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The Presumption of the Age of Victims under International and Domestic Regulations

Abstract: The question of the security of proceedings and protection for victims involves a whole array of issues. One of them is the principle of the presumption of the age of the victim, which is an important element in the regulations on the legal protection of children in criminal proceedings. The Polish government has indicated that introducing the principle of the presumption of the victim's age into the Polish legal system was part of the implementation of the Sustainable Development Goals adopted in the UN Agenda 2030. For several years, there has been an emphasis in the field of European law on the need to implement appropriate procedures and take legislative steps for the comprehensive implementation of the obligations under Directive 2011/93/EU of the Parliament and of the Council of 13 December 2011 and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012. Both of these are to be implemented through the provision of Article 49(b) of the Code of Criminal Procedure, which was introduced into the Code by the Act of 16 December 2020 amending the Code of Criminal Procedure, which came into force on 9 February 2021. The principle provided for in Article 49(b) establishes a legal assumption used to indicate the provisions of the Code of Criminal Procedure that should be applied to a victim if their age cannot be determined and they may be a minor.

Keywords: age of the victim, child abuse, child victims, children's rights, restorative justice

Introduction

The protection measures available to a victim serve to ensure their freedom and sense of security in particular, as well as creating a sense of comfort during proceedings

in which they are involved and to protect them from possible retaliation by the suspect. The importance of these regulations is significant, if only because the very fact of being a victim of any crime is a very difficult experience. In order to protect victims from secondary victimisation, it is especially important that their participation in the investigation should not aggravate the trauma associated with the crime (Bieńkowska, 2016, p. 263; Falandysz, 1980, pp. 183, 185; Gronowska, 1989, pp. 112, 115).

The question of the security of proceedings and protection for the victim involves a whole array of issues. One of them is the principle of the presumption of the age of the victim, which is an important element in the regulations on the legal protection of children in criminal proceedings. Both internationally, including in EU law, and more recently in domestic law, there are regulations that provide for extending the application of special standards in respect of child victims to persons whose age cannot be established and whose physical and mental characteristics may indicate that they are minors.

The Polish legal system contains a number of international human rights acts (Jasudowicz, 2010, pp. 47–91; Malinowska, 1996, p. 17; Michalska, 1982, pp. 36–66; Mierzwińska-Lorencka, 2012, pp. 207–216; Mik, 1992, pp. 4–14), which guarantee the general rights of the individual and those related to participation in criminal proceedings but which do not address specifically the situation of a victim or a minor related to his or her interrogation. However, when establishing laws in individual countries – parties to international agreements – these rights should be taken into account so that they do not contradict the safeguards of fundamental rights contained therein.¹

1. The rights of child victims in the 2030 Agenda for Sustainable Development and in EU law

The 2030 Agenda for Sustainable Development, adopted at the 2015 UN Summit and titled ‘Transforming Our World’, provides a set of global Sustainable Development Goals aimed at eradicating poverty and addressing the economic, social and environmental aspects of sustainable development. The goal set forth in Article 16 of the Agenda begins with a recommendation to ‘[s]ignificantly reduce all forms of violence and related death rates everywhere.’ It concludes with a recommendation to ‘[p]romote and enforce non-discriminatory laws and policies for sustainable development.’ As has been rightly pointed out, the sequence of tasks seems to emphasise specifying

1 There are several international documents that address the issue of protection measures for victims; bearing in mind the issues addressed in this article, it is worth noting in particular the Universal Declaration of Human Rights (adopted on 10 December 1948 in Paris by the United Nations General Assembly), the International Covenant on Civil and Political Rights (adopted on 19 December 1966 in New York by the United Nations General Assembly) and the Convention on the Rights of the Child (adopted on 20 November 1989 in New York by the United Nations General Assembly).

and making subjective activities for peace, inclusiveness and justice.² Agenda 2030 reiterates that there are ‘responsibilities of all States [...] to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status’ (United Nations, 2015).

The European Union also played an important role in the process that led to the adoption of the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals in September 2015. In its communications, as well as its directives, the Council of the European Union reiterated that the EU and its Member States are determined to fully implement Agenda 2030 and achieve the 17 goals (Council of the European Union, 2017). It is worth pointing out that the Polish government also indicated that introducing the principle of the presumption of the victim’s age into the Polish legal system was part of the implementation of the Sustainable Development Goals (gov.pl, 2024).

For several years, there has been an emphasis in the field of European law on the need to implement appropriate procedures and take legislative steps for the comprehensive implementation of the obligations under Directive 2011/93/EU of the Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography and Replacing Council Framework Decision 2004/68/JHA (European Parliament, 2011) and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Assistance and Protection of Victims of Crime and Replacing Council Framework Decision (European Parliament, 2012). The provisions of Polish criminal procedure overwhelmingly ensure the implementation of these directives. The provisions of Directive 2012/29 are mainly reflected in the regulations of the Code of Criminal Procedure (CCP), in particular on the right of the victim to information on their rights and about the proceedings, the right to translation, including the right to file a crime report in the language that the victim speaks, to be heard, to legal aid, to reimbursement of expenses incurred, to compensation, to protection measures and, in addition, through the Criminal Executive Code in terms of the Victim Support Fund and the Post-Penitentiary Aid Fund, which provide a wide range of assistance measures for victims, with material and non-material assistance in the form of legal advice or psychological assistance (Sejm of Poland, 1997), as well as in the Law on Protection

2 The ideological basis for the goal expressed in Article 16 derives from the UN Charter. Peacekeeping is an objective of the Charter overriding all other UN objectives, as declared in its preamble. According to the UN’s interpretation, peacekeeping is subordinate to justice and all other human values. This is the initial interpretation of the hierarchy of these values. In the translation of United Nations law into domestic law, which may use other legal principles, this may imply interpretation issues, for example on the subjects of gender equality, prohibition of discrimination or abolition of the death penalty (see Filipkowski et al., 2019).

and Assistance for an Aggrieved Party and a Witness (Sejm of Poland, 2014). This law introduced transparent mechanisms that provide victims and witnesses with support and protection both before and during criminal proceedings. The situation is exactly the same with regard to Directive 2011/93. The provisions of this Directive are echoed in a number of laws, including the Criminal Code in terms of sexual offences, the Code of Criminal Procedure in terms of the rights of child victims, including the special questioning procedure and the recording of such questioning, the Act on Counteracting Domestic Violence (Sejm of Poland, 2005) and the aforementioned laws: the Criminal Executive Code (with regard to the Victim Support Fund and the Post-Penitentiary Aid Fund) and the Law on Protection and Assistance for an Aggrieved Party and a Witnesses.

Both of these documents also address the issue of the age of the victim. The provision of Article 24(2) of Directive 2012/29 states that '[w]here the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child'. In turn, it follows from Article 18(3) of Directive 2011/93 that

Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 19 and 20.

As part of the infringement procedures, the European Commission has addressed requests (Infringement No. 2019/2106 and No. 2019/2107) regarding Poland's incomplete implementation of Directives 2011/93 and 2012/29.

2. Presumption of the age of the victim in Polish criminal law

The above-mentioned directives are to be implemented through the provision of Article 49(b) of the CCP, which was introduced into the Code by the Act of 16 December 2020 amending the Code of Criminal Procedure, which came into force on 9 February 2021 (Sejm of Poland, 2020). The idea behind the new measures is to specify and clarify the existing provisions of the CCP relating to the protection measures during investigation to which victims are entitled (Sejm of Poland, 2021). The explanatory memorandum to the draft amendments indicates that the purpose of introducing the principle of the presumption of the age of the victim is to extend the application of special standards pertaining to child victims to persons whose age cannot be determined (e.g. foreigners whose identity is unknown) and whose physical and mental characteristics may indicate that they are minors. The provision's function and

purpose of protecting victims who may be minors is unquestionable, but the practical application of this institution may prove problematic, as will be discussed later.

The principle provided for in Article 49(b) of the CCP establishes a legal assumption used to indicate the provisions of the CCP that should be applied to a victim if their age cannot be determined and they may be a minor. According to this provision, the regulations of the Code relating to minors apply to the victim provided that the conditions indicated in Article 49(b) of the CCP are met. The first of these is when there are doubts about the age of the victim that cannot be resolved, i.e. a comprehensive evidentiary investigation does not provide grounds for resolving these doubts. The phrase used in the Act that refers to insoluble doubts is found in Polish law in the principle of the presumption of innocence and the resolution of all doubts in favour of the accused. It should be borne in mind, however, that the term 'insoluble doubts' means that the application of the above principle is possible only when a comprehensive evidentiary investigation has not provided grounds for the removal of such doubts. The use of such wording in the provision of Article 49(b) seems to imply that the recognition of a victim as a minor, and the subsequent application of the measures that the Code of Criminal Procedure provides for such victims, can take place only after the comprehensive activities of the investigative body have not resulted in a clear determination of the age of the victim, due to, for example, an inability to determine their age on the basis of civil registration documents, an identity document or the statement of another person who knows the victim. As Świecki (2024) rightly points out, when carrying out these investigations, it is necessary to take into account the victim's declaration of age, but this declaration should be verified, especially if the appearance of the victim suggests that they are a minor. If the provision in question were to be applied literally, this would mean that, for example, the questioning of a victim about whose age there are doubts cannot take place until the authority has carried out all the steps that could ascertain the above circumstance. In the case of a foreign victim, for example, this could mean asking the competent embassy to send relevant information.

In any event, these steps may be time-consuming and may therefore constitute an obstacle to carrying out an activity that is crucial to any investigation, that is, questioning the victim. Needless to say, questioning provides the basic and most important information about the circumstances of the crime, and it is often only by carrying out the questioning that the proceedings can continue and the remaining evidence can be secured. It is therefore obvious that any delay in questioning may entail very detrimental consequences. Therefore it seems that, taking into account the above, this provision should be interpreted as referring to doubts that cannot be resolved at a given moment, at a given stage of the proceedings. Such an interpretation in no way violates the safeguard function of the provision, and also ensures that the fulfilment of the norm contained therein does not contradict the best interests of the proceedings and does not impede the fulfilment of its objectives (Kochanowski, 2021).

The second premise concerns a reasonable suspicion that the victim is a minor. This presumption may arise from the person's overall characteristics (his or her phenotype, physical traits, including, for example, tertiary sexual characteristics, or psychological traits such as the way he or she behaves, expresses emotions or responds to stimuli). It is necessary to carry out an individual assessment of such persons in order to apply special protection measures, which in this case include separate rules for the questioning of minors (Articles 147(2)(a) and 185(a)–(d) CCP). The assumption established by the provision in question is rebuttable by convincingly demonstrating the victim's age of majority, such as providing a document that clearly indicates their actual age (Paluszkiewicz, 2023).

It is worth quoting here one of the rulings of the Supreme Court on a case of sexual abuse of a minor, in which it was pointed out with regard to the determination of the perpetrator's awareness of the minor's age that the determination of developmental age involves the evaluation of many elements of physique, i.e. the degree of bone development, teeth and bodily functions (physiological age) and the stage of development of somatic features, i.e. size and proportions (morphological age), which is the task of anthropology, or more strictly speaking, the branch of it referred to as ontogenetic anthropology or auxology (Judgment of the Supreme Court, 2021).³ It follows from this ruling that in order to determine the developmental age of the victim, knowledge beyond life experience and the competence of law enforcement authorities and the court is required. Of course, this does not apply to obvious situations, i.e. the determination of minority in a child a few years old. Ambiguity about the age of the victim, however, applies to minors in their teens, i.e. from about 14 to 17 years of age, because sometimes the appearance of a person at the age of 16 or 17 is no different from that of an adult at the age of 18 or 19.

The consequence of applying the assumption of Article 49(b) CCP is that the regulations on minor victims apply to such a person, and thus the rights of the victim are exercised in the proceedings by the person in whose permanent custody they remain (Article 51(2) CCP). Regulations on questioning a minor in situations provided for in the provisions of Article 185(a)–(c) also apply to such a person. The application by judicial bodies of the provision of Article 49(b) is connected with the fact that it is also necessary to carry out an individual assessment with regard to such persons in order to apply special protection measures. This makes it possible to use special protections for victims against them, including the recording of questioning during pre-trial proceedings by means of video and audio recording devices (Article 147(1) and (2)(a) CCP), the right to legal assistance and professional representation depending on the child victim's role in the proceedings (Article 87(1) CCP) or the

3 In this ruling, the Supreme Court referred to the concept of ontogenic anthropology, indicating that it is a field that deals with the study of the variability of the human body structure in time and space, including in small periods measured by sections of a single person (Charzewski et al., 1993, p. 7).

questioning of victims in specially prepared rooms, by or with the participation of trained professionals or by persons of the same sex if the offences involved sexual misconduct (Article 185(a)–(d) CCP).

The regulation of Article 49(b) CCP is a provision that serves to protect victims who may be minors. If such a person is considered a minor, the application is included in the protection for this category of victim. The application of the summary of principles is only possible if a complementary and comprehensive evidentiary procedure is carried out, which does not occur if these problems are removed. In practice, this may cause difficulties and become an obstacle to interrogating such a victim or repeatedly interrogating him or her outside the protective mode (Dziergawka, 2024; Kulesza, 2024).

Regarding the aforementioned provision of Article 24 of Directive 2012/29, it should be noted that it refers to specific protections for child victims during criminal proceedings. Paragraph 1 of this provision mentions the following protection rights for child victims in criminal proceedings: recording of questioning during pre-trial proceedings by means of video and audio recording devices (Article 147(1) and (2)(a) CCP), appointment of a representative for the child (Article 51(2) CCP, Article 99 of the Family and Guardianship Code), and the right to legal assistance and professional representation depending on the child victim's role in the proceedings and when there is a conflict of interest between the child and those exercising parental authority (Article 87(1) CCP). In turn, Article 23(2) and (3) of Directive 2012/29 provides for questioning of victims in specially prepared rooms, by or with the participation of trained specialists, by the same persons, by persons of the same sex (if they are not conducted by a judge or prosecutor) if the offences involved sexual misconduct (Article 185(a)–(d) CCP); questioning should be conducted so as to avoid eye contact between the victim and the perpetrator, without the perpetrator in the courtroom (Articles 177(1)(a) and 390(2) and (3) CCP); unnecessary questions should be avoided during the questioning (Article 171(6) CCP) and the questioning should take place without members of the public present (Article 360(1) CCP).⁴ Under Polish law, only some of these provisions apply explicitly to minors; in other cases, the provisions apply to all individuals, including those under the age of 18. The provision of Article 49(b), introduced by the 2020 Amendment Act, refers directly only to the provisions applicable to minors and leaves out those that apply regardless of the age of the victim. It is also noteworthy that some of the above-mentioned provisions of the CCP regarding protections for victims are applicable if the conditions specified therein are met. The existence of such conditions does not contradict the requirements of

4 EU law stipulates in the provision of Article 19(3) of Directive 2011/93 that taking specific measures to provide child victims with the help and support that will enable them to exercise their rights under the Directive should follow a case-by-case assessment of the specific situation of each victim, with due consideration of their opinions, needs and concerns.

Directive 2012/29, which, in Article 23(1), stipulates that certain protections may be exercised if justified by the competent authority's individual assessment of the victim (Sejm of Poland, n.d.).

The collection of information, as well as the hearing of the victim as part of the individual assessment, is covered by Article 52(a) CCP, which, like Article 49(b), is a result of the implementation of Directives 2011/93 and 2012/29. Prior to the introduction of this norm, whether measures such as those provided for in Article 185(a) or (c) CCP were necessary was decided based on the circumstances revealed in the course of the proceedings, following activities carried out in pursuance of the proceedings' general objective; that is, to determine whether a criminal act had been committed and to identify the perpetrator, the extent of the damage, etc. When it emerged from the circumstances thus established, for example, that the victim was a minor, this resulted in the application of judicial institutions defining the rules for carrying out an investigation with such a victim. The provision of Article 52(a) CCP introduced a change in this regard, imposing an obligation on the investigating body to conduct proceedings aimed at determining the circumstances listed therein, such as the personal characteristics and circumstances of the victim as well as the extent and consequences of the damage caused to them.

This special 'resultant evidentiary hearing' should lead to a determination of whether there are grounds for the application of the measures indicated in the provision. There are two duties of the investigation authority in applying the provision of Article 52(a) CCP prior to the commencement of the procedures referred to in Articles 143(1)(2), 177(1)(a), 184–185(c), 185(e), 299(a)(1), 360(1)(1) (d) and (3), and 390(2) and (3) CCP and in Article 10(2) of the Act on the Protection of an Aggrieved Party and a Witness. On the one hand, it is a legal obligation to establish the circumstances of the case, in particular regarding the characteristics and personal circumstances of the victim, as well as the nature and extent of the negative consequences of the crime. On the other hand, there is the obligation to collect a statement from the aggrieved person as to whether they want the measures provided for in the provision to be applied, i.e. whether they want the testimony that they will give to be recorded with a video or audio recording device.⁵

In the original version of Article 52(a) CCP, the lawmakers did not include an explicit obligation to update the individual assessment. In an effort to streamline the procedure for individual assessment of the victim and to ensure equal treatment of all victims, the norm of Article 52(a) was supplemented by a dedicated tool: a questionnaire

5 The issue of taking a statement from the victim as to whether they want the prescribed measures to be applied can prove problematic in practice. The victim may not have sufficient knowledge as to the meaning of particular investigative steps, which in turn may negatively affect their decisions on the subject. Moreover, upon first contact with the investigative body, the victim may not be able to predict which activities will be of particular importance to them.

for individual assessment of the victim (Sejm of Poland, 2023). This solution is meant to help the authority conducting the criminal proceedings to determine the characteristics and personal circumstances of the victim and the type and extent of the adverse consequences of the crime committed against them, taking into account the nature of the crime and the circumstances under which it was committed, on the basis of a standardised questionnaire. Its template is to be specified by the Minister of Justice by means of a regulation. This measure, in essence, should permit quick and efficient identification of the needs of the victim in terms of criminal proceedings. According to Article 52(a)(3) CCP, the individual assessment should be carried out no later than before the start of the proceedings indicated in the provisions of Article 52(a)(1). In practice, the lack of definition of the timing for the individual assessment may raise some doubts. Certainly, the assessment must be made before the statement is taken, the cut-off point for which, in turn, is also the commencement of the proceedings specified in Article 52(a)(1). The use of a questionnaire in making an individual assessment of the victim is the rule, and the only exception for waiving it is a situation in which there is a danger of losing or distorting the evidence in case of delay or when this will impede the investigation. In such a case, in accordance with Article 52(a)(3) CCP *in fine*, the information on the making of an individual assessment and the information on the victim's statement will have to be included in the report of the proceedings (Mierzwińska-Lorencka, 2023).

The literature rightly points out that the individual assessment should take into account such personal characteristics of the victim as age, sex, gender identity and expression, sexual orientation, ethnicity, race, religion, health status, disability, residence rights, communication problems, relationship with or dependence on the perpetrator, and prior experience of the crime; in assessing the crime, it should take into account whether it is a crime motivated by hate, resulting from prejudice or discrimination, whether sexual violence, violence in a close relationship or exploitation of a relationship of dependency is involved, as well as whether the victim resides in an area with a high crime rate. The assessment is a two-step process, in which the first stage aims to determine whether the victim, according to the criteria listed in Article 22(2) of the Directive, has special needs; if they do, the second step should identify which of the protection measures listed in its Articles 23 and 24 are necessary in that particular case. The Directive introduces neither priority categories of victims nor a hierarchy of them with regard to making individual assessments, but lists certain categories of victims as those who tend to be more vulnerable to further victimisation (for example, children) (Bieńkowska, 2015; Falenta, 2021).

The measures proposed in the provisions in question clearly seek to strengthen the position and increase the standard of protection of the interests of minors, aggrieved parties and witnesses to crimes, as well as adults – victims of crimes against sexual freedom and morality. The amendments focus on showing more respect for the dignity of such persons and are designed to minimise cases in which aggrieved

parties and witnesses to crimes experience secondary victimisation, i.e. re-exposure to traumatic experiences due to the reaction of those around them to their experience. Simultaneously, domestic regulations meet the requirements of the EU directives indicated above. The current provisions of the Polish Code of Criminal Procedure offer a broad range of institutions that guarantee the protection of the rights of the victim in criminal proceedings. Some of them are mandatory, i.e. applied in every case, some depend on the decision of the authority to apply them and some require action from the victim.

Conclusion

In light of the assumptions indicated in the acts of EU law and the basic rules of conduct for sustainable development addressed in the UN Agenda 2030, the changes made to Polish criminal procedure should be assessed positively. The relatively short period in which the new regulations have been in force means that their effectiveness in practice has yet to be determined. Some of the norms may obviously raise doubts; nevertheless, one should appreciate the efforts of the lawmakers manifested in the successive additions to the code's regulation of new norms, the purpose of which is to broaden the rights of the victim and strengthen the protection of their rights in ongoing proceedings. However, as the experience of the application of the law shows, the fundamental problems do not arise from the statutory regulations but from the practice of the law enforcement agencies and the judiciary. The first point to be mentioned here is, of course, the length of proceedings – their duration is steadily increasing – followed by the practice of communication between investigation authorities and the victim (as an example, we should mention here, unfortunately, the quite frequent practice of persuading the victims not to report the crime), the alleged impact of statistical results on the manner of ending proceedings, and others. To a certain extent, the active involvement of the victims themselves and their attorneys in the course of the proceedings constitutes a preventive measure, and this is done at the pre-trial stage: submitting requests for evidence and information on evidence, presenting the position of the victim on the measures that can be used by the investigation authority, and finally, resorting to complaints about the length of the proceedings. Nevertheless, as long as the fundamental problem of the malfunctioning of the justice system is not resolved, all such measures will have extremely limited effectiveness in terms of properly guaranteeing the rights of victims in ongoing proceedings (Kochanowski, 2021; Mierzwińska-Lorencka, 2023).

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