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A model of court proceeding in the cases of under age people against the background of the act on proceeding with under age people. General remarks

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Summary: The article's considerations concentrate on the characteristics of a court proceeding in minor-related cases before a family court. It is based on the model of the act on proceedings in minor-related cases from 26.10.1982, but its all sections have undergone many changes since then. The last necessary and long awaited amendment of the act brought some important changes in court proceedings in such cases. It made the proceeding in minor-related cases more uniform and increased guarantee of provided solutions, indicating *expressis verbis* minor's rights in a proceeding before a minor's court. However, a new law on minors is still needed that would be suited to the autonomous character of that branch of the law.

Key words: under age people (minors), proceeding in minor-related cases, law on minors, family court, court proceeding in minor cases, minor's rights in court proceeding, rules of court proceeding in minor cases, parties of a proceeding in minor cases, minor proceeding before a family court of the first instance, appeal proceeding in minor cases.

Model sądowego postępowania w sprawach nieletnich na tle ustawy o postępowaniu w sprawach nieletnich. Uwagi ogólne

Streszczenie: Przedmiotem rozważań jest charakterystyka postępowania sądowego w sprawach nieletnich prowadzonych przed sądem rodzinnym. Opiera się ono na modelu stworzonego na podstawie ustawy o postępowaniu w sprawach nieletnich z 26.10.1982 r., ale całe jego segmenty ulegały wielokrotnej zmianie. Ostatnia nowelizacja ustawy o postępowaniu w sprawach nieletnich – niezwykle potrzebna i oczekiwana -przyniosła istotne zmiany w sądowym postępowaniu w tego rodzaju sprawach. Ujednoliciła procedowanie w sprawach nieletnich i zwiększyła gwarancyjność rozwiązań wskazując *expressis verbis* na prawa nieletniego w postępowaniu przed sądem nieletnich. Jednak nadal potrzebne jest nowe prawo nieletnich, dostosowane do autonomiczności tej dziedziny prawa.

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Słowa kluczowe: nieletni, postępowanie w sprawach nieletnich, prawo nieletnich, sąd rodzinny, postępowanie sądowe w sprawach nieletnich, prawa nieletniego w postępowaniu sądowym, zasady postępowania sądowego w sprawach nieletnich, strony postępowania w sprawach nieletnich, postępowanie w sprawach nieletnich przed sądem rodzinnym I instancji, postępowanie odwoławcze w sprawach nieletnich.

1. The act on proceeding in the cases with under age people² (minors) in art.15 clearly stipulates that such proceeding is to be conducted by a family court. The Polish model of contemporary law for minors is from this point of view a court, judicial model.

Pursuant to art. 12§1a of the act on the system of common courts dated 27 July 2001, a department for minors and family may be established in a local court - to deal with cases from the sphere of the family and caring law, cases of demoralisation and punishable actions by minors, treatment of people addicted to alcohol, drugs, psychotropic substances as well as cases attributable to a caring court according to separate acts. The legislator in 568§1a of the Civil Procedure Code uses in exchange for the term of “family and minors’ department” also in bracket the one of “a family court”. The legislator uses also such term in the act on proceeding with under age people, so a family and minors’ department of a local court is a family court. Such a department (court) is relevant as regards the object to deal with proceeding of minors. A family court is mainly the old court for minors.

Poland has a long tradition of courts for minors that within the contemporary legal system form family courts. Family courts originated at the end of the 19th century in the USA³, and their idea from there was brought to Europe. In Poland, the first attempt to establish a court for minors was made in 1915, after Warsaw was left by the Russian occupational authorities. The Main Civil Court established on 10.08.1915 as a special court for minors, which was supposed to deal with minors’ cases up to the age of 17⁴, nominated even two chairmen - M. Korenfeld and B. Sobolewski. However, the court’s creation was not completed as the German occupational authorities got away with civil courts⁵.

Courts for minors were established in Poland soon after the country regained its independence by a decree issued by the Head of the State dated 7.02.1919⁶ and ordinance by the Minister of Justice dated 26 07. 1919⁷. They were created in Warsaw, Lublin and Łódź and were supposed to deal with “all criminal cases as occurred within the territory of a given city and being within the range of courts of peace as long as the accused or the harmed are minors aged up to 17 years old⁸.

² The act on proceeding in minor’s cases from 26.10.1982, uniform text: Vol. of Laws from 2014, item 382 with subsequent changes, later UPN.

³ M. Cieślak, *Od represji do opieki(rzut oka na ewolucję odpowiedzialności nieletnich)*, „Palestra” 1973, no 1, p. 40n.

⁴ E. Neymark, *Sądownictwo dla nieletnich w Polsce*, [in:] A. Komorowski, E. Neymark, Z. Rosenblum (edit.), *O sądownictwie dla nieletnich w Polsce*, Warszawa 1928, p. 8.

⁵ A. Moglinicki, *Dziecko i przestępstwo*, Warszawa 1925, p. 352, 353.

⁶ A Decree on the establishment of minor’s courts Dz.Pr.P.P.from 8.2.1919 no 14, item 171.

⁷ Dz. P PP no 63 from 5.8. 1919, item 378.

⁸ Art. 1 par. 2 of the decree.

The cases concerning minors in the precincts where such courts did not have their jurisdiction were handled before the courts of peace taking into account the rules as applicable for minors' courts⁹. They operated till 1928 - when in the ordinance by the President of Poland from 06.02.1928 "The Law on the System of Common Courts" it was indicated that the Minister of Justice might by means of an ordinance establish separate courts for minors in local courts, both in their seats and outside, and moreover may send hearing cases involving minors to one of magistrate courts for a few precincts of such courts¹⁰.

After the World War I, a network of minors' courts was created that gradually covered the whole territory of Poland¹¹. It is assumed that by 1954 the process of establishing courts for minors had been completed¹². Since 1973 family courts have started being established, to which also courts for minors were incorporated, but their jurisdiction included also lawsuits of adults committing crimes against children and youth as well as family-related civil and caring cases - including such cases as those on non-alimony (lack of maintenance) and divorce. This tendency led to the establishment in 1978 of family courts of such range of competence all over Poland¹³. This, unfortunately, distorted the original idea of family courts and minor's cases in practice were pushed to the background.

In 2001 family courts' object range of competence was limited, returning in a way to the conception of courts for minors, though with extended object range. In art.12 §1a of the act on the system of common courts, it was indicated that a local court is divided into such departments as: (...) a family and for minors (family court) for the cases a) from the range of family and caring law, b) those concerning demoralisation and criminal offences, c) concerning treatment of people addicted to alcohol, drugs and psychotropic means, d) attributable to the caring court according to separate acts of the law¹⁴. In the uniform text this is expressed in the following way: "In a local court, the following department may be established: 1) a family and for minors - for the cases a) from the range of family and caring law, cases concerning demoralisation and criminal offences of minors, treatment of people addicted to alcohol, drugs and psychotropic means as well as those attributable to the caring court according to separate acts of the law"¹⁵.

The act dated 26.10.1982 on handling minors' cases¹⁶ makes use of a uniform name of "family court" and such family court that deals with minors' cases due to being subject to civil procedure - non-trial one - is included into civil courts. Such classification is confirmed by using by courts of civil procedure code as relevant for minors' cases unless a separate regulation provides otherwise.

⁹ A. Grześkowiak, *Postępowanie w sprawach nieletnich* (Polish Law on Minors), Toruń 1986.

¹⁰ Ordinance of the President of the Republic of Poland dated 6 February 1928, Dz. U 1928, No 12, item 93, art. 4.

¹¹ The act on changing law on court system of common courts from 27.4.1948, Dz. U. No 32, item 237.

¹² M. Korcyl-Wolska, *Postępowanie w sprawach nieletnich*, Warszawa 2008, p. 29.

¹³ V. Konarska-Wrzošek, *Prawny system postępowania z nieletnimi w Polsce*, Warszawa 2013, p. 149.

¹⁴ Dz. U. 2001, Nr 98, poz. 1070.

¹⁵ Dz. U. z 2018 r. poz. 23, 3, 5, 106, 138, 771, 848, 1000, 1045.

¹⁶ Dz. U. z 2010 r z późniejszymi zmianami.

Family court, always consisting of one “judge” is relevant as regards its object range to deal with proceedings concerning minors and such court handles cases connected both with demoralisation as well as committing some offence. It is however a condition that such proceeding should be initiated before a minor turns 18. The act attributes two functions to such family court in proceeding of minors’ cases. The first and basic one may be called a recognizing function. It comprises all court’s activities as contained in recognizing such minor’s case - from its filing into the family court, initiating proceeding, till issuing a final decision that terminates the case in the first instance. A family court initiates its proceeding concerning a minor if there is a justifiable suspicion that circumstances prescribed in art. 2 UPN [Act on Handling Minor’s Cases] i.e. when a minor exhibits some symptoms of demoralisation or commits an offence subject to punishment.

Proceeding in the first instance may be terminated with a statement in the form of a decision, which closes subject matter consideration of such a case at this instance level. It may also be completed with discontinuance of such case. Family court does not initiate a proceeding and those which are initiated may be discontinued in whole or partially if there are no reasons to initiate or conduct them or when deciding on caring and remedial means is pointless, and especially when it considers that due to the means decided in other cases they are sufficient to achieve the aim of such proceeding.

Another function of courts for minors is a supervising one. In the situation when a court in the course of a proceeding involving a minor does not conduct some, strictly prescribed by the act activities - concerning especially evidence proceeding, but orders another statutory subject to do it (e.g. Police) - it supervises completion of such activities¹⁷. Similarly, when pursuant to art. 32j §1 UPN, a family court sends a minor’s case to school or some specific organizations - then within its supervision - it checks whether such imposed obligations are carried out in an adequate way. Such subject informs the family court of taken upbringing actions and achieved results, at least every 6 months, and immediately when they are not effective. It also supervises court probation officer’s activities and orders to carry out environmental interview in order to find necessary information about a minor and his/her environment (art. 24 UPN). It is a statutory obligation of a court to exert caring supervision over the course of activities as ordered or sent to other organs.

However, the act on handling minors’ cases provides for some exceptions from the rule that a family court is always relevant in dealing with such cases. First of all, it concedes such obligation to criminal courts as in some limited cases proceeding involving minors (as prescribed by UPN) may be conducted by a criminal court. The act from 1982 provides for two such cases: when there are justifiable reasons to issue a judgment involving a minor pursuant to art. 10§2 KK (Criminal Code) and when a minor has committed a crime prohibited by the act as an offence or a fiscal offence and proceeding against him/her was initiated before s/he turned 18.

A criminal court conducting a minor’s case and accused pursuant to art. 10§2

¹⁷ Art. 32 i upn.

KK, when such proceeding was initiated before the minor came of age, is, however, obliged to modify its criminal procedure as indicated precisely in art. 18§2 upn.

If the proceeding against a minor that has committed an offence treated as a crime, was initiated after s/he turned 18, then hearing such case is attributable to the above court according to KPK (Code of Criminal Procedure) that is, however, obliged to use material regulations of UPN as the offence was committed when the culprit was under age and must also take into account procedural requirements as prescribed by UPN.

A criminal court may also be a relevant court to deal with a minor's case in some justifiable cases when the committed offence is in close relation with an adult's offence and joint consideration of such cases is necessary and the minor's good is not an obstacle. However, when such joint cases of both a minor and an adult is considered by a relevant court according to KPK, it is obliged to keep UPN regulations as regards the minor.

Civil appeal courts are appeal courts for cases conducted in UPN-related cases, whereas in courts where no family and minors' departments have been established, civil department of local courts are also receive such cases concerning demoralisation and offences by minors that so far have been heard by criminal (appeal) departments of local courts. It means that there are no specialized departments for family matters in appeal courts.

A case by a minor - as it was indicated - as a rule is considered by a family court. It may also be dealt with by a criminal court but with all differences as prescribed by UPN. However, it may also be conducted - according to UPN - by out of court organs as there is a possibility of sending a minor's case by a family court to out of court modes of resolving it. This time, it is a concession for the conception of dejudication of proceeding in minors' cases. Such conception of delegating minors' cases or part of them to out of court organs was popular some time ago; an establishment of out of court commissions for minors was even suggested in Poland. A specific kind of social commissions acting within so called participative model consisting in solving conflicts within local communities, called also the nordic model, functions satisfactorily in Scandinavian countries¹⁸. However, in Poland this conception failed and a traditional court model of dealing with minors' cases has been functioning that is a heritage of Polish legal thought.

However, family court may within certain dejudication of proceeding pursuant to art. 32j UPN, delegate a minor's case, provided that it gets his/her consent, to a school s/he attends, youth, sport, cultural or educational organizations or other social organizations where such under age people belong. It is a condition that according to the court the means of educational influence that such school or organization possess should be sufficient to achieve the aim of such proceeding. A subject that received such minor's case is obliged to notify a court of taken upbringing actions and achieved results at last every 6 months, and immediately when they fail. At the same time, a

¹⁸ A. Grześkowiak, *Wybrane problemy reformy prawa nieletnich w Polsce*, [in:] *Reforma prawa karnego, propozycje i komentarze*. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej. Warszawa 2008, p. 507.

court is able to react to received information, which means resorting to the relevant application of art. 79 § 1 UPN. This means that a court does not “liberate” itself completely from such minor’s case delegated to the indicated out of court organs but has the obligation of supervising not only the course of dealing with such minor’s case but also checks the effects.

When a family court considers it reasonable, it may - with a harmed party’s consent who is a minor - send a case to a mediation procedure¹⁹ carried out by an institution or a trustworthy person. It is not a symptom of dejudication of a minors’ proceedings but only delegating some part of a proceeding to specialists-mediators, who, however, do not issue conclusive decisions as these are reserved for a family court. Mediation is allowed at every stage of a minor’s proceeding. After carrying out of a mediation proceeding, the case is sent back to a family court that when solving it takes into account the results of such mediation as well and may discontinue such proceeding. This form of a part of the proceeding with minors is considered as not only a modern way of dealing with the problem but also receives strong support from international organizations, which makes it becoming a dominant element of dealing with minors being included in the international standard of minor handling. It is pointed out to its significant upbringing effect as regards a minor who gets in contact with a harmed party, which is to enable the former to understand bad aspect of his/her behaviour²⁰. It is also ascribed some important moralizing impact, which is especially related to apologizing to the harmed party. In practice, however, family courts do not delegate minor’s cases to mediation too often²¹. Place relevance of a family court is adapted to the character of proceedings involving minors. It is established, as a rule, in a different way than in criminal proceedings as according to a minor’s place of residence, which means that rules as prescribed in KPC (Civil Procedure Code) are applied in such a case. In the event of difficulties in determining such place, the relevant court is the court of a minor’s place of living. Moreover, having in mind the principle of a proceeding concentration, a family court may in some situations delegate a case to a family court, where a minor stays.

2. The characteristic feature of the Polish model of court proceedings in minor-related cases is the principle of long and well grounded tradition “in the Polish legal system (...) that the host of minors’ proceedings, irrespective their stage, is a family court, not excluding personal identity of a judge”²². As it was indicated, in the Polish legal system, court model of handling minors has over 100 years of tradition, according to which and currently as a rule, all such proceedinga are carried out by family courts.

Consequently, the object relevance of one organ - a family court is conducting evidence and investigating procedure, which is the realization of the concentration

¹⁹ Art.3a UPN.

²⁰ E. Bieńkowska, *Mediacja w sprawach nieletnich*, Warszawa 2011, p. 4,12.

²¹ www.mediacja.gov.pl/Statystyki.html, B. Czarnecka-Dzialuk, *Wprowadzanie mediacji w sprawach nieletnich-polskie doświadczenia i perspektywy*, [in:] P. Hofmański, S. Waltoś (ed.), *W kręgu prawa nieletnich. Księga pamiątkowa ku czci Profesor Marianny Korcyl-Wolskiej*, Warszawa 2009, p. 219 n.

²² A draft of an act on handling minors’ cases and the act of the Law on the common court system with drafts of executory acts. Justification, Parliament’s document 1130 z 15.2.2013 r, p. 6.

of a proceeding rule. A family court consisting of one judge, carries out the whole minor-related proceeding in the first instance - which in its initial stage takes the form of a quasi-preparatory proceeding followed by an investigating one. This is a significant rule from the point of view of an upbringing aim of a proceeding.

Family court has all independent competences necessary to handle minor-related cases in way that is reliable and according to the rules of objective truth. The distribution of a proceeding obligation, that as a rule is imposed exclusively on the family court, is justified by the special character of a handled case as it involves a minor being a person of special personal, bio-psychological and social properties, so it is advisable that it should be handled by the same subject having a better chance to learn such minor as a person. Such court has at its disposal legal measures enabling it to issue such decisions of operational character that are necessary from the point of view of aims of such proceeding. It may place a minor in a youth shelter, impose certain duties on parents (guardians); orders, when such need arises, a search and inspection as well as conducts other procedural activities to explain a case thoroughly.

If the court, while conducting proceeding, recognizes that there are circumstances revealing the need to face a minor with formal accusation for some offence pursuant to art. 10§2 KK (Criminal Code), it may order to send the case to a prosecutor.

3. The model of court handling of minor-related cases is not a uniform one. Although it is unified in the first instance by court uniformity, but family court in its proceedings uses three normative procedure patterns that combine: specific proceeding as prescribed in UPN exclusively for minor-related cases and to large extent modelled on non-trial proceedings, civil proceeding in non-trial mode specific for caring cases and criminal proceeding conducted according to KPK (Criminal Procedure Code). In art. 20 UPN it is clearly indicated that “in minor-related cases adequate regulations of the Civil Procedure Code are applicable and as regards collecting, recording and presenting evidence by the Police as well as calling and applying defence the adequate regulations of Criminal Procedure Code are applicable with changes prescribed in the act”.

The regulations of the two procedure codes are applicable respectively, which means that depending on a need they complete the UPN regulations. Even the very term of an “adequate” application of KPC and KPK (Criminal and Civil Procedure Codes) may give rise to some doubts, though the legislator often uses such term. The Supreme Court in a judgment dated 15.02.2008r²³ pointed out that “in the literature and practice of issuing judgments there is no doubt that adequate application of law regulations means either using some relevant regulations without any changes to other reference range, using them with some changes or not using such regulations to another reference range (compare a resolution by the Supreme Court dated 23 August 2006 , III CZP 56/06, OSNC 2007, no 3, item 43)”. In the UPN there are no direct regulations of many procedural issues necessary to hear a

²³ ICSK 357/07, Legalis.

case in accordance with current standards in force. The act on handling minor-related cases refers in such situation to the rules of non-trial mode as relevant for caring cases contained in KPC, ordering them to be applied in an adequate way. It is, therefore, the family court that decides in relation to a specific case how to apply adequately some KPC regulations. However, this type of normative instruction, although being useful, may raise some doubts and lead to the applications of various procedural standards.

The statutory model of court proceeding in minor-related cases is therefore still a conglomerate of various proceedings. As M. Korcyl-Wolska aptly remarked: "the legislator introduced (...) a mixed procedure, consisting partially in independent regulation, and in the remaining range referring to other procedural acts, i.e. civil procedure code of non-trial mode and criminal procedure code"²⁴.

It should be, however, emphasized that the new model of a proceeding in minor-related cases introduced into UPN in 2013²⁵, to a larger extent than before, is based on the non-trial model of civil proceeding, following its pattern even in the regulations *expressis verbis* introduced into UPN, which in the literature was recognized as a much better solution than that used so far²⁶.

The regulations of a criminal procedure are applied exclusively in statutory indicated cases. They are mainly applicable when dealing with collecting, recording and presenting evidence by the Police and as regards establishing and functioning of a defence. It is assumed that KPK regulations in such issues provide more guarantees than the civil procedure, as for example, they provide higher quality standards of minors' interrogations worked out in the criminal proceeding.

Criminal procedure as established by KPK, partially modified by the UPN is applicable in minor-related cases if a minor's case is heard by a criminal court, relevant according to KPK - when there are reasons to give judgment in a minor's case pursuant to art. 10§2 KK. These regulations apply also when a proceeding is against a minor culprit and concerns an offence prohibited by the act as a crime or a fiscal crime, and it was initiated after s/he turned 18 years of age.

An important guarantee of a special handling of a minor as regards procedure is providing the application of certain rules as prescribed by the UPN in the situation when a minor who when committing a crime was 15 years of age and faces criminal accusation in an enumerative way according to art. 10§2KK, and moreover the proceeding was initiated before s/he turned 18, despite the fact that the proceeding is held according to KPK rules. Therefore, a criminal court must respect certain UPN regulations such as: preparatory proceeding is to be carried out by a family court, unless a minor cooperated with an adult person and especially justifiable case applies when it is handled by a criminal court. Moreover, a minor must have a defence and his/her parents or a guardian must have a right of a party involved. In the above situation, also regulations prescribed in the UPN are applicable towards a minor - e.g. parents or guardians are notified of initiating a procedure against a minor (also school or other self-government or social organizations may be notified).

²⁴ M. Korcyl-Wolska, *Postępowanie w sprawach nieletnich*, Warszawa 2008, p. 65.

²⁵ Ustawa z 30 VIII 2013 r., obowiązuje od 2 I 2014 r.

²⁶ V. Konarska-Wrzošek, *Prawny system postępowania z nieletnimi w Polsce*, Warszawa 2013, p. 300.

A family court conducting such proceeding in whole in the first instance may use the help of some external subjects in cases indicated by UPN that require some expert's knowledge. If a need arises to obtain an expert opinion on minor's mental health, a criminal court may apply for such opinion to an expert panel of court specialist as well as may order an examination by two expert psychiatrists, which may be connected with putting a minor to observation in a relevant institution. Also an environmental interview may be ordered to a court probation officer, and exceptionally to another institution.

4. A supreme principle governing whole proceeding in minor-related cases is the rule of a minor's good. It is indicated as a general rule by the legislator in art. 3 UPN emphasizing that in such cases one should follow most of all his/her good and try to achieve some desirable changes in his/her personality and conduct. However, the act by making a minor's good a supreme principle, at the same time, instructs to take into account social interest as well. As minor's good is always connected with social interest, so it should be assumed that the latter is always taken into account as long as a minor's good is respected²⁷. The principle of a child's good is to fulfil an important guarantee function. It should constitute a guarantee of protecting child's rights and be a barrier against their potential breach²⁸. As the principle is addressed to a family court and all subjects involved in a minor's case, thus it shapes the whole minor's proceeding as well as the court one.

In court handling minors, significant role is also played by specific rules on which the legislator based such proceeding. They may be reconstructed from the act on minor's handling, though they are not always formed in a direct way. They function to optimise the aim that such court proceeding serves. The rules characterizing such proceeding clearly prove that it does not have a character of a criminal procedure and the rules constitute a significant modification of the rules applicable by KPC for non-trial mode in caring cases. They are based on the need to provide a minor handling that is best suited to his/her level of biological, psychological and social development.

Proceeding in minor-related cases is determined most of all by the rule of purposeful initiation and conducting of a proceeding created for its benefit. It results from the statutory indication of an aim of conducting minor handling cases contained in the UPN preamble as well as from the statutory description aim of conducting such proceeding.

It is important that such aims should be present at every stage of a minor's proceeding as well as concern every decision of a family court and other organs dealing with a minor. A court when dealing with cases and respecting the preamble's wording should follow the rule of preventing minors' demoralisation, delinquency and create conditions of resuming by them of a normal life as well as attempt to strengthen caring and upbringing functions expressed by the feeling of responsibility for minors' upbringing.

²⁷ A. Grześkowiak, *Postępowanie w sprawach nieletnich (polskie prawo nieletnich)*, Toruń 1986, p. 60.

²⁸ Ibidem.

Court proceeding in minor's cases are to determine whether there are circumstances indicating minor's demoralisation or whether s/he has committed an offence or if there is a need to apply measures as provided for in the UPN²⁹ towards minors. This regulation was added to UPN by an act from 2013 that changed to a large extent a minor-related court proceeding³⁰. The aim of a proceeding before a court in a minor's case should be, however, seen in a wider aspect - in the perspective of general UPN aims as indicated in the preamble.

A family court initiates minor-related proceeding if there is a justifiable suspicion that a minor shows symptoms of demoralisation or committed an offence, therefore such initiation depends on the existence of a basis either of its initiation or conducting it in a given range and on some assumption that judging upbringing and correctional measures is justifiable in given minor's case. In contrary cases - pursuant to - art. 21 § 2 UPN - a proceeding is not initiated and the already started one is discontinued.

Within the court proceeding, data on a minor are collected, his/her upbringing, health and living conditions as well as some other evidence are presented. Family court, having in mind the above aim of a proceeding, hears a minor, his/her parents or guardians or orders, when such need arises, a search and inspecting and makes other procedural activities in order to explain a case thoroughly. The last expression contained in art.32b §2 item 2 of UPN, should be complementary to the general aim of a minor-related proceeding. It is therefore obvious that the whole court minor's proceeding should aim at comprehensive explaining of such case.

A characteristic feature of minor-related cases is the rule of concentrating a proceeding within one organ - the family court. This feature was indicated above emphasizing that the family court hosts such proceeding in the first instance. However, the UPN provides for some exceptions to the rule as certain activities prescribed by the act may be ordered to other organs, especially the Police.

The rule of legalism as valid in minor-related proceedings is modified in certain cases prescribed by the act by the rule of opportunism. Pursuant to the regulation from art. 21§1 UPN, a family court initiates a proceeding if there is a justifiable suspicion that a minor shows symptoms of demoralisation or committed an offence, therefore such a court is obliged to initiate such proceeding. However, when administering upbringing or correctional means is pointless, especially due to already administered measures in some other case, the court does not initiate such proceeding and the already initiated discontinues. A concession to the rule of opportunism is the possibility of sending such case to a school or social organization.

A family court initiates a minor-related proceeding with a decision, where it describes such a minor whom the decision concerns, which is a beginning of *in personam* proceeding³¹. The proceeding is initiated without a plaintiff's complaint, so in such type of proceedings the rule of a complaint lodging does not apply³².

²⁹ Art. 21a UPN,

³⁰ E. Kruk, E. Skrętowicz, [in:] T. Bojarski, E. Kruk, E. Skrętowicz, *Postępowanie w sprawach nieletnich. Komentarz*, Warszawa 2016, p. 148.

³¹ T. Bojarski, E. Kruk, *Przebieg postępowania*, [in:] T. Bojarski, E. Kruk, E. Skrętowicz, *Postępowanie w sprawach nieletnich. Komentarz*, Warszawa 2016, p. 170.

³² A. Grześkowiak, *Postępowanie w sprawach nieletnich. (Polskie prawo nieletnich)*, Toruń 1986, p. 86.

Assessing from this point of view of the model of court proceeding, one may say using an analogy to a criminal trial procedure that in minor-related cases there is a dominance of inquisitive elements.

In the cases concerning actions investigated at a lodged request, a family court initiates proceeding only when such request (application) has been lodged, but further proceeding is conducted *ex officio*. However, when action investigated at private request is involved, a proceeding is initiated only when public (social) interest requires so or a concern of a minor's upbringing or protection of a harmed party. Such proceeding is conducted *ex officio*³³.

Family court hears a minor's case at a closed session or a seating, as a rule. The sessions and seatings are held with closed doors, as a rule, unless an open proceeding is justified by upbringing aspects.

Also the rule of openness towards its members is limited in the proceeding before a family court. Such limitation is determined by the upbringing aspect of the proceeding. As a rule, a minor may browse through case files, make copies of them, but the family court may also refuse such rights if some upbringing aspects justify it. From this point of view, it is sometimes more beneficial not to make a minor familiar with all case's circumstances. A session is held in a minor's presence, however, environmental interviews and opinions on him/her are read during his/her absence unless special upbringing reasons are in favour of making him/her familiar with their content³⁴.

Pursuant to the UPN, a session may not be conducted in a minor's absence, if s/he has provided a reason of his/her absence and applied for the session to be postponed and the court considered such absence as justified. A family court, at a request of a minor's staying in a minor's shelter or in a youth correctional centre, orders him/her to be brought to such court session unless it considers his/her defender's presence to be sufficient.

5. The issue of a minor's rights in a proceeding before a family court has an important place in the model of court minor's handling.

A minor in a proceeding before such court enjoys self-evident rights as prescribed in the act. First of all, a minor is a party of such proceeding, therefore s/he enjoys all rights of a party, including the right to browse through files, right to receive expert opinions, ordinances, notifications, copies of documents delivered to other parties according to the act as well as the right to present evidence applications and complaints for activities breaching their rights.

A novelty, introduced by the act amendment from 30.08.2013 is granting minors the right to defence, which has been proposed for a long time in specialist literature. In the current court model of minor proceedings it is directly considered as every minors' right and belongs to their basic entitlements, irrespective the stage of a proceeding. The act clearly indicates³⁵ that a minor has a right for defence, including the right to use defender's services.

³³ Art. 22 UPN.

³⁴ Art. 32n §2 UPN.

³⁵ Art. 18a item 1 UPN.

A minor due to one's personal properties and due to legal nature of the situation has limited abilities to use the right to defence by oneself and therefore s/he should use a defender's help.

The UPN also provides for an obligatory *ex officio* defence of a minor in the cases indicated in art. 32c, when the minor's interest and that of his/her parents or a guardian are contradictory, and the minor does not have a defender. These two cases were also included in the previous version of the UPN regulations, but now so far reasons of the obligatory defence have been completed by some obvious cases. They include such situations when a minor is deaf, speech or sight impaired as well as when there is a justifiable doubt whether his/her mental health condition allows him/her to participate in a proceeding or conducting defence in an independent and reasonable way³⁶. It is also possible to establish a defender *ex officio* at a minor's request if a court's president considers it necessary and the minor or his/her parents cannot afford the costs of hiring a defender of their choice without a considerable loss for their financial resources necessary to maintain them or their families. The UPN also emphasizes that a minor's defender may apply procedural actions only at the request of such minor, taking into account his/her reasonable interest (art.32c §4 of UPN). Court president appoints *ex officio* a defender for a minor in cases prescribed by the act.

The act also provides a minor the right to refuse giving explanations or answering some specific questions, that is contained and closely correlated with the right to defence as a realization of one of the guaranteed rights for minors. A minor should be instructed of both these rights before starting his/her hearing or interrogation. The problem arises whether it should be done any time before each of the above activities³⁷. Determining of a minor's right to refuse providing explanations in a proceeding before a family court is a novelty. Lack of statutory determination of such right has so far placed minors in worse procedural situation as compared with adults accused in a lawsuit. The current model of court proceeding has clearly made up for this gap matching the intentional standards in this respect in spite of certain shortages occurring in this regulation. However, in connection with the right, one should perceive a minor's right to be heard as an original one³⁸ which is anyway an activity that every family court is obliged to conduct.

In the range of a minor's rights, one should also see certain cases prescribed by the act when taking some decisions by a court concerning a minor, his/her consent is required. In such cases, the expressed consent of the minor concerned is or may be of decisive importance for a court. It deals, most of all, with the application of an extra-court mode in the form as prescribed by art. 32j § 2 UPN of delegating a minor's case to a school, which s/he attends or to a youth, sport, cultural and educational and other social organizations, where s/he belongs. Similarly, a court may at its own initiative or with the consent of a minor, among others, send a case to an institution or a trustworthy person in order to conduct mediation proceeding.

³⁶ Justification of a governmental draft of an act, parliament's document no 1130.

³⁷ E. Kruk, *Skrętowicz pay attention to it*, op.cit., p. 141/142.

³⁸ See P. Górecki, *Uczestnicy postępowania na tle projektu. Prawa nieletnich*, [in:] P. Hofmański, S. Waltoś (ed.), *W kręgu prawa nieletnich*, p. 289.

From the point of view of the supreme principle in handling minor's cases - the rule of a minor's good - it is important that UPN grants to parents or guardians a status of a party in such proceeding. The right of participation of parents or guardians in a minor-related proceeding is of significant guarantee and upbringing importance.

Parents are notified both of initiating a proceeding and of its ending when a statement (decision) closing such proceeding has been delivered to them. They are entitled to browse through the files of a case and they may not be refused such right as they are heard in connection with such a case, may present evidence applications, are entitled to a complaint on activities breaching their laws and may apply for appeal measures. Parents, as a rule, cover the costs of a proceeding, except the cost of a mediation proceeding.

Assessing the level of trial guarantees contained in the rights granted to a minor in a proceeding before a minor's court after the last amendments of UPN, one may remark that they in most cases correspond to minors' rights as contained in so called Beijing rules from 1989. These rules stipulate the right to receive information, to keep silent, for legal aid or use the presence of a family member or a guardian, right to ask questions to witnesses and a right to appeal to a higher instance. A minor may use these rights pursuant to the UPN regulations and their exposition in the act proves that a minor is treated as a subject in a proceeding before a court³⁹.

6. By the amendment from 2013, the model of a court proceeding in minor-related cases was completely changed as before that time it had been divided into a few separate proceedings conducted according to different procedures. They contained an explanatory proceeding and investigating one that in turn might be conducted as a caring and upbringing proceeding or a correctional one. Such solution, atomizing a proceeding in minor-related cases, has been criticized for a long time⁴⁰.

First of all, progressing from an explanatory to investigating proceeding required approval and justification that it was reasonable to apply educational or treatment measures or put a minor in a correctional centre, which meant prior and made before hearing of a case acceptance by a judge that a minor was demoralised or that s/he had committed an offence. Practice of family courts, based on these regulations and connected with the obligation of issuing a statement by a family judge, where s/he expressed his/her assumption of a minor's involvement in an offence before even hearing a case at a session, was also negatively evaluated by ETPC⁴¹. The Tribunal found this to be violation of art. 6 §1 of the European Convention on protecting human rights and basic freedoms, among others, as regards the range of hearing a

³⁹ A. Gaberle attracted attention that UPA's drawback is not granting a minor rights allowing him/her to influence the course of a proceeding, such as, for example, right to information on his/her entitlements, right to submit evidence applications, etc – A. Gaberle, *Podstawowe problemy nowej ustawy o nieletnich (na przykładzie projektu ustawy – Prawo nieletnich z 2008 r.)*, [in:] T. Bojarski and others (ed.), *Problemy reformy postępowania w sprawach nieletnich*, Lublin 2008, p. 19.

⁴⁰ A. Grześkowiak, *Postępowanie w sprawach nieletnich. (Polskie prawo nieletnich)*, Toruń 1986, p. 85.

⁴¹ Judgment from 2.3.2010 in the lawsuit of Adamkiewicz versus Poland (complaint no 54729/00). <https://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/listByYear,4.html?ComplainantYear=2010>

case by an unbiased court in correctional proceeding. Such conclusion was based on the content of a decision issued by a family court and based on already repealed art. 42 of the UPN on hearing a case, where court revealed its assumption that a minor had committed an offence although the former did not judge the case in one of the statutorily prescribed proceedings (correctional one or caring and educational one), though no longer existing in a new proceeding model. The Tribunal pointed out that it was a breach to state by the judge, before issuing a final decision (statement) that the case's circumstances as revealed in an explanatory proceeding point to the minor as the one who had committed the offence. It was, therefore, a well justified step to make the regulations on handling minor-related cases before a family court uniform, due to many reasons. The UPN reform from 2013, introducing a uniform handling procedure before a family court has done away with various kinds of investigating minor-related proceedings and by it also repealed the need to issue a preliminary statement on recognizing such case in a specific mode.

The first stage of a court proceeding, uniformly regulated for the whole proceeding in the first instance is the stage of trial activities comprising collecting data on a minor, his/her upbringing, health and living conditions as well as gathering other necessary evidence. A court presents relevant evidence by itself but may order conducting some of the activities to the Police, as well.

Within the range of activities conducted at this stage of a proceeding, the family court hears a minor, his/her parents or a guardian, orders carrying out search, visual inspection and other trial activities aimed at comprehensive clarification of a case. Evidence applications in a proceeding before a family court may be applied by all parties concerned, defenders, attorneys, whereas the harmed party enjoys such right till a court session is initiated.

Environmental interview is an important evidence that is to establish some data on a minor in a minor-related cases besides his/her hearing. Its conducting is ordered by a family court to a probation officer, and in some exceptional circumstances it may be ordered to other subjects, including the Police. If a need arises to achieve an overall diagnosis of a minor's personality, a family court submits an application to court experts or other specialist institutions or a certified court specialist. If the court deems it necessary to gain an expert opinion on a minor's mental health, it orders his/her examination by at least two psychiatrists. Such examination may at the request of experts be combined with an observation in a relevant medical centre, but only if the collected evidence points out to the possibility that a minor is demoralized to a large degree or has committed an offence prohibited by the act as a crime or a fiscal offence. After hearing a minor, the court states on the need of holding an observation in such centre, which cannot last, as a rule, more than 4 weeks, but may be, at the request of the subject conducting such observation, prolonged for some specific time necessary to complete such observation (its total time, however, may not exceed 6 weeks).

A family court in the situation prescribed in art. 321 UPN, rules at a session on the application of educational measures of non-isolation character (art. 6 items 1-8 UPN), if the circumstances and nature of such case as well as reasonability and choice of their application are beyond doubts. As UPN does not contain any reference to a

party's presence at such session, in commentaries to the regulation it is indicated that their facultative presence at such session is based on the regulations of art. 154§1 KPC in connection with art. 20⁴².

A session is held by a family court in a situation when there are no premises as prescribed in art. 21 § 2, or in 32j § 1 or 32l § 1 of UPN, so when there are no premises to discontinue the case, send a minor's case to a school or social organization or issue a ruling at a session concerning applying educational measures as mentioned in art. 6 items 1-8 UPN. Court proceeding in a minor-related case in the first instance, when it is heard at a session, is completed with issuing a ruling in which the family court states whether the minor shows symptoms of being demoralised or has committed an offence or rules on the application of measures as prescribed in art. 6, art. 7 § 1 or art. 12 UPN.

7. In the reformed act's regulations on handling minor-related cases in connection with making the first instance proceeding before a family court uniform, also a uniform appeal procedure was introduced before a 3-person civil court that is conducted according to KPK regulations, taking into account some separate elements on minors as contained in the UPN. In the current legal status quo, appeal proceeding is conducted according to a civil procedure regulations and applied in a relevant way.

In the previous legal solution, the regulation concerning this issue raised a lot of doubts, which - as it was indicated - resulted not only from a limited range of regulating this appeal proceeding but also from not uniform basis and the need to apply both KPK and KPC regulations, which might lead to the fact that an applicant was not sure of its legal bases⁴³. The position of judges who demanded creating in an appeal court of a special department for minors is not only interesting but also worth considering in a legislative form⁴⁴.

The parties enjoy the right of appeal or lodging a complaint against the decision issued by a family court. An appeal may be submitted as regards subject matter conclusions, i.e. from the decisions concerning the content of a case. It may be submitted from all conclusions issued by a family court in minor-related cases in connection with an accusation of committing an offence or demoralisation. A complaint, on the other hand, may be applied in the cases as prescribed by the UPN or pursuant to relevant regulations from KPC - non-trial mode for caring cases, and when KPK is applied, in the cases as prescribed by it. A right for appeal measures is enjoyed by all parties of a proceeding, including minors, their parents or guardians and a prosecutor. Moreover, such appeal measure may be submitted by a minor's defender, parents' or guardian's attorney.

In an appeal proceeding, there is a procedural rule, adapted for the need of

⁴² T. Bojarski, E. Kruk, [in:] T. Bojarski, E. Kruk, E. Skretowicz (ed.), *Postępowanie w sprawach nieletnich*. Komentarz, Warszawa 2016, p. 191.

⁴³ See M. Żak, *Wybrane zagadnienia postępowania apelacyjnego w postępowaniu w sprawach nieletnich*, [in:] P. Hofmański, S. Waltoś (ed.), *W kręgu prawa nieletnich*. Księga pamiątkowa ku czci Profesor Marianny Korcyl-Wolskiej, Warszawa 2009, p. 427, 428.

⁴⁴ See M. Korcyl-Wolska, *Sądy rodzinne w Polsce orzekające w sprawach nieletnich wczoraj, dziś i jutro*, [in:] *Problemy penologii i praw człowieka na początku XXI stulecia*. Księga poświęcona pamięci Profesora Zbigniewa Hołdy, Warszawa 2011, LEX.

minor-related cases, in the form of ban of *reformationis in peius* that is of special guarantee importance in such proceeding. It imposes a ban on stating in minor's cases of measures prescribed in the act beyond the appeal. Therefore, when such upbringing measures as those prescribed in art. 6 items 1-8 or measures mentioned in art. 6 item 11 have been applied in a minor's case (other measures reserved for a family court' disposal or measures as prescribed in KRiO), excluding being placed in a substitute related family, non-professional substitute family, in a family orphanage, institution of day-care support, caring and upbringing institution and regional caring and therapeutic institution), and such appeal measure does not contain an application on stating an upbringing measures from art. 6 item 9 UPN, correctional measure or a measure from art. 12 UPN - i.e. placing in health, youth correctional centre or social care home, then as a result of a an appeal proceeding such measures may not be administered. This means that is is only possible - beyond the appeal's boundaries - to change the decision itself when the change of already administered upbringing means are changed into others of the same category.

The ban of *reformationis in peius* contains also decisions where measures as prescribed by art. 6 UPN were applied pursuant to art. 10§4KK or art. 5§2 KKS.

Appeal proceeding provides the implementation of a minor's right to participate in a proceeding before the court of appeal, although such participation in an appeal lawsuit is not obligatory. If a minor is placed in a minor's shelter or a youth upbringing centre and the court considers his/her presence necessary or when parties concerned or a defence require it, the court orders him/her to be brought before it.

As the appeal court as regards bringing a minor to a lawsuit at its request should possess an analogical possibility to the court of the first instance, then regulation of art. 62 § 1 UPN refers to the relevant application of the regulation prescribing such entitlements of the family court.

A cassation may be lodged against an absolute judgment of a local court according to general terms in the case when a ruling was issued towards a minor of putting him/her in a correctional centre as well as against a decision of an appeal court when some upbringing measures were decided (ruling by the Supreme Court dated 12.VI.2001, IIIKZ 39/01, OSNKW 2001 no 9-10, item.82). Complaints against decisions of a family court are heard by an appeal court, but in the cases indicated in the UPN, they are included in the family court's range of duties - e.g. complaints against activities violating rights of one of the parties involved are dealt with by a family court (art.31a).

8. The UPN regulations confirm that the proceeding system in minor-related cases is based on the court model of minor proceedings. The changes made in 2013 confirmed that tendency that had been present in the Polish law on minors since the interwar period, and even expanded it. Such solution pattern should be considered as a right one. A thorough modification introduced by this novelty amendment on the course of a proceeding before a court as well as limiting the recognizing proceeding to only one mode is also, beyond doubt, worth being accepted. Similarly, other changes - including especially the exposition of a minor's right in a court proceeding - were

necessary and had been suggested for a long time. In spite of desirable changes adopting a uniform model of hearing a minor's case, minor-related proceedings are still not uniform as a whole both as regards their character and course. After the reform from 2013, its uniformity was enhanced, but they are still not conducted in a unique procedure prescribed exclusively for minor's cases. The legislator did not decide for an autonomous regulation of such proceeding of a minor-related cases before a family court or to create a separate procedure contained as a whole in the UPN and determined exclusively for minor-related cases so that one would not have to use the enigmatic expression of using "adequate" KPC [Civil Procedure Code - non-trial procedure] application for family and caring matters or KPK [Criminal Procedure Code].

This would be necessary both for a minor's benefit as well as to provide guarantees of minor-related proceedings. Currently, as it was indicated above, a non-trial procedure contained in the civil procedure code is a base for such proceeding before a court and relevant for caring matters, and as regards evidence activities conducted by the Police or establishing and acting of a defence - criminal procedure as contained in KPK, obviously applied adequately with changes prescribed in the UPN. Consequently, a mixed type procedure is in force consisting in "partially autonomous regulation and in the remaining range referring to other trial regulations i.e. civil procedure code and criminal procedure code"⁴⁵. M. Korcyl-Wolska is right when writing that "one should aim at elaborating a legal act that would comprehensively regulate the issue of minors conflicted with the law, contain its own, uniform procedure and determine the scope of rights and obligations of a proceeding's participants in accordance with solutions applied in the Polish legal system, especially in the Constitution of the Republic of Poland together with European standards and all documents determining international child rights standards ratified by Poland"⁴⁶.

Amendment of the UPN seen in a broad perspective may rise need for more. Expectations included a new comprehensive solution that is uniform, suited to changing times and needs and guaranteeing needs of the whole law on minors. They delineated a very broad area of the new regulation, so the long lasting works on the new minors' law allowed to believe that such eclectic legal construction as the UPN, based on conceptions and solutions from the eighties and completed by following segments of solutions over its 35 years in force, would become a past. A hope for a new and comprehensive act was really big.

After interesting and pretty new proposals contained in the draft of minors' law from the first decade of the 21st century, one could expect to overcome kind of a legislation impasse and pass a new act based on the new axiology. This resulted in an act that although being useful but does not meet the hope to create basics of a new, autonomous discipline of minors' law. It is even hard to imagine how many times this act has been amended as soon alphabet letters will not be enough to mark all introduced regulations. However, it would be better than instead of such segmental amendments, to complete the work started a dozen years before and prepare a new,

⁴⁵ M. Korcyl-Wolska, *Sądy rodzinne w Polsce orzekające w sprawach nieletnich-wczoraj, dziś i jutro*, [in:] *Problemy penologii i praw człowieka*, LEX.

⁴⁶ *Ibidem*.

coherent, complete and, most of all, autonomous act being in a comprehensive perspective the law for minors based on the court model of minor-related proceedings.

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