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Minor Victim Representation in Cases of Crimes Committed by Family Members in Polish Law[1]

Reprezentacja małoletniego pokrzywdzonego w przypadku przestępstwa popełnionego przez członków rodziny w prawie polskim

SUMMARY

The study presents the current legal regulations and problems with the implementation of procedural rights of a minor victim in the case of crimes committed by members of his family in the Polish legal system. The presented issue concerns the necessity to apply provisions contained in various acts, both public and private law. The author discusses the most important judgements of Polish jurisprudence in the indicated scope, emphasizing, however, that many aspects of the discussed issues, of a procedural nature, have still not been regulated. The conclusions include *de lege ferenda* postulates concerning, i.a., the transfer to the criminal court of the competence to appoint a guardian *ad litem* for disadvantaged minors.

Keywords: legal regulations; minor victim; crimes committed by family members; guardian *ad litem*; criminal court

INTRODUCTION

Family ties are an example of a value that is under the protection of many legal systems. Confirmation of this statement among others can be found in the Polish legal order, starting from the constitutional standpoint. According to the Consti-

[1] The paper is written version of speech presented by the author at the XII Polish-Russian Summer Law School on the matter of the current problems of the family law in the interdisciplinary approach, organized by Saint Petersburg State University (17–27 July 2018).

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tution of the Republic of Poland of 2 April 1997[2] everyone shall have a right to legal protection of his private and family life (Article 47) and, what is more, the State shall take into account the welfare of the family in its social and economic policy (Article 71). Going further, the Polish Constitution creates a legal basis for ensuring protection of the rights of the child as stated in Article 72 therein. However, in certain factual situations, a conflict in legal interests might arise between the protection of family values and the rights of children. To be more exact, as an example of such contradicted configuration one can denote the case in which the child is a victim of a crime committed by her or his family members. Taking into account the above, the main aim of this paper is to present a legal framework adopted in Polish law in order to determine who should represent the rights of the child in such cases. Moreover, in this context, the question is whether the provisions of the Code of Criminal Procedure[3] protect family values. The answer might not be so self-evident, bearing in mind that in such a case one may observe a necessity to protect the legal interest of one family member against the actions of the other.

It is necessary to stress that Polish law creates an ambiguous legal basis in order to explain the presented matter. The analyzed matter is of multifaceted and complex character that deals with the inevitability of the interpretation of regulations that are of different nature, which are: criminal law, criminal procedure, civil procedure and family law. Such a nature of the problem creates a series of far-reaching institutional problems that must be answered, because needless is to say that an adequate representation of minor victims is one of the key issues of the criminal proceeding. What is more, it helps to prevent the victims from the phenomenon of secondary victimization[4] and improves the legal protection of the children which is a matter not only subjected to domestic law but also international legal obligations[5].

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[2] Journal of Laws 1997, no. 78, item 483, hereinafter: the Constitution or the Polish Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.08.2020].

[3] Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997, no. 89, item 555 as amended), hereinafter: CCP.

[4] On the matter of secondary victimization see, i.e., U. Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, "Social Justice Research" 2002, vol. 15(4), pp. 313–325. See also J. Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystaniem seksualnym*, Warszawa 2012, p. 121.

[5] See, i.e., United Nations Convention on the Rights of the Child of 20 November 1989 (Journal of Laws 1991, no. 120, item 526). See also soft-law documents and guidelines and recommendations as well, i.e., Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum (https://rm.coe.int/16804b2cf3 [access: 29.06.2020]) or Recommendation CM/Rec(2009)10 of the Committee of Ministers to member states on integrated national strategies for the protection of children from violence, adopted by the Committee of Ministers on 18 November 2009 at the 1070bis meeting of the Ministers' Deputies.

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In the article, the general rules of representation in Polish law are described in order to present the matter in a comprehensive manner. Then, the focus is on the representation in criminal proceedings, and in a more detailed part, representation in cases related to offences committed by members of the victim's family was emphasized. Finally, the crucial problems and possible *de lege ferenda* solutions are presented with a conclusion in order to evaluate the Polish legal framework in the mentioned area.

GENERAL RULES OF A MINOR'S REPRESENTATION

As stated above, the common approach taken by many legal orders is the assumption that a minor cannot execute her or his rights by herself or himself. Such an approach implies the necessity to provide a legal form of representation of the mentioned subjects. A similar concept may be derived from the Polish regulations. Consequently, at the beginning of considerations, the outline of the definition background in Polish law appears as indispensable.

As a principle, according to Article 11 of the Civil Code[6], full capacity for acts in law shall be acquired at the moment of becoming an adult. An adult is a person who has attained 18 years of age or, exceptionally, a minor woman who becomes an adult on marriage after turning 16 years of age. However, this situation is possible if there are important reasons and only after permission of the Guardianship Court[7]. Conclusively, as a principle, a minor without the full capacity for acts in law is a person below 18 years of age[8]. Furthermore, in general, a minor who has not such capacity needs to be represented by his statutory representative before courts, public authorities, and in the sphere of private law as well.

As stated in Article 98 § 1 in conjunction with Article 92 AFGC, the parents are statutory representatives of the child who is under their parental authority. In addition, until reaching the age of majority (i.e. 18 years of age), a child remains under parental authority. If the child is subjected to the authority of both parents, each of them may, as a principle, act as a legal representative. On the other hand, if none of the parents is able to represent the child due to the lack of legal authority,

[6] Act of 23 April 1964 – Civil Code (Journal of Laws 1964, no. 16, item 93 as amended).

[7] According to Article 10 of the Act of 25 February 1964 – Family and Guardianship Code (Journal of Laws 1964, no. 9, item 59 as amended [hereinafter: AFGC]), the court may permit a woman who has reached the age of sixteen to marry when there are important reasons and, what is more, the circumstances of the case indicate that the marriage could be in accordance with the best interests of the new established family.

[8] Minor may have certain capacity for acts in law prescribed by the regulations of the Polish Civil Code (see Article 14 § 2).

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the child has to be represented by a custodian (guardian) appointed by the Guardianship Court, according to Article 99 AFGC[9].

Presented regulations stem from the legal framework adopted in the area of private law. Criminal law and criminal procedure are the branches of law defined as a part of public law, which means that they have different specificity. However, due to the lack of different regulations in the Code of the Criminal Procedure, there is a necessity to apply the above-mentioned provisions to the latter. Nonetheless, the discrepancy between the private and public law may cause certain problematic issues when it comes to the applicability of the presented rule of representation. The elaboration of the above is presented in the following parts of the article.

MINOR'S REPRESENTATION IN CRIMINAL PROCEEDINGS

Moving on to the sphere of the criminal law, in order to fully comprehend the presented matter, there is a need for additional clarification. In doing so, one should emphasize that Polish law in the legal definition of a victim encompasses a natural or legal person whose legal interest was infringed or threatened by an offence[10]. In other words, a person who is a subject of the alleged crime is under legal protection and acquires certain procedural rights, in accordance with the Code of Criminal Procedure. Nevertheless, as already established, not every victim is capable to execute such rights by itself.

The most well-known example of a victim who cannot execute its procedural rights acquired in compliance with the Code of Criminal Procedure is a minor. As established in Article 51 § 2 CCP, if the aggrieved party (victim) is a minor or person who is fully or partially incapacitated, its rights are executed by a legal representative or by a person, under whose permanent care the aggrieved party remains. Thus, as a principle, the rights of a child who is a victim, should be executed by her or his parents. However, as accepted by the doctrine of Polish criminal law, if the authority that conducts the proceeding affirms that none of the parents is capable to exercise the procedural right of the aggrieved party, such procedural authority should submit a motion for the establishment of other forms of legal representation, which is explained in following parts of this paper[11].

The above-mentioned rule should apply to all activities related to the minor victim in criminal proceedings. Furthermore, for instance, in cases concerning

[9] A.Z. Krawiec, *Kurator jako podmiot reprezentujący małoletniego pokrzywdzonego w postępowaniu karnym*, „Prokuratura i Prawo" 2013, no. 11, pp. 118–119; eadem, *Małoletni pokrzywdzony w polskim procesie karnym*, Toruń 2012, p. 138.

[10] See Article 49 § 1 CCP.

[11] A.Z. Krawiec, *Kurator*..., p. 119.

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offences prosecuted on a complaint, such complaint has to be submitted by a legal representative. What is more, activities like submitting a claim to remedy the damage, evidentiary motions or appointing an advocate also have to be taken by the legal representative of the victim. On the other hand, one may observe some controversial questions in this area. For instance, it is unclear whether the right to refuse to testify shall be executed by the legal representative or, due to the personal character of such right, by the child itself. The elaboration of this issue is far beyond the range of this paper, notwithstanding it points out that the regulation is not comprehensive and may entail serious legal controversies[12].

One of such problems is the matter of the representation of the victim by the parents in cases in which the other family member is the suspect. It is clear that presented situation is of a contradicted nature and exemplifies the conflict of interest. However, as hereinbefore raised, a legal framework is not detailed in this area and is consequently unsatisfactory when looking for a solution. Hence, this part is followed by the interpretation of analyzed provisions given by the Supreme Court and the Constitutional Tribunal. What is more, the other, far-reaching outcomes of the lack of comprehensive regulation is presented in order to evaluate the framework of the minor victim representation in criminal law.

REPRESENTATION IN CASES OF CRIMES COMMITTED BY FAMILY MEMBERS

The practical approach proves that the answer to the analyzed issue is of crucial nature. Relying on statistics carried out by the Polish Police and Nobody's Children Foundation, the percentage of cases in which the crimes against children were committed by one of its parents is 72 in the pre-trial phase of the proceedings and as much as 90% in the trial phase[13]. It is the vast majority of cases which, needless to say, makes the presented issue of significant importance. One may observe that quoted statistics are focused only on crimes committed by the other parent. Expansively, the amount of crimes committed against children by other relatives is even greater.

[12] See E. Bieńkowska, L. Mazowiecka, *Uprawnienia pokrzywdzonego przestępstwem*, Warszawa 2014; J. Mierzwińska-Lorencka, *Kurator procesowy – zadania, rola, cel ustanowienia*, [in:] *Kurator procesowy dla małoletniego pokrzywdzonego*, Warszawa 2016, pp. 35–55; K. Osiak, *Prawa i obowiązki małoletniego pokrzywdzonego, które przysługują mu podczas przesłuchania w trybie art. 185a Kodeksu postępowania karnego*, „Dziecko krzywdzone. Teoria, badania, praktyka" 2016, vol. 15(4), pp. 88–91.

[13] O. Trocha, *Udział dzieci w postępowaniu karnym – wyniki badań, obserwacje, rekomendacje*, „Dziecko krzywdzone. Teoria, badania, praktyka" 2013, vol. 12(4), p. 57.

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In the face of lack of strict regulation, Polish courts, when dealing with the case related to this kind of representation, should refer first and foremost to the provisions contained in Article 98 § 2 AFGC[14]. According to this provision, neither of the parents may represent the child at legal actions between the children under their parental authority or at legal actions between the child and one of the parents or their spouse, unless one of the few exceptions occurred. Going further, the Article states that indicated provisions are applicable accordingly in proceedings before the court or other state organs which makes it relevant in case of criminal prosecution. As a result, if both parents have their parental authority, one of them cannot execute the rights of a child who is an aggrieved party, when the latter is a suspect or accused person[15].

Such a point of view was stressed by the Supreme Court in similar cases, starting with judgement in which the Court pointed out that if one of the parents would be allowed to execute a victim's right in a trial against the second one, the legal position of the child could be adversely affected[16]. Mother or father could be biased, both in favor of the accused or the aggrieved party, which generates a high risk of a potential lack of objectivity. The Supreme Court aptly established that inevitable emotional impact resulting from family ties excludes the admissibility of such a framework of representation that would allow parents to compete against each other in court, no matter the type or gravity of the crime[17]. However, it is crucial to notice that the presented case dealt only with the relation between both parents. The Supreme Court did not strictly exclude the possibility of representation of the child by his or her parent in the case of crime committed by another relative. Concurrently, the scope of exclusion of discussed matter remains unclear. On a side note, it is worth to highlight a recent resolution given by the Supreme Court in this context[18]. As regards the offence of non-alimentation under Article 209 of the Criminal Code[19] committed by one of the parents, the Supreme Court claimed that the minor's rights in these proceedings can be exercised by the other parent.

[14] Resolution of the Supreme Court of 30 September 2010, I KZP 10/10, OSNKW 2010, no. 10, item 84. This point of view was reaffirmed, e.g., in judgement of the Supreme Court of 1 December 2010 (III KK 315/09, LEX no. 686665) and in resolution of the Supreme Court of 11 January 2011 (V KK 125/10, R-OSNKW 2011, item 27).

[15] Resolution of the Supreme Court of 30 September 2010, I KZP 10/10, OSNKW 2010, no. 10, item 84.

[16] *Ibidem*.

[17] The Supreme Court found out that the accusation of the parent may be in the interest of the other parent and, at the same time, in contrary to the interests of the child. It could be so, for instance, in divorce cases in which family courts shall in principle attribute the guilt for the disintegration of marriage.

[18] Resolution of the Supreme Court of 25 June 2020, I KZP 4/20, www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20kzp%204-20.pdf [access: 29.06.2020].

[19] Act of 6 June 1997 – Criminal Code (Journal of Laws 1997, no. 88, item 553), hereinafter: CC.

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In the opinion of the Supreme Court, the objectification of the signs of the crime of non-alimentation reduces the possibility of possible abuse by one of the parents who, acting in their own interest and not for the benefit of the child, would file unjustified motions for prosecution or unnecessarily push for active participation in the trial of a minor victim.

Undoubtedly, competitive interests take place not only in cases between both parents. The exclusion of admissibility of this form of representation should be expanded to cases which involve other family members. Conceivably, one of the parents, acting as a legal representative of the child may take, even unconsciously, steps that could be detrimental for the child in cases of crimes committed by other child relatives. The fear of such actions occurs when the legal interest of a parent can be objectively inconsistent or competitive with the good of the minor child. One should notice that the scope of inadmissibility of the representation by parents in criminal cases involving other relatives has a guarantee function due to the necessity of protection of the good of the child[20]. The reason to exclude such a framework of representation is the protection of the legal interest of the probably most vulnerable subject of the proceedings. Consequently, such an interest could be affected when the crime was committed for instance by one of the grandparents. Strong emotional impact that stems from family ties is unavoidable in the presented sphere. However, Polish law does not strictly prohibit parental representation in this type of case.

It is worth noting that the arguments in favor of extension of the subjective range of the exclusion emphasized in judgement handed out by the Supreme Court are convincing. It was reaffirmed by the judgement of the Constitutional Tribunal that occurrence of the ambiguity of the legal framework in this matter provokes an irresistible urge for legislative changes[21]. What could be adequate, is the reference to the concept of the next of kin regulated in Article 115 § 11 CC.

According to Article 115 § 11 CC, the next of kin is a spouse, an ascendant, descendant, brother or sister, a relative by marriage in the same line or degree, a person in an adopted relation, as well as his or her spouse, and a domestic partner. Presented scope seems to be broad and has different functions in the area of criminal law, i.e. increases a legal liability or creates a possibility to refuse to testimony[22]. In the presented concept, the reason to invoke this definition is to exclude the competitive legal interests between persons that fall within the scope of this term in relation to the legal representative and the latter. In other words, if the accused person is next of kin of one of the parents, that has parental authority, such

[20] A.Z. Krawiec, *Kurator*..., p. 120.

[21] Judgement of the Constitutional Tribunal of 21 January 2014, SK 5/12, Journal of Laws 2014, item 135.

[22] P. Daniluk, [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, vol. 4, Warszawa 2018, comment on Article 115, Nb 111–122.

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a parent cannot execute the rights of a victim in this case. The presented solution strengthens guarantee function, increases the protection of the good of the child and, in addition, prevents family ties by eliminating a conflict of interests. All the mentioned reasons are extremely important, especially in such an invasive branch of law as the criminal one.

IF NOT PARENTS, THEN WHO? THE EXCEPTIONS FROM THE GENERAL RULE OF REPRESENTATION

The exclusion of parents' representation in an analyzed matter is not self-evident but commonly accepted by the Polish doctrine and courts. However, a question that still is to be answered is, who should be the legal representative of the minor victim if not her or his closest ascendants. In order to determine who is the statutory representative of such minor, one should once again refer to the provisions of the Family and Guardianship Code, according to which if neither parent is able to represent the child under their parental authority, the child is represented by a guardian *ad litem* appointed by the Guardianship Court[23]. Therefore, a guardian *ad litem* is a person who acts on behalf of a child[24]. This issue initially seems to be simple, however, causes a series of procedural problems that lengthen and in exceptional circumstances may even paralyze criminal proceeding. Nevertheless, when elaborating this matter, at the beginning attention should be paid to the conditions that need to be fulfilled by a person that could be appointed as a guardian *ad litem*. Secondly, the consequences of an actual framework should be described and evaluated with additional *de lege ferenda* arguments that could enhance Polish criminal procedure in the presented matter.

First and foremost, in order to be appointed as a guardian *ad litem*, a person has to fulfill several conditions[25]. The guardianship court needs to be convinced that there is a high probability that such a person will perform her or his duties properly and will act in compliance with the interests of a child. Moreover, a guardian *ad litem* has to have full legal capacity for acts in law and cannot be deprived of her or his civil rights. In other words, a guardian *ad litem* cannot be a minor itself. Additionally, it is not possible to appoint as the guardian *ad litem* anyone who has been deprived of parental authority or convicted of a crime against sexual freedom or decency or convicted of an intentional crime of violence against a minor or in association with a minor. Finally, the court cannot appoint as a guardian a person

[23] M. Horna, *Kurator reprezentujący małoletniego pokrzywdzonego w procesie karnym – wybrane zagadnienia proceduralne*, „Dziecko krzywdzone. Teoria, badania, praktyka" 2014, vol. 13(1), p. 52.

[24] S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2005, p. 194.

[25] See Article 178 § 2 in conjunction with Article 148 § 2 AFGC.

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who is not allowed to carry out activities related to raising, treating, or educating minors. All of these conditions are created as a guarantee of adequate protection and realization of the child's interests. It should be certain for the court that the guardian *ad litem* is a person that only enhances the execution of a minor's rights. However, the law does not require any legal qualifications as a prerequisite to be appointed as a guardian. That raises the first possible and, as statistics shows, a practical problem in the adequate protection of minor victims.

As it can be observed from the statistics carried out by the Office of the Ombudsman for Children in Poland, very often guardians do not fulfill their duties properly[26]. The analysis of cases shows that guardianship courts often appoint persons who do not have the required experience, knowledge, and preparation in order to execute procedural rights. As a consequence, minors who are victims of crimes are *de facto* deprived of an adequate representation. Their guardians did not manifest any activity, lacked procedural and legal knowledge, or did not know the exact facts of the cases. To strengthen this statement, one may refer to the statistics quoted by the Minister of Justice, according to which in all Polish courts only 27% of people representing minor victims at trials were lawyers or legal advisors[27]. One-third of guardians were probation officers and almost a quarter of representatives were appointed from the family of the victim. Eventually, in 10% of cases the guardians were employees of the court's secretariat[28]. As a summary, one has to stress that only in half of cases guardians had some kind of legal qualifications. In other words, in almost half of the criminal proceedings involving a minor as a victim, there was a high risk of inadequate legal representation.

What deems to be necessary is an implementation of a simple requirement of having a certain standard of legal education in order to be the representative of a minor victim in criminal proceedings. Needless to say that professional legal assistance should be ensured for a minor victim in a criminal case, especially in a very vulnerable situation when the perpetrator is a next of kin, as a *sine qua non* condition for establishing sufficient legal protection[29]. The presented standard could be fulfilled if children would have been represented at least by probation officers or persons that have undergone legal training in crucial areas linked with the issue of legal representation. What is more, such a requirement could enhance the realization of a fair trial clause, in which the principle of community life will be implemented. The need to protect children and prevent them from adverse affection of their rights justify the postulate for amendment in the indicated area.

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[26] Speech of the Ombudsman for Children in Poland of 25 May 2012, ZSR/500/9/2012.

[27] O. Trocha, *op. cit.*, p. 57. See also „Niebieska Karta" – 2013, http://statystyka.policja.pl/ST/informacje/94596,quotNiebieska-Kartaquot-2013.html [access: 22.01.2020].

[28] Paper of the Minister of Justice of 19 June 2012, DWMPC=VI-072-1-12/5.

[29] A.Z. Krawiec, *Kurator*..., pp. 131–132. See also O. Trocha, *op. cit.*, p. 64.

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PROBLEM OF DIVERGE JURISDICTION

Another key issue in the presented topic is a question of jurisdiction. According to the provisions derived from the Code of Civil Procedure[30] and Family and Guardianship Code, a guardian is appointed by the guardianship court. As a matter of law, jurisdiction in this matter belongs to that court, in which circuit a minor has a place of residence or resided permanently[31]. Such a court has the right to supervise the activity of a guardian *ad litem*, providing guidance and instructions when it deems necessary. Additionally, the guardian is obliged to submit a report to the court, concerning the minor that remains under its care. On the other hand, if the guardian does not exercise care properly, the guardianship court is permitted to issue appropriate orders or release the guardian if its actions or omissions violate the interests of the minor. Eventually, the guardian *ad litem* should obtain the consent of the court for all important matters concerning the person of a minor, including the question of reconciliation between the aggrieved party and the perpetrator[32], property management, and appointing of a legal advisor. In other words, in many events the guardian *ad litem* cannot act autonomously and remains under judicial supervision. In general, such a framework is applicable unless a minor turns 18 years of age and be capable to exercise its rights without any form of statutory representation[33].

What seems to be overlooked in this sphere is the possibility of diverse jurisdiction when it comes to supervise and appoint a guardian *ad litem* and hear the criminal prosecution. As concluded above, the guardianship court has the authority to specify the person and activity of the guardian. In turn, as a principle, the jurisdiction over the criminal case belongs to the court in whose judicial circuit the crime was committed[34]. Consequently, it is not hard to picture a situation in which the crime was committed in a different judicial circuit than the one in which the victim has a permanent place of residence. This may cause the potential risk to make a whole criminal procedure more time-consuming due to the fact that different courts would have jurisdiction over different spheres of the procedure. Such matters as exchanging information or issuing orders and supervising the activity of guardian could be highly inconvenient and presumably would cause the prolongation of the trial.

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[30] Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws 1964, no. 43, item 296).

[31] M. Horna, *op. cit.*, p. 53.

[32] Resolution of the Supreme Court of 20 June 2012, I KZP 9/12, OSNKW 2012, no. 7, item 73. See also J. Misztal-Konecka, *Pojednanie w prawie karnym (zagadnienia wybrane)*, „Prokuratura i Prawo" 2013, no. 12, pp. 65–81.

[33] Resolution of the Court of Appeal in Wrocław of 24 June 2005, II S 13/05, OSA 2005, no. 10, item 72.

[34] Article 31 CCP.

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De lege ferenda the presented discrepancy may be eliminated by entrusting the jurisdiction over appointing and supervising the guardian *ad litem* to the criminal court. The considered amendment may improve the criminal procedure by fastening and making it more economically efficient. Nevertheless, the transfer of competencies requires a comprehensive and systemic novelization of the Code of Criminal Procedure in this matter. However, the indicated solution would strengthen sufficient implementation and protection of the interests of the aggrieved party. Conclusively, the extension of Article 51 CCP in the question of conferring the authority over the appointment and superintendence of the representative of a minor to the criminal court in a judicial and pre-judicial phase of the proceedings appear as a suitable solution.

MINOR'S REPRESENTATION IN THE CONTEXT OF AN INTERNATIONAL LAW

To make a comprehensive assessment of the regulations in force in the Polish legal order, it is necessary to analyze them from the perspective of the standard resulting from the international law. In this regard, one can find several indications related to the representation of a minor victim in criminal proceedings. A concise analysis of legal solutions at this tier will make it possible to highlight the role of professional legal assistance to underage victims. However, due to the limited volume of this article, a more detailed analysis of this issue is not feasible.

As a starting point, as indicated in Article 20 para. 2 of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JH[35], each Member State shall ensure that child victims have, without delay, access to legal counseling. Moreover, minor victim such a legal counseling should be free of charge where the victim does not have sufficient financial resources. Indicated provision stresses the need to establish adequate legal aid primarily for the purpose of claiming compensation. Nevertheless, it implies a certain desirable minimum standard to ensure that, whenever the victim is a child, professional legal counseling shall be provided in order to protect her or his interests[36]. The Directive emphasizes the need to provide long-term support for children as victims of sexual offences, if need be, even until adulthood, so that the victim could regain his or her mental and physical health.

[35] OJ EU L 335/1, 17.12.2011.

[36] See S. Rap, *The implementation of the right to be heard in juvenile justice proceedings in Europe*, [in:] *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions*, eds. I. Iusmen, H. Stalford, Toronto 2016, pp. 140–141.

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There is also the possibility of providing support to the parents or legal guardians of the child victim, unless they are suspected of the specific crime, to help them support the child victim in the course of the investigation[37].

It seems that a similar approach was taken by the EU legislator in the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[38]. Indeed, Recital 38 of the preamble to that Directive points out the need to take into account the role between victim and perpetrator. In particular, when the perpetrator is a relative of the child, especially one of the parents, it seems necessary to provide adequate and specialized legal and psychological assistance to the child. The aim of introducing such a standard is to prevent secondary victimization of victims and to support in the process of rehabilitation and overcoming possible traumatic experiences resulting from the crime. It is therefore justified to conclude that the exercise of a child's procedural rights should be carried out through the support of an entity with legal qualification. The mere exclusion of the possibility for a family member to represent the victim may, in the opinion of the EU legislator, be insufficient. In this context, the *de lege ferenda* conclusions set out in the previous sections of this article seem fully valid.

The above-mentioned conclusions are also justified in the light of the framework set out by the Council of Europe. In the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice[39], one can find several broad provisions related to the minimum standard of minor victim's representation. These recommendations include, i.e., 1) the right to legal counsel and representation, in particular in proceedings where there is, or could be, a conflict of interests between the child and the parents; 2) free legal aid for children; 3) representation by lawyers trained and knowledgeable on children's rights and related issues with an in-depth training of communication skills; 4) inclusion of the opinion of the child; 5) the need to appoint guardian *ad litem* in cases where there is conflict of interests between parents and children[40]; 6) the guarantee for representation independent from the parents, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

[37] P. Karlik, P. Wiliński, *Improving Protection of Victims' Rights: Access to Legal Aid*, Poznań 2014, pp. 25–26.

[38] OJ EU L 315/57, 14.11.2012.

[39] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum.

[40] See I. Berro-Lefèvre, *Improving children's access to the European Court of Human Rights*, Strasbourg 2008, pp. 69–78.

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As it is clear, indicated guidelines are much broader than provisions set out in the Polish law. Thus, unfortunately, one has to conclude that both EU and Council of Europe minimum standards have not yet been met by the Polish legislator. As a result, in the light of the analysis carried out above, the presented *de lege ferenda* postulates remain valid and necessary. There is no doubt that an adequate legal representation of children affected by crime, especially committed by family members, is one of the key issues both in terms of protecting their rights and preventing negative psychological and behavioral consequences.

CONCLUSION

It should be emphasized that the current model of Polish criminal procedure includes the role of the family and protects it in several areas, i.e. refusal to testimony. It is clear that in the Polish legal system family is a kind of a sanctified value, as expressed in the Polish Constitution and other legal acts of the lower tier. A similar approach is taken when it comes to the protection of the aggrieved party and the legal situation of minors. Polish legislator created certain provisions in order to improve the protection of the most vulnerable subject of the criminal procedure, e.g. by implementing law regarding specific conditions of interrogation of a child who is under 15 years of age[41]. However, it seems clear that Polish law does not regulate comprehensively the matter of legal representation of a minor victim. The general provision contained in Article 51 § 2 CCP does not take into account many possible legal configurations, especially in cases involving relatives of the minor victims as perpetrators. Luckily, the lack of regulation has not been overlooked by Polish courts, including the Supreme Court which provided an interpretation of this procedural situation, taking into consideration regulations indicated in several legal acts of a different nature in specificity. What is more, as pointed out by the Constitutional Tribunal the actual legal basis of the representation does not infringe the Polish Constitution[42]. Nevertheless, regardless this interpretation and considering the fact that the case law is not a universally binding source of

[41] See, i.e., A. Antoniak-Dróżdż, *Przesłuchanie dziecka w procesie karnym – uwagi praktyczne*, „Prokuratura i Prawo" 2006, no. 6, p. 46; J. Mierzwińska-Lorencka, *Przesłuchanie małoletniego pokrzywdzonego w trybie art. 185a k.p.k. – wybrane wyniki badań aktowych*, „Dziecko krzywdzone. Teoria, badania, praktyka" 2011, vol. 10(2), pp. 56–76; E. Pływaczewski, *Nowe rozwiązania w zakresie przesłuchania małoletnich ofiar przestępstw seksualnych z perspektywy teorii i praktyki w Polsce*, Białystok 2015, p. 4; K. Postulski, *Przesłuchanie pokrzywdzonego dziecka – rozważania na tle wyroku Sądu Najwyższego z dnia 1 lutego 2008 r., sygn. akt V KK 231/07*, „Gdańskie Studia Prawnicze" 2008, vol. 4, pp. 115–121.

[42] Judgement of the Constitutional Tribunal of 21 January 2014, SK 5/12, Journal of Laws 2014, item 135.

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law in the Polish legal system, it seems necessary to postulate legislative changes in the presented area.

Moreover, as presented above, even though the controversies could be eliminated by the legal interpretation, the actual institutional framework causes other practical obstacles, regarding matter of jurisdiction, legal qualifications of the representative of the victim, and last but not least, the scope of exclusion of relatives against which a parent of a victim may act as an executioner of rights of the latter. To sum up, the Polish regulation, even if allows to avoid a conflict of interests, is highly imprecise, which is the reason to highlight the necessity to provide adequate amendments to the Code of Criminal Procedure.

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STRESZCZENIE

W opracowaniu omówiono aktualnie obowiązujące regulacje prawne oraz problemy dotyczące realizacji uprawnień procesowych małoletniego pokrzywdzonego w przypadku przestępstw popełnionych przez członków jego rodziny w polskim porządku prawnym. Przedstawiona problematyka dotyczy konieczności zastosowania rozwiązań zawartych w różnych ustawach, o charakterze zarówno publiczno-, jak i prywatnoprawnym. Autor omawia najważniejsze rozstrzygnięcia polskiego orzecznictwa we wskazanym zakresie, podkreślając jednak, że wiele aspektów poruszanej problematyki, o charakterze procesowym, wciąż nie zostało uregulowanych. W konkluzji zamieszczono postulaty *de lege ferenda*, dotyczące m.in. przeniesienia na sąd karny kompetencji ustanawiania kuratora procesowego dla małoletnich pokrzywdzonych.

Słowa kluczowe: regulacje prawne; małoletni pokrzywdzony; przestępstwa popełnione przez członków rodziny; kurator; sąd karny

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