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LEGAL STATUS OF THE INJURED PERSON IN POLISH CRIMINAL PROCEEDINGS

Criminal proceedings is the plane in which is actual implementation of substantive criminal law norms – in fact on the basis on proceedings these norms are set in motion, in relation to the functioning order of the procedure. However adjudication in question of criminal responsibility of the accused is the object of criminal action. Penal liability shall be incurred by a perpetrator who commits an act prohibited under penalty, as defined in the act in force at the time of its commission, assuming that it is also unlawful, culpable and socially harmful in a higher level than negligible. This act, therefore, comes from a man, usually affecting the other subject, who is a natural person, legal person or institution – a passive subject of a crime¹. It should be emphasized that the role of the passive subject of a crime – the victim of a crime, can't

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¹ Such qualification of the passive subject of a crime (victim) can be concluded from the definition of the injured person, as formulated in art. 49 § 1 and § 2 of the Polish Code of Criminal Procedure (PCCP) – Act of 6 June 1997 The Code of Criminal Procedure, Dziennik Ustaw (Journal of Laws) 1997, no. 89, pos. 555. According to this definition, the injured person may be a natural person, legal person and a public, local government or social institution whose legal rights have been directly violated or threatened by an offence. It is worth noting in this context the act of 27 September 2013 amending the act – Code of Criminal Procedure and certain other acts, which is expected to come into force on 1 July 2015, in accordance with the provision of art. 49 § 2 PCCP will be replaced by the following wording: „The injured person may also be without legal personality: 1) a public or local government institution, 2) other organizational entity, additional provisions which confer legal capacity”. See: [orka.sejm.gov.pl/opinie7.nsf/nazwa/378_u/\\$file/378_u.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/378_u/$file/378_u.pdf). About the concept of the passive subject of a crime in polish literature of criminal law see: M. S m a r z e w s k i, *Podmiot bierny jako element struktury przestępstwa*, „Roczniki Nauk Prawnych” 2010, no. 2, pp. 117-134.

be reduced solely to the function of the object, perceived by the prism of his legal rights, directly violated or threatened by the perpetrator. “Camouflaging” the passive subject of a crime within the structure of the type of a crime by indentifying him with the subject matter of an executory act, cannot be considered appropriate. Thus it’s necessary to indicate at subjectivity of a victim, which subsequently should receive due its expression in the criminal proceedings. In this context it usually leads to consider the victim, analyzing her significance, as the subject of the specific criminal proceedings – an injured person. The injured person is a subject that less or more participate in the proceedings and have an impact on its course, depending on the stage of the proceedings, its stadium and the measures, as provided by law, which victim has undertaken. From his act or omission depends on his status in the trial. In close relationship with a specific, prescribed by law, activity of a injured person may finally remains being of proceedings. The victim’s behavior then determines indication and conduct of criminal proceedings as a positive condition.

I

Basically, according to the provision of art. 9 PCCP and specified therein principle of proceedings *ex officio*, public agencies responsible for prosecuting criminal offenses are entitled to initiate and conduct preliminary proceedings with or without the agreement of a victim. The exception to the specified principle is when the law provides for prosecution, depending on the application for prosecution of a person, institution or agency or upon permission of an authority. The second exception to the principle of proceeding *ex officio* is provided for in case of committing any of the prohibited acts prosecuted on private accusation.

As a result, it’s made the division for crimes prosecuted *ex officio* and those prosecuted on private accusation. Within the offenses prosecuted *ex officio* can be done further categorization into those crimes which arise makes initiating proceedings *ex officio* unconditionally, i.e. without having to meet any additional requirements. It’s also possible to single out crimes for which to initiate of proceedings is necessary to exist premise in the form of complaint for prosecution or permission of an authority. In this context is important conditional mode of criminal prosecution *ex officio*, because the person entitled to applicate for the prosecution is, as a general rule, an injured

person. In Polish criminal law crimes prosecuted on application (complaint) are divided into: crimes in which the application is always necessary regardless of the qualities of perpetrator (e.g. punishable threat – art. 190 § 2 of PPC² i.c.w. art. 190 § 1 PPC); crimes generally prosecuted *ex officio*, but require the application, when the perpetrator is a next of kin³ – so they are prosecuted on complaint because of qualities of perpetrator (e.g. theft and burglary committed to the detriment of a next of kin – art. 278 § 4 PPC and art. 279 § 2 PPC). Moreover, with regard to the crimes: intentionally or unintentionally causing a bodily injury lasting not longer than 7 days, unless the injured person is the person closest to the accused or a person living together with the perpetrator (art. 157 § 4 and § 5 PPC), defamation (art. 212 § 4 PPC), insult (art. 216 § 5 PPC), violation of bodily integrity (art. 217 § 3 PPC), criminal proceedings is initiated by bringing an private indictment to the court by the injured person. It is also possible to fill private complaint through the Police. In this situation the Police shall accept oral or written charge of an injured person and, in necessary, secure the evidence, whereupon it shall transmit the charge to the appropriate court (art. 488 § 1 PCCP). Injured person with a moment of filing of the private indictment obtained the status of a private prosecutor, which is *de iure* a party of the criminal proceedings under private accusation. It is also important to be pointed out that the being of a trial is than dependent on the support the accusation by the private prosecutor (art. 59 § 1 PCCP). The right of a victim to a private complaint may, however, be reduced as a result of initiate proceedings or intervene in proceedings previously instituted by the state prosecutor, in case the public interest so requires (art. 60 § 1 PCCP)⁴.

The prosecution of crimes on the injured person's motion is one of the modes of prosecution of crimes *ex officio*, when possession of an application, filled by a subject entitled to this, is a prerequisite for the starting and leading criminal proceedings. Following the submission of a complaint such

² Act of 6 June 1997 The Polish Penal Code (PPC), „Dziennik Ustaw” (Journal of Laws) 1997, no. 88, pos. 553.

³ According to the provision of art. 115 § 11 PPC a next of kin is: “[...] a spouse, an ascendant, descendant, brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in co-habitation”.

⁴ C. Kulesza draws attention to this in: C. K u l e s z a, *Prawa podmiotowe osoby pokrzywdzonej przestępstwem w świetle niektórych zasad procesowych*, „Państwo i Prawo” 1991, no. 7, p. 48.

proceedings shall be thenceforth conducted *ex officio*⁵. A lack of application required to prosecute becomes then a negative circumstance within the meaning of art. 17 § 1 pt 10 PCCP, causing discontinuance or refusal to initiate proceedings. Until a motion is filed which has been prescribed by law as a prerequisite to prosecution, the agencies conducting the trial shall conduct only actions not amenable to delay, in order to secure traces or material evidence, and actions aimed at clarifying whether the motion is to be filed (art. 17 § 2 PCCP).

The complaint, in principle, fills the same injured person, but sometimes entitled to its fill can also be a legal representative of a victim or a person under whose custody remains constant (if the injured person is a minor or wholly or partially incapacitated) – art. 51 § 2 PCCP. Rights of an injured person, in case of his death, may be exercised by his closest relatives or, when they are either absent or not discover, by a state prosecutor acting *ex officio* (art. 52 § 1 PCCP). With regard to crime of art. 209 § 1 PPC (persistent evasion of duty alimony), competent for a fill a complaint may also be social welfare authority or agency taking appropriate actions against the debtor. In the case of a soldier of another service than basic military service, which persistently fails to fulfill an obligation under this service complaint is filed by commander of the unit (art. 341 § 3 PPC). Since no request for prosecution, originating either from an injured person or other person entitled to fill complaint, is a negative prerequisite for initiation and lead the prosecuting agency is obliged to take steps to obtain a vacant application and advise the person entitled to file a complaint of this right. The lack of formal request for prosecution is a „brake” for the initiation and conduct of criminal proceedings. However, the complaint may be completed at any time, at any stage of the proceedings, e.g. even after valid discontinuance, if it hasn't passed the period of limitation for crimes prosecuted on the injured person's motion⁶. On the other hand, when in the course of the proceedings, it appears that the offense is prosecuted on complaint, then it's necessary to call a victim to make a statement whether demand prosecution of the crime

⁵ See resolution of the Supreme Court of Poland (SCP) of 13 October 1971, VI KZP 34/71, OSNKW 1972, no. 1, pos. 2.

⁶ See sentence of the SCP of 4 April 2000, V KKN 29/00, Orzecznictwo Sądu Najwyższego, Sądów Apelacyjnych, Naczelnego Sądu Administracyjnego i Trybunału Konstytucyjnego. „Prokuratura i Prawo”, dodatek 2002, no 2, pos. 5. See also J. G r a j e w s k i, *Konsekwencje procesowe oświadczenia pokrzywdzonego o niezadaniu ścigania sprawy przestępstwa wnioskowego*, „Państwo i Prawo” 1977, no. 6, p. 72.

(§ 134 section 1 ordinance of the Minister of Justice of Poland of 24 march 2010 Internal rules of the office of the common organizational units of the Prosecution⁷).

The complaint shall be filed in writing or orally. When it is made orally, then, following the provision of art. 143 § 1 pt 1 PCCP, such action requires a record in writing, under pain of nullity. The condition is that of the document should arise the request in matter of prosecution expressed by the victim of crime or other authorized person. The statement expressing willingness to prosecute has therefore postulative nature. With regard to crimes in which the application is always necessary regardless of the qualities of perpetrator, in a complaint shall be indicated perpetrators. However there isn't obligation to determine them by name. Extremely important in this context is the regulation of art. 12 § 2 PCCP, according to which in the event that a complaint has been only filed against certain perpetrators of an offence, the public prosecutor is obligated to prosecute the co-perpetrators, instigators, accomplices, and other persons whose offence is closely linked with that of the perpetrator indicated in the complaint. The person filling such complaint should be notified thereof. Thus the provision of art. 12 § 2 PCCP formulates the principle of the subjective indivisibility of a complaint. There is also indicated an exception to the principle of indivisibility referring to the next of kin of the complainant. This means that if in the application for the prosecution wasn't identified by name the person closest to victim, then, in the case of disclosure that it is the perpetrator of a criminal act, it's necessary to obtain a separate complaint determining perpetrator by name to prosecute him. The lack of request supplementing the primary complaint causes inability to initiate and conduct criminal proceedings against a next of kin of the injured⁸.

As stated in art. 12 § 3 PCCP the complaint may be withdrawn in the preparatory proceedings with the consent of the state prosecutor. On the other hand in the court proceedings the proposal can be withdrawn to start the trial

⁷ „Dziennik Ustaw” (Journal of Laws) 2010, no 49, pos. 296.

⁸ See widely regarding to the principle of the subjective indivisibility of a complaint: M. C i e ś l a k, *O ściganiu na wniosek w obowiązującym prawie karnym*, „Państwo i Prawo” 1973, no. 1, pp. 65-68; W. D a s z k i e w i c z, *Ściganie na wniosek w polskim procesie karnym (Uwagi de lege lata i postulaty de lege ferenda)*, „Państwo i Prawo” 1956, no. 3, pp. 525-529; R. K m i e c i k, *Jeszcze w sprawie wniosku o ściganie nieznanego sprawcy*, „Palestra” 1972, no 3, pp. 53-56; F. R o s e n g a r t e n, *Oznaczenie sprawcy we wniosku o ściganie*, „Palestra” 1972, no. 3, pp. 56-60.

on the first trial – with the consent of the court. The provision of art. 12 § 3 PCCP also formulates the exception for inability to withdraw the complaint for prosecution of the offence described in art. 197 PPC (rape). The filling of the motion for the second time isn't admitted⁹.

II

Following the art. 299 § 1 PCCP the injured person is the party in the course of preparatory proceedings. He is then regarded as the party due to the fact that his legal rights have been directly violated or threatened by the offense. For this reason, he's entitled to a number of the rights specified in the following provisions of the Polish Code of Criminal Procedure, i.e.: art. 23a § 1 PCCP; art. 47 § 1 PCCP i.c.w. art. 41 § 1 PCCP; art. 69 § 1 PCCP; art. 116 PCCP; art. 147 § 4 PCCP; art. 148 § 4 PCCP; art. 150 § 2 PCCP; art. 156 § 1 i 2 PCCP; art. 156 § 5 PCCP; art. 159 PCCP; art. 253 § 3 PCCP; art. 305 § 4 PCCP; art. 306 § 1 pt 1 PCCP; art. 306 § 3 PCCP; art. 315 § 1 PCCP; art. 315 § 2 PCCP; art. 316 § 1 PCCP; art. 316 § 3 PCCP; art. 317 § 1 PCCP; art. 318 PCCP; art. 321 § 5 PCCP; art. 323 § 2 PCCP; art. 334 § 2 PCCP; art. 336 § 4 PCCP; art. 465 PCCP and art. 466 § 1 PCCP.

Whereas the legal situation of an injured person presents in a different manner in the court proceedings. At that time he is no longer a party of the criminal proceedings. This is because the participation of a victim in a criminal proceedings as its party is dependent on the withdrawal appropriate steps to enter the role of auxiliary prosecutor (art. 53 PCCP) or civil plaintiff (art. 62 PCCP). In addition in cases of crimes prosecuted by private accusation the condition of initiation and conducting of a criminal proceedings is bringing an indictment as a private prosecutor and promote the prosecution before the court (art. 59 PCCP).

⁹ It should be noted that the indicated exception ceases to exist on 27 January 2014, with the entry into force of the act of 13 June 2013 amending the act – Penal Code and the act – Code of Criminal Procedure [„Dziennik Ustaw” (Journal of Laws) 2013, pos. 849] repealing art. 205 PPC and amending the content of art. 12 § 3 PCCP. As a result of amendments the provision of ar 12 § 3 PCCP will obtain the following wording: „The complaint may be withdrawn in the preparatory proceedings with the consent of the state prosecutor and in the court proceedings, with the consent of the court – before the start of the trial on the first trial. The filling of the motion fort the second time isn't admitted”.

In science of the criminal proceedings law is assumed sometimes, that an injured person, even in the event of absence of any action specified by law, is a party of artificially distinguished stage of the criminal proceedings, so-called interim proceedings¹⁰. This scientific view seemed to function partially in the case law, what is clear from the content of the resolution of the Military Chamber of Supreme Court of Poland of 29 April 1993. The resolution provides that in cases of crimes prosecuted by public prosecution, after bringing an accusation and before starting the trial on the first trial, the injured person which isn't acting as an auxiliary prosecutor or civil plaintiff preserves rights of the party¹¹. In fact, an injured person was recognized as a party, till the moment of starting the trial on the first trial, i.e. also in first phase of main proceeding. Acceptance of the pointed thesis arising from the relatively numerous rights, then available to a victim¹². Such the assumption, however, ought to be considered as too broad. An injured person is in fact, due to his victimization, only the party of preliminary proceedings¹³. Moreover, it seems that it isn't necessary to grant a victim a status of the party at this stage of the criminal proceedings. As sufficient *de lege ferenda*, appears to adopt the wording of art. 339 § 5 PCCP as adapted to an injured person as a subject entitled to participate in the meetings referred to in art. 339 § 1 PCCP and art. 339 § 3 pts 1, 2 and 6 PCCP¹⁴.

At the stage of the interim proceedings an injured person may also make a declaration of willingness to act in the trial as the accessory auxiliary prosecutor or the subsidiary auxiliary prosecutor, else as the civil plaintiff. In the absence of such activity the victim isn't a party of the main proceeding, however has the rights to: submit of the request referred to in art. 46 § 1 PCCP, i.e. for impose the obligation to redress the damage caused, in

¹⁰ See S. W a l t o ś, *Proces karny. Zarys systemu*, Warszawa 2008, p. 187.

¹¹ See the resolution of the Military Chamber of SCP of 29 April 1993, WZ 87/93, OSNKW 1993, no. 11-12, pos. 75. Cf. in this context: R. K m i e c i k, *Glosa do postanowienia Sądu Najwyższego z dnia 29 kwietnia 1993 r.*, WZ 87/93, „Wojskowy Przegląd Prawniczy” 1994, no. 2. Cf. also K. P a p k e, *Status pokrzywdzonego w fazie przygotowania do rozprawy głównej*, „Palestra” 1995, no. 11-12, pp. 56-57.

¹² Cf. H. P a l u s z k i e w i c z, *Nowe środki ochrony pokrzywdzonego w polskim prawie karnym procesowym na tle europejskiej polityki karnej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2010, no. 3, pp. 30; W a l t o ś, *Proces karny. Zarys systemu*, p. 188.

¹³ Cf. J. N o w i Ń s k a, *Status prawny powoda cywilnego w procesie karnym*, Warszawa 2007, p. 44.

¹⁴ Cf. W. P o s n o w, *Niektóre aspekty uprawnień pokrzywdzonego*, „Nowe Prawo” 1975, no. 1, pp. 66-67.

whole or in part, until the end of the first interview the victim at the main trial (art. 49a PCCP)¹⁵; participate in the hearing, if they appear, and remain in the room, even if he had to testify as a witness – in this case, the court heard it first (art. 384 § 2 PCCP).

III

In cases of offenses prosecuted by indictment an injured person may participate in judicial proceedings as its party acting as an auxiliary prosecutor (art. 53 PCCP). This institution is governed by Section III („Parties to the proceedings, defense counsel, attorneys of the injured person, and the social representative”), chapter 5 („Auxiliary prosecutor”) of the Polish Code of Criminal Procedure (art. 53–58 PCCP). On the basis of Polish Code of Criminal Procedure distinguishes, as it was mentioned earlier, two categories of the auxiliary prosecutors: accessory auxiliary prosecutor and subsidiary auxiliary prosecutor. This means that an injured person may in fact join in the role of auxiliary prosecutor, supporting the indictment performing in the main proceeding next to the public prosecutor or, in certain situations as provided by law, bringing the public accusation instead of the public prosecutor.

An accessory auxiliary prosecutor is an injured person, who after bringing the indictment by the public prosecutor or after taking to prosecute by the public prosecutor a case normally prosecuted on the private accusation or else in the proceedings before the court in a petty offense case, makes a statement the he wants to support the indictment next to the public prosecutor and the supports that accusation before the court. The participation of the victim in the process as an accessory auxiliary prosecutor is a subject to compliance with certain conditions specified in the act. First, according to art. 54 § 1 PCCP an injured person has to fill a statement either orally or in writing on his intention to act as an auxiliary prosecutor. That statement shall be declared until the start of the trial, but not earlier than before bringing an accusation to the court. Not entirely clear, in the context of statutory

¹⁵ With the effect from 1 July 2015, i.e. with the entry into force of the act of 27 September 2013 amending the act – Code of Criminal Procedure and certain other acts a victim shall have the right to submit of the indicated request until the closing of the trial on the main trial.

regulations, may seem the moment in which an injured person becomes an auxiliary prosecutor. This problem was resolved by the Supreme Court of Poland in the resolution of 11 February 2004, according to which the statement of the victim referred to in art. 54 § 1 PCCP has a constitutive character, what means that in the absence of negative prerequisites preventing admission of this declaration, an injured person becomes an accessory auxiliary prosecutor, from the moment in which he made the statement¹⁶. What is particularly important he acts next to the public prosecutor although the public prosecutor's withdrawal of the indictment shall not deprive him the rights of the accessory auxiliary prosecutor (art. 54 § 2 PCCP). The court doesn't issue the decision on the admission of the injured person to participate in the proceedings as the accessory auxiliary prosecutor, while can only make a decision to refuse admission when: there are already number of auxiliary prosecutors participating in the proceedings limited by the court – the injured person unadmitted to the proceedings as the accessory auxiliary prosecutor has the right to lodge a complaint against the decision within seven days from the date of service of the order (art. 56 § 1 PCCP and art. 56 § 4 PCCP); such a prosecutor is an unauthorized person or his statement on his intention to act as an auxiliary prosecutor was submitted after the prescribed timelimit (art. 56 § 2 PCCP). It is also necessary to mark the fact that in the event of withdrawal from the prosecution claiming damages he may not re-join the proceedings (art. 57 § 1 PCCP). An auxiliary prosecutor is entitled to appeal against a judgement rendered by a court of the first instance (art. 444 PCCP). An auxiliary prosecutor doesn't bear the costs of such a process, even if the accused has been acquitted or the proceedings have been discontinued (art. 632 pt 2 PCCP).

Then the subsidiary auxiliary prosecutor is an injured person who single-handedly brought an accusation towards the indictable offence, under the conditions specified in the act, and supporting the indictment before the court. The process of constitution of the subsidiary indictment and thus obtain the status of a subsidiary auxiliary prosecutor by the victim takes the following steps: passing or approving the order on refusal to institute the preliminary proceedings or on discontinuance (art. 305 § 1 and § 3 PCCP); bringing interlocutory appeal against the order refusing to institute or against the order on discontinuance preliminary proceedings by the injured person to

¹⁶ See the resolution of SCP of 11 February 2004., III KK 295/03, unpublished.

the court of first instance having jurisdiction over the case (art. 306 § 1 PCCP i.c.w. art. 329 § 1 PCCP); the court may consider complaint against the decision and then revoking an order on discontinuance of preparatory proceedings or on refusal to institute it, the court shall indicate the reasons thereof, and, when necessary, also the circumstances which should be clarified or actions which should be conducted – these indications shall be binding on the state prosecutor (art. 330 § 1 PCCP); the state prosecutor still doesn't find grounds to bring an indictment and because of that he again issues an order on discontinuance of proceedings or a refusal to institute it, whichever is back the same decision (art. 330 § 2 sent. 1 PCCP); in the event of upholding the order appealed against, an injured person obtain the right to bring a subsidiary indictment, within one month of the date of the service of notification about decision on the refusal to institute proceedings or on the discontinuation of the proceedings, and he should be so instructed of this right (art. 330 § 2 sent. 2 PCCP i.c.w. art. 55 § 1 PCCP)¹⁷. With regard to the bringing of a subsidiary indictment to a court, however, there are also restrictions set by law. First, due to the fact that the indictment is to be brought in cases of indictable offences, the indictment filed by a victim must be drawn up and signed by an advocate or by a legal counsel, in compliance with conditions specified in art. 332 PCCP and in art. 333 § 1 PCCP (art. 55 § 2 PCCP). The court may also limit, as it is in the case of accessory auxiliary prosecution, the number of subsidiary prosecutors participating in the proceedings (art. 56 § 1 PCCP). Moreover it should also be noted that in case of acquittal of the accused or discontinuance of the proceedings the subsidiary auxiliary prosecutor shall be charged the costs of the court proceedings (art. 632 PCCP i.c.w. art. 640 PCCP).

IV

The passive subject of a crime as an injured person in a particular criminal action may also participate in the judicial proceedings as a civil plaintiff, which is *de iure* a party to this stage of the criminal proceedings. The civil plaintiff is the active party to the proceedings, which file a civil complaint against the accused in order to litigate, within the framework of

¹⁷ W a l t o ś, *Proces karny. Zarys systemu*, p. 192.

the criminal proceedings, his property claims directly resulting from the offence. A civil action is considered, within so-called give-away trial or in other words adhesion proceedings, taking place within a criminal action. A crime, in addition to a criminal responsibility, often results in a civil liability¹⁸. This means that it is necessary to take into consideration the institutional possibility to claim pecuniary claims in the trial, although the essential object of the criminal proceedings is still a matter of criminal liability of the accused. Advisable solution, as correctly pointed out I. Nowikowski, actualizes the idea, assuming a need of victim assistance in pursuing civil (pecuniary) claims, directly resulting from the offence, by allowing him to obtain appropriate civil compensation, without initiating a separate civil proceedings¹⁹. Therefore, despite of the fact that such proceedings concern a civil matter, which is undoubtedly decision on the claims on an estate directly resulting from the offence, it goes on the principles and form prescribed for the criminal action. In the event that questions concerning a civil complaint aren't regulated by the Polish Code of Criminal Procedure, the provisions of the Polish Code of Civil Procedure shall be applied accordingly (art. 70 PCCP). At the same time, title to the claim must arise from the provisions of civil law and may only include a compensation or also a reparation.

An important caveat is that the decision in a civil matter may not cause neither problems in the context of the settlement in a matter of criminal liability nor excessive length of proceedings, what in essence is a certainly fair assumption, but also the premise which is the main reason of top-down marginalizing the importance of the institution of the civil plaintiff in criminal action, and therefore the position of an injured person acting in the role of a civil plaintiff in proceedings.

In the role of the civil plaintiff in adhesion proceedings may perform natural or legal persons (art. 49 § 1 PCCP), public, government or social institutions (art. 49 § 2 PCCP), the Social Security Agency (art. 49 § 3 PCCP), the authorities of the State Labor Inspectorate (art. 49 § 3a PCCP), agencies of state control (art. 49 § 4 PCCP), closest relatives and a state prosecutor, which aren't substitutes parties according to the injured person

¹⁸ W. D a s z k i e w i c z, *Powództwo cywilne w procesie karnym*, Warszawa 1976, p. 5.

¹⁹ I. N o w i k o w s k i, *Instytucja procesu adhezyjnego w polskim procesie karnym w kontekście tradycji i postępu*, „Teki Komisji Prawniczej. Oddział Polskiej Akademii Nauk w Lublinie” 2008, pp. 139-140.

(art. 52 PCCP). At the same time the Polish Code of Criminal Procedure²⁰ provides the possibility to fill a civil complaint by a state prosecutor on behalf of the injured person or of the person which is the closest relative for the victim, if the public interest such requires (art. 64 PCCP).

Civil action is limited, because basically it is only possible pursuing through a civil complaint pecuniary claims, directly resulting from a crime (art. 62 PCCP).

From the provision of art. 361 § 2 PCC²¹ bridging that the material scope of civil action includes both *damnum emergens* and *lucrum cessans*. It isn't allowed pursuing pecuniary and non-pecuniary claims indirectly resulting from the offence²². If it comes to the persons closest to the victim, they can first, in case of his death, according to art. 63 § 1 PCCP, may fill a civil complaint with property claims directly resulting from the offence as substitutes parties. Additionally, following the provision of art. 63 § 2 PCCP should be underlined that the person next of kin can also assume the rights of the deceased injured person. They are then new parties to the proceedings, which can claim their rights, but also due claims of the injured person, if he lived, to the extent to which they are covered in the brought civil action²³. In this context it should be emphasized that a civil action is brought solely against the accused person.

A civil action in the criminal proceedings is brought in written or orally form as statement of claim. It must comply with the formal requirements of a pleading, precise in art. 119 PCCP, but also these regarding a lawsuit on civil law, referred to in art. 187 PCCivP i.c.w. art. 70 PCCP. It is therefore necessary to deliver copies of the civil action to the parties (art. 128 PCCivP i.c.w. art. 70 PCCP). For bringing a civil action an injured person or other person entitled to this can establish a representative (art. 87 PCCP).

The injured person may file a civil complaint until the commencement of the judicial examination at the main trial (art. 62 PCCP). Nevertheless there

²⁰ Act of 17 November 1964 The Polish Code of Civil Procedure (PCCivP), „Dziennik Ustaw” (Journal of Laws) 1964, no. 43, pos. 296.

²¹ Act of 23 April 1964 The Polish Civil Code (PCC), „Dziennik Ustaw” (Journal of Laws) 1964, no. 16, pos. 93.

²² Obviously, it isn't also allowed pursuing pecuniary claims directly resulting from the offence.

²³ See: K. T. B o r a t y ń s k a, A. G ó r s k i, A. S a k o w i c z, A. W a ż n y, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 177; Cf. W. G r z e s z c z y k, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 86.

is possibility to bring a civil action in the course of preparatory proceedings. The day on which the claim is filed during the preparatory proceedings shall be considered as the date on which the civil complaint has been filed (art. 69 § 1 PCCP). Simultaneously with the civil complaint an injured person has the right to make a motion requesting security on property for the claim by way of future claims (art. 69 § 2 PCCP). In the event that the preparatory proceedings are discontinued or suspended an injured person may, within a final date of 30 days from the date on which the order is delivered that the case be referred to the appropriate court having jurisdiction over civil cases (art. 69 § 4 PCCP).

An injured person becomes a civil plaintiff in criminal action with the moment of issue an order on the admission of the civil complaint by the court (art. 69 § 1 PCCP). It cannot happen then only by the very fact of submitting the claim, which as mentioned may be filed in the course of preparatory proceedings. From the moment of admission a civil action an injured person becomes a civil plaintiff and therefore a party to the main proceedings. The role of the civil plaintiff the victim may combined with the functions of auxiliary and private prosecutor.

At the court hearing the civil plaintiff has the right to ask questions to examined questions, as the last of the active parties (art. 370 § 1 PCCP), unless the witness is admitted at his request. Then a party on whose motion the witness was admitted puts its questions before the remaining parties (art. 370 § 2 PCCP). He also speaks as the last from the active parties during the closing arguments (art. 406 § 1 PCCP). Furthermore he has the right to appeal against the resolutions or findings only if they are prejudicial to his rights or benefits (art. 425 § 3 PCCP). On the other hand he has the right to file objections to the penal order only in case of accumulation of procedural roles of civil plaintiff and a private or auxiliary prosecutor (art. 503 § 1 and § 2 PCCP, art. 506 § 1 PCCP).

If, however, after valid termination of the proceedings reveal the reasons for its re-opening limited only to civil claims, an injured person may apply to his resume, but only accordingly the provisions of the Polish Code of Civil Procedure and before a court having jurisdiction to decide in civil cases (art. 543 PCCP).

According to art. 642 PCCP a civil plaintiff shall be temporarily exempted from the obligation to remit the payment due for the civil complaint and for the appeal. In case when the complaint has been dismissed or the appeal has been withdrawn, the civil plaintiff shall be charge with the court costs

(art. 644 § 1 PCCP). If the civil complaint is granted, the court shall charge the accused with the court costs, including legal representation. On the other hand, if the civil plaintiff used an attorney designated *ex officio*, the court shall charge the amount due directly to the attorney (art. 643 PCCP).

The civil plaintiff is entitled to withdraw a civil complaint. If such complaint is combined with waiving a claim by injured person, then, until passing a sentence, it isn't necessary consent of the accused in this regard. Without a waiver of the claim, the revocation without the consent is possible till opening the court hearing (art. 203 § 1 PCCivP i.c.w. art. 70 PCCP). Limitation of the civil action is concerned as a partial withdrawal. It is worth in this context to refer also to the resolution of the Supreme Court of Poland of 24 November 1999, whereby it is assumed that the civil plaintiff who has withdrawn a lawsuit, retains entitlements of the party, till the moment of validation of the order of the court regarding discontinuance of the proceedings in a matter of civil action²⁴.

V

In addition to the right to bring a civil complaint and in this way become a party to the criminal proceedings the injured person may also accentuate his participation in the criminal action, pursuing their interests through other forms of a civil action, which are the expression of the realization of the compensatory function of the criminal law. As part of the performing of the indicated function legislator has left also an opportunity for imposing the obligation to redress the damage caused apart from the penalty of restriction of liberty (art. 36 § 2 PPC i.c.w. art. 72 § 2 PPC) and in connection with the conditional suspension of punishment (art. 72 § 2 PPC). Moreover in art. 67 § 3 PPC it was stipulated that in discontinuing conditionally the criminal proceedings the court is obliged to require the perpetrator to redress in whole or in part the damage²⁵. This means that the interests of the injured person in obtaining a compensation for damages and harms incurred as a result of the offence may be taken into account in a judgement *ex officio* by the court.

²⁴ See the resolution of SCP of 24 November 1999, I KZP 40/99, OSNKW 2000, no. 1-2, pos. 6.

²⁵ Regarding to the compensatory function of the conditional discontinuance of the criminal proceedings see especially: E. A. W d z i ę c z n a, *Warunkowe umorzenie postępowania karnego w świetle koncepcji sprawiedliwości naprawczej*, Toruń 2010, pp. 285-368.

However, on the other side it is necessary to point out the existence of a specific penal measure from art. 39 pt 5 PPC in form of the duty to redress the damage. From the other penal measures distinguishes it the fact that it is predicated upon a motion from the injured person or from the another person so entitled or else from the state prosecutor²⁶. As it was stated in art. 46 § 1 PPC in the case of conviction the court, at the request of the injured person or another entitled person, shall sentenced the obligation to redress the damage, caused by the offence, in whole or in part or the reparation for injuries suffered²⁷. Instead of the obligation to redress the damage or of the reparation for the injuries suffered, the court may decide upon a supplementary payment to the injured person (art. 46 § 2 PPC)²⁸. In this context it is also important the provision of art. 49a PCCP, which provides that the decision in a matter of the obligation to redress the damage caused shall be imposed unless the civil action was brought. The appropriate motion, beside of the injured person, may also file the state prosecutor until the end of the first hearing of the injured person at main trial. The use of the duty to redress the damage has to be acknowledged as a measure providing notably the compensation of damages caused to the victim by the crime. Compensation may however also occur through application the other institutions, such as already mentioned civil action and, moreover, the active repentance²⁹, the apology to the injured person, and finally, at least in principle, the mediation³⁰.

²⁶ See: E. B i e n k o w s k a, *W kierunku lepszej realizacji funkcji kompensacyjnej przez polskie prawo karne – propozycje zmian*, [in:] *Karnomaterialne i procesowe aspekty naprawienia szkody w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, ed. Z. Cwiąkański, G. Artymiak, Warszawa 2010, p. 19.

²⁷ About the duty to redress the damage see: Z. G o s t y Ń s k i, *Karnoprawny obowiązek naprawienia szkody*, Katowice 1984; I d e m, *Obowiązek naprawienia szkody w nowym ustawodawstwie karnym*, Kraków 1999; A. M a r e k, T. O c z k o w s k i, *Obowiązek naprawienia szkody jako środek karny*, [in:] *System prawa karnego*, t. VI: *Kary i środki karne. Poddanie sprawcy próbie*, ed. M. Melezini, Warszawa 2010, pp. 687-727; A. M u s z y Ń s k a, *Naprawienie szkody wyrządzonej przestępstwem*, Warszawa 2010.

²⁸ See in particular: J. B r y k, *Nawiązka – środek karny o charakterze kompensacyjnym*, [in:] *Księga pamiątkowa ku czci prof. Z. Gostyńskiego*, ed. S. Waltoś, B. Nita, P. Trzaska, M. Żurek, „Czasopismo Prawa Karnego i Nauk Penalnych” 2002, no. 2, pp. 123-129.

²⁹ See more widely: A. R. Ś w i a t ł o w s k i, *Kompensacyjna funkcja czynnego żalu w kodeksie karnym z 1997 r.*, [in:] *Księga pamiątkowa ku czci prof. Z. Gostyńskiego*, pp. 151-167.

³⁰ See: W. Z a l e w s k i, *Naprawienie szkody w polskim prawie karnym a postulaty restorative justice*, [in:] *Księga pamiątkowa ku czci prof. Z. Gostyńskiego*, p. 65.

In the analysis of instruments which were assumed to serve to the victim of a crime it is necessary to refer to the European Union Council Directive 2004/80/EC of 29 April 2004³¹ relating to compensation to crime victims, which imposed on the Member States of the European Union the obligation to implement a compensatory system. As a result of it was passed the Act on State Compensation for Victims of Certain Intentional Crimes of 7 July 2005³². Initially it is required to be stressed, that the state compensation has only subsidiary character³³. This follows from art. 5 SCVCIC, under which the state compensation shall be awarded only, and to the extent that, the applicant, i.e. according to art. 2 pt 3 SCVCIC the victim or the victim's next to kin, is unable to obtain damages to cover the loss in earnings, other income or medical and funeral costs from the offender (offenders), in the form of insurance, social welfare or from some other source, irrespective of whether the offender (offenders) has (have) been discovered, accused or sentenced. Such compensation is therefore an additional source whereof the victim and eventually the victim's next to kin may obtain a compensation of the damages resulting from the offence. Notwithstanding, the attention should be paid to understanding the victim designated by the provision of art. 2 pt 1 SCVCIC providing that the victim is a natural person who died as a result of an intentional offence committed with the use of violence or whose bodily organs or health were damaged as per art. 156 § 1 PPC and art. 157 § 1 PPC, i.e. heavy or medium damage to health³⁴. The victim is therefore only a natural person, except for the category of legal persons and institutions. The material scope of the regulation is designated by the effects of the offence, such as death, medium or heavy damage to health of the victim. The act specifying the cases when it is possible attempting to obtain the state compensation limits both of the scopes of analyzed regulation: subjective and objective. The provision of art. 6 SCVCIC limits also the amount of compensation which shall not exceed 12 000 PLN.

³¹ OJ (Official Journal of the European Union) L 261 of 6 August 2004.

³² „Dziennik Ustaw” (Journal of Laws) 2005, no. 169, pos. 1415.

³³ Thus: A. K i e ł t y k a, *Praktyczne aspekty stosowania ustawy o państwowej kompensacie przysługującej ofiarom niektórych przestępstw*, [in:] *Karnomaterialne i procesowe aspekty naprawienia szkody*, p. 573; W a ł t o ś, *Proces karny. Zarys systemu*, p. 30.

³⁴ See more in: P. J a n d a, A. K i e ł t y k a, *Ustawa o państwowej kompensacie przysługującej ofiarom niektórych przestępstw. Komentarz*, Warszawa 2010, pp. 28-34; M. N i e - ł a c z n a, *Kompensata dla ofiar przestępstw – prawo a praktyka. Raport z monitoringu działania ustawy o państwowej kompensacie dla ofiar niektórych przestępstw umyślnych*, Warszawa 2007, pp. 46-55.

It should be also pointed out that some kind of way for actively participation of an injured person in the criminal proceedings in order to achieve an agreement is the mediation proceeding³⁵, which can be conducted both at the stage of the preparatory proceedings and at the stage of court proceedings³⁶. According to art. 23a § 1 PCCP the court, in preparatory proceedings the state prosecutor, may the initiative or with the consent of the injured person and the accused, refer the matter to an institution or a trustworthy person for the purpose of conducting mediation between the injured and accused. Following art. 23a § 2 PCCP the mediation procedure shouldn't last longer than a month. From the literal interpretation of this provision doesn't arise than, that this is a firm deadline. It should be merely said that the period of mediation procedure isn't included in the duration of the preparatory proceedings. The provision of art. 23a § 3 PCCP includes exceptions for persons, who can't conduct the mediation proceedings, using in this matter regulations relating to the disqualification of a judge, and *stricte* to the reasons underlying the foundations for such disqualification. Additionally from the sphere of entities authorized to lead the mediation the legislator also ruled out professionally active judge, prosecutor, lawyer, legal adviser, and a trainee to those professions or person employed by the court, prosecutor or other institution authorized to prosecute crimes. Making the preceding stipulations is undoubtedly important to ensure the impartiality of institutions or a trustworthy person, leading the mediation proceedings³⁷.

³⁵ In this sense see also: P. Chlebowski, M. Kotoska-Romanowska, *Problematyka mediacji z perspektywy wiktymologicznej*, [in:] *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, ed. T. Cielecki, J. B. Banach-Gutierrez, A. Suchorska, Szczytno 2008, p. 79.

³⁶ About the mediation in the polish criminal proceedings see i.a.: D. Kuźlewska, *Mediacja po nowelizacji kodeksu postępowania karnego – krok ku zwiększeniu roli konsensualizmu w polskim procesie karnym?*, [in:] *Problemy znowelizowanej procedury karnej. Materiały konferencji naukowej Rzeszów-Czarna 17-18 października 2003 r.*, ed. Z. Sobolewski, G. Artymiak, Cz. P. Kłak, Kraków 2004, pp. 267-277; J. Waluk, *Mediacja – instytucja dla pokrzywdzonego*, [in:] *Poszanowanie godności ofiar przestępstw*, ed. T. Cielecki, Warszawa 2002, pp. 68-82; J. Wojciechowska, *Podstawy prawne stosowania procedury mediacyjnej w Polsce*, [in:] *Gaudium in litteris est. Księga jubileuszowa ofiarowana Pani Profesor Genowefie Rejman z okazji osiemdziesiątych urodzin*, ed. L. Gardocki, M. Królikowski, A. Walczak-Żochowska, Warszawa 2005, pp. 507-515; D. Wójcik, *Rola mediacji między pokrzywdzonym a sprawcą przestępstwa*, [in:] *System prawa karnego*, t. I: *Zagadnienia ogólne*, ed. A. Marek, Warszawa 2010, pp. 350-413.

³⁷ With regard to the changes and additions in the context of the rules governing the mediation proceedings, which shall come into effect on 1 July 2015 see: the act of 27 September 2013 amending the act – Code of Criminal Procedure and certain other acts.

It is significant to pay attention on the circumstance of a seat of general issues regarding the mediation proceedings in the Section I entitled “Preliminary provisions”. Therefrom, some representatives of the doctrine draw consequence in the form of assumption of a possibility to use the mediation in the whole criminal proceedings³⁸. So sometimes there are raised postulates of leading the mediation at the stage of executory proceedings³⁹. Detailed issues determining the conditions, which shall be met by institutions and persons authorized to conduct the mediation, the way their appointment and dismissal, scope and conditions of file sharing by institutions and persons entitled to it and the manner and procedure of the mediation, governing the regulation of the Ministry of Justice of 13 June 2003 on Mediation Proceedings in Criminal Matters⁴⁰.

The last stage of the criminal proceedings may be considered the enforcement (executory) proceedings. Thus, entering the victim in criminal proceedings as its participant it is important to consider his position in the final stage of the proceedings. In this context the response is formulated by E. Bieńkowska and L. Mazowiecka indicating that the injured person is never a party to the executory proceedings and because of that generally doesn't have any entitlements on this stage of the proceedings⁴¹. The exceptions in this subject-matter, however, are i.a. regulations concerning execution of the duty to redress the damage, the compensation and the supplementary payment and else publication of the sentence, i.e. in art. 196-199 PEPC⁴².

³⁸ See: I. B o r k o w s k a, *Rozwój mediacji w sprawach karnych w Polsce*, [in:] *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, p. 189.

³⁹ See: A. M u r z y n o w s k i, *Instytucja mediacji jako czynnik humanizacji w stosowaniu prawa karnego w Polsce*, [in:] *W kręgu kryminologii romantycznej. Konferencja zorganizowana w pierwszą rocznicę śmierci prof. Lecha Falandysza 18 lutego 2004 r.*, ed. M. Fajst, M. Płatek, Warszawa 2004, pp. 213-215; M. P ł a t e k, *Mediacja w postępowaniu wykonawczym. Argumenty zgłoszone na rzecz i przeciw mediacji na tle doświadczeń międzynarodowych*, [in:] *Konferencja naukowa: „Mediacja w polskiej rzeczywistości” (11 września 2002 r.)*, Warszawa 2003, pp. 50-68; T. S a k o w i c z, *Mediacja pomiędzy sprawcą a ofiarą przestępstwa podstawą skutecznej resocjalizacji*, [in:] *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, pp. 143-151; K. W i n i a r e k, *Mediacja po wyroku*, [in:] *Sprawiedliwość naprawcza. Idea. Teoria. Praktyka*, ed. M. Płatek, M. Fajst, Warszawa 2005, pp. 199-223.

⁴⁰ „Dziennik Ustaw” (Journal of Laws) 2003, no. 108, pos. 1020.

⁴¹ E. B i e ń k o w s k a, L. M a z o w i e c k a, *Prawa ofiar przestępstw*, Warszawa 2009, pp. 53-54.

⁴² Act of 6 June 1997 The Polish Executive Penal Code (PEPC), „Dziennik Ustaw” (Journal of Laws) 1997, no. 90, pos. 557.

Important from the point of view of the injured person may also be art. 168a PEPC, according to which, at the motion of the victim, respectively – a penitentiary judge or a director of a prison shall immediately notify the injured person, his statutory representative or the person under whose custody the victim remains constant, about the release of the offender from a prison after serving the sentence, the escape of the offender from a prison, as well as about the passing a decision providing to the convicted: the pass referred to art. 91 pt 7 PEPC i.c.w. art. 92 pt 9 PEPC; the temporary permission to leave the prison without supervision or without a prison escort officer or an assist of another trustworthy person; the conditional release (art. 168a § 1 pts 1-4 PEPC). The court shall instruct the injured person on the right to file the indicated motion, following the decision to perform (art. 168a § 2 PEPC)⁴³.

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Summing up, in widely understood polish criminal law may be seen a number of instruments serving to realize the interests of the victim of a crime, as the injured person in a particular criminal proceedings. What's more, there are visible the tendencies to changes, aimed at the further underpin the legal status of the subject, whose legal rights were directly violated or threatened by the offence⁴⁴. They are also confirmed on the background of the European legislation, especially in connection with Directive 2012/29/EU of the European Parliament and of the Council of the European Union of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA⁴⁵. In this context it is particularly important to emphasize a significance of the principle of protection of the injured person in criminal proceedings expressed in art. 18 of the Directive. It is an expression of aspirations for the synthesis of the position of the

⁴³ See: W. S y c h, *Zmiana sytuacji pokrzywdzonego w stadium wykonawczym polskiego procesu karnego*, „Prokuratura i Prawo” 2006, no. 2, pp. 142-147.

⁴⁴ In this context it is necessary to refer to the already cited draft law of 5 June 2012 amending the acts – the Penal Code, the Penal Code of Criminal Procedure and certain other acts, referred to the Sejm on 8 November 2012.

⁴⁵ OJ (Official Journal of the European Union) L. 315/57 of 14 November 2012. See more widely: C. K u l e s z a, *Projekt Europejskiej Dyrektywy z dnia 18 maja 2011 r. w sprawie wsparcia i ochrony ofiar w świetle prawa polskiego*, „Prokuratura i Prawo” 2011, no 12, pp. 5-27.

victim of a crime to the position of the perpetrator⁴⁶. This, in turn, is essential if it is assumed to make a balance between these subjects of a crime that occur in the criminal proceedings as its parties. Of course – it is necessary to provide the accused an appropriate status and procedural safeguards to the full realization of the right of defense. That's because a potential offender, as an individual, who has been charged or against whom an indictment has been filed or with respect to whom the state prosecutor conditionally discontinued proceedings, is inherently in a disadvantage situation in criminal proceedings. Nonetheless, the injured person requires empathy, treating it with respect and particular carefulness, because of the risk of occurrence of secondary victimization. It is necessary to bear in mind that as the principles of presumption of innocence and of *in dubio pro reo* refer to the perpetrator, so the state of harm of the victim is also from time to time a kind of presumption. Thus, the position of the accused and the victim must be properly balanced, taking into account the principle of the equality of parties (“equality of arms”). Therefore, it seems righteous that in the modern world the problems related to the victim are more and more emphasized. It is in fact often a natural person, an entity who suffers as a result of a committed prohibited act – the subject, not the object of a criminal behaviour. Then it is eligible to require the development of a comprehensive solutions, aimed to secure of the minimization of the sufferings by the state and focused on the satisfaction of a victim. This is an obligation of the state, which, through authorities functioning in its structures, shall protect citizens against violations of their legal rights by the acts prohibited by law under penalty, and in case of lack of efficacy in this regard – to provide them an appropriate assistance.

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⁴⁶ Cf. F. M a n t o v a n i, *Diritto penale. Parte generale*, Padova 2009, p. 227.

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STATUS PRAWNY POKRZYWDZONEGO W POLSKIM POSTĘPOWANIU KARNYM

S t r e s z c z e n i e

W artykule zaprezentowane zostały rozważania dotyczące pokrzywdzonego w polskim postępowaniu karnym. Autor podejmuje próbę przedstawienia pozycji prawnej pokrzywdzonego w przekroju całego postępowania karnego, tj. zarówno w postępowaniu przygotowawczym i postępowaniu jurysdykcyjnym, jak i na etapie postępowania wykonawczego. Autor stara się również podkreślić znaczenie pokrzywdzonego, jako podmiotu, do którego ochrony należy przywiązywać szczególną wagę. Jest to bowiem jednostka, która cierpi wskutek popełnionego czynu zabronionego – podmiot bierny przestępstwa. Stąd wskazuje się również na potrzebę tworzenia dalszych rozwiązań prawnych, mających na celu zapewnienie ofierze minimalizacji jej cierpień oraz stosownego zadośćuczynienia.

Słowa kluczowe: postępowanie karne, pokrzywdzony, ofiara, podmiot bierny przestępstwa, sprawca, oskarżyciel posiłkowy, powód cywilny, oskarżyciel prywatny.

Key words: criminal proceedings, injured person, victim, passive subject of a crime, perpetrator, auxiliary prosecutor, civil plaintiff, private prosecutor.