

**M Y L A W Y E R**  
**M Y R I G H T S**

**ACCESS OF CHILDREN  
TO THE ASSISTANCE  
OF A DEFENCE LAWYER  
COUNTRY REPORT**  

---

**POLAND**

Katarzyna Wiśniewska  
Marcin Wolny

Warsaw  
February 2017

Edited by Katarzyna Wiśniewska, Marcin Wolny  
Scientific consultation by Dr Piotr Kładoczny

Cover page design: Marta Borucka

ISBN 978-83-62245-66-6

Free publication, not for sale

**Publisher:**

Helsinki Foundation for Human Rights  
ul. Zgoda 11  
00-018 Warszawa

The publication was financed by the European Union's programme *Criminal Justice*. This publication reflects only the opinions of its authors. The European Commission bears no liability for the content of the publication.

**FOR MORE INFORMATION ABOUT THE PROJECT "MY LAWYER, MY RIGHTS",  
VISIT OUR WEBSITE [HTTP://WWW.MYLAWYERMYRIGHTS.EU/](http://www.mylawyermyrights.eu/).**



# TABLE OF CONTENT

<b>1. INTRODUCTION</b>	<b>3</b>
1.1 LIST OF ACRONYMS	3
1.2 ORGANISATIONAL FRAMEWORK:	4
1.3 TEAM:	4
1.4 METHODOLOGY	4
1.5 LIMITATIONS IN CONDUCTED RESEARCH	5
<b>2 THE INTERNATIONAL FRAMEWORK</b>	<b>6</b>
2.1 CONVENTION ON THE RIGHTS OF THE CHILD	6
2.2 SOFT-LAW INTERNATIONAL INSTRUMENTS AND THEIR PROMOTION	6
2.3 MEASURES TAKEN TO PROMOTE SOFT LAW	6
<b>3 REGIONAL FRAMEWORK</b>	<b>6</b>
3.1 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS	7
3.2 SOFT-LAW INTERNATIONAL INSTRUMENTS AND THEIR PROMOTION	7
3.4 MEASURES TAKEN TO PROMOTE SOFT LAW	7
3.5 <b>ERREUR ! SIGNET NON DEFINI.</b> JURISPRUDENCE OF THE EC <sup>TH</sup> R	8
<b>4 THE NATIONAL FRAMEWORK</b>	<b>0</b>
4.1 THE CONSTITUTION OF THE REPUBLIC OF POLAND	0
4.2 CHILDREN SUSPECTED OR ACCUSED IN CRIMINAL PROCEEDINGS: NATIONAL DEFINITIONS	0
4.2.1 HOW LONG ARE YOU A CHILD?	0
4.2.2 RESPONSIBILITY OF CHILDREN FOR THEIR OWN ACTIONS UNDER POLISH LAW AND THE SCOPE OF APPLICATION OF THE DIRECTIVES	1
4.2.3 RESPONSIBILITY OF JUVENILES UNDER THE JJA AND CCP	2
4.2.4 JUVENILES IN STATISTICAL DATA	3
<b>5. THE YOUTH LAWYER - FROM THEORY TO PRACTICE: ANALYSIS</b>	<b>6</b>
5.1 THE YOUTH LAWYER – ROLE AND MISSION	6
5.2 THE RIGHTS OF ACCESS TO/ASSISTANCE BY A LAWYER	6
5.2.1. JUVENILE JUSTICE PROCEEDINGS	6
5.2.2. CRIMINAL PROCEDURE	10
5.3 PRESENCE OF AN ATTORNEY DURING AN INTERVIEW	12
5. 3.1 JUVENILE JUSTICE PROCEEDINGS	13
5.3.2 CRIMINAL PROCEEDINGS	13
5.3.3 CONCLUSIONS	15
5.4. PRINCIPLES OF CONTACTING A DEFENCE LAWYER	15
5. 4.1 JUVENILE JUSTICE PROCEEDINGS	15
5.4.2. CRIMINAL PROCEEDINGS	18
5.5 INFORMATION ON RIGHTS	18
5.5.1 JUVENILE JUSTICE PROCEEDINGS	19
5.5.2 CODE OF CRIMINAL PROCEEDINGS	20
5.6 LEGAL AID SYSTEM FOR CHILDREN (AND/OR EQUIVALENT SYSTEM)	22
5.6.1 JUVENILE JUSTICE ACT	22
5.6.2. CRIMINAL PROCEEDINGS	23
5.7 TRAINING FOR LAWYERS IN THE JUVENILE JUSTICE SYSTEM	23
5.8 RELATION YOUTH LAWYER - MINOR CLIENT	25
<b>6. CONCLUSIONS</b>	<b>25</b>
<b>7. GOOD PRACTICES AND OBSTACLES</b>	<b>27</b>
7.1 GOOD PRACTICES	27
7.2 OBSTACLES	27
<b>8. SUMMARY</b>	<b>28</b>
8.1 CRIMINAL, ANTISOCIAL AND DELINQUENT BEHAVIOUR AMONG CHILDREN	28

8.2. INTERNATIONAL LAW	28
8.4 LAW OF THE EUROPEAN UNION AND CHILDREN’S RIGHTS IN CRIMINAL PROCEEDINGS	28
8.5. DOMESTIC LAW	29
8.6 CONTACTS OF CHILDREN WITH THE JUSTICE SYSTEM AND CRIMINAL JUSTICE AUTHORITIES	29
8.7. THE CHILD’S REPRESENTATION – DEFENCE LAWYER’S PERSPECTIVE	29
8.8. THE CHILD’S REPRESENTATION – CHILDREN’S PERSPECTIVE	30
8.9. CONTACTS OF CHILDREN WITH DEFENCE LAWYERS – EXPERTS’ PERSPECTIVE	30
8.10. STATE OF KNOWLEDGE ABOUT PROCEEDINGS AGAINST CHILDREN	30
<b>9. RECOMMENDATIONS</b>	<b>32</b>
9.1. LEGISLATIVE	32
9.2. PRACTICAL	32
9.2.1. EDUCATION	32
9.2.2. CONTACT WITH CHILDREN	32

# 1. INTRODUCTION

## 1.1 LIST OF ACRONYMS

<b>CC</b>	Criminal Code of 6 June 1996, J.L. 2016, item 1137 (consolidated text).
<b>CCP</b>	Code of Criminal Procedure of 6 June 1996, J.L.2016, item 1749 (consolidated text)
<b>CHR</b>	Commissioner for Human Rights
<b>Constitution</b>	Constitution of the Republic Of Poland, as adopted by the National Assembly on 2nd April 1997
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms
<b>EctHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>HFHR</b>	Helsinki Foundation for Human Rights
<b>JJA</b>	Juvenile Justice Act of 26 October 1982 J.L. 2016, item 1654 (consolidated text).
<b>UN</b>	United Nations

## 1.2 ORGANISATIONAL FRAMEWORK

**The Helsinki Foundation for Human Rights** is a non-governmental organization established in 1989 in Warsaw. Its mission is to promote the development of a culture based on the respect for freedom and human rights in Poland and abroad.

The main areas of activity of the Foundation are:

- International education programmes (theoretical training courses on human rights issues, training courses for participants from outside Poland to develop the ability to act effectively in defence of human rights, and training courses for professional groups (e.g. lawyers, Police officers, journalists and teachers));
- National education programmes (education programmes and initiatives addressed to different target groups – e.g. the International Film Festival WATCH DOCS).

Human Rights in Film one of the biggest human rights festival in the world, gathering thousands of viewers around Poland); Activity in the public interest (monitoring of the legislative process, monitoring of public institutions, strategic litigation and provision of free-of-charge legal assistance to Polish citizens, refugees and members of national minorities, and research on human rights-related matter, most recently on procedural safeguards in criminal proceedings).

## 1.3 TEAM

**Katarzyna Wiśniewska** – an attorney and the coordinator of the Strategic Litigation Programme at the Helsinki Foundation for Human Rights. In recent years, Katarzyna has been involved in many European projects in the area of criminal procedure and human rights law. She is an expert in juvenile legal responsibility and the author of many academic and popular science publications. Katarzyna is a graduate of the Faculty of Law and Administration at the Jagiellonian University of Kraków. She currently works on a doctoral dissertation on the compensatory liability of the State Treasury for unjust application of measures of criminal procedure and penal measures and has been appointed by the Commissioner for Human Rights to the Experts Committee at the National Preventive Mechanism. In 2015, Katarzyna ranked first in the contest *“Rising Stars among Lawyers. Leaders of tomorrow”* organised by *Dziennik Gazeta Prawna*.

**Marcin Wolny** – an attorney, graduate of the Faculty of Law and Administration of the University of Warsaw. He has been involved with the Helsinki Foundation for Human Rights since 2010, initially as a volunteer of the “Innocence” Law Clinic and subsequently as an assistant to the Clinic’s coordinator. In 2012-2013 he was a lawyer for the HFHR Strategic Litigation Programme. Marcin has been involved in many European projects whose purpose was to monitor the rights of persons staying at detention facilities. He is an expert in the area of juveniles’ rights and procedural guarantees for a participant in criminal proceedings. Currently, Marcin works as an assistant in the HFHR’s project “Monitoring of the Legislative Process”.

## 1.4 METHODOLOGY

The report has been developed for both legal practitioners who handle juvenile cases (attorneys, legal counsellors, judges, guardians and probation officers, police officers) and professionals working with

juveniles (carers at youth detention centres, youth educational centres, young offender institutions, child counsellors, psychologists and social workers).

At the same time, the recommendations presented in this report will be communicated to the Ministry of Justice and the Sejm, which are the key stakeholders in the process of implementation of the directives to domestic legal systems.

This report is also intended for watchdogs of individual rights such as the Commissioner for Human Rights, the Ombudsperson for Children or the National Preventive Mechanism, which regularly monitor the realisation of the right to a fair trial and the manner in which children are treated.

As part of our research, we have interviewed the following persons:



12 experts (in social rehabilitation, human rights protection, criminal procedure, children's rights)



6 children, wards of institutions for juveniles



5 lawyers who represent children in criminal proceedings and juvenile justice proceedings

## 1.5 LIMITATIONS IN CONDUCTED RESEARCH

The key difficulty in our research was the determination of the scope of analyses. This is because the scope of application of the two directives described in this report is not immediately identifiable. These issues will be addressed in detail below.

It was equally difficult to find attorneys and legal counsellors who specialise in juvenile justice proceedings. Unfortunately, relevant registers kept by professional associations of attorneys and legal counsellors contain no such information. In the consequence of the above, we had problems with contacting a professional counsel whose key area of practice is advocacy in juvenile justice proceedings or the representation of juvenile defendants in criminal proceedings.

## 2 THE INTERNATIONAL FRAMEWORK (See Annex 1)

### 2.1 CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child plays the key role in the system of protection of the rights of the child. It obliges the State Parties to ensure that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Furthermore, the Convention obliges the State Parties to recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Among safeguards that are to fulfil this objective, the CRC lists, among other things, the principle of *nullum crimen*, the presumption of innocence and the right to a defence.

There are 3 additional protocols to the Convention on the Rights of the Child. The third protocol, which introduces the mechanism of an individual complaint, has not yet been ratified by the Republic of Poland. The Committee on the Rights of the Child (CRC) is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child and Optional Protocols by State parties.

### 2.2 SOFT-LAW INTERNATIONAL INSTRUMENTS AND THEIR PROMOTION

A review of all international instruments of soft law developed by human rights protection bodies may be helpful for the purposes of discussing juveniles' rights. Examples of key instruments of this type include:

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);<sup>1</sup>
- The UN Rules for the protection of juveniles deprived of their liberty (Havana Rules).<sup>2</sup>

### 2.3 MEASURES TAKEN TO PROMOTE SOFT LAW

The promotion of international soft-law instruments is the responsibility of law protection bodies such as the Commissioner for Human Rights and the Ombudsperson for Children. The Ombudsperson for Children financed the publication of translations of the UN soft law documents<sup>3</sup>.

## 3 REGIONAL FRAMEWORK (See Annex 1)

---

<sup>1</sup> The Rules were adopted on 29 November 1985 by the UN General Assembly, <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf> (accessed on 23.02.2017).

<sup>2</sup> Adopted on 14 December 1990 by the UN General Assembly, [https://www.unodc.org/pdf/criminal\\_justice/United\\_Nations\\_Rules\\_for\\_the\\_Protection\\_of\\_Juveniles\\_Deprived\\_of\\_their\\_Liberty.pdf](https://www.unodc.org/pdf/criminal_justice/United_Nations_Rules_for_the_Protection_of_Juveniles_Deprived_of_their_Liberty.pdf).

<sup>3</sup> M. Michalak, P. Jaros, *Prawa Dziecka, Dokumenty Organizacji Narodów Zjednoczonych*, [http://brpd.gov.pl/sites/default/files/prawa\\_dziecka\\_-\\_zbior\\_dokumentow\\_onz.pdf](http://brpd.gov.pl/sites/default/files/prawa_dziecka_-_zbior_dokumentow_onz.pdf).

## 3.1 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Children also benefit from the guarantees laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms. The key Convention guarantees include the prohibition of torture, inhuman and degrading treatment and punishment, the right to a fair trial and the prohibition of unlawful deprivation of liberty.

## 3.2 SOFT-LAW INTERNATIONAL INSTRUMENTS AND THEIR PROMOTION

A review of all regional instruments of soft law developed by human rights protection bodies may be helpful for the purposes of discussing juveniles' rights. Examples of key instruments of this type include:

- Recommendations Rec (2003) of the Council of Europe's Committee of Ministers concerning new ways of dealing with juvenile delinquency and the role of juvenile justice;<sup>4</sup>
- Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice;<sup>5</sup>
- European Commission Recommendation C (2013) 8179/2 on the right to legal aid in criminal proceedings<sup>6</sup>;
- European Commission Recommendation C (2013) 8178/2 on safeguards for vulnerable persons suspected or accused in criminal proceedings<sup>7</sup>.

## 3.4 MEASURES TAKEN TO PROMOTE SOFT LAW

The promotion of regional soft-law instruments is the responsibility of law protection bodies such as the Commissioner for Human Rights and the Ombudsperson for Children. The Ombudsperson for Children financed the publication of the Council of Europe<sup>8</sup> documents regarding children. The publication was prepared in 2012 and it is available at the website of the Ombudsman.

---

<sup>4</sup> The Recommendation adopted on 24 September 2003 during the 853rd session of the Committee of Ministers, [http://www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202013/Rec\(2003\)20\\_E.pdf](http://www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202013/Rec(2003)20_E.pdf) (accessed on 23.02.2017).

<sup>5</sup> <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> (accessed on 23.02.2017).

<sup>6</sup> [http://ec.europa.eu/justice/criminal/files/c\\_2013\\_8179\\_en.pdf](http://ec.europa.eu/justice/criminal/files/c_2013_8179_en.pdf)

<sup>7</sup> [http://ec.europa.eu/justice/criminal/files/c\\_2013\\_8178\\_en.pdf](http://ec.europa.eu/justice/criminal/files/c_2013_8178_en.pdf)

<sup>8</sup> P. Jaros, *Prawa Dziecka Dokumenty Rady Europy*, [http://brpd.gov.pl/sites/default/files/prawa\\_dziecka\\_dokumenty\\_rady\\_europy.pdf](http://brpd.gov.pl/sites/default/files/prawa_dziecka_dokumenty_rady_europy.pdf) (accessed on: 23.02.2017).

## 3.5 JURISPRUDENCE OF THE ECtHR

Since ratification of the Convention by Poland the ECtHR issued 950 judgements in cases against Poland. Majority of them concerned extensive length of the court proceedings or violation of the right to liberty. In more than 100 the ECtHR found a violation of a right to fair trial<sup>9</sup>.

Children's rights in juvenile justice proceedings have been the subject of the ECtHR's jurisprudence. In the judgment issued in the case *Adamkiewicz v. Poland*<sup>10</sup> the Court found a violation of Article 6 § 3(c) of the Convention read in conjunction with Article 6 § 1 of the Convention. The Court noted that juvenile justice proceedings were of repressive nature. Therefore, the child who is held responsible in such proceedings should be given any guarantees available to an adult person. Notwithstanding the above, in the said case the applicant's right to a defence was limited due to a denial of access to an attorney for a period of six weeks.

At the same time, the same family judge heard the case at the stage of both preliminary inquiry and the judicial examination proceedings. In the decision ending the first stage of proceedings, the judge held that disclosed circumstances suggested that the applicant had perpetrated the imputed act. Subsequently, the judge went on to decide the case on the merits. In assessing this case, the ECtHR found that Poland had violated the directives on a fair trial and had failed to provide the applicant with the right to an impartial court.

In the judgment issued in the case *P. and S. v. Poland*, the ECtHR questioned, among other things, the lawfulness of the emergency placement of a juvenile victim of a sexual offence in a youth shelter. According to Strasbourg judges, the placement did not serve an educational purpose within the meaning of Article 5 of the Convention but was only meant to separate a juvenile from her parents and ensure that she would take an independent decision whether to terminate a pregnancy or not. For these reasons, the ECtHR found that Poland had violated Article 5 of the Convention.

In the judgement issued in the case *Grabowski v. Poland*<sup>11</sup> the Court considered the absence of a periodical review of the lawfulness of detention of a juvenile in a juvenile shelter. Pursuant to the provisions of the JJA, after a case is referred to trial there is no further need to issue a separate decision on the extension of a juvenile's stay in a juvenile shelter. In assessing the case of *Grabowski*, the Court decided that there was no legal basis for the applicant's placement at the shelter and that it was impossible to satisfy the need to verify whether an extension of placement was necessary.

In the judgment delivered in the case *Płonka vs Poland*<sup>12</sup>, the ECtHR found a violation of the applicant's right to be assisted by a lawyer at a preliminary stage of criminal proceedings conducted in a manslaughter case (Article 6 § 3 (c) of the Convention read in conjunction with Article 6 § 1 of the Convention). On 8 April 1999, the applicant was arrested on suspicion of manslaughter and interviewed by a police officer. Next day she was charged with manslaughter and interviewed by a prosecutor. During the interview, she explained that she had been having problems with alcohol for the last 20 years. She claimed she had no recollection of what had happened. Later, she confessed to manslaughter. During all the interviews that were conducted on 8-10 April 1999, the applicant was not assisted by a defence lawyer. On 9 April 1999, she signed a statement acknowledging that she had been informed of her procedural rights, including the right to be assisted by a lawyer and the right to refuse

---

<sup>9</sup> European Court of Human Rights, Violation by article and by State, available at: [http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf)

<sup>10</sup> The ECtHR judgment in the case *Adamkiewicz v. Poland*, 2 March 2010, no. 54729/00.

<sup>11</sup> The ECtHR judgment in the case *Grabowski v. Poland*, 30 March 2015, no. 57722/12.

<sup>12</sup> *Płonka v. Poland*, ECtHR judgment of 31 March 2009, no. 20310/02.

to testify. It was not until 23 April 1999 when the Regional Court appointed a legal aid defence lawyer for the applicant. On 5 May 1999, the applicant privately retained a defence lawyer.

## 4 THE NATIONAL FRAMEWORK (See Annex 1)

	Is there a law?	Name and reference of the law(s)?	Date of promulgation?	What does the law provide for? (briefly)	Derogations
1.1 Juvenile Justice system	Yes	Juvenile Justice Act of 26 October 1982 J.L. 2016, item 1654 (consolidated text).	26 October 1982	The central regulation regarding responsibility for the rights of underage persons is contained in the Juvenile Justice Act. The wording of the Act's preamble establishes that the purpose of the Act is to prevent the depravation and delinquency of the youth, as well as to create a means for minors who had fallen afoul of the law to return to normal life.	
1.1 bis. Age of criminal responsibility	Yes	Criminal Code of 6 June 1996, J.L. 2016, item 1137 (consolidated text).	6 June 1996	Under Polish law a person who has reached the age of 17 and has committed a prohibited act may be held responsible in accordance with the rules laid down in the Criminal Code. An exception to this rule is expressed in Article 10 (2) CC, under which a juvenile who, after reaching 15 years of age, has committed a prohibited act contrary to any of the following articles of the CC: Art. 134, Art. 148 (1)-(3), Art. 156 (1) or (3), Art. 163 (1) or (3), Art. 166, Art. 173 (1) or (3), Art. 197 (3) or (4), Art. 223 (2), Art. 252 (1) or (2) or Art. 280 may be held responsible pursuant to the rules laid down in the Criminal Code, if the circumstances of the case and the level of the delinquent's developmental maturity, his features and personal conditions speak for this and in particular where the educational and/or corrective measures previously taken have proven ineffective.	
1.2 Right of access to a lawyer	Yes	Juvenile Justice Act (JJA), Code of Criminal Procedure (CCP)	JJA - 26 October 1982 CCP – 6 June 1996	JJA- Article 18a provides that a juvenile has the right to a defence, including the right to assistance of a defence lawyer.  CCP- Article 6 CCP affords a defendant the right to a defence, including the right to use the assistance of a defence lawyer, and states that a defendant should be informed about these entitlements.	

1.3 Right of assistance by a lawyer	Yes	Juvenile Justice Act (JJA), Code of Criminal Procedure (CCP)	JJA - 26 October 1982 CCP – 6 June 1996	JJA-(see above) CCP-(see above)	
1.4 Legal aid system	Yes	Juvenile Justice Act (JJA), Code of Criminal Procedure (CCP)	JJA - 26 October 1982 CCP – 6 June 1996	The JJA stipulates the possibility of appointing a legal aid defence lawyer. The president of the court is obliged to consider the motion of a juvenile, but only if they consider that granting such a motion is needed and that a juvenile or the juvenile’s parents are unable to afford a defence lawyer of their choice without detriment to their ability to provide means of subsistence for themselves and their family. It is possible to appeal a denial of the motion.  CCP- The Code of Criminal Procedure also provides for the institution of legal aid defence (Article 78). Under current regulations, a defendant who has no lawyer of their choice may request the appointment of a legal aid defence lawyer provided that they reasonably show that they are unable to afford a lawyer without detriment to their ability to provide means of subsistence for themselves and their family.	
1.5 Appointment of a lawyer	Yes	Juvenile Justice Act (JJA), Code of Criminal Procedure (CCP)	JJA - 26 October 1982 CCP – 6 June 1996	According to the art. 83 of CCP a defence council is appointed by the accused. Until the accused who is detained on remand appoints a defence council, the defence council may be appointed by another person, of which the accused should be notified immediately. This provision applies also to JJA.	
1.6 Socio-legal defence centers	Yes	Ombudsman- Act of 15 July 1987 on Human Rights Defender	15 July 1987	According to the art. 80 of the Constitution of the Republic of Poland everyone shall have the right to apply to the Ombudsman for assistance in the protection of his freedoms or rights infringed by organs of public authority. After case examination the Ombudsman is entitled to explain applicant that no infringement of liberties and rights of a human and a citizen has been found; refer to the agency, organization or institution whose activity has been found to have caused an infringement of the liberties and right of a human and a citizen and ask them to apply	

				<p>measures provided by law; such motion may not, however, infringe upon independence of the judiciary. The Ombudsman is also able to demand that proceedings be instituted in civil cases, participate in any ongoing proceedings with the rights enjoyed by the prosecutor. It may also demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted ex officio, ask for instituting administration proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor. The Ombudsman is also entitled to move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanor, under rules and procedures set forth elsewhere and lodge cassation or extraordinary appeal against each final and valid sentence, under rules and procedures set forth elsewhere.</p>	
		<p>Ombudsman for Children - Act of 6 January 2000 on the Ombudsman for Children</p>	<p>6 January 2000</p>	<p>The Ombudsman for Children shall safeguard the rights of children as set forth in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other regulations of law, with respect for the responsibility, rights and obligations of parents. In performing his duties, the Ombudsman shall be guided by the best interest of the child and shall take into consideration that family is the natural environment for the child to develop. The Children Ombudsman is entitled to examine any case, require information or documents from public authorities. The Children Ombudsman is also able to initiate and participate in civil proceedings and demand prosecutors proceedings to be initiated. It is empowered to conduct analyses and opinions. The Children Ombudsman may also refer to the public authorities and ask them to take action in children case.</p>	
<p>1.7 National monitoring mechanism(s)</p>	<p>Yes</p>	<p>The document of 18 January 2008</p>		<p>The Defender shall perform the function of the inspector for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (National Prevention</p>	



Mechanism). As stated in the Article 8.2. Defender shall regularly examine the treatment of prisoners. In the view of Article 13.1a When pursuing the task referred to in Article 8( 2), the Defender also has the right to: 1) record sound and image in places where prisoners are detained, upon the consent of the persons to be recorded, 2) meet people deprived of their liberty with no other people present and meet people who, according to the Defender, may provide important information.

## 4.1 THE CONSTITUTION OF THE REPUBLIC OF POLAND

Article 72 of the Constitution of the Republic of Poland states that the Republic of Poland guarantees the protection of children's rights.

The same Article grants any person the right to request that public authorities should protect a child from violence, cruelty, exploitation and antisocial and delinquent behaviour. Simultaneously, it indicates that every child deprived of parental care has the right to be cared and helped by public authorities. While ascertaining children's rights public authorities and persons responsible for a child are required to listen to a child and consider his or her opinion to the extent possible. Children also benefit from all the constitutional safeguards laid down for adults. Given the above, the constitutional provisions establishing the right to a defence, presumption of innocence and the right to have one's case heard by an impartial and independent court should also apply to children.

## 4.2 CHILDREN SUSPECTED OR ACCUSED IN CRIMINAL PROCEEDINGS: NATIONAL DEFINITIONS

### 4.2.1 HOW LONG ARE YOU A CHILD?

*“Children are usually afraid of the procedure that is commenced against them.”*

Within the meaning of the basic international law act, i.e. the Convention on the Rights of the Child “a child” is every human being below 18 years of age, unless he or she earlier attains the age of majority under the law applicable to children<sup>13</sup>. Poland ratified the Convention in 1991.

The Polish Constitution contains no definition of a child. Such a definition is included in the Ombudsperson for Children Act and declares that a child is any human being from the moment of conception until attaining the age of majority. Article 10 (1) of the Civil Code provides that a person attains majority upon reaching the age of 18.

---

<sup>13</sup>THE CONVENTION ON THE RIGHTS OF THE CHILD adopted on 20 November 1989 by the General Assembly of the United Nations (Journal of Laws of 23 December 1991).

## 4.2.2 RESPONSIBILITY OF CHILDREN FOR THEIR OWN ACTIONS UNDER POLISH LAW AND THE SCOPE OF APPLICATION OF THE DIRECTIVES

### **DIRECTIVES 2016/800/EU**

*This Directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.*

*This Directive applies to children who are suspects or accused persons in criminal proceedings. It applies until the final determination of the question whether the suspect or accused person has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.*

*This Directive, or certain provisions thereof, should also apply to suspects or accused persons in criminal proceedings, and to requested persons, who were children when they became subject to the proceedings, but who have subsequently reached the age of 18, and where the application of this Directive is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned.*

*When, at the time a person becomes a suspect or accused person in criminal proceedings, that person has reached the age of 18, but the criminal offence was committed when the person was a child, Member States are encouraged to apply the procedural safeguards provided for by this Directive until that person reaches the age of 21, at least as regards criminal offences that are committed by the same suspect or accused person and that are jointly investigated and prosecuted as they are inextricably linked to criminal proceedings which were initiated against that person before the age of 18.*

### **DIRECTIVES 2013/48/EU**

*This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.*

#### 4.2.3 RESPONSIBILITY OF JUVENILES UNDER THE JJA AND CCP<sup>14</sup>

Under Polish law a person who has reached the age of 17 and has committed a prohibited act may be held responsible in accordance with the rules laid down in the Criminal Code. An exception to this rule is expressed in Article 10 (2) CC, under which a juvenile who, after reaching 15 years of age, has committed a prohibited act contrary to any of the following articles of the CC: Art. 134, Art. 148 (1)-(3), Art. 156 (1) or (3), Art. 163 (1) or (3), Art. 166, Art. 173 (1) or (3), Art. 197 (3) or (4), Art. 223 (2), Art. 252 (1) or (2) or Art. 280 may be held responsible pursuant to the rules laid down in the Criminal Code, if the circumstances of the case and the level of the delinquent's developmental maturity, his features and personal conditions speak for this and in particular where the educational and/or corrective measures previously taken have proven ineffective.

The Juvenile Justice Act is applied in respect of preventing and combating antisocial and delinquent behaviour of children towards persons under the age of 18. There is no minimum age of such responsibility. In such cases educational measures might, such as supervision of school, tutor or parents might be imposed on children.

The JJA enables court also to impose correctional measures towards person between 13 and 17 years of age who have committed a prohibited act.

Age of criminal responsibility is of vital importance from the point of view of the application of the said directives. This is because they show the need to evaluate the compliance of the said directives solely with the content of the Code of Criminal Procedure. However, it is not the case that such directives do not matter in the context of the Juvenile Justice Act.

Considering this issue, we have subscribed to the opinion of the Criminal Law Codification Commission that under current law Directive 2013/48/EU does not apply to juvenile justice proceedings. In particular, this is a consequence of the provisions of Chapter IV of the TFEU that limits powers of the European Union only to cooperation in criminal cases. Furthermore, Directive 2016/800 contains a direct statement that its provisions should not be applied to proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.

However, the very fact that the Directive has no application to juvenile justice proceedings does not mean (paradoxically) that its provisions are without any significance for such proceedings. This problem should be looked at from the point of view of other sources of law and in particular Article 32 of the Constitution and Article 14 of the Convention. The first one prohibits any discrimination in political, social or economic life for whatever reason. The other one establishes the principle that the exercise of the rights and freedoms enumerated in the Convention should be guaranteed without any discrimination for whatever reasons.

From a perspective of human rights and freedoms, both juvenile justice proceedings and criminal proceedings may potentially lead to a situation where an individual is deprived of liberty. In other words, from the point of view of the Constitution and Convention, a juvenile brought before a family

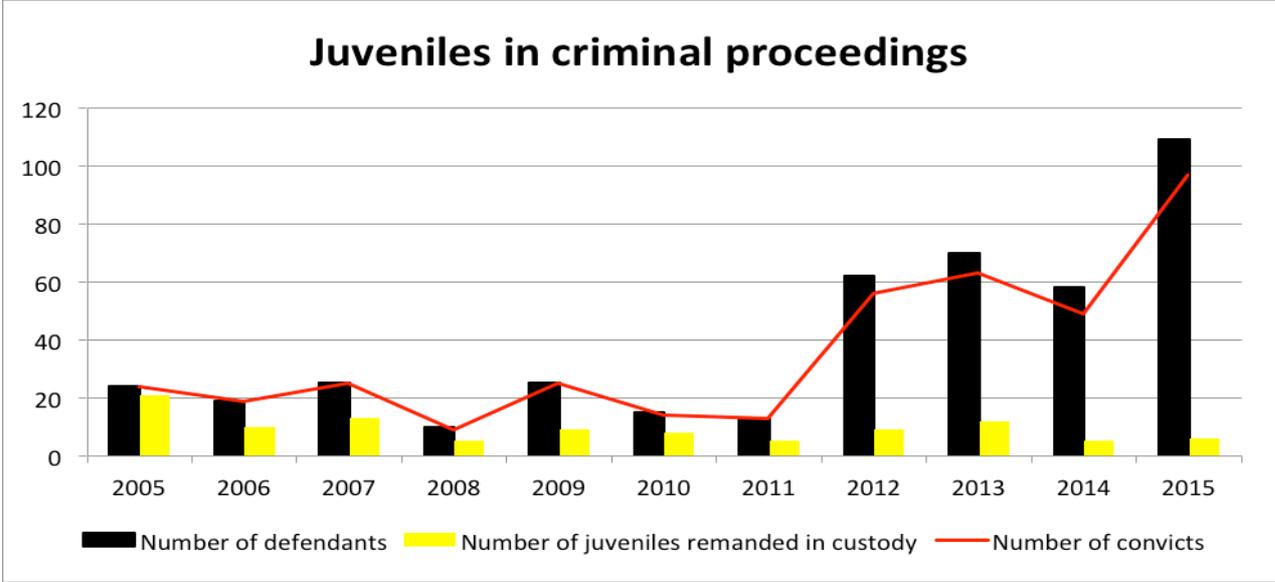
---

<sup>14</sup> Recently, the issue of the age of criminal responsibility appeared during works on the 2013 amendment to the Code of Criminal Procedure. The explanatory memorandum to the draft amendment prepared by the Criminal Law Codification Commission indicated that although "A child under international law (e.g. the Convention on the Rights of the Child) is a person who has not attained the age of 18, different procedural rules should be applied towards children – perpetrators of prohibited acts – than those applied towards adult perpetrators. It does not seem socially acceptable nor justified to increase the minimum age of criminal responsibility laid down in Article 10(1) up to 18 years of age" (explanatory memorandum to the draft amendment to the Criminal Code and certain other acts of 5 November 2013 prepared by the Criminal Law Codification Commission, pp. 7-8).

court is in the same legal situation as an adult perpetrator standing before a criminal court. Both of them face the penalty of deprivation of liberty. For this reason, the two categories of persons should benefit from the same standard of procedural guarantees. The only differentiation in this regard that is allowed under Article 72 of the Constitution is the one that would be beneficial for juveniles.

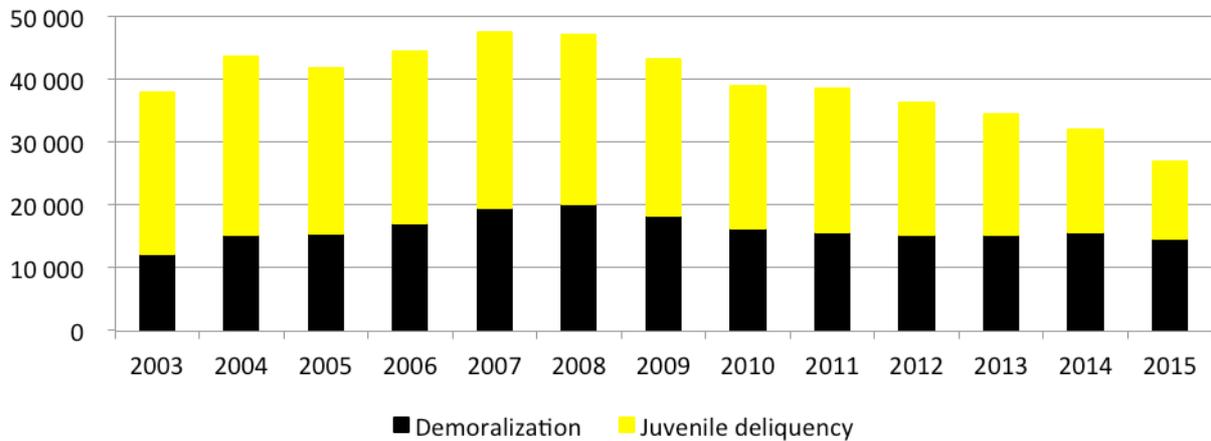
All this brings us to the conclusion that if the said Directives raise the procedural standard for perpetrators tried in criminal proceedings, then the legislator should also adjust to the same level the procedural standard applicable in juvenile justice proceedings. Otherwise, we deal with discrimination on the grounds of age.

### 4.2.3 JUVENILES IN STATISTICAL DATA

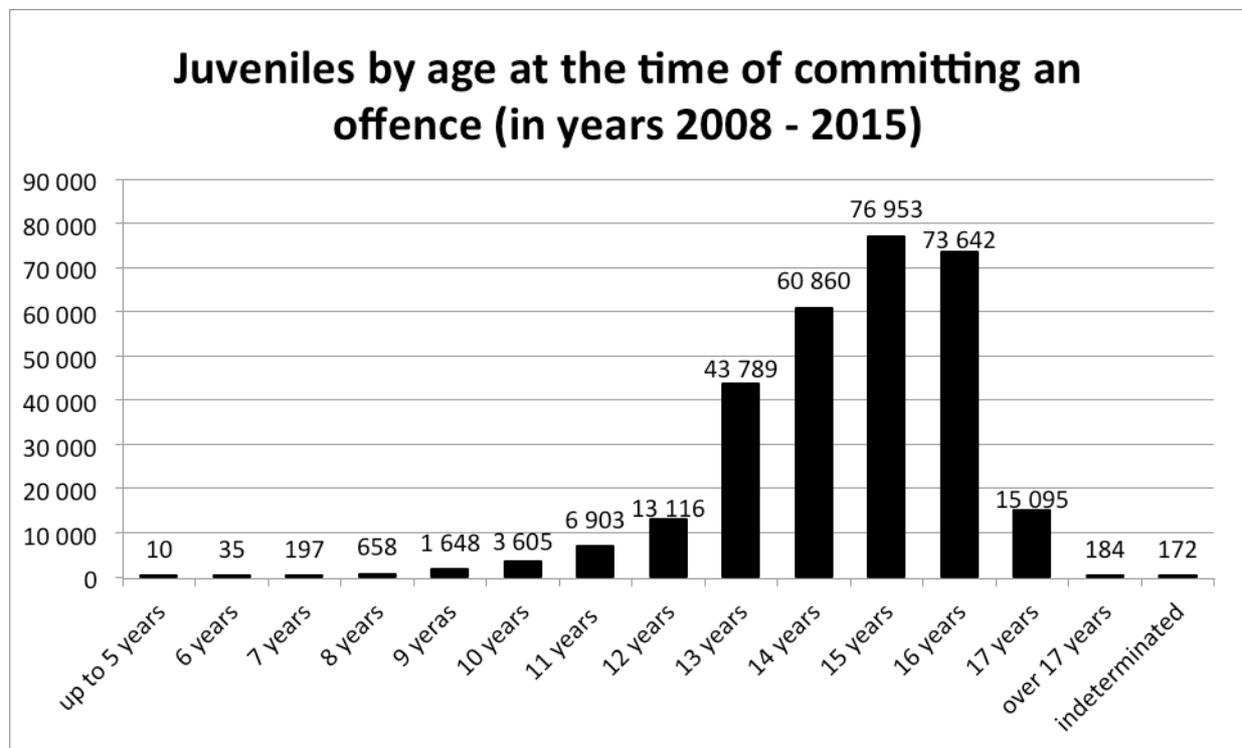


Data obtained by the Helsinki Foundation for Human Rights point out towards a growing number of cases in which juveniles are held responsible for the commission of a punishable act under the rules laid down for adult perpetrators. Whereas in 2005 only 24 juveniles were so prosecuted, in 2015 the number surpassed 100. However, the relevant statistics of the Ministry of Justice show that juvenile cases are increasingly more often concluded with non-custodial sentences. For instance, in 2006 only 4 out of 19 juveniles tried for the commission of a punishable act were sentenced to a penalty other than imprisonment. Whereas in 2015, as many as 41 persons (out of 109) were found guilty and sentenced to a penalty other than imprisonment. This begs the question whether all such persons should be tried under the procedure laid down in Article 10 (2) of the CC.

## Final judgements in cases of juveniles' delinquency and demoralization



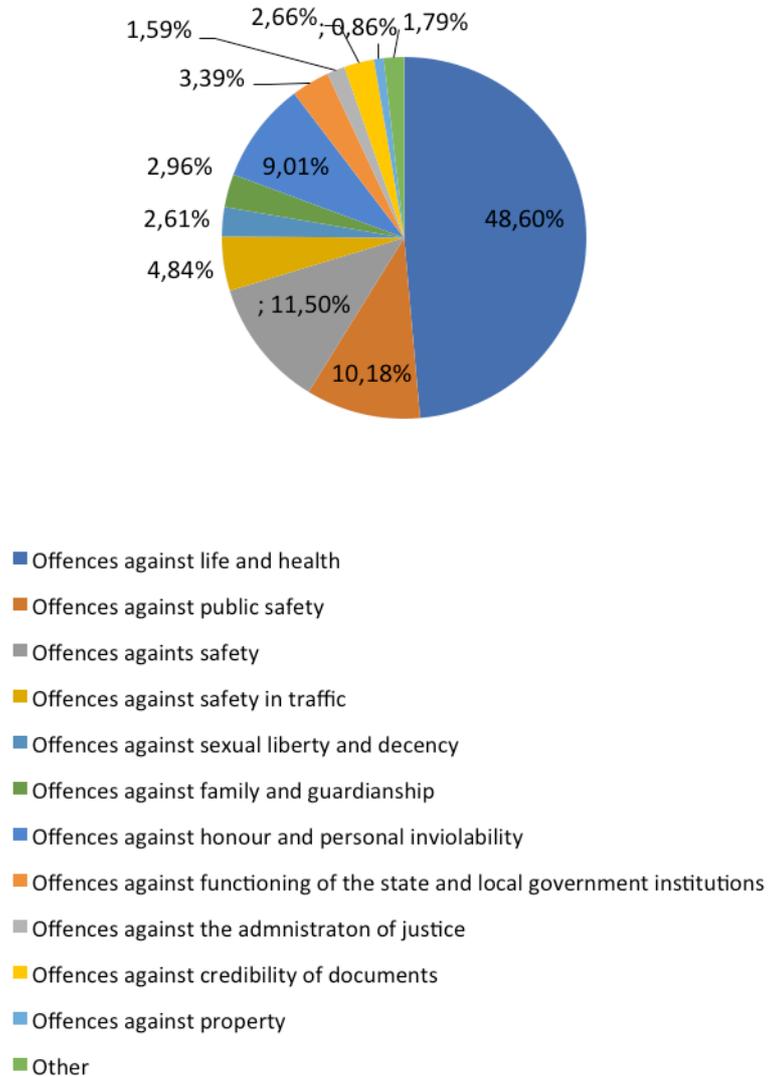
At the same time, data from the statistical portal of the Ministry of Justice show that since 2007 there has been a systematic drop in the number of proceedings conducted by family courts in cases of punishable acts committed by juveniles. Whereas in 2007 as many as 28,000 juveniles were brought before a family judge, in 2015 the figure was barely higher than 12,000. Over the period of 5 years, the number of children held responsible as part of corrective proceedings has remained at the same, stable level of nearly 15,000 cases annually. Data from the Ministry of Justice show that measures specified in the JJA are most often applied to juveniles who have committed a punishable act between 13 and 16 years of age.



Punishable acts that are most often committed are offences against property that account for over 50 percent of all the acts committed in the examined period. By comparison, the number of offences against life and health, which are second in the list, is lower by over 100,000 in the reported period.

Details are visible in a diagram based on the information from the Statistical Portal of the Ministry of Justice.

## Types of offences committed by children in years 2003-2015



## 5. THE YOUTH LAWYER - FROM THEORY TO PRACTICE: ANALYSIS

### 5.1 THE YOUTH LAWYER – ROLE AND MISSION

In Poland, there is no top-down and formal system of specialisations within the professions of an attorney and a legal counsellor. There is also no subcategory of attorneys handling children's cases. The register of attorneys offers no option for searching practitioners specialising in juvenile justice cases. The available searchable categories include the practitioners with specific expertise in criminal procedure, civil procedure, family and guardianship cases, human rights.<sup>15</sup>

*“It is still an unanswered question whether the justice system can be child-friendly, as a court is not an appropriate place for a child. Nevertheless, a child’s perception of this system certainly and primarily depends on the human factor and the adults’ preparedness to perform their roles within the system.”*

Arguably, given the specific features of juvenile justice proceedings, such a category should be added to the register in order to facilitate clients’ access to counsel capable of effectively handling their cases. Juvenile justice is not a popular speciality among attorneys: there is no such thematic section at the Regional Bar Association of Warsaw, which operates twenty different sections for attorneys specialising in various branches of law such as the law of the media or sports law. Obviously and noteworthy, there are sections devoted to criminal law and human rights law, whose activities include the implementation of EU directives on criminal law.

### 5.2 THE RIGHTS OF ACCESS TO/ASSISTANCE BY A LAWYER

#### DIRECTIVES 2016/800/EU

*Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with Directive 2013/48/EU. Nothing in this Directive, in particular in this Article, shall affect that right.*

*“Children involved in the proceedings are often left on their own, don’t have sufficient support from the family, school, the loved ones. This means that the assistance of a lawyer is desirable or even necessary.”*

#### DIRECTIVES 2013/48/EU

*This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.*

#### 5.2.1. JUVENILE JUSTICE PROCEEDINGS

##### *Right to a defence*

Appropriate changes in this regard were introduced only as part of the implementation of the European Court of Human Rights’ judgment handed down<sup>16</sup> in the case of Adamkiewicz v. Poland<sup>17</sup>.

<sup>15</sup> The register of attorneys may be accessed online at <http://rejestradwokatow.pl/adwokat/ewidencja>.

<sup>16</sup> Hereinafter, the “Tribunal”.

<sup>17</sup> Judgment of the ECtHR of 2 March 2010 in the case Adamkiewicz v. Poland, application no. 54729/00.

Among other things, the division of juvenile justice proceedings in two stages was abolished and a provision granting juveniles the right to a defence in the course of the entire proceedings was introduced<sup>18</sup>.

Newly introduced Article 18a of the JJA provides that a juvenile has the right to a defence, including the right to assistance of a defence lawyer, as well as the right to refuse to make explanations or answer particular questions.

### *Mandatory Defence*

The Juvenile Justice Act also provides for the measure of mandatory defence. Pursuant to Article 32c JJA, a juvenile must have a defence lawyer if their interests and those of their parents are contradictory and a juvenile has no defence lawyer. Assessment as to whether or not there is any conflict between the juvenile's parents and the juvenile is made each time by a court hearing a case.

*"I first met my attorney in a courtroom. He didn't explain anything to me, because he was late"*

*"The attorney didn't understand a thing. He asked no questions. He was telling something to the court, but not to me"*

Moreover, the president of the court appoints a defence lawyer to a juvenile, whenever a juvenile has no defence lawyer and at the same time is deaf, mute or blind and also where there is a reasonable doubt as to whether the juvenile's mental condition allows them to act in the proceedings or conduct their own defence in an independent and reasonable manner. Moreover, the Act

provides for mandatory defence in cases where a juvenile has been placed in a juvenile shelter.

In his statement of October 2016, the Ombudsperson for Children noted that mandatory defence available as part of criminal proceedings was greater in scope than that provided in juvenile justice proceedings<sup>19</sup>.

### *Access to case files*

The legislator included in the Juvenile Justice Act a procedure for obtaining access to case files. Pursuant to Article 32d JJA the parties and defence lawyers and counsel can review case files and make their copies.

In this context, P. Górecki presents a rather interesting view that *"reviewing and making copies of the files is an action that requires one's ability to perform procedural acts, therefore neither a juvenile under 13 years of age nor a juvenile who is partially incapacitated cannot review case files and make their copies"*.<sup>20</sup>

Nevertheless, no matter whether or not a juvenile with a limited capacity to perform acts in law has the right to review case files, it must be noted that the procedure for accessing case files has a greater significance as a procedural guarantee than its counterpart set out in the Code of Criminal Procedure. It is not possible for a court to deny access to files to a defence lawyer representing a juvenile, his parents or legal guardians. At the same time, the Code of Criminal Procedure provides for a possibility to limit such an access in cases where there is a need to secure a proper course of proceedings.

---

<sup>18</sup> However, the Polish Bar Association has submitted reservations about the implementation of this judgment indicating that its implementation requires that mandatory defence for children appearing in juvenile justice proceedings be introduced. The PBA's statement in English may be found here: [http://www.adwokatura.pl/admin/wgrane\\_pliki/file-adamkiewicz-v-poland-15049.pdf](http://www.adwokatura.pl/admin/wgrane_pliki/file-adamkiewicz-v-poland-15049.pdf) (accessed on 28 February 2017).

<sup>19</sup> The OC's statement in the case of 28 October 2016 sent to the Ministry of the Interior, [http://brpd.gov.pl/sites/default/files/wyst\\_2016\\_10\\_28\\_msw\\_0.pdf](http://brpd.gov.pl/sites/default/files/wyst_2016_10_28_msw_0.pdf) (accessed on: 5.01.2017 r.)

<sup>20</sup> P. Górecki, V. Konarska-Wrzošek, *Postępowanie w sprawach nieletnich*, p. 165.

A family court may deny a juvenile's request to be granted access to files and the right to make copies of them if this is justified by a need to reform the juvenile's behaviour. The Act does not say directly whether in such a case a juvenile has the right to appeal against an order denying him or her access to case files. However, considering the content of Article 31a (1) JJA that grants the parties and other persons a possibility of appealing against acts violating their rights, one should find that such an appeal is inadmissible.

### *Acting for the benefit of a child*

Similarly to the Code of Criminal Procedure, also the Juvenile Justice Act in its Article 32c (4) provides that a juvenile's defence lawyer may perform procedural acts only to the benefit of the juvenile. The only difference is that in the JJA the legislator explicitly indicated that such actions should consider an equitable interest of the child.

P. Górecki notes that a defence lawyer has no right to take unfavourable actions and *"so such actions are ineffective"*<sup>21</sup>. However, he points out referring to the thematic literature *"that in practice difficulties may arise in assessing whether a given action of an attorney is favourable or unfavourable for a juvenile"*<sup>22</sup>. As an example, he gives an assessment of educational measures from the point of view of the child's benefit.

*"He didn't do everything he could. He applied for my placement at a young offender institution during a hearing. I was in shock. I was sent to an institution because of him."*

Scholarship indicates that the discussed provision focuses on a defence lawyer's duty to consider an equitable interest of a juvenile. "It seems that the assessment of the equitable interest should be made under Article 3 JJA (the principle of a juvenile's best interests, the principle of individualisation) as well as objectives of the entire juvenile justice proceedings"<sup>23</sup>. Such objectives, read from the recitals of the act, include preventing antisocial and delinquent behaviour and juvenile delinquency and creating conditions for juveniles return to a normal life.

This approach results in a situation where under the JJA a defence lawyer is another entity, next to a court, obliged to consider an objective interest of a juvenile, i.e. assessing whether specific corrective or educational measures will reduce symptoms of a juvenile's exposure to antisocial and delinquent behaviour and will affect his return to a normal life. Such an approach to the topic places a huge question mark under a question whether such a manner of providing defence meets a standard developed in the instruments of international law and the Constitution of the Republic of Poland.

### *Costs of a defence lawyer's participation*

The Juvenile Justice Act does not contain any self-contained regulation regarding costs of legal aid representation. It seems that by analogy in this regard under a reference contained in Article 20 (1) JJA one should apply provisions of the Code of Criminal Procedure and the regulation of the Minister of Justice on fees for attorneys<sup>24</sup>.

<sup>21</sup> P. Górecki, *Rola i zadania obrońcy nieletniego w świetle znowelizowanej ustawy o postępowaniu w sprawach nieletnich*, Prokuratura i Prawo (10) 2014, p. 150.

<sup>22</sup> Ibid., p. 150.

<sup>23</sup> P. Górecki, V. Konarska – Wrzosek, *Postępowanie w sprawach nieletnich. Komentarz*, LEX 2015.

<sup>24</sup> Regulation of the Minister of Justice on fees for attorneys of 22 October 2015 r., J.L. of 2015, item. 1800 as amended.

### *Defence lawyer in execution proceedings*

The Act also stipulates the involvement of a defence lawyer in execution proceedings. Article 70 JJA grants to a juvenile, his defence lawyer, parents and guardians a right to submit motions and also, in cases laid down in the Act, complaints against decisions issued in execution proceedings.

***“Instead of waiting for a phone call, they could come by and ask how the centre treats us.”***

### *Practice*

On the one hand, legal literature points to the absence of guarantees that would ensure the effective assistance of a defence lawyer in proceedings under the JJA. On the other hand, legal experts express concerns over the quality of defence lawyers' assistance. In a report with recommendations concerning Poland's implementation of the Convention on the Rights of the Child, the UN Committee on the Rights of the Child expressed concern over the fact that child delinquents are interviewed, must give statements or sign documents in the absence of a lawyer or another accompanying person of trust.<sup>25</sup>

As M. Lewandowski indicates, *“A juvenile with no life experience or knowledge of the law, whose interview may be the first direct contact with justice bodies, may be extremely vulnerable to the influence of an interviewer or a team of interviewers who, through applying professional expertise and appropriate interrogation techniques, may to a large extent affect the content of the interviewee's testimony or induce their admission of guilt. In my assessment, the absence of a defence lawyer at this stage leads to a limitation of the right to a defence and violates the freedom of expression. Given the above, I shall take the liberty of making a more general argument that an attorney is not only a defence lawyer in the procedural sense but also a juvenile's “guardian” who should take them through the difficult times and mitigate the negative consequences of such proceedings. Clearly, this is not the role played by the police who, somewhat automatically, always assume the role of the prosecution [in proceedings against juveniles]. Or at least this is what most often happened in my professional practice”*<sup>26</sup>.

***“Attorney's aid should be granted automatically. Especially in the case of juveniles. As a young man enters the system, they know they did something wrong. Some prosecutor tells them on the phone at a police station that they must agree to a penalty. At that point the young person is scared, they are on their own really.”***

However, as P. Górecki emphasises, *“Current judicial practice shows that the way in which defence lawyers' handle juvenile cases is, unfortunately, quite routine. A defence lawyer should be active and diligent at all stages of the proceedings. A defence lawyer's role should not be limited to reading the case files and appearing during the trial or a hearing before the family court. An attorney should meet a juvenile and his or her parents in person before the trial. A juvenile's defence lawyer may also visit the client placed at a youth shelter before the first court appearance date.”*<sup>27</sup>

In the opinion of K. Sergiej, *“An active approach of a defence lawyer in juvenile justice proceedings is very much desirable. A question appears: should we introduce the rule that juveniles must at all times be*

<sup>25</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Poland*, 30 October 2015, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPOL%2fCO%2f3-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPOL%2fCO%2f3-4&Lang=en) (accessed on 5.01.2017).

<sup>26</sup> M. Lewandowski, *Postępowanie w sprawach nieletnich z perspektywy obrońcy* (in:) M. Szwast, K. Wiśniewska, M. Wolny, *Rzetelność postępowania w sprawach nieletnich*, [http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc\\_postepowania\\_w\\_sprawach\\_nieletnich.pdf](http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc_postepowania_w_sprawach_nieletnich.pdf) (accessed on 02.01.2016).

<sup>27</sup> P. Górecki, *Rola i zadania obrońcy nieletniego w świetle znowelizowanej ustawy o postępowaniu w sprawach nieletnich*, *Prokuratura i Prawo* (10) 2014, pp. 145-157.

*represented by professional counsel? Sometimes, the inaction of parties causes delays in proceedings as the court is burdened with all the work.”<sup>28</sup>*

## 5.2.2. CRIMINAL PROCEDURE

The starting point for a discussion on the right to defence in criminal proceedings should be Article 6 CCP, which affords a defendant the right to a defence, including the right to use the assistance of a defence lawyer, and states that a defendant should be informed about these entitlements.

*“I had access to a lawyer. But each time it was a different person. Nobody told me why.”*

This is a general rule of criminal procedure. Equally importantly, pursuant to Article 71 (3) CCP, this rule also applies to suspects whenever the Code uses the term “defendant” in its broad meaning. A defendant may have no more than three defence lawyers (Art. 77 CCP).

### *Mandatory Defence*

A defence lawyer’s involvement in the proceedings is not mandatory unless there are circumstances that justify mandatory defence. A defendant is legally obliged to have a defence lawyer if:

- is under 18 years of age;
- is deaf, dumb or blind;
- there is a justified doubt as to whether the defendant’s ability to comprehend the meaning of his or her actions or to control his behaviour was not, at the time of committing the offence, significantly reduced, or non-existent;
- there is a reasonable doubt whether the defendant’s mental state allows them to participate in the proceedings or conduct defence in an independent and reasonable manner. (Article 79 (1) CCP).

Moreover, a defendant is obliged to have a defence lawyer also if the court deems this necessary due to the existence of other circumstances hindering defence (Art. 79 (2) CCP), and in proceedings pending before a regional court, if the defendant is accused of a felony.

For the purposes of this Report, the key conclusion is that if a defendant has not attained the legal age, state authorities are obliged to provide the defendant with free legal aid. It is worth noting that the most recent change in this respect was introduced by the amendment to the Code of Criminal Procedure from 27 September 2013, which entered into force on 1 July 2015. Previously, the Code used the term “juvenile” instead of “a person under 18 years of age”, which has important and far-reaching consequences under Polish law. By detaching the condition for mandatory defence from the concept of “juvenile”, the amendment ensures that persons who have committed a prohibited act after attaining the age of 17 but who are under 18 during the proceedings are eligible for mandatory defence. According to scholarship, since the Code designated no point in time at which the age is determined, it would be reasonable to accept that the determination of the age of such defendants should be made during the course of the proceedings against them (from the proceedings commencement date) and not as of the moment when the imputed act was committed. This means that mandatory defence is no

---

<sup>28</sup>K. Sergiej, *Ocena postępowania w sprawach nieletnich z perspektywy sędziego* (in:) M. Szwaś, K. Wiśniewska, M. Wolny, *Rzetelność postępowania w sprawach nieletnich*, [http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc\\_postepowania\\_w\\_sprawach\\_nieletnich.pdf](http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc_postepowania_w_sprawach_nieletnich.pdf) (accessed on 02.01.2017).

longer available for defendants who attained the age of 18.<sup>29</sup> *This arrangement does not fully correspond with the provisions of the Directive. First and foremost, the Directive provides that it applies until the question whether a suspect or an accused person (defendant) has committed a prohibited act is finally determined, which includes, where applicable, sentencing and considering any appellate measures. Moreover, under Directive's Article 2 para. (3), the "Directive or certain provisions thereof apply to persons" who "were children when they became subject to the proceedings but have subsequently reached the age of 18, and the application of this Directive, or certain provisions thereof, is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. Member States may decide not to apply this Directive when the person concerned has reached the age of 21."*

However, the current wording of Article 79 CCP should be interpreted in conjunction with Article 18 (2)(1)(b) JJA. Pursuant to the latter provision, a juvenile must have a defence lawyer in proceedings conducted under the CCP if the proceedings were initiated before the juvenile attains the age of 18. In consequence, in the proceedings conducted in the situation described in Article 18 (2)(1) JJA, the mandatory defence is available until the final conclusion of these proceedings, irrespective of the defendant's age at the conclusion date. This is because scholarship and jurisprudence universally agree that the juvenile status, obtained in connection with the commission of a prohibited act before a person's 17th birthday, is retained "forever", regardless of the duration of the proceedings.<sup>30</sup>

*"A lawyer should ask us what we expect, what we want to fight for."*

However, a legal commentator argues that *"under the new law it seems reasonable to purposively shift away from the Supreme Court's line of authority expressed under the pre-amendment law and to accept that after attaining the age of 18 a defendant is no longer eligible for mandatory defence in criminal proceedings. If a defendant commits a crime before their 18th birthday but the criminal proceedings are conducted many years later, when the defendant is already a grown-up person, it should be stated that there are no rational arguments that would justify the appointment of a legal aid defence lawyer for such a defendant under Article 79 (1)(1)".*<sup>31</sup>

If mandatory defence applies, the absence of a defence lawyer in court proceedings constitutes an absolute ground for an appeal within the meaning of Article 439 (1)(10) CCP and the second instance court is obliged to revoke the contested decision irrespective of the limits of an appeal and pleas raised in the appeal and regardless of how the absence affects the content of the decision.<sup>32</sup>

In all above situations (including those concerning a juvenile) a defence lawyer is obliged to appear at the trial and those of the court hearings during which the defendant's appearance is mandatory (Article 79 (3) CCP).

If the defence is mandatory and a defendant has no privately retained defence lawyer, the president or a court referendary of the court that has jurisdiction to examine the case appoints a legal aid defence lawyer for the defendant. Upon a justified request of a defendant or their defence lawyer, the president or a court referendary of the court that has jurisdiction to examine the case may appoint a new defence lawyer as the replacement of the previously appointed defence lawyer.

The legal aid defence lawyer is appointed from among the lawyers appearing on a list of defence lawyers. The president of a court, the court or a court referendary is obliged to immediately consider a request for the appointment of a legal aid defence lawyer. If the circumstances make it necessary to

<sup>29</sup> S. Steinborn, *Kodeks postępowania karnego. Komentarz do wybranych przepisów* LEX 2016.

<sup>30</sup> Judgment of the Supreme Court of 1 June 2006, case no. V KK 158/06, LEX no. 188369.

<sup>31</sup> K. Eichstaedt, *Komentarz do art. 79* (in:) D. Świecki (Ed.), *Kodeks Postępowania Karnego. Komentarz*, Vol. I, 2nd Ed., LEX 2015.

<sup>32</sup> M. Szwast, K. Wiśniewska, M. Wolny, (in:) *Rzetelność postępowania w sprawach nieletnich*, [http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc\\_postepowania\\_w\\_sprawach\\_nieletnich.pdf](http://www.hfhr.pl/wp-content/uploads/2014/06/rzetelnosc_postepowania_w_sprawach_nieletnich.pdf) (accessed on 23.02.2017).

defend the defendant's case immediately, the president of the court, the court or a court referendary will notify the defendant and the defence lawyer, in the manner designated in Article 137 CCP, of the appointment of a legal aid defence lawyer.

A defence lawyer may only be a person authorised to provide criminal defence services in accordance with the laws on the attorney or legal counsellor professions. A defence lawyer is appointed by a defendant; however, until a defendant who is deprived of liberty appoints a defence lawyer, a defence lawyer may be appointed by another person, of which the defendant must be immediately notified. An authorisation to defend may be given in writing or verbally for the record kept by a body in charge of criminal proceedings.

#### *The child's representation – practical aspects*

All groups of interviewees stressed how crucial is the role of a defence lawyer in criminal proceedings. Professional counsel indicated that a manner in which juvenile proceedings are organised, namely their informal nature and focus on the protection of the child's best interests, makes a defence lawyer's work particularly demanding. Although this carries certain educational potential, it does not mean that a defence lawyer is forced to take on a court's role. It is not a defence lawyer's job to ensure that subjective interests of a juvenile are protected. Hence, he or she does not need to forego filing an appellate measure in situations where an administered educational measure seems to be beneficial from the point of view of the child's interest.

All the interviewees underlined the importance of the presence of a defence lawyer. Attorneys indicated that a manner in which juvenile justice proceedings are organised puts a defence lawyer in a special position. This does not mean, however, that a defence lawyer is obliged to take on the role of a court and take care of objective interests of a juvenile, e.g. forego filing an appellate measure where the applied measure is beneficial for the child. At the same time, the interviewed attorneys indicated that under the Code of Attorneys' Professional Conduct every client, whether an adult or a child, must receive equal treatment.

***“Children avoid facing the problem. What does it mean? ‘I’ll think about it tomorrow. I’ll manage, whatever’.”***

## 5.3 PRESENCE OF AN ATTORNEY DURING AN INTERVIEW

### **DIRECTIVES 2016/800/EU**

*Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with Directive 2013/48/EU. Nothing in this Directive, in particular in this Article, shall affect that right.*

*Member States shall ensure that children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:*

- (a) before they are questioned by the police or by another law enforcement or judicial authority;*
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4;*
- (c) without undue delay after deprivation of liberty;*
- (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*

## DIRECTIVE 2013/48/EU

*Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:*

- (a) before they are questioned by the police or by another law enforcement or judicial authority;*
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;*
- (c) without undue delay after deprivation of liberty;*
- (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*

### 5. 3.1 JUVENILE JUSTICE PROCEEDINGS

What must be noted is that Article 32f JJA provides that a juvenile must be interviewed by the police always in the presence of the juvenile's parents who exercise parental authority, juvenile's guardian or their defence lawyer. However, the JJA establishes an exception to this general rule, which is broad enough to distort the rule to the point of making it an empty declaration. According to the exception, if it is impossible to ensure the presence of parents, guardians or a defence lawyer in a given case, the police must summon a friend or relative indicated by the juvenile, a representative of the juvenile's school, family assistant, coordinator of family foster care services or representative of a community organisation whose statutory objects include juvenile education or support for the social rehabilitation of juveniles. Given the above, the concern appears whether this legal regulation complies with the requirements of the European Convention on Human Rights, and in particular with those established in the ECtHR's judgment in *Salduz v. Turkey*<sup>33</sup>.

*“The first interview of a child is often conducted in the absence of an attorney or even parents. This can't effectively be corrected later.”*

A recent case worked by the Helsinki Foundation for Human Rights is an excellent example of problems in this area. The Foundation acted in the case of a 14-years-old boy with an intellectual disability who was interviewed by police officers without a defence lawyer or parents being present. Apart from police officers, the only other adult present was a child counsellor from the boy's school. The boy told his parents about the whole thing on the next day.

### 5.3.2 CRIMINAL PROCEEDINGS

Pursuant to Article 301 CCP, if a suspect so requests, their interview must be conducted in the presence of the defence lawyer appointed by the suspect. A defence lawyer's failure to appear does not prevent the conduct of the interview. A later appointment of a privately retained or legal aid defence lawyer does not affect a suspect's right to request a defence lawyer's presence during the interview. As the literature indicates, a suspect can be interviewed with the presence of a defence lawyer if two conditions are satisfied: a defence lawyer must be appointed at the date of the hearing and they must physically appear during the hearing.

The wording of the discussed provision offers no suggestion as to whether the right to request a defence lawyer's presence at an interview is exhausted after a single interview. A part of the criminal scholarship

---

<sup>33</sup> *Salduz v. Turkey*, ECtHR judgment of 27 November 2008, no. 36391/02.

answers this question positively.<sup>34</sup> However, it may reasonably be argued that the treating this right as a one-off entitlement falls short of the procedural guarantee standard under Article 6 (3)(c) ECHR.

As it has already been mentioned in an opinion of the Codification Commission, such regulations of the CCP on the defence lawyer's participation in interviews are incompatible with the standard established in the Directive<sup>35</sup>. The following changes must be made to Polish law in order to meet the requirements of the Directive:

- a suspect has the right to be interviewed in the presence of a defence lawyer,
- this right is not a one-off entitlement and applies to all interviews of the suspect conducted in the course of pre-trial proceedings, irrespective of the cause of another interview,
- the suspect has the right to contact a defence lawyer before an interview,
- if the suspect has not retained a defence lawyer, the suspect must be allowed to retain a defence lawyer or be assigned a legal aid defence lawyer and must be given an opportunity to contact with the defence lawyer. If an interview follows directly the presentation of charges, a criminal justice body should appropriately delay the conduct of the interview, and if the suspect is deprived of liberty, the suspect and their defence lawyer should be given an opportunity to confer prior to the interview,
- an interview may not proceed in the event of an excused non-appearance of a defence lawyer.

In aforementioned judgement *Płonka v. Poland*<sup>36</sup>, the European Court of Human Rights pointed to difficulties with a defence lawyer's access to an interview in Poland. On the session on 9 December 2015, the Council of Europe's Committee of Ministers adopted Resolution CM/ResDH(2015)235 on the execution of the judgment of the European Court of Human Rights in the case of *Płonka v. Poland*. The resolution was opposed by the Polish Bar Association, which in 2016 presented its observations to the Committee, arguing that the Committee's decision was premature.<sup>37</sup>

***"I couldn't get a lawyer. They refused to get one for me."***

As the HFHR noted in an opinion from February 2016, the derogation of Article 80a of the Code of Criminal Procedure under a newly enacted law resulted in a further deviation of Polish criminal law from the standards established under the Directive. According to the opinion, by limiting access to legal aid at the stage of judicial proceedings, the amendment simultaneously restricted effective access to a defence lawyer.<sup>38</sup>

---

<sup>34</sup> S. Steinborn, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX 2016.

<sup>35</sup> Opinion on the national implementation of 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 in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>36</sup> *Płonka v. Poland*, ECtHR judgment of 31 March 2009, no. 20310/02.

<sup>37</sup> Observations of the Polish Bar Council on the execution of the judgment of the European Court of Human Rights in *Płonka v. Poland* (application no. 20310/02) by the Republic of Poland, [http://www.adwokatura.pl/admin/wgrane\\_pliki/file-plonka-v-poland-15058.pdf](http://www.adwokatura.pl/admin/wgrane_pliki/file-plonka-v-poland-15058.pdf), accessed on 23.02.2017).

<sup>38</sup> HFHR comments to the Government's proposal of an amendment to the Code of Criminal Procedure and certain other acts, [http://www.hfhr.pl/wp-content/uploads/2016/02/HFPC\\_opinia\\_kpk\\_fnl\\_23022016.pdf](http://www.hfhr.pl/wp-content/uploads/2016/02/HFPC_opinia_kpk_fnl_23022016.pdf) (accessed on 23.02.2017).

### 5.3.3 CONCLUSIONS

The attorneys we talked to pointed to the fact that the Directive's implementation was only "theoretical". The reason for this conclusion is the absence of mechanisms that would enable the ex officio appointment of a legal aid attorney or legal counsellor for arrested persons, including children. The relevant practice is based on improvisation and entirely depends on the people involved. On the other hand, defence lawyers noted that law enforcement authorities have become more aware of the problem and have been increasingly cooperative in ensuring professional legal aid for participants in the proceedings.

However, this does not change the fact that, according to our interlocutors, the current law effectively prevents the ex officio appointment of a legal aid defence lawyer for an arrested person. In consequence of the above, an arrested person who does not have a telephone number to an attorney or legal counsellor is unable to obtain legal advice before taking part in an interview conducted by law enforcement authorities.

All initiatives aiming to address this problem are grassroots and fragmented projects operated by dedicated sections of professional associations of lawyers, individual law firms or legal protection bodies such as the Commissioner for Human Rights.

Even more worryingly, the relevant provisions of the Juvenile Justice Act are wholly and entirely incompatible with requirements established in the Directive. Under the JJA, a juvenile may be interviewed without the presence of a parent or a defence lawyer provided that a family assistant or a representative of a community organisation or the juvenile's school is present during the interview.

## 5.4. PRINCIPLES OF CONTACTING A DEFENCE LAWYER

### **DIRECTIVE 2016/800**

*Member States shall respect the confidentiality of communication between children and their lawyer in the exercise of the right to be assisted by a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.*

### **DIRECTIVE 2013/48/EU**

*Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.*

### 5.4.1 JUVENILE JUSTICE PROCEEDINGS

Domestic human rights protection bodies have been expressing substantial concerns over whether juveniles are afforded the proper conditions to use the assistance of a defence lawyer. Under the current rules of detention at a police remand home for children, juveniles have the right to be visited by their parents, defence lawyers or guardians – on agreement by the court, the director of the home or the police officer in charge of their case. According to a new proposed version of the rules, a juvenile, at his or her request and after arranging a date with the head of a police remand home for children, should be given access to a defence lawyer, parent or guardian.

In the opinion of the Commissioner for Human Rights, the fact that access to an attorney depends not on the will of an arrestee but on another person's decision is in contravention of the Constitution of the Republic of Poland and international standards. The CHR notes that jurisprudence of the European Court of Human Rights in Strasbourg proves that access of a detained person to a defence lawyer – including the possibility of preparing for a defence and providing the same in the course of proceedings – is very

important from the point of view of fairness of a court trial and should be guaranteed from the very beginning of detention. When exceptional circumstances of a case justify a denial of access to an attorney, restrictions in using his or her services may not negatively affect the exercise of rights enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>39</sup>.

In response to the CHR's intervention of 30 November 2015, the secretary of state Jarosław Zieliński indicated that the Minister of the Interior and Administration agree with the above arguments. He also noted that a provision conditioning the possibility of a defence lawyer's visit on the consent of a court, the head of a police remand home for children or a police officer handling the case has no justification in the context of procedural guarantees of a juvenile in the scope of his right to a defence. According to Minister Zieliński, it seems reasonable to maintain solutions that will guarantee the proper organisational order in police remand homes for children. To achieve this end, it is necessary to introduce regulations preventing defence lawyers from requesting contact with a juvenile at times overlapping with a daily schedule of activities for a given police remand home (e.g. at night or at meal times) or during a juvenile's absence from the institution due to for instance his appearance before a criminal justice body<sup>40</sup>.

Minister Zieliński said that "considering a faster legislative route in the case of amending an executive act ..., the Minister of the Interior and Administration announces the commencement of actions aimed to modify § 8 (1) (9) of the Rules"<sup>41</sup>.

In 2016, also the Supreme Audit Office assessed the functioning of police remand homes for children. In the course of inspections, a particular attention was given to guaranteeing juveniles' rights. In the opinion of this institution, in all police remand homes for children contact of juveniles with their loved ones or a defence lawyer was possible only upon consent of a court, the head of a police remand home for children or a police officer handling the case, which violates the rights enshrined in the Constitution of the Republic of Poland, the Juvenile Justice Act and the Convention on the Rights of the Child. It was noted in the post-visitation report that in police remand homes for children in Olsztyn, Gdańsk and Bydgoszcz as well as in Warsaw there had been cases where consent to a visit by a juvenile's parents, defence lawyer or guardian had been denied and in Białystok a juvenile had been denied even a phone contact with a parent.

According to the report, only one in five inspected institutions allowed for contact with parents, a defence lawyer or a guardian without the presence of an officer. The heads of the remaining facilities explained that a police officer's presence during such meetings was required under the order of the Chief Commissioner of the Police on methods and forms of performing tasks in police remand homes for children according to which: "police officers on duty at the home are forbidden from leaving juveniles detained at the home without supervision"<sup>42</sup>.

Following the results of these inspections, the Ombudsperson for Children approached the Chief Commissioner of the Police asking for information at what stage are works enabling the implementation of these recommendations and when one may expect the presentation of the results<sup>43</sup>. The Ombudsperson for Children had noted before that provisions of the Juvenile Justice Act (consolidated

---

<sup>39</sup> The CHR's report on the operations of the NPM in 2015, <https://www.rpo.gov.pl/pl/content/raport-rpo-z-dzia%C5%82alno%C5%9Bci-w-polsce-kmp-w-roku-2015>, (accessed on 5.01.2017).

<sup>40</sup> The response of the MFA of 8 January 2016, [https://www.rpo.gov.pl/sites/default/files/Odp\\_MSWiA\\_dostepu\\_do\\_adwokata\\_nieletnich\\_w\\_PID.pdf](https://www.rpo.gov.pl/sites/default/files/Odp_MSWiA_dostepu_do_adwokata_nieletnich_w_PID.pdf) (accessed on 5.01.2017).

<sup>41</sup> *Ibid.*

<sup>42</sup> The report of the SAO on the functioning of police remand homes for children, <https://www.nik.gov.pl/plik/id,12226,vp,14609.pdf>, (accessed on 5.01.2017).

<sup>43</sup> The OC's statement in the case of 28 October 2016 sent to the Ministry of the Interior, [http://brpd.gov.pl/sites/default/files/wyst\\_2016\\_10\\_28\\_msw\\_0.pdf](http://brpd.gov.pl/sites/default/files/wyst_2016_10_28_msw_0.pdf) (accessed on: 5.01.2017 r.).

text 2014 J.L. item 382 as amended) do not guarantee children the full right to a defence due to restrictions in access to a legal aid attorney.

Currently, a draft regulation modifying the above regulations has been under discussion. The proposed change is heading in the right direction. Pursuant to the proposed regulation a juvenile, at his or her request and after arranging a date with the head of a police remand home for children, should be given access to a defence lawyer, parent or guardian. As stressed by the CHR, it is proper to use the term “contact” in place of the current term “visit” and adding an indication that it takes place at the request of a juvenile. Eliminating the expression “upon consent of a court, the head of a police remand home for children or a police officer” should be welcomed as well. The CHR notes however that introducing the need to “arrange a date” of contact raises certain doubts<sup>44</sup>.

In the opinion report to the draft regulation of 26 January 2017 the Ombudsperson for Children notes that it cannot be so that rights and freedoms of a juvenile placed at a police remand home for children are more restricted than rights and freedoms of an arrested person or a person in pre-trial detention as laid down in Article 73 CCP. According to the OC contacts of a juvenile with parents, a defence lawyer or a guardian should, as a rule, take place without the presence of a police officer, however if a given visit may, considering the circumstances of a specific case, threaten the conducted proceedings or security, one may stipulate that a designated police officer be present during a visit<sup>45</sup>. In his statement, the OC referred to constitutional and international norms. A particular attention was placed on the position of the Constitutional Tribunal expressed in the judgment of 11 December 2012. The CT underlined that Article 245 (1) of the act of 6 June 1997 – the Code of Criminal Procedure (J.L. No. 89 item 555 as amended) violated Article 42(2) in connection with Article 31 (3) of the Constitution of the Republic of Poland by failing to indicate a ground entitling an arresting officer to be present during a conversation of an arrested person with an attorney. In this judgment, the CT recalled a much-repeated statement that “The constitutional right to a defence should be understood extensively, as it is not only a fundamental principle of a criminal process but also a basic standard of a democratic state ruled by law. This right is vested in any human being from the moment criminal proceedings are launched against him or her (in practice from the moment charges are presented) until the moment a final and binding judgment is issued. The right also applies to the stage of enforcement proceedings. The right to a defence in the criminal process has a material and formal dimension. Material defence is a defendant’s possibility of personally defending his or her interest (e.g. the right to refuse to make explanations, the right to access files and submit evidentiary motions). A formal defence is the right to be assisted by a defence lawyer of one’s choice or a legal aid defence lawyer (“ex officio defence lawyer”).

Moreover, in this ruling, the Constitutional Court stressed that: “contact of an arrested person (a suspected person against whom there is a reasonable suspicion of committing an offence) with an attorney is crucial for ensuring their right to an effective defence during the entire criminal proceedings. Information obtained at the initial stage of criminal proceedings (before charges are presented) may be of key importance for the final decision regarding the arrested person. Simultaneously, the moment of arrest and first procedural acts is stressful and surprising for an arrested person and may lead to a situation where a person, especially an innocent person who has been in such a difficult position for the first time in his or her life, takes hasty decisions, whose effects may negatively affect the person’s future life. For these reasons, it is necessary to enable an arrested person to receive effective and professional legal aid at the initial stage of criminal proceedings (examined in this case). A lack of access to such aid at this moment may be a reason for an unfair conviction. At the same time – in the light of discussed proposals of changing the model of Polish criminal proceedings by making it more adversarial (at the judicial stage) – access to professional legal aid from the earliest stage of proceedings becomes all the more important.”

<sup>44</sup><https://legislacja.rcl.gov.pl/docs/513/12290851/12383935/12383938/dokument252679.pdf> (accessed on 24.02.2017).

<sup>45</sup> The CHR’s intervention statement to the Minister of the Interior and Administration of 26 January 2017, [http://brpd.gov.pl/sites/default/files/wyst\\_2016\\_01\\_26\\_mswia.pdf](http://brpd.gov.pl/sites/default/files/wyst_2016_01_26_mswia.pdf) (accessed on 23.02.2017).

One should fully subscribe to the opinion of the Ombudsperson for Children that a child placed at a police remand home for children should have the right to an unlimited contact with his or her defence lawyer, as only such contact may guarantee the exercise of rights of a juvenile in accordance with international standards.

However, it is worth adding that under the Regulation of the Minister of Justice of 17 October 2001 on young offender institutions and youth shelters, wards should be offered the possibility of contact with a defence lawyer or an attorney of a ward at the institution without the involvement of other persons.

#### **5.4.2. CRIMINAL PROCEEDINGS**

The Code of Criminal Procedure entitles all arrested persons to immediately initiate, as far as practicable, contact with a legal counsellor or an attorney and to confer with them directly. Only in exceptional cases justified by special circumstances, the arresting officer may reserve the right to be present during such a lawyer-client conference.

Also, a person remaining in pre-trial detention is entitled to communicate with their defence lawyer without anyone else being present and via correspondence (Article 73 CCP). In this context, a note should be made of the content of the statement of the Commissioner for Human Rights on telephone contacts with defence lawyers, which was addressed to the Minister of Justice. The CHR pointed to numerous complaints his office received from persons in pre-trial detention in which they mention restrictions put on their right to talk with a defence lawyer on the phone, justified by the “need to secure the integrity of the proceedings”.<sup>46</sup>

### **5.5 INFORMATION ON RIGHTS**

#### **DIRECTIVES 2016/800/EU**

*This Directive should be implemented taking into account the provisions of Directives 2012/13/EU and 2013/48/EU. This Directive provides for further complementary safeguards with regard to information to be provided to children and to the holder of parental responsibility in order to take into account the specific needs and vulnerabilities of children.*

*Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case.*

#### **DIRECTIVES 2013/48/EU**

*This Directive should be implemented taking into account the provisions of Directive 2012/13/EU, which provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights containing information about the right of access to a lawyer.*

#### **DIRECTIVES 2012/13/EU**

*This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules*

---

<sup>46</sup> The CHR's intervention statement of 25 January 2017, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20Stanis%C5%82awa%20Trociuka%20do%20Ministra%20Sprawiedliwi%C5%9Bci%20w%20sprawie%20prawa%20zatrzymanego%20do%20pomocy%20prawnej.pdf> (accessed on 23.02.2017).

concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.

### 5.5.1 JUVENILE JUSTICE PROCEEDINGS

The Juvenile Justice Act<sup>47</sup> has been in force for more than 30 years. Despite this, until recently there has been no provision granting juveniles the right to a formal defence throughout entire proceedings. This right was interpreted from the wording of individual provisions of the Act.

*“Nobody explained to me, what’s written in the notice of rights.”*

A juvenile should be informed of their right to a defence immediately after the arrest and also immediately before the commencement of an interview or a special child hearing.

*“It should be explained how to talk to a juvenile, how to persuade them to follow specific decisions, how to explain things to them”.*

According to legal scholarship, it is unclear whether this rule means that a juvenile should be informed only once or before each interview or hearing. In this context, E. Kruk and T. Skrętowicz point to the relevant jurisprudence developed under Article 175 of the Code of Criminal Procedure<sup>48</sup>, according to which currently applicable provisions form no basis for the argument

that a defendant should be informed of their rights and duties before each interview. However, the authors indicate that given *“the specific features of the juvenile justice proceedings and having regard to the individual degree of a juvenile’s intellectual development, one should consider the need to inform a juvenile of his or her right to refuse testimony or give answers to particular questions at each instance when the juvenile is interviewed or heard.”*<sup>49</sup>

At the same time, the authors indicate that the JJA is silent on the consequences of a failure to provide such advice.<sup>50</sup> Meanwhile, the Code of Criminal Procedure (in Article 16 (1)) provides that the absence of such advice or faulty advice cannot cause any adverse procedural consequences for a participant in the proceedings or another interested person. However, there is no similar provision in the JJA or in the Code of Civil Procedure. Moreover, the jurisprudence of the Supreme Court based on the Code of Civil Procedure, which refers to the provision of advice on the time limit for submission of an appellate measure, indicates that the absence of such advice or incorrectly given advice does not affect the commencement of such a time limit.<sup>51</sup> The party that has been incorrectly informed may request an extension of a time limit.

*“Police officers wanted to explain [to me] what it was all about in these letters but I was too shocked to ask about anything”*

<sup>47</sup>The Juvenile Justice Act of 26 October 1982 (*Ustawa o postępowaniu w sprawach nieletnich*), J.L. 2016, item 1654 (consolidated text).

<sup>48</sup>E. Kruk, T. Skrętowicz (in:) T. Bojarski (Ed.), *Ustawa o postępowaniu w sprawach nieletnich Komentarz*, 5th edition, LEX.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid.

<sup>51</sup>Resolution of the joint Chambers of the Supreme Court of 22 November 2011, case no. III CZP 28/11, LEX.

## 5.5.2 CODE OF CRIMINAL PROCEEDINGS

Without a doubt, in order to effectively exercise their rights and obligations, children need to be extensively informed of their legal entitlements.

The obligation to provide information to participants in criminal proceedings is one of the fundamental rules of the criminal process. According to this rule, in the situation where a body in charge of criminal proceedings is obliged to inform participants in the proceedings of their rights and duties, the absence of such information or faulty information cannot cause any adverse procedural

consequences for a participant in the proceedings or another interested person. If a need arises, a body in charge of criminal proceedings should also inform participants in the proceedings about their rights and duties even if a statute does not explicitly establish such an obligation.

*“Children involved in juvenile justice proceedings come from underprivileged backgrounds, which means that the legal awareness of their parents is very low.”*

The Code of Criminal Procedure establishes the general rule that a suspect must be informed of their rights before the first interview. As part of an investigation, a suspect receives a notice of rights after the presentation of the decision to present charges and before the commencement of an interview (Article 313 (1) CCP). If a decision to present charges is not issued (Article 308 (2) – in cases of urgent need arising during an investigation; Article 325g (2) – if a suspect named in an inquiry is put in pre-trial detention), a suspect receives a notice of rights directly after the presentation of charges.

In its current form, the notice of rights includes the following elements:

- information about the right to refuse testimony, including written testimony;
- information about the right to refuse to testify or answer individual questions without the need to state reasons for the refusal;
- information about the right to be assisted by a privately retained defence lawyer;
- information about the right to be assisted by a legal aid defence lawyer (*“ex officio”* defence lawyer);
- information about the right to be assisted by an interpreter, also during contacts with a defence lawyer;
- information about the right to be informed about the content of charges, amendments or additions to charges and the legal classification of the imputed offence;
- information about the right to submit motions to perform procedural acts in the investigation or inquiry, e.g. to interview a witness, obtain a document, admit expert evidence;
- information about the right to access case files and to make copies or transcripts of case files, also after the conclusion of pre-trial proceedings;
- information about the right to submit a motion for access to the complete case records (of an investigation or inquiry) before the formal conclusion of the proceedings;
- information about the right to submit a motion to refer the case to mediation in order to reconcile with the victim;
- information about the right to ask for a prosecutor’s approval for a motion for the delivery of a judgment and imposition of determined penalties or other measures without evidentiary proceedings (Article 335 (1) CCP), which may be granted by a court in the absence of a victim’s objection;
- information on specific features of the accelerated proceedings.

On the other hand, the Code of Criminal Procedure does not oblige criminal justice bodies to deliver a written notice of a defendant’s rights or require that a template of such a notice is developed in an act of secondary legislation. Pursuant to Article 386 CCP, if a defendant participates in the main trial, the presiding judge informs them of their right to testify, to refuse to testify or answer questions, the right

to submit evidentiary motions and consequences of their failure to do so and about the content of the following articles: Art. 100 (3)-(4), Art. 376, Art. 377, Art. 419 (1) and Art. 422. Further, the presiding judge asks the defendant whether they plead guilty and whether they want to testify or not, and – if they want to testify – what they want to testify about. After the hearing of the defendant, the presiding judge advises them of the right to cross-examine persons who testify and to provide explanations about all pieces of evidence.

The current domestic rules on advising as to one's rights and obligations in criminal proceedings are derived from a plethora of sources, including the implementation of the Right to Information Directive. Provisions of the Directive were introduced to the Polish legal system in the amendment to the Code of Criminal Procedure of 27 September 2013, which partially became effective on 2 June 2014 (Directive's transposition date). The remainder of the amendment's provisions entered into force on 1 July 2015, which was the date of the introduction of the adversarial model of criminal procedure.

According to the HFHR's report *HOW TO INFORM IN CRIMINAL PROCEEDINGS? Polish law and practice vs. European standards*, 73.33% of the provisions of relevant UE law have been successfully introduced to the Polish legal system.<sup>52</sup> Authors of the report criticised, among other things, the manner in which the notices of rights are phrased: as a rule, they either repeat or restate the wording of individual provisions of the Code of Criminal Procedure, which may obscure their actual meaning for the readers. The authors also emphasised that at the time of the report's publication there were no versions of notices of rights custom-tailored for the needs of elderly persons or persons with a disability. The Commissioner for Human Rights has presented similar proposals in a statement for the Minister of Justice.<sup>53</sup>

**Children should have their situation explained so they knew where they stand. But this takes time. To do that, you need to devote some time to a**

The discussed Directive requires that additional elements must be added to the existing templates of the notice of rights. These are, among other things, information on the right to notify a holder of parental responsibility, the right to protection of privacy, a child's right to be accompanied by a holder of parental responsibility at different stages of proceedings other than the trial and court hearings and the right to the

individual assessment of one's case. According to a statement of the Criminal Law Codification Commission, *"The changes in law resulting from the adoption of the Directive should nevertheless be assessed positively since they will only reinforce the implementation of the recommendation to inform participants in the [criminal] process of their rights, which is already an important rule of criminal procedure."*<sup>54</sup>

Given the above remarks about the structure of the notice of rights, it would be reasonable to prepare its special, easily approachable version for persons under the age of 18. Notably, the laws introducing the right to be informed has not been developed in order to create another technical measure but to guarantee that certain rights and duties are communicated in a way which ensures that a person receiving advice knows how to exercise such rights and perform such duties.

**"By becoming involved in the justice system in such cases, a child is trapped in adult machinery whose rules of operations they do not fully understand."**

<sup>52</sup> HFHR, *JAK INFORMOWAĆ W POSTĘPOWANIU KARNYM? Polskie prawo i praktyka a standardy europejskie*, [http://www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa\\_ca%C5%82o%C5%9B%C4%871.pdf](http://www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa_ca%C5%82o%C5%9B%C4%871.pdf) (accessed on 2.02.2017).

<sup>53</sup> The CHR's intervention statement to the MJ of 26 April 2016, <https://www.rpo.gov.pl/pl/content/rpo-postuluje-zmiane-wzorow-pouczenia-osob-uczestniczacych-w-postepowaniach-karnych> (accessed on 2.02.2017).

<sup>54</sup> Opinion statement of the Criminal Law Codification Commission (*Komisja Kodyfikacyjna Prawa Karnego*) dated 20 March 2014.

The children we talked to stressed the importance of being effectively informed about their rights. They said they wanted to receive such information. On the other hand, they claimed that they could not understand the notices of rights they were given. This was a consequence of not only the wording of the notices but also circumstances of their cases, mainly the stress caused by the fact of being arrested. They said that a key part of a defence lawyer's job was to explain the situation in which they found themselves in.

Children also emphasised that police officers gave them a printed notice of rights, but tried to explain their most important rights anyway. Nearly all interviewed children spoke highly of judges whom they referred to as the most friendly and informative authorities in the system.

## 5.6 LEGAL AID SYSTEM FOR CHILDREN (AND/OR EQUIVALENT SYSTEM)

### 5.6.1 JUVENILE JUSTICE ACT

The JJA stipulates the possibility of appointing a legal aid defence lawyer. The president of the court is obliged to consider the motion of a juvenile, but only if they consider that granting such a motion is needed and that a juvenile or the juvenile's parents are unable to afford a defence lawyer of their choice without detriment to their ability to provide means of subsistence for themselves and their family. It is possible to appeal a denial of the motion. This provision leads to a situation where the level of procedural guarantees to which juveniles are entitled diverges in this aspect from the one afforded to adult perpetrators. It is so because in the case of juveniles the president of the court has no power to assess whether in a particular case they are going to need legal aid. Instead, the president is compelled to make such an assessment in juvenile justice proceedings.

***“An attorney should be awarded automatically. It would be good if such persons had appropriate training, knew the problem. And it is not only about the knowledge of law but about the knowledge of realities”.***

Scholarship notes that the discussed Act contains no express reference to the rules on applying for a legal aid defence lawyer.<sup>55</sup> It is not known whether any statement on a person's family status, their property, income or sources of maintenance should be attached to a motion for the appointment of a legal aid defence lawyer. A. Haak-Trzuskawska and H. Haak indicate that there is no such obligation.<sup>56</sup> The opposite position is taken by P. Górecki and V. Konarska-Wrzosek.<sup>57</sup>

***“I read the notice of rights. It says we have the right to an attorney. But this is only on paper. If you don't sign this, they won't let you go. This is how it works.”***

At the same time, scholarship takes the position that differently from criminal proceedings the provisions of the Juvenile Justice Act do not provide for the possibility of revoking a decision to appoint a legal aid defence lawyer for a juvenile<sup>58</sup>. It is aptly noted that a reference to the Code of Criminal Procedure contained in Article 32c(3) JJA concerns only the issues regarding the appointment of a defence lawyer. Consequently, one cannot apply to the JJA Article

<sup>55</sup> E. Kruk, T. Skrętowicz...

<sup>56</sup> A. Haak-Trzuskawska, H. Haak, *Ustawa o postępowaniu w sprawach nieletnich. Komentarz*, Warszawa 2015, p. 162.

<sup>57</sup> P. Górecki, V. Konarska – Wrzosek, *Postępowanie w sprawach nieletnich. Komentarz*, Warszawa 2015, p. 179.

<sup>58</sup> A. Haak-Trzuskawska, H. Haak, *Ustawa...*, p. 163.

78(2) of the CCP, which provides that a court may revoke the appointment of a defence lawyer if it turns out that circumstances under which they were appointed are no longer valid. As a result, juvenile justice proceedings are more guarantee-focused than proceedings in which adult perpetrators are tried.

In the opinion of the Ombudsperson for Children, making the appointment of a legal aid defence lawyer conditional on the financial status of a juvenile and their family is an erroneous assumption because the situation where a juvenile or their parents do not have sufficient financial means to pay attorney's fees without detriment to their ability to provide means of subsistence for themselves and their family is an exception and not a typical situation. Furthermore, if the question of awarding a legal aid defence lawyer depends on an arbitrary decision of the president of the court, this may lead to an inability to appoint a defence lawyer, which according to the OC means a substantial restriction of the juvenile's right to a defence.

### 5.6.2. CRIMINAL PROCEEDINGS

The Code of Criminal Procedure also provides for the institution of legal aid defence (Article 78). Under current regulations, a defendant who has no lawyer of their choice may request the appointment of a legal aid defence lawyer provided that they reasonably show that they are unable to afford a lawyer without detriment to their ability to provide means of subsistence for themselves and their family. A complaint may be filed against the decision denying the request. A court may revoke an appointment of a defence lawyer if it turns out that circumstances under which he or she was appointed are no longer valid. A decision to revoke the appointment of a defence lawyer may be appealed against via a complaint submitted to another panel of the court of the equal procedural standing.

Depriving a defendant of their right to use services of a legal aid defence lawyer is treated as a gross violation of Articles 78 and 6 CCP, which is in breach of the standards of a fair trial.<sup>59</sup> However, an unfair refusal to appoint a defence lawyer will lead to a revocation of a challenged judgment only where a party will be able to show that this could affect the content of a judgment.

## 5.7 TRAINING FOR LAWYERS IN THE JUVENILE JUSTICE SYSTEM

According to our investigations, courses in juvenile justice proceedings are not taught as part of the curricula of law studies in Poland. Moreover, not all universities offer extracurricular tutorial classes in this field.<sup>60</sup> The academic centres that provide courses in juvenile justice proceedings most frequently offer a course with 30 class hours.

*“Juvenile justice proceedings are an extremely specific area of law. This equally applies to their subject-matter, rules, frequent modifications and, above all, the kind of person whose responsibility is assessed by the court. All these factors make training very much desirable.”*

The area of juvenile justice is not a major element of the programmes of professional education and training for future attorneys and legal counsellors. There are local branches of the professional associations that train aspiring lawyers in the area but one can reasonably say that juvenile justice is a marginalised subject (exception to this is the Bar Association in Opole who established the branch

---

<sup>59</sup> Judgment of the Supreme Court of 29 January 2002 II KKN 386/99, Prok. i Pr.-wkł. 2002, no. 10, item. 6.

<sup>60</sup> For example, the University of Warsaw, the largest university in Poland, has no such courses in its educational offer. A course in juvenile justice was offered in the past.

dedicated to family law and juvenile cases). Usually, during the three years of professional education and training, a maximum number of class hours devoted to juvenile justice proceedings is 1.5.<sup>61</sup> A similar situation may be observed in continuing legal education for attorneys and legal counsellors. However, in some regions of Poland, professional associations do not provide training in juvenile justice at all.<sup>62</sup> In practice, the subject of juvenile justice does not appear as part of continuing legal education for attorneys.

***“Children do not have the knowledge of rights. They are taught about duties and learn how duties are enforced. This is what school teaches you. We live in a system created in this way.”***

Undoubtedly, the effective legal representation of children requires intensified efforts in the area of professional education and training. This is especially important in Poland, where the Juvenile Justice Act is very often amended.

It seems that the moment of the Directive’s implementation should provide a stimulus that would drive efforts taken in order to develop the educational background for children’s representation in juvenile justice proceeding, both at universities and as part of professional education schemes. This need was expressed in the interviews conducted with lawyers and independent experts.

***“Sometimes a lawyer’s presence is more harmful than helpful, for example if a lawyer submits an appeal and delays the proceedings while a child is already well-settled in the new reality.”***

This information should be compared with statistics on the education of judges and prosecutors.

According to the Polish National School of Judiciary and Public Prosecution, the plan of professional education activities for 2017 partially incorporates the topic of this project. For example, the PNSJPP plans to conduct courses in the new measures of mutual recognition of judgments or the consequences of the EU membership for the jurisprudential practice of courts and prosecutors. Aspects of juvenile justice proceedings are included in the professional education programmes for candidate judges and prosecutors and comprise a part of judges’ continuing education. A particular attention should be given to classes on the separate juvenile justice proceedings that involve punishable acts, which are taught as part of the programme of professional education and training for judges, or courses in the psychological aspects of the credibility of juveniles’ testimony, available for aspiring prosecutors.<sup>63</sup>

Some of the recommendations included proposals for adding an interdisciplinary element to courses in legal proceedings in children’s cases, namely workshops in education techniques, psychology and communication methods.

It must be noted that the right to a defence cannot be exercised appropriately if the persons who may have contact with children during the proceedings are not fully aware of the significance of such right. A key group is the personnel of juvenile institutions, who spend a lot of time with children and often are the

***“The staff of institutions don’t know that a child should appear in court. They don’t care about the child going to a hearing, showing repentance, apologising. Already at this stage, institutions are unaware that this is how this should be done.”***

---

<sup>61</sup> Such classes have been taught in the local branches of the Bar Association in

<sup>62</sup> For example, the Kraków or Białystok branch of the Bar Association may offer a trainer.

<sup>63</sup> The letter of the Director of the Polish National School of Judiciary and Public Prosecution of 17 January 2017 (ref. BD-I-070.3.2017) sent in response to a letter of the HFHR.

first source of knowledge of children rights. They need to understand the role of a professional counsel in a pending case. According to what we have learnt, there are training courses in the right to a defence for this group. However, such training is usually conducted by members of the staff of a given institution. It seems that training delivered by a lawyer, a professional able to share their own perspective on the subject, not only would improve the skills of the personnel of juvenile institutions but also create a better understanding of the work of legal practitioners dealing with juvenile justice cases.

## 5.8 RELATION YOUTH LAWYER - MINOR CLIENT

Persons with whom we talked claimed that working with children, because of the specific nature of the proceedings, personal traits of children themselves and their special needs, must be combined with proper training.

The interviewed children pointed towards negative experience they had with their defence lawyers. According to them, defence lawyers who were supposed to help them failed to accomplish this task, they failed to approach it diligently and properly.

*“A lawyer should find out what we did. They should contact us. So that they learn from us and not from somebody else.”*

It follows from experiences of experts that defence lawyers do not visit juvenile institutions. As a result, many of such facilities do not have even a separate room for lawyer-client conferences and arrange such a space when and if needed.

While preparing the report, we encountered a number of obstacles in finding the legal counsellors and attorneys who specialise in working with children. Internet registers contain no information on such a specialisation. This makes it much harder for persons seeking legal aid to find a counsel prepared to work cases of children.

This problem is accompanied by the long-standing discussion about specialisation among members of professional associations of lawyers. Without going into detail, it is worth noting that none of the counsel we talked to mentioned directly that a need existed to introduce the specialisation of “children’s lawyer”, although most of them indicated that such a role required proper training. In this context, one should positively assess the attempts of the National Legal Counsellors Society that approached the TRECHILD European project aimed to prepare a group of counsel to work with children.

## 6. CONCLUSIONS

One cannot talk about the fairness of criminal, educational and corrective proceedings that involve children without referring to the right to a defence. This right exists and is fully exercisable only where an individual may talk to his or her lawyer from the moment when first actions are taken by law enforcement authorities. Otherwise, i.e. where such contact is not ensured, or even worse, where a suspect is denied an opportunity to confer with a lawyer, this right is transformed from an actual constitutional guarantee to an embellishment that looks impressively among the principles governing proceedings.

This comment receives a special meaning in the context of children’s right to a defence. Children, due to their age and level of mental development, are often not able to understand the situation in which they

found themselves. If left on their own without the assistance of a defence lawyer, they may easily become pressurised or manipulated by law enforcement authorities.

Regardless of whether we consider that Directives 2013/48/EU and 2016/800 apply to juvenile justice proceedings or not, we should agree that a situation where children have fewer rights than adults do cannot be accepted. The Constitution of the Republic of Poland not only prohibits discrimination against children but also obliges Poland to take particular care of children and their fate.

The right to a defence will be exercised only where a child is defended by a well-trained lawyer who is aware of difficulties and challenges a child may pose. Although the top-down introduction of a specialisation of “the child’s lawyer” is of no interest to professional associations, this does not mean that lawyers who work with children should abandon an attempt to specialise. On the contrary, they should do their best to be prepared for this role as well as possible.

Whereas professional associations of lawyers and tertiary education institutions should make this task easier for them.

For this reason, we recommend that courses in juvenile justice proceedings and children’s representation be reintegrated in university curricula and programmes of professional education and training for lawyers.

For the right to a defence to become a reality it is also important to raise the legal awareness of children themselves. School education has a crucial role to play in this regard. A certain effort must also come from rehabilitation facilities that deal on a daily basis with difficult youth who face the highest risk of re-offending.

We must remember that only children aware of their rights will be able to demand respect for their rights.

## **7. GOOD PRACTICES AND OBSTACLES**

### **7.1 GOOD PRACTICES**

- Police officers and judges practices to explain children their most important rights during juvenile proceedings.
- National Legal Counsellors Society approached the TRECHILD European project aimed to prepare a group of counsel to work with children.

### **7.2 OBSTACLES**

- Stakeholders different views on defence lawyer role in juvenile proceedings
- Lack of lawyer specialization system in Poland
- Lack of specialized youth lawyers
- No discussion on child lawyer specialization
- Inappropriate quality of defence lawyers' assistance
- Differences in legal guarantees for children and adults
- Possibility to interrogate juvenile in juvenile justice proceedings without a presence of lawyer or parent
- Lack of lawyers' assistance at the first stages of the proceedings
- Lack of courses on juvenile justice proceedings during law studies in Poland
- Lack on training on juvenile justice proceedings during legal education of attorneys

## 8. SUMMARY

### 8.1 CRIMINAL, ANTISOCIAL AND DELINQUENT BEHAVIOUR AMONG CHILDREN

- There is a growing number of cases in which juveniles are held responsible for the commission of a punishable act under the rules laid down for adult perpetrators. Whereas in 2005 only 24 juveniles were so prosecuted, in 2015 the number surpassed 100. At the same time, statistics of the Ministry of Justice show that such cases often are concluded with non-custodial sentences;
- From 2007, there has been a systematic drop in the number of proceedings conducted by family courts in cases of punishable acts committed by juveniles. Whereas in 2007 as many as 28,000 juveniles were brought before a family judge, in 2015 the figure was barely higher than 12,000;
- In the period of 5 years, the number of children held responsible as part of corrective proceedings has remained at the same, stable level of nearly 15,000 cases annually.

### 8.2. INTERNATIONAL LAW

- The most important act of international law that describes children's rights is the Convention on the Rights of the Child;
- Children benefit from the rights laid down in the Convention on Human Rights and Fundamental Freedoms in the same way as adults do;
- The European Court of Human Rights dealt with the rights of Polish children in a number of cases including *P. and S. v. Poland*, *Grabowski v. Poland* and *Adamkiewicz v. Poland*;
- The soft law instruments of international law developed by the Council of Europe and the United Nations may also be useful in an analysis of the rights of children.

### 8.4 LAW OF THE EUROPEAN UNION AND CHILDREN'S RIGHTS IN CRIMINAL PROCEEDINGS

- Directives adopted as part of the *Road Map of Procedural Rights* also affect, to a significant degree, the rights of children who are responsible for their own acts;
- 27 November 2016 was the final date for the implementation of the Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;
- 11 June 2019 is the final date for the implementation of the Directive on procedural safeguards for children suspected or accused in criminal proceedings.
- The purpose of this Directive is to establish procedural safeguards to ensure that children (persons under the age of 18) who are suspected or accused in criminal proceedings are able to understand and follow those proceedings, to enable such children to exercise their right to a fair trial, access to a lawyer and to prevent re-offending by children and foster their social integration.
- It is impossible to fully assess the impact of EU directives on procedural rights of children at national level.

## 8.5. DOMESTIC LAW

- The Constitution of the Republic of Poland guarantees the protection of children’s rights;
- Pursuant to the Ombudsperson for Children Act, a child is any human being from the moment of conception until attaining the age of majority;
- There are two regimes of responsibility of children for the commission of a punishable act (a criminal offence). The basic one is the responsibility under the Juvenile Justice Act; The purpose of such proceedings is primarily to educate rather than punish a child;
- Furthermore, children may be held criminally responsible when they commit an act after they attain the age of 17. In exceptional cases, they may also be held responsible when they commit certain offences under the Criminal Code after having attained the age of 15;
- Procedural guarantees contained in the Juvenile Justice Act differ from the ones laid down in the Code of Criminal Procedure;
- In certain areas, juvenile justice proceedings do not contain sufficient procedural guarantees for juveniles.

## 8.6 CONTACTS OF CHILDREN WITH THE JUSTICE SYSTEM AND CRIMINAL JUSTICE AUTHORITIES

- The first contact with the justice system and criminal justice authorities is surprising for children and makes it difficult for them to understand the situation in which they found themselves;
- Children say that some types of the notice of rights document are written in a way that makes it difficult for them to understand their meaning;
- Children appreciate the way in which family judges explain their situation;
- The first contact of children with the justice system usually happens without the involvement of a defence lawyer.

## 8.7. THE CHILD'S REPRESENTATION – DEFENCE LAWYER’S PERSPECTIVE

- In Poland, there are no formal, centrally accredited specialisations of attorneys and legal counsellors;
- Among professional counsel there is no will to create a separate specialisation of the “child’s lawyer”. However, lawyers point out to the need to have appropriate skills to work with children;
- Children’s cases are handled by lawyers specialising in criminal and/or civil law;
- The National Legal Counsellors’ Society<sup>64</sup> attempts to educate a group of counsel to specialise in children’s cases;
- Counsel admit that the child's representation is totally different from the representation of an adult;

---

<sup>64</sup> Krajowa Izba Radców Prawnych – the authority of professional self-government of legal advisers, equivalent of the chief organ or Bar Association.

- Professional counsel who handle children's cases come into contact with legal guardians of children;
- The system of providing children with free legal aid defence immediately after the arrest does not work;
- Directive 2013/48/UE was implemented in theory, and not in practice;
- The professional association of attorneys takes grassroots initiatives to ensure that every arrestee may exercise the right to be assisted by an attorney or a legal counsellor.
- Juvenile justice proceedings are informalised and based on the principles of equity, which empowers the role of a defence lawyer.
- The rules of professional ethics that are binding on professional counsel make no distinction between cases of children and adults.

## 8.8. THE CHILD'S REPRESENTATION – CHILDREN'S PERSPECTIVE

- Children have no knowledge of their procedural rights or the practical dimension of such rights;
- In proceedings concerning children, they are often represented by a legal aid counsel;
- As our interviews with children suggest, it is often already in a courtroom when children make their first contact with a defence lawyer;
- As a rule, counsel do not visit children who stay in institutions and do not talk with them on the phone;
- Defence lawyers come into contact with legal guardians of children;
- Children do not know whether they may complain about or change a legal aid lawyer;
- Children accuse lawyers of disregarding their opinion about the case in the course of proceedings;
- In the opinion of children, a professional counsel could have really helped in the proceedings if he or she had been interested in and thoroughly reviewed the case.

## 8.9. CONTACTS OF CHILDREN WITH DEFENCE LAWYERS – EXPERTS' PERSPECTIVE

- In institutions such as young offender institutions, youth shelters, youth educational centres or police remand homes for children there are no separate rooms where defence lawyers can privately confer with children;
- Lawyers generally do not come in contact with the personnel of youth shelters in which children stay.

## 8.10. STATE OF KNOWLEDGE ABOUT PROCEEDINGS AGAINST CHILDREN

- Children have no knowledge of their rights and the practical dimension of such rights;
- Juvenile justice proceedings are not taught as obligatory courses at faculties of law and some universities do not even offer such courses as optional classes.
- Courses in juvenile justice are often not included in the programmes of professional education and training for aspiring attorneys and legal counsellors. Even if such courses exist, they are limited in scope;

- The programme of continuing professional development for attorneys and legal counsellors include only a limited number of courses in judicial proceedings involving children.
- Professional education of future judges and prosecutors include topics involving the rights of children responsible for the commission of a punishable act;
- The staff of institutions for juveniles do not understand the role of professional counsel working children's cases.

## **9. RECOMMENDATIONS**

### **9.1. LEGISLATIVE**

- There is still a need to change the current regulations on access to an attorney in order to ensure their full compliance with the provisions of the directives;
- Full implementation of the Directive on access to an attorney requires the creation of a mechanism for the provision of legal aid for arrested persons;
- It is necessary to adjust the provisions of the JJA to the requirements of Directives 2013/48/EU and 2016/800;
- The introduction of changes to the Code of Criminal Procedure (CCP) should also create an opportunity to amend the Juvenile Justice Act to the extent required to ensure the effective assistance of a defence lawyer for juveniles;
- Upon the directives' entry into force, it will become necessary to change the existing template of the notice of rights;
- It seems reasonable to change the manner in which the notice of rights is currently phrased so that it would be possible for children to understand their rights and duties.

### **9.2. PRACTICAL**

#### **9.2.1. EDUCATION**

- It is important to increase pressure to introduce legal education at schools;
- It is reasonable to increase the number of or to introduce educational classes in juvenile justice proceedings at Faculties of Law;
- It is necessary to intensify training courses for attorneys and legal counsellors and trainees in these professions in the area of juvenile justice proceedings;
- It is necessary to add a psychological, teaching and communicational component to training courses for lawyers that would make it easier to establish contact with a child whom a lawyer represents.
- In connection with the growing role of EU law concerning criminal proceedings it would be advisable to extend a training programme in this area;
- It is necessary to hold training courses in the role of defence lawyers in juvenile justice proceedings for the staff of institutions for juveniles that would be conducted by an attorney or a legal counsellor specialising in such cases. Such a meeting would enable a better understanding of the role of a professional counsel in proceedings.

#### **9.2.2. CONTACT WITH CHILDREN**

- It is necessary to effectively inform children about their rights in proceedings and about the course of proceedings. This applies to lawyers, police officers, judges and staff of institutions for juveniles;
- Informing a juvenile about his or her rights cannot be limited to handing out a copy of the notice of rights;
- It should be recommended that one should ask whether a child has understood provided information.
- It is necessary to adjust the language of communication to the special needs of children.

# ANNEX 1

INTERNATIONAL FRAMEWORK		
	Signature/Date	Ratification/Date
ICCPR	2 March 1967	18 March 1977
CRC	26 January 1990	07 June 1991
Optional Protocol no. 3 to CRC	30 September 2013	Not ratified yet

REGIONAL FRAMEWORK		
	Date of signature	Date of ratification
ECHR	26 November 1991	19 January 1993
European Union Charter of Fundamental Rights	13 December 2007	-
European Social Charter	26 November 1991	25 June 1997

Directive	Date of transposition
2010/64/EU	27 September 2013 (date of Act)
2012/13/EU	27 September 2013 (date of Act)
2013/48/EU	27 September 2013 (date of Act)
2016/800/EU	-

## FREE LEGAL AID AND MANDATORY DEFENCE IN JUVENILE JUSTICE PROCEEDINGS AND CRIMINAL PROCEEDINGS

		Juvenile justice proceedings	Criminal proceedings
<b>Mandatory Defence</b>	Grounds	Interests of a juvenile and those of their parents or guardians are contradictory and the juvenile has no lawyer	
			The suspect has not attained the age of 18 years
		The juvenile is deaf, dumb or blind	The suspect is deaf, dumb or blind;
			There is a justified doubt as to whether the suspect's ability to comprehend the meaning of his or her actions or to control his behaviour was not, at the time of committing the offence, significantly reduced, or non-existent.
		There is a reasonable doubt as to whether the juvenile's mental condition allows them to act in the proceeding or conduct their own defence in an independent and reasonable manner.	There is a reasonable doubt whether the defendant's mental state allows them to participate in the proceedings or conduct defence in an independent and reasonable manner. (Article 79 (1) CCP).
			The appointment of a defence lawyer is necessary due to circumstances hindering defence.
			The suspect stands before the Regional court in a felony case.
		The juvenile has been placed in a youth shelter.	
		<b>Free legal aid</b>	Grounds for granting
Additional premises	The court must find the participation of a defence lawyer in a case as necessary		
The possibility of revocation:	There is no possibility of revocation		A court may revoke an appointment of a defence lawyer if it turns out that circumstances under which he or she was appointed are no longer valid.
A complaint against a refusal to appoint:	A possibility of lodging a complaint		A possibility of lodging a complaint