article 607zj § 2 CPC);
– in the case regarding admissibility of taking over or transferring the execution of a penalty if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fh § 1 CPC);
– in the case regarding the execution of penalties of monetary character if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fh § 1 CPC);
– in the case regarding the execution of the forfeiture of property sentence if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fx § 1 CPC);
– in the case regarding the execution of an imprisonment sentence if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611ti § 1 CPC);
– in the case regarding the execution of a suspended imprisonment sentence or a fine or another measure that is not a fine or a custodial penalty, or regarding a conditional release, a conditional discontinuance of the proceeding or any other conditional postponement of penalty execution if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611ue § 1 CPC);
– in the case regarding the execution of the European protection order if the person who is or was subject to criminal proceeding does not stay in the territory of the Republic of Poland and does not have counsel for the defence (Article 611wf § 1 CPC).

RULES FOR APPOINTING COUNSEL FOR THE DEFENCE

Ex officio appointed counsel for the defence is selected from the list of attorneys entitled to engage as defence counsel. The president of a court, a court or a judicial officer examines a motion to appoint counsel for the defence without delay (Article 81 a § 2 CPC). If there are circumstances indicating the necessity for immediate defence, the president of a court, a court or a judicial officer notify the accused and the counsel of the appointment in the way laid down in Article 137 CPC (Article 81a § 3 CPC). Detailed rules of appointing counsel for the defence are laid down in secondary regulations of the Minister of Justice of 27 May 2015 on ensuring that the accused has access to the assistance of appointed counsel for the defence[43].

[43] Secondary legislation of the Minister of Justice of 27 May 2015 on ensuring defence assistance ex officio for the accused (Journal of Laws item 816); for more see T. Grzegorczyk, *Obrońca i pełnomocnik z urzędu… [Counsel for the defence and proxy…]*, pp. 60–61; W. Grzyb, Obrona z urzędu w polskiej procedurze karnej – rozwiązania modelowe [Defence ex officio in the Polish criminal proceeding – model solutions], *Palestra* 2013, no. 5–6, p. 27 and subsequent ones.

The amendment of 27 September 2013 introduced a formerly unknown solution of suspension of the flow of time limitation for the performance of a procedural action – in case of a motion to appoint counsel for the defence – if the activities of counsel for the defence are the condition for its effectiveness. Pursuant to Article 127a § 1 CPC, if the condition for the effectiveness of the procedural action is its performance by defence counsel, the time limit for its performance shall be suspended for the party to the proceeding until the request for the appointment of counsel for the defence is examined. The statement of reasons highlights that the issue has already provoked controversies and divergent judgements often resulting in depriving a party of a real possibility of performing a procedural activity (e.g. filing a subsidiary indictment). The regulation is aimed at enabling a party to obtain a decision in the field of legal assistance provision in the way that does not cause a time-limit expiry. With respect to that, the solution matches the change of the rules of appointing counsel for the defence (Article 80a CPC). Because of guarantee reasons, it was right to introduce the possibility of suspending the flow of time limitation under the general provision of Article 127a CPC instead of introducing a possibility of filing a motion to reinstate the time limit in each case[44]. In the event counsel for the defence is appointed, the time limit for procedural actions starts when the party is delivered the appointment decision or order (Article 127q § 2 CPC).

In connection with that, a problem arises how to calculate the time limit in a situation when counsel for the defence does not find grounds for filing an extraordinary appeal measure in the form of cassation or a motion to re-institute the proceeding (Article 84 § 3 CPC). It is rightly assumed in jurisprudence that the time limit is also suspended for the time the defence counsel needs to consider undertaking a particular step and starts again when the accused is notified that the defence counsel has not found grounds for appeal[45]. This interpretation is of guarantee character and is pursuant to the adjudication practice developed before the amendment came into force. Court judgements used to state that in such situations the flow of time limit for cassation starts from the date when the accused is notified of the decision of the defence counsel and is 30 days regardless of the fact whether he filed the so-called own cassation motion or a request to appoint counsel for the defence in order to file the appeal, about which he must be informed[46].

Filing a request for the appointment of counsel for the defence to undertake a particular procedural action (Article 80a § 2 CPC) directly before its performance or even in the course of it is another issue. What especially needs considering is whether it is necessary to adjourn this action until a motion is examined. Two values are in conflict in this case: speed of proceeding and the right to defence. However, since the Act does not envisage a requirement of examining a motion before action is undertaken, there are no grounds to state that the proceeding organ has an absolute duty to adjourn the action, especially when the accused was able to file a motion for the appointment of counsel in advance.

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[44] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, pp. 115–116.

[45] T. Grzegorczyk, *Kodeks postepowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015, p. 239.

[46] See ruling of the Supreme Court of 18 November 2009, II KZ 54/09, OSNKW 2010, no. 1, item 9, and of 22 December 2009, III KZ 87/09, OSNKW 2010, no. 5, item 46; also see rulings of 19 October 2000 Rutkowski v. Polska, complaint no. 45995/99, LEX no. 42829, or of 14 February 2006 Woźniak v. Polska, complaint no. 74454/01, LEX no. 482314.

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APPOINTED COUNSEL FOR THE DEFENCE IN THE POLISH CRIMINAL PROCEEDING

Summary

The article discusses the institution of appointed counsel for the defence in the criminal proceeding after the amendment of 27 September 2013. It analyses particular conditions for the appointment of counsel for the defence: poorness of the accused and lack of obligatory defence counsel. Separate consideration is given to the issue of the appointment of counsel for the defence on the request of the accused and the appointment of counsel to undertake particular procedural actions. The mode and rules of appointing defence counsel are also discussed.

Key words: *criminal proceeding*, *right to defence*, *ex officio appointed counsel for the defence*, *obligatory defence*, *appointment of counsel for the defence*, *right of the poor*

OBRONA Z URZĘDU W POLSKIM PROCESIE KARNYM

Streszczenie

W opracowaniu odniesiono się do instytucji obrony z urzędu w procesie karnym po nowelizacji z dnia 27 września 2013 r. Analizie poddano poszczególne przesłanki wyznaczenia obrońcy z urzędu w postaci niezamożności podejrzanego i braku obrońcy obligatoryjnego. Odrębne rozważania poświęcono kwestii wyznaczenia obrońcy na żądanie oskarżonego oraz problematyce wyznaczenia obrońcy do poszczególnych czynności procesowych. Przedmiotem rozważań uczyniono także zagadnienie trybu i zasad wyznaczania obrońcy.

Słowa kluczowe: *postępowanie karne*, *prawo do obrony*, *obrona z urzędu*, *obrona obligatoryjna*, *wyznaczenie obrońcy*, *prawo ubogich*