PROTECTION OF THE RIGHTS OF CRIME VICTIMS IN THE ACTIVITY OF THE HUMAN RIGHTS DEFENDER

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1. Enforcement of victims' rights in practice

Strength and quality of a democratic state under the rule of law is best measured by its attitude to the most vulnerable persons or those in a dramatic situation, such as victims of crime. Fair proceedings must ensure and respect not only the rights of the suspect and the accused, but also the rights of the victim, at each stage of the proceedings, including the pre-trial stage. It is important that the rights of victims are not only guaranteed by the letter of the law, but are also enforceable in practice. They must be appropriately, i.e. clearly and explicitly, communicated to victims so that they could understand them correctly. Therefore, it is not only precise legal regulations on the rights of victims that are extremely important, but also adequate education of citizens, psychological assistance, protection of victims during proceedings, friendly and empathic approach to victims by competent state services, and, most of all, professional legal assistance for victims.

It is a cliché to say that persons affected by crime are in an extremely traumatic and stressful situation and, in most cases, in need of both psychological and legal assistance. However, the instruction about the rights of victims which they receive on a specific form is overloaded with information and thus often incomprehensible and unclear to the victims. It contains 4 pages in small print and consists of 44 points. Victim sign the instruction form, thus declaring that they have been advised about their rights and obligations, but this is not necessarily the case. Assistance of a professional lawyer is therefore indispensable.

Furthermore, as emphasized by the Human Rights Defender[1] in her petitions to the Minister of Justice[2], the obligation to inform the victims about their rights is not always properly fulfilled by law enforcement agencies, resulting in the victims lacking exhaustive information about their rights and obligations. In the preparatory proceedings, only the suspects have their general right ensured to receive complete information about their rights and obligations prior to the first examination (cf. Article 300 of the Code of Penal Procedure[3]). Although the authorities conducting the proceedings have an obligation to advise the victim in a specific procedural situation, this does not remedy the deficit of a statutory guarantee to provide complete procedural information to the victim. The Defender points out that the obligation to provide

[1] Hereinafter also: the Defender, the HRD.
[2] Cf. petition of 9 August 2011, file No RPO-513323.
[3] Dz. U. No 89, item 555, as amended; hereinafter also CPP.

the form entitled "Instruction on the victim's basic rights and obligations" and collect the declaration of the victim that he/she acquainted himself/herself with the instruction is still misinterpreted as the fulfilment of the obligation to appropriately advise the victims about their rights and, due to the way of providing such information, victims often remain passive and helpless in penal proceedings, as evidenced by the complaints submitted to the Defender. Therefore, the Defender asked the Minister of Justice to consider an initiative to amend Article 300 of the Code of Penal Procedure, in order to impose an obligation on authorities conducting preparatory proceedings to advise the victims about their rights, providing them with complete and comprehensible information, as well as to consider an amendment to the current wording of the instructions to make them exhaustive and comprehensible to an average reader. Article 300 of the Code of Penal Procedure is to be amended by introducing, as from 1 July 2015, pursuant to the Act of 27 September 2013 amending the Act - Code of Penal Procedure and certain other acts (Dz. U. of 25 October 2013 item 1247), the new § 2[4], which provides for an obligation to advise the victims about their rights, including the right to have a counsel of choice and to file a request for a court-appointed counsel[5].

2. Victims' access to legal assistance

As regards the issues related to victims' access to legal assistance, the Polish Code of Penal Procedure provides for the right to use the assistance of a counsel, who can be an attorney or a legal counsellor (cf. Article 87 and Article 88 of the Code of Penal Procedure), as well as for the right of the injured party to apply for a court-appointed counsel if the party can duly prove that he/she is unable to pay the costs of such a counsel without detriment to his/her and his/her family's necessary support and maintenance (cf. Article 88 and Article 78 § 1 of the Code of Penal Procedure). Therefore, when decisions are issued based on evaluative grounds, the risk of errors cannot be eliminated and, what is important, there are currently no means of appeal against the decision of the court president refusing to appoint a counsel.[6] The above

[4] Pursuant to § 2 of Article 300 of the Code of Penal Procedure which is to enter into force: "Prior to first examination, an injured party shall be advised of having a status of a party to the preparatory proceedings and of the resulting rights, in particular to submit motions for actions in inquiry or investigation and conditions of participation in such actions specified in Article 51, Article 52 and Articles 315-318, to use the assistance of a counsel, including to file a request for a court-appointed counsel in the circumstances referred to in Article 78, to acquaint himself/herself finally with the materials of the preparatory proceedings, as well as of the rights specified in Article 23a § 1, Article 87a and Article 306 and on the obligations and consequences specified in Article 138 and Article 139. These instructions shall be given to the injured party in writing; the injured person shall confirm receipt of the instructions with his/her signature." However, pursuant to § 3 of Article 300 of the Code of Penal Procedure: "The Minister of Justice shall specify, by ordinance, the templates of written instructions referred to in § 1 and 2, taking into account the need for the persons not using the assistance of a counsel to understand the instructions."

[5] If he/she duly proves in the preparatory proceedings that he/she is unable to pay the costs of a counsel without detriment to his/her and his/her family's necessary support and maintenance, which is described in detail further on in the text.

[6] In its judgment of 8 October 2013, file No K 30/11 (OTK-A of 2013 No 7, item 98), the Constitutional Tribunal granted the application of the Human Rights Defender (the author of this article drew up the draft application of the HRD) and adjudicated that Article 81 § 1 of the Code of Penal Procedure, insofar as it did not provide for an appeal against a decision issued by the president of a given court to refuse the ex officio appointment of

issue will become even more important when on 1 July 2005 the changes to penal proceedings enter into force, since they transform penal proceedings into a more adversarial process and in practice shift the responsibility for the result of the proceedings from the court onto the parties. The representation of the victim by a professional counsel will be of fundamental importance. However, while the amended regulations stipulate that at the stage of trial the injured party will have the right to request a court-appointed counsel, regardless of his/her financial situation (cf. Article 87a of the Code of Penal Procedure[7]), the appointment of such a counsel in preparatory proceedings will still take place on evaluative grounds (i.e. when the injured party duly proves that he/she is unable to pay the costs of such a counsel without detriment to his/her and his/her family's necessary support and maintenance).

It must be emphasized that the first stage of proceedings (pre-trial) is extremely important and may have a bearing on the entire proceedings, including the outcome. Therefore, there are serious and justified doubts as to whether the victims' rights of access to professional legal assistance are duly guaranteed, both in the current legal situation and in the legal situation as from July 2015. The doubts are further enhanced by the absence of a comprehensive system of legal assistance for the poor in Poland, which has been the subject of numerous petitions of the Human Rights Defender to the Minister of Justice over many years (cf. multiple petitions of the HRD in the years 2004-2013[8]). In the petitions, the Defender pointed to the need for a complete reform of the system of legal assistance provision to the poorest citizens and emphasized that such legal assistance should also include out-of-court legal counselling. The current legal system does not provide any systemic solution for free-of-charge legal counselling concerning extrajudicial actions. The Defender stressed that, from the very beginning, the experience of the Office of the Human Rights Defender revealed an urgent need for providing free-of-charge legal counselling in numerous cases before bringing them to court. All justified needs of the society may be satisfied only by the legal assistance system operating based on the principle of continuity and providing access to professional, free-of-charge legal advice to citizens with limited financial means in a situation where it is justified by the need to protect the legal status of the given individual. In her petitions, the Human Rights Defender called for appropriate legislative action to create a systemic regulation on free-of-charge legal assistance, in particular to introduce into the Polish legal system a real possibility for the poorest citizens to

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a defence counsel for a party who had filed a request in accordance with Article 78 § 1 of the Code of Penal Procedure, was inconsistent with Article 42(2) in conjunction with Article 45(1) and Article 78 of the Polish Constitution; and that Article 78 § 2 of the Code of Penal Procedure, insofar as it did not provide for appeals against a decision of the court to revoke the ex officio appointment of a defence counsel, was inconsistent with Article 78 in conjunction with Article 42(2) of the Constitution. The judgment is scheduled for enforcement.

[7] Pursuant to Article 87a of the Code of Penal Procedure which is to enter into force: "§ 1. At the request of other party than the accused, who does not have a counsel of choice, the court president, the court or a court referendary shall *ex officio* appoint a counsel. § 2. The provision of § 1 shall apply accordingly to the appointment of a counsel to perform a specific procedural act in the course of court proceedings. § 3. The party shall be advised of the right to file a request and of the fact that, depending on the outcome of the trial, the party may have to pay the cost of *ex officio* appointment of the counsel, upon delivery of the notice about the date of trial or hearing referred to in Article 341 § 1, Article 343 § 5 and Article 343a. § 4. The repeated appointment of the counsel in line with the procedure referred to in § 1 and 2 is possible only in particularly justified cases".

[8] Case with ref. No RPO-481256, which is continued by the Office of the HRD until now.

obtain legal assistance at the pre-trial stage.[9] The Ministry of Justice agreed with the Defender that the reform of the current system of providing legal assistance to the poorest citizens was justified and necessary due to the lack of a common and coherent system of free-of-charge legal assistance at the pre-trial stage in the Polish legal system.[10] Regrettably, the reform has not been introduced yet.

3. Mediation in criminal cases

Another persisting problem is the need to increase the role of mediation in criminal cases. The legal doctrine stresses that a special advantage of mediation for the victim is that "it restores autonomy and dignity to the victim, prevents - by means of participation and inclusion in the discussion - the feeling of abandonment and isolation which occurs if the case is examined in the traditional penal law system, it allows to obtain information from the perpetrator, to receive compensation for damages and offers an opportunity to express one's feelings and to obtain help in reaching a constructive agreement."[11] However, the statistics of the Ministry of Justice show that the use of mediation is insignificant. Moreover, it is decreasing. In 2006, 5052 cases were submitted for mediation, while in 2011 the figure fell to 3251 and in 2012 it stood at 3252.[12] There are numerous reasons for this, but it primarily results from the lack of confidentiality of the proceedings and the lack of trust in entities conducting mediation. Therefore, the new Article 23a § 7 of the Code of Penal Procedure, which stipulates that mediation shall be impartial and confidential and will enter into force pursuant to the abovementioned Act of 27 September 2013, is a welcome amendment. It should be noted that in her petitions to the Minister of Justice[13], the Human Rights Defender on several occasions called for wider accessibility of mediation and its new role in penal cases. In the petitions, the Defender proposed to provide an opportunity to submit a case for mediation before the decision on laying charges is issued, to introduce mediation in proceedings concerning petty offences, to initiate legislative work on the Act on the profession of mediator, analogous to the Act on the profession of probation officer, and to introduce mediation at the stage of enforcement proceedings. As regards the last proposal, in her petition to the Minister of Justice of 20 January 2011[14], the Defender emphasized that the introduction of mediation at the stage of enforcement proceedings might be significant for both the perpetrator and the victim. On the one hand, mediation may fulfil a role of restorative justice for the victim by compensating,

[9] Cf. petition of the HRD of 23 May 2013; RPO-481256-IV/04/AGR.

[10] Cf. e.g. replies of the Minister of Justice of 13 September 2004 (P.II. 4308/727/04) or 13 June 2013 (DPK-II-454-57/13/9).

[11] E. Bieńkowska, *Wdrażanie instrumentów sprawiedliwości naprawczej w sprawach karnych: standardy międzynarodowe* [Implementation of restorative justice instruments in penal cases: international starndards] [in:] *Mediacja w praktyce prokuratorskiej – dziś i jutro* [Mediation in prosecutors' practice - today and tomorrow], L. Mazowiecka (ed.), Warsaw 2012, p. 33 and the literature quoted therein.

[12] "Postępowania w sprawach karnych w sądach powszechnych zakończone w wyniku postępowania mediacyjnego w latach 1998 – 2012" [Proceedings in penal cases in common courts finished as a result of mediation in the years 1998-2012]; publ. http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/.

[13] Cf. the petition of the HRD in the case RPO-458685, e.g. of 7 June 2010; or in the case RPO- 618035.

[14] Case RPO- 618035.

at least partially, the injuries sustained. On the other hand, mediation may act as rehabilitation for the perpetrator allowing him to understand the consequences of his actions and to remedy them. In reply to the said proposal, the Minister of Justice[15] stated that widespread use of mediation in enforcement proceedings was controversial due to fears of possible repeat victimisation of victims and the lack of interest on the part of victims to meet the perpetrators. Therefore, the initiation of legislative work in this regard should be preceded by an analysis of reasonability of introducing mediation at this stage of proceedings and of its scope. In her petitions relating to mediation, the Defender pointed to the need to introduce compulsory training for mediators, their regular assessment and the dismissal procedure.[16] The absence of compulsory trainings results in each social or professional organisation having its own mediator appointment standards. In the opinion of the Defender, this has an adverse impact on professionalization of mediation services. The Defender pointed to the Ordinance of the Minister of Justice of 18 May 2001 on mediation in cases concerning juveniles[17] as a possible source of standards. It is important that the Ordinance stipulates that mediation proceedings in cases concerning juveniles are confidential (§ 12 of the Ordinance) and mediation may be conducted by appropriately trained mediators (§ 8 of the Ordinance[18]). The trainings, comprising both theory and practice, are delivered in line with the standards laid down in the Annex to the Ordinance. The Annex to the Ordinance entitled "Mediator training standards" consists of two sections. The first section lists the subjects to be covered by the training (thematic areas concerning legal and organisational aspects of mediation between the injured party and the perpetrator of a prohibited act; psychological mechanisms of emergence, escalation and resolution of conflicts; training in mediation skills), while the second focuses on requirements for institutions and instructors delivering the training for mediators, including the qualifications of instructors and requirements concerning the organisation of training.

In the opinion of the Defender, adoption of similar standards for mediators in criminal cases could contribute to increasing the qualifications of mediators, encourage judges and counsels representing the parties to resort to mediation more frequently and could have a positive impact on its effectiveness. In reply[19], the Minister of Justice stated that actions had been undertaken to popularise mediation among both the authorities conducting the procedures and the parties to the dispute or penal conflict. The actions focus on two areas, namely, on popularisation of mediation and building the network of coordinators for mediation and on trainings for judges, referendaries, probation officers and the employees of customer service centres and registry offices.

[15] Letter of 3 March 2011; DPC-V-072-I/II/3.
[16] Cf. petition of the HRD of 27 June 2011; RPO-458685.
[17] Dz. U. of 2001, No 56, item 591.
[18] Pursuant to § 8(1) of the Ordinance, "the training of mediators consists in learning about the issues related to mediation proceedings and obtaining the knowledge required to act as a mediator."
[19] Letter of 29 July 2011; DPC V 072 - 3/11/3.

4. Vulnerable victims

"Vulnerable victims", e.g. children who are victims of crime, are a particular concern of the Human Rights Defender. The Defender welcomes the legal solutions aimed at preventing multiple, arduous interrogation of minors[20] and an increasing number of the so-called "friendly interview rooms" ("blue rooms"[21]; in 2013 there were 65 such rooms[22]), including appropriate rooms for interrogation of crime victims with two-way mirrors and video and audio recording equipment. The possibility to present the suspect in a way excluding the possibility to identify the victim is an important factor for preventing secondary victimisation. Therefore, all Police units should be appropriately equipped (e.g. in two-way mirrors) to conduct such procedures.

Regrettably, the persisting problem is the lack of appropriate procedures for granting professional legal assistance to minors in penal cases where a parent of the minor is the accused. Guardians assigned to minors in such cases often lack the required legal knowledge which may adversely affect the legal situation of such injured parties in the proceedings. The Defender addressed the Minister of Justice[23] on this issue, but no amendments have been

[20] Article 185a of Code of Penal Procedure (in its current wording, in effect from 27 January 2014) stipulates that in cases arising out of offences committed with the use of violence or unlawful threats or specified in Chapters XXIII, XXV and XXVI of the Penal Code, the injured party who, at the time of the examination, was younger than 15 years, should be examined in the capacity of witness only if his testimony may be important for resolution of the case and only once, unless new essential circumstances are disclosed whose elucidation requires repeated examination or when it is demanded by the accused who had no defence counsel at the first examination of the injured person. Furthermore, the amended provision stipulates that apart from an expert psychologist, the prosecutor, defence counsel, attorney of the injured party and the person specified in Article 51 § 2, an adult indicated by the injured party referred to in § 1 of the said provision may also participate in the proceedings, provided that it does not preclude the possibility of free expressions of the examined person. In addition, § 4 of the said Article extends the scope of application of the special examination procedure for minor victims who finished 15 years of age at the time of examination. The minor victim is interviewed in the conditions specified in § 1-3, if there is a reasonable fear that the examination in other conditions could have an adverse impact on the minor's mental state. The aim of the regulation is to enhance protection of minors against secondary victimisation, which is to be accomplished also due to introducing an obligation for the accused to have a defence counsel and video and audio recording of the interview with the minor. The above changes implement the Directive 2011/92/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 in terms of strengthening the protection of minor victims.

[21] The Human Rights Defender has actively promoted the creation of the so-called "blue rooms" and has been a member of the Coalition for Child Friendly Interrogation, established in 2007 upon the initiative of the Nobody's Children Foundation.

[22] According to statistical data of the Police, the total number of "friendly rooms (as of 13 September 2012) was 344 (238 in the Police units), of which the certified rooms – 59 (11 at the Police units); source: http://www.policja.pl/download/1/100549/NiebieskiepokojenamapiePolski.pdf.

[23] Cf. petition of the HRD of 29 June 2012 (RPO-685058) where the Defender pointed, *inter alia*, to a more general, systemic problem of procedural representation of persons who for any reason cannot participate in court or administrative proceedings. Complaints submitted to the Office of the Defender reveal frequent problems with finding appropriate candidates for representatives, i.e. those who wish to perform the function responsibly and with commitment. The Defender pointed out that the represented persons are particularly exposed to damage, since they cannot act on their own. The complaints submitted to the Defender suggest that in such cases it is often the members of the family of the represented person or employees of court administration that are appointed as representatives. Those persons usually do not have professional qualifications to manage property and to conduct

introduced to the law thus far. The fact which needs to be emphasized is the need to implement the signal decision of the Constitutional Tribunal of 11 February 2014 (file No S 2/14[24]), where the Tribunal, having analysed the constitutionality of Article 51 § 2 of the Code of Penal Procedure[25], pointed to the necessity to undertake legislative action aimed at eliminating irregularities in penal proceedings, where minors, who are victims of crime committed by their parent or parents, are represented by a guardian appointed by a guardianship court. In the opinion of the Tribunal, the Polish law currently grants the courts extensive discretion in selecting the person to represent a minor in court proceedings, including penal proceedings; general regulations in the Family and Guardianship Code do not ensure appropriate level of representation of a minor in court proceedings, including penal proceedings, and therefore a specific regulation is necessary to introduce requirements for persons appointed as guardians in such cases. The Constitutional Tribunal stated that "the failure to undertake legislative actions aimed at eliminating the said gaps creates a risk of inadequate representation of minors by their appointed guardians and may lead to establishment of a constant, repeated and common practice infringing the rights of children in court proceedings".

It is impossible to list all actions of the Human Rights Defender aimed at guaranteeing and enforcing the rights of victims of crime[26], also to ensure their access to professional legal

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another person's affairs in offices and courts which means that they can cause damage (to property or person) to the represented person and incur financial liability due to inappropriate performance of their obligations.

[24] OTK-A of 2014 No 2, item 19.

[25] In its judgment of 21 January 2014 (file No SK 5/12), the Constitutional Tribunal adjudicated that Article 51 § 2 of the Act of 6 June 1997 – the Code of Penal Procedure in conjunction with Article 98 § 2(2) in conjunction with Article 98 § 3 in conjunction with Article 99 of the Act of 25 February 1964 – the Family and Guardianship Code (Dz. U. of 2012 item 788, as amended), insofar as they stipulated that a parent of a minor – acting as the child's statutory representative – might not exercise the rights of the minor when the child was the aggrieved party in criminal proceedings against the other parent, and introduced an obligation to appoint a guardian for that purpose, were consistent with Article 47 in conjunction with Article 51(1), Article 48(2) in conjunction with Article 32(1) and Article 72(1) of the Constitution of the Republic of Poland, as well as were not inconsistent with Article 45(1) in conjunction with Article 32(1) and Article 72(3) of the Constitution.

[26] Actions which must be mentioned here include the motion of the HRD to the Constitutional Tribunal to declare Article 55 § 1 of the Act - Code of Penal Procedure, insofar as it does not specify the deadline for filing subsidiary indictment to be the final deadline, to be inconsistent with Article 45(1) and with Article 2 of the Constitution (RPO-628295); petition of the HRD to the Minister of Justice concerning Article 118 § 2 of the Petty Offences Procedure Code, insofar as it stipulates that in cases where an auxiliary prosecutor filed a motion and the penal proceedings were discontinued due to limitation of charges the costs of the proceedings must be covered by the auxiliary prosecutor (RPO-747033); participation of the HRD in the proceedings concerning constitutional complaint SK 65/13, where the HRD presented an opinion that Article 56 § 3 of the Act - Code of Penal Procedure, insofar as it does not allow to appeal against the decision issued pursuant to Article 56 § 2 of the Code and referring to the auxiliary prosecutor referred to in Article 54 of the Code, is inconsistent with Article 45(1) in conjunction with Article 78 in conjunction with Article 176(1) in conjunction with Article 31(3) of the Constitution (RPO-751005); participation of the HRD in the proceedings concerning constitutional complaint SK 22/13, where the HRD presented an opinion that Article 339 § 5 of Code of Penal Procedure in conjunction with Article 54 § 1 of the Code of Penal Procedure, insofar as it does not provide for the right of the injured party to participate in the court hearing on discontinuation of the proceedings before the trial, while the injured party has the right to submit a declaration that he will act as an auxiliary prosecutor until the court proceedings at the main trial begin, is inconsistent with Article 45(1) in conjunction with Article 2 of the Constitution (RPO- 732495), or the

assistance. A lot remains to be done and the situation of crime victims in criminal cases is expected to significantly improve as a result of implementation of the European Union law, including 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.

5. Protection of victims as an obligation

Summing up, it needs to be stressed that the protection of the rights of crime victims is an obligation of the democratic state under the rule of law which should make every effort possible to prevent secondary victimisation and protect the dignity of victims. The obligation to protect the dignity of victims and their family members is enshrined in the abovementioned Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012. In the Polish legal system, the Penal Code provides for respecting the dignity of only the perpetrators, ignoring their victims[27] which, in the opinion of the Human Rights Defender, is discriminatory and unacceptable in the democratic state under the rule of law. Therefore, the Defender asked the Minister of Justice[28] to consider the introduction of a provision imposing an obligation to respect the dignity of victims of crime into the penal procedure. With satisfaction, it must be specified that the Minister of Justice shared the view of the Ombudsman in this regard and in the letter of 15 May 2014[29], admitted that one of the major assets of the victim, which should be protected, is her/his dignity and pointed out that it is possible to concretize the constitutional standard of art. 30 of the Constitution, by including it among the purposes of criminal proceedings. Minister of Justice suggested that this might occur by supplementing the content of art. 2 § 1 item 3 of the Code of Criminal Procedure of the norm expressing the obligation to respect the dignity of the victim. Minister of Justice emphasized that such a change will be the subject of analysis in the further development of the above-cited law.

petition to the Minister of Justice on the lack of the possibility for the injured party to read the files of the case, after the completion of explanatory activities, where the authorised body does not file charges to the court (RPO-676881), and numerous more on the subject.

[27] Article 3 of the Penal Code stipulates that "penalties and other measures provided for in the Code shall be applied with a view to humanitarian principles, particularly with the respect for human dignity". Pursuant to Article 2 § 1(3) of the Code of Penal Procedure, the provisions of the Code aim at establishing the rules of penal procedure ensuring that legally protected interests of the injured party are secured. The interests of the injured party must be secured in a way respecting their dignity.

[28] Petition of the HRD of 15 April 2014, file No II.518.24.2014.MK; the draft petition was drawn up by the author of this article.

[29] Cf. e.g. replies of the Minister of Justice (DPK IV 072-2/14/3).