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im. Janusza Korczaka



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**Report
on the position of a child in court proceedings in Poland and on cross-border family
mediation**

Brussels, 28 June 2021

In the last decade in Poland, many legal provisions have been introduced that significantly strengthen the subjectivity of the child, the protection of his/her welfare and rights, as well as his/her protection in court proceedings. The introduction of a number of legal instruments advocated for by the Commissioner for Children's Rights¹ should be noted, among others, and in particular the following:

- the prohibition on corporal punishment of children,
- the right of the child to be brought up by both parents,
- closing the loopholes in the health care system for children at birth, which prevents a child from being "lost in the system",
- closing the loopholes in the child adoption system and introducing adoption with indication, which reduces illegal adoption,
- enhancing the protection of children by criminal law, *inter alia* by introducing a legal obligation to report a suspected sexual offence against a child, increasing criminal sanctions for certain offences against children, including grievous bodily harm, unlawful deprivation of liberty, abandonment and abduction,
- the prohibition of the statute of limitation for sexual offence against a child until the victim has reached the age of 30,
- a specific procedure for hearing a child victim and a child witness in criminal proceedings,
- the court's obligation to hear a child in matters concerning his or her person or property, where the child's mental development, state of health and degree of maturity so permit, and to take into account the child's opinion and reasonable wishes,
- the statutory regulation of the prevention of domestic violence and the regulation of foster care,
- the mandatory imposition by the courts of a prohibition to work with children for those convicted of a sexual offence against a child.

These are just examples of the regulations, which show that we can speak of real protection of children in Polish law. This does not mean, however, that the regulations in force are sufficient. In my opinion, this does not exempt us - the Polish State - from improving and refining what

¹ Marek Michalak - Commissioner on Children's Rights in Poland (2008 - 2018).



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is in place, or from looking for new solutions that will better protect the rights of children pursued through court proceedings.

The following indicates the most important problems and issues which, in my opinion, children face in court proceedings in Poland. In synthetic terms, it is proposed to divide the issues in question into three areas:

1. a child as the subject in civil proceedings,
2. a child as the subject in criminal proceedings - both as a victim and as a perpetrator,
3. a child offender - the subject in juvenile proceedings.

A child in civil proceedings

1. Participation of a child in court proceedings

The European Convention on the Exercise of Children's Rights provides children with:

1. the right to be informed of pending proceedings concerning them,
2. the opportunity to express their own opinion,
3. the right to demand the appointment of an independent representative of their interests,
4. the right to require the presence of selected persons in proceedings before a court,
5. the right to be informed of the possible consequences of his/her position and of the possible outcomes of each decision.

The implementation of the above rights faces limitations in the Polish civil procedure. Polish law and courts still attach too little importance to respecting the rights of the child, such as the right to participate in proceedings or the right to express a view, but also the right to access to information. The practice is that one of the parents represents the child in proceedings concerning regulation of contacts, prohibition of personal contact with the child, deprivation, restriction or suspension of parental authority over the child. A parent represents himself/herself in these proceedings as the same time.

Current legal situation: Current provisions of the Code of Civil Procedure (Article 573 § 1 CCP) do not grant a child the status of a party to court proceedings in cases concerning his/her person. The Supreme Court has also taken a stance against the need to grant a child the status of a party in proceedings concerning the deprivation or limitation of parental authority and removal of the child.

The legal doctrine considers the above position of the Supreme Court to be wrong. The relevant legal provisions and the position of the Supreme Court are also criticised by family judges.

Justification for a change: The absence of granting explicitly a child the status of a participant in civil proceedings results in depriving the child of a participation in family and guardianship matters concerning him/her. At present, in principle, a child does not participate in any of



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family proceedings concerning the relationship between parents and thus the child's interests are not properly represented. A family court guardian who, in other types of proceedings, assists the court in determining what is best for the child's welfare does not represent the child in this kind of proceedings. The legal representation of the child by a professional attorney who would act in accordance with the child's instructions and wishes is also excluded.

Although a family or guardianship court has a duty to look after the best interests of a child of its own motion, this duty is not sufficient to guarantee the representation of the child in court proceedings. Conflicted parents are often unable to decide on the best way of providing care for their child and are unable to separate their own needs from those of the child, forgetting that the child's needs must take priority. In cases involving the restriction or termination of parental authority, a court's decision often cannot be subject to the appeal court's control, because a child, not being a party to the proceedings, cannot challenge such a decision.

Recommendation: The child should be a participant in the proceedings in all matters concerning him or her, and should be entitled to participate in person in court proceedings from the age of 13.

Such a solution was envisaged in the *Draft Family Code* developed between 2013 and 2018 by the Family Law Codification Commission established at the Commissioner on Children's Rights. *The Draft* emphasizes the subjectivity of a child in relations with parents and in court proceedings, introduces the protection of a conceived child and of a child without citizenship left unattended, increases the protection of an adopted child and of a child of biological parents, as well as of a child who is incapacitated after reaching the age of 18. It also provides for the institution of a child's advocate, defines for the first time in Polish law the basic notions in family law, such as, *inter alia*: the best interests of the child, family relations, upbringing situations, introduces the notion of parental responsibility instead of parental authority - the authority of a parent over a child. *The Draft* allows for alternate child custody, but only when it serves the best interests of the child. These are only examples of the solutions enshrined in *the Draft*. In my opinion, these solutions should be an inspiration for the Polish legislature and should be introduced into the Polish legal system as soon as possible.

2. Hearing of a child in civil proceedings

Current legal situation: Provisions of the Polish Code of Civil Procedure impose an obligation on the court to hear a child in civil proceedings concerning a minor (Article 216) and in non-litigious proceedings in cases concerning both the person and the property of a minor (Article 576 § 2). The provisions stipulate only that the hearing shall take place outside the courtroom.

Justification for a change: There is still no regulation that would define the manner, form and conditions for conducting a hearing of a child. A minor heard in civil proceedings, unlike a minor testifying in criminal proceedings as a victim or a witness (under the age of 15), does not enjoy clearly defined rights and obligations.



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Recommendation: The rules of civil procedure should be supplemented with provisions concerning preparation of the hearing, conditions that should be met by the premises intended for such hearings, including their technical equipment, taking into account the need to ensure freedom of expression and a sense of security of the child being heard. In my opinion, the legal solutions provided for the hearing of a child in criminal proceedings (Article 185a et seq. of the Code of Criminal Procedure) should be used.

3. Requirements concerning the guardian representing a child

Current legal situation: Under the Polish family law, as a rule children are represented by their parents, with the rare exception of being represented by a guardian. In every case in which parents and children appear in court proceedings - as parties or participants - the court is obliged to examine whether there is a hypothetical possibility of a conflict of interests between them. This conflict of interests is a threat to the best interests of the child. If there is a conflict of interests between the parents and the child, neither parent can represent the child in the court. If neither parent can represent the child in court, a guardian appointed by the guardianship court (Article 99 of the Family and Guardianship Code) represents the child.

Before appointing a guardian in cases concerning a child or his/her property, the court should determine whether the child is a party to the proceedings. In proceedings concerning the limitation or termination of parental authority or the removal of a child, according to the position of the Supreme Court, a child is not a participant in the proceedings. Therefore, in cases concerning limitation, termination or suspension of parental authority a child has no representation in the proceedings, and a guardian's appointment for the child is not even foreseen.

An attorney or a legal adviser who demonstrates specific knowledge of matters concerning a child, of the same kind or of a kind corresponding to the matter in which representation of the child is required, or who completed training on the principles of child representation, the rights or needs of a child, may be appointed as a guardian (Article 99 § 1 of the Family and Guardianship Code). The legislation allows the possibility to appoint another person with higher legal education and knowledge of a child's needs as a guardian, if the complexity of the case so permits. Another person without legal education may also be appointed a guardian if, in the court's opinion, it is justified by the special circumstances.

Justification for a change: The current legislation does not guarantee that the function of a guardian of a minor in civil proceedings will be entrusted to persons with adequate professional background. There are still cases of appointing random persons as guardians of the child (e.g. an employee of a court's secretariat), who do not guarantee adequate representation of the child's welfare and interests in court proceedings.

Recommendation: The qualifications of a guardian of a child in civil proceedings should be determined in such a way as to guarantee adequate representation of the child. The guardian should be a person adequately prepared for this task.

In my opinion, the Polish legislator should adopt a solution whereby only an attorney or a legal adviser can be appointed as guardian of a child. It is also possible to introduce mandatory



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representation of a child by the child's attorney in such cases. The Polish State should take appropriate measures to support training for lawyers acting as guardians of children. It is necessary to increase the remuneration for acting as a guardian of a child by a professional attorney - the current rate (40% of the minimum remuneration for unpaid legal assistance provided by the State) does not encourage attorneys to perform this function.

4. Determination of the origin of a child in court proceedings

Current legal situation: The right to know one's origins is one of the fundamental rights of the child (Article 7 of the UN Convention on the Rights of the Child). Family law in force in Poland is based on the biological kinship. The Polish Code of Civil Procedure does not contain specific provisions concerning DNA testing for evidence purposes. The law does not allow to collect genetic material for DNA testing without the consent of the person entitled to express it. There is also no obligation to undergo such tests. A consent is required and there are no exceptions to this rule. There are cases when courts are hindered by the impossibility of conducting DNA tests (due to the lack of consent of the entitled person) in order to establish the origin of the child. Refusal to consent to DNA testing has become one of means of defence of a defendant, often leading to invalidation of the request for determination of paternity, denial of paternity or determination of ineffective acknowledgment of paternity.

Justification for a change: A child has the right to know fully his or her parentage. Genetic testing is a standard evidence in proceedings concerning establishment or denial of parentage. The current legislation does not sufficiently serve to establish the rights determining the legal situation of an individual. Rules on DNA testing in civil proceedings, including the issue of the consent of the entitled person, are non-existent.

Recommendation: The law must be changed. It should be mandatory to undergo DNA testing to determine the child's parentage. A child's attorney should represent a child in those proceedings.

5. The lack of a provision specifying deadline within which parents may reject the inheritance on behalf of a child

Current legal situation: According to the Polish Civil Code, a declaration on acceptance or rejection of the inheritance may be submitted within six months from the date on which a heir became aware of the title to his appointment to inheritance. If such a declaration is not submitted within the deadline or if it is submitted after the deadline, it is equivalent to accepting the inheritance with the benefit of inventory (Article 1015). In the case of minor heirs inheriting from their parents - after their rejection of the inheritance - the period for submitting a declaration begins on the day the parents have rejected the inheritance. The rejection of the inheritance by the child is an act that falls beyond the scope of the ordinary administration of its property. For that reason a parent who intends to reject an inheritance on behalf of a child has to apply for a permission to do so to the guardianship court (Article 101 § 3 of the Family and Guardianship Code). The law does not specify from when the period of six months for a



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parent to submit a declaration on rejection of the inheritance on behalf of a child should be counted. The case law of the Supreme Court is not uniform in this respect.

Justification for a change: The lack of definition of how to count the period of six months for a child to submit a declaration on the rejection of the inheritance and the inconsistent jurisprudence of the Supreme Court violates the possibility of exercising - on the principle of equal rights - the constitutional right to legal protection (Article 45(1) and Article 32(1) of the Polish Constitution). Failure to submit the declaration by the parent or submitting it after the deadline may result in an adverse legal and factual situation for the child.

Recommendation: It is necessary for the Polish legislature to supplement the existing regulations by indicating the method of calculating the deadline of six months for submitting the declaration on the rejection of inheritance by a child. In my opinion, the child should be obligatorily represented by a child's attorney, who will professionally guarantee protection of the child's interests in civil proceedings.

6. Lack of provisions regulating the procedure and the competences of employees of courts, family support services, social services and police officers when removing a child from its biological family

Current legal situation: The procedure for the removal of a child remaining under parental authority is conducted when the parents are in need of assistance for the proper exercise of parental authority (the family is experiencing temporary caretaking difficulties) or when proceedings are conducted under the Hague Convention on the Civil Aspects of International Child Abduction. The provisions on the compulsory removal of a child also apply to the enforcement of decisions regulating contacts between a parent and a child, ordering the release of a child by the parent to whom parental authority has been granted and obliging the other parent to return the child.

The provisions of the Code of Civil Procedure (Article 598¹ et seq.) define the court proceedings concerning the forced removal of the child. If the obliged person does not comply with the court's decision - at the request of the entitled person - the court orders the court's guardian to remove the child (Article 5986 et seq.). At the request of the guardian, the police are obliged to assist in the activities related to the forced removal of the child. During the forced removal of the child, a person entrusted with custody rights or a person or representative of an institution authorised by him/her must be present.

Justification for a change: A child is not a party to the court proceedings and is not represented by a professional entity. The legislation does not regulate the procedure and competence of persons involved in the forced removal of a child. The provisions do not provide for psychological assistance in the procedure of removal of a child.

Recommendation: A child should have legal standing in court proceedings and should be represented by a child's attorney. It is also necessary to supplement the provisions concerning the procedure and the competences of persons participating in the act of removal of a child. A



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child has the right to psychological assistance and the Polish State should guarantee this right by means of law.

7. The functioning of expert psychologists appointed in court proceedings and in pre-trial (prosecutor) proceedings

Current legal situation: The current model of functioning of expert psychologists does not ensure the appointment in court and pre-trial proceedings of persons who ensure the correct, reliable and timely expert opinions. In particular, it does not ensure an adequate process of verifying the competence of candidates for court experts, and allows for the appointment of persons who do not guarantee the proper performance of expert witness activities.

Justification for a change: The competences of expert witnesses appointed in family, guardianship and criminal cases are important to ensure that children's welfare and rights are protected.

Recommendations: The Polish State should urgently take measures to guarantee an adequate level of competence of expert witnesses.

A child in criminal proceedings

The actions of the Polish legislature in respect of the protection of children in the area of criminal law, undertaken over the past several years, take into account most of the suggestions of the Commissioner on Children's Rights. They are essential for securing the welfare and protection of children's rights. They are particularly important in case of children who are victims of crime. Children can also be perpetrators of criminal acts. They also deserve special attention in criminal proceedings and their rights should be guaranteed as enshrined in the Convention on the Rights of the Child and EU legislation concerning children. The rights of accused and suspected children as laid down in directives of the European Parliament and the Council are important elements of the right to a fair trial.

(a) A child as a victim or a witness of crime

8. Hearing of a child victim of crime or a witness of crime in criminal proceedings

Current legal situation: The provisions of the Code of Criminal Procedure provide for a special procedure and conditions for conducting the interrogation of a child who is under 15 years of age at the time of the interrogation, harmed by offences such as an offence against sexual freedom and decency, against family and guardianship and against freedom (Articles 185a and 185d). In case of a child who has witnessed an offence such as an offence against sexual freedom and decency and against family and guardianship, the special procedure and conditions for conducting the interrogation are to apply when the child is under 15 years of age at the time of the interrogation (Articles 185b and 185d).



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Justification for a change: Every child, and therefore also those between the ages of 15 and 18, requires the same special care and attention in criminal proceedings.

Recommendation: The legal protection of child victims and child witnesses of any crime, interrogated in criminal proceedings, should be extended to apply to every child - up to 18 years of age at the time of the interrogation special procedure and conditions of the hearing, as set out in Article 185a et seq. of the Code of Criminal Procedure.

9. Raising the age of special legal protection for children up to age of 18

Current legal situation: The Polish Criminal Code provides for special legal protection under criminal law of children under the age of 15 at the time of the offence. According to Polish law (e.g. the Civil Code, the Family and Guardianship Code, the Act on the Commissioner for Children's Rights) and international law (e.g. the Convention on the Rights of the Child, the Convention on Cybercrime), - a child is a person under the age of 18.

Justification for a change: Special protection is required for all children, and this includes those in the age group of 15 to 18.

Recommendation: Relevant provisions should be introduced into the Polish Criminal Code and the Polish Code of Criminal Procedure.

10. Guardian ad litem of a child in criminal proceedings

Current legal situation: In Polish criminal proceedings a parent of a child cannot, when acting as a legal/statutory representative, exercise the child's rights who has been a victim if the other parent (the abusive parent) is an accused party. In criminal proceedings, by way of systemic reference, the provisions of the Family and Guardianship Code concerning a child's guardian *ad litem* apply accordingly. The prohibition of representation of a child by its parents, in the case of a possible conflict of interests between them, applies before the court and any State authority. In such a situation, a guardian *ad litem* appointed by the guardianship court is entitled to represent the child and exercise its rights in criminal proceedings.

Pursuant to Article 99¹ § 1 and 3 of the Family and Guardianship Code, only an attorney or a legal adviser may be appointed as a guardian *ad litem* representing a child. However, these persons must meet additional criteria set out by law. They must have special knowledge of matters concerning a child in criminal proceedings or have completed training on the principles of child representation, the rights or needs of a child.

The guardian *ad litem* is obliged to provide information on the course of the criminal proceedings and the actions taken during the proceedings to the non-offending parent, if this is not against the best interests of the child. The information is to be provided, at the request of such parent, in writing or by means of electronic communication.

The guardian *ad litem* must obtain from the non-offending parent information about the child, the child's health, family situation and environment, to the extent necessary for the representation of the child. The guardian *ad litem* may also request information about the child



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from authorities or institutions and social services and organisations to which the child belongs or which provide assistance to the child.

If the child's mental development, his/her health condition and degree of maturity allow for it, the guardian *ad litem* representing the child shall establish contact with the child and inform the child about the actions taken in the proceedings and the manner of completion, and the consequences of the actions taken on the child's legal situation, in an understandable manner and adapted to the child's degree of development (Article 99² of the Family and Guardianship Code).

Justification for a change: The provisions concerning the guardian *ad litem* representing the child in criminal proceedings were advocated by the Commissioner on Children Rights during his time in the office (10 years). They were introduced by the Act of 16 May 2019 (Official Journal of Laws of 2019, item 1146) and entered into force on 19 September 2019. Despite the amendment of the legislation, to-date lists of attorneys and legal advisors meeting the statutory qualifications' requirements which would authorise these persons to act as guardians *ad litem* of a child in criminal proceedings have not been developed. There are practical difficulties in appointing a professional attorney as guardian *ad litem* due to the unpreparedness of attorneys and legal advisors to perform this role.

Recommendation: The current provisions guarantee that the function of a guardian *ad litem* of a child in criminal proceedings will be entrusted only to persons with appropriate professional qualifications, which will ensure the child's best interests and proper representation during the proceedings. The Polish State should immediately take steps to establish lists of attorneys qualified to act as guardian *ad litem* of children in criminal proceedings. Action should also be taken in order to determine the remuneration for acting as a guardian *ad litem*, as the current fees do not encourage professional attorneys to take on this role.

11. Rights and Obligations' Instruction in criminal proceedings for child victim of crime and child witness of crime

Current legal situation: In accordance with the Polish Code of Criminal Procedure (Article 16), the authority conducting the proceedings is obliged to instruct the participants in the proceedings (victim, witness, defendant) about their obligations and rights. In practice, the authority uses specific forms. One copy of the instruction concerning rights and obligations shall be attached to the case file, the other - the participant may take home. Specimen instruction to victims and witnesses of crimes are laid down in: Regulation of the Minister of Justice of 14 September 2020 on defining a specimen instruction on rights and obligations of a victim in criminal proceedings (Official Journal of Laws of 2020, item 1619) and Regulation of the Minister of Justice of 14 September 2020 on defining a specimen instruction on rights and obligations of a witness in criminal proceedings (Official Journal of Laws of 2020, item 1620).



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Justification for a change: Polish law and practice do not differentiate - based on age, level of maturity, ability to understand - the information provided with regard to the procedural rights and obligations of participants in proceedings. Currently developed specimens inform a victim and a witness in an important manner about rights and obligations in criminal proceedings, but still do not take into consideration the age and the level of maturity of a child.

Recommendation: The instruction concerning rights and obligations addressed to a child victim or a child witness of crime should be formulated in a simple and accessible language. Information given orally and in writing must be adapted to the child's age, maturity, capacity to understand and be conveyed taking into account communication difficulties. Visual material can help in this respect. It is also important to check whether a child feels adequately informed about their rights and obligations and knows what to expect during the procedure.

The Regulation of the Minister of Justice, which specifies the preparation of an interrogation conducted under Articles 185a to 185c of the Code of Criminal Procedure, concerns only the preparation of a child under 15 years of age, interrogated as a victim or witness of strictly defined offences. Thus, it concerns only a small area of children's procedural rights and obligations. In addition, it does not cover children between the ages of 15 and 18.

(b) A child as an offender

Under Polish criminal law, anyone who commits a criminal act after the age of 17 is liable under the terms of the Criminal Code. This means that a child between the age of 17 and 18 is liable in the same way as an adult. A child who is at least 15 years of age and commits a prohibited act enlisted in the provision may also be held liable as an adult. This applies to murder, grievous bodily injury, causing a generally dangerous event, hijacking a ship or aircraft, transport disaster, rape of a person under 15 years of age, gang rape, rape with particular cruelty, rape of ascendants, descendants, adoptees, adopters, siblings, active attack on a public servant or a person assisting him or her, as a result of which they suffered grievous bodily injury, taking a hostage and robbery. The circumstances of the case, the degree of maturity of the offender, his/her personal conditions and characteristics and the fact whether the previous educational or corrective measures applied to the minor have proved unsuccessful are also taken into account.

12. Rights and Obligations' Instruction in criminal proceedings for the child a suspect of crime

Current legal situation: The regulation of the Minister of Justice on the determination of specimen instructions on the rights and obligations of suspects in criminal proceedings does not contain a specific form of instructions to children who are suspects in criminal proceedings. The same situation applies to a child detained in the course of criminal proceedings. The specimen instruction for a suspect is set out in the Regulation of the Minister of Justice of 14 September 2020 on the determination of the specimen instruction on the rights and obligations of a suspect in criminal proceedings (Journal of Laws of 2020, item 1618) and the template of the instruction on the rights of a temporarily detained person in criminal proceedings is



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provided for in the regulation of the Minister of Justice of 13 April 2016. (Official Journal of Laws of 2016, item 513), the template of the instruction on the rights of a detainee in criminal proceedings - the regulation of the Minister of Justice of 3 June 2015. (Journal of Laws of 2015, item 835), the specimen instruction on the rights of a detainee on the basis of a European Arrest Warrant - Regulation of the Minister of Justice of 11 June 2015 (Official Journal of Laws of 2015, item 874).

Justification for a change: It is the duty of the Polish State to establish procedural guarantees to ensure that children who are suspects or defendants in criminal proceedings have an opportunity to understand and follow the proceedings. The current template of the instructions is addressed to persons who, under the Polish Criminal Code, are adults and juveniles responsible for committing offences, meaning those at least 17 years of age. On the basis of Article 10 § 2 of the Penal Code, minors who are at least 15 years of age may be held responsible under the rules set out in this Code. This applies to a situation where minors have committed a prohibited act - a specific serious offence. The template of the instructions does not include the information on the child's right to compulsory defence under Article 79 § 1(1) of the Code of Criminal Procedure. The lack of a clear instruction, understandable for children, may deprive them of the benefit of all procedural guarantees. It is also important to guarantee children's right to a fair trial and to prevent them from repeating offences, as well as to support their social integration.

Recommendation: A specific specimen instructions for children suspected or detained in criminal proceedings should be prepared, taking into account the guidelines set out in Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereinafter "Directive 2016/800"; (Article 4(2)). The information should be provided to the child both in writing and orally and should be drafted in a simple and accessible language. It is worth considering developing the instruction in the form of a booklet, especially for younger children. The person supporting the child should check whether the child feels adequately informed about his/her rights and knows what to expect during the proceedings. Preparation should take place shortly before the hearing.

The above recommendation also applies to children in pre-trial detention, children arrested in criminal proceedings and children arrested on the basis of a European Arrest Warrant.

13. Advocate's support to a child

Current legal situation: The Polish Code of Criminal Procedure introduces mandatory defence, *inter alia*, in cases where the accused is under 18 years of age (Article 79 § 1(1)). At the same time, the letter on the rights and obligations of the suspect indicates that the suspect has the right to be assisted by a defence lawyer of his own choice. If the suspect demonstrates that he cannot afford a lawyer, he may apply for the court to appoint him a public defender.



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There is no precise provision in the Polish Code of Criminal Procedure on the possibility for a suspected child to consult a defence lawyer prior to the first interrogation as part of the presentation of charges. It follows from Article 313 § 1 of the Code of Criminal Procedure that a suspected child must be interrogated without delay after the announcement of the order to present charges. The possibility of questioning with the participation of a defence lawyer, but only one already acting in the case, is provided for in Article 301 of the Code of Criminal Procedure. However, this provision does not give grounds for consultation before the interrogation takes place.

Justification for a change: The assistance of a lawyer to a suspected child under the age of 18 should be available to the child without delay. It should not be conditional on the suspect appointing a defence lawyer of his own choice or having to prove that he is unable to bear the costs of defending himself and to apply to the court to appoint a public defender. Waiting for the authority conducting the procedure to fulfil all these actions takes time and deprives the child of the assistance of a defence lawyer - so important for the protection of the rights of the child - in the course of the first procedural steps. Polish legislation does not properly regulate the access of a suspected child to a defence lawyer in view of the first interrogation.

The absence of a legal basis to allow consultation with a defence lawyer before the first interrogation is a violation of the right of access to a lawyer 'before interrogation' (Article 6(4) of Directive 2016/800 and Article 3(2)(a) Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European Arrest Warrant proceedings and on the right to communicate with third parties and consular authorities while deprived of liberty; hereinafter "Directive 2013/48/EU").

This situation of the child in criminal proceedings deviates from the standards set out in Directive 2016/800. Suspected children should be given access to a lawyer in such a time and manner that they can effectively exercise their rights of defence. Member States should ensure that national law guarantees the effective exercise of the right to the assistance of a lawyer.

Recommendation: The provisions of the Polish Code of Criminal Procedure should be aligned with the requirements of EU law in terms of guaranteeing children the right of access to a lawyer at the earliest stage of criminal proceedings, i.e. during the first actions with the child's participation.

14. Confidentiality of communication between the child suspect and his/her lawyer in criminal proceedings

Current legal situation: Directive 2016/800 indicates the need to maintain the principle of confidentiality of communications between a child and his or her lawyer when exercising the right to assistance of a lawyer (Article 6(5)). Such communication includes meetings, correspondence, telephone calls and other forms of communication permitted under national law. The Polish Code of Criminal Procedure provides for the possibility of restricting supervision of communication between a suspected or accused person or a detained person and his or her lawyer in exceptional cases justified by special circumstances (Article 73 § 2 and



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Article 245 § 1). These grounds, due to their lack of precision, may result in a high degree of discretion on the part of law enforcement authorities in practice.

Justification for a change: Confidentiality of communication between the child and the lawyer is crucial to ensure the effective exercise of the rights of defence and is an essential part of the right to a fair trial. Member States should respect, without any derogation, the principle of confidentiality of meetings and other communications between the lawyer and the child when receiving legal assistance, as provided for in the Directive.

Recommendation: It is necessary to adapt immediately the provisions of Polish criminal procedure to the provisions of Directive 2016/800, especially since Member States were required to introduce regulations and administrative provisions necessary to implement the Directive by 11 June 2019.

15. Interrogation of a child suspect in criminal proceedings by the police or a public prosecutor

Current legal situation: In addition to taking minutes, the Polish Code of Criminal Procedure provides for the possibility to make a recording of the course of an interrogation - in addition to taking minutes - also by means of a video or audio recording device (Article 147 § 1).

Justification for a change: Children who are suspects in criminal proceedings are not always able to understand the content of the interrogations in which they participate. In order to provide sufficient protection for children, law enforcement interrogations should be audiovisually recorded. This measure should be proportionate, taking into account the presence of a lawyer and the possible deprivation of liberty of the child with the proviso that the best interests of the child should be a primary consideration (Article 9(1) of Directive 2016/800). Mandatory recording of interrogations would be an important guarantee for the interrogated child. Recording the procedural act would eliminate the suspicion of the interrogator that he or she is exerting pressure or asking biased questions. It would also prevent possible allegations of inappropriate behaviour or treatment of the child under interrogation. The optionality of the recording in pre-trial proceedings is not sufficient to fulfil the guarantee function referred to in the Directive.

Recommendation: In order to implement the Directive 2016/800 properly, the mandatory recording of children interrogations by the police or prosecutor should be introduced. The recording should be annexed to the traditional written record of the activity, which could then be more limited.

16. Participation of a parent and a child in a court hearing

Current legal situation: The Polish Code of Criminal Procedure does not regulate the participation of a subject of parental responsibility who would accompany the child during the court hearing or court session.



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Justification for a change: Directive 2016/800 guarantees the child the right to be accompanied by a person exercising parental responsibility during the court hearing and court session (Article 15(1) of Directive 2016/800). It is the duty of the State to adopt such practical arrangements to make this possible. It is also the State's duty to ensure that the child is present at the court hearing concerning him or her and to take all steps to enable that presence (Article 16(1) of Directive 2016/800). This is to enable the child to be heard and to make his or her point of view known.

Recommendation: The implementation by the Polish State of the above provisions is crucial because Directive 2016/800 postulates the introduction into the national legal order of a separate ground for reopening criminal proceedings in the event of absence of the child defendant at the court hearing concerning him/her (Article 16(2) of the Directive). Such a ground for reopening does not exist in the Polish Code of Criminal Procedure.

17. The right to privacy of a child suspect or accused in criminal proceedings

Current legal situation: With regard to the protection of the privacy of suspected or accused children, the Polish Code of Criminal Procedure does not contain explicit provisions with regards to these issues. The court may exclude the public from a hearing in whole or in part *ex officio* or at the request of a party if, *inter alia*, at least one of the accused is a minor (Article 360 § 1 point 2 of the Code of Criminal Procedure). The provision indicates that the exclusion is optional and does not apply to child defendants aged between 17 and 18. In addition, the court hearing is held in public if the public prosecutor objects to the exclusion of the public from that hearing (Article 360 § 2 of the Code of Criminal Procedure).

Justification for a change: The right to protection of privacy is particularly important for facilitating the social reintegration of suspected or accused children. In order to ensure the protection of the privacy of children, court hearings and court proceedings where children participate in principle should be held in camera. It should be ensured that audio-visual records of the interrogation of suspected or accused children are not disseminated to the public. The importance of the right to privacy of children suspected or accused persons in criminal proceedings is stressed in Directive 2016/800.

Recommendation: Special attention to the protection of the privacy of suspected and accused children should be a high priority of the Polish justice system. The same consideration applies to the broadcasting of procedural activities involving suspected children in pre-trial proceedings.

18. Children in detention and pre-trial detention

Current legal situation: The Polish Criminal Executive Code uses the concept of "juvenile" (person under 21 years of age). It is unfamiliar with the concepts of a child deprived of liberty and "the best interests of the child". In place of the best interest of the child, Polish law uses the concept of "special educational reasons". In the case of separation of a juvenile from an



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adult deprived of liberty, the Code uses the term "justified cases" or "justified by the needs of influence". In a juvenile prison, convicts who are under 21 years of age serve their sentence. In justified cases, a prisoner may serve his sentence in this institution after reaching the age of 21. If it is justified by the needs of influence, an adult convicted for the first time who has shown good behaviour may serve, upon the consent, in a juvenile prison. He then enjoys the same rights as a juvenile (Article 84 of the Penal Executive Code).

Under the Polish law, temporarily detained children are placed as juveniles. They should be separated from adults, unless special educational reasons support the placement of an adult with a child (Article 212 § 1 of the Executive Penal Code).

Justification for a change: Children are not a separate subject in the Polish Criminal Executive Code and do not enjoy special protection. It is necessary to separate children deprived of their liberty from adults, unless the opposite solution is considered to be in the best interests of the child (Article 37 point c, Article 12(1) of Directive 2016/800).

Recommendation: Special wards for children in pre-trial detention and children serving a sentence in prison should be established. Children deprived of their liberty must be separated from adults and guaranteed the right to benefit from special protective measures. This principle also applies to children placed in police detention.

A child as a juvenile offender

A minor within the meaning of the Polish law is: a person under the age of 18 at risk of demoralisation; a person who after the age of 13 and before the age of 17 has committed a criminal offence; a person with respect to whom educational or correctional measures have been decided and are being executed, but not longer than until the person reaches the age of 21. Polish law has not introduced a lower age limit for minors.

19. The right of a minor to a lawyer

Current legal situation: The Polish juvenile law introduces a mandatory defence for minors. It occurs in the following circumstances: when there is a conflict of interest between a minor and his/her parents; when a minor has hearing, speech or visual impairment; when there are reasonable doubts about the mental health of a minor; when a minor has been placed in a shelter for minors (art. 32c § 1 and 2 of the Juvenile Proceedings Act). A minor and his/her representatives (parents, guardian) may submit a request for appointment of a public defender.

The establishment of a public defender is determined by two cumulative conditions: the need for the participation of a defence lawyer in the case and a minor's inability to cover the remuneration of a defence lawyer. The applicant is obliged to include in the application a personal statement including detailed information on family status, assets, income and sources of income. The lack of such a statement (which is treated in the literature as a means of evidence, by means of which the legitimacy of the application is to be proved) results in the



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dismissal of the application (after a prior call to remedy its deficiencies or supplement the missing information).

Justification for a change: In principle, Polish law does not provide for a mandatory defence of a minor throughout the proceedings. The appointment of a public defender is subject to the discretion of the court, which establishes for a minor offender a lower standard of protection of his/her rights in proceedings than for an adult or juvenile in criminal proceedings. The Convention on the Rights of the Child indicates the special care and protection of a minor in proceedings.

It follows from the right to a fair trial that an application for a lawyer to be appointed should be considered without undue delay and without taking further definitive procedural steps. Delayed consideration of the application may lead to invalidity of the proceedings as a result of depriving the party of its rights of defence.

Recommendation: The appointment of a public defender should take place immediately after the initiation of proceedings, unless the minor has a defence counsel of his/her own choice. The discretion of the family court in appointing a public defender for a minor should be abolished, and the principle of immediacy in appointing a public defender for a minor should be introduced.

20. Rights and obligations' instruction for a juvenile offender in judicial proceedings

Current legal situation: Polish juvenile law does not contain a separate regulation on instructions on rights and obligation for a minor about his/her rights and obligations in court proceedings. The instruction takes place on the general principles resulting from the Code of Civil Procedure (Article 5).

Justification for a change: The lack of proper content and form of instructions violates the minor's right to a fair trial. A minor finds himself in a situation where he will not know how to present his/her procedural position, does not have a basic understanding of the court proceedings, his/her rights and procedural obligations, and the instruction provided for in the Code of Civil Procedure is often incomprehensible to him/her. It is also contrary to the provisions of the Convention on the Rights of the Child regarding the special care and protection of minors in court proceedings.

Recommendation: The letter given to children - juvenile offenders - should be formulated in a simple and accessible language. Information given orally and in writing must be adapted to the child's age, level of maturity, ability to understand, and communicated taking into account communication difficulties. Visual material can help in this respect. It is also important to check that the child feels adequately informed about his/her rights and responsibilities and knows what to expect during the procedure.



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21. Hearing of a juvenile in court proceedings

Current legal situation: In accordance with the Polish juvenile law, the hearing of a juvenile should take place in conditions similar to natural ones, if necessary in the juvenile's place of residence (Article 19 of the Act on Proceedings in Juvenile Cases).

Justification for a change: When hearing a juvenile, the juvenile must be given freedom of expression and his/her rights to special care and protection must be guaranteed in the proceedings before the court.

Recommendations: It is necessary to take measures resulting in the implementation by family courts of the existing legislation on the hearing of a minor. It is also necessary to create appropriate technical conditions to enable family courts to realise the right of a child - a minor - to safe and friendly hearing conditions that will not stigmatise the child.

Cross-border mediation in family matters

Family conflicts and disputes affect the emotional sphere and have a strong impact on the family, especially on children, due to the high emotional involvement of the participants. For this reason, they belong to a specific category of cases in which the welfare of the child must be given priority.

In the case of conflicts accompanying divorce and separation, it is extremely important to reduce the spouses' mutual hostility by providing an opportunity to express and deal with their emotions. Mediation enables parents to understand their child's needs and interests and thus protects the child from additional and repeated trauma.

It is important in mediation to make the parents aware that the child is also an equal subject in their dispute. For this reason, the child's legal and factual interests should be recognised and taken into account by both parents. In a mediation procedure the mediator plays the role of a sort of "advocate" for the child, who reminds of the child's subjectivity. This guarantees the protection of his or her welfare and interests.

In the case of all sort of conflicts concerning the division of the responsibility over the child between the parents in binational families (custody, location of the child, contact with the non-custodial parent, maintenance), when the parents reside in different countries, cross-border family mediation between the parents becomes a necessity. This should take place before the commencement of legal proceedings.

Member States should put in place legal provisions to ensure that a parent or parents who cannot bear the costs of mediation are reimbursed by the State or States in which the two conflicting parties reside.

In case of cross-border parental abduction, in accordance with the Hague Convention, the question of the child's return to the country should in the first instance be the subject of cross-border family mediation. The consent of both parents is necessary. Mediation should begin as soon as possible after the parental abduction, should be of limited duration, and extended if both parties agree.



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It is essential for the Member States to conduct permanent and extensive social campaigns highlighting the negative aspects of international parental child abduction and promoting family mediation as the most beneficial form of solving family disputes for children. A guide of good practices should also be drawn up for mediators conducting cross-border family mediation.

It is necessary for the Member States to develop common standards for conducting cross-border family mediation. The 2007 Wrocław Declaration developed by a group of Polish-German judges and mediators can serve as a model for such standards. The 2008 Wustrau Declaration later confirmed its content.

The standards developed in the mediation procedure, which are aimed at resolving bi-national German-Polish parental conflicts in which the child is the victim, are as follows:

1. The mediation should be conducted as a binational mediation, with two mediators.
2. Mediators should come from the countries of origin of the parties to the mediation. In Polish-German family mediation, including international child abduction, mediators should come from Poland and Germany, which guarantees knowledge of the culture and traditions of both parents.
3. In order to represent both genders, the mediation team should consist of a woman and a man.
4. The mediation team should consist of a lawyer and a psychologist or educator. The dynamics of the conflict requires communication skills and psychological knowledge of the mediator as well as knowledge of family law and parental child abduction proceedings.
5. Child abduction cases require both mediators to be ready to mediate within one or two weeks of receiving the order.

The method of mediation described above is to help the parties to settle contentious family issues relating to the exercise of parental responsibility, parental child abduction, parent-child contact and property issues. However, it can involve a lot of mediator's work and costs.

Bi-national mediation is complementary to instruments of international law and national order. It helps to resolve conflicts and disputes involving children effectively, taking into account the needs and interests of children and parents.

Dr Marek Michalak (mm@marekmichalak.pl)

President of the International Janusz Korczak Association

Director of the Janusz Korczak Institute for Children's Rights