JOURNAL OF MODERN SCIENCE
SPECIAL ISSUE
5/59/2024
www.jomswsge.com

DOI: doi.org/10.13166/jms/192841

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SELECTED VICTIM PROTECTION MEASURES IN ORDINARY CRIMINAL PROCEEDINGS

Abstract

The publication analyses the evolution of measures designed to improve the situation of the victim during criminal proceedings in Poland, taking into account the differences in the victim's procedural status. Selected measures for the victim acting as a party are discussed (Article 299 § 1 of the Criminal Procedure Code (hereinafter CPC) and Article 53 CPC) and testimonial evidence source (Article 177 § 1 CPC, Article 185a § 1 CPC, Article 185c CPC).

Keywords: *victim, criminal procedure, protection, procedural guarantee, witness, procedural activity, party to the proceedings*

Introduction

The victim becomes a participant in the criminal proceedings not because he or she has consciously made such a decision. It is almost always that the victim becomes a participant against their will, which is caused by a direct violation or threat to its legal interest by a criminal offence. This is reflected in the legal definition of the victim contained in Article 49 § 1 of the Criminal Procedure Code (hereinafter CPC)[1]. Cezary Kulesza notes that this definition contains the following elements: subjective (natural or juridical person) and objective, relating to the legal interest infringed by the criminal offence to the extent defined by that provision, but also a provision of substantive criminal law (Kulesza, 1995, p. 17–18).

The victim's participation in criminal proceedings makes the victim a participant in those proceedings, whether natural or juridical person, and that participation is limited to fulfilling the role assigned to them by the criminal procedural law (Tylman, 2003, p. 47). The legislature attributes three roles to the victim: in the pre-trial proceedings, the victim is a party (Article 299 § 1 CPC), in the judicial proceedings, the victim may be an auxiliary prosecutor (Article 53 CPC), incidental or subsidiary, and in the course of the entire criminal proceeding, also a testimonial evidence source (Article 177 § 1 CPC, Article 185a § 1 CPC, Article 185c CPC). The status of a party to pre-trial proceedings is acquired by operation of law and does not require the victim to take any action. The situation is different in judicial proceedings, where acquiring the status of auxiliary prosecutor requires

a certain effort to by the victim, namely expressing the will to act in that capacity. The statement should be made until the trial at the main hearing begins (Article 54 § 1 CPC). At the same time, the auxiliary prosecutor is a participant included in the category of parties to the proceedings, which results from the structure of Section III of the Code of Criminal Procedure and the chapters that make up this unit. The role of a testimonial evidence source may be linked to the role of a party in pre-trial proceedings or the role of a prosecutor in judicial proceedings. Due to the vastness of the issue of victim rights protection, only the questions considered by the author worthy of particular attention will be discussed herein.

Protection of victim's interests in pre-trial proceedings

The inclination to limit situations which may harm the victim is visible even at the beginning stage of the pre-trial proceedings. The solution for this *enhanced protection* (Kolińska, 2003, p. 22) is, among others, Article 185c § 1 CPC. On its basis, the victim of an offence under Articles 197-199 of the Criminal Code, when reporting a criminal offence, may limit the report to listing the most important facts and pieces of evidence (Kurowski, 2024, thesis 3).

Also, the introduction in 2013 of new unit, § 2, into Article 300 CPC proves that the legislature finally noticed the problem of unequal treatment of parties appearing in pre-trial proceedings, which was manifested in the lack of access of the victim to basic information about victim's procedural rights. At the very beginning of being in force, Article 300 § 2 CPC required that the victim be informed of the right to apply for undertaking investigation or police inquiry and the conditions for participation in these activities, as specified in Article 51, art. 52 and Article 315 to 318, of the right to use the assistance of an attorney, including the right to apply for the appointment of an *ex officio* attorney in the circumstances indicated in Article 78, for final consulting the materials of the pre-trial proceedings, as well as the powers specified in Article 23a § 1, Article 87a and Article 306, and the obligations and consequences referred to in Article 138 and Article 139. Subsequent amending acts expanded the scope

of information by adding the instruction about: the right under Article 204 CPC, the possibility of rectification of damage by the accused or obtaining compensation from the State, access to legal assistance, available protection and assistance measures, the possibility of issuing a European protection order, victim support organizations and the possibility of reimbursement of costs incurred for participation in the proceedings (2014) with the provision of Article 59a of the Criminal Code and on available protection and assistance measures referred to in the Act on protection and assistance of the victim and the witness (for more detail see: Bieńkowska, 2015, p. 5–25) (2015[2]), on the aid provided for in Article 43 § 8 of the Criminal Enforcement Code and the content of Article 337a CPC (2016[3]) and the rights under Article 315a CPC (2019[4]). In 2016, from the instruction under Article 300 § 2 CPC the information on Article 87a CPC and Article 59a of the Criminal Code was deleted, while in 2019, the method of providing the instruction referred to in Article 300 § 2 CPC was extended. From now on, this can be done not only before the first questioning of the victim, but also *immediately after the identification of the victim, if one abandons undertaking this action*. The amendment of 2023[5] additionally increased the guarantees for those victims (also for suspects and witnesses) who are helpless *due to their age or health condition* and who *are under 18 years of age*, which is manifested by allowing them access to *explanations as to the scope of their rights and obligations, as well as the manner and conditions of questioning* (Article 300 § 3a CPC). The legibility of these explanations is enhanced by the possibility of their *descriptive or graphic* presentation (Article 300 § 3b CPC). From the very moment of adoption of Article 300 § 2 CPC, the legislature has ordered that the victim be informed of the status of a procedural party, including inter alia Article 300 § 2 CPC. One should agree with Monika Klejnowska that the scope of the latter instruction is not specified, but this instruction should specify, among other things the object of proceeding, so that the aggrieved party knows what the case is about (Klejnowska, 2017, p. 8).

The provision of Article 300 § 2 CPC is an embodiment of the principle of the right to legal information (Kosowski, 2012, p. 137) in the area discussed herein, and corresponds to the requirements set out in international acts, although the scholarly opinion in the field criticizes the ministerial model

instruction for i.a. its obscurity and certain illegibility of the wording duplicating statutory phrases (Zyzański, 2021, p. 158–161). The mentioning in Article 300 § 2 CPC of only the victim cannot be understood as disregarding those who exercise the rights of the victim in situations referred to in Article 49 § 3a and 4, Article 51 § 2 and 3, and Article 52 CPC. In these situations, the instruction should also be addressed to the statutory representative or actual guardian of a minor victim or incapacitated victim (Palka, 2023, thesis 4).

Extending the information activities addressed to the victim with the possibility of providing the victim with an explanation as to the scope of their rights and obligations as well as the manner and conditions of questioning (Article 300 § 3a CPC) and covering them, and the very instructions, of the possibility of providing them in a descriptive or graphical manner meets with an excess the requirements of Article 4 (1) of Directive 2012/29/EU in the part about instructing victims of crime *in simple and accessible language* (Directive 2012/29/EU). On the other hand, instructing *before the first questioning or immediately after the victim has been identified* corresponds to the EU requirement to provide information to victims *without unnecessary delay, from their first contact with a competent authority* (Bieńkowska, 2016, p. 9 5).

It is commendable that the victim is granted access to certain acts in pre-trial proceedings, and the differences in the rules of this access are justified by varied nature of these acts (Article 315 § 2, Article 316 § 1, Article 317 § 1 and Article 318 CPC).

In my view, there is still striking disproportionality of the rights of the suspect and the victim, which arises in a situation governed by Article 321 § 1 CPC, and the victim and victim's attorney are still not allowed to finally consult the materials of the pre-trial proceeding. I am afraid that it will not be possible under such conditions to effectively exercise the right to apply for supplementing the investigation (§ 5). A similar negative assessment should concern the failure to notify the victim or send the victim a notice of the content of the order to close the investigation (§ 6). On the other hand, the mandatory notification to the identified victim that the indictment has been sent to court and on the content of the provisions of Article 343, art. 343a and Article 378a CPC and instructing the victim on the content of the provision of Article 49a, and on the right to make a statement about acting as an auxiliary

prosecutor (Article 334 § 2, sentence I and II CPC) should be assessed positively. The current wording[6] of Article 334 § 2, sentence II CPC is to some extent a fulfilment of the truly reasonable proposal put forward by Katarzyna Dudka that the instruction about the possibility of making a statement about acting as an auxiliary prosecutor should not take place *as necessary*, but that it should be covered by the absolute obligation to inform (Dudka, 2006, p. 203). The fact of these notifications is reported to the court for review purposes, but not in the content of the indictment itself, but in a cover letter transmitting the indictment to the competent court (for more about the consequences of failure to comply with this obligation, see Brzeziński, 2006, p. 39–40) (§ 228 (1) item 1 of the rules and regulations for prosecution offices[7]).

A solution that should be assessed positively is to grant the victim the right to assistance in the case by a professional representative in the form of an advocate or attorney-at-law. The victim, as a party other than the suspect, may appoint in the course of the pre-trial proceedings a representative on the same terms as the suspect, i.e. without the need to have the consent of the proceeding body for this. Thus, unlike under Article 87 § 2 CPC, the proceeding body does not examine whether the appointment of an attorney is justified by the need to *protect the interests of [the victim] in the ongoing proceedings*, as this assessment has already been made by the legislature in Article 87 § 1 CPC. As a result of the application of the provisions of Article 78 CPC (Article 88 § 1, sentence II CPC.) *mutatis mutandis* to the attorney, the victim may request that an attorney *ex officio* be appointed for him/her, if the victim duly proves that he or she is unable to bear the costs of defence without jeopardizing the necessary maintenance of themselves and their family. This equates the victim in terms of access to legal services in criminal proceedings with victim's litigation opponent, which significantly strengthens victim's position (Grzegorczyk, 2014, art. 88, thesis 2, the same view in Grzeszczyk, 2014, art. 88, thesis 1), but also aligns Polish law with the model contained in Article 13 of Directive 2012/29/EU. After all, the provision requires the Member States to ensure that victims have access to legal aid, provided that those victims have been granted the status of a party to the criminal proceedings in question, while leaving them free to determine the *conditions and procedural rules* for that aid to be provided.

Protection of interests of the victim as an auxiliary prosecutor

The filing of the indictment by the public prosecutor opens the way for the victim to join the case as an auxiliary prosecutor (Article 54 § 1 CPC), which requires that a relevant statement be submitted within the time limit *until the commencement of the trial at the main hearing*. The effectiveness of the exercise of this right does not depend on the court finding that it is in the interests of justice administration (Grzeszczyk, 1997, p. 58; Steinborn, 2016, thesis 1), not only because such review is not provided for by law, but also because it is impossible to accept that such a solution, contrary to the interests of justice administration, is acceptable to the rational lawmaker. The time limit provided for in Article 54 § 1 CPC is final and that is why it cannot be reinstated (Eichstaedt, 2024, thesis 1). This solution can be seen as limiting the rights of the victim, but also as a solution to streamline the proceedings and increase its efficiency. This is achieved primarily by reducing the number of active participants in the jurisdictional phase, which is also served by the court's right to limit the number of auxiliary prosecutors appearing in the case, if this is necessary to ensure the proper course of proceedings (Article 56 § 1 CPC). In my view, this solution must necessarily be enriched with victim's right to complain about a decision which *states that he may not take part in the proceedings when the number of accused persons determined by the court already participate in them.* This would require the deletion of § 1a of this provision introduced in the Code in 2019.[8] An important argument for granting the victim the right of complaint against a decision issued pursuant to Article 56 § 1 CPC is provided by Article 54 § 3 in conjunction with its § 2 CPC, which provides for a complaint to another equivalent adjudicating panel of this court against a decision excluding from the case an unauthorized person or a person who has submitted to the court an indictment or a declaration of joining the proceedings after the time limit. If the legislature intended to give the unauthorized person the right to appeal against the elimination decision (Article 54 § 2 CPC), can the lack of a similar right on the part of a person that is entitled, but removed from the case just for the reason of *numerals*, be reasonably justified? Another argument for unification of the rules for challenging elimination decisions is that the institution of

auxiliary prosecutor serves to implement what Katarzyna Dudka calls a *satisfaction function*, which would only strengthen the protection of the interests of the victim in criminal proceedings (Dudka, 2021, p. 92).

The consequence of granting the victim the right to act as an auxiliary prosecutor, i.e. a procedurally independent party, is that the victim is almost completely independent of the attitude of the public prosecutor. This is expressed in Article 54 § 2 in conjunction with Article 14 § 2 CPC. This provision stipulates that *the withdrawal of an indictment by the public prosecutor does not deprive the auxiliary prosecutor of his rights* and *a victim who has not previously exercised the rights of auxiliary prosecutor may, within 14 days of being notified of the public prosecutor's withdrawal of the indictment, declare that he is joining the proceedings as an auxiliary prosecutor*. The victim thus gains an instrument that allows him or her to continue the prosecution under changed procedural conditions, while retaining the previously achieved public prosecutor's *gains*.

Protection of interests of the victim as a witness

The provisions of the Code generally treat witnesses as a homogeneous group, applying to them the same institutions and the same rules of hearing. A significant exception is only the victim testifying in the case, but this special treatment of the victim may be supported by the circumstances in which the offence has been committed and victim's age, whose disregard could result in secondary victimisation. Some scholars in the field, such as Cezary Kulesza, point out that the victims of sexual crimes, including women and children, deserve such exceptional treatment. Firstly, this safeguards their interests, and secondly, it increases the chances of obtaining necessary evidence from these witnesses, often being the only evidence available in the case (Kulesza, 1995, p. 66–78). Wojciech Dadak aptly noted that secondary victimisation of the victim *in the trial* may take the form of victimisation caused by the victim's participation in procedural acts and be the result of *interaction with the proceeding body*, as well as *interaction with the suspect or accused person involved in the same procedural acts* (Dadak, 2021, p. 12).

The former can be mitigated: by organizational means, by training the law enforcement and judicial staff members and requiring them to be more empathetic, but also by normative means, e.g. by introducing a derogation from the principle of legalism (Article 12 CPC) (Kluza, 2021, p. 204–206), by limiting access to evidence or by exempting the victim from the obligation to act as an auxiliary prosecutor in the case at the jurisdictional stage. The latter type of interaction, on the other hand, requires only statutory actions. Examples of these actions include the provisions of Article 315a CPC, Article 185a and Article 185c CPC.

The same victim, who has been instructed under Article 300 § 2 CPC, becomes at the same time the recipient of the instruction under § 3 of that provision. Article 300 § 3 CPC makes no difference in this respect in the case of a victim witness, which results in the victim receiving two instructions: as a party (§ 2) and as a witness (§ 3), the latter only *before first questioning*. This instruction concerns the rights and obligations set out in Articles 177 to 192a CPC and the available means of protection and assistance referred to in the Act of 28 November 2014 on the protection and assistance for victims and witnesses.

The provision of Article 315a CPC allows the victim questioning to be abandoned if it is not necessary to establish the facts. The victim may, however, request such questioning, which then should take place unless the fulfilment of that request would make the proceedings protracted. The provision sets the general rule to spare any victim the trauma of testifying, although the inclusion of that provision in Chapter 35 on the conduct of investigation means that that the limitation does not apply to the judicial stage of proceedings. As put by scholars in the field, this limitation must be read in a manner consistent with the principle of substantive truth, the objectives of criminal proceedings and systemic interpretation (Kurowski, 2024, thesis 5). A victim standing before a court as a witness may, on an equal basis with other witnesses, exercise the right to refuse to testify under Article 182 § 1 or § 2 CPC or to refuse to answer a question under Article 183 § 1 and Article 185 CPC. If a victim who testifies has a justified concern that life, health, freedom or considerable property of the witness or the person closest to him/her is endangered, he/she may benefit from the protection granted to him/her by Article 184 CPC, i.e. may obtain the status of an anonymous witness. In this way, the circumstances allowing disclosure of victim's identity, including personal data, if they are not relevant

to the outcome of the case, will be kept secret (§ 1) and the hearing itself will take place in the manner set out in § 2 of this Article.

Extending the protection of victims does not necessarily mean increasing victim's procedural rights, but sometimes may take the form of extending the objective scope of an existing procedural institution. This was the case i.a. with Article 185a § 1 CPC, which until its amendment of 2013[9] could be applied to crimes under Chapters XXV and XXVI of the Penal Code, while after that year also to crimes under Chapter XXIII, albeit in all these cases to crimes committed with the use of violence or unlawful threat (Bieńkowska, 2014, p. 27). On the other hand, the amendment of 2023 only seemingly serves to properly define the relationship between the accused and the court, refraining from calling the accused's request for re-hearing the minor victim a *demand* and pointing out that it may be disregarded.[10] In my opinion, this is a solution designed to protect such a particularly sensitive source of evidence from exposure to stress associated with the hearing or rehearing, which undermined the belief in the provision that it is an act carried out only if it is found to be *relevant to the outcome of the case and only once* (For more on the guarantee nature of this provision, see Kąkol 2018. It is considered as a manifestation of *care about crime victims* by Stefański, Zabłocki, 2019, thesis 1, the same view in Jarocki 2002, p. 127). After all, the intention of the lawmakers was to treat the hearing of such a victim as a means of last resort (Żbikowska, 2016, p. 85).

The interests of the minor victim questioned as a witness, and at the same time the attempt to reconcile them with the principle of promptness of proceedings (Koper, 2019, p. 74), are safeguarded by separating the victim from the accused and conducting the interview at a meeting with a psychological expert and, optionally, also with the participation of the prosecutor, defence counsel and the victim's attorney (Article 185a, § 2 CPC) (the person mentioned in Article 51 § 2 CPC or a person of age chosen by the victim, as referred to in § 1, is also entitled to be present at the questioning if this does not restrict the questioned person's freedom to speak (Article 185a § 2 sentence III CPC)). This mode of procedure is mandatory for victims who are under 15 years of age at the time of questioning (Article 185a, § 1) and optional for victims who are over 15 years of age at the time of questioning (Article 185a, § 4 CPC). The legislature also grants a similar level of protection for victims of crime under

Articles 197 to 199 of the Penal Code, who at the time of questioning are over 15 years old and are to be questioned as a witness (Article 185c § 1-2), allowing the victim to submit a request the participation in his or her questioning of an expert psychologist of the gender of victim's choice, most often the same as the victim's gender (Article 185c § 4 CPC). Nothing prevents that a more widely addressed provision, i.e. Article 185e CPC, be applied to the testimony of the victim as a witness, but Article 185f CPC, governing the place of questioning of witnesses listed in Article 185 a-c CPC, always applies.

Conclusion

The comparison of the provisions of the current Code of Criminal Procedure with those of the previous Code reveals the significance of the changes which have taken place in the procedural situation of the victim. Although the procedural status of the victim has not changed, the means of victim's protection have been extended, which has not necessarily translated into an increase in the activity of victims, primarily at the pre-trial stage of criminal proceedings (Żylińska, 2015, p. 50). The change in the approach to the victim and his or her *legally protected interests (…) while respecting his or her dignity* is evident from the very beginning of the regulation of the Code of Criminal Procedure of 1997, Article 2 § 2 point 3 CPC is considered in the scholarly opinion as one of the so-called principal objectives of (Paluszkiewicz, 2023, art. 54, thesis 3) criminal proceedings. Both values should be treated on an equal footing and respect for one value should not be at the expense of the other. This provision can, of course, be seen as a declaration, but also as an announcement that further provisions will be worded in such a way as to secure the attainment of those objectives. It is significant that since the adoption of the Code of Criminal Procedure, apart from the changes within Article 2 § 1 point 1 CPC, only the objective relating to the victim has been extended[11]. The strengthening of the protection of victims is to some extent a consequence of the introduction of new institutions into the criminal procedure, such as mediation or criminal-law agreements (plea bargaining), but also a better understanding of the complex situation of victims of crime.

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[3]Ustawa z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (Dz. U. poz. 437 z późn. zm.).
[4] Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (Dz. U. poz. 1694).
[5] Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz. U. poz. 289 z późn. zm.).
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[8] Article 1 (7)(a), Ustawa z dnia 19 lipca 2019 r. (Dz. U. z 2019 r. poz. 1694) amending this Act as of 5 October 2019.
[9] Ustawa z dnia 13 czerwca 2013 r. o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego (Dz. U. poz. 849).
[10] Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz. U. poz. 289 z późn. zm.).
[11]This is about extending the objective under Article 2 § 1 pkt 3 CPC with "while concurrently respecting his or her dignity" – ustawa z dnia 28 listopada 2014 r. o ochronie i pomocy dla pokrzywdzonego i świadka (Dz. U. z 2015 r. poz. 21).