



KOPEĆ & ZABOROWSKI

LAW FIRM

Guideline

DEFENSE IN CRIMINAL PROCEEDINGS

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DEFENSE IN CRIMINAL PROCEEDINGS

The right of defense is a **fundamental principle of the criminal proceedings that has existed as long as the law itself**. A person accused of acting contrary to the rules in force at a given time and place has always had the right to comment on the charges against him or her. The right of defense is the right of a suspect or an accused person, derived from the right to a fair trial, which, however, is a broader concept that includes the right of defense. There is no fair and reliable trial if the right of defense is not properly respected and is only an illusory right.

The right of defense is guaranteed by constitutional and statutory acts of states and is shaped by the norms of international law (i.e. the Convention for the Protection of Human Rights and Fundamental Freedoms), including the law of the European Union (i.e. the Charter of Fundamental Rights of the European Union).

DEFENSE IN CRIMINAL PROCEEDINGS IN THE POLISH LEGAL SYSTEM

In Poland, the right of defense is based on the Constitution of the Republic of Poland (Article 42(2)), according to which *anyone against whom criminal proceedings are conducted has the right of defense at all stages of the proceedings. In particular, such person may choose a defense counsel or use a public defense attorney under the terms specified in the Act*, as well as in other acts constituting the Polish criminal law system.

Under the Code of Criminal Procedure, the right of defense is regulated by Article 6, according to which *the accused has the right of defense, including the right to use the assistance of a defense counsel, about which the accused should be instructed*. Although this provision indicates that the right of defense is vested in the accused, these rights also extend to the suspect, i.e. the person against whom preparatory proceedings are pending and charges have been brought. This is regulated by Article 71 § 3 of the Code of Criminal Procedure, which sets out: *If this Code uses the term "accused" in a general sense, the relevant provisions shall also apply to the suspect*.



The right of defense is available throughout the entire preparatory and judicial proceedings. It is implemented through the possibility of exercising the rights granted to the accused by law.

An obvious right of the suspect/accused is the right to appoint a professional defense counsel pursuant to Article 83 of the Code of Criminal Procedure. As set out in Article 82 of the Code of Criminal Procedure, *only a person authorized to conduct a defense in accordance with the provisions of the bar system or the Act on legal advisors may be a defense counsel*. This excludes the possibility of appointing as defense counsel a person who does not have the appropriate skills, which is also an indirect guarantee of the fairness of the proceedings and the proper exercise of the right of defense by the suspect/accused.

What is important from the point of view of a person exercising the right of defense is the possibility of appointing a defense counsel for this person by a third party (in writing) if this person stays in penitentiary confinement. This opens the way for actions taken by a professional defense counsel to ensure the best representation of the interests of that person. Additionally, authorization to conduct defense may also be granted by an oral statement included in the minutes prepared by the authority responsible for the criminal proceedings.

A suspect/accused who is under provisional arrest **may communicate with his or her lawyer without any other persons being present and by mail**. This right protects the attorney-client privilege. There are certain exceptions to this right. If the preparatory proceedings so require, the prosecutor, in particularly justified cases, may reserve the right to control the correspondence of the suspect with the defense counsel, and when granting permission for communication, the prosecutor may stipulate that the prosecutor or a person authorized by the prosecutor will be present during such communication.

The mere appointment of a defense counsel or the appointment of a public defense counsel (as described below) gives the defense counsel the right to act throughout the proceedings, including activities after the judgment becomes final, if it does not contain any restrictions. Therefore, **the scope of the defense counsel's authority is also important.** In practice, there are situations where the suspect/accused appoints a defense counsel only for one or several selected activities. Then, such a defense counsel may act in the proceedings only within the limits of his or her authorization.

In addition, the suspect/accused has the right to:

- provide explanations. However, he or she may refuse to answer particular questions or to provide explanations without giving reasons. The authority is obliged to inform the suspect/accused about this right (Article 175 of the Code of Criminal Procedure);
- submit requests for conducting activities in the course of an investigation or inquiry (Article 315 of the Code of Criminal Procedure). The suspect and the defense counsel may not be refused to take part in activities if they request so;
- demand his or her hearing with the participation of the appointed defense counsel. It should be noted that the defense counsel's failure to appear does not stop the interrogation of the suspect and in such a situation the suspect will be questioned without the participation of the defense counsel (Article 301 of the Code of Criminal Procedure);
- demand, in the preparatory proceedings, that he or she be given the opportunity to provide written explanations during the interrogation. Written explanations, with the date of their submission and signed by the suspect, are attached to the report. However, the interrogator may, for important reasons, refuse to accept written explanations (Article 176 of the Code of Criminal Procedure);



- request access to the case files. With the consent of the prosecutor, the suspect may have access to the case files, be allowed to make copies, and receive photocopies or certified copies of the case files against a fee (Article 156 § 5 of the Code of Criminal Procedure);
- appeal against decisions made during the proceedings;
- use the free assistance of an interpreter if the suspect does not have a sufficient command of the Polish language. The suspect also has the right to obtain decisions on presenting, supplementing, or changing the charges, the indictment, and the rulings that are subject to appeal, together with their translations (Article 72 of the Code of Criminal Procedure);
- the suspect/accused has no obligation to prove his or her innocence. There is also no obligation to provide evidence against oneself (Article 74 of the Code of Criminal Procedure). In criminal proceedings, the burden of proof rests with law enforcement authorities;
- final presentation of the proceedings materials. He or she will be informed, upon request, about the date of the meeting to present such materials, and the suspect's unexcused failure to appear does not stop further proceedings. The suspect has the right to submit a request to supplement the proceedings within three days from the date such materials were presented to the suspect (Article 321 of the Code of Criminal Procedure);
- ask questioned persons questions during the hearing (Article 370 of the Code of Criminal Procedure);
- challenge the judgment by filing an appeal (Article 444 of the Code of Criminal Procedure).

The suspect/accused may appoint a **maximum of three defense counsels in given pending proceedings**. This is to ensure that the suspect/accused has the right to defend himself or herself to the fullest extent possible. At the same time, this restriction prevents attempts to obstruct the proceedings by abusing the rights.

The Code of Criminal Procedure provides for situations where the suspect/accused must have a defense counsel. Pursuant to Article 79 § 1 of the Code of Criminal Procedure, the suspect/accused must have a defense counsel if he or she:

- is under 18 years of age;
- is deaf, mute or blind;
- there is a justified doubt whether his or her ability to recognize the meaning of the act or to control his or her conduct was disabled or significantly impaired at the time of committing the offense;
- there is a justified doubt whether the state of his or her mental health allows him or her to participate in the proceedings or conduct his or her defense independently and reasonably.

Additionally, the accused **must also have a defense counsel if the court deems it necessary due to other circumstances making the defense difficult**. Such a regulation somehow secures the right to obligatory defense of the suspect/accused in a situation where the conditions under Article 79 § 1 of the Code of Criminal Procedure are not met, and the possibility that the suspect/accused may conduct his or her defense on his or her own is significantly hampered by other circumstances and could adversely affect his or her procedural situation.

Proceedings in which there were grounds for establishing obligatory defense for the suspect/accused and which were conducted without the participation of a defense counsel give the absolute right to an appeal on these grounds. In practice, this means **that a judgment issued in such a situation may be overturned regardless of the limits of the appeal and the allegations raised**, and the impact of the subject irregularity on the judgment.



Another critical issue when discussing the right of defense is the possibility of requesting the appointment of a public defense counsel. A suspect/accused who does not have a defense counsel of his or her choice may request for a public defense counsel if he or she duly demonstrates that he or she is unable to cover the costs of defense without prejudice to the necessary maintenance of the suspect/accused and his or her family (Article 78 of the Code of Criminal Procedure).

The suspect/accused **may request the appointment of a public defense counsel to perform a specific procedural action** by referring to the same reasons as in the case of requesting the appointment of a public defense counsel for the entire proceedings (as described above).

The court may cancel the appointment of a defense counsel if it turns out that the reasons for which he or she was appointed do not exist. This usually happens in the case of a sudden, significant improvement in the financial situation of the suspect/accused.

The court will cancel the appointment of a public defense counsel by a decision which may be appealed to another equivalent panel of that court.

Formally, **the right of defense may only be exercised by persons against whom criminal proceedings are pending**, i.e. the suspect (the person against whom charges have been brought) or the accused (the person against whom an indictment has been filed with the court).

Nevertheless, persons who have not been formally charged and who are of potential interest to law enforcement authorities may protect their interests by appointing an attorney to represent a given person in activities before law enforcement authorities. This right results from Article 87 § 1 of the Code of Criminal Procedure, according to which *a party other than the accused may appoint an attorney.*



This is a kind of gateway to securing one's procedural situation as early as possible for a person who is of interest to law enforcement agencies and takes part in the proceedings, for example as a witness. In such a situation, representation by a professional attorney allows for a prior understanding of the subject matter of the proceedings and minimizes the potential adverse impacts of the proceedings on a person who is not a party.

As a law firm specializing in criminal law, we have extensive experience in defending clients suspected of minor offenses and crimes provided for in the Penal Code and the Penal-Tax Code, including the largest and most complex cases in Poland.

In these cases, the time and experience of lawyers are the most crucial factors. Our goal is to provide our clients with a sense of security and certainty that their case is in the hands of professionals who are experts in criminal procedure.

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