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Admission of a Community Representative to Court Proceedings to Article 90 of the Amended Code of Criminal Procedure of 10 June 2016

Abstract: In June this year, Polish Sejm passed a law amending Article 90 of the Code of Criminal Procedure. This provision regulates the institution of the so called community representative (similar to *amicus curiae*) in a Polish criminal trial. A purpose of the above amendments is to facilitate participation of a community representative in the proceedings. Adopted amendments change the procedural mechanism of admitting a community representative to the proceedings, which is conditioned on consent thereto of at least one party to litigation.

Keywords: criminal procedure, community representative, admission requirements, non-governmental organization

1. Introduction

A community representative is a participant of a criminal trial whose role therein is a specific manifestation of society's participation in criminal proceedings and, at the same time, fulfilment of the principle of cooperation between society and institutions to prosecute crimes¹. A community representative was introduced to the system of criminal procedural law when the Act of 14 April 1969 – the Code of Criminal Procedure², came into force. Provisions regulating this institution were contained in four Articles (Art. 81-84) in Chapter 10. Due to social and economic transformations in Poland in the 1990s, when works were launched on a new Act of Criminal Procedure, this institution was not envisaged in the governmental draft of 1995³. Nev-

1 S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 244.

2 *Journal of Laws* No. 13, item 96 as amended.

3 See: Rządowy projekt ustawy – Kodeks postępowania karnego (druk nr 1276 z 18 sierpnia 1995 r.), <http://orka.sejm.gov.pl/proc2.nsf/opisy/1276.htm>.

ertheless, during legislative works, it was eventually included in Chapter 10 of the new Code of Criminal Procedure enacted in 1997, embracing altogether two Articles (Art. 90-91)⁴.

Despite insignificant practical importance of this institution, a community representative has arisen numerous controversies from the very beginning of its functioning. For nearly three decades, representatives of science have embraced both its supporters and opponents⁵. Overwhelming majority of authors found this institution to be dead and ostensible⁶. Keen interest in this specific form of social participation in a criminal trial generated a considerable amount of publications devoted to this issue⁷. Despite a hectic nature of works of the Polish legislator in nearly every political climate, the institution of a community representative has so far eluded numerous amendments to the Code of Criminal Procedure. Only on 10 June 2016, passing another (over one hundredth) amendment to the Code of Criminal Procedure, the Sejm changed Art. 90 of the CCP – one of the two provisions regulating the discussed institution⁸.

The above mentioned amendment extended the Article by several new paragraphs (§ 4 – § 6) and modified three previous ones (§ 1 – § 3). Compared to the previous reading of Art. 90 of the CCP, prerequisites and procedural mechanism admitting a community representative to take part in criminal proceedings have been newly formulated. In the light of these provisions, newly formulated prerequisites thereof include: a) an authorized entity to act as a community representative – Art. 90 § 1 of the CCP, where the word representative has been repealed from the previous reading; b) protection of individual interest, here the adjective important that was referring to this interest has been deleted – § 1; c) time limit to designate a community

4 Journal of Laws No. 89, item 555 and uniform text: Journal of Laws of 2016, item 1749.

5 The following authors approved of this institution, yet not without some reservations: M. Siewierski, *Przedstawiciel społeczny w nowym kodeksie postępowania karnego*, "Palestra" 1969, No. 9, p. 5 et seq.; A. Murzynowski, *Udział przedstawiciela społecznego w procesie karnym*, NP 1971, No. 7/8, p. 1021; whilst critical opinion thereon was expressed by: M. Lipczyńska, *Przedstawiciel społeczny w procesie karnym*, NP 1972, No. 4, p. 562 and literature cited therein; W. Daszkiewicz, *Przedstawiciel społeczny w procesie karnym*, Warszawa 1976, p. 168.

6 Comp. e.g., W. Daszkiewicz, *Przedstawiciel społeczny w procesie karnym*, "Palestra" 1985, No. 11, p. 59, 73-74; W. Daszkiewicz, *Spółeczni uczestnicy procesu karnego*, "Państwo i Prawo" 1990, No. 5, p. 71 et seq.; J. Grajewski, (in:) J. Grajewski, L.K. Paprzycki, *Kodeks postępowania karnego z komentarzem*, Sopot 2000, p. 160; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Tom 1. Komentarz do artykułów 1-296*, Warszawa 1999, p. 414 and literature cited therein; R. Kniecik, E. Skrętowicz, *Proces karny. Część ogólna*, Kraków 1996, p. 172; K. Marszał, *Proces karny*, Katowice 1998, p. 169-170; S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 1998, p. 197 (however, already in the issue of his handbook of 2001, the author draws attention to certain "animation" of this institution after changes of the CCP in 1997); S. Waltoś, P. Hofmański, *Proces...*, *op. cit.*, p. 199; different opinion: M. Tomkiewicz, *Udział przedstawiciela społecznego w procesie karnym*, "Prokuratura i Prawo" 2012, No. 7/8, p. 120.

7 Comp. publications cited in the footnote 2 and 3, and, i.a., A. Wierciński, *Przedstawiciel społeczny w polskim procesie karnym*, Poznań 1978; W. Sieracki, *Uwagi na tle wytycznych wymiaru sprawiedliwości i praktyki sądowej w sprawie udziału przedstawiciela społecznego w postępowaniu przed sądami wojskowymi*, WPP 1980, No. 4; J. Lisiewicz, S. Przyjemski, *Udział czynnika społecznego w wojskowym prawie karnym na tle uchwały Izby Wojskowej Sądu Najwyższego*, WPP 1980, No. 4.

8 See Art. 1 point 1 of the Act of 10 June 2016 on the Amendment of the Act – Code of Criminal Procedure, Act on the Profession of a Physician and Dentist, and Act on the Rights of Patients and Patient Ombudsman (Journal of Laws, item 1070).

representative to entire "litigation" – § 1 *in principio*; d) the introduction of an explicit requirement of a formal submission, which should contain confirmation of the existence of substantive prerequisites, designation of a representative of a given social organization, and an official copy of articles of association or other document regulating operation of this organization – § 2; e) a consent expressed by at least one party to litigation to admit a statutory representative to participate in these proceedings and the mechanism of such consent's withdrawal – Art. 90 § 3; f) the introduction of prerequisites admitting several community representatives to proceedings – Art. 90 § 6. Due to the introduced requirement of consent of the parties to admit community representatives to proceedings, if the consent is withdrawn, a mechanism of court control of the envisaged declarations of will within this scope has been introduced – Art. 90 § 3, sentence 3 of the CCP and Art. 90 § 6, sentence 5 of the CCP. Further comments presented below attempt to preliminarily analyse a new perspective of prerequisites admitting a community representative to participate in a trial.

2. Social organisations

A social organization is authorized to take part in litigation as a community representative fulfilling a role of the Commissioner for Public Interest. Such a legal concept of the discussed procedural entity has already been commonly adopted in the current literature⁹. Before the amendment, the reading thereof contained the expression according to which a representative of a social organization declared his or her participation in proceedings. However, it did not imply at all that a community representative was a social organization but merely its representative. A social organization exercised its right through a person of a community representative. The amendment of the above issue not longer evokes a sliver of doubt. At the same time, the amendment does not introduce any changes into the notion of a social organization leaving a definition of this concept to the doctrine of criminal procedural law. Moreover, it rightly does not return to the solution binding under the Code of Criminal Procedure of 1969, i.e. a list of social organizations included therein authorized to act as a community representative¹⁰. A substantive criterion qualifying a social or-

9 M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Kraków 2011, s. 35; S. Waltoś, P. Hofmański, *Proces...*, *op. cit.*, s. 198 i n.; T. Grzegorzczak, (in:) T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne*, Warszawa 2014, p. 372; G. Artymiak, M. Klejnowska, Cz.P. Klak, M. Rogalski, Z. Sobolewski, K. Sowiński, *Proces. Część ogólna*, Warszawa 2012, p. 161; W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, tom I, Bydgoszcz 2000, p. 228; Z. Gostyński, (in:) J. Bratoszewski, Z. Gostyński, L. Gardocki, S.M. Przyjemski, R.A. Stefański, S. Zablocki, *Kodeks postępowania karnego. Komentarz*, tom I, Warszawa, 2003, p. 622; K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 207; J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz*, tom I, Warszawa 2013, p. 332; T. Grzegorzczak, *Kodeks postępowania karnego wraz z komentarzem do ustawy o świadku koronnym*, Warszawa 2014, p. 395; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks...*, *op. cit.*, p. 608; Z. Świda, J. Skorupka, R. Ponikowski, W. Posnow, *Postępowanie karne. Część ogólna*, Warszawa 2012, p. 222.

10 More: K. Woźniwski, (in:) C. Kulesza (ed.), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa 2016, p. 1258. As rightly noticed by L.K. Paprzycki, these organizations

ganization as a legal entity is sufficient to apply the analyzed procedural institution in practice. In the meaning of the provision of Art. 90 § 1 of the CCP, this criterion are organization's objectives, i.e. protection of public or private interest, in particular of human rights and freedoms. Thus a positive answer to the question whether the articles of association of a social organization contain a statement that the objective of this organization is protection of public or private interest, in particular of human rights and freedoms, decides about subjective admissibility of a given social organization to participate in a trial. In practice, from the perspective of a legal nature of a given legal entity, such applicants are most frequently associations (including collective copyright licensing organizations acting under provisions of the Act of 7 April 1989 – the Law on Associations¹¹, and the Act of 4 February 1994 on Copyright and Related Rights¹²), religious organizations, trade unions, social-professional farmers organizations, employers organizations, sports organizations, and professional self-governments and foundations if only their articles of association embrace tasks connected with the protection of protection of public or private interest, in particular of human rights and freedoms¹³.

3. Protection of private interest

Another important change ensuing from the amendment is connected with a newly specified nature of the prerequisite of private interest protection. Removing the adjective “important”, the legislator lowered a requirement concerning the importance of the need to protect private interest. Therefore, it can be assumed *de lege lata* that private interest mentioned in § 1 Art. 90 of the CCP does not have to belong to the category of interests characterized by great importance, significance, or relevance to the litigants taking part in concrete litigation. A removal of the word “important” from the analysed provision eventually implies that examining the motion to admit a community representative, the court is deprived of the right to evaluate whether private interest *in concreto* is significant enough to admit a community representative to a trial. Thus it would seem that in practice a social organization will simply point out a public or private interest covered by their statutory tasks, which should decide about admitting them to proceedings. However, the analysis of the content of Art. 90 § 5 of the CCP regulating the grounds of refusal to admit a representative of a social organization to take part in the case clearly entrusts the court with both the right and duty to examine two issues, i.e., firstly, whether a public or private interest declared

had political profile typical of PRL – L.K. Paprzycki, (in:) J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks...*, *op. cit.*, p. 333.

11 Uniform text: Journal of Laws of 2015, item 1393 as amended.

12 Uniform text: Journal of Laws of 2016, item 666 as amended.

13 In practice, on the other hand, a possibility of participation of such special entities as non-profit commercial law companies which, nevertheless, enjoy a status of public benefit organizations, arises doubts – see: K. Woźniewski, (in:) C. Kulesza (ed.), *System...*, *op. cit.*, p. 1267 and literature cited therein.

in the motion is covered by the applicant organization's statutory tasks and, secondly, whether declared interests are connected with the case being heard. The second criterion deserves special attention due to its substantive nature. Insofar as the provision of § 1 cancels the criterion of importance of a private interest, § 4 replaces it, as it appears, with the criterion of a relation existing between protected public or private interest and the case being heard. Thus a social organization submitting a motion to admit a community representative to a trial will be procedurally burdened with a duty to confirm the existence of the above relation on pain of refusal to admit them to take part in a trial.

4. Time limit to submit a community representative

Another change introduced by the discussed amendment is connected with a different determination of a procedural moment when a motion on the participation of a community representative in the case may be submitted. In the previous legal system, a maximum procedural time limit to submit the motion was specified very precisely, i.e. by the indication of the stage of litigation, that is initiation of proceedings. A motion submitted afterwards was null and void. Due to the fact that the above expression has been repealed, the question about a current time limit to submit the motion arises. The expression "during litigation", which was retained without determined additional maximum procedural time limit to pursue a procedural action of submitting a litigation friend, theoretically means that such a motion may be submitted anytime during litigation. Starting from its initiation, when the indictment is brought before a first instance court, or an appeal activating appeal proceedings as well as in litigations pursued due to extraordinary appeal, or even in proceedings after the judgment became final and valid – in each case when procedural decisions are taken during a hearing and, exceptionally, in sessions¹⁴.

On the other hand, we can attempt to indicate a final moment when such a motion would be admissible due to its practical procedural sense once the legislator resigned from an explicit legislative barrier for such motions. It appears that a final jurisdictional moment, at least in first instance and appeal proceedings, to submit such a motion should be activities connected with closing litigation because after these actions the phase of final speeches occurs during which an admitted community representative is entitled to speak¹⁵.

The reasoning to the draft does not provide *ratio legis* for such a solution but it may be supposed that it again implied the encouragement for social organizations to

14 More: K. Woźniowski, (in:) C. Kulesza (red.), System..., *op. cit.*, p. 1284.

15 The discussed amendment removed from Art. 406 of the CCP the issue of a community representative being allowed to speak depending on the court's decision, i.e. the court decided whether there was a need for that at its discretion. Now, if a community representative has been admitted to a trial, he or she has the absolute right to speak after litigants and their representatives made their statements.

undertake such activities. Apparently, it is connected with the fact that many social organizations must be aware of a pending or due trial of a concrete person to take a decision of acting therein as a community representative. A source of such information are usually members of a given social organization counting on its help in just this form. Now, social organizations more and more often find out about criminal trials from the media and join the proceedings perceiving the need to protect a public or private interest to gain publicity or promote their public image. Obviously, a social organization may submit a motion to be admitted to participate in a trial already during preparatory proceedings; then a relevant body pursuing such proceedings encloses the motion to the case files and sends it to the court together with the indictment – analogous to Art. 69 § 1 of the CCP¹⁶.

Despite considerable liberalization of the formal requirement of a time limit to submit a motion by a social organization, such a solution may appear problematic in practice due to the advancement of litigation. Although the sequence of procedural actions making up litigation somewhat designates natural time limits to submit motions about admission of a litigation friend, i.e. bringing the indictment or appeal and closing litigation, it seems that only the practice of applying this provision will more accurately specify a procedural time limit that is so widely determined now.

5. Elements of the submission

Another change introduced by the discussed amendment considers formal issues connected with the admission of a community representative to a trial. More precise and systematized description of necessary formal elements of pleadings that are a declaration of will of a social organization within this scope should be approved of because the previous provision of § 2 Art. 90 of the CCP merely set forth that a social organization designated its representative in the submission whereas the representative submitted a written power of attorney with the court. First of all, the current reading of this provision imposes on the applicant an obligation to indicate a public or private interest covered by their statutory tasks, which should be understood as an obligation to confirm the above. A proper fulfilment of this duty will allow to assess its legitimacy. Secondly, the Act imposes an obligation to enclose a formal copy the organization's articles of association or another document regulating its activity (e.g. resolutions of executive or decision making bodies of social organizations specifying their objectives and tasks). In practice, such documents were submitted but this requirement should have been evaluated as a procedural burden of proof rather than a legal obligation. Whereas the third sentence of the discussed paragraph is an effect of the change discussed in point 2 herein.

16 The same under the CCP of 1969. A. Wierciński, *Przedstawiciel...*, *op. cit.*, p. 65.

6. Required consent of litigants

An entirely new and very specific procedural solution is the required consent of at least one litigant (Art. 90 § 3, first sentence of the CCP) introduced to a decision making process on the admission of a community representative. The reasoning to the drafted amendment pointed out the necessity to abolish court's arbitrariness with regard to the admission of a community representative to a trial¹⁷ while the consent of at least one litigant is just to be a measure to achieve this purpose. In effect of such a consent, the court is obliged to admit a community representative to a trial¹⁸.

A procedural declaration of will made by a party on giving or refusing to give a consent is, however, of a relatively imperative nature. It is connected with the fact that the Act entrusts the court with the right to admit a community representative despite a lack of consent given by the parties provided it is justified by the interest of the administration of justice (§ 4). The above solution should be considered accurate¹⁹. What is more, within the framework of the institution of consent of litigants to admit a community representative, the provision of Art. 90 § 3 also regulates the issue of withdrawal of the given consent. Although theoretically correct, this solution evokes mixed feelings. It cannot be excluded that a possibility of making a statement on a withdrawal of the consent by the party will be treated as a peculiar type of a sanction in relation to a community representative who does not meet the party's "expectations" with regard to supporting it. From the perspective of litigants, community representatives can be divided into those designated in effect of the agreement or arrangement with a given litigant, and those not connected with a given litigant at all. In the second case, a possibility of both giving and withdrawing a consent by the parties should not arise major doubts but the issue becomes complicated when a community representative "arranged" by the party has been admitted. A possibility of withdrawing a consent by the party that opposed the community representative who was submitted by the other party and with their consent does not seem to be a fortunate solution, particularly if making a statement on a withdrawal of the consent may result in the exclusion of the representative from participating in the case. Although the content of the provision of Art. 90 § 3, sentence 2, appears not to exclude such a possibility, the court's right – due to the interest of the administration of justice – to refuse to exclude a community representative against whom a statement on the withdrawal of a consent has been made, is a protection against the abuse of this right by the parties.

17 See: Uzasadnienie do projektu ustawy, druk nr 451, p. 10, (<http://orka.sejm.gov.pl/Druki8ka.nsf/0/DB-D9E9635C-718980C1257FA2002E7085/%24File/451.pdf>).

18 *Ibidem*.

19 In practice, after submitting a motion to admit a litigation friend by a social organization, the court is obliged to inform the parties about it and ask them whether they agree to this. Yet, it does not seem that the consent was a panacea for the court decision's arbitrariness with regard to admitting a litigation friend.

7. A larger number (plurality) of community representatives

Under Art. 90 of the CCP before the discussed amendment, the doctrine debated on the issue of plurality of community representatives in a concrete trial. It may happen that more than one organization decides it is desirable or necessary to declare their participation in the case as a community representative. Neither the CCP of 1969 and nor the binding procedure Act regulated this issues until the discussed amendment. Nevertheless, some proposals to resolve this problem did appear in the literature²⁰. Thus amending the provision of Art. 90 of the CCP, the legislator added a new paragraph number six regulating this issue. The implemented solution is analogous to the resolution of the issue of plurality of auxiliary prosecutors adopted in Art. 56 § 1 of the CCP, which is based on the court's power to determine their number taking into account the need to secure a regular course of proceedings.

Hence, pursuant to § 6 of Art. 90 of the CCP, if at least several social organizations submit a motion to admit their community representatives, exercising its right to limit their number, the court then requests the prosecutor²¹ and defendant to designate not more than two representatives of social organizations who could participate in the case. If more than one defendant or one prosecutor acts in the case, each can designate one representative whilst failure to do so effects in a withdrawal of consent to his or her participation in the case. If there is only one active party to the proceedings (e.g. auxiliary prosecutor and one passive party), a number of community representatives may be maximum four, two for each litigant. If there are numerous parties to the proceedings, each prosecutor and every defendant is entitled to designate one litigation friend whilst the problem of the right of a social organization to participate will emerge if more than several subjects turn up with one of the parties while the court arbitrarily limits their number inevitably excluding some of them from participating in the trial.

Similar to auxiliary prosecutor, the criterion of limiting a number of community representatives implies the need to secure regularity of proceedings. A regular course of litigation can be understood as proceedings conducted in accordance to the principle of expeditious and concentrated trial so that all circumstances of the case are explained and clarified on the basis of the evidence allowing to fulfil postulates ensuing from the principle of accurate criminal response. The above meaning of a regular course of proceedings was proposed in the literature with reference to Art. 56 § 1 of the CCP, which is using just this criterion with regard to limiting a number of auxiliary prosecutors²². It seems that in principle it remains still adequate in the context

20 More about it: K. Woźniewski, (in:) C. Kulesza (ed.), *System...*, *op. cit.*, p. 1277 et seq.

21 It obviously refers here solely to a subsidiary auxiliary prosecutor because it is hard to imagine that a public prosecutor would designate a community representative, similar to the consent given for the participation of a community representative under § 3 Art. 90 of the CCP.

22 See: K. Woźniewski, *Prawidłowość czynności procesowych w polskim procesie karnym*, Gdańsk 2010, p. 25 and literature cited therein.

of limiting a number of community representatives too since the legislator did not decide to introduce explicit additional criteria the court should follow when determining a number of community representatives. The legislator did not indicate more perceptible and tailored criteria only for the institution of a community representative, i.e. those connected with their role in litigation involving, most of all, the expression of social assessment of practically all factual and legal circumstances connected with the subject of a concrete criminal trial. The court is provided with a certain possibility within this scope by being entitled to decide about further participation of individual litigants' representatives despite failure to designate "their" community representative by the authorized party because regardless of the parties' opinion, the court may decide about further participation of individual representatives of social organizations if their participation is in the interest of the administration of justice (Art. 90 § 6, sentence 5 of the CCP).

It should be pointed out here that the parties' right to, first of all, give a consent to admit a specific community representative to take part in a trial and, secondly, designate their community representatives upon the court's request in case of multi-party litigation, must evoke repeated discussion about the legal nature of this procedural institution. The right to appoint somehow one's own community representative by the party may be indeed perceived as designation of a public defender or community prosecutor. We can only wish that the legislator had not intended to change a previously neutral position of a community representative into the one committed to one of the parties. If in practice the application of the provisions of Art. 90 § 3, sentence 1 and § 6, sentence 2 and 3 of the CCP, will take a direction contrary to the statutory function of a community representative while the court's right referring to community representatives will continue to be only slightly decisively used, it may imminently result in the transformation of concrete litigations into collective community disputes in criminal cases.

8. Conclusion

The institution of a community representative has remained beyond the legislator's interest to amend for decades as one of very few such institutions in criminal proceedings. The amendment of June 2016 is indeed the first one which so significantly changed its structure, which has been somehow marginalized in a criminal trial. With regard to other amendments limiting, among others, participation of lay judges in a criminal trial, it has become an important manifestation of the principle of community participation in these proceedings. A keynote thereof, which was strongly emphasized in relation to the amendment, was the extended possibility of community acting in proceedings as a community representative to be achieved by the abolition of formal barriers hampering their participation in litigation. It does not

appear, however, that the discussed solutions contributed to an increased degree of this “facilitated” participation. It is not relative automatism of admitting a community representative to litigation upon the consent given by at least one party that will decide about it but, perhaps, it will lead to a re-defined status of a community representative from an autonomous advocate of a public interest that is neutral to the parties to an advocate of a public interest that is somewhat a satellite of one litigant. We can only suppose here that probably an actual barrier to more frequent engagement of social organizations are rather insignificant “soft” rights of community representatives admitted to a trial, which are limited to participating in a hearing, presenting opinions, or making written statements (not amended Art. 91 of the CCP).

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