

Instytut Prawa Karnego UMCS  
Zakład Kryminalistyki i Prawa Dowodowego

Adam TARACHA

**The Participation of the Suspect and the Injured Person  
in the Evidential Acts of the Preparatory Proceedings\***

Udział podejrzanego i pokrzywdzonego w czynnościach dowodowych  
w postępowaniu przygotowawczym

The discussion over the model of preparatory proceedings<sup>1</sup> which started in the 40's of the previous century reached its particular intensity on the turn of the 19th century when a series of the international congresses on the penal law dealing with these matters took place.<sup>2</sup> It turned out soon however, that sorting out of this problem is a particularly difficult task. It is connected strictly with the necessity to reconcile the opposite aims of this phase of the proceedings: the lawsuit's speed and efficiency on the one hand, and the due gathering of the evidence material and the guarantee to give the basic citizen's rights to the people the suit is pending against on the other. As the speed of the proceedings may be best guaranteed by the investigation principle (the pursuit by virtue of the office) but it is hard to imagine the guarantee of the suspect's rights without introducing, at least to the limited extent the contradictory principle into the preparatory proceedings.

The contradictory (adversory) principle to be fully realized needs at least three elements: separation of the litigant parties, describing the subject matter of litigation, the equality of the parties leading the liti-

---

\* A shortened version of the paper delivered at the international conference "Victimology in Eastern and Western Europe" (Mađralin near Warsaw, 1993).

<sup>1</sup> I use the word "model" in the same meaning as S. Waltoś does. cf. S. Waltoś: *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa 1969, p. 9 and 10.

<sup>2</sup> J. Paygert: *Kilka kwestii śledztwa wstępnego ze szczególnym uwzględnieniem sprawy aresztu śledczego*, Część I. *Reforma śledztwa wstępnego*, Lwów 1912, p. 32 and ff.

gation before the organ which is deciding a dispute. This principle cannot be fully realized in the preparatory proceedings, because there is no full division of the functions of the proceedings which is a basic prerequisite of the realization of the contradictory principle.<sup>3</sup> So it is right to say then, only about some elements of the contradictory principle in the preparatory proceedings.

The code of criminal procedure (c.c.p.) imposes upon the subject carrying the preparatory proceedings as a rule an absolute duty to admit the parties participation in the acts mentioned in the art. 272, 274 and 277 § 3, as to the other acts — the participation of these people depends on the agreement of the investigating organ (art. 273 c.c.p.). The following view was presented in literature, that is a very inconspicuous range of parties' rights in the preparatory proceedings.<sup>4</sup> Only art. 272 c.c.p. allows both the suspect and the injured person and their substitutes in the proceedings to participate in evidential acts (unrepeatable actions). Regulations in the art. 274 c.c.p. (an evidence based on an institution of experts) and the art. 277 c.c.p. (final acquainting with all preparatory proceedings material) give these rights only to the suspect. Used by the legislator formulation in the art. 272 c.c.p., that "should be admitted to the participation in the acts" clearly shows that the legislator's intentions were to assure the parties the ability of active participation in unrepeatable evidential acts. It is assumed that the parties admitted to participation in these actions should have the same rights as during the main judicial proceedings and so should have the right to ask the witnesses, to give motions and make notices.<sup>5</sup>

The significant importance of the realization of rights of the parties mentioned in the art. 272 c.c.p. has a question of notifying about the time and the place where the unrepeatable actions will take place. The organ of the preparatory proceedings, according to the art. 102 § 1 c.c.p. has the duty to notify the authorized persons of the time and place thereof.

<sup>3</sup> Cf. Z. Doda: „Kontraduktoryjność” postępowania przygotowawczego na tle polskiego prawa karnego procesowego, [w:] *Postępowanie przygotowawcze*, Red. M. Cieślak i W. E. Czugunow, „Zeszyty Naukowe UJ” 1973, no. 61.

<sup>4</sup> Cf. M. Cieślak, Z. Doda: *Węzłowe zagadnienia postępowania karnego (ocena realizacji kodyfikacji z 1969 r.)*, „Zeszyty Naukowe IBPS” 1978, no. 9, p. 152 and ff.; T. Majewski: *Uprawnienia jednostek gospodarki uspołecznionej w procesie karnym*, Warszawa 1971, p. 772.

<sup>5</sup> Cf. S. Waltoś: *Istota i zakres uprawnień podejrzanego i pokrzywdzonego oraz ich zastępców w niepowtarzalnych czynnościach śledczych i dochodzących*, „Palestra” 1969, no. 9, p. 18; T. Taras: *Krok naprzód w kierunku kontraduktoryjności postępowania przygotowawczego w projekcie k.p.k.* „Palestra” 1969, no. 3, p. 8; Z. Halota, K. Niementowski: *Rola i pozycja obrońcy w przygotowawczym stadium procesu karnego* „Problemy Praworządności” 1970, no. 6, p. 35.

One case is excluded, however, when the procedure of these actions, according to the art. 267 c.c.p., to notify about the time and place is a formal condition of their carrying out (art. 102 § 2 c.c.p.). The character of these acts which are regarded as unrepeatable, usually demanding from these actions to be quickly executed obliges the organ carrying out the proceedings to use fast means of communication (telephone, fax, telegraph, telex and the like) in such a way that both parties could use their authority. Such possibility is foreseen *expressis verbis* in the art. 123 c.c.p.

In such activities as a police line up, a visit of a scene of crime, exhumation, most of the process experiments, when the time of these actions is previously known, the organ carrying the proceedings ought to notify the persons authorized in an usual way: that is by the delivery of letters.

It should be taken for granted that the danger of losing or putting out of shape the evidence in case of the delay should release the organ carrying the proceedings from the duty of admitting the parties to participate in the acts which is suggested by the redaction of the art. 272 § 1 c.c.p., but only from the duty of notifying about the time and place of this act in all the cases when using even the fastest means of communications is useless (e.g. in case of inspection of a road accident). If we considered that, in this case the organ carrying the proceedings does not have the duty to admit the parties to this act on the basis of the art. 272 c.c.p. and so the act takes place according to the strictness of the repeatable actions, we would deprive the parties of the right of participation in all the acts carried according to the art. 267 c.c.p., if only the parties were just where the act took place. The solution of this kind would deprive the parties of the authorities to the majority of unrepeatable acts (art. 272 c.c.p.), because the evidences realized during the investigation in the essential range form the majority of these acts.

The disposition of the art. 272 c.c.p. gives the authority to participate in the unrepeatable act both to the suspect and to the injured person and also to their substitutes in the process. The following question arises whether the organ of the process in the situation when it is not established yet who from the participants of the event is the suspect and who is the injured person, is released from the duty to admit the parties to participate in the unrepeatable act. The construction of the art. 272 c.c.p. admitting the both parties to participate in the act allows to avoid the difficulties in finding out who plays which role. In the essential range these situations in investigation may happen relatively often.

The equalization of the injured person's authorities with the suspect's during the unrepeatable acts, allows to realize the disposition in the art. 272 c.c.p. without the final decision, who is the suspect and who is the injured person. It is enough to know for sure that both these persons

will play one of the roles in the process. This interpretation of the regulations is suggested by the guaranteeing function of the regulation art. 272 c.c.p. which has to be treated as the basic one. Additional limitations to the participation of the suspect in the unrepeatable acts are introduced, by still in force, Inquiry — Investigation Instruction of Civic Militia.<sup>6</sup> This instruction in the § 48 p. 7 provides, that the organ carrying the preparatory proceedings is released from the duty of admission of the suspect to the unrepeatable act, when "the presence of the suspect can evoke a feeling of shame to the injured person, the meeting of the suspect with the injured person or his relatives is not recommended during the acts considering the goodness of the proceedings or other reasons".

In spite of the illicit interpretation spreading to the suspect's disadvantage, we are dealing here with the interpretation which is spreading the special regulation, despite the fact that the limitation of parties' duty to participate in unrepeatable act has a character of the closed list of enumeration. An argument, that the act in the process should not endanger personal properties of taking an active part in it, should be by all means supported. It should not take place at the cost of any of the parties. In case when the act may endanger somebody's rights (but rather more serious than a feeling of shame) we should consider whether the carrying of the act ought to be abandoned altogether. However, when the person conducting the preparatory proceedings decides to do so all the possible measures should be taken to diminish this complaint as much as possible. As an example may serve here a substitution of the open direct line up by the discreet direct line up (e.g. the use of Phoenician mirror) when the recognizing witness is the person injured in the brutal crime (rape, robbery and the like). In this case again the confrontation face to face of the victim with the perpetrator would be too painful for the victim. This solution is suggested not only to protect the injured person's psychological sphere, but also objectivism of the recognition (a person having a big stress has less chances to recognize the perpetrator correctly). The protection of these victim's rights cannot be, however, realized by the complete exclusion of the suspect's authorization.<sup>7</sup>

However, if we approved of the second premiss mentioned in the instruction, namely exclusion of the suspect from the participation in the

---

<sup>6</sup> *Instrukcja dochodzeniowo-śledcza Milicji Obywatelskiej, zarządzenie Ministra Spraw Wewnętrznych z 19 lipca 1976 r. w sprawie prowadzenia przez Milicję Obywatelską postępowania przygotowawczego.*

<sup>7</sup> The suspect's rights will be more restricted after the future regulation which will allow to introduce an "incognito witness". Draft of this Act is considered by the Polish Parliament.

unrepeatable act ("a confrontation of the suspect with the injured person is not advisable considering the good of the proceedings or other reasons") we would have to take into account the fact that the suspect's right to participate in the unrepeatable acts would be crossed out altogether in practice.

The remaining regulations of the Code of Criminal Procedure the art. 274 and 277 impose upon the organ which is conducting the process the duty to admit to the act only the suspect, so we are dealing here with the unsettling of the balance of the authorizations to the injured person's disadvantage. Particular critics were met by the regulation of the art. 274 c.c.p. according to which in case of admission of the evidence based on an opinion issued by a scientific institute, scientific-research institute, a specialized establishment, an institution of experts, the suspect and his defence council shall be served with the order of the admission of this evidence and permitted to participate in the examination of experts and to acquaint themselves with the opinion, if one has been prepared in writing. The critical opinions of the subjective range of this regulation were accompanied by a fairly common postulate to equalize the suspect's and the injured person's authorizations.<sup>8</sup> We find a similar situation with the institution of a final acquaintance with the investigation's materials or inquiry materials (art. 277 c.c.p.). A postulate to equalize the parties' authorizing was evenly frequent as in case of the art. 274 c.c.p.<sup>9</sup>, but in practice, the admission of the injured person to the final acquaintance with the investigation materials or inquiry may be sometimes connected with a necessity to prolongate the duration of the preparatory proceedings (especially in case of the extensive evidence material).

A possibility to participate by the parties in other investigative or inquiry actions (art. 273 c.c.p.) actually is seriously limited. Firstly, the admittance takes places upon the motion of the authorized person. The motion must specify the inquiry action the motion is applied for, by the party. The inquiry motion must be applied in time. With seriously limited openness of the preparatory proceeding the application of such motion will not be an easy task at all. Secondly, in spite of the fact that the legislator in the art. 273 § 1 c.c.p. formulates the rule of admitting the

---

<sup>8</sup> Cf. Doda: *op. cit.*, p. 100. M. Lipczyńska, W. Posnow: *Adwokat — pełnomocnik pokrzywdzonego w stadium przygotowawczym procesu karnego*, „Palestra” 1980, no. 8—9, p. 52.

<sup>9</sup> Cf. Doda: *op. cit.*, pp. 103—104; S. Stachowiak: *Miejsce i rola instytucji zamknięcia postępowania przygotowawczego w polskim procesie karnym*, „Państwo i Prawo” 1984, no. 7, p. 79; S. Pulikowski: *Sytuacja prawna pokrzywdzonego w związku z czynnościami zamknięcia postępowania przygotowawczego*, „Wojskowy Przegląd Prawniczy” 1985, no. 4, pp. 429—432.

parties to participate in the act and the formulation seems to be quite univocal ("shall be admitted on request...") but still, the § 2 giving the procurator the right to deny such request, if the interest of the investigation or inquiry requires it, forms an exception widely breaking this rule. Moreover, the decision of the denial may not be complained. This jeopardy has been quite early paid attention to.<sup>10</sup>

The postulates of changes, which were to enlarge the guarantees of the parties' rights in the preparatory proceedings and to enlarge the possibility of their active participation, were almost completely including the drafts of the code of the penal procedure dated 1981, both the social (variants I and II) and the governmental one.<sup>11</sup> According to both of the drafts, the social (variant I) and the governmental, an absolute admission of the parties to the participation in the actions upon a motion would be a rule. The parties' authorizations were made equal as to the activities of the final acquaintance with the investigation materials and the experts' opinion. Also the possibility to acquaint with the case's material would be widened for the parties. According to the governmental project, the person conducting the proceedings could not deny the inspection to the report of the activities, in which the requesting party could participate. It regarded also the document that was applied by the party, coming from it or made with its contribution. The denial of seeing the files to copy them could be complained.

According to the variant II of the social project, the examining magistrate would decide about showing of the files, and variant I, was imposing upon the person conducting the proceedings the duty to render the files accessible to the defendant in the range that would be enough to prepare the complaint about the temporary arrest or a motion to appeal.

The works over the reformation of penal law, already highly advanced were interrupted by the introduction of the martial law on 13th December 1981. Only on 14th May 1987 the Prime Minister in his regulation no. 16 appointed the Commission to deal with reforming of the penal law, which commenced its work on 26 October 1987.<sup>12</sup>

The draft of the code of criminal procedure worked out by the "group of the penal procedure law" under this Commission (redaction from 1994) introduces an important change of the model of the preparatory

<sup>10</sup> Taras: *op. cit.*, p. 10.

<sup>11</sup> *Wstępny społeczny projekt nowelizacji ustawy z dnia 19 kwietnia 1969 r. kodeks postępowania karnego (wariant I i II)*, Kraków, styczeń—maj 1981; *Projekt zmian przepisów kodeksu postępowania karnego*, Warszawa, wrzesień 1981.

<sup>12</sup> 30 research workers and 37 people working in Courts and Bar took part in the Commission. Staff of the Commission has changed a lot.

proceedings. The creators of the draft, as one of the most important changes in the model give "the reinforcement of the parties guaranties and especially a fundamental equalization of the suspect's and the injured person's position in this respect".<sup>13</sup>

The art. 310 of the project gives the both sides a right to submit an evidential motion. The person conducting a process is imposed a duty to admit the parties participation in the acts upon their request. The exception is only the possibility of not bringing the deprived of liberty suspect if it causes serious difficulties. The decision of the denial to perform the acts may be complained.

The art. 311 in § 1 and 2 in the same way as in the art. 272 of The Code of Criminal Procedure regulates participation in the unrepeatable acts. Whereas § 3 gives the parties and the prosecutor and also the other organ conducting the preparatory proceeding the right to demand from the court to interrogate the witness if there is a danger that it will not be possible during the trial.

The art. 313 equalizes the injured person with the suspect in case of the admission, in the preparatory proceedings, of the evidence based on the opinion issued by a specialized establishment of scientific research or experts. Limitations concern only the participation of the suspect deprived of liberty if it causes serious difficulties. Admission to participate in other acts (upon the party's request) may be, by the procurator's decision, denied if the interest of the investigation or inquiry requires it. He could also deny to bring the suspect if it would cause serious difficulties.

The art. 316 permits the injured person and his legal representative to participate in the final act of acquainting the suspect with the materials of the proceedings. It also equalizes the rights of the parties to submit motions for the completion of the investigation or inquiry and the right to participate in the acts. The decision of the denial to perform the acts may be complained.

The project widens also the internal openness of the preparatory proceedings. The art. 154 § 3 states that the party cannot be refused a permission to make a copy of the acts' record, in which the party participated or had the right to participate, and also the document coming from it or made with its contribution. By the considerable widening of the right of the parties to participate in the preparatory proceedings, the regulation (for parties' benefit) limits the general rule that the parties

---

<sup>13</sup> Komisja ds. Reformy Prawa Karnego, Zespół Prawa Karnego Procesowego — *Projekt kodeksu postępowania karnego wraz z uzasadnieniem „Państwo i Prawo”* 1994, an additional paper no. 5, pp. 156—157.

and their legal representatives in the proceeding, have an access to the files only after the agreement of the person conducting the preparatory proceeding (art. 153 § 4).

The suggested regulation gives an actual ability of an active performing of the parties in the preparatory proceeding by eliminating the existing disproportions of the authorizations concerning the injured person and the suspect in our legal situation.

The draft widens the right of the suspect to defence. The subject carrying the preparatory proceedings must inform the suspect about his right to refuse depositions (art. 171 § 1). The defence council has the right to be present at the time of the interrogatory of the suspect (art. 296 § 1).

The draft considerably changes the injured person's status in the criminal proceedings. The renewed discountinuanance of the proceedings (after the reversal by the court of the first decision) of the renewed denial of instituting legal proceedings, causes that the injured person may institute the indictment act himself as an auxiliary prosecutor (art. 329 § 2 and art. 51). Thus he becomes a substituting auxiliary procurator, (who is acting instead), whose rights are far larger than the rights of the auxiliary prosecutor (who is acting a side procurator), whose function is presently performing. Will these changes ensure the development of the adversary system of the preparatory proceedings? It seems so, as all the most important postulates of the doctrine are fulfilled. But one should be a very moderate optimist. The regulations enlarging the contradiction of this proceeding introduced to the penal code dated 1969 (in spite of their imperfection, they give however far more possibilities to the parties to act in relation to the previous state) did not induce a clear change in this matter, particularly there was no growth of the defendant's participation in this phase of the proceedings.<sup>14</sup>

The change of the present practise (playing not only the defence council's role) of avoiding to get involved in the preparatory proceedings needs some time, certainly. The Bar's attitude, treating this phase of the penal proceeding as being completely dominated by the penal prosecution agency, which seems to be plainly confirmed by lawyers' tariff invariably establishing a very low level of the global sum for lawyer's participation is also vital. It may be so that the extended possibilities of the injured person's acting in this stage of the proceeding "will force" a more active work of the lawyers in the role of attorneys, which seems to be indispensable in the context of possibilities to institute an indictment

---

<sup>14</sup> Cf. T. Grzegorzczuk: *Obrońca w postępowaniu przygotowawczym*, Łódź 1988, p. 196 and ff.



act by the injured person. It seems, however, that the crucial significance for using the possibilities to extend contradiction of the preparatory proceeding that are created by the draft, will have breaking of the procurators' and lawyers' mutual distrust and respecting of the loyalty principle.

#### STRESZCZENIE

Przedstawiono uprawnienia stron do udziału w czynnościach dowodowych postępowania przygotowawczego zarówno *de lege lata*, jak i — wobec zaawansowania prac nad nowym kodeksem postępowania karnego — *de lege ferenda*. Zauważono, że większość zgłoszonych dotychczas postulatów, zmierzających do rozszerzenia i zrównania uprawnień stron w przygotowawczej fazie procesu, znalazło swój wyraz w treści projektu kodeksu postępowania karnego. Podkreślono także, że w propozycji regulacji karnoprosesowej nastąpiło zwiększenie jawności wewnętrznej postępowania przygotowawczego, mającej zasadnicze znaczenie dla możliwości korzystania przez strony z przysługujących im uprawnień. Jednak umiarkowanie optymistycznie oceniono praktyczne zwiększenie aktywności stron w tym postępowaniu. Przełamanie bowiem wieloletnich nawyków nieangażowania się stron oraz obrońców i pełnomocników pokrzywdzonych w czynności dowodowe postępowania przygotowawczego wymaga oczywiście czasu.

