



ORDO IURIS

INSTITUTE FOR LEGAL CULTURE

Warsaw, 15th August 2021

Honorable Member
United Nations Committee
on the Rights of the Child

Dear Madam or Sir,

Member of the United Nations Committee on the Rights of the Child,

the Ordo Iuris Institute for Legal Culture welcomes the opportunity to assist the United Nations Committee on the Rights of the Child in its adoption of the Report as regards realization of the rights of the child in Poland.

We hope the Committee on the Rights of the Child will find this Complementary Report useful.

Jerzy Kwaśniewski
President of the Board
Ordo Iuris Institute for Legal Culture

**The Ordo Iuris Institute Complementary Report
(CRC and OPSC)
for the 88th session
of the Committee on the Rights of the Child**

Review of POLAND
(6-24 September 2021)

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Introduction

The Ordo Iuris Institute for Legal Culture is an independent legal organization established as a foundation in Poland. It gathers academics and legal practitioners who strive to promote legal culture based on respect for human rights. Ordo Iuris pursues its objectives by means of research, advocacy, litigation, and academic activity.

Ordo Iuris is among the organizations that are consulted by the Polish Government within the legislative process. Third party interventions (including *amici curiae* briefs) by Ordo Iuris Institute have been accepted by Polish courts of all levels, including the Supreme Court of the Republic of Poland. The Institute has also been permitted by the President of the European Court of Human Rights to deliver third party interventions. The vice-President of the Institute is the member of the European Economic and Social Committee.

The experts of the Institute have extensive experience in matters relating to human rights in Poland. In particular, they regularly prepare opinions and analyses, propose legal acts, and defend cases before the courts. Moreover, the Ordo Iuris Institute has ECOSOC consultative status with the United Nations.

I. General principles

a. **Right to life, survival ,and development (Article 6)**

The Convention on the Rights of the Child ("CRC" or "Convention") ratified by Poland in 1991, imposes an obligation on the States Parties to guarantee the legal protection of the life, conditions, and development of every child on their territory (Article 6). With regard to the assurance of this obligation, the Convention uses the phrase "to the maximum extent possible the survival and development of the child". This indicates that States bound by the provisions of the CRC should make every possible effort to ensure that the survival and development of children is guaranteed to the highest extent possible. Paragraph 2 of this provision can be considered as the standard for the implementation of the obligation of States Parties to the CRC to recognize the fundamental, inalienable right of every child to life. This right is derived from the dignity of the human being, independent of the will of the legislator. Thus, the signatories of the CRC who recognize children's right to life are obliged under Article 6(2) of the CRC to undertake concrete actions as a manifestation of that recognition. The first and fundamental obligation of the States Parties to the Convention under Article 6 is thus to guarantee to all children the possibility of survival (protection from death) and subsequently adequate conditions of existence and development. It is important to note that, in accordance with the provisions of the CRC, the obligation to protect children from death is activated not at the moment of birth, but already at the prenatal stage. This is confirmed by the contents of Article 1 of the CRC, as well as the preamble, referring in this regard to the Declaration of the Rights of the Child - a child, due to its physical and mental immaturity, requires special **care and concern, including appropriate legal protection, both before and after birth.**

➤ **Implementation by Poland of its obligations under Article 6 of the CRC**

A specific expression of Poland's implementation of its obligations under Article 6 of the CRC is the ruling of the Constitutional Tribunal ("CT") issued on 22 October 2020 in case K 1/20¹, on the basis of which the so-called "eugenic abortion" was banned in this country. As a consequence, a statutory provision allowing for the possibility of taking the life of a child before birth on the basis that a grave and irreversible impairment of the fetus or an incurable life-threatening illness was highly probable has been eliminated from the Polish legal order. The provision of Article 4a(1)(2) of the Act on Family Planning, Protection of the Human Fetus and Conditions for the Permissibility of Abortion ("AFP"), in force before the date of the ruling of the Constitutional Tribunal² was found to be in violation of the

¹ Wording of the ruling is available at: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerwywania-ciazy>, access: 21 July 2021

² Polish Journal of Laws for 1993 no 17 item. 78

Polish Constitution³, as well as being in breach of the Poland's obligations under a number of binding international agreements, including the Convention.

The K 1/20 case focused on the compliance of the provision of Article 4a(1)(2) of the AFP with, inter alia, Article 30 of the Constitution, guaranteeing legal protection of inherent and inalienable human dignity⁴, and Article 38 of the Polish Constitution, providing the legal protection of life to every human being. As the Constitutional Tribunal indicated in its ruling, the eugenic premise of abortion infringes the inherent dignity of a human being, i.e. a child in the prenatal stage of development. Human dignity is in turn the source of all rights and freedoms, including the right to protection of life referred to in Article 38 of the Constitution of the Republic of Poland.

It is also worth noting that the ruling of the Constitutional Tribunal issued on 22 October 2020 is not a novelty in the subject of the legal protection of the conceived life on the territory of Poland. Already in 1997, that is before the current Constitution entered into force, the Constitutional Tribunal issued a ruling in case K 26/96⁵, in which it unequivocally stated that the obligation of the state to respect human life during the prenatal stage results from the principle of a democratic state of law in Poland. It should be added that this principle is common to all democratic states.

In the K 1/20 judgment, the Polish constitutional court clearly sided with those children's rights that arise from the provisions of Article 6 of the CRC. Its issuance by a state authority constitutes the fulfilment of Poland's obligations as a State Party to the CRC, resulting from Article 6(1) of the CRC - to recognize that every child has an inalienable right to life, and from Article 6(2) of the CRC - to take measures to ensure, to the maximum extent possible, the living and developmental conditions of every child (enabling survival as a priority). There is no doubt that the term "child" should be understood within the meaning of the CRC also as "child conceived, not yet born". This is evidenced not only by the Preamble, but also by a range of scientific evidence which clearly show that human life begins at the moment of the fertilization of the egg cell⁶, and therefore that the fertilized cell constitutes a new human being⁷, i.e. a child as defined in Article 1 of the CRC (as well as the definition functioning in the Polish legislation - Article 2(1) of the Act on the Ombudsman for Children ("AOC")⁸).

³ Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws for 1997 No. 78 item 483)

⁴ *Human dignity, inherent and inalienable, is the source of human and civil liberties and rights. It is inviolable and its respect and protection is the duty of public authorities.*

⁵ Ruling of the Constitutional Tribunal of 28 May 1997 in the case K 26/96, <http://orka.sejm.gov.pl/proc3.nsf/opisy/85.htm>, access: 6 August 2022.

⁶ D. Murswiek, *Art. 2 (in:) Grundgesetz. Kommentar*, Hrsg. M. Sachs, ed. 3, München 2003, nb. 143, 145; H. Schulze-Fielitz, *Art. 2 Abs. 2 (in:) Grundgesetz. Kommentar*, Hrsg. H. Dreier, vol. 1, ed. 2, Tübingen, 2004, nb. 29; D. Lorenz (in:) *Handbuch des Staatsrecht*, Hrsg. H. Bethge, vol. 6, wyd. 1, Heidelberg 1989, § 128, nb. 12; R. Beckmann, *Rechtsfragen der Präimplantationsdiagnostik*, „*Medizinrecht*” 2001, vol. 19, nr 4, s. 169–171; S. Djie, *Präimplantationsdiagnostik aus rechtlicher Sicht*, Shaker Verlag 2001, p. 36.

⁷ T.V. Daly, *The Status of Embryonic Human Life – A Crucial Issue in Genetic Counselling* (w:) *Health Care Priorities in Australia: Proceedings of the 1985 Annual Conference on Bioethics*, ed. N. Tonti-Filippini, Melbourne 1985, s. 55, 191.

⁸ Act of 6 January 2000 on the Ombudsman for Children (consolidated text, Polish Journal of Laws for 2020 item 141).

➤ **Evaluation and recommendations by Ordo Iuris**

The change in the legal status in Poland which took place as a result of the ruling of the Constitutional Tribunal in case K 1/20 should undoubtedly be regarded as an important step towards improving the status and protection of unborn children, whose inalienable right to life is confirmed by the provisions of the CRC. The decision of the Constitutional Court once again reminded that every child, even before birth, has the dignity of a human being, subject to legal protection. Despite another ruling of the Court emphasizing the dignity of unborn children, the questioning of this dignity is relatively frequent in Poland. One of the reasons for such cases is the inconsistent statutory terminology, which often uses the term "fetus" (e.g. in AFP) as allegedly not being synonymous with the term "child", which in consequence often leads to absurd statements that "a fetus is not a child". A desirable change in this respect would therefore be the unification of statutory terminology unambiguously indicating the humanity of children in the prenatal period of development, in line with that adopted in Article 1 of the Convention ("a child" means every human being below the age of eighteen years), as well as in Article 2(1) of the Polish AOC (a child is every human being from conception to the age of majority).

b. Non-discrimination (Article 2)

Article 2(1) of the CRC prohibits States Parties from any discrimination against children, including on grounds of race, color, sex or **disability**. Thus, all states that have adopted the Convention are obliged to respect and guarantee the rights specified therein for every child, including the sick and disabled ones. The development of the said principle of non-discrimination is found in **Article 23 of the CRC**, which provides, inter alia, that the signatories to the Convention recognize that a mentally or physically **disabled** child should **enjoy a full and decent life, in conditions which ensure dignity**, promote self-reliance and facilitate the child's active participation in the community (paragraph 1) and recognize **the right of the disabled child to special care** and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care (paragraph 2).

➤ **Implementation by Poland of its obligations under Article 2 (and Article 23 of the CRC)**

In the context of the above-mentioned provisions of the CRC, it is therefore of fundamental importance to ensure appropriate living conditions for every child with disabilities, including such legal measures which will protect life at its initial stage, i.e. at the prenatal stage. The ruling of the Polish Constitutional Tribunal in the case K 1/20, as a result of which the eugenic practice of depriving disabled children of life before birth was declared illegal, is an expression of fulfilment of Poland's obligations resulting from the provisions of Article 2, as well as Article 23 of the CRC. The consent of a given country to abortion on the grounds of a child's illness or disability should be regarded as a violation of the

prohibition of discrimination against children, precisely because of their illness or disability. This view is also confirmed by the position of the UN Committee on the Rights of Persons with Disabilities, according to which **provisions that expressly permit abortion on the grounds of disability violate the Convention on the Rights of Persons with Disabilities (Articles 4, 5, 8)**. Even if the human condition is considered terminal, the decision is still made on the basis of impairment⁹. Poland, as a State Party to the Convention (as well as to the Convention on the Rights of Persons with Disabilities), not only actively opposes the discrimination against children with disabilities, but also consistently takes measures to improve the living conditions of all persons with disabilities and their families.

➤ **Action for ill and disabled children and their families - "Pro-Life" program**

Counteracting discrimination against children with disabilities (ill, handicapped) and guaranteeing them and their families protection of the rights set out in particular in Article 23 of the CRC requires that the States Parties to the Convention take a number of multidimensional measures to ensure, on one hand, decent living conditions for ill children, and on the other hand, appropriate support for the guardians of such children. Recognizing the challenges that arise in this area, and taking the initiative to help and support Polish families, on 4 November 2016, the Act on Support for Pregnant Women and Families "Pro-Life" was passed.¹⁰ It contains legal, structural, and financial solutions which aim at full social integration of disabled persons and support for the family of a disabled person in psychological, social, practical, and economic aspects. The program is addressed to families raising handicapped, terminally ill, and/or disabled children. It also encompasses pregnant women and their families in the case of complicated pregnancies.

There are four main priorities within the "Pro-Life" Program: **(1) support for pregnant women and their families (2) early support for child and family development (3) support and rehabilitation services and (4) housing support**. The priorities thus defined are implemented by:

- ensuring access to comprehensive care for women during pregnancy (including complicated pregnancy), childbirth and postpartum,
- guaranteeing support for families and children with a lethal defect,
- providing interdisciplinary early support for child development, which enables the child and its family to be provided with specialized care;
- establishing coordination, rehabilitation and care centers;

⁹Committee on the Rights of Persons with Disabilities, *Comments on the draft General Comment No 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights*. General Comment No. 36 was adopted on 30 October 2018, <http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/CRPD.docx>, access: 22 July 2021.

¹⁰The Act of 4 November 2016 on Support for Pregnant Women and Families "Pro-Life" (Polish Journal of Laws for 2016, item 1860 as amended) and Resolution no. 160 of the Council of Ministers of 20 December 2016 on the program of comprehensive support for families "Pro-Life" (M.P. 2016 item 1250).

- improvement of the quality and accessibility of health care services and
- increase of effectiveness and accessibility of rehabilitation of children diagnosed with severe and irreversible disability or incurable life-threatening illness, which occurred in the prenatal period or during childbirth.

Moreover, the program includes guarantees of support for family members in caring for a disabled person through the introduction of assistance in the form of respite care; support for parents and caregivers in daily activities and household duties; securing housing needs of families bringing up a disabled child; enabling caregivers of disabled persons to combine work with care for a disabled person and support them in the event of an illness of a disabled child; creating a network of self-government institutions which aim to help disabled persons achieve independence in social and professional life.

The “Pro-Life” program emphasizes, among others, early support for the development of children affected by illness or disability. It also contains provisions on palliative care and provisions providing for the rehabilitation of children certified as having a severe or irreversible handicap or an incurable life-threatening illness that occurred prenatally or at birth.

The program provides for the involvement of a family assistant - an institution established by the provisions of the Act of 9 June 2011 on Family Support and the System of Foster Care ¹¹. The “Pro-Life” program extends the scope of activities of the family assistant - his/her task is to help parents with difficulties in fulfilling their caretaking and educational functions, and pregnant women and their families, with particular attention to women with complicated pregnancies, women in situations of obstetric failures, and families of children diagnosed with severe and irreversible disability or incurable life-threatening disease that occurred in the prenatal period of child development or during childbirth. Pregnant women and their families can always report the need for a family assistant to the commune. Upon the request of those concerned, the family assistant becomes the coordinator of support activities, including, inter alia: (1) providing information on access to policy instruments for the family, (2) psychological support, (3) support in carrying out daily duties, (4) assistance in official matters, supporting parents in communication with the school staff, preschool, court, counselling centers, clinics, police, offices and other institutions.

The priority on services and rehabilitation includes respite care for parents or caregivers of disabled persons. The purpose of this is the possibility to help the family, for example, if the caregiver needs to run daily errands or take a break, or if a family member takes up a full-time or part-time job. Respite care is provided to low-income caregivers who have children with a disability certificate indicating permanent or long-term care or assistance of another person due to significant limitation of independent existence and the necessity of permanent participation of the child's caregiver in the child's treatment,

¹¹ Polish Journal of Laws for 2011 no. 149 item 887

rehabilitation and education on a daily basis. The respite care also applies to caregivers of disabled children with a recognized severe disability. The envisaged forms of care provision are: (1) services provided 24 hours a day or as needed for several hours a day, (2) provision of respite care for up to 120 hours per calendar year, (3) subsidized employment of an unemployed person to assist a family with a disabled child by a local authority or an employer NGO.

Another important priority of the “Pro-Life” Program is the housing support, the objectives of which include increasing the availability of housing for families raising children with disabilities. Apartments are being built for rent, including the possibility of eventually acquiring ownership, i.a. using public land. The aim of this measure is to increase the availability of housing in particular for families with disabled children. The basic factor that determines the allocation of housing is family income, understood as the minimum rent capacity. Additional criteria are set individually for given locations by individual commune local governments, taking into account the housing situation in the given region, and they include, i.a., families bringing up children with disabilities.

➤ **Implementation of the Program of comprehensive support for families “Pro-Life” in 2017-2019 with the example of selected elements of the program**

The Ministry of Family and Social Policy provides data on the implementation of the “Pro-Life” Program. This information shows that the Program for supporting disabled children and their families, initiated on 1 January 2017, in the period of 3 years, enjoyed significant interest among beneficiaries. For example, the following values can be indicated within the selected priorities of the Program¹²:

- **Coordinated care for pregnant women, with special attention to complicated pregnancy (Action 1.1):** under coordinated care for pregnant women, 1,756 babies were born in 2017, in 2018 - 37,712 children, and in 2019. - 32,416 children.
- **Prenatal diagnosis and therapy (Action 1.2):** prenatal diagnosis and therapy services provided under contracts for the provision of services in the field of prenatal testing program: in 2017 - 106,986 beneficiaries used the services, in 2018 - 109,909 beneficiaries, in 2019. - 108,949 beneficiaries.
- **Palliative and hospice care (Action 1.3):** number of patients/parents covered by perinatal palliative care services: in 2018 - 289, in 2019 - 476.
- **Coordination of neonatal and pediatric care for children diagnosed with a severe and irreversible disability or an incurable life-threatening disease that occurred in the prenatal period of development or during childbirth (Action 2.1.):** in 2017 - 280 children

¹²Ministry of Family and Social Policy „Implementation of the Program of Comprehensive Support for Families “Pro-Life” in 2017-2019”, <https://www.gov.pl/web/rodzina/efekt-programu-wybranc-dzialania>, access: 26 July 2021.

were covered by the children coordinated care (CCC); in 2018 - 521 children were covered. The CCC centers that benefited from computer and IT equipment subsidies under the program in 2017-2018 covered 238 children up to the age of 3 years with child coordinated care in 2018; 540 children were covered in 2019, including 256 children admitted for the first time for whom an individual CCC care plan was established. With regard to the task of coordinating neonatology-pediatrics care for children, six specialized centers coordinating care for and working with children were retrofitted with computer equipment and IT tools in 2017-2018. These providers provided 881 children under the age of 3 with pediatric coordinated care in 2019.

- **Early rehabilitation of children diagnosed with a severe and irreversible disability or an incurable life-threatening disease that occurred in the prenatal period of development or during childbirth (Action 2.3.):** in 2017 - number of children under the age of 3 years covered by the rehabilitation under the CCC children coordinated care - 20, in 2018 - 555 children benefited from rehabilitation, in 2019. - within the task of early rehabilitation of children in 2017, two rehabilitation centers for children were equipped with equipment for rehabilitation of cognitive and speech disorders, which in 2019 covered 652 children with rehabilitation.
- **Establishment of coordination, rehabilitation and care centers with particular emphasis on early support for the development of children from the moment of detecting disability or risk of disability (Action 2.4.):** in 2017 - 3,948 children aged from 0 to the start of school were covered; in 2018 - at least 14,651 children; in 2019. - at least 18,804 children.
- **Supporting employment of family members caring for a disabled person (Sub-action 3.5.1.):** the action has been implemented since 2018. In 2018 - 126 people benefited from the support, in 2019 - 380 persons will benefit from the support in the above-mentioned scope.
- **Increasing the availability of apartments for families bringing up children with disabilities - construction of apartments for rent, including with the possibility of eventually obtaining ownership, e.g. with the use of public land (Action 4.1.):** by the end of 2019 - 867 apartments were completed, including apartments adapted to the needs of the disabled persons: in Biała Podlaska (186 apartments), Gdynia (172 apartments), the commune of Jarocin (258 apartments), Kępno (36 apartments) and Wałbrzych (215 apartments); construction of over 1.9 thousand apartments was in progress, including apartments adapted to the needs of the disabled: in Dębica (201 apartments), Jarocin (108 apartments), Katowice (513 apartments), Kępice (42 apartments), Kraków (481 apartments),

Łowicz (96 apartments), Mińsk Mazowiecki (138 apartments), Radom (124 apartments), Świdnik (108 apartments) and Zamość (96 apartments).

- **Evaluation of the “Pro-Life” program and recommendations of the Ordo Iuris Institute**

At the initial stage of its functioning, the Program enjoyed relatively low interest. In the Institute's opinion, this could have been influenced in particular by a fairly poorly organized marketing campaign. Possible shortcomings in the promotion of the program should not, however, obscure the positive overtone of the growing number of its beneficiaries. Another advantage of the program is that the assistance is not restricted by age. Some of the actions are addressed to older children and to people at working age, which demonstrates consistent and long-term assistance to people in need and may have positive influence on families' decisions to accept and bring up a child with disabilities. In the communication and promotion of the program, it should be emphasized that some of the activities included in the program may be benefited from by all children, which is to the advantage of a wider group of people than only those with disabilities.

In order to improve the functioning of the “Pro-Life” Program of support for families, the Institute has prepared its analysis¹³, in which it presented a proposal for the establishment of a program coordinator, whose work would enable its more effective implementation. The competences of the coordinator should include in particular: initiating substantive changes in the program, prioritization of the activities covered by the program, assessment of the priorities and free allocation of funds within the program budget. The coordinator should also be responsible for communication and information, and have a decisive influence on the introduction of new activities into the program and completing current initiatives. The Institute also suggests the following solutions for a better use of the potential of the “Pro-Life” program:

- changes in the rules for granting the attendance allowance (a cash benefit due to persons caring for a disabled child), which is currently granted only to caregivers resigning from gainful employment; the requirement has no rational justification and, moreover, worsens the material situation of caregivers of disabled persons and their families. The proposed guarantee of the possibility to receive the attendance allowance by caregivers resigning from gainful employment would increase the income of the family of a disabled person, and thus increase the possibilities to spend resources, for example on their rehabilitation;

¹³ Raport Ordo Iuris „Jak systemowo wspierać osoby z niepełnosprawnościami?” [„How to support people with disabilities in a systemic way”] 6 November 2020, <https://ordoiuris.pl/rodzina-i-malzenstwo/jak-systemowo-wspierac-osoby-z-niepelnosprawnosciami-raport-ordo-iuris>, access: 27 July 2021.

- a proposal for a support system is also the appointment of disability assistants in each commune, so that people with disabilities and their families are supported in dealing with formal matters, coordinating rehabilitation and other health-related matters;
- a solution which could improve the situation of persons with disabilities may also be the introduction of the so-called **therapeutic voucher for the disabled**. The voucher could primarily cover rehabilitation services and certain medical services. It could be financed from the EU recovery fund intended to support the post-pandemic economy, including the rehabilitation services sector;
- systemic support for persons with disabilities should also include changes in tax law by extending the rehabilitation allowance and abolishing the limit of donations made to organizations working for the benefit of persons with disabilities deductible from income.

II. Violence against children

a. Abuse and neglect, including physical and psychological recovery and social reintegration (Article 19)

Under Article 19(1) of the CRC, States Parties are required to take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s) or any other person(s) who has the care of the child. In accordance with paragraph 2, such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

- **Implementation by Poland of its obligations under Article 19 of the CRC**

In accordance with the Polish Constitution, the state has the duty to protect the family (Article 18 of the Polish Constitution), which also implies the duty to prevent violence in this basic social unit. Various forms of violence are subject to criminal sanctions in Poland, of which the following are examples: abuse (Article 207 of the Criminal Code (C.C.)¹⁴), causing damage to health, violation of organ functions or other health disorder (Articles 156-157 C.C.), as well as rape (Article 197 C.C.).

¹⁴Ustawa z dnia 6 czerwca 1997 r. Kodeks karny (Dz.U.2020.1444 t.j.).

The Act of 29 July 2005 on Counteracting Violence in the Family (ACVF) is another legal act on the basis of which activities aimed at combating violence against, among others, children are carried out.¹⁵. In the light of police statistics, **persons suspected of being victims of domestic violence in 2020 were most often** women, **children**, elderly persons, and persons with disabilities. Children (without distinction by sex) accounted for 14% of all victims of violence (11,787 minors)¹⁶. On the basis of the provisions of the ACVF persons affected by family violence are provided with free assistance, in particular in the form of medical, psychological, legal, social, vocational, and family counselling; crisis intervention and support; protection from further harm by preventing the perpetrators of violence from using the apartment occupied jointly with other family members and prohibiting contact and approaching the victim; safe shelter in specialized support centers for victims of family violence is provided; medical examination to determine the causes and type of injuries related to the use of family violence and issuance of a medical certificate in this respect; persons affected by violence, who do not have a legal title to the premises jointly occupied with the perpetrator of violence, are provided with assistance in obtaining accommodation (3 ACVF).

Actions of the state are undertaken in this regard under the National Program for Prevention of Family Violence (NPPFV). On 29 April 2014 the Council of Ministers adopted Resolution No 76 on the establishment of the National Program for Prevention of Family Violence for 2014-2020¹⁷. In accordance with the provisions of the ACVF the Program defines detailed actions in four main areas: (1) prevention and social education, (2) protection and assistance to persons affected by family violence, (3) influencing persons using family violence, (4) increasing the authority of services and representatives of entities implementing actions in the field of family violence prevention.

The Ministry of Family, Labor, and Social Policy provides annual reports on the implementation of the NPPFV in each Program area. The 2016, 2017, 2018, and 2019 reports are also currently available on the Ministry's website¹⁸.

- **Evaluation and recommendations of the Ordo Iuris Institute**

The comparative analysis shows that the criminal sanctions provided for by the legislator in connection with acts constituting forms of violence against family members (including children) are relatively mild in comparison with analogous offences in other European countries. Therefore, in the Institute's view, it

¹⁵Dz.U.2021.1249 t.j.

¹⁶„Stop przemocy. Poradnik dla ofiar przemocy domowej” [„Stop the violence. A guide for victims of domestic violence”], Ordo Iuris, Warsaw 2021, https://ordoiuris.pl/sites/default/files/inline-files/Stop%20przemocy_digital_0_0.pdf, access: 29 July 2021.

¹⁷M. P. item 445.

¹⁸Sprawozdania z Krajowego Programu Przeciwdziałania Przemocy w Rodzinie [Reports on the National Program for Counteracting Family Violence], <https://www.gov.pl/web/rodzina/sprawozdania-z-krajowego-programu-przeciwdzialania-przemocy-w-rodzynie>, access: 29 July 2021.

is reasonable to raise the statutory punishment limits for this type of crime. This postulate, together with proposals of specific changes in the provisions of the Criminal Law, has been widely discussed in the Institute's Report "How to effectively counteract domestic violence?" [*Jak skutecznie przeciwdziałać przemocy domowej*]¹⁹. Apart from increasing the statutory punishment limit for individual crimes, it will undoubtedly also be a right direction to introduce the obligation to adjudicate a protective measure specified in Article 93a § 1(2) of the Criminal Code, i.e. therapy for persons sentenced for crimes committed within the frames of domestic violence. Moreover, it will also be justified to systematize a specialized type of rehabilitation in prisons, intended for persons sentenced to imprisonment for offences committed against close relatives and partners.

Moreover, in order to better support the victims of domestic violence, and thus complement the National Program for Counteracting Family Violence, **Ordo Iuris recommends the adoption and implementation of the "Support for Persons Affected by Domestic Violence Program"**, which would be part of the social policy of the state in terms of counteracting the phenomenon of domestic violence (of which children are the main victims) and strengthening the foundations of the proper functioning of the family, which is the most fundamental social unit. According to the Institute's assumptions, the objectives of the "Support for Persons Affected by Domestic Violence Program" include the following:

- creation of a network of institutions offering advice and support to persons affected by domestic violence who, for various reasons, do not wish to make use of the support offered in the local government unit, where they reside;
- offering psychological counselling, legal, educational and health advice, psychotherapy, mediation;
- bridging the gap in self-esteem of people affected by domestic violence, in particular children and women;
- assistance in finding a temporary place of residence in case of fear for the health and life of the victim of domestic violence - if the victim of violence decides to leave the commune where he/she lives and at least temporarily move to a locality where an assistance unit operates (in order to avoid the risk of any contact with the perpetrator of violence). In such a situation, these individuals should also receive appropriate support outside the community in which they were previously residing.

¹⁹Report of the Ordo Iuris Institute „Jak skutecznie przeciwdziałać przemocy domowej? Propozycje mechanizmów zapobiegania i zwalczania przemocy domowej oraz wsparcia ofiar” [„How to prevent domestic violence effectively? Proposals for mechanisms to prevent and combat domestic violence and to support victims”], Warsaw 2021, https://ordoiuris.pl/sites/default/files/inline-files/Jak_skutecznie_przeciwdzia%C5%82ac%CC%81_przemocy_domowej.pdf, access: 30 July 2021.

In the opinion of the Institute, as the author of the "Support for Persons Affected by Domestic Violence" Program, the latter should be based on three principles setting the standards for functioning of the network of institutions: (1) anonymity (in the case of children it will be necessary to provide data enabling their identification, nevertheless, the child will be provided with a sense of security so that it will not be afraid to use professional assistance), (2) confidentiality, and (3) exterritoriality (individuals affected by violence who decide to seek help may obtain it in any unit of their choice in Poland). According to the Program, support and advisory services within the network of institutions (provided by experienced: psychologists, lawyers, doctors, mediators, teachers) would be provided by non-governmental organizations. On the territory of each administrative unity, an "Anti-violence Center" would be established as part of the network of institutions, managed by a non-governmental organization. The minister competent for social security would supervise the quality and scope of the services provided.

III. Family environment and alternative care

a. Separation from parents (Article 9)

Article 9(1) of the CRC provides that States Parties shall ensure that **a child shall not be separated from his or her parents against their will**, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such a conclusion may be particularly necessary in matters involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence.

➤ Implementation by Poland of its obligations under Article 9(1) of the CRC

The most far-reaching form of interference in the family life and development of the child is undoubtedly the possibility of taking the child away from its parents (or actual or legal guardians) and placing it in foster care²⁰. Due to the significant consequences²⁰ of such a decision, it should be subject to particularly restrictive regulations, and its scope of application should be limited to duly justified cases, each time taking into account the principle of autonomy and primacy of the family expressed in Articles 47 and 48 of the Constitution of the Republic of Poland.

²⁰Foster care is regulated by the Act of 9 June 2011 on Supporting the Family and on the Foster Care System (i.e. Polish Journal of Laws for 2020 item 821 as amended); Article 2(2) defines foster care as „a group of persons, institutions, and activities aimed at providing temporary care and upbringing to children in cases where parents are unable to care for and upbringing them”, and Article 32(1) specifies that it is applied if the parents are unable to care for and raise the child.

The concept of foster care is regulated in Articles 112¹ – 112⁸ of the Polish Family and Guardianship Code („FGC”)²¹. For the purpose of this report special attention should be paid to **Article 112³ FGC, which was amended by the act of 18 March 2016**²².

As a result of this amendment, the provision was substantially significantly reconstructed, with the result that:

- In Article 112³ § 1 FGC the catalogue of measures to assist the family was extended by adding a requirement for ineffective application of measures stipulated in Article 109 § 2(1-4) FGC, before the child may be placed under foster care;
- the requirement of exhausting all the forms of assistance to the child's parents referred to in the provisions on family support and the system of foster care was replaced by the requirement of ineffective application of other measures listed in the new, expanded catalogue, so that the provision ceased to be a fictitious provision, not applied in practice due to frequent impossibility of exhausting all the indicated measures²³;
- **the newly added Article 112³ § 2 FGC introduces a literal prohibition on placing children under foster care against their parents' will only for the reason of poverty** - which may be considered the most important change in the described amendment; however, it should be emphasized that such a provision does not close the way to placing a child under foster care with the parents' consent.

A separate procedure, based on which it is currently permissible under Polish law to take a child away from the family, is the procedure resulting from the ACVF. Pursuant to Article 12a(1) of the ACVF a social worker has the right to take a child away from a family without a court decision, provided that the following three cumulative conditions are met:

- the reason behind taking the child away is violence;
- there is an imminent threat to the child's life or health in connection with domestic violence;
- the existence of an imminent threat to the life or health of a child related to domestic violence was found in the course of executing the social worker's duties, i.e. the social worker witnesses a situation endangering the life or health of a child.

There is therefore no scope to apply that provision to other situations, such as the existence of financial hardship of the parents or their disability.

²¹The Act of 25 February 1964 Family and Guardianship Code (i.e. Polish Journal of Laws Dz. U. of 2020 item 1359).

²²The Act of 18 March 2016 Amending the Family and Guardianship Code (Polish Journal of Laws Dz. U. item 406).

²³A. Andrzejewska, Plenipotentiary of the Minister of Justice for Constitutional Family Rights, *Towards the protection of the autonomy of the family [W stronę ochrony autonomii rodziny]*, 2.12.2016 <https://nawokandzie.ms.gov.pl/numer-30/dobre-praktyki-2-numer-30/w-strone-ochrony-autonomii-rodziny.html>, access: 29.07.2021.

However, in practice, it is often the case that a decision taken by a social worker on the basis of, for example, an anonymous denunciation or a misinterpretation of the situation of a given family is unjustified and in fact unreasonable- this can be demonstrated by the fact that after lengthy proceedings in family courts following the intervention of a social worker, almost half of the children return to the family home²⁴. This was the case of 12-year-old Agatka, who suffers from Asperger's syndrome and who complained about a one-off argument with her mother. This resulted in an anonymous denunciation and, as a consequence, the girl was taken away from her family home by force and spent six months in a children's home. Although the girl wrote letters and begged to be returned home, she was not allowed to do so. It was only thanks to the consistent and professional assistance of Ordo Iuris lawyers that the 12-year-old girl returned to her family²⁵.

In total, according to the data published by the Ministry of Family, Labor, and Social Policy, between 2011 and 2017, a total of 6,399 children were taken away on the basis of Article 12a of the law in question²⁶.

➤ **Evaluation and recommendations of the Ordo Iuris Institute**

From the perspective of the realization of the rights and welfare of the child, the 2016 amendment to the Family and Guardianship Code should be assessed positively. Taking a child from its parents and placing it in the system of foster care, as the most far-reaching and most significant in terms of consequences from the perspective of the child's well-being, has, under the new provisions, been subjected to more meticulous regulation and its ultimate character has been strengthened. However, its scope of application has been significantly limited, in particular through the introduction of the provision of Article 112³ § 2 of the FGC. The prohibition on placing a child in foster care against the will of the parents solely on the grounds of poverty should be regarded as satisfactory from the perspective of a situation in which the parents, while living in conditions of poverty, nevertheless fulfil their caring and upbringing duties properly. It is worth emphasizing that the solution applied can be regarded as a commitment on the part of the State to help parents to improve their financial situation. Providing the parents the possibility to place the child in foster care in line with their will remains consistent with the regulation of Article 100 § 1 of the FGC, under which every parent may request the guardianship court or another competent public authority to provide foster care for the child²⁷.

²⁴B. Lewandowski, M. Kryczka, M. Majkowska, M. Wadoń, *Odebranie dziecka z rodziny w trybie ustawy o przeciwdziałaniu przemocy w rodzinie – poradnik*, Ordo Iuris 2019: <https://dzieciwrodzinach.ordoiuris.pl/>, dostęp:29.07.2021 r.

²⁵ Tamże.

²⁶Sprawozdanie z Realizacji Krajowego Programu Przeciwdziałania Przemocy w Rodzinie na lata 2014-2020, z sierpnia 2018 r.

²⁷ Zob. uzasadnienie rządowego projektu o zmianie ustawy – Kodeks rodzinny i opiekuńczy z 2015 roku: <https://orka.sejm.gov.pl/Druki8ka.nsf/0/AE8FF45C599C8D35C1257F2B002F31DF/%24File/164-uzasadnienie.docx>, dostęp: 29.07.2021 r.

On the other hand, the practice of immediate removal of a child on the basis of the provisions of the ACVF, i.e. by a social worker, without a court decision, as well as without specifying the precise prerequisites which should be fulfilled in such a situation, deserves strong criticism. Particular objections are raised by the fact that there is no obligation to carry out the procedure of forcible removal of a child in the presence of its parents who, in practice, may learn about placement of the child in another institution after the procedure has been carried out. In the Institute's opinion, such a situation unnecessarily exposes the child to additional stress and prevents the parents from indicating the closest relative to whom the child taken from the family home should be directed. It is only in the absence of such a person that a child taken from a family home should be directed to a foster family or, as a last resort, to an educational-care center.

b. Parents' common responsibilities, assistance to parents and the provision of childcare services (Article 18)

In accordance with Article 18(2) of the CRC, for the purpose of guaranteeing and promoting the rights set forth in the Convention, States Parties **shall render appropriate assistance to parents and legal guardians** in the performance of their child-rearing responsibilities and shall **ensure the development of institutions, facilities, and services for the care of children**. Furthermore, pursuant to Article 18(3) of the CRC States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from **child-care services and facilities** for which they are eligible.

➤ **Implementation by Poland of its obligations under Article 18 of the CRC**

The provisions of Article 18 of the CRC impose an obligation on States Parties to actively participate in the process of upbringing children by parents or legal guardians by supporting parents and creating childcare infrastructure. In Poland, various forms of assistance are available to parents (guardians) of children in the process of their upbringing, which include in particular: the possibility for parents to directly care for their child during paid maternity and parental leave, as well as the possibility to use publicly funded (or subsidized) childcare institutions and facilities. Another important element of support for caring for and bringing up children is the system of cash family benefits offered to parents or caregivers. These benefits are intended to relieve parents' budgets and protect children from poverty, particularly those from families with many children. The above-mentioned forms of parental support available in Poland, as well as others aimed at improving the situation of mothers or both parents, and

consequently of entire families, were included and discussed in the 'Charter of Mother's Rights' - a synthetic guide published by the Confederation of Polish Women²⁸.

➤ **State obligation to provide childcare**

In Poland, mothers of newborn children may enjoy paid maternity leave²⁹. The leave is granted immediately after the birth of the child and may be enjoyed by the mother if she is employed under an employment contract. The length of service and time of work do not matter - the leave may be exercised in the case of both full-time and part-time employment. The duration of maternity leave for the birth of one child is 20 weeks. If birth is given to two children or more, the maternity leave will be extended. The first 14 weeks of basic maternity leave are reserved for the mother, the further 6 weeks may be enjoyed by the father if the mother resigns from it. At the end of the maternity leave, the child's parents may exercise a parental leave, which lasts 32 weeks if one child is born (34 if two or more children are born at the same time). This leave may also be enjoyed in parts, depending on the needs of the parents, by both the mother and the father of the child. The mother may choose whether to take 100% salary or 80% salary during the basic maternity leave. If she decides to take 100% of the salary, as a rule she is entitled to the same amount for the first six weeks of parental leave, and for the remaining weeks of parental leave she receives 60% of the salary. If she decides to take 80% of the salary, she is entitled to that amount for the entire period of maternity and parental leave.

At the end of parental leave, the child's parents shall be entitled to parental leave of a maximum of 36 months³⁰ provided, however, that they do not receive remuneration during that period. In accordance with Polish labor law, there are no obstacles for a parent exercising parental leave to work during the leave period, as long as the amount of work does not prevent the parent from taking care of the child on his/her own³¹. Parents who have adopted or taken in a child also have the right to enjoy the same amount of leave as maternity leave³².

Working parents of a small child have the opportunity to use **publicly funded or subsidized childcare facilities**. These include in particular nurseries, children's clubs (operating in a form similar to nurseries, but are more intimate - they provide up to 30 places for children aged from one to three), kindergartens, day caregivers (an alternative to a nursery or children's club, a form of institutional care for a small group of children - no more than five children, and if the group includes a child who is under one year of age, is disabled or requires special care - no more than three children).

²⁸K. Pawłowska, K. Wiśniewska, K. Krojec, A. Pizoń, Karta Praw Matki [Mother's Right Charter] 1 December 2020, <https://konfederacijakobiet.pl/wp-content/uploads/2021/01/Karta-Praw-Matki.pdf>, access: 27 July 2021.

²⁹Article 180 of the Act of 26 June 1974 The Labor Code (Polish Journal of Laws Dz.U.2020.1320, consolidated text)

³⁰Article 186 K of the Labor Code.

³¹Article 186² § 1. Of the Labor Code.

³²Article 183 of the Labor Code.

➤ **Financial support in the form of family benefits**

Polish law provides several forms of financial support for childbirth, as well as several types of benefits for families, including families with many children. The benefits, addressed mainly to poor families, aim to protect children from poverty and thus to improve their living and development conditions (Article 6(2) of the CRC). These benefits include:

- **„Family 500+” program**- financial foundation of family support, aimed at: improving the demographic situation, reducing poverty among the youngest, investment in the family. Regulations introducing the "500+" upbringing benefit into Polish law were enacted in 2016.³³

Under the program, families with dependent children are entitled to an upbringing benefit of PLN 500 per month per child up to the age of 18. As a result of the introduced changes in the "Family 500+" program, **from 1 July 2019 the upbringing benefit is available for each child up to the age of 18, regardless of the income achieved by the family.** In its assumptions, the extended formula of the program is to ensure improvement of the quality of life of all Polish families with dependent children and constitute an important supplement to the state policy towards families.

Data on the implementation of the program, regularly shared by the Ministry of Family, Labor and Social Policy, shows that in 2018, more than 2.45 million Polish families participated in the "Family 500+" program, and more than 3.74 million children were covered by the benefit. On this basis, it was estimated that in whole Poland, the "Family 500 plus" program in 2018 covered 54.1% of all children under 18 years of age, and in rural areas the percentage is 61%. Among the beneficiaries in 2018, 5% of all families were families with a disabled child.

Other forms of financial support provided to families by the state include the following:

- **„newborn benefit”**³⁴ - benefit for families, in which the monthly income per person does not exceed the amount of PLN 1 922 net. This benefit is one-off and amounts to PLN 1,000 per child. The benefit is exempt from income tax. It is also granted to adoptive parents;
- **Family benefit**³⁵ – As in the case of the newborn benefit, the granting of the family benefit depends on the family's income. Its amount also varies and increases with the age of the child. In principle, the family allowance is granted to parents or guardians of a child until the child turns 18 or until completion of education at school, however, not longer than until the child turns 21 or until the child turns 24 if the child continues education at school and has a certificate of moderate

³³Act of 11 February 2016 on State's Assistance in Upbringing Children (Polish Journal of Laws Dz.U.2019.2407 consolidated text)

³⁴Act of 28 November 2003 on Family Benefits (Polish Journal of Laws Dz.U.2020.111 consolidated text).

³⁵Ibidem.

or significant degree of disability. A mother, a father or a legal guardian raising a child alone is entitled to the supplement to family allowance due to single parenthood;

- **School starter kit „Good Start” (300+)**³⁶ - It is a benefit paid once a year to buy a school starter kit for a child starting a new school year. The benefit is available regardless of family income. In order to receive the benefit, a child must be under 20 years of age; however, in the case of children with a moderate or significant degree of disability, the age limit is 24 years. School starter kit is available to children who attend such institutions as: primary school, secondary school, art school, youth sociotherapycenter, special school and educational center, special educational center, revalidation and educational center.

Benefits for families with many children are also significant elements of financial support provided to Families in Poland:

- **„Big Family Card”**³⁷ - a system of discounts and additional entitlements in the public and private sectors for parents with 3 or more dependent children. Holders of the card have the opportunity to use the offer of entities in the food, fuel, banking or recreation sectors at a lower cost. The card is intended to support the budgets of families with many children and facilitate their access to goods and services;
- **Family tax relief**³⁸ – convenience for families with many children to deduct a certain amount from their income tax returns for a given year for children receiving attendance allowance or social pension or for children at school or studying.

➤ **Evaluation and recommendations of the Ordo Iuris Institute**

A reasonable support for parents of young children would be to extend the paid parental leave from 12 (currently) to 24 months. A first step in this direction might be to extend leave linked to the birth of another child before the older child reaches the age of four. Creating the possibility of taking longer paid parental leave could, in this case, create an incentive for parents to have another child and thus constitute an effort to change the unfavorable demographic situation.

As a supplement to the proposed solutions, changes can be made to the tax system directly related to caring for the smallest children. In particular, the introduction of a zero VAT rate on children's goods and a deduction from income increasing proportionally to the number of children being brought up could be a significant improvement for parents, thus relieving the budgets of families with many children in real terms.

³⁶Resolution no 80 of the Council of Ministers of 30 May 2018 on establishing a government program „Good Start” (M.P. item 514).

³⁷Act of 5 December 2014 on Big Family Card (Polish Journal of Laws Dz.U.2020.1348 consolidated text).

³⁸Act of 26 July 1991 on Personal Income Tax (Polish Journal of Laws Dz.U.2021.1128 consolidated text).

In addition, it should be noted that the childcare system in Poland seems to be one-sided, where collective forms of care for young children (nurseries) are preferred. Thus, the state significantly limits the freedom of choice of a significant number of women as to the most optimal childcare model for them and their children. The unilateral investment only in collective institutional care raises many doubts from the point of view of the parents' right to raise their children in accordance with their own world view. In the Institute's opinion, parents should have the freedom to choose the form of childcare which is best for them, including, for example, a nanny. It is worth adding that currently some cities (communes) in Poland offer additional financial support for parents of children enrolled in private institutions in the form of a 'nursery voucher'. **Modification of the "nursery voucher"** should therefore be considered as a proposal for changes in the system of institutional care for young children, so that it can be used by parents who choose a nanny as a form of care for their children, or in a situation where one parent is employed and the other, choosing to stay at home, takes care of the child. The 'nursery voucher' would then be allocated to the parent bringing up the child. In addition, **funding should be increased for day-care centers and parents' clubs**. Many parents are unaware of the existence of such places, outside of nurseries, where professional caregivers can look after their children. Therefore, institutions of this kind should also be promoted.

IV. Disability, basic health and welfare

a. Health and health services, in particular primary health care (Article 24)

The removal of the eugenic condition for termination of pregnancy from Polish law (see point I of the Report) is also a manifestation of Poland's fulfilment of the obligations resulting from the provisions of Article 24 of the CRC, in particular paragraphs 1 and 2(d). In accordance with **Article 24(1) of the CRC** Poland as a State Party to the Convention is obliged to recognize *the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health* and for that purpose it should strive *to ensure that no child is deprived of his or her right of access to such health care services*. Pursuant to **Article 24(2)(d) of the CRC** the signatories of the Convention should in particular *ensure appropriate pre-natal and post-natal health care for mothers*.

First of all, attention should be drawn to the wording of the quoted Article 24(2)(d) of the CRC, which - it would seem - refers only to the health of the pregnant woman, and not to that of the child. In fact, however, the cited provision is intended to ensure appropriate health care also for children in the period before birth, whose well-being at this stage depends on the state of health of the mother. This is evidenced by the fact that paragraph 1 of this provision refers to the right of the child to the highest standard of health and to the possibility of treatment of illnesses and of medical rehabilitation, and

States Parties are obliged to seek to exercise this right by, inter alia, providing appropriate health care for pregnant women. By adopting the CRC, the States Parties (including Poland) undertake to develop their health policies and programs in such a way as to take into account and implement the postulate of protection of health and treatment of children, including those who have not yet been born.

➤ **Implementation by Poland of its obligations under Article 24 of the CRC**

The legal situation in Poland, which was changed as a result of the Constitutional Tribunal's ruling in case K 1/20, can significantly contribute to raising the level of health and facilitating treatment of children who were diagnosed with a developmental defect or disease already at the prenatal stage. These activities are supported by the program of free (publicly funded) prenatal tests functioning in Poland, which aims to *identify the risk of fetal malformations and their diagnosis in the early stage of pregnancy. This will make it possible to begin treatment of defects while still in foetal life. The program enables the child's parents to prepare for the immediate implementation of specialized care after the birth.*³⁹ The provision in force in Poland prior to the ruling of the Constitutional Tribunal in case K 1/20, allowing termination of pregnancy in the case of detection of a defect or illness of the child, significantly limited the execution of the right of every child to the highest level of health and facilities for treatment of illnesses, as well as the potential of the national prenatal testing program as an impulse towards the development of prenatal therapy techniques. There is also no doubt that the mere legal permission of the deprivation of life of sick or disabled children at the prenatal stage stands in stark contrast to the requirements placed on the States Parties by the above mentioned provisions of Article 24 of the CRC.

➤ **Evaluation and recommendations of the Ordo Iuris Institute**

Recognition by the Polish Constitutional Tribunal of a higher level of legal protection for ill and disabled children than previously is an important step giving a real chance to raise the level of medical care provided to such children in the prenatal period in Poland. In the opinion of the Institute, the change in the legal status should become an impulse for further legislative actions, in particular:

- increasing financial support for the development of prenatal research and therapy, which makes it possible to treat many defects or diseases during fetal life,
- making it compulsory for mothers of children suspected of having a malformation or illness to be referred to perinatal hospices able to provide comprehensive medical and psychological care to the families of these children and to the children being born,

³⁹ Service of the Ministry of Health and the National Health Fund, Prenatal Examination Program – document available at: <https://pacjent.gov.pl/program-profilaktyczny/program-badan-prenatalnych>, access: 22 July 2021.

- introducing compulsory training for health professionals (doctors, nurses, midwives) to increase their competence and sensitivity, which is essential for providing appropriate care for mothers and their disabled or sick children.

V. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography („Protocol”) - Article 2

a. Surrogacy in the light of the provisions of the Protocol and CRC

The issue of surrogacy is not explicitly regulated in the Convention on the Rights of the Child. Nevertheless, some of the Convention's provisions refer to various phenomena related to surrogacy (transfer of children outside their country of birth, violation of the rules on adoption). Pursuant to Article 11 of the Convention, *States Parties shall take measures to combat the illicit transfer and non-return of children abroad*. This provision may be of particular relevance in relation to those countries where surrogacy is not permitted by law. Article 21(4) of the Convention stipulates that the States Parties that recognize and/or permit the system of adoption shall ensure that **the best interests of the child shall be the paramount consideration and they shall take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it**. In addition to the provisions of the Convention, the contents of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography should be taken into account.⁴⁰ Pursuant to Article 2(c), for the purposes of the Protocol *sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*. It is clear that the legal definition of child trafficking also includes commercial (paid) surrogacy and even surrogacy undertaken for altruistic reasons with the reimbursement of various expenses incurred by the pregnant woman (usually related to medical care). **In a similar vein, the Committee on the Rights of the Child has explicitly stated that surrogacy can constitute the sale of a child⁴¹.**

➤ Implementation by Poland of its obligations under the Protocol and CRC

In accordance with Article 61⁹ of the Family and Guardianship Code: **mother of the child is the woman who gave birth to it**. The addition of this provision to the Polish Family and Guardianship Code was aimed at removing the doubts which have arisen in connection with the development of science and the spread of such phenomena as "surrogate motherhood". As a result of extracorporeal fertilization (the

⁴⁰ Polish Journal of Laws Dz. U. of 2007, No 76, item 494.

⁴¹ Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 10 September 2019, CRC/C/156, § 52.

in vitro procedure) it is possible that there is no genetic bond between the child and the woman who gave birth to it.⁴² This happens when an ovum of one woman, fertilized extracorporeally (without sexual intercourse) is engrafted to another woman, who consequently gives birth to a child. As it is rightly argued in subject literature, in light of Article 61⁹ of the Polish Family and Guardianship Code the fact of giving birth to a child by a woman unambiguously determines that in the eyes of the law she is the child's mother, which constitutes grounds for disclosing this fact in the civil status records⁴³. It follows from the principle of indivisibility of civil status that **each child may have only one mother and one father**⁴⁴. Therefore, in accordance with Polish law, surrogacy contracts should be considered absolutely invalid (Article 58 § 1 of the Polish Civil Code⁴⁵).

Notwithstanding the above, surrogacy in Poland is subject to penalization under the provisions of the Polish Criminal Code. Pursuant to Article 211a § 1 of the Polish Criminal Code, a person who, in order to gain financial gain, organizes the adoption of children contrary to the provisions of the Act, shall be subject to punishment of imprisonment between 3 months and 5 years. Pursuant to § 2 of the aforementioned provision, a person who is entitled to parental authority over the child, gives consent for the adoption of the child by another person shall be subject to the same punishment, if he/she acts:

- 1) **for the purpose of obtaining financial or personal benefit, concealing that purpose from the court which has taken a decision in the adoption proceedings or, if the parent consents to the future adoption of the child without specifying the adopter - before the court accepting the declaration of such consent,**
- 2) **omitting the adoption proceedings.**

Pursuant to Article 211a § 3 of the Polish Criminal Code, a person who grants consent to adoption of a child by him/her under the conditions specified in § 2 above shall be subject to the same punishment.

It is worth underlining that **the current wording of Article 211a of the Polish Criminal Code results from the amendment of 2019, the purpose of which was to counteract the phenomenon of “underground adoption”**⁴⁶. In the justification of the draft amendment ("Justification"), the authors of the amendment pointed out that [in] *the Internet one may easily find advertisements of women who offer*

⁴²J. Słyk, commentary to Article 61⁹, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz [Family and Guardianship Code. Commentary]*, [ed.] K. Osajda, Warsaw 2020, nb. 2. See also: D. Garbal, *Macierzyństwo zastępcze – uwagi na temat systemu prawnego polskiego [Surrogacy – comments within the scope of the Polish legal system]*, „Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego” 3/1 (2013), p. 43-44; T. Sokołowski, J. Haberko, commentary to Article 61⁹, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz [Family and Guardianship Code. Commentary]*, [ed.] H. Dolecki, Lex 2013, remark 5.

⁴³G. Jedrejek, *op. cit.*, remark 1; T. Sokołowski, J. Haberko, *op. cit.*, remark 2a; M.A. Lebensztejn, *Macierzyństwo zastępcze. Problemy etyczne i prawne [Surrogacy. Ethical and legal problems]*, „Miscellanea Historico-Iuridica” 13/2 (2014), p. 309.

⁴⁴Decision of the Supreme Court of 18 January 2006, case file number V CSK 108/05; M. Wojewoda, *Kilkauwag o definicji „stanu cywilnego” w nowym ustawie Prawo o aktach stanu cywilnego [Several remarks on the definition of the „civil status” in the new Act on Civil Status Records]*, „Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego” 4/2 (2014), p. 30 (further literature therein).

⁴⁵Act of 23 April 1964 – The Civil Code (Polish Journal of Laws for 2019, item 1145, as amended)

⁴⁶See: Justification to the draft act amending the Criminal Code, parliamentary note 3665 (Sejm of the VIII term), p. 1 – available at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3665>, access: 6 August 2021.

to give birth to a child and give it away immediately after birth (...). It is estimated that there may be as many as 2 000 cases of child trafficking in Poland annually, with approximately 3 000 legal adoptions. The widescale of the practice can be proved by the fact that one of the websites where such advertisements are placed has about 400 visitors daily, and in total it has already been visited by over 1.3 million people. The above considerations indicate that there is a real need to penalize behavior which is aimed at the acquisition of parental authority over a child by a person who is not its biological parent—by concealing the essential circumstances connected with obtaining financial or personal benefit before the court ruling in adoption proceedings or by circumventing these proceedings and using other legal institutions leading to that result. In fact, these behaviors should be treated as child trafficking, most often without consideration for the child's well-being, which takes place on the periphery, and very often even outside the sphere of knowledge of state organs established to care for the child's well-being, ensure its proper care, and respect its rights⁴⁷.

The individual object of protection in the case of the crime specified in Article 211a of the Polish Criminal Code is the well-being of the child, since pursuant to Article 114 § 1 of the Polish Family and Guardianship Code, a minor may be adopted only for his/her good.

Article 211a § 2 of the Polish Criminal Code penalizes two types of acquisition of parental authority over a child:

- **in the situation specified in point 1);** the wording of the provision indicates that not every financial or personal gain in connection with granting consent to adoption is punishable, but only the gain that was concealed from the guardianship court ruling in the adoption proceedings (on the basis of the provisions of the Polish Family and Guardianship Code). In the Justification it was argued that this kind provision is reasonable, because it is the guardianship court that is competent (and at the same time obliged) to correctly assess whether the adoption is made for the well-being of the child, and concealment of the purpose makes it impossible to issue a ruling *on the basis of true and comprehensive evidence*⁴⁸. The authors of the draft also noted that *in practice there may be exceptional situations in which acting for the purpose of achieving financial or personal benefit should not per se rule out the chances of the person seeking to adopt a child. This concerns, for example, a small amount of money intended to support the mother during confinement, donation of items intended for the child, such as nappies or a pram;*
- **in the situation described in point 2);** in this case, the scope of the regulation does not raise any major doubts, as it serves to penalize behavior consisting in fictitious recognition of a child or waiver of parental rights⁴⁹.

⁴⁷Ibidem.

⁴⁸Ibidem, p. 4.

⁴⁹Ibidem, p. 5.

In Polish law, therefore, criminal liability is imposed not only on the person who gives the child for adoption, but also on the person who wants to adopt the child (Article 211a § 3 of the Polish Criminal Code).

➤ **Evaluation and recommendations of the Ordo Iuris Institute**

The consequences of surrogacy arising from Article 619 of the Family and Guardianship are not free from doubts of a very fundamental nature. The created bond of maternity, without the characteristics of genetic connection between the child and its mother (the woman who gave birth to it) may not only lead to a violation of the rights of the child, who will not have the legal possibility to know its own origin in the genetic sense, but also affect its knowledge of its own health (in relation to genetically determined diseases, etc.)⁵⁰. A solution that can prevent the accumulation of legal and social problems resulting from the de facto "bifurcation" of the concept of maternity into "genetic" and "legal" is the introduction of a **ban on surrogacy, particularly commercial surrogacy (although this argument in fact supports introduction of a complete ban on surrogacy, including the so-called altruistic surrogacy, i.e. free of charge), expressed explicitly in statutory provisions.**

Referring to the provisions of the Polish Criminal Code, the amendment of Article 211a of the Polish Criminal Code carried out in 2019 should be considered a good step dictated by the well-being of children. However, in practice, application of Article 211a of the Polish Criminal Code is not very frequent, in contrast to the phenomenon of surrogacy, as pointed out by the authors of the discussed amendments. In addition, the procedure of intermediation in surrogacy existing in Poland⁵¹ remains without any reaction on the part of competent law enforcement authorities. In order to counteract this phenomenon, it is necessary to **recommend an amendment of Article 211a of the Polish Criminal Code which would directly state that a person who in any form organizes or advertises surrogacy practices commits a crime.** Moreover, it is recommended to introduce a qualified type of crime in a situation when a perpetrator has turned such a crime into a regular source of income. In the opinion of the Institute, the said provision should read as follows:

Article 211a. § 1. Whoever, for the purpose of financial gain, organizes, mediates, or advertises surrogacy or adoption practices contrary to the provisions of the act, shall be subject to the punishment of imprisonment between 3 months and 5 years.

⁵⁰More on this subject: T. Sokołowski, J. Haberko, *op. cit.*, remark 5; J. Haberko, *Anonimowość rodziców genetycznych a dobrostan zdrowotny dziecka. Uwagi na tle rekomendacji 2156(2019) Zgromadzenia Parlamentarnego Rady Europy [Genetic parent anonymity and child health well-being. Observations against the background of Recommendation 2156(2019) of the Parliamentary Assembly of the Council of Europe]*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 4 (2019), p. 59 i n.

⁵¹See for example <https://www.newlifepoland.net/pl/#>

§ 2. *Whoever, being a person with parental authority over a child, consents to the adoption of that child by another person shall be liable to the same punishment:*

1) for the purpose of obtaining financial or personal benefit, concealing that purpose from the court ruling in the adoption proceedings, and, if the parent consents to the future adoption of the child without naming the adopter, from the court accepting the statement of consent,

2) omitting the adoption proceedings.

§ 3. *Whoever consents to the adoption of a child by himself under the conditions referred to in § 2 shall be subject to the same punishment.*

§ 4. *If the perpetrator made a regular source of income out of the crime mentioned in § 1, he shall be subject to the punishment of imprisonment from 6 months to 8 years.*

List of key recommendations

a. General principles: Right to life, survival and development (Article 6)

- The change in the legal status in Poland which took place as a result of the ruling of the Constitutional Tribunal in case K 1/20 should undoubtedly be regarded as an important step towards improving the situation of unborn children, whose inalienable right to life is confirmed by the provisions of the CRC.

A desirable change in this respect would therefore be the unification of statutory terminology unambiguously indicating the humanity of children in the prenatal period of development, in line with that adopted in Article 1 of the Convention ("a child" means every human being below the age of eighteen years), as well as in Article 2(1) of the Polish Act on Ombudsmen for Children (a child is every human being from conception to the age of majority).

b. General principles: Non-discrimination (Article 2)

- In order to improve the functioning of the "Pro-Life" program of support for families, the Institute proposes the establishment of a Program coordinator, whose work would enable its more effective implementation. The competences of the coordinator should include in particular: initiating substantive changes in the program, prioritization of the activities covered by the program, assessment of the priorities and free allocation of funds within the program budget. The coordinator should also be responsible for communication and information, and have a decisive influence on the introduction of new activities into the program and completing current initiatives.

Furthermore, the Institute propounds the following:

- to guarantee of the possibility to receive the attendance allowance by caregivers of disabled children resigning from gainful employment would increase the income of the family of a disabled person, and thus increase the possibilities to spend resources, for example on his or her rehabilitation.
- to appoint disability assistants in each commune, so that people with disabilities and their families are supported in dealing with formal matters, coordinating rehabilitation and other health-related matters.
- to introduce the so-called therapeutic voucher for the disabled, which could primarily cover rehabilitation services and certain medical services.
- changes in tax law by extending the rehabilitation allowance and abolishing the limit of donations made to organizations working for the benefit of persons with disabilities deductible from income.

c. **Violence against children: Abuse and neglect, including physical and psychological recovery and social reintegration (Article 19)**

- In the opinion of the Institute, it is reasonable to raise the statutory punishment limits for crimes against family members.
- Apart from increasing the statutory punishment limit for individual crimes, it will undoubtedly also be a right direction to introduce the obligation to adjudicate a protective measure specified in Article 93a § 1(2) of the Criminal Code, i.e. therapy for persons sentenced for crimes committed within the frames of domestic violence. Moreover, it will also be justified to systematize a specialized type of rehabilitation in prisons, intended for persons sentenced to imprisonment for offences committed against close relatives and partners.
- Furthermore, Ordo Iuris Institute recommends the adoption and implementation of the "Support for Persons Affected by Domestic Violence Program", which would include:
 - creation of a network of institutions offering advice and support to persons affected by domestic violence who, for various reasons, do not wish to make use of the support offered in the local government unit, where they reside;
 - offering psychological counselling, legal, educational and health advice, psychotherapy, mediation;
 - bridging the gap in self-esteem of people affected by domestic violence, in particular children and women;

- assistance in finding a temporary place of residence in case of fear for the health and life of the victim of domestic violence - if the victim of violence decides to leave the commune where he/she lives.

d. Family environment and alternative care: Separation from parents (Article 9)

- The prohibition on placing a child in foster care against the will of the parents solely on the grounds of poverty should be regarded as satisfactory from the perspective of a situation in which the parents, while living in conditions of poverty, nevertheless fulfil their caring and upbringing duties properly. It is worth emphasizing that the solution applied can be regarded as a commitment on the part of the State to help parents to improve their financial situation.
- In the Institute's opinion the practice of immediate removal of a child on the basis of the provisions of the ACVF unnecessarily exposes the child to additional stress related to the whole situation, and, moreover, prevents the parents from indicating the closest relative to whom the child taken from the family home should be directed in the first place. It is only in the absence of such a person that a child taken from a family home should be directed to a foster family or, as a last resort, to an educational-care center.

e. Family environment and alternative care: Parents' common responsibilities, assistance to parents and the provision of childcare services (Article 18)

- A reasonable support for parents of young children would be to extend the paid parental leave from 12 (currently) to 24 months. Creating the possibility of taking longer paid parental leave could, in this case, create an incentive for parents to have another child and thus constitute an effort to change the unfavorable demographic situation.
- The introduction of a zero VAT rate on children's goods and a deduction from income increasing proportionally to the number of children being brought up could be a significant improvement for parents, thus relieving the budgets of families with many children in real terms.
- Modification of the "nursery voucher" should therefore be considered as a proposal for changes in the system of institutional care for young children, so that it can be used by parents who choose nanny as a form of care for their children, or in a situation where one parent is gainfully employed and the other, choosing to stay at home, takes care of the child. The 'nursery voucher' would then be allocated to the parent bringing up the child. In addition, funding should be increased for day-care centers and parents' clubs. Many parents are unaware of the existence of such places.

f. **Disability, basic health and welfare: Health and health services, in particular primary health care (Article 24)**

- Recognition by the Polish Constitutional Tribunal of a higher level of legal protection for ill and disabled children than previously is an important step giving a real chance to raise the level of medical care provided to such children in the prenatal period in Poland. In the opinion of the Institute, the change in the legal status should become an impulse for further legislative actions, in particular:
 - increasing financial support for the development of prenatal research and therapy, which makes it possible to treat many defects or diseases during fetal life,
 - making it compulsory for mothers of children suspected of having a malformation or illness to be referred to perinatal hospices able to provide comprehensive medical and psychological care to the families of these children and to the children being born,
 - introducing compulsory training for health professionals (doctors, nurses, midwives) to increase their competence and sensitivity, which is essential for providing appropriate care for mothers and their disabled or sick children.

g. **Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography („Protocol”) - Article 2**

- In the Institute's opinion in order to prevent the accumulation of legal and social problems resulting from the de facto "bifurcation" of the concept of maternity into "genetic" and "legal", which is inevitably connected with surrogacy, it is necessary to introduce a ban on surrogacy, at least commercial surrogacy, expressed explicitly in statutory provisions.
- In order to counteract the phenomenon of mediation in surrogacy it is to recommend amendment of Article 211a of the Polish Criminal Code which would directly state that a person who in any form organizes or advertises surrogacy practices commits a crime. Moreover, it is recommended to introduce a qualified type of crime in a situation when a perpetrator has turned such a crime into a regular source of income.
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ANNEX I

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