

# Presumption of Innocence: procedural rights in criminal proceedings

Social Fieldwork Research (FRANET)

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**Date:** 3 June 2020 (Revised version: 13 July 2020; second revision: 21 July 2020)

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# Table of Contents

<b>PART A. EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>PART B. INTRODUCTION.....</b>	<b>3</b>
• B.1 PREPARATION OF FIELDWORK .....	4
• B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS .....	4
• B.3 SAMPLE AND DESCRIPTION OF FIELDWORK .....	4
• B.4 DATA ANALYSIS .....	6
• B.5 LEGAL FRAMEWORK.....	7
<b>PART C. MAIN REPORT ANALYTICAL STRUCTURE.....</b>	<b>9</b>
• C.1 The right to be presumed innocent in general.....	9
a. How do different criminal justice professionals implement the presumption of innocence? 9	
b. Potential factors that affect guaranteeing the presumption of innocence .....	13
c. The role of prejudices and stigma .....	14
d. Discussion of findings .....	15
• C.2 Public references to guilt.....	16
a. How do different criminal justice professionals liaise with the media? .....	16
b. Mapping of laws and guidelines.....	19
d. Differences in the media coverage of certain groups .....	26
e. Revealing information on pending proceedings by persons other than justice system officials.....	27
f. Remedies available to defendants presented as guilty in media reports.....	29
g. Discussion of findings .....	30
• <b>C.3 The presentation of suspects and defendants .....</b>	<b>31</b>
a. Measures used to present the accused and their impact on the accused’s presumption of innocence.....	32
b. Clothing.....	36
c. Presentation of vulnerable groups.....	37
d. Reactions to presenting the accused as guilty.....	39
e. Discussion of findings.....	40
• <b>C.4 Burden of proof .....</b>	<b>41</b>
a. Exceptions to the burden of proof .....	42
b. Confession .....	43
c. Discussion of findings .....	46

• <b>C.5 The right to remain silent and not to incriminate oneself</b> .....	46
a. The right to remain silent in practice .....	47
b. How is information on the right to remain silent and not to incriminate oneself shared with the accused? .....	48
c. Self-incrimination .....	50
d. Right to remain silent.....	51
e. Discussion of findings.....	52
• <b>C.6 The right to be present at the trial and to have a new trial</b> .....	53
a. Consequences of non-appearance.....	54
b. What has been understood as “effective participation”? .....	56
c. Vulnerable groups .....	57
d. Discussion of findings.....	58
• <b>C.7 Challenges and improvements</b> .....	59
a. Challenges.....	59
b. Improvements .....	60
c. Suggestions.....	60
<b>PART D. GENERAL ASSESSMENT</b> .....	<b>61</b>
<b>PART E. CONCLUSIONS</b> .....	<b>63</b>
<b>Annex 1</b> .....	<b>1</b>

## List of Tables

TABLE 1: SAMPLE PROFESSIONALS .....	5
TABLE 2 USE OF PRESUMPTION OF INNOCENCE BY LEGAL PROFESSIONALS IN THEIR DAILY WORK .....	9
TABLE 3 EQUAL APPLICATION OF THE PRESUMPTION OF INNOCENCE .....	13
TABLE 4 FACTORS INFLUENCING PRESUMPTION OF INNOCENCE .....	14
TABLE 5 EXPERIENCE IN COOPERATION WITH THE MEDIA .....	16
TABLE 6 LAWS AND GUIDELINES REGULATING WORKS WITH THE MEDIA .....	19
TABLE 7 MEDIA COVERAGE IMPACT ON THE PROCEEDINGS.....	22
TABLE 8 PUBLIC SCRUTINY IMPACT ON THE FAIRNESS OF THE PROCEEDINGS .....	22
TABLE 9 DIFFERENCES IN MEDIA COVERAGE DEPENDING ON GENDER.....	26
TABLE 10 GROUPS PRONE TO BIAS REPORTING .....	26
TABLE 11 REVEALING INFORMATION FROM PENDING PROCEEDINGS BY PERSONS OTHER THAN CRIMINAL JUSTICE OFFICIALS .....	27
TABLE 12 REMEDIES AVAILABLE TO DEFENDANTS PRESENTED AS GUILTY IN MEDIA REPORTS.....	29
TABLE 13 LEGAL REGULATIONS CONCERNING DEFENDANTS' TRANSFERS TO AND FROM COURT .....	32
TABLE 14 MEASURES USED TO PHYSICALLY RESTRAIN DEFENDANTS IN TRANSIT .....	32
TABLE 15 USE OF MEASURES OF PHYSICAL RESTRAINT AND THE PRESUMPTION OF INNOCENCE .....	32
TABLE 16 CLOTHES WORN BY DEFENDANTS IN THE COURTROOM SETTING .....	36
TABLE 17 THE IMPACT OF A DEFENDANT'S CLOTHES ON THE PRESUMPTION OF INNOCENCE .....	36
TABLE 18 AVAILABILITY OF SAFEGUARDS PROTECTING DEFENDANTS FROM BEING PRESENTED AS GUILTY .....	37
TABLE 19 MEASURES PROTECTING DEFENDANTS FROM BEING PRESENTED AS GUILTY .....	38
TABLE 20 VULNERABLE DEFENDANTS.....	38
TABLE 21 TYPES OF SAFEGUARDS AVAILABLE FOR CERTAIN VULNERABLE GROUPS.....	38
TABLE 22 REMEDIES AVAILABLE FOR DEFENDANTS PRESENTED AS GUILTY .....	39
TABLE 23 REMEDIES AVAILABLE TO DEFENDANTS PRESENTED AS GUILTY .....	40
TABLE 24 EXCEPTIONS TO THE PRINCIPLE OF THE BURDEN OF PROOF.....	42
TABLE 25 IMPACT OF THE CONFESSION ON THE CRIMINAL PROCEEDINGS.....	43
TABLE 26 SAFEGUARDS ENSURING THAT CONFESSION IS AN INFORMED AND CONSCIOUS CHOICE .....	44
TABLE 27 IMPLEMENTATION OF THE RIGHT TO REMAIN SILENT IN THE WORK OF LEGAL PROFESSIONALS .....	47
TABLE 28 THE FORM IN WHICH DEFENDANTS ARE INFORMED ABOUT THE RIGHT TO REMAIN SILENT.....	48
TABLE 29 THE TIME WHEN DEFENDANTS ARE INFORMED ABOUT THE RIGHT TO REMAIN SILENT .....	48
TABLE 30 THE IMPACT OF THE ABSENCE OF INFORMATION ON THE RIGHT TO REMAIN SILENT ON THE PROCEEDINGS .....	48
TABLE 31 PRESENTING SELF-INCRIMINATING EVIDENCE .....	50
TABLE 32 PROVIDING PHONE OR COMPUTER SECURITY CREDENTIALS .....	50
TABLE 33 RIGHT TO REMAIN SILENT .....	51
TABLE 34 CAUTIONING A DEFENDANT ABOUT THE CONSEQUENCES OF THEIR DECISION TO REMAIN SILENT .....	51
TABLE 35 INFORMING DEFENDANTS ABOUT THE RIGHT TO PARTICIPATE IN A TRIAL.....	54
TABLE 36 METHODS OF ESTABLISHING DEFENDANTS' ADDRESSES.....	54
TABLE 37 SAFEGUARDS FOR VULNERABLE GROUPS WHICH ENSURE THAT THEY HAVE BEEN INFORMED OF THE TRIAL .....	57
TABLE 38 SPECIAL ARRANGEMENTS FOR DEFENDANTS WITH A PHYSICAL OR MENTAL DISABILITY WHICH ENSURE THEY ARE ABLE TO FOLLOW THE PROGRESS OF THE TRIAL .....	57
TABLE 39 CHALLENGES IN RELATION TO THE PRESUMPTION OF INNOCENCE .....	59
TABLE 40 CHANGES IN THE PROTECTION OF THE PRESUMPTION OF INNOCENCE IN LAST 2-3 YEARS .....	60

## PART A. EXECUTIVE SUMMARY

The conducted research revealed the following outcomes:

**The right to be presumed innocent in general:** According to the Polish Constitution everyone is presumed innocent until their guilt is determined in a final judgement of a court. In practice, however, the protection of the presumption of innocence may be problematic due to several factors. First, the Polish legal system does not fully meet international standards related to different aspects of the presumption of innocence such as the burden of proof, the prohibition of using illegally obtained evidence in criminal proceedings and the prohibition of self-incrimination. In this context, the lack of proper implementation of Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings is particularly visible. Second, the protection of the presumption of innocence was further weakened by the judicial reforms that have been implemented in Poland since 2015. The research revealed that the 2016 reform of the prosecution service, structural changes in the organisation of the prosecution service and the judicial practice of application of pre-trial detention had considerably influenced the presumption of innocence.

**Public references to guilt:** Although the Polish Constitution and Press Law Act forbid the expression of opinions on the judicial resolution of a case before the delivery of the ruling of the first instance court, the research showed that public references to guilt occurred in media and public discourse. The research revealed that the application of the presumption of innocence in public statements may become illusory depending on the nature of the crime, the victim and, finally, the accused person and their features (such as e.g. a public role). Furthermore, the growing polarization of the Polish media landscape creates the risk of biased reporting, especially in politically charged cases. The research revealed certain patterns of strengthening (or weakening) the presumption of innocence in media reports, but failed to provide any examples of media reports influencing a final judicial decision.

**The presentation of suspects and accused persons:** The use of coercive measures and physical restraints during transfers of accused persons to and from the court is strictly regulated by laws and internal police guidelines. In general, although interviewed research participants (or “interviewees”) did not observe any trend of the excessive use of these measures, interviewees pointed to examples indicating that the proper implementation of these measures may raise difficulties and influence the presumption of innocence. None of the binding regulations take into consideration the fact that the use of measures of physical restraint may lead to suspects being presented as guilty. Thus, according to interviewees, a defendant’s will be allowed to cover the handcuffs or their face provided that they make such a request to the escorting police officers and the officers grant the request.

**Burden of proof:** Polish criminal law does not introduce the principle of burden of proof in an explicit way. Instead, the principle is derived from the general notion of the presumption of innocence. The research did not reveal any concrete exceptions to the principle of burden of proof. However, it indicated several practical problems concerning the protection of this principle. First and foremost, the inquisitorial model of criminal proceedings has an impact on the trial position of the prosecutor and the judge. In practice, the role of the prosecutor is often limited and solely entails the presentation of the charges. At the same time, the judge’s responsibility is to actively look for the evidence in support of the prosecution’s case. Another researched area was the trial impact of the confession on the outcome of the trial. Interviewees admitted that the confession should not be the sole ground for a conviction, but failed to point to any specific safeguards established to ensure that the confession is an informed and conscious choice.

**The right to remain silent and not to incriminate oneself:** Key problems related to the implementation of the right to remain silent concern the process of informing suspects about this right. Usually, a suspect receives this information prior to the first interview by law enforcement officers or the first hearing during the trial. Interviewees observed that in many cases this information is provided in a way that is difficult to understand for a layperson. Although the process of informing suspects about this right is a standardized procedure and accused persons rarely do not receive such information, procedurally speaking, a failure to provide this information before the first interview or hearing does not influence the validity of suspects' testimonies. The lack of a proper appeal procedure to exclude a testimony given by a defendant who has not received the full information on the right to remain silent is arguably the main deficiency in this respect.

**The right to be present at the trial and to have a new trial:** The 2015 amendment of the Code of Criminal Procedure provided the accused person with the *right* to be present at the trial, abolishing the previous rule of mandatory appearance. The research revealed that the key problems related to the effective participation in the trial are the lack of proper information about the consequences of the defendant's non-appearance and the absence of systemic safeguards for the vulnerable defendants that would allow them to effectively participate in the trial.

## PART B. INTRODUCTION

The report presents the results of fieldwork research on criminal procedural rights, which deals specifically with the presumption of innocence and the right to be present at the trial.

In total, **12 eligible interviews** were carried out from 4 February to 20 May 2020. The research sample includes 4 police officers, 4 judges and prosecutors (2 judges and 2 prosecutor) and 4 defence lawyers. The interviews were carried out in 3 cities: Warsaw (6 interviews), Łódź (3 interviews) and Katowice (3 interviews).

The first two interviews were carried out face-to-face. As from mid-March 2020, when the national epidemic emergency resulted in the introduction of social distancing and lockdown measures, the remaining interviews were carried out by phone or electronic means of communication. The results of the research did not show any differences in the amount of information obtained from the face-to-face interviews and interviews conducted via phone or electronic means of communication. The differences in the amount of gathered information in the interviews mainly depended on the level of interviewees' engagement and expertise. Thus, it may reasonably be argued that the change in the mode of conducting the interviews had not influenced the research outcomes.

The interviews focused on three main themes: (1) interviewees' experience with the presumption of innocence and the burden of proof, (2) defendants' right to be present at the trial, and (3) defendants' right to have a new trial. The part exploring the interviewees' experiences with the presumption of innocence also explored their experiences with working with the media involved in the coverage of criminal proceedings. More than 50% of the interviewees **had some experience working with the media**. The interviews offered in-depth insights on how an interviewee's institution liaises with the media, as well as those concerning interviewees' observations to the media's approach to the presumption of innocence and the general media coverage of operations of the criminal justice system. The interviewees with limited experience in working with the media (especially the interviewed police officers) proved to be able to share some information but were quite hesitant to discuss this subject in detail.

While speaking about the burden of proof, defendants' right to be present at the trial and defendants' right to have a new trial, interviewees have offered important legal insights (including in respect to their institutions' internal policies and regulations) and observations on the practical implementation of these laws, policies and regulations. The interviewed judges and lawyers most notably presented numerous examples of laws and rules applied as part of their day-to-day practice.

Two parts of interviews have proven particularly challenging for the interviewees. First, the majority of the interviewees **struggled to identify any safeguards for defendants from vulnerable groups**. Often, the safeguards the interviewees were able to identify were merely physical accessibility accommodations for persons with disabilities or the measures taken to assist defendants who do not speak Polish. The questions concerning the safeguards further revealed a systemic absence of a critical review of whether such issues are at all recognised and addressed by the Polish criminal laws and criminal justice system. Second, the interviewees have offered **relatively limited observations concerning the challenges to, and the room for improvement in, the protection of the presumption of innocence**. The interviewees did not refer to any legal challenges to the presumption of innocence and often described the relevant legal framework as satisfactory. Given the fact that the majority of laws on the presumption of innocence were introduced to the Polish legal system before 2016, it can be inferred from the interviewees' responses that the implementation of Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present

at the trial in criminal proceedings (the “Directive”) has failed to give an impetus to any significant legal reform in this area.

### **B.1 PREPARATION OF FIELDWORK**

Fieldwork preparation included setting up a research team, making preparation for interviews, obtaining a regular peer review and developing the questionnaire and data protection documents.

The research team was composed of two HFHR lawyers who carried out the interviews and one HFHR junior lawyer assisting in the project’s works. Both interviewers have been involved in FRA studies concerning rights of participants in criminal proceedings carried out in previous years.

During the interview preparation phase, research materials were translated and the questionnaire was analysed. Before the interviews started, members of the research team met to discuss key points of the interviews. Furthermore, after first interviews were conducted, team members identified the well-executed elements of the interviews and pointed to the aspects that needed improvement. For the duration of the entire project, members of the research team shared their observations made in the course of subsequent interviews. The process included elements of peer review – interview reports were read and analysed by all members of the team.

Data protection was another important consideration in the entire research process. The files with recordings of interviews were kept in secured file-sharing systems used by the HFHR or FRA. The reporting templates were anonymised upon drafting and no personal data that would enable the identification of interviewees or their cases appeared in the reports.

### **B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS**

The identification of interviewees started on 14 February 2020 with sending (via e-mail, and via fax in one case) the cover letter, containing a brief description of the project, to courts, prosecution offices and police stations in three cities (Warsaw, Katowice and Łódź). The intention was to address only criminal divisions in district courts, which issue certain decisions in preparatory proceedings and apply pre-trial detention, as well as district prosecution offices, responsible for conducting or supervising the vast majority of preparatory proceedings. With regard to the Police, the selection process concerned only those officers doing service in municipal police stations and responsible for investigations (additionally, a need for police officers having experience in liaising with media was signalled by us).

Despite some refusals to participate in the research, the recruitment process went quite smoothly. The only problem we encountered was scheduling the interviews with the police officers (due to their workload or e.g. being on leave) and one of the prosecutors. It should be noted, however, that judges and lawyers presented the most positive attitude towards the research and interviews with them were the most informative and comprehensive ones.

### **B.3 SAMPLE AND DESCRIPTION OF FIELDWORK**

Police officers:

Requested: 4, completed: 4

Judges/prosecutors:

Requested: 4 (2/2), completed: 4 (2/2)

Defence lawyers:

Requested: 4, completed: 4

Table 1: Sample professionals

No.	Group	Operational expertise on criminal investigations and trials	Experience with media	Gender
1	Police officer	Yes (investigations)	Limited	Female
2	Police officer	Yes (investigations)	Limited	Male
3	Police officer	Yes (investigations)	No	Male
4	Police officer	Yes (investigations)	No	Male
1	Lawyer	Yes	Yes (limited to some cases)	Male
2	Lawyer	Yes	Yes (limited to some cases)	Male
3	Lawyer	Yes	Yes	Male
4	Lawyer	Yes	Yes	Male
1	Judge	Yes	No	Female
2	Judge	Yes	Yes	Female
3	Prosecutor	Yes	Yes	Female
4	Prosecutor	Yes	Yes	Male

In general, the atmosphere of the interviews was very good, and the level of trust was high. Most of the respondents were eager to participate in this research and share their observations. The interviewees did not mind recording the conversations. The average length of an interview was 66 minutes, with the shortest and longest interview lasting 43 minutes (police officer) and 118 minutes (lawyer), respectively.

#### **B.4 DATA ANALYSIS**

The data were analysed to evaluate interview outcomes in the light of the applicable law, policies, based on cross-referencing of the information shared by interviewees.

The questionnaires and report templates provided by FRA were strictly followed, both in the fieldwork phase and during the data analysis phase.

The most concrete and detailed information was obtained during the interview section devoted to the presumption of innocence in the works of the criminal justice system and the media works. In this regard, the analysis focused on interviewees' professional experiences with the media and their general observations on the media coverage of criminal proceedings. Most interviewees observed that some of the potential or actual violations of the presumption of innocence were a consequence of, among other things, the polarisation of the media landscape.<sup>1</sup>

The remaining sections of the interview focused on the practical implementation of individual legal provisions. The sections concerning, among other things, defendants' transfers to and from court, the burden of proof or defendants' participation in the trial, not only sought to describe the relevant practices but also aimed to identify any systemic loopholes or deficiencies that may be prejudicial to the presumption of innocence.

In addition to exploring the themes raised in the questionnaires, the **research revealed also three aspects specific to the national context, which have been featured in the interviews and the report.** The first one was a reform of the criminal procedure, introduced in 2015 and revoked 9 months later, in 2016. As the reform systemically changed the approach to the burden of proof during the trial, the interviewees who had been dealing with this dimension of criminal procedure were asked to compare the two models. The second aspect, above all raised by interviewed lawyers and prosecutors, was to the changes in the laws governing the public prosecution service that authorised high-ranking prosecutors (including the Prosecutor General/Minister of Justice) to exercise direct control over pending investigations and disclose details of pending proceedings to the media. This issue was widely discussed in the sections devoted to, among other things, cooperation with the media. The third country-specific problem was the practice of application of pre-trial detention.

The presented sample of opinions and answers is not a representative sample for professionals who share with the interviewees the characteristics such as background or work experience. Thus, any general conclusions drawn from the interviews may be applied only to the surveyed group.

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<sup>1</sup> [The Polish media environment is highly polarized](#). In 2015, the Parliament adopted changes to the legal framework regulating the work of the public media. The changes led to significant politicization of the public media (TV, radio stations and the Polish Press Agency). According to the reports published by Poland's Society of Journalists and the Batory Foundation the public media serve "[as a propaganda tool for the government](#)". The part of the private media outlets (two national TV stations, the part of the national and local press outlets as well as the internet news websites) remain independent from the government whereas the government supports "a number of other media companies through the substantial advertising spend of state enterprises and agencies".

## B.5 LEGAL FRAMEWORK

The presumption of innocence is one of the key principles of the criminal procedure. According to the Polish Constitution, everyone is presumed innocent until their guilt is determined in a final judgement of a court.<sup>2</sup> Article 5 of the Code of Criminal Procedure repeats this rule, stipulating that the accused is to be presumed innocent until their guilt is proven and determined in a final judgment. In the light of Article 5 § 2 Code of Criminal Procedure, any irremovable doubts occurring in the proceedings should not be resolved to the prejudice of the accused.<sup>3</sup> Furthermore, the Press Law Act<sup>4</sup> establishes the general prohibition of expressing opinions on the judicial resolution of a case before the delivery of the ruling of the first instance court. Consequently, under the Press Law Act, the media should refrain from using any expression that could indicate a person's guilt before the guilt is established by the court in a judgement. Furthermore, the provisions of the Code of Criminal Enforcement<sup>5</sup> and the Coercive Measures Act<sup>6</sup> regulate, to a certain extent, problems resulting from accused persons being presented as guilty by e.g. the application of coercive measures or clothes worn by the defendants in court. Other legal remedies include a general mechanism provided under the Civil Code<sup>7</sup>, namely the civil action that may be brought to remedy a violation of an accused person's publicity rights, or "personal interests".

As of 2016, there have been no significant changes in the Polish legal system related to the transposition of the Directive. According to the Ministry of Justice, the criminal law in Poland already meets the standards provided for in the Directive.<sup>8</sup>

However, it may reasonably be argued that **the Directive has not been fully implemented to the Polish legal system in three main areas**. The first problematic area is the burden of proof. According to the Directive "any doubt should benefit the suspect or accused person" whereas the Code of Criminal Procedure states that "irremovable doubts shall not be resolved to the prejudice of the accused". In the opinion of the Polish Ombudsman, the wording of the Polish Code does not meet the standards set by the Directive as the Directive refers to all kinds of doubts while the Code of Criminal Procedure mentions solely those doubts which remain unresolved after the completion of evidentiary proceedings. According to many rulings of the Polish Supreme Court, this principle should apply only provided that all other means of resolving doubts have been exhausted.

Secondly, the Directive provides that "Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed". The Directive is applicable to all phases of criminal proceedings, from preparatory proceedings to the court proceeding. However, in the Polish legal system there is no comprehensive regulation concerning the prohibition of self-incrimination that would apply to *all* phases of the criminal process. Furthermore, there are no provisions which would prohibit

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<sup>2</sup> Poland, Constitution of the Republic of Poland, (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.) 2 April 1997, Article 42(3)

<sup>3</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997 Article 5(1).

<sup>4</sup> Poland, Press Law Act ([Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe](#)), 26 January 1984.

<sup>5</sup> Poland, Code of Criminal Enforcement (Ustawa z dnia 6 czerwca 1997 r. Kodeks Karny Wykonawczy), 6 June 1997

<sup>6</sup> Poland, Coercive Measures Act (Ustawa z dnia 24 maja 2013 r. o środkach przymusu bezpośredniego i broni palnej) 24 May 2013

<sup>7</sup> Poland, [Civil Code](#) (Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny), 23 April 1964

<sup>8</sup> Poland, Ombudsman's Office, Odpowiedź Ministra Sprawiedliwości, 18 October 2018, available at: [https://www.rpo.gov.pl/sites/default/files/Odpowiedz%20MS%2018.10.2018\\_0.pdf](https://www.rpo.gov.pl/sites/default/files/Odpowiedz%20MS%2018.10.2018_0.pdf)

interviewing a suspect initially as a witness and later presenting him with charges. Such a situation limits the suspect's right to a defence and access to a defence lawyer (there are no provisions that would ensure that a witness must receive legal aid).

Thirdly, the Code of Criminal Procedure has been substantially amended with respect to the procedural admissibility of illegally obtained evidence. According to the amended wording of the Code, unlawfully gathered evidence cannot be excluded from the proceedings solely on the grounds of its illegality unless such evidence has been obtained in connection with a public officer's performance of their official duties or as a result of manslaughter, an intentionally caused injury to health or deprivation of liberty.<sup>9</sup>

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<sup>9</sup> Poland, Ombudsman's Office, Dyrektywa "niewinnościowa" nadal nie wprowadzona do polskiego prawa. Rzecznik pyta Ministra Sprawiedliwości, available at: <https://www.rpo.gov.pl/pl/content/dyrektywa-niewinnosciowa-nadal-nie-wprowadzona-do-polskiego-prawa>

## PART C. MAIN REPORT ANALYTICAL STRUCTURE

### C.1 The right to be presumed innocent in general

In the Polish legal system, the presumption of innocence applies to the accused from the outset of the criminal proceedings. Presumption of innocence applies also in a retrial that takes place after a final judgement is revoked through extraordinary means of appeal (e.g. the cassation appeal). It covers both the preparatory and judicial stage of criminal proceedings and must be followed by all criminal justice bodies (courts, prosecutors, the police).

In its strictly procedural interpretation, the presumption of innocence means that the court is obliged to acquit the defendant if their guilt has not sufficiently been proven. The legal force of an acquittal on grounds of insufficient evidence is equal to that of an acquittal following a thorough and convincing examination of guilt. However, the more general interpretation of this principle is that it imposes certain obligations on society as a whole. For instance, the defendant retains the right to dignity and good name and, as a citizen, can exercise any legal remedies (civil or criminal) if this right is violated. This rule applies also to the media, which thereby obliged to refrain from predicting the outcome of the still pending proceedings.

- a. How do different criminal justice professionals implement the presumption of innocence?

How do you use the presumption of innocence in your daily work?	Assessing or gathering the evidence	Appealing against decisions on pre-trial detention	Assessing the defendant's guilt	Other
<b>P</b>	4			
<b>J</b> (respondents in this group indicated several answers)	3 (a judge and two prosecutors)		2 (two judges)	
<b>L</b> (respondents in this group indicated several answers)		4	1	1

Table 2 Use of presumption of innocence by legal professionals in their daily work

Different categories of respondents pointed to different practical contexts in which they apply the presumption of innocence, depending on their role in criminal proceedings.

All of the **interviewed police officers** stated that they use the presumption of innocence mainly to collect evidence of the accused's guilt. The evidence must be gathered in a fair, professional and objective manner. In this context, one of the interviewed police officers indicated that in cases of serious crimes, the police follow prosecutors' instruction concerning collecting evidence whereas in cases of less serious crimes the police have a much wider margin of appreciation in collecting the evidence.

*W jaki sposób stosuje pani zasadę domniemania niewinności w swojej codziennej pracy? (...) ja, bezpośrednio jako policjant... w jaki sposób mogę to stosować? Jedyne poprzez zbieranie materiału dowodowego, nie tylko wynikającego z wniosku, który składa podejrzany w postępowaniu karnym, ale również z inicjatywy instytucji."*

*How do you apply the principle of the presumption of innocence in your everyday work? I, as a police officer... The only possible way I can do that is by gathering evidentiary material, not only requested by the suspect in criminal proceedings but also at the initiative of an authority.”*  
(Police officer, Poland)

Another interviewed police officer stated that while investigating a case the police take into consideration many lines of inquiry and verify them based on collected evidence. In obvious cases, in which the identity of the perpetrator and facts of the case are known from the beginning, the presumption of innocence seems not to be a decisive factor. Furthermore, one of the interviewees (police officer) noted that the presumption of innocence is a guiding principle applicable to the assessment of evidentiary motions. In his opinion, when evaluating such motions, the police should act in an unbiased way and fairly assess the motions submitted by the defence. This interviewee revealed **an interesting practice of the police**. According to the interviewee, the police officers seem to assess whether or not an evidentiary motion has been submitted to delay the proceedings instead of assessing it on its merits. They might dismiss the evidence if they decide that the sole purpose of it is delaying the proceedings. The interviewed police officers underlined that although the police gather the evidence indicating an accused's guilt, they are not to decide whether the accused is guilty of having committed the crime.

*Poszanowanie domniemania niewinności jest rolą sądu, a nie policji. W naszej pracy zasadą jest to, by zebrać obiektywny materiał dowodowy.*

*Respecting the presumption of the innocence is a role of the court, not of the police. Our job is to collect objective evidence.*  
(Police officer, Poland)

**The interviewed judges and prosecutors** use the presumption of innocence mainly to assess the facts of the case, the evidence collected and, in the case of judges, to decide if the defendant is guilty. When assessing the facts of a case, the interviewees (one judge and two prosecutors) take into consideration all elements of the case and the applicable law. The interviewees stated that in some cases, even if suspects' conduct indicates that they committed a crime, it may not still meet all of the legal elements of the crime specified by the Criminal Code and, in consequence, it might not be treated as a criminal offence. Interviewees took note of the cases of financial crime, which became very frequent over the last years. Two interviewees (a judge and a prosecutor) indicated that in such offences as fraud or predatory lending it is important not only to prove the fact that the defendant has not paid their debts (fraud) or has charged exorbitant interest on a loan (predatory lending) but also to show the defendant's criminal intent of purposively defaulting on the debt (or unduly taking advantage of their clients). In this context, an interviewed prosecutor indicated that financial crime is extremely important for the leadership of their prosecutor's office. In the opinion of the interviewee, the extreme interest in prosecuting a certain category of crimes may create pressure on rank-and-file prosecutors and, in consequence, have a negative impact on the presumption of innocence, for example being detrimental to the unbiased and meticulous assessment of gathered evidence material. The interviewee linked this practice to the systemic changes first introduced to the prosecution service in **2016, a year that marked a massive revamping of the service's workforce structure and a wave of sudden promotions and demotions**. In the opinion of the interviewee, the prosecutors who were then promoted may be more eager to conduct the proceedings in the way advancing the leadership's political agenda.

*Bierze się takiego prokuratora na delegację do prokuratury wyższego szczebla, to wiąże się z dodatkami służbowymi. Nie mówię o środkach twardego oddziaływania, ale mówię o sytuacjach miękkich – kiedy kończy się okres delegacji i taki prokurator jest wzywany i prokurator przełożony mówi “no, Pan ma taką koncepcję na sprawę, a lepiej byłoby zrobić tak i tak, no i kończy się Panu okres delegacji, chce Pan wracać do prokuratury rejonowej?”. Te miękkie środki nacisku powodują to, że prokuratorzy mogą oceniać sprawy pod innym kątem, bo jest na nich wywierana presja. Jeśli prokurator ma inne motywacje niż tylko dobre przeprowadzenie postępowania i chce zostać na delegacji, to on może podchodzić do takiego podejrzanego, który się nie broni z bardziej represyjnymi środkami zapobiegawczymi*

*You delegate a prosecutor to a higher prosecutor's office, which entails service pay bonuses. I am not talking about any hard measures, but I am talking about soft persuasion. When the delegation ends, the prosecutor is summoned by the superior and the superior says: “I know your strategy in this case, but wouldn't it be better to take a different approach? Oh yes, your delegation is about to end, but do you really want to go back to your district [the lowest level] prosecutor's office?” Being persuaded in such a subtle way, prosecutors may want to re-evaluate their approach to cases due to the pressure they feel. If a prosecutor is motivated by factors other than the proper conduct of the proceedings and wants to extend his or her delegation, they may use harsher preventive measures against a suspect who is unable to mount an effective defence.*

*(Prosecutor, Poland)*

Furthermore, the interviewed judges strongly emphasised that the presumption of innocence **should be a guiding principle for all judges who decide on the defendant's guilt**. In this context, those interviewees underlined another aspect of the presumption of innocence, namely the obligation to prove the defendant's guilt beyond a reasonable doubt. The judges indicated that in the absence of sufficiently convincing evidence, the defendant should be acquitted.

*Jak ważna jest w Pani pracy zasada domniemania niewinności?*

*[...] jeden z moich wykładowców na aplikacji mówił, że “lepiej jest uniewinnić stu winnych niż skazać jednego niewinnego”*

*How important in your daily work is the presumption of innocence?*

*... As one of the teachers during my judge training used to say: “it's better to acquit one hundred guilty men than sentence one innocent men”*

*(Judge, Poland)*

*Jak w swojej codziennej pracy stosuje Pani zasadę domniemania niewinności?*

*[...] Często powtarzam, że zawód sędziego to najlepszy zawód wśród zawodów prawniczych. W życiu jeśli mamy wątpliwości, to nie wiemy, co zrobić, a sędzia jeśli ma wątpliwości to musi kogoś uniewinnić.*

*How do you apply the presumption of innocence in your everyday professional practice?*

*... I keep saying that the judicial profession is the best legal profession there is. If you are an ordinary person and you have doubts, you don't know what to do, but if you are a judge and have doubts, you know you have to go for acquittal.*

*(Judge, Poland)*

**All interviewed lawyers** indicated that the presumption of innocence was important in their work especially when it comes to appealing against **decisions on pre-trial detention**. According to the Code

of Criminal Procedure, pre-trial detention is ordered by the court if there is a reasonable risk that the defendant would abscond or go into hiding or if there is a risk that the defendant may engage in witness tampering. Furthermore, pre-trial detention is ordered if the defendant faces the risk of a severe custodial penalty that may be imposed for a crime punishable by a prison term of at least 8 years. To order pre-trial detention, the court must be satisfied that there is a high probability that the defendant has committed the charged crime or that certain circumstances indicate that the integrity of the proceedings would be undermined, or that there is a risk that the defendant may commit another crime, in the absence of the defendant's detention. In the investigation (pre-trial) phase of the proceedings, pre-trial detention is ordered and be extended by the district court; after the case goes to trial, an extension of pre-trial detention may be ordered by the trial court.

In the opinion of the interviewed lawyers, **the presumption of innocence should play a key role in the assessment of the necessity of ordering pre-trial detention.** One of the interviewed lawyers said, the presumption of innocence should be used to assess the criterion of a severe custodial penalty and that regarding the probability of commission of the crime. Interviewees also regretted that in practice the presumption of innocence is not fully taken into consideration by the courts. An interviewed lawyer pointed out that he has never encountered a situation in which the court would dismiss a pre-trial detention request by invoking the presumption of innocence, whereas another interviewed lawyer stated that the courts are in general unwilling to challenge pre-trial detention requests made by prosecutors.

*Jak sądy podchodzą do stosowania zasady domniemania niewinności przy stosowaniu tymczasowego aresztowania?*

*Z mojej praktyki wynika, że sądy tą zasadą się nie przejmują przy stosowaniu tymczasowego aresztowania. Owszem sądy używają tego pojęcia, ale to jest bardziej jako wytrych i pewne usprawiedliwienie własnej decyzji. To ma taką formułę w uzasadnieniach "wprawdzie sąd nie przesądza o winie oskarżonego, ponieważ stosuje zasadę domniemania niewinności, ale..."*

*How do the courts use the presumption of innocence in applying pre-trial detention?*

*My practice shows that the courts don't care about the presumption of innocence while ruling on pre-trial detention. Sure, the courts use the presumption of innocence as a buzzword and some sort of justification for their [pre-trial detention] decisions. You can see this in how they phrase detention orders: "This court does not decide on the defendant's guilt as it fully adheres to the presumption of innocence, but..."*

*(Lawyer, Poland)*

Furthermore, one of the interviewed lawyers stated that invoking the presumption of innocence in appeals against pre-trial detention orders may not be sufficient if not supported by sufficient evidence.

*Samo domniemanie niewinności nie jest głównym argumentem adwokata.*

*The presumption of innocence in itself should not be the main argument of a lawyer.*

*(Lawyer, Poland)*

One of interviewed lawyers and one judge noted other practical aspects concerning the judicial imposition of pre-trial detention that may influence the presumption of innocence. The interviewees stated that certain concerns over the unbiased assessment of guilt result from the fact that the same judge who decides on an extension of a defendant's pre-trial detention decides on the defendant's conviction. However, one of the interviewed lawyers admitted that given the courts' workload and low judicial staffing levels, it would not be possible to have another judge handling pre-trial detention matters in proceedings separate from the pending criminal trial.

Furthermore, one of the interviewed lawyers indicated that the presumption of innocence is usually invoked by defence lawyers in the closing arguments during the trial. It is the lawyer's role to provide the court with a different view on the case and highlight the circumstances that were not proved and are favourable of the defendant's case. Two judges raised a similar point while discussing the application of the presumption of innocence to the assessment of the circumstances of the case and the absence of sufficient prosecution's evidence.

The interviewed lawyers also pointed out other aspects of their work in which the reasonably required use of the presumption of innocence faces major challenges. Among these aspects, they noted the problem related to the application of financial surety established on the defendant's property (see also comments on the burden of proof below), which is ordered by the prosecutor without the need of obtaining court's approval. In the opinion of the interviewees, the application of this measure constitutes a serious interference with a defendant's right to property and may also influence the presumption of innocence.

Finally, two interviewed lawyers observed that the application of the presumption of innocence, especially in contacts with the media, may have an educational impact. These interviewees said that they tried to underline that the fact that someone is charged with a crime does not automatically mean that that person is guilty.

b. Potential factors that affect guaranteeing the presumption of innocence

Does the presumption of innocence apply equally to everyone?	Yes	No
<b>P</b>	3	1
<b>J</b>	1 (a judge)	3 (a judge and two prosecutors)
<b>L</b>	1	3

Table 3 Equal application of the presumption of innocence

Interviewees, even those belonging to the same professional group, presented a differing assessment of whether the presumption of innocence is equally applicable to everyone.

Five interviewees (three police officers, one judge and one lawyer) said that the **presumption of innocence is equally applicable to all defendants despite their personal characteristics**. In this group, one of the interviewed judges expressed the strongest opinion stating that a judge is obliged to distance themselves from any non-legally relevant factors that may influence their judgement. The interviewee admitted that there might be some factors affecting the protection of the presumption of innocence, but said that such factors do not influence her work.

*Czy są jakieś czynniki, które wpływają na ochronę domniemania niewinności?*

*Wydaje mi się, że tak. Czasami jak rozmawiam z prokuratorami, to oni mi mówią "No, on (oskarżony - red.) jest winny, ma taką kartę karną" (śmiech) Może nie jestem doskonała w swoim orzekaniu, ale na to (domniemanie niewinności - red.) bardzo zwracam uwagę"*

*Are there any factors influencing the presumption of innocence?*

*I think so. Sometimes, when I talk to prosecutors they say: "Well, with a rap sheet like that, he or she [the defendant] must be guilty" (laughs). Maybe I'm not a perfect adjudicator, but I pay great attention to this [presumption of innocence].*

(Judge, Poland)

On the other hand, more than half of the respondents **did not acknowledge that the concept of “blind justice” applies equally to everyone in practice**. A police officer, a judge, and two prosecutors as well as three lawyers said that the presumption of innocence may be applied differently, depending on the nature of the crime or the criminal record of the defendant. A judge stated that a judge’s professional experience is one of the safeguards of the equal application of the presumption of innocence to every defendant. The judge mentioned one of her cases, in which she acquitted a woman who confessed to having committed the crime.

c. The role of prejudices and stigma

What kind of factors may influence the presumption of innocence?	Nature of the crime	Former conviction	Ethnic or national origin	Other (gender or social background)
P		1		
J (interviewees provided several answers)	1 (a judge)	2 (a judge and a prosecutor)		1 (a prosecutor, other: sexual orientation)
L (interviewees provided several answers)	2	1	2	2 (other: social status)

Table 4 Factors influencing presumption of innocence

The most often indicated factors influencing the protection of **the presumption of innocence was the criminal record of the defendant and the nature of the crime**. Referring to the defendant’s criminal record, the interviewees indicated that the information on a person’s previous convictions may be decisive in the elimination of potential suspects. According to an interviewed police officer, this is especially true of suspects in cases involving sexual abuse or offences against minors.

*(Czy) nie jest tak, że jak przychodzi do postępowania względem recydywisty to się zapala lampka, że coś musi być na rzeczy, skoro (...) był już wcześniej skazywany?*

*Są przestępstwa, gdzie należy szczególną uwagę zwracać na bezpieczeństwo osób, czy nawet małoletnich. Są to przestępstwa na tle seksualnym, przestępstwa przeciwko zdrowiu i tutaj faktycznie, jeżeli takie osoby były wcześniej skazywane za czyny podobne, no to należy tutaj brać to pod uwagę.*

*Isn’t it true that, when it comes to investigating a habitual offender, a red flag appears: there must be something to it because of their previous conviction?*

*There are offences where particular attention should be paid to the safety of persons, including minors. These are sex offences and violent crimes and, sure, if a suspect has a previous conviction for a similar offence, this should be taken into account.”*

(Police officer, Poland)

Some of the interviewees mentioned that the presumption of innocence may enjoy a varying level of protection depending on the **nature of the crime**. For example, two interviewed lawyers indicated that in the case of the serious crimes (crimes against health or life or crimes related to the participation in organized criminal groups), the presumption of innocence is less protected and the defendants are more likely to be detained pending the investigation and/or trial. Furthermore, the interviewees

observed that the presumption of innocence may not be fully protected in high-profile politicised cases involving e.g. members of a political party. An interviewed judge also pointed out that certain categories of crimes, in particular “white-collar” crimes, are difficult to adjudicate and any judge’s mistake may result in the presumption of innocence being compromised.

Furthermore, two interviewees mentioned that the **defendant’s ethnic or national origin** also may influence the presumption of innocence. One of the lawyers observed that e.g. persons from countries of the former USSR are more likely to be presented with charges of smuggling than other foreigners. Another lawyer observed that the presumption of innocence may be less robustly applied to members of the Roma community. This observation was based on a single example of a Roma defendant put in pre-trial detention whose correspondence was blocked by the head of the pre-trial detention facility because it was written in a foreign language that could not be easily translated by the prison facility’s staff.

Among the answers concerning the presumption of innocence, the most striking observation was shared by one of the prosecutors, who said that the presumption of innocence may be challenged not only based on the factors such as the nature of the crime or a defendant’s ethnic origin, but also on the grounds of a defendant’s **social background**. The prosecutor seems to suggest that a defendant who can afford legal representation would be treated differently than a person who is not represented by a lawyer during the investigation. In his/her opinion, prosecutors should apply the presumption of innocence also in the pre-trial phase of the proceedings and should not take advantage of the fact that someone conducts their defence without an attorney. Furthermore, the interviewee linked the challenges to the protection of the presumption of innocence with the **organisational system of the public prosecution service**. In his/her opinion, prosecutors are at risk of being pressurised to investigate the cases that are given priority by the chiefs of the prosecution service (such as fraud or predatory lending). Thus, in the opinion of the interviewee, the presumption of innocence may not be always fully protected in such cases.

Only **one respondent mentioned gender** as a factor which may influence the presumption of innocence. At the same time, several interviewees – a prosecutor and two police officers stated that the offender’s gender has no bearing on the course of the proceeding. At the same time, some of the interviewees (e.g. one of the interviewed judges) indicated that women commit crimes less often than men, but another interviewee (a prosecutor) stated that a crime committed by a woman can be as violent as that committed by a man.

#### d. Discussion of findings

The practical application of the presumption of innocence depends mainly on an actor’s role in the criminal proceedings. The presumption of innocence is a crucial factor in the assessment of evidence by police officers, prosecutors and judges. In the light of the principle that a person should be found innocent if there is insufficient evidence to prove their guilt, the interviewees belonging to all surveyed professions assess the evidence to determine whether it proves the defendant’s guilt beyond a reasonable doubt, which is a consequence of the *in dubio pro reo* principle.

Whereas for judges the presumption of innocence remains valid throughout the entire proceedings, the lawyers’ answers seem to suggest that this principle has the key impact at the beginning of the proceedings, when the court decides on pre-trial detention based on prima facie evidence of the commission of a crime. According to the interviewees, the courts too rarely take into consideration the presumption of innocence while deciding on pre-trial detention. In subsequent phases of criminal proceedings, the presumption of innocence is invoked by defence lawyers in situations involving doubts regarding the sufficiency and credibility of the collected evidence. The interviewed lawyers

pointed to a lack of proper consideration for the presumption of innocence that accompanies prosecutorial decision making on preventive measures in the criminal proceedings.

The nearly even split in the interviewees' assessment of whether the presumption of innocence is equally implemented for everyone followed the lines of the interviewees' professions. Among the factors that may influence the presumption of innocence, the interviewees indicated previous convictions, nature of the committed crime (the more serious the crime is, the weaker the presumption of innocence is protected) and other factors, such as social status. Some interviewees stated that the protection of the presumption of innocence may be jeopardised not due to the defendant's personal features, but rather due to the organization of the criminal justice system. In this context, an interviewee said that the system of promotions and incentives in the public prosecution service may influence prosecutors' approach to the presumption of innocence in highly politicised and/or high-profile cases.

## C.2 Public references to guilt

According to the Polish Press Law Act<sup>10</sup> one must not express opinions on adjudication before ruling in the first instance is delivered. Thus, instead of being called "a criminal" or "a felon", the defendant should be publicly referred to as "the suspect", "the accused (of having committed ...)" etc. No criminal sanction is provided for a journalist who does not comply, however civil liability for violation of personal rights of the defendant, as well as disciplinary liability before the journalists' association court can apply. Second, the press cannot publish the image and other personal data of individuals against whom preparatory or court proceedings are pending, unless these persons agree to it. However, a competent prosecutor or court may allow to disclose these data due to public interest. The decision on disclosure of personal data and image may be appealed against by the defendant.

- a. How do different criminal justice professionals liaise with the media?

How do you cooperate with the media?	Via institution's spokesperson	Individual cooperation or via institution's spokesperson	Individual cooperation
<b>P</b>	4		
<b>J</b>	1 (a judge)	3 (a judge and two prosecutors)	
<b>L</b>			4

Table 5 Experience in cooperation with the media

Each of the interviewed professions has a different media contact policy. According to the Chief Police Commander's order, in each of the Police's units the authorized media officers are responsible for maintaining the relations with media.<sup>11</sup> According to the Act on prosecution, the chief of the prosecutor's office can appoint a prosecutor to the position of a spokesperson who is responsible for the cooperation with media and informing media about the prosecution works.<sup>12</sup> Also, in courts the spokespersons are responsible for contact with media. The courts' spokespersons are appointed from

<sup>10</sup> Poland, Press Law Act ([Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe](#)), 26 January 1984.

<sup>11</sup> Poland, Chief Police Commander Order no. 1204 on forms and methods of Police's information activity (Zarządzenie nr 1204 Komendanta Głównego Policji z dnia 12 listopada 2007 r. w sprawie form i metod działalności prasowo-informacyjnej w Policji), 12 November 2007

<sup>12</sup> Poland, Prosecution Service Act (Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze), 28 January 2016

among the judges. Whereas there are three ranks of the courts - district, regional and appellate courts - the spokespersons are appointed at the level of regional and appellate courts.<sup>13</sup>

The most strict and formalised policy has been adopted by the police, who maintain virtually all contacts with the media via authorised officers – the spokespersons of police units. If there is a need to provide the media with information on a case, a police officer in charge of the case briefs a media liaison officer or the unit’s spokesperson. It is rather unusual, albeit possible (as indicated by one of the police officers) for case officers to comment on the case on their own. None of the interviewed police officers had any considerable experience in direct collaboration with the media.

The prosecutors and judges may either comment on pending proceedings on their own or pass their comments through an institution’s spokespersons. Three out of four interviewees from this group (a judge and two prosecutors) had experience in working with the media. In general, both the courts and prosecutor’s offices have their spokespersons, who are also active judges or prosecutors. The courts and prosecutor’s offices of the lowest level (district courts and district prosecutor’s offices) do not have dedicated spokespersons and their media communication activities are performed by the spokespersons of higher-ranking bodies (regional courts or circuit prosecutor’s offices). However, the media may record statements of judges delivering judgments and verbally explaining reasons for judgements or obtain comments from prosecutors in charge of an investigation if a prosecutor’s office spokesperson is not available.

The interviewed judges’ and prosecutors’ contacts with the media concerned the particular cases in which they presided over (as indicated by one of the interviewed judges) or which they prosecuted (in the case of two prosecutors). In each of these cases, the interviewees worked with the media while discharging their official duties – in the courtroom or during press conferences organized by the prosecutor’s office. None of the interviewees mentioned any other forms of cooperation with the media, e.g. participation in TV or radio programmes. Their observations revealed three interesting aspects.

First, an interviewed judge stated that the **media’s presence in the courtroom can be beneficial**, encouraging judges to speak more clearly and plainly. The interviewed judge admitted that not all judges are so encouraged and too many judges do not take enough care to communicate in a way understandable for a layperson.

*Jakie ma Pani doświadczenia w pracy z mediami?*

*W ustnych motywach uzasadnienia nie używam trudnych, wydumanych słów, nie żongluję przepisami. Staram się mówić prosto, wolno i zawsze pytam dziennikarzy, czy wszystko jest zrozumiałe i czy coś jeszcze wytłumaczyć.*

*What are your experiences with working with the media?*

*I don't use difficult, fancy words when I give verbal reasons for the judgment, I don't juggle with legalese. I try to use plain language. I speak slowly and always ask journalists if everything is clear and if I should explain something in more detail.*

*(Judge, Poland)*

The judge who had experience in working with the media provided a very positive assessment of media work and stated that she had never had a situation in which the media would have covered any of her cases in a biased way. On the other hand, the judge who had lesser experience in contacts with the media repeatedly recalled her case covered by the media noting that the coverage was quite

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<sup>13</sup> Poland, Ministry of Justice Regulation on functioning of common courts (Rozporządzenie Ministra Sprawiedliwości z dnia 18 czerwca 2019 r. Regulamin urzędowania sądów powszechnych), 18 June 2019

biased and presented only one side of the story. The problem with media bias was further discussed in the section concerning the impact of media coverage on the presumption of innocence.

Second, the interviewed prosecutors stated that they observed a new practice concerning cases with a media potential or those that may attract public attention. In such cases, the interviewees admitted that **their supervisors often requested detailed information concerning a case concerned.**

*Jeśli sprawa jest medialna, to od razu taka sprawa zajmuje nam dwa albo trzy razy więcej czasu. Bo my musimy o tym informować wszystkich świętych, bo wszyscy chcą wiedzieć, co się w sprawie dzieje. Prokuratury wyższego szczebla muszą być o tej sprawie poinformowane, a potem dziennikarze [...] w takich sprawach jest nacisk, żeby postępowanie poszło bardzo sprawnie, a jednocześnie kara była bardzo surowa [...] [to zainteresowanie mediów – red.] powoduje, że jest bardzo dużo stresu związanego z tą sprawą.*

*If the case attracts public attention it means we will have to invest two-three times more time in it. “The all saints” have to be informed about it. The supervising prosecutors need to be informed as well as the media. In such cases, there is a pressure to conduct the proceeding in the most effective way and there is an expectation that the sentenced punishment will be severe [...] [the media interest] causes a lots of stress.*

*(Prosecutor, Poland)*

Third, one of the prosecutors stated that the prosecutor leading an investigation has to give their supervisors **a two weeks’ notice of any procedural steps scheduled to take place within the investigation** (e.g. an arrest). In the opinion of the interviewee, such information may be used in controlled press leaks to secure the media coverage of a certain case.

*Informacja o planowanych czynnościach w śledztwie przekazywana na 2 tygodnie wcześniej do Prokuratury Krajowej pozwala nie tyle, co manipulować śledztwem, co daje Prokuratorowi Generalnemu narzędzia do kreowania polityki informacyjnej: o jednej sprawie może powiedzieć, o innej nie. Dożyliśmy takich czasów, że sama informacja o wszczęciu danego postępowania kreuje już publiczne odium.*

*The notice of planned procedural steps in an investigation, which must be sent to the National Prosecutor's Office two weeks in advance, is not a measure that would allow the Prosecutor General to take the backseat control over the investigation. It's more a tool used to develop a communication policy as to which cases should be publicised and which shouldn't. We have come to a point where the information about the initiation of given proceedings is enough to create an anathema.*

*(Prosecutor, Poland)*

This practice was also observed by interviewed lawyers who stated that they had learnt about the details of some of their cases such as the date of an interview or charges presented to their clients from the media reports *before* having been notified through official channels.

Furthermore, interviewed prosecutors expressed concern over the **proper timing of releasing media statements** about cases. The prevailing opinion was that a prosecutor should inform the media about a case when the investigation is closed, and the bill of indictment is submitted to the court. An exception should be made in cases which attract significant public attention from the very outset – in such situations, the prosecution should only release information concerning the basic facts of the case and the proceedings.

As compared to the experiences of the interviewed judges, prosecutors and police officers, the interviewed lawyers maintained less formal contacts with the media. Three out of four interviewed lawyers had experience in working with the media. Their media involvement was limited and only included making comments on cases of their clients. In these comments, lawyers communicated what a client’s plea was and, if possible, gave key details of the proceedings. One of the interviewed lawyers mentioned an “extraordinary” case in which his client asked him to prepare a press release, which, as the interviewed lawyers’ answers suggest, is not a common practice. Apart from the above, the interviewed lawyers seem to share the opinion that legal professionals should avoid commenting on proceedings without having access to the case files (this observation was also shared by representatives of other groups, e.g. one of the judges).

b. Mapping of laws and guidelines

<b>What are the applicable laws or guidelines concerning cooperation with the media?</b>	<b>Code of Criminal Procedure and Criminal Code</b>	<b>Press Law Act</b>	<b>Internal regulations or policies</b>
<b>P</b>		1	2
<b>J</b>	2 (a judge and a prosecutor)	1 (a judge)	1 (a prosecutor)
<b>L</b>	2		2

Table 6 Laws and guidelines regulating works with the media

The interviewees indicated several legal provisions and internal regulations concerning the cooperation with the media (internal guidelines and policies) or the media coverage of pending criminal proceedings (legal provisions).

First of all, the key legal framework for the media coverage of pending criminal proceedings is set out in the Press Law Act<sup>14</sup>, which prohibits the media from expressing opinions on a pending court case before it is decided in the first instance. Thus, before the delivery of the final judgment, a person accused of committing a crime may not, as a rule, be named, only referred to as “the suspect” or “the defendant”. Furthermore, the Press Law Act provides that neither the image nor the personal data of a suspect or a defendant may be published during the pendency of the proceedings unless the person concerned consents to the disclosure.

Furthermore, according to Article 241 Criminal Code, disclosure of information from an active investigation is punishable by fine, restriction of liberty or imprisonment of up to 2 years. This provision applies to everyone who has received information from the investigation, including defence lawyers. On the other hand, the Prosecution Service Act<sup>15</sup> stipulates that a prosecutor can authorise the disclosure of specific information from an investigation to a third party, including the media.

Finally, cooperation with the media is regulated by an array of internal rules, regulations or policies binding on different actors involved in the criminal process. In the case of the police, media contact rules and communication policies are set out in an order issued by the Chief Commissioner of the Police. The order describes the responsibilities of police spokespersons appointed in individual units and departments and establishes the rules of coordination of their activities.

<sup>14</sup> Poland, Press Law Act ([Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe](#)), 26 January 1984.

<sup>15</sup> Poland, Prosecution Service Act ([Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze](#)), 28 January 2016

Interviewees presented several observations regarding the practical application of the above laws and regulations.

Almost all of the **interviewed police officers admitted that they did not work with the media on their own** and that media contacts are usually handled by spokespersons of police units. They pointed to the Chief Commissioner's order as the source of binding internal guidelines concerning cooperation with the media and noted that according to such guidelines, a police officer may provide information to the media only if they have been authorised to do so by a spokesperson.

The interviewed police officers were generally aware of the prohibition against releasing a suspect's or defendant's image and personal data but had difficulties with pointing to a legal basis for this prohibition. Two interviewed police officers noted that, by way of an exception to the general rule, a suspect's data may be released if a search warrant is issued. Two of the interviewed police officers also said that in some cases (most often, serious crimes), when a suspect's identity is not known, the police (on their own initiative or at a prosecutor's request) may publish the suspect's image on official websites.

*Policja podejmuje decyzje o upublicznieniu wizerunku osoby podejrzewanej w zależności od rodzaju sprawy. W drobnych sprawach to się praktycznie nie zdarza.*

*Depending on a case, the Police may decide to release a suspect's image. This virtually doesn't happen in cases of lesser offences.*

*(Police officer, Poland)*

The interviewed judges and prosecutors most frequently pointed to provisions of the Criminal Code, the Code of Criminal Procedure and the Press Law Act as the legal basis for the protection of a defendant's identity. Only one interviewee, one of the lawyers, mentioned another instrument governing the disclosure of defendants' details in criminal proceedings (rules and regulations of a prosecutor's office).

The interviewed judges and prosecutors emphasised in general that **criminal justice authorities do not disclose the full name of an accused person**. For example, an interviewed prosecutor said that in media statements and releases the prosecutor's office usually uses general descriptive references such as "a 55-year-old man". The question on the protection of a defendant's identity prompted observations regarding the prohibition of disclosure of a defendant's full name and the practice of using an "anonymised" form of his/her surname (the first letter). In the opinion of some interviewees (e.g. a judge and a prosecutor), in cases concerning public figures, such protection is usually illusory as frequently a release on the arrest or charging of a public figure include information that indirectly reveals the defendant's identity, such as their profession or function. This observation was also expressed by two interviewed lawyers. The dominant opinion among the judges and prosecutors was that criminal justice authorities, in general, protect defendants' identities. In an isolated statement, one of the interviewed prosecutors shared that in a high-profile case, a prosecutor's office had published a release on the launch of an investigation disclosing the suspects' names.

Two interviewed lawyers further pointed out that **disclosure of information from an active investigation may constitute a criminal offence**. Thus, in the opinion of one of the lawyers, a lawyer's cooperation with the media during the investigative phase of the proceedings should be limited to a minimum. The other interviewed lawyer perceived the above regulation as a source of a great imbalance between the defence's and prosecution's access to the media, which enables the latter to control the public narrative of the case. As the interviewee noted, the prosecution has a wide margin

of discretion in deciding on the scope of released information, the defence media activities are subject to strict limitations, which not only result from the defence strategy but also are set by provisions of the criminal law.

When it comes to the internal or professional guidelines on working with the media, some of the interviewed lawyers mentioned the Bar Association's Code of Ethics, which stipulates that **a defence lawyer cannot act as the client's spokesperson**. Two of the interviewed lawyers generally declared to making significant efforts not to appear as publicists or media representatives of their clients, trying to maintain strictly limited interactions with the press focused on communicating key aspects of the case.

Another lawyer stated that a defence lawyer's role to an extent resembles that of a spokesperson. The interviewee acknowledged the limitations imposed by the Bar Association's Code of Ethics but admitted that the defence lawyer is usually the only person who can tell the defendant's version of the story at the outset of the proceedings. Still, the interviewee said that in working with the media, lawyers should be very cautious and never use their client's case for self-advertisement.

*Jak Pan współpracuje z mediami w swojej codziennej pracy?*

*[...] co do zasady ograniczam swoją obecność w mediach, staram się ważyć każde słowo i nie epatuję swoją osobą.*

*How do you cooperate with the media in your daily work?*

*[...] in general, I try to limit my presence in the media to a minimum. I try to consider every word I say and I avoid a show.*

*(Lawyer, Poland)*

Interestingly, the doubts regarding the lawyer's role in communicating with the media were not shared by judges and prosecutors. One of the interviewees in this group, a prosecutor, admitted that lawyers liaise with the media, effectively acting as defendants' spokespersons. This interviewee also observed that since some of the prosecutors are reluctant to work with the media, defence lawyers may monopolize the narrative of media coverage.

*Takie sytuacje (gdy obrońca się wypowiadał) zdarzały się wielokrotnie. Widzimy relacje z sprawy – prokurator wypowiada się czasami, bo zwykle ucieka i nie chce się wypowiadać, tak to wygląda niestety. A obrońca ma dużo do powiedzenia na temat niewinności swojego klienta.*

*Such situations [when the defence lawyer comment the case] happened many times. We saw it in the recording from the court hearing. Usually the prosecutor runs away as they don't want to talk to the journalists, unfortunately. But the lawyer stays and wants to comment. The lawyer has a lot to say about his/her client's innocence.*

*(Prosecutor, Poland)*

The interviewed lawyers did not observe any significant challenges to the protection of a defendant's identity. Some lawyers noted that the legal measure used to protect a defendant's identity ("anonymisation" of the surname) – can be illusory in certain situations, especially in respect of public figures.

*Aktualna praktyka w zakresie anonimizacji osiąga efekt odwrotny. To stygmatyzacja podejrzanego.*

*The current anonymisation practice is counterproductive. Suspects are stigmatised because of how this is done.*

*(Lawyer, Poland)*

Furthermore, two lawyers noted that some of their clients do not wish to have their names obscured in this way.

*Miałem takiego klienta, i to w bardzo poważnej sprawie zabójstwa. (...) Wyrażał on zgodę od samego początku i kładł bardzo mocny nacisk na to, że nie życzy sobie, by występować pod inicjałem (wolał występować pod pełnym imieniem i nazwiskiem zamiast tego – red.). Tłumaczył to tym, że przedstawienie go pod inicjałem stanowiłoby stygmatyzację.*

*One of my clients was charged in a very serious case of manslaughter. (...) Since the beginning, he had consented [to the disclosure of his full name] and very strongly insisted not to appear under the initial. He explained that being referred to with an initial would constitute stigmatisation.*

*(Lawyer, Poland)*

c. Effects the media have on the presumption of innocence

Does media coverage influence the presumption of innocence?	Yes (often or in some cases)	No	No opinion
<b>P</b>	1	1	2
<b>J</b>	1 (a prosecutor)	3 (two judges and a prosecutor)	
<b>L</b>	1	2	1

Table 7 Media coverage impact on the proceedings

What is the public scrutiny impact on the fairness of the proceedings?	Positive	Negative	In some cases positive, in some – negative	No opinion
<b>P</b>			2	1
<b>J</b>	2 (a judge and a prosecutor)		1 (a prosecutor)	1 (a judge)
<b>L</b>	3	1		

Table 8 Public scrutiny impact on the fairness of the proceedings

The problem of media coverage of pending criminal proceedings prompted various observations regarding the general condition of the media. Almost all interviewees pointed out certain deficiencies in the quality and professionalism of the media that may negatively affect the presumption of innocence and also, more broadly speaking, the image of the judiciary and the protection of fundamental procedural rights. These observations formed a basis for the statements regarding the effect of media coverage on the presumption of innocence and its positive or negative aspects.

**General observations**

According to many interviewees, mainly lawyers but also one of the interviewed police officers, **the media are very much involved in sensational journalism and journalists are less interested in providing detailed factual accounts or checking the facts.** The interviewees stressed that media reports on ongoing criminal proceedings are insufficiently factual and often biased as journalists either unwilling (or unable) to explore the story in sufficient detail or put a too extensive focus on securing “the scoop”. In this context, an interviewed lawyer expressed an opinion that sometimes media interest in the proceedings may artificially be generated by law enforcement agencies who are interested in presenting a specific narrative of a given case. Based on this observation, the lawyer said that criminal proceedings may turn into “a reality show”.

The growing trend of sensational journalism is further enhanced by **lawyers’ propensity to comment on cases that they have no actual knowledge of (no access to case files).** Certain interviewees, two judges and a lawyer, negatively assessed this practice. The interviewees stressed that it is impossible to present a fair judgement on the outcome of proceedings without having even the slightest insight into the evidence collected in the case and thus being unaware of the actual grounds for the court’s decision. Interviewees reasoned that such uninformed comments may be harmful not only for the case at hand but also, in the long term, may contribute to the undermining of the legitimacy and procedural integrity of the justice system. Furthermore, an interviewed lawyer mentioned an attorney who said, live on TV, that a suspect had committed a crime even though the proceedings were still pending. The attorney was reportedly investigated by the Bar disciplinary board and received a disciplinary sanction.

Some of the interviewees (e.g. two of the lawyers) pointed to a **disproportion between the media attention evoked by the fact that a person is charged with a crime or arrested and the fact of the defendant’s acquittal.**

Finally, other interviewees, a lawyer and a prosecutor, noted the strong polarization of the media, which influences reporting on certain cases, especially the cases concerning individuals perceived as opponents by a media outlet’s political “patrons”.

### **The effect of media coverage on the presumption of innocence**

The interviewed police officers offered very limited observations on how media coverage may affect the presumption of innocence. One of the interviewed police officers saw no difference between the cases that attract public attention and those which do not. In his/her opinion, the police leadership do not differentiate between high- and low-profile cases and treat all cases equally. Thus, in the interviewee’s opinion, media attention does not have any influence on the presumption of innocence.

*Moi przełożeni interesują się prowadzonymi przeze mnie sprawami, niezależnie od tego, czy są to sprawy medialne czy nie.*

*My superiors are interested in all of my cases, no matter whether the case is covered by media or not.*

*(Police officer, Poland)*

Some interviewees provided examples of cases in which **media interest may be beneficial for the defendant** but they did not mention any example of a case in which the media coverage directly influenced the presumption of innocence. There may be two reasons for this notable omission. First, an actual link between media coverage and the court’s adjudication of a case is particularly difficult to spot. Second, in all cases, including those raising considerable public attention, the general role of the

police is to investigate a crime; they often do not have information on courts' final decisions in cases brought to trial.

The judges and prosecutors were split in their opinions as to whether media coverage may influence the presumption of innocence. The interviewed prosecutors offered a general observation that **media coverage is likely to much more strongly affect a pending investigation rather than the course of the trial and the ultimate court's decision.** This observation was reinforced with e.g. a statement of an interviewed prosecutor who said that in many cases extensively covered by the media the judges had effectively distanced themselves from the media and the dominating media narrative. Also, both interviewed judges stressed that they did not follow the news and usually were unaware of the media coverage of a given case or that even did not know the public or social status of defendants standing trial in their court.

*Pani zdaniem, jaki jest wpływ przekazu medialnego na domniemanie niewinności?  
Dla sądu żaden [...] wydaje mi się, że ani media ani rodzina [obecna na sali rozpraw – red.] nie jest w stanie wpłynąć na moje orzecznictwo [...] obecność kogokolwiek nie ma żadnego wpływu na to jak proceduję.*

*In your opinion, what is the media's influence on the presumption of innocence?  
From a judge's perspective, none (...) I think that neither the media nor the [defendant's] family [present in the courtroom] is capable of influencing my judging in any way (...) The presence of any person has no impact on the way I proceed.*

*(Judge, Poland)*

On the other hand, interviewed prosecutors admitted that media interest may influence the presumption of innocence in active investigations. In high-profile cases, prosecutors must deal not only with media pressure but also with the pressure from their supervisors. In this context, it is important to underline that the overhaul of the public prosecution service in 2016 effectively abolished all guarantees of prosecutors' independence and note that in the current public prosecution system rank-and-file prosecutors are exposed to pressure from their supervisors. The interviewed prosecutors' answers revealed that the higher the public interest in a pending investigation is, the higher is the risk of a biased prosecution's approach.

In the opinion of the majority of the interviewed lawyers, **media coverage does not influence judicial decisions but may have an impact on the image of the defendant.** In the opinion of two interviewed lawyers the media's frequent focus on sensational content may produce biased coverage. Different media outlets may present the same defendant as either a criminal or an innocent man (a similar observation was shared by one of the judges).

*Gazety i stacje telewizyjne mają określoną linię. Wpływa to na sposób, w jaki prezentują podejrzanych związanych z daną opcją polityczną.*

*Newspapers and TV stations have specific political sympathies. It influences the way they present a defendant with a certain political affiliation.*

*(Lawyer, Poland)*

Furthermore, one of the lawyers stated that it is almost impossible for the **participants in a criminal trial to distance themselves from media coverage**, which perhaps does not influence the court's final decision but may change the way the defendant is perceived by the court, which may generate bias. In the opinion of this interviewee, the approach adopted by the US criminal justice system (resulting

in the jurors being prevented from accessing media reports during the trial) should be followed as a measure effectively protecting the fairness of the proceedings.

### **Beneficial aspects of public scrutiny over pending proceedings**

In general, the interviewees concluded that the media have an important role to play in reporting on pending criminal proceedings.

The interviewees presented the above conclusion in the context of the criminal proceedings as a whole, and not only in the context of the presumption of innocence. According to the majority of interviewed lawyers and one judge the media should not only inform but also educate. Commenting on this aspect, interviewees seem to have concluded that wider availability of information on criminal proceedings would result not only in more equitable and fair judicial decisions (interviewees by and large agreed that media coverage does not influence the court's decision) but also would generate a more positive social attitude to, and confidence in, the criminal process. Speaking on that issue, one of the interviewed judges indicated that media presence in the courtroom may also be important to other participants in the proceedings, e.g. the victim or witnesses as it creates a feeling of their case being relevant in the public view, which they may perceive as a source of comfort. An interviewed police officer mentioned that in some cases media scrutiny may contribute to the effectiveness of the proceedings. In this context, s/he mentioned the (in)famous case of Tomasz Komeda, a man sentenced for 25-year imprisonment for a crime he did not commit and exonerated after his case was publicised by a TV programme. Finally, one of the interviewed lawyers indicated that in certain circumstances media interest may be beneficial for the defendant's case. The interviewee stated that in some proceedings, especially these affected by judicial backlogs or involving the abuse or excessive use of pre-trial detention, he tries to attract the media's attention as he considers media coverage a factor capable of expediting the works of the criminal justice authorities.

Three interviewees had mixed observations regarding public scrutiny over the justice system. In their opinion, the intensified media attention on a case creates a higher risk of biased decision-making on the part of investigating authorities or may impede the course of the investigation.

### **Potential negative aspects of public scrutiny**

In addition to the aforementioned mixed observations concerning the impact of media attention on pending proceedings shared by interviewees, **one of them (an interviewed lawyer) suggested that media attention is generally likely to have a negative impact on the proceedings.** They referred to a situation in which media commentaries relate to a case that is concluded with the lawfully and correctly issued sentence, which is considered too lenient in the public reception. One of the interviewees mentioned the case in which the perpetrator of rape and killing of a child was sentenced to 15 years in prison, which was the maximum sentence for the offence concerned. According to media reports, the court sympathised with the defendant and imposed a sentence lighter than the legal maximum. This factually incorrect reporting was followed by a smear campaign against the judge presiding over the case, conducted via certain media outlets and in social media. In the interviewee's opinion, such a response from the media and public opinion may contribute to the chilling effect that may emerge in other cases decided by the same judge. Thus, the interviewee indicated that he tries to keep certain cases he works on as low profile for as long as possible.

The backlash judges may face because of their decisions were also discussed by an interviewed judge. When asked about the benefits of public scrutiny, the interviewee stated that it does not have any impact on the court's adjudication. At the same time, the interviewee pointed to the existing general trend to expand the political influence over the courts. In the opinion of the interviewee, any narrative

calling for widening public scrutiny over the justice system may serve the government’s agenda, which includes the desire to exercise more control over the works of the courts.

d. Differences in the media coverage of certain groups

Are there any differences in the media coverage of a crime committed by a man (or a woman)?	Yes	No
P		4
J	1 (a prosecutor)	3 (a judge and two prosecutors)
L	1	2

Table 9 Differences in media coverage depending on gender

What kind of groups are most prone to bias reporting?	Women	Migrants	Political affiliation or public function	Other
P			2	2 (other: nature of the crime)
J				2 (a judge and a prosecutor, other: victim’s characteristics, poverty and nature of the crime)
L		2	2	

Table 10 Groups prone to bias reporting

Almost all interviewees said that they **did not observe any differences in media coverage based on the suspect’s (defendant’s) gender**. Only two interviewees (a prosecutor and lawyer) observed certain differences in cases involving women. The prosecutor mentioned a case of a pregnant woman suspected of fraud who spent several weeks in the pre-trial detention. The interviewee noted that the court’s decision on pre-trial detention was criticised in the media mainly due to the suspect’s condition. An interviewed lawyer mentioned a case of an organized criminal group led by a woman. In the opinion of the interviewee, the media became interested in this case mainly because the woman was the leader, which is unusual.

The interviewees indicated several factors other than gender which may influence media reports. First, interviewees said that **the most impactful factor is the nature of the crime**. The more violent the crime is, the more the media are interested in it. This trend combined with the impact of the victim’s characteristics (a factor noted by one of the judges) may influence the presumption of innocence and the image of the defendant. Furthermore, in the opinion of interviewees, the media are more inclined to express less favourable opinions on defendants suspected of crimes committed under the influence of alcohol (e.g. drunk driving).

The second factor which may influence the presumption of innocence is **the political affiliation of a defendant**. This problem is strongly connected with the polarization of the media in Poland. The state-owned media corporations and certain privately-owned media outlets are known supporters of the ruling majority, whereas the rest of the media outlets (mainly private newspapers and a well-known

TV broadcaster) present a more objective or a very critical approach to the Government and its policies. Thus, the interviewees (two police officers and two lawyers) noted that depending on a defendant’s political affiliation or public function, relevant media reports may be biased and attribute guilt (or innocence, as the case may be) to a defendant in question.

Two interviewees said that a **defendant’s ethnic or national origin may also influence media coverage**. In the opinion of these interviewees, stereotypes may have a major impact on media biased reporting in cases of crimes committed by non-Polish perpetrators.

- e. Revealing information on pending proceedings by persons other than justice system officials

Are you aware of instances when persons other than justice system officials use press conferences to inform about pending investigations?	Yes	No
P	2	2
J	3 (a judge and two prosecutors)	
L	3	

Table 11 Revealing information from pending proceedings by persons other than criminal justice officials

As stated above, disclosures of information from active criminal investigations are strictly regulated. In general, the law prohibits any releases of such information by participants in criminal proceedings, with the notable exception of prosecutors who exercise a certain margin of discretion as to the timing and scope of the publicly released information. Furthermore, the law also provides that the Minister of Justice who is also the Prosecutor General can always release any such information to the media. The double role of the Minister of Justice and the Prosecutor General led to certain discrepancies in the assessment of the Minister’s media statements: some interviewees considered that such statements have been by a politician and not an official of the criminal justice system. In this context, several interviewees **presented an example of a press conference held by the Minister of Justice in 2007 immediately after the arrest of a famous cardiologist in Warsaw**, accused of corruption and malpractice. During the conference, the then Minister of Justice/Prosecutor General (who currently serves in the same capacity) said: “This gentleman is not going to kill anyone else”<sup>16</sup>. Although this statement was made 14 years ago, the interviewees recalled it as one of the most flagrant violations of the presumption of innocence, and an example of outright abuse of media communication measures. In the opinion of the interviewees, such statements may have a detrimental impact on the presumption of innocence. On the other hand, speaking about the powers of the Minister of Justice, two interviewees (a prosecutor and lawyer) noted that as a member of the prosecution service, the Minister of Justice is legally authorised to reveal information from investigations.

The Minister of Justice’s infamous 2007 conference and his other, more recently organized, conferences were noted also by the interviewed lawyers. One of them made note of a conference concerning the case of his clients organized mere “moments” after the arrests were made. Furthermore, the interviewed police officers observed that over recent years criminal proceedings have been used for political purposes. In their opinion, politicians view a well-publicised

<sup>16</sup> Wprost.pl, "Nikt nigdy przez tego pana życia pozbawiony nie będzie", available at: <https://wiadomosci.wp.pl/skandale-korupcyjne-6038697674879617g/2>

commencement of proceedings as proof of the Government's efficiency and the effective operation of the criminal justice system. This approach is also closely linked with the growing pressure on the courts and the prosecution service which is a result of the systemic changes that have been introduced since 2015.

#### **Example no. 1**

In March 2018, Jacek Kapica, the former deputy Minister of Finance between 2008 and 2015, was arrested. Jacek Kapica is accused of among others failing to effectively supervise the works of Customs Service and suspending the control of 149 low-value prize gambling machines. According to the prosecution, Jacek Kapica acted in an attempt to receive a personal benefit of 21 billion PLN (approx. 5 billion EUR).

The arrest of Jacek Kapica brought a lot of media attention and triggered numerous comments from the politicians and members of the government.

After Jacek Kapica arrest, the National Prosecutor said in the radio interview that *"most probably, the prosecution will direct an indictment soon"*.<sup>17</sup> Then, during a press conference, the National Prosecutor added that *"Jacek Kapica's failure in supervision"* had given rise to the practice, according to which the low-prize machines were installed in wrong places. The National Prosecutor also revealed some parts of the evidence material, stating that *"from what we know, the Deputy Minister of Finance had broad knowledge on this practice (installing the low-prize gambling machines - ed.) and yet he did not undertake any actions"*. During the same press conference, the Prosecutor General Zbigniew Ziobro said that *"the prosecution collected evidence which makes it highly possible that in the case a crime was committed"*. Furthermore, the Prosecutor General suggested that Jacek Kapica had not acted on his own but under pressure coming from higher-rank governmental officials.<sup>18</sup> Furthermore, on the day of the arrest, the Deputy Minister of Justice Patryk Jaki said that *"the case is about 20 billion PLN which [the State's budget - ed.] lost as a consequence of the gambling scandal. The prosecutors collected very solid evidence"*.<sup>19</sup> Deputy Minister of Justice also suggested that the previous investigation in this case had been ineffective due to the lack of a political will from the former government.<sup>20</sup>

*W ostatnich latach mamy doświadczenie z pewną kategorią spraw, które służby specjalne uruchamiają na zamówienie polityczne. Z jakiegoś powodu takie sprawy są potrzebne rządzącym i szuka się przykładów na to, że państwo funkcjonowało źle [a teraz jest lepiej – red.]*

*In recent years, we observe a certain category of cases in which the special services launch the procedures upon the political demand. For some reasons, the politicians need these cases and*

<sup>17</sup> Polskie Radio, Afera hazardowa. Bogdan Świączkowski: Jacek K. niebawem ma stanąć przed sądem, available at: <https://www.polskieradio.pl/7/473/Artykul/2087013,Afera-hazardowa-Bogdan-Swiczkowski-Jacek-K-niebawem-ma-stanac-przed-sadem>

<sup>18</sup> Gazetaprawna.pl, Ziobro: Nie wykluczamy, że na Jacka K. były wywierane naciski, available at: <https://www.gazetaprawna.pl/artykuly/1114417,ziobro-o-aresztowaniu-kapicy-i-wyludzeniach-vat.html>

<sup>19</sup> Business Insider, Wiceminister finansów w rządzie PO-PSL Jacek Kapica zatrzymany przez CBA, available at: <https://businessinsider.com.pl/polityka/jacek-kapica-byly-wiceminister-finansow-zatrzymany-przez-cba/y808xjb>

<sup>20</sup> Polskie Radio, Patryk Jaki: wystarczyło zmienić sposób myślenia o państwie, żeby postawić zarzuty Jackowi K., available at: <https://www.polskieradio.pl/9/301/Artykul/2078162,Patryk-Jaki-wystarczylo-zmienic-sposob-myslenia-o-panstwie-zeby-postawic-zarzuty-Jackowi-K>

*they're looking for examples showing that the state used to operate badly but now it has improved.*

*(Lawyer, Poland)*

None of the interviewed police officers referred to the Minister of Justice's 2007 conference. Two of the interviewed officers who noted the issue of external (political) actors commenting on pending criminal proceedings provided only few examples of this phenomenon. One of the police officers recalled a press conference organized by a defendant in one of his/her cases and another police officer provided an example of a press conference on the Warsaw reprivatisation scandal organized by politicians. The interviewees shared the opinion that such press conferences do not influence the presumption of innocence. However, as one of the interviewed police officers stated, sometimes such publicization attempts may be demotivating for the police officers involved in the actual case work.

f. Remedies available to defendants presented as guilty in media reports

What are the remedies available to defendants presented as guilty in media reports?	Civil action	Presenting the defendant's version of the story to the media	Right to be forgotten	Mechanisms provided by the Press Law Act	No mechanisms available
J	2 (a judge and a prosecutor)	1 (a prosecutor)			1 (a judge)
L (interviewees provided several answers)	3	3	1	1	

Table 12 Remedies available to defendants presented as guilty in media reports

There is no one, specified legal remedy available to defendants presented as guilty in media reports. In such cases, the defendants may either seek compensation for violation of their good reputation by initiating civil proceeding or send requests to the media outlets to correct specific information (the mechanisms provided by the Press Law Act).

Interviewed lawyers indicated several remedies available for defendants who have been presented as guilty by the media. Three out of four interviewees pointed to civil remedies, e.g. a defendant's right to bring the action against the media outlet that attributed guilt to the defendant before the final decision of the court. Interviewed lawyers noted that **civil proceedings are time-consuming** and observed that in order to improve the chances for success of the civil action it is advisable to first obtain the acquittal in the criminal proceedings. The lawyers agreed that this remedy is rarely used by defendants. Furthermore, one of the interviewed lawyers pointed to a remedy available under the Press Law Act, namely the right to request the correction of a misleading or untrue report. The interviewee also stated that defendants may demand an update of the online version of a published

news piece on their case if they are acquitted. Yet, the defendants have to consider the amount of time that would elapse between the first media report on the case and court's final decision. Hence, all interviewees said that the exercise of these legal remedies may be quite ineffective given the dynamics of the contemporary media environment. Accordingly, three interviewed lawyers stated that the aggrieved defendant's best remedy would be ensuring that their defence lawyer be present in the media and tell their story.

All interviewed lawyers said that the available remedies must be pursued in separate proceedings and there is no possibility to raise the issue of media bias during the pending criminal proceedings. In this context, one of the interviewed lawyers shared an interesting observation concerning the media coverage of a client's case, recalling that he and his client considered the option of submitting a motion to revoke a state-owned TV station's access to the trial based on the fact that the station has run several biased reports concerning the defendant. After consideration, the lawyer decided not to submit the motion fearing it could only intensify biased reporting on the case.

As compared to the interviewed lawyers, the judges and prosecutors mentioned fewer remedies available to defendants. An interviewed judge and prosecutor stated that defendants may seek the protection of their good name in a civil action. The interviewees from this group did not provide any further assessment concerning the effectiveness of this measure. An interviewed prosecutor made the same observation as the defence lawyers, saying that the lawyer's pro-active approach to media communication in their client's case may arguably be the most effective remedy against the unlawful attribution of guilt. The prosecutor has repeatedly expressed the opinion that defence lawyers act as de-facto spokespersons for defendants whereas this conclusion was strongly contested by the interviewed lawyers.

#### g. Discussion of findings

The cooperation of legal professionals and police officers with the media depends mainly **on internal policies of their organisations**. The bodies involved in the conduct of pre-trial proceedings, such as the police or the prosecutor's office, have very strict internal rules concerning media contacts and relations with journalists. Prosecutors and (especially) police officers have very little discretion in liaising with media professionals. Such limitations are reinforced by internal rules and regulations, which require rank-and-file prosecutors to inform their supervisors about ongoing proceedings and planned procedural steps. The judges, in turn, keep their media interactions at the necessary minimum (the media are only allowed to record the hearings). Any comments on pending proceedings are given by the court's spokesperson. Among the interviewed groups, the lawyers seem to have the most opportunities to liaise with the media.

All interviewees were familiar with the base legal rules on media reporting in relation to the presumption of innocence as well as the internal media policy regulations applicable in their professional environments. The interviewees' answers **revealed certain disproportions between prosecutors' and defence lawyers' authority to engage in media communication activities**. Notably, the prosecution bodies may freely decide what kind of information should be released during an active investigation, while defence lawyers are subject to criminal provisions prohibiting unauthorised disclosure.

Furthermore, one of the issues which seemed to evoke the strongest response in the interviewees was the media **communication role of the defence lawyer**. To avoid the perception of lawyers as defendants' spokespersons, the Bar Association's Code of Ethics strictly forbids lawyers to act as such. In consequence, criminal defence lawyers must often deal with the dilemma of how to inform the

public about the facts of their clients' cases without revealing privileged information from the investigation or being perceived as the defendant's spokesperson.

The interviewees seemed to agree that media coverage does not influence the presumption of innocence, however they were also aware of the fact that certain media publications may damage defendants' reputation. The interviewees observed major differences in the approach taken by the media to the criminal cases depending on the political affiliation of a particular defendant. This observation was strongly linked with their conclusions concerning the polarized media landscape in Poland.

In general, the interviewees seemed to be very critical of the practices that involve external actors (other lawyers and politicians) commenting on pending criminal proceedings without having access to the case files. At the same time, the interviewees were critical of the Prosecutor General's/Minister of Justice comments on pending proceedings despite the latter being legally authorised to do so.

The interviewees pointed to several remedies available to defendants who are presented as guilty in media coverage. However, none of these remedies has been named effective. The interviewees' answers seem to suggest that in certain circumstances biased media accounts can be as detrimental to defendants as the final conviction and yet there is no effective mechanism to remedy the situation.

### **C.3 The presentation of suspects and defendants**

According to the the Executive Criminal Code<sup>21</sup>, in principle, defendants are entitled to wear their own clothes, underwear and shoes when the activities of the proceedings are carried out (thus, also during a hearing or a session at court). A competent authority, public prosecutor or the court, might rule, however, that the defendant must be dressed in prison clothes and this decision cannot be challenged. The provision is very vague and does not include any exemplary bases for the authority's decision, which makes it arbitrary to some extent.<sup>22</sup> Also, security concerns can be invoked to justify such decision. A similar regulation applies to persons who are already imprisoned in other case,<sup>23</sup> with a notable exception concerning maximum-security convicts, who are not entitled to use their own clothes at all.<sup>24</sup>

The matter of use of measures of physical restraint is regulated by the Act on Direct Coercive Measures of 2013.<sup>25</sup> The act obliges the police to ensure, when applying measures of physical restraint, that their aim is legitimate, as well as that they are necessary and proportionate to the extent of danger, always choosing the least burdensome one, and the one that causes as little harm as possible. The police should also disapply the measure if the aim of its use is achieved. The most often examples of use of such measures as e.g. the handcuffs is where there is a need to apprehend and bring compulsorily a person to court or to temporarily expel a person from the courtroom, to prevent the escape of the defendant, as well as when they are aggressive towards others or act dangerously for themselves.

Where a defendant finds the way they were dressed or the use of coercive measures implying their guilt during the proceedings, they are entitled to file a lawsuit against the state, according to provisions of the Civil Code regulating the protection of personal interests.<sup>26</sup>

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<sup>21</sup> Poland, [Executive Criminal Code](#), 6 June 1997, Article 216a(1).

<sup>22</sup> See Postulski, K. (2017), *Kodeks karny wykonawczy. Komentarz*, Art. 216a.

<sup>23</sup> Poland, [Executive Criminal Code](#), 6 June 1997, Article 111.

<sup>24</sup> *Ibidem*, Article 88b.

<sup>25</sup> Poland, [The Act on Direct Coercive Measures and Firearms](#), 24 May 2013.

<sup>26</sup> Poland, [Civil Code](#), 23 April 1964, Article 23.

a. Measures used to present the accused and their impact on the accused's presumption of innocence

<b>Legal regulations concerning defendants' transfers to and from court</b>	<b>Police internal rules</b>	<b>Other</b>
<b>P</b>	2	1
<b>J</b>	2 (a judge and a prosecutor)	
<b>L</b>	2	

Table 13 Legal regulations concerning defendants' transfers to and from court

<b>Measures used to physically restrain defendants in transit</b>	<b>Handcuffs</b>	<b>Handcuffs and leg shackles</b>	<b>Handcuffs and shackles and the orange jumpsuit (for high-risk detainees)</b>	<b>Other</b>
<b>P</b> (respondents in this group indicated several answers)	4	1	1	1
<b>J</b> (respondents in this group indicated several answers)	4 (two judges and two prosecutors),	2 (two prosecutors)	2 (two prosecutors)	
<b>L</b> ((respondents in this group indicated several answers))	3	2	1	

Table 14 Measures used to physically restrain defendants in transit

<b>Do the physical restraints influence the presumption of innocence?</b>	<b>Yes</b>	<b>No</b>	<b>No opinion</b>
<b>P</b>		3	1
<b>J</b>	2 (a judge and a prosecutor)	1 (a judge)	1 (a prosecutor)
<b>L</b>	4		

Table 15 Use of measures of physical restraint and the presumption of innocence

The use of physical restraints is regulated by the Coercive Measures Act<sup>27</sup> and an order issued by the Chief Commissioner of the Police<sup>28</sup> which sets out guidelines and protocols relating to transfers of persons remaining in police custody. The instruments establish procedures to be followed during

<sup>27</sup> Poland, Coercive Measures Act (Ustawa z dnia 24 maja 2013 r. o środkach przymusu bezpośredniego i broni palnej) 24 May 2013

<sup>28</sup> Poland, Chief Police Order no 360 (Zarządzenie nr 360 Komendanta Głównego Policji w sprawie metod i form wykonywania przez policjantów konwojów i doprowadzeń), 26 March 2009

transfers of detained persons to and from courts or prosecutor's offices and security protocols used while detainees' attend court hearings or prosecutorial interviews. Under the Coercive Measures Act, any such measures should be used proportionally and to pursue a legitimate aim and should cause the least possible harm. The Act also provides that no restraining devices may be used to restrain pregnant women, persons under 13 or persons with disabilities (only manual restraint techniques are allowed). The Act references to such restraint measures as handcuffs and handcuffs connected with leg shackles. The order of the Chief Commissioner of the Police further specifies the composition of police escort teams and the circumstances warranting the use of the coercive measures. None of these regulations includes any provisions with guidance on the use of coercive measures in a manner preventing stigmatisation of detainees (e.g. measures restricting the visibility of the handcuffs or a defendant's face).

Almost all interviewed police officers pointed to police internal regulations (mainly the Chief Commissioner's order) as the key source of guidelines on the use of physical restraints during transfers to and from the court. Police officers indicated that handcuffs are used in virtually all situations.

*Każdy oskarżony przewożony jest w kajdankach [...] używamy kajdanek dla naszego bezpieczeństwa i bezpieczeństwa oskarżonego.*

*All defendants are transferred in handcuffs [...] We use handcuffs for our safety and the safety of the defendant.*

*(Police officer, Poland)*

The handcuffs/leg shackles combination is only used in the case of defendants posing a high risk of being violent. The same restraints are used against defendants with the "high-risk" status according to the prison categorisation system, who also wear a distinctive orange jumpsuits. Two interviewed police officers noted that handcuffs are generally removed in the courtroom at the judge's direction, however in some, limited cases, the judge directs the defendant to remain restrained. The majority of the interviewed police officers thought that the use of handcuffs or other physical restraints does not influence the presumption of innocence. Two interviewed police officers also indicated that defendants can cover their faces or the handcuffs if the escorting police officers allow them to do so, however the Police has a discretionary power in this regard. One of the interviewed police officers stated that the safety of the defendant and police escort detail is much more important than the perception of a defendant as an innocent person.

*Czy pani zdaniem takie środki jak kajdanki (...) w drodze do sądu albo na posiedzenie w przedmiocie tymczasowego aresztowania mogą mieć negatywny wpływ na domniemanie niewinności? Myślę, że nie. (...) w kwestii domniemania niewinności nie możemy przedkładać jednak kwestii bezpieczeństwa ponad to, w jaki sposób sprawę mogła odebrać osoba postronna.*

*In your view, do measures such as handcuffing (...) the defendant in transfer to a trial or pre-trial detention hearing negatively affect the presumption of the defendant's innocence? I think not. (...) as far as the presumption of innocence is concerned, safety should have priority over the perception of the case a third party may have.*

*(Police officer, Poland)*

Sharing the view expressed by the interviewed police officers, the judges and prosecutors pointed to handcuffs and handcuffs/leg shackles combination as the most often used physical restraints. A judge and a prosecutor presented an assessment different from the one presented by the police officers and

said that the use of restraint measures could have a detrimental impact on the presumption of innocence. In this context, an interviewed judge **mentioned two arrests carried out by the police, which, in her opinion, involved degrading treatment of the suspects concerned.** One of these arrests concerned a man suspected of killing a child, who was arrested and taken away in underwear.

#### **Example no. 2**

In 2019, media reported on a case of killing of 10-year old girl. The day before, after the end of classes, the girl left her school in the early afternoon and headed home (situated about 1 km away from the school). She never reached home and was last seen about 200 m from the place where she lived. Soon, the search for the killer begun. The alleged perpetrator, J.A., was apprehended after three days and it turned out that he knew the girl and her mother.

A video footage of the very moment the suspect was apprehended and transported to the custody was published by the police, arousing controversy. In the almost 2-minute video the police anti-terror squad enters the premises where the suspect was hiding, then we can see a man lying on the floor, face down, having his hands and legs cuffed with combined shackles. Next, the suspect, wearing only a t-shirt and boxers, and barefoot, is transported to the police van (for a moment, he even seems to be dragged or carried by the police officers). After the questioning, the man is seen walked by two police officers to a cell, still incompletely dressed, barefoot and cuffed. Parts of the video were presented in all major nationwide news programmes that day, as well as being available on the Internet.

After a 6-hour questioning at the prosecutor's office, the 22-year old man confessed to having murdered K.

The interviewed judge mentioned also the second case concerning the arrests of military personnel who, according to the interviewee, were subjected to humiliating treatment during and immediately after the arrest. The interviewed prosecutor stated the police occasionally engages in "show of force" practices while making arrests, which are intended to demonstrate police effectiveness.

*Policji zależy na tym, by filmować zatrzymania, zwłaszcza w przypadku rozbijania grup przestępczych – takie obrazki <<skutego karka>> na kafelkach jego własnej łazienki. Takie zdjęcia mają niesamowity wpływ na domniemanie niewinności.*

*The police want to have arrests on tape, especially during gang-busting raids, the images of a handcuffed thug laying on his own bathroom's floor are especially sought-after. Footage like this has an enormous impact on the presumption of innocence.*

*(Prosecutor, Poland)*

All judges and prosecutors indicated that defendants do not have handcuffs on during court hearings or interviews at the prosecutor's office. Only one interviewee, a judge, said that if defendants pose a threat to themselves or other persons, they may remain restrained for the duration of a hearing. The interviewed judges and prosecutors were not aware of any specific regulations that would allow defendants "in transit" to cover their faces. According to the majority of the interviewees from that group, **the possibility of covering a defendant's face mainly depends on the decision of the escorting police officers.** Furthermore, one of the interviewees, a prosecutor, stated that safeguarding the protection of a defendant's image remains by and large an obligation of the media (who are legally

prohibited from disclosing a defendant's image during the proceedings) rather than a duty of law enforcement authorities.

Interviewed lawyers said that handcuffs and the handcuffs/leg shackles combination are the most widely used physical restraints, sharing other interviewees observations in this respect. However, differently from the interviewed police officers, the lawyers were unable to provide specific references to the legal regulations on defendants' transfers. Members of this group shared differing views regarding the practice of removing the handcuffs during court hearings. Two interviewed lawyers said that **the presiding judge, who is responsible for keeping the order in the courtroom, has a final say in that matter**. However, these interviewees also mentioned that in some cases the judge follows the guidance of the leader of the escorting detail. This practice is reportedly not followed during interviews in prosecutor's offices.

*Muszę przyznać, że w prokuraturze zawsze prokurator wydaje konwojentowi polecenie rozkucia, natomiast w sądach zdarza się, że muszę o to wnioskować na początku rozprawy. Wprawdzie nie zdarzyło się, żeby sąd odmówił, ale mnie wydaje się to tak oczywiste, że dziwi mnie fakt, że muszę o to w ogóle prosić. (...) Dla mnie siedzenie 8 godzin ze skutymi rękoma to rodzaj tortury, który może mieć wpływ na treść wyjaśnień.*

*I have to admit that during interviews in prosecution offices suspects are never handcuffed, while in court I sometimes need to ask the judge to have a defendant uncuffed. No judge has so far refused such request, but this is so obvious to me that I am surprised that I have to ask for it at all. (...) For me, sitting for 8 hours with your hands cuffed is a kind of torture that might affect the suspect's testimony.*

*(Lawyer, Poland)*

Furthermore, interviewed lawyers generally agreed that there is no specific regulation that would apply to the covering of a defendant's face or handcuffs and agreed that this is a matter left for the decision of the police officers escorting the defendant. Interviewed lawyers observed that if a defendant asks the police to cover his/her face or handcuffs, granting such a request is an entirely discretionary decision on the part of police officers.

Finally, all interviewed lawyers agreed that the use of physical restraints influences the presumption of innocence. Furthermore, **in some cases, restraints are used excessively, which leads to the humiliation of defendants**. For example, an interviewed lawyer mentioned a case during which one out of three defendants was treated as a "high-risk detainee" despite any grounds that would justify such an assessment. While brought to the courtroom, this defendant was handcuffed behind his back and forced to move head-and-neck down.

*Te środki mają na celu to, by zburzyć domniemanie niewinności. Jeśli się widzi człowieka w majtkach, skutego, później wyprowadzonego to to są te obrazki, które w opinii publicznej zostają. To jest wizerunek skazańca wiedzionego na szafot, a nie osoby, która jest zatrzymywana i ma mieć zapewniony proces w demokratycznym państwie.*

*These measures aim at undermining the presumption of innocence. If you see a man wearing only his underwear then these photos stick in the public opinion. This is an image of a convict dragging to a scaffold and not a person who is arrested and awaits the trial in a democratic state.*

*(Lawyer, Poland)*

b. Clothing

What clothes do defendants wear in the courtroom?	Their own, private clothes	Prison uniforms	No information
P (respondents in this group indicated several answers)	4	1	
J (respondents in this group indicated several answers)	4 (two judges and two prosecutors)	1 (a judge)	
L (respondents in this group indicated several answers)	4	3	

Table 16 Clothes worn by defendants in the courtroom setting

Do the clothes influence the presumption of innocence?	Yes	No	No opinion
P	1	2	1
J	2 (a judge and a prosecutor)	1 (a judge)	1 (a prosecutor)
L	1	2	1

Table 17 The impact of a defendant's clothes on the presumption of innocence

Interviewees observations revealed an important distinction relevant to the clothing aspect. During the initial pre-trial detention hearing, **a suspect usually wears the clothes worn during the arrest**. If the suspect did not take a change of clothes from home and the court orders their pre-trial detention, then they will have to wear prison uniforms during any subsequent court attendance unless they receive a parcel with clothes from the family. This process, however, may take some time.

Interviewed police officers stated that defendants usually wear their private clothes during court hearings. Two interviewed police officers stated that they allow defendants to pack their things during the arrest or allow the family to pass a bag with a defendant's personal belongings before the court orders pre-trial detention. A similar practice was observed by one of the lawyers who said that he always advises his clients and their families to prepare such a bag as soon as possible and ask the arresting officers to allow the defendant to take the bag to the court.

Interviewed police officers differed in the assessment whether the **clothes could influence the presumption of innocence; they generally agreed that it does not have an impact on the court's adjudication** but it may have an impact on how the defendant is presented in the media.

Interviewed judges and prosecutors said that in general, the defendants wear their private clothes during court hearings. In exceptional cases, defendants choose to wear prison uniforms but this, as interviewees observed, does not happen very often. One of the interviewees (a judge) indicated that high-risk detainees wear orange jumpsuits. The interviewed judges and prosecutors offered differing assessments of the impact of clothing on the presumption of innocence. A judge stated that this factor does not have any impact whatsoever, whereas a prosecutor and another judge said that clothes may influence how a defendant is perceived by the court. However, in the opinion of a judge clothing is not a decisive factor given the paramount impact of evidence in criminal proceedings.

*Czy to, jakie ubrania ma na sobie oskarżony ma wpływ na domniemanie niewinności?  
[...] Tak naprawdę, największe znaczenie ma to, jak my się przed tym sądem zaprezentujemy i materiał dowodowy.*

*Does the defendant's clothing affect the presumption of innocence?  
... In fact, what matters most in court is how you present yourself and the evidence in defence of your case.*

*(Judge Poland)*

Interviewed lawyers shared slightly different observations on the matter. In general, their answers suggest that defendants wear their private clothes, however, more often than the interviewees in two other groups, the lawyers sometimes observed defendants wearing prison uniforms.

Similarly to the interviewed police officers, the lawyers differed in the assessment of how clothing affects the presumption of innocence. Some argued that e.g. the orange jumpsuit may a clear indication of a defendant's guilt but in general, interviewed lawyers agreed that clothes do not have an impact on courts' final decisions.

#### c. Presentation of vulnerable groups

Are there any safeguards in place protecting a defendant from being presented as guilty?	Yes	No	No information
P	3		1
J	3 (a judge and two prosecutors)	1 ( a judge)	
L	4		

Table 18 Availability of safeguards protecting defendants from being presented as guilty

Types of measures protecting defendants from being presented as guilty	Use of a separate entrance to the courtroom	Involvement of a defence lawyer	Other
P	3		
J	2 (a judge and a prosecutor)	1 (a prosecutor)	

L	2	1	1 (other: legal education)
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Table 19 Measures protecting defendants from being presented as guilty

Vulnerable groups	Persons with disabilities	Migrants	No information
P	2		2
J	2 (a judge and a prosecutor)	1 (a judge)	1 (a prosecutor)
L	2		2

Table 20 Vulnerable defendants

Types of safeguards for certain vulnerable groups	A private entrance adjusted to the needs of persons with disabilities	No physical restraints used against persons with disabilities	No specific safeguards
P		2	2
J	1 (a judge)		3 (a judge and two prosecutors)
L			4

Table 21 Types of safeguards available for certain vulnerable groups

The questions concerning safeguards protecting defendants from the public attribution of guilt have proven to pose considerable difficulty for all interviewed professional groups. In general, **interviewees struggled with pointing to any legal, policy or practical measures that may shield defendants from being presented as guilty in the public eye**. Furthermore, interviewees seemed to be even less able to designate any groups of vulnerable defendants and any safeguards available to such groups. In their answers, interviewees very often indicated persons with disabilities or migrants as *potentially* vulnerable groups, but even then, they would rather mention technical adjustments and accessibility improvements rather than concrete *legal or policy* safeguards.

Among the interviewees, a judge and prosecutors noted certain safeguards, which included the **availability of a backdoor entrance to the courthouse**, giving examples of such a separate entrance being accessible by defendants with disabilities. At the same time, the judge stated that such the separate entrance in her court building was not available for defendants with disabilities, who needed to use the main (front) entrance. Another judge stated that in her court the possibility of transferring defendants out of sight of other visitors is rather limited.

*Czy są stosowane jakieś środki, które mogłyby zapobiegać ukazywaniu oskarżonego jako winnego? Takich technicznych rozwiązań to raczej nie ma, żeby osoba postronna nie zobaczyła oskarżonego jak jest prowadzony na korytarzu.*

*Are there any measures in place that could prevent the accused from being presented as guilty? We don't have any facilities that would prevent people in the hallway from seeing a defendant being brought in. It would be extremely problematic to have such arrangements in place.*

*(Judge, Poland)*

On the other hand, one of the interviewed lawyers stressed that in the recent years, technical facilities implemented in the court building (e.g. separate entrances for defendants) decreased the number of situations where defendants are brought to the courtroom through a hallway, in full public sight.

Furthermore, a prosecutor shared an interesting observation (which was also made earlier in the discussion on defendants' protection from being presented as guilty in the media), pointing out that the assistance of a lawyer may be one of such safeguards.

Similarly, interviewed police officers mainly noted the use of the **back entrances in courts but failed to note if such entrances were adjusted to the needs of persons with disabilities**. Furthermore, the interviewees' answers about separate entrances in courts suggest that such facilities are used because of safety concerns rather than as a specific safeguard protecting defendants from being presented as guilty. Finally, the most concrete safeguard presented by members of this group was the legal provisions prohibiting<sup>29</sup> the use of coercive measures against persons with disabilities allowing only the use of methods of physical restraint. However, this regulation seems to be based on practical considerations (limited motor capacities inherent to the disability of a detainee) rather than to be intended as a specific safeguard against the undue attribution of guilt.

Interviewed lawyers presented two additional factors that may be perceived as safeguards. The first one, already indicated by one of the prosecutors, was the **role of the defence lawyer**. However, the interviewee stressed that the defence lawyer plays primarily the role of a defender of defendants' procedural rights. The second factor, mentioned by one of the lawyers, is the level of society's legal awareness and education, which may contribute to preventing the attribution of guilt preceding its full judicial assessment. Besides, interviewed lawyer and a prosecutor shared observations concerning negative practices which may only amplify the phenomenon of defendants being presented (and perceived) as guilty. The interviewed lawyer recalled once seeing in the Polish courtroom the **defendants' dock was located behind a caged partition, a feature resembling Russian judicial facilities**. One of the interviewed lawyers spoke about the absence of a systemic solution for the provision of medical care to detained defendants. In his opinion, the unavailability of medical care is oppressive as the defendants are deprived of access to medical health due to the sole fact of being charged.

#### d. Reactions to presenting the accused as guilty

Are there any remedies available for defendants presented as guilty?	Yes	No	No information
J	2 (a judge and a prosecutor)	1 (a judge)	1 (a prosecutor)
L	4		

Table 22 Remedies available for defendants presented as guilty

What remedies are available for	Civil action	The interlocutory appeal against the detention order	Other

<sup>29</sup> Poland, Coercive Measures Act (Ustawa z dnia 24 maja 2013 r. o środkach przymusu bezpośredniego i broni palnej) 24 May 2013, available at: <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20130000628>

defendants if they are presented as guilty?			
J	1 (a prosecutor)	1 (a judge)	
L	1	2	2 (other: complaint against the unreasonable use of coercive measures to the commander of a police unit and complaint to the prison governor, available in the case of e.g. unreasonable use of prison uniforms)

Table 23 Remedies available to defendants presented as guilty

The majority of the interviewed judges, prosecutors and lawyers stated that there are remedies available to defendants presented as guilty by e.g. the excessive use of coercive measures. The interviewees mentioned the interlocutory appeal against a detention order as one of the most effective remedies. A defendant put in pre-trial detention should submit the appeal within 7 days from the date when the detention order is issued. This appeal is heard in proceedings separate from the pre-trial detention proceedings. The court decides on the legality, proportionality and the manner of carrying out the detention and may rule that e.g. the use of coercive measures was excessive.

The interviewees also noted the civil action as a remedy which may be used in the case of e.g. an unauthorised release of footage of a defendant's arrest. This remedy, however, was not assessed by interviewees as particularly effective. The civil action is brought separately from the pending criminal proceedings.

Finally, two interviewees mentioned two other potential remedies: the complaint against the manner in which the arrest was carried out which may be submitted to the commander of a police unit, and the complaint against the improper conditions or practices in a penitentiary facility which may be submitted to a prison governor (the latter may be used by e.g. a defendant unreasonably forced to wear a prison uniform).

#### e. Discussion of findings

The interviewees' answers revealed that the handcuffs and handcuffs/leg shackles are the most common used measures of physical restraint. In general, in their practice, the interviewees did not observe any particular cases in which the measures of physical restraint were used in a way to humiliate the defendant. However, in the majority of the interviews, the interviewees kept referring to an infamous case of an arrest of a person suspected of killing a 10-year old girl (see Example no. 2). Although the interviewees did not observe a general tendency of excessive use of the coercive measures, they did not observe a standard practice of allowing the defendant to cover the measures of physical restraint either. From interviewees answers it seems that the possibility for a defendant to cover the handcuffs or his/her face depends only on the defendant's request and escorting police officers good will.

When it comes to clothes worn by the defendants during the court hearings, the interviewees tended to agree that the defendants do have a possibility to wear their own clothes. The problems may occur if the defendant before the arrest did not have a chance to pack their own clothes. In practice passing a bag with personal belonging to the detention facility may be quite time consuming and depending on the decision of the prison service. The research revealed a lack of systemic practice in this regard.

The problem of safeguards for vulnerable groups protecting them from being presented as guilty was particularly challenging for the interviewees. In general, interviewees struggled with pointing to any legal, policy or practical measures that may shield defendants from being presented as guilty in the public eye. Their answers seemed to limit mainly on the architectural adjustments for persons with physical disabilities allowing them to get to the court room without however consideration whether this access may not be available to the public. Only few respondents indicated certain limitations in e.g. use of the coercive measures towards the persons with disabilities and some practical safeguards such as e.g. the role of a defense lawyer.

There is a significant range of remedies available to the defendants in a case they would be presented as guilty due to the use of the measures of physical restraint. None of the remedies, however, was found by the interviewees as fully effective and in a result worth trying. The dominant opinion was rather that in a case of undermining the presumption of innocence by use of any of the coercive measures the defendant needs to launch a separate proceeding that could be time and resources consuming.

#### **C.4 Burden of proof**

Polish criminal law does not explicitly express the principle of burden of proof; this principle is derived from the general principle of the presumption of innocence.<sup>30</sup> The burden of proving the guilt of the accused always lies with the prosecution, regardless of the type of prosecutor involved proceedings (a public prosecutor, private prosecutor or subsidiary prosecutor). Accordingly, the defence is under no obligation to prove the defendant's innocence (no such obligation is imposed on the court, either).

The principle of *in dubio pro reo*, also expressed in the Code of Criminal Procedure, is closely connected to the burden of proof.<sup>31</sup> According to this principle, any irremovable doubts of a factual or legal nature must be resolved in favour of the accused. In practice, the principle applies most often to the facts and evidence. However, where a legal issue, despite the exhaustion of available methods of interpretation, remains disputable, it should be interpreted in favour of the accused as well.<sup>32</sup> According to the well-established jurisprudence of the Polish Supreme Court<sup>33</sup>, this principle should apply only provided that all other means of resolving the doubt had been exhausted.

In 2015, several amendments to the Code of Criminal Procedure came into force. The key changes concerned the procedural position of the judge who was no longer to play a leading role in establishing facts of the case. That role was assumed by the prosecution which became solely responsible for proving the defendant's guilt whereas the defence was to oppose the allegations made by the prosecution. The court's role was limited to considering the evidence presented by the parties and rule on the criminal liability of the defendant based on that evidence.<sup>34</sup> This reform was revoked in

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<sup>30</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 5.

<sup>31</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 5(2).

<sup>32</sup> Grzegorzczak, T., Tylman, J. (2014), *Kodeks postępowania karnego*, Warsaw, p. 141.

<sup>33</sup> *Ibidem*, p. 142.

<sup>34</sup> Wojciech Jasiński, [Polish criminal process after the reform](#), Helsinki Foundation for Human Rights.

2016, so the practical dimension of the new procedural model has not fully developed. Today, five years later, this short-lived attempt at implementing an adversarial model of criminal proceeding raises certain controversies within the legal community.

a. Exceptions to the burden of proof

Are there any exceptions to the principle of the burden of proof?	Yes	No	No information
P	1	3	
J		3 (two judges and a prosecutor)	1 (a prosecutor)
L	4		

Table 24 Exceptions to the principle of the burden of proof

In the opinion of the majority of interviewed police officers, **there are no exceptions to the principle of the burden of proof**. However, one of the interviewees in this group indicated that in some cases the provision of evidence by the defendant expedites the proceedings. This is especially true of the situation when the presented evidence is covered by the banking secrecy privilege, which the police would otherwise be able to access only after obtaining the court's authorisation. There are no legal provisions that would oblige the defendant to present such evidence.

*Co do zasady, ciężar dowodzenia winy spoczywa na oskarżeniu. Czy wiadomo pani o jakichkolwiek wyjątkach od tej reguły?*

*Są takie dane (...), na które się długo czeka, to są głównie dane objęte tajemnicą bankową, gdzie na zwolnienie z zachowania tej tajemnicy my potrzebujemy zgody sądu. To są czynności bardzo długotrwałe, no i jeżeli nam podejrzany sam dostarczy dany dowód, no to wiadomo, że z niego skorzystamy.*

*Typically, the burden of proof rests with the prosecution. Are you aware of any exceptions to this rule?*

*Accessing certain types of data (...), in particular information covered by the banking secrecy privilege, takes a long time. We need a court's permission to have this privilege waived. These procedures are very time-consuming, so if a suspect comes to us with such evidence, we'll obviously going to accept it.*

*(Police officer, Poland)*

None of the interviewed **judges or prosecutors noted any exceptions to the principle of the burden of proof**. They all indicated that it is the prosecutor's role to present the evidence proving the defendant's guilt. However, two interviewees (a judge and a prosecutor) indicated that sometimes the judge actively seeks the evidence during the trial. This paradox was explained in detail by one of the judges who said that if certain pieces of evidence are missing from the indictment, the court, legally obliged to determine "the objective truth", needs to seek the missing pieces. The interviewee also said that the judge, instead of trying to obtain the missing evidence, may in such a case simply acquit the defendant but added that her experience shows that such an acquittal will likely be reversed on appeal and the case will be referred to a re-trial. In the interviewee's opinion, such a "double role" of the judge may lead to violations of the presumption of innocence. An interviewed prosecutor shared similar observations. In the opinion of that interviewee, it is the **prosecutor's role to prove the defendant's guilt beyond a reasonable doubt and the prosecutor should not limit their activity**

**during the trial to presenting charges.** For these reasons, both the judge and the prosecutor seemed to agree that the purely adversarial model of the criminal trial was more beneficial from the perspective of the defendant and that of the presumption of innocence. On the other hand, another interviewed judge did not observe any problems related to the judge’s role in the evidentiary proceeding under the current, inquisitorial-adversarial, model of the criminal trial. Indeed, the interviewee expressed quite a critical assessment of the adversarial model calling that model too much dependent on the proper quality of legal representation. As the interviewee explained, with the purely adversarial model in place, the situation of a financially deprived defendant unable to privately retain an attorney would be much worse than the situation of a defendant who can afford proper representation.

The majority of interviewed lawyers said that **the burden of proof only in theory rests with the prosecution.** The interviewees indicated that the current procedural model forces judges to both take *and* review evidence.

*Czy zawsze ciężar dowodu spoczywa na oskarżeniu?*

*W praktyce taka obrona bierna oznacza poddanie się i w praktyce kończy się wyrokiem skazującym. Liczenie na zasadę obiektywizmu, na zasadę domniemania niewinności kończy się tym, że sądy uznają, że wina w jakiś sposób została udowodniona. Żeby się bronić trzeba porzucić teorię i przejść do praktyki.*

*Does the burden of proof always rest with the prosecution?*

*In practice, such a "passive defence" means giving up and ends with a conviction. If you sit back and wait for the court to apply the objectivity principle or the presumption of innocence, you'll end up with a ruling reading that the guilt has been proven. If you want to mount a proper defence, you'll need to forget about the theory and act.*

*(Lawyer, Poland)*

Finally, one of the interviewed lawyers indicated that some of the measures applied by the prosecution during the preparatory stage of the proceedings such as “extended seizure”, which affects not only the property of the defendant but also that of his next of kin, is an example of shifting the burden of proof. Similar observations concerning the presumption of innocence being disregarded in the process of ordering measures in the pre-trial proceedings were described in C.1.

b. Confession

Does the defendant’s confession have an impact on the proceedings?	Yes	No
P	1	3
J	3 (a judge and two prosecutors)	1 (a judge)
L	4	

Table 25 Impact of the confession on the criminal proceedings

What are the safeguards in place to ensure that confession is	Assistance of the defence lawyer	Presence of a psychologist or psychological evaluation	Written notice of rights	There are no such safeguards

<b>an informed and conscious choice?</b>				
<b>P</b>	1	2	2	1
<b>J</b>	1 (a judge)	1 (a prosecutor)		2 (a judge and a prosecutor)
<b>L</b>	4			

Table 26 Safeguards ensuring that confession is an informed and conscious choice

Almost all interviewed police officers indicated that the defendant's confession does not influence the proceedings and the police are **still obliged to collect evidence, regardless of the defendant's testimony**. Some interviewees (e.g. one of the lawyers) referred to cases that had been concluded after the defendant's confession but, in their opinion, should have been further tried or investigated.

*Jeżeli oskarżony przyzna się do winy, jak wpływa to na przebieg postępowania w kontekście domniemania niewinności?*

*Materiał dowodowy (...) jest i tak zbierany, dlatego, że podejrzany ma takie uprawnienia w trakcie postępowania karnego, że tę swoją linię obrony może zmienić. I on może jednostce policji czy prokuraturze się przyznać, a potem na etapie postępowania sądowego może powiedzieć, że on się jednak nie przyznaje, bo miał, jakieś powody do tego, żeby się przyznać na etapie postępowania przygotowawczego. Materiał dowodowy jest zbierany tak samo, w mojej ocenie, bez względu na to, czy podejrzany się przyznał czy nie.*

*If a defendant confesses, what impact does it have on the proceedings in the context of the presumption of innocence?*

*The evidence (...) is gathered anyway because the defendant has certain rights in criminal proceedings and they can change their line of defence. The defendant can confess at a police station or a prosecutor's office, and then, at the trial, they can plead not guilty and explain that in pre-trial proceedings they had certain reasons for confessing. So, I'd say that the evidence is collected anyway, regardless of the confession.*

*(Police officer, Poland)*

Only one of the interviewed police officers indicated that a suspect's confession may be a ground for waiving the right to a trial, noting that this option is especially useful in cases when the defendant is caught in the act and the evidence is overwhelming.

A similar observation was shared by the majority of the interviewees from judges and prosecutors' group, who agreed that a **defendant's confession does have an impact on the proceedings**. First of all, the interviewees noted that confession enables the use of certain plea-bargaining measures leading to the conclusion of the proceedings without a trial. Furthermore, an interviewed judge said that confession and the signs of remorse may also affect the sentence. The interviewee pointed to examples from her judicial practice and said that in many cases she expected from the defendants to show a willingness to change their way of life.

*W jaki sposób przyznanie się oskarżonego do popełnienia przestępstwa wpływa na domniemanie niewinności?*

*Wielokrotnie z takiej chęci zwykłego, ludzkiego pokazania się od lepszej strony, wyszło tak, że ten człowiek się w tym odnalazł i się zmienił. Przyznanie się do winy nie jest czymś, co powoduje gorszy wyrok. Jeżeli coś zrobiliśmy i przyznamy się, to mamy szansę też coś zmienić, przeprosić, a przede wszystkim wybrać sobie karę.*

*How does the accused person's confession to the crime affect their presumption of innocence?*

*Many times, it comes to the simple human desire to excel in something; I've seen people who found their way and turned their lives around. Admission of guilt does not make your sentence worse. If you did something bad and took responsibility for what you did, you have a chance to make things right, apologise and, above all, have a say in your punishment.*

*(Judge, Poland)*

A defendant's **confession impact on the proceedings was also analysed from the perspective of the pace and effectiveness of the proceedings**. Both interviewed prosecutors said that a defendant's confession simplifies and expedites the proceedings by shortening the length and scope of evidence-taking but noted the importance of collecting evidence that will confirm the defendant's version.

*Jeśli oskarżony przyznaje się do winy to, to ułatwia prokuratorowi postępowanie, ale też pozwala na skorzystanie z środków koncyliacyjnych jak np. dobrowolne poddanie się karze. To znacznie ułatwia przebieg postępowania. Czasami przyznanie wymaga pewnej weryfikacji, ale na pewno skraca postępowanie. Ma to niestety wpływ na domniemanie niewinności – skoro się przyznał, to prokuratora to zwalnia ze stosowania tej zasady.*

*If the defendant pleads guilty, this makes it easier for the prosecutor to proceed, but also allows for plea bargaining measures such as voluntary submission to punishment. This streamlines the proceedings considerably. Sometimes a confession requires certain verification, but it definitely shortens the proceedings. Unfortunately, this has an impact on the presumption of innocence: as soon as the defendant pleads guilty, the prosecutor is exempted from applying this principle.*

*(Prosecutor, Poland)*

Only one judge shared a view expressed by the majority of the interviewed police officers, stating that a defendant's confession has no impact on the proceeding and that even if a defendant confesses the court is still obliged to carry out evidentiary proceedings.

Similar observations were shared by interviewed lawyers. They all stated that confession affects procedural options such as plea bargaining. At the same time, interviewed lawyers noted cases in which defendants' confessions were made under pressure. Forced confessions are a phenomenon that appears particularly often in proceedings brought against members of organized criminal groups (multi-defendant cases), in which the prosecution tends to persuade defendants to testify against each other by offering them release from pre-trial detention. In such cases, a defendant may be as well pressurised into confessing to a crime he or she did not commit. Furthermore, two interviewed lawyers expressed the same observation as that made by a judge saying that even if a defendant confesses to a crime, they still may be acquitted if the court decides that the defendant's conduct did not satisfy the criteria of a criminal offence set by law. Finally, these interviewees observed that in certain cases suspects are cajoled into confessing by the police, who take an ostensibly friendly stance towards suspects in an attempt to encourage them to confess at the very outset of the proceedings (to find out more about this phenomenon, see the section on the right to remain silent).

*Oni (oskarżeni – red.) często myślą, że przyznanie się do winy im ułatwi sprawę, bo to słyszą zaraz po zatrzymaniu w radiowozie.*

*They [the defendants] often think that admission of guilt is going to improve their situation because this is what they hear right after the arrest when sitting in the back of the patrol car.*

*(Lawyer, Poland)*

Commenting on particular safeguards that would ensure that a defendant's confession is a conscious choice, interviewees indicated that suspects are advised on their right to confess and the consequences of confession before the first police interview (this observation was made by almost all interviewees). Interviewees' answers suggested that provision of a written letter of rights to suspects is a routine procedure and that it may be ineffective as defendants usually struggle to fully understand the notice contents.

Apart from the assistance of a defence lawyer, **interviewees did not observe any specific safeguards established to ensure that confession is an informed and conscious choice**. However, in the opinion of some of the interviewees there are no arrangements in place that would secure effective legal representation at the pre-trial stage of criminal proceedings. One of the lawyers noted that even if an interviewed suspect belonged to a vulnerable group and showed e.g. signs of a mental disability, the questioning would continue and the record of the questioning would be included in the case files. Only after the interview is finished, the prosecutor files a motion with the court for the appointment of a defence lawyer or orders the psychiatric evaluation of the defendant. In the opinion of the interviewee, a police or prosecutor's interview should be stopped as soon as the interviewing official realises that the suspect may have any difficulties in understanding the situation and should immediately ask the court to appoint a defence lawyer. The interviewees mentioned two cases of suspects with mental disabilities who were interviewed without the presence of a defence lawyer and confessed to the crime they did not commit as examples of the severe consequences of the absence of appropriate safeguards for persons with mental disabilities in criminal proceedings.

#### c. Discussion of findings

The discussion on the burden of proof in the current model of the criminal proceeding sparked interesting observations about the roles of a judge and a prosecutor in the criminal proceeding in general. The inquisition model of the proceeding in practice limits the prosecution role to prepare and present the charges whereas the judge may face the necessity to actively search the evidence supporting the indictment. This practice led to observations of some of the interviewees that in practice the judge act as "prosecutor's attorney".

Furthermore, when it comes to the role of the confession in the evidentiary process, the interviewees tended to agree that the confession should never be the sole ground for conviction. On the other hand, however, the interviewees observed that a confession may have an impact on the proceeding by e.g. allowing using the plea-bargaining measures. Furthermore, from the perspective of the judges and prosecutors the defendant's confession seemed to significantly improve the pace of the proceeding. On the other hand, the interviewed lawyers' observations showed that the confession is rarely a conscious choice of the defendant. This may be particularly harmful for the position of defendants with mental disabilities who may not be aware of the proceeding as such but also may not be aware of the consequences of their testimonies. Yet again, also in this context, the interviewees' observations revealed a systemic lack of any safeguards for vulnerable groups which may address their needs.

### **C.5 The right to remain silent and not to incriminate oneself**

In the Polish legal system, no legal provision expressly grants the right to remain silent to the accused. According to the Code of Criminal Procedure, the accused is under no obligation to prove their

innocence or submit self-incriminating evidence.<sup>35</sup> Moreover, the accused may, without giving reasons for doing so, refuse to answer particular questions or generally refuse to provide explanations (and must be advised of this right).<sup>36</sup> However, in such a case, the law provides for the possibility of reading out the transcripts of the relevant parts of testimony previously given by the accused<sup>37</sup>, in the case at hand or another case brought against them, at the trial or pre-trial stage. The transcripts of the accused's testimony given in other types of legal proceedings can also be used. It should be emphasised that it is inadmissible to read out any previous testimony given by the accused who was, at the relevant time, interviewed as a witness (admission of such testimony would constitute a grave procedural violation). Having read out the transcripts, the presiding judge must request the accused to comment on the content of the transcript.

If the right to remain silent is violated, the defendant is entitled to raise this point in the appeal against the first instance judgement. According to the Code of Criminal Procedure, a judgment will be reversed or rectified if the appellate court is satisfied that a violation of procedural provisions has occurred and that the violation has (or could have) affected the contents of the first instance judgment.<sup>38</sup>

a. The right to remain silent in practice

How do you implement the right to remain silent in your work?	Informing about the right before the first interview/court hearing	Defendants receive the information from other criminal justice authorities	Advise when the defendant should give testimony
P	1	3	
J	4 (two judges and two prosecutors)		
L		1	3

Table 27 Implementation of the right to remain silent in the work of legal professionals

In practice, the implementation of the defendant's right to remain silent by criminal justice authorities is **limited to the notification of defendants of this right**. If a police officer interviews a suspect, they must advise the suspect of this right. Also interviewed judges and prosecutors implement this right solely by informing defendants about its existence (for further discussion, see point b). It seems from interviewees' answers that the notice of this right is given only once, before the first interview or hearing in court.

The answers provided by interviewed lawyers show that their clients are informed on the right to remain silent by the interviewing police officer or prosecutor, or by the lawyer.

*Jesteśmy w takiej sytuacji, w jakiej jesteśmy (na przesłuchaniu w prokuraturze – red.). Nie mam pojęcia, jaka jest percepcja mojego klienta. Dlatego zawsze przed wejściem do prokuratora mówię mu o tych prawach, żeby miał czas je przemyśleć.*

<sup>35</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997 Article 74.

<sup>36</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 175.

<sup>37</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 389.

<sup>38</sup> According to the well-established jurisprudence of the Polish Supreme Court Article 438(2).

*We are in a certain situation [during an interview in the prosecutor's office]. I do not know what the perception of my client is. This is why before entering the prosecutor's room I always tell my clients about their rights so they have enough time to think about them.*

*(Lawyer, Poland)*

Interviewed lawyers generally **advise their clients not to testify before the charges are presented to them** and before the lawyers have a chance to read the case file. Interviewed lawyers follow a general rule in their practice that clients should not testify at the earliest stage of the investigation when the defence does not know much about the case and the charges. In the opinion of an interviewed lawyer, testimony is a crucial element of the investigation and the client needs to be properly prepared to testify. One of the interviewed lawyers stated that there are potential negative consequences of the decision to remain silent. His observations show that almost all defendants who decide to remain silent during their first interview face the risk of pre-trial detention.

b. How is information on the right to remain silent and not to incriminate oneself shared with the accused?

How are defendants informed about the right to remain silent?	In writing	Verbally
P (interviewees provided several answers)	4	2
J (interviewees provided several answers)	2 (a judge and a prosecutor)	3 (two judges and a prosecutor)
L (interviewees provided several answers)	4	2

Table 28 The form in which defendants are informed about the right to remain silent

When are defendants informed about the right to remain silent?	Before the first hearing in court/first interview in the pre-trial proceedings	At other time
J	4 (two judges and two prosecutors)	1 (prosecutor, right after the arrest)
L	2	

Table 29 The time when defendants are informed about the right to remain silent

Does the lack of notification of the right to remain silence influence the proceedings?	Yes	No
J	2 (a judge and a prosecutor)	2 (a judge and a prosecutor)
L	1	3

Table 30 The impact of the absence of information on the right to remain silent on the proceedings

According to interviewed police officers, the information on the **right to remain silent is provided in writing and verbally**. The interviewees failed to provide any information that would confirm the existence of any practice of checking if a defendant understands the information. What is more, interviewees' answers suggest that the provision of a notice of rights is rather a routine procedure and any defendant's doubts regarding the meaning of the rights or additional information are rather explained by defence lawyers rather than police officers. Furthermore, one of the interviewed lawyers stated that it happens very rarely that defendants have any concrete questions regarding their rights.

**The interviewed prosecutors and judges generally inform defendants about the right to remain silent.** This information is provided to defendants immediately before the first interview in pre-trial proceedings or before the first hearing during the trial. If a prosecutor informs a defendant about this right, they first do it verbally and afterwards provide the defendant with a copy of a notice of rights (including the right to remain silent). The defendant signs a receipt of this notice. When discussing the issue of informing the defendants about their rights, interviewees made certain observations concerning the "hermetic" language of the notices, which, in the opinion of some interviewees (e.g. one judge and one lawyer), is difficult to understand for laypersons, but noted that there was no procedure to check if the defendant understood this information.

Then, during the trial, the judge verbally informs the defendant about the right to remain silent before the first hearing. This information is provided only once. If a defendant is heard during the first court sitting and later the case is adjourned and the defendant continues to testify during another sitting that takes place several days later, the defendant most likely will not be notified on the right to remain silent again. The interviewed judges and prosecutors offered a differing assessment of the admissibility of testimony provided by the defendant without being notified of the right to remain silent. According to two interviewees, a judge and a prosecutor, such testimonies cannot be further used in the proceedings. On the other hand, another judge and prosecutor stated that such information can be used as the failure to notify of the right to remain silent can easily be remedied after the defendant gives testimony for the first time.

Interviewed lawyers also noted the practice of informing defendants about their right to remain silent before the first interview/hearing. Furthermore, some lawyers recalled that their clients were informed about this right before the first interview. According to interviewed lawyers, this information is provided in writing and verbally. **For the lawyers, the most controversial aspect of the right to remain silent was the use of testimonies given by defendants who have not been informed about this right.** In the opinion of three out of four interviewed lawyers such testimonies are used in the trial even though they should not be considered admissible evidence. Furthermore, two of the interviewed lawyers indicated that in sometimes, police officers use the "good cop" strategy (also used to evoke confessions) in an attempt to convince defendants to testify. The interviewees also observed in their practice that memos drafted by police officers to record suspects' offhand statements made after the arrest and before the first interview are used as evidence in court. One of the interviewed judges strongly criticised such a practice and stated that these memos should not be used as evidence in criminal proceedings. On the other hand, the interviewee admitted that these documents can influence judges' perception of the defendant and "cloud" their judgement. The interviewee stated that in the Polish legal system all prohibitions against the use of the "fruits of poisonous tree" had been abolished.

*Zapala mi się taka lampka [gdy widzę te notatki, że przyznał się do popełnienia przestępstwa]. Co prawda powiedział to niepouczony o swoich prawach, poza rozprawą, gdzieś w jakiejś nieformalnej rozmowie w policyjnym radiowozie, to nie ma wartości dowodowej, ale jest to dla mnie jakaś informacja, że ta sytuacja mogła przebiegać inaczej niż oskarżony to opisuje.*

*Each time I see these police memos [with information of the suspect's alleged confession], a warning light goes off in my head. That's something the suspect said without having been informed about their rights, in some casual conversation in a patrol car, this is not legal evidence, but still, for me, it's some kind of information that the things may have been different from what the defendant says.*

*(Judge, Poland)*

Furthermore, one of the lawyers pointed out to the practice of continuing the defendant's interrogation despite their declaration to remain silent. According to the interviewee, the police officers ask question and wait for the declaration of the defendants that they refuse to answer the specific question. Such an answer (refuse to answer the question) is then indicated in the interrogation record creating a suggestion that the defendant is trying to hide something.

The lawyers also pointed out that, in practice, the exercise of the right to remain silent may be detrimental to the defendant's procedural situation. As some of them stated, referring to defendants' confessions, **the unwillingness to cooperate with criminal justice authorities and to testify may result in pre-trial detention.**

*Cytując bogate orzecznictwo sądów w sprawie tymczasowego aresztowania: wprawdzie nieprzyznanie się nie może rodzić negatywnych konsekwencji dla oskarżonego, ale wzmaga ono obawę matactwa, a to z kolei rodzi konieczność zastosowania tymczasowego aresztowania*

*Let me refer to the extensive jurisprudence of courts concerning pre-trial detention: although the lack of confession cannot give rise to any negative consequences for the defendant, it strengthens the suspicion of obstruction of justice, which in turn leads to the necessity of applying pre-trial detention.*

*(Lawyer, Poland)*

### c. Self-incrimination

Are there any instances in which defendants are obliged to present evidence that may incriminate them?	Yes	No
P		4
J		4 (two judges and two prosecutors)
L	2	2

Table 31 Presenting self-incriminating evidence

Are defendants obliged to provide their computer passwords or phone's PIN?	Yes	No
P		4
J		4 (two judges and two prosecutors)
L		4

Table 32 Providing phone or computer security credentials

**All interviewed police officers indicated that defendants are not obliged to provide self-incriminating evidence.** Furthermore, the police officers seem to agree that the defendants do not

have to provide their phone PINs or computer passwords. The police officers also agreed that there are no measures that could be used to force defendants to reveal such credentials. Only one of the interviewed police officers hypothetically considered using physical force on the defendant to use a fingerprint to switch on their phone or computer in the case of the most serious crimes, e.g. a terroristic attack.

Interviewed judges and prosecutors said that a defendant is under no legal obligation to provide self-incriminating information or evidence. The interviewees also noted that it is a task of the police to obtain access to secured phones or password-protected computers and that defendants should not be expected to provide such access against their will.

Interviewed lawyers generally agreed that there are no legal grounds that would oblige a defendant to provide any self-incriminating evidence. They noted, however, that certain types of evidence may be collected from a defendant even against their will, e.g. blood or saliva samples. Furthermore, one of the interviewed lawyers indicated that at the beginning of each interview defendants are asked general questions concerning their family status, employment status, etc. Usually, defendants answer these questions, however, their refusal to provide such information should not lead to any negative consequences. Finally, all interviewees agreed that defendants do not have to disclose their computer passwords or phone PINs. However, sometimes the police ask them to do so “off-record”, arguing that if they cooperate, the proceedings will be conducted faster. One of the interviewed police officers indicated that in the most serious crimes e.g. the case of terrorism s/he would consider using a coercive measure to unblock the phone if there would be a chance to safe life or health.

d. Right to remain silent

Does a defendant’s choice to remain silent influence the proceedings?	Yes	No	No opinion
P	2	2	
J	2 (a judge and a proesecutor)	2 (a judge and a proesecutor)	
L	3		

Table 33 Right to remain silent

Does cautioning a defendant that their silence will be taken into consideration amount to putting pressure on the defendant?	Yes	No	No opinion
P	1	1	2
J	3 (two judges and a prosecutor)		1 (a prosecutor)
L	2		1

Table 34 Cautioning a defendant about the consequences of their decision to remain silent

Interviewed police officers, judges and prosecutors differed in their assessment of whether a defendant’s decision to remain silent affects the proceedings. Those interviewees who affirmatively answered this question considered such an **impact mainly from the perspective of the pace of the proceedings**. Those interviewees claimed that if a defendant decides to testify, then the proceedings may be easier and quicker concluded. The effectiveness of the proceedings seems to be a dominating

aspect of some answers. For example, one prosecutor initially said that a defendant cannot be forced to testify, but later admitted that if the defendant testifies, they may be treated more favourably by criminal justice authorities and may be given broader access to plea bargaining instruments.

The observations concerning differences in the courts' approach to the defendants based on their willingness (or unwillingness) to testify also were also made by some of the interviewed lawyers. For example, three out of four interviewed lawyers stated that a defendant's decision to remain silent often leads to the prosecutor's motion for pre-trial detention. Furthermore, one of the interviewed lawyers said such a decision may create an impression that the defendant is trying to withhold certain factual information.

*Podejrzany, które decyduje się zachować milczenie może wytworzyć w organach procesowych psychologiczne wrażenie, że chce coś ukryć, że coś zarzuty wobec niego w jakimś stopniu są uzasadnione.*

*A defendant's decision to remain silent may have a psychological effect on a law enforcement officer or the judge, creating a sentiment that the defendant is trying to hide something, which only confirms that the charges against them must have at least some merit.*

*(Lawyer, Poland)*

Almost all non-police interviewees **seemed to agree that defendants should not be pressured to testify**. On the other hand, interviewed police officers presented a contrary opinion. Two interviewees did not have a strong opinion on the matter, whereas one of the interviewees said that informing a defendant on consequences of their refusal to testify would be fair to the defendant. An interviewee noted that the court is more likely to be suspicious of a defendant who remains silent during the proceedings, thus the defendant needs to know that his/her silence may negatively affect his/her situation.

*Zasadnym jest przekazanie podejrzanemu informacji, że sąd inaczej, negatywnie oceni to, że zachował milczenie, niż to, że wyjaśnia.*

*It is reasonable to inform the defendant that if they don't want to explain things, the court won't be as pleased as it would be if they wanted to cooperate.*

*(Police officer, Poland)*

#### e. Discussion of findings

The interviewees' answers revealed a rather standardized procedure of informing the defendants about their right to remain silent. This information is provided to the defendants by either the prosecutor or a judge prior to the first hearing. Still, the main problems are related to the form of this information that was described as hermetic and difficult to understand for a lay person and the use of the testimonies given by a defendant in a case, he or she did not receive the information on the right to remain silent. Still, the interviewees agreed that the lack of such information would not be an efficient ground for an appeal.

Furthermore, interviewed lawyers' observations on the police practice of evoking the defendant's confessions seem to be the main threat to the protection of the right to remain silent in practice. This method combined with the lack of effective guarantees prohibiting the use of the illegally obtained evidence in the criminal proceeding significantly lower the standards of defendant's right to a defence.

## C.6 The right to be present at the trial and to have a new trial

The amendments to the Code of Criminal Procedure that came into force in July 2015 provided accused persons with the right to be present at the trial, abolishing the previously applicable general rule of mandatory appearance.<sup>39</sup> However, the presiding judge or the court may order the presence of the accused mandatory. In felony (serious crime) cases, the presence of the accused is mandatory during the presentation of the charges by the prosecution. Moreover, the presiding judge may order the accused not to leave the courthouse before the conclusion of the trial session.

The accused may not obstruct the course of the proceedings by intentionally not attending the trial. Thus, if the accused whose presence at the trial is mandatory has already given their testimony and left the courtroom without the permission of the presiding judge, the court may carry on with the trial despite the absence of the accused.<sup>40</sup> The court, however, may order the arrest of the accused and their forced appearance if it deems the presence of the accused necessary. This rule applies *mutatis mutandis* to a situation where the accused whose presence at the trial is mandatory and who had given testimony, having been notified of the date of an adjourned or interrupted trial session, has not appeared at that session and has failed to show cause for the non-appearance.

The accused, in principle, has the right to be present during every step of evidentiary proceedings.<sup>41</sup> In exceptional circumstances, if there is a justified risk that the presence of the accused may have an inhibiting effect on the testimony given by other accused persons (co-defendants) or the testimony of a witness or an expert witness, the presiding judge may order that the accused leave the courtroom for the duration of the questioning of such other person. The presiding judge may also conduct the questioning with the use of technical devices enabling this procedural step to be conducted remotely via video link.

According to the provisions of the Code of Criminal Procedure governing the notifications of court dates to defendants, the documents whose delivery triggers the running of a time limit, including summons and notices, must be served personally upon the addressee.<sup>42</sup> However, if the personal service cannot be effected, a document dispatched by a post operator is left at the nearest branch of that operator, whereas a document served in a different manner is left at the nearest police station or the local municipal office.<sup>43</sup> The process server must notify the addressee that the document has been left elsewhere by affixing a clear notice to the door of the addressee's apartment or in another visible place; the notice must set forth where and when the document has been left and inform that it should be collected within 7 days. In the case of an ineffective lapse of this time-limit, the notification procedure is to be repeated. The document will be considered legally served upon the conclusion of the foregoing procedure.

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<sup>39</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997 Article 374.

<sup>40</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997 Article 376.

<sup>41</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997 Article 390.

<sup>42</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 132.

<sup>43</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 133(1).

A failure to appear by parties, their defence lawyers or attorneys does not prevent the pronouncement of the judgment.<sup>44</sup>

The Code of Criminal Procedure provides only limited possibilities to start a new trial in a case suspects or accused persons were not present at their trial. According to Article 540b § 1 of the Code, the proceeding can be re-opened upon the motion of the accused person submitted within a month since the person learned about the sentencing judgement. This provision is applicable only when the case was heard in absentia and the accused person was not informed about the pending proceeding. Still, all the mentioned above presumptions concerning delivering the court correspondence are applicable in this regard.

a. Consequences of non-appearance

How are defendants informed about their right to participate in the court trial?	Verbally by a judge	In a written notice, which includes information on the defendant's rights, prior to the first interview	Other
<b>J</b>	3 (a judge and two prosecutors)	1 (a judge)	
<b>L</b> (interviewees provided several answers)	2	2	1 (both in written and orally)

Table 35 Informing defendants about the right to participate in a trial

How do authorities establish defendants' addresses?	By searching available databases (address database, health care system database, Border Guard and the Police databases)	By using the defendant's address initially provided in the case files	No specific measures
<b>J</b> (interviewees provided several answers)	3 (a judge and two prosecutors)	1 (a judge)	1 (prosecutor: family members are interviewed, a search warrant is used if necessary)
<b>L</b>	1		3

Table 36 Methods of establishing defendants' addresses

The majority of interviewed judges and prosecutors said that the defendant's presence during the trial is not mandatory. Certain interviewees, e.g. one of the judges, noted repeatedly during the interview that the defendant's presence at the hearing is their right but not an obligation.

Interviewees observed that an **accused person is informed about their right to participate in the trial on two separate occasions**. First, this information is provided in writing, in the notice of the suspect's rights provided before the first interview. Referring to the formal notice of rights, interviewees (e.g. a

<sup>44</sup> Poland, Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego), 6 June 1997, Article 419(1).

judge or two lawyers) once again observed the very “hermetic” language of the information provided and pointed out that it is difficult to assess whether suspects’ understand the notice.

An accused person is informed about their right to **participate in the trial** for the second time **by the judge at the beginning of the trial**. Interviewees’ answers suggest that the scope of the notification made by the judge is limited and most often include information about the defendant’s right to attend the trial sessions and the consequence of their absence, namely the fact that the court will proceed with the case in the absence of a properly notified defendant. The judge does not mention other effects of the defendant’s absence, such as the fact that the defendant who fails to attend the pronouncement of the judgement will not receive the judgment in writing. In practice, the above rule may have serious consequences: for instance, the defendant may have no knowledge of whether they have been convicted or acquitted until they personally inspect the case file in the court. This particular concern was shared by one of the interviewed lawyers who emphasised that the way in which judges inform defendants about the consequences of the latter’s absence may be detrimental to defendants. In the opinion of this interviewee, judges focus on the progress of the proceedings rather than the adequate protection of defendants’ rights. On the other hand, another lawyer shared positive observations regarding the practice of judges notifying defendants about the right to participate in the trial. This interviewee’s observations suggest that the notification is provided in accessible language and includes almost all consequences of a defendant’s absence.

Interviewed judges and prosecutors provided several examples of methods used to establish a defendant’s address in a situation where **a defendant cannot be located**. A judge and two prosecutors many databases in which the defendant’s address may be found (e.g. the national address database, the health care system database and the Police or the Border Guard records. Interviewed judges also indicated that if a database search is ineffective, the court may nevertheless deliver service of process to the last address provided by the defendant in the case file. A suspect is asked about their address before the first interview by the prosecutor or the police and is legally obliged to notify justice authorities about any change of their address.

The interviewed lawyers were rarely engaged in the process of establishing a defendant’s address so they do not have any knowledge on the practical methods of locating the defendant during the trial. Certain interviewees (e.g. one lawyer and one prosecutor) stated that defendants are obliged to provide their mailing address *and* their email address, noting that this requirement should improve communication with defendants, especially those living abroad. However, the interviewees did not offer any observations on how this method worked in practice.

The interviews revealed very limited observations concerning the right to a new trial in a case an accused person was not aware of the pending proceeding and court's judgement. Given the fact that the presence in the trial is the accused persons' right not duty and the broad scope of presumptions concerning the delivery of the court's correspondence (the correspondence does not have to be handed personally to the accused person to considered it delivered), the possibility of reopening the proceeding only on the grounds of accused persons' absentia is very limited. None of the interviewees directly referred to the issue of the new trial in a case of the accused person was absent. The reopening the proceeding on the grounds of the accused person absentia would be possible only if the accused person did not receive the information on the proceeding. Still, in the opinion of one of the interviewed lawyers judges tend to exercise considerable caution in dealing with defendant's absence during the trial. By doing so, judges try to avoid any problems that may arise from absence, especially the risk their judgement is reversed in the second instance.

b. What has been understood as “effective participation”?

The definitions of “**effective participation**” provided by interviewees **covered a broad scope of notions**, from the effective provision of information about the proceedings through the defendants’ ability to actively participate in the evidence-taking process and the hearing of witnesses to the accused person’s opportunity to consult with a defence lawyer or mount their defence on their own.

*Jak Pani interpretuje pojęcie „skutecznego udziału w postępowaniu”?*

*Moim zdaniem chodzi o możliwość przedstawienia dowodów na swoją niewinność. Tak naprawdę możemy prowadzić postępowanie pod nieobecność oskarżonego, możemy go nawet nie widzieć – jeśli nie mamy z nim kontaktu i oskarżony się nie pojawia na rozprawach. Jeśli chce, to powinien mieć możliwość przedstawienia przed sądem dowodów na swoją niewinność.*

*How do you interpret the concept of “effective participation in the proceedings”?*

*In my opinion, it comes down to being able to effectively present the evidence proving someone's innocence. In fact, we can proceed in absentia, we don't even have to see the defendant if there is no contact with them and they don't show up for hearings. If they want to, the defendant must be allowed to present the evidence proving that they're innocent.*

*(Judge, Poland)*

The interviewees offered relatively few observations regarding the situation of a defendant being unable to fully follow the pace and scope of a hearing. The two aspects they did mention in this respect were hearings conducted over an online video link and the use of a glass box-type of defendants’ dock.

Most often, the courts use the online video link method in extraordinary circumstances when a defendant cannot physically attend court but their testimony and presence is required. The COVID-19 lockdown seems to have influenced the interviewees’ assessment of the feasibility of “remote” court hearings conducted over a video link. A judge and a lawyer interviewed in February 2020 indicated that the organisation of such hearings would be challenging, whereas certain interviewees interviewed later, in March and April 2020 (e.g. a judge or a prosecutor), considered this option feasible. However, the sample of interviewees was too small to assess whether such “video link friendly” attitude was a general trend in the justice system or the interviewees simply relayed on their personal positive experiences with these solutions.

Furthermore, some of the interviewees expressed **criticism regarding the measures of physical separation of defendants in the courtroom**. An interviewed judge strongly opposed to the use of “glass boxes”, saying that such facilities violate the defendant’s right to a fair trial and to participate in the court hearing by depriving the defendant of an opportunity to speak with his/her lawyer in a way that does not interrupt the proceedings. A similar observation was made by a defence lawyer who stated that it is quite uncomfortable to follow the trial and consult with his/her client who sits behind the defence table in a glass box.

*Co w sytuacji, gdy oskarżony jest obecny na rozprawie, ale nie może śledzić jej przebiegu?*

*[...] Jeśli mówimy o ograniczeniu praw oskarżonych, to uważam, że ta pleksa jest ewidentnie ograniczeniem praw oskarżonego. To jest wygodne dla wymiaru sprawiedliwości, natomiast nikt z nas nie chciałby uczestniczyć w procesie [...] inaczej jest gdy ktoś siedzi tuż za obrońcą i może się porozumiewać z obrońcą. A w tej w sytuacji jest inaczej – trzeba wstrzymać bieg procesu, obrońcy muszą się wymieniać karteczkami z oskarżonymi i nie są w stanie na bieżąco się porozumiewać.*

*What if the defendant is present during the trial but cannot follow the trial?  
 ... If we are talking about restricting defendants' rights, I think this glass box is clearly a restriction of the defendant's rights. It is convenient for the courts, but you wouldn't like to be tried in that way ... it is a different story if you are sitting right behind your lawyer and you can freely talk with your lawyer. But in this situation [when a glass box is used] things are different: the proceedings have to be stopped, the defence lawyers have to exchange notes with the defendants, and they are not able to communicate with each other on an ongoing basis.*

*(Judge, Poland)*

c. Vulnerable groups

Safeguards for vulnerable groups which ensure that they have been informed of the trial	Assistance of an interpreter speaking in the defendant's mother tongue	Correspondence in Braille	Other	No safeguards
J	3 (a judge and two prosecutors)	1 (judge)	1 (prosecutor: the presence of a defence lawyer)	
L	2			2

Table 37 Safeguards for vulnerable groups which ensure that they have been informed of the trial

Special arrangements for defendants with a physical or mental disability which ensure they are able to follow the progress of the trial	Architectural adjustments for persons with physical disabilities	Legal aid for persons with mental disabilities	Other
J (respondents in this group indicated several answers)	3 (two judges and a prosecutors)	2 (a judge and a prosecutor)	1 (prosecutor: the presence of a defence lawyer)
L (respondents in this group indicated several answers)	1	3	1 (judge establishing contact with the defendant and checking regularly if the defendant understands the conduct of the trial)

Table 38 Special arrangements for defendants with a physical or mental disability which ensure they are able to follow the progress of the trial

Referring to the situation of vulnerable groups in criminal proceedings, interviewees mainly focused on the situation of persons with a physical or mental disability and migrants with the majority of the interviewees admitting that they did not have enough experience in working with persons with disabilities and much often work with migrant defendants. This lack of experience may explain the general difficulty the interviewees had with indicating any concrete safeguards available for vulnerable groups.

While referring to particular safeguards used to ensure that defendants are properly notified of the pending proceedings, the interviewees mainly noted the **assistance of an interpreter**. Interviewees' answers (e.g. those given by two judges) suggest that criminal justice authorities make sure that all

documents and correspondence in the case are translated into the defendant's native language. Notwithstanding any difficulties related to finding an interpreter of less popular languages (a provided example concerned a sworn translator of Norwegian), the courts make efforts to convey all the information to the defendant in a language they understand. The linguistic assistance includes document translation and on-site interpretation during the trial. An interpreter handles the communication between the judge, defendant and prosecutor. There is no dedicated interpreter assistance to facilitate communication between defendant and their lawyer.

Interviewees noted relatively few adjustments made to allow members of vulnerable groups to hear and follow the progress of the trial. Interviewed judges and prosecutors indicated that the court buildings should be adjusted to the needs of persons with physical disabilities. However, some of their answers suggest that not all courts have proper facilities. Certain interviewees (a prosecutor and a lawyer) observed that in courts they frequent only the main entrance and several courtrooms are adjusted to the needs of persons using wheelchairs whereas other parts of the same court building may be inaccessible to such persons. These interviewees also mentioned that defendants with disabilities are tried in a specially adjusted courtroom, which suggests that not all courtrooms have adequate facilities for persons with disabilities.

**A prevailing observation made by all participants in the research was that the defence lawyer plays a pivotal role in protecting the rights of vulnerable defendants.** The interviewees shared a general opinion that the appointment of the defence lawyer operates not only as a safeguard of the defendant's procedural rights but also somehow mitigate all the shortcomings of the criminal justice system. The interviewees pointed to the role of the defence lawyer also while referring to special arrangements made to enable vulnerable defendants to follow the progress of the trial, especially in the context of the situation of persons with mental disabilities. According to the Code of Criminal Procedure, the appointment of a defence lawyer is mandatory if the person has a mental disability (see point C.3 c). In such a case, interviewees perceived the presence of the defence lawyer as a "remedy" for the defendant's inability to follow the course of the trial.

#### d. Discussion of findings

The interviewees seem to agree that the defendant has the right, but is not obliged, to participate in the trial. Whereas the interviewed judges seem to focus on the fact that the defendant's non-appearance does not obstruct the works of the justice system, the lawyers noted that in certain cases the defendant's ignorance of the consequences of their absence may significantly complicate their legal situation.

Interviewees' answers also revealed a broad spectrum of actions the court may undertake to establish the address of the defendant whose whereabouts are unknown.

The interviewees offered relatively limited observations on the situation of defendants unable to personally participate in a hearing who are following the trial via a video link. It seems that this solution is used only in extraordinary situations when the court decides that the defendant's presence is required for the conduct of the trial. On the other hand, interviewees made several observations concerning the use of the glass box defendants' dock, generally agreeing that such a solution negatively affects the presumption of innocence and the right to a defence.

In this context, interviewees' answers once again revealed the lack of systemic solutions that could address the needs of vulnerable groups by assisting members of such groups in following the proceedings. Two main safeguards mentioned by the interviewees were the assistance of an

interpreter, provided for defendants who do not speak Polish, and the appointment of a defence lawyer for defendants with mental disabilities.

## C.7 Challenges and improvements

### a. Challenges

What are the biggest challenges in relation to the presumption of innocence?	Media coverage	Other	No challenges
P	1	1 (police media communication policy)	2
J	2 (two judges)	1 (prosecutor: the hierarchical organisation of the prosecution service, which allows higher-ranking prosecutors to interfere with pending investigations; also the prosecution service media communication policy)	1 (prosecutor)
L	3	1 (the lack of legal education and the practice of application of pre-trial detention)	

Table 39 Challenges in relation to the presumption of innocence

The majority of the interviewees agreed that the **main challenge for the presumption of innocence is the media coverage of criminal proceedings**. In this regard, interviewees once again observed that the media tend to report on criminal proceedings in a biased way, focusing on sensational content rather than the objective presentation of facts. Furthermore, interviewees observed that, in some cases, a short piece of news about *the launch* of a criminal investigation against a person may lead to the stigmatisation of that person, effectively removing their innocence in the eyes of the public. Interviewees observed that the more drastic or serious the case is, the lesser respect for the presumption of innocence is likely to be maintained.

Interestingly, two interviewees (a police officer and a prosecutor) said that this trend may be further exacerbated by the media communication policies of the police and the prosecution service. An interviewed police officer indicated that in some cases the police should refrain from publishing videos or photos depicting arrests of suspects, especially when the suspects are not fully dressed.

*Jakie są pani zdaniem największe wyzwania związane z domniemaniem niewinności? Myślę, że należałoby tutaj zwrócić szczególną uwagę na materiały, jakie publikuje sama Policja. (...) jednostki policji chcą pochwalić się tym, jakie policjanci mają osiągnięcia i bardzo często ujawniają różnego rodzaju wizerunki, filmy z czynności w sieci, no i tutaj może trochę trzeba popracować nad tym, żeby jednak może trochę ograniczyć niektóre publikacje.*

*What, in your opinion, are the biggest challenges concerning the presumption of innocence? I think that particular attention should be paid to the materials published by the police themselves. (...) Police units want to show how much they achieved and publish online things like images or video footage from actions. It would be a good idea to show some restraint with some publications.*

*(Police officer, Poland)*

Furthermore, an interviewed prosecutor stated that prosecutor’s offices communication with the media, especially in politicised cases, constituted another challenge to the presumption of innocence. The interviewee also observed that the hierarchical structure of the prosecution service and the powers of supervising prosecutors may pose a threat to the presumption of innocence, given the increasing risks of political pressure being exerted in certain pending proceedings.

b. Improvements

In relation to the presumption of innocence, has the situation changed in last 2-3 years?	Yes, it has improved	Yes, it has worsened	No, there are no significant changes
<b>P</b>			4
<b>J</b>	1 (judge)	1 (prosecutor)	2 (a judge and a prosecutor)
<b>L</b>			3

Table 40 Changes in the protection of the presumption of innocence in last 2-3 years

The vast majority of the interviewees did not observe any significant changes in the protection of the presumption of innocence. In part, this may be related to the absence of significant legal changes related to the national transposition of the principle of the presumption of innocence (see point B.5) derived from EU law. Certain interviewees (e.g. one of the prosecutors) said that the presumption of innocence is a key rule of the criminal process and the level of its protection remained unchanged throughout their professional careers.

Only two interviewees expressed a different opinion on that matter. An interviewed judge stated that the protection of the presumption of innocence improved together with the improving access to legal aid. Although the interviewee made some critical comments concerning the works of defence lawyers, she perceived the improved access to legal aid as the most important safeguard for defendants’ procedural rights. On the other hand, an interviewed prosecutor indicated that the systemic changes in the structure of the prosecution service had considerably influenced the guarantees of the presumption of innocence.

c. Suggestions

Interviewees presented few suggestions on how to improve the protection of the presumption of innocence. First, an interviewed police officer noted a need to improve the practice of publishing images of accused persons. In this context, the interviewee recalled the case of a witness who published a photo of the accused person. In his/her opinion, the prosecutor’s office should order to publish the accused person’s image much earlier so that a third person would not have to risk criminal or civil liability.

Second, an interviewed lawyer noted that the criminal procedure should be changed in order to strengthen the position of the judge who should appear as an independent umpire rather than “an advocate for the prosecution’s case”.

## PART D. GENERAL ASSESSMENT

The research revealed a number of key challenges related to the protection of the presumption of innocence and concerning the following aspects related to this presumption.

- **Equal application of the presumption of innocence** – the research revealed several factors which may influence the presumption of innocence against the background of media reports. Among these factors, interviewees indicated, inter alia, the defendant's criminal record, nature of the committed crime (the more serious the crime is, the weaker protection is provided for the presumption of innocence) and the defendant's social status. Some interviewees stated that the presumption of innocence may be jeopardised not because of the defendant's features, but rather in the consequence of the organisation of the criminal justice system. In this context, the negative publicity related to the launch of proceedings in politicised cases generated by the prosecutor's office media communication policy may lead to exposing the presumption of innocence to the risk of further violations;
- **Public reference to guilt** – in general, it was observed that media outlets comply with the key legal rules applicable to the publication of the accused person's image and name during the trial. However, media reporting is most strongly impacted by the process of deepening media polarisation that drives the growing tendency of biased and sensational reporting. In this context, several interviewees agreed that the fact of launching an investigation against a person (particularly, against a public figure) may in itself result in a public anathema and significantly tarnish the accused person's reputation;
- **Right to remain silent** – although the Polish legal system safeguards the right to remain silent and prohibits self-incrimination, still there are some practical problems related to respecting this right. As interviewed lawyers observed, the main practical threat to the protection of the right to remain silent is arguably the practice of hearing police officers as witnesses who give testimony as to what the suspect said during the arrest (e.g. a confession). This method, combined with the lack of effective guarantees ensuring the inadmissibility of illegally obtained evidence in criminal proceedings significantly lower the standards of protection of the defendant's right to a defence.
- **Lack of effective remedies** – the research showed that defendants may use certain remedies (civil action, remedies under the Press Law Act or the complaint against the manner in which the arrest was carried out) if they have been presented as guilty by the media or due to the excessive use of coercive measures. However, none of these mechanisms is capable of fully addressing the need for an effective and expedient remedy mitigating the damage that may be caused by violations of the presumption of innocence.
- **Lack of specific safeguards for vulnerable groups** – the interviewees found it particularly challenging to elaborate on the problem of safeguards for vulnerable groups, which would protect members of such groups from being presented as guilty. In general, interviewees struggled to point out any legal, policy or practical measures that may shield vulnerable defendants from being publicly presented as guilty or guarantee that they may effectively participate in the proceedings. In their answers, interviewees mostly referred to architectural adjustments for defendants with physical disabilities, which allow them to access the courtroom, but failed to consider whether such access is provided to members of the public. Only few respondents indicated concrete measures in this area, such as limitations in the use of coercive measures against persons with disabilities and certain practical safeguards, e.g. the role of a defence lawyer. The questions concerning safeguards for vulnerable groups also

revealed the systemic absence of a critical review of whether such issues are at all recognised and addressed by the criminal laws of Poland and the Polish criminal justice system.

## PART E. CONCLUSIONS

Whereas the presumption of innocence is a key element of the criminal process and the legal system provides sufficient safeguards for this principle, its proper practical application raises significant challenges.

In the Polish criminal process, the main challenges concern the role of the court and the burden of proof. The inquisitorial model of criminal proceedings influences the trial position of the prosecutor and the judge. In practice, during the trial, the role of the prosecutor may be limited to presenting charges whereas the judge may be required to actively search for the evidence in support of the prosecution's case. In this context, the adversarial model of criminal proceedings, which operated in Poland between July 2015 and March 2016, seems to have offered more robust guarantees for the presumption of innocence in the context of the criminal trial.

As regards the burden of proof, the research showed that the defendant's confession cannot constitute the sole ground for the conviction. However, interviewees failed to point to any specific safeguards established to ensure that confession is an informed and conscious choice. This aspect is also considerably influenced by the lack of effective mechanisms ensuring the inadmissibility of illegally obtained evidence in criminal proceedings. In consequence, as the research showed, informal conversations between the suspect and police officers, which fall outside the scope of the official interview, may result in the building of evidence against the defendant. This practice may be especially detrimental for vulnerable defendants such as persons with mental disabilities.

The research also revealed that the protection of the presumption of innocence may be affected by both concrete changes in criminal procedure *and* systemic changes to the justice system. For example, the reform of the prosecution service, the merger of the positions of the Minister of Justice and the Prosecutor General and the abolishment of guarantees of prosecutors' independence exposed the prosecution service to political influences that may impact individual proceedings and cases. The consequences of these changes, combined with the practice of launching proceedings in politicised cases for publicity purposes, create the risk that such proceedings may fall short of the standards of the fair trial.

## Annex 1

Poland case study/ media coverage #1		
1	<b>Reference details/Name/Title (please indicate here how the case has been publicly referred to)</b>	The killing of 10-year old K. in Mrowiny
2	<b>Brief description of the case</b>	The half-naked body of a 10-year old girl with numerous stab wounds around the chest and neck was found in forest nearby Mrowiny, the village where she lived. The day before, after the end of classes, the girl left her school in the early afternoon and headed home (situated about 1 km away from the school). She never reached home and was last seen about 200 m from the place where she lived. Soon, the search for the killer begun. The alleged perpetrator, J.A., was apprehended after three days and it turned out that he knew the girl and her mother. After a 6-hour questioning at the prosecutor's office, the 22-year old man confessed to having murdered K.
3	<b>Timeline of events (briefly outline major events in order to capture the nature of the case)</b>	<ul style="list-style-type: none"> <li>• 13/06/2019 The body of a 10-year old girl, K., is found in forest nearby Mrowiny by a hiker.</li> <li>• 16/06/2019 A suspect is apprehended by the Police. A video recording of that moment is published on the police official website.</li> <li>• 17/06/2019 A photograph of the suspect with visible face, probably taken during the questioning at the prosecutor's office, is published by a Facebook fanpage and goes viral on the social media.</li> <li>• 31/01/2020 Two expert opinions (of a psychiatrist and a sexologist) are delivered saying that the alleged perpetrator does not suffer from any disturbance of mental functions, and thus was fully capable of recognising the significance of his act and controlling his conduct at the time the act was committed.</li> </ul>

4	<p>Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)</p>	<p>This case of violent murder has appalled the public opinion in Poland since the media started to cover it.</p> <p>Some tabloid press titles used very strong expressions when referring to the suspect from the very beginning of the investigation. The suspect was called, for instance, “the beast from Mrowiny”<sup>45</sup> or “the killer of K. from Mrowiny”<sup>46</sup>. To magnify the fact that the suspect knew his alleged victim and her mother (with whom he allegedly was in love)<sup>47</sup> and to emphasise the shock resulting from it, one of the newspapers cited the grieving grandmother of the victim, who said that “this bandit should burn in hell for the harm done to our family” (this excerpt was used as the title of the article).<sup>48</sup></p> <p>Before even the suspect was apprehended by the police, an expert psychiatrist’s opinion was quoted by one of the tabloid newspapers, indicating that the perpetrator knew the victim and it was possible that it was her older colleague, probably suffering from some mental disturbance. The expert was also very confident that the killing had a sexual background.<sup>49</sup></p> <p>The issue of the suspect’s mental health was reported on by the media also at the later stage of the proceedings. The media informed that a famous expert in sexology was involved in preparing an opinion</p>
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<sup>45</sup> SuperExpress, *Kim jest morderca Kristiny? Poznaliśmy przeszłość bestii z Mrowin*, se.pl.

<sup>46</sup> Fakt, *Jest decyzja sądu ws. zabójcy Kristinki z Mrowin*, fakt24.pl.

<sup>47</sup> TOK FM, *Mrowiny. Zabójca 10-letniej Kristiny był zakochany w jej matce i o nią zazdrosny [WIDEO Z ZATRZYMANIA]*, tokfm.pl.

<sup>48</sup> Fakt, *Babcia Kristinki z Mrowin o zabójcy. „Niech smaży się w piekle”*, fakt24.pl.

<sup>49</sup> Fakt, *To on zabił 10-latkę?! Mamy profil psychologiczny sprawcy*, fakt24.pl.

commissioned by the prosecution. The press title revealed that relatives of the suspect have a record of mental disorders, by the way calling him “a degenerate” and implying that he might be “a pervert”.<sup>50</sup>

A video footage of the very moment the suspect was apprehended and transported to the custody was published by the police, arousing controversy.<sup>51</sup> In the almost 2-minute video the police anti-terror squad enters the premises where the suspect was hiding, then we can see a man lying on the floor, face down, having his hands and legs cuffed with combined shackles. Next, the suspect, wearing only a t-shirt and boxers, and barefoot, is transported to the police van (for a moment, he even seems to be dragged or carried by the police officers). After the questioning, the man is seen walked by two police officers to a cell, still incompletely dressed, barefoot and cuffed. Parts of the video were presented in all major nationwide news programmes that day, as well as being available on the Internet.

The Minister of Justice addressed the case during a press conference. In the Minister’s view, this murder was a calculated and thoroughly planned one, and as such, it should be punishable by death penalty, however, he was aware of the fact that introducing such punishment to Polish legal system was impossible because Poland is a member state of the EU. Yet, the Minister emphasised that it was his idea to amend the Criminal Code so that such violent murders are punishable by unconditional life imprisonment.<sup>52</sup> The Minister of Justice (who is also the General Prosecutor) assured that the prosecution would demand the most severe penalty possible for the accused in this case.<sup>53</sup> The stance taken by the Minister of Justice was rather criticised as populist and not suitable for a constitutional minister.<sup>54</sup>

A day after the questioning of the suspect at the prosecutor’s office, an allegedly leaked photograph of the suspect appeared on a local news Facebook fanpage.<sup>55</sup> It was said to have been taken during the questioning. The post was taken down a few hours later but in the meantime it was shared by other users and went viral throughout the social media. The police are investigating the case of disclosure of the suspect’s image.

5	Key issues (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)	<p>The key issues concerning this case were, first, the disclosure of the suspect's physical appearance through a leaked photograph, and second – the correctness of his apprehension (the way he was presented to the public).</p> <p>As mentioned above, the police investigation into the disclosure of the suspect's image did not prove to be effective when it comes to ascertaining the source of the leak.</p> <p>Regarding both issues, the Commissioner for Human Rights (acting as the National Mechanism for the Prevention of Torture) decided to publish a statement, expressing a deep concern about the manner in which the police apprehended and treated the man suspected of committing the murder of a 10-year-old girl from the village of Mrowiny.<sup>56</sup> In the opinion of the National Mechanism for the Prevention of Torture (NMPT), the manner in which the detainee was treated by the law enforcement agencies constituted degrading treatment. According to the opinion, the measures used during the detainee's apprehension and escorting to the place where relevant procedures were conducted were not proportionate to the situation and therefore not justified by any related need. The Ombudsman expressed doubts with regard to the use of the police action group to apprehend the man who did not act as member of an organised criminal group or armed group. The measures used by the police were, in the NMPT's opinion, disproportionate and intended to make a demonstration, to manifest the state's power that can be used in relation to an individual. In particular, the Commissioner's office criticised the use of hand and leg cuffs together with an incapacitating grip to a man who did not resist, as well as the fact that the suspect was not fully dressed and barefoot while being escorted and interrogated – which could have amounted to a violation of his dignity. Finally, the NMPT was also concerned about the fact that the suspect had had no adequate legal aid from the very beginning of the proceedings and the fact</p>
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<sup>50</sup> SuperExpress, *Morderstwo Kristiny z Mrowin. Jakub A. ma zaburzenia seksualne? [NOWE FAKTY]*, se.pl.

<sup>51</sup> Poland, *Mężczyzna zatrzymany do zabójstwa w Mrowinach usłyszał zarzuty*, policja.pl.

<sup>52</sup> WPwiadomości, *Ziobro o zabójstwie Kristiny: "Za takie zbrodnie byłbym zwolennikiem kary śmierci"*, wp.pl.

<sup>53</sup> wMeritum, *Zbigniew Ziobro wydał oświadczenie ws. zatrzymania podejrzanego o mord w Mrowinach*, wmeritum.pl.

<sup>54</sup> T. Pietryga, *Zabójstwo 10-latki z Morwin: niech państwo skupi się na wymierzeniu sprawiedliwości - komentuje Tomasz Pietryga*, rp.pl.

<sup>55</sup> DoRzeczy, *Wyciekło zdjęcie zabójcy 10-letniej Kristiny*, dorzeczy.pl.

<sup>56</sup> Poland, *Statement of the National Mechanism for the Prevention of Torture in connection with the detention and manner of treatment of the man suspected of committing the murder in Mrowiny*, rpo.gov.pl.

		<p>that the questioning before the prosecutor had taken place at night. The unlawful disclosure of the suspect's image was also addressed.</p> <p>The statement of the NMPT was backed by legal experts who called upon the authorities to examine the case thoroughly, refrain from emotional attitude and any demonstrations of power.<sup>57</sup> On the other hand, the Commissioner for Human Rights was attacked both by the politicians of the ruling party<sup>58</sup> and the right-wing media<sup>59</sup> for standing by the murderer instead of the family of the victim.</p> <p>It should be also noted that a major allegation of the suspect's guilt appeared in the media. It was revealed that the suspect confessed to having committed the killing in the police van when he was transported from the prosecutor's office to Mrowiny (where the crime scene inspection was to take place). According to a person who took part in the investigation, the man described to the policemen in detail, moment after moment, how he had killed the girl and then staged a sexual crime.<sup>60</sup></p>
6	Key consequences or implications of the case with regard to the presumption of innocence (with a focus on public reaction to publications in the media which might lead to a public debate)	<p>Since the investigation of the case is still in progress, the possible future impact on the presumption of innocence remains elusive. However, the defence counsel of the accused expressed fear that political pressure would be imposed on the court so that the convicting judgement be as harsh as possible. According to the lawyer, the media have already ascertained the suspect's guilt, whereas such statement is definitely premature (even though he confessed to having committed the act before the prosecutor).<sup>61</sup></p>
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate	Not available – the proceedings is still in the preparatory phase (the investigation), the indictment has not been filed yet to court.

<sup>57</sup> M. Gutowski, P. Kardas, *Nawet mając rację, trzeba uważać, jak się czyni z niej użytek*, edgp.gazetaprawna.pl, and P. Słowik, *Słowik: Bodnar nie stanął po stronie bandyty, lecz w obronie standardów [OPINIA]*, wiadomości.dziennik.pl.

<sup>58</sup> wPolityce, *TYLKO U NAS. Jaki o oświadczeniu RPO: Pokazuje typowy sposób myślenia przedstawicieli PO, którzy myślą: biedni mordercy, biedni przestępcy*, wpolityce.pl.

<sup>59</sup> R. A. Ziemkiewicz, *Ziemkiewicz krytykuje Bodnara: Oddaje się propagandzie, dorzeczy.pl*.

<sup>60</sup> wPolityce, *Nowe informacje ws. zabójstwa 10-letniej Kristiny. To mogła być zemsta. Jakub A. przyznał się w radiowozie*, wpolityce.pl.

<sup>61</sup> E. Wilczyńska, *Prawniczka Jakuba A., który miał zabić 10-letnią Kristinę: "Boję się nacisków politycznych na jak najsurowszy wyrok"*, wroclaw.wyborcza.pl.

	reference details of the case)? How did media report on the decision?	
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<b>Poland case study/ media coverage #2</b>		
1	Reference details/Name/Title (please indicate here how the case has been publicly referred to)	The case of Jacek Kapica, former Minister of Finance
2	Brief description of the case	<p>Between 2005-2009, the number of machines of low-value prizes (such as the so-called “one-armed bandits”) significantly rose in casinos and game rooms across Poland. This trend was a result of a loophole that allowed to win higher prizes – instead of winning several smaller prizes, the machine accumulated the prizes and allowed to obtain a bigger win. This practice led to a situation in which the owners of the machines paid set tax for smaller wins (approx. 80-100 EUR), instead of 45% tax of the won amount.</p> <p>This practice was a part of a bigger scandal revealed by media in 2009. “Rzeczpospolita” daily published transcripts of conversations between one member of the Parliament, Z.C., and casinos owner, R.C. The transcripts showed how the lobbyist influence the works on the amendments to the Gambling Act which was supposed to introduce a new tax on gambling. After the contacts between the MP and the businessman, this amendment was withdrawn from the draft law. The so-called "gambling scandal" was often presented by the members of Law and Justice (back then – in opposition, and since 2015 a governing majority) as an example of corruption of the Civic Platform which formed the government back then.</p> <p>Jacek Kapica was the deputy Minister of Finance between 2008 and 2015 in the Civic Platform's government. He was responsible for, among others, supervising the works of the Customs Office that collects taxes from gambling.</p> <p>In 2009, the prosecution started an investigation concerning lack of effective supervision over the gambling sector and collecting taxes from gambling. Within the investigation, the prosecution presented charges to over 200 persons. In 2014, the prosecution split the case into two proceedings: one concerning the gambling and casino operators, and</p>

	<p>the second one concerning the responsibility of the Ministry of Finance’s management. The proceedings in the latter case was eventually discontinued in March 2017.</p> <p>In December 2017, the National Prosecutor decided to re-open the case. In March 2018, Jacek Kapica was arrested. The prosecution directed the indictment in July 2018. Jacek Kapica is accused of among others failing to effectively supervise the works of Customs Service and suspending the control of 149 low-value prize gambling machines. According to the prosecution, Jacek Kapica acted in an attempt to receive a personal benefit of 21 billion PLN (approx. 5 billion EUR).</p> <p>The proceedings are still pending.</p>
<p>3 Timeline of events (briefly outline major events in order to capture the nature of the case)</p>	<ul style="list-style-type: none"> <li>• October 2009 – media revealed the so-called "gambling scandal". The part of the scandal is the problem of a rising number of low-prize gambling machines.</li> <li>• 2009 – the Appellate Prosecution in Białystok started an investigation in the case concerning the tax frauds related to the operation of low-prize gambling machines.</li> <li>• 2014 – the prosecution split the proceedings into two separate ones; the proceedings concerning an alleged responsibility of the Ministry of Finance's management was directed to the Prosecution Office in Poznań.</li> <li>• March 2017 – the Prosecution discontinued the proceedings concerning the alleged responsibility of Ministry of Finance's management.</li> <li>• December 2017 – the National Prosecutor decided to re-open the case.</li> <li>• March 2018 – Jacek Kapica was arrested.</li> <li>• May 2018 – the court decided that there were no grounds to arrest Jacek Kapica.</li> <li>• July 2018 – the prosecution directed indictment to the court. The proceedings are still pending.</li> </ul>
<p>4 Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or</p>	<p>The arrest of Jacek Kapica brought a lot of media attention.</p> <p>Upon his request, the media referred to the arrested as Jacek Kapica, without using only the first letter of his family name.</p>

<p>other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)</p>	<p>On the day of his arrest and the following days, several representatives of the law enforcement and government made comments regarding the case. First of all, the National Prosecutor said in the radio interview that "most probably, the prosecution will direct an indictment soon".<sup>62</sup> Then, during a press conference, the National Prosecutor added that "Jacek Kapica's failure in supervision" had given rise to the practice, according to which the low-prize machines were installed in wrong places. The National Prosecutor also revealed some parts of the evidence material, stating that "from what we know, the Deputy Minister of Finance had broad knowledge on this practice (installing the low-prize gambling machines - ed.) and yet he did not undertake any actions". During the same press conference, the Prosecutor General Zbigniew Ziobro said that "the prosecution collected evidence which makes it highly possible that in the case a crime was committed". Furthermore, the Prosecutor General suggested that Jacek Kapica had not acted on his own but under pressure coming from higher-rank governmental officials.<sup>63</sup> Furthermore, on the day of the arrest, the Deputy Minister of Justice Patryk Jaki said that "the case is about 20 billion PLN which [the State's budget - ed.] lost as a consequence of the gambling scandal. The prosecutors collected very solid evidence".<sup>64</sup> Deputy Minister of Justice also suggested that the previous investigation in this case had been ineffective due to the lack of a political will from the former government.<sup>65</sup></p> <p>There is no available footage from the moment Jacek Kapica was arrested.</p>
<p>5 Key issues (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)</p>	<p>Because 10 years passed between the irregularities in supervising the gambling market were reported for the first time and the arrest of Jacek Kapica, the media did not cover in details the background of the case but rather focused on the issues whether the arrest was a part of the political rivalry between Law and Justice and the largest opposition party, Civic Platform.</p> <p>Due to the political nature of the case, the comments were very polarized – the representatives of the law enforcement and the government suggested that Jacek Kapica had committed a crime, whereas the representatives of the opposition parties claimed that Jacek Kapica's arrest was a part of the governing majority vindictive attitude.</p>

<sup>62</sup> Polskie Radio, Afera hazardowa. Bogdan Świączkowski: Jacek K. niebawem ma stanąć przed sądem.

<sup>63</sup> Gazetaprawna.pl, Ziobro: Nie wykluczamy, że na Jacka K. były wywierane naciski.

<sup>64</sup> Business Insider, Wiceminister finansów w rządzie PO-PSL Jacek Kapica zatrzymany przez CBA.

<sup>65</sup> Polskie Radio, Patryk Jaki: wystarczyło zmienić sposób myślenia o państwie, żeby postawić zarzuty Jackowi K..

On the one hand, the prosecution and the representatives of the government commented on the arrest suggesting that the case was solid and leaving no doubt for Jacek Kapica's guilt (see above). Some of the representatives of the governing majority used the narration showing the improvement in a way in which the criminal justice system addresses this case. "This arrest is a proof that the justice system works" – said Beata Mazurek, Law and Justice's spokesperson.<sup>66</sup> Finally, politicians made also comments indicating Jacek Kapica's guilt. For example, Bartosz Józwiak, a member of the opposition party Kukiz 15, made a comment stating that "I wouldn't underestimate Jacek Kapica's role in the gambling scandal. He won't evade justice".<sup>67</sup> The Member of the Parliament and member of Law and Justice, Marcin Horała stated that "Jacek K. had caused damage to Polish entrepreneurs in many ways. During his time in the office, there was chaos in the tax administration. The time of impunity is over and charges are pressed in cases in which damages could be assessed in millions".<sup>68</sup>

The media critical of the government also paid attention to how the investigation was conducted. For example, OKO.press analyzed whether there were reasons for arresting Jacek Kapica at that particular moment. According to a lawyer quoted by the media outlet, "since the proceeding was pending for several years and the prosecution gathered all necessary evidence, there was no risk that the arrest could confabulate or hide".<sup>69</sup> Furthermore, "Gazeta Wyborcza" quoted its materials published a couple of years earlier while reporting on the previous investigation in this case. In this material, Jacek Kapica was presented as an "honest civil servant" and "a positive hero of the gambling scandal".<sup>70</sup> Furthermore, media questioned the way the prosecution estimated the potential personal benefit in the case, amounting to the huge sum of 21 billion PLN.

Third, Jacek Kapica commented on his case as well. In a TV interview, he claimed that his case was a part of a bigger political fight, in which the main target is the former Prime Minister Donald Tusk, indicating that his arrest was "a political show".<sup>71</sup>

<sup>66</sup> Polskie Radio, "Zatrzymanie Jacka K. świadczy o tym, że wymiar sprawiedliwości działa".

<sup>67</sup> Polskie Radio 24.pl, Akt oskarżenia przeciwko Jackowi Kapicy. Polityk Kukiz'15: nie ucieknie on od odpowiedzialności.

<sup>68</sup> Polskie Radio, CBA zatrzymało b. wiceministra finansów w rządach PO/PSL.

<sup>69</sup> Mariusz Jałoszewski, Kapicę zatrzymano, bo Zbigniew Ziobro ma „inną wizję i inne oczekiwania wobec prokuratury”, Oko.press.

<sup>70</sup> Sylwia Czubkowska, Maciej Orłowski, Jacek Kapica, wiceminister finansów w rządzie PO-PSL, zatrzymany ws. afery hazardowej, Gazeta Wyborcza.

<sup>71</sup> TVN24, Jest akt oskarżenia przeciwko byłemu wiceministrowi finansów, and TVN24, Kapica o swoim zatrzymaniu: spektakl polityczny.

6	Key consequences or implications of the case with regard to the presumption of innocence (with a focus on public reaction to publications in the media which might lead to a public debate)	As the proceeding is still ongoing, it is difficult to assess how the media coverage and politicians' statements will influence the presumption of innocence. The key matter in this case will be analyzing whether Jacek Kapica, when acting in the capacity of the Deputy Minister of Finance, failed to effectively supervise the gambling market. Second, it will be crucial to assess properly the scope of the State's budget financial loss.
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?	N/A

Member State case study/ media coverage #3		
1	Reference details/Name/Title (please indicate here how the case has been publicly referred to)	The killing of Paweł Adamowicz, the mayor of Gdańsk
2	Brief description of the case	<p>The case concerns the killing of Paweł Adamowicz in January 2019. Paweł Adamowicz, a mayor of Gdańsk, was stabbed with a knife on a stage during a final of an annual charity event in Poland. He died the following day.</p> <p>The moment of the attack was captured by a TV team and witnessed by several thousands of people gathered during the event. After the stabbing, the perpetrator took a microphone and made a statement on his unfair treatment in prison which he left a couple weeks earlier and about the former government of the Civic Platform. After that, the perpetrator was apprehended by the event's security and then arrested by the Police.</p>

	<p>Prior to his death, Paweł Adamowicz was numerous times attacked by the public media on the grounds of his alleged mismanagement of the City Hall in Gdańsk. The case was widely covered by media and triggered a nation-wide discussion in the prevalence of hate speech in public discourse (both online as well as in media).</p>
<p>3 Timeline of events (briefly outline major events in order to capture the nature of the case)</p>	<ul style="list-style-type: none"> <li>• 13 January 2019 – Paweł Adamowicz, the mayor of Gdańsk, was stabbed several times on a scene during a charity event</li> <li>• 13 January 2019 – the Police apprehended the perpetrator</li> <li>• 14 January 2019 – Paweł Adamowicz died in a hospital</li> <li>• 14 January 2019 – the court ordered the pre-trial detention for the perpetrator, over the year the court prolonged the pre-trial detention a couple of times</li> </ul> <p>Over the year, the perpetrator was psychologically evaluated twice. The investigation in the case is on-going, the case has not been directed to the court yet.</p>
<p>4 Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)</p>	<p>The charity event was covered by media - a TV group was present at the scene when the stabbing took place and there were also many other people recording the event standing in the front of the scene. Hence, the footage of the crime was almost immediately available in the public sphere – in media and social media. In the footage used by the media, the perpetrator’s face was covered.</p> <p>After the stabbing, the perpetrator took a microphone and made a short statement during which he revealed his name and family name. Media, however, did not use his full name in its reports (although it is possible to establish</p>

the name by internet search) and referred to the perpetrator as Stefan W. Alternatively, in many other publications media also used terms such as e.g. Adamowicz's killer<sup>72</sup>, Adamowicz's murder<sup>73</sup> or a psychopath<sup>74</sup>.

Online, there are numerous footages of Stefan W. being transferred to the court or to the prison facility. In this footage, Stefan W. is handcuffed, he wears his clothes (not prison clothes) and his face is not covered. Still, the pictures presented by media<sup>75</sup> or by the Police on its social media channels<sup>76</sup> do not reveal Stefan W.'s face. In January 2019, media also published a leaked photo of Stefan W. taken just after his arrest – in this photo Stefan W. wears prison uniform, his face is bruised and his hand is bandaged. In this photo, Stefan W. is handcuffed. The Police started an investigation concerning the unlawful release of these materials.<sup>77</sup>

As the case attracted wide public attention, some media outlets also started publishing Stefan W.'s private photos. In these photos, only Stefan W.'s eyes are covered by a black strip, yet the rest of his face could be easily recognized.<sup>78</sup> As a part of these publications, media presented information from Stefan W. former friends and colleagues suggesting that he used to train how to use knives and "he was passionate about death".<sup>79</sup> These publications contributed to the narrative that Stefan W. planned his actions and was aware of the consequences of his wrongdoings (see further point 5).

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<sup>72</sup> Poland, Wyciekł list zabójcy Adamowicza. Szokująca treść, DoRzeczy.pl, and Włodkowska K., Zabójca Pawła Adamowicza: Posiedzę dwa lata i wyjdę, Wyborcza.

<sup>73</sup> Poland, Co się dzieje z mordercą Pawła Adamowicza? Gdzie teraz przebywa Stefan W.?, and Morderca Adamowicza nie wie, kogo zamordował? Wstrząsające wyznanie matki zabójcy, Super Express.

<sup>74</sup> Chrabota B., Chrabota: Atak na Adamowicza to próba politycznego zabójstwa, Rzeczpospolita.

<sup>75</sup> Poland, Służby wiedziały o poglądach politycznych Stefana W. Co z tym zrobiły?, TVN24.pl.

<sup>76</sup> Polska Policja, Twitter.

<sup>77</sup> Poland, Zabójca Adamowicza ze statusem pokrzywdzonego. Bo wyciekły jego zdjęcia, Dziennik.pl.

<sup>78</sup> Poland, Morderca Adamowicza nie wie, kogo zamordował? Wstrząsające wyznanie matki zabójcy, Super Express, or Poland, Zabił prezydenta na oczach Polaków. Kim jest Stefan W.?, Fakt.pl, or Szczęsny K., To on zabił Pawła Adamowicza! „Stefan W. leczył się psychiatrycznie, ma schizofrenię paranoidalną”.

<sup>79</sup> Poland, Kim jest Stefan W., zabójca prezydenta Gdańska Pawła Adamowicza? [reportaż UWAGA! TVN], Dziennik.pl.

	<p>The case was widely discussed during the officials' press conferences and public statements. On 30 January 2019, the Minister of Justice informed the Parliament about Stefan W. criminal record and his previous stay in prison (as a part of the allegations in the public discussion concerned a potential influence of public media available in the prison facility on initiated hatred against Mayor Adamowicz). During his statement, Minister of Justice once presented Stefan W.'s full name<sup>80</sup> and described him as "a dangerous criminal".<sup>81</sup></p> <p>On the further stages of the proceeding, the prosecution office organized either press conferences or gave comments for journalists. In these statements, the prosecution referred to the perpetrator as Stefan W. Prosecution office's statements concern mainly the progress of the investigation or prosecution's actions such as e.g. motion to the court to prolong the pre-trial detention, hearing witness or ordering new psychological evaluation.<sup>82</sup></p>
<p>5 Key issues (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)</p>	<p>In this case, the main issue related to the presumption of innocence regarded Stefan W.'s mental stability and whether he was capable of controlling his actions. In media coverage, the main discussed issue concerned the fact whether Stefan W. can face criminal charges and bear criminal responsibility or should be declared mentally unstable and could not face criminal charges.</p> <p>In media coverage, there has been several media material speculating about Stefan W. mental health. Some media outlets suggested that he planned his actions in advance and he could not act spontaneously. In these reports, the media focused on Stefan W. criminal record and his stay in prison while serving the previous sentence. In some media reports, there are information (not confirmed with the prosecution office) that Stefan W. used to</p>

<sup>80</sup> Poland, Zbigniew Ziobro podał pełne nazwisko Stefana W. w Sejmie. Podejrzany może go za to pozwać, Gazeta.pl.

<sup>81</sup> Poland, Ziobro o Stefanie W.: pozostawał w stanie remisji, kategorycznie odmawiał leczenia, Tvn24.pl.

<sup>82</sup> Poland, Sprawa zabójstwa Adamowicza: Stefan W. pozostanie w areszcie co najmniej do lipca, Gazeta Bałtycka, or Prokuratura mówi o śledztwie ws. zabójstwa Pawła Adamowicza, TVP Info.

receive mental health treatment.<sup>83</sup> Furthermore, when it comes to Stefan W. past, media underlined the role of Stefan W.'s mother who notified Police a couple of times that her son should not be released from prison as he would commit a crime again. In these reports, the dominating information is the fact that Stefan W.'s mother warned the Police about her son's unstable mental conditions and her concerns about whether he should be released from prison after serving the sentence.<sup>84</sup>

Just after the killing, the media quoted opinions of expert criminologists stating that Stefan W.'s behavior just after the attacks revealed the signs of deep mental disturbing, even paranoid schizophrenia.<sup>85</sup> These opinions were not backed up by any psychologist evaluation and were based only on experts' analysis of the situation right after the attack. Furthermore, with the progress of the investigation media started quoting materials from the investigation claimed that the results of the psychological evaluation proofed that Stefan W. is mentally unstable and should not face criminal charges. In each of these cases, the prosecution office reacted to the media reports saying that the proceeding is still on-going and it has not reached any final conclusions.<sup>86</sup>

On the other hand, some media reports suggest that Stefan W. did not have any mental health problems and was able to control his behavior. One media report quotes former inmates serving the sentence with Stefan W. to whom he allegedly said about his plans to commit another crime after release from prison. This media report

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<sup>83</sup> Szczęsny K., To on zabił Pawła Adamowicza! „Stefan W. leczył się psychiatrycznie, ma schizofrenię paranoidalną”.

<sup>84</sup> Poland, "Śledczy muszą rozstrzygnąć, czy zgłoszenie matki zostało potraktowane poważnie", Tvn24.pl.

<sup>85</sup> Poland, Nazywam się Stefan... W najnowszym numerze tygodnika „Sieci”: Co wiemy o zabójcy Pawła Adamowicza?.

<sup>86</sup> Poland, "Zabójca Adamowicza nie trafi do więzienia, zostanie uznany za niepoczytalnego"? Oświadczenie Prokuratury Okręgowej w Gdańsku, Gdansk Nasze Miasto, available at: <https://gdansk.naszemiasto.pl/zabojca-adamowicza-nie-trafi-do-wiezienia-zostanie-uznany/ar/c1-5156913> and Morderca Pawła Adamowicza był niepoczytalny? "Śledztwo powinno zostać zakończone, DoRzeczy.pl.

		<p>describes Stefan W.'s fascination with a military equipment (especially knives) and materials from the investigation secured by the Police after January 2019.<sup>87</sup></p> <p>In their public statements, Paweł Adamowicz's family, e.g. Adamowicz's brother, expressed doubts regarding expert psychiatrists' opinions concerning Stefan W.'s mental health.<sup>88</sup></p>
6	Key consequences or implications of the case with regard to the presumption of innocence (with a focus on public reaction to publications in the media which might lead to a public debate)	As the investigation is still on-going, it is not possible to say whether there is any impact of the public discussion concerning Stefan W. on the final outcome of the case and the presumption of innocence.
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?	Not applicable.

<sup>87</sup> Włodkowska K., Zabójca Pawła Adamowicza: Posiedzę dwa lata i wyjdę, Wyborcza.

<sup>88</sup> Poland, Opinia biegłych o mordercy Adamowicza "budzi poważne wątpliwości", TVN24.pl.

