

RIGHT TO APPROPRIATE REPRESENTATION OF DEFENDANTS WITH INTELLECTUAL DISABILITIES IN CRIMINAL PROCEEDINGS

KATARZYNA GIRDWOYŃ*

DOI: 10.26399/iusnovum.v14.3.2020.26/k.girdwoyn

There is no doubt that people with mental and intellectual disabilities who are parties to criminal proceedings should be ensured opportunities to exercise their right to equal treatment of all citizens.¹ Apart from Article 32 of the Constitution of the Republic of Poland, this results directly from Article 13 of the Convention on the Rights of Persons with Disabilities, which obliges States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participation, including as witnesses, in all legal proceedings, including at investigations and other preliminary stages.² The necessity of taking into account the disability of victims is also emphasised in 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.³

Intellectual disability of persons who are subject to criminal proceedings⁴ means that they are covered by the definition of suspected or accused persons who require special treatment. The Preamble to the Commission Recommendation of

* PhD, Assistant Professor at the Criminal Procedure Department, Faculty of Law and Administration of the University of Warsaw; e-mail: k.girdwoyn@uw.edu.pl; ORCID: 0000-0002-2788-8308

¹ Compare K.L. Paprzycki, *Osoba niepełnosprawna psychicznie w prawie i postępowaniu karnym. Zarys problematyki*, Forum Iuridicum 2, 2002, pp. 107–111, 119.

² Dz.U. 2012, item 1169.

³ OJ L 315, 14.11.2012, p. 57.

⁴ The article presents a deepened analysis of some theses presented in a conference paper at the 9th Convention of Criminal Procedure Departments: *Quo vadit processus criminalis? Proces karny sensu largo – rzeczywistość i wyzwania*, Łódź 16–18 September 2019.

27 November 2013⁵ devoted to this category of participants to criminal proceedings indicates that it applies to all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities. Moreover, the act lays down the necessity of presuming particular vulnerability of persons suspected or accused in criminal proceedings. However, although the act is declarative in nature, it does not remain only in the declarative sphere. The need to grant those people additional rights was also expressed in several directives of the European Parliament and of the Council.⁶

The content of the above-mentioned regulations and standards laid down in them aimed at ensuring that accused persons with intellectual disability have relevant safeguards justifies the attempt to assess relevance of Polish solutions in the context of appropriate procedural representation. The analysis will cover two most important aspects: firstly, theoretical and practical issues concerning granting intellectually disabled persons legal assistance will be analysed not only through the prism of statutory solutions but also recommendations addressed to law enforcement bodies. Secondly, the article will present the analysis of national provisions concerning the participation of an appropriate adult in proceedings involving this category of suspects or accused persons in the light of the Commission Recommendation. Apart from the comparison of regulations concerning the representation of a victim and the accused when they fulfil the criterion of 'a vulnerable person' but are not legally incapacitated, an institution of a temporary advisor envisaged in civil procedure will also be mentioned. The discussion presented in the article justifies a statement that the existing regulations are not sufficient to ensure that people with intellectual disability get real legal support and that there is no regulation of grounds for and participation of a person taking care of an accused intellectually disabled person in procedural activities.

The findings of empirical research show that the issues are not just theoretical in nature. Although there are no up-to-date statistics concerning the situation in

⁵ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (OJ C 378/02, 24.12.2013, p. 8); hereinafter Commission Recommendation.

⁶ Apart from Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1), which is beyond the scope of analysis in this article, although they should be classified as a category of people requiring special support, these are: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1); Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

Poland⁷ showing the scale of the phenomenon, the data of 1983 indicate that ca. 40% of convicts were recognised as suffering from some type of mental disability.⁸ It should be emphasised here that although the Act on the protection of mental health⁹ includes mentally impaired persons in the category of persons with psychological disorders, the above-mentioned statutory term, though still quite commonly used in legal literature and case law, is subject to criticism in medical literature.¹⁰ That is why, a term of 'intellectual disability' (ID) is used instead of 'mental impairment', 'intellectual retardation' or 'general learning disability'.¹¹ As Piotr Gałęcki and Kinga Bobińska emphasise: 'The legislator does not take into account the dynamics of changes in the medical approach to the issues of mental health.'¹² Although the proportion of people with intellectual development disorder¹³ is difficult to determine, it is estimated to be 1% of the population, although according to some sources, it may reach 2–3%.¹⁴ Based on research conducted in various states, it is assumed that the proportion of people with ID among convicts accounts for 4–10%. According to Janusz Heitzman's estimation, in the case of convict population of 70 thousand, it may concern 3 thousand to 7 thousand persons.¹⁵ Regardless of methodological reservations, over-representation of people with intellectual development disorder among prisoners is confirmed by data obtained in other countries.¹⁶

⁷ M. Gordon, *Osoby niepełnosprawne w jednostkach penitencjarnych*, paper presented at the First National Congress on Human Rights on 9 December 2017, information available at: <https://www.rpo.gov.pl/pl/content/kpo/panel/panel-sytuacja-osob-z-niepelnosprawnoscia-intelektualna-lub-psychiczna-w-jednostkach-penitencjarnych> (accessed 7.6.2019).

⁸ According to M. Gordon, *Sytuacja osób z niepełnosprawnością intelektualną lub psychiczną w jednostkach penitencjarnych*, available at: <https://webcache.googleusercontent.com/search?q=cache:RCiAr9paDMgJ:https://www.rpo.gov.pl/sites/default/files/M%2520Gordon%2520Osoby%2520niepe%25C5%2582nosprawne%2520w%2520jednostkach%2520penitencjarnych.pptx+&cd=3&hl=pl&ct=clnk&gl=pl> (accessed 10.9.2019).

⁹ Article 3 para. 1 Act of 19 August 1994 on the protection of mental health (consolidated text, Dz.U. 2018, item 1878, as amended).

¹⁰ P. Gałęcki, A. Szulc, *Psychiatria*, Wrocław 2018, p. 365; also the Ombudsman draws attention to that in *Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2018*, p. 314, available at: <https://www.rpo.gov.pl/sites/default/files/Informacja%20Roczna%20Rzecznika%20Praw%20Obywatelskich%20za%20rok%202018.pdf> (accessed 10.2.2020).

¹¹ P. Gałęcki, A. Szulc, *supra* n. 10, p. 367.

¹² As the authors predict, in the future the term 'ID' will be recognised as stigmatising, which will mean the need to change it, K. Bobińska, P. Gałęcki, K. Eichstaedt, *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 2016, pp. 43, 45.

¹³ The term is quoted after K. Bobińska, P. Gałęcki, K. Eichstaedt, *ibid.*, p. 47.

¹⁴ P. Gałęcki, A. Szulc, *supra* n. 10, pp. 365, 372.

¹⁵ J. Heitzman, *Niepełnosprawni intelektualnie i chorzy psychicznie w jednostkach penitencjarnych*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną lub psychiczną osadzone w jednostkach penitencjarnych. Z uwzględnieniem badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, Warszawa, 2017, p. 19.

¹⁶ G. Murphy, J. Mason, *Osoby niepełnosprawne intelektualnie w konflikcie z prawem*, [in:] N. Bouras, G. Holt (eds), Polish edition: A. Florkowski, P. Gałęcki (eds), *Zaburzenia psychiczne i zaburzenie zachowania u osób niepełnosprawnych intelektualnie*, transl. by M. Grzesiak, Wrocław 2019, p. 196.

Some authors also recognise intellectual disability as a factor more conducive to the commitment of crime than physical impairment,¹⁷ which encounters empirical justification in some research conducted in various countries.¹⁸ It should be emphasised, however, that there are also opinions negating or at least challenging this thesis.¹⁹ It is hard to disagree with Glynis Murphy and Jonathan Mason who write: 'Maybe people with ID are not so fit to avoid being apprehended by the police [...], maybe they are also more "visible" or "easier" to apprehend (or even to be unjustly convicted [...]).'²⁰ As it is rightly pointed out in literature, deficiencies in the mental sphere have more negative effects than physical impairment; they even preclude people who suffer from them from defending themselves efficiently.²¹ It is highlighted not only in Polish literature but also in, e.g. Swedish,²² Czech²³ or English-Welsh²⁴ analyses. Around 90% of such people have problems with understanding, expressing their thoughts, social communication and reading; they often cannot understand information provided or questions asked.²⁵ It is also pointed out that people with intellectual development disorder can be more likely

¹⁷ M. Ciosek, *Psychologia sądowa i penitencjarna*, Warszawa 2003, pp. 208–210.

¹⁸ Research findings presented by G. Murphy, J. Mason, *supra* n. 16, pp. 190–197.

¹⁹ P. Gałecki, K. Eichstaedt, K. Bobińska, *Aspekty prawne i orzecznictwo u osób z niepełnosprawnością intelektualną w polskim ustawodawstwie*, [in:] K. Bobińska, T. Piertas, P. Gałecki (eds), *Niepełnosprawność intelektualna – etiopatogeneza, epidemiologia, diagnoza, terapia*, Wrocław 2012, pp. 530–531 and sources referred to therein.

²⁰ G. Murphy, J. Mason, *supra* n. 16, pp. 190, 207, 210.

²¹ R.A. Stefański, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2017, p. 895; M. Mazur, *Wybrane aspekty prawa do obrony w kontekście osób z niepełnosprawnością intelektualną lub psychiczną*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością*, *supra* n. 15, p. 107. It was also emphasised by the Supreme Court, which, referring to the Strasburg case law, indicated that 'just the lack of a defence counsel during the first interrogation in preparatory proceedings against a suspect does not constitute an obstacle to use his/her explanations provided in such conditions at a trial due to Article 6 para. 1 in conjunction with Article 6 para. 3(c) European Convention on Human Rights of 1950 provided that there is no objective vulnerability of the suspect to harm', the Supreme Court ruling of 5 April 2013, III KK 327/12, OSNKW 2013, No. 7, item 60.

²² According to Civil Rights Defenders and RMSH, *Alternative Report to the Swedish Government's Response on the Compliance of the EU-Commission's Recommendation of 27 November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings* (2013/C 378/02), Stockholm, November 2016, p. 4 et seq., available at: <https://crd.org/wp-content/uploads/2016/12/CRD-Report-on-EU-Commission-Recommendation-on-procedural-safeguards-for-vulnerable-suspected-or-accused-in-criminal-proceedings-2013%EF%80%A2C-378%EF%80%A202.pdf> (accessed 20.2.2019).

²³ Z. Durajová, M. Štrftek, *Dignity at Trial. Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings. Key Findings of the Czech National Report*, League of Human Rights, p. 7, available at: <https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security-projects-development-cooperation-and-business/dignity-trial-enhancing-procedural-safeguards-suspects-intellectual-and-psychosocial-disabilities> (accessed 19.2.2020).

²⁴ F. Gerry, P. Cooper, *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, *Journal of Judicial Administration* 26 (4), 2017, p. 1.

²⁵ European Union Agency for Fundamental Rights, *Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information*, Luxembourg 2016, p. 96, available at: <https://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation-and> (accessed 20.2.2020).

to be affected by suggestions made during an interrogation, which can increase the risk of self-incrimination resulting from the formulation of questions asked.²⁶

In accordance with para. 3, Section 1 Commission Recommendation, vulnerable persons should be associated in accordance with their best interests to the exercise of procedural rights taking into account their ability to understand and effectively participate in the proceedings. It is also emphasised in the preamble of the document that there is a need to provide them with appropriate assistance and support during criminal proceedings. The issue of vulnerable persons can be analysed on a few levels, however, in this paper, only one aspect is discussed more thoroughly: the right to appropriate representation during procedural activities.

In the Polish case law and legal doctrine, deficiencies connected with intellectual disability are traditionally associated with the issue of obligation to have a defence counsel. It is of course a right approach, and casuistic analysis of case law shows that such persons must be represented by the counsel due to the need to fulfil the criteria laid down in Article 79 § 1(3) and (4) Criminal Procedure Code (CPC) or in case of recognition of another circumstance hampering defence.²⁷ The recognition by the Polish legislator of the obligation to have a defence counsel in the circumstances mentioned in the above provisions can be *prima facie* regarded as being in compliance with para. 11, Section 3 Commission Recommendation, which stipulates that if a vulnerable person is unable to understand and follow the proceedings, the right to a lawyer in accordance with Directive 2013/48/EU should not be waived. What is fundamental and particularly important in this context is the issue resulting from the Supreme Court's²⁸ statement that the assessment of circumstances is not only applicable to the relative obligation to have a counsel²⁹ but also to the grounds for the counsel appointment based on the present content of Article 79 § 1(4) CPC. As Katarzyna Dudka rightly notes, the necessity of determining whether the accused persons can defend themselves in a reasonable way 'is extremely evaluating in nature'.³⁰

²⁶ G. Murphy, J. Mason, *supra* n. 16, p. 202 and sources referred to therein; also compare J. Heitzman, *supra* n. 15, p. 22.

²⁷ R.A. Stefański, *Obrona obligatoryjna w polskim procesie karnym*, Warszawa 2013, pp. 140–148, 168–177; *idem*, *Obrona obowiązkowa ze względu na okoliczności utrudniające obronę*, Prokuratura i Prawo 12, 2006.

²⁸ The Supreme Court rulings: of 7 February 2004, II KK 277/02, OSNKW 2004, No. 4, item 43; of 25 June 2014, II KK 124/14, LEX No. 1480317.

²⁹ R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 911; *idem*, *Obrona obligatoryjna*, *supra* n. 27, p. 166; *idem*, *Obrona obowiązkowa*, *supra* n. 27, p. 111 and case law referred to therein; K. Eichstaedt, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2018, p. 410; T. Grzegorzczak, *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2014, p. 356; R.A. Stefański, *Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r.*, [in:] M. Kolendowska-Matejczuk, K. Szwarc (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 29.

³⁰ K. Dudka, *Wyznaczniki procesowej pozycji obrońcy w procesie karnym*, [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa 2015, p. 60; attention is also drawn to that by R.A. Stefański, *Obrona obligatoryjna*, *supra* n. 27, p. 123; M. Klejnowska, *Prawo do samodzielnej i rozsądnej obrony w świetle nowelizacji Kodeksu postępowania karnego z dnia 27 września 2013 r.*, [in:] M. Rogacka-Rzewnicka et al. (eds), *Wokół gwarancji*, *supra* n. 30, p. 239;

Another issue connected with ensuring a defence counsel's assistance for an accused person with intellectual disability can result from the lack of efficient regulations guaranteeing appropriate flow of information. The rules and regulations for internal operations of public prosecution organisational units obliges a prosecutor, in case of the recognition of circumstances justifying the appointment of a counsel in accordance with Article 79 § 1 and § 2, to file a relevant motion to the president of a competent court without delay.³¹ However, it is worth drawing attention to the guidelines issued by the Chief Commander of the Police that indicate that in the case the behaviour of the accused person during an interrogation raises justified doubts as to his/her sanity and the continuation of proceedings might result in justified charges of violation of the rights of the accused persons, a police officer should stop interrogating them, document the reason for the decision in the report and refer the preparatory proceeding files to a prosecutor with a motion to appoint two expert witnesses – psychiatrists.³² It is clearly stated in § 38 that this obligation is limited to this activity and the situation concerning justified doubts as to sanity of the accused occurring in its course. This surely makes reference to the approach to the reasons for the recognition of the obligatory participation of a defence counsel before the amending statute of 2013 entered into force. However, it divided the grounds for granting the accused professional assistance into *tempore criminis* and *tempore procedendi*. It was emphasised in the justification for the bill that in the circumstance laid down in § 3, it was to refer to the content of Article 31 § 1 and § 2 Criminal Code and not 'as before, to the concept of "sanity", which is difficult to define', with the simultaneous separate approach to the grounds for recognition of a defence counsel's participation as obligatory due to justified doubts as to the ability of the accused to defend themselves in an independent and reasonable way.³³ Although in the legal state before 1 July 2015, in accordance with the Supreme Court resolution of 21 January 1970, it was also assumed that doubts as to sanity of the accused person concern not only the moment of a crime commission but also the period of criminal proceedings,³⁴ the issue required urgent and relevant amendment. It is also important that, despite the fact that a court was granted competence to decide

K. Eichstaedt, *Kodeks postępowania karnego*, *supra* n. 29, p. 410; S. Ładoś, *Wątpliwości co do stanu zdrowia psychicznego jako przesłanka obligatoryjnej obrony formalnej*, [in:] M. Kolendowska-Matejczuk, K. Szwarc (eds), *supra* n. 29, p. 89 et seq. The Supreme Court indicated the existence of objective evaluating criteria for justified doubts concerning sanity of the accused in relation to grounds for obligatory participation of a defence counsel laid down in Article 70 Criminal Procedure Code of 1969 – the Supreme Court resolution of 21 January 1970, VI KZP 23/69, OSNKW 1970, No. 2–3, item 15.

³¹ Compare § 168(2) Rules and regulations for common organisational units of public prosecution operation – Regulation of the Minister of Justice of 7 April 2016 (Dz.U. 2017, item 1206, as amended).

³² Guidelines No. 3 of the Chief Commander of the Police of 30 August 2017 concerning the performance of some investigative activities by police officers (Dziennik Urzędowy Komendy Głównej Policji of 2017, item 59).

³³ Justification for the governmental Bill amending the Acts: Criminal Procedure Code, Criminal Code and some other acts, Sejm paper No. 870, p. 30, available in Polish at: <http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=870> (accessed 22.2.2020).

³⁴ The Supreme Court resolution of 21 January 1970, VI KZP 23/69, OSNKW 1970, No. 2–3, item 15; R.A. Stefański, *Obrona obligatoryjna*, *supra* n. 27, pp. 126–128; S. Ładoś, *Pozycja prawna*

that there are circumstances in a case that hamper defence, it is assumed that the regulation is also applicable to preparatory proceedings.³⁵ The interpretation should be approved of also in the context of a recommendation emphasising the necessity of observing the procedural rights granted to vulnerable persons in the course of the whole criminal proceedings. However, due to the wording of the above-mentioned recommendations, there is a considerable risk that the relevant information will not be passed to a prosecutor supervising preparatory proceedings. In addition, as the Ombudsman highlighted in his addresses to the Chief Commander of the Police and the President of the Council of Ministers, the regulations in force do not oblige police officers to document information indicating that a person arrested or one that is subject to other activities may belong to the category of vulnerable persons. In his opinion, the relevant observation should be written down in the arrest or interrogation report. However, in the opinion of the Minister of Internal Affairs and Administration, there is no need to change the report format by introducing a special section and obliging police officers to write down their observations concerning facts or circumstances that may indicate that a person arrested or interrogated may meet the requirements stipulated in the Commission Recommendation.³⁶

The cases in which even the direct contact of a court with a person with intellectual development disorder did not always result in obligatory participation of a defence counsel prove the insufficiency of Polish regulations in the area and irregularities concerning the application of provisions, e.g. the famous case in which Judge Alina Czubieniek issued a decision on waiving temporary arrest of the accused with ID who could not write or read.³⁷ The Ombudsman's procedural interventions resulting from the examination of the situation of 100 persons with intellectual disability or mental disease serving the penalty of deprivation of liberty also confirm this. Most of those cases required that relevant action was taken. He initiated supervision of sentences in 45% of cases. In thirteen (out of fourteen) cassation cases, the Supreme Court recognised irregularities constituting absolute grounds for appeal that consisted in a court's failure to take into account data concerning health condition of the accused indicating doubts as to sanity, as well as unjustified hearing of a case in writ proceedings.³⁸ Courts have also agreed

oskarżonego z zaburzeniami psychicznymi, Warszawa 2013, p. 185 et seq.; M. Klejnowska, *supra* n. 30, p. 229 et seq.

³⁵ R.A. Stefański, *Obrona obowiązkowa*, *supra* n. 27, p. 100; W. Posnow, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, p. 246; T. Grzegorzczak, *supra* n. 29, p. 356; S. Steinborn, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, commentary on Article 79, thesis 23, LEX/el. 2016; K.T. Boratyńska, P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018, p. 269.

³⁶ J. Nowakowska, *Wczesna identyfikacja osób wymagających szczególnego traktowania, będących uczestnikami postępowania karnego*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną*, *supra* n. 15, p. 160.

³⁷ M. Bober, P. Gąciarek, J. Jurkiewicz, J. Kościerzyński (ed.), M. Krasoń, D. Zabłudowska, *Wymiar sprawiedliwości pod presją – represje jako metoda walki o przejęcie kontroli nad władzą sądowniczą i Prokuraturą w Polsce. Lata 2015–2019*, Iustitia Raporty, p. 26, available at: https://www.iustitia.pl/images/pliki/raport2020/Raport_PL.pdf (accessed 9.3.2020).

³⁸ The Ombudsman's address of 17 March 2017 to the Speaker of the Senate concerning information on activities undertaken by the Ombudsman in relation to proceedings against

with the Ombudsman's charges in 18 out of 22 cases in which he filed a motion to reopen the proceedings due to the recognition of new important, earlier unknown, circumstances supporting the necessity of participation of the defence counsel in the proceedings concluded with legal force.³⁹

However, it is necessary to strongly emphasise that the right of persons with intellectual disability to appropriate representation, which is expressed in the Commission Recommendation, has a broader meaning than the right to a lawyer and can be exercised not only through a professional procedural representative. The content of para. 10, Section 3, indicates that a legal representative or an appropriate adult who is designated by the vulnerable person or by the competent authorities to assist that person should be present at the police station and during court hearing. The legal representative, within the meaning of this document, is a person who represents the interests and oversees the legal affairs of the vulnerable person, e.g. a court appointed guardian. The term 'appropriate adult' means a relative or a person in a social relationship with the vulnerable person, who is likely to interact with the authorities and to enable the vulnerable person to exercise his or her procedural rights.

Taking into account the content of the Commission Recommendation, it is worth indicating the evident asymmetrical treatment, still at the legislator's level, of the victim and the accused person, provided that both parties to the proceedings fulfil the criterion of 'vulnerable persons'. Although the provisions in force applicable to the latter entity grant the right to participate in the proceedings to a person who takes care of them not only permanently⁴⁰ but also temporarily, and he or she does not have to be appointed by a family court,⁴¹ it is important that this care is really provided.⁴² However, Article 76 CPC clearly limits this to minors or incapacitated persons against whom criminal proceedings are conducted. Moreover, although according to the stand dominating literature, which should be approved of, it should also apply to partial deprivation of legal capacity,⁴³ due to the lack of relevant regulation, there are also opinions that it should be limited to complete

persons with intellectual or mental disability who are in prisons or on remand, p. 2, available in Polish at: www.senat.gov.pl/senat/senatoswiadczenia/09_035_818_1_odp (accessed 15.2.2020).

³⁹ J. Nowakowska, *Wprowadzenie*, [in:] Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną*, *supra* n. 15, p. 13.

⁴⁰ T. Grzegorzczuk, *supra* n. 29, p. 338; S. Steinborn, *supra* n. 35, commentary on Article 76, thesis 5.

⁴¹ R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 855.

⁴² W. Posnow, *supra* n. 35, p. 239; P. Mazur, W. Nowak, *Sytuacja prawna opiekuna oskarżonego ubezwłasnowolnionego całkowicie w polskim postępowaniu karnym przed sądem pierwszej instancji*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1, 2007, pp. 88–90.

⁴³ R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 856; A. Światłowski, *Przedstawiciel ustawowy oskarżonego nieletniego lub ubezwłasnowolnionego*, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, p. 859; S. Steinborn, *supra* n. 35, commentary on Article 76, thesis 3; W. Posnow, *supra* n. 35, pp. 238–239; M. Jankowska, K. Witkowska, *Niepoczytalność w prawie karnym, w prawie cywilnym a udział i reprezentacja stron procesowych z zakłóceniami czynności psychicznych w procesie karnym*, *Wojskowy Przegląd Prawniczy* 2, 2011, p. 45.

incapacitation.⁴⁴ An important issue that deserves separate discussion is also the establishment of instruments aimed at ensuring that procedural bodies be really informed about a civil court final decision⁴⁵ concerning this matter in every case.

In relation to the accused person, the catalogue of situations enabling third parties to represent him or her is much broader. It is not only minority or incapacitation but also helplessness, which can also apply to persons enjoying all civil rights.⁴⁶ In accordance with Article 51 § 3 CPC, the reason why they can exercise their rights through another entity may be in particular old age or health condition. As it is rightly indicated in literature, this also concerns mental sphere:⁴⁷ circumstances indicating that it is a person with mental or intellectual impairment, the states 'that justify complete or partial incapacitation, although it has not been introduced, as well as when there are no grounds for issuing such a decision but a person has considerable difficulties with the independent exercise of his/her rights'.⁴⁸

Enacting the above provision by means of the amending statute of January 2003 was justified by social reasons, in particular the need to protect victims.⁴⁹ It is approved of in literature,⁵⁰ also due to the fact that it makes it easier for some participants to act in proceedings.⁵¹ As it has been mentioned above, the regulation 'fills the huge gap'⁵² because before the amendment the Criminal Procedure Code did not allow legal representation of helpless victims.⁵³ It cannot be excluded that this resulted from more pragmatic reasons: the necessity of ensuring representation for such participants in order to enable procedural bodies to conduct procedural activities with their participation (in particular in preparatory proceedings) and their status of a party granted by force of law. Finally, it is also important in this context that the statute of 28 November 2014⁵⁴ introduced Article 299a § 1 CPC.

⁴⁴ H. Paluszkiwicz, [in:] K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018, p. 209; K. Eichstaedt, *Kodeks postępowania karnego*, *supra* n. 29, p. 393.

⁴⁵ The Supreme Court ruling of 9 April 1968, II CR 112/68, LEX No. 6309.

⁴⁶ T. Grzegorzcyk, *supra* n. 29, p. 273.

⁴⁷ S. Steinborn, *supra* n. 35, commentary on Article 51, thesis 12; K.T. Boratyńska, P. Czarnecki, *supra* n. 35, p. 217.

⁴⁸ R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 727; also compare M. Jankowska, K. Witkowska, *supra* n. 43, pp. 43–44.

⁴⁹ Justification for the Bill of ... 2001 amending the Acts: Criminal Code, Criminal Procedure Code, Code of Criminal Execution and some other acts [Projekt ustawy z dnia ... 2001 o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy i niektórych innych ustaw], *Czasopismo Prawa Karnego i Nauk Penalnych*, Year V: 2001/2, p. 46.

⁵⁰ P. Hofmański, *Opinia o rządowym projekcie Ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy oraz niektórych innych ustaw (druk nr 2510 – w zakresie przepisów procesowych) oraz poselskich projektach ustaw o zmianie Ustawy – Kodeks postępowania karnego (druki nr: 1638, 1655, 1814, 2154 oraz 2336)*, *Czasopismo Prawa Karnego i Nauk Penalnych*, Year V: 2001/2, p. 60.

⁵¹ S. Zabłocki, *Opinia dotycząca zmian w Kodeksie postępowania karnego, zawartych w projekcie rządowym (druk nr 2510) oraz w projektach poselskich (druki nr: 2336, 2154, 1638, 1814 i 1655)*, *Czasopismo Prawa Karnego i Nauk Penalnych*, Year V: 2001/2, p. 123.

⁵² A. Świątłowski, *supra* n. 43, p. 856.

⁵³ S. Steinborn, *supra* n. 35, commentary on Article 51, thesis 12.

⁵⁴ Act of 28 November 2014 on the protection of and assistance to victims and witnesses (Dz.U. 2015, item 21).

The regulation, which obviously resulted from the need to implement Article 3 para. 3 Directive 2012/29/EU, grants a victim the right to be assisted in preparatory proceedings in which he/she participates by a person of his/her choice (provided that it does not preclude or considerably hamper the activities). In relation to persons with intellectual disability against whom criminal proceedings are conducted, there are no legal grounds for admitting an appropriate adult to participation in procedural activities, except in the situation stipulated in Article 76 CPC.

It is worth drawing attention to the institution of a temporary advisor envisaged in civil proceedings. In accordance with Article 548 Code of Civil Procedure (CCP), in a situation when a motion is filed to incapacitate an adult, when initiating proceedings or in their course, a court can appoint a temporary advisor if it is recognised necessary for the protection of a person or his or her property (it is emphasised in literature that the fulfilment of this condition means an obligation⁵⁵ not a right). This entity's task is to protect the interests of a person against whom incapacitation proceedings have been initiated in the transition period.⁵⁶ Apart from a spouse, a relative or another person in close relationship, the role may be also played by a person designated by a non-governmental organisation the statutory tasks of which is the protection of the right of disabled people, providing them with assistance or the protection of human rights (Article 548 § 4 and Article 546 § 3 CCP). A court can request the above-mentioned entity to designate a person who might be appointed a temporary advisor in case there are no close relatives or there is no possibility of appointing one in this character due to a conflict between them and a person subject to incapacitation proceedings.⁵⁷ In accordance with Article 549, the appointment of the temporary advisor results in the recognition of a person's limited legal capacity as in the case of partial incapacitation. It is indicated in literature that the temporary advisor is a statutory representative of a person and a court should determine the scope of competences granted in its appointment decision,⁵⁸ yet unlike in the case of the guardian, the temporary advisor's competences concern the whole legal sphere of the person represented.⁵⁹

Theoretically, *de lege lata*, taking into account entitlements granted to a prosecutor in civil proceedings, there are no legal obstacles to initiate proceedings concerning deprivation or limitation of a suspect's legal capacity and file a motion to appoint a temporary advisor if, in his opinion, the requirements under Article 13 Civil Code are satisfied (Article 546 § 2 CCP). In practice, due to the regulations in force concerning organisation and division of work in particular organisational units, the use of such a possibility would have to result in the lengthening of proceedings:

⁵⁵ J. Gudowski, [in:] T. Erciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. IV, Warszawa 2016, p. 188; B. Czech, [in:] A. Marciniak (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. III, Warszawa 2020, p. 744.

⁵⁶ K. Flaga-Gieruszyńska, [in:] K. Flaga-Gieruszyńska, A. Zieliński, *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2019, p. 1202.

⁵⁷ P. Prus, [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa 2015, pp. 103–104; A. Górski, [in:] H. Dolecki, T. Wiśniewski (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. III, Warszawa 2013, p. 132.

⁵⁸ B. Czech, *supra* n. 55, pp. 745–746.

⁵⁹ J. Gudowski, *supra* n. 55, p. 188.

usually by referring the case files to a prosecutor competent in civil cases. At the same time, it would mean the necessity of suspending criminal proceedings, which, due to the tasks laid down in Articles 297 CPC and 2 CPC, seems to be difficult to imagine. Simultaneously, it would be in general excluded in cases where a suspect with intellectual disability is on remand, regardless of their vulnerability and the need of assistance.

There are a few arguments for the need to grant the accused vulnerable persons additional guarantees, apart from the grounds for the implementation of the Commission Recommendation. For example, one can indicate the modification of criminal procedure, in particular initiated by the amending statute of 2013, which fundamentally changed the rules of the accused person's participation in a trial, and was connected with the introduction of an elaborated system of instructions. This can cause serious problems with exercising the right to a lawyer, by the way, not only for vulnerable persons. The introduction of the evidence-taking time limit⁶⁰ or a possibility of conducting a trial despite justified absence of the accused makes the present situation of persons with intellectual disability in criminal proceedings very difficult. However, the preparatory stage of criminal proceedings, especially conducted in the form of investigation, poses incomparably more threats to the interests of those people. The growing number of cases in which sentences may be issued in the absence of an accused person, especially when a prosecutor enters into a relevant agreement with the accused concerning a penalty or other measures prescribed for a misdemeanour referred to in Article 335 CPC via a police officer, can also result in a lower chance of recognising the problems of the accused person with an intellectual development disorder.

Even only those reasons are for the legitimacy of legislative changes. It is worth drawing attention to the Ombudsman's reasonable demands that, inter alia, police officers should be obliged to report the fact of impeded contact with a person that is subject to the proceeding activities, to record an interrogation electronically and to recognise the inability of the suspect to write or read as a circumstance requiring obligatory participation of a defence counsel *ex lege*, and therefore to eliminate some arbitrariness.⁶¹ Apart from the above-mentioned necessity of harmonising the guidelines of the Chief Command of the Police and the present content of Article 79 CPC, similarly to covering all procedural activities performed in relation to the accused persons or suspects with an obligation resulting from § 38 in case their features or behaviour prescribe presumption of their vulnerability, the introduction of a third party's right to participate in the proceedings needs urgent regulation. *De lege ferenda*, it might consist in supplementing Article 76 CPC, following the model of the regulation concerning a helpless victim. At the same time, it would

⁶⁰ Ł. Chmielniak, M. Klonowski, A. Rychlewska-Hotel, J. Zagrodnik (ed.), *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, Warszawa 2020, commentary on Article 170.

⁶¹ Another proposal concerned legitimacy of social environment interviews in order to establish whether a person subject to proceedings has features confirming that he or she should be recognised as a vulnerable person, which could precede potential psychological or psychiatric examinations, see Ombudsman, *Informacja*, *supra* n. 10, p. 121; also compare M. Mazur, *Wybrane aspekty*, *supra* n. 21, pp. 122–124, 163.

be reasonable to approve of granting a prosecutor the right to apply to a court for requesting a non-governmental organisation (referred to in Article 546 § 3 CCP) to designate a person who could provide assistance to a person with intellectual development disorder in case he or she has no close relative, or there is a lack of interest in or a possibility of taking on this function. It should be also recognised necessary to introduce a provision obliging procedural bodies to unconditionally admit an appropriate adult to participation in proceedings conducted in relation to the accused person with intellectual disability and other vulnerable persons in the course of the entire criminal proceedings. In addition, in opposition to Article 299a CPC, the regulation making it conditional not only on a motion filed by a person against whom the proceedings are conducted but also at the initiative of an appropriate adult as well as *ex officio* should be recognised as justified.

Participation of an appropriate adult in procedural activities concerning accused vulnerable persons undoubtedly has positive influence on their procedural situation. This is confirmed, *inter alia*, by research into the practice in Austria⁶² and some other, not only European, states.⁶³ However, the fact can be also important from the point of view of procedural bodies and efficiency and effectiveness of procedural activities. As it was indicated in the report of the European Union Agency for Fundamental Rights, the representatives of the broadly understood administration of justice point out communication problems with such persons and appropriate interpretation of their behaviour.⁶⁴ The fact that the role of an appropriate adult is not only to assist a vulnerable person within the meaning of the proceedings in which he or she participates but also to facilitate effective communication between him or her and police officers is emphasised in Scottish legislation (section 3(2) The Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019). The issue is regulated similarly, although more broadly, in the English and Welsh Code C,⁶⁵ a legal act issued by the Home Office (after its submission to the Parliament and obtaining the approval of both Houses) based on the Police and Criminal Evidence Act 1984, which is treated as a concise investigation guidebook.⁶⁶

⁶² B. Linder, N. Katona, T. Schleicher, *Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings: Exploring the Need for Actions, Key Findings of the Austrian National Report*, Austria Boltzmann Institute Human Rights, p. 24, available at: https://bim.lbg.ac.at/sites/files/bim/attachments/austria_key_findings_of_the_national_reports.pdf (accessed 28.2.2020).

⁶³ It concerns e.g. Singapore or the Australian state of Victoria, according to J. Beqiraj, L. McNamara, V. Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, p. 30, available at: https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf (accessed 2.3.2020).

⁶⁴ European Union Agency for Fundamental Rights, *Rights of Suspected and Accused Persons*, *supra* n. 25, p. 96.

⁶⁵ The regulation determines the tasks of the appropriate adult in a little broader way than the Scottish statute and indicates that its role is also to safeguard the rights and entitlements and welfare of vulnerable persons; compare paragraphs 1.7–1.7A Code C – Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers, July 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729842/pace-code-c-2018.pdf (accessed 6.2.2020).

⁶⁶ J. Sprack, *A Practical Approach to Criminal Procedure*, New York 2011, p. 25.

It is also indicated in literature that the motive behind active participation of this entity is the reduced risk that the discussed category of suspects will provide evidence that may result in unjust conviction.⁶⁷

CONCLUSIONS

Due to inadmissibility of waiving the right of an accused person with intellectual disability to a lawyer, Polish regulations can be recognised as being in conformity with the requirements established by the European Commission. At the same time, due to the evaluating nature of the conditions for obligatory participation of a defence counsel, it is not possible to exclude the risk of a court's failure to appoint such counsel for the accused who meets the criterion of 'a vulnerable person'. Indeed, it is empirically confirmed. Apart from incompatibility of the guidelines of the Chief Commander of the Police with the present wording of Article 79 § 1(3) and (4) CPC, there is an additional problem, which is the lack of a regulation obliging police officers to provide a prosecutor with information about facts suggesting that there is a need to treat a person that is subject to proceedings as a vulnerable one. Apart from sharing the Ombudsman's stand on the legitimacy of the modification of the arrest report form, it is necessary to call for the introduction of relevant and necessary changes in the guidelines and public prosecution service rules and regulations aimed, inter alia, at ensuring the assistance of a defence counsel to persons with intellectual disabilities who participate in procedural activities other than interrogation. A prosecutor's motion to a court to appoint the defence counsel at the stage preceding the formulation of charges would also create a chance that he/she would participate in the first interrogation.

What raises even more serious objections is the irrelevance of the provisions in force applicable to the representation of the accused with intellectual disability by a statutory representative or another appropriate adult. The legislator limited the regulation of the statutory representative's participation in the case of an incapacitated person, in addition, without determining whether it also applies to partial legal incapacitation. Despite theoretical possibility of initiating incapacitation proceedings by a prosecutor and a related possibility of designating a temporary advisor for the accused person, it is necessary *de lege ferenda* to call for an amendment to Article 76 CPC following the model of the change in provisions concerning a helpless victim introduced in 2003. Apart from harmonising Polish law with the European Commission Recommendation, the additional introduction of a provision based on the example of Article 299 CPC but regulating the rules of participation of an appropriate adult in proceedings and acting for the benefit of the accused vulnerable person would reflect the principle of equality.

⁶⁷ C. Palmer, *Still Vulnerable After all These Years*, Crim. L. R. 1996, Sep., 633–644, p. 633 and sources referred to therein.

BIBLIOGRAPHY

- Bobińska K., Gałecki P., Eichstaedt K., *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 2016.
- Ciosek M., *Psychologia sądowa i penitencjarna*, Warszawa 2003.
- Czech B. et al., Marciniak A. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. III, Warszawa 2020.
- Dawidziuk E., Mazur M. (eds), *Osoby z niepełnosprawnością intelektualną lub psychiczną osadzone w jednostkach penitencjarnych. Z uwzględnieniem badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, Warszawa 2017.
- Dolecki H., Wiśniewski T. (eds), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2013.
- Dudka K., *Wyznaczniki procesowej pozycji obrońcy w procesie karnym*, [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa 2015.
- Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018.
- Ereciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. IV, Warszawa 2016.
- Flaga-Gieruszyńska K., Zieliński A., *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2019.
- Gałecki P., Eichstaedt K., Bobińska K., *Aspekty prawne i orzecznictwo u osób z niepełnosprawnością intelektualną w polskim ustawodawstwie*, [in:] K. Bobińska, T. Piertas, P. Gałecki (eds), *Niepełnosprawność intelektualna – etiopatogeneza, epidemiologia, diagnoza, terapia*, Wrocław 2012.
- Gałecki P., Szulc A., *Psychiatria*. Wrocław 2018.
- Gerry F., Cooper P., *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, *Journal of Judicial Administration* 26 (4), 2017.
- Grzegorzczak T., *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2014.
- Jankowska M., Witkowska K., *Niepoczytalność w prawie karnym, w prawie cywilnym a udział i reprezentacja stron procesowych z zakłóceniami czynności psychicznych w procesie karnym*, *Wojewódzki Przegląd Prawniczy* 2, 2011.
- Klejnowska M., *Prawo do samodzielnej i rozsądnej obrony w świetle nowelizacji Kodeksu postępowania karnego z dnia 27 września 2013 r.*, [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa 2015.
- Ładoś S., *Pozycja prawna oskarżonego z zaburzeniami psychicznymi*, Warszawa 2013.
- Ładoś S., *Wątpliwości co do stanu zdrowia psychicznego jako przesłanka obligatoryjnej obrony formalnej*, [in:] M. Kolendowska-Matejczuk, K. Szwarc (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014.
- Manowska M. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa 2015.
- Mazur P., Nowak W., *Sytuacja prawna opiekuna oskarżonego ubezwłasnowolnionego całkowicie w polskim postępowaniu karnym przed sądem pierwszej instancji*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1, 2007.
- Murphy G., Mason J., *Osoby niepełnosprawne intelektualnie w konflikcie z prawem*, [in:] N. Bouras, G. Holt (eds), *Pioliish edition: A. Florkowski, P. Gałecki (eds), Zaburzenia psychiczne i zaburzenie zachowania u osób niepełnosprawnych intelektualnie*, transl. by M. Grzesiak, Wrocław 2019.
- Palmer C., *Still Vulnerable After all These Years*, *Crim. L.R.* 1996, Sep., 633–644.
- Paprzycki K.L., *Osoba niepełnosprawna psychicznie w prawie i postępowaniu karnym. Zarys problematyki*, *Forum Iuridicum* 2, 2002.
- Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018.
- Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2020.

- Sprack J., *A Practical Approach to Criminal Procedure*, New York 2011.
- Stefański R.A., *Obrona obowiązkowa ze względu na okoliczności utrudniające obronę*, Prokuratura i Prawo 12, 2006.
- Stefański R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa 2013.
- Stefański R.A., *Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r.*, [in:] M. Kolendowska-Matejczuk, K. Szwarz (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014.
- Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2017.
- Steinborn S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016.
- Świątłowski A., *Przedstawiciel ustawowy oskarżonego nieletniego lub ubezwłasnowolnionego*, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016.
- Świątłowski A., *Przedstawiciel ustawowy pokrzywdzonego małoletniego, ubezwłasnowolnionego lub nieporadnego*, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016.
- Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2018.
- Zagrodnik J. (ed.), *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, Warszawa 2020.

Reports and other sources

- Beqiraj J., McNamara L., Wicks V., *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, p. 30, https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf (accessed 2.3.2020).
- Civil Rights Defenders and RMSH, *Alternative Report to the Swedish Government's Response on the Compliance of the EU-Commission's Recommendation of November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings (2013/C 378/02)*, Stockholm, November 2016, <https://crd.org/wp-content/uploads/2016/12/CRD-Report-on-EU-Commission-Recommendation-on-procedural-safeguards-for-vulnerable-suspected-or-accused-in-criminal-proceedings-2013%EF%80%A2C-378%EF%80%A202.pdf> (accessed 20.2.2019).
- Durajová Z., Stříteš M., *Dignity at Trial. Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings. Key Findings of the Czech National Report*, League of Human Rights, <https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security-projects-development-cooperation-and-business/dignity-trial-enhancing-procedural-safeguards-suspects-intellectual-and-psychosocial-disabilities> (accessed 19.2.2020).
- European Union Agency for Fundamental Rights, *Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information*, Luxembourg 2016, <https://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation-and> (accessed 20.2.2020).
- Gordon M., *Osoby niepełnosprawne w jednostkach penitencjarnych*, paper presented at the First National Congress on Human Rights on 9 December 2017, <https://www.rpo.gov.pl/pl/content/kpo/panel/panel-sytuacja-osob-z-niepelnosprawnoscia-intelektualna-lub-psychiczna-w-jednostkach-penitencjarnych> (accessed 7.6.2019).
- Gordon M., *Sytuacja osób z niepełnosprawnością intelektualną lub psychiczną w jednostkach penitencjarnych*, <https://webcache.googleusercontent.com/search?q=cache:RCiAr9paDMGJ:https://www.rpo.gov.pl/sites/default/files/M%2520Gordon%2520Osoby%2520Niepe%25C5%2582>

- nosprawne%2520w%2520jednostkach%2520penitencjarnych.pptx+&cd=3&hl=pl&ct=clnk&gl=pl (accessed 10.9.2019).
- Hofmański P., *Opinia o rządowym projekcie Ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy oraz niektórych innych ustaw (druk nr 2510 – w zakresie przepisów procesowych) oraz poselskich projektach ustaw o zmianie Ustawy – Kodeks postępowania karnego (druki nr: 1638, 1655, 1814, 2154 oraz 2336)*, Czasopismo Prawa Karnego i Nauk Penalnych, Year V: 2001/2.
- Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2018*, p. 314, <https://www.rpo.gov.pl/sites/default/files/Informacja%20Roczna%20Rzecznika%20Praw%20Obywatelskich%20za%20rok%202018.pdf> (accessed 10.2.2020).
- Kościerzyński (ed.), *Wymiar sprawiedliwości pod presją – represje jako metoda walki o przejęcie kontroli nad władzą sądowniczą i Prokuraturą w Polsce. Lata 2015–2019*, Iustitia Raporty, https://www.iustitia.pl/images/pliki/raport2020/Raport_PL.pdf (accessed 9.3.2020).
- Linder B., Katona N., Schleicher T., *Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings: Exploring the Need for Actions, Key Findings of the Austrian National Report*, Austria Boltzmann Institute Human Rights, https://bim.lbg.ac.at/sites/files/bim/attachments/austria_key_findings_of_the_national_reports.pdf (accessed 28.2.2020).
- Zabłocki S., *Opinia dotycząca zmian w Kodeksie postępowania karnego, zawartych w projekcie rządowym (druk nr 2510) oraz w projektach poselskich (druki nr: 2336, 2154, 1638, 1814 i 1655)*, Czasopismo Prawa Karnego i Nauk Penalnych, Year V: 2001/2.

RIGHT TO APPROPRIATE REPRESENTATION OF DEFENDANTS WITH INTELLECTUAL DISABILITIES IN CRIMINAL PROCEEDINGS

Summary

The subject of this paper is a discussion of selected issues related to ensuring appropriate representation for people with intellectual disabilities against whom criminal proceedings are conducted. The need to grant them additional rights stems from the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. The text points to problems connected with ensuring in practice the participation of a defence counsel for this category of the accused and with inadequate Polish procedural regulations concerning the obligation to ensure the presence of a legal representative or an appropriate adult during preparatory proceedings and a court hearing. The text also draws attention to the inequality in this respect of the legal situation of the accused and the injured party who require additional support due to, for instance, intellectual development disorders suffered by them.

Keywords: vulnerable person, accused person with intellectual disability, legal representation, appropriate adult

PRAWO DO ODPOWIEDNIEJ REPREZENTACJI OSKARŻONYCH Z NIEPEŁNOSPRAWNOŚCIĄ INTELEKTUALNĄ W POSTĘPOWANIU KARNYM

Streszczenie

Przedmiotem niniejszego opracowania jest omówienie wybranych kwestii związanych z zapewnieniem odpowiedniej reprezentacji osobom z niepełnosprawnością intelektualną, przeciwko którym prowadzone jest postępowanie karne. Powinność przyznania im dodatkowych praw wynika z Zalecenia Komisji Europejskiej z dnia 27 listopada 2013 r. w sprawie gwarancji procesowych dla osób wymagających szczególnego traktowania podejrzanych lub oskarżonych w postępowaniu karnym. W tekście wskazano na problemy związane z realnością zagwarantowania tej kategorii oskarżonym udziału obrońcy oraz niedostateczność polskich regulacji proceduralnych dotyczących powinności zapewnienia obecności przedstawiciela prawnego lub stosownej osoby dorosłej podczas czynności postępowania przygotowawczego oraz rozprawy. W artykule zwrócono również uwagę na asymetrię w tym zakresie pomiędzy sytuacją prawną oskarżonego oraz pokrzywdzonego, którzy z uwagi np. na zaburzenia rozwoju intelektu wymagają dodatkowego wsparcia.

Słowa kluczowe: osoby wymagające szczególnego traktowania, oskarżony z niepełnosprawnością intelektualną, reprezentacja procesowa, stosowna osoba dorosła

DERECHO A LA REPRESENTACIÓN ADECUADA DE ACUSADOS CON DISCAPACIDAD INTELECTUAL EN EL PROCESO PENAL

Resumen

La presente obra analiza algunas cuestiones relacionadas con la obligación de representación adecuada de las personas con discapacidad intelectual contra las cuales se lleva a cabo el proceso penal. El deber de proporcionarles derechos adicionales resulta de la Recomendación de la Comisión, de 27 de noviembre de 2013, relativa a las garantías procesales para las personas vulnerables sospechosas o acusadas en procesos penales. El texto plantea problemas en la práctica de garantizar a esta categoría de acusados la participación de abogado y las deficiencias de regulación procesal polaca relativa al deber de asegurar la presencia del representante legal o persona mayor de edad pertinente durante las diligencias en la fase de instrucción y en el juicio. El artículo presta la atención también a la asimetría en este ámbito entre la situación legal del acusado y del perjudicado que debido, p. ej. a trastornos de desarrollo intelectual requieran ayuda adicional.

Palabras claves: personas que requieran trato especial, acusado con discapacidad intelectual, representación procesal, mayor de edad pertinente

ПРАВО НА НАДЛЕЖАЩЕЕ ПРЕДСТАВИТЕЛЬСТВО В УГОЛОВНОМ ПРОЦЕССЕ ОБВИНЯЕМЫХ С ОГРАНИЧЕННЫМИ УМСТВЕННЫМИ ВОЗМОЖНОСТЯМИ

Аннотация

Работа посвящена обсуждению отдельных вопросов, связанных с обеспечением надлежащего представительства лицам с ограниченными умственными возможностями, в отношении которых возбуждено уголовное дело. Необходимость предоставления им дополнительных прав вытекает из Рекомендации Европейской комиссии от 27 ноября 2013 года относительно процессуальных гарантий для лиц, нуждающихся в особом обращении и являющихся подозреваемыми или обвиняемыми по уголовному делу. В статье обозначены встречающиеся на практике проблемы с обеспечением участия защитника для этой категории обвиняемых, а также отмечена недостаточность польских процессуальных норм, касающихся обязанности обеспечить присутствие законного представителя или соответствующего взрослого лица во время предварительного расследования и судебного процесса. Автор также обращает внимание на асимметричность, возникающую в этой связи между правовым положением обвиняемых и потерпевших, которым требуется дополнительная поддержка, например, в силу расстройств умственного развития.

Ключевые слова: лица, требующие особого подхода; обвиняемый с ограниченными умственными возможностями; процессуальное представительство; соответствующее взрослое лицо

DAS RECHT VON ANGEKLAGTEN MIT GEISTIGER BEHINDERUNG AUF EINE ANGEMESSENE VERTRETUNG IN STRAFVERFAHREN

Zusammenfassung

Gegenstand dieser Studie ist die Erörterung ausgewählter Themen im Zusammenhang mit der Problematik, Menschen mit einer geistigen Beeinträchtigung, gegen die ein Strafverfahren durchgeführt wird, eine angemessene Vertretung zu gewährleisten. Aus der Empfehlung der Europäischen Kommission vom 27. November 2013 über Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte schutzbedürftige Personen ergibt sich die Pflicht, ihnen zusätzliche Rechte einzuräumen. Im Text werden Probleme im Zusammenhang mit der Machbarkeit angesprochen, solchen Angeklagten die Hinzuziehung eines Verteidigers zu gewährleisten und es wird die Unzulänglichkeit der polnischen Verfahrensvorschriften in Bezug auf die Pflicht hingewiesen, die Anwesenheit eines gesetzlichen Vertreters oder geeigneten Erwachsenen an den Verfahrenshandlungen im Vorverfahren und der Verhandlung sicherzustellen. Der Artikel macht außerdem auf die diesbezügliche Asymmetrie zwischen der rechtlichen Situation von Beschuldigten und Opfern aufmerksam, die beispielsweise aufgrund von Störungen der geistigen Entwicklung zusätzliche Unterstützung benötigen.

Schlüsselwörter: Schutzbedürftige Personen, Beschuldigter mit einer Beeinträchtigung der intellektuellen Fähigkeiten, Prozessvertretung, geeigneter Erwachsener

LE DROIT À UNE REPRÉSENTATION APPROPRIÉE DES PRÉVENUS AYANT UNE DÉFICIENCE INTELLECTUELLE DANS LES PROCÉDURES PÉNALES

Résumé

Le sujet de cette étude est de discuter de certaines questions liées à la garantie d'une représentation adéquate des personnes handicapées mentales contre lesquelles des poursuites pénales sont menées. L'obligation de leur accorder des droits supplémentaires résulte de la recommandation de la Commission européenne du 27 novembre 2013 relative à des garanties procédurales en faveur des personnes vulnérables soupçonnées ou poursuivies dans le cadre des procédures. Le texte fait état de problèmes liés à la réalité de garantir aux accusés de cette catégorie la participation du défenseur et à l'insuffisance des règles de procédure polonaises concernant l'obligation d'assurer la présence d'un représentant légal ou d'un adulte approprié lors de la procédure préparatoire et du procès. L'article attire également l'attention sur l'asymétrie à cet égard entre la situation juridique de l'accusé et de la partie lésée qui, en raison, par exemple, de troubles du développement intellectuel, ont besoin d'un soutien supplémentaire.

Mots-clés: personnes nécessitant un traitement spécial, accusé ayant une déficience intellectuelle, représentation légale, adulte approprié

DIRITTO DI ADEGUATA RAPPRESENTANZA DI IMPUTATI CON DISABILITÀ INTELLETTIVE NEL PROCEDIMENTO PENALE

Sintesi

Oggetto del presente elaborato è la presentazione di questioni selezionate legate alla garanzia di adeguata rappresentanza di persone con disabilità intellettive, nei confronti delle quali viene intentato un procedimento penale. L'obbligo di concedere loro dei diritti aggiuntivi deriva dalla Raccomandazione della Commissione, del 27 novembre 2013, sulle garanzie procedurali per le persone vulnerabili indagate o imputate in procedimenti penali. Nel testo si sono indicati i problemi legati alla reale garanzia, a tali categorie di persone, della partecipazione del difensore nonché l'insufficienza delle norme procedurali polacche riguardanti l'obbligo di garantire la presenza del rappresentante legale o di un adulto idoneo durante le attività delle indagini preliminari e durante le udienze. Nell'articolo si è fatta anche notare l'asimmetria in tale ambito tra la situazione giuridica dell'imputato e della parte lesa, che a motivo dei disturbi dello sviluppo intellettuale richiedono un sostegno aggiuntivo.

Parole chiave: persone vulnerabili, imputato con disabilità intellettive, rappresentanza processuale, adulto idoneo

Cytuj jako:

Girdwoyń K., *Right to appropriate representation of defendants with intellectual disabilities in criminal proceedings* [Prawo do odpowiedniej reprezentacji oskarżonych z niepełnosprawnością intelektualną w postępowaniu karnym], „*Ius Novum*” 2020 (14) nr 3, s. 67–86. DOI: 10.26399/iusnovum.v14.3.2020.26/k.girdwoyn

Cite as:

Girdwoyń, K. (2020) 'Right to appropriate representation of defendants with intellectual disabilities in criminal proceedings'. *Ius Novum* (Vol. 14) 3, 67–86. DOI: 10.26399/iusnovum.v14.3.2020.26/k.girdwoyn