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PROTECTION OF CHILDREN’S RIGHTS IN THE DRAFT LAW ON JUVENILE DELINQUENCY PROCEEDINGS

Introduction

More than 36 years have passed since the entry into the Polish legal order of the Act of 23 October 1982 on juvenile delinquency proceedings.¹ At that time, serious changes took place in social life, especially in the area of children’s and youth’s lives. The need for a new regulation of JDP was noticed several years ago. In the meantime, it has been amended 24 times. Therefore, an apt objection raised against the existing regulation is its opacity and loss of consistency in many places.²

In subsequent amendments, the legislator aimed to deviate from the dualism of procedures as much as possible. Part of the inconsistency of JDP is a consequence of the abolition of the division into explanatory proceedings and guardianship and educational or correctional proceedings. This change, which took place in 2013 (with the effective date from 1 January 2014), was long awaited. It led to the standardization of the procedure by resigning from the separation of the phase of explanatory and investigative proceedings. It also abolished the previously functioning division into two modes of investigative proceedings – 1) guardianship and educational; 2) correctional – which determined the application of the provisions of the Code of Civil Pro-

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¹ Journal of Laws of 2018, item 969 [henceforth cited as: JDP].

² Consequently, if the content of Art. 27 JDP, it can be seen that in para. 3 of this article, the legislator indicated that the period of a juvenile’s stay in a juvenile shelter before referring the case to a trial may not last longer than 3 months and in this respect the 2013 amendment did not interfere. In this state of affairs, dividing the procedure – as it is done by Art. 27, para. 3 JDP – it loses its *raison d’être* in the “before referral” and “after referral” phases.

cedure³ or the Code of Criminal Procedure,⁴ respectively. Currently, regardless of whether the proceedings against a juvenile were initiated in connection with a criminal act or manifestations of demoralization, it is conducted with the appropriate application of the provisions of the Code of Civil Procedure.

The methodology adopted so far in the presented draft law is maintained. The draft law organizes and systematizes the matter concerning juveniles, incorporating those provisions of the existing act which, despite the passage of time, have not lost their validity. It covers both material, procedural and executive provisions. It is divided into 6 sections, in which separate groups of issues are regulated: Part I. General provisions; Part II. Measures for prevent the demoralization of juveniles and the commission of criminal acts by them; Part III. Investigation procedure; Part IV. Execution procedure; Part V. The functioning of educational and adaptation centres, juvenile detention centres, shelters; Part VI. Amendments to binding provisions, transitional and final provisions.

The draft law on juvenile delinquency proceedings comprehensively regulates the issues of juveniles, contains its own procedure and defines the rights and obligations of juveniles and other participants in the proceedings in accordance with the solutions adopted in Polish law, European standards and documents setting international standards for children's rights. It is based on the same principles as the right to adults, and in particular "every child [...] 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."⁵

³ Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2020, item 1575 as amended.

⁴ Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2020, item 30 as amended.

⁵ Convention on the Rights of the Child of 20 November 1989, ratified by Poland on 30 April 1991, Journal of Laws of 1991, No. 120, item 526, Art. 40, para. 1. Entered into force on 7 July 1991, Journal of Laws No. 120, item 527.

When talking about the protection of children's rights under JDP, we must remember that we are dealing not only with a juvenile perpetrator of a criminal offense or showing signs of demoralization, but also very often with a juvenile injured party.

First, the procedural guarantees contained in the draft law on juvenile delinquency proceedings will be presented, and then the position of the juvenile injured party and his rights will be discussed.

1. Procedural guarantees

In the current legal state, the lower age limit has not been defined. As a consequence, cases are referred to courts against juveniles, who are often under 10 years of age. Usually these are juvenile offenses (e.g. crossing a red light), "scuffles", quarrels and fights and other criminal acts (e.g. against property) at school in grades I-III and outside school. This results in the need to determine whether there are circumstances proving the juvenile's demoralization and whether there is a need to apply educational measures to the juvenile (Art. 21a JDP) and then to issue a decision by the court not to initiate the procedure or to treat it as a signal giving grounds for issuing guardianship orders pursuant to Art. 109 of the Family and Guardianship Code.⁶

The draft law provides for the application of the provisions of the act in the field of demoralization proceedings to persons who are 10 years old and "under the legal age." The use of this term and not the term "under 18" is a consequence of Art. 10, para. 2 of the Civil Code,⁷ which stipulates that by entering into a marriage, a juvenile obtains the age of majority (it is about women who, with the consent of the guardianship court, entered into a marriage after the age of 16).

The determination of the lower limit of juvenile delinquency at 10 years is justified by the fact that only at the age of 9-10 does a person begin to understand the meaning of norms, initially moral, and as they develop also others, including legal ones [Bee 2004, 296-324]. It is pointless to push the

⁶ Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2020, item 1359.

⁷ Act of 24 April 1964, the Civil Code, Journal of Laws of 2020, item 1740.

lower age limit under 10. It should be mentioned here that there are unjustified voices in the media that the legislator “wants to punish 10-year-old children.” Quite the opposite – the legislator assumes that all influences of the home and school environment should be applied to children under 10, especially increased parental influence. It is undisputed that the draft law on juvenile delinquency proceedings does not provide for any penalties and does not know the concept of crime and guilt, because juveniles do not commit a crime. The draft law, if a juvenile shows signs of demoralization or has committed a punishable act, only allows the use of educational measures and, in very strictly defined cases, a correctional measure. Proceedings in cases for criminal offenses are possible against persons who have committed such an act after the age of 13, but before the age of 17.

The purpose of the act is to counteract the demoralization and criminality of juveniles and to create conditions for the juvenile’s return to proper functioning in the environment. An important part of the act is also the strengthening of the guardianship and educational functions and the sense of responsibility of parents (Art. 18-20 of the draft law).

The guiding principle of proceeding in cases of juvenile is the welfare of the juvenile and the principle of individualisation (Art. 3, para. 1 and 2 of the draft law). At every stage of the procedure, the court is obliged to take into account the juvenile’s personal characteristics and conditions, in particular the age, health, level of mental and physical development, character traits, and the juvenile’s family situation, the conditions of upbringing and the nature of the environment, causes and degree of demoralization, including type of the prohibited act, as well as the manner and circumstances of its commission. The above-mentioned criteria should be treated as a set of connections constituting the basis for undertaking educational impact. Guided by the juvenile’s best interests, one should strive to achieve favourable changes in the juvenile’s personality and behaviour, and aim at the proper fulfilment of duties by his parents or guardians, taking into account the social interest.

Bearing in mind the principle of opportunism, the family court hosting the proceedings may and will always be able to refrain from instituting proceedings and to discontinue the instituted proceedings, if, due to the juvenile’s personal characteristics, the juvenile should not be liable under the act even after he turns 10 years old (Art. 54 of the draft law).

In addition, the draft law provides for two exceptions to the obligation to notify the court or the police about demonstrating signs of demoralization or committing a criminal act: 1) the headmaster of the school the juvenile attends has the possibility of educational interventions (if, e.g., the juvenile fails to fulfil his compulsory education, behaves negatively on the school premises) – Art. 4, para. 4 of the draft law; 2) the authority conducting the proceedings in the case of an offense (e.g. crossing the red light) may itself apply educational measures – instruction, attention, notification of the school – Art. 4, para. 5 of the draft law.

According to Art. 23 of the draft law, the family court is the host of the proceedings. In Art. 40, para. 2, sect. b, point iii of the Convention on the Rights of the Child, it is referred to the examination of the case of an alleged or accused child without undue delay by a competent, independent and impartial court. This rule was included in the draft law. As a rule, court hearings are held in camera (Art. 29 of the draft law). Decisions, orders, notices and copies of letters to be served on the parties are also delivered to the juvenile's defender (Art. 31, para. 1 of the draft law).

2. Position of the juvenile injured party and his rights

In the draft law, it was decided to expand the provisions ensuring juveniles with standards not lower than those provided for adults. The protection of the juvenile's fundamental rights has been strengthened without the need to resort to procedures other than the civilian's minimum. According to Art. 36, para. 1 of the draft law juvenile has the right: 1) to defence, including the right to use a defender, is granted to a juvenile from the moment of taking the first action with his participation; 2) to submit explanations or answers to individual questions; 3) to refuse to provide explanations or answers to individual questions in cases of demoralization, the manifestation of which is the juvenile's commission of a prohibited act, or in cases of a criminal act; 4) to free assistance of a sign language interpreter, if he is a person referred to in Art. 2, para. 1 of the act on sign language and other means of communication.⁸

⁸ Act of 19 August 2011 on sign language and other means of communication, Journal of Laws of 2017, item 1824.

In addition, the proposed provision introduces the obligation to instruct the juvenile about the rights described above during the first action with his participation. Moreover, the draft law also introduces the rigor expressed in the statement that the lack of instruction or wrong instruction cannot have negative consequences for the juvenile – Art. 36, para. 2 of the draft law.⁹

A juvenile may have no more than three defenders who may take procedural steps only for the benefit of the juvenile, taking into account his legitimate interest.

According to Art. 38, para. 1, if the interests of the juvenile and his parents or the guardian are inconsistent, and the juvenile does not have a defender, the family court will appoint him an *ex officio* defender.

Pursuant to Art. 38, para. 2, if the juvenile has no defender and at the same time: 1) is deaf, dumb or blind or; 2) there is reasonable doubt as to whether his mental health condition allows him to participate in the proceedings or to defend himself in an independent and reasonable manner, or; 3) the juvenile has been subject to a provisional measure referred to in Art. 44, para. 4-8 of the draft law (temporary isolation measures – which is an extension of the catalogue of cases in which a public defender is appointed) or; 4) there is a justified suspicion that the juvenile has committed a prohibited act that would constitute a crime, or; 5) there are other circumstances which the family court finds that make it difficult for the juvenile to defend himself – the family court will appoint an *ex officio* defender.

When a defender is appointed *ex officio*, Art. 81a, para. 1-3 of the Code of Criminal Procedure and the provisions adopted pursuant to Art. 81a, para. 4 of the Code of Criminal Procedure shall apply accordingly.

In addition, the juvenile and his parents or guardian may submit an application for the appointment of an *ex officio* defender of a juvenile. The court will grant the request if the participation of a defender in the case deems it necessary, and the juvenile or parents or guardian are not able to support themselves and their family, or if there are other special circumstances. The

⁹ UN Minimum Rules, known as the Beijing Rules, adopted at the VII United Nations Congress for the Prevention of Crime and Treatment of Offenders, adopted at the UN 40th Assembly in November 1985; Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on September 4, 1950, which Poland ratified on October 2, 1992 with a supplemented protocol (Journal of Laws No. 85, item 427).

appointment of an *ex officio* defender requires him to take procedural steps until the final completion of the enforcement proceedings (Art. 38, para. 3-4 of the draft law). The juvenile defender may view the case files and make copies of them. A family court may refuse to view files and make copies of a juvenile if it is justified by educational reasons (Art. 32, para. 1 of the draft law).

The existing Art. 19 JDP, which has its counterpart in Art. 61 of the draft law. The juvenile guarantees freedom of expression during questioning. The juvenile has the possibility to make a full, unhampered statement of knowledge, in accordance with his will.

The issues related to the application of provisional measures (Art. 42-52 of the draft law) towards juveniles and their detention were also regulated in detail. The draft law contains a wide but closed catalogue of interim measures that the court may immediately revoke or amend if the reasons justifying their application no longer apply. Prerequisites for the application of isolation measures are indicated in detail (temporary placement in a foster family, youth educational centre, educational and adaptational centre, treatment centre, shelter for juveniles). The rules for applying interim isolation measures have been specified, taking into account the ETCP judgment of 30 June 2015 in the case of *Grabowski v. Poland*.¹⁰

A maximum period of application of an interim isolation measure has been introduced – 1 year until the final conclusion of the examination proceedings with the possibility of extending this period by the regional court in particularly specified cases for a definite period of time. The necessity to issue a court decision each time stating the period of stay not longer than 3 months was clarified (Art. 47 of the draft law).

The draft law also modifies the regulation on juvenile detention (Art. 48). It was precisely indicated what instructions should be given to the juvenile, which should be included in the detention record, and the legal basis for lodging a complaint against detention was introduced. If the juvenile makes such a request, the juvenile should be allowed to contact the parents, guardian or defender, and to contact the defender without the participation of third parties. Juveniles should also be immediately questioned and released and handed over to their parents or guardian, if the reason for detention has

¹⁰ Application No. 57722/12.

ceased. The detention of a juvenile by the police is subject to a complaint to the competent family court, which is obliged to examine it immediately.

The need to preserve a juvenile who has been examined by the police has been combined in Art. 61 of the draft law. This operation should be performed in the presence of at least one of the parents on parental responsibility.

Obtaining an opinion about a juvenile by opinion-forming teams of forensic specialists and at least 2 expert psychiatrists, when the need for an opinion on the mental health condition is revealed, was also specified in detail. The procedure and duration of observation of a juvenile in a medical institution were specified – not longer than 4 weeks with the possibility of exceptional extension to 6 weeks (Art. 65 of the draft law).

The draft regulates comprehensively, similarly to the Code of Civil Procedure, the cases of admissibility of a complaint in examination proceedings (Art. 83, para. 1 of the draft law), and in the unregulated area the provisions of the Code of Civil Procedure also apply (Art. 27 of the draft law).

A juvenile has the right to a public hearing, is covered by the principle of innocence, has the right to defence and the right to appeal against the decision on the application of an educational, therapeutical or correctional measure to a court of second instance by way of an appeal. The draft law indicates that if an appeal is brought by a juvenile, it applies to the entire decision and is free of charge. It also contains the principle of *reformationis in peius*, although to a limited extent – if non-custodial educational measures were applied to a juvenile in the first instance and the appeal does not contain an application for a judgment of an isolation measure, this measure cannot be adjudicated as a result of the appeal procedure (provisions governing appeal proceedings – Art. 78-82 of the draft law).¹¹

When developing the draft law on juveniles, attention was paid first of all to the child's subjectivity and the need to ensure its proper development and personality shaping, while respecting its identity, dignity and privacy.

For this purpose, the range of educational measures was also expanded by introducing a new educational measure, which is an educational and adaptational centre. The draft law specifies in detail the conditions and pro-

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6.

cedure for placement, and defines the rights and obligations of juveniles who have been granted an isolation educational measure (placement in a youth educational centre, educational and adaptational centre, treatment centre, correctional centre, juvenile shelter). Until now, this issue was mostly regulated at the level of departmental executive acts or statutes.

The new regulation of enforcement proceedings ensures effective enforcement of judgments. So far, the provisions on enforcement proceedings have been largely regulated in regulations issued under JDP. Recognizing that enforcement proceedings are equivalent to investigative proceedings, as they jointly constitute one coherent whole, it has also been regulated in JDP.

The enforcement proceedings are initiated immediately when the judgment has become enforceable, however, when the measures under Art. 7, points 7-11, Art. 8, Art. 9 and Art. 18, para. 1 and to impose the financial penalty referred to in Art. 19, para. 1 and 2, their enforcement takes place after the judgment becomes final.

The main purpose of executive proceedings still remains the rehabilitation and readaptation of juveniles. What is new is the definition of the purpose of the therapeutical measure. The draft law emphasizes that its main purpose is to improve the juvenile's health.

According to Art. 31, para. 3 of the Constitution of the Republic of Poland,¹² restrictions on the exercise of rights may be established only by act and only when it is necessary for the safety or public order, or for the protection of the freedoms and rights of other people. The existing regulations on the rights and obligations of juveniles staying in centres were considered unconstitutional, as most of them were contained in regulations, bye-laws or statutes of centres. Currently, the draft law regulates in detail the statutory matter of the rights and obligations of juveniles placed in youth care centres, educational and adaptational centres, correctional centres and shelters for juveniles. Introducing a uniform catalogue of rights for all centres where juveniles stay on the basis of a court decision will set the standards for their functioning.

The draft law states in Art. 107 that the juvenile has the right to: respect for personal dignity; respect for privacy, with limitations resulting from the

¹² Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, item 114 as amended.

type of centre; protection against physical and psychological violence, exploitation and abuse and all forms of cruelty; exercising religious freedom; access to health services; protection of family ties; education; get acquainted with the rights and obligations imposed on them; access to information about the statute or regulations in force in the centre, awards, penalties and disciplinary measures; information about the course of the rehabilitation process; contact with family members and other relatives and other people through visits, correspondence and using other means of distance communication, including electronic means of communication; contact with a defender or representative without the participation of other persons; receiving cash and parcels; obtaining psychological, pedagogical and therapeutical help; manifesting one's own activity in acquiring knowledge and skills; participate in classes organized in the centre and, with the consent of the director, also outside the centre; food adapted to developmental needs; clothing, underwear, shoes, school supplies, equipment and cleaning products; use the rest necessary for health, and dispose of funds with the consent of the director of the centre; submitting a complaint about activities violating his rights and submitting complaints and applications. An important supplement to the regulation is Art. 111 of the draft law, setting the framework for exercising one's rights – i.e. it may not violate the rights of other people or disturb the internal order established in a given centre.

The periods of application of educational, therapeutical and educational measures and a correctional measure as well as the possibility of withdrawing, interrupting or postponing its implementation remain unchanged. The draft law also provides for the possibility of discontinuing the procedure when its further conduct has become unnecessary or a change of the educational measure in both directions.¹³

When analysing the issues related to the protection of a child in the draft law on juvenile delinquency proceedings, one cannot ignore the juvenile injured party, because due to the specific nature of the proceedings, in a large number of cases of demoralization or committing a punishable act, the injured party is a juvenile.

¹³ UN Minimum Rules, Art. 17.4, 18.1, 23.1, 23.2.

The position of the juvenile injured party in the draft law is a duplication of the previous act. Although JDP does not grant the injured person the status of a party, it pays a lot of attention to him and provides him with tools to protect his rights. The status of a juvenile injured party does not differ from that of an adult injured party. Juvenile act through their statutory representative, legal guardian or a person under whose care they remain. It also has the right to appoint a representative. Art. 32, para. 2 of the draft law grants him, with the consent of the court, the right to review the files and make copies of them, except for environmental interviews and opinions about the juvenile.

The draft law in question also meets the requirements of directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography.¹⁴ The draft law in Art. 28 is based on the provisions of Art. 185a and 185b of the Code of Criminal Procedure. Moreover, it points out that the provisions of Art. 185c, 185d, para. 1 of the Code of Criminal Procedure apply accordingly. Both the principle of one-time questioning of a juvenile injured party as a witness and the method of carrying out this activity (excluding the participation of an under-age from it) ensures appropriate protection for the juvenile injured party, comparable to protection in criminal cases.

The decision to initiate the proceedings is served on the disclosed injured party with information on his rights and obligations (Art. 53, para. 3 of the draft law). Then, the effect of notifying the injured party about the date of the hearing is to allow him to be present at it. At the hearing, the injured party may ask questions during the taking of evidence admitted at his request. However, the presence of the injured party at the trial is excluded if it is contrary to the under-age's welfare or educational reasons. This corresponds to Art. 59, para. 2 of the draft law, which grants the injured party the right to submit evidence motions for the commencement of the hearing. In addition, participation in the hearing allows the injured party to become familiar with the course of the hearing, as well as the protocols and documents to be read or restored, if he requested it (Art. 71, para. 3 of the draft law). Moreover, it is possible to read the ruling concluding the proceedings in the case.

¹⁴ 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/JHA.

Art. 84, para. 1 of the draft law contains a catalogue of cases in which the injured party is entitled to a complaint. These are those decisions which end the proceedings in the case without applying any measures (non-initiation of proceedings, discontinuation of proceedings), suspend their course (suspension of proceedings) or limit the scope of the injured party's procedural rights (refusal to admit the attorney-in-fact to participate in the proceedings).

It should be emphasized that the draft law on juvenile delinquency proceedings provides the same guarantees to under-age and juvenile injured parties as adults are entitled to on charges of committing a crime. Supervision over the enforcement of judgments is exercised by a family judge (Art. 143 of the draft law).

Conclusion

Finally, it should be noted that the draft law introduces a new educational measure, which is an educational and adaptational centre. It also introduces the foundations for organizing homes for mothers and children in designated youth care centres and defines the rules for placing and staying in mother and child homes by juvenile mothers and their children (Art. 134-140 of the draft law).

In addition, it contains a comprehensive regulation of the implementation of a therapeutical and educational measure, including the appointment of a referral committee to the appropriate hospital and the recognition of complaints regarding the prolongation of this measure.

Under the current legal framework, all the prohibited acts of a juvenile (described in the Penal Code, the Code of Practice for Petty Offences or other acts), regardless of the age of the juvenile, are submitted by law enforcement to the juvenile court. This places a heavy burden on family and juvenile departments. According to the draft law, children under the age of 10 who show signs of demoralisation or have committed a criminal act will be subject to educational influence in the environment (school, family, social welfare authorities and, in a special situation, their parents within the limits of their parental authority).

The draft law increases the procedural guarantees of juvenile perpetrators of criminal offenses and perpetrators of acts of demoralization, sufficiently

secures the interests of juvenile injured party and comprehensively regulates the procedure, which has a direct impact on its economy.

REFERENCES

Bee, Helen. 2004. *Psychologia rozwoju człowieka*. Poznań: Zysk i S-ka.

Protection of Children's Rights in the Draft Law on Juvenile Delinquency Proceedings

Summary

The act on juvenile delinquency proceedings has been functioning in the Polish legal system for over 36 years. During this period, it was amended 24 times. The need for a new regulation of the act was noticed already several years ago, taking into account the serious changes that took place in social life, primarily in the area of life of children and youth. Legislative work is currently underway to amend the act. In this article, the procedural guarantees contained in the draft law on juvenile delinquency proceedings are analysed in detail and the legal position of the juvenile injured party is explained.

Key words: juvenile injured party, procedural guarantees, children's rights

Ochrona praw dziecka w projekcie ustawy o postępowaniu w sprawach nieletnich

Streszczenie

Ustawa o postępowaniu w sprawach nieletnich funkcjonuje w polskim porządku prawnym ponad 36 lat. W tym okresie 24 razy była nowelizowana. Potrzebę nowej regulacji ustawy dostrzeżono już kilkanaście lat temu, uwzględniając poważne zmiany, jakie nastąpiły w życiu społecznym, przede wszystkim w obszarze życia dzieci i młodzieży. Aktualnie trwają prace legislacyjne nad zmianą ustawy. W niniejszym artykule szczegółowej analizie poddano gwarancje procesowe zawarte w projekcie ustawy o postępowaniu w sprawach nieletnich oraz wyjaśniono pozycję prawną małoletniego pokrzywdzonego.

Słowa kluczowe: małoletni pokrzywdzony, gwarancje procesowe, prawa dziecka

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