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Part One

Ecumenical Theological Thought

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Rights (Claims) of Parents and the Child's Welfare

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In many contemporary debates and ethical disputes, in particular in those which concern bioethical issues, an argument over *the right of parents to have or not to have a child* arises. On the one hand, we hear some quite common arguments such as: "We have the right to have a child." This argument, put forward in the disputes concerning the in vitro fertilization, comes from the couples suffering from infertility, who further strengthen their standpoint with a statement somehow especially justifying this "right" — "we love each other." Thus, a claim included in the form of law and supported with strong ethical-sounding arguments appears as a consequence: "Since we love each other very much, we have the right to have a child." The same reasoning appears in the discussions concerning the legalization of adoption of children by homosexual relationships: "If these people are in love and want to have a child and raise it, they should be allowed to execute that right."

On the other hand, there appear arguments which in a comparable style and based on an analogous "legal" structure, express firm opposition toward having a child. We often hear that "a woman has the right to abortion." Behind this statement lies a more or less immediately realized opposition — between the articulated woman's right to terminate the life of the fetus and the alleged rights of the child to life.

The problem of this opposition is the hallmark of our civilization and the concept of democracy. Saint John Paul II in his encyclical *Evangelium Vitae* wrote very distinctly and unequivocally: "Certainly the purpose of civil law is different and more limited in scope than that of the moral law.

But 'in no sphere of life can the civil law take the place of conscience or dictate norms concerning things which are outside its competence', which is that of ensuring the common good of people through the recognition and defence of their fundamental rights, and the promotion of peace and of public morality. The real purpose of civil law is to guarantee an ordered social coexistence in true justice, so that all may 'lead a quiet and peaceable life, godly and respectful in every way' (1 Tim 2:2). Precisely for this reason, the civil law must ensure that all members of society enjoy respect for certain fundamental rights that innately belong to the person, rights which every positive law must recognize and guarantee. First and fundamental among these is the inviolable right to life of every innocent human being."[1]

Pope reiterates also the clear teaching of Saint Thomas Aquinas, who writes that "human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence."[2] And again: "Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is not really a law but rather a corruption of the law."[3]

The Pope's teaching is in a stark contrast to the ideology of today's distributed so-called reproductive rights. This ideology is also contrary to the original human rights, including the rights of the child. The reflection undertaken herein follows the above-described situation. Its starting point is the ideologised concept of the so-called reproductive rights, and it seeks justification in the so-called reproductive health. Then the rights of a child will be outlined in the light of chosen acts of the positive law. This should allow for the complementation of the vision of positive law with the concept of children's rights proposed by John Paul II, which is more axiomatic than juridical.

1. "Reproductive health" and "reproductive rights"

According to the World Health Organization definition, the "[reproductive] rights rest on the recognition of the basic rights of all couples

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[1] John Paul II: *Encyclical Letter "Evangelium vitae."* March 25, 1993 (henceforth: EV), no. 71.

[2] *Summa Theologiae*, I—II, q. 93, a. 3, ad 2um.

[3] Ibidem, I—II, q. 95, a. 2. Aquinas quotes Saint Augustine: *Non videtur esse lex, quae iusta non fuerit*; *De Libero Arbitrio*, I, 5, 11: PL 32, 1227; EV, no. 72.

and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence."[4]

Reproductive rights are treated as elements of the basic human rights and are connected with the "reproductive health." This term entered the language of the United Nations documents in 1972, at the same time when it was adopted by Jose Barzelatto, head of the WHO human reproduction programme.[5]

Twenty years later, the term "reproductive health" appeared in the WHO report prepared by Mahmoud Fathalla, the successor of Barzelatto. Interpretation of the then presented vague term, included "the fertility regulation," of which part was "the termination of pregnancy."

By promoting anti-birth strategy, WHO entered constitutively in the concept of "reproductive health" and "reproductive rights," and at the same time appealed very strongly and equally unreasonably to human rights (i.e. displayed a rights-based approach).

The WHO definition of reproductive health was propagated during the population conference in Cairo in 1994. The results of this conference were, among others, reproductive health programmes promoted by a number of organizations such as USAID, UNFPA, Population Council, Ford and MacArthur Foundations. Support for the enumerated organizations was provided by the World Bank and other institutions.

Despite the expansion on a global scale, individual states have rejected demands to recognize abortion as a human right, accepted conference documents (from Cairo, and a year later from famous conference on the woman in Beijing), with reservations, rejecting the term "reproductive health" and other similar, together with the definition of "fertility regulation" promoted by the WHO.

In 1996, the movement for "reproductive health" adopted a slightly different approach, forcing the UN treaty bodies dealing with human rights to reinterpret the existing rights, in such a way that they include the right to abortion. Then, at the level of domestic courts, there began a process of questioning the national provisions on the protection of the unborn as incompatible with human rights treaties. Another progress in the promotion of reproductive rights took place in 2012, when the "Office of

[4] The United Nations: Programme of action of the International Conference on Population and Development, Cairo, 1994. New York 1995, paragraph 7.3.

[5] Cf. S. Yoshihara: "Fiasko praw reprodukcyjnych na gruncie prawa międzynarodowego" — http://www.ordoiuris.pl/fiasko-praw-reprodukcyjnych-na-gruncie-prawa-miedzynarodowego,3315,analiza-prawna.html (accessed 12.12.2014).

the High Commissioner for Human Rights issued technical guidelines on abortion as a human right included in the right to health."[6] However, due to the need to "adjust" data on abortion, in 2011 the movement met with reservations, coming from the General Assembly of the United Nation.

The following years brought new attempts at new strategies: smuggling of the term "reproductive health" in the appendix to the report of the Secretary General for 2007, or in the contents of binding international treaty in 2006, in the Convention on the Rights of Persons with Disabilities.

Terminological ambiguities related to the scope of the concept of reproductive health contributed to the fact that there are interpretations indicating that the concept of reproductive health does not include "any new rights," as well as, indoctrination efforts in expanding the circle of supporters of the "right" to abortion.

Not analysing the problem thoroughly, one should pay attention to the contemporary repercussions in a contemporary Polish context. These were expressed in recent months as the dispute over the "Chazan case" which can be equaled to the conflict of "the right to abortion" versus the standpoint of a doctor supporting "the right to live." The statements on the parliamentary press conference organized by the Deputy Speaker Wanda Nowicka on March 8, 2014 were another expression of the problem: According to Nowicka, "problems in the private sphere are associated with violence against women, since the law (on the prevention of domestic violence) does not protect them adequately."[7] As the Deputy Speaker stated, these are also issues "related to reproductive rights that mean the termination of pregnancy, in vitro [fertilization] and access to contraception."[8]

Professor Magdalena Środa, in turn, emphasized that women do not demand "nothing extraordinary, but the basic rights."[9] In her assessment, Polish women still do not have reproductive rights, namely the right to sex education, contraception refund and in vitro [fertilization] funding. "These rights must be guaranteed, even if no one would exercise them"[10] — she added.

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[6] Ibidem.

[7] Wanda Nowicka (Deputy speaker of Sejm) — http://samorzad.pap.pl/palio/html.run?_Instance=cms_samorzad.pap.pl&_PageID=2&s=depesza&dz=redakcyjne.sejm&dep=105056&data=&_CheckSum=-524941045 (accessed 12.12.2014).

[8] Ibidem.

[9] Sejm — Lower Chamber of the Polish Parliament: Conference organized to celebrate Women's day. Cf. http://www.tvpparlament.pl/aktualnosci/sejm-konferencja-z-okazji-dnia-kobiet/6689794 (accessed 12.12.2014).

[10] Ibidem.

What is the most striking, however, in this briefly signalled ideological jargon, is the rendering of quite ambiguous "reproductive rights" as "human rights," while at the same time completely ignoring the rights of the child, who becomes, in the context of aforementioned reproductive rights, a disposable object.

2. Rights of the child in chosen legal acts of positive law

In the light of the Act of January 6, 2000 on the Ombudsman for Children, one can define a child as a legal subject, and indicate its basic individual rights:

Article 2.

Within the meaning of the Act, a child is every person from the moment of conception until the age of majority.

The age of majority is set forth in separate regulations.

Article 3.

1. The ombudsman shall take measures on terms set forth in this Act to provide the child with full, harmonious development, respecting the dignity and subjectivity of the child.
2. The Ombudsman Acts for the rights of the child, in particular:
   the right to life and health protection,
   the right to be raised in a family,
   the right to decent social conditions,
   the right to education.
3. The ombudsman shall take measures aiming at protection of the child against violence, cruelty, exploitation, demoralization, neglect and other forms of maltreatment.
4. The ombudsman shall provide disabled children with special care and help.
5. The ombudsman shall promote the rights of the child and ways to protect them.[11]

The Polish act, therefore, at first emphasizes the subjectivity itself, of a child as a human being, at the same time defines this subjectivity from

[11] Act of January 6, 2000 on the Ombudsman for Children, prepared on the basis of: *Journal of Laws* 2000 r. no. 6, item. 69, from 2008 no. 214, item. 1345, from 2010 no. 182, item 1228, no 197, item 1307, from 2011 no. 168, item 1004. (English version — The Act of 6th January 2000 on the Ombudsman for Children, *Journal of Laws* of 6th January 2000 — http://brpd.gov.pl/sites/default/files/ustawa_o_rpd_en.pdf [accessed 12.12.2014]).

the moment of conception. It also indicates toward a (meager) catalogue of children's rights which, however, is arranged in a certain axiological space — from the fundamental right to life, through the right to education in the family, which implies what is the potential and specificity of such education — education to love, education to the moral values of life and participation in society, to end with the right to decent development conditions.

One can complete this catalogue of children's rights, based on the norms of international law. In particular, two legal acts are worth considering here — the Convention on the Rights of the Child adopted by the United Nations on November 20, 1989,[12] and the European Convention on the Exercise of Children's Rights, prepared in Strasbourg on January 25, 1996.[13]

The first act is especially worth noting, since it clearly stresses that children are subjects of certain inalienable freedoms and rights of all human beings by the virtue of their humanity. The Convention on the Rights of the Child is an international human rights treaty, the aim of which is to ensure that all children and each child individually have the right to survival, health and education. The convention also emphasizes the child's right to a caring family environment, to play and to have access to culture; to protection from exploitation and abuse of any kind. It conveys the belief that the right of a child is also to be heard and child's opinion or views to be taken into account when dealing with a variety of key issues.

The Convention of 1989 is the culmination of more than 60-year-long history of advocacy for the rights of the youngest human beings. It is worth noting and stressing that it had been developed by non-governmental organizations and experts in the field of human rights, and passed owing to an unusual consensus of governments (except two) at the international level.

It is believed that the Convention on the Rights of the Child is a unique document, due to the fact that the rights of the child are its subject overall. It also has a universal value — the object of interest is all children, in all situations, in the global dimension of the international community. It also has the unconditional character, so it is also an appeal addressed to the government institutions that do not have sufficient resources for the effective protection of children's rights. Finally, the convention is definitely opting for the non-transferability, indivisibility, interdependence and mutual equality of these rights.

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[12] *Journal of Laws* 1991 no. 120 item 526 — http://isap.sejm.gov.pl/DetailsServlet?id=WDU19911200526 (accessed 12.12.2014).

[13] *Journal of Laws* 2000 no. 107 item 1128 — http://isap.sejm.gov.pl/DetailsServlet?id=WDU20001071128 (accessed 12.12.2014).

The Convention on the Rights of the Child is based on four basic principles. The first two of these are general and apply to the entire human population, two others — relate to children in a special way.

The first two universal principles indicate toward the prohibition of discrimination and the right to survival and development. The first rule defines the prohibition of the "discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[14] The second rule defines the right to development also in terms of physical, emotional, psychosocial, cognitive, social and cultural development.

Two detailed and specific rules apply to priority character of actions in the best interests of the children, taken both by the state, administrative or judicial authorities, as well as by family and to possibility of the free expression of views and opinions of children who should be heard and treated with due respect.

Built on these principles, the rights of children create a detailed catalogue which includes civil, social, cultural and political (for older children) rights. An exception is the exclusion of the economic rights which have been left under the supervision of adults.

The rights of the child:

- the right to life and development,
- the right to a civil status,
- the right to acquire a nationality,
- the right of the child to a family,
- the right to know his or her genetic origin, the right to be educated by the biological parents;
- the right to the freedom of religion and believes,
- the right to the freedom of expression of views, which are to be respected by adults;
- the freedom from physical or mental violence, exploitation, cruelty and sexual abuse;
- the freedom from direct participation in hostilities (up to 15 years of age),
- a ban on the use of the death penalty or life imprisonment sentence against a child.

Social rights:

- the right to benefit from social security,

[14] The United Nations*:* Convention on the Rights of the Child, November 20, 1989 (henceforth: CRC), Art. 2,1 — http://www.un.org/documents/ga/res/44/a44r025.htm (accessed 12.12.2014).

- the right to the enjoyment of the highest attainable standard of health care,
- the right to a decent standard of life,
- the right to rest and leisure, to engage in play and recreational activities.

Cultural rights:

- the right to education (primary education and secondary education compulsory and available free to all),
- the right to the variability of his or her rights,
- the right to use the culture,
- the right of ethnic minorities to enjoy their own culture, to profess and practice their own religion.

Political rights:

- the right to freedom of association and to freedom of peaceful assembly,
- the right to freedom of expression, freedom to seek and impart information and ideas of all kinds;
- the right to freedom of thought, conscience and religion.[15]

Recognizing the significance and importance of the above-mentioned legal acts, one could propose some critical comments, which arise from the particular option of the philosophy of law. Firstly, it seems that the fact of a specific definition of the child, as contained in the convention may be worrisome: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[16] When it comes to the upper age limit for being a child, it is defined here precisely and unequivocally, however the convention lacks the wording that the child exists from the moment of conception. Another article provides: "[…] the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents,"[17] might suggest that the lower limit to recognize that one is a child is the moment of birth. In this perspective — the rights of the fetus and an unborn child are completely abolished with the claims of others (in the form of the so-called right to abortion).

The problem remains within philosophical justification of these laws — a reference to the principle of non-discrimination and the right to development do not indicate an anthropological basis of these laws. If we are commanded to respect every human being equally, regardless of his

[15] See CRC, Part I (articles 1—41).

[16] CRC, Art. 1.

[17] CRC, Art. 7,1.

beliefs, race, age, or ethnicity, or one points to the right of personal development, it is certainly a good idea to justify such wording — demands with the fundament of human dignity.

These dilemmas, characteristic for the concept of human rights, stemming from the perspective of positive law and not from the legal and natural perspective, have and may have their significance.

This is probably the reason why in practical dispute concerning human rights, their interpretation is used to manipulate. They are respected depending on this manipulation. In practice, it happens that the rights of the child are manipulated by ideologues. Today, for example, it takes the form of the withdrawal of parents' rights to educate their child because of "an offense," which is considered to be the use of any type of physical punishment, oral, harsh scolding, but also a refusal to replace sex education institutions with education for love, which is the prerogative of parents through the sex education, which becomes the ideological policy operation. Contemporary situations where parental rights are taken away on the basis of a slap, disagreement for the "gender" education, or due to a "thought crime" (externalized attitude stereotypically defined as homophobia, xenophobia) seem to interfere with one of the articles of the Convention: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."[18]

These situations, showing not so much the legal gaps, but the gap in anthropological-axiological basis of the laws, point to the need to take the voice of the Church into account.

3. A concept of the rights of the child by Saint John Paul II

John Paul II, who in his consistent personalism and relentless struggle for the "culture of life" lavished every man equally and with the same commitment, used a kind of a preferential option when it comes to children and adolescents.

Stressing that the man is the first and the main aim of the Church, he noticed the uniqueness of this aim, which is the child. This uniqueness was proved to John Paul II by the fact of the Incarnation of God-Man:

[18] CRC, Art. 7.

"The highly favoured Son of God becomes present among us as a newborn baby; gathered around him, the children of every nation on earth feel his eyes upon them, eyes full of the Heavenly Father's love, and they rejoice because God loves them. People cannot live without love. They are called to love God and their neighbour, but in order to love properly they must be certain that God loves them."[19]

The fact of the Incarnation of God and his coming into the world as a child was not symbolic in nature, but thoroughly real and existential. Jesus, in his mature teaching, has made a clear promotion of the dignity and rights of the child. John Paul II, during his apostolic journey to Poland in 1979, said: "No one of us can ever forget the following words of Jesus; 'Let the children come to me, and do not hinder them' (Lk 18:16). I want to be, before you dear Polish children, a living echo of these words of our Saviour, particularly in this year in which the Year of the Child is celebrated throughout the whole world. With my thought and with my heart I embrace the infants that are still in the arms of their fathers and mothers. May those loving arms of parents never cease to exist! May the number be extremely small on Polish soil of those who are known as 'social' orphans, coming from broken homes or from families that are unable to educate their own children. May all the children of pre-school age have easy access to Christ. May they be prepared with joy to receive him in the Eucharist. May they grow 'in wisdom and in stature, and in favour with God and man' (Lk 2:52), as he himself grew, in the house of Nazareth."[20]

The Pope's words in a very simple, yet fundamental, way, point to a genetic natural family environment as a factor necessary for the full development of the individual child. One can see the Pope's utterance, on the one hand, as only to see the child as a person in the community of the nation, as a human being endowed with dignity in the community of social life subjects. One can also, and no doubt one should, see this fundamental relationship between parents and children, which creates the family community. This topic in the days of John Paul II and the beginning of his pontificate gained its momentum due to increasing plague of divorces, social orphanhood and breakdown of family ties. Today, it gains its dramatic concretization in a form of ideological currents, which redefine the term and model of marriage, in this way taking away from the child the possibility to grow in the natural environment comprised of the mother and the father (and not the "parent 1" and the "parent 2").

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[19] John Paul II: *Letter to Children in the Year of the Family "Tra pochi giorno"*, December 13, 1994 — http://w2.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_13121994_children.html.

[20] John Paul II: *Apostolic Journey to Poland, Welcoming Ceremony in Gniezno. Address* (June 3, 1979), no. 2.

Emphasizing this genetic relationship between the child and parents, Saint John Paul II also confirmed and emphasized, in the new cultural context, the fundamental rights of the child and the basic duties of parents. Their mutual relation is governed by the principle of subsidiarity, which determines both the authority and duties of parents toward the child, but also equally their inviolable skills and powers in relation to higher authorities and institutions (school, state). Speaking on the rights of the child, John Paul II noticed the right to spiritual development and associated with it the conditions for its implementation, including education for a life of faith, the right to pray and the right to the use the sacraments. Rights treated this way were seen not solely in their judicial aspect — their reference point was and remained the authentic good of the child, his or her dignity and destiny. One could say that this is not due to the negative principle — the prohibition of discrimination, as stipulated by the convention — but because of the positive principle: affirmation of good and dignity of the child, John Paul II derived the rights of the minors.

Pointing to the genealogy of the person and the genealogy of the child, invariably associated with marital community — a community of love, open to the gift of life, Saint John Paul II already showed children the need to find the meaning of life as a recognition of God's calling. In this way, not only did he set the tasks for them as a requirement for general human freedom and responsibility, but also showed the child in a view of a perspective of the man searching for the meaning of life. Not only the origin of life, but also its purpose is a measure of human dignity. Both the initial and final points of human existence measure the good in human life, including the child's life. "God calls every person, and his voice makes itself heard even in the hearts of children: he calls people to live in marriage or to be priests; he calls them to the consecrated life or perhaps to work on the missions… Who can say? Pray, dear boys and girls, that you will find out what your calling is, and that you will then follow it generously."[21] Here one can see what real fatherly love is. Such love understands, leans with care, supports with a good word, but is also very trusting, and based on that trust it sets tasks, shows and thus arises and allows growth.

Child revealed — according to John Paul II, as may be inferred from his speech — authentic beauty and value of human dignity, which is why the Pope appealed to adults: "The child is the beauty of human existence. The beauty. Jesus affirmed this with his actions, as I said at the beginning.

[21] John Paul II: *Letter to Children* — http://w2.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_13121994_children.html (accessed 12.12.2014).

The beauty of the child! Let us still be stared at the beauty of the child, us, the adults."[22]

The beauty revealed and manifested dignity typical to a child. It was the foundation and even a kind of synonym for the rights of the child. Perhaps because of these ambiguities in interpretation, the Pope stated: "The Church [...] not always using the recent term for the rights of the child — consistently considered the child not as a unit that can be used, not as an object, but as a subject of inalienable rights, as an emerging and developing personality, which has its own value and its particular destiny."[23]

Subjectivity, exceptional value as a human being — a person (that is the dignity of the human person) and destiny — these are the determinants that protect the child (the human being) from the utilitarian use and instrumentation.

It is easy to see that regardless of the catalogue of formulated laws, precisely in this respect — a full recognition of the status of the child, along with all its consequences, there appears a dramatic dispute over the life of the child, especially an unborn child.

Saint John Paul II, in this respect, represented an utterly and absolutely clear standpoint. He expressed it in a myriad of his speeches. In the *Letter to Families* of 1994, he made it clear that no human authority has the right to grant permission to kill another human being, also the one that is still in the mother's womb. The law of God in relation to human life is clear and categorical. God commands: "Thou shalt not kill" (cf. Exodus 20:13). No human lawgiver can therefore establish laws that would have questioned the fundamental right to life of another human being, regardless of the stage of his biological or social development. "How can one morally accept laws that permit the killing of a human being not yet born, but already alive in the mother's womb? The right to life becomes an exclusive prerogative of adults who even manipulate legislatures in order to carry out their own plans and pursue their own interests. We are facing an immense threat to life: not only to the life of individuals but also to that of civilization itself. The statement that civilization has become, in some areas, a 'civilization of death' is being confirmed in disturbing ways. Was it not a prophetic event that the birth of Christ was accompanied by danger to his life? Yes, even the life of the One who is at the same time Son of Man and Son of God was threatened."[24]

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[22] Idem: "Speech given in the pediatrics hospital, Olsztyn, June 6, 1991," no. 7. In: Jan Paweł II: *Pielgrzymki do Ojczyzny*. Kraków 2005, p. 663.

[23] J. Górny: *Jan Paweł II Wielki. „Z potrzeby serca"*. Olsztyn 2005, p. 128.

[24] John Paul II: *Letter to Families "Gratissimam sane"* (February 2, 1994), no. 21.

John Paul II expressed it even more strongly in his encyclical on life: "Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Vatican II defines abortion, together with infanticide, as an 'unspeakable crime'."[25] "But today, in many people's consciences, the perception of its gravitas has become progressively obscured. The acceptance of abortion in the popular mind, in behaviour and even in law itself, is a telling sign of an extremely dangerous crisis of the moral sense, which is becoming more and more incapable of distinguishing between good and evil, even when the fundamental right to life is at stake. Given such a grave situation, we need now more than ever to have the courage to look the truth in the eye and to call things by their proper name, without yielding to convenient compromises or to the temptation of self-deception."[26]

The Pope's words reveal the tradition of the Catholic Church teaching on the right to life. John Paul II not only argued with more and more increasing, in his time, claims of the "reproductive rights," but in a way that did not allow any objections, proclaimed the right to life. Referring to *nasciturus* — a conceived but unborn child, became and remains a measure of not only the legal culture, but a measure of civilization and a measure of the democratic system.

Today these rights are being replaced by freedom claims of absolute, anarchic provenance, which does not take into account the horizon of truth about another person as a subject of fundamental rights.

In the era of the bioethical discussions, especially those most vulnerable and essential — those on the life of the unborn threatened by murder — through the act of abortion, or threatened by manipulation reaching to the elimination of in vitro fertilization in the act of reproduction, "rights to freedom," "rights to self-determination" of a woman about her fetus or embryo are often invoked. These rights are implemented on the basis of arbitrary and hypocritical, in relation to the truth of other human, decisions. They become an expression of the dominance of the strong against the weak. They become an expression of the totalitarian submission of the weak to the strong. They, *de facto*, become an act of lawlessness. In the face of such option of positive law philosophy, it is worth to look at, growing out of the mainstream of legal and natural, yet deeply personalistic, conception of human rights by John Paul II, the Pope of human rights.

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[25] EV no. 58; Vatican II*: Pastoral Constitution on the Church "Gaudium et spes,"* no. 51: *Abortus necnon infanticidium nefanda sunt crimina.*

[26] EV no. 58.

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Paweł Bortkiewicz

Rights (Claims) of Parents and the Child's Welfare

Summary

In the contemporary bioethical disputes, which are at the same time political, what is often put forward is the argument of the right to have or not have a child. According to the supporters of this right, it is a consequence of widely promoted reproduction rights (which are an expression of the so-called reproductive medicine). Such a perspective constitutes an expression of a peculiar asymmetry — claims with relation to the child do not correspond with the rights of the child. The mentioned idea, visible in the acts of the codified law, is the subject of Church criticism. In place of the claims with relation to the child, the Church, by the means of John Paul II's words, formulates an original idea and the charter on the rights of the child.

Paweł Bortkiewicz

Les droits (revendications) des parents face au bien de l'enfant

Résumé

Dans les litiges bioéthiques et politiques contemporains, on avance un argument relatif au droit d'avoir ou ne pas avoir d'enfant. D'après les personnes qui réclament ce droit, il est la conséquence des droits reproductifs largement propagés (résultant de la soi-disant médecine reproductive). Une telle perspective manifeste une asymétrie particulière, à savoir les droits de l'enfant ne correspondent pas aux revendications envers l'enfant. La conception mentionnée, visible dans les actes du pouvoir réglementaire, constitue l'objet de la critique de l'Église. En recourant à l'enseignement de Jean-Paul II, l'Église, au lieu des revendications envers de l'enfant, formule une conception originelle et une charte des droits de l'enfant.

Mots clés : droit d'avoir un enfant/de ne pas avoir d'enfant, santé reproductive, droits reproductifs, positivisme juridique, droits de l'enfant

Paweł Bortkiewicz

I diritti (le rivendicazioni) dei genitori e il bene del bambino

Sommario

Nelle controversie bioetiche e nel contempo politiche dei nostri tempi, spesso viene presentato l'argomento del diritto ad avere o non avere figli. Secondo i postulatori di tale diritto è la conseguenza dei diritti riproduttivi ampiamente divulgati (che costituiscono l'espressione della cosiddetta medicina riproduttiva). Una simile prospettiva esprime un'asimmetria particolare — alle rivendicazioni nei confronti del bambino non corri-

spondono i diritti del bambino. La concezione menzionata, visibile negli atti di legge emanati, è oggetto della critica della Chiesa. Al posto delle rivendicazioni nei confronti del bambino, la Chiesa, con le parole di Giovanni Paolo II, formula una concezione originale e la carta dei diritti del bambino.

Parole chiave: diritto ad avere/non avere figli, salute riproduttiva, diritti riproduttivi, positivismo giuridico, diritti del bambino

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Children, Common Good, and Society

Keywords: child, common good, society, rights, duties, dignity, person, social relations

A prominent American philosopher of law, Mary Ann Glendon, noticed the following common rule present in American society: “After divorce it is nearly always the mother who remains primarily responsible for the physical care of the children; the father’s standard of living typically rises, while that of the mother and children declines in all too many cases below the poverty line.”[1] I suppose this rule works similarly in quite a number of other countries. Divorced mothers with children usually bear a disproportionately heavier burden measured in economic terms when it comes to the situation of the breakup of the family, not to mention other types of burdens which are difficult to be measured and quite individually experienced by particular women and men. However, this statement does not intend to present the child as a cause of theburden. On the contrary, it aims at showing how mothers with children are often discriminated against in juxtaposition with men — fathers of these children, and how this points to the fact that the society at large does not adequately value motherhood, parenthood, and the good of the child. It does not value the persons well enough. A disproportionate burden put on the arms of the mother in such sad cases of divorce is a proof of how discrimination against women is connected with the discrimination against children, and how both types of injustices follow from the common and systemic mentality of treating persons as disengaged individuals

[1] M. A. Glendon: “Feminism and the Family.” *Commonwealth*. February 14, 1997, vol. 124, Issue 3: 11—15, p. 13.

rather that persons within relations, and persons having not just rights but also duties towards others. In other words, the fact of discrimination rightly understood shows the antisocial climate of contemporary society, which does not seem to perceive the reality and continuity of *relations* as such. This paper aims to show the perspective of the good of the child within the perspective of the common good of society including the good of families and its individual members.

John Paul II noticed the connection between the aforementioned realities. In his letter to Gertrude Mongella, Secretary General of the Fourth World Conference on Women of the United Nations he wrote: "Greater efforts are needed to eliminate discrimination against women in areas that include education, health care and employment. Where certain groups or classes are systematically excluded from these goods, and where communities or countries lack basic social infrastructures and economic opportunities, women and children are the first to experience marginalization."[2] We may wonder why the lot of women is so often so closely related to that of children. Part of the explanation may be provided by the systemic cause mentioned earlier: men are not perceived as responsible for their offspring as much as mothers are, so the social arrangements usually burden women with the almost sole responsibility for raising their children. In other words, we can note it as the institutional individualism paying a premium to men (incorrectly seen as disengaged individuals without commitments); individualism which thus causes anti-female and anti-child effects at the same time.

Another cause, though partly connected with the previous one, may be the female generally high sense of responsibility for the welfare of the child she gave birth to. The sense of responsibility itself does not, of course, constitute a problem but the exclusive way of attributing this responsibility to oneself, rather than sharing the responsibility with the father, may be the problem. Another side of this is that very often it may be the case that the social institutions treat mothers automatically as more related to the child than the fathers are. However, I claim that part of the problem may be the woman's own will of disconnecting the fathers from children, and attributing the sole responsibility for the children. However, whether this is the fault of women or the fault of the institutional solutions overburdening the women and freeing men from their duties, the problem is that the female strong relatedness to the child (or the social assumption of this relatedness) *allows* men (through the unjust policies legitimized by

[2] John Paul II: "*It Is with Genuine Pleasure*" *Letter of His Holiness John Paul II to Mrs. Gertrude Mongella Secretary General of the Fourth World Conference on Women of the United Nations*, no. 6.

society) to escape their responsibilities towards their children and towards the mothers of their children.

Going further along this line, we may wonder about the source of this female strong relatedness to a child, which in turn may be the cause of social expectation of this relatedness. I choose to venture an opinion that besides the social influence exerted upon mothers to be linked very closely to their children, there is a great amount of the natural basis of this link, largely taking its root from the experience of pregnancy and breast feeding, while the father's link needs to be more consciously established and learnt by men. (This need of men's learning many aspects of fatherhood from the maternal example of child-care was noticed by John Paul II in his document devoted to women's nature and dignity entitled *Mulieris dignitatem*, 18) However, whether naturally or socially influenced, the fact of connection between the lot of mothers and children, particularly in cases of troubled familial situations, shows how (at least) the Western societies do not take under enough consideration the question of relationships together with their effects, namely children. Instead, their social mentality and practice is so individualistic as to relatively reward financially people without commitments rather than support people who are committed to the care of minors; in other words, women committed to their children.

A result of that (and at the same time the underlying perspective causing this result) is the lack of adequate consideration of the good of the child (or even lack of the perspective of the child as a value in himself/herself). Not to sound banal and groundless, I would like to cite an argument supporting my statement, which comes from the study done by Helen Alvaré, who analysed the changes in American marriage and family law in the last decades. She claims that the children's good is now virtually removed from sight in individualistic perspective of law in the United States of America. On the basis of her findings she concludes that there can be observed a certain tendency to move away from self-giving towards self-seeking in law and its social application. For example, quoting results of research from some sociologists, she claims that easier divorce laws allow parents to ignore the good of children.[3] Parents are largely seen there as individuals who want to end their marriage, rather than as people with duties towards their children, whose well-being should be considered during the decision making process of divorce. We may say that in an individualistic perspective children seem to be more or less invisible

[3] H. M. Alvaré: "The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors." *Stanford Law & Policy Review*, vol. 16, issue 1, 2005: 135—196, pp. 136, 147.

in law or treated as burden to married people in the process of divorcing. The good of children connected with having a stable family (or at least stable relations with both parents, despite the fact of them being difficult to organize in cases of divorce) is largely ignored by the legal practice and by the mentality and culture dominated by the way of thinking which promotes individuals' right of seeking their subjective satisfaction as separated from their fulfilment of duties towards other human beings. Thus, individualistic culture built into the legal system acts mainly against the interest of children and in the long run also against the good of the parents, who after some time may find lack of deeper-level satisfaction which comes only from self-giving towards those dependent on them, namely their children. The long-term effect of such individualistic attitudes may be the lack of social cohesion, instability of social ties, lowering of the level of social trust, and rise of the level of egoism instead of very productive attitudes of altruism needed by society and appreciated by social thinkers.[4]

Similar tendency towards self-seeking can be noticed in the area of the so-called collaborative reproduction. Children's rights seem to be less important than the potential parents' will to start the child's existence artificially in whatever way technologically possible. There is an enormous difference between the natural act of creating the child and artificial techniques of child's production. The former may be planned but it is not controlled by possible parents in its natural dynamic, while the couple should concentrate on their mutual love and acceptance of possible outcome of their love-act. The artificial ways, on the contrary, concentrate on the unrestrained will of the possible parents to have a child, rather than to love someone with whom one may create a child as an effect of this love. Though in both cases the people may consciously choose to attempt the creation of a child, only the first case respects the dignity of the child as a human being, and not a product of one's will. That is because only in the first case the parents respect the natural processes not produced by them, which protect the right of the child to be created in a vital sense *independently* of the parents' or the doctor's artificial intrusion.

The social consciousness and debates often concentrate on the consequences of the child's existence or non-existence, while ignoring the matter of the dignity and rights of the child's way of coming to existence. Helen Alvaré rightly notes the following: "It is not sufficiently concrete or responsive to assert that the duty or benefit is in the fact of the child's

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[4] Cf., for instance, P. A. Sorokin's fundamental study of altruistic attitudes analysed in his book *Altruistic Love: A Study of American Good Neighbors and Christian Saints*. Boston 1950.

existence versus nonexistence. Indeed, the opposite might be true. It is possible that, for the sake of the child as well as the wider society, one should avoid creating children using technology that experiments with their health; deliberately estranging children from their biological parents; and creating children without the benefits of stability, the network of love, and the biological relationships available in two-parent families."[5] The author enumerates negative conditions and effects of such a way of producing children. However, what is even more important, she notices the underlying basic cause of the problems which is connected with the aforementioned lack of respect for the natural way of creation of children. "The choices that inhere in collaborative reproduction seem to contradict an important paradigm of the parent-child relationship, one on which family law is generally based. This paradigm holds that merely by virtue of the birth of 'this child' to 'this parent', this parent has been 'chosen' to love 'this child'. Parents are to be the chosen ones, not, as with collaborative reproduction, the choosers."[6] In other words, the impact of nature in this process causes the state in which parents receive the child rather than choosing or producing him or her, and by this fact the child is independent in his/her dignity and autonomy.

This seems to me to be the gist of the message: respecting nature is in this case (as in many other cases of respecting it) a way and expression of the respect and right of the child to be created without the total control, total choice, total planning and technological manipulation done by others. Despite the fact that in the artificial production of the child the process itself is not entirely controlled by parents or doctors, yet the amount of control is incomparably larger, handed over to a doctor from the exclusivity of parents, and finally, the intention of control is present as aiming at totality.

Thus, the logic of production of children is also the logic of self-seeking (someone intending almost at all costs to become a parent) within the perspective of the self as freely constructing or destroying ties with others, without the limits coming from nature or from any confines guaranteeing social stability that would come from outside individual unrestrained autonomy. Maybe even more importantly, it is the logic of the "technological making" rather than the logic of the *gift* of nature (or nature's Creator). The perspective of the gift assumes the existence of the Giver, who gives out of the will to give, and this will to give is connected with the benevolent motivation towards those who receive the gifts. In Chris-

[5] H. M. Alvaré: "The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective." *Harvard Journal on Legislation*, vol. 40, no. 1, Winter 2003: 1—63, p. 46.

[6] Ibidem, p. 55.

tianity this motivation is perceived as love. The very coming to existence of a child is intimately connected with the dynamic of free giving and receiving. The technological production of children removes this perspective of giving and receiving from sight. It rather introduces the individualistic market perspective where particular people want to buy a product of their child rather than opening themselves to a free gift of a new person.

A Harvard political philosopher Michael J. Sandel considers hypothetical consequences of the development in genetic engineering which could be used for designing children by improving their genetic equipment. He discusses many cases which may seem possibly realized in future, although they are not practiced yet, but their possible ethical aspects need to be discussed ahead of practical application of the technological innovations. Sandel wonders about possible effects of situations in which parents who, with good intentions, would like to improve some qualities of their children with the help of genetic engineering. He claims that such improvement of children's characteristics by their parents may, if it ever gets done in practice, remove the dimension of natural giftedness from the ethical perspective of our lives.[7] In other words, we may lose the consciousness of being gifted without our effort or planning. Even more, not just consciousness, but also reality of free giving and receiving would be exchanged for the reality of planning, designing, and actually buying certain desired qualities of children. Rather than being open to the unbidden and accepting whatever qualities our children may have, and trying to work with them in order to overcome the difficulties and thus develop their character, we would require them to be changing all the time in order to fit our dreams, put a lot of pressure on them to try to achieve ever better results instead of accepting them no matter what.

Sandel recalls the differentiation of the two aspects of parental love described by William F. May. This late American ethicist distinguished the aspects of acceptance and transformation, both present in the love of parents towards their children. Sandel points out that acceptance is largely diminished in the mental framework standing behind the genetic improvement of children. So, the harmony between the two dimensions of parental love is lost. The pressure put on the transformation of a child may be stronger than the accent put on the unconditional acceptance of the child. The will to change, activity, and work on the better "quality" of an individual becomes more important than the fact of being a gift as a person and a fact of having one's own characteristics also as gifts of nature which have not been planned by parents and which have not even

[7] M. J. Sandel: "The Case Against Perfection." *The Athlantic Monthly*, April 2004, pp. 51—62.

been possible to be fully planned by any human. The consequence of a possible new perspective of designing and planning of child's qualities, according to Sandel, may be the loss of the feeling or attitude of gratitude in many dimensions of social life. This would result in the loss of the sense of duty or social solidarity, since everything then could be worked out by an individual and/or bought by one's parents.

We may wonder whether this ethical shift would really take place, should such genetic designing projects were possibly practiced. One may claim that social solidarity does not have to be connected with the fact of previous reception of gifts. After all, we may fulfil our social duties without the motivation coming from gratitude, and this would make us even more ethical. Yet, practically speaking, it may be very hard for humans to achieve such a level of altruism. Besides, the tendency to improve children genetically may have unintended and unforeseen consequences for their health and well-being. Additionally, these "improvements" seem to be based on a philosophy of enlarging autonomy of parents as "producers" or "planners" of children's qualities, and independently of whether this would diminish social solidarity, it definitely contributes to the decreasing of the level of openness to nature and raising the level of illegitimate intrusion in the planning of other human beings. In the name of one's own autonomy, one diminishes the level of autonomy of one's children. Jürgen Habermas wondered whether the human subjectivity, autonomy, and dignity would not be in danger because of genetic experiments.[8] Autonomy is slowly being lost, paradoxically, in the name of autonomy itself. Autonomy broadly understood and practiced by parents is here combined with attempts of improvement of children. This, however, may be related to eugenics.

More importantly, it seems to me, we lose the perspective of the gift, together with the perspective of the Giver, be it nature (for unbelievers) or God as its creator (for believers). Parents do not see themselves as receiving the gift of a child to such an extent as was the case with the natural creation of the child without technological intervention, while the child may not perceive himself or herself as a gift and effect of love of his/her parents towards each other. The child's existence is not to be easily legitimized then, if the child is designed like a product ordered in a supermarket. The dignity of the child is disrespected not only by manipulating with the child as if it was an object, but also by depriving the child of his/her status as a gift which should be accepted as he/she is. All children and their way of coming to existence which is respectful of their dignity

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[8] J. Habermas: *Przyszłość natury ludzkiej. Czy zmierzamy do eugeniki liberalnej?* Trans. M. Łukasiewicz. Warszawa 2003.

remind us of the gifted way of our human condition. After all, our very lives, together with their many aspects, constitute the fundamental gifts for us, and our human dignity is also given in order to be later recognized and respected rather than socially created.

We may thus say that every child reminds the society that the world itself, including humans and life itself, is fundamentally given. In the words of John Paul II we can find an example of similar expression of the gifted character of spousal and parental love: "In giving origin to a new life, parents recognize that the child, "as the fruit of their mutual gift of love, is, in turn, a gift for both of them, a gift which flows from them."[9] Connected with the fact of our gifted nature is the consequence of the way we become actualized by accepting and presenting gifts, including the most important gift of our persons in relations to others. If we deprive the child of the status of the gift, we will also deprive the society of a clear sign of giftedness as the nature of our (social and personal) existence. Losing giftedness from our perspective and consciousness might cause not only the lack of gratitude and solidarity, as Sandel notes, but also the loss of touch with reality and increase of the illegitimate attitude of pride taken in the supposedly social self-constructionist activity. I purposefully use the adjective "social" because an individual is within this framework produced by the social design, that is by others, so he or she is not creating him- or herself, but the autonomy is practiced on the part of society, in this case represented by the parents and various kinds of social pressure contesting the acceptance of what is given in a child, while pushing for genetic "improvement" of a child.

Society broadly understood thus seems to be the agent considering itself legitimate to plan and produce children according to its design, while the traditionally understood autonomy and dignity of a child may not be protected, if such an outlook gets social acceptance. A similar attitude towards children is visible already in cases of in vitro fertilization: possible parents claim it to be their right to have and produce a child without the regard for the limits of nature which in this case protect the children from manipulating on them by artificial means. One of the so-called New Feminists,[10] Michele M. Schumacher, writes that this view of "a right to a child" is also visible in claims of homosexual couples con-

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[9] John Paul II: *Encyclical "Evangelium vitae,"* no. 92. The citation inside comes from: John Paul II: *Address to Participants in the Seventh Symposium of European Bishops, on the theme of "Contemporary Attitudes towards Life and Death: a Challenge for Evangelization"* (October 17, 1989), No. 5: Insegnamenti XII, 2 (1989), 945.

[10] I use capital letters in the name "New Feminism" in order to differentiate this kind from other new feminisms in history and to refer to the specific stream of feminism inspired by Catholic theology of woman as offered by John Paul II.

cerning adoption: "When […] homosexual couples insist upon the 'right' to adoption, the Church never tires of proclaiming the right of the child over any presumed right to a child."[11] Schumacher here refers to the *Catechism of the Catholic Church*, no. 2378 and claims that this right is rooted in the personalistic perspective, which is opposed to the individualistic view of the human freedom. Personalism offers an attractive alternative to both individualistic unbounded autonomy and social domination over individuals. It is a standpoint respecting the dignity of each person (e.g. by protecting one's natural way of coming to existence and not allowing the others' interference with one's genetic equipment) and a standpoint perceiving each human as related to others within various types of communities. These communities should not dominate over persons but come from natural and socially affirmed ties which serve personal development and fulfilment. Human freedom is here accepted, recognized, and yet, not treated as conflicted with others' freedoms. Another New Feminist, Helen M. Alvaré states: "A new feminism understands freedom as an inherently communal project — it is not only about oneself."[12] She includes this statement within an article considering the matter of parental duties towards their family, claiming that both mother and father have to treat childcare as their priority task over their jobs which need to become secondary and serving the purposes of familial, personal relations. Serving the persons within family becomes the top priority above the professional goals. The latter are also perceived as serving the society but as naturally more distant than the members of one's own family. Both the family (with its particular members) and society at large are treated as the common good. It thus constitutes an example of a social philosophy of the common good including the good of the child within family relations.

Such a perspective of linking the good of persons with the communities is, however, possible if the goods are not opposed, and this in turn is realized when what constitutes the common good is not just the sum of conditions favourable for individuals' development, but the person himself or herself. The self-actualized person, the person realized through the webs of relationships, stands at the centre of this model. Every person is then the focal point of the common good of society in general, while particular people in their different situations and stages of life constitute the focal points and common goods of particular communities. In John Paul II's *Letter to Families* it is claimed that "*in the newborn child is real-*

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[11] M.M. Schumacher: "A Plea for the traditional family: Situating marriage within John Paul II's realist, or personalist, perspective of human freedom." *The Linacre Quarterly* 81 (4) 2014: 314—342, p. 330.

[12] H.M. Alvaré: "When Both Parents Work. New Feminism and the Family." *Liguorian*, August 1998, pp. 26—29, p. 28.

ized the common good of the family. Just as the common good of spouses is fulfilled in conjugal love, ever ready to give and receive new life, so too the common good of the family is fulfilled through that same spousal love, as embodied in the newborn child. [...] *The common good of the whole of society dwells in man*; he is, as we recalled, 'the way of the Church'. Man is first of all the 'glory of God': '*Gloria Dei vivens homo*', in the celebrated words of Saint Irenaeus, which might also be translated: 'the glory of God is for man to be alive'. It could be said that here we encounter the loftiest definition of man: *the glory of God is the common good of all that exists*; the common good of the human race. Yes! *Man is a common good*: a common good of the family and of humanity, of individual groups and of different communities."[13] Of course the word "man" used in this context refers to the human being, and the whole quote is a kind of glorification of humanity as the central value of society within the broader context of God's creation. Consequently, since the human being is the common good of all, then the way society treats every newborn child constitutes a test of whether it can recognize the common good properly and whether it can live up to its ideal by accepting each human life well. John Paul II offered this kind of a test or a measuring rod for the adequate way of treating one person by another. In his *Apostolic Exhortation "Familiaris consortio"* he wrote as follows: "Concern for the child, even before birth, from the first moment of conception and then throughout the years of infancy and youth, is the primary and fundamental test of the relationship of one human being to another."[14] We may say that this is the test of a good society: the acceptance and good treatment of every new human is the proof of the proper attitude towards others and the adequate condition of society.

The same concerns the social treatment of parents and families. Since they form the closest circles for their children and when they take care of the children well, their tasks should receive proper recognition from the society at large that benefits from parental care of the members of new generations. Mary Ann Glendon claims that "when mothers and fathers raise their children well, they are not just doing something for themselves and their own children, but for all of us. Governments, private employers, and fellow citizens would all have to recognize that we all owe an enormous debt to parents who do a good job raising their children under today's difficult conditions. There's something heroic about the everyday sacrifices that people have to make these days just to do the right thing

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[13] John Paul II: *Letter to Families "Gratissimam sane,"* no. 11.

[14] John Paul II: *Apostolic Exhortation "Familiaris consortio,"* no. 26.

by their nearest and dearest."[15] What is more, in the light of the test criterion mentioned above (the acceptance and care of a child being a test of a good society), societies should not just value the work of parents for the their job of bringing up the socialized individuals. It should also notice that through accomplishing this task the parents embody in its fullest the general goal of the human society, namely the day-to-day practical realization of the openness and even the loving attitude towards persons embedded in the web of tight and warm relations.

The essence of this attitude can be noticed since the early beginning of the experience of children in their mothers' wombs. Let me quote again from John Paul II: "A mother welcomes and carries in herself another human being, enabling it to grow inside her, giving it room, respecting it in its otherness. Women first learn and then teach others that human relations are authentic if they are open to accepting the other person: a person who is recognized and loved because of the dignity which comes from being a person and not from other considerations, such as usefulness, strength, intelligence, beauty or health."[16] A paradigm of social acceptance of a human being is in the woman's acceptance of her child evident in the physical, bodily relation between a mother and her child.

Man's participation in the creation of a new human being does not involve his body as much as it involves the body of a woman. The woman accepts the sexual act as well as its fruit inside her body, so her openness to the new human being (both the man and the child) is literal and expressed bodily. What is more, the child is being accepted unconditionally as he or she is completely unknown as concerns his or her qualities. Though the father should also accept the child this way, yet he does not literally make space for the child in his body, so the mother's acceptance does seem to constitute the literal paradigm of total receptivity and inclusion. No wonder then why it is the mother who in a sense teaches the man how to fulfil his paternal role. Furthermore, it can be claimed that both parents can through this process of parenting teach the rest of society how to treat each new human being and all human beings for that matter, too. Mere humanity in a person is thus recognized to be worthy of social acceptance, respect, and care.

Moreover, the parental acceptance of a child, physically embodied in the early maternal experience of pregnancy, provides a perfect solution of the imagined liberal problem of the assumed possible conflict between freedom of the mother and freedom of the child, and an equally strongly assumed conflict between freedom and love. The conflictual model envi-

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[15] M.A. Glendon: "Feminism and the Family...," p. 14.

[16] John Paul II: *Encyclical "Evangelium vitae,"* no. 99.

sions the possible conflict between the child's right to life and the mother's right to choose her child's life or death for various reasons starting from the mother's difficult situation and ending with her will as such. Instead, if we treat the child as the human being to be received with acceptance, the woman's personal fulfillment would involve the best care for the child, for herself, and for their mutual relation rather than the choice of abortion as killing the baby, destroying the relation, and doing harm to the woman herself. Marzena Szczepkowska rightly pointed out in her article that pro-life activities are usually set opposite to the women's rights attitudes. In her opinion, these issues should not be seen as opposed but strongly linked together because what requires the proper care is the relation of mother and child. One-sided fight for children's rights to life with the lack of care for the woman's situation or one-sided concentration on the woman's rights without the concern for the life of the child is bad for both sides, while the proper concern for woman may secure the child's safety and allow the relation to be well protected.[17]

The perspective of noticing the importance of relation is based on the concept of anti-individualistic freedom which finds its full realization in love as relating persons according to their will but also involving long-lasting commitments and duties beyond the change of one's will. A person is treated as unique in one's dignity but related to others and finding one's development in these relations. While the individualistic concept of freedom may assume independence from relations in terms of one's fulfillment (freedom from being forced to relations or freedom from being dependent on relations), the personalistic model is based on the concept of freedom as finding its goal in love (freedom to being related to others in a deep sense of the word). John Paul II identified the essence of love in relatedness which at first seems as limiting one's freedom, but on a deeper level shows itself to be connected with the mature kind of freedom. In his homily given in Jasna Góra during the first pilgrimage to Poland in 1979 he claimed that such an example of freedom as fulfilled in love is clearly shown in the experience of mothers taking care of a sick child whose care is not treated as limitation but as affirmation of liberty.[18] It looks like his example from the homily makes a strong argument for such an understanding of freedom by the whole humanity but in order to make it understandable and persuasive, the humanity needs to seriously take into consideration the female experience of relatedness to a child. This does

[17] M. Szczepkowska: "Pro life znaczy pro love [Pro-life means pro-love]." *Imago. Czasopismo Fundacji Pro Humana Vita*, no. 4 (4) 2011, pp. 41—43, p. 41.

[18] John Paul II: *Homilia wygłoszona w czasie Mszy świętej na Jasnej Górze, 4.06.1979* [audio document]. In: *Musicie być mocni. I Pielgrzymka Jana Pawła II do Polski 2—10 czerwca 1979*. Warszawa 2005. CD-ROM.

not only constitute an appeal to acknowledge the special value of pregnancy but it also notices the meaning which the existence of the child, dependent on others in his or her existence, has for the rest of society, namely his or her being a gift to be loved and thus allowing others to fulfill their freedom and realize their humanity.

From all the above we may draw a conclusion that the child has a right to be loved, which gives the proper meaning to all other particular rights, while the mother has a right to be recognized in her socially significant difference from the father (besides the obvious and very important overall similarity and exchangeability of the parents' roles). From the theoretical discussion we may then follow on to the practical application of these findings. The social teaching of the Catholic Church included such directives as it is shown in John Paul II's encyclical *Laborem exercens*: "Experience confirms that there must be a social re-evaluation of the mother's role, of the toil connected with it, and of the need that children have for care, love and affection in order that they may develop into responsible, morally and religiously mature and psychologically stable persons. It will redound to the credit of society to make it possible for a mother — without inhibiting her freedom, without psychological or practical discrimination, and without penalizing her as compared with other women — to devote herself to taking care of her children and educating them in accordance with their needs, which vary with age. [...] It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfil their tasks in accordance with their own nature, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The true advancement of women requires that labour should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role."[19]

The document does not suggest restricting women's activity to the private sphere. Instead, it tries to point our attention to the value of women's specificity in making clear the central value of human relatedness, personhood, and love, which need to be respected and valued by everyone, and that is why the female role of mothers (whether joined with their professional careers outside home or not) calls for special recognition by society and its various institutions which may let women choose how their want to contribute their femininity to the rest of society. Paying due value to

[19] John Paul II: *Encyclical "Laborem exercens,"* no. 19.

a child and to the mothers (and fathers!) who witness and embody the social value of acceptance of persons may result in various pro-family policies which may include flexible work possibilities, opportunities for combining work outside the home with family duties, promoting long and paid maternity leaves as well as institutional guarantees for mother's return to work after her leave, the right to stay at home with a sick child guaranteed by law to a mother or father, the social recognition of the significance of work done at home (by a woman or a man) while taking care of family members (which could be expressed by counting this work into GDP and for the purpose of retirement), and accepting the family (not the individual) as the basic unit for taxation and social programs.[20] Propositions and solutions of this kind need to be consulted with parents and in their practical application decided freely by both of them as to the sharing of duties. However, as it was mentioned earlier in the argumentation by Helen Alvaré, the sole fact of having a family should make the family tasks a priority for both mother and father if they work professionally. This seems to me a practical conclusion drawn from the fact of perceiving the family, the child, and the relations as central among other social values.

The aim of the article was to present the interconnectedness between the issues of the good of a child, the child as constituting the good in himself or herself, and the common good of society. It juxtaposed the perspective of personalism and individualism; rights versus duties, goods, and commitments, while linking the issues of freedom and love as fulfilment of freedom. The paper discussed these issues by examples of tendencies towards growing individualism noticed by some authors in changes of American divorce laws, the so-called collaborative reproduction, and in the possibilities of genetic engineering. Finally, the article called for the social recognition of the child (and every person) as the common good and pointed to the social attractiveness of the perspective of giftedness of human nature and social relations exemplified especially in the links between the mother and the child, which should be recognized by various institutions of society.

[20] Consideration of such policies is to be found in the book by J. H. Matlary: *Nowy feminizm. Kobieta i świat wartości* [New feminism. Woman and the world of values]. Trans. M. Ratajczak. Poznań 2000, pp. 52—56, 115, 138—139.

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Aneta Gawkowska

Children, Common Good, and Society

Summary

The article presents the interconnectedness between the issues of the good of the child, the child as constituting the good in himself or herself, and the common good of society. It juxtaposes the perspective of personalism and individualism, rights versus duties, goods, and commitments, while linking the issues of freedom and love as fulfilment of freedom. The paper discusses these issues by examples of tendencies towards growing individualism noticed by some authors in changes of American divorce laws, the so-called collaborative reproduction, and in the possibilities of genetic engineering. Arguments quoted or discussed are taken from John Paul II, Helen M. Alvaré, Michele M. Schumacher, Mary Ann Glendon, Michael J. Sandel, and Jürgen Habermas. The article calls for the social recognition of the child (and every person) as the common good and points to the social attractiveness of the perspective of giftedness of human nature and social relations exemplified especially in the relation between the mother and the child, which needs to be recognized by various institutions of society.

Aneta Gawkowska

Les enfants, bien commun et société

Résumé

L'article a pour objectif de présenter les corrélations existant entre les éléments liés au bien de l'enfant, à l'enfant en tant que bien et au bien commun en tant que tel. En unissant les questions de la liberté et de l'amour compris comme une réalisation de cette liberté, on y juxtapose la perspective du personnalisme et de l'individualisme, celle des droits de l'individu et de ses devoirs, des biens, des obligations. L'article analyse ces problèmes à l'exemple de la tendance croissante de l'individualisme aperçue par des auteurs particuliers dans le domaine des changements dans le droit de divorce dans la soi-disant procréation assistée ainsi que dans des possibilités éventuelles créées par l'ingénierie génétique. Les arguments cités et décrits ont été relevés des textes des auteurs tels que Jean-Paul II, Helen M. Alvaré, Michele M. Schumacher, Mary Ann Glendon, Michael J. Sandel ou Jürgen Habermas. L'article contient un appel visant à reconnaître socialement l'enfant (et toute personne humaine) comme un bien commun et dirige l'attention sur l'attractivité sociale de la perspective du don et celle de la gratification liée à la nature humaine et aux relations sociales, ce qui est visiblement accentué dans la relation d'une mère avec son enfant, ce qui — de son côté — exige la reconnaissance de la part de différentes institutions sociales.

Mots clés : enfant, bien commun, société, droits, devoirs, dignité, personne, relations sociales

Aneta Gawkowska

I bambini, il bene comune e la società

Sommario

L'articolo tratta le correlazioni tra le questioni del bene del bambino, il bambino come bene e il bene comune in sé. Vi vengono contrapposti la prospettiva del personalismo e dell'individualismo, i diritti dell'individuo e i doveri, i beni, le obbligazioni unendo le tematiche della libertà e dell'amore inteso come soddisfacimento della libertà. Il testo analizza questi problemi sull'esempio della tendenza del crescente individualismo scorta da alcuni autori nel campo dei cambiamenti nel diritto americano sul divorzio, nella cosiddetta "procreazione assistita" e nelle possibilità eventuali create dall'ingegneria genetica. Gli argomenti citati e discussi sono stati attinti da scritti di autori quali Giovanni Paolo II, Helen M. Alvaré, Michele M. Schumacher, Mary Ann Glendon, Michael J. Sandel, o Jürgen Habermas. L'articolo include un appello al riconoscimento sociale del bambino (e di ciascun essere umano) come bene comune, e fa notare l'attrattiva sociale della prospettiva del dono e del donare correlata alla natura umana ed alle relazioni sociali, cosa che è fortemente messa in evidenza nella relazione tra la madre e il bambino e che richiede il riconoscimento da parte di diverse istituzioni sociali.

Parole chiave: bambino, bene comune, società, diritti, doveri, dignità, persona, relazioni sociali

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The Good of the Child — the Good of the Family, the Church and Society

Keywords: God, man, good, child, family, Church, society, human rights

Introduction

Due to the communitarian and social dimension of human life, there is no individual alone. The first moments of life are connected with medical staff and close relatives (mother, father, siblings). A child's intellectual development enables his or her interest in deeper topics relating to human coexistence — searching for the good and the truth. The term "the good" (in Greek *to agathón*, in Latin *bonum*) is preferably perceived by an individual as something good for oneself, and simultaneously, differentiating between the good of one's own and the good of others.

The good is closely related to the truth (in Greek *alétheia*, in Latin *veritas*). The Greek philosopher Plato (427—347 BC) stated that one should love the good for its own sake.[1] By this he meant that the synthesis of the good and the truth creates the beauty (in Greek *to kalon*, in Latin *pulchritudo*). The Good, the Truth and the Beauty constitute a transcendental triad that indicates the transcendental reality — a never completed dimension with a permanent potential for growth. Only in God, the eternal and uncreated Devine Being are the Good and the Truth and the Beauty pleromatic in their fullness.

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[1] Plato: *Ústava* [The Republic]. Praha 1996, book II 357b, p. 38.

If the merit of the good is to be discussed in the present article, first it is important to realize that the good is confronted with volition which is, in the words of a French neo-Thomist Jacques Maritain (1882—1973) described as something accompanied with affection and desire.[2]

In all created beings, higher (angels and humans) as well as lower (animals, plants and material objects) the ontological good is present — the goodness in themselves according to the quality of their ontological being. Human beings, who are physical as well as spiritual with an intellect and a free will, are also characterized by the moral good (*bonum moralis*) which each human being strives for, by his or her good deeds; and also by the honest good (*bonum honestum*) that honours a human individual. The concept of the good, as seen in life-experience, is of experimental nature. Owing to the human wisdom and encounters with virtuous human beings and beneficial things, it is possible to imagine the kindness of God, the goodness in our own beings mediated via consciousness, and the good in other people as well as natural and material world.

The gift of life, family, mother and father, is the very first good for each individual. The family environment is the place where love can be experienced for the very first time. However, a child might not be accepted with love, but he or she may experience rejection. In this sense, apart from parental love, the coming-of-age and cognitive processes also represent the good for a child. Cognition is interrelated with the intellect while volition with the coming of age. Each individual develops during these processes for his or her own sake and for the sake of other people

The family a child is born to is the good for him or her and vice versa: a child is the good for his or her family. The family represents a very first form of community which developed on the basis of natural human needs. Thomas Aquinas[3] in his *Summa Theologica* claims that "a household is a mean between the individual and the city or kingdom."[4]

The original meaning of God's intention with a human family lies primary in mutual love, secondarily in educative-formative process which

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[2] J. Maritain: *Nove lezioni sulle prime nozioni della filosofia morale*. Editrice Massimo, Milan, 1996, p. 77.

[3] The family is referred to in two works of Thomas Aquinas: *Commentary on Aristotle's Politics* (com. In: Pol. Lect. 1) and *Summa Theologica (II.—II., q. 50.)*. He considered the father to be the head of the family. His is authority due to economic and financial care (analogy to authority of the king in Aristotle's *Politics*, although it is not perfect power and absolute supremacy. Bringing up belongs to mothers. (com. Suppl., q. 62, a. 4).

[4] Thomas Aquinas: *Summa Theologica. q, II.—II., q. 50, a. 3.* Edizioni Studio Domenicano (Traduzione e. commento a cura dei Domenicani italiani. Testo latino dell´edizione Leoniana), Bologna 1984. Available at: http://www.newadvent.org /summa/3050.htm#article3 (accessed 8.2.2014).

passes down values to younger generations. Considering God's intention, the role of the family seems to be indispensable in this process.

Apart from families, which constitute basic units of every society, the state is also composed of other organizational entities, such as cities, districts, and regions. The modern states have also created alternate institution providing education to orphans or rejected/abandoned children. However, parental love cannot be fully substituted. Despite this fact, the essential terms of the family are at risk of manipulation nowadays.

The family assumes a relationship of two people, a man and a woman who desire to confirm their love by a marriage commitment. In its fundamental meaning the marriage serves life. Keeping in mind this paramount task, it is of particular nature which makes marriage different from friendship between a man and a woman. Love of heterosexual couple can beget a child and married persons become parents both *de facto* and also *de jure*.

The status of the family is a theme of many contemporary discussions; however, they are mainly apologetic in their character. A traditional family and its claims are in need of urgent protection; even from the state interference, which often yields under the pressure to follow regulations of globalist and multinational governments of the United Nations and the European Union. As a consequence of growing influence of gender ideology and gender equality what emerges is the violation of human rights and rights of the family. The role of a traditional family is being purposefully marginalized. The postmodern secular society with its inclination to liberate a homosexual partnership and make it equal to a heterosexual marriage has contributed to this happening.

These tendencies have shaken the foundations of human existence; they have shattered all the moral norms that have formed the rational and well-balanced order of the society. Three English authors (Sherif Girgis, Ryan T. Anderson and Robert P. George), in the book entitled: *What is Marriage: Man and Woman: A Defense* claim that "it is hard to think of a salient cultural conflict."[5] Marriage, in its essence, "is ordered to procreation and broad sharing of family life […], but it is also a moral reality: a human good with an objective structure which is inherently good for us to live out."[6] As indicated, the institution of marriage is a crucial phenomenon that constitutes a social order, welfare and the common good in the state. The effort to redefine its status suggested by EU and UN legislation weakens the role of the family, and subsequently, the control is overtaken

[5] S. Girgis, R. T. Anderson, R. P. George: *What is Marriage: Man and Woman: A Defense*. New York 2012, p. 16.

[6] Ibidem, p. 17.

by the state. The disharmony that has appeared around competences of the family will definitely require strong opposition in the future.

1. The child as the good and the family as the good

In order to understand why the child is natural good for the family and the family is natural good for the child, it is necessary to perceive the life as a literal gift and value. Life is the gift because it was given to us. Where is the life also there is love. The giver of life, being just and perfect in His decisions, respects the good of life and does not destroy the natural laws.

The human life is a way, heuristic wandering, examination of ethical character through occurrences composing a mosaic of events that provide sense. Amongst them lies the answer to the question why life has the origin and finds the best conditions for its development in the context of matrimony, which is based on mutual love and mutual bond between a man and a woman.

Spouses are bringing different gifts into their marriage, which they further cultivate together and then deliver them to their children. In this sense the marriage is a human good, which influences the common good. A child born out of love is a good for its parents and vice versa. Primarly, the parents acknowledge the value of this good, and later also the children do so. The older the children are, the more they appreciate the love they receive and the good example of their parents, the values they were given or mediated through their dedicated work. At the same time, however, the children expect responsibility of the overall behaviour of their parents and this expectation alone strengthens the mutual trust and stability of the marriage. Also for this reason, throughout the centuries, the marriage preceded the birth of a child. "So, the internal relation between marriage and children reinforces the reasons for spouses to stay together and to remain faithful to each other throughout their entire life."[7] This is no more a rule in the current secular atheistic society, neither is it the reason for qualms of conscience. Through deregulation of sexual rules accompanied with the moral alibis in the 21st century we have considerably weakened the system of values as well as the status of family, even though the family has always secured the survival of the humankind. We live in the time when we speak neither about evil nor sin. Also moral lapse is considered non-

[7] Ibidem, p. 39.

punishable until the evildoers are not caught in the act. American publicist Dinesh D'Souza (born 1961) argues in his book *What's So Great about Christianity* "that the atheism is not, in spite of the common opinion, primarily the intellectual revolt, but a moral one. Atheists do not adjust their yearnings to the truth, but rather the truth to their yearnings.[8] The freedom in everything is being stressed, but in reality it is not the true freedom but the deformed one. Also, these questions are providing evidence: Is the man really without a sin when he stops speaking about it? Does the evil cease to exist if we do not speak about it?

As a consequence of similarly misleading attitudes, the moral standards are removed from the consciousness of people as something disturbing. Then we wonder why the postmodern people are not able to distinguish what is the true and what is the lie, what is the good and what is the evil, what is the virtue and what is the lack thereof? How can we speak about ethics when we are not even able to distinguish between the opposite notions?

Parents of the child have always presented two different models of behaviour in the human family, which, in turn, influenced the behaviour of their offspring, and mostly in a positive way. However, it is hard to deny that sometimes the said impact was also negative, when children witnessed disputes, hatred, dependency on alcohol or illegal drugs, or when they experienced abuse on the part of their parents.

All of the above notwithstanding, the child needs the family, which has been proven by virtually all the social sciences Family, which was called a "Domestic Church"[9] by Saint John Paul II, constitutes value for the child. This value is derived from the mutual love in the family, from the unity in opinions and desires by considering the common goals when coordinating the family life, as well as in cooperation in conceiving and educating children. The most relevant sociological research in this respect (Girgis, Anderson and George) informs us that in general, the children are prospering best when they are brought up by their married biological parents. Therefore, not only the upbringing of the children confirms and extends the marriage, but also the marriage is good for the children.[10]

Privilege of matrimony is the voluntary commitment towards one's own offspring. Human society, as we can see it from the historical context, still has not invented anything more effective than the institutions of matrimony and family, hence the family needs the financial, emotional,

[8] D. D'souza: *Křesťanství a ateismus úplně jinak*. Praha 2009, p. 234.

[9] Ján Pavol II: *Apostolic Exhortation "Familiaris consortio"*, 21, (58). Trnava 1993.

[10] S. Girgis, R. T. Anderson, R. P. George: *Čo je manželstvo? Obhajoba zväzku muža a ženy*. Trans. M. Sitár. Ivanka pri Dunaji 2013, p. 38.

and social support from the state and from society. Following this objective the Declaration of the Rights of the Child was approved by the United Nations on November 20, 1959. The document's main intention was that all children in the world were able to enjoy a happy childhood. This declaration contains ten moral principles which can be summarized as follows:

1. Each child has the right for equality, regardless of race, colour, sex, religion, origin or status.
2. Each child should be offered opportunity and resources for its physical, mental, moral, spiritual and social development.
3. Each child has the right to a name and a membership;
4. Each child has the right to social security, adequate nourishment, housing, recreation and medical care. Child and mother shall be provided with special care and protection before and after the birth.
5. The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care.
6. Each child has the right to love and understanding. As far as it is possible, the child should grow up under the responsibility of his parents. A child of tender years could be separated from his or her mother only under exceptional circumstances. Financial support from the state and other help to children from numerous families is desirable.
7. Each child has the right to education, which should be free and compulsory in the elementary stages. Each child also has the right to play and recreation.
8. The child should be among the first to receive and relief, in all circumstances.
9. The child should be protected against all forms of neglect, cruelty and exploitation. He or she must not be a subject of commerce in any form, neither by being engaged in employment before achieving adequate minimal age. Equally, the child should be protected against everything that could be to the detriment of his or her health, education, or hinder its physical, mental, or moral development.
10. Each child should be protected against deeds supporting racial, religious, or any other kind of discrimination. The child should be brought up in the spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood in the full awareness that his or her energy and talents should be to the service of his fellow human beings.[11]

It follows from the declaration that the children have the right to care of both parents and the parents have the right to upbringing of their chil-

[11] Cf. www.osn.cz/…osn/…/umluva-o-pravech-ditete.pdf (accessed 31.12.2013); http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf

dren. It is in the interest of children to grow in the environment of stable marriages and in the presence of their biological parents.

On the 30th anniversary of the Declaration of the Rights of the Child, the UN General Assembly passed the Convention on the Rights of the Child (November 20, 1989, in New York), which was then gradually ratified by 193 countries.[12] Individual countries, in accordance with the convention, regularly report on the quality of children's lives in their countries to the Committee on the Rights of the Child in Geneva. The document contains, in addition to Preamble, 54 articles divided into three parts, as well as three optional protocols. It is also stressed therein that the child (until the age of 18 years) for the reason of physical and mental immaturity needs special guarantees: care and appropriate legal protection before and after the birth. Every child has the civil, cultural and social rights. These rights are based on four basic principles ensuring that no child is discriminated, that his or her concerns are taken into consideration, that the rights of the child for life and development are respected, as well as the right for respecting the opinions of child.

At the theoretical level it seems that all rights of the child are thoughtfully formulated, however, at the practical level, it is not as clear. Currently we are witnesses to the massive killing of unborn children, as if the killing of children was considered a human right. What is the matter with this materialistic society? Who do we want to persuade that the right to life and the right to kill are not opposite values anymore? It is similar in case of paedophilia, child trafficking for prostitution or for body organs, with labour exploitation of children, bullying at school, interventions of family and guardianship courts in cases concerning child adoption by homosexual couples, etc. The secular rights are full of holes from many points of view, and because of this they cannot be enforceable. It seems that they are leading to despair and chaos, in which there is neither stability nor dignity, and this reasonably calls for right of each person to have and express reservations.

However, there is still visible a tendency to speculate in order to exonerate the crimes of our time. At the same time, one fact cannot be denied: a complete family, consisting of a mother and a father, remains a proven good for the child. Janne Haaland Matlary says that the family is politically relevant, because it is a place where people are brought up. Parents are performing the most important work in society and nobody can replace them."[13] Whatever pressures are levied against the rights of the

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[12] Cf. Dohovor o právach dieťaťa. Available: http://www.unicef.sk/sk.práva-deti/dohovor-text (accessed 31.12.2013).

[13] J.H. Matlary: *Ľudské práva ohrozené mocou a relativizmom*. Prešov 2007, p. 130.

child and against the rights of parents, the institution cannot, indeed, be supplanted.

2. The child — a blessing for the Church

A child, its conception and birth, have always been perceived as a blessing, which goes back to the times of the Old Testament. The Israelites considered children a sign of God's blessing: "Children's children are the crown of old men and the glory of children are their fathers" (Prov. 17, 6). Not having children meant a social humiliation (Gn 29, 29—35; Gn 30, 23).

Analogically, in the texts of the New Testaments there is emphasized the care and protection of children. Jesus himself came to the world as a little and fragile child (cf. Lk 2) 12; 2, 27; 2, 43—51) and later he blessed the children (cf. Mc 10, 16; Mt 19, 14). The secret of genuine greatness of Gospel, as underlined by Saint Matthew the Apostle, is expressed in the following words: "Except ye turn, and become as little children, ye shall in no wise enter into the kingdom of heaven. Whosoever therefore shall humble himself as this little child, the same is the greatest in the kingdom of heaven" (Mt 18, 3—4). In Gospel we also read a warning for those "who so shall cause one of these little ones that believe in me to stumble" (Mt 18, 6), and also "See that ye despise not one of these little ones" (Mt 18, 10). In the Letters of Saint Paul we also find an appeal for Christians to grow up in the faith "[…] We are not meant to remain as children" (Ephes 4, 14). Spiritual infancy, following the Saint Paul's words, is in the contrast with age maturity: "Brethren, be not children in understanding, howbeit in malice be ye children, but in understanding be men" (1 Cor 14, 20). But in other place Saint Paul emphasizes the apostle's smallness and compares it to the tenderness of mother: "tenderness, rather like that of a devoted nurse among her babies" (1 Thessal 2, 7).

The Church as a community of followers of Jesus Christ, who is the world and to all ages. For this reason, the Church Head of Universal Church, is referred to all cannot be national (English, Sweedish, Danish, Norwegian, Chinese). The Church is the greathuman family, the home of believers who are bound together and unified by the love for Christ, in the same way as the love of parents unifies them with their children. Christians respect life as a gift. Every newly born and newly baptized child, by the act of baptism "has put on Christ" (Gal 3, 27). It becomes a God's beloved child, a living part of the Christ's mystical body and, at the same

time, a part of the Church community. Every child is considered by the entire Church community a unique God's gift. Thanks to this gift, God is incessantly in contact with the Church through new lives, through the holy liturgy and the sacraments. The essence of the Church is therefore "more rich than what can be statistically registered or documented by the declarations. It is a body whose circulation absorbs the nutrients from Christ itself."[14]

The Christian tradition, with the exception of Saint Luke, did not devote much attention to the childhood of Jesus. The Gospels were interested more in the divine origin of Jesus and his new message to the world. This is why Saint John the Evangelist speaks of the rebirth of the God's children: "See what love the Father has given us, that we should be called children of God: and so we are" (1 John 3, 1). Despite this, John did not avoid to express this kind of tenderness: "Little children, yet a little while I am with you" (John 13, 33).

The Church, as we see from the Scripture and the Tradition, acknowledges that the Divine Love is a fundamental condition of life. Every child coming to this world, apart from parental love, is embraced by a mysterious love and care of God. The Church as a community has in itself — under the influence of the Holy Spirit — a potential to love and to unite the community of devotees as one family, in which the children are accepted with respect and affection.

The Church has an obligation to protect children, their life from the moment of conception. Cardinal Joseph Ratzinger in his book *God and the World*, which is a conversation with the well-known publicist Peter Seewald, indicated that: "The man is not a creator, he is only an assistant and a guard in the God's garden. But where he would like to exalt himself as a creator, there the creation itself is endangered, too."[15]

In this day and age, it seems that people exceed the last limits of respect towards God and make themselves the sovereign decision-makers over the matters of life and death. An acute problem of our times concerns manipulating the human genetic code. For instance, there are already children who, from their earliest years, in fact have three mothers: the first one provides her ovum, another one carries an embryo through the pregnancy until the labour, and the third one raises the child. If in the European legal acts prevails the opinion that it is better to substitute the words mother and father for the phrases Parent no. 1 and Parent no. 2, the real nature of family atmosphere shall disappear.

[14] J. Ratzinger: *Boh a svet. Viera a život dnes. Rozhovor s Petrom Seewaldom*. Trnava 2005, p. 279.

[15] Ibidem, p. 109.

The Church, knowing that life is a mystery, also knows that the human being should not be a subject to genetic manipulation. It is not possible, therefore, to have a child at all cost, because a child is not a subject of legal claim, nor is it a property, but a gift. Removing the child from its natural context, that is the family, can translate into serious impoverishment and consequences for both the child and the society as well as the entire humanity.

3. The child — a blessing for the society

Each child needs both the family and more widely understood social life. No family, then, should be secluded from the outside world, but, on the contrary, every family should have a public and social aspects to it. Every man is firstly incorporated into the family circle, and only then, gradually, in a larger scope of the society. From this it follows that every man should be useful both for his or her community and for the society.

The Pope Benedict XVI in his *Encyclical "Spes salvi"* (35) wrote: "Every serious and correct action of man is an active hope."[16] Cooperation between people is a part of human existence. The society needs children and the children need presence, not only of their own parents, but also of other people, the tutors and wise teachers, because no one is independent to such a degree that he or she no longer needs others.

The secularized, multicultural model of society, accompanied by the prosperity in the Western culture, have brought enormous changes in the contemporary culture. A child is not considered a blessing from God any more. Many parents perceive their own children as objects depriving them of their comfortable lives and reducing their living space. Their own egoism does not allow them to see in children the future, so they prefer to invest in material things. All of this creates the postmodern variants, in accordance with which people assure themselves in order to multiply the value of the proper "ego" through the value of the things.

Another phenomenon which poses an extreme risk is the fact of children now become the subjects of legal claims and are considered a property. It is reflected, for example, in the expectation of the parents that their own children realize the ideas they did not manage to actual-

[16] Benedikt xvi: *Encyclical "Spes salvi,"* no. 35. Library Editrice Vaticana, Cittá del Vaticano November 30, 2007.

ize in the course of their own lives. Such circumstances can sometimes lead to rebellion on the part of a child. It does not mean, however, that it is not necessary to educate children. Education still needs to be provided to children for at least two reasons: the human intellect has a tendency to grow and liberty of man is fragile and needs to be directed in a right way.

In our contemporary society a graduate depreciation of affection towards children is observed since, owing to egoism, children are no longer awaited. It should be a cause for an in-depth reflection, because it is the whole society that loses a lot owing to this attitude. The consequences of the public campaigns regarding promoting contraception are generally known. They reflect the elements of demoralization of the society, because despising the gift of life, they have no respect for human beings and their future.

Conclusions

It seems necessary to express some optimistic thoughts in the concluding remarks of the present article, because there is always hope when a man lives in the horizon of faith. Particularly, when a man is inclined to reflect with humbleness on his own existence, to evaluate the things from a bird's-eye view and not to give up seeking new solutions. The greatest hope in this respect are the people who are open for the comprehension of three things:

- dignity of the human being is inviolable and sacred;
- the most tragic illusion of contemporary people is their effort to be liberated from God;
- every single man is a new blessing from God for the humanity as a whole.

These statements result from the abundance of knowledge and skills, as well as from the experience of God's grace, which help each man to see life and things in their proper aspect. For this reason it is justified to repeat the words of Saint Paul that without faith we are "strangers to the covenants of the promise, not having hope and without God in the world" (Ephes 2, 12).

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Helena Hrehová

The Good of the Child — the Good of the Family, the Church and Society

Summary

The article entitled "The Good of the Child — the Good of the Family, the Church and Society" deals with the fact that reminds people for many centuries that the child is a good in three aspects: for the family, the Church and society. The family is the first and irreplaceable form of human community. In the family, every person learns to love and to form him- or herself through moral-ethical education in harmonic relationship with other people.

These are rational reasons why we should protect the traditional family against marginalization and interventions from government and state administration. Parents have a right to educate their own children and children have a right to have both parents

— mother and father. In the Churche very child is a gift from God and living limb of Christ's mystical body, therefore the Church has a duty to protect human life from conception to natural death. The child needs society and society needs children in order to function and have a future.

Thus, the article stresses three convictions: human dignity is inviolable and sacred; with every person comes God's blessing into the world; any attempt to separate man from God is the most tragic mistake of modern people.

Helena Hrehová

Le bien de l'enfant est le bien de la famille, de l'Église et de la société

Résumé

La réalité, qui depuis des siècles rappelle aux hommes que l'enfant est un bien en trois sens : bien pour la famille, pour l'Église et pour la société, constitue le sujet de l'article *Le bien de l'enfant est le bien de la famille, de l'Église et de la société*. La famille est la première et irremplaçable forme de la communauté humaine. C'est au sein de la famille que chaque homme apprend non seulement l'amour, mais aussi des règles morales et éthiques qui sont fort indispensables pour nouer des relations interpersonnelles harmonieuses. Il existe alors des raisons rationnelles qui incitent à protéger la famille traditionnelle contre toutes sortes de marginalisation et interventionnisme de l'appareil d'État. Les parents ont le droit d'élever leurs propres enfants, et les enfants ont le droit d'avoir les deux parents : une mère et un père. À l'Église, tout enfant est perçu comme un don divin et un membre vivant du corps mystique du Christ, et c'est pourquoi l'Église est obligée de protéger la vie humaine depuis la conception jusqu'à la mort naturelle. L'enfant a besoin de la société, mais c'est également la société qui a besoin des enfants pour pouvoir se développer et planifier son avenir. Cela étant, on accentue dans le présent article les trois axiomes suivants : la dignité humaine est inviolable et sacrée, la bénédiction divine vient au monde avec tout homme et une quelconque tentative de séparer l'homme de Dieu est la plus tragique erreur de l'homme contemporain.

Mots clés : Dieu, homme, bien, enfant, Église, société, droits humains

Helena Hrehová

Il bene del bambino come bene della famiglia, della Chiesa e della società

Sommario

L'oggetto dell'articolo *Il bene del bambino come bene della famiglia, della Chiesa e della società* è la realtà che da secoli ricorda alle persone che il bambino è un bene con tre significati: bene per la famiglia, per la Chiesa e per la società. La famiglia è la prima ed insostituibile forma di comunità umana. Ogni uomo impara in famiglia l'amore

e vi riceve l'istruzione morale-etica indispensabile a creare relazioni interpersonali armoniose. Pertanto vi sono motivi razionali per proteggere la famiglia tradizionale da ogni genere di emarginazione e dall'interventismo dell'apparato statale. I genitori hanno il diritto di educare i propri figli ed i figli hanno il diritto di avere entrambi i genitori: la madre e il padre. Nella Chiesa ogni bambino viene scorto come dono di Dio e membro vivo del corpo mistico di Cristo perciò la Chiesa ha il dovere di difendere la vita umana dal concepimento alla morte naturale. Il bambino ha bisogno della società ma anche la società ha bisogno dei bambini perché si possa sviluppare e programmare il futuro. Per tale motivo nel presente articolo sono evidenziati tre assiomi: la dignità umana è inviolabile e santa, con ciascun individuo viene al mondo la benedizione di Dio e qualsiasi prova di separazione dell'uomo da Dio è l'errore più tragico che l'uomo contemporaneo possa commettere.

Parole chiave: Dio, uomo, bene, bambino, Chiesa, società, diritti umani

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Social Determinants of the Significance of the Child in a Micro- and Mezosocial Perspective

Keywords: child, rights of the child, social determinants, civilization and cultural threats

1. Contemporary dilemma of an ageing civilization of prosperity

"Child constitutes the hope of the world," by the means of these words Barbara Smolińska-Theiss concluded the 20th century within the context of the achievements of the Convention on the "Rights of the Child," legislated on November 20, 1989 by the United Nations General Assembly. While agreeing with the significance of these words — about the hope that the humankind stakes on the succession of generations — what seems interesting is the deep plane of this emotional and declaratory phrase. Are the contemporary societies, after experiencing not long ago the tragedies of human fate, both connected with the calamities of wars, dictatorships, as well as unconcern in formulating the principles of economic politics, the consequence of which was massive exclusion, marginalization and poverty to the extent of indigence, sensitive to the fate of children, or not? How are the Convention provisions respected, if some years ago even the biggest optimists did not suspect that in a short period of time over 200 countries will implement the resolutions of the Convention. We need to acknowledge that the document was recognized by the international society because of at least several reasons, among those of key importance are:

(a) adequacy of the Convention provisions in the face of the defined (in a peculiar consensus) situation of children in the world and their usability in the creation of the children politics in the countries — signatories of the Convention;
(b) complementarity and juridical harmony of the Convention provisions in the face of the local (domestic) law as defined in Art. 41 of the Convention, which states that: "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in the law of a state party or in the international law in force for that state";
(c) subjectivization of a child as a completely autonomous social being, at the same time acknowledging the fact that the rights of a child are human rights and are of a universal character.

We could suppose that in many countries, owing to the act of the ratification of the Convention, the situation of children would improve and indeed it happened. What influenced it were the changes that the Convention induced in the local legislation, adapting it to its requirements. What is more, the Convention became the framework for the actions undertaken by UNICEF and also had its impact over the activity of UNESCO, WHO and ILO. Nevertheless, still in many parts of the world the situation of children is critical, they are the subject of a unitary/institutional exploitation, captivation and violence. Their value is estimated in the category of economic profitability, by the means of various types of exploitation, including human trafficking, trading their organs, employment in sex business, as well as forced participation in military conflicts and fights among organized crime groups.

Therefore, the reflection upon the actual respecting of the regulations of the Convention on the Rights of the Child is still essential. The repetition of Ellen Key's postulate concerning the implementation of "the century of the child" is a task to execute that calls on us to act. What is surprising is that in spite of the fact she formulated this call at the beginning of the 20th century (1900) it is still up-to-date and sometimes sounds as empty as a claptrap dressed in a politically-correct narration.

These words are strengthened by the significance of certain facts, which confirm the necessity of a constant strive for the realization of the regulation of the Convention, both on a local and global level. Amid the recent research and press reports on the situation of children the regulations which become visible are those which concern the situation of children in Ukraine, Somalia, Romania, Ruanda, Brazil and Poland.[1]

[1] The examples of ruining childhood and of a bad fate of children in the contemporary world:

Many years ago, apart from Ellen Key, it was Janusz Korczak[2] who in his *Myśl Pedagogiczna*, published in 1933, wrote: “we cannot leave the world the way it is […] what a tragedy is the contemporary world and

(a) On Thursday, June 20, 2013, this year the UN accused Israel of maltreating Palestinian children, including torture and using them as human shields. In the period from January 2010 till March 2013 fourteen instances of *using Palestinian children as human shields and informants* were reported. The children were forced to enter possibly dangerous buildings before the soldiers, or forced to stand in front of military vehicles to prevent them from being pelt with rocks; Source: Reuters http://www.kampania-palestyna.pl/index.php/2013/06/22/onz-oskarza-izrael-o-torturowanie--palestynskich-dzieci/

(b) The Bulgarian Helsinki Committee (BHC), in its report, states that children in Bulgaria are very often illegally or arbitrarily deprived of freedom for longer periods of time. It constitutes an infringement of the international human rights, including the Convention on the Rights of the Child, according to which the depravation of one's freedom should be applied for the possibly shortest period of time. The report (in Bulgarian) also states that the children who are deprived of freedom are susceptible to violence, abuse, social discrimination and the lack of observance of their civil, economic, social and cultural rights. Source: http://www.liberties.eu/pl/news/detencja-dzieci-bulgaria-raport-bhc January 12, 2015, Bulgarian Helsinki Committee.

(c) In Poland approximately 2 million people suffer from extreme poverty. Their income does not allow them to satisfy their needs. Another 5 million people face difficult living conditions. The data provided by the Central Statistical Office and Diagnoza Społeczna (Social Diagnosis) researchers from 2011 suggest that the poverty sphere in Poland decreases in number. Since 2009 the number of households, which cannot afford to satisfy their current needs, has decreased from 28% to 26%. However, at the same time the number of poor people who make their living off such means of support as social benefits, disability and attendance pension is ever-growing. In case of the number of poor people in Poland the indicator has risen since 2009 from 28.5% to 36.4%. Poverty poses a serious risk to, first and foremost, incomplete families, families with many children, which raise three children or more. The factor that distinguished the Polish poverty in the European Union is its rural character — since the most difficult situation is among families and children who live in the countryside. Source: Web site of the Central Statistical Office http://www.stat.gov.pl/gus; Web site of the European Statistical Office http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/; Report by Unicef: *The Children Left Behind*. Warszawa 2011.

(d) For the first time Mali was included in the report. The authors claim that the conflict between the army and the Islamists from the north, which has lasted since the last year, caused “painful suffering” to the children. Dozens of people were killed or injured in combat, explosions of mines and during bombing raids organized by the Malian army and the French, who support them. Boys aged 12—15 are forced to fight by various military groups and the girls are sexually abused. “It is a systemic practice applied on a massive scale” — the authors of the report warn. Source: http://wyborcza.pl/1,76842,14094577,Okaleczane__gwalcone__torturowane__Raport_ONZ_nt_.html#ixzz3PsLtvhLw

[2] J. Korczak: *Dzieła*. Vol. 3, pp. 223—227.

what a disgrace it is for this generation, which passes on a disorderly world to their children."[3] Therefore, a great many times he pointed toward the meaning of the development of the idea of the love of a fellow human being in the 20th century, in which he led children from the shadow to the epicentre of the social concern, children who were supposed to be liberated from various, characteristic of this period of time, bondages! Nowadays, according to the examples previously mentioned in the footnotes, we deal with new, however, also those not solved for years, bondages of the subjective nature of a child. Therefore, what seems valuable is the reference to not only the intellectual but also the spiritual and emotional legacy of the "Old Doctor," since it still retained the value of a permanent usefulness. At least because the Convention was also founded on Korczak's intellectual achievements. Indeed, many years ago he claimed that: "Children will not only become, but already are human beings [...] in their soul there are germs of the thoughts and feelings, which we have."[4]

Apart from that, he tried to draw attention toward the necessity of not only respecting the rights pertaining to a child, but also his or her emancipation. He specified a horizon in the individual perspective, as well as noticed the necessity of perceiving childhood and children as a separate social category and an independent subject/object of psychological/pedagogical research. Today, it all seems obvious to us, however, considering the different cultural and civilization context (the beginning of the 20th century) Korczak's ideas were innovative, almost revolutionary.

The Convention lays down explicitly formulated expectations and objectives for societies and countries. Their lifespan frequently becomes overshadowed by global societal, cultural, economic and political changes, which leave their clear stamp on the present time. The globalized world that we are surrounded by is too often perceived through a simplified perspective of homogenization, standardization and flattening of the perspective, as well as processes concentrated on the dominance of economic effectiveness over social reason. Paradoxically, it competes with rakishness and an egoistic elevating of separatisms and local perspective.

It is achieved through promoting distinctness, separatisms, fervent protection of one's borders and space. It couples with the tendencies of being together versus being apart in the face of the global challenges. A contact between the two elements occurs, both the similar ones and these clearly and extremely different. The result of the meeting can be both a march toward the good, as the well as generation of evil.

[3] Idem: "Ku otwarciu Domu Sierot." In: *Myśl pedagogiczna Janusza Korczaka, Nowe źródła*. Warszawa 1983, p. 242.

[4] Cf. Idem: *Idea miłości bliźniego...*, p. 226.

One of the evident global problems is the procreational diversity of the "old" Europe and a most unusual dynamics in the countries located on the American, African or Asian continent. Ageing in Europe, settled in prosperity and social-existential security, stands in contrast with the procreational dynamics of people from Africa, both American continents, countries in Asia, or also India. What we observe there is overpopulation, excess of births in the presence of the impossibility of economic and social support of families with many children. Nevertheless, in the public discourse there is a clear disproportion in the accentuation of these phenomena, with a sensitivity to the demographic stagnation in Europe. The available reports suggest that the ageing society, aware of the threat of self-annihilation due to the procreational tardiness, simultaneously does not create socialization paths for the following generation that would be attractive and patent enough. Since we still face a situation, in which the real needs, including the social ones, are changed for the artificial needs of egoistic self-worship and self-fulfillment, be it through promoting singleness, a lonely life but attractive and economically predictable. Therefore, the real needs are changed for their fetishes, which have the power of compensating the depravity of what is natural and characteristic of the human kind. They come into being as a result of the frustration connected with the lack of fulfillment of elementary needs. They are their faint echo, like an ersatz, in situations when the society defines the criteria of success, desired examples of behaviour, desired attributes of a career, paths of recognized promotions!

The society of excess, focused chiefly on consumption, excess of goods, and simultaneously which has distinct social inequalities, visible in the fields of marginalization and exclusion, becomes also a threatened society, risk society, as it is defined by Ulrich Beck (1986), in our depiction also threatened with self-annihilation.

The instance of a horizontal vista (along the entities' biographic paths) of risk that await those who start their journey through life, in comparison with those who are in the twilight of their life — are of both a common and a separate character. Taking into consideration and giving one's consent for some radicalism of this comparison, the area of common risk of the ascending and the descending generation are to be found, among others, in such phenomena and conditions as: lifestyle diseases, inequalities of social and economic nature; health and social system dysfunctions; natural disasters; armed conflicts. Whereas among those which more often take the separate character are: being the victim of human trafficking; abuse in sex business; organ trade; economic exploitation as a cheap labour force; being a victim of mediatized world, including cyber or technology addiction.

Pointing toward some experiences of contemporaneity believed to be the manifestations of everyday democratic risks, I explicitly separate these, which are more common in those who, because of various reasons do not have enough competence, potential of a different type to "chase away" these risks. The absence of this power is to be found usually within three scopes: poverty, the frailty of the environment of upbringing and socialization, as well as the potential of the very person and/or negligence, desistance, abdication of mezostructural institutions, which *should* support all in the spirit of social solidarism through self-development and realization of life objectives.

The contemporary times are filled with alternative offers related to how one's life, which seems to be rushing (in the 21st century) with a overwhelming speed, can be planned. It translates into dynamic (because of their tempo, sometimes perceived as radical) changes, both in the area of normativeness, economics, the character of a community (including the definition of a family), recognition of the obligations toward other human being (*neighbour*), concentrating around an idea (e.g. Fatherland, National Country), faith and the Church. Among the areas, in which the changes leave the clearest trace, is the family and its changing character, the main appraisers of the actual versus media reality, State and its changing role in the face of globalization and unionity; homogenization of culture, with its macdonaldization, commercialization of human relations, culture of consumption and sensations. In a broad trend of so many changes new communication pathways, different from the current ones both in the intra and the intersocial perspective, are constructed. An individual becomes embroiled and harnessed in new technologies and social networks, it also has new forums and means of self-presentation. It brings so far not known forms and intensity of satisfaction or its lack (selfies, likes, dislikes, hates…). This dissimilar from the so far known quality and form of entering into communication "about oneself" and "with oneself", on a different level situates also the feeling of responsibility for the truth, consequence of one's actions and judgments. It restricts the relations of "intra" versus the intensification of the "inter" relation. If we are in a society, which is characterized by various types of dehumanization, then in an unavoidable way these can and in fact do affect the youngest ones. They (children) become an object (subject) of various interests, passions, desires, among which are also these, which are induced by the need for sensations, maximization of consumption, caused by a necessity of an immediate gratification and total fulfillment. These states do not subjectivize the human being, quite opposite they depart from the principles and respect toward the dignity of the human being. It happens that they constitute an infringement of all pos-

sible human rights (here children) and in particular the regulations of the Convention.

2. The richness of the childhood in an individual-ontogenetic perspective and in a community-family perspective

Yet our sensitivity to the fate of a child developed and still develops from the awareness of the *fundamentality* of the young generation for the duration of the human kind, as well as societies and nations. In many fields of science, humanities and social sciences we encounter crucial reports emphasizing the universalism of the richness of childhood. This richness was perceived both in the perspective of its experiencing by an individual, its relatives (family, parents) and also in a social, community perspective. The richness of children's naivety, honesty, straightforwardness, very often becomes visible in everyday functioning, however, under one condition, namely the presence of a keen sense of sight, sensitive hearing and a motherly/fatherly heart burning with parental love. Only when we spend enough time with children, and when this time is used knowingly, can we be enchanted by the whole richness of a fresh, not defiled children's sensitivity. Therefore, instead of seating the child in front of any screens or inducing sleepiness by the means of psychotropic drugs, we should merrily and intensively enjoy every moment that we are allowed to spend together. Sometimes it happens that one of the parents takes the main professional and economic duties, which as result limits his presence at home. It is not exclusively about the very time (its large amount devoted to a child is important, however, we should not absolutize it), what is crucial is the style and way of spending it. A beneficial postulate, from the point of view of the educational impingement and creation of a bond, is the concern for the *quality* of being together and its contexts! It is better when it is conducted in a stimulating, kind, warm atmosphere that will give the child a chance of natural expression, creativity and feed the child's curiosity. It is in the children's questions, a natural need of coming up to something/ someone, expressed directly, without a particular caution, that we can find the carpet of sensitivity weaved from the inspirations of the heart, movements of eyes, or ears and free associations of both the child and his or her immediate family.[5]

[5] Surely everybody is capable of recalling situations, which were engraved in our memory because of their exceptional spiritual beauty, when we are/were giddy with the

How easy it is to scare it off, trample it down. Unfortunately, it does not require any particular measures, it is enough to show dryness — lack of coddling the love toward a child and not showing interest in him or her. A child not noticed, ignored, child "hindrance," with time disappears in the mist of invisibility that enwraps it. After all it is a creation of reactivity on both sides — adult (parent) creates its structure by the means of announcements intentionally/unintentionally addressed to the child: "I do not see You!/I do not communicate with You!/I do not care what You do!"

As a result, after several attempts of dispersing this mist, the child becomes accustomed to its veil, acknowledging that it is a particular type of intimacy — runs into the *invisibility paradox* — starts reasoning in the following way: "I will become invisible, if that is what you want from me" — it seems that he or she announces to the adult, believing that owing to it he or she will gain attention/acceptance with the adult. He or she does not take into consideration, since he or she does not know, for he or she has too little experience/knowledge of the fact that since he or she is not so visible then I do not have to react, since I do not notice his or her presence — the adult reckons. The borrowed veil of a nebula of a parental distance toward his child, which should have been the connecting thread, separates even stronger, muffles better…

In the past the children's spontaneity and straightforwardness manifested itself by the means of a naive belief and conviction that all adults strive for the well-being of children. Since the parents, grandparents, multi-generational families proved that, then this conviction overflew with an overwhelming trust and openness toward others. The Jesus' gesture of open arms, so amazingly triggered with a subtle squat, when the child runs toward us — becomes replaced with fright and doubt: "can I, should I, how will it be understood?"

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children's sensitivity, the simplicity of assessments, accuracy of associations… The house in Mokry Dwór, near the city of Wrocław, which belongs to Mr. and Mrs. Golem. We kneel down to say our evening prayers. Next to the parents — Amelia and Dominik, their kids 4-year-old Karol and 2-year-old Estera. During the prayers we move on to specifying the intentions that we want to pray for. The very moment Karol turns toward his Father and poses a question: "Daddy, what is the color of intentions?" Other time, while I was wandering in Roztocze, I headed for Zwierzyniec, where walking amidst old oak trees I came up against two little children. Ignacy (aged 6) and Stefania (aged 7), who passionately were helping some snails cross the road. Since it was a typical period of time when Roman snail were in abundance, the children had their hands full. Nevertheless, they did not cease to heartily support the column of (they believed tardy) snails in crossing the road. In any case they were informing the snails why they were doing it and where they are taking them, making sure that the snails "do not drift away from the chosen track," which the children thought of the snails followed.

A political correctness, based on the EU directives connected with the Istanbul Convention, as well as the pressure to ratify the Charter of Fundamental Rights of the European Union, exerted on the EU and UN member states, forces its way into the educational and socialization reality with the power of a tornado. It is therefore difficult to selectively analyse the regulations of the Convention on the Rights of the Child, nevertheless it is worth referring to its following articles:

Art. 5: "States Parties shall respect the responsibilities, rights and duties of parents […] to provide [the child with] appropriate direction and guidance […]."

Art. 6: "States Parties recognize that every child has the inherent right to life," and also Articles 7, 8, 9, 10, 11, 12 and 13, which refer to the commitments of the child's family, parents, legal guardians, leading to Art. 14, and in particular its 3rd point, which claims that: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."[6] The observance of the Convention regulations has contemporarily an important meaning, since currently we have to deal with a great many legislative initiatives, resulting from cultural and civilization changes, which relativize the definition of a family as a relationship of two people of different sex, introducing many different versions. It creates, in a socialization and educational meaning, a completely new situation, dissimilar from the already known, in the perception of the basic social unit, which the family is called, as a matter of fact, the same way but completely different.

It is connected, among others, with an evident distinctness of the roles of a father/mother, be it in the case of people of the same sex. It is in opposition with the natural phenomenon of love of two people, the high point of which is the act of procreation. "God wanted the relationship of love between the husband and the wife to be the source of new life."[7] "Family is […] the fullest community from the point of view of human bonds. There is not a bond, which would bind people more than the marriage bond and the family bond […]."[8] "The woman […] is above all the heart of the family community. She gives life — and she is the one to bring up. Naturally, she is supported by her husband and she systematically shares with him the entire scope of the parental and educational

[6] Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989 (*Journal of Laws* from December 23, 1991)

[7] John Paul II on February 19, 1981 during the Holy Mass for families in Cebu, the Philippines.

[8] John Paul II on June 3, 1991 sermon during the Holy Mass on the airfield of the flying club in Masłów.

duties."[9] "Fatherhood is the responsibility for life: for life at the beginning conceived in the woman's womb, then born, in order to let a human being appear in it, a human being that is blood from your blood and body from your body."[10] "There is no doubt that the public authorities have in the area of education their rights and duties, since it is the well-being of all people. Nevertheless, they cannot stand in for the parents, since the mission of the authorities is to provide support to the parents, to help them fulfill their rights and obligations connected with raising children in accordance with their religious and moral beliefs."[11]

The above quotations from the numerous speeches delivered by Saint John Paul II in a fundamental (principled) manner remind about the order of social and family relations, which can in a holistic, complementary and proper way be conducive to the development of the child. Moreover, they indicate toward the role and position of a given country and its agencies in this process. If it is currently suggested that the equality of relationships of people of the same sex with heterosexual ones, then in an evident way we separate ourselves from the natural motherly and fatherly obligations and the context of raising a child in the natural presence of two parents of different sex. Any erudite and intellectual measures are not capable of leveling the qualitative difference in exercising motherly/fatherly educational service by a woman/a man, and a person assuming the feminine/masculine role. Both within the somatic and physiological area and the emotional and mental one, different predispositions, individual features, adopted lifestyles, interaction strategies and types of socialization environment are visible, which has a serious influence over the quality of the process of child development. The consequence of this type of changing of roles or role changeability (their fluidity) come to light on several planes of the process of shaping the individual's self-image, starting from:

— somatic and physiological area (physiological functions, natural behaviour, typical ailments);
— sexual and identity area (gender identity, sexual behaviour);
— sensual area (self-awareness of one's body, its erotic preferences and changeability);
— area of social competence and taking up social roles;
— area of interpersonal relations and social bonds.

The child, who remains under the influence of the pressure of cultural correctness, is forced into a reality, which promotes and strengthens

[9] John Paul II on June 13, 1987 Speech to the Women in "Uniontex" in Łódz.

[10] John Paul II on March 19, 1981 during the Holy Mass on Liberati stadium in Terni, Italy.

[11] John Paul II on November 2, 1982 during the Holy Mass for Christian families in Madrid.

a belief and a behaviour that is in opposition to Art. 14, point 1, Art. 14, point 3, and also Art. 19 points 1 and 2 of the Convention on the Rights of the Child. What constitutes an example here is a coverage and media productions, and also the functioning of institutions (including the country) and organizations, which by taking into consideration the postulates of minority groups aim at dominating over the broadcast, annexing more and more socialization and educational agencies and through them publicizing their minority beliefs. Not only is such a situation the usurpation of pestering ideas but also a cultural and civilizations invasion, which the Country authorities either do not react to or quietly support (vide the examples of "Ponton" sexual educators and/or the activities undertaken by the Minister's Plenipotentiary for Equal Treatment or the Ombudsman for Children).

We are in a dichotomous and schizoid situation, in which, on the one hand, the Convention on the Rights of the Child is postulated and announced, and on the other, an activity, which destroys and shatters this dignity, rights and respect, is promoted and practiced. We have to acknowledge that in such a situation we have to fight for their (children) rights, speak about them loudly, broaden the circle of those, who are willing to participate in multiplying their happiness and good existence.

3. Civilization and cultural danger for the childhood and the child

In the previous consideration I indicated toward the examples (Bulgaria, Syria, Israel, African countries) of a total interference in the fate and the existential safety of children. The contemporary instances are so numerous that what seems essential is a global review of the social attitude toward the phenomenon of childhood and children. The insincere submitting of an ever growing number of new postulates, the original aim of which is to change the fate of the youngest ones, does not find a real reflection. To conclude it in a playful way, it is "giving empty promises." Many of those, who are responsible for the world politics, and therefore are in possession of the "keys" to a feasible change of its fate, remain in a blissful conviction that the successive resolutions, standpoints and declarations are enough to make it happen. They ignore and/or force out the evidence, arriving from far and wide, of the disastrous situation of children and teenagers all over the world.

Amid those which cannot be ignored any longer are those connected with:

1. Exploiting children in the current armed conflicts, which results in the mortality of children as the war victims, using them as human shields, maltreating them, using them as suicide soldiers (from the UNICEF report: “In the period from January 2010 untill March 2013 fourteen cases of *using Palestinian children as human shields and informers* were reported. The children were forced to enter possibly dangerous buildings before the soldiers, or forced to stand in front of military vehicles to prevent them from being pelt with rocks”).[12]
2. Abusing children’s sexually, both during armed conflicts and also situations when armed conflict is not present (the UN report, which described the atrocity, which young Syrian go through, when they get behind bars: “Even 14-year-old boys are abused sexually by intelligence and army officers, who employ such a way to extort the confession of one’s guilt. An alleged sympathizing with the opposition is often the guilt. The tortures, which the children are subjected to — beating, electrocution, sexual tortures and threats — do not differ from those employed in case of adult prisoners.” What is frequent is the sexual abuse of girls by soldiers and Shabiha (armed militia in support of the regime) during the attacks on cities, in prisons and at checkpoints. The rebels kidnap and rape girls from places accussed of supporting the government).[13] An element, which completes this unwanted landscape are statistics suggesting the engagement of the youngest ones in the prostitution business, as well as using them as organ donors, so creating a network of bad adults, for whom the child is precious as long as his or her body can be taken advantage of for financial purposes.

A different symptom of a difficult position of children and “troublesome childhood” are indicators, which suggest that many families live on the verge of poverty. Unemployment, poor education and a large number of children to support are the most serious factors that generate poverty. Families that live in poverty find it difficult to guarantee the fundamental needs of the children. Starting from securing food, clothes, schoolbooks and school utensils, through ensuring appropriate living conditions and finishing with the realization of the ever growing social and cultural needs of the children. The studies clearly show a significant and a non-decreasing scale of children malnutrition in Poland. In 2010 over 130,000 children required extra food. With such a result Poland comes in third

[12] Cf. http://www.kampania-palestyna.pl/index.php/2013/06/22/onz-oskarza-izrael-o-torturowanie-palestynskich-dzieci/.

[13] Cf. http://wyborcza.pl/1,76842,14094577,Okaleczane__gwalcone__torturowane__Raport_ONZ_nt_.html#ixzz3PsLtvhLw.

in the European Union, just after Bulgaria and Romania. The poverty of children is not only the issue of childhood in poverty. It is also the problem of inheriting poverty, which leaves entire families on the margin of the social life for a long time.[14]

Within the category of extreme symptoms of people's degeneration in behaviour and attitude toward the weakest ones, since in case of the youngest ones successive examples could be provided, and we want to focus on the causes of such a situation, the crucial cultural and civilization accelerators, which, I believe, have influence over the "increase" of these negative phenomena are:

- dehumanization of interpersonal relations (Ortega y Gaset, Z. Bauman; A. Giddens);
- disintegration of social bonds aggregated around the predominance of the "human person," family as the foundation of the social development, while shifting toward commercialization and calculating (McRizer; B. Barber, M. Hohschfild);
- disparity in the global development, with a clear dominance of the rich north in the face of an ever bigger economic deterioration and impoverishment of the south, with the consequence of this disparity in the shape of a mass exodus of people;
- implementing the elements of "new axiology," connected with dismantling of the current definition of a traditional family, as a relationship of two people of different sex, and moving toward radical gender trends, leveling them with civil partnership and introducing an acceptance for distinctness (in the past deviation) to the public circulation, which today are, according to the order of political correctness, alternative ways of expression and "communicating oneself."

These elements (naturally it is not an exhaustive list) are not in itself devastating. They become such only when a personal factor is added, so the attitude of those, who in the face of the above mentioned changes show disorientation (are lost, and therefore they do not know how to behave in the presence of such situations and how to interpret and understand them) and/or neophytic zeal of those, who after abandoning their recent normative and moral equipment, uncritically take the new ideas or fashions as a model. Apart from that it is worth highlighting that promoting new ideas is achieved nowadays with a significantly greater dynamics than in the past. It is an effect of the mediatization of modern times, placing in the global internet network, which is an environment that

[14] E. Tarkowska: "Children Poverty in Poland." In: *Poverty and Social Exclusion in Poland: National report of the Polish Social Watch Coalition and the Polish Committee of the European Anti-Poverty Network.* Warszawa 2011, pp. 57—62.

"absorbs" every content, gives it "space" and justifies it, which causes a situation in which the desired content, which is conducive to development, neighbours content which shatters the gentleness, innocence, frailty of the nature of a "pure human being" (*tabula rasa*).

A different element, which supports the process of the destruction of the modern times normativeness is the social awareness of the *impunity* of those, who commit infamy, sinfulness and crime. No matter how the human dysfunctions and entering into the circle of crime is interpreted, be it as sinfulness, immorality, crime, what we lack here is the evidence that would suggest that the *global community* — mankind — does not want such behaviour. It is accompanied by the abandonment of consequences, leniency toward the perpetrators, imperfection of the support and protection of victims, with simultaneous enormous profits from this business and not distancing ourselves from those who accumulated their fortunes on the wrong done to the children!

4. Concern for the child and childhood as a social and moral task

Taking into consideration the incohesion of the activities undertaken by people/institutions, in the face of the regulations of the Convention of the Rights of the Child, the following should be regarded as justifiable:

1. Creating real (as opposed to virtual) and functional pressure groups, which would exert pressure on decision-makers to make sure that the institutions, departments, structures they manage respect rights and principles, the signatories of which they are! Even if what I refer to seems completely obvious in moderm times there is a predilection for questioning axioms, among others, to negate the Kotarbiński's concept of pragmatics in action. Therefore, declarations are often given but not so often implemented.
2. Undertaking activities, which are possible in a personal perspective, so acknowledging that the world can be changed by starting from oneself, from taking the first step toward the direction that is desirable. Since sometimes the global perspective captivates us and/or suggests us that in a personal conviction "nothing will change, since what does my voice regarding the children in Syria, or Benin mean" — we withdraw into apathy, doing nothing. After some time we do not hear the cries of the suffering people, images of executed bodies, or evidence of

victims — we select the content. Since I do not have any influence — I force out the existence of the phenomenon, problem, state. Becoming insensitive to their misery, we leave them for the oppressors and torturers, who owing to the feeling of impunity enter into more and more dim levels of crime. A recommendation here is the appeal to act every time when we are aware of a crime, misdeed, falsehood, or evil.

3. Continuing the perspective of activities, which are in a personal reach, what seems primary is to undertake activities, which become the antithesis of *abandonment*, so a situation in which the child is not sufficiently groomed, cared for, has a feeling that he or she does not mean anything for anyone! It develops better in a conducive, loving, stimulating environment of its own family, which is complete, traditional, based on mutual respect and mutual love.

This line will for sure make a great many Readers to bridle, however, it is not about blocking oneself to this content because of ideological reasons, but about becoming aware that not all that has the "certificate of modern times" is in itself precious and useful. Similarly as with some methods or sensitivity that were the standard of everyday life in the past does not disqualify them because of their historicity. Despite the fact that this paragraph can be perceived as petty, in the face of the global perspective of analyses connected with the rights of children, it seems worth referring to the *priority* of having a child by Parents and for the Family. For I assume, taking into consideration the cultural and civilization differences, as well as economic circumstances, that the primary feeling, which remains ahead of procreation is love and responsibility. In the nature of a relationship of two people of different sex, is the hope for offspring. I believe that it is more often the fruit of well thought-out decisions and call for motherhood and fatherhood, than coincidence. Both states (fatherhood and motherhood) ennoble man, sublimate him or her, under the condition that their quality is flawless. Therefore, the recommendation is the concern for noble parenthood, its richness and a "full-time" character, so adopting the *predominance* of the child's presence and its fate in his or her own life and family life, over egoistic, narcissistic nature of a man called for freedom from everything.

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Jacek Kurzępa

Social Determinants of the Significance of a Child in a Micro- and Mezosocial Perspective

Summary

The author touches upon the subject matter of the rights of a child within the vista of the social conditions in the micro and mezosocial perspective. In the initial part of his considerations he indicates toward the challenges that the ageing society has to face, as well as evokes the phenomenon of love — as not only an ontic value but also biological and demographic. A natural destiny and biology of the body is ageing, we should accept such a natural consequence, which for ages has been difficult and led toward negation and acknowledgement that nature can be cheated, or improved. As a result new offers appear, be it within the scope of medicine (medications that help preserve the potency regardless of the age) and also beauty and plastic surgery, which subjects to correction the natural flabbiness of the skin, its senile spottiness and naturalness. What follows the possibilities and technologies is genetic engineering and modification connected with conception, creating new life, as well as its deprivation (euthanasia). The new possibilities kindle human passion, dream of perpetual youth, deny and disclaim the law of nature. They strengthen these "dreams," elements of cultural narration, which talk people into recognizing new axiology, accepting every "modality" of the current ethical, moral, legal and customary axioms. What also appears within the scope of the "dreams of eternity" is the necessity of commercializing emotions, interpersonal bonds, using human embryos, organs, exploitation of children and their abuse. In spite of the proclamation of rights and respect toward Human Person, regardless of age, the letter of law and declarations are not a sufficient guarantee to protect and care for children and childhood effectively.

In the evoked, numerous examples of destroying the nature of childhood and treating children atrociously, the Author reveals claptrap and ineffectiveness of signatories of manifold documents and declarations on the one hand and touches upon the issue of our individual, personal responsibility for the fate of the youngest ones on the other. He emphasizes, both by generously making use of referred ideas conceived by Saint John Paul II, as well as by referring to Janusz Korczak, or Ellen Key, that the fate of the child is in our, adults' hands. Therefore, if "our adulthood grows wild," it is difficult to hope that we will behave properly and accordingly toward those who are weaker, smaller and dependant. In the face of the above, our adulthood, in its humanistic dimension, *must* continuously become better, more mature and also more beautiful, in order to meet the challenges which we face and which are connected with protecting and caring for the youngest ones.

Jacek Kurzępa

Déterminants sociaux de l'importance de l'enfant dans la perspective micro- et mésosociale

Résumé

L'auteur aborde la question des droits de l'enfant dans la perspective micro- et mésosociale de leurs conditions. Dans la première phase de ses réflexions, il démontre les défis qui se profilent devant une société vieillissante et rappelle le phénomène de la jeunesse comme une valeur aussi bien ontique que biologico-démographique. Conformément aux lois de la nature et aux processus biologiques, l'organisme vieillit et l'on devrait accepter une telle séquence naturelle, ce qui est quand même difficile depuis des siècles. Cela étant, une attitude visant à contester et reconnaître que l'on peut tromper ou corriger la nature paraît séduisante. Par conséquent, surgissent des propositions non seulement dans le domaine de la médecine (des moyens permettant de garder la puissance sexuelle indépendamment de l'âge), mais aussi dans le domaine de la médecine esthétique qui corrige la laxité naturelle de la peau, sa tacheture et sa naturalité. Ces possibilités et technologies sont appuyées par la génétique et les modifications liées à la fécondation, à la création d'une nouvelle vie ainsi qu'à sa privation (euthanasie). De nouvelles possibilités enflamment les passions humaines et le rêve d'une jeunesse éternelle ; elles nient et contestent les lois de la nature. Les éléments de la narration culturelle renforcent ces « rêves » et convainquent de la nouvelle axiologie, de l'acceptation de toute « modalité » des axiomes éthiques, moraux, juridiques et ceux de mœurs qui étaient en vigueur jusqu'à présent. Dans le courant des « rêves de l'éternité » apparaît également la nécessité de la commercialisation des émotions et des liens interpersonnels, l'exploitation des embryons humains, des organes et des enfants ainsi que leur abus qui, quant à lui, devient de plus en plus fréquent. Malgré la proclamation des droits et du respect envers l'être humain — sans distinction d'âge —, la lettre de la loi et les déclarations ne constituent pas une garantie suffisante pour protéger les enfants et prendre effectivement soin d'eux et de leur enfance.

Dans de nombreux exemples rapportés liés à la dévastation de la nature de l'enfance et au traitement cruel des enfants, l'auteur, d'un côté, démontre le verbiage et l'inefficacité des signataires de nombreux documents et déclarations, de l'autre, il soulève la question de notre responsabilité individuelle et personnelle du sort des enfants. En puisant amplement dans les pensées du Saint-Père Jean-Paul II et en se référant à Janusz Korczak et Ellen Key, il souligne que le destin de l'enfant se trouve entre les mains des personnes adultes, c'est-à-dire entre les nôtres. Si « notre maturité devient sauvage », il est difficile d'espérer que l'on se comportera comme il faut à l'égard de ceux qui sont plus faibles, plus petits et sous notre dépendance. Cela étant, notre maturité — dans sa dimension humaine — doit sans cesse devenir meilleure, plus mûre et plus belle pour surmonter les défis qui se posent devant nous et qui concernent la protection et le soin des enfants.

Mots clés : enfant, droits de l'enfant, déterminants sociaux, menaces civilisationnelles et culturelles

Jacek Kurzępa

Le cause sociali determinanti della rilevanza del bambino nella prospettiva micro e meso-sociale

Sommario

L’autore intraprende il tema dei diritti del bambino nella prospettiva micro e meso-sociale dei loro condizionamenti. Nella fase iniziale della sua riflessione indica le sfide che dovrà affrontare la società che sta invecchiando, e ricorda anche il fenomeno della gioventù come valore sia ontico, sia biologico-demografico. Il corso naturale del destino e della biologia dell’organismo è il suo invecchiamento e dobbiamo accettare questa sequenza naturale, cosa che da secoli è peraltro difficile, quindi pare allettante il cammino che porta a negarlo e a riconoscere che è possibile ingannare o migliorare la natura. Di conseguenza appaiono non solo proposte nel campo della medicina (mezzi che permettono di mantenere la potenza indipendentemente dall’età), ma anche nel campo della medicina estetica che sottopone a correzione la normale flaccidezza della pelle, la sue macchie e la naturalezza. Vengono in soccorso alle possibilità ed alle tecnologie la genetica e le modifiche legate alla fecondazione, alla creazione di una nuova vita, come pure alla sua privazione (eutanasia). Le nuove possibilità accendono le passioni umane, il sogno dell’eterna giovinezza, negano e smentiscono i diritti della natura. Gli elementi della narrazione culturale rafforzano tali “sogni” che convincono le persone ad una nuova assiologia, all’accettazione di ciascuna “modalità” degli assiomi etici, morali, giuridici, di costume finora validi. Nella corrente dei “sogni di eternità” appare anche la necessità di commercializzare le emozioni, i legami interpersonali, l’utilizzo degli embrioni umani, degli organi, l’uso dei bambini e il loro sfruttamento diffuso. Malgrado la proclamazione dei diritti, della stima e del rispetto nei confronti degli esseri umani, indipendentemente dall’età, la lettera della legge e le dichiarazioni non sono una garanzia sufficiente per proteggere i bambini e per prendersi cura di loro e dell’infanzia in modo efficace.

Nei numerosi esempi citati di devastazione della natura dell’infanzia e di trattamento crudele dei bambini l’autore da un lato presenta l’ampollosità e l’inefficacia dei firmatari di molteplici documenti e dichiarazioni, mentre dall’altro solleva la questione della nostra responsabilità individuale, personale per la sorte dei più piccoli. Sottolinea, sia fruendo generosamente dei pensieri di san Giovanni Paolo II, sia riallacciandosi a Janusz Korczak o Ellen Key, che il destino del bambino si trova nelle nostre mani, ossia degli adulti. Se quindi “si incrudelisce la nostra età adulta” è difficile sperare che ci comporteremo in modo debito e corretto nei confronti di coloro che sono più deboli, piccoli, dipendenti. Visto quanto sopra la nostra età adulta, nella sua dimensione umanistica, deve divenire sempre migliore, più matura ma anche più bella, per vincere le sfide che dovremo affrontare nel proteggere e avere cura dei più giovani.

Parole chiave: bambino, diritti del bambino, cause determinanti sociali, pericoli legati alla civilizzazione-culturali.

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The Art of Communicating with a Child

Keywords: interpersonal communication, personality ego states, transactional analysis, barriers to communication, conditions of effective communication with a child

Communication is a common and basic form of interpersonal contact. Every social situation is a meeting of at least two people, in which there is a mutual interaction between them. This interaction, to be effective, that is, to allow to meet the needs of persons who get in touch with each other, undoubtedly is an art and requires — like love, on which Erich Fromm wrote about in his book *The Art of Loving*[1] — and implies a knowledge of theory and practice. If effort is not made to deepen knowledge of what interpersonal communication is, and to practise it, we will be exposed to making mistakes, creating barriers which hinder or even prevent us from reaching agreement with others. The need to deepen self-awareness in the field of communicating with others is of particular importance in relation to children learning social behaviours — including ways to communicate with others. They do this first by imitation, identifying themselves with significant people, modelling their behaviours on others, and strengthening desired behaviours through a system of rewards and weakening them by the use of negative reinforcement, and finally in adolescence the process of internalisation of social and moral rules and standards is made. The child in all phases of childhood (early, middle and late — from birth to 11—12 years of age) needs to remain in close — both physical and mental — relationships with others. From the moment he begins to use words (the turn of the first and second years of age), he gradually asks more and more questions about the nature of phenomena, their cause,

[1] E. Fromm: *O sztuce miłości*. Trans. L. Bogdański. Poznań 2006.

operation, effects. If he gets answers to spontaneous questions asked by him, he becomes richer not only in knowledge but also increases his self-esteem, a sense of belonging to certain social groups. Bonds with those who understand him become closer, deeper, and authentic and are based on mutual getting to know each other, trust, and respect. The child also experiences, however, such meetings with others that disrupt the process of building satisfactory interpersonal relationships. This is especially so when his needs are ignored, when he does not receive answers to his questions, when others avoid contact with him or when he meets with aggression — both physical and verbal — from people significant to him. Then he experiences a peculiar put down and restricts his activity not only with people behaving incorrectly to him, but his reactions become generalised, that is, he becomes generally less active. Here are two examples of adults' communication behaviours "incapacitating" the child. The first situation happens on the bus. Mother holds an approximately 4-year old son on her lap. The travel time is 45 minutes. The little boy's eyes are fixed at the window and he excitedly talks about what is going on outside, asking the mother to look out of the window. After a few minutes of the child's requests, the mother says to her son: "Calm down, let me rest." To the end of the journey the boy said nothing. The other situation I know from the story of a student who really looked forward to starting school. When he was finally in class he talked a lot to the teacher and peers enjoying the fact that he could now read and write. At some point he heard his teacher's words, "Shut up, you came here to learn and not to play the wise guy!" "I shut up — as he said to me — for 3 years. For 3 years I did not speak a word to my teacher!" You can imagine what a damage the boys presented in the above examples suffered, in the shaping of their self-esteem, building a relationship with the mother, the teacher, and peers. Many people sustain similarly difficult experiences in their childhood when dealing with others. I would like to mention also an example of positive interpersonal relations. In a family a 10-year-old boy from time to time hears adults from the family circle express negative opinions on his behaviour and encourage his mother to scold him more often by giving him a slap, which the mother is opposed to. One day he says to his mother: "How is it that you understand me and others do not?" The mother could not get a better reward from her child!

What, therefore, is effective, rewarding all the participants in the interaction, communication? The answer to this question requires understanding of the nature and model of communication.

The nature and model of communication

Communication is a process of information exchange between individuals. During interpersonal communication each of the participating people — the sender and the recipient — performs two types of activities: sends messages by selecting appropriate codes (symbols) and reproduces the content contained within. Communication model is illustrated below:

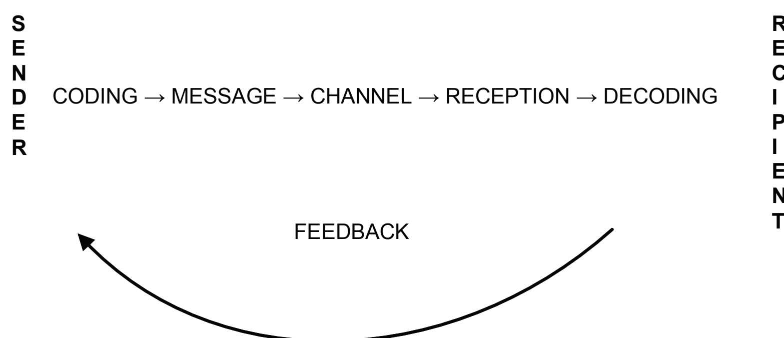

Figure 1. Model of communication

The sender has specific information, knowledge, skills, experience, competences, personality and his or her physicality. The beginning of making contact with the other person is feeling the need to communicate the information. People can communicate through systems of signs familiar to them, which are a kind of code containing a set of behaviours and of their associated meanings. The sender decides through what signs he will provide information. To these conventional characters certain meanings are assigned which can be read and interpreted by the recipient. The message is a physical form of encoded information that the sender forwards. It is something that can be heard, read, seen. The message is speech, writing, gesture. The contents transmitted take two basic forms, therefore: verbal and non-verbal, known as body language. The latter includes: facial expression, visual behaviour, spatial distance between individuals, the power of voice, its softness, the rate of speech, rhythm, vocal signals (laughing, yawning, swallowing), breath. Attention is drawn to extremely low participation of verbal messages (35%) compared to body language (65%) in the process communication.[2]

[2] K. Balawajder: "Umiejętności interpersonalne w pracy menedżera." In: *Psychologia w pracy menedżera*. Ed. B. Kożusznik. Katowice 1994, pp. 76—119.

The recipient has the task to receive the signal, decode it, that is, to read its meaning and to inform the sender about his reactions to the received signal. Feedback is essentially a repetition by the recipient of the communication process with the reversal of the role of the sender and the recipient. It informs whether the message was understood and the attitude of the recipient towards the sender. The better people read messages transmitted by themselves and others, and thus more fully communicate, the greater the degree of verbal and non-verbal signals co-creating the message compatibility or complement. Assessment of the effectiveness of communication can also be made for the effectiveness of the implementation of joint activities: communication is all the more effective, the greater the degree goals realised thanks to co-operation. What happens in the event of discrepancies between the words uttered by speakers and the language of their bodies? The title of a song written by Agnieszka Osiecka is: "Can these eyes lie?" These words are repeated in the text: "Can these eyes lie? — I do not think so … Can these eyes lie? — Of course not!" They reflect the truth about the fact that body language is judged to be more credible as compared to words.

Usually interpersonal communication is seen as a two-way process. It happens, however, that the person transmitting information puts maximum effort in order to achieve the objective, to make the message clear, easy to read, that they can lose sight of the recipient, forget about the fact that at the other end of the communication process there is "another" person, someone who has their own goals, desires, troubles or worries.

It is important in communicating with others whether principles and rules of communication have been defined clearly and whether they are known to participants of the interaction. If so, they take certain actions during transmission and reception of information. The knowledge of rules and principles of communication is also the source of the formation of expectations towards a partner or partners of the interaction. Since the degree of fulfilment of these expectations depends largely on whether the people talking to each other will be satisfied with mutual relations, whether communication will be a road leading to growth of the perception of self-esteem of each of them.

The structure of personality as the source of communication with others

Seventy years ago Eric Berne[3] began research on transactional analysis — the theory of interpersonal behaviour. Transactional analysis is the analysis of human transactions external behaviours that are still under the influence of one of the personality's ego states. A dialogue between such states is also possible. The main desire of man is the need for social contact. There is a conflict between the significant force of this need and social requirements and norms that determine its satisfaction. The ability to solve this dilemma determines the harmony of the inner nature of man. If we manage to solve it, we feel we are *winners*, we experience the pleasure of being with others, of communicating with them. Partners of interaction also become winners. People winning in life are characterised by: authenticity, acceptance of themselves and others, orientation towards the development of innate predispositions, self-esteem adequate to their abilities, openness to others, empathy, loyalty, the ability to establish relationships with many people, brotherhood, the capacity for self-development, engaging in actions, sensitivity to the needs of others, implementation of respected values, responsibility for themselves and others. These people definitely deal more easily with meeting the need for contact compared to *losers*, that is, those who aspire to gain security either by adapting to social norms and rules and at the same time abandoning the desire to satisfy individual needs, which is accompanied by experiencing fear, guilt, and the conflict between the standards governing social behaviours and the needs of the inner nature, or by the dominance over others, gaining control over others, and sometimes even by aggressive behaviour towards others with whom they crave contact. However, the more they limit their freedom, the more they risk rejection by others and social isolation.

The basic components of interpersonal contacts are transactions consisting of successive stimuli (S), and responses (R). Interpersonal transactions may take the form of simple transaction consisting of one stimulus and one response (S—R) and complex ones constituting an entire sequence of successive alternating stimuli and responses. What is the source of these stimuli and responses? They are specific ego states of personality. At any point of social contact an individual is in one of the ego states: *Parent*, *Child* or *Adult* (Figure 2).

[3] E. Berne: *W co grają ludzie. Psychologia stosunków międzyludzkich*. Trans. P. Izdebski. Warszawa 2012.

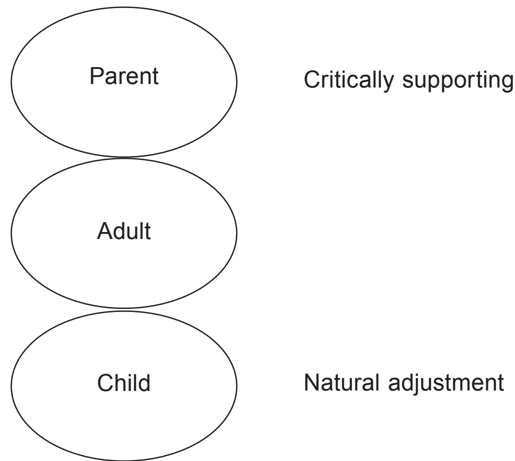

Figure 2. Diagram of ego states of personality and the corresponding life concepts

States *Parent* and *Child* are formed in the first five years of human life and are a record of the contents perceived and experienced by the child in relation to other people, usually parents or other caregivers. Ego state — *Parent* is responsible for the learned concept of life — acquired by the child without reservation from significant people. In ego state — *Child* emotions are formed which are reactions to the behaviour of significant people towards the child; this state determines the experienced concept of life. Ego state — *Adult* begins to develop around 10 months of age (!), when the child is able, owing to the acquisition of crawling skills, to intentionally make contact with others — physically get closer to them, create a direct, physical relation, and by developing pincer grip he can explore the surrounding reality. This reflects the cognised concept of life. Each of the states communicates with the environment through three channels: words, voice timbre, and extra-verbal behaviours.

In the *parental ego* responsible for the learned concept of life, all orders, prohibitions, instructions and parents' caring behaviours are recorded. In the *parental ego* there is *Critical Parent* — having a tendency to reprove the child and to punish, but also to transmit tradition, respect for universally accepted standards and rules of conduct and to react quickly to crisis situations. By activating *Critical Parent* we use imperative sentences, which prohibit something or order something, in which such words as: "you must, you should, always, never" are present. The voice is raised, reflecting the superiority over the child. Extra-verbal behaviour consists of the so-called body language indicating an advantage over another per-

son (e.g. raised eyebrows), a contemptuous smile, reaching for various objects to punish the other person. The other parental state is *Supporting Parent* responsible for caring, helping others, creating an atmosphere of safety and patient listening. For *Supporting Parent* words like: "I'll do it for you, do not overdo, rest" are characteristic. The voice is calm, affectionate, warm, and extra-verbal behaviours are helping another person, sometimes doing something for someone.

Ego state — *Child* also varies and is formed by *Natural Child* and *Adjusted Child. Natural Child* makes contact with others imbued with spontaneity, openness, his feelings, joy, emotion. The words coming out of this state are: "I'm glad, fabulous, I love you." *Natural Child* is loud, laughs, but also sometimes is whimsical, sad and tearful. His non-verbal behaviours are playing, eagerness to meet people, seeking new sensations, but also passivity, discouragement, showing little emotion, avoidance of others. For the state of *Adjusted Child* characteristics are words like: "I agree, I will do as you wish, if-questions" or such questions as: "Did I behave? Did I do my homework well?" Words uttered from the position of this state are quiet, and a desire to consent, to submit to the others is evident in extra-verbal behaviours.

Ego state — *Adult* is a thoughtful rational side of life. It allows to perceive the reality, ask questions, investigate the causes of various phenomena, reason logically, resolve conflicts cooperatively. It acts as a mediator between the other two ego states of personality, that is between *Parent* and *Child*, as well as in relations with others. Typical words from the the ego state — *Adult* include: "I can do this, I will consider, think, believe, suppose, in my opinion, hypothetically speaking, I believe [...]." The voice of the person transmitting the message from the described state position is calm, composed, extra-verbal behaviours take the form of a face to face contact, eyes are focused on the partner of interaction expressing interest in him and being "here and now."

In dealing with others all the aforesaid states of personality can be activated. Particularly important for the development of personal identity, creativity, resourcefulness, coping with the challenges posed by everyday life, stress, and also for the proper development of relationships with others is strengthening of the ego state — *Adult*. Of course, each of the personality states requires effort to strengthen it when it is poorly shaped, or in case of its weakness, when a person has a tendency to react too often in relationships with others from a particular state position. It is essential that the formation of the ego states enables the activation of individual states adequately to the social situation in which at a time an individual is located. In particular, in the educational process the formation of the ego state *Adult* should be taken care of, so that it would not be dominated by any of the

other states. In relationship with the child from the earliest years of life it is good to communicate with him from the position of all three states of the personality, which will enable a harmonious development of his personality.

The type of transaction with others determines whether they will be a source of satisfaction, or perhaps will promote confusion, dissatisfaction with the contacts. The main types of transactions are simple and crossed transactions. Simple transactions occur when a stimulus sent by the person starting the transaction originates from a particular state of personality and a response is emitted by the state to which the stimulus was sent. If identical states of personality of the people involved in the interaction are activated, we have simple parallel transactions (Figure 3).

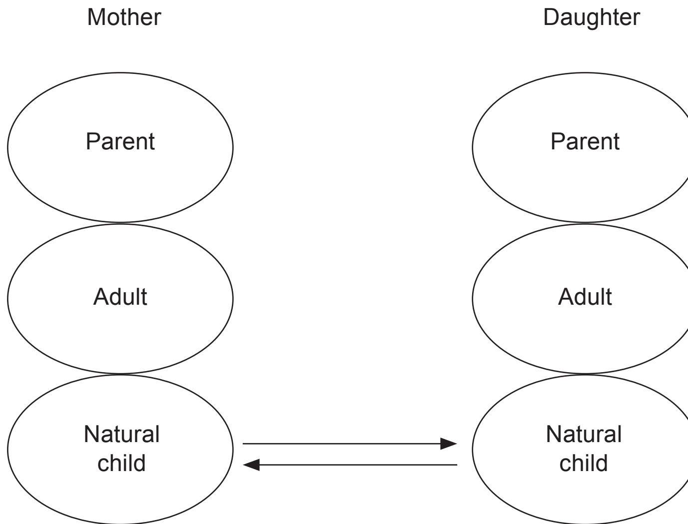

Figure 3. Simple parallel transaction

An example of such a transaction is the following situation:

Mother says to her daughter, "Today is such a beautiful, sunny day that I want to jump out of joy" (a stimulus comes from *Natural Child*);

The daughter responds, "I also feel very happy today!" (a response is also activated by the ego state *Natural Child*).

Simple complementary transactions occur when a stimulus coming from a particular ego state of the person starting the transaction is directed not to the state, which initiated it, and the person responds from the position of the state which the stimulus

reached and directs it toward the state, from which the stimulus came (Figure 4).

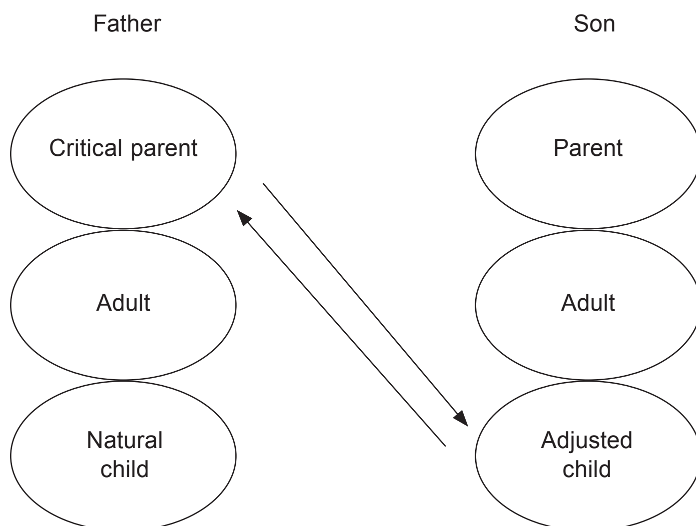

Figure 4. Simple complementary transaction

An example of a simple complimentary transaction:

Father directs a message to the son, “Do your homework immediately, you have been lingering over it too long.” (a stimulus comes from the ego state *Critical Parent*);

The son says, “Dad, I will sit down at the desk at once and get down to doing the homework” (the reaction was initiated from the ego state *Adjusted Child*).

Simple transactions usually satisfy participants of interaction: they tend to continue the relationship. It happens differently in case of crossed transactions. They occur when a stimulus coming from a particular ego state of the person starting the transaction goes to any ego state of the person receiving the message, and the response comes either from the state, which got the message, but does not return to the state from which it was sent (Figure 5a) or not from the state to which the message is directed and goes to any state of ego of the person who initiated the interaction (Figure 5b).

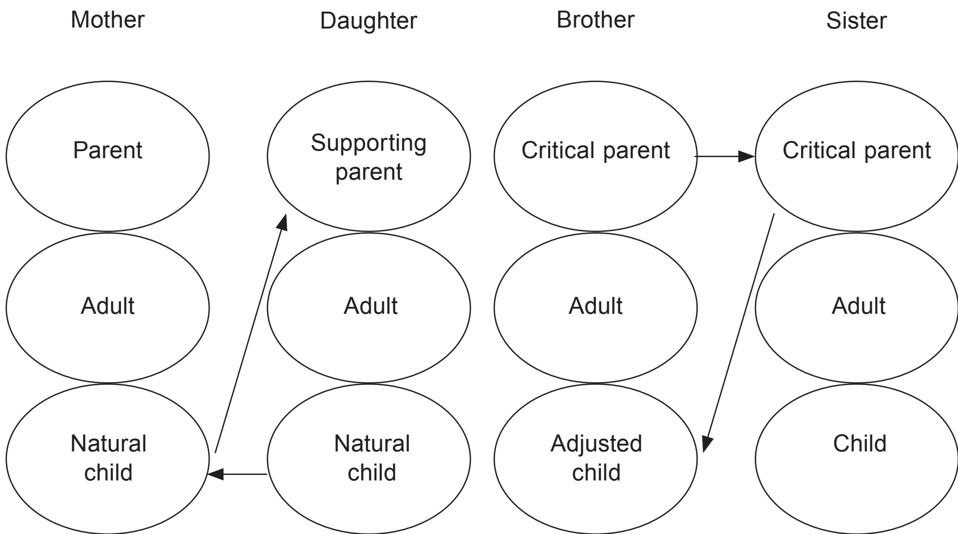

Figure 5a. Crossed transaction **Figure 5b.** Crossed transaction

Examples of crossed transactions:

Mother says to her daughter, “Honey, I have a headache, I do not know what to do?” (a stimulus comes from mother’s state of *Natural Child* and is directed to daughter’s state of *Supporting Parent*);

Daughter says, “Mummy, let’s go for ice cream, such beautiful weather today!” (a response comes from the daughter’s state of *Natural Child* and is addressed to mother’s state of *Natural Child*);

Brother says to his sister, “Parents never have time for us, they are horrible!” (a stimulus comes from brother’s state of *Critical Parent* and is directed to the state of sister’s *Critical Parent*);

Sister says, “How dare you say that, you are unfair to parents!” (a response comes from sister’s state of *Critical Parent* and is directed to brother’s state of *Adjusted Child*).

Crossed transactions cause discontent, disgust or a sense of misunderstanding and hence their result is either discontinuation of contact, or the appearance of conflicts or confrontational behaviours. If one of the people involved in the interaction at some point responds from the ego state *Adult*, he will break the escalation of the conflict, and thus reaching an agreement will become possible.

With the development of the child more mature behaviours are expected from him. But do his interlocutors direct to him messages in a manner conducive to achieving the balance between the different ego states of his personality? They usually behave according to the experiences acquired during their own childhood in the area of interpersonal behav-

iour and rarely subject them to rational assessment. It therefore seems reasonable they started from themselves training in sending and receiving messages from others, which will allow them and the people with whom they come in contact, to improve mutual communication and thus alleviate communication barriers.

Barriers of communication with the child

Thomas Gordon[4] distinguishes twelve categories of communication barriers, calling behaviours qualified to them barricades. These barriers are commonly used by parents, teachers and managers of organisations. These barriers take the form of "you" statements addressed to the participants of interaction; they include an assessment of their behaviour or are imbued with aggression. Senders of these statements are perceived by recipients as people towering over them, devoid of empathy, not understanding their needs, with a tendency to depreciate them and with no interest in them. Here are the twelve communication barriers distinguished by Thomas Gordon:

1. Commanding, managing, pushing around (e.g. a statement: "Stop telling on your brother");
2. Warning, reprimanding, threatening (e.g. "One more such a word, and you will walk out of the door");
3. Persuading, moralising (e.g. "You should give in to younger brother");
4. Dictating solutions, making proposals (e.g. "I suggest you turned to dad with this");
5. Reproaching, instructing, quoting logical arguments (e.g. "When I was your age, I had to do three times as much housework as you do");
6. Judging, criticising, blaming, opposing (e.g. "You are completely wrong");
7. Praising, approving (e.g. "Now I can see that you are a good boy");
8. Upbraiding, ridiculing, embarrassing (e.g. "You are crying like a baby");
9. Interpreting, analysing, giving diagnoses (e.g. "In fact, you do not believe yourself in what you are saying");

[4] Th. Gordon: *Wychowanie bez porażek czyli Trening Skutecznego Rodzica*. Trans. A. Makowska, E. Sujak. Warszawa 2014; Th. Gordon: *Wychowanie bez porażek w praktyce*. Trans. E. Sujak. Warszawa 2007; Th. Gordon: *Wychowanie bez porażek w szkole*. Trans. D. Szafrańska-Poniewierska. Warszawa 2000; Th. Gordon: *Wychowanie bez porażek szefów, liderów, przywódców*. Trans. A. Makowska. Warszawa 2000.

10. Soothing, comforting, showing compassion (e.g. “Tomorrow you will no longer think about it”);
11. Asking, plying with questions (e.g., “Who has drummed this idea into your head?”);
12. Drawing attention away, cheering up, entertaining (e.g. “Let’s not talk about it, let’s go to the cinema”).

Other barriers to reaching full agreement could be:

— lack of focus on the interlocutor (dealing with something else during the speech, lack of focus on the speech),
— interrupting statements, showing impatience,
— changing the topic of conversation,
— inquisitiveness,
— assessing the person and not the arguments,
— talking only about what interests the message sender.

Characteristic statements of communication barriers in the perception of the child include more than one meaning or message. The child sees them not only as being directed at him, but also reads their hidden meaning. Friedemann Schulz von Thun distinguished four dimensions of statements: disclosure of oneself, that is, showing who I am; substantive content of speech, that is comprehensiveness and clarity of information about the current state of affairs; reciprocal relationship, that is, the method of treating the interlocutor; and the appeal, that is what the person wants to achieve by sending a specific message[5]. When, therefore, is such communication with the child possible in order to be beneficial for both the child and people who interact with him?

Conditions for effective communication with a child

Effective communication with a child requires the adoption of an attitude “towards the child,” giving him the opportunity to establish a sustainable, free, true contact. The foreground condition for the adoption of such an approach is to feel the need to be with a child and communicate with him. In the wake of this the adoption of a child should follow, which means accepting him as he is, with his physicality, intellect, emotionality, desires, talents creating the opportunity to achieve success in some areas and limitations hindering the achievement of success in oth-

[5] F. Schulz von Thun: *Sztuka rozmawiania. Część 1: Analiza zaburzeń*. Trans. P. Włodyga. Kraków 2007.

ers. According to Thomas Gordon, acceptance “is like fertile soil, which allows a fine seed to grow into a nice flower that was stuck in it in the bud. The soil only allows a seed to become a flower. It releases the seed capacity to grow, but the capacity lies only in the heart of the seed. Just as in the seed, the child’s capacity to develop exists only in his body. Acceptance is like the soil — only allows the child to realise his own potential.”[6]

People who accept children like them and are able to show it. They are satisfied with being with them, try to understand their needs and to satisfy them. They give children a sense of security and stimulate them to independence. In a transparent and open manner they show their position in situations when they cannot tolerate certain behaviours. Acceptance can be shown in different ways: with words, for example, “I’m glad that you’re here,” passive listening called tacit acceptance, extra-verbal behaviour, for instance hugging the child, and not interfering. Experiencing the feeling of being accepted by others is the basic source of self-acceptance.

An important factor of effective communication with the child is cooperation that gives an opportunity to get to know each other, reveal personal abilities and talents, formulate common goals and take responsibility for the joint implementation of tasks. Collaboration plays a considerable role in socio-moral development of the child encouraging him to take up helpful behaviours and sensitises him to the needs of others, so that later in life it becomes possible for him achieving autonomous morality — the highest level of human moral development. While cooperating with the child you should remember that he should have the right to free activity, to express himself and to make mistakes. In undertaking a joint activity with the child it is worth taking care of the atmosphere of seriousness in situations requiring it, but also of fun constituting — until he starts school — the basic form of activity.

Recognition of the rights of the child is another factor which supports experiencing satisfaction from the relationship. It consists in treating the child as an equal, adjusting to his present level of the development phase. People recognising the rights of the child help him to learn about the world by explaining, justifying and searching for arguments; they tend to base discipline on mutual arrangements.

For the proper course of interaction with the child, it is important to give him reasonable freedom appropriate for his age as an expression of trust in his ability to cope with challenges typical of his life phase, which

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[6] Th. Gordon: *Wychowanie bez porażek czyli Trening Skutecznego Rodzica*..., pp. 35—36.

will allow him to gain more and more autonomy and independence in later life.[7]

The described features of the attitude "towards the child" not only serve to develop the child but also to contribute to the personality development of the people disclosing these attitudes. These people have considerable standing with the child — but not formal, the source of which is, for example, parental or teachers' authority — but it is the authority which the child grants them by reason of their certain characteristics.

So how to educate effectively, that is not experiencing failures? Failures in education are the result of — according to Thomas Gordon — dominance of or submission to the child and are the consequence of the use of the previously discussed barriers. In such a relationship, in fact, no party derives satisfaction from the contact. So what is education without failures? Briefly speaking, meeting the mutual needs of the people interacting. The starting point is therefore the equality of people, that is, neither dominance nor submission of one person to another. The so-called principle of having a problem is important for the development of the relationship. Problem situations between the child and others may have a threefold form:

Firstly, a child as an interlocutor indicates his problem (e.g. after his return from kindergarten a 5-year-old boy in a tearful voice says to his mother, "Tomorrow I will not go to kindergarten, I hate going there.") A typical behaviour of the mother (and all other persons to whom the child would direct the statement) would be to run one or more of the ineffective behaviours distinguished by Thomas Gordon, for example: "You have to go to kindergarten, otherwise you stay at home alone tomorrow." This statement is in the form of "you." Mother's behaviour shows that she did not open up to the son's problem and did not understand his emotional state. An effective reaction requires listening — both passive, silent (gestures, body movements expressing involvement in the conversation) and active consisting in deciphering the emotional code hidden behind the child's verbal and extra-verbal reactions. Reflection of active listening could be mother's words to the son: "It is difficult to go to the kindergarten, which you do not like." Such wording provides an incentive for the child to say something more and makes him feel understood by his mother.

Secondly, the child's interlocutor has a problem with his interactions with the child, because for instance he or she does not accept the fact that

[7] S. Mielimąka, N. Lubszczyk: "Skuteczne porozumiewanie się rodziców z dziećmi." In: *Kontakty z ludźmi „Innymi" jako problem wychowania, opieki i resocjalizacji*. Eds. B. Kosek-Nita, D. Raś. Katowice 2007, pp. 31—50.

a child shouts while playing with his siblings and demands that they play according to his wishes. A common reaction of the parent in such situations is critical words directed towards the child, such as: “Stop behaving like that at once,” “You’re behaving like a baby,” “Because of you there is never peace at home.” These statements deprecate the person of the child, accusing, commanding. Thus we see that even in the situations where we have a problem with the child’s behaviour, we use such an expression as “you.” An effective parent would activate the message of “I” type. A full message of “I” type contains three elements: a description of unacceptable behaviour, a feeling experienced by the parent in the interaction with the child, the specific result of the child’s behaviour that causes this feeling. Effective behaviour of the parent in the above-described situation might look like this: “When I hear these screams, I start to get angry. I am sad that I cannot hear joy in your play.”

Thirdly, the problem may be common, that is, affect all members of the interaction. It appears in the case of divergent aspirations between the child and other participants in the contact. Often in such cases the needs of the child are not respected and he is forced to certain behaviours or vice versa, you give in to him and in this way resign from satisfying your own needs. Effective problem solving requires from all participants in the interaction the application of the method — called by Thomas Gordon the method without failures — consisting of six links: (1) identification of the problem, namely its recognition and naming; (2) possible solutions — while ideas; (3) critical assessment of the indicated solutions, but not of the people who gave them; (4) adoption of the solution accepted by all participants in the interaction; (5) application of the solution; (6) after a set time evaluation of the effectiveness of the adopted solution. If the result is not satisfactory for the participants of the interaction, return to step 2 and generate new ideas to solve a defined problem. It is important to listen to interlocutors and articulate expression of the “I” type in the next stages of problem solving. The method with no failures requires opening to the needs indicated by others, their values and limitations. It teaches us how to determine the boundaries of behaviours in mutual relations. Furthermore, this method requires something that is currently in deficit in relationships with others. That something is time. It is common to hear complaints about the lack of time, it is said that it flies quickly, that it is lost. Relations with others require a stop, involvement in the contact, patience and not looking at the watch: being here and now.

Furthermore, communication with the child requires self-awareness in terms of errors, imperfections and limitations on the side of people entering into contact with the child and courage and joy in making contact with him. It is worth, therefore, to discover the world of the child’s

desires, his perception of the world — how different from adults' one, to share his fascination, be surprised with what surprises him and to communicate with him as we ourselves would like others to communicate with us.

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Stanisława Mielimąka

The Art of Communicating with a Child

Summary

The article discusses effective communication with the child, that is, giving satisfaction to all the participants of the interaction, which in the first place requires the knowledge of the components of the communication process. Messages sent by people entering into interaction with each other may take the form of specific stimuli and responses stemming from — according to Eric Berne — three states of ego personality: the ego state *Parent*, the ego state *Adult* and the ego state *Child*. These states are shaped from the early years of the child's life and determine the quality of communication of each person with other people over the whole course of life. They decide whether transactions with others

are simple, which generally promotes the continuation of the interaction, or crossed leading to a feeling of being not understood, or even to the interruption of the interaction. The article provides examples of simple and crossed transactions. Characteristics of the communication barriers have been given, named by Thomas Gordon the twelve typical ineffective behaviours of parents, teachers or bosses. The last part of the article indicated factors of effective communication with the child reflecting the adoption of the attitude "towards the child" including acceptance, passive and active listening, articulating statements of the "I" type, using the "method with no failures" in solving common problems, focusing on what is happening "here and now" in a relationship with the child.

Stanisława Mielimąka

L'art de communiquer avec l'enfant

Résumé

L'article aborde la question d'une communication efficace avec l'enfant, donc, celle qui satisfait tous les participants d'une interaction. Cette capacité exige en premier lieu la connaissance des composants du procédé de communication. Les informations transmises par les personnes qui entrent en interaction peuvent prendre forme des stimulants concrets et des réactions dont la source — selon Éric Berne — sont trois états du Moi : Parent, Adulte, Enfant. Ces états se forment dès les premières années de la vie de l'enfant et déterminent la qualité de la communication de chaque homme avec d'autres personnes au cours de toute sa vie. Ils décident si les échanges avec les autres sont simples — ce qui facilite l'interaction — ou croisés et conduisant par conséquent à la sensation de ne pas être compris, ou voire à l'interruption de l'interaction. Dans l'article, on a présenté des exemples des transactions simples et croisées. On a caractérisé les obstacles à une communication appelés par Thomas Gordon les douze comportements inefficaces manifestés par les parents, les enseignants et les patrons. Dans la dernière partie de l'article, on a présenté les facteurs d'une communication réussie avec l'enfant reflétant la prise de position « envers l'enfant », comme par exemple : acceptation, écoute passive et active, articulation de l'énoncé du type « moi », application de « la méthode sans échecs » visant à résoudre les problèmes communs, concentration sur ce qui se passe « ici et maintenant » dans une relation avec l'enfant.

Mots clés : communication interpersonnelle, états du Moi, analyse transactionnelle, obstacles à une communication, conditions d'une communication efficace avec l'enfant

Stanisława Mielimąka

L'arte della comunicazione con il bambino

Sommario

L'articolo parla del rapporto efficace di comunicazione con il bambino ossia un rapporto che dà soddisfazione a tutti i partecipanti a tale interazione. In primo luogo tale

capacità richiede la conoscenza dei componenti del processo della comunicazione. I messaggi inviati dalle persone che interagiscono possono assumere la forma di stimoli concreti e di reazioni, le cui fonti — secondo Eric Berne — sono tre stati dell'ego: lo stato io — Genitore, io — Adulto e io — Bambino. Tali stati si formano a partire dai primi anni di vita del bambino e determinano la qualità della comunicazione di ciascuna persona con gli altri lungo tutto il corso della vita. Decidono se le transazioni con gli altri sono semplici, cosa che favorisce essenzialmente la continuazione delle interazioni, o se sono incrociate e di conseguenza portano alla sensazione di essere incompreso o addirittura ad interrompere l'interazione. Nell'articolo sono stati indicati esempi di transazioni semplici e incrociate. Sono state analizzate le barriere della comunicazione chiamate da Thomas Gordon dodici tipici comportamenti inefficaci dei genitori, degli insegnanti o dei superiori. Nell'ultima parte dell'articolo sono stati indicati i fattori di comunicazione efficace con il bambino che riflettono l'accettazione del comportamento "verso il bambino", quali tra l'altro: l'accettazione, l'ascolto passivo e attivo, l'articolazione delle affermazioni tipo "io", l'applicazione nella risoluzione dei problemi comuni del "metodo senza perdenti", la concentrazione su cosa succede "qui e adesso" nelle relazioni con il bambino.

Parole chiave: comunicazione interpersonale, stati dell'ego, analisi delle transazioni, barriere della comunicazione, condizioni di comunicazione efficace con il bambino

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Roman Catholic-Anglican Mixed Marriages in Ecumenical Dialogue and Pastoral Practice

Keywords: marriage, mixed marriage, ecumenism, Anglicanism, Catholicism, pastoral work

In Jolanta Szarlej's opinion, protection from predators, easier foraging for nutrients, more accessible reproduction partner, taking care of the weaker and the elderly and information exchange, have become the genesis of social structure, and, at the same time, initiated a way which led to the birth of family based on a relationship between a man and a woman. The attitudes to marriage and the relationship between a man and a woman have changed over the centuries, for instance Jewish patriarchy or Roman pragmatism with respect to marriage (Romans saw a strong and healthy family as a source of power of the nation, permanence of nation and personal happiness of its members). Both Jewish and Roman Catholic tradition include accents of faith in God with reference to marriage, however, it is Christianity which displays the religious aspect of a relationship between a man and a woman and soteriological dimension of marriage, it also considers it a sacrament.[1]

Nevertheless, an astute scholar will not concur with the salvific and sacramental character of marriage stressed by Christianity. Following the history of Christianity, we become aware of conflicts of doctrinal character, as well as schisms and changes which became a permanent part of the reality of the followers of Christ. Therefore, when discussing the idea

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[1] Cf. J. Szarlej: "Małżeństwo — monogamia — dziewictwo — zmierzch idei? [Marriage — monogamy — virginity — twilight of idea?]." In: *O zmierzchu myśli różne* [Various thoughts on twilight]. Eds. E. Gajewska, A. Matuszek, B. Tomalak. Bielsko-Biała 2014, pp. 233—237.

of marriage, it should be elaborated on how it is understood by Catholicism, the Orthodox Church and Protestantism. Addressing the issue of the Roman Catholic-Anglican mixed marriages, in this article I want to look from this perspective on natural, but also religious relationship between a man and a woman in the Anglican Catholic Church, on the possibility of ecumenical dialogue about marriage, points of contact of teachings and practices of life, as well as on difficulties which may arise in mixed relationships. I will also discuss the practice established in the Roman Catholic Church with respect to marriages between Christians of different denominations.

Roman Catholic marriages

When looking for fundamental statements on marriage in the Roman Catholic Church, I will refer to two representative texts dealing with this subject, namely *Casti connubi* encyclical of Pope Pius XI from (promulgated in) 1930, and a more contemporary *Familiaris consortio* apostolic exhortation of John Paul II, signed in 1981.

Pius XI highlights fundamental features of marriage at the very beginning of the document he handed over to the Catholic Church. He describes matrimony as a special gift from God: "[…] matrimony was not instituted or restored by man but by God; not by man were the laws made to strengthen and confirm and elevate it but by God, the Author of nature, and by Christ Our Lord by Whom nature was redeemed, and hence these laws cannot be subject to any human decrees or to any contrary pact even of the spouses themselves. This is the doctrine of Holy Scripture; this is the constant tradition of the Universal Church; this the solemn definition of the sacred Council of Trent, which declares and establishes from the words of Holy Writ itself that God is the Author of the perpetual stability of the marriage bond, its unity and its firmness."[2] This does not mean, however,

[2] *Matrimonium non humanitus institutum neque instauratum esse, sed divinitus; non ab hominibus, sed ab ipso auctore naturae Deo atque eiusdem naturae restitutore Christo Domino legibus esse communitum, confirmatum, elevatum; quae proinde leges nullis hominum placitis, nulli ne ipsorum quidem coniugum contrario convento obnoxiae esse possint. Haec Sacrarum Litterarum est doctrina, haec constans atque universa Ecclesiae traditio, haec sollemnis Sacrae Tridentinae Synodi dennitio, quae perpetuum indissolubilemque matrimonii nexum eiusdemque unitatem ac fumitatem a Deo auctore manare ipsis Sacrae Scripturae verbis praedicat atque confirmat*. Pope Pius XI: *Litterae Encyclicae* "*Casti connubi*." Vatican 1930.

that God determined man to marriage, with or without the possibility of making a choice, even such an important choice as love of the other: "Yet although matrimony is of its very nature a divine institution, the human will, too, enters into it and performs a most noble part. For each individual marriage, inasmuch as it is a conjugal union of a particular man and woman, arises only from the free consent of each of the spouses."[3]

Therefore, fundamental features of marriage include indissolubility, unity and its origin in God, who at the same time gives it "power," so to speak empowers spouses to take specific actions whilst retaining their act of goodwill. What tasks does God give to spouses? Pius XI gives priority to the gift of their progenity: "Thus amongst the blessings of marriage, the child holds the first place. And indeed the Creator of the human race Himself, Who in His goodness wishes to use men as His helpers in the propagation of life, taught this when, instituting marriage in Paradise, He said to our first parents, and through them to all future spouses: "Increase and multiply, and fill the earth." As Saint Augustine admirably deduces from the words of the holy Apostle Saint Paul to Timothy when he says: "The Apostle himself is therefore a witness that marriage is for the sake of generation: 'I wish,' he says, 'young girls to marry.' And, as if someone said to him, 'Why?,' he immediately adds: 'To bear children, to be mothers of families'."[4]

Marriage is also based on mutual love of the spouses, which, in turn, includes such features as unity, matrimonial love and obedience. While the first two are understandable, obedience may raise questions about its scope and character: Is there a particular hierarchy in marriage, a matriarchal or patriarchal relation? Although the Pope points to submission of wife and children to husband, he immediately explains what he has in mind: "This subjection, however, does not deny or take away the liberty which fully belongs to the woman both in view of her dignity as a human person, and in view of her most noble office as wife and mother and companion; nor does it bid her obey her husband's every request if

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[3] *At, quamquam matrimonium suapte natura divinitus est institutum, tamen humana quoque voluntas suas in eo partes habet easque nobilissimas; nam singulare quodque matrimonium, prout est coniugalis coniunctio inter hunc virum et hanc mulierem, non oritur nisi ex libero utriusque sponsi consensus* […], Ibidem.

[4] *Itaque primum inter matrimonii bona locum tenet* proles. *Et sane ipse humani generis Creator, qui pro sua benignitate hominibus in vita propaganda administris uti voluit, id docuit cum in paradiso, matrimonium instituens, protoparentibus et per eos omnibus futuris coniugibus dixit: «Crescite et multiplicamini et replete terram». Quod ipsum Sanctus Augustinus ex Sancti Pauli Apostoli verbis ad Timotheum perbelle eruit, dicens: «Generationis itaque causa fieri nuptias, Apostolus ita testis est: «Volo, inquit, iuniores nubere. Et quasi ei diceretur: «Utquid?, continuo subiecit: Filios procreare, matres familias esse»*. Ibidem, I, 1a.

not in harmony with right reason or with the dignity due to wife; nor, in fine, does it imply that the wife should be put on a level with those persons who in law are called minors, to whom it is not customary to allow free exercise of their rights on account of their lack of mature judgment, or of their ignorance of human affairs. But it forbids that exaggerated liberty which cares not for the good of the family; it forbids that in this body which is the family, the heart be separated from the head to the great detriment of the whole body and the proximate danger of ruin. For if the man is the head, the woman is the heart, and as he occupies the chief place in ruling, so she may and ought to claim for herself the chief place in love."[5] The Pope's emphasis is on the fact that the level of wife's subordination to her husband can differ — depending on attitude to people, places and time. If a husband neglects his duties, then wife should replace him in the family's government.[6]

In his encyclical Pius XI also highlights the indissolubility of marriage: "But this accumulation of benefits is completed and, as it were, crowned by that blessing of Christian marriage which in the words of Saint Augustine we have called the sacrament, by which is denoted both the indissolubility of the bond and the raising and hallowing of the contract by Christ Himself, whereby He made it an efficacious sign of grace."[7] The issue of sacramental nature of marriage is also brought up by John Paul II, who writes: "Receiving and meditating faithfully on the word of God, the Church has solemnly taught and continues to teach that the marriage of the baptized is one of the seven sacraments of the New Covenant. […] this indestructible insertion that the intimate community of conjugal life and love, founded by the Creator, is elevated and assumed into the spousal charity of Christ, sustained and enriched by His redeeming power. By virtue of the sacramentality of their marriage, spouses are bound to one

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[5] *Haec autem obtemperatio non libertatem negat neque aufert, quae ad mulierem tam pro humanae personae praestantia quam pro nobilissimis uxoris, matris, sociae muneribus pleno iure pertinet; neque obsecundare eam iubet quibuslibet viri optatis, ipsi forte rationi vel uxoris dignitati minus congruentibus; nec denique uxorem aequiparandam docet personis, quae in iure minores dicuntur, quibus ob maturioris iudicii defectum vei rerum humanarum imperitiam liberum suorum iurium exercitium concedi non solet; sed vetat exaggeratam illam licentiam, quae familiae bonum non curat, vetat in hoc familiae corpore cor separari a capite, curo maximo totius corporis detrimento et proximo ruinae periculo. Si enim vir est caput, mulier est cor, et sicut ille principatum tenet regiminis, haec amoris principatum sibi ut proprium vindicare potest et debet*. Ibidem, I, 2c.

[6] Cf. ibidem.

[7] *Attamen tantorum beneficiorum summa completur et quasi cumulatur illo christiani coniugii bono, quod Augustini verbo nuncupavimus* sacramentum, *quo denotatur et vinculi indissolubilitas et contractus in efficax gratiae signum per Christum facta elatio atque consecratio*. Ibidem I, 3.

another in the most profoundly indissoluble manner. Their belonging to each other is the real representation, by means of the sacramental sign, of the very relationship of Christ with the Church."[8] In their documents both the Popes Pius XI and John Paul II draw attention to tasks as well as threats which marriage and family are faced with in the contemporary world. Since it is not the main subject of this article, I will not discuss those subjects furthermore.

Anglican concept of marriage vs. ecumenical dialogue

I will now present marriage from the Anglican perspective[9] in the context of Roman Catholic and Anglican dialogue since on its basis it is

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[8] John Paul II: *Apostolic Exhortation "Familiaris consortio,"* no. 13. Vatican 1981.

[9] Despite the fact that the Anglican Church is sometimes considered as a reform of Protestantism, in the minds of the faithful it never considered itself as a denomination arising from Reformation of the 16th century. Apart from the mainstream of reformation restoration, it is characterized by a conscious strive to ensure continuity with Ecclesia Anglicana established by Augustine of Canterbury. Circumstances in which the schism took place were related to King Henry VIII. The pope gave him dispensation from the impediment of affinity, so that he could marry the widow of his brother, Arthur — Catherine of Aragon. After 19 years of marriage Henry decided to marry lady-in-waiting Anne Boleyn and asked the pope to annul his marriage to Catherine. In order to exert pressure on the outcome of the trial, he referred to opinions of universities, of which English, French and Northern Italian ones supported the king, and Spanish, Southern Italian ones and Wittenberg together with Martin Luther, maintained that the marriage was valid. In 1531 Henry VIII gathered synod of clergy who acknowledged him as the only master and the head of the Church of England. Thomas Cranmer declared king's marriage to Catherine as invalid. In this situation the pope excommunicated the king, Anne Boleyn and Archbishop Cranmer. In 1534 the Parliament declared the "Act of Supremacy" which declared the king the only supreme head of the Church of England. As a result, the pope lost his authority as the source of law for the Church in England. Participating in the theological tradition of universal Church, Anglicans did not create their own dogmas or teachings applicable in the Anglican Church. They do not have in their ecclesial structure a centralised management centre nor universally applicable religious law, nor central educational authority which would guarantee stability of education. When describing their identity, they talk about Anglican consciousness of faith, which in the end fluctuates in the sphere ranging from Catholic interpretations to extreme evangelical and liberal and modernist interpretation. Their rule is not to define something which has been defined by God in the Holy Scripture. The fundamental sources of Anglican theology include the Bible, early Christian profession of faith, Common Prayer Book and 39 articles of religion. Cf. P. Jaskóła: "Anglican community." In: *Towards the Christianity of tomorrow. An introduction to ecumenism*. Eds. W. Hryniewicz, J. Gajka, S Koza. Lublin 1997, pp. 178—188.

clearly visible what points of contacts of both confessions are and what basically differs them.

"The thirty-nine articles of Religion" of 1563[10] does not list marriage among sacraments. In Art. XXI we read that: "Sacraments ordained of Christ be not only badges or tokens of Christian men's profession, but rather they be certain sure witnesses, and effectual signs of grace, and God's good will towards us, by the which he doth work invisibly in us, and doth not only quicken, but also strengthen and confirm our Faith in him.

There are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism, and the Supper of the Lord.

Those five commonly called Sacraments, that is to say, Confirmation, Penance, Orders, Matrimony, and Extreme Unction, are not to be counted for Sacraments of the Gospel, being such as have grown partly of the corrupt following of the Apostles, partly are states of life allowed in the Scriptures, but yet have not like nature of Sacraments with Baptism, and the Lord's Supper, for that they have not any visible sign or ceremony ordained of God.

The Sacraments were not ordained of Christ to be gazed upon, or to be carried about, but that we should duly use them. And in such only as worthily receive the same, they have a wholesome effect or operation: but they that receive them unworthily, purchase to themselves damnation, as Saint Paul said."[11]

I quoted this extensive passage in full since it summarises Anglican sacramentology in addition to refering to marriage, the sacramental character of which Anglicanism denies together with all the privileges and commitments which result from this fact.

In the Catholic Church the canonical form of marriage is in force. The approach of the Anglican Church to this matter is different: "It is not necessary that Traditions and Ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diversity of countries, times, and men's manners, so that nothing be ordained against God's Word."[12] However, this is not an appeal for total freedom of choice: "Whosoever, through his private judgment, willingly and purposely, doth openly break the Traditions and Ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked

[10] *39 Artykułów Wiary Kościoła Anglikańskiego z 1563 r.* [Thirty-nine articles of Religion of 1563]. In: *Wyznania wiary protestantyzmu* [Anglican profession of faith]. Ed. L. Sadko. Kraków 1995, pp. 88—95.

[11] Ibidem, pp. 91—92.

[12] Ibidem, p. 94.

openly, (that others may fear to do the like) as he that offendeth against the common order of the Church, and hurteth the authority of the Magistrate, and woundeth the consciences of the weak brethren."[13] This is an unquestionable gesture towards Roman Catholics since Anglicanism puts itself between Protestantism and Roman Catholicism. Nevertheless, the subsequent paragraph of Art. XXXIV clearly states the tendency in the directions of the churches and post-reformation communities: "Every particular or national Church hath authority to ordain, change, and abolish, Ceremonies or Rites of the Church ordained only by man's authority, so that all things be done to edifying."[14]

The Catholic Church keeps reminding clergy about the fundamental canonical standard which forbids solemnizing a mixed marriage without the permission from clerical authority. Marriage should be a unity, and in case of a mixed marriage spouses differ in terms of understanding of and approach to faith, which may result in conflicts, especially when first fascination passes and they have to face the reality of life. In order to exclude those inconveniences and dangers in the course of direct preparation for marriage, the parish priest of the church in which the couple intends to marry, has to perform canonical activities, which are necessary to enter into a mixed marriage.[15] These include the necessity to prepare a protocol of canonical and pastoral talks with the prospective bride and groom, along with the supplement for mixed marriages, with a non-Christian, non-believer and a person who is not engaged in religious practices in which the following questions are asked:

1. The Catholic party:
   (a) Do you realize that harmonious life together in marriage is threatened because of differences between most internal matters, which is not perceived as a result of emotional engagement?
   (b) What will you do if in case of conflict none party will not be willing to compromise, for instance in cases of moral matters and religious education of children?
   (c) Will you agree to act against God's law, namely sinful life to protect the unity of marriage?
2. The non-Catholic party:
   (a) Are you aware of differences in beliefs, various moral judgment in numerous matters?

[13] Ibidem.

[14] Ibidem.

[15] Cf. T. Wojnowski: "Małżeństwo mieszane w pracach synodów polskich po Soborze Watykańskim II." In: *Małżeństwo w świetle dialogu kultur* [Mixed marriage in works of Polish synods after the Second Vatican Council]." In: *Marriage in the light of dialogue of cultures*. Eds. W. Nowak, M. Tunkiewicz. Olsztyn 2009, p. 174.

(b) Are you aware of the natural duty of tolerance towards beliefs and commitments of the Catholic party?
(c) Do you know your spouse's conscience duties?
(d) Do you accept the indissolubility and monogamy of marriage and its purposes: spouses' well-being and conceiving and raising children?[16]

I have quoted the above-mentioned issues in detail since they constitute an important element in the development of spousal unity if spouses are of different confession. Those are questions which should not be asked to individuals, but which should appear in ecumenical dialogue of doctrinal character, so that they can help to pursue the unity of Christians, and before this unity is obtained, to support Christians in creating spousal bonds despite some religious differences.

This article is written from the perspective of Poland where the Anglican Church is a small minority. Economic emigration of Polish people, largely to England, where, for obvious reasons, the majority of population is Anglican, is the reason why ecumenical dialogue with this Christian community, as well as interest in Roman Catholic-Anglican mixed marriages (which may happen more and more often) should be developed and deepened.

Przemysław Kantyka presents an outline of the ecumenical Roman Catholic-Lutheran dialogue in a synthetic manner. He highlights the role of Anglican-Roman Catholic International Commission (ARCIC) that started operating in 1970, which had been preceded by works of the Preparatory Commission in the years 1968—1969. The commission prepared a number of important documents: *Agreement on Eucharistic Doctrine* — 1971, *Ministry and holy orders* — 1973, three documents on the subject of ministry of authority and management in Church: *Authority in Church* — 1976, *Authority in Church II* — 1981, *The Gift of Authority. Authority in Church III* — 1999. Soteriological and ecclesiological issues have been taken up: *Salvation vs. church* — 1986 as well as *Church as a Communion* — 1990. The subject of moral life has been taken up in the document entitled: "Life in Christ: moral rules, community and Church" — 1993. What is more, an agreement on Mariology has been published: "Mary, grace and hope in Christ" — 2005. ARCIC has also published explanations to earlier published documents when it gathered critical opinions and questions from the proper Church authorities and theologians. In

[16] *III Synod Gdański. Misja ewangelizacyjna Kościoła Gdańskiego na początku Nowego Tysiąclecia. Załączniki* [III Synod of Gdańsk. Gdańsk gospel mission at the beginning of the New Millenium. Attachements]. Gdańsk 2001, quoted after: T. Wojnowski: "Małżeństwo mieszane w pracach synodów polskich po Soborze Watykańskim II,"… pp. 174—175.

1981, along with the publication of "Final report", which is the fruit of the first phase of the dialogue, also "Clarifications" were published. The work of commission is still in progress, and simultaneously, since 2000, the International Anglican-Roman Catholic Commission for Unity and Mission (IARCCUM), consisting of bishops of both parties, established to seek roads to unity on the basis of dialogue, has been operating. In 2006, it published the document entitled *Being Raised Together in Unity and Mission*. The document which is of highest importance to us is the agreement published by ARCIC on mixed marriages: "Marriage theology and its application to mixed marriages" — 1975.[17]

Analysing the above-mentioned document, we find out that it is the fruit of eight-year's work of the commission established in 1967 with the authorization from Pope Paul VI and the Archbishop of Canterbury. The Commission held six meetings: in St. Georges House, Windsor Castle, April 16—18, 1968; in Pineta Sacchetti, Rome, November 27—30, 1968; in London, November 22—25, 1971; in Haywards Heath, in Priory of Our Lady of Good Counsel, April 9—12, 1973; in Divinity Hostel, Dublin, April 1—5, 1974; and in Casa Cardinale Piazza, Venice, June 23—27, 1975, when the final report was prepared.[18]

As fascinating as history may seem, what is more relevant for us is the theological and practical perspective of mixed marriages. The Roman Catholic-Anglican dialogue concerning doctrine has always been based on three fundamental theological rules shared by both confessions:

i. That Holy Baptism itself confers Christian status and is the indestructible bond of union between all Christians and Christ, and so of Christians with one another. This baptismal unity remains firm despite all ecclesiastical division.
ii. That in Christian marriage the man and the woman themselves make the covenant whereby they enter into marriage as instituted and ordained by God; this new unity, the unity of marriage, is sacramental in virtue of their Christian baptism and is the work of God in Christ.
iii. That this marriage once made possesses a unity given by God to respect which is a primary duty; this duty creates secondary obligations for

[17] Cf. P. Kantyka: "Dialog ekumeniczny katolicko-protestancki — założenia, zakres, rezultaty [Roman Catholic-Protestant ecumenical dialogue — premises, scope, results]." In: *Ekumenizm w posoborowym półwieczu. Sukcesy i trudności katolickiego zaangażowania na rzecz jedności chrześcijan* [Ecumenism in post-council half century. Successes and difficulties of Catholic engagement for the unity of Christian]. Eds. M. Składanowski, T. Syczewski. Lublin 2013, pp. 35—36.

[18] Cf. *Anglican-Roman Catholic Commission on the Theology of Marriage and Its Application to Mixed Marriages*, 1968—1975, Introduction, http://www.prounione.urbe.it/dia-int/arcic/doc/e_arcic.classific.html (accessed 13.06.2015). Relevant link: http://www.prounione.urbe.it/dia-int/arcic/doc/e_arcic_classific.html

the Church in both its pastoral and its legislative capacity. One is the obligation to discourage marriages in which the unity would be so strained or so lacking in vitality as to be both a source of danger to the parties themselves and to be a disfigured sign of or defective witness to the unity of Christ with his Church. Another is the obligation to concert its pastoral care and legislative provisions to support the unity of the marriage once it is made and to ensure as best it can that these provisions be not even unwittingly divisive.[19]

Therefore, the basis for joint discussions and Christian life of both Catholics and Anglicans is holy baptism. It includes a person into the supreme divine life and empowers them to accept the gifts God has for him or her. Marriage is so to speak started and ordained by God, but it can come into existence only by means of a free act of a man and a woman — it is they who conclude this holy alliance, which is of sacramental character by virtue of Baptism. Marriage is a unity, therefore pastoral concern should focus on the protection of this unity, its stability and indissolubility.

The participants of Roman Catholic-Anglican dialogue point also to the necessity to change the mutual attitude of the Roman Catholic and Anglican Churches, their relations and language they use — especially in case of ecclesiology, which, from the Catholic perspective, is very exclusive.[20]

An important element of the agreement is differentiating between current references to canon law and state law — they differ in the Roman Catholicism and Anglicanism. The authors of the agreement point to historical differences: "Behind these differences lie others, less tangible but real. Even before the Reformation co-existence between the canon law of the Church and the common law of England was never easy. Not only did they differ in substance; not only had they different sources of ultimate authority and courts of final appeal, the Papacy in the one, the Crown in the other; they differed radically in procedure and even more in that sensitive area of the relation of authority to consent. The common law tradition was quicker to respond to public opinion, through the interplay of parliamentary legislation, judicial interpretation and the jury system, than was the canonical tradition with its closer involvement with a curial, and predominantly clerical, structure. These facts of history have influenced the unspoken attitude of Anglicans to the proportionate place of law in the government of their Church. The Anglican canon law does indeed state obligations incumbent on the laity as well as the clergy. Yet

[19] Ibidem, 6.
[20] Cf. ibidem, pp. 15—20.

these obligations are legally enforceable on laymen only in respect of their holding ecclesiastical office, for example, as churchwarden, or as judge in an ecclesiastical court. In his ordinary Christian living the Anglican accepts the authority of the Church as a moral obligation; the sense of their being a law to keep seldom occurs to him."[21]

It needs to be highlighted that the commission does not see a fundamental doctrinal difference between the two churches in reference to the issue of the marriage's character as "ordinated to serve."[22] Unfortunately, there are also fundamental differences between the two churches, for example remaining in unity and indissolubility: if (for different reasons) problems and misunderstandings appear in marriage and there is reluctance to continue to live together — the Anglican Church allows for the possibility of a split up. These rules are so to speak adapted to current pastoral situation rather than universal truths.[23] Anglicans believe that in case of various problems in marriage, various steps should be taken by a parish priest, theologian or a lawyer. They do not accept explicitly Catholic claim on the indissolubility of the sacrament of marriage: "Catholic teaching is that all marriages are intrinsically indissoluble. This means that the marrying parties effect something that they themselves cannot undo and which cannot of itself perish except by the death of a partner. In this sense the Church makes no distinction between natural and sacramental marriage. Similarly all marriages are held to be extrinsically indissoluble by any human power" (CIC, can. 1118).[24] Anglicans agree with Catholics on the discussed issue only in two cases: annulment of marriage or it being "non-consummated."[25] At the same time, they allow for a greater possibility of annulment of validly solemnized marriages: "[…] the third situation is where there is a breakdown of relationship within a valid marriage, which is brought into cognizance, whether of the law or of the pastoral discipline of the Church, because relief is sought by one or both of the parties from a situation judged no longer tolerable. For these the only relief known to the canon law of the Church of England and, until recently, of the other Churches of the Anglican Communion, is a separation a *mensa et thoro*, without liberty to remarry during the lifetime of the other spouse. In the Anglican theological tradition, however, there have always been those who, accepting as legislative the words of Jesus including the so-called Matthaean Exception, would have allowed re-marriage after a divorce occasioned by adultery, had the canon law

[21] Ibidem, pp. 24—25.
[22] Cf. ibidem, pp. p. 21.
[23] Cf. ibidem, pp. 28—31.
[24] Ibidem, 34.
[25] Cf. ibidem, 40.

permitted, which it did not. This tradition is still alive today, maintaining the possibility of a discipline, faithful to the words of Jesus, based on the principle of what might be called a modified exceptive indissolubility; that is, on the principle that while marriage is properly indissoluble, the authority of Jesus would allow of exceptions where sin of some sort had invaded or destroyed the marriage bond. This position is maintained in disregard of the exegesis of the critical passages of Scripture generally maintained among New Testament scholars."[26] Besides, Anglicans allow for the possibility of remarriage of people who had been divorced, solemnized in Church, with the right to participate fully in the life of Church (e.g. receive Holy Communion).[27]

It also needs to be noted that the duty to raise children in Catholic faith in a mixed marriage is not an absolute prerequisite, what is more important is retaining the unity of family. In this conflict the necessity to raise children in the Christian faith rather than as Roman Catholics or Anglicans.[28] The authors of the agreement also paid attention to the necessity to preserve the canonical form when entering into marriage. However, it has been concluded that this is not entirely ecumenical issue since such practice has been in effect in Church before schism and it would be worth resign from this commitment.[29]

As far as pastoral recommendations are concerned, the authors basically point to a single issue: respect for a different confession, not depreciating it and — this allusion may be implied — not "winning" believers to one's side: "Local Ordinaries and parish priests shall see to it that the Catholic husband or wife and the children born of a mixed marriage do not lack spiritual assistance in fulfilling their duties of conscience. They shall encourage the Catholic husband or wife to keep ever in mind the divine gift of the Catholic faith and to bear witness to it with gentleness and reverence and with a clear conscience (cf. 1 Peter 3:16). They are to aid the married couple to foster the unity of their conjugal and family life, a unity which, in the case of Christians, is based on their baptism too. To these ends it is to be desired that those pastors should establish relationships of sincere openness and enlightened confidence with ministers of other religious communities."[30]

The above-mentioned provision is not incompatible with rules which are in force in the Catholic Church, which is emphasized by Wojciech Góralski, who cites can. 1128 CL. Priests have been obliged to spiritual

[26] Ibidem, 41.
[27] Cf. ibidem, 42 f.
[28] Cf. ibidem 56 f.
[29] Cf. ibidem, 62 f.
[30] Ibidem, 74.

care of Catholic spouses and children born in a mixed marriage. At the same time, they are obliged to strengthen the unity of spousal and family life in such a marriage.[31]

In line with developments in the ecumenical area, one has to pay attention to the documents of the Catholic Church which normalize the rules of entering into a mixed marriage. The first of them — *Matrimonii sacramentum*[32] — published by Congregation for the Doctrine of Faith in 1966, was of rather provisional character. It indicates difficulties and threats related to mixed marriages, however it does not define precisely what a "mixed marriage" is. It argues for the necessity to soften the law related to marriages of people of different confessions. However, for fear of losing Catholic identity, it was difficult to meet the expectations of the non-Catholic side.[33]

Motu proporio. Matrimonia Mixta[34] by Pope Paul VI of 1970 was a groundbreaking document in the appraisal of mixed marriages. Pope's care concerns the right formation of teenagers and couples who intend to enter into a mixed marriage or already live in such a relationship. Pope Paul VI points to differences between Christian marriages and marriages of people of mixed confessions. He also assesses the difficulties that may come up in mixed marriages, namely differences between religious matters, raising children and moral issues.[35]

On the basis of the above-mentioned teaching as well as changing canonical legislation (Canon Law of 1983) the Polish Episcopacy published *Recommendations of the Polish Episcopacy on the implementation of Motu proporio of Paul VI "Matrimonia mixta"* (April 1, 1971) first, and then *The instruction of the Polish Episcopacy on the preparation to enter into marriage in the Catholic Church* (March 11, 1987) and at the same time *The instruction of the Polish Episcopacy on pastoral care of marriages of dif-*

[31] Cf. W. Góralski: *Kanoniczne prawo małżeńskie* [*Canonical matrimonial law*]. Warsaw 2000, pp. 160—161.

[32] Full text: Congregation for the Doctrine of Faith: *Instrukcja „Matrimonii sacramentum". O małżeństwach mieszanych* (18 marca 1966) ["Matrimonii sacramentum" Instruction. On mixed marriages (March 18, 1966)]. In: *Małżeństwa mieszane* [Mixed marriages]. Ed. Z. Kijas. Kraków 2000, pp. 97—101.

[33] Cf. P. Jaskóła: *Problem małżeństwa w relacjach ewangelicko-rzymskokatolickich* [The issue of marriage in Evangelican-Roman Catholic relations]. Opole 2013, pp. 181—182.

[34] Full text: Paul VI: *Motu proprio „Matrimonia mixta" ustanawiające przepisy odnośnie do małżeństw mieszanych* (20 marca 1970) [Motu proprio "Matromonia mixta" establishing provisions related to mixed marriages (20 March 1970)], In: *Małżeństwa mieszane* [Mixed marriages]…, pp. 103—109.

[35] Cf. P. Jaskóła: *Problem małżeństwa*…, pp. 182—183.

ferent confessions (March 11, 1987).[36] On the basis of these documents Piotr Kroczek and Stanisław Lubaszka prepared, for the Bielsko-Żywiec diocese, a "clerical textbook" containing rules of entering into mixed marriages, apart from purely clerical and canonical comments, it is worth to cite those which at the same time outline the above-mentioned documents and Catholic teachings. The authors of the textbook draw attention to the fact that a marriage between a Catholic and a non-Catholic is a sacrament. Pastoral care of mixed marriages should be carried out in the ecumenical spirit by highlighting what is common to both parties, apart from polemics, and at the same time one should beware of artificial blurring of differences. They also point to the fact that marriage solemnized by a non-Catholic baptized party with a Catholic party — as a result of being sacramental — is an obstacle to remarry after being granted civil divorces. Then only ecclesiastical court can investigate if the previous marriage was valid if there is a basis to declare its invalidity.[37]

It needs to be indicated that the declaration of Canon Law in 1983 also contributes to softening the previous practice in the Catholic Church and so to speak opens up to "mixed marriages." The provisions of the new law abolish the obligation to maintain the canonical form by obtaining a dispensation from the local bishop.

An obligation to baptize a child in the Catholic Church and raise it in the Catholic faith has been left as an obligation in conscience only of the Catholic party.[38] In its "softening" activities Canon Law refers to pastoral needs: "Local bishops and other priests should make effort to ensure that a Catholic spouse and children born in a mixed marriage are provided with spiritual help to fulfill their duties. Besides, they should support spouses in strengthening the unity of marriage and family life."[39]

"Directory on the implementation of rules and standards related to ecumenism" also confirms the care of the unity of marriage: "[…] in each marriage the fundamental care of the Church consists in supporting the stability and permanence of the indissoluble marriage and family life resulting from it […]."[40] An important element of these actions is

[36] Full texts of those documents can be found in: *Małżeństwa mieszane* [Mixed marriages]…, pp. 111—144.

[37] Cf. P. Kroczek, S. Lubaszka: *Podręcznik kancelaryjny dla duchowieństwa diecezji bielsko-żywieckiej (wybrane zagadnienia)* [Clerical textbook for the clergy in the Bielsko-Żywiec diocese]. Bielsko-Biała 2006, pp. 41—42.

[38] Kodeks Prawa Kanonicznego z 25 stycznia 1983 (Cf. Code of Canon Law of January 25, 1983), (henceforth CL), Poznań 1994, can. 1124—1127.

[39] CL 1128.

[40] Pontifical Council for Promoting Christian Unity: *Dyrektorium w sprawie realizacji zasad i norm dotyczących ekumenizmu* (25 marca 1993) [Directory on the imple-

assisting both spouses in living their common Christian legacy, reminding them about the value of common prayer and the meaning of reading and study of the Holy Scriptures.[41]

Conclusions

The aim of this article was to present the issues of Roman Catholic-Anglican mixed marriages. This is not an easy task, especially in a country where Anglicanism is a small minority. What is more, it is an important and current issue — for instance, as I have already mentioned, in the face of economic emigration, the easiness of communication, travelling, making friends and, at the same time, entering into relationships with followers of other confessions. This article does not claim the right to exhaust this subject, but rather initiates further and more detailed studies. First I have shown representative teachings on marriage from the Catholic perspective, which has become a starting point in the search for the road to unity with Anglican confession, mainly by presenting the works of Catholic-Anglican Commission and its report of 1975 on the subject we are interested in. By means of analysis of its content, I have presented fundamental points of contacts related to marriage from the Catholic and Anglican perspective, as well as remaining differences — that can or cannot be overcome, which is proven by subsequent documents of the Catholic Church introducing another practice related to entering into and pastoral care of mixed marriages.

A proper closure of our investigation should be important words quoted from the *Catechism of the Catholic Church*, which surely fills us with hope, but at the same time, calls for greater effort to take care of spouses of mixed marriages: "Differences of religion do not constitute an impassable obstacle to enter into marriage if spouses can share what each has received from their community and if one will learn from the other a way of living out their fidelity to Christ."[42]

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mentation of rules and standards related to ecumenism (25 March 1993)], no. 144, quote after: *Małżeństwa mieszane* [Mixed marriages]…, p. 147.

[41] Cf. ibidem, no. 149.

[42] *Katechizm Kościoła Katolickiego* [Catechism of Catholic Church]. Poznań 1994, no. 1634.

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Robert Samsel

Roman Catholic-Anglican Mixed Marriages in Ecumenical Dialogue and Pastoral Practice

Summary

The article entitled "Roman Catholic-Anglican Mixed Marriages in Ecumenical Dialogue and Pastoral Practice" presents the teachings of the Catholic Church with respect to marriage based on the encyclical of Pope Pius XI *Casti connubi* and apostolic exhortation by John Paul II *Familiaris consortio*. Presenting marriage with its fundamental features: unity, indissolubility, sacramentality, as being a natural union between a man and a woman, blessed by God and empowered to take on matrimonial and parental tasks, constitutes a basis for deliberations on mixed marriages between people baptized in various Christian confessions, in this case Roman Catholic and Anglican ones. The issue of the mixed marriage between people of those two confessions has become an element of works by the Anglican-Roman Catholic International Commission, ARCIC, which in 1975 published a document entitled *Theology of Marriage and Its Application to Mixed Marriage*. Its content became a basis for the presentation of the Anglican vision of marriage in the context of the ecumenical dialogue: points of contacts and differences. Because of schism, out of concern for spouses' religious identity as well as the unity and stability of marriage, it is necessary to introduce the right rules of pastoral care and confession discipline, which constitute the final part of the presented material.

Robert Samsel

Les mariages mixtes anglo-catholiques dans le dialogue œcuménique et dans la pratique pastorale

Résumé

L'article *Mariages mixtes anglo-catholiques dans le dialogue œcuménique et dans la pratique pastorale* présente l'enseignement de l'Église catholique à propos du mariage, basé sur le texte de l'encyclique du pape Pie XI *Casti connubi* et l'exhortation apostolique de Jean-Paul II *Familiaris consortio*. La présentation de la communauté entre époux avec ses traits fondamentaux : unité, indissolubilité, sacramentalité, étant une communauté naturelle d'un homme et d'une femme bénie par Dieu et capable de remplir ses devoirs conjugaux et parentaux, constitue la base pour les réflexions sur les mariages mixtes conclus entre les personnes baptisées dans différentes croyances chrétiennes, dans ce cas-là : catholique et anglicane. La question relative au mariage mixte de ces deux croyances est devenue le thème des publications de la Commission internationale anglicane-catholique romaine (ARCIC) qui en 1975 a publié le document intitulé *Théologie du mariage et son application aux mariages mixtes*. Son contenu est devenu la base pour présenter la vision anglicane du mariage dans le contexte du dialogue œcuménique : points communs et différences persistantes. Pour garantir l'identité religieuse des deux époux ainsi

que l'unité et la stabilité de leur mariage, il est nécessaire — vu la scission au niveau confessionnel — d'établir des principes du soin pastoral et d'une discipline confessionnelle ; cette question constitue la dernière partie du présent article.

Mots clés : mariage, mariage mixte, œcuménisme, anglicanisme, catholicisme, prêtrise

Robert Samsel

I matrimoni misti cattolico-anglicani nel dialogo ecumenico e nella pratica pastorale

Sommario

L'articolo *I matrimoni misti cattolico-anglicani nel dialogo ecumenico e nella pratica pastorale* presenta l'insegnamento della Chiesa cattolica sul matrimonio basato sul testo dell'enciclica di Papa Pio XI *Casti connubi* e dell'esortazione apostolica di Giovanni Paolo II *Familiaris consortio*. La presentazione della comunità coniugale con le sue caratteristiche fondamentali: unità, indissolubilità, sacramentalità, essendo una comunità naturale tra un uomo e una donna, benedetta da Dio e capace di intraprendere i compiti coniugali e genitoriali, costituisce il fondamento per le riflessioni sui matrimoni misti contratti tra persone battezzate di diverse confessioni cristiane, in questo caso cattolica e anglicana. La questione del matrimonio misto di tali confessioni diventò l'argomento dei lavori della Anglican-Roman Catholic International Commission (ARCIC) che nel 1975 emise il documento intitolato *La Teologia del matrimonio e la sua applicazione ai matrimoni misti*. Il suo contenuto divenne il fondamento per rappresentare la visione anglicana del matrimonio nel contesto del dialogo ecumenico: dei punti comuni e delle differenze rimanenti. Considerato lo scisma confessionale, avendo premura per l'identità religiosa dei coniugi e nel contempo per l'unità e la durata dell'unione maritale sono necessari principi adeguati di cura pastorale e disciplina della confessione; essi costituiscono il contenuto dell'ultima parte del materiale presentato.

Parole chiave: matrimonio, matrimonio misto, ecumenismo, anglicanesimo, cattolicesimo, pastorale

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Religious Education of Children in Families of Different Confessions

Keywords: Roman Catholic and Evangelical Church, religious education, children, inter-religious marriages.

Cieszyn Silesia region is proud of its idiosyncratic history since the 16th century. It is a region where two confessions — Roman Catholic and Evangelical-Augsburg — live peacefully together. The number of Protestants living here amounts to 50,000 nowadays (it is a region of Poland with the biggest number of Protestant inhabitants). Due to this fact, there are more and more inter-religious families in the area.

The unquestionable fact is that the family is the first and the most important educational environment for a child. It also includes religious education. Parents are the first teachers of faith and it is them who are responsible for their children religious education. In inter-religious families the task is even more difficult as the child is brought up at the meeting of two religions which differ from each other. Moreover, it is the family that introduces the child into the Church community. There, they are taught their first prayers, start their first religious discussions, read the Holy Scripture and — last but not least — a positive attitude to the Lord is developed in the child.

Religious education "is a conscious social activity based on an educational relationship between the pupil and the teacher whose aim is to evoke in the pupil deliberate identity changes. The changes include cognitive-instrumental structures connected with understanding the reality and interaction skills which help to influence it, as well as emotional and motivating structures, which means shaping the man's attitude

towards the world and people, their beliefs and behaviour, the hierarchy of values and sense of life."[1] However, religious education is a system based on the fact that "the educational activity is subordinated to the foundations of a religion; in Poland it is the Roman Catholic religion, which the majority of the society identifies with. Religious education is rich in traditions: in the old days in Poland, it used to be the dominant part of education but gradually, as there were more and more attempts to separate the Church from the State, it has become one of the elements of school education. After World War II, there was a progressive separation between the Church and the State; in 1990, the Polish government decided to reintroduce religious education in state schools."[2] Religious education concerns the growth of new life united with God which means that the process of learning certain achievements related to the love for God is set in motion. It takes place in the family, in the Church, in the social milieu and at school, and its main aims are to teach the love for God, to bring up to a life in faith and prayer, to participate in the holy mass, to understand the Eucharist and to shape the conscience.[3] Religious education is understood as handing down the faith and as a school of faith, as an integral part of holistic education, which for a Roman Catholic should be its vital part.[4]

An important part in the educational process is "the originating from anthropology adequate consciousness of the ideal, the attitude to the truth and personal responsibility of both the teachers and pupils. […] the vital aspect is the character of the teacher. Their pedagogical gift, good interpersonal skills, competence, responsibility for themselves and other people, kindness coming from love are all the features which have an essential influence on the pupil."[5]

Religious training is "a process of inner, autonomic, reflexive existential change of an individual and the activities supporting this process which are performed in the normative horizon of values, sense, meanings and events connected with tradition and contemporary practices of a given religion."[6]

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[1] W. Okoń: *Nowy Słownik Pedagogiczny*, Warszawa 2004, pp. 462—463.

[2] Ibidem, p. 466

[3] G. Hansemann: *Wychowanie religijne*. Warszawa 1988, pp. 83—88.

[4] K. Jeżyna, T. Zadykowicz: *Wychowanie w rodzinie chrześcijańskiej. Przesłanie moralne Kościoła*. Lublin 2008, pp. 53—54.

[5] A. Rynio: "'Wczoraj' i 'Dziś' katolickiej myśli pedagogicznej w kontekście współczesnych wyzwań wychowawczych." In: *Pedagogika chrześcijańska. Tradycja. Współczesność. Nowe wyzwania*. Eds. J. Michalski, A. Zakrzewska. Toruń 2010, p. 85.

[6] B. Milerski: *Hermeneutyka pedagogiczna. Perspektywy pedagogiki religii*. Warszawa 2011, p. 230.

Religious education plays an important role in the life of every Christian. The attitude of parents, religion teachers and priests has an indispensable significance in shaping the religious thinking of a child. The biggest responsibility for the religiousness, morality and hierarchy of values rests with the family. However, the ideal of Christian education is to follow our Lord, to hand down the truth and to lavish big, absolute and inevitable love on everyone.

The role of the family in the process of Christian education

At home "the child gets their first religious experiences. The relationship with mother or both parents creates favourable conditions to teach the child religious practices, like participating in services, prayers, charity. Entering the religious community is another experience. That is why the Roman Catholic Church and other Churches care so much about the religious education in families. […] Parents — mother and father, teachers and priests are the important role models in religious education, not to mention the religious climate of home, school and contacts with other members of a given religion."[7] But the unquestionable fact is that the family must have considerable standing.

When John Paul II talks about the parents' standing, he tries not to use the word "authority" because in his opinion parents just participate in the upbringing process, they are not the authority. The parents' role is kind of a "service" subordinated to the benefits of the child and its aim is to enable them to gain a responsible freedom. The child must be helped in making the right choice between the good and the evil. What these extremes mean, the child learns in the process of education. That is why, the parents must have their standing, their personalities must be full of values which they want to hand down to their children. Parents should show their children to what depths the faith and Jesus Christ's love lead. However, it is not enough only to talk about it but there must be examples which the children could follow. Parents must not only talk about love, but they must create a home full of love to make the process of education effective.[8]

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[7] W. Okoń: *Nowy Słownik Pedagogiczny…*, p. 466.

[8] T. Zadykowicz: "Autorytet w wychowaniu." In: *Wychowanie w rodzinie chrześcijańskiej. Przesłanie moralne Kościoła*. Eds. K. Jeżyna, T. Zadykowicz. Lublin 2008, pp. 47—51.

According to the authors in some Evangelical publications, an important influence on the child's demeanour and behaviour comes from the parents and the household: "[…] if the atmosphere is full of love, warmth and care in the Christian home, then the young are in good mood, too. If parents say the prayers together with the child, the kid gets a good example and learns to pray from the earliest age and this evokes in the child the need for religious life — participation in the life of the Church and in services.[9] The task of the adult is to support the child; to support them when they face problems and gather new experiences. The child must know that the parents are interested in them and are fond of them.[10]

Marriage from the Roman Catholic point of view

Parents constitute a couple which is the basic institution in all nations and religions, it is the smallest unit of human community. The most important here is the love between the wife and the husband, the love which God bestows upon the man. The Roman Catholic Church regards marriage as one of the sacraments, it is the picture of God's covenant with his people. In the wedding the bride and the groom promise each other love, faithfulness, honesty and indissolubility of their marriage. The Roman Catholic Church does not recognize divorces and it is impossible the be wed twice in the church.[11]

As far as inter-religious marriages are concerned, the Roman Catholic Church is of the opinion that a marriage of members of different religions may cause arguments and problems, and in consequence the couple may drift apart. What is more, the Church claims that the biggest problems arise when it comes to bringing up children. This may result in withdrawing of both parties from the oath and then the offspring might be brought up in a non-religious way. A considerable difference between the Roman Catholic Church and the Protestant Church can be noticed in their understanding of marriage — for the Catholics it is a sacrament, for the Protestants it is not. Therefore, when the Catholic side wants to marry

[9] J. Badura: "Jezus wychowuje przykładem." *Zwiastun Ewangelicki* 2008, no. 3, pp. 6—7.

[10] A. Mikler-Chwastek: "Czy Jezus wielkim pedagogiem był? — wspieramy rozwój zgodnie z przykazaniem miłości." *Zwiastun Ewangelicki* 2008, no. 20, pp. 6—8.

[11] P. Jaskóła: *Problem małżeństwa w relacjach ewangelicko-rzymskokatolickich. Historia i perspektywy nowych rozwiązań*. Opole 2013, pp. 141—146.

to a member of the Protestant Church, they need a bishop dispensation. In addition, the Protestant side is obliged to sign a declaration which says that the child will be brought up in the Catholic faith.[12]

The Roman Catholic priests also see the difficulties in the relations between spouses in inter-religious marriages. They say that: “life in these families is really difficult, and problems appear continually. The young people’s only motivation to enter into marriage is their love. In some cases, it is enough — in cases where there is a cooperation with Love, which means the Lord.” *Cautele* (a declaration and vow which is signed by the bride and groom of different religions) are not always respected. “Sometimes it is a problem to decide in which Church the child should be baptized or which religion lessons they should attend. For those people it is often a tragedy when they leave the house together on a Sunday morning and then they go in different directions.”[13] On the other hand, Roman Catholic priests think that if somebody takes the decision to get married to a member of a different religion, it is a well-thought-out decision and the idea of ecumenism which is included in this form of marriage is to keep to one’s religion and not to convert to the other.

Marriage from the Evangelical-Augsburg point of view

In the Evangelical Church marriage is perceived in a different way than in the Roman Catholic Church. For Protestants, it is not a sacrament. Even if people enter into marriage at a registry office, it is recognized as valid in the Evangelical Church. The Evangelical-Augsburg marriage is a synonym of Christ’s love for the Church. It makes the newly-weds unite with the Christian community and it does not mean that the woman is subjected to the man but they are both in a state of utter subjection to the Lord. The Evangelical catechism for adults says that marriage is an institution, an alliance and partnership. Love, sexuality, a desire for offspring, faithfulness, common tasks, relations with other people and the attitude towards the Church are behind it. In the opinion of the members of the Evangelical Church, marriage at its core is indissoluble, but there are cases of divorces, too. If the relationship between the woman and the man is ill, it is better for them to divorce. The Lutheran faith allows its follow-

[12] Ibidem, pp. 147—148.

[13] J. Budniak: *Ekumenizm jutra na przykładzie Śląska Cieszyńskiego*. Katowice 2002, pp. 220—221.

ers to enter into marriage for the second time because it adopts a view that our Lord is merciful and forgiving and gives the chance for a new start.[14]

Let us concentrate now on young people belonging to different confessions and present their point of view. Nowadays young people who want to marry each other are not influenced by religious differences and they often tend to avoid a church wedding as it causes too many problems. The Protestants think that different religions of the bride and groom can be an obstacle for the harmony in marriage, but the other opinion is that the religious difference may in a sense enrich the couple. Children brought up in such families can get to know the spiritual value of both Churches; unfortunately they cannot belong to both Churches as their world needs to be clear and united. For the Lutherans, the future lies in the ecumenical services which will let them educate their children in the spirit of ecumenism and understanding. This Church does not put pressure on its members and allows them to celebrate marriage ceremony in the Catholic Church. It is also aware of the necessity of pastoral support and help which the young people might need. However, the activities are not meant to keep those people in the Protestant Church but their aim is to pay attention to the problems connected with their different religions.[15]

Lutheran pastors think that "inter-religious couples should decide on the roles between them and the children before they get married. The decision about the inter-religious wedding belongs to the engaged couple and only they decide how they will solve the question of bringing up the children. It also depends on how strong their faith is and how much God's love is in them. Moreover, young people should be free to make the decision on their own and nobody must put pressure on them as to how their future life should look like. These couples that stick firmly to their beliefs are creative, active and they function well. But the Lutheran pastors emphasize the stiff rules of the Roman Catholic Church about inter-religious marriages — the must of a Roman Catholic to get the bishop dispensary to marry in the Lutheran Church, the primacy of the Roman Catholic priest in case of an ecumenical wedding. According to the faithful, the Churches should not put any pressure on the couples living in such marriages — which Church to attend, how to bring up the children, where to baptize them. The couples-to-be often face a difficult choice and the new family will have to cope with the problem, especially in the issue of bringing up the children. There comes the task of priests and pastors

[14] Cf. P. Jaskóła: *Problem małżeństwa w relacjach…*, pp. 129—138.
[15] Cf.: Ibidem, pp. 139, 140, 169.

who should respect the choices and help the spouses to live on and solve the difficult questions.[16]

Stages of religious education of a child

The religious education is aimed at "a permanent union of the child with the Lord, namely to a life in grace through a better meeting Him and giving a testimony about Him. The point is that in the child's mind the picture of the loving God is shaped — the God giving you the feeling of safety."[17]

The children understand the signs of the religious life taking place around them before they start to speak. At first it is just intuition but later the understanding is similar to the understanding of the adults. That is why religious education should start at the very early age. In the process of the child's development, they begin to talk about the Lord with the parents, they start saying their prayers. The process is intensified when the child starts to ask the first questions: some of them concern religion. Parents must answer the questions thoroughly, which means they need to have a proper knowledge on this subject. Another stage in the child's development is discovering God through discovering their own "I" and their own will. The child understands that God is like the father in the family who knows and sees everything, so the child starts to pray with a greater engagement. At this stage the child creates in their mind the picture of God by following the example of parents, especially the father. Therefore, the proper attitude of parents is so important because if the picture of father and God is at least once misrepresented, it is very difficult to change it.[18]

The stages of religious education of a little child clearly show how important the religious role of the parents is. Their attitude creates the picture of God which stays with the child for during their entire life. A bad example of the parents can result in resignation from religious life in their children's adult life. The family home is the first and the most important school of religion and every parent must keep this in mind. Parents must cooperate in the process of education of their children — respect them

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[16] J. Budniak: *Ekumenizm jutra na przykładzie Śląska Cieszyńskiego*…, pp. 221—222.

[17] Cf. P. Poręba: "Wychowanie religijne w rodzinie." In: *Rodzina wspólnota miłości*. Ed. I. Krainska-Rogala. Kraków 1999, pp. 19—25.

[18] Cf. ibidem, pp. 27, 28.

as human beings and treat them as a God's gift. They should show their obedience to God in order to pass this attitude to their children. Home is the place where virtues are formed; sacrifice, common sense and self-control are taught, and all this can bring the real freedom. Parents must not be afraid to admit error — everybody makes mistakes. When the child realizes the open attitude of the parents, they open themselves for the parents, too.

Religious problems of inter-religious marriages

Sometimes inter-religious families can experience difficulties in fulfilling their religious role. Among the difficulties are:

- lack of responsibility of parents — parents often shift the responsibility for their child's religious education onto the Church, forgetting that they are the first religion teachers;
- lack of religious knowledge — parents are often not able to answer the child's questions concerning religion because their own knowledge is poor and they are reluctant in extending it;
- lack of educational skills — parents often lack the educational training; actually, love for the child is the base of everything, but sometimes it may have a destructive influence on religious education;
- lack of bonds with the parish;
- absence of parents from home;
- discord between educational institutions — often the Church and the State proclaim opposite outlook on life, in consequence the child is influenced by atheistic activities of schools and mass-media.[19]

In the past there was a rule among the inter-religious couples that the sons followed their father's religion and the daughters — their mother's. There is no need to say that it was an unwritten rule as — according to the directives of the Roman Catholic Church — all children born in an ecumenical family should be baptized in the Catholic Church. Nowadays, this rule seems to be forgotten and parents most often chose the same religion for their children, the Protestnat one. Parents do not obey the document signed before their ecumenical wedding which distinctly shows that the attempts of pressure made by the Catholic Church failed and parents acted in accordance with their own beliefs.

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[19] Cf.: P. Poręba: "Wychowanie religijne w rodzinie...," pp. 37—42.

However, according to some research conducted in Cieszyn Silesia, inter-religious parents declare that they do not experience many problems in bringing up children. Traditionally, this is the mother's duty and she educates the children in her religion or in the religion which both parents accepted as theirs. Children accept the inter-religious marriage of their parents and parents would not mind if their children enter into marriage with someone of a different religion, too.[20]

Conclusion

Spouses of inter-religious marriages face much more difficult task in bringing up their children than parents of the same religion. Therefore, their job is much more important because a child brought up in such family often does not understand all the different aspects of Evangelical-Augsburg and Roman Catholic confessions. The differences make the parents put much more effort in introducing the child into the religious life.

According to the research conducted in Cieszyn Silesia region concerning inter-religious families, it can be said that despite the document stipulating choosing the Catholic faith for their children, which the newlyweds sign before the wedding, they seldom act upon it. The conclusion is simple — the Roman Catholic Church, through its not very friendly attitude, discourages parents to educate their children in this religion.

Nevertheless, inter-religious couples live in the spirit of ecumenism, follow the Protestant and Catholic traditions in celebrating holidays, visit both churches and teach their children tolerance. Sometimes they meet with obstacles because of the differences in their religions, but generally they are the religious authority for their children and that means they fulfill their task properly. In the hierarchy of their values love occupies the highest place. Without doubt, there is also the belief in God, charity, kindness and honesty take significant positions. All the values which connect the Evangelical and the Catholic religions allow to form a good man and a good Christian because it counts most regardless of the religion they profess.

John Paul II, as the patron of the family, used to emphasise how important the role of the parents in children education is. The role of the inter-religious parents is even more important. The most vital purpose is

[20] J. Budniak: *Ekumenizm jutra*…, p. 223.

to live in concord with oneself and the other man. Therefore, ecumenical marriages — despite the fact that they are not religiously perfect — can become good parents and educate the child in the spirit of tolerance, respect, and in a world rich in traditions of both religions.

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Józef Budniak

Religious Education of Children in Families of Different Confessions

Summary

The family is the first and most important educational environment. It also concerns religious education. Parents are the first teachers of faith and they are responsible for their children's religious education. In inter-religious families the job is even harder as

the child is brought up at the meeting of two confessions which differ from each other. In such a family, the child is introduced into the Church community, taught the first prayer, starts the first conversations about religion, reads the Holy Scripture, and what is most important — he or she adopts a positive attitude to the faith in God.

Inter-religious families live in the spirit of ecumenism — they celebrate holidays in concord with Catholic and Lutheran traditions, attend both Churches, teach their children respect, love and tolerance for people of other religions. All these values help to educate the child to become a good man and a good Christian.

Józef Budniak

L'éducation religieuse des enfants dans une famille de différentes appartenances confessionnelles

Résumé

La famille est le premier et le plus important milieu éducatif, et cela concerne aussi l'éducation religieuse. Les parents sont pour un enfant les premiers propagateurs de la foi et c'est sur eux que repose la responsabilité pour l'éducation religieuse de leurs enfants. Dans les familles de différentes appartenances confessionnelles, il est plus difficile de remplir ce rôle important puisque l'enfant est élevé dans un lieu de rencontre de deux confessions différentes. Dans une telle famille, l'enfant est introduit dans la communauté religieuse. Après qu'on lui a enseigné la première prière, il engage ses premières conversations sur les thèmes religieux, il lit la Sainte Écriture et, ce qui est le plus important, on fait naître en lui une attitude positive à l'égard de la foi en Dieu.

Les familles de différentes appartenances confessionnelles — en vivant dans l'esprit de l'œcuménisme — célèbrent les fêtes conformément à la tradition catholique et évangélique, elles fréquentent les deux églises, enseignent à leurs enfants le respect, l'amour et la tolérance envers les personnes de croyance différente. Ces valeurs permettent d'élever l'enfant de façon qu'il devienne un homme juste et un bon chrétien.

Mots clés : Église catholique et évangélique, éducation religieuse, enfants, familles de différente appartenance confessionnelle

Józef Budniak

L'educazione religiosa dei bambini in una famiglia di diversa appartenenza religiosa

Sommario

La famiglia è il primo e più importante ambiente educativo, cosa che riguarda anche l'educazione religiosa. I genitori sono per il bambino i primi divulgatori della fede e su di loro ricade la responsabilità dell'educazione religiosa dei figli. Nelle famiglie di diversa appartenenza religiosa l'adempimento di tale ruolo così importante è più difficile perché il bambino è educato al limite di due confessioni che sono diverse tra loro. In una

famiglia simile il bambino viene introdotto nella società ecclesiastica, gli viene insegnata la prima preghiera, intraprende le prime conversazioni su argomenti religiosi, legge le Sacre Scritture e, cosa più importante, nel bambino viene sviluppato il rapporto positivo con la fede in Dio. Le famiglie di diversa appartenenza religiosa — vivendo nello spirito dell'ecumenismo — celebrano le feste conformemente alla tradizione cattolica ed evangelica, frequentano entrambe le Chiese, insegnano ai bambini il rispetto, l'amore e la tolleranza per i credenti di altre confessioni. Tali valori permettono di educare il bambino per farlo diventare un buon uomo e cristiano.

Parole chiave: Chiesa cattolica ed evangelica, educazione religiosa, bambini, matrimoni di persone di diversa appartenenza religiosa.

Part Two

Ecumenical Juridical Thought

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Children's Rights Provisions of Certain International Conventions

Keywords: the international juridical status of the child, juridical protection, parental responsibility

Among the international legal instruments having the force of *jus cogens*, the international conventions occupy prominent places which, according to The Statute of the International Court of Justice,[1] are "whether general or particular" and are the first source[2] of the international law (cf. Art. 38 al.).

Amongst the said international conventions, prepared and adopted by the United Nations (UN), the Council of Europe , and other particular international organizations, are those that provide for and protect the Rights of the Child, hence the need to examine and evaluate the text for the better understanding of the international juridical status of the child, which the world's states must take into consideration both in their national laws, and with regard to the specific actions they should be involved in order to ensure the child's conditions for his or her dignified life and the proper juridical protection.[3]

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[1] For the text of this statute — which has been published at the same time as the Charter of the United Nations was, and signed in San Francisco on June 26, 1945, see: www.anr.gov.ro/docs/legislatie/international/Carta_organizatiei_Natiunilor_Unite_ONU_pdf.

[2] The second, the third, and the fourth source of the Internal Law are: (a) International Customary Law; (b) General Principles of International Law; and (c) Jurisprudence of the International Court of Justice.

[3] As regards this type of protection, see N.V. Dură: "Les droits fondamentaux de l'homme et leur protection juridique." *Annals of the Lower Danube University in Galati*,

1. European Convention on Human Rights (Rome, 1950)

The European Convention on Human Rights, which mentions the right to the family life among other fundamental human rights,[4] recognizes the child's right to identity since birth (cf. Art. 8 al. 2). The same convention includes the family life — the child being a constitutive part thereof — among the rights of the person,[5] and grants its juridical protection, "although it does not define it,"[6] as the UN's International Covenant on Civil and Political Rights (1966) does. Indeed, for this covenant, "the family is the natural and fundamental group unit of society," which "is entitled to be protected by society and the State" (Art. 23, par. 1).

The convention did not define the family but, at the same time, the European Court of Justice did not make — in its jurisprudence — the distinction between the "legitimate" family and the "natural" one. Besides, for the European Court of Justice, the family is not established through marriage, "but it is a factual relation."[7]

The European Court of Justice does not exclude "the relation between a natural father and a child born out of wedlock" as — for the Court — the family is not restrained "solely to the relations based on wedlock," but also to the relations "of the parties that live together outside the wedlock." Therefore, for the Court, "the child born in such a relation is part of the familial cell from the moment when he or she was born," and the

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Fascicle XXII, Law and Public Administration, 2008, no. 2, pp. 19—23; Idem: "General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights." *Journal of Danubius Studies and Research*, 2013, vol. III, no. 2, pp. 7—14.

[4] See, N.V. Dură: "Drepturile şi libertăţile omului în gândirea juridică europeană. De la 'Justiniani Institutiones' la 'Tratatul instituind o Constituţie pentru Europa' [Human Rights and Freedoms in European Juridical Understanding. Since 'Justiniani Institutiones' to 'The Treaty for a European Constitution']." *Annals of Ovidius University*, Series: Law and Administrative Science, 2006, no. 1, pp. 129—151; Idem: "The Fundamental Rights and Liberties of Man in the E.U. Law." *Dionysiana*, 2010, IV, no. 1, pp. 431—464; Idem: "The Rights of the Persons who Lost Their Autonomy and Their Social Protection." *Journal of Danubius Studies and Research*, 2012, vol. II, no. 1, pp. 86—95; Idem: "General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights." *Journal of Danubius Studies and Research*, 2013, vol. III, no. 2, pp. 7—14.

[5] According to Art. 8 of The European Convention on Human Rights, everyone has "the right to respect for his private and family life."

[6] C. Bîrsan: *Convenţia europeană a drepturilor omului. Comentariu pe articole* [European Convention on Human Rights. Comments on Articles]. Vol. I. Bucharest 2005, p. 626.

[7] Ibidem.

relations between the parents and the child, which represent the "family life," are established even if, on the moment of the child's birth "the parents do not live together or the relation has previously been broken." [8]

Therefore, in the understanding of the Court, the relations between the parents and their children — which have always been considered as one of the main issues of the family life — are not strictly determined by the *matrimonium* (the civil or religious marriage), but the birth of the child. Moreover, the right to family life occurs on the very moment when the child is born, because "prior to the birth there has been no family life between the child and his or her parents, as there have not been any social relationships."[9]

At the same time, we should also remark that the Court "does not see in the common life the condition without which one cannot talk about the family life between the parents and their underage child. According to the jurisprudence of the Court, the relationship created by a wedlock between the two spouses must be considered family life regardless of their living together or apart." Consequently, the child born from this union is naturally a part of the relationship; hence, "the simple fact of his birth generates between him and his parents a relationship as constitutive part of the family life, though they do not live together with him."[10]

Finally, according to the jurisprudence of the Court, although "certain subsequent events can break this connection, on the moment of birth the family life exists."[11]

In the opinion of certain European jurists, the family life can only exist "based either on the simple juridical relationship or the one of kinship, without the need of being coupled with the common life."[12] The same jurists underline that the family life between the parents and the children does not take into consideration the way in which "the relation between the parent and child is established, as the family life does exist regardless of the fact that the relationship is biological or juridical. Thus, between the parent and his or her child there is a family life even if the child is born out of wedlock, because the parenthood is not established based on such relationship."[13]

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[8] A. Drăghici: *Protecția juridică a drepturilor copilului* [Juridical protection of Children]. Bucharest 2013, pp. 166—167.

[9] R. Chiriță: *Convenția europeană a drepturilor omului. Comentarii şi explicații* [European Convention on Human Rights. Comments and explanation]. Ediția a II-a. Bucureşti 2008, p. 437.

[10] Ibidem.

[11] Ibidem.

[12] Ibidem, p. 438.

[13] Ibidem.

Certainly, the family life is not suspended after the divorce of the parents and when one parent is authorized to take care of the child! Besides, the European Court of Justice considers that "the relationships between the parents are not relevant from the licit or illicit point of view [...]. Instead, in order to admit the existence of a family life between a biologic parent and his or her child, it is required that the parenthood of that specific person is beyond any doubt."[14]

In case of adoption, the European Court of Justice decided that "the relationships between the adoptive parents and the child are family relations, even if they did not ever live together."[15]

As regards "the family life" of homosexual couples, "the European Court of Justice stipulated that according to the permanent jurisprudence of the Convention authorities, the long-term homosexual relations between two males do not fall under the application of the right to family life as protected by Article 8."[16] However, as regards the relations between "the children and the homosexual parents, the European Court of Justice [...] stipulated against the solutions expressed by certain national courts that it is not possible to interdict a principle that is included in the Convention, based on which a homosexual parent is not entitled to be authorized to raise and educate his child."[17]

In the situation of the couple consisting "of one trans-sexual, that is a woman that became a man, and his concubine who gave birth to a child after the so-called A.I.A.D (Artificial Insemination by Anonymous Donor)," the instance of European Convention of Human Rights considers that we are dealing with "a significant element of the familial life."[18] Beyond any doubt, the European Court of Justice only took into consideration the existence of the family life "between the trans-sexual person that lives together with the mother and the child born in the conditions mentioned above, because the Court did not accept — as a magistrate of the Court said — the possibility to acknowledge that specific person as a parent as a result of admitting this method. In order to decide that, the Court used as a starting point — the same magistrate concluded — the remark that there is no European legislation granting parenthood rights to the trans-sexual persons."[19]

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[14] Ibidem.

[15] Ibidem, p. 439.

[16] C. Bîrsan: *Convenția europeană a drepturilor omului. Comentariu pe articole...*, p. 634.

[17] Ibidem.

[18] Ibidem, p. 635.

[19] Ibidem.

2. European Convention on the Adoption of Children (Strasbourg, April 24, 1967)

On April 24, 1967, the member states of the Council of Europe adopted in Strasbourg the European Convention on the Adoption of Children.[20]

In the Preamble of this convention, the states considered that although "the institution of the adoption" exists "in their legislations," yet there are "differing views as to the principles which should govern adoption and differences in the procedure for effecting, and the legal consequences of, adoption."

For the authors of the convention, "the child" was a person that "has not attained the age of 18, is not and has not been married, and is not deemed in law to have come of age" (Art. 3).

Over time, the matrimonial full age — along with the transition from the child to the grown-up status — was different from one epoch to another. For example, during the Roman times, in order to conclude a marriage *secundum praecepta legum* (according to the legal provisions), that is to proceed a *iustas nuptias* (legal weddings), the both parties must have reached the adulthood (ἥβη-, *pubertas*). The *masculi* (men) must have reached 14 years of age, that is *puberi*, and the *feminae* (women) 12 years of age, that is*nubiles.*[21] On the other hand, in the Byzantine Empire, the age of 16 for men and 14 for women was required.[22] This age limitation beyond which the young couples could have concluded the marriage, perpetuated until the modern age, when the law-maker enforced the age of 18 as adulthood for men and 16 for women, with dispensation for the last one down to the age of 15.[23]

Based on Art. 7 of the convention from 1967, "a child may be adopted only if the adopter has attained the minimum age prescribed for the purpose, this age being neither less than 21 nor more than 35 years"

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[20] Romania has adhered to this convention through the Law no. 15 issued on March 15, 1993, published in *The Official Gazette* no. 67 of March 31, 1993, with the following specification: "Romania will not apply the provisions of Art. 7, according to which the minimum age of the adopter cannot be under 21 years and over 35," because in the Romanian law the minimum age is 18 years, without the maximum limitation."

[21] *Justiniani Institutiones*, lb. I, cap. X.

[22] See, *Digestae*, XXIII, 1, 9; *Codex Justinianus*, V, 60, 3; *Basilicales*, XXVIII, 1, 7 şi XXXVIII, 19; *Prochiron*, IV, 2, etc.

[23] The law issued in Romania during the communist regime stipulated the possibility of conferring matrimonial dispensation to the female part "only after reaching the age of 15, not under this age" (I. N. Floca: *Drept canonic ortodox* [Orthodox Canonical Law]. Vol. II. Bucharest, 1990, p. 77).

(Art. 7, par. 1). However, the convention admitted the right of the states to stipulate in their national legislations to "permit the requirement as to the minimum age to be waived [...] when the adopter is the child's father or mother," and "by reason of exceptional circumstances" (Art. 7, par. 2), without any specification concerning such circumstances.

The convention also provided the obligation of the competent authority (a trial court or an administrative authority) not to grant an adoption "unless it is satisfied that the adoption will be in the interest of the child" (Art. 8, par. 1), and "until appropriate enquiries have been made concerning the adopter, the child and his family" (Art. 9, par. 1).

The same convention has also stipulated that "the number of children who may be adopted by an adopter shall not be restricted by law" (Art. 12, par. 1), and "if adoption improves the legal position of a child, a person shall not be prohibited by law from adopting his own child not born in lawful wedlock" (Art. 12, par. 3).

Such provisions regarding the age under which a person can still be considered a child, the adopter's age, the conditions of adoption, etc. have also been reiterated in the texts of the conventions issued later on.

3. Minimum Age Convention (June 26, 1973)

The Minimum Age Convention was adopted on June 26, 1973, which was intended for and succeeded in gradually replacing up until then existing (international) legal instruments in force that regulated the minimum age for admission to employment (cf. the Preamble).

Since the first convention on the minimum age for admission to employment entered into force in 1919, until the 1973, other similar conventions had also been elaborated, adopted, and published; however, those conventions had only taken into account a specific sector of activity (industry, agriculture, underground/miner work, etc.).

The signatory states of the 1973 Convention, put forward by the International Labour Organization, undertake "to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons" (Art. 1).

As regards "the minimum age," the Convention provided that it shall not be "less than the age of completion of compulsory schooling and, in

any case, shall not be less than 15 years" (Art. 2, al. 3), but in the member states whose economy and educational facilities "are insufficiently developed" may "initially" specify "a minimum age of 14 years" (Art. 2, al. 4).

At the same time, the Convention provides that "National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work" (Art. 7, al. 1).

4. European Convention on the Legal Status of Children Born Out of Wedlock (Strasbourg, October 15, 1975)

Beginning with the Preamble of the European Convention on the Legal Status of Children Born out of Wedlock[24] — adopted in Strasbourg on October 15, 1975 — the member states of the Council of Europe declared that their desire is to facilitate "the adoption of common rules in the field of law" and make efforts "to improve the legal status of children born out of wedlock" intended to effectively contribute as well to harmonize the laws of the member States in this field."

After the convention adopted in October 1975, "the father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock" (Art. 6, par. 1). Thus, a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock" (Art. 9).

5. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Luxemburg, May 20, 1980)

On May 20, 1980, in Luxemburg, the Council of Europe adopted the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Chil-

[24] Romania has adhered to this Convention through the Law no. 101 issued on September 16, 1992, published in *The Official Gazette* no. 243 of September 30, 1992.

dren.[25] In the Preamble of this Convention it was mentioned that the recognition and application of the decisions concerning the custody of a child results in providing "greater protection of the welfare of children," and "the right of access of parents is a normal corollary to the right of custody." At the same time, it was mentioned the fact that in order to solve the "cases where children have been improperly removed across an international frontier," the EU member states expressed their desire to establish "legal co-operation between their authorities."

It is noteworthy that "for the purposes of this Convention," that is the convention of May 20, 1980, a "child" means "a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed" (Art. 1, al. a).

According to the understanding of the authors and of the signatory parties of this convention, the child is a "person" that is entitled to the status of "child" until 16 years of age, not 14, as previously issued international documents stipulate.[26]

As regards the right of access of parents, the convention of May 1980 established that "the competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter" (Art. 11, al. 2), and in such cases where "no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access, if the person claiming a right of access so requests" (Art. 11, al. 3).

According to the provisions of the 1980 Convention, the customary law — as a source of the international law — can be invoked in order to obtain the recognition or enforcement of a decision related to children custody and the restoration of such custodies. At the same time, the text of the Convention expressly provides that it "shall not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed or on any other law of the State addressed not derived from an international agreement for the purpose of obtaining recognition or enforcement of a decision" (Art. 19).

[25] Also published in *The Official Gazette*, Part I, no. 367 of May 29, 2003.

[26] As, for instance: The Geneva Declaration of the Rights of the Child; The New York Declaration of the Rights of the Child, UN, November 20, 1959, etc.

Therefore, in the present situation the convention allows not only the possibility of relying on any other international legal instrument, as, for example, the UN General Assembly declarations, international covenants, treaties etc., but also the invocation of the customary national law, whose value is recognized as source of the EU member states law, and *ipso facto*, of jus cogens in matters of children custody and custody commitment.

Moreover, the 1980 Convention recognized also the value of source for the international law in the field of child custody to the positive national law (*jus scriptum*), namely the law of the EU member states. As regards this reality, the convention provides that when "two or more Contracting States have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field," they "shall be free to apply, between themselves, those laws or that system in place of this Convention or any part of it," provided that "the States [...] shall notify their decision to the Secretary General of the Council of Europe" (Art. 20, al. 2).

Thus, this uniform legislation in the field of child custody — based on the positive national law and the customary law of two or more contracting states — could have been applied in place of the provisions of this convention.

6. Convention on the Civil Aspects of International Child Abduction (Hague, October 25, 1980)

Designed to protect children "internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access" (Preamble, the EU member states adopted the Convention of Hague issued on October 25, 1980 on the Civil Aspects of International Child Abduction[27]).

The text of the convention[28] provides *expressis verbis* that the application of the convention — the first objective of which was to ensure "the prompt return of children wrongfully removed to or retained in any Con-

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[27] For the text of the convention, see: http://www.copii.ro/afisareact6982.html?id_act=260.

[28] Romania has also adhered to the convention through the Law no. 100/1992 (*The Official Gazette* no. 243 of September 30, 1992).

tracting State” (Art. 1, par. a) shall cease to apply “when the child attains the age of 16 years” (Art. 4).

According to Art. 11, “The judicial or administrative authorities of Contracting States” are those who “shall act expeditiously in proceedings for the return of children.” However, the authority is not enabled to act for the return of the child “if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views” (Art. 11, par. a).

The convention enabled the “central authorities” of the contracting states to initiate or promote “either directly or through intermediaries, [...] to make arrangements for organising or securing the effective exercise of rights of access, and the conditions to which the exercise of these rights may be subject” (Art. 21).

The signatory States of the Convention of May 20, 1980 have emphasized as well that such provision “shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States” (Art. 35).

7. Convention on the Rights of the Child (New York, November 20, 1989)

The basic principles formulated in the Declaration of the Rights of the Child (November 20, 1959) can be also, to a large extent, found in the text of the Convention on the Rights of the Child[29] adopted by the UN General Assembly on November 20, 1989 and entering into force on September 2, 1990.

The convention clearly provided the right of the children to take advantage of both exercising the human rights, and their juridical protection. Indeed, the 1989 Convention provided it to be compulsory for the state parties to “respect the right of the child to freedom of thought, conscience and religion” (Art. 14, par. 1) and to consider his or her capacity of “forming his or her views,” “of the age and maturity of the child” (Art. 12, par. 1).

[29] The Convention of the Rights of the Child (http://www.copii.ro/afisareactdece.html?id_act=241). Romania has ratified this Convention through the Law no. 18/1990, published in *The Official Gazette of Romania*, Part. I, no. 109 of September 28, 1990 and re-published in *The Official Gazette of Romania*, Part I, no. 314 of June 13, 2001.

The Preamble of the Convention on the Rights of the Child, adopted by the UN General Assembly on November 20, 1989, reminded that in the Universal Declaration of Human Rights the United Nations proclaimed that "childhood is entitled to special care and assistance," hence "the need — the authors justified — to extend particular care to the child [...], stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 [...]."

According to the understanding expressed by the Convention on the Rights of the Child of 1989, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Art. 1). Thus, under the provisions of the convention every human being below the age of 18 is considered to be a "child."

Amongst others, the states parties were under the obligation to take "all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members" (Art. 2, par. 2). At the same time, the convention stipulates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Art. 3, par. 1).

The same convention provided that "States Parties recognize that every child has the inherent right to life" (Art. 6, par. 1). Besides, the UN General Assembly provided — in the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted on December 15, 1989, that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,"[30] including the child, who is considered by the convention a "human being below the age of eighteen years" (Art. 1).

The 1989 Convention also provided the right of the child "to know and be cared for by his or her parents" (Art. 7, par. 1). In the particular case that the children are involved in "abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence" (Art. 9, par. 1).

The convention has also stipulated the right of the child "to maintain on a regular basis [...] personal relations and direct contacts with both parents," who "reside in different States." Therefore, according to

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[30] The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Preamble (Romania has ratified this Covenant on January 25, 1991, through the Law no. 7 published in *The Official Gazette of Romania*, Part I, no. 18 of January 26, 1991).

the convention, there must be respected the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention" (Art. 10, par. 2).

Another important issue that the Convention underlines is the obligation of the state parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, [...]" (Art. 12, par. 1); thus, the child is entitled "to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law" (Art. 12, par 2).

The convention also stipulates that the state parties "shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (Art. 19, par. 1).

The child "temporarily or permanently deprived of his or her family environment [...] shall be entitled to special protection and assistance provided by the State" (Art. 20, par. 1). Such protection includes "foster placement," "adoption," or "placement in suitable institutions for the care of children."

When considering a solution in such situations, the Convention adopted by UN General Assembly on November 20, 1989, expressly demands that "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (Art. 26, par. 2).

According to the provisions of the convention, the recognition of the benefits legally provided shall take into consideration "the resources and the circumstances of the child and persons having responsibility for the maintenance of the child [...]" (Art. 26, par. 2).

The same convention provided the obligation of the states parties to take "all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the States Party and from abroad" (Art. 27, par. 4)

The same provisions of the convention dispose that the child has to be educated in the spirit "of respect for the child's parents, his or her

own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own" (Art. 29, par. 1 let. c), in order to take the responsibility of "life in a free society, in the spirit of […] equality […] and friendship among all peoples, [regardless of their] ethnic, national and religious […] origin" (Art. 29, par. 1 let. d).

Raising the child in the spirit of respect for the "national values" of his country also includes the responsibility for life in the spirit of understanding and respect for the values of the persons belonging to other ethnic, national, and religious groups. Besides, Art. 30 of the convention provides *expressis verbis* that every child of "indigenous origin" or belonging to "ethnic, religious or linguistic minorities" shall not be "denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion" (Art. 30).

The Convention of 1989 also provided the obligation of the states parties to ensure respect for the "Rules of International Humanitarian Law" and to apply them "in armed conflicts" for "the protection of the child" (Art. 38, par. 1), hence their obligation to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces" (Art. 38, par. 3).

8. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague, May 29, 1993)

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption was adopted in Hague, on May 29, 1993,[31] and Romania ratified the document through the Law no. 84/18.10.1994, published in *The Official Gazette*, Part. I, n. 298/21.10.1994.

Following Art. 6, par. 1 of the convention, through the Law 84/18.10.1994 the Romanian Parliament established "The Romanian Committee for Adoptions as central authority in charge with fulfilling the obligations under the Convention" (Art. 2).[32]

[31] Available in Romanian at: http://lege5.ro/gratuit/gu3tgnbr/conventia_de_la_haga_asupra_protectiei_copiilor.

[32] Article amended by the Law no. 274 of June 21, 2004 (Art. 13 on July 15, 2004).

Among others, the signatory states declared that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."

The fact of the same signatory states declaring the preparation and adoption of the convention also stemmed from their belief regarding "the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children" (cf. the Preamble).

According to the expression mentioned by the signatory states, the preparation of the convention adopted in Hague in May 1993 took into account "the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children [...]" (the Preamble).

The general principles of international law, that is the text of the third source of the convention, represented not only the legal background of this document, but also the documentary reference that guided and advised them in their approach and evaluation of the way the protection of the children is applied and in the cooperation between the states in terms of international adoption.

The Hague Convention of May 29, 1993, provides that the adoption involves the recognition of three real facts, which are:

"a. (recognition of) the legal parent-child relationship between the child and his or her adoptive parents;

b. (recognition of) parental responsibility of the adoptive parents for the child;

c. (recognition of) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made" (Art. 26, par. 1).

9. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague, October 19, 1996)

The EU member states adopted on October 19, 1996 the Hague Convention on parental responsibility and protection of children.[33]

The preparation and adoption of the Convention was decided by the urge need of revising "the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors" and the desire of the signatory States "to establish common provisions to this effect." In order to fulfil such needs the signatory States took "into account […] the United Nations Convention on the Rights of the Child of 20 November 1989" (the Preamble).

The Convention adopted on October 19, 1996, replaced both the "Convention relating to the settlement of guardianship of minors, signed in Hague on June 12, 1902," and the "Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, signed on October 5, 1961" (Art. 51).

The 1996 Convention has been signed as well by the states which were members of the Hague Conference on Private International Law (Art. 57, par. 1).

Similarly to the previous conventions, this one has also been prepared in English and French languages (Art. 63, let. g).

Starting with Art. 1, the authors of the 1996 Convention intended to stress that the term "parental responsibility" includes "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child" (Art. 1, par. 2).

Thus, the convention provides that the "parental authority, or any analogous relationship of authority," that is the guardian or other legal representative, has not only rights and obligations, but also "powers" applied to the children — according to the law — "from the moment of theirbirth […] until they reach the age of 18 years" (Art. 2). In other words, the age of majority is not any longer 16 years, as the previous conventions provided, but 18 years of age.

According to the provisions of Art. 29, par. 1 of the Convention adopted in Hague on October 19, 1996, Romania designated in 2007 "The

[33] Published in *Official Journal of the European Union*, L 151/39 of June 11, 2008 RO, and in *The Official Gazette of Romania*, Part I, no. 895 of December 28, 2007.

National Authority for the Protection of the Child, as central Authority to discharge the duties which are imposed by the Convention […]" (Law no. 361/2007, Art. 2 par. 1).[34]

As regards the articles 23, 26, and 52 of the convention, the Romanian Law no. 361/2007 issued for the ratification of the convention provides that such articles "allow the Contracting States the flexibility to a certain degree, intended to apply a simpler and quicker procedure of recognizing and enforcing the legal decisions […]. Therefore, a decision taken in a EU Member State on a matter regarding the Convention is recognized and enforced in Romania through the application of the internal rules relevant for the community law" (Art. 2, par. 2).

Thus, Romania, alike other EU member states, reserved the right to apply the provisions of the convention according to the national relevant rules belonging to the community law. Besides, the investigation and application of the international conventions in the all EU member states has been done through the respective rules belonging to the customary law, which is an undeniable reality.

As regards "Article 60 corroborated with the paragraph (1) of Art. 55 of the Convention," Romania reserved the right to both "take measures for the protection of the goods of a child situated on the national territory," through the "powers of the Romanian authorities," and "the right to deny the parental responsibility or the measures that are incompatible to those taken by the national authorities regarding such goods" (Art. 3, par. b).

10. Convention of the International Labour Organization (Geneva, June 17, 1999)

The 87th Session of the General Conference of the International Labour Organization — called in Geneva on June 17, 1999 — adopted the Convention of the International Labour Organization (no. 182/1999), concerning the prohibition and immediate action for the elimination of the worst forms of child labour.

[34] The Law no. 361/2007 for the ratification of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, enforced in Hague on October 19, 1996, published in *The Official Gazette*, Part I, no. 895 of December 28, 2007.

For the signatory states of the convention "the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action" was an obvious and urgent reality, hence "the importance of free basic education," which contribute to the prohibition of these forms of labour (the Preamble).

According to the provisions of the convention,[35] "the term 'child' shall apply to all persons under the age of 18" (Art. 2).

For the Convention no. 182/1999, the worst forms of child labour are:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. (Art. 3)

11. Convention on Contact Concerning Children (Strasbourg, May 15, 2003)

The Convention on Contact Concerning Children — published by the Council of Europe member states in Strasbourg on May 15, 2003 and adopted on July 17, 2006 — recognized "not only parents but also children as holders of rights"; consequently, the convention provided the replacement of the notion "access to children" with the notion of "contact concerning children" (the Preamble).

The signatory states of this convention agreed "on the need for children to have contact not only with both parents but also with certain other persons having family ties with children and the importance for parents and those other persons to remain in contact with children, subject to the best interests of the child" (the Preamble).

[35] Romania has ratified this convention through the Law no. 203/2000, published in *The Official Gazette*, Part I, no. 577 of November 17, 2000 (http://www.copii.ro/afisareactd602.html?id_act=268).

According to this Convention, "child" means "a person under 18 years of age in respect of whom a contact order may be made or enforced in a State Party" (Art. 2, c), and "family ties" means "a close relationship such as between a child and his or her grandparents or brothers or sisters, based on law or on a family relationship" (Art. 2, d).

The signatory states of this convention clearly specified that "in their mutual relations, States Parties which are members of the European Community shall apply Community rules and shall therefore not apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned" (Art. 20, par. 3). Besides, the authors of the Convention also referred to the provisions of the previous conventions, namely the conventions adopted on May 20, 1980 and November 20, 1989 (cf. the Preamble).

According to Art. 25 of the said convention, "no reservation may be made in respect of any provision of this Convention," that is the convention published on July 17, 2006 "on contacts concerning children." Nevertheless, this provision did not allow the signatory states or those that adopted the Convention[36] to apply it according to their national legislation or their own interests.

12. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague, November 23, 2007)

The convention adopted in Hague on November 23, 2007 refers to the recovery of the support on international level for the children and other members of the family; the main purpose of the Convention was to ensure the effective recovery of this maintenance support for children outside the country.

On June 9, 2011, the Council of Europe adopted the decision on approving the Convention of Hague signed on November 23, 2007; however, after this procedure some Council of Europe member states changed their previous statement.

[36] Romania has adopted and published it in *The Official Gazette*, Part I, no. 257 of April 17, 2007.

13. European Convention on the Adoption of Children (Revised) (Strasbourg, November 27, 2008)

The revised European Convention on the Adoption of Children,[37] — which has been adopted on November 27, 2008 in Strasbourg and enforced as an international document on April 4, 2009, stipulates that the revision of the Hague Convention signed on May 29, 1993 on child protection and co-operation in Respect of Intercountry Adoption was needed because "although the institution of the adoption of children exists in the law of all member states of the Council of Europe, differing views as to the principles which should govern adoption and differences in adoption procedures and in the legal consequences of adoption remain in these countries" (the Preamble).

Starting with the Preamble of this European Convention adopted in Strasbourg on November 27, 2008, the member States of the Council of Europeand other signatory states reaffirmed the principle according to which "the best interests of the child shall be of paramount consideration."

According to the provisions of the convention, "an adoption shall be valid only if it is granted by a court or an administrative authority […]" (Art. 3), which should not consider the adoption as valid unless "it is satisfied that the adoption will be in the best interests of the child" (Art. 4, par. 1).

The two authorities — namely the court and the competent administrative authority — must also take into account the "consent of the child" when he or she has the "sufficient understanding" and "on attaining an age which shall be prescribed by law" (Art. 5, par. 1 let. b).

The revised European Convention on the Adoption of Children considers a "child" the person who "has not attained the age of 18, is not and has not been married, is not in and has not entered into a registered partnership and has not reached majority" (Art. 1, par. 1).

The authors of the convention have also underlined that "this Convention covers only legal institutions of adoption which create a permanent child-parent relationship" (Art. 1, par. 2) and "a child may be adopted only if the adopter has attained the minimum age, […] this minimum age being neither less than 18 nor more than 30 years."

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[37] The convention has been signed by Romania as well in Strasbourg, on March 4, 2009, and ratified by the Romanian Parliament through the Law no. 138/2011, published in *The Official Gazette of Romania*, Part I, no. 515 of July 21, 2011.

The convention has also provided the obligation of "an appropriate age difference between the adopter and the child, [...] preferably a difference of at least 16 years" (Art. 9, par. 1). However, the law can provide — the text of the convention mentions — the possibility of derogation for the minimum age or the age difference, "having regard to the best interests of the child" (Art. 9, par. 2).

According to the provisions of Art. 7, par. 1 of the convention, the law shall permit a child to be adopted only under the condition that the adoption is concluded "by two persons of different sex," "who are married to each other" and "by one person." However, the convention provides the possibility of the EU to extend the scope of adoption application to "same-sex couples who are married to each other or who have entered into a registered partnership together" (Art. 7, par. 2).

The presentation, however brief, of the texts of the thirteen international conventions analysed in this paper offers the possibility to easily understand that the rights of the child are considered basic human rights which are recognized as soon as the child is born.

The scientific approach consisting in the investigation and examination of these international conventions concerning the rights of the child additionally offered the possibility to remark that such international documents having binding juridical force — presented chronologically, according to their coming into force — also evinces the evolution of the world states awareness concerning both the need of harmonizing the legislation in this field, and the obligation of taking concrete and effective measures on ensuring the legal protection of the children.

As a result of the affirmation of the norms and principles of the international law and establishing concrete measures aiming at ensuring the juridical protection of the child, the signatory states of above discussed conventions will certainly contribute to the enforcement of the international law of the family — of which "the child" is an integral part — that must represent one of the permanent preoccupations of the international organizations that promote and protect the human rights, including the rights of the child.

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Nicolae V. Dură, Teodosie Petrescu

Children's Rights
Provisions of Certain International Conventions

Summary

The subject of the article is the analysis of thirteen international Conventions concerning the rights of the child presented chronologically, according to their coming into force. Such an analysis gave the authors the opportunity to remark that such international documents having compulsory juridical force also evince the evolution of the world states awareness concerning both the need of harmonizing the legislation in this field, and the obligation of taking concrete and effective measures on ensuring the legal protection of the children.

Nicolae V. Dură, Teodosie Petrescu

Les droits de l'enfant
dans les réglementations des conventions internationales

Résumé

Les treize conventions internationales concernant les droits de l'enfant — présentés ici de manière chronologique conformément à leur mise en application — sont l'objet de l'analyse effectuée par les auteurs du présent article. Cette analyse a donné aux auteurs la possibilité de dénoter que le contenu de ces documents internationaux, ayant force de loi, démontre la croissance de la conscience des États dans le monde entier à propos

du besoin d'uniformiser la législation dans ce domaine et d'inciter à entreprendre des démarches concrètes et efficaces visant à garantir la protection juridique des enfants.

Mots clés : statut de l'enfant dans les conventions internationales, protection juridique, responsabilité des parents

Nicolae V. Dură, Teodosie Petrescu

I diritti del bambino nelle norme delle convenzioni internazionali

Sommario

L'oggetto dell'analisi eseguita dagli autori dell'articolo è rappresentato da tredici convenzioni internazionali sui diritti del bambino, presentate in ordine cronologico secondo la loro entrata in vigore. Tale analisi ha dato agli autori la possibilità di annotare che il contenuto di questi documenti internazionali che hanno validità legale assoluta, segnala una crescita della consapevolezza degli stati di tutto il mondo sulla necessità di uniformare la legislazione in tal campo e l'impegno ad intraprendere passi concreti ed efficaci mirati a garantire la tutela giuridica dei bambini.

Parole chiave: status del bambino nelle convenzioni internazionali, tutela giuridica, responsabilità dei genitori

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The Children's Rights Regulations and Rules of International Law

Keywords: international legal instruments, the quality of a parent, the legal protection of the children

Children's rights are provided for in the texts of numerous international legal instruments, some of which were subject of our study: declarations, pacts, resolutions, regulations, recommendations and the Charter of Fundamental Rights of the European Union; the texts of these instruments provide a first-hand documentary reference not only in the drafting and publication process of the Rules and Regulations on Children's Rights, but also of its principles.

In order to better capture the way in which — for nearly a century — the international community has approached and perceived the issue of the child, I would like to present these international legal instruments in the chronological order of their occurrence.

1. The Declaration of the Rights of the Child (Geneva, September 26, 1924)

On September 26, 1924, the General Assembly of the League of Nations adopted the Geneva Declaration of the Rights of the Child,[1]

[1] The Declaration of the Rights of the Child (Geneva, September 26, 1924) — http://ro.wikipedia.org/wiki/Declara%C8%9Bia_de_la_Geneva_din_1924_privind_Drepturile_Copilului.

whose initiator and overseer was Eglantyne Jebb, founder of the international organization "Save the Children." This first international instrument which provided for the need for the special legal protection of the child actually reiterated five basic principles outlined and adopted by the international organization "Save the Children," in Geneva, on February 23, 1923. According to the first principle, "The child shall have the means necessary to its normal development, both material and spiritual."

Thus, in 1924 the child's right not only to the "material," but also the "spiritual" means was recognized, means which should be provided by the State or by the society in which he or she is born.

In the subsequent international documents, the reference to such "spiritual" means — which, of course, cannot be separated from the "spiritual-religious" ones — was either allusive or totally ignored.

The second principle of the Geneva Declaration obliged the States to feed the "hungry child," to care for the "sick child," to help the "retarded child," to rehabilitate the "delinquent child" and to protect "the orphan and the widow."

However, in international law, the Geneva Declaration did not have the power of *ius cogens*, but served only as "guidelines that countries may or may not follow."[2]

2. The Universal Declaration of Human Rights (New York, 1948)

In 1948, the General Assembly of UN adopted and proclaimed the Universal Declaration of Human Rights.[3] Among other things, the Declaration states that "the family" — which includes the two spouses (male and female) and the children — is "the natural and fundamental group unit of society and is entitled to protection by society and the State" (Art. 16).

The declaration states that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" (Art. 25, par. 2) and that "Parents have a prior right to choose the kind of education that shall be given to their children" (Art. 26, par. 3).

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[2] Ibidem.

[3] For the full text see: http://www.anr.gov.ro/docs/legislatie/internationala/Declaratia_Universala_a_Drepturilor_Omului.pdf.

Thus, the declaration provides for the parents' right to choose — for their children — the form of education (public, private or religious) according to their own religious beliefs.[4] Since that date, this right has been consistently stated in the text of international legal instruments,[5] claiming thus the children's right to the freedom of religion,[6] one of the fundamental human rights.

The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, provided not only for the right of every human being "to education," but also the obligation of States to ensure "free, at least in the elementary and fundamental stages" education (Art. 26, par. 1), whose beneficiaries are, of course, the children.

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[4] See N. V. Dură, C. Mititelu: "International Covenant on Economic, Social and Cultural Rights." In: 8th Edition of International Conference *The European Integration — Realities and Perspectives* Proceedings. Galati. 2013, pp. 130—136; C. Mititelu, M. Mitra Radu: "International Covenant on Civil and Political Rights." *Journal of Danubius Studies and Research*, 2013, vol. III, no. 2, pp. 47—57; N. V. Dură: "The rights and fundamental freedoms and their legal protection. The right to religion and to religious freedom." *Orthodoxy*, LVI (2005), no. 3—4, pp. 7—55; Idem: "Christian religious values and 'the cultural, religious and humanist heritage'. 'Secularism' and 'religious freedom'." In: Symposium *Modernity, postmodernity and religion*, Constanta, May 2005. Iaşi 2005, pp. 19—35; Idem: "The right to human dignity (dignitas humana) and religious freedom. From *natural jus* to *jus cogens*." In: *Ovidius University Annals*. Series: Law and Administrative Sciences, 2006, no. 1, pp. 86—128; Idem: "The Law no. 489/2006 on Religious Freedom and General Regime of Religious Cults in Romania." *Dionysiana*, II (2008), no. 1, pp. 37—54.

[5] See, N. V. Dură: "Instruction and Education within the themes of some International Conferences. An evaluation of the subjects approached by these from the angle of some Reports, Recommendations and Decisions." In: International Conference, *Exploration, Education and Progress in the third Millennium*, Galaţi, 24th—25th of April 2009, vol. II, pp. 203—217.

[6] See Idem: "Religious freedom and the general regime of religious cults in Romania." *Ovidius University of Constanta Annals*. Series: Theology, 2009, Year VII, no. 1, pp. 20—45; Idem: "The European juridical thinking, concerning the human rights, expressed along the centuries." A*cta Universitatis Danubius. Juridica*, 2010, no. 2 (VII), pp. 153—192; Idem: "Proselytism and the Right to Change Religion: The Romanian Debate." *Law and Religion in the 21st Century. Relations between States and Religious Communities*. Eds. S. Ferrari, R. Cristofori. Ashgate Publishing Limited, England 2010, pp. 279—290; Idem: "The Fundamental Rights and Liberties of Man in the EU Law." *Dionysiana*, 2010, IV, No. 1, pp. 431—464; Idem: "Proselytism and the right to change religion in the light of Romanian legislation." *Orthodoxy*, 2010, year I s.n., no. 2, pp. 11—21; Idem: "Religious Freedom in Romania." *Theologia Pontica*, 2012, year V, no. 3—4, pp. 9—24; Idem: "General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights." *Journal of Danubius Studies and Research*, 2013, vol. III, no. 2, pp. 7—14.

3. The Declaration of the Rights of the Child (New York, November 20, 1959)

The Declaration of the Rights of the Child proclaimed by the UN General Assembly on November 20, 1959 by Resolution no. 1386 (XIV) sets forth ten principles, namely:

1. Every child shall enjoy all the rights set forth in this Declaration "without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family."
2. The laws of the UN States must have "the paramount interest of the child" for he or she to enjoy "special protection" and benefit from "the given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."
3. Every child "shall be entitled from his birth to a name and a nationality."
4. Every child should benefit from "social security," hence his or her right to "adequate nutrition, housing, recreation and medical services."
5. Every child "who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition."
6. Typically, every child should grow "in the care and under the responsibility of his parents, and [...] in an atmosphere of affection and of moral and material security." For the children without families, and for those who do not have the necessary means of subsistence, the "Society and the public authorities shall have the duty to extend particular care." Also, "payment of State and other assistance towards the maintenance of children of large families is desirable."
7. Every child "is entitled to receive education, which shall be free and compulsory, at least in the elementary stages." At the same time, it was provided that, by the education received — from parents and school — the child must develop "his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society."
8. "The child shall in all circumstances be among the first to receive protection and relief."

9. A child cannot be admitted "to employment before an appropriate minimum age," that is 14 years, and cannot be "permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development."
10. Every child must be "protected from practices which may foster racial, religious and any other form of discrimination."

Among other things, the Declaration of the Rights of the Child, proclaimed by Resolution 1386 (XIV) of the UN General Assembly on November 20, 1959, provided that every child should enjoy "all the rights set out in this Declaration" without distinction or discrimination regarding his or her "religion" (Principle 1).[7]

The same Declaration provided that every child should have the right to "develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity" (Principle 2).[8]

As such, any form of religious education — whether state, private or confessional — must aim at the development of these qualities in a healthy and normal environment and in conditions of freedom and dignity, hence the obligation of state authorities to ensure the way in which the educational, religious process takes place, in all three types of schools (public, private, and religious).

4. The International Covenant on Economic, Social and Cultural Rights (New York, December 16, 1966, entered into force on January 3, 1976)

The International Covenant on Economic, Social and Cultural Rights[9] — adopted by the United Nations General Assembly on December 16, 1966 by Resolution 2200 A (XXI), which entered into force on January 3,

[7] The Declaration of the Rights of the Child (New York, November 20, 1959) — http://ro.wikipedia.org/wiki/Declara%C8%9bia_drepturilor_copilului

[8] Ibidem.

[9] International Covenant on Economic, Social and Cultural Rights — https://www.law.georgetown.edu/rossrights/chapters/documents/originalICCPROP.pdf. For the Romanian text of the Pact — which was ratified by Romania in October 1974, and published in *The Official Gazette of Romania*, Pt. I, no. 146 of 20 November 1974. See http://www.irdo.ro/file.php?fisiere_id=79&inline

1976 — requires the States Parties to provide "the widest possible protection and assistance [...] to the family [...] while it is responsible for the care and education of dependent children" (Art. 10, par. 1).

The same International Covenant[10] obliges the States Parties to take "special measures of protection and assistance [...] on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

These states were also required to protect "children and young persons [...] from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law" (Art. 10, par. 3).

5. The International Covenant on Civil and Political Rights (New York, December 16, 1966, entered into force on March 23, 1976)

The International Covenant on Civil and Political Rights[11] — adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976 — also reiterated that "every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," that "every child shall be registered immediately after birth and shall have a name" and, finally, that "every child has the right to acquire a nationality" (Art. 24). The States Parties to this International Covenant[12] also instituted a "Human Rights Com-

[10] Regarding its provisions, see N. V. Dură, C. Mititelu: "International Covenant on Economic, Social and Cultural Rights." In: 8th Edition of International Conference *The European Integration — Realities and Perspectives*. Proceedings. Danubius University Press, Galati 2013, pp. 130—136.

[11] International Covenant on Civil and Political Rights — http://ec.europa.eu/justice/policies/privacy/docs/16-12-1996_en.pdf. For the Romanian text of the Pact, which was ratified by Romania on October 31, 1974, and published in *The Official Gazette of Romania*, Pt. I, no. 146 of 20 November 1974.

[12] Regarding its provisions, see Mititelu, M. Mitra Radu: "International Covenant on Civil and Political Rights." *Journal of Danubius Studies and Research*, 2013, Vol. III, no. 2, pp. 47—57.

mittee," consisting of "nationals of States Parties," who shall be "persons of high moral character and recognized competence in the field of human rights" (Art. 28, par. 1 and 2).

Under the Optional Protocol to the International Covenant on Civil and Political Rights[13] — adopted by UN General Assembly by Resolution 2200 A (XXI) of December 16, 1966 and entered into force on March 23, 1976 — the committee was empowered "to receive and consider, […], communications from individuals claiming to be victims of the violations of any of the rights enunciated in the Covenant" (the Preamble). As such, children are also entitled to address to this Committee whenever they become victims of the violation of the rights set for them by this covenant.

6. The Beijing Rules (1985)

In 1985, the United Nations adopted the "Beijing Rules,"[14] which represent the UN standard of minimum rules on the administration of juvenile justice and "the first international document detailing the rules for the administration of justice in what concerns juveniles, focusing on children's rights."[15]

These "rules" — involving "a person aged up to 18 years" — were primarily focused on the "nature of the punishment for an offense" and on determining whether the offender "is or is not a minor."[16]

The text of these "rules" sets a number of ten "fundamental principles." One of them states that "the goals of juvenile justice must include, on the one hand, to promote the welfare of minors, and, on the other hand, the reaction of the authorities commensurate with the nature of the offense and with the individual offender."[17]

Another principle postulates that, for the juveniles in conflict with the law, "the death penalty and corporal punishment will be abolished for all crimes."[18]

[13] The Optional Protocol was ratified by Romania on June 28, 1993 by Law no. 39, published in *The Official Gazette*, pt. I, no. 193 of 30 June 1993.

[14] *The Administration of Justice in the Community. International Standards and Regulations*. 2nd edn. Ed. G. W. Giles. Bucharest 2001, pp. 87—121.

[15] Ibidem, p. 89.

[16] Ibidem, p. 90.

[17] Ibidem, p. 91.

[18] Ibidem.

According to another principle, “when implementing institutional treatment,” “appropriate educational services to assist juveniles in their return to society” will be made available to minors.[19]

7. Resolution 40/33 of November 29, 1985

By Resolution 40/33 — adopted by the UN General Assembly on November 29, 1985 — Member States were asked to adapt “their national legislation, policies and practices, particularly in training juvenile justice personnel, to the Beijing Rules.”[20]

In the text of the same resolution, it was stated that the provisions of such “rules” must be applied “to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.”[21]

Regarding “the punishment of minors,” the States Partieswere asked to consider “not only the seriousness of the offense, but also the individual circumstances of perpetrators — social status, family status, damage or other factors affecting personal circumstances.”[22]

The resolution provided for the need to perform “a control at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.”[23]

The resolution did indeed express reference to “children’s rights” in all stages of the procedure on the administration of justice, and also provided for the obligation to ensure “the Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority.”[24]

As for “the preventive detention,” the resolution demanded that it be used “only as a measure of last resort and for the shortest possible period of time” and, “whenever possible, detention pending trial shall

[19] Ibidem.
[20] Ibidem, p. 98.
[21] Ibidem, p. 100 (Principle 2, 1).
[22] Ibidem, p. 102 (Principle 5, 1. Commentary).
[23] Ibidem, p. 103 (Principle 6, 1).
[24] Ibidem, p. 104 (Principle 7, 1).

be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home." [25]

Finally, pursuant to Resolution 40/33 of 1985, "minors will not be subject to corporal punishment."[26]

8. CE Recommendation no. 1065/1987 on the Traffic in Children and Other Forms of Child Exploitation

In 1987, the Parliamentary Assembly of the Council of Europe has made a Recommendation on the traffic in children and other forms of child exploitation. It was the Recommendation no. 1065/1987, which recognized that "children have the right to be brought up in a secure and humane way, and that society has an obligation to protect them and look after their interests" (section 1).

The European Union Council also took note of the overt existence of "the international trade in children for such purposes as prostitution, pornography, slavery, illegal adoption, etc." (section 2), and urged Member States to urgently adopt a set of measures, of which the following have been postulated: (a) public information concerning the sale of and traffic in children, and the exploitation of child labour (section 6 d); (b) inform educators and youth of the rights of the child, and incorporate human rights education in school curricula at all levels (section 6 e); (c) enact strict laws and regulations to combat child pornography and harmonize member states' relevant legislation (section 6 g); (d) promote and pursue a policy directed at meeting the needs of abandoned and street children (section 6 h).

9. UN Resolution no. 45/112 of December 14, 1990

In Resolution 45/112 of December 14, 1990, the General Assembly of the United Nations set out the principles for the prevention of juvenile delinquency, called "the Riyadh Guidelines."

[25] Ibidem, p. 108 (Principle 13, 1 and 2).
[26] Ibidem, p. 111 (Principle 17, 3).

Among other things, this resolution reminded the UN member states that "the implementation of the present Guidelines, in accordance with national legal systems, represents a policy of bringing them to the attention of relevant authorities, including policy makers, juvenile justice personnel, educators, the mass media, practitioners and scholars."[27]

Although, in recent decades, the EU legislation on matrimonial matters has increased, however, the differences — and sometimes the divergences — in terms of knowledge and harmonization of the laws, and in terms of the application of the European family law, at the national level, still remain a reality.

However, these differences also concern the juridical authority and the enforcement of judgments in matrimonial matters, hence the need for a set of European principles relating to family law, in order to contribute to the harmonization of this law in the European Union. Moreover, it has also been the main aim of establishing — on September 1, 2001 — the Commission on European Family Law.

10. UN Resolution of May 25, 2000

On May 25, 2000, the UN General Assembly adopted — on the occasion of the 20th anniversary of the publication of the Convention on the Rights of the Child — a resolution which reiterated the commitment of the member states to strive "to promote and protect children's rights,"[28] and, also, on this occasion, two optional protocols were adopted.

The First Protocol to the Convention on the Rights of the Child regards the child's involvement in an armed conflict, and the second tackles three unfortunate realities, namely, "the sale of children, child prostitution and child pornography."

[27] UN General Assembly resolution, 45/112 of 14 December 1990, Art. 4.

[28] Resolution adopted by the General Assembly (97th Plenary Session, May 25, 2000). A/Res/54/263, p. 1.

11. The Commission on European Family Law (September 1, 2001)

On September 1, 2001 there was created the Commission on European Family Law, whose main objective was to draw up a set of "principles" that contribute to the harmonization of the European family law. This Commission prepared and published — in the form of "recommendations" — a set of principles concerning parental authority,[29] suggestively entitled "Principles of European Family Law Regarding Parental Responsibilities."[30]

To dwell more deeply into the topic of European family law and on perception that this Commission has on the relationship between the child and parent, we are going to mention some of these principles:

1. The superior interest of the child must prevail in all matters relating to parental authority (par. 3, 3); in the preamble to the Principles it is stated that the Commission wishes to contribute "to the common European values on the Rights and Welfare of the Child".
2. Children should not be discriminated on grounds of sex, race, colour, language, religion, political or other types of opinions, nationality, ethnicity or social origin, sexual orientation, disability, property, birth or other status, whether they refer to the child or to the persons holding parental authority (par. 3, 5).
3. Holders of parental authority should provide child care, protection and education, according to the personality and needs of the specific child development (par. 3, 11 (1)).
4. The child should not be subjected to corporal punishment or to any other unilateral treatment (par. 3, 11 (2)).
5. There should be provided direct contact between the child and his or her close relatives (par. 3, 25 (2)).

As for the phrase "parental authority," it is perceived and defined by the Commission as "an accumulation of rights and obligations, which aim to promote and protect the welfare of children. They refer — as Principles 3.1 state in the text — in particular to: (a) care, protection and education; (b) maintaining personal relationships; (c) establishing residence; (d) property management and (e) legal representation."[31]

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[29] See Principles of European Family Law Regarding Parental Responsibilities (http://ceflonline.net/).

[30] See web http://ceflonline.net/

[31] Principle 3, 1.

In the case of the dissolution or annulment of marriage, or of other forms of relationship that leads to the *de jure* or *de facto* separation of parents, and, *ipso facto*, to their living separately, they “have to agree on the person who will reside with the child.”[32] The Commission considers that the child “may alternatively reside with the holders of the parental authority, or pursuant to an agreement approved by the competent authority or to a decision taken by the latter.”[33] Thus, the child can reside alternately with both parents.

12. UN Resolution of May 10, 2002

In another resolution of the UN General Assembly — adopted on May 10, 2002 — the Member States reaffirmed “the obligation to take all measures to promote and protect the rights of every child, of every human being below the age of 18, including teenagers. We are determined — UN Member States declared — to respect the dignity of children and to ensure their welfare state.”[34]

Of course, in order to materialize these measures, the UN Member States need to cooperate specifically and effectively both in matters concerning “the social protection of vulnerable people”[35] and the judicial proceedings concerning criminal acts.[36]

13. European Council Regulation no. 2201/2003

The EU Council has developed and adopted the Regulation no. 1347/2000 of May 28, 2000 on the jurisdiction, recognition and enforcement of the judgments in matrimonial matters and in matters of paren-

[32] Principle 3. 20 (1).

[33] Principle 3. 20 (2).

[34] Resolution adopted by the General Assembly: *A World Fit for Children*, I, 4, p. 2. A/Res/S-27/2.

[35] C. Mititelu: “The Human Rights and the Social Protection of Vulnerable Individuals.” *Journal of Danubius Studies and Research*, 2012, vol. II, no. 1, pp. 70—77.

[36] M. Mitra Radu, C. Mititelu: “Specific Provisions on the Procedure for Judicial Cooperation in Criminal Matters.” *Ovidius University Annals*. Series: Economic Sciences, Vol. XIII, Issue 1, 2013, pp. 1599—1605.

tal responsibility for common children. This regulation, however, was repealed by Regulation no. 2201/2003 for two main reasons, namely: (a) that, among other things, it would have included provisions related to "common children," that is, the children resulting from previous relationships, and not just the children of that family; (b) that this Regulation would have targeted a limited field of application concerning parental responsibility.

As such, on November 27, 2003, the EU Council adopted the "Regulation (EC) No. 2201 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility," which entered into force on August 1, 2004 and was applied from March 1, 2005.

In this regulation, "parental responsibility" means "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access" (Art. 2, 7).

It should also be pointed out that, in Regulation no. 2201/2003, "parental responsibility" was shaped "in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility" (Preamble, 12) .

Under Art. 8 of this Regulation, "the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized" (Art. 8, par. 1).

As for the "right of access," the Regulation defines it as "the right to take a child to a place other than his or her habitual residence for a limited period of time" (Art. 2, par. 10). This right "is granted in an enforceable judgment given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin" (Art. 41, par. 1).

The Regulation gave to several UE States the possibility to apply the Conventions signed by them on "custody" instead of applying the rules provided for in this regulation (see Art. 59, par. 2).

According to Art. 60, "In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 […];
(b) the Luxembourg Convention of 8 September 1967 […];
(c) the Hague Convention of 1 June 1970 […];
(d) the European Convention of 20 May 1980 […];
(e) the Hague Convention of 25 October 1980 […]."

In relation to the Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, this regulation applies in two situations, namely: "(a) where the child concerned has his or her habitual residence on the territory of a Member State;(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention" (Art. 61).

The regulation also stipulates that for the "Member States with two or more systems of law or sets of rules concerning matters governed by this Regulation"; its provisions apply to the "territorial units" of that State where "the jurisdiction, recognition or enforcement are invoked" (Arti. 66).

The provisions of the European Council Regulation no. 2201/2003 on "the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility" have been often invoked in the European Court decisions,[37] which envisages both their authority and importance.

Finally, we would like to recall that, in accordance with the European Union Council Regulation no. 2116 of December 2, 2004 — which amended the Regulation no. 1347/2000 of the same Council on the Treaties concluded with the Holy See — in a divorce proceeding, if the defendant does not habitually reside in an EU Member State and is neither a national of a Member State, the courts of a Member State cannot rely on their domestic law jurisdiction in order to decide on this demand if the courts of another Member State have this jurisdiction under Art. 3 of this Regulation.[38]

[37] See, for example, Court Decision (3rd Chamber) of November 29, 2007 (Demand for a preliminary ruling drafted by Högsta domstolen (Sweden) — K. Sundelin Lopez/ M.E. Lopez Lizazo. Cauza C-68/07, in the Official Journal of the European Union, C82, April 14, 2007 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:082:SOM:RO:HTML).

[38] Published in *Official Journal of the European Union*, L367 of December 14, 2004.

14. Charter of Fundamental Rights of the European Union (December 14, 2007)

Regarding the rights of children, we must also refer to the Charter of Fundamental Rights of the European Union[39] — published on December 14, 2007 — which expressly prohibits "the reproductive cloning of human beings" (Art. 3, letter d), and also provides for "the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions" (Art. 14, par. 3), thus affirming the principle enunciated by the provisions of international conventions and treaties.

The same Charter states the child's right "to protection and care as is necessary for their well-being," and for the freedom to express "views freely […] on matters which concern them in accordance with their age and maturity" (Art. 24, par. 1).

The same Art. 24 of the Charter provides that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" (Art. 24, par. 2) and that "every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests" (Art. 24, par. 3).

Conclusions

The research and assessment of the documents presented in this paper clearly reveal that they had the gift of creating a set of principles on the Rights of the Child, which, "willy-nilly," will be taken into account by the world's states in their approach undertaken in order to harmonize their national legislation with the international law doctrine of the child.

The research and assessment of these documents — from the Geneva Declaration of 1924 on the Child's Rights to the Convention adopted in Strasbourg in 2006, on the "personal relationships concerning children" — also revealed that the field of the international family law was con-

[39] Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*, March 30, 2010, C/83/389.

stantly concerned about the "person"[40] of the child, whose "*dignitas*"[41] (dignity) was also, in fact, the object of other instruments. The analysis of these documents — international instruments of *jus cogens* force — has revealed, however, that the countries of the world did not want only to enumerate the rights of the child, but also to expressly provide measures and sanctions to be taken to his or her legal protection, creating the premises for the harmonization of their national legislation, which — in the legal protection of children — still has some gaps.

The examination of these documents also provided us with the opportunity to see that they remain an evident testimony on the constructive contribution that the international law brought to the children's rights and in their legal protection.

Finally, the brief presentation of these international legal instruments (declarations, pacts, resolutions and regulations) provides the endorsed researcher with the finding that, in recent decades, the international legislator was constantly concerned to develop new "rules" and "regulations" on the children's rights and on their legal protection; hence the need that the basic principles enunciated by it should not be only known and inserted into the text of national laws, but also respected and applied by practical and concrete measures. We actually believe that these regulations and rules — set by these international legal instruments — will raise the interest,due to their contents, topics and interpellation, not only to those who have the quality of a parent or of a magistrate or of a legal sciences professor, but also to all the citizens of the world, because the child is the hope of life, and he or she should feel and be protected by the whole society where he or she has come to life.

[40] On the international legal status of the human person, see V. Dură, C. Mititelu: "The Treaty of Nice, European Union Charter of Fundamental Rights." In: 8th Edition of International Conference *The European Integration — Realities and Perspectives*, Proceedings. Danubius University Press, Galati 2013, pp. 123—129.

[41] See, N.V. Dură: "The right to human dignity (dignitas humana) and religious freedom. From *jus naturale* to *jus cogens*." *Annals of the Ovidius University*. Series: Law and Administrative Sciences, 2006, no. 1, pp. 86—128.

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Cătălina Mititelu

The Children's Rights
Regulations and Rules of International Law

Summary

The hermeneutical analysis of the text of the main regulations and rules of international law regarding the children's rights, reveal to the reader that they created a set of principles on the Rights of the Child, which have to be taken by the world's states in their approach undertaken in order to harmonize their national legislation with the international law doctrine of the child.

Among others, this article's reader could also find out that in recent decades the international legislator was constantly concerned to develop new rules and regulations on the children's rights and on their legal protection; hence the need that the basic principles enunciated by it should not be only known and inserted into the text of national laws, but also respected and applied by practical and concrete measures.

Cătălina Mititelu

Les droits de l'enfant
Réglementations et principes du droit international

Résumé

L'analyse herméneutique du contenu des réglementations principales du droit international concernant les droits de l'enfant instruit le lecteur de l'ensemble des principes — définis comme « les droits de l'enfant » — que tous les États du monde doivent prendre en considération au moment où ils approprient la législation nationale aux principes de la loi internationale concernant les enfants.

Grâce à notre étude, le lecteur peut apprendre entre autres que les dernières décennies sont une période d'une préoccupation continuelle des législateurs internationaux qui font tout leur possible pour élaborer de nouvelles réglementations et de nouveaux principes liés aux droits de l'enfant et à sa protection juridique ; d'où le besoin de garantir que les principes de base élaborés jusqu'à présent soient non seulement connus et introduits dans les contenus des droits nationaux, mais aussi respectés et appliqués par la prise des démarches pratiques et concrètes.

Mots clés : moyens juridiques internationaux, qualité parentale, protection juridique des enfants

Cătălina Mititelu

I diritti del bambino
Norme e principi del diritto internazionale

Sommario

L'analisi ermeneutica del contenuto delle norme principali del diritto internazionale concernente i diritti del bambino fa conoscere al lettore un insieme elaborato di principi indicati con il nome di diritti del bambino di cui gli stati di tutto il mondo devono tener conto durante l'adeguamento della legislazione nazionale alle norme del diritto internazionale che riguarda i bambini.

Grazie al nostro studio il lettore può, tra l'altro, venire a conoscenza del fatto che le ultime decadi sono state un periodo di cura incessante dei legislatori internazionali per elaborare nuove norme e principi legati ai diritti del bambino ed alla sua tutela giuridica; ne scaturisce la necessità di garantire che i principi fondamentali elaborati non solo siano conosciuti e riportati nel contenuto delle leggi nazionali, ma anche rispettati ed applicati intraprendendo passi pratici e concreti.

Parole chiave: misure giuridiche internazionali, qualità genitoriale, tutela giuridica dei bambini

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An Infant in *Codex Iuris Canonici*

Key words: infant, infant's rights, legal status, parents, obligations, baptism, education

Introduction

"According to the God's will, a marriage is the basis for a broader family community, since the purpose of the institution of marriage itself and marital love is to procreate and educate infants, in which its culmination shall be found."[1] These words of the *Familiaris consortio* apostolic exhortation of John Paul II indicate distinctly that conception and education of infants is — except for the spousal interest — the immediate purpose of the marriage. The exclusive and inseparable relationship of a man and a woman is likewise specified in the highest ecclesiastical legislation in can. 1055 § 1 of CIC). While the spousal interest (*bonum coniugum*) is more individual and personal purpose, conception and education of infants (*bonum prolis*) is more of social character; however, both purposes of the marriage, which are not subject to any hierarchization, are complementary to each other: they are unity in multiplicity.[2]

Dedicating the marriage, inherently, to procreate and educate infants, which is the essence of this relationship, causes that the fruit of the mari-

[1] Jan Paweł II: *Adhortacja apostolska „Familiaris consortio" do biskupów, kapłanów i wiernych całego Kościoła katolickiego o zadaniach rodziny chrześcijańskiej w świecie współczesnym*. Częstochowa 1982, p. 25, no. 14.

[2] Cf. *Konstytucja duszpasterska „Gaudium et spes" Soboru Watykańskiego II*, no. 48; A. Kowalik: *Direito canônico familiar*. Santa Maria 2003, pp. 102—104.

tal love is an infant. One can say that focusing the marriage on procreation materializes in the marriage, in building space appropriate to pass on and educate human life.[3] "The real respect to marital love and the full sense of family life is claimed in provided in *Gaudium et spes* Pastoral Constitution of the Second Vatican Council, aiming that the spouses would manfully cooperate, without knowing of the other purposes of marriage, with love of the Creator and Savior, who has continually enlarged and enhanced its family."[4] Thus, infants are the most valuable gift of the marriage and bring the most good."[5]

In order to talk about the infant (*infans*) in CIC, canons in which this word appears (11 times),[6] as well as canons in which equivalent words: *filius* (30 times)[7] and *proles* (9 times)[8] — depending on context — appear. At the same time, provision of can. 97 § 2 of CIC shall be taken into consideration, according to which a minor (*persona minor*)[9] before reaching 7 years of age is called an infant (this legislator's distinction between *minor* and *minor ante plenum septennium* results in consequences regarding the subject's capability). However, one should not forget that according to can. 99 of CIC whoever habitually lacks the use of reason is considered not responsible for oneself and is equated with infants.

It shall be mentioned that as far as minors, including infants, are concerned, there is no organic legislation in binding CIC, as it is for other categories of persons, such as pastors or members of consecrated life institutions and apostolic life associations. Should the canonic doctrine deal with minors, including infants, to a little extent, and even lesser right to life, it shall be attributed to the fact, that there has always been quite limited and completely non-organic regulation. Reasons of such a state of affairs lie in mutually connected phenomena both of structural and historical as well as cultural character.

As far as the first phenomenon is concerned, it shall be considered that the Church, in spite of being legally perfect community, creates a positive imperfect or incomplete legal order; it is structurally supplemented by the natural and positive law of God. However, the positive canonic

[3] A. Sarmiento: *Małżeństwo chrześcijańskie. Podręcznik teologii małżeństwa i rodziny*. Kraków 2002, 3. 46.

[4] *Konstytucja duszpasterska „Gaudium et spes" Soboru Watykańskiego II*, no. 50.

[5] Ibidem.

[6] *Infans, antis*. In: *Index verborum ac locutionum Codicis Iuris Canonici*, paravit ac digessit X. Ochoa, Roma 1983, p. 206.

[7] *Filius, ii*. In: *Index verborum*..., pp. 179—180.

[8] *Proles, is*. In: *Index verborum*..., p. 352.

[9] "Osobą małoletnią (*persona minor*) jest ten, kto nie ukończył osiemnastego roku życia; osobą pełnoletnią (*persona maior*) jest ten, kto ukończył osiemnasty rok życia." Can. 97 § 1 KPK.

law, which has been formed by adopting the natural law, does not need to take a position — in second place — towards facts and situations, which have already been the subject taken into consideration in this natural order. As far as historical and cultural reasons are concerned, narrowing down the focus of canonic on the issue of life and minority, one shall take into consideration the influence of many-ages-old ecclesiology focused on institutional aspect and hierarchy on canonic law, understood as legal provisions and education. This ecclesiology has shaped the positive law in Church, provided for, among others, towards own status and distinguishing believers, and clergymen and monks in particular, in regard to which legal positions the status of minors was treated narrowly, not drifting away too much from the status of believers.[10]

According to G. Dalla Torre, a traditional, ruling for centuries, model regarding legal position of minors, as dominated in legal experience of the Church, has been amended by the Second Vatican Council, however, it should be added that the ecclesiological renewal influenced slowly and gradually the canonic legislation and the doctrine, and this process has not been finished yet, and a new, post-council codification has overcome the former situation only partially. However, the focus of the doctrine on the central position of human person in the canonic law has progressively become even more visible.[11]

The legal status of the infant — both baptized and unbaptized — can be defined more precisely in CIC on the basis of canons including the already mentioned words (*infans*, *proles*, *filius*).

Among numerous provisions of CIC regarding the minor, including the infant, the categories of rights connected with natural personality of the infant and rights connected with their legal personality in the Church can be distinguished.

1. Infant's rights connected with their natural personality

Even though CIC defines the infant as a minor before they reach 7 years of age, it has acknowledged their rights since the conception. Regardless of the fact that *nasciturus*, which is a human being since they were

[10] Cf. G. Dalla Torre: "Diritto alla vita e diritti dei minori nell'ordinamento Canónico." In: *Tutela della famiglia e diritto dei minori nel Codice di Diritto Canonico*. Città del Vaticano 2000, pp. 63—64; R. Castillo Lara: "La condizione e lo stato giuridico del minore nell'ordinamento della Chiesa." *Salesianum*, 1990, vol. 52, p. 257.

[11] G. Dalla Torre: "Diritto alla vita...," p. 64.

conceived until they are born, has no legal entity, which they may achieve in the future, the legislation has granted them many rights, protecting them as the legal interest requiring special protection. Firstly, the Church has protected their fundamental right to life since their conception, and has penalized severely the violation of this right (can. 1098 of CIC).

In CIC the rights of *nasciturusa* have been emphasized by the already mentioned legislator's statement of focusing the marriage on the spousal interest as well as conception and education of infants. Thus, should the contractor exclude any significant element of the marriage, regarding, among others, *bonum prolis*, by a positive act of will, they conclude an invalid marriage (can. 1101 § 2). Consequently, rights of the infant (unborn or born) from which serious parental obligations follow, in fact do exist.[12] Primarily, they shall take care for an unborn infant to develop properly; they shall not take any decisions influencing negatively the infant's development (e.g. poisoning the infant with alcohol), as well as take care of their safe birth.[13]

A special meaning is given to the provision of can. 871 of CIC, according to which stillborn fetus shall be baptized, if possible.

Recognizing the infant as a natural person — as the principle taken over from the Roman law,[14] introduced for the first time to the canon law in *Decretals* of Gregory IX,[15] confirmed in can. 97 of CIC, means that they are the subject of rights, thus, it shall possess legal capacity (legal personality in other words), but only natural one.

Pursuant to can. 97 § 2 of CIC the infant shall be considered as lacking the use of reason; it shall not be legal assumption, but legal provision, which entails the lack of the infant's ability to any legal actions in the Church, and, thus, actions producing legal effects.[16]

As a person being below 7 years of age, the infant is not subject to church law, even if in a particular case they had *de facto* sufficient use of their reason, which follows from can. 11 of CIC. It shall be confirmed by can. 852 § 1 of CIC, according to which the prescripts of the canons on adult baptism are to be applied to all those who, no longer infants, have attained the use of reason and, thus — according to can. 862 § 2 of CIC

[12] A. Cortés: "Infante." In: *Diccionario General de Derecho Canónico*. Vol. 4. Eds. J. Otaduy, A. Viana, J. Sedano, Pamplona 2012, p. 566.

[13] H. Stawniak: "Udział małżonków-rodziców w kościelnej posłudze uświęcania." *Studia Warmińskie*, 1994, vol. 31, p. 138.

[14] *Digesta* 37, 3.

[15] 4, X, IV, 2.

[16] J. Krukowski: "Osoby fizyczne i prawne." In: *Komentarz do Kodeksu Prawa Kanonicznego*, t. 1: *Księga I. Normy ogólne*. Eds. J. Krukowski, R. Sobański. Pallotinum 2003, p. 167; G. Dalla Torre: "Diritto alla vita…," pp. 68—69.

— a person who is not responsible for oneself is also regarded as an infant with respect to baptism.

Therefore, the infant shall be free of any obligations, however, some authors admit exceptions here of obligations provided for in canons: 989 (confession at least once a year after having reached the age of discretion), 914 (communion after having reached the age of discretion and after having made sacramental confession) and 920 §§ 1—2 (communion during the Easter time, after the First Communion time). This opinion, however, does not seem correct, because it is in conflict with provision of can. 97 § 2 of CIC (the infant is considered a person lacking the use of reason).

According to can. 1323 nn. 1 and 6 of CIC, it shall be presumed that the infant is not capable of committing a crime. They have no right to stand trial as well — unless they are represented by their parents, guardians or curators — even in spiritual cases or connected with spiritual ones (can. 1478 §§ 1 and 3 of CIC)[17]; they shall also not be allowed to give testimony as a witness (can. 1550 § 1 of CIC).

Having no capacity to perform acts in law, in order to exercise their rights, a minor, thus, the infant as well, shall be subject to — according to can. 98 § 2 of CIC — parental or guardian's authority. As far as appointing guardians and their powers are concerned, according to the above canon provisions of civil law shall apply, unless the canon law provides otherwise or a diocese bishop reasonably admits in some cases, that it shall be remedied by appointing another guardian. This provision shall prevent from a situation in which the same person would have two different guardians (in canonical and national forum). The justifiable reason of appointing another by the bishop can be an eventual discrepancy between a given national law and God's law.[18]

Canon 1136 of CIC, which imposes a serious obligation (*officium gravissimum*) of education of infants — physical, social, and cultural, as well as moral and religious — results in the right of the infant to be educated.[19] "Right-obligation of parents to education [infants — W.G.], has been stated in *Familiaris consortio* apostolic exhortation of John Paul II,

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[17] Cf. R. Coppola: "La tutela dei minori nel diritto canonico processuale e penale." In: *Tutela della famiglia nel Codice di Diritto Canonico*. Città del Vaticano 2000, p. 80.

[18] J. Krukowski: "Osoby fizyczne i prawne…," p. 168.

[19] Cf. A. Dzięga: "Funkcja wychowawcza rodziny w prawie kanonicznym." In: *Współdziałanie Kościoła i państwa na rzecz małżeństwa i rodziny*. Eds. J. Krukowski, T. Śliwowski. Łomża 2005, pp. 127—129; J. Krajczyński: *Wychowanie dzieci i młodzieży w świetle posoborowych dokumentów Stolicy Apostolskiej i Konferencji Episkopatu Polski*. Płock 2002, pp. 70—73; see J. Hervada: "Obligaciones esenciales del matrimonio." *Ius Canonicum*, 1991, vol. 31, pp. 79—80; R. Sztychmiler: *Istotne obowiązki małżeńskie*. Warszawa 1997, pp. 261—262; Cf. C. Burke: "The Essentials Obligations of Matrymony." *Studia Canonica*, 1992, vol. 26, pp. 379—399.

and shall be considered crucial and as such connected with giving human life; it is *natural and prior to* educational tasks of other persons, due to its uniqueness and love connecting parents and infants [emphasis in the text — W.G.]."[20]

Taking into consideration the obligation of spouses to take appropriate actions and attitudes by educating infants/children, to spheres of education shall be presumed provided for in the above canon: purely human (universal), in other words physical (natural), defined as *bonum physicum prolis* and moral and religious, defined as *bonum spirituale prolis*.[21]

In the spheres in which purely human education materializes, the infant shall primarily have right to be provided by their parents with everything necessary for their life and development.[22] After an infant is born, their parents shall keep them alive (shall not abandon them, deprive of their lives, injure), take care of their physical and mental condition as well as of everything necessary to their proper development.[23] As far as social education is concerned, it shall include care for the infant to be open to social problems and shaping their traits necessary for a child in order to actively participate in social life. Then, parents' obligation of cultural education shall be fulfilled mainly by providing infants with proper education which could lead them to right intellectual development.[24] Canon 795 of CIC emphasizes the need to take into consideration within the educational process a complete formation of the human person and harmonious development of infant's physical, moral, and intellectual talents. Among the means to foster education, can. 796 §1 of CIC mentions schools are the principal assistance to parents in fulfilling the function of education; it also advises close collaboration of parents and teachers in schoolsthat infants attend (can. 796 § 2 of CIC).

The infant's interest, including the aspect of their education, shall be protected in difficult family situations, when one of the spouses causes grave mental or physical danger to the other spouse or to the infant or otherwise renders common life too difficult; then the spouses may separate (can. 1153 § 1 of CIC). As soon as the separation has been decided

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[20] Jan Paweł II: *Adhortacja apostolska „Familiaris consortio"*..., p. 68 , no. 36.

[21] Cf. P. Picozza: "L'esclusione dell'obbligo dell'educazione della prole." In: *Prole e matrimonio canonico*. Città del Vaticano 2003, p. 279; W. Góralski: "Wykluczenie prawa-obowiązku wychowania potomstwa a ważność małżeństwa kanonicznego." In: *Ochrona funkcji wychowawczej rodziny*. Eds. J. Krukowski, A. Maćkowski. Szczecin 2007, pp. 221—242.

[22] L. Świto: *„Exclusio boni polis" jako tytuł nieważności małżeństwa*. Olsztyn 2003, p. 43.

[23] W. Góralski: "Wykluczenie prawa-obowiązku wychowania potomstwa...," pp. 225—226.

[24] Ibidem, p. 226.

(either by decree of the local ordinary, judgment of the ecclesiastical court or local ordinary's own authority) proper maintenance and education of infants shall be provided (can. 1153 § 1 and 1154 of CIC). This issue shall be decided under the local ordinary's decree or ecclesiastical court's order. As a rule the infant (infants) of separated spouses shall be educated by the innocent spouse. It shall be the innocent spouse, who takes care of the infant's interest of the separated spouses. However, the infant's interest may require another decision, for instance ordering relatives or education establishment to take care of the infant. Should the separation of spouses be decided by a civil court, a decision regarding care for the infant is decided as well.[25]

The sphere of moral and religious education to the larger extent pertains to the infant's rights connected with their legal personality, which is provided in can. 217 of CIC proclaiming the rights of baptized to Christian education, through which they shall be instructed properly to strive for the maturity of the human person and at the same time to know and live the mystery of Salvation. This right shall apply to all Christians, regardless of their age, thus, also to infants.[26]

The unbaptized infant shall have the right, but only relative, to the ecclesiastical funeral, however, this shall apply to the infant whom the parents intended to baptize but who died before baptism (can. 1183 § 2 of CIC).

As far as the origin of the infant is concerned, the basic principle is provided in can. 1137 of CIC, according to which legitimate infants shall be the infants conceived or born of a valid or putative marriage. This principle is supplemented by the following two legal assumptions. The first is provided for in can. 1138 § 1 of CIC, according to which the father is he whom a lawful marriage indicates unless clear evidence proves to the contrary. According to the second one, legitimate infants are presumed infants born at least 180 days after the day when the marriage was celebrated or within 300 days from the day of the dissolution of conjugal life (can. 1138 § 2 of CIC).

The next principle is provided in can. 1139, which states that illegitimate infants are legitimated by the subsequent valid or putative marriage of their parents or by a rescript of the Holy See (can. 1139 of CIC). According to can. 1140, legitimated infants are equal — as regards canonical effects — in all things to legitimate ones unless the law has expressly provided otherwise.[27]

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[25] P. Kasprzyk: *Separacja prawna małżonków*. Lublin 3003, pp. 72—73.

[26] Cf G. Dalla Torre: "Diritto alla vita..," p. 72.

[27] Cf M.Al. Żurowski: *Kanoniczne prawo małżeńskie Kościoła katolickiego*. Katowice 1987, pp. 384—387.

The place of origin (*locus originis*) of an infant is that in which the parents had a domicile or, lacking that, a quasi-domicile when the infant was born or, if the parents did not have the same domicile or quasi-domicile, that of the mother (can. 101 § 1 of CIC). In case the infant is illegitimate or posthumous, their place of origin shall be also permanent or temporary domicile of the mother; in case of any discrepancies as for domicile of the genetic and natural mother, the domicile of the infant shall be the domicile of the latter.[28] In the case of the infant of transients, the place of origin is the actual place of birth; in the case of the abandoned infant, it is the place where the infant was found (can. 101§ 2 of CIC). As regards the place of residence of the infant, according to can. 105 § 1 of CIC, a minor necessarily retains the domicile and quasi-domicile of the one to whose power the minor is subject. Whoever for some other reason than minority (thus, either due to the fact that they are not infants any more) has been placed legitimately under the guardianship or care of another has the domicile and quasi-domicile of the guardian or curator (can. 105 § 2 of CIC).

According to can. 106 of CIC it shall be presumed that the infant loses their domicile and quasi-domicile together with the loss of domicile or quasi-domicile by the one under whose guardianship they remain.[29]

When determining the status of adopted infants, the legislator provides that infants who have been adopted according to the norm of civil law are considered the infants of the person or persons who have adopted them (can. 110 of CIC).

Just by the very fact that the infant is born, they "aquire" consanguinity with particular persons — both through lines and degrees, as well as the affinity (when the relative of the infant concluded a valid marriage), pursuant to can. 108 and 109 of CIC.

2. Infant's rights connected with their legal personality in the Church

The infant shall have right to be baptized since they are born, and this sacrament — according to can. 96 of CIC — incorporates a human person into the Church of Christ who is now constituted as a person in it

[28] J. Krukowski: "Osoby fizyczne i prawne...," pp. 170—171.

[29] "Stałe lub tymczasowe miejsce zamieszkania traci się przez odejście z tego miejsca połączone z zamiarem niepowracania tam" (can. 106 KPK).

with the duties and rights which are proper to Christians in keeping with their condition insofar as they are in ecclesiastical communion. Thus, the baptism makes that the baptized, without losing their natural personality, acquire legal personality in the Church, and therefore, legal capacity. Execution of rights by the baptized, however, shall be conditioned by numerous factors contributing to their legal position.[30]

Through the reception of baptism, the infant of parents who belong to the Latin Church is enrolled in it, or, if one or the other does not belong to it, both parents have chosen by mutual agreement to have the infant baptized in the Roman Catholic Church; if there is no mutual agreement, however, the infant is enrolled in the ritual Church to which the father belongs (can. 111 § 1 of CIC).

After the reception of baptism, the infants of spouses who have obtained permission from the Apostolic See, the infants of a spouse who, at the time of or during marriage, has declared that he or she is transferring to the ritual Church *sui iuris* of the other spouse, as well as — in a mixed marriage — the infants of the Catholic party who has legitimately transferred to another ritual Church, shall be enrolled in another ritual Church *sui iuris* (can. 112).[31]

The legislator obliges parents to make sure that infants are baptized within the first few weeks following their birth; as soon as possible after the birth, or even before it; they are to go to the pastor to request the sacrament for their infant and to be prepared properly for it (can. 867 § 1 of CIC). The infant in danger of death shall be baptized without delay (can. 867 § 2 of CIC). The abandoned infant or a foundling shall be baptized unless after diligent investigation the baptism of the infant is established (can. 870 of CIC).

For the infant to be baptized licitly, the legislator requires that the parents or at least one of them or the person who legitimately takes their place must consent and there must be a founded hope that the infant will be educated in the Catholic religion (can. 868 § 1 of CIC). The infant of Catholic parents or even of non-Catholic parents shall be baptized licitly in danger of death even against the will of the parents (can. 868 § 2 of CIC). If the conferral or validity of the baptism remains doubtful, the reasons of the doubtful validity of the baptism shall be explained to parents before the baptism is conferred (can. 869 § 3 of CIC). The pastor shall instruct parents and sponsors on the meaning of this sacrament and the obligations attached to it, as well as to prepare parents properly to the baptism of the infant (can. 851, n. 2 of CIC).

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[30] J. Krukowski: "Osoby fizyczne i prawne...," pp. 164—166.

[31] Ibidem, pp. 181—186.

As far as mixed marriages are concerned, both *sensu stricto* (can. 1124 of CIC), and *sensu lato* (can. 1086 § 1 of CIC) it shall be mentioned that before granting permission by the local ordinary or dispensation, the Catholic party shall declare that he or she shall do all in his or her power so that all infants are baptized and educated in the Catholic Church.

As far as possible, a person to be baptized shall be given a sponsor who — together with the parents — presents the infant for baptism and helps the baptized person to lead a Christian life in keeping with baptism and to fulfill faithfully the obligations inherent in it (can. 872 of CIC). Can. 877 §§ 2—3 specifies, whose name shall be inscribed into the book of baptized if it concerns an infant born to an unmarried mother or an adopted infant.

It shall also be mentioned that the exhaustive position of the Church regarding the baptism of infants has been presented in *Pastoralis action* Instruction of Congregation for the Doctrine of Faith of October 20, 1980.[32]

A person who has not received baptism cannot be admitted validly to the other sacraments and it shall be the condition required by can. 842 § 1 of CIC for their validity.

As far as the sacrament of confirmation is concerned, it follows from can. 891 of CIC that the infant could be conferred this sacrament in danger of death and when — for a serious reason — the minister suggests so.[33]

Taking into consideration can. 920 and 989 of CIC, it shall be presumed that the infant is not obliged to confess.

As regards the Most Holy Eucharist, it follows indirectly from can. 913 § 1 and 914 of CIC, that, generally, the infant cannot be admitted to the Holy Communion. However, according to can. 913 § 2 of CIC the holy communion can be administered to infants in danger of death if they can distinguish the body of Christ from ordinary food and receive communion reverently.

According to can. 1004 of CIC it shall be presumed that the Anointing of the Sick can be administered to the infant (in danger of death) who has reached the use of reason.[34]

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[32] Congregatio pro Doctrina Fidei: *Instructio de baptismo parvulorum*. Civitas Vaticana 1980.

[33] Cf. P. Hemperek: "Sakrament bierzmowania." In: *Komentarz do Kodeksu Prawa Kanonicznego z 1983 r.*, t. 3: *Nauczycielskie zadanie Kościoła. Uświęcające zadanie Kościoła*. Eds. P. Hemperek, W. Góralski, F. Przytuła, J. Bakalarz. Lublin 1986, p. 109.

[34] In accordance with *Ordo unctionis infirmorum* (Polish edition: *Sakramenty chorych. Obrzędy i duszpasterstwo*. Katowice 1978, no. 12) annointing of the sick may also be provided to children dangerously sick, if they reach an appropriate mental level for the sacrament to bring them solace.

The baptized infant, shall have, then, right to moral and religious education (except for earlier mentioned purely human education), which arises in parental obligation. One can say that education in the mentioned spheres shall be considered as parental care for Christian formation of their infants. "Through the grace of the sacrament of marriage, according to the *Lumen gentium* dogmatic Constitution of the Second Vatican Council, parents have obtained a task and privilege to evangelize their infants. They shall introduce their infants to the secrets of faith, of which they are their first trailers, as soon as possible."[35]

A domain connected with moral and religious education of the offspring has been reflected in can. 226 § 2 of CIC, in which the legislator states that Christian parents shall particularly take care of the Christian education of their infants according to the doctrine handed on by the Church. In turn, can. 774 § 2 of CIC imposes on parents (and those who replace them) and sponsors obligation to form their infants — by word and example — in faith and in the practice of Christian life. On the other hand, in can. 835 § 4 of CIC the legislator provides that parents of the Christian faithful also have their own part in the function of sanctifying by leading a conjugal life in a Christian spirit and by seeing to the Christian education of their infants.

In can. 793 § 1 of CIC the legislator provides that parents have the duty and right of choosing those means and institutions through which they can provide more suitably for the Catholic education of their infants according to local circumstances. On the other hand, can. 798 of CIC makes the final end of human person as the point of reference for religious education, and can. 798 of CIC obliges parents to entrust their infants to those schools which provide a Catholic education. In this context, it is not difficult to understand the provision of can. 1366 of CIC, according to which parents or those who take the place of parents who hand their children to be baptized or educated in a non-Catholic religion are to be punished with a censure or other just penalty. This type of penalty shall be treated as evident violation of obligation of Christian education of infants.[36]

Finally, it shall be mentioned that local ordinaries and other pastors of souls are to take care that the Catholic spouse and the children born of a mixed marriage, both *sensu stricto* and *sensu lato* — do not lack the spiritual help to fulfill their obligations and are to help spouses foster the unity of conjugal and family life (can. 1128 of CIC).

[35] *Konstytucja dogmatyczna „Lumen gentium" Soboru Watykańskiego II*, no. 11.

[36] Cf. J. Syryjczyk: *Kanoniczne prawo karne: część szczególna*. Warszawa 2003, pp. 43—47.

It shall not be added that the subject of moral and religious education is all that is necessary to introduce the infant to divine life, starting from the baptism. “Thus, it is about the parental care for growth of faith in their infant, their participation in the sacramental life, practicing prayers, participation in liturgy, study the word of God, among others through religious education, shaping the right conscience, proper sexual education, following the principles of faith.”[37] Obviously, each of these forms of education shall be adjusted to and applied with regard to the age of the infant.

It also have to be mentioned that the baptized infant shall have right to be given ecclesiastical funerals (comp. can. 1183 § 2 of CIC).

3. Final remarks

The interest of offspring (their conception and education), as one of the purposes of the marriage, requires taking special care of infants, that is, the minors in the Church who are below 7 years of age. The expression of this care can be, among others, ecclesiastical legislation, in the area of which, despite organic family law, the legal status of the infant has been stipulated distinctly.

Codex Iuris Canonici (CIC), based in its fundamentals on the natural law, expresses the ecclesiastical legislator’s deep concern for respecting human life from its conception to natural death.[38] Thus, it protects its non-transferable right to life and birth of the *nasciturus*.

As far as the liveborn infant is concerned, rights following from their individual natural personality, among others, right to life, parental care, human education, or receiving baptism have been stipulated.

As regards the baptized infant, who becomes *persona in Ecclesia* by reception of their first sacrament (can. 96 of CIC), provisions of the code sanction their numerous fundamental rights, among others, right to moral and religious education, to grow up in faith or right to other sacraments.

Rights of the *nasciturus*, born and baptized infant generally correspond to certain obligations of their parents (or legal guardians). It is easy

[37] W. Góralski: “Wykluczenie prawa-obowiązku wychowania potomstwa…,” p. 228; A. Stankiewicz: “L’esclusione della procreazione ed educazione della prole.” In: *La simulazione del consenso matrimoniale canonico*. Città del Vaticano, p. 320; H. Stawniak: “Udział małżonków-rodziców…,” p. 145.

[38] Cf. *Katechizm Kościoła Katolickiego*. Pallotinum 1994, p. 515, no. 2270; Jan Paweł II: *Adhortacja apostolska „Familiaris consortio”*…, pp. 48 f., 26.

to notice a parallel here, for example in the domain emphasized by CIC in particular, which is education (in its all aspects). When for example the legislator provides in can. 793 of CIC: "Parents and those who take their place are bound by the obligation and possess the right of educating their offspring," it means that infants have right to be educated by their parents (and those who take their place).

As G. Dalla Torre has pointed out, the autonomy of the minor, including the infant, appears, as a matter of fact, in the canon law as greater that the one which national legal regulations provide. It probably follows from the fact that — unlike in the latter — canon law, nevertheless, pays more attention to the human person and is less conditioned by patterns of legal subjectivism. On the contrary, *ius canonicum*, unlike most of these legal orders does not depend on the anthropological paradigm, unlike the individualism. The anthropology of the canonic order considers a human person in its integrity, in their natural truth, which has been disclosed precisely by the Revelation and accepted on the supernatural plane, since "Christ reveals the human person in full to the human person themselves. There is a deep community between the natural legal order and ecclesiastic legal order in the way that the primacy of a human person in the natural law is approved and emphasized in the law of the Church. This is so, despite that focus on the human person in the canonic law in new codification has not fully overcome former antinomy between a human person and institution, freedom and power, what is private and public in the Church."[39]

Finally, it is important to note that in comparison to CIC of 1917 the current legislation has relocated significantly obligations connected with rights of minors, including infants, from pastors (parsons in particular) to parents. The ecclesiastical responsibility of parents for keeping their children alive and educating them is emphasized in particular, which has occurred due to the doctrine of the Second Vatican Council as regards the common priesthood of the faithful.

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[39] G. Dalla Torre: "Diritto alla vita"..., p. 74.

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An Infant in *Codex Iuris Canonici*

Summary

The interest of the offspring (their conception and education), as one of the purposes of the marriage, requires taking special care of infants, thus, minors in the Church, who are below 7 years of age. The expression of this care can be, among others, ecclesiastical legislation, in the area of which, despite organic family law, the legal status of the infant has been stipulated distinctly.

As far as the live-born infant is concerned, rights following from their individual natural personality, among others, right to life, parental care, human education or reception of baptism have been stipulated. As regards the baptized infant, who becomes *persona in Ecclesia* by reception of their first sacrament (can. 96 of CIC), provisions of the code sanction their numerous fundamental rights, among others, right to moral and religious education, to grow up in faith or right to other sacraments.

The traditional, ruling for centuries, model regarding legal position of minors, which dominated in legal experience of the Church, has been amended by the Second Vatican Council, the post-council codification of the canonic law has overcome former situation only partially. However, it shall be added, that the ecclesiological renewal influenced slowly and gradually the canonic legislation and the doctrine, and this process has not been finished yet, and a new, post-council codification has overcome the former situation only partially. However, the focus of the doctrine on the central position of human person in the canonic law has progressively become even more visible.

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L’enfant dans *Codex Iuris Canonici*

Résumé

Le bien des enfants (leur naissance et éducation), comme un des buts du mariage, veut que l’on prenne un soin particulier des enfants, donc d’un groupe de mineurs à l’Église, qui n’ont pas encore atteint l’âge de sept ans. C’est entre autres la législation ecclésiastique qui est l’expression de ce soin. Bien que le droit familial organique y fasse défaut, c’est bel et bien le statut juridique de l’enfant qui y a été clairement défini.

Pour ce qui est des enfants déjà nés, on a défini les droits résultant de leur condition naturelle, par exemple : droit à la vie, au soin parental, à l’éducation humaine ou

droit d'être baptisé. Par contre, pour ce qui est d'un enfant baptisé — qui, ayant reçu le premier sacrement, devient *persona in Ecclesia* (can. 96 CIC) — un grand nombre de ses droits sont sanctionnés par les normes inscrites dans le code de droit canonique, par exemple : droit à l'éducation morale et religieuse, droit d'être élevé dans une ambiance de foi et droit à d'autres sacrements.

Le modèle traditionnel concernant la position juridique des mineurs, qui régnait depuis des centaines d'années et qui dominait dans l'expérience juridique de l'Église, a été modifié par le Concile Vatican II. La codification du droit canonique de l'après-Concile a triomphé la situation précédente seulement d'une façon partielle. En revanche, l'attention de la doctrine à l'égard de la position centrale de la personne humaine dans le droit canonique devient de plus en plus visible.

Mots clés : enfant, droits de l'enfant, statut juridique, parents, devoirs, baptême, éducation

Wojciech Góralski

Il bambino nel *Codex Iuris Canonici*

Sommario

Il bene della prole (la sua procreazione ed educazione) come uno dei fini del matrimonio, impone di avere una cura particolare per i bambini e quindi per la categoria di persone minorenni nella Chiesa che non hanno compiuto il settimo anno di età. Una manifestazione di tale cura è tra l'altro la legislazione ecclesiastica nell'area della quale, malgrado manchi un diritto organico della famiglia, lo status giuridico del bambino è stato comunque definito univocamente.

Rispetto al bambino nato sono stati definiti i diritti risultanti dalla personalità naturale che gli è propria, tra l'altro il diritto alla vita, alla cura dei genitori, all'educazione umana o il diritto a ricevere il battesimo. A sua volta, in riferimento al bambino battezzato che ricevendo il primo sacramento diventa *persona in Ecclesia* (can. 96 CIC), le norme del codice sanzionano una serie di suoi diritti fondamentali, tra l'altro il diritto all'educazione morale e religiosa, a crescere nella fede o il diritto agli altri sacramenti.

Il modello tradizionale che regna da secoli, riguardante la posizione giuridica dei minorenni, che dominava nell'esperienza giuridica della Chiesa, fu modificato dal Concilio Vaticano II. La codificazione post-conciliare del diritto canonico ha vinto tuttavia la vecchia situazione solo in parte. Invece l'attenzione della dottrina rispetto al luogo centrale della persona umana nel diritto canonico sta divenendo progressivamente sempre più visibile.

Parole chiave: bambino, diritti del bambino, status giuridico, genitori, doveri, battesimo, educazione

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Legal Protection of the Unborn Child

Keywords: *nasciturus*, unborn child, pregnancy, fetus, right to life

Introduction

The Convention on the Rights of the Child, adopted on November 20, 1989 by the United Nations General Assembly, already in its preamble clearly provides that "the child [...] needs special safeguards and care, including appropriate legal protection, before as well as after birth."[1] Poland ratified the Convention on April 30, 1981.[2] Therefore, a reasonable question emerges as to whether the conceived child (*nasciturus*) is subject to legal protection under the Polish legal system? And if so, what does this protection involve? What is the scope of this protection? The issue undertaken in this article will be limited to presenting the position of the Polish doctrine on the civil-law situation of the *nasciturus*, and the actual scope of the protection of the conceived child will be determined on the basis of the Polish law regulations currently in force.

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[1] Moreover, Art. 1 of the Convention specifies that the term "child" means every human being below the age of 18 years. Consequently, since the human fetus is unquestionably "a human being," then the protection provided also covers *nasciturus*; see T. Smyczyński: *Konwencja o prawach dziecka*. Warszawa 1994, p. 10.

[2] Ratified by the Republic of Poland on 30 April 1981, Dz.U. of 1991, No. 120, item 526 as amended.

1. Who is the subject of the legislator's protection?

The first problem to face is to identify the subject of protection. It seems odd that the Polish legislator is unable not only to indicate time frames of the beginning of the human life that is subject to protection, but also to use a uniform term to define *nasciturus*, that is, the form of human life before birth,[3] applying instead such notions, as, for example: conceived child,[4] unborn child,[5] conceived but yet unborn child,[6] unborn descendant,[7] fetus, pregnancy,[8] child in the labour period,[9] conceived child capable of living independently outside the body of the pregnant woman.[10] In the doctrine of criminal law alone there are a multitude of various concepts defining the beginning of human life based, among others, on the following criteria:

— **developmental criterion** — according to which the fetus becomes a child when it is able to live independently outside the mother's body;

[3] Such definition of *nasciturus* was proposed by: T. Smyczyński: "Pojęcie i statut prawny dziecka poczetego." *SP*, 1989, vol. 4, p. 25.

[4] Art. 75 of the Family and Guardianship Code: "It is possible to recognize paternity before the birth of a *conceived child*."

[5] Art. 142 of the Family and Guardianship Code: "If the paternity of a man not being the mother's husband has been authenticated, the mother may demand that this man *before the birth of the child* sets aside an appropriate sum of money for the cost of maintaining the mother for three months during pregnancy and the cost of maintaining the child during the first three months after the birth. The date and manner of payment of this amount is determined by the court."

[6] Art. 182 of the Family and Guardianship Code: "A custodian may be appointed for *a conceived but yet unborn child*, if it is necessary to protect the child's future rights. The custodianship ceases as soon as the child is born." Art. 599 of the Code of Civil Procedure: "The guardianship court competent for appointing a custodian for a *child conceived but yet unborn* is the court competent for the place of residence or stay of the mother."

[7] Art. 994 §2 of the Civil Code: "In the calculation of the legitimate portion due to the descendant, gifts made by the testator when he/she had no descendants shall not be added to the estate. However, this shall not apply when the gift was made less than three hundred days before *the birth of the descendant*.

[8] Art. 10 §3 of the Family and Guardianship Code: "If a woman becomes pregnant, her husband cannot claim the annulment of marriage for reasons of age."

[9] Art. 149 of the Criminal Code: "A mother who kills *her child during the period of labour* under the influence of its course, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years."

[10] Art. 152 §3 of the Criminal Code "Whoever commits an act specified in § 1 or 2, after the *conceived child became capable of living independently outside the pregnant woman's body*, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years."

— **obstetrical criterion** — according to which the fetus becomes a child (human being) at the moment when labour starts (actual labour pains occur);
— **physical criterion** — according to which the fetus becomes a human being from the moment of partial or total evacuation from the mother's womb;
— **physiological criterion** — according to which the moment of human birth is the moment of starting independent breathing (with lungs).

In view of such a conceptual disorder and the lack of precision in determining the beginning of the human life, it seems illusory to refer to the legal protection of *nasciturus*.

2. Civil law situation of *nasciturus* in the doctrine

The Polish civil-law doctrine also does not provide for a uniform position towards legal protection of the unborn child. Four trends concerning views on the civil-law situation of *nasciturus* can be established in the doctrine, according to which the situation of *nasciturus* as a matter of principle is subject to legal protection, but it does not have full legal capacity. At this point, the following views can be distinguished.

2.1. *Nasciturus* has no legal capacity

Although supporters of the view claiming no legal capacity of *nasciturus* do not share the early-Roman idea assuming that *nasciturus* is only a part of the body of the mother (*pars viscerum matris*), they refer to a later Roman principle expressed in the following words: *Nasciturus pro iam nato habetur, quoties de commodis eius agitur*. According to this principle, a human fetus is covered by legal protection by applying a fiction stating that the results of life birth extend backwards.[11] In the same vein, for instance the child that was to be born was provided with the possibility to gain material advantage (mainly securing the right to inheritance)

[11] See K. Kolańczyk: *Prawo rzymskie*. Warszawa 1973, p. 164; L. Świto: "Osobowość prawna *nasciturusa w prawie kanonicznym i polskim*." *Prawo Kanoniczne*, 1997, vol. 40, no. 1—2, p. 233.

by establishing a special custodian to care for its interests. However, the advocates of this idea do not recognize any other rights and obligations of the unborn as living beings.

2.2. *Nasciturus* has legal capacity subject to the condition precedent

According to the view claiming that *nasciturus* has legal capacity subject to the condition precedent, subjective rights before the child birth do not exist yet, and consequently, they cannot be exercised, but are only secured for the future. Only after the birth of a live child is the statutory condition satisfied. The child acquires full legal capacity, and therefore its statutory rights emerge at this moment, for example the right to inheritance.[12]

2.3. *Nasciturus* has legal capacity subject to the condition subsequent

Legal capacity subject to the condition subsequent ensures stronger protection for *nasciturus*, assuming that it has general legal capacity, but on the condition subsequent, and not precedent. Under this theory, *nasciturus* is entitled to subjective rights, which expire if the child is not born alive. The subjective right of *nasciturus* exists already before its birth, and after the childbirth, this conditional subjective right is transformed into an absolute subjective right vested to an already born child, and still constitutes the same substantive right. For instance, *nasciturus* conditionally inherits the bequest after the testator who had died before its birth, and since the moment of birth, it still holds the same inheritance, but now unconditionally. This theory builds a stronger position of *nasciturus*, since it is based on the assumption of the continuity of the existence of human being from the conception to the death. Birth does not constitute an event that changes the existing humanity of a person.

[12] Art. 927 § 2 of the Civil Code: "However, the child that had been conceived before the moment of opening the will may be a heir provided that it is born alive."

2.4. *Nasciturus* has full legal capacity

The final approach assumes full legal capacity, as expressed in Art. 8 § 2 of the Civil Code, introduced by the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion of January 7, 1993.[13] The norm of this article granted *nasciturus* full legal capacity with regard to non-material rights (such as life, health, civil status rights, particularly descent from specific parents), and a conditional capacity to property rights. However, an amendment to the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion introduced three years later"[14] resulted in repeal of Art. 8 § 2 of the Civil Code, depriving *nasciturus* of legal capacity.

Nevertheless, it should be emphasized that in the tears 1993—1996, legal capacity granted to *nasciturus* did not ensure its full protection, since the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion admitted in Art. 7.2 — under certain conditions — the possibility of abortion. Depriving *nasciturus* of the right to life was possible when pregnancy endangered the mother's life or health; when the death of a conceived child resulted from actions undertaken to save the mother's life, or to counteract serious damage to mother's health, the threat of which was confirmed by the opinion of two other doctors; if prenatal tests indicated severe and irreversible damage to the fetus; if there were strong grounds for believing that the pregnancy was the result of a criminal act, for example rape or incest. As applicable legislation concerning abortion did not change, it is impossible to talk about full legal protection of *nasciturus*.

3. Polish law

While analysing the regulations of the Polish law, it should be stated that the scope of legal protection of *nasciturus* is not full and comprehensive, but concerns first of all its material rights.[15] This manifests itself

[13] Dz.U. of 1993, No. 17, item 78.

[14] Act of 30 August 1996 amending the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion and amendment of some other acts, Dz.U. No. 139, item 646.

[15] See the decision judgment of the Constitutional Tribunal of May 28, 1997 in case K 26/96.

in granting *nasciturus* the right to inheritance,[16] the legitimate portion of inheritance,[17] alimony claims,[18] and the possibility to establish a custodian to protect its future rights.[19] A partial recognition of the subjectivity of *nasciturus* is also granted by the Polish legislator in regulations that make it possible to recognize the unborn child,[20] grant alimony for a pregnant mother[21] or forbid annulment of marriage on the grounds of pregnancy.[22] A partial protection of the life of *nasciturus* is also referred to in regulations that forbid killing the child during the labour,[23] prohibit abortion with a breach of the applicable abortion law,[24] or forbid using

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[16] Art. 927 § 2 of the Civil Code "the child who had been conceived at the moment of opening the estate can be a heir if it is born alive."

[17] Art. 994 § 2 of the Civil Code: "In the calculation of the legitimate portion due to the descendant, gifts made by the testator when he/she had no descendants shall not be added to the estate. However, this shall not apply when the gift was made less than 300 days before the birth of the descendant."

[18] Art. 754 of the Code of Civil Procedure: "The court may, even before the child is born, secure future alimony claims related to establishment of paternity, referred to in Art. 141 and Art. 142 of the Family and Guardianship Code, by obligating the obligor to pay an appropriate sum of money for the cost of maintaining the mother for 3 months in the period of labour and of maintaining the child during for the first 3 months after birth [...]."

[19] Art. 599 of the Code of Civil Procedure: "The guardianship court competent for establishing a custodian for the child conceived but yet unborn is the court competent for the place of residence or stay of the mother"; Art. 182 of the Family and Guardianship Code: "A custodian may be appointed for a conceived but yet unborn child, if it is necessary to protect the child's future rights. The custodianship ceases as soon as the child is born."

[20] Art. 75 of the Family and Guardianship Code: "It is possible to recognize paternity before the birth of a conceived child."

[21] Art. 142 of the Family and Guardianship Code: "If the paternity of a man not being the mother's husband has been authenticated, the mother may demand that this man before the birth of the child sets aside an appropriate sum of money for the cost of maintaining the mother for 3 months during pregnancy and the cost of maintaining the child during the first 3 months after the birth. The date and manner of payment of this amount is determined by the court."

[22] Art. 10 § 3 of the Family and Guardianship Code: "If a woman becomes pregnant, her husband cannot claim the annulment of marriage for reasons of age."

[23] Art. 149 of the Criminal Code: "A mother who kills her child during the period of labour under the influence of its course, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years."

[24] Art. 152 of the Criminal Code "§1. Whoever, with consent of the woman, terminates her pregnancy in violation of the law shall be subject to the penalty of deprivation of liberty for up to 3 years. § 2. The same punishment shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so. § 3. Whoever commits an act specified in § 1 or 2, after the conceived child has become capable of living independently outside the pregnant

violence towards a pregnant woman.[25] Thus, Polish legislation not only lacks regulations that could be — as the Convention on the Rights of the Child postulate — an expression of "special safeguards and care" about a child "before as well as after birth," but due to the effective Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion that permit abortion, *nasciturus* is not guaranteed even such rights as *natus*, since it is deprived of the most important right to life.

Conclusions

The situation of *nasciturus* in Polish law is problematic. On one hand, Polish law partially protects some rights of the conceived child. On the other, the amended Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion deprives it of one of the most basic rights — the right to life. Without the right to life, exercising by *nasciturus* of any other rights is a fiction. Therefore, the Polish law currently in force does not guarantee *nasciturus* full legal capacity and thus does not provide it with satisfactory protection. Consequently, the Convention on the Rights of the Child of November 20, 1989, although it was ratified by Poland on 30 April 1981, is not complied with at the point concerning full legal protection of the conceived child.[26]

woman's body shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years."

[25] Art. 153 of the Criminal Code: "§ 1. Whoever, through the use of force against a pregnant women or by other means, without her consent, terminates the pregnancy, or by force, an illegal threat or deceit induces her to terminate the pregnancy shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years. § 2. Whoever commits the act specified in §1 after the conceived child has become capable of living independently outside the pregnant woman's body, shall be subject to the penalty of the deprivation of liberty for a term of between one year and 10 years."

[26] In the Canon law there are two legal norms referring to the legal protection of *nasciturus*:

Can. 1398 CIC provides for a penalty of excommunication for actual killing of a human fetus.

Can. 871 CIC requires that aborted fetuses should be baptized, "if they are alive in so far as this is possible," therefore grants them with the ability to receive baptism, as any other person already born who has not been baptized yet.

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Lucjan Świto

Legal Protection of the Unborn Child

Summary

The article undertakes the issues of legal protection of the conceived child in Polish law. The analysis of Polish legislation and the Polish doctrine concerning the civil law situation of *nasciturus* leads to the conclusion that Polish law currently in force is contrary to the Convention on the Rights of the Child of November 20, 1989 which demands legal protection of a child both before and after birth. On the one hand, Polish law partially protects certain rights of the conceived child, and on the other — deprives it of the most fundamental rights, the right to life. Without the right to life, exercising any other rights by *nasciturus* is a fiction.

Lucjan Świto

La protection juridique d'un enfant conçu

Résumé

L'article aborde la question de la protection juridique d'un enfant conçu, dans le droit polonais. L'analyse entreprise à propos de la législation polonaise et de la doctrine polonaise relative à la situation civile *nasciturus* conduit à la conclusion que le droit polonais en vigueur est en contradiction avec la Convention relative aux droits de l'enfant du 20 novembre 1989 qui exige la protection juridique de l'enfant aussi bien avant et après sa naissance. D'un côté, le droit polonais protège partiellement certains droits d'un enfant conçu, de l'autre, il lui retire un des droits les plus fondamentaux : celui à la vie. En effet, si un enfant conçu en est privé, sa possibilité de profiter d'autres droits n'est qu'une fiction.

Mots clés : *nasciturus*, enfant conçu, droit à la vie, grossesse, fœtus

Lucjan Świto

Tutela giuridica del bambino concepito

Sommario

L'articolo intraprende le questioni della tutela giuridica del bambino concepito nel diritto polacco. L'analisi eseguita della legislazione polacca e della dottrina polacca sulla situazione civile-giuridica del *nasciturus* porta alla conclusione che la legge polacca vigente è in contraddizione con la Convenzione sui diritti dell'infanzia del 20 novembre 1989 che esige la tutela giuridica del bambino sia prima, sia dopo la nascita. Da un lato la legge polacca difende parzialmente alcuni diritti del bambino concepito, dall'altro lo priva di uno dei diritti più fondamentali, il diritto alla vita. Senza il diritto alla vita la fruizione da parte del *nasciturus* di altri diritti è quindi una finzione.

Parole chiave: *nasciturus*, bambino concepito, diritto alla vita, gravidanza, feto

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Protection of Minors in the Current Canon Law

Keywords: theology, canon law, legal protection, legal autonomy, natural person, minors, adults, age of majority, personal status, law of sacraments, penal law, procedural law

Introduction

The protection of minors constitutes a challenge for each human society including the Catholic Church. The Church, thanks to its long experience, offers a clear conception of different "orders" of natural persons: person of adult age, adults, and minors.

Starting from the description of the evolution of canonical regulation concerning these three "orders" of persons and of the legal limitation of the activities of minors, I will try to present two kinds of the legal protection of minors: first, the indirect protection consisting in the guarantee of the possibility of an autonomous action by minors, then the direct protection in the procedural law and in the penal law, especially in the difficult matter of crimes against morality, and I shall attempt, at the same time, at identifying to what degree this regulation has its foundation in the divine law or merely in the ecclesiastical law.

1. Concept of minors in the canon law in the 20th century

In this chapter we want to present the evolution of the concept of a minor in the canon legislation over the 20th century.

1.1. Codification before the Second Vatican Council

In the period before the Second Vatican Council, in the 20th century, there was only one complete code, the Code of Canon Law from 1917 (hereinafter: CIC/1917) for the Latin Church.[1] The codification prepared for Eastern Churches had not been completed before the Second Vatican Council, it had been published in parts since 1949, and until 1957 there was promulgated only four of the intended five parts. The last published part in 1957, motu proprio *Cleri sanctitati*, regulated the safeguarding of the Oriental rites, the life of clergy, the hierarchical structure and the general norms, including norms about natural and moral persons (today called juridical persons).[2]

1.1.1. In the CIC/1917

The CIC/1917 defines a major person and a minor one in can. 88 § 1: *Persona quae duodevigesimum aetatis annum explevit, maior est; infra hanc aetatem, minor.* In the following § 2 of the same canon it defines adult persons: *Minor, si masculus, censetur pubes a decimoquarto, si femina, a duodecimo anno completo*.[3] Furthermore, it is important that any autonomous juridical action of a minor can occur only after the acquisition of the use of reason, what is presumed in the age of 7 years[4] (cf. can. 88 § 3).

[1] Cf. E. Eichmann, K. Mörsdorf: *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici*. Paderborn 1953, pp. 43—44.

[2] J. Dvořáček: *Východní kanonické právo*. Praha 2014, pp. 22—26.

[3] The English translation of the can. 88: "§ 1. A person who has completed the twenty first year of age has reached majority; below this age, a person is a minor. § 2. The male minor is considered to be adult by achieved the fourteenth, the female one by achieved the twelfth year of age."

[4] E. Eichmann, K. Mörsdorf: *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici*..., pp. 196—197.

A text of big practical importance is the definition of legal capacity to autonomous actions of minors in the next can. 89: *minor in exercitio suorum iurium potestati parentum vel tutorum obnoxia manet, iis exceptis in quibus ius minores a patria potestate exemptos habet.*[5]

1.1.2. In the motu proprio *Cleri sanctitati*

The motu proprio *Cleri sanctitati* defines major and minor persons in can. 17 § 1: *Persona quae duodevigesimum aetatis annum explevit, maior est, firmo iure particulari provectiorem aetatem assignante; infra hanc aetatem, minor.*

In the following text of the § 2 of the same canon of the motu proprio defines adult persons: *Minor, si masculus, censetur pubes a decimo quarto, si femina, a duodecimo anno completo.*[6]

The possibility of autonomous actions of minors is described by the next can. 18: *minor in exercitio suorum iurium potestati parentum vel tutorum obnoxia manet, iis exceptis in quibus ius minores a patria potestate exemptos habet.*[7]

1.1.3. Summary

We can state that the formulation of the Latin legislation and of the Oriental one is nearly the same. The only one difference consists in the possibility to determinate a higher age for achieving the age of a major by the particular law of an Oriental Church.

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[5] The English translation of the text of can. 89: "A minor, in the exercise of his or her rights, remains subject to the authority of parents or guardians except in those matters in which minors are exempted from the paternal authority by law."

[6] The English translation of the text of can. 17: "§ 1. A person who has completed the twenty-first year of age has reached majority, without prejudice to the prescripts of particular law determining higher age; below this age, a person is a minor. § 2. The male minor is considered to be adult by achieved the fourteenth, the female one by achieved the twelfth years of age."

[7] The English translation of the text of can. 88: "A minor, in the exercise of his or her rights, remains subject to the authority of parents or guardians except in those matters in which minors are exempted from the paternal authority by law."

1.2. Codification after the Second Vatican Council

The codification after the Second Vatican council encompasses two complete codes: the Code of Canon Law from 1983 (hereinafter: CIC/1983) for the Latin Church and the Code of Canons of Eastern Churches from 1990 for the Oriental Catholic Churches (hereinafter: CCEO).

1.2.1. In the CIC/1983

The CIC/1983[8] defines a major person in the can. 97 § 1: *Persona quae duodevigesimum aetatis annum explevit* and in the same text consequently says: *infra hanc aetatem, minor*.[9] The CIC/1983 does not indicate a definition of an adult person. The possibility of minors for their autonomous activity is described by the next can. 98 § 2: *Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico ab eorum potestate exempti sunt*.[10]

1.2.2. In the CCEO

The CCEO[11] defines a major and at the same time a minor in the can. 909 § 1 with the same words: *Persona, quae duodevicesimum aetatis annum explevit, maior est; infra hanc aetatem minor*.[12] The CCEO does not, however, formulate a definition of an adult person.

The capacity of minors for autonomous activity is described by the next can. 910 § 2: *Persona minor in exercitio suorum iurium potestati paren-*

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[8] *New commentary on the Code of Canon Law*, pp. 142—143.

[9] The English translation of the can. 97 § 1: "A person who has completed the eighteenth year of age has reached majority; below this age, a person is a minor."

[10] The English translation of the can. 98 § 2: "A minor, in the exercise of his or her rights, remains subject to the authority of parents or guardians except in those matters in which minors are exempted from their authority by divine law or canon law."

[11] *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 783—784.

[12] The English translation of the can. 909: "A person who has completed the eighteenth year of age is a major, below this age, a person is a minor."

tum vel tutorum subest eis exceptis, in quibus minores iure divino vel canonico ab eorum potestate exempti sunt.[13]

1.2.3. Summary

We can state that the regulation in the both contemporarily valid codes is the thing that causes bigger peace for all interested persons and institutions.

1.3. Comparison and recapitulation

We can indicate four clear differences between the regulation after and before the Second Vatican Council:

1. The age for being a major has been reduced to 18 years in comparison with previous 21 years.
2. There no longer exists the possibility to establish a higher age for being major in the particular Oriental legislation, therefore, only the limit of 18 years is now valid in the entire Catholic Church.
3. The postconciliar legislation does not define the age of adulthood.
4. There is a more accurate description of the possibility of autonomous activities of minors: exceptions contained in the divine or canon law.

In the next chapter we want to present the most important possibilities of the latter activities.

2. Capacities of autonomous activities of minors

In this chapter we want to emphasize the most important capacities of autonomous activities of minors, while trying to specify to what degree it is a matter of divine law or of the canon law.

[13] The English translation of the can. 910 § 2: "In the exercise of his or her rights, a minor person is under the authority of parents or guardians, with the exception of those areas in which minors by divine or canon law are exempt from their power."

Because of the almost identical legal regulation in the CIC/1983 and in the CCEO, we describe the singular matters in a more synthetic way then in the first chapter. Because of the importance of these affairs we indicate the very legal text.

2.1. Autonomous activities in the area of the personal status

The basis for analysis of the autonomous activities of minors in the area of the personal status can be found in the description of the rights and obligations of all the Christian faithful. We will emphasize the rights, because there it is possible to act more voluntarily and autonomously.

2.1.1. Free choice of a state of life

The free choice of a state of life is guaranteed in can. 219 of CIC/1983 and in can. 22 of CCEO with the same words: *Christifideles omnes iure gaudent ut a quacumque coactione sint immunes in statu vitae eligendo*.[14]

The choice of a state of life is neither really nor legally reserved for major persons, because rather often it is possible, that the own state of life is chosen in the age of minors, even shortly after the age of discretion, as it is testified by the Church history, especially in the life of many saints.

We are persuaded that this freedom is based on the divine law.

2.1.2. Receiving of an assistance from the pastors of the church

The right to receive assistance from the pastors of the Church is defined in can. 213 of CIC/1983 and in can. 16 of CCEO by the same

[14] The English translation of the text of can. 219 of CIC/1983 and of the can. 22 of CCEO: “All the Christian faithful have the right to be free from any kind of coercion in choosing a state of life.”

words: *Ius est christifidelibus ut ex spiritualibus Ecclesiae bonis, praesertim ex verbo Dei et sacramentis, adiumenta a sacris Pastoribus accipiant.*[15]

Although it is often necessary to push the minors to use the pastoral assistance, on the other hand it is big joy for parents, educators and clergymen, when the minors alone request such assistance.

Also this right is to our mind based on the divine law.

2.1.3. Communication of their needs and of their opinions to the pastors

The right to communicate their needs to the pastors is guaranteed in can. 212 § 2 of CIC/1983 and in can. 15 § 2 of CCEO with the same words: *Christifidelibus integrum est, ut necessitates suas, praesertim spirituales, suaque optata Ecclesiae Pastoribus patefaciant.*[16]

The right — and sometimes even a duty — to communicate to the pastors their opinion for the good of the Church is defined in can. 212 § 3 of CIC/1983 and in can. 15 § 3 of CCEO by the same words: *Pro scientia, competentia et praestantia quibus pollent, ipsis ius est, immo et aliquando officium, ut sententiam suam de hisquae ad bonum Ecclesiae pertinent sacris Pastoribus manifestent.*[17]

These rights develop the latter mentioned right to receive the spiritual help: they also include the initiative of minors, taking into account the possibility of their solid professional knowledge permitting their expert help to the pastors.

This right, to our mind, is also based on the divine law.

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[15] The English translation of the text of the can. 213 of CIC/1983 and of the can. 16 of CCEO: "The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments."

[16] The English translation of the text of the can. 212 § 2 of CIC/1983 and of the can. 15 § 2 of CCEO: "The Christian faithful are free to make known to the pastors of the Church their needs, especially spiritual ones, and their desires."

[17] The English translation of the text of the can. 212 § 3 of CIC/1983 and of the can. 15 § 3 of CCEO: "According to the knowledge, competence, and prestige which they possess, they have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church."

2.1.4. Protection of the good reputation and the privacy

The right of protection of the good reputation and the privacy is expressed by the can. 220 of CIC/1983 and by the can. 23 of CCEO with the same words: *Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare*.[18]

The good reputation is quite natural condition for worthy life, its violation brings many damages. Even more, it is valid for the protection of the privacy, especially of the intimacy (which will be described in point 4 discussingthe penal law).

Therefore, we estimate these rights to come from the divine law.

2.1.5. Protection of own rights in general

We want to conclude the description of main autonomous activities of minor by the general protection of own rights, described broadly (therefore, we do not excerpt the very text) in the can. 221 of CIC/1983 and in can. 24 of CCEO.

This protection includes:

1. Vindication and defence of rights in the competent ecclesiastical forum.
2. Judging according to the prescripts of the law applied with equity/equality? (it shall be discussed in point 3).
3. Punishment with canonical penalties except according to the norm of law (it shall be discussed in point 4).

This protection inherent to every human being, regardless of their age, but only persons having the use of reason can actively defend their rights. This possibility is to be seen as derived from the divine law — only the specification of technical means is to be done by the canon law.

[18] The English translation of the text of the can. 220 of CIC/1983 and of the can. 23 of CCEO: "No one is permitted to harm illegitimately the good reputation which a person possesses or to injure the right of any person to protect his or her own privacy."

2.2. Autonomous activities in the area of the sacramental life

Baptism

The practice of the Church distinguishes two ways of receiving baptism: as an infant and as an adult, without defining the adult age (cf. can. 851 of CIC/1983 and cann. 681 and 682 of CCEO). Minors with the use of reason are compared to adults for receiving baptism by the law (can. 851 § 1 of CIC/1983, cf. can. 682 § 1 of CCEO).

With the baptism is connected belonging to a determinate Church *sui iuris*. The terminology used in CIC/1983 and in CCEO differs. While can. 111 of CIC/1983 speaks not specifically about "rites" and "ritual Church" and can. 112 of the same code about "ritual Church *sui iuris*," can. 27 and 28 of CCEO distinguish clearly the conception of a rite and of a "Church *sui iuris*." In each case, can. 111 § 2 of CIC/1983 and can. 30 of CCEO gives to a minor who completed the 14 years of age the choice of belonging to a Church *sui iuris* in occasion of his baptism; under this age the minor belongs the Church *sui iuris* primarily of his father, secondarily of his mother, even in the case of their transfer to another Church *sui iuris*, but he can return to the original Church *sui iuris* upon completion of the 14th year of age (cann. 111 and 112 § 1, 3° of CIC/1983, cann. 29 and 34 of CCEO). As we see, the age limit of 14 years is of a big importance.[19]

Nonetheless, it is permitted to take on the function of a sponsor to a minor by a person of at least 16 years of age (can. 874 § 1, 2° of CIC/1983) or of the age required by particular law (can. 685 § 2 of CCEO).[20]

Confirmation

The Latin practice of the sacrament of confirmation is very different from the Oriental one.[21]

In the Latin Church the celebration of confirmation — with the exception of the baptism of an adult (cf. can. 866 of CIC/1983) — is separated from the celebration of baptism. Furthermore, in the ordinary situations it is necessary that the person to be confirmed reaches the age of discretion and the administration should be after a due preparation; the exception is done for the danger of death (cann. 889 and 891 of CIC/1983). But the

[19] D. Salachas: *Teologia* e *disciplina dei sacramenti nei Codici latino e orientale: studio teologico-giuridico comparativo*. Bologna 1999, pp. 101—104.

[20] Ibidem, pp. 90—93.

[21] We do not deal the difference of the terminology: the confirmation in CIC, the Chrismation with holy myron in CCEO. Cf. J. Dvořáček: *Východní kanonické právo. Úvod do studia*…, p. 96.

conference of bishops can elevate the requested age (can. 891) — theoretically to the age of majors.

In the Oriental Churches the celebration of confirmation is usually connected with the celebration of baptism, even in the case of infants (cann. 692 and 695 § 1 of CCEO). These two celebrations can be separated only in a case of true necessity, and it is to be seen that the confirmation is administered as soon as possible.[22]

There are in the both codes the same conditions for sponsors as it is in the case of sponsors for baptism (see above).

Eucharist

The Latin practice of the administration of the Eucharist differs from the Oriental one.

The Latin discipline requires for allowed administration of the Most Holy Eucharist to children that they have sufficient knowledge and careful preparation so that they understand the mystery of Christ according to their capacity and are able to receive the body of Christ with faith and devotion; only in case the danger of death is sufficient that the children can distinguish the body of Christ from ordinary food and receive communion reverently (can. 913 of CIC/1983). Therefore, the Latin tradition excludes the administration of the Eucharist to infants.

According the Eastern tradition it is possible to administer the Eucharist to infants in occasion of their baptism as part of the integral Christian initiation, otherwise the prescriptions of the liturgical books of each Church *sui iuris* are to be observed (can. 710 of CCEO).[23]

Sacraments of Penance and of Unction of the Sick

The Latin legislation requires explicitly the use of reason for receiving the sacraments of penance and of the unction of the sick (cann. 989 and 1004 of CIC/1983), the Oriental legislation requires it only implicitly (cann. 718 and 737 § 1 of CCEO). In the doubt whether the sick person has attained the use of reason, the unction of the sick is to be administered (can. 1005 of CIC/1983), and the care of the administration of the unction obliges pastors of souls and persons who are close to the sick (can. 738 of CCEO).[24]

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[22] D. Salachas: *Teologia* e *disciplina dei sacramenti nei Codici latino e orientale*..., pp. 125—134.

[23] Ibidem, pp. 167—172. L. Sabarese. *Collocazione dell'Eucaristia tra i sacramenti dell'iniziazione cristiana*, pp. 47, 55—56.

[24] D. Salachas: *Teologia* e *disciplina dei sacramenti nei Codici latino e orientale*..., pp. 265—266, 295—297.

Only the Oriental legislation obliges explicitly the faithful, who is aware of serious sin, to receive the sacrament of penance as soon as possible (can. 719 of CCEO).

Without prejudice to the obligation of annual confession for persons with the use of reason (can. 989 of CIC/1983) or of the frequent confession according the particular law (can. 719 of CCEO),[25] the administration of the sacrament of penance is bound to the initiative of a particular recipient, which includes minors.

The sacrament of Holy Orders

The administration of the deacon or priest ordination (and *a fortiori* of the episcopal ordination) to minors is excluded by the prescripts of the required age, in each case higher that 18 years (cann. 1031 and 378 of CIC/1983, cann. 759 and 180 of CCEO).[26] Only CCEO admits explicitly the possibility of administration of minor ordinations according the particular law (can. 327), but it is not probable that minor persons could be admitted to those ordinations. Even extended commentaries to the CCEO do not deal with this topic.[27]

In the area of the sacrament of holy orders, the autonomous activity of minors is practically excluded.

Sacrament of Marriage

In the whole tradition of the Church, an achievement of sufficient maturity was required for weddings. The Church legislation in the 20th century describes the minimal age uniformly: 16 years for men and 14 years for women (can. 1067 § 1 of CIC/1917, can. 57 § 1 of the motu proprio *Crebrae allatae sunt* from 1949, can. 1083 of CIC/1983 and can. 800 of CCEO).[28]

Therefore, minors could and can validly celebrate a marriage, ideally according their will. On the other hand, pastors were even obliged to take care to dissuade youth from the celebration of marriage before the age at which a person usually enters marriage according to the accepted

[25] Cf. *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 603—604.

[26] D. Salachas: *Teologia* e *disciplina dei sacramenti nei Codici latino e orientale*…, pp. 337—339.

[27] Cf. ibidem, pp. 290—291; *A guide to the Eastern Code: a commentary on the Code of canons of the Eastern churches*, pp. 268—271.

[28] The history of the prescribed age for spouses before *Crebrae allatae sunt* (i.e. the age of 14 years for males and 12 years for females) and the preparation of the actual legislation is presented by D. Salachas: *Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese orientali*. Bologna 1994, pp. 96—97; *Il matrimonio nel Codice dei canoni delle Chiese orientali*, pp. 156—160, 132.

practices of the region (can. 1067 § 2 of CIC/1917, can. 57 § 2 of the motu proprio *Crebrae allatae sunt* and can. 1072 of CIC/1983). The prudence regarding marriages of minors is clearly expressed by the prohibitions to pastors, to celebrate or to bless matrimonies of minors without previous permission of the local ordinary, when the parents are unaware or reasonably opposed (can. 1071 § 1, 4° of CIC/1983 and can. 789, 4° of CCEO).[29]

As we see, in the matter of matrimony are the possibilities of autonomous activities of minors very limited.

3. Protection in the procedural law

Minors are usually not quite able to know the law and to defend their rights; therefore, the canon law protects them in various ways which we want to describe briefly.

3.1. Capacity to act as a party in a trial

Generally, minors cannot act as a party (the petitioner or respondent) themselves, only through their parents, guardians, or curators (can. 1478 § 1 of CIC/1983, can. 1136 § 1 of CCEO).

There are two exceptions: first, in the case of conflict between the rights of a minor and the rights of the parents, guardians, or curators, according the deliberation of the judge — in such a case the judge appoints a new guardian or curator (can. 1478 § 2 of CIC/1983, can. 1136 § 2 of CCEO); second, in spiritual cases and those connected with spiritual matters — the minor with the use of reason can act (petition or respond) himself or herself and without the consent of their parents or guardian (can. 1478 § 3 of CIC/1983, can. 1136 § 3 of CCEO).[30]

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[29] *New commentary on the Code of Canon Law*, pp. 1645—1646; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 952—953.

[30] *New commentary on the Code of Canon Law*, pp. 1645—1646; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 661—663; *Il matrimonio nel Codice dei canoni delle Chiese orientali*, p. 132.

On the other hand, in a contentious trial which involves minors, the judge is to appoint *ex officio* a defender for a party who does not have one; the only exception is in marriage cases, where even the minor can act himself (can. 1481 § 3 of CIC/1983, can. 1139 § 3 of CCEO). If the defender (guardian, curator, or procurator) rescinds from that function, the trial is suspended in the meantime and the judge is to appoint another guardian or curator as soon as possible (can. 1519 of CIC/1983, can. 1200 of CCEO).[31]

3.2. Ability to stand as a witness

Generally, the minors can stand as witnesses in a trial only from the age of 14 years, but the judge can permit an exception, if he finds it expedient (can. 1550 § 1 of CIC/1983, can. 1231 of CCEO). By this limitation is protected the minor in of an early age.[32]

3.3. Advantage in the *restitutio in integrum*

For the reasons of peace, every use of legal remedy is limited by law. The time limitation of request for the *restitutio in integrum* is rather strict — there are peremptory terms, which do not run as long as the injured person is a minor (can. 1646 § 3 of CIC/1983, can. 1327 § 3 of CCEO). This provision of law gives an extraordinary protection for minors.[33]

[31] *New commentary on the Code of Canon Law*, pp. 1267—1271; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 956—957.

[32] *New commentary on the Code of Canon Law*, pp. 1678—1679; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 1029—1030.

[33] *New commentary on the Code of Canon Law*, p. 1747; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 1067—1068.

4. Protection in the penal law

The penal law has to regulate difficult situations connected with fall of a human being. It seems appropriate to protect minors in two directions: as perpetrators of criminal acts and as victims of such acts because of their generally lower level of discretion and because of their bigger vulnerability.

4.1. Reduction of the culpability

Regardless of general reasons of an exclusion of a reduction of culpability, there is taken into account the singular conditions of minors.

There are differences in the matter of an exclusion of the penal culpability between the Latin legislation and the Oriental one. According to the Latin code, minors below the age of 16 are totally excluded from penal culpability (can. 1323, 1° of CIC/1983), in the Oriental code this limit is set lower: only 14 years of age (can. 1413 § 1 of CCEO).

Mostly similar is the regulation concerning the reduction of the penal culpability: for each criminally liable person under the age of 18 years, the penalty established by law or precept must be tempered or a penance should be employed in its place (can. 1324 § 1, 4° of CIC/1983, can. 1413 § 2 of CCEO). Because of lack of *latae sententiae* penalties in the Oriental canon tradition, only the Latin legislation excludes minors from the *latae sententiae* penalties (can. 1324 § 2 of CIC/1983).[34]

4.2. Protection in the area of offences against morality

Each offence against morality causes a notable wound for its victim, all the more for young persons, *a fortiori* for minors.

[34] *New commentary on the Code of Canon Law*, pp. 1542—1543; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 1117—1118.

4.2.1. In the Codes

Minors are protected by the penal law in the cases of offences against morality *expressis verbis* only if the perpetrator is a clergyman. There are four different bodies of the crime: the first is concubinage (can. 1395 § 1 of CIC/1983, can. 1453 § 1 of CCEO), the second is another external sin against the Sixth Commandment of the Decalogue (can. 1395 § 1 of CIC/1983, can. 1453 § 1 of CCEO), the third is another offense committed against the Sixth Commandment of the Decalogue with a minor below the age of 16 years (can. 1395 § 2 of CIC/1983, it is not regulated by CCEO), and the fourth is the solicitation of a penitent to sin against the Sixth Commandment of the Decalogue in the act, on the occasion, or under the pretext of confession (can. 1387 of CIC/1983, can. 1458 of CCEO).[35]

In the Latin penal law, other crimes against morality could be punished on the basis of the general norms — can. 1399 of CIC/1983, but such a norm lacks from the CCEO.[36]

4.2.2. In the legislation regarding *graviora delicta*

The Pope Saint John Paul II promulgated in 2001 very important norm of canon law: motu proprio *Sacramentorum sanctitatis tutela*, which finally regulates the matter of crimes reserved to the Congregation for the Doctrine of the Faith (cf. can. 1362 of CIC/1983 and can. 1152 of CCEO). One of decisive reasons for this legislation was the scandal caused by cases of sexual abuses of minors committed by Catholic clergymen. The very penal legislation is to be found in the subsequent document of the Congregation for the Doctrine of the Faith *Epistula a Congregatione pro Doctrina Fidei missa ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas interesse habentes: De gravioribus delictis eidem Congregationi pro Doctrina Fidei reservatis* (hereinafter *Normae de gravioribus delictis*) a few days later. The norms were amended in 2010 by a similar document *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis*.

[35] *New commentary on the Code of Canon Law*, pp. 1598—1601, 1591—1592; *Corpus iuris canonici II*, *Commento* al *Codice dei canoni delle Chiese Orientali*, pp. 1144—1145, 1147.

[36] J. Dvořáček: *Východní kanonické právo. Úvod do studia…*, p. 139.

This legislation brings very important changes:

- There is changed the age of a victim in the case another offense committed against the Sixth Commandment of the Decalogue with a minor from 16 to 18 years, therefore the new legislation covers the entire age of the minor (cf. can. 1395 § 2 of CIC/1983).
- The above-mentioned body of the crime is extended to the Eastern Catholic Churches too, with the same obligation.
- In the amended *Normae de gravioribus delictis* from 2010 there is defined a new crime, the child pornography: the acquisition, possession, or distribution by a cleric of pornographic images of minors "under the age of fourteen," for purposes of sexual gratification, by whatever means or using whatever technology (Art. 6 § 1, 2°).
- In a case of all such crimes, an ordinary or a hierarch has to manage the preliminary investigation. If the result thereof is not negative, he is obliged to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the ordinary or hierarch how to proceed further, with due regard, however, for the right to appeal, if the case warrants, against a sentence of the first instance only to the Supreme Tribunal of the very same Congregation (Art. 16).
- In 2011, the above-mentioned congregation sent a letter to all ordinaries and hierarchs imposing to all conferences of bishops the elaboration of guidelines for dealing with cases of sexual abuses of minors perpetrated by clerics until May 2012, which have to be recognised by the same congregation. The guidelines have to contain not only norms for investigation of the sexual abuses in due collaboration with civil authorities, but also (and above all) norms for an effective prevention of such crimes.

We can conclude that by this way the legislation for the protection of minors in the penal law achieved in the Catholic Church a very high level.

Conclusions

The analysis of the evolution of the concept of a minor in the canon law in the 20th century leads to three interesting conclusions: (1) the age of minors was reduced from 21 years in the legislation before the Second Vatican Council to 18 years in the legislation after the said council; (2) the age of adulthood is now equal for the entire Catholic Church in the current legislation; (3) there is no more a legal definition of the age of

adulthood in the current legislation, but the analysis of other norms of the canon law shows so lucidly the importance of the limit of 14 years of age, that this limits works practically as the age of adulthood.

The protection of minors includes two different matters: the direct protection (especially in the penal law), and the indirect one, the guarantee of the capacity of an autonomous action by minors.

The autonomous action can be stated by the divine law, or by the canon law. The canonical regulation of such action in the area of the personal status is clearly founded on the basis of the divine law. The regulation in the area of sacramental life is founded on the divine law, but the details are regulated merely by the ecclesiastical laws. And last but not least, the regulation in the procedural law is regulated only by ecclesiastical laws.

The direct protection of minors is regulated partly in the procedural law, above all the protection of spiritual goods and in the situation of a conflict of interests between minors and their guardians, curators or procurators, and also by an advantage in the *restitutio in integrum*. The most important part of the direct protection consists in the regulation in the penal law: the reduction of the culpability for minors and the special guarding in the area of *graviora delicta*, particularly in the area of crimes against morality, where the recent legislation guarantees very high level of the protection. Besides its basis in the divine law, all this norms (in the procedural law and in the penal law) are merely ecclesiastical law.

The legal protection of minors cannot be ever perfect, and therefore it has to be developed continuously. On the other hand, the means of the current canon law (including norms of the divine law and of the merely ecclesiastical law) create a solid basis for an effective protection of minors.

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Damián Němec

Protection of Minors in the Current Canon Law

Summary

Outgoing from a short analysis of the conception of minors, adults and persons of major age in the canon law in the 20th century, the author presents two ways of the protection of minors in the current canon law: the guarantee of their autonomous actions (personal status, cooperation with pastors of the Church, law of sacraments) and the very protection of their rights above all in the procedural law and in the penal law. Withal the author tries to identify to what degree this regulation has its fundament in the divine law or in the merely ecclesiastical law.

Damián Němec

La protection des mineurs dans le droit ecclésiastique contemporain

Résumé

En commençant par une courte analyse de la notion de personnes mineures, adultes et majeures dans le droit canonique du XXe siècle, l'auteur présente deux moyens de protéger les mineurs dans le droit canonique contemporain : garantie de leur fonctionnement autonome (statut personnel, coopération avec les prêtres, activité sacramentelle) et protection des droits des mineurs avant tout dans le droit formel et pénal, tout en précisant à quel point cette réglementation base sur le droit divin et à quel sur le droit purement ecclésiastique.

Mots clés : théologie, droit canonique, protection du droit, autonomie juridique, personne physique, mineurs, adultes, majeurs, droits des personnes, droit aux sacrements, droit pénal, droit formel

Damián Němec

La tutela dei minorenni nel diritto canonico contemporaneo

Sommario

Iniziando da una breve analisi del concetto delle persone minorenni, adulte e maggiorenni nel diritto canonico del XX secolo, l'Autore presenta due modi di tutelare i minorenni nel diritto canonico contemporaneo: la garanzia della loro azione autonoma (status personale, collaborazione con i sacerdoti, attività sacramentale) e la tutela stessa dei diritti dei minorenni soprattutto nel diritto processuale e penale, precisando quanto tale regolamentazione si basi sul diritto di Dio o sul diritto puramente ecclesiastico.

Parole chiave: teologia, diritto canonico, tutela giuridica, autonomia giuridica, persona fisica, minorenni, adulti, maggiorenni, diritti personali, diritto dei sacramenti, diritto penale, diritto processuale

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The Sacrament of Confirmation: From Being Educated in Faith to Christian Maturity

Keywords: confirmation, sacraments, Catholic Church, Eastern Churches, catechesis, canon law

1. Historical remarks — between Christian East and West

The Zwinger gallery in Dresden exhibits a pictorial cycle entitled *Seven Sacraments* by a Bolognese painter Giuseppe Maria Crespi (1665—1747). In his *Confirmation*, we may notice a remarkable difference to today's practice of conferring the sacrament: the bishop does not anoint an adolescent, but a small boy. What change has come about in the understanding of the sacrament of Confirmation in the meantime?

Eastern Christianity kept the immediate succession of Baptism and Confirmation even after the gradual transition to massive christenings of newborns. The Orthodox Church still feels bound by the call for smearing the Myron just after the Baptism as we find it in can. 48 of the Council of Laodicea (363): "It is appropriate for the illuminated to be anointed with heavenly unction and thus become participants in the Kingdom of God."[1] The West, however, began to separate Baptism and Confirmation,

[1] *Pravidla všeobecných a místních sněmů i sv. otců pravoslavné církve* [The Rules of General and Local Councils and Holy Fathers of the Orthodox Church]. Pravoslavná církev v Československu 1955, p. 95.

and this process was completed in the High Middle Ages. What is more, the more rationally oriented notion of the sacraments in the West presupposed a conscious receiving of the sacrament of Confirmation and the Eucharist on the basis of elementary understanding of their significance. The problem of the expected age became the indicator for understanding the disposition for receiving Confirmation, both on the personal and spiritual levels.[2]

Baptism itself — partly due to high infant mortality — was to be conferred as soon as possible (*quam primum*). Confirmation then went to be understood in a more ecclesiological sense, as an expression of personal bond between the bishop and the community of the faithful. Therefore, the bishop effectively became the exclusive conferrer of the sacrament, as it was established by the Council of Trent during its 7th session in 1547: "If any one saith, that the ordinary minister of holy Confirmation is not the bishop alone, but any simple priest soever; let him be anathema."[3] As regards the conferrer, the Catholic Church respects the practice of Confirmation in the Eastern churches *sui iuris*, since they are hierarchically united with the Apostolic see. This is confirmed in can. 694 of the CCEO: "According to the tradition of the Eastern Churches, Chrismation with holy myron is administrated by a presbyter either in conjunction with Baptism or separately." The same Code in can. 695 §1 also prefers the immediate time succession of conferring Confirmation after Baptism: "Chrismation with holy myron must be administered in conjunction with Baptism, except in a case of true necessity, in which case, however, it is to be seen that it is administered as soon as possible."

In the West, the requirement of elementary rational cognition gradually played a more important role. Therefore, in can. 788 of the first Code of Canon Law, CIC/1917, we find the practice of confirming infants only as an exception to the rule: "Although the administration of the sacrament of Confirmation in the Latin church is conveniently deferred until about the age of 7 years, nevertheless, it can be conferred earlier, if an infant is faced with the danger of death or there appear to the minister grave and just causes (*ob iustas et graves causas*) to expedite it." The age

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[2] "By the 13th century, the practice of conferring the sacrament of Confirmation to the baptised, which were trained in faith after their reasoning had matured, had been established in the Western church. This practice is advantageous in that the sacrament is more revered and thus more beneficial for the recipient when he is more ready for it." R. Špaček: *Katolická věrouka. Díl III. — Kniha V.—VII.: O milosti, svátostech a dokonání* [Doctrine of the Catholic church, Volume III, Book V-VII: On Grace, Sacraments and the Fulfillement]. Praha 1922, p. 265.

[3] Sessio VII, *Decretum primum [De sacramentis]*, *Canones de sacramento Confirmationis* 3. In: *Conciliorum Oecumenicorum Decreta*. Bologna 2002, p. 686.

of 7 was first fixed by the Roman Catechism published after the Council of Trent (1566).[4] The canonical jurisprudence later specified that the sacrament of Confirmation "may be conferred earlier, in danger of death or there appear other grave causes, which the conferrer should take into account according to Canon 788, for instance if the parents travel to countries where Confirmation is only seldom conferred."[5] As for the permissibility of conferring the sacrament according to can. 786 (in the new Code of Canon Law the corresponding canon is 889 §2, CIC/1983), it was required that the confirmee "be in the state of grace and if he or she can use reason, sufficient instruction should be provided." The then practice was, nevertheless, critically reviewed.[6]

2. The problem of instructing the confirmees within recent canon law

The new Code of the Latin church in can. 891 refrains from stating the age of the confirmee to about the age of 7 and uses a more general formulation: "The sacrament of Confirmation is to be conferred on the faithful at about the age of discretion (*circa aetatem discretionis*) unless the conference of bishops has determined another age, or there is danger of death, or in the judgment of the minister a grave cause suggests otherwise." Thanks to the modification of the different bishops' conferences or the bishops of individual dioceses, the development moved in the direction of raising the age of the confirmees. The relevant norms of the Archbishopric of Prague give reasons for the age of 14 with proper pastoral intentions: "The preparation for Confirmation is a relatively significant occasion to help an adolescent to move from child's faith to the faith of an adult. It is just as important for him or her to encounter topics, for

[4] *Catechismus Romanus*, Pars II, c. 3, n. 8.

[5] M. Leitner: *Handbuch des katholischen Kirchenrechts. Auf Grund des neuen Kodex vom 28. Juni 1917. Vierte Lieferung. Sakramente*. Regensburg 1924, p. 69.

[6] "The child was baptised soon after birth. At about seven years of age, it privately received the First Communion and was confirmed generally prior to the age of ten or twelve. This was done hurriedly, if not secretly. This lamentable practice had various reasons. Because the Confirmation was usually administered by the bishop and the solemn First Communion took place between Easter and the summer holidays, bishop's visits were rescheduled to weekdays and periods, in which it was impossible for the parish community to gather." P. Eicher (Ed.): *Neue Summe Theologie. 3 — Der Dienst der Gemeinde*. Freiburg in Breisgau 1989, p. 271.

example choosing the state of life or finding his or her own place and task in the Church. The goal of the preparation for the sacrament of Confirmation is that the believer starts living his or her faith out of his or her own volition and accept Jesus Christ consciously as the Lord of his life."[7]

This understanding of the sacrament of Confirmation somewhat shifts the theological aspect of the grace efficacy for newborns or children who have attained the age of discretion, and becomes a pastoral means of addressing especially the youth. Within the framework of a "popular church" (*Volkskirche*), however, this educational goal can miss its target, as any preparation for the sacraments of initiation.[8] Of course, the decisive moment is the authenticity of religious practice and spiritual life of their parents.[9] The effort of some pastors to secure the fulfilment of the duty to be present at the Eucharistic celebration and to receive sacraments by issuing a special "Confirmation certificate" where the pastor signs the confirmee's presence at masses and sacraments of reconciliation is thus often an idle enterprise.

In fact, already the pedagogical method of Saint John Bosco refused such forced sacramental life.[10] Nevertheless, we still see efforts to justify

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[7] "Směrnice pro udílení svátostí v Arcidiecézi pražské [Guidelines for conferring sacraments in the Archbishopric of Prague]." In: *Sbírka právních norem Arcidiecéze pražské z let 1945—2009* [The Collection of Legal Norms in the Archbishopric of Prague in 1945—2009]. Ed. M. Kolářová. Praha 2009, pp. 87—106; pp. 94—95

[8] "The consequence is a troubling phenomenon: the initiation catechesis (which is to introduce a person into an autonomous and regular sacramental life), in fact, does not introduce, but paradoxically rather closes. In other words: for a lot of children who receive the first sacrament of reconciliation or the First Communion is this act (for a long time, if not for the rest of their life) the final one. Similarly, the sacrament of Confirmation is by many youngsters now taken to be the symbolic full stop to the hitherto religious practicing, and for some of them, actually, a ceremonial farewell to the life of faith." E. Alberich, L. Dřímal: *Katechetika* [Catechesis]. Praha 2008, p. 18.

[9] "A great number of parents who want their children to attend preparation for sacraments are used to receive sacraments as a 'conscious habit', which is perceived as a 'duty'. In these families and in those that lack even such motivations, children soon abandon sacramental practice." R. Mezulánik: "Výchova nebo vzdělání? — praktické zkušenosti s katechezí v ČR [Education or Learning? Practical Experiences from Catechesis in the Czech Republic]." In: *Školská a mimoškolská katechéza v európskej edukačnej štruktúre* [Catechesis at School and Outside School in the European Educational Structure]. Eds. M. Petro, G. Paľa. Prešov 2008, pp. 48—69, p. 56.

[10] "At one of the conferences in Paris, he declared that 'education is based on two principles: to be always kind and to have a chapel always opened where an easy access to the confession and communion is secured' [...] In this respect, don Bosco was a son of his period, i.e., post-Tridentine Catholicism, where sacraments were understood instrumentally. On the other hand, since he put emphasis on freedom in relation to receiving the sacraments, we can gather that he was aware of the danger of formalism in sacramental life: 'Never force young people to receive sacraments, but often encourage

the control over regular sacramental life of the confirmees, if this practice becomes the basis for further catechetical and experiential training.[11] Traditionalist Catholic spirituality is inclined to stress lower age for the confirmees and suspects the contemporary practice of insufficient trust in the efficacy of the sacramental grace and of an effort to emulate the practice of Confirmation in reformed churches: “The presently promoted late Confirmation at the age of civil adulthood is more or less a return to protestantising Jansenism […]. The emphasis is put on the conscious confessing of one’s religion. The meaning of the sacrament, however, is not pronouncing your confession, but receiving grace via the sacramental sign.”[12] The complaint of jansenistic inspiration evokes an excessive stress on the performance of the confirmees who will still feel unfit and will keep postponing the preparation for the sacrament. Their parents may, in fact, even support this kind of attitude. The Code of Canon Law, however, explicitly talks about confirmees as “children” (can. 777, 2°). One of the important duties of the parish priest is to take care “that through catechetical instruction imparted for an appropriate period of time children (*pueri*) are prepared properly for the first reception of the sacraments of penance and the Most Holy Eucharist and for the sacrament of Confirmation.” Nevertheless, in can. 890 the Code makes clear that the obligation of the parents in this respect is primary, that is before parish priests or pastors. The parents should make sure that “the faithful are properly instructed to receive the sacrament and come to it at the appropriate time.” This is one of the practical consequences of the basic responsibility of the parents, found in can. 226 § 2: “Since they have given life to their children, parents have a most grave obligation and possess the right to educate them. Therefore, it is for Christian parents particularly to take care of the Christian education of their children according to the doctrine handed on by the Church.”

them and make it possible for them to receive the sacraments everywhere and readily’.” L. Dřímal: *Preventivní systém Dona Boska* [The Preventive System of Don Bosco]. Olomouc 2013, p. 27.

[11] “In this respect, Sunday mass attendance and regular confession are particularly stressed (and sometimes even controlled), since the young often lack liturgical practice and spiritual experience. In many parishes the preparation for receiving the sacrament of Confirmation includes weekend sojourns for small groups. During these sojourns the young and their animators can deepen their mutual relationship. This helps to accommodate the building of an easier and more personal relationship with the Lord.” M. Poláková: “Mimoškolská katechéza v príprave na sviatosť birmovania [Catechesis outside school].” In: *Školská a mimoškolská katechéza…*, Eds. M. Petro, G. Paľa, pp. 194—205, p. 196.

[12] T. Stritzko: “Vhodný věk pro biřmování [Suitable age for Confirmation].” *Te Deum* 1/12, p. 19.

The Confirmation preparation of young people must not also be oriented too intellectually, that is, in such a way as to excessively stress the catechetical nature of the instruction: "This formation should not be simply intellectual and doctrinal as it is at school, but it should be more based on experience. It should incorporate the whole path of the youngster's conversion and faith and cement all the human and religious experience from the life in the church community. The confirmees could be prevented from certain decadent experiences during the period after being confirmees, or such experiences might be reduced, if they found a lively community, into which they could organically integrate and apply their charismas and take on various services: in short, a parish organized into a small apostolic community."[13]

3. The impact of Protestant practice and the appropriate order of initiation sacraments

The Protestant conception of Confirmation was preceded by Erasmus's idea of renewal of the Baptismal vows.[14] The Reformation, however, refuted the sacramental character of Confirmation.[15] The meaning of such non-sacramental Confirmation in the reformed tradition is aptly expressed in Komenský's *Confession of the Brethern*: "We hold this as an absolutely necessary matter for baptised children when they achieve the age of discretion, that their Baptism should be renewed in their minds and serve to its truth, that is that the Christian faith (without which Baptism

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[13] P. Giglioni: *Svátosti Krista a církve* [Sacraments of Christ and the Church]. Kostelní Vydří 1996, p. 77.

[14] "In 1522 Erasmus of Rotterdam proposed to provide religious instruction to children baptised as infants and to pass a test after whose completion they would renew their Baptismal vows. The proposal was first accepted by Zwingli." P. Mikluščák: *Teológia sviatostí I.* [Sacramental Theology I.]. Spišská kapitula — Spišské Podhradie 1995, p. 68.

[15] "Confirmation is a free creation of the Christian community, and so it is not instituted forever. The theological understanding of Confirmation is determined especially by its association with Baptism and the Lord's Supper. According to the evangelical conception, Confirmation does not complete Baptism and it also does not mediate any subsequent grace. Rather, Confirmation is the reminder of Baptism, intercession and an act of blessing in a particular phase of life on the basis of Gospel assurance." G. Adam: "Konfirmandenunterricht [Instructing the Confirmees]." In: *Handbuch religionspädagogischer Grundbegriffe*. Eds. G. Bitter, G. Miller. München 1986, pp. 208—213, p. 213.

is nullified) is to be diligently taught and instructed in order to understand the mystery of Baptism (which they received in their infancy). Their faith should be confessed with their own mouths before the church of God and they should voluntarily declare to keep the covenant with God at Baptism and thus sanctify themselves in it, and the obligation of their sanctification (which firstly came through their parents and godfathers) they should renew. This takes place among us at the time when they are to be allowed to access the table by laying hands on them (visibly before the church). Thus they are confirmed in God's grace and the growth of their Christianity."[16] It is clear that the reformed practice kept the gesture of laying hands and, what is more, Confirmation is usually the condition under which one is admitted to the Lord's table, often in a ceremony that follows immediately after that: "Confirmation is thus conjoined with the first receiving of the Lord's Supper."[17] The Czech situation prior to 1989 was specific, because the state administratively complicated the opportunities to teach religious education. However, the Evangelical Church of the Brethren (Českobratrská církev evangelická) organized biblical lessons for the confirmed, which practically substituted religious education for the adolescents, without parents having to enrol their children into such classes under ignominious conditions.

The Catholic Church has always been aware of the priorities in conferring the sacrament of Confirmation to the sacrament of the Eucharist, even though this order has not always and everywhere been kept. This is attested in the *Abrogata* letter of Pope Leo XIII addressed to the archbishop of Marseille (1897), in which the Pope enthusiastically approves of (*laudamus cummaxime*) the archbishop's decision to abolish the local custom of conferring Confirmation to children after the First Communion.[18] Given the situation today, the prior receiving of the communion as opposed to Confirmation leads to major doubts: "First of all, we need to rethink the relation between Baptism and the First Communion. Is it not somehow strange that 12-year-olds are not fit to receive Confirmation while 8-year-olds are ready to receive the Eucharist? This discrepancy practically turns the original succession of the sacraments of initia-

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[16] "Bratrské vyznání [Confession of Brethern]," čl. 12,6 — in: *Čtyři vyznání. Vyznání augsburské, bratrské, helvetské a české se čtyřmi vyznáními staré církve a se čtyřmi články pražskými* [Four Confessions. Augsburg Confession, Confession of Brethern, Helvetic and Bohemian Confession with Four Confessions of the Old Church and Four Articles of Prague]. Praha 1951, pp. 156—157.

[17] J. Filo: *Ekumenický dialóg medzi rím. - katolíkmi a ev. - luteránmi* [Ecumenical Dialogue Between Roman Catholics and the Lutherans]. Prešov 1997, p. 107.

[18] F.M. Cappello: *Tractatus canonico-moralis de sacramentis. Vol I. — De sacramentis in genere, de Baptismo, Confirmatione et Eucharistia*. Romae 1938, pp. 191—192.

tion (Baptism-Confirmation-the Eucharist according to can. 842 §1) on its head, but also overestimates Confirmation while underestimating the Eucharist."[19]

The reversal of the order of conferring the sacrament of Confirmation and the Eucharist could not be stopped even by the decree *Quam singulari*, issued by the Sacred Congregation for the Sacraments under the pontificate of Pope Pius X in 1910. For the First Communion the decree interpreted the age of discretion to be "around seven years of age." Requirements of age and reasoning for the confirmees and those that receive the First Communion are practically identical. The 1917 Code again confirmed "convenient postponing of conferring the sacrament of Confirmation to approximately seven years of age." Post-conciliar development of raising the age of the confirmees was later accelerated by the apostolic constitution of Paul VI *Divinae consortium naturae* (1971), which serves as a preface for the new adaptation of the ceremonies of Confirmation for the Latin Church[20]: "Confirmation of children in the Latin church is generally postponed to the age of about seven years. From pastoral reasons, especially to instruct the faithful to live in full obedience to Christ the Lord and give courageous witness, the ordinaries may collectively decide for an age which seems more appropriate to them. It means to confer this sacrament, after proper preparation, at a mature age."[21]

The Catechism of the Catholic Church wants to somewhat muffle the consequences of postponing the age of the confirmees: "Although Confirmation is sometimes called the sacrament of Christian maturity, we must not confuse adult faith with the adult age of natural growth, nor forget that the Baptismal grace is a grace of free, unmerited election and does not need ratification to become effective."[22] In relation to this, one may remember the argumentation of Saint Thomas Aquinas: "Age of body does not determine age of soul. Even in childhood man can attain spiritual maturity: as the book of Wisdom (4,8) says: For old age is not honoured for length of time, or measured by number of years. Many children, through the strength of the Holy Spirit they have received, have bravely fought for Christ even to the shedding of their blood."[23]

[19] S. Demel: *Handbuch Kirchenrecht. Grundbegriffe für Studium und Praxis*. Freiburg im Breisgau, p. 227.

[20] *Acta Apostolicae Sedis* 63, pp. 657—664.

[21] *Praenotanda* n. 11.

[22] CCC 1308.

[23] *Summa theologiae* III, 72,5 — ad 2.

4. Conclusion: The need for a systematic catechesis

Especially in relation to changing the order of conferring the sacraments of initiation, the flattening of the meaning of Confirmation as a means of doing catechesis lacks theological basis.[24] It is more important not to reduce the catechesis to an instrument for receiving this sacrament or another, but accompany the whole Christian life where the faith is born and consolidated: "For whether people really want to receive the sacrament in the sense, in which the church understands itself, will in the present situation be more obvious after the ceremony, that is, in the degree of their willingness to follow Christ in his Church. Once this becomes clear also from the visible practice in the church, an intense catechesis pays, since it creates a real 'path' for the families in the interim between topical solemnities from Baptism, First Communion and Confirmation to marriage, a path along which the Church accompanies them. Without this accompanying along the path of catechesis prior to the ceremony, we can hardly expect more than the school instruction in mathematics brings to someone who needs to pass the school-leaving-exam. Once it is done, the student is happy that it can freely be thoroughly forgotten."[25]

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[24] "Narrow relations sometimes created between catechetical programmes and conferring of the sacraments show that all of the interest lies on the side of catechesis and also that the question of the Confirmation age is not identical with the problem of Christian formation of the youth. It seems as if the bishops often did not avoid the danger of mixing a broad and complex problem of doctrinal and moral formation of young Christians with the question of personal disposition allowing a fruitful receiving of the sacrament of Confirmation. This is the reason why the theological reflection of the bishops on the one hand and the decisions taken over the sacramental practice on the other lack coherence […]. Mere fixing of the age, whatever it is, cannot solve the grave difficulties of contemporary pastoral work, especially in relation to the young." B. Mohelník: *Pečeť daru Ducha svatého. Teologie svátosti biřmování* [The Seal of the Holy Spirit. The Theology of the Sacrament of Confirmation]. Praha 2012, p. 79.

[25] M. Kehl: *Kam kráčí církev? Diagnóza doby* [Where is the Church headed? The time diagnosis]. Brno 2000, p. 104.

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The Sacrament of Confirmation: From Being Educated in Faith to Christian Maturity

Summary

While Eastern churches have kept the practice of Christian Antiquity, that is, to confirm immediately after conferring Baptism, the Western church gradually separated Confirmation and Baptism. Baptism was conferred short after the child's birth, while Confirmation came to be associated with the age of discretion. This development is also mirrored in contemporary codes of canon law in force: while the Code of Canons of the Eastern Churches prescribes the Chrismation immediately after Baptism, the (Western) Code of Canon Law presupposes for the candidates of Confirmation the age of discretion. However, particular legal norms of Bishops' Conferences raise the age of the confirmees in such a way that the preparation for this sacrament in fact substitutes catechesis for the adolescents. In this process, one overestimates the role of rational understanding and human maturity as opposed to the conditions used for the sacrament of the Eucharist, where the age for the First Communion is lower.

Stanislav Přibyl

Le sacrement de la confirmation : dès l'éducation dans l'ambiance de foi jusqu'à la maturité chrétienne

Résumé

Alors que les Églises orientales ont gardé l'ancienne pratique de l'Antiquité chrétienne (le sacrement de la confirmation était administré juste après celui du baptême), l'Église occidentale séparait progressivement le sacrement de la confirmation de celui du baptême. Le sacrement du baptême était administré le plus tôt possible (après la naissance de l'enfant) ; par contre, le sacrement de la confirmation a commencé à être associé à l'âge de discernement. Ce sont les codes du droit canonique en vigueur qui reflètent ce développement : tandis que le Code des canons des Églises orientales exige que la confirmation soit administrée directement après le baptême, le Code (latin) du droit canonique exige que les personnes accédant à la cérémonie de confirmation fassent usage de leur propre raison. Cependant, les normes particulières des conférences des évêques augmentent l'âge des personnes accédant au sacrement de la confirmation de façon que la préparation à ce sacrement substitue la catéchèse des adolescents. En l'occurrence, les exigences concernant la connaissance rationnelle et la maturité humaine sont haussées par rapport aux principes relatifs au fait de recevoir l'Eucharistie où l'âge des premiers communiants est plus bas.

Mots clés : confirmation, sacrements, Église catholique, Églises orientales, catéchèse, droit canonique

Stanislav Přibyl

Il sacramento della cresima: dall'educazione nella fede alla maturità cristiana

Sommario

Mentre le Chiese orientali mantennero la vecchia pratica dell'antichità cristiana di impartire il sacramento della cresima subito dopo il battesimo, la Chiesa occidentale separò gradualmente il sacramento della cresima dal sacramento del battesimo. Il sacramento del battesimo veniva impartito il più presto possibile dopo la nascita del bambino mentre il sacramento della cresima iniziò ad essere unito all'età del discernimento. I codici del diritto canonico vigenti attualmente riflettono tale sviluppo: mentre il Codice dei Canoni delle Chiese orientali impone che la Cresima venga impartita dopo il battesimo, il Codice di diritto canonico (latino) esige dai cresimati l'uso della ragione. Le norme dettagliate della conferenza episcopale aumentano tuttavia l'età dei cresimati al punto che la preparazione a questo sacramento sostituisce la catechesi degli adolescenti. In tale situazione viene accresciuto eccessivamente il requisito della cognizione razionale e della maturità umana in confronto ai principi di ricevimento dell'eucarestia dove l'età dei bambini che si accostano alla prima Comunione è più bassa.

Parole chiave: cresima, sacramenti, Chiesa cattolica, Chiese orientali, catechesi, diritto canonico

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The Right of the Child to Life and to Preserve His or Her Identity

Key words: the child's right to life, the child's right to identity, Convention on the Rights of the Child, the Polish legal order

In this article two rights of the child are juxtaposed: the right to life and the right to preserve his or her identity. The right to life is the foundation of all other rights which were formulated in the Convention on the Rights of the Child, adopted and opened for signature in 1989,[1] and each of them could be discussed in relation to the child's right to life. Adopting this stance, I will deal with both the mentioned rights and, at the same time, point out their mutual implications.

The subject of both the rights is a child, which term, as it is described by the Convention, means every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier.[2] The Convention does not define the beginning of childhood but only its conclusion. The question of the beginning of life and defining its subject as a child, is open to acknowledging that conception is such a moment. This does not rule out discussion about establishing a later time for the beginning of a person's life.

Considering the right to preserve one's identity will constitute the main subject of the present article since, as it turns out, the right to life and the life of a person during the prenatal period do not result in the right to preserve identity. On the other hand, the legal definition of per-

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[1] Convention on the Rights of the Child (November 20, 1989) — http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed 4.6.2014).

[2] Art. 1.

sonal identity shows there are some implications for the person's life before his or her birth. Therefore, the question that follows is: Does the child's right to life always result in his or her right to preserve identity?

From protection of the child to his or her rights

The first attempts at protecting the rights of the child on the ground of national legislation were made in Great Britain in 1819. Robert Owen, an activist of the socialist movement and pioneer of the cooperative movement, proposed a ban on employing small children in mines, factories and farming, which resulted in enacting a law called the Children Act in 1908. Subsequent acts protecting children were passed in Hungary (1901), France (1904) and Belgium (1912). In terms of their content they referred to social assistance for children, the character of which was philanthropic.

Next, attempts to protect the rights of the child, on an international scale, took on the form of tutelary activity. In 1920 in Geneva L'Union Internationale de Secours aux Enfants (UISE — International Save the Children Union) was founded. Its purpose was, among other things, the legal regulation of the child's rights on an international scale. The commitment of the Union led to the approval, by the League of Nations General Assembly on September 26, 1924, of the first international act protecting human rights, namely, the Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, in which five demands rather than laws were formulated as responsibilities of humankind towards the child.[3]

Concern for the rights of the child resulted in establishing, in 1922, the Association Internationale pour la protection de l'enfance. In the statutes of this Association, the protection of the child included improvement

[3] "By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva', men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed: 1. The child must be given the means requisite for its normal development, both materially and spiritually; 2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; 3. The child must be the first to receive relief in times of distress; 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; 5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men" — http://www.un-documents.net/gdrc1924.htm (accessed 4.6.2014).

of his or her social situation, being safeguarded against negative influences in educational environments, taking care of homeless and orphaned children and struggling with the signs of abnormalities in their development.[4] Next, the basic rights of the child were included in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, which states in Art. 25 clause 2: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” However, the Declaration of the Rights of the Child adopted by UN General Assembly in 1959 was the first to express and formulate clearly the fundamental principles concerning protection of the rights of the child. Declaration of the Rights of the Child pointed out that the child is an independent person with his or her own interests, needs and rights. Therefore, the child is not only the subject of care and attention but the subject of rights which should be respected.

Individual identity and its status

Identity is a notion which is meaningful for many theories in which the subject of research is the human being, community, citizen, nation or culture. Philosophical depiction of identity,[5] in which identity means “being the same person” and deals with defining “what existence is,” has a special meaning for the legal definition of the person. Both these dimensions emphasize unity of the person in an ontological sense (being the same person), the consequence of which is responsibility for his or her actions. Thus, the person not only has identity, which is determined

[4] Cf. art. 4, Dz. U. z 1929 r. Nr 49, poz. 403.

[5] Legal concept of identity might also be the subject of theological interest within theology of law. Pope John Paul II in *Letter to Families “Gratissimam sane”* wrote about identity using the following words: “This rich and meaningful formulation first of all confirms what is central to the identity of every man and every woman. This identity consists in the *capacity to live in truth and love*; even more, it consists in the need of truth and love as an essential dimension of the life of the person. Man’s need for truth and love opens him both to God and to creatures: it opens him to other people, to life ‘in communion’, and in particular to marriage and to the family. In the words of the Council, the ‘communion’ of persons is drawn in a certain sense from the mystery of the Trinitarian ‘We’, and therefore ‘conjugal communion’ also refers to this mystery. The family, which originates in the love of man and woman, ultimately derives from the mystery of God. This conforms to the innermost being of man and woman, to their innate and authentic dignity as persons” (no. 8b).

by the ability to think back and being aware of the actions whose perpetrator is one's true "self" (the unity of consciousness), as well as responsibility for one's deeds, but the person is identical as long as he or she is defined as a unity.[6] To describe the unity of a man, John Locke introduces the term of the person, pointing out that personal unity is the unity of a particular person, which is different from the sum of its parts.[7]

The concept of identity with reference to people forming national and international community, allows their individualization with a view to defining their status, including above all legal capacity and capacity for legal action. From this aspect legal individualization of the person is a requirement which results from respect for human dignity and, at the same time, determines the position of parties in legal relations. A set of traits that make human individualization possible is described as the identity of a natural person.[8] The identity of a natural person is established: (1) after the child's birth by drawing up a birth certificate, or (2) by pursuing the rights of marital status. Individual identity influences the definition of the legal status, which consists of: political status (citizenship), marital (family) status which indicates that an individual is a member of a particular family and personal status (first name, surname, age, sex, state of health).[9]

Developing the right of the child to preserve his or her identity

Recognizing the legal subjectivity of the child requires deciding on the criteria which determine it and allow for the personalization (individualization) of the subject of rights and responsibilities. The consequence of

[6] Cf. R. Ferber: *Podstawowe pojęcia filozoficzne*. Vol. 2. Kraków 2008, p. 81.

[7] Cf. J. Locke: *An Essay Concerning Human Understanding* [web edition published by eBooks@Adelaidev; https://ebooks.adelaide.edu.au/l/locke/john/l81u/index.html], (Polish trans. *Rozważania dotyczące rozumu ludzkiego*. Warszawa 1955), II, 27, 26.

[8] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z 7 grudnia 2007 r. *zmieniające rozporządzenie w sprawie szczegółowych zasad sporządzania aktów stanu cywilnego, sposobu prowadzenia ksiąg stanu cywilnego, ich kontroli, przechowania i zabezpieczenia oraz wzorów aktów stanu cywilnego, ich odpisów, zaświadczeń i protokołów* (Regulation of the Minister of the Interior and Administration passed on December 7, 2007 *amending the regulation concerning specific principles of drawing up and keeping civil registry records, their inspection, storage and security and standard forms of vital records, their copies, certificates and reports*), Dz.U. Nr 235, poz. 1732.

[9] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości w polskim porządku prawnym*. Warszawa 2013, p. 79.

individualization is the determination of specific rights and duties. Thus, the subject of law stops functioning as a quite unidentified part of the community. Personalization (individualization) of the person, whose foundation lies in the dignity of every human being proclaimed in the Universal Declaration of Human Rights, has significance for determining the legal status of the person together with the rights and responsibilities he or she is entitled to and allows for legal protection.

The first recommendations concerning personalization were made in the Declaration of the Rights of the Child adopted by UN General Assembly in 1959, where, for the first time, in Art. 3, there appeared the formulation of what was later known as the right of the child to preserve his or her identity, which was thus phrased: "the child shall be entitled from his birth to a name and a nationality."

Assuming this point of view, the European Court of Human Rights (formerly the European Commission of Human Rights), pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms drafted in 1950, on more than one occasion issued statements based on its Art. 8.1: "Everyone has the right of respect for his private and family life, his home and his correspondence." The right to respect for one's family life described in this article is not limited to the ties of blood, marriage or adoption, but comprises common and liberating laws, which aim at protecting one's privacy, including, among many other laws,[10] the law to find one's own identity.[11] The Tribunal expressed its opinion about the right to preserve one's identity while dealing with the issues of sex change, concluding that the surname is a means of personal identification and indicates family ties, so it concerns the private family life of an individual,[12] thus acknowledging the right of an adopted person to seek information which allows him or her to find their identity and live a stable private life.[13]

The necessity to identify a child was proclaimed by the United Nations General Assembly on December 16, 1966 in the International Covenant on Civil and Political Rights,[14] which, in article 24.2, contains the following expression: "Every child shall be registered immediately after birth

[10] The array of these rights is not a closed matter. It includes, for instance, the right of parents and their children to be in contact with each other, the right of parents to take a stand on the issue of their child's adoption, the right to live in the country of origin.

[11] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości...*, pp. 96—98.

[12] Cf. M.A. Nowicki: *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*. Warszawa 1998, p. 256.

[13] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości...*, p. 98.

[14] The Covenant was adopted by Poland in 1977 (Dz.U. Nr 38, poz. 167).

and shall be given a name" and "every child has the right to acquire a nationality" (24.3).

The right of the child to preserve identity, the scope of which was much broader, was formulated in the Convention on the Rights of the Child adopted by the UN General Assembly in 1989[15] in Art. 7[16] and in 8.[17]

The development of the right to preserve one's identity reflected in international documents beginning with the right of the child to identification through surname and citizenship (Declaration and International Covenant) acquired wider scope and was expressed in the right to have a first name, surname, citizenship and getting to know, in so far as it is possible, one's parents and family relations. The above expressions contain their aim, that is, the situation in which the child cannot function as a stateless person, thereby losing those rights connected with his or her citizenship. The purpose of ensuring the right to identity is for the protection of the rights of the child, which the state is obliged to restore.

In the above quoted documents the child's subjectivity was clearly emphasized and therefore he or she is entitled to have a birth certificate drawn up immediately after birth as well as to be given a surname and citizenship. The right to preserve one's identity has its foundations in the fundamental law, which is, in a constitutional sense, the right to life, that in turn belongs to the array of personal liberties and rights. It guarantees the possibility of taking advantage of other things that the child is entitled to, including the right to preserve identity. Referring to what was mentioned earlier in terms of the concept of identity, one can say that recognizing one's own life (I live by myself), that is "being the same person" is connected with the right to getting to know the one who lives and acts ("what existence is").

[15] Poland ratified the Convention in 1991 (Dz.U. Nr 120, poz. 526) and thus it became an element of the binding legal system.

[16] "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

[17] "1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

The content of the right of the child to preserve identity

The Convention on the Rights of the Child determines the child's identity in reference to the following categories: the child's first name and surname, citizenship, family relations or descent of the child. The identity of the child begins at the moment of making a civil registry record. A human being, by virtue of his or her dignity, has an inherent right to a record in those civil offices which reflect the truth concerning his natural origin. Acquiring civil status, the child acquires recognition through his or her identity. As a personal right, the child is subject to legal protection which constitutes the condition for pursuing one's rights.

Nevertheless, there are situations in which marital status is different from the actual one. In this case the legal status is more important. Yet, it does not exclude the possibility of pursuing the actual state. That is why, within the right of the child to preserve identity one can distinguish the right to (a) have one's own identity through drawing up a birth certificate according to the actual state, (b) establishing identity (the right to get to know one's parents), which was clearly stated in the Convention in Art. 7,5, and (c) and to protect that identity (Art. 8,1).

In the Polish legal order, regulations directly demanding personalization of the human being, do not exist. Indirectly, this gap was filled with the rules of the family and administrative law created while dealing with the system of binding regulations as a whole.[18] The legal doctrine which discusses the right to preserve one's identity also focuses mainly on the subjective right to find out the truth about it, using the term of biological identity, that is, the actual biological origin and not the genetic one.[19]

The right to maintain identity

Polish legislation, abiding by the statement of the Convention which prescribes immediate compilation of an appropriate birth certificate after the child's birth, does not allow situations in which a child would not possess one.[20] Polish law is explicit about the necessity of having a name

[18] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości…*, p. 89.

[19] Cf. Ibidem.

[20] The law on the certificates of personal status passed on September 29, 1986 (Art. 38, l) states that the birth of a child should be registered within 14 days from the day of birth.

and a surname.[21] Furthermore, the regulation concerning Polish citizenship appears to be sufficient because the child holds Polish citizenship from the moment of birth if at least one of his or her parents is a Polish citizen.

The right to establish one's own identity

The right to establish one's identity, which is connected with finding out about the descent of the parents, is much more complicated in Polish legislation. Determining the origin of parents is essential, since it conditions the existence of legal relations between the child and his or her parents. Hence establishing the descent of the parents is a pre-condition for the right to preserve identity. In this respect, the Convention in Art. 7,1 allows passing laws which can hinder or even make it impossible to exercise the right to get to know one's parents since it states "as far as possible."

Ratifying the Convention on September 30, 1991, in reference to the above article, Poland asserted that "the right of the adoptee to get to know his or her natural parents will be limited by legally binding solutions which allow adoptive parents to keep the child's descent a secret."[22] Confidentiality of adoption was juxtaposed with the right of the child to find out about his or her identity resulting from birth.

Another element which hinders establishment of identity resulting from birth is the issue concerning methods of assisted reproductive technology. The Polish Family and Guardianship Code introduced a method of assisted procreation by means of the so-called medical procedure, whose scope was not precisely defined.[23] In the doctrine this regulation is interpreted as the possibility of assisting reproduction in case of the husband's inability to conceive a child because of infertility (for example through heterologous artificial insemination). Interpretation arrived at only from a doctrinal perspective is likely to turn out to be insufficient, since a med-

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[21] It is guaranteed by the Family and Guardianship Code, Art. 72, 88, 89 and the regulations on the certificates of personal status (Art. 50. 1,2), which in article 40 specify personal details necessary to draw up the certificate of birth.

[22] Dz.U. Nr 120, poz. 526.

[23] "Zaprzeczenie ojcostwa nie jest dopuszczalne, jeżeli dziecko zostało poczęte w następstwie zabiegu medycznego, na który mąż matki wyraził zgodę" (Denying paternity is not permissible if the child was conceived as a consequence of a medical procedure which the mother's husband consented to), Art. 68.

ical procedure might be extended so that it becomes a method of procreation which ignores parents, that is, a human couple.[24] With the increasing number of conceptions made *in vitro* and due to the diversity of legal and genetic origin, the right of the child to preserve identity becomes especially significant.

The above problem is connected with the issue of determining the so-called natural origin, which according to Polish law and doctrine, is identified with biological (not genetic) origin, that is, descent of the child from parents, namely a human couple. The mentioned change in Art. 68 of the Family and Guardianship Code (Pol. Kodeks rodzinny i opiekuńczy — k. r. i o.) concerning the impossibility of denying paternity if the child was conceived as a consequence of a medical procedure which was accepted by the mother's husband shows that, in case of establishment of the child's marital status with regard to his or her father, the legislator gave priority to the genetic origin of the child over the biological one. When it comes to maternity, the legislator favoured biological origin stating that "the woman who gave birth to the child is the mother."[25] The marital status of the child is determined on the basis of the natural (biological) origin, namely from a human couple. As for the possibility of getting to know genetic origin with regard to fatherhood, it is only a relative establishment of the legal civil status. Polish legislation, when establishing the marital status favours biological origin, making a *iuris tantum* presumption. In this situation, however, the person does not lose the right to find out the truth about his or her birth and genetic father, which is rooted in his or her dignity since this right exists regardless of the knowledge of an individual about his or her descent. This situation also occurs in case of surrogate motherhood. The right to establish one's identity concerns biological origin and not genetic one. The existing right of the child to get to know his or her genetic origin means that one cannot regard concealing it for the child's sake as a good thing. This right is also based on personal liberty and human dignity.[26]

Modern methods of medical intervention with regard to the beginning of human life and bearing a child give rise to the impression that, as far as the right to establish identity is concerned, the category of genetic origin outweighs the biological one. However, in this situation there is a clash between the right to establish one's identity and the right of an anonymous donor of the genetic material, which leads to the negation of

[24] Cf. M. Andrzejewski: *Prawo rodzinne i opiekuńcze*. Warszawa 2004, p. 121.

[25] Cf. k.r.o. Art. 61.

[26] Cf. L. Stecki: "Prawo dziecka do poznania swego pochodzenia genetycznego (dwugłos)." *Państwo i Prawo* 1990, vol. 10, pp. 65—76.

the right to establish identity at its very core by the procedures of medically assisted procreation.

The right of the child to establish identity is also confirmed by Polish legislation in the case of "an infant unable to survive, born live, but had lived for less than 24 hours."[27] By live births we should understand "the total excreting or extracting of an infant from the mother's body, regardless of pregnancy duration, who after such excretion or extraction is breathing or shows signs of life, such as, heartbeat, the pulsating of the umbilical cord or distinct voluntary muscle contractions, no matter whether the umbilical cord was cut or the placental lining separated from the uterus of the mother."[28] An infant that was born live acquires legal status and becomes the subject of rights and responsibilities.

Individualization of the person by the drawing up of a birth certificate in accordance with natural origin is the content of the right to preserve identity. However, making such a registration is not always synonymous to this right. According to Polish legislation, there is the possibility of giving a name and a surname to the stillborn child by making a record in the Registry Office. Nevertheless, in this situation one cannot talk about the right of the child to preserve identity because it was stillborn and does not become a natural person in the legal sense. In compliance with the regulation issued by the Minister of Health on 21 December 2006, a health certificate may be drawn up upon the parents' request irrespective of pregnancy duration.[29] Issuing a health certificate by a medical facility is equal to the duty of drawing up a birth certificate in the Registry Office with an annotation that the child was stillborn. Yet, a death certificate cannot be issued if it is not possible to ascertain the presence of fetus tissue and determine the sex of the child. Lack of data concerning the sex of the child makes it impossible to choose a name and determine the inflection pattern of the surname and thereby issuing a birth certificate.

[27] Cf. art. 66 ust. 1 a.s.c.

[28] Załącznik do rozporządzenia Ministra Zdrowia z dnia 17 września 2004 r. nr 2 (The annex to the regulation issued by the Minister of Health on 17 September 2004), Dz.U. Nr 219, poz. 2230.

[29] Cf. § 1 ust. 2. pkt 1 rozporządzenia Ministra Zdrowia z dnia 21 grudnia 2006 r. *zmieniającego rozporządzenie w sprawie wzoru karty zgonu oraz sposobu jej wypełniania* (§ 1 p. 2 p. 2 of the Regulation of The Minister of Health of 21 December 2006 *amending the regulation concerning death certificate and the way it should be filled in*), Dz.U. z 2007 r. Nr 1, poz. 9.

The right to protect identity

A form of the right to identity is the right to preserve it, "including citizenship, surname, family relations," which is stated in Art. 8, section 1 of the Convention. The degree of protection of this right is as important as the one to establish identity. With regard to preserving citizenship, the Polish Constitution states that "a Polish citizen cannot lose Polish citizenship unless he or she renounces it" (Art. 34,2). When it comes to minors who remain in the exclusive custody of a person or persons who do not have Polish citizenship, renouncing it occurs upon the request of his or her legal representatives."[30]

Examples of state legislation prove that legal protection of the right to preserve identity stands in contradiction to the international law acknowledging the right to get to know one's identity. This situation occurs in the case of the law of the adopted child to get to know his or her parents. This possibility is expressed in the phrasing of Art. 7, section 1 of the Convention, in which the statement "if it is possible" was added. Poland, making a stipulation to Art. 7 of the Convention, limited the right of the adopted child to get to know his or her biological parents by "legally binding solutions allowing adoptive parents to keep the child's descent secret." Adoption, whose aim is the child's good, understood as ensuring him or her proper upbringing in a family, deprives the child of his or her former identity. Such a possibility, with the decreed right of the child to identity, was provided for by the Convention in no. 8.1. It states that actions aiming at maintaining identity must be taken in compliance with the law. The institution of adoption functioning in Polish law provides for the possibility of changing the child's identity. In an artificial way, adoption creates a new relationship, on the basis of which a new legal relation within the family develops, as the equivalent of a natural family relation. In case of exploiting solutions which forbid finding out about one's natural origin, which is connected with the loss of the former name and surname, the basic right to preserve identity is negated.[31] Different forms of adoption determine the maintaining of certain elements defining the identity of the person.[32] The act, issued on September 11, 1956 Law on

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[30] Art. 47, ust. 2 Ustawy z dnia 2 kwietnia 2009 r., *o obywatelstwie polskim* (Art. 47, 2 of the act of 2 April 2009 *on Polish citizenship*), Dz. U. z 2012 r., poz. 161.

[31] The sources of such action can be found in the idea of anonymity, whose full form was provided in the European Convention on the Adoption of Children of 1967, Dz.U. z 1999 r., Nr. 99, poz. 1157.

[32] Partial adoption results only in a relation between an adoptive parent and an adoptee and in the future his or her lineal descendants. Complete adoption results in

Acts of Civil Status (Pol. Prawo o aktach stanu cywilnego — a.s.c.[33]), introduced the substitution of names and surnames of the adoptee in favour of the surname of the adoptive parents, with the possibility of getting to know personal data of adoptive parents in the short-form copies of these acts. Thereby, educational and social considerations were given priority over the postulate of objective truth of entries on birth certificates. If adoption is dissolved, the adoptee gains the right to get to know his or her biological parents. He or she has not this right in case of complete adoption if a new birth certificate was drawn up for the adoptee with the possibility of putting down new and complete personal data of the child as well as the personal data of adoptive parents as parents.[34] Thus, the child gains a new identity and a new origin, which permanently breaks the ties with biological parents. In the event of complete adoption there is a possibility of including adoptive parents as the child's parents in the short copies of the birth certificate. In the complete certificate there is an annotation about adoption and natural parents. The other possibility includes drawing up a new birth certificate upon the request of the adoptive parents. However, the previous certificate is not revealed and its copies are not issued. Only the amendment to the regulation on acts of civil status of 1995 introduced the right of an adoptee, who attained majority, to have access to the original birth certificate revealing his or her natural origin, although it can differ from the actual (genetic) one.[35]

Gaining a new identity as a consequence of adoption by drawing up a new birth certificate or making an entry in the already existing one, does not result in the loss of the former civil status and the possibility of pursuing its rights, including establishing or denying natural origin. The fact of adoption only breaks the legal bond which does not influence the existing natural ties. The prohibition on pursuing the rights of civil status concerns only a complete adoptee[36], which, as a consequence, leads to the total lack of the possibility of pursuing it.[37]

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mutual rights and responsibilities between an adoptee and the relatives of an adoptive parent and ceasing of rights and responsibilities between the child and his or her relatives. Complete adoption which cannot be dissolved on the basis of consent to adoption (giving the child up to be adopted by an unknown person in the future) signed by parents who decide to put their child up for adoption. Cf. E. Holewińska-Łapińska: "Przysposobienie." In: *Wielka Encyklopedia Prawa*. Warszawa 2000, pp. 820—822.

[33] Dz.U. Nr 141, poz. 189.

[34] Cf. J. Ignatowicz: "Tajemnica przysposobienia w ujęciu prawa o aktach stanu cywilnego z 29 września 1986 r." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1987, vol. 2, p. 2.

[35] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości…*, p. 251.

[36] Art. 124 k.r.o.

[37] Cf. H. Pietrzak: *Prawo do ustalenia tożsamości…*, pp. 262—264.

The loss of the right to preserve identity by covering up the tracks of the actual origin, results in depriving the person of that right, but at the same time gives rise to the right to preserve the new identity which is the consequence of adoption. Evaluation of the institution of adoption functioning in the Polish legal order leads to the conclusion that protection of biological and adoptive parents` interest has an advantage over the protection of the child's interest, although it is justified with the latter. According to international legislation, based on acknowledging human dignity and basic rights, including the right to establish identity, it seems appropriate to postulate that an adult should have full access to all the data concerning his or her descent. Establishing one's origin in accordance with biological truth is significant in the proper "establishment of civil status in terms of filiation."[38]

The right to life

The right of the child to preserve identity has its foundations in the basic right to life, which belongs to the array of personal rights and liberties. Subsequent articles of the Convention refer to the consequences of this right. I will discuss only these aspects of the right to life which are connected with the right to identity.

The right to acquire identity comes into existence the moment a newly-born child comes into the world. However, I will draw attention to those legal aspects which allow the child developing in the mother's womb to acquire this right. Legislators, both international and Polish, recognize the fact of human existence regardless of the debate on the beginning of human life, as early as before birth and attend to it with legal care. Humanity results from possessing a human genotype, which came into existence as a consequence of being born of a man and a woman,[39] it is primal in relation to the concept of a natural person, which comprises a shorter span of time from the perspective of law.[40]

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[38] T. Smyczyński: "O potrzebie ustalenia pochodzenia dziecka zgodnie z tzw. prawdą biologiczną." In: *Finis legis Christus. Księga pamiątkowa dedykowana Księdzu Profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*. Eds. J. Wroceński, J. Krajczyński, vol. 2. Warszawa 2009, p. 1266.

[39] Cf. Z. Radwański: *Prawo cywilne — część ogólna*. Warszawa 2004, p. 148.

[40] Cf. T. Sokołowski: "Sytuacja prawna nasciturusa w art. 9 Projektu Kodeksu cywilnego." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2009, vol. 2., p. 186.

Characteristic of the protection of human life before birth is the legal definition of a "human being" contained in the Explanatory Report on the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (known as the Convention on Human Rights and Biomedicine) 4 April 1997.[41] A human being is a person at every stage of development, including the prenatal period. The same statement may be found in the ruling of the Constitutional Tribunal of 28 May 1997 in which it is said that "legal protection of life begins as early as at the moment of conception of every human being" and "the value of life as a commodity protected constitutionally does not depend on the phase of development."[42]

Despite the above statements, complete and absolute protection of human life has not been legally determined. Initiated at the turn of the 19th and 20th centuries, the trend of liberalization of protection of human life so far guaranteed in the penal codes and based on the juxtaposition of the *nasciturus*' rights and other rights protected by law (the mother's well-being) led to handing over the competences connected with protecting life to special acts. Influenced by the situation at the moment they were being passed, they gave rise to the fact that human life took on a relative character.[43]

Legal protection of the life of the *nasciturus* is regulated in different ways: from the model absolutely forbidding abortion to the model allowing exceptions from absolute protection of human life in the prenatal stage. There are also legal systems in which abortion can be performed on demand. In the latter one, the legal status of the *nasciturus* is not equal to a born person but requires additional defining.[44]

Despite diversity within legal doctrine for the concepts of a conceived child and a natural person having legal capacity, the legislator provides the *nasciturus* as well as a live-born person with legal protection.[45] Then, however, the child's parents are not his absolute representatives when the attributes of parental power cannot be attained; for instance, due to lack of the legal possibility of establishing the child's origin (with the exception of the presumption of the married couple's descent) or the

[41] Poland signed the document on May 7, 1999, but is not a party to the Convention, because it has not been ratified.

[42] K 26/96, OTK 1997, nr 2, poz. 19.

[43] Cf. H. Pietrzak: "Prawo do życia, jego nienaruszalność i nie rozporządzalność. Aspekty prawno-karne." *Prawo Kanoniczne*, 2013, vol. 56, no. 2, pp. 147—149.

[44] Ibidem, pp. 149—150.

[45] For example, a child conceived at the moment of opening the estate can be the heir or the legatee if he or she comes into the world alive — Art. 927 § 2, k.c (Civil Code); paternity of the conceived child can be established through the act of acknowledgement; for a stillborn child a certificate of birth can be drawn up.

potential danger to the life of the *nasciturus* because of action taken to procure an abortion, which is not included in parental power. In this situation, the Polish legislator provides for the possibility of appointing a *ventris* guardian (*curator ventris*).[46] The purpose of this position is to protect the well-being of the unborn child which is reinforced by public interest.[47] The child's well-being means guarding the "future rights of the child" which he or she will be entitled to after acquiring legal status (birth), as long as there is a real threat of any violation (for example taking steps aiming at abortion or medical interventions which would harm the health of the fetus). The guardian carries out tasks whose purpose is protection of the life and health of the conceived child, the violation of which might result in a demand, from a statutory representative, to redress the losses suffered by the child before birth.[48] Appointing a *ventris* guardian equals acknowledging a conditional legal capacity and the capacity of the conceived child to perform actions in court proceedings.

Both legal declarations and legislative activity prove, at least conceptually, the value of life from the moment of birth and action is taken in order to protect it. However, human life becomes the subject matter of a contract and is subject to relativization and legal compromise. Similar statements can be made about the right to preserve identity which, as a basic right resulting from human dignity, is not adequately observed. It is also not possible to ignore some contradictions which are considered beyond legal solutions. The human being becomes a natural person the moment he or she is born, and as a result acquires legal status and becomes the subject of rights and responsibilities. Moreover, he or she acquires civil status and identity which is confirmed by drawing up an official birth certificate. Such an identity, however, is also acquired by a stillborn whose birth certificate was recorded. It proves that he or she was recognized as a living being regardless of the developmental phase of prenatal life. This living being was acknowledged to be a human who, *de facto,* is not entitled to have identity, but who acquires it as a dead person. To prove that the *nasciturus* is treated as a person from the moment of birth, he or she is granted rights, the execution of which may be watched over by a *ventris* guardian. Therefore, is not granting the *nasciturus* these rights equal to recognizing him or her as a human

[46] Art. 506 and 470 k.p.c., Dz.U. Nr 43, poz. 296 z późn. zm. Appointing a guardian occurs according to a routine procedure the moment there are legal foundations to it or upon the request of an indicated person. The guardian can be one of the parents if there is no conflict of interest between him or her and the child.

[47] Art. 182 k.r.o.

[48] Cf. Art. 446 k.c.

being who acquires legal status only after birth? The concept of personal identity is much broader than the concept of the right to preserve identity. Opening oneself to cognition enlightened by faith one could add that this identity is shaped in God's creation of man in His own image and is reflected in life in accordance with this act and conception by the Creator.

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Tomasz Gałkowski

The Right of the Child to Life and to Preserve His or Her Identity

Summary

The subject matter of the essay is discussing the development of the child's right to identity and referring it to the child's right to life. The subject of both rights is the child, who according to the Convention on the Rights of the Child adopted in 1989 means "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Thus, in the description of the Convention the issue of the beginning of life of the person-child remains open. In accordance with this thought the author of the study analyses some regulations of the Polish legislation, which grant the child certain rights as early as in the pre-natal period. However, the right to life and the life of the person in the pre-natal period do not result in the right to identity, which is acquired at the moment of birth. On the other hand, legal description of personal identity indicates that it has its implications also in reference to pre-natal life of the person. The author attempts to answer the question concerning the relationship between the right to life and the right to identity — whether the child's right to life always gives rise to the right to identity or whether only the birth of the child influences this right.

Tomasz Gałkowski

Le droit de l'enfant à la vie et celui de garder son identité à lui / à elle

Résumé

Le présent article aborde la question de la formation du droit de l'enfant à son identité et sa référence au droit de l'enfant à la vie. C'est bel et bien l'enfant qui est le sujet des deux droits. Selon l'article 1er de la Convention relative aux droits de l'enfant de 1989, « un enfant s'entend de tout être humain âgé de moins de dix-huit ans, sauf si la majorité est atteinte plus tôt en vertu de la législation qui lui est applicable ». Selon la définition de la Convention, la question concernant le début de la vie de l'homme-enfant est restée par conséquent ouverte. Conformément à cette idée, l'auteur du présent article analyse quelques réglementations de la législation polonaise qui accordent certains droits à l'enfant déjà à la période prénatale. Le droit à la vie et la vie de l'homme au cours de la période prénatale n'entraînent pas cependant le droit à l'identité qui est acquis au moment de la naissance. D'autre part, la définition juridique de l'identité personnelle indique qu'elle a ses implications également à l'égard de la vie humaine prénatale. L'auteur essaie de répondre à la question concernant le rapport entre le droit à la vie et celui à l'identité : le droit de l'enfant à la vie entraîne-t-il toujours le droit à l'identité et est-ce seulement la naissance de l'enfant qui influence ce droit ?

Mots clés : droit de l'enfant à la vie, droit de l'enfant à l'identité, Convention relative aux droits de l'enfant, ordre juridique polonais

Tomasz Gałkowski

Il diritto del bambino alla vita e al mantenimento della propria identità

Sommario

L'argomento dello studio è quello di presentare la formazione del diritto del bambino all'identità e il suo riferimento al diritto del bambino alla vita. L'oggetto di entrambi i diritti è il bambino che, conformemente all'art. 1 della Convenzione sui diritti dell'infanzia del 1989, è definito come "ogni essere umano avente un'età inferiore a diciott'anni, salvo se abbia raggiunto prima la maturità in virtù della legislazione applicabile". Nella definizione della Convenzione nel contempo è rimasta aperta la questione dell'inizio della vita dell'uomo-bambino. Conformemente a tale pensiero l'Autore dello studio analizza alcune norme della legislazione polacca che, già nel periodo prenatale, riconoscono al bambino alcuni diritti. Il diritto alla vita e la vita dell'uomo nel periodo prenatale non comportano tuttavia il diritto all'identità che viene acquisito al momento della nascita. D'altro canto la definizione giuridica dell'identità personale indica che ha le sue implicazioni anche rispetto alla vita umana prenatale. L'Autore cerca di dare una risposta alla domanda relativa al legame tra il diritto alla vita e il diritto all'identità: il diritto alla vita del bambino genera sempre il diritto all'identità? E solo la nascita del bambino influisce su tale diritto?

Parole chiave: diritto del bambino alla vita, diritto del bambino all'identità, Convenzione sui diritti dell'infanzia, ordine giuridico polacco

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The Right of the Child to be Raised in a Family Around the Current Issues

Keywords: family, the right of the child to be raised in a family, the family sovereignty, the subsidiarity principle, the Charter of the Rights of the Family, the Convention on the Rights of the Child

1. "Sign of the times": The horizon of the contemporary humanization mission of the family

Twenty-five years ago Pope John Paul II, in no. 40 of the post-synodal *Apostolic Exhortation "Christifideles laici,"* conducted a peculiar reassumption of the postconciliar teaching of the Church on family — with reference to the major works of his *opus magnum*: the *Familiaris consortio* exhortation (1981) and the Charter of the Rights of the Family (1983), prepared by the Holy See. What remains its testimony is the famous sentence: "[…] the family is the basic cell of society. It is the cradle of life and love, the place in which the individual 'is born' and 'grows'."[1] It turns out that nowadays the aftermath of the Pope-great humanist thought can be easily recognized in the words of the document which prepares the next session of the Synod of Bishops (October 5—19, 2014): "The beauty of the biblical message on the family has its roots in the creation of man

[1] John Paul II: *Apostolic Exhortation "Christifideles laici"* (December 30, 1988), [henceforth: ChL], no. 40.

and woman, both made in the image and likeness of God (cf. Gen 1:24—31; 2:4—25). Bound together by an indissoluble sacramental bond, those who are married, experience the beauty of love, fatherhood, motherhood, and the supreme dignity of participating in such way in the creative work of God. In the gift of the fruit of their union, they assume the responsibility of raising and educating other persons for the future of humankind. Through procreation, man and woman fulfil, in faith, the vocation of being God's collaborators in the protection of creation and the growth of the human family."[2] It is difficult not to notice that what comes up in the former and the latter text is the truth that the social function of the family constitutes a constitutive and a foreground dimension of its mission.[3] This is reflected in cardinal Peter Erdö's commentary[4] to the quoted "Preparatory Document," and more precisely the place, where the important — in the evangelization work aimed at promotion of dignity of matrimony and family — where the passage from the Conciliar Pastoral Constitution on the Church is evoked: "[…] the family, in which the various generations come together and help one another grow wiser and harmonize personal rights with the other requirements of social life, is the very foundation of society."[5] According to an outstanding canonist, this single sentence — in the contemporary, marked with the stamp of individualism,[6] epoch of a crisis of the institution of marriage and

[2] Synod of Bishops. Extraordinary General Assembly: *Pastoral Challenges to the Family in the Context of Evangelization. Preparatory Document*. Vatican City 2013.

[3] Augusto Sarmiento, moral theology professor at the University of Navarra in Pamplona, an outstanding expert specializing in issues related to marriage and family, devoted, among others, an interesting monograph to the substantiation of this thesis — A. Sarmiento: *Al servicio del amor y de la vida: el matrimonio y la familia*. Madrid 2006.

[4] P. Erdö: "Osservazioni sotto l'aspetto canonistico-pastorale sul 'documento preparatorio' della III Assemblea Generale Straordinaria del Sinodo dei Vescovi." In: *Conferenza stampa sulla preparazione della III Assemblea Generale Straordinaria del Sinodo dei Vescovi, 05.11.2013* — http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2013/11/05/0722/01618.html (accessed 30.6.2014).

[5] Vatican Council II*: Pastoral Constitution on the Church "Gaudium et spes"* [henceforth: GS], n. 52,2; Synod of Bishops. Extraordinary General Assembly: *Pastoral Challenges to the Family…*, p. 3.

[6] Let us recall the fact that John Paul II perceived individualism as the origin of contemporary threats to the civilization of love, the part of which is the family — John Paul II: *Letter to Families "Gratissimam sane"* (February 2, 1994) [henceforth: GrS], n. 14. Today, Pope Francis — similarily — looks for the reason of the fact that "the family is experiencing a profound cultural crisis," in the individualism ("of our postmodern and globalized era") that "favours a lifestyle, which weakens the development and stability of personal relationships and distorts family bonds" — Francis: *Apostolic Exhortation "Evangelii gaudium"* (November 24, 2013) [henceforth: EG], nos. 66, 67.

family[7] — constitutes a compass pointing towards a common construction/reconstruction (owing to an effort made by the entire societies, with an indispensible participation of civil authorities) of the impaired bonds and intergenerational solidarity, with a view to securing for the family the function of a "rock" — a fundamental institution of the human society.[8]

It is clearly visible how this fresh interpretation of the "sign of the times"[9] corresponds with John Paul II's concern expressed 25 years ago, in which he appealed to all people of goodwill: "Required […] is a vast, extensive and systematic work, sustained not only by culture but also by economic and legislative means, which will safeguard the role of family in its task of being the *primary place of 'humanization'* for the person and society."[10] The voice of the international spiritual authority reverberates even more loudly, when the words calling for a need of firm endeavours, not to let the social awareness of the fact that the family is the first and elementary social unit and fulfils a completely irreplaceable role in the society diminish, are addressed: "the family can and must require from all, beginning with public authority, the respect for those rights which in saving the family, will save society itself."[11] Indeed, the subject matter of the message embedded in the last words of the above-mentioned no. 40 of *Christifideles laici* is surprising, when it turns out — it is worth emphasizing it now, on the eve of the assembly of the Synod, the aim of which is, after all, to intensify the evangelization effort to the benefit of the family — how this John Paul II's appeal preserved its timeliness: "As experience testifies, whole civilizations and the cohesiveness of peoples depend above all on the human quality of their families. For this reason the duty in the apostolate towards the family acquires an incomparable social value. The Church, for her part, is deeply convinced of it, knowing well that 'the path to the future passes through the family'."[12]

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[7] In the monograph *Matrimonio y familia. Iniciación Teológica* reputable canonists Jorge Miras and Juan Ignacio Bañares — after synthetical albeit instructive remarks concering the sources of the contemporary marriage and family crisis (with an emphasized destructive impingement of the *gender* ideology, in the chapter entitled *Matrimonio y familia bajo la presión cultural*) — accurately defined the "keys" to the understanding of the mentioned crisis: a) *el rechazo del realismo*, b) *el positivismo jurídico*, c) *el relativismo moral y el individuo como absolute*, d) *la libertad como pura opción* — J. Miras, J.I. Bañares: *Matrimonio y familia. Iniciación Teológica*. Madrid 20072, pp. 22—32.

[8] P. Erdö: "Osservazioni…," n. 3.

[9] Cf. A. Pastwa: "Normy kodeksowe dotyczące małżeństwa a wyzwania współczesności." In: *„Hodie et cras" — dziś i jutro Kodeksu Prawa Kanonicznego z 1983 roku 30 lat po promulgacji*. Ed. K. Burczak. Lublin 2014, pp. 49—66.

[10] ChL, no. 40

[11] Ibidem.

[12] Ibidem.

Therefore, if based on the papal magisterium, we assume that the social function defines the nucleus of the mission of the family,[13] then the conclusion that emerges — according to an marriage expert Augusto Sarmiento — is obvious. This well-known Spanish theologian, inspired by the profoundness of the papal teaching in *Familiaris consortio* — especially by the articulations of the exhortation included in the titles of points 37 and 43: "Educating in the Essential Values of Human Life" (with an important message that the family is "the first and fundamental school of social living"[14]) and "Family Life as an Experience of Communion and Sharing" (with the first sentence of key importance: "the very experience of communion and sharing [...] represents its first and fundamental contribution to society"[15]) — does not hesitate to propose a thesis which suggests that in this magisterium lecture one issue is of central and utmost importance: the fundamental role of the family is a service to the benefit of life[16]; it is precisely this assignment that the human humanization mission[17] — so strongly emphasized by Pope Wojtyła — is inseparably and inescapably connected with.

Indeed, the humanization mission constitutes an essential feature and one of the main determinants of *institutum familiae*.[18] Since the task of every family — "an educating community" — is to: help a human being from the very beginning with identifying his own calling or prepare him for undertaking interpersonal relationships, based on justice and love.[19] Naturally, it concerns a family community initiated by the matrimonial covenant[20] — according to a paradigm clearly defined in the canonical legal order: exclusiveness of the family model based on natural marriage, a model the parameters of which are fastness and stability (here I agree with Paolo Moneta: *la famiglia fondata sul matrimonio naturale, quale*

[13] Cf. A. Sarmiento: *Al servicio del amor...*, p. 276.

[14] FC, no. 37.

[15] FC, no. 43.

[16] "Fundamental duties are, therefore, incumbent on the family, the generous exercise of which cannot but enrich deeply those who are mainly responsible for the family itself, making them more direct collaborators with God in the formation of new men" — John Paul II: *Address to Young People Gathered in the Vatican Basilica* (January 3, 1979) — http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/january/documents/hf_jp-ii_spe_19790103_basilica-vaticana_en.html (accessed 30.6.2014).

[17] Cf. A. Sarmiento: *Al servicio del amor...*, p. 277.

[18] "The family is [...] the place of origin and the most effective means for humanizing and personalizing society: it makes an original contribution in depth to building up the world, by making possible a life that is properly speaking human, in particular by guarding and transmitting virtues and 'values'" — FC, no. 43.

[19] FC, no. 2.

[20] GrS, no. 7.

modello esclusivo di particolare saldezza e stabilità[21]). In turn, to understand the specificity (uniqueness) of the phenomenon of the Christian family[22] — in the light of the truth regarding the sacramental character of marriage (containing the spouses' love in the Christ's betrothed-redemptive love) means to perceive the family as "the first community called to announce the Gospel to the human person during growth and to bring him or her, through a progressive education and catechesis, to full human and Christian maturity."[23] Within this context the conclusion put forward by Augusto Sarmiento's research on the family as a "school of social living" (and at the same time "school of deeper humanity"[24]) seems completely just. He believes that not all forms of family life serve the human humanization and participate in the development of the society. A family, in order to create the integral human well-being — and that is, in fact, what the humanization is about — should act in a manner respecting this set of goods and values, which characterize it as a "community of life and love."[25]

The subject matter criteria of the Charter of the Rights of the Family (October 22, 1983)

Recently, an outstanding canonist, authority in the field of the church matrimonial and family legislation, bishop Antoni Stankiewicz[26] raised an issue of the cognitive values of a slightly forgotten — *nota bene* published on the Vatican websites, only in the Italian original version — John Paul II's 1986 allocution *Sono lieto*. The opportunity to deliver it was the 6th Colloquium on Juridical Studies held in Rome and organized by the

[21] P. Moneta: "Stabilità della famiglia e sua tutela." In: *Tutela della famiglia e diritto dei minori nel codice di diritto canonico*. [Atti del XXIX Congresso Nazionale di Diritto Canonico Canonico, Trieste 7—10 Settembre 1998]. Studi Giuridici. Vol. 53. Città del Vaticano 2000, p. 37.

[22] See G. Lo Castro: "Famiglia e matrimonio nella temperie della modernità." In: *Tutela della famiglia*…, pp. 18—20.

[23] FC, no. 2.

[24] GS, no. 52,1.

[25] A. Sarmiento: *Al servicio del amor*…, pp. 278—279.

[26] A. Stankiewicz: "Familia e filiazione in diritto canonico." In: "*Finis legis Christus*". *Księga pamiątkowa dedykowana ks. prof. W. Góralskiemu z okazji 70. rocznicy urodzin*. Eds. J. Wroceński, J. Krajczyński. Vol. 1. Warszawa 2009, pp. 187—188.

Utriusque Iuris Pontifical Institute (April 26, 1986) in cooperation with the Pontifical John Paul II Institute for Studies on Marriage and Family of the Pontifical Lateran University entitled *La famiglia e i suoi diritti nella comunità civile e religiosa*.[27] The family and its foundation: marriage — John Paul II teaches — are institutions to the benefit of which the civil and religious society should invariably serve. After all, it is about institutions ingrained in nature, that is, in the same human-person ontology, the real individual welfare of which always goes hand in hand with the welfare of the entire society.[28]

There is no escaping the question how to execute this ambitious cooperation "programme," when one of the main problems of our times, influencing the relations between the state and the Church, is the axiological confusion present in the public discourse, and on the contemporary "agorae" very popular are ideas undermining the moral order (or even creating "new morals")[29] — among them is the "subversive" thesis suggesting the existence of an antinomy between: nature and freedom,[30] nature and culture. Naturally, a particular vocation to give the lie to similar statements rests with the Church. However, it is necessary to add that there is nothing that can substitute a well-thought out positive message — an affirmation of the priceless value of marriage and family on the ground

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[27] John Paul II: *Discorso ai partecipanti al VI Colloquio Giuridico organizzato dal Pontificio Istituto «Utriusque Iuris» "Sono lieto"* (April 26, 1986) — http://www.vatican.va/holy_father/john_paul_ii/ speeches/1986/april/documents/hf_jp-ii_spe_19860426_giuristi_it.html (accessed 30.6.2014).

[28] Ibidem, no. 2.

[29] See *„Mężczyzną i niewiastą stworzył ich". Afirmacja osoby ludzkiej odpowiedzią nauk teologicznych na ideologiczną uzurpację genderyzmu*. Ed. A. Pastwa. Katowice 2012.

[30] Let us recall an important passage of *Veritatis splendor*: "*For some*, 'nature' becomes reduced to raw material for human activity and for its power: thus nature needs to be profoundly transformed, and indeed overcome by freedom, inasmuch as it represents a limitation and denial of freedom. *For others*, it is in the untrammeled advancement of man's power, or of his freedom that economic, cultural, social and even moral values are established: nature would thus come to mean everything found in man and the world apart from freedom. In such an understanding, nature would include in the first place the human body, its make-up and its processes: against this physical datum would be opposed whatever is 'constructed', in other words 'culture', seen as the product and result of freedom. Human nature, understood in this way, could be reduced to and treated as a readily available biological or social material. This ultimately means making freedom self-defining and a phenomenon creative of itself and its values. Indeed, when all is said and done man would not even have a nature; he would be his own personal life-project. Man would be nothing more than his own freedom!" — John Paul II: *Encyclical Letter "Veritatis splendor"* (August 6, 1993) [henceforth: VS], no. 46.

of the integral and referring to the "beginning"[31] *de persona humana* teaching.[32]

What proves that fact that the Pope-teacher of personalism understood it perfectly well are, for instance, the memorable fragments of the *Encyclical "Veritatis splendor"*: "It is in the light of the dignity of the human person — a dignity which must be affirmed for its own sake — that reason grasps the specific moral value of certain goods towards which the person is naturally inclined. And since the human person cannot be reduced to a freedom which is self-designing, but entails a particular spiritual and bodily structure, the primordial moral requirement of loving and respecting the person as an end and never as a mere means also implies, by its very nature, respect for certain fundamental goods, without which one would fall into relativism and arbitrariness."[33] Let us add that Héctor Franceschi rightly refers this papal magisterium to the relation between the freedom and inseparability of marriage, and consistently to establishing a marriage-family bond.[34]

These remarks make it possible to develop the previously submitted doubts; what is more, the undertone of the consecutive passages of the above-mentioned 1986 speech becomes completely intelligible. What does this real cooperation within the field of civil and church legislation activity for the family and its rights consist in? — the Pope asks. The answer comes immediately: it is impossible to narrow down the rights of the family to exclusively spiritual or religious issues; nothing more wrong (!). The church proclamation of these rights refers to the rudiments of the social order on the fundamental level, where the very roots of a given person's identity are influenced.[35] It is true that the Church, by promoting the fundamental values of the family *communio personarum*, fulfils its own mission. However, it is also true that the same obligation of protecting these values and rights, which constitute the vital component of

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[31] See K. Wojtyla: *Love and Responsibility*. Trans. H.T. Willetts. New York 1981; John Paul II: *Man and Woman He created Them. A Theology of the Body 1,2-4*. Trans. M. Waldstein. Boston 2006.

[32] See GS, nos. 47—52.

[33] VS, no. 48.

[34] Cf. H. Franceschi: "Valori fondamentali del matrimonio nella società di oggi: indissolubilità." In: *Matrimonio canonico e realtà contemporanea*. Studi Giuridici. Vol. 68. Città del Vaticano 2005, pp. 220—221.

[35] Code of Canon Law (promulgated January 25, 1983), can. 747 § 2: "It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it"; cf. also Code of Canons of the Eastern Churches (promulgated October 18, 1990), can. 595 § 2.

the inherent goods of marriage, is incumbent upon the civil authorities.[36] Therefore — let us conclude after John Paul II — it becomes obvious that by defending the Christian vision of marriage and the family, the Church at the same time constructs and strengthens the civil community with durable and stable moral order bonds.[37]

If we assume that the family ethos constitutes the foundation of the entire social ethos, then it is worth to follow Pope Wojtyła's train of thought, which in the discussed speech also aims at reminding that at the beginning of the marriage and family communion lies a disinterested gift of a person,[38] so the realization of the "personalistic norm"[39] ethos. That is the aim of referring, at the end of the speech, no longer only to the exhortation *Familiaris consortio*, but also to the Charter of the Rights of the Family (CRF).[40] Within this doctrinal context, what the Holy Father regarded as particularly important to emphasize is the right and duty of parents to give education. Referring to the conciliar magisterium the Pope states that: "This role in education is so important that only with difficulty can it be supplied where it is lacking. Parents are the ones who must create a family atmosphere animated by love and respect for God and man, in which the well-rounded personal and social education of children is fostered. Hence the family is the first school of the social virtues that every society needs."[41] And if so, both Antoni Stankiewicz[42] and

[36] John Paul II: *Discorso ai partecipanti al VI Colloquio…*, no. 4. "Il destino della comunità umana è strettamente legato alla sanità dell'istituzione familiare. Quando, nella sua legislazione, il potere civile disconosce il valore specifico che la famiglia rettamente costituita porta al bene della società, quando esso si comporta come spettatore indifferente di fronte ai valori etici della vita sessuale e di quella matrimoniale, allora, lungi dal promuovere il bene e la permanenza dei valori umani, favorisce con tale comportamento la dissoluzione dei costumi" — ibidem.

[37] Ibidem, no. 3. "Infatti, l'adesione dei fedeli alla dottrina della Chiesa circa il matrimonio e la famiglia contribuisce efficacemente a far sì che tra i componenti di una comunità regnino quelle virtù morali, che rendono possibile la giustizia e cioè la fedeltà, il rispetto della persona, il senso di responsabilità, la comprensione vicendevole, l'aiuto reciproco" — ibidem.

[38] Cf. GrS, no. 14.

[39] "A person is a good towards which the only proper and adequate attitude is love" — K. Wojtyla: *Love and Responsibility…*, p. 41.

[40] Holy See: Charter of the Rights of the Family (October 22, 1983) — http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html (accessed: 30.6.2014).

[41] Vatican Council II*: Declaration on Christian Education "Gravissimum educationis"*, no. 3,1; John Paul II: *Discorso ai partecipanti al VI Colloquio…*, no. 5.

[42] The canonist quotes, among others, an important passage of the 2001 address to the Roman Rota, in which John Paul II teaches: "It is necessary to bear in mind the principle that *juridical significance* is not juxtaposed as something foreign to the *interpersonal reality* of marriage, but constitutes *a truly intrinsic dimension* of it. Relations

Salvatore Berlingò[43] are right, when they, by referring to the signs of times, emphasize — in the constitution of marriage and family — the structural (ethical) role of the principle of love. Berlingò additionally raises an issue of the meaning of the Preamble E of the CRF, in which we read: "[…] the family constitutes, much more than a mere juridical, social and economic unit, a community of love and solidarity, which is uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society."[44]

It is not difficult to notice that the quoted important standard of the Charter not only points to the very family *ethos*, but also to its *logos*. It is not of no importance. This, characteristic in the Holy See document connection of the above mentioned orders needs to be accepted as the ideological structure of the normative criteria, defining the conditions of an authentic execution of the child's rights to be raised in a family, evoked in the title of this study. What reassures us is John Paul II's well-known statement derived from no. 17 of the *Letter to Families "Gratissimam sane"* (1994): "The rights of the family *are not simply the sum total* of the rights of the person, since the family is *much more* than the sum of its individual members. It is a community of parents and children, and at times a community of several generations. For this reason its 'status as a subject', which is grounded in God's plan, gives rise to and calls for certain proper and specific rights […] on the basis of the moral principles."[45]

The question formulated in the same number of the *Gratissimam sane*: "What does the family as an institution expect from society?,"[46] with

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between the spouses, in fact, like those between parents and children, are constitutively *relations of justice*, and for that reason have in themselves juridical significance. Married and parent-child love is not merely an instinctive inclination, nor an arbitrary and reversible choice, but *is rather a love that is due*" — http://www.vatican.va/holy_father/john_paul_ii/speeches/1997/documents/hf_jp-ii_spe_19970127_rota-romana_en.html (accessed 30.6.2014); A. Stankiewicz: "Familia e filiazione…," pp. 188—189.

[43] Ibidem, p. 122.

[44] GrS, no. 17. further we read: "The Charter of the Rights of the Family, on the basis of the moral principles mentioned above, consolidates the existence of the institution of the family in the social and juridical order of the 'greater' society — those of the nation, of the State and of international communities. Each of these 'greater' societies is at least indirectly conditioned by the existence of the family. As a result, the definition of the rights and duties of the 'greater' society with regard to the family is an extremely important and even essential issue" — ibidem.

[45] Ibidem.

[46] The crucial passages of the CRF must not be overlooked: "The Charter is addressed principally to governments. In reaffirming, for the good of society, the common awareness of the essential rights of the family, the Charter offers to all who share responsibility for the common good a model and a point of reference for the drawing up of legis-

a simultaneous indication toward the CRF — sufficiently explains why the Holy See (the author of this document) explicitly makes the state authorities the addressee[47] of the declared[48] rights. It is precisely the state authorities that the main responsibility for the protection of "family sovereignty" [49] rests upon, since this "family" — ingrained in the creation order and with *eo ipso* status[50] — constitutes the fundamental nucleus of the social fabric.[51] On the other hand the conclusions that emerge from the sovereignty principle[52] seem to be obvious: "In the conviction that the good of the family is an indispensable and essential value of the civil community, the public authorities must do everything possible to ensure that families have all those aids — economic, social, educational, political and cultural assistance — that they need in order to face all their responsibilities in a human way."[53]

It goes without saying that among the mentioned missions of the family the most vital one is the mission of upbringing[54] — according to a par-

lation and family policy, and guidance for action programmes" — Pontifical Council for the Family: Charter of the Rights of the Family. Introduction — http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html (accessed 30.6.2014). This *ad extra* CRF value is aptly recognized by Paolo Bianchi, who writes: "Tale 'Carta' […] concerne più propriamente i diritti dell'istituto familiare, da tutelare e da promuovere — come risulta dal contesto e dai suoi destinatari principali, i Governi — nell'ambito della società civile e della sua organizzazione politica" — P. Bianchi: "Il 'diritto di famiglia' della Chiesa." *Quaderni di Diritto Ecclesiale*, 1994, vol. 7, p. 285; see more — D. Martin: "La Carta dei Diritti della Famiglia: le sue origini e la sua originalità." In: *La famiglia e i suoi diritti nella comunità civile e religiosa*. Roma 1987, pp. 99—107.

[47] The foundation of the rights of the family mentioned in the CRF is in the order of creation; cf. FC, no. 46.

[48] GrS, n. 17; cf. P.J. Viladrich: "La famiglia sovrana." *Ius Ecclesiae*, 1995, vol. 7, pp. 539—550; W. Góralski: "Family as a sovereign institution." In: *Sovereign Family. Ecumeny and Law*, 2014, vol. 2, pp. 91—104.

[49] Cf. GrS, no. 17.

[50] Pontifical Council for the Family: *The Family and Human Rights* (December 9, 1999), no. 71 — http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html (accessed 30.6.2014).

[51] Cf. A. Pastwa: "The Right to Found a Family and the Right to Parenthood. Remarks on Articles 2 and 3 of the Charter of the Rights of the Family." In: *Sovereign Family. Ecumeny and Law*, 2014, vol. 2, pp. 183—186.

[52] FC, no. 45.

[53] "The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others" — FC, no. 36.

[54] Pontifical Council for the Family: *The Family and Human Rights*. 6.2: *The Family, First Educator*, nos. 67—70.

adigm formulated by the Catholic Church: "the family, first educator."[55] It is an area in which it is explicitly visible, why the proclamation of the "family sovereignty," in the church documents, is — invariably — accompanied by the affirmation of the subsidiarity principle. It is worth taking into account the voice of Cardinal Camillo Ruini, who in the introduction to the book *La famiglia soggetto sociale: radici, sfide, progetti* remarks that the Catholic Church — by a translation of the main *Familiaris consortio* concepts into a normative language — applies in the CRF "principles" and "articles" a basic criterion normalizing the subject relations between the state and the family. "The State must recognize that 'the family is a society in its own original right' and so society is under a grave obligation in its relations with the family to adhere to the principle of subsidiarity."[56] The meaning of this principle within the subject context is explained in the *Gratissimam sane* section of the proclamation, which states that the family belongs to the soul of every state: "the family […] is connected with the State precisely by reason of the *principle of subsidiarity.* Indeed, the family is a social reality which does not have readily available all the means necessary to carry out its proper ends, also in matters regarding schooling and the rearing of children. The State is thus called upon to play a role in accordance with the principle mentioned above. Whenever the family is self-sufficient, it should be left to act on its own; an excessive intrusiveness on the part of the State would prove detrimental, to say nothing of lacking due respect, and would constitute an open violation of the rights of the family. Only in those situations where the family is not really self-sufficient does the State have the authority and duty to intervene."[57]

[55] FC, no. 45; "Questo principio della Dottrina sociale della Chiesa implica che lo Stato riconosca il ruolo e la titolarietà della famiglia in tutti quegli ambiti in cui sono in gioco i suoi diritti primari e inalienabili" — C. Ruini: "Introduzione — La Chiesa italiana e la famiglia." In: *La famiglia soggetto sociale: radici, sfide, progetti*. Eds. L. Santolini, V. Sozzi. Roma 2002, p. 16; see more — P. Donati: "La famiglia come soggetto sociale: ragioni, sfide, programmi." In: *La famiglia*…, pp. 33—68.

[56] GrS, no. 17.

[57] Considering the aspectuality of this proposal, this standard is the one which deserves the closest attention.

Implementation of the standards of the Convention on the Rights of the Child within the Domestic Context (November 20, 1989)

On November 20, 1989 the General Assembly of the United Nations passed Convention on the Rights of the Child (CRC) — the first in the world and up to this day the most important legal document promoting the protection standards of the youngest members of the society. According to the regulations stipulated by this document, a child is an independent entity, which has its own identity, dignity and the right to privacy. Nonetheless, because of its physical and mental immaturity it requires special care and protection. Here the Convention keynote idea does not leave room for doubt — the latter shall be guaranteed by the state, however, always (!) taking into consideration the observance of the family's autonomy. A family, in which both parents aim at securing the well-being of their offspring, constitutes the optimum environment for the child's development. Precisely — to formulate it negatively — the state must not arbitrarily deputize for parents in upbringing and usurp the rights within this scope. On the other hand, in a positive depiction — a key importance standard of the Convention is the right to be raised in a family and to maintain contact with both parents.[58] This standard is complemented by two different ones: the right to alternative care, in an instance of the lack of possibility of upbringing in a family and the right of adoption.

Bringing the matter to its essence: three CRF articles guard the right to be raised in a family. The fundamental principle of this central standard of the Convention was expressed in its Art. 5: "States Parties shall respect the responsibilities, rights and duties of parents [...] to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."[59] Equally important normative contents is rendered by the articles 9 and 18 of CRC. The right of a child to family[60] puts forward a requirement, which suggest that a child, for reasons contrary to

[58] United Nations: Convention on the Rights of the Child (November 20, 1989) [henceforth: CRC] — http://www.un.org/documents/ga/res/44/a44r025.htm (accessed 30.6.2014); see a good commentary S. Detrick: *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague 1999, pp. 115—124. Is consonant with this principle article 14, n. 2 of CRC: "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."

[59] The right of a child to be raised by both parents, discussed here, is justifiably referred to in the reference books as "the right of a child to family" or the "right to live in a family."

[60] See also CRC, Art. 10.

his well-being, should not be separated from the parents, and should the necessity arise — the regular contact with father or/and mother be guaranteed for the child. The applied regulations contain Art. 9: “States Parties shall ensure that a child shall not be separated from his or her parents against their will […]” (no. 1). “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents […]” (no. 3).[61] In turn the content of the parental responsibility is defined by Art.18, which states that “both parents have common responsibilities for the upbringing and development of the child […] [and — A.P.] the best interests of the child will be their basic concern” (no. 1).” “For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents […]” (no. 2).

This significant, defined in such a way, standard of the Convention (the right to be raised in a family) is completely realized[62] within the Polish law.[63] It is sufficient to quote a norm proper for this matter of the Constitution of the Republic of Poland,[64] namely Art. 48 § 2: “Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.” Equally convincing are the regulations of the Family and Guardianship Code,[65] like the one in article 93 § 1: “parental authority applies to both parents,” or these in article 97 “[…] each of them is entitled and obliged to exercise that authority” (§ 1); “[…] on important matters the parents of the child decide on matters together; if there is no agreement between them, the

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[61] T. Smyczyński: “Czy jest potrzebna Konwencja o prawach dziecka? Geneza i funkcje Konwencji.” In: *Prawa dziecka…*, pp. 17, 9—17; A.N. Schultz: “O Konwencji o prawach dziecka i o jej wpływie na prawo polskie.” In: *Prawa dziecka…*, pp. 68, 59—79; M. Łączkowska: “Instytucjonalna ochrona praw dziecka w Polsce.” In: *Prawa dziecka…*, pp. 94—95, 89—106.

[62] See *Konwencja o prawach dziecka a prawo polskie*. Ed. A. Łopatka. Warszawa 1991; *Konwencja o prawach dziecka: analiza i wykładnia*. Ed. T. Smyczyński. Poznań 1999; *Prawa dziecka. Konteksty prawne i pedagogiczne*. Ed. M. Andrzejewski. Poznań 2012.

[63] *Konstytucja Rzeczpospolitej Polskiej*, April 2, 1997. Dz.U.1997.78.483 (English version — http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed 30.6.2014)).

[64] Ustawa z dnia 25 lutego 1964 r. *Kodeks rodzinny i opiekuńczy* [henceforth: KRO]. Dz.U.1964.9.59 z późn. zm. (English version — *The Family and Guardianship Code. Kodeks rodzinny i opiekuńczy*. Trans. N. Faulkner. Warszawa 2010).

[65] Art. 1131 of KRO regulates the principles of access: “If the child lives permanently with one parent, the way of maintaining contact with the child is specified by the parents jointly, based on the welfare of the child and taking into account his/her reasonable wishes; in the absence of an agreement settled by the guardianship court (§ 1).” “The provisions of § 1 will apply accordingly if the child does not live with either of his/her parents and is cared for by a guardian or has been placed in foster care or in institutional care (§ 2).”

guardianship court will decide" (§ 2). What do the detailed precepts of the Code say? If the parents remiss or overuse in their parental authority, then the court is entitled to: limit their authority (Art. 107), suspend it, in the presence of a temporary impediment in wielding authority (article 110 § 1), and finally, it is possible in the last resort to deprive the parents of the authority (Art. 111 § 1).

Such situations usually cause limitation of the contact with a child,[66] if required for the child's welfare (Art. 1132 § 1). In turn "if maintaining contact between parents and the child seriously endangers or violates the child's welfare, the court will prohibit contact" (Art. 1133).

In connection with the last regulation it is worth quoting a fragment of the judicial opinion of the Polish Supreme Court of November 7, 2000 (I CKN 1115/00): "To deprive parents of personal contact with the child can be adjudicated exclusively under specific circumstances, e.g. when maintaining personal contacts between the parents and the child jeopardizes the child's life, health, security, or has a corrupting influence over the child."[67]

As regards the remaining two standards of child's protection, the right to alternative care, in case of a lack of possibility to be raised in family, is expressed in Art. 20 of CRC: "A child temporarily or permanently deprived of his or her family environment […] shall be entitled to special protection and assistance provided by the State (Art. 20,1); States Parties shall […] ensure alternative care for such a child (article 20,2)."[68] In turn the third standard, which allows to perceive adoption as a means of realizing the right of a child to family,[69] is regulated by article 21 of CRC (specified in 5 points).[70]

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[66] "Disallowing personal parent-child contact can be adjudged under certain circumstances, e.g. when such a contact between the parents and the child constitutes a threat to the child's life, health, safety, or has a corruptive influence on the child." Orzecznictwo Sądu Najwyższego — Izba Cywilna 2001, nr 3, poz. 50 — http://prawo.legeo.pl/prawo/i-ckn-1115-00/ (accessed 30.6.2014) (trans. — A.P.).

[67] See S. Detrick: *A Commentary on the United Nations Convention…*, pp. 330—340; see also other relevant international instruments: European Convention on the Adoption of Children (March 24, 1967) (in Polish legal system — Dz.U.1999.99.1157); Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993 (Dz.U. 2000.39.448).

[68] Cf. J. Panowicz-Lipska: "Przysposobienie dziecka." In: *Konwencja o prawach dziecka…*, pp. 201—202, 199—227.

[69] It is worth noticing that the introduction to this article invokes the principle of the "child's well-being" ("the best interests of the child"): "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall"; see S. Detrick: *A Commentary on the United Nations Convention…*, pp. 341—360. About the principles, which constitute the basis of CRC — A.N. Schultz: "O Konwencji o prawach dziecka…," pp. 63—68.

[70] See M. Machinek: "The Charter of the Rights of the Family and the Yogyakarta Principles. Two Worlds." *Ecumeny and Law*, 2014, vol. 2, pp. 33—48.

Naturally, as it was already stated, similar regulations can be found in the Polish legal system. Article 72 § 2 of the Polish Constitution stipulates: "A child deprived of parental care shall have the right to care and assistance provided by public authorities." In turn, in the Family and Guardianship Code: article 109 § 2 standardizes the detailed issue of taking the minor into foster care, whereas articles 112—127 systemically regulate such issues as: the custody over children (placed in foster care or institutional care) and adoption.

The 1989 Convention standards, described briefly here and dedicated to the right of a child to upbringing in a family, undeniably constitute a crucial reference point for the domestic legislator. However, it is important to remember that a characteristic feature of the international law standards (binding for countries which ratified them) — similarly as legal acts of lesser legal force, like: recommendations or resolutions, is their conciseness, condensation, but also a peculiar terseness "justified" by the means of reference to the minimum of common idea of contemporary family relationship, equality of women and men, family autonomy, rights of individual especially weaker party, namelya child. This impartial permanent situation is connected with such advantages as, for example leaving a subject matter freedom margin for a given country legislator: maintaining or passing detailed normative solutions coherent with the state law. However, today it is also not difficult to notice disadvantages: especially the underspecification — in the name of the outlook pluralism principles — the axiological plane of the accepted standards (and precisely, avoiding what we called the logos and ethos of the institutions of matrimony and family). In practice it can signify forcing a legal thought alien in a given culture and bear all stamps of a bad lobbing (it is not necessary to add that nowadays we are witnessing an aggressive lobby for the idea of *gender*[71]).

Three examples make it possible — in my opinion — to explicitly demonstrate what we are concentrating here on. What will support us here, I believe, is a constructive *modus operandi*, and precisely every time the appointing of convention standards will be accompanied by an invocation of pertinent CRF standards:

Example 1

It is worth reminding that a famous Polish scholar Professor Tadeusz Smyczyński, director of the Centre for Family Law and Children's Rights at the Institute of Law Studies of the Polish Academy of Sciences, an

[71] See M. Machinek: "The Charter of the Rights of the Family and the Yogyakarta Principles. Two Worlds." *Ecumeny and Law*, 2014, vol. 2, pp. 33—48.

expert of both chambers of the Polish Parliament, created, as part of the activity of the Centre, a project of a document, which became the starting point for the work on the 1989 Convention. This outstanding lawyer, a family law expert, is the author of a study entitled "The right of the child to be raised in a family" (*Prawo dziecka do wychowania w rodzinie*).[72] In the study the author elevates, among others, the virtue of a principle, quoted in no. 18 of CRC, which states that "both parents have common responsibilities for the upbringing and development of the child." In the above-mentioned study we read: "The right of the child to family means a right to the contact with both the father and the mother, regardless of the fact whether they are spouses and whether the child is illegitimate or not."[73] However, Professor Smyczyński promptly adds: "I have no doubt, though, the child must be protected against the environment of a unisexual pair of people. First of all, such relationship does not constitute a family, but is some form of people's existence, whose sex life will never bear fruit in the shape of a child."[74]

At the same time it should be highlighted that what gives a strong base for the expert's constatation are two passages of the CRF Preamble: the family is based on marriage, that intimate union of life in complementarity between a man and a woman, which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony and is open to the transmission of life (Preamble B); marriage is the natural institution to which the mission of transmitting life is exclusively entrusted (Preamble C). The words of the Congregation for the Doctrine of the Faith of 2003 — curiously enough, with the evocation of the universal idea of the CRC — are also characteristic for this context: "As experience has shown, the absence of sexual complementarity in these unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development. This is gravely immoral and in open contradiction

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[72] What proves the importance of the voice of the Polish expert is the fact the this study was placed on the website of the Commissioner for Children's Rights — T. Smyczyński: "Prawo dziecka do wychowania w rodzinie" — http://brpd.gov.pl/aktualnosci/prawo-dziecka-do-wychowania-w-rodzinie (accessed: 30.6.2014) (*nota bene* the author gave the same title to yet another article — "Prawo dziecka do wychowania w rodzinie." In: *Konwencja o prawach dziecka*..., pp. 149—165).

[73] Ibidem, no. I,5

[74] Ibidem.

to the principle, recognized also in the United Nations Convention on the Rights of the Child, that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case."[75]

Hence, the expert's harsh tone of voice should not come as a surprise: "It is unnecessary to […] possess any specialist knowledge to claim that for a proper and balanced development of personality, a child needs both a masculine and a feminine exemplar. Therefore, the legislator favours adoption by spouses, rather than by a single person. The consent in the name of the law, in many European countries, to the adoption by homosexuals (lesbians) is a scandal and a gross infraction of the child's rights (Art. 3 of CRC), and especially the right to be raised in a family. Let me just point to the fact that the above- mentioned precept stipulates that in every undertaken activity the best interest of the child must be protected. It turns out that surrendering to the egoistic demands and interests of the homosexual circles is for some parliaments more important that the well-being of a child. How do the organizations that guard the rights of a child, including the Committee on the Rights of the Child in Geneva, react?" — Tadeusz Smyczyński asks rhetorically.[76]

Example 2

The same expert remarks that in an instance of difficulties related to a proper execution by a family of its obligations towards the child, the family should be offered help first (the principle of subsidiarity[77]). "Separating the child from its natural family should be the ultimate measure, undertaken only when the parents pose a threat to the child."[78]

In an obvious way this standpoint, in consonance with one of the seven key principles (which the Holy See promotes as an authentic perspective of the rights and duties of the child), was evoked in the recent Holy See's Periodic Report on the CRC: "full respect of the child's rights and duties require special protection and promotion of the family's rights and duties."[79] The CRF once again touches upon the crux of this trouble-

[75] Congregation for the Doctrine of the Faith: *Considerations regarding proposals to give legal recognition to unions between homosexual persons* (June 3, 2003), no. 7 — http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (accessed 30.6.2014).

[76] T. Smyczyński: "Prawo dziecka…," no. I,5.

[77] M. Andrzejewski: *Pomocnicza rola państwa w świetle Konwencji o Prawach Dziecka i prawa polskiego*. In: *Współczesne kierunki w opiece nad dzieckiem. Wybór tekstów*. Ed. Z.W. Stelmaszuk. Warszawa 1999, pp. 94—113.

[78] T. Smyczyński: *Prawo dziecka…*, no. I,1.

[79] S. Tomasi: *Presentation of the Periodic Reports of the Holy See to the Committee on the Convention of the Rights of the Child and the Optional Protocols*. Geneva, January

some legal matter, this time in Art. 3c: "The family has a right to assistance by society in the bearing and rearing of children. Those married couples who have a large family have a right to adequate aid and should not be subjected to discrimination."

Precisely, it is right to agree with Tadeusz Smyczyński, who claims that the "reform of the family support system in Poland seems to be realizing this postulate." To illustrate the validity of this thesis, it is worth evoking the introduction (resembling a preamble) to the Act of June 9, 2011 on the support of family and the fosterage system where we read:

> For the well-being of children, who need particular protection and support from adults, family environment, the atmosphere of happiness, love and understanding, concerned for their harmonious development and future life independence, for assuring the protection of their rights and liberties, for the well-being of family, which is the elementary unit of the society and a natural environment for the development and well--being of all of its members, especially children, convinced that an effective support for a family that encountered difficulties caring for and upbringing children and an effective protection of children and help offered them can be achieved through a cooperation of all people, institutions and organizations working with children and parents — it is resolved as follows.[80]

It has to be noticed that articles 1, 8 and 9 of this legal act confirm the legislator's intention to implement the not so long ago presented ideological assumptions.[81]

Example 2

In the last example, contrary to the previous ones, Tadeusz Smyczyński's opinion can be shared only partially. He notices the virtues of the European Convention on Contact Concerning Children passed in Strasbourg,

16, 2014 — http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140116_tomasi-child-rights_en.html (accessed 30.6.2014).

[80] Ustawa z dnia 9 czerwca 2011 r. O wspieraniu rodziny i systemie pieczy zastępczej. Dz.U.2011.149.887 (trans. — A.P.)

[81] Art. 1 of the act defines: "1) principles and forms of supporting a family which undergoes difficulties in fulfilling guardianship and educational functions; 2) principles and forms of exercising fosterage care and helping the of-age foster children become independent; 3) the assignments of public administration within the scope of supporting family and the fosterage system; 4) the rules of financing the family and fosterage system support; 5) assignments within the scope of adoption procedures." In turn, articles 8 and 9 of the act (in chapter 2 entitled "Supporting Family") regulate the issues of helping a family which faces difficulties in fulfilling its guardianship and educational functions.

May 15, 2003,[82] calling for — according to the expert[83] — a fast ratification process of this legal act in our country. Two arguments were put forward. The first one, an entirely just broadening of the scope of the notion of child's contacts: beyond the circle of immediate family, i.e. parents (like in the Polish law); this notion should also span different people who developed a family bond with the child. The matter concerns the protection of child's feelings toward, for instance, grandparents, siblings, relatives or other people with whom the child has a true emotional bond. Let us add that the author evokes a precedential Supreme Court ruling, which recognized the right of the grandparents to personal contacts with the child (in spite of a resistance of one of the parents), when such contacts serve the well-being of a child.[84] The Polish expert notices the second value of the project of the convention in the normalization of the cross-border contacts and preventing the use of the contact with the child, by one of the parents, to destabilize the child's situation ruled by the court.[85]

However, the arguments of this and other experts from the Lower Chamber of the Parliament were not enough to guarantee the ratification of the act by the means of the highest Polish authority. President Professor Lech Kaczyński did not sign the Act dated October 23, 2008, on Ratification Convention on Contact concerning Children. Strasbourg, May 15, 2003. In the justification of the refusal to sign the President argued: "The order to protect the well-being of a child constitutes an elementary and superior principle of the Polish family law system, in relation to which all other regulations within the scope of the contacts between parents and children should be subordinate. […] According to article 25 it is prohibited to file, by the countries, any reservations toward the Convention. As a result, countries, which are to apply its solutions cannot connect the way of its usage with their legally binding system of values and traditions related to upbringing a child."[86] The refusal was for example motivated by the fact that "granting the Convention a status of a legally binding law

[82] European Convention on Contact concerning Children, Strasbourg (May 15, 2003) — http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm (accessed 30.6.2014).

[83] T. Smyczyński: "Prawo dziecka…," no. I,4.

[84] Uchwała Sądu Najwyższego z dnia 14 czerwca 1988 r. III CZP 42/88 — http://www.i-kancelaria.pl/przydatne_informacje2/kontakty_dziadkow_z_wnukami._uchwala_sadu_najwyzszego_ z_dnia_14_czerwca_1988_r._iii_czp_4288 (accessed 30.6.2014).

[85] T. Smyczyński: "Prawo dziecka…," no. I,4.

[86] Prezydent Rzeczpospolitej Polskiej: *Odmowa podpisania ustawy z dnia 23 października 2008 r. "O ratyfikacji Konwencji w sprawie kontaktów z dziećmi, sporządzonej w Strasburgu w dniu 15 maja 2003 r." (z uzasadnieniem)*, pp. 2—3 — http://orka.sejm.gov.pl/Druki6ka.nsf/0/ BA9F6A80266805DCC12575150046C9EB/$file/1442.pdf (accessed 30.6.2014).

seems to be at least premature, and moreover the results of its implementation can prove disadvantageous for family bonds. One of the fundamental values subject to the constitutional protection is the well-being of the family. The obligation of the legislator is striving for the provision of the stability of existing family relations, which enhances a correct development of underage children. It is the interest of children that has an immediate influence over the future of the family and it extorts defined rulings on the part of the public authority."[87]

At the end of this justification the President strengthens his argumentation, by making use of the judgment of the Constitutional Tribunal[88]: "The necessity of securing the stability of a family determines a set of legal remedies, toward which the Constitutional Tribunal pointed in its ruling of November 12, 2002 [...] stating that 'such a shape of the regulation is substantiated by the necessity to respect the unusually crucial, within the context of the norms related to marital status, principle of security and firmness of law. These principles have a particularly fundamental meaning for the stabilization of the family bonds, which cannot be disproved in a random way, in any conduct and time'."[89]

Indeed, eventually — after implementing amendments — President Lech Kaczyński finally affixed his signature under the act on the ratification of the above-mentioned convention.[90] However, the quoted example makes us think; constitutes a good exemplification of the fact that the right of a child to family implies a particular autonomy of the latter one. All the external activities for the stabilization of the relations in the family should be characterized by the respect of the human rights within the scope of morals, tradition, culture and religion. Namely, in legal systems, in which the well-being of a child is treated par excellence as the well-being of the family and the society, the value especially promoted and protected — as it expressed by the *Apostolic Exhortation "Familiaris consortio"* — is "bringing up children in accordance with the family's own traditions and religious and cultural values, with the necessary instruments, means and institutions."[91]

A similar ideological message can be found in Art. 5 of CRF, the content of which, let us add, concludes well the remarks included here: "Since they have conferred life on their children, parents have the original, pri-

[87] Ibidem, s. 3.

[88] Wyrok z 12 listopada 2002 r. SK 40/01, OTK ZU nr 6/2002, poz. 81.

[89] Prezydent Rzeczpospolitej Polskiej: *Odmowa podpisania ustawy...*, p. 3.

[90] Ustawa z dnia 23 kwietnia 2009 r. O ratyfikacji Konwencji w sprawie kontaktów z dziećmi, sporządzonej w Strasburgu w dniu 15 maja 2003 r. Dz.U.2009.68.576.

[91] John Paul II: *Apostolic Exhortation "Familiaris consortio"* (November 22, 1981), no. 46.

mary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children: Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family which favour the good and the dignity of the child; they should also receive from society the necessary aid and assistance to perform their educational role properly."[92]

* * *

It is not possible to talk about the rights of a child separately from the subject of family and the culture, tradition and values important in its environment. Such a clear message is included in the CRC Preamble, in its 5th and 6th paragraph: "Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

It is difficult to overestimate the value of this proclamation, constituting in its essence a universal (not only because of its scope) promotion of appropriate depictions of the rights of children. Indeed, the truth that the matter is related to a person rooted in the family should be reminded especially nowadays, when time after time tendencies to antagonize the relation between parents and children appear, mainly through evoking in an inappropriate way the rights of the latter ones.[93] Therefore, if we accept as an evident rule that the obligation to observe the conventional rights related to children rests upon countries, and the adults are responsible for the realization of this rights,[94] then the most desired activity of the country will always be an institutional support of the family with a view to securing a comprehensive protection of the rights of a child. All this in the name of a principle which states that the family is the basic unit of society and the natural environment for the growth and well-being of children.[95]

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[92] CRF, no. 5a.

[93] Cf. M. Łączkowska: "Instytucjonalna ochrona praw dziecka…," pp. 91—93.

[94] Cf. T. Smyczyński: "Legislacyjne podstawy ochrony dziecka." In: *Polska dla dzieci. Ogólnopolski szczyt w sprawach dzieci. Materiały i dokumenty*. Eds. M. Kaczmarek, P. Kierenko, Warszawa 2003, p. 47.

[95] CRC, Preamble.

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Andrzej Pastwa

The Right of the Child to be Raised in a Family Around the Current Issues

Summary

The article is initiated by a contemplation on the contemporary humanization mission of the family. "The family is the basic unit of society. It is the cradle of life and love, the place in which the individual 'is born' and 'grows'" (*Christifideles laici* exhortation, no. 40). However, not all forms of family life serve the human humanization and participate in the development of the society. A family, in order to create the integral human well-being — and that is, in fact, what the humanization is about — should act in a manner respecting this set of goods and values which characterize it as a "community of life and love." Among the missions of the family the most vital one is the mission of upbringing (according to a paradigm: "the family, first educator"). It is an area in which it is explicitly visible why the proclamation of the "family sovereignty," in the church documents — especially in the Charter of the Rights of the Family (1983) — is invariably accompanied by the affirmation of the subsidiarity principle. The standards of the Convention on the Rights of the Child (1989), touched upon in the last chapter, constitute a crucial reference point for the domestic legislator: the right to be raised in a family and to maintain contact with both parents. However, it is important to remember that a characteristic feature of the international law standards (binding for countries that ratified them) — similarly as legal acts of lesser legal force, like: recommendations or resolutions, is their conciseness, condensation, but also a peculiar terseness "justified" by the means of a reference to the minimum of common idea concerning a contemporary family relationship, equality of women and men, family autonomy, rights of individual, especially weaker party, that is, a child. This impartial, permanent situation is connected with such advantages as, for example leaving a subject matter freedom margin for a given country legislator: maintaining or passing detailed normative solutions coherent with the state law. However, today it is also not difficult to notice disadvantages: especially the underspecification — in the name of the outlook pluralism principles — the axiological plane of the accepted standards (and precisely, avoiding what we called the logos and ethos of the institutions of matrimony and family). In practice it can signify forcing a legal thought alien in a given culture, or even bear all stamps of a bad lobbing. It is demonstrated — in the last part of the article — by the means of examples, which depict real problems with the implementation of the relevant conventional regulations in the national (Polish) law.

Andrzej Pastwa

Le droit de l'enfant d'être élevé dans une famille Au sein de la problématique actuelle

Résumé

La réflexion sur la mission contemporaine d'une famille humaine ouvre le présent article. « Berceau de la vie et de l'amour, dans lequel l'homme "naît" et "grandit", la famille est la cellule fondamentale de la société » (Exhortation *Christifideles Laici*, n 40). Cependant, ce ne sont pas toutes les formes de la vie familiale qui servent à l'humanisation de l'homme et participent au développement de la société. Pour pouvoir créer le bien intégral de l'homme, la famille devrait agir d'une manière respectant cet ensemble de biens et de valeurs qui la définissent comme une « communauté de la vie et de l'amour ». Parmi tous les devoirs de la famille (selon le paradigme : « la famille, la première institutrice »), c'est la mission éducative qui occupe la première place. C'est dans ce domaine que l'on voit le plus clairement pourquoi la proclamation de « la souveraineté de la famille » est continuellement accompagnée dans les documents ecclésiastiques — notamment dans la Charte des Droits de la Famille (1983) — de l'affirmation du principe de subsidiarité. Présentés dans le dernier chapitre, les standards de la Convention relative aux droits de l'enfant (1989) qui sont de prime importance, c'est-à-dire le droit d'être élevé dans une famille et de rester en contact avec les deux parents, constituent un point de repère important pour le législateur d'un pays donné. Il ne faut pas quand même oublier que ce qui caractérise les normes du droit international que l'on analyse (il s'agit des normes réunissant les États qui les ont ratifiées), c'est la brièveté, la concision, mais aussi une certaine lapidarité « justifiée » par le fait qu'elle se réfère au minimum de visions communes concernant les relations familiales contemporaines, l'égalité de la femme et de l'homme devant la loi, l'autonomie de la famille, les droits de l'individu (surtout ceux qui sont plus faibles), etc. À cet état de choses objectif sont liés les côtés positifs, comme par exemple la possibilité permettant au législateur d'un pays donné de garder une marge de liberté conforme à la Convention : maintenir ou adopter des solutions normatives détaillées, homogènes avec le système du droit national. Mais il est aussi difficile aujourd'hui de ne pas remarquer les côtés négatifs : surtout le manque de précision — au nom des principes du pluralisme concernant la manière d'envisager le monde — du niveau axiologique des standards adoptés (et plus précisément, le fait d'omettre ce que l'on a appelé le logos et l'éthos de l'institution du mariage et de la famille). Dans la pratique, cela peut désigner l'appui d'une idée juridique qui est étrange au niveau culturel, ou voire porter toutes les marques d'un mauvais lobbying. Les exemples présentés dans la dernière partie de l'article mettent en évidence un tel état de choses en démontrant les problèmes réels liés à l'implémentation au droit national (polonais) des réglementations qui sont l'objet de la convention.

Mots clés : famille, droit de l'enfant d'être élevé dans une famille, souveraineté de la famille, principe de subsidiarité, Charte des Droits de la Famille, Convention relative aux droits de l'enfant

Andrzej Pastwa

Il diritto del bambino all'educazione in famiglia
Intorno alla problematica attuale

Sommario

L'articolo si apre con la riflessione sulla missione contemporanea di umanizzazione della famiglia. "Culla della vita e dell'amore, nella quale l'uomo «nasce» e «cresce», la famiglia è la cellula fondamentale della società" (Esortazione *Christifideles Laici*, n. 40). Tuttavia non tutte le forme di vita familiare giovano all'umanizzazione dell'uomo e partecipano allo sviluppo della società. Affinché possa creare il bene integrale dell'uomo la famiglia deve operare rispettando tale gruppo di beni e valori che la contraddistinguono come "comunità di vita e di amore". Tra i compiti della famiglia il posto principale è occupato dalla missione dell'educazione (secondo il paradigma: "la famiglia come prima educatrice"). È in quest'area che si vede meglio perché la proclamazione della "sovranità della famiglia" è accompagnata immutabilmente nei documenti ecclesiastici — specie nella Carta dei Diritti della Famiglia (1983) — dall'approvazione del principio di sussidiarietà. Standard presentati nell'ultimo capitolo della Convenzione sui diritti dell'infanzia (1989) di importanza primaria: il diritto all'educazione nella famiglia ed ai contatti con entrambi i genitori costituiscono un punto importante di riferimento per il legislatore nazionale. Occorre ricordare tuttavia che le norme del diritto internazionale trattate (vincolanti per gli stati che le hanno ratificate) sono caratterizzate dalla concisione, dalla sintesi e da una certa lapidarietà "giustificata" dal riferirsi alle idee comuni minime sui rapporti familiari contemporanei, sulla parità tra donna e uomo, sull'autonomia della famiglia, sui diritti dell'individuo, specialmente della parte più debole, ecc. A questo stato obiettivo delle cose sono legati aspetti positivi come ad esempio il fatto che al legislatore di un determinato stato venga lasciato un certo margine di libertà in tal campo: mantenere o accogliere soluzioni particolari normative coerenti con il sistema del diritto nazionale. Ma oggi è difficile non scorgere anche aspetti negativi: specialmente la mancanza di precisione nel definire — in nome dei principi del pluralismo sulla concezione del mondo — lo strato assiologico degli standard assunti (e concretamente, l'omissione di ciò che abbiamo chiamato logos e ethos delle istituzioni del matrimonio e della famiglia). In pratica può significare la forzatura del pensiero giuridico estraneo culturalmente o addirittura presentare tutti i tratti del lobbing negativo. Lo rendono evidente, nell'ultima parte dell'articolo, gli esempi che presentano i problemi reali di implementazione nel diritto nazionale (polacco) delle norme delle convenzioni in oggetto.

Parole chiave: famiglia, diritto del bambino ad essere educato nella famiglia, sovranità della famiglia, principio di sussidiarietà, Carta dei Diritti della Famiglia, Convenzione sui diritti dell'infanzia

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The Right of the Child to Decent Social Conditions and Education

Keywords: child, rights of children, social rights, education

1. Social rights of the child

The history of rights of the child is not so distant. The social and political changes in Europe at the end of the 18th century and then the rise of capitalism and industrial development resulted in a twofold approach to the child: on the one hand, the child was a right holder, and on the other hand their capabilities were exploited. Children were often physically exploited, badly treated, forced to work and contribute through it to their maintenance. Remaining under the authority of their parents or legal guardians children were and still are required to give them their obedience.[1]

In the 20th century the Geneva Declaration,[2] adopted by the General Assembly of the League of Nations in 1924, was the first document on

[1] See Art. 95 of The Family and Guardianship Code. In Poland, it was only in 2010 when the reference to the use of corporal punishment of children was deleted from the Family and Guardianship Code by introducing Art. 96,[1] see: The Family and Guardianship Code, 25 II 1964, *Journal of Laws* of 1964, no. 9, item 59 with further amendments (last amendment: *Journal of Laws* of 2014, item 1188).

[2] See: http://ms.gov.pl/Data/Files/_public/ppwd/akty_prawne/onz/deklaracja_praw_dziecka.pdf (accessed 12.10.2014). The English text available at: http://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF

the rights of the child. Although at that time social rights were not yet discussed, the text of the Declaration almost completely refers to them. It was stated that mankind should provide the child with all the best it has and it was accepted that regardless of race, nationality and creed it is its duty to provide the child with means for the child's normal development, both physical and spiritual; moreover, "The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured; 3. The child must be first to receive relief in times of distress; 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; 5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men."[3] The issue of protecting children against economic exploitation was present a few years before, however the work on protection of rights of the child was stopped due to the outbreak of the Second World War.[4] As early as in Convention no. 5 of the International Labour Organization (ILO) of 1921 fixing the minimum age for admission of children to industrial employment[5] Art. 2 states that "Children under the age of 14 years shall not be employed or work in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed." The issue of the protection of rights of children was also referred to in ILO Convention No. 6 concerning the night work of young persons employed in industry.[6] Article 2 states that: "Young persons under 16 years of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."[7]

[3] Ibidem.

[4] A. Szarkowska: *Dziecko w kontekście historycznym*, p. 13, see: http://www.iceow.uwb.edu.pl/pliki/as_dwkh.pdf (accessed 23.12.2014).

[5] The Convention was adopted on November 28, 1919 in Washington. It entered into force on 13 June 1921, was amended in 1937 with Convention No. 59 and in 1973 with Convention No. 138, withdrawn in 1978, see: http://www.mop.pl/html/polska_w_mop/konwencje_polska.html (accessed 25.10.2014). The English text available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312150

[6] The Convention was adopted on 28 November 1919 in Washington. It entered into force on June 13, 1921, it was revised in 1948 with Convention No. 90, see: http://www.mop.pl/html/polska_w_mop/konwencje_polska.html (accessed 25.10.2014).

[7] "Young persons over the age of 16 may be employed during the night in the following industrial undertakings on work which, by reason of the nature of the process, is required to be carried on continuously day and night:
(a) manufacture of iron and steel; processes in which reverberatory or regenerative furnaces are used, and galvanising of sheet metal or wire (except the pickling process);

Also in the Universal Declaration of Human Rights of 10 December 1948 in Art. 25 there are some references to social rights and education: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Whereas Art. 26 states that: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."[8] In 1959 the Declaration of the Rights of the Child[9] was adopted and though it consisted only of 10 articles, it included social rights and social security of children. It was only 30 years later that the Convention on the Rights of the Child,[10] adopted in 1989, had some new, more detailed rights added, was further extended to 54 articles and was addressed to children and states and people responsible for the care of the children.

The inherent dignity of the human person is a source of rights of each human being. It means that these rights derive from natural law and they are not granted by the state. Therefore, they are natural, independent of the will of the state authorities and each person is entitled to them by birth. They are inalienable, no person may waive these rights, they are also inviolable and it is a duty of the state to guarantee their realization and protection. Moreover, they are universal and concern every person

(b) glass works;
(c) manufacture of paper;
(d) manufacture of raw sugar;
(e) gold mining reduction work." The English text available at: http://www.ilo.org/dyn/normlex/en/f?p= NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312151:NO

[8] See the text of the Declaration at: http://www.unic.un.org.pl/prawa_czlowieka/dok_powszechna_deklaracja.php (accessed 25.10.2014). The English text available at: http://www.supremecourt.ge/files/upload-file/pdf/act3.pdf

[9] See the text of the Declaration at: http://ms.gov.pl/Data/Files/_public/ppwd/akty_prawne/onz/deklaracja_praw_dziecka.pdf (accessed 25.10.2014]. The English text available at: http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf

[10] See the text of the Convention at: http://www.unicef.org/magic/resources/CRC_polish_language_version.pdf (accessed 25.10.2014), *Journal of Laws* of 1991, No. 120, item 526. The English text available at: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx. Janusz Korczak (1878/79-1942) contributed substantially to the development of the rights of the child.

without exception. Every child is entitled to the rights of the child just like every adult is entitled to human rights. The child is a human person with dignity, therefore he is entitled to all human rights, regardless of his biological or mental immaturity, that is the age and being subject to the authority of parents, he requires special treatment and care, therefore he is entitled to such rights. No child can be deprived of these rights. It needs to be emphasized that there is no relation between possessing these rights by the child and fulfilling responsibilities or being obedient, that is the child does not have to earn these rights. The rights of the child and his responsibilities are two different issues. The child's entitlement to rights does not depend on performing or not performing his responsibilities (though he should do so). Upon his birth the child is given the rights, which do not have to be earned by satisfying any kind of requirements. The dignity of the human person is the only source of these rights.

But the question arises, at what point the child is entitled to social rights and when their applicability ends? Pursuant to Art. 1 of the Convention: "[…] a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Article 2 (1) of the Polish Act on the Ombudsman for Children states that: "[…] a child is every person from the moment of conception until the age of majority."[11] It should be recognized that the beginning of these rights is the beginning of the child's life from the moment of conception, whereas the end is marked by reaching the age of maturity.

The Convention on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1989, ratified by Poland[12] on July 7, 1991, in many articles, especially from no. 22 to no. 32[13] contains regulations on social rights. First of all, the Convention regulates the rights of the disabled child, either mentally or physically, so that he can enjoy a full and normal life in conditions which guarantee dignity, promote self-reliance and facilitate his active participation in social life. Moreover, the disabled child has the right to education, training, health care and rehabilitation services, preparation for employment and recreation opportunities (Art. 23). The Convention emphasizes the right of every child to the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health.[14] It also provides the child with the right to social security, including social insurance. Moreover, the child is entitled to a standard of living adequate for his physical, mental, spiritual,

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[11] See *Journal of Laws* no. 6, item 69 of 6 January 2000. The English text available at: http://brpd.gov.pl/sites/default/files/ustawa_o_rpd_en.pdf

[12] See *Journal of Laws* of 1991, no. 120, item 526.

[13] See articles from 23 to 32, in particular Art. 26, of the Convention.

[14] Art. 24 of the Convention.

moral and social development (Art. 27). Articles 28 to 30 of the Convention include the regulations connected with the right to education on the basis of equal opportunity, such as primary education that is compulsory and free of charge, and emphasizes that the education should develop the child's personality, talents and mental and physical abilities to their fullest potential. The states with ethnic, religious or linguistic minorities or persons of indigenous origin cannot deny the child that belongs to such minorities or the child of indigenous origin the right to have and enjoy their own culture, to confess and practice his own religion or to use his own language, together with other members of his group.[15]

Social rights are these human rights that are related to employment, social security, health, family life, participation in cultural life and education. There are several groups of these rights: (1) workers' rights connected with the performed job — including prohibition of forced labour, prohibition of discrimination in employment, the right to decent working conditions, fair wages and equal remuneration for work of equal value, the right to organize oneself and the right to strike; (2) the right to social security and medical protection — related to the right to social security in the event of sickness, old age, disability, unemployment and the right to social assistance; (3) family rights — including the right of the family to legal, social and economic protection, the right to protection of maternity, the right of children to protection against all forms of exploitation; (4) the right to education — including the right to free education at primary level, access to education at a higher level, the right to social assistance in order to facilitate access to education.[16] The Convention defines not only the rights of the child, the rights and duties of parents or legal guardians but also the duties and responsibilities of the state towards children in the following areas: providing assistance for children and the family, in education, in health care, social security and the protection of these rights. Social rights belong to the so-called second generation of rights. These include economic, social and cultural rights, which are these rights that provide for physical and mental development and social security of an individual. They also impose on the state economic and social responsibilities towards the citizen.[17] Social rights include in particular: the right to social security benefits and insurance, the right to health and health services, the right to rest, the right to social security. The adequate pro-

[15] Art. 30 of the Convention.

[16] Ministry of Labour and Social Policy in Poland, see: http://www.mpips.gov.pl/spoleczne-prawa-czlowieka/ (accessed 25.10.2014).

[17] Written sources of social rights include International Covenant on Economic, Social and Cultural Rights of 1966, see: http://www.hfhrpol.waw.pl/pliki/Miedzynarodowy_Pakt_Praw_Gospodarczych_Spolecznych_i_Kulturalnych.pdf (accessed 20.10.2014).

tection of these rights is the state's duty. In the case of individual's rights it is necessary for their holder to make the protection of these entitlements possible and be realized without any insurmountable difficulties, following the idea that: […] *parum esset iura condere, nisi, qui ea tueatur, existat*.[18]

The rights of the child are inextricably linked with the rights of the family because the child is born into and grows in the family. Hanna Waśkiewicz reminds that human rights are the rights to which a person is born, bringing them to society. They are universal, inalienable and inviolable. The rights of the family form a special group of human rights. The state cannot repeal, change, limit or suspend them. It is the task of the state to protect the rights of the family, that is to create such conditions in which family members will be able to exercise their rights freely. In addition, the state is a subject of responsibilities correlative to the rights of the family. The state does not accomplish its purpose if, for example, its legislation undermines the right of the family to exist by allowing divorces or it refuses new family members the right to life, or if the parents are denied the right to decide about the direction of their children's upbringing or education.[19]

2. Fairness of social conditions for the child

In the Polish language the word "decent" means appropriate, adequate, fair. We can talk about decent social conditions for the child in a situation when the child has the opportunity to develop in appropriate conditions which ensure his access to and use of such rights as social security, health care,[20] recreation or education. Fairness of social conditions for the child depends primarily on fairness of the wage of his parents or legal guardians and their standard of living. The size of the wage for parents' work has a significant impact on the child's development and exercise of his rights. Teresa Liszcz notes that a decent, that is adequate, standard of living designated by family wage essentially corresponds to

[18] See *Extravagantes Communes* 2,1,1. Also: Pree H.: "Das Recht auf die Heilsgüter (c. 213 CIC)." *Heiliger Dienst* 4 (1994), p. 288.

[19] H. Waśkiewicz: "Prawa człowieka a prawa rodziny." In: *Chrześcijanin w świecie* 139 (1985) no. 4, pp. 38—55.

[20] On the protection of child's health see more in: E. Respond: "Prawne aspekty ochrony zdrowia dzieci w Polsce." *Roczniki Nauk Prawnych* 24 (2014), no. 3.

the level of a modest life.[21] In Poland the so-called social minimum, set by the Institute of Labour and Social Studies, is the expression of this level. In western countries, the term "minimal wage" is used to determine it in relation to the average wage or to the national income per capita.[22] A social minimum should be understood as such low-level income that allows people to participate in social life, to integrate with it and not to fall into poverty. It is not de facto the poverty line but the line warning that below this limit there is a risk of poverty.[23] It is a model of meeting the needs at a generally low level but which is still sufficient to reproduce human vitality at each stage of his biological development, to possess and bring up children and to maintain a relationship with society. In the basic needs basket there are goods satisfying existential needs such as food, clothing, footwear, housing, health, hygiene and these which are used to perform work, for example local transport and communication, education (education and upbringing children), maintenance of family ties and social contacts and modest participation in culture. The basket includes three groups of needs: (1) municipal-consumption needs (food, housing, clothing, hygiene, health, transport and communications); (2) educational and cultural (upbringing, education, culture); (3) recreational and leisure (recreation, sport and tourism).[24]

If parents' income does not allow them to satisfy needs enlisted in the basic needs basket, there may be a phenomenon of poverty. Poverty describes a situation in which a person does not have the necessary means to survive and to survive he must rely on the help of others.[25] It is defined in many different ways. It is commonly referred to as a state of various types of defects occurring to such an extent and of such size that a person cannot permanently satisfy his basic needs, he feels humiliated in his human dignity and there is a crisis of the development of his personality that cannot be overcome on his own and he needs some help to do so.[26]

[21] T. Liszcz: "Prawo pracy a rodzina." In: *Prawo pracy a rodzina. Układy zbiorowe pracy*. Scientific ed. Idem. Warszawa 1996, p. 23.

[22] See E. Szczot: "The Right to Work and Family Wage. Some reflections on Article 10 of the Charter of the Rights of the Family from the Polish Perspective." In: *Ecumeny and Law* no. 2 (2014), pp. 203—220.

[23] See more in: P. Kurowski: *Koszyki minimum socjalnego i minimum egzystencji — dotychczasowe podejście* — https://www.ipiss.com.pl/wp-content/uploads/downloads/2012/08/rola_funk_min_soc_egz.pdf (accessed 25.10.2014).

[24] Ibidem.

[25] See Archbishop J. Michalik: A *Letter to the Clergy. „Ubóstwo kapłana realizacją Ewangelii*." November 28, 2010, http://www.mojepowolanie.pl/1886,a,ubostwo-kaplana-realizacja-ewangelii-list-do-kaplanow-abp-joz.htm (accessed 23.9. 2014).

[26] L. Dyczewski: "Kościół Katolicki wobec ubóstwa i ludzi ubogich," pp. 370—380, In: *Polska bieda II. Kryteria. Ocena. Przeciwdziałanie*. Ed. S. Golinowska. Warszawa 1997.

Poverty understood in this way includes both economic and spiritual aspects. A poor person is both the one who has something to eat and wear as well as the one for whom the school corresponding to his talents is not available, or somebody who cannot cope with everyday tasks because of his disability or impairment, or somebody who is lonely or does not participate in public life. The analysis of the social range of poverty which was conducted in Poland at the beginning of the 1990s confirms that poverty affects mostly children and young people.[27] The opposite of decent conditions of life are indecent conditions, difficult for life and development, namely such conditions which do not allow for the proper development of the child and exercise of his of her rights. Difficult conditions are also these conditions that differ significantly from the average living conditions of the children in a given state. Therefore, it is the duty of each state to take action for the benefit of the children and their families in the areas of education, health care and social assistance. Pursuant to the regulation in Art. 44 of the Convention, the activities of social assistance undertaken for the benefit of children are an important element of reports submitted by each state to the United Nations Committee on the Rights of the Child.[28]

The Constitution of the Republic of Poland in Art. 71 (1) defines the tasks of the state's social policy as follows: "The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances — particularity those with many children or a single parent — shall have the right to special assistance from public authorities [...]."[29] This provision

[27] Implementation of the right of the child to decent social conditions is particularly at risk in large families, families affected by unemployment, single-parent families and these families in which the responsibilities to maintain the family rest on one of the parents, and in dysfunctional families. In such families there is a greater risk of poverty. It is worth emphasizing the fact that in recent years even the work of two parents often cannot protect families from poverty. Cf. I. Wóycicka: Raport of 2007. *Walka z ubóstwem wśród dzieci oraz promocja ich integracji społecznej. Studium polityki państwa* — http://ec.europa.eu/social/BlobServlet?docId=5164&langId=pl (accessed 20.10.2014). In Poland in 2011 the number of people at risk of poverty or social exclusion amounted to 10.2 mln, representing 27.2% of the total population, to 24.2% on average in the EU, see: *Krajowy Program Przeciwdziałania ubóstwu i wykluczeniu społecznemu 2020. Nowy wymiar aktywnej integracji*. Ministry of Labour and Social Policy. Warszawa, May 2014 — isip.sejm.gov.pl/Download?id=WMP20140000787&type=2 (accessed 8.12.2014).

[28] See: Ombudsman for Children: "Prawo dzieci do godziwych warunków socjalnych" — http://brpd.gov.pl/aktualnosci/rzecznik-prawo-dzieci-do-godziwych-warunkow-socjalnych (accessed 25.10.2014).

[29] The Constitution of the Republic of Poland, March 2, 1997, *Journal of Laws* of 1997, no. 78, item 483 with further amendments. The English text available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

imposes on the state the obligation to provide assistance to families in a difficult financial situation, especially large and single-parent families. The principle of subsidiarity of the state and other public institutions towards the family means that the state supports the efforts of the family, yet it does not relieve the family in their efforts to provide a decent standard of living. In its socio-economic policy the state should seek to guarantee citizens the income which is sufficient to support the family and supplement with social benefits the income of those who cannot provide a decent standard of living with their income to dependant family members. The state should support parents in their efforts to properly secure social needs of children, as well as it should create social and family policy which is favourable for ensuring, to the greatest extent possible, the conditions for the child's life and development. Social rights set in the Constitution are only general indications, as the objectives of the state's activities. A full elaboration and detailed definitions of these are included in the statutory regulations. These rights do not directly create claims on the side of the citizens, particular claims against the state, but they impose on the state the obligation to take all necessary measures to implement these rights. This includes legal, political, economic or cultural activities.[30]

Provisions of the Convention on the Rights of the Child define general standards for implementation of social rights of the child. The state which ratified the Convention is obliged to recognize the right of every child to a standard of living adequate for his physical, mental and social development. The primary responsibility to secure adequate conditions of living lies, within their capabilities, with parents and other people responsible for the child. Only if the parents, or others responsible for the child, are not able to secure adequate and decent conditions of living, necessary for the child's development, it is the duty of competent public institutions to provide children with adequate social conditions.

Article 27 of the Convention fully presents social rights of the child:

1. State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The patent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development.

[30] Ombudsman for Children: "Prawo dzieci do godziwych warunków socjalnych" — http://brpd.gov.pl/aktualnosci/rzecznik-prawo-dzieci-do-godziwych-warunkow-socjalnych (accessed: 25.10.2014).

3. State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in the State different from that of the child, State Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Articles 6 (2),[31] 26 (1) and (2) of the Convention should also be considered.[32] Children often bear consequences of situations which are without their fault. They should be more effectively protected against such situations because they are beyond their control. They take negative consequences of social changes with "the benefit of inventory," for example structural changes in areas of the former state farms (PGR), unemployment, parents' resourcelessness in life, or the presence of events beyond control (flood, fire) or life in poverty, in which case we can talk about the so-called transmission of poverty. In these situations children pay the highest price. The report submitted to the Ministry of Labour and Social Policy shows that in Poland since 2010 over 1,800 children were taken away from their parents due to poverty and impoverishment, resourcelessness in life, difficult living conditions, unemployment and many other factors which contribute to the phenomenon of poverty. As an example, in 2011 in foster families and institutions of various kinds there were over 95,000 of children. This number was higher than in 2005 mainly due to the increasing educational and care problems among children and

[31] Art. 6: "1. State Parties recognize that every child has the inherent right to life. 2. State Parties shall ensure to the maximum extent possible the survival and development of the child." Art. 24: "1. State Parties shall recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

[32] "State Parties shall recognize for every child the right to benefits from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for the benefits made by or on behalf of the child."

young people as well as insufficient and ineffective support provided to parents.[33]

3. The right to education

The right to education was included in Art. 28 paragraphs from a) to e) of the Convention on the Rights of the Child[34] which specifies that State Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity they will, in particular, make primary education compulsory and available to everyone. Earlier, the right to education was included in the International Covenant on Economic, Social and Cultural Rights of 1966 in Art. 13. Paragraph 1 of this article emphasizes the right of everyone to education, and that this education should be directed towards the full development of the human personality and the sense of its dignity, and should strengthen the respect for human rights and fundamental freedoms.

In Poland, after political changes in 1989, the Act of September 7, 1991 on the education system[35] was prepared and in the preamble it is stated that the school must provide each student conditions which are necessary for his growth, prepare him for performing family and civil responsibilities on the basis of the principle of solidarity, democracy, tolerance, fairness and freedom. Pursuant to Art. 1 of this act each citizen of the Republic of Poland is granted the right to education and children and young people are guaranteed the right to education and care, taking into

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[33] See: http://www.csopoid.pl/odbieranie_dzieci_z_powodu_biedy.html (accessed 20.12.2014). Also research shows that in Poland over 500,000 of children do not get enough food, almost 450,000 do not have all textbooks and almost 600,000 do not go to the dentist's due to their poverty — the report of GUS (Central Statistical Office of Poland).

[34] Art. 28: "2. State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. State Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."

[35] Ustawa o systemie oświaty z dnia 7 września 1991 r., *Journal of Laws* of 2004, no. 95, item 425 with further amendments.

account their age and developmental stage. The education system also provides support for the educational role of the family. Moreover, Art. 70 of the Constitution of the Republic of Poland of 1997 guarantees the right of each citizens to education and imposes the schooling obligation until 18 years of age. Education in public schools is free of charge and parents have the right to choose a school for their children.[36] However, in whole Europe and Poland there is a problem connected with a group of young people, the so-called NEETs. It is an acronym of English words "not in education, employment, or training." Young people between 15 and 24 prematurely leave school, are unemployed and cannot benefit from trainings that could prepare them for work.[37] Therefore, new forms of schooling arise in the form of informal education.[38]

The Education Development Strategy for Poland for years 2007—2013 indicates that the strategy is based on the assumption that as an integral system of schooling, education in Poland enables gaining knowledge and skills, upbringing, formation and promotion of attitudes.[39] Currently there is a new strategy, EUROPE 2020,[40] which emphasizes promotion of high-quality early care and education, including the focus on an individual approach to the needs of young children and an effective cooperation with

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[36] The Constitution of the Republic of Poland, 2 IV 1997, Art. 70 (1) and (2), Journal of Laws of 1997, no. 78, item 483 with further amendments.

[37] According to the Report on tackling poverty and social exclusion issued by the Ministry of Labour and Social Policy in 2013 the biggest concern among older children and the youth (15—24) caused the phenomenon of being left outside education, training and work (the case of NEETs). In Poland the pre-estimated percentage of young people in this situation amounted to 11.6% in 2011, and it concerns mainly the youth aged 18—24 (only a few countries managed to reach less than 5%, e.g. Holland). The youth unemployment rate in Poland has been growing for several years, in the fourth quarter of 2012 it increased to 27.4%. Several countries managed to reduce this rate to less than 10% (Holland, Germany, Austria). The problem of poverty and exclusion affects particularly children and the youth. Cf. also: *Diagnoza społeczna 2013. Warunki życia i jakość życia Polaków*. Warszawa 2014. Eds. J. Czapiński, T. Panek, pp. 105—106.

[38] On informal education see: *Doświadczać uczenia. Materiały pokonferencyjne*, Warszawa 2005, http://www.frse.org.pl/sites/frse.org.pl/files/doswiadczac_uczenia_materialy_pokonferencyjne_pdf_90786.pdf (accessed 21.11.2014). Cf.: Ministry of Economy: *Krajowy Program Reform Europa 2020. Strategia na rzecz inteligentnego i zrównoważonego rozwoju sprzyjającego włączeniu społecznemu*, http://www.mg.gov.pl/files/upload/8418/EUROPA_PL.pdf (accessed 10.12.2014).

[39] *Strategia edukacji na lata 2007—2013*. Point 3.4: *Główne kierunki strategii edukacji*. In: *Edukacja w ramach Strategii Lizbońskiej. Wybór dokumentów*. Eds. D. Bis, I. Szewczak. Lublin 2007, p. 68.

[40] See: Ministry of National Education: *Główne kierunki krajowej polityki edukacyjnej do roku 2020*, Warszawa, April 4, 2013, http://konfederacjalewiatan.pl/opinie/fundusze_europejskie/programowanie-perspektywy-2014-2020/_files/Projekty_UE/G_wne_kierunki_krajowej_polityki_edukacyjnej_do_2020_ MEN.pptx (accessed 10.12.2014).

the home environment and support for parents in caring for children. It is proposed to give all children aged 3 to 5 a site for preschool education and guarantee a smooth transition from preschool to school education. Promotion of early education should contribute to levelling the chances for education of children and a better development of their learning competencies. The strategic objective of the Social Capital Development Strategy sets out educational activities both in the area of supporting formal education in the field of teaching methods that encourage cooperation, creativity and communication and the development of democratic culture of the school, as well as supporting informal education and directing it towards cooperation, creativity and social communication.

The Report on tackling poverty and social exclusion showed that in Poland in 2005 children's access to kindergartens and nurseries was very poor. Only 20% of children aged 6 benefited from preschool care (14% in 2003). In urban areas the access of preschool children to care facilities is over twice higher than in rural areas, where only 11% of children benefited from such care. The worst access to kindergartens have children from neglected municipalities and disabled children, those for whom preschool education is most needed because of creating equal educational opportunities in the future.[41] Recently, as regards the care provided by nurseries and preschool education, the rates have increased but they still remain at a level lower than in western countries. The report issued by UNICEF shows that, unfortunately, in Poland the number of nurseries is still too small because only about 3% of children aged 0—3 living in urban areas and a marginal percentage of children from rural areas can benefit from them. The situation was slightly improved with the introduction of new forms of care for preschool children. The access to childcare and education is better in the case of kindergartens where the enrollment rate, steadily increasing since 2005, amounted to 69.9% in the school year 2010/2011. However, it turns out that far more children from urban areas than from rural areas go to kindergartens and this disproportion, despite the overall growth of the rate, is still significant (in the school year 2010/2011 the enrollment rate was 83.6% in urban areas and 51.2% in rural areas).[42]

The right to education was included in the Charter of Fundamental Rights of the European Union, adopted in Nice in 2000, in Art. 14. It was stated that everyone has the right to education and access to vocational and continuing training. Moreover, this right includes the possi-

[41] I. Wóycicka: *Walka z ubóstwem wśród dzieci oraz promocja ich integracji społecznej. Studium polityki państwa* (Report: May 2007), http://ec.europa.eu/social/BlobServlet?docId=5164&langId=pl (accessed 20.10.2014).

[42] *Dzieci w Polsce. Dane, liczby, statystyki*. Warszawa 2013 — http://www.unicef.pl/Media/Files/Dzieci-w-Polsce.-Dane-liczby-statystyki (accessed 15.12.2014).

bility to receive free compulsory education and the freedom to found, with due respect for democratic principles, educational establishments, and the right of parents to ensure education and teaching of their children according to their own religious, philosophical and pedagogical convictions. They are respected in accordance with national laws governing the exercise of such freedom and this right.[43] Moreover, as in previous documents, the Treaty of Lisbon of 2007, in Title XII on education, vocational training, youth and sport, Art. 165, states that the Union is to contribute to the development of quality education and encourage cooperation between Member States, and to support and, if necessary, supplement their activities.[44] All documents emphasize the role of quality education, they talk about upbringing that respects religious and philosophical convictions of parents and they emphasize the need for vocational and continuing training. However, currently there is a problem that education does not guarantee a job for young people and bettering their economic situation.

Children are defenseless, helpless and subordinate to the authority of adults. For this reason they should require special care and protection, manifested especially in the pro-family policy of the state. Article 71 of the Constitution of the Republic of Poland imposes such a pro-family direction of the policy. Moreover, there is a close relationship between the economic policy of the state, social policy and the quality of life of the family. The better condition of the family, the lower unemployment, decent wages of parents and a greater care of the state for developing the pro-family policy the greater likelihood that the right of the child to decent social conditions is preserved and better protected. It is in the interest of the state to care for better living conditions of its citizens and opportunities to implement their social rights because, as commonly believed, poor children need to be given a chance so that they do not become poor adults in the future.

Translated from Polish by Anna Bysiecka-Maciaszek

[43] Ministry of Foreign Affairs. Karta Praw Podstawowych Unii Europejskiej. Warszawa 2001. Art. 14, points 1—3.

[44] “Traktat o funkcjonowaniu Unii Europejskiej.” In: *Prawo Unii Europejskiej wraz z indeksem rzeczowym*. 16th edition. Warszawa 2011, Art. 165 (2), 166.

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Elżbieta Szczot

The Right of the Child to Decent Social Conditions and Education

Summary

The article presents the genesis and sources of rights of the child. Every child is entitled to the rights of the child just like every adult is entitled to human rights. The child is a human person with dignity, therefore he or she is entitled to all human rights. Moreover, because of his biological and mental immaturity and being subject to the authority of parents the child requires special treatment and care. Social rights are these human rights that are related to employment, social security, health, family life, participation in cultural life and education. They include economic, social and cultural rights, which are these rights that provide for physical and mental development and social security of an individual. Rights of the child are inextricably linked with rights of the family because the child is born into and grows in the family. The Constitution of the Republic of Poland imposes such a pro-family direction of the policy in Art. 71. What is more, there is a close relationship between the economic policy of the state, social policy and the quality of life of the family. The better condition of the family, the lower unemployment, decent wages of parents and a greater care of the state for developing the pro-family policy the greater likelihood that the right of the child to decent social conditions is preserved and better protected.

Elżbieta Szczot

Le droit de l'enfant aux conditions sociales convenables et à la formation

Résumé

On a présenté dans le présent article la genèse et la source des droits de l'enfant. Les droits de l'enfant reviennent à chaque enfant, tout comme les droits de l'homme reviennent à chaque personne adulte. L'enfant est une personne humaine ayant la dignité de la personne et, pour cette raison, il a le droit de profiter de tous les droits de l'homme. En plus, étant donné son immaturité biologique et intellectuelle ainsi que le fait qu'il est sous la dépendance de ses parents, l'enfant demande un soin particulier. Les droits sociaux sont les droits de l'homme concernant le travail, la protection sociale, la santé, la vie familiale, la participation à la vie culturelle, la formation. Parmi ces droits on range les droits économiques, sociaux et culturels, c'est-à-dire ceux qui assurent à l'individu le développement physique et spirituel ainsi que la sécurité sociale. Les droits de l'enfant sont inséparablement liés aux droits de la famille parce que l'enfant naît et grandit au sein de la famille. L'article 71 de la Constitution de la République de Pologne requiert que la politique de l'État prenne en considération le bien de la famille. En plus, il existe un rapport étroit entre la politique économique, la politique sociale et la qualité de la vie des familles. Si la situation de la famille est meilleure, le chômage plus bas, les salaires des parents plus convenables et que l'État s'occupe mieux de la formation de la politique

familiale, la probabilité que le droit de l'enfant aux conditions sociales convenables et à la formation soit respecté et convenablement protégé augmente.

Mots clés : enfant, droits de l'enfant, droits sociaux, formation

Elżbieta Szczot

Il diritto del bambino a condizioni sociali e di istruzione dignitose

Sommario

Nell'articolo sono stati presentati la genesi e la fonte dei diritti del bambino. I diritti del bambino spettano a ciascun bambino come a ciascun adulto spettano i diritti dell'uomo. Il bambino è un essere umano che ha la dignità di persona, perciò gli spettano tutti i diritti dell'uomo. Inoltre il bambino per la sua immaturità biologica e intellettuale e la sottomissione all'autorità dei genitori richiede un'assistenza e una cura particolari. I diritti sociali sono quei diritti dell'uomo che riguardano il lavoro, la tutela sociale, la salute, la vita familiare, la partecipazione alla vita culturale, l'istruzione. Vi rientrano i diritti economici, sociali e culturali ossia quelli che garantiscono all'individuo la crescita fisica e spirituale nonché la sicurezza sociale. I diritti del bambino sono indissolubilmente legati ai diritti della famiglia in quanto il bambino nasce e cresce nella famiglia. Alla tendenza profamiliare della politica dello stato obbliga la Costituzione della Repubblica Polacca nell'art. 71. Inoltre esiste uno stretto legame tra la politica economica, la politica sociale realizzata e la qualità della vita delle famiglie. Migliore è la situazione della famiglia, più è basso il tasso di disoccupazione, i guadagni dei genitori dignitosi, maggiore è la cura per la formazione della politica profamiliare, allora è più probabile che il diritto del bambino a condizioni sociali e di istruzione dignitose venga mantenuto e venga tutelato adeguatamente.

Parole chiave: bambino, diritti del bambino, diritti sociali, istruzione.

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The Right of the Child to Access Information and to Express Views Freely

Keywords: child, information, freedom, speech, religion

The Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, and ratified by Poland on July 7, 1991,[1] includes, among others, declarations of children's rights to information and to express their views freely in all matters concerning them directly (Art. 7, 12—17). The rules contained within the Convention affect the delicate, and often fraught with emotion and tension, spheres of life and relations within the family between parents and children. Hence, both the discussion concerning the interpretation of these rules and implementation of them into the legal system of individual states is characterized by axiological, pedagogical, psychological and ideological tensions around the issue.

1. The child's right to information

In order to formulate a catalogue of children's rights, it is important to consider the content of the Convention, in particular articles 7, 13 and 17, as well as provisions within in the European Convention on the Exer-

[1] *Dziennik Ustaw Rzeczypospolitej Polskiej* 1991, No. 120, item 526 (*Journal of Laws of the Republic of Poland*, abbreviation: Dz.U.).

cise of Children's Rights of 1996,[2] which in its preamble recognizes that children should be provided with relevant information in order to promote their rights and best interests and that due weight be applied to children. Article 2 defines "relevant information," as information appropriate to the age and understanding of children, which should be given to them to allow the full exercise of their rights, unless this would be contrary to their welfare. As a result, the following directory of children's rights in the field of information can be formulated as:

(a) the right to information on parentage (the knowledge of their parents).

According to Art. 7, the child, if it is possible, has the right to know their parents (par. 1) and the State ensures that this right will be guaranteed in their domestic law (par. 2). The practical problem arises when the child is adopted. When signing the Convention, Poland did so with two caveats. One of them was with regard to Art. 7, stipulating that the right of an adopted child to know its natural parents shall be subject to limitation by the validity of the legal solutions enabling adopters to keep secret the child's origin. This reservation was withdrawn in 2013.[3] Similar objections were also reported by then-Czechoslovakia, stating that "in the case of adoption that is not subject to appeal, based on the anonymity of such adoptions, and artificial insemination, the doctor performing the procedure is required to ensure that the husband and wife of one side, and the other donor remain anonymous, failure to inform the child about the name or names of the natural parents is not in conflict with this provision."[4]

In addition, Art. 20 of the European Convention on the Adoption of Children of 1967[5] contains the provisions for obtaining information relat-

[2] European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on January 25, 1996, Dz.U. 2000, No. 107, item 1128.

[3] Ustawa z dnia 10 października 2012 r. o zmianie zakresu obowiązywania Konwencji o prawach dziecka, przyjętej dnia 20 listopada 1989 r. w Nowym Jorku, Dz.U. of 2012, item 1333; Oświadczenie Rządowe z dnia 27 marca 2013 r. w sprawie zmiany zakresu obowiązywania Konwencji o prawach dziecka, przyjętej dnia 20 listopada 1989 r. w Nowym Jorku, Dz.U. of 2013, item 677.

[4] Oświadczenie Rządowe z dnia 30 września 1991 r. w sprawie ratyfikacji przez Rzeczpospolitą Polską Konwencji o prawach dziecka, przyjętej przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., Dz.U. 1991, No. 120, item 527.

[5] Europejska Konwencja o Przysposobieniu Dzieci, sporządzona w Strasburgu dnia 24 kwietnia 1967 r., ratyfikowana przez Polskę w dniu 24 kwietnia 1996 r., Dz.U. 1999, No. 99, item 1157.

ing to individuals. It requires the implementation of a decision to allow an adoption without disclosing the identity of the adopter to the child's family (par. 1), and also declares that the adopter and the adoptee should have the right to obtain documents from the act of civil status attesting to the fact, date and place of birth of the adopted person, but not expressly revealing the fact of adoption nor the identity of the natural parents (par. 3). However, with regard to the storage and dispensing of acts of civil status, the Convention indicates that the acts should be kept and copies of them be issued at least in such a way that persons who have no legal interest in the matter could not find out that the person was adopted, or if this fact is known — they would not be able to establish the identity of the natural parents (par. 4).

Discussion on the subject of the right to information about the identity of the parents appeared not only in the context of adoption and IVF, but also for the sake of the realization of this right into questioning the possibility of the function of the so-called Window of Life in which a woman can anonymously leave her child.[6] From the discussion, the position of UN experts shows that the right to information about the identity of the parents has a greater importance than the right to life, whose implementation enables this "Window of Life."

(b) The right to seek, receive and impart information, as well as ideas of all kinds, regardless of boundaries, either orally, in writing or in print, in the form of art, or through any other medium of the child's choice;
(c) the right to receive information, appropriate to the age and understanding of the child, which should be given to them to allow them the full exercise of their rights, unless this would be contrary to their welfare.

An example of a particularly delicate sphere, which is health, are detailed settlements proposed for example by the Polish Ombudsman as "the Charter of Rights of the Dying Child,"[7] which in Art. 6 declares that each sick child has the right to be informed and to participate in making decisions relating to the care they receive, in accordance with their

[6] See A. Bałaban: "'Okna życia' przeszkadzają ONZ." *Nasz Dziennik*, published online: www.naszdziennik.pl/wp/4690,okna-zycia-przeszkadzaja-onz.html [13.06.2012].

[7] Rzecznik Praw Obywatelskich: "Karta Praw Dziecka Śmiertelnie Chorego w Domu." In: *Raport o korespondencji i kontaktach między Rzecznikiem Praw Obywatelskich i Ministrem Zdrowia w sprawie przestrzegania praw obywateli do ochrony zdrowia w okresie od 14 lutego 2006 do 30 kwietnia 2009. Biała Księga, Biuletyn Rzecznika Praw Obywatelskich* 2009, No. 4, pp. 525—526.

age and understanding. In contrast, the European Charter for Children in Hospital,[8] adopted at the European Conference of the European Association for Children in Hospital in 1999, includes a provision that children and parents should have the right to obtain information in a manner appropriate to their age and comprehension (Art. 5, par. 1).

(d) The right to be informed (including by proxy) about the possible consequences of their position, as well as the possible consequences of any decision in judicial and administrative proceedings.

This issue has found its details in the European Convention, which contains, among others, the procedural rights of the child. And so, Art. 3 declares the right to be informed and to express their views in proceedings. Therefore, a child considered by internal law as having sufficient understanding, in proceedings affecting him or her before a judicial authority, should be granted and may themselves request the right to receive all relevant information, to be consulted and to express their views, as well as to be informed of the possible effects of their position and the possible consequences of any decision. The consequence of this is formulated in Art. 5, the possibility of granting additional rights to children, in particular the right to request assistance by a person chosen by them who would assist them in expressing their views.

On the other hand, in Art. 5 of the Convention, Member States undertake judicial authorities so that in proceedings concerning children, before any decisions about the child considered by internal law as having sufficient understanding, ensure that the child has received all relevant information, in appropriate cases, if necessary — informally, consulting the opinion of the child, in person or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be obviously contrary to the child's well-being, allowing the child to express his or her views and applying due weight to the views expressed by the child. In such proceedings, a duly constituted representative, in accordance with Art. 10, par. 1, unless it would be obviously contrary to the best interests of the child, during proceedings relating to the child held before a judicial authority, should provide the child with all relevant information, if the child is considered to have sufficient understanding by internal law. This representative should provide explanations to the child, if the child is considered to have sufficient under-

[8] European Association for Children in Hospital, Charter, in: www.each-for-sick-children.org/each-charter/the-10-articles-of-the-each-charter.html (accessed 6.1.2015).

standing, on the possible consequences of its position and actions by the representative, identify the child's position and present it to the judicial authority.

An example of the application of the Convention standards was developed by the Polish Foundation "Nobody's Children," in the "Bill of Rights of the Child Victim/Witness to a Crime," in which Art. 10 provides that a child victim/witness to a crime has the right to information concerning his or her participation and role in the proceedings at a level appropriate to their developmental capabilities (par. 1), and the child should be informed in particular about the right to refuse to testify or refuse to answer the questions in a manner adapted to the development of the child, if the child is able to grasp the importance of this information (par. 2).[9]

(e) The right to information about the educational process.

An example of implementing this power are, among others, the rights of students codified in educational institutions. According to the Statute of Primary School No. 23 in Zabrze,[10] the right of the student-child to information about the learning process is carried out by the fact that the Director of the institution ensures students the opportunity to familiarize themselves with the statutes and information about the measures they are entitled to in case of violation of their rights. In addition, the school should inform the students about all decisions made regarding the student; for example, to move on to another class, at the request of the student or parents, the issued assessment should be briefly justified. A student also has the right to know what the interim or annual evaluation will be. Each teacher, in the manner and time specified in the school statute must submit such information, and before that, meet the criteria for evaluating behaviour and know what are the possibilities of appeal from the final assessment are, by improving it or taking an exam (§ 8 and 27).

In turn, the Statute of Primary School No. 28 in Zabrze[11] includes, among others, the student's rights to open and up-to-date assessments of individual subjects, to familiarize themselves with school regulations, and most of all, with the internal grading system and criteria for evalu-

[9] Fundacja "Dzieci niczyje": *Karta Praw Dziecka Ofiary/Świadka Przestępstwa*. Refrieved from: www.canee.net/files/org_640karta_praw.pdf (accessed 1.4.2015).

[10] "Statut Szkoły Podstawowej Nr 23 im. Tadeusza Kościuszki w Zabrzu": http://www.sp23zabrze.edupage.org/files/statut.pdf (accessed 4.1.2015).

[11] "Statut Szkoły Podstawowej nr 28 w Zabrzu": http://www.sp28.zabrze.pl/wp-con tent/uploads/2013/04/Statut.pdf (accessed 1.4.2015).

ation of behaviour, to the current information about school life (among others awards, penalties, etc.), conveyed at appeals for fair, objective and transparent assessments and strategies of the control in advances in education, to information about educational requirements resulting from the curricula and how to verify educational achievements, principles of evaluating the behaviour, as well as to obtain information about the expected intra-annual assessments (annual), including inadequate assessments, a month before the classification meeting of the Board of Education (§ 2).

2. The right of the child to express their views

Article 12 of the Convention provides for a bright child to express their own views and the right to express them freely in all matters concerning them, accepting these views with due attention, according to the age and maturity of the child.

(a) The right to express themselves in judicial and administrative proceedings.

Hence, the child shall, in particular, be provided the opportunity to express themselves in all judicial and administrative proceedings concerning his or her person, directly or through a representative or an appropriate body, in accordance with the procedural rules of national law. This provision is implemented in Polish law by Art. 573 § 2 of the Code of Civil Procedure. It is worth, in this context, to recall and cite two decisions of the Supreme Court. The first being from December 15, 1998 (I CKN 1122/98), regarding the guardian of the minor, that the court is obliged to consult with their position, if the degree of maturity of the minor permits it, and this is deliberate. In any such case, the court considers the opportunity to take reasonable requests of the minor, if it is consistent with his well-being. This obligation is not stated directly in the Code of Civil Procedure (Art. 573, 574 and 576), but is primarily due to Art. 12 of the Convention on the Rights of the Child. The judges state that the adoption of such obligations corresponds to the principle of the 3rd Recommendation No. R/84/4 of the Committee of Ministers of the Council of Europe on February 28, 1984, with respect to parental responsibility, calling for, directed to the authority responsible for making decisions about parental responsibilities of the child, to familiarize them-

selves with the child's position.[12] The minor expresses his or her position before the court, which hears it, or before experts, who are to express an opinion on the case.

In the second decision — from December 16, 1997 (III CZP 63/97) — judges found that the clear wording of Art. 12 of the Convention, especially its second point, shows the child's established guarantee of the possibility to express themselves in any legal proceedings that concern him or her. This does not mean, however, that this requirement can only take place by granting the child a status of participant in the proceedings. The Convention leaves the determination of how to implement this obligation regulated by domestic law of the competent State. In our procedure, the opportunity to express a belief by a child is guaranteed by the institution to be heard, provided for in Art. 576 § 2, in connection with Art. 573 § 2 k.p.c. On the topic of the desirability of listening to the child, the Supreme Court has expressed in its decision in the above resolution of the full composition of the Civil Chamber. This is even more stressed by the Supreme Court in its resolution of May 3, 1979 (III CZP 14/79-OSNCP in 1979, item 230) taken in the composition of the ordinary, but related to the procedural rights of minors on the restriction of parental authority over them. The entrance of this into the life of the Convention on the Rights of the Child has resulted in only such a change, that formulated so far by way of judicial interpretation the recommendation to listen to the child became henceforth the duty of the court process on any matter concerning a child whose mental state and physical development permits, and also in the case of the deprivation of parental authority over him.

Any violation by a court of this duty should be assessed in terms of material deficiencies affecting the outcome of the case. However, it is important to underscore, that this obligation does not need to be carried out only in the form of directly hearing the child before the court, especially in the courtroom. Due to the confirmed-in-practice fact that direct contact with the court often has a harmful effect on the child's psyche, the court has the opportunity to familiarize themselves with a child's position through their subsidiary bodies, such as the curator or opinion of the diagnostic-consulting centre, and finally the opinion of an expert psychologist.

In the end, it must be emphasised that hearing, as a sufficient guarantee of the child's process to present his views in legal proceedings con-

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[12] The competent authority who makes all decisions on parental responsibility or the exercise thereof, relating to the fundamental interests of the child, should be familiar with his position, if the level of maturity of the child permits" — see M. Safjan (ed.): *Standardy prawne Rady Europy, teksty i komentarze*. Vol. I: *Prawo rodzinne*. Warszawa 1994, p. 202.

cerning the establishment of his rights, is provided for by Art. 72, par. 3, of the Polish Constitution of April 2, 1997.

(b) The right to freedom of expression.

According to Art. 13 of the Convention, a child has the right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of boundaries, either orally, in writing or in print, in the form of art, or through any other medium of the child's choice (par. 1). However, the exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the respect of the rights or reputations of others or for the protection of national or public order, or public health or morals (para. 2).

An example of the application of this law in an educational context is the provision found in the already cited above Statute of Elementary School No. 23 in Zabrze. A student has the right to freedom of expression of its thoughts and beliefs, if it does not infringe on the welfare of others, the child has the right to express an opinion on curricula and teaching methods, and important issues in the life of the school, class, local government, [the child] has the right to express opinions and present their position (e.g. in a conflict) or on decisions relating to another student. A student also, as long as it does not infringe on the good of others, can deliver controversial views and opinions contrary to the canon of teaching. Maybe, for example, they wish to express their own judgments and opinions about historical or literary heroes, but it does not absolve them from having the knowledge of the teaching material. These ideas, which may be controversial or inconsistent with the views of the teacher's opinions, cannot affect the student's periodic assessment of merit. The fundamental rights of the students also state that a student has the right to present their views to the school council, pedagogical council and the Director, including their conclusions and opinions on all school matters.

In turn, the Statute of Elementary School No. 28 in Zabrze states that the student has the right to tolerance in terms of expressing their own thoughts and religious beliefs — if it does not violate the welfare of others.

(c) The right to freedom of thought, belief and religion, including its practice.

According to Art. 14 of the Convention, States Parties have the obligation to respect the rights of the child to freedom of thought, conscience

and religion (par. 1), and the freedom to practice one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect national security and public order, health or morals or the fundamental rights and freedoms of others (par. 3).[13]

The Convention grants the child the freedom of religion, conscience and religion, without taking into account age limit above which the law could be considered. It is hard to specify at what age a child could decide with full knowledge their choice of religion. On the other hand, this right is also limited by the rights of parents who invariably, also in this situation, have the right to direct their own children in exercising their rights. In literature,[14] you can meet with these background themes in conflicts between parents and children. One author describes the following situation: Roman Catholic parents raised their son in this same spirit, then abandoned this faith and bound themselves as Jehovah's Witnesses and forced their 14-year-old son to abandon his Catholic practices in order to participate in the Jehovah's Witnesses meetings. The case went to court and ended up limiting parental rights of the boy who was taken to a foster home. The basis for such a decision was, among others, that a child at that age, who was raised in the Catholic faith, cannot be forced to change their religion and to undertake those religious practices.[15]

The Polish Constitution of 1997, in Art. 48, par. 1, states: "Parents have the right to educate their children in conformity with their own convictions. This upbringing should respect the degree of maturity of the child, as well as his freedom of conscience and religion and its beliefs." This is a record remaining in full compliance with the UN Convention. This issue also found its regulation in the rules concerning, among others, organizing religious education in public schools.[16]

(d) The right of association and the right to assembly.

Another prescribed by legislation and related to the right to expression, is the right of association. In Art. 15 of the UN Convention of the State — parties recognized the rights of the child to freedom of associa-

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[13] See H. Misztal: "Gwarancje prawa międzynarodowego i polskiego w zakresie uprawnień rodziców do religijnego wychowania dzieci." *Studia z Prawa Wyznaniowego* 1 (2000), pp. 5—20.

[14] H. Bzdak: *Prawo dziecka do życia i godnego wychowania — uwarunkowania prawne, religijne, społeczne*. Szczecin 2000, p. 163.

[15] See K. Borkowska: *Prawo dziecka do wypowiedzi w sprawach rozpoznawanych przez sąd rodzinny*. Helsińska Fundacja Praw Człowieka, Warszawa 2014, p. 23.

[16] Ustawa z dnia 7 września 1991 r. *o systemie oświaty*, Dz.U. 2004. No. 256, item 2572, as amended, Art. 12 par. 1.

tion and freedom to peaceful assembly (para. 1), provided that the exercise of those rights cannot be imposed by any restrictions except those that are legitimate and which are necessary in a democratic society to ensure the interests of national security, public order, health or morals, or the protection of the rights and freedoms of others (par. 2).

Every person, similarly to a child, if he is granted the right to speak, should be able to implement it. One form of that execution would be the freedom to take an active part in formal social groups and associations. Such organizations generally have a specific objective of action, which is implemented by its members, with voting rights, which impacts others. Children were given the opportunity to participate in school organizations, organizations dealing with environmental and charitable activities or sports, both cultural and religious.[17]

It should also be noted that by ratifying the UN Convention on the Rights of the Child, Poland declared that it considers that the execution of child's rights under the Convention, in particular the rights defined in articles 12 to 16, shall be made with safeguarding the respect of parental authority, in accordance with Polish customs and traditions, regarding the place of the child within the family and outside the family. A child's right to information and the right to express their views are so connected to one another, and therefore both parts of the above presentation should be considered together.

[17] K. Borkowska: *Prawo dziecka do wypowiedzi…*, p. 23.

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Leszek Adamowicz

The Right of the Child to Access Information and to Express Views Freely

Summary

The Convention on the Rights of the Child adopted by the UN General Assembly on November 20, 1989, and ratified by Poland on July 7, 1991 (Dz.U. 1991, No. 120, item 526), includes in its contents, among others, declarations of children's rights to information and to express those views freely in all matters concerning them directly. In particular, the right to information includes more specific issues: the right to informa-

tion on parentage (the knowledge of their parents); “the right to seek, receive and impart information and ideas of all kinds, regardless of boundaries, either orally, in writing or in print, in the form of art or through any other medium of the child’s choice”; the right to receive relevant information, dependant on the age and understanding of children, which should give them the freedom to fully exercise their rights, unless this would be contrary to their welfare, and right to information about the educational process. However, the right to expression includes the right to speak in judicial and administrative proceedings, the right to freedom of expression, the right to freedom of thought, belief and religion, including its practice, the right to association and the right to assembly.

Leszek Adamowicz

Le droit de l’enfant à l’information et celui d’exprimer librement son opinion

Résumé

La Convention relative aux droits de l’enfant de l’ONU adoptée par l’Assemblée générale des Nations unies le 20 novembre 1989, et ratifiée par la Pologne le 7 juillet 1991(Dz. U. z 1991 r., Nr 120, poz. 526) contient entre autres les déclarations des droits de l’enfant à l’information et d’exprimer librement son opinion sur toute question l’intéressant directement. Ce sont en particulier les droits à l’information qui contiennent des problèmes plus détaillés : le droit d’obtenir l’information concernant son origine (de retrouver ses parents), le droit « de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen du choix de l’enfant », le droit d’obtenir des informations — conformément à son âge et à son degré de maturité — que l’on doit lui fournir pour permettre la réalisation complète de ses droits (sauf si cela était en contradiction avec son bien) et, enfin, le droit de recueillir des informations au cours de sa formation. Par contre, le droit d’exprimer librement son opinion contient le droit d’être entendu dans toute procédure judiciaire ou administrative, les droits à la liberté de pensée, de convictions et de religion ainsi que les droits à la liberté d’association et de réunion.

Mots clés : enfant, information, liberté, expression, confession

Leszek Adamowicz

Il diritto del bambino all’informazione ed a esprimere le proprie opinioni

Sommario

La Convenzione sui diritti dell’infanzia dell’ONU, approvata dall’Assemblea Generale delle Nazioni Unite il 20 novembre 1989, ratificata dalla Polonia il 7 luglio 1991 (Gazz. Uff. polacca del 1991, n. 120, pos. 526) include nel suo contenuto tra l’altro le

dichiarazioni dei diritti del bambino all'informazione ed a esprimere liberamente le proprie opinioni in tutte le questioni che lo riguardano direttamente. In particolare il diritto all'informazione comprende problematiche più dettagliate: il diritto all'informazione che riguarda le origini (la conoscenza dei propri genitori), il diritto a cercare, ricevere e trasmettere informazioni ed idee di ogni genere, indipendentemente dalle frontiere, in forma orale, scritta o per mezzo della stampa, in forma artistica o usando ogni altro mezzo di comunicazione a scelta del bambino, il diritto a ricevere informazioni, adeguate a seconda dell'età e del discernimento dei bambini che devono essere loro impartite per permettere l'esecuzione completa dei loro diritti, a meno che siano in contraddizione con il loro bene e il diritto all'informazione sul processo di formazione. Invece il diritto ad esprimere le opinioni include il diritto a pronunciarsi nel procedimento giuridico ed amministrativo, il diritto alla libera espressione, il diritto alla libertà di pensiero, di concezione del mondo e di religione, tra cui a praticarla, il diritto di associazione e il diritto di riunione.

Parole chiave: bambino, informazione, libertà, affermazione, confessione

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Legal Protection of the Child from Violence and the Detention of Minor Foreigners in Poland

Keywords: minor, violence, legal protection, foreigner, detention

Child protection from violence is one of fundamental principles of the contemporary legal system, rooted in numerous acts of domestic and international legal order.[1] This protection finds its fullest expression in the Convention on the Rights of the Child.[2] To date, this document is the greatest achievement of the international community as regards the protection of children's rights, since it provides an axiological and normative basis for acting for the benefit of children, both on the global and regional levels, as well as nationally and locally.

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[1] The international legal protection of children's rights includes not only documents explicitly concerning the rights of children, but also general documents containing provisions that directly or indirectly refer to children. They include, for example, the European Social Charter, which entered into force in 1965; the Convention of the International Labour Organization; Conventions, Recommendations and Guidelines of the Council of Europe. For more on this subject, see H. Górecka, M. Górecka: *Ochrona praw dziecka w prawie międzynarodowym i jego realizacja w Polsce*. Olsztyn—Kraków 2001.

[2] The Convention on the Rights of the Child was adopted by the United Nation General Assembly on November 20, 1989, and entered into force on September 2, 1990. Poland signed the Convention on January 26, 1990. The Sejm, by the Act of September 27, 1990 *on ratification of the Convention on the Rights of the Child adopted by the UN General Assembly of 20 November 1989* (Dz. U. of 27 February 1991, No. 16 item 71) granted consent for its ratification by the President. The Convention entered into force as of July 7, 1991 (Dz. U. 1991, No. 120, item 526). The Convention as a ratified international treaty constitutes an integral part of the internal Polish legal order.

The Convention on the Rights of the Child determines the universal legal norms for protection of children from neglect, mistreatment and exploitation, at the same time providing children with the guarantees of fundamental human rights. The catalogue of rights granted to a child in the Convention includes civil rights (personal rights and freedoms of a child, with the most important of them including: the right to life, citizenship, identity, the right to family, privacy, freedom of opinions, religion, the right to freedom from violence), social rights (the right to health protection and social security), cultural rights (the right to learning, to take advantage of cultural achievements, the right to information and knowledge of own rights) and political rights (the right to freedom of association and peaceful gatherings).

The principle of protecting the child from all forms of mistreatment is included *expressis verbis* in articles 19[3] and 36[4] of the Convention, while the states that have ratified the Convention also agree to protect children from all forms of exploitation and sexual abuse (Art. 34), as well as torture or cruel, inhuman or humiliating treatment or punishment (Art. 37). In the light of the Convention, it is unquestionable that the states that have ratified the document have obliged themselves to ensure protection to children — victims of military conflicts and children without families, as well as child-refugees. They also obliged themselves to protect children against non-legal decisions concerning their fate, as well as to enable children to express their own opinion in matters that concern them, also including the right to obtain and provide information.

Obligations of states to ensure protection to children are also ensured by Art. 24 of the International Covenant on Civil and Political Rights,[5]

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

[4] "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare." More about the relation between Art. 19 and Art. 36 of the Convention and the term "mistreatment" in: L. Kociucki: "Ochrona dziecka przed złym traktowaniem." In: *Konwencja o Prawach Dziecka — analiza i wykładnia*. T. Smyczyński. Poznań 1999, pp. 375—381.

[5] The Covenant, adopted as a result of the UN conference in New York, under resolution of the General Assembly No. 2200A (XXI) of 16 December 1966, entered into force on March 23, 1976. Poland ratified this Covenant in 1977.

and Art. 9, par. 1 of this Covenant provides that everybody has the right to liberty and personal security. No one can be subjected to arbitrary arrest or detention. No one can be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Article 10 of the Covenant provides that each person deprived of liberty should be treated with humanity and with respect for the inherent dignity of the human person, and that juvenile persons should be separated from adults and treated appropriately to their age and legal status.

On the other hand, pursuant to Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[6] inhuman or degrading treatment or punishment is forbidden, and under Art. 5 par. 1 and Art. 5 par. 4 of this Convention, deprivation of liberty can occur only in accordance with a procedure prescribed by law and in explicitly specified situations, while every person who has been deprived of liberty by arrest or detention should be entitled to appeal to the court to speedily obtain a decision on the lawfulness of his detention and a release order if the detention is against the law.

International standards do not exclude the possibility of applying detention in order to prevent illegal entry into the territory of a state or during deportation or extradition proceedings. However, it should be pointed out that the guidelines of the United Nations High Commissioner for Refugees[7] of February 1999 concerning criteria and standards concerning detention of asylum-seekers provide that an asylum-seeker, as a matter of principle, should not be placed in detention. Exceptions are permissible only when the application of detention is necessary to verify the identity of the foreigner, to establish grounds on which he/she applies for a refugee status, or if the asylum-seeker destroyed his/her travelling documents (or identity documents) or used a falsified documents in order to mislead the authorities of the state in which he/she is seeking asylum, as well as for protection of national security and public order.[8] According to

[6] The international treaty concluded by states members of the Council of Europe became effective on September 3, 1953. Poland signed the Convention on November 26, 1991 and ratified it on January 19, 1993.

[7] The United Nations High Commissioner for Refugees (UNHCR) — a position created according to Resolution No. 319 (IV) adopted by United Nations General Assembly on December 3, 1949. The task of UNHCR is to ensure international protection to refugees and to search for a permanent solution to the problem of refugees by way of their voluntarily repatriation or assimilation in new national communities.

[8] In 2012, UNHCR guidelines concerning application of detention measures towards asylum seeking persons were adopted. Those guidelines provide that: (1) The right to seek asylum must be respected; (2) The rights to liberty and security of a person and to freedom of movement also apply to asylum seekers; (3) detention must be in accordance with and authorized by law; (4) detention must not be arbitrary and any decision

the above-mentioned guidelines, unattended asylum-seekers under the age of 18 should not be placed in detention. Guideline No. 6 provides that if it is possible, such persons should be entrusted to the care of members of family who already obtained the status of refugee in a given country, and if this solution is not possible, competent child care institutions should provide a minor foreigner with alternative care in the form of suitable accommodation and appropriate supervision.

With reference to children accompanying their parents, the High Commissioner recommends considering any appropriate alternatives for detention. Those alternatives include reporting or a permanent stay requirement, provision of a guarantor, release on bail, placing the family in an open centre, which they could leave only at specific hours. Children and their primary caregivers should not be detained, except for when it is the only possibility to preserve family unity.

The guidelines emphasize that application of detention towards families with children should comply with Art. 37 of the Convention on the Rights of the Child, which means it should be a measure of last resort, and should be applied for the shortest possible period. Foreign asylum seeking children may not be detained under prison-like conditions. If it is not possible to avoid application of detention, children and their families should be placed in especially designated departments in detention facilities.

Similarly, the recommendations of the Committee of Ministers issued on April 16, 2003 concerning detention of asylum seekers[9] emphasized that detention of minors should be the measure of the last resort and for the shortest possible time. Minors should not be separated against their will from their parents or any other legal or customary carers. In its recommendations, the Committee indicated that if minors have to be detained, they must not be held under prison-like conditions. A release

to detain must be based on an assessment of the individual's particular circumstances; (5) detention must not be discriminatory; (6) indefinite detention is arbitrary and maximum limits on detention should be established in law; (7) a decision to detain or to extend detention must be subject to minimum procedural safeguards; (8) conditions of detention must be humane and dignified; (9) the special circumstances and needs of a particular asylum seeker must be taken into account; (10) detention should be subject to independent monitoring and inspection. See http://www.unhcr.org/505b10ee9.html, after: T. Sieniow: "Detencja cudzoziemców a międzynarodowe standardy ochrony praw człowieka." *Stosowanie detencji wobec cudzoziemców. Raport z monitoringu i rekomendacje.* Ed. Idem. Fundacja Instytut na rzecz Państwa Prawa, Lublin 2013 p. 16.

[9] Recommendations of the Committee of Ministers of the Council of Europe of April 16, 2003 on measures of detention of asylum seekers, https://wcd.coe.int/wcd/ViewDoc.jsp?id=2121.

from detention should take place as fast as possible, and such a person should be provided with separate accommodation. The Committee also recommended introduction of special solutions in closed centres for families with children, as well as alternative measures ensuring execution of proceedings, not related to deprivation of liberty, such as residential facilities or foster homes for unaccompanied minor asylum seekers.

On the other hand, Reception Directive No. 2003/9/EC laying down minimum standards for the reception of asylum seekers[10] provides that the best interests of the child shall be a primary consideration for Member States when implementing the provision of the Directive that involve minors. The report on the implementation of the Reception Directive of February 5, 2009 emphasizes that all fundamental rights and principles expressed in the Charter of Fundamental Rights and in the European Convention on Human Rights, and in particular family life, access to health care and efficient appeal against application of detention must be respected regardless of the legal status of the third-country national. The report considers detention as a measure of last resort, which should be applied only for the shortest period possible and when detention alternatives cannot be applied. In each case, application of the detention measure should take place after individual assessment of a given case. Amendments to the directive proposed by the European Commission emphasize the importance of assuring legal protections to guarantee that detention will not be applied arbitrarily, and the children will not be placed in detention, except for situations when it is in their interest (with the provision that in general, unaccompanied minors should not be placed in detention).[11]

Protection of a child from violence, cruelty, exploitation and demoralization is a principle also accepted in the Polish legal order. In the Republic of Poland, this principle is a constitutional value. Pursuant to Art. 72 of the Constitution of the Republic of Poland of April 2, 1997[12]: "1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public author-

[10] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, O. J. L31/18 of February 6, 2003.

[11] J. Burnett, J. Carter, J. Evershed, M. B. Kholi, C. Powell, G. De Wilde: *'State Sponsored Cruelty'. Children in immigration detention*. Medical Justice, 2010. Retrieved from http://www.statewatch.org/news/2010/sep/uk-medical-ustice-tate-ponsored-ruelty-report.pdf. (accessed 19.2.2014).

[12] The Constitution of the Republic of Poland of April 2, 1997 adopted by the National Assembly on April 2, 1997, adopted by the Nation in the constitutional referendum on May 25, 1997, signed by the President of the Republic of Poland on July 16, 1997 (Dz.U. 1997, No. 78, item 483).

ity that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child." This protection is also implemented in various normative acts of lower levels.[13]

Therefore, in view of the multitude of regulations existing in the subject matter under analysis, the law in Poland protects the minor against violence in a multifaceted way and, it seems — universally. However, a question arises whether this law equally protects from violence minor foreigners staying in the territory of the Republic of Poland, particularly those who are subject to the procedure of being placed in guarded centres for foreigners[14] and whether standards of this protection are identical in case of the minors who are subject to detention together with the members of their family or carers and those unattended.

Principles concerning detention of foreigners in the territory of the Republic of Poland are governed (as to the merits) by the following acts: the Act on Foreigners of December 12, 2013[15] and the Act on Granting the Foreigners Protection in the Territory of the Republic of Poland of June 13, 2003.[16] Pursuant to Art. 398 par. 1 of the Act of Foreigners, a foreigner shall be placed in a guarded facility if: (1) there is a probability that a decision on imposing the return obligation on a foreigner will be issued without a specified period for voluntary return; (2) a decision on imposing the return obligation on a foreigner has been issued without a specified period for voluntary return; (3) a foreigner has not voluntar-

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[13] This protection is ensured, for instance, by the Act on Counteracting Domestic Violence of July 29, 2005 (Dz.U. 2005, No. 180, item 1493 as amended.; the Act on the Upbringing in Sobriety and Alcoholism Prevention of October 26, 1982 (Dz.U. of 2002, No. 147, item 1231, as amended), the Social Welfare Act of March 12, 2004 (consolidated text Dz.U. of 2008 No. 115, item 728), the Penal Code Act of June 6, 1997 (Dz.U. of 1997, No. 88 item 553 as amended), the Family and Guardianship Law Act of February 25, 1964 (Dz.U. of 1964, No. 9, item 59 as amended), The Medical Profession Act of December 5, 1996 (Dz.U. of 1998 No. 106, item 668) and others.

[14] Six guarded centres for foreigners operate in the territory of the Republic of Poland: Guarded Centre for Foreigners in Przemyśl, Guarded Centre for Foreigners in Biała Podlaska, Guarded Centre for Foreigners in Białystok, Guarded Centre for Foreigners in Kętrzyn, Guarded Centre for Foreigners in Lesznowola, Guarded Centre for Foreigners in Krosno Odrzańskie.

[15] Dz.U. 2013 item 1650; hereinafter the Act on Foreigners and AF.

[16] Dz.U. of 2009 No. 189, item 1472 as amended, hereinafter the Act on Granting Protection to Foreigners and AGPF.

ily left the territory of the Republic of Poland within the period specified in the decision on imposing the return obligation, and immediate forced execution of the decision is not possible; (4) a foreigner fails to meet the obligations set out in the ruling on use of the measures referred to in par. 3 of this regulation.[17] Detention for expulsion can be also applied towards a foreigner when any of the above circumstances occur and there is a risk that the foreigner will not comply with the rules applicable in a guarded centre (Art. 399, par. 1 of the Act on Foreigners). A foreigner is placed in a guarded centre or a detention centre for foreigners upon a court ruling (Art. 401, par. 1 of the Act of Foreigners).

The regime in guarded facilities for foreigners is modelled after the military or prison regime and, in combination with the external architecture or fittings inside those centres, is considered oppressive.[18]

A foreigner placed in a guarded centre is obliged — under pain of disciplinary liability (Art. 421, par. 1 FA) to comply with the organization and order regulations governing the stay of the foreigners in a guarded facility or a detention centre for expulsion (Art. 419, par. 1 FA), attached as a schedule to regulation of the Minister of Interior and Administration of August 26, 2004 on conditions for guarded facilities and detention centres for expulsion.[19] According to Art. 3 of this Regulation, a morning and an evening roll-call are carried out in a guarded facility, during which the number of foreigners staying in the centre is established, and according to Art. 4, a foreigner during his/her stay in the guarded facility or detention centre can be supervised with the use of technical devices, and in particular with TV monitoring. Foreigners walk under the supervision of an officer in a designated open-air area (Art. 29, par. 1). Male foreigners are entitled to get haircut at least once per two months, and a warm bath at least once a week (Art. 28, par. 1), and female foreigners — warm water at least once a day and a warm bath twice a week (Art. 28, par. 2). A visiting order is granted by the head of the facility or an officer responsible for operation of the detention centre in consultation with the head

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[17] Poland, as a member of the Schengen area, is obliged to protect EU borders against illegal immigration. Foreigners who reach other EU countries via Poland, under regulations of Dublin II (Regulation of the Council [EC] No. 343/2003 of February 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) are returned to Poland.

[18] J. Białas, D. Cegiełka, A. Chrzanowska, M. Górczyńska, W. Klaus, K. Rusiłowicz, K. Słubik, M. Tobias, Helsinska Fundacja Praw Człowieka: *Migracja to nie zbrodnia. Raport z monitoringu strzeżonych ośrodków dla cudzoziemców*. Warszawa 2012, http://www.hfhr.pl/raport-migracja-to-nie-zbrodnia/#sthash.GkZc3DA1.dpuf (accessed 1.3.2014).

[19] Dz.U. 2004, No. 190, item 1953.

of the facility, and the visit does not last longer than 60 minutes (Art. 20, par. 1, Art. 21, par. 1).

According to Art. 9 of the above-mentioned regulation on conditions for guarded facilities and detention centres for expulsion, the area of the guarded facility is secured by a protective fence. This fence is made of the external line performed from a full material, not lower than 3 m high, on a concrete foundation reaching at least 0.7 m inside the ground, and ended with inclined at 30°—45° offset arms inside of the centre, 1 to 1.5 m long, with stretched barbed wire, and an internal line made of metal mesh, of not less than 2 m high, ended with inclined at 30°—45° offset arms inside the centre, up to 0.5 m long, with stretched barbed wire. Between the external and the internal line there is a protective belt at least 3 m wide, illuminated with two independent sources of electricity.

Windows in rooms for foreigners are protected with bars, just like entries to individual blocks (Art. 4, par. 1, point 2).

The Act on Foreigners admits application of a measure in the form of placement in a guarded facility also towards minors detained in relation to their illegal stay in Poland. At the same time, detention can be applied both to minors under the care of adults, and to unattended minors.

The situation of minors in proceedings concerning granting a refugee status or auxiliary protection is slightly different. In accordance with Art. 88 par. 3 point 1 of the Act on Granting Protection to Foreigners, unattended minors in the refugee procedure are not placed in guarded facilities for foreigners. Pursuant to the agreement concluded between the Capital City of Warsaw and the Office for Foreigners, unattended minors subject to the refugee procedure are placed in the Children's Home in Warsaw.[20] On the other hand, minors staying under the care of their parents or legal guardians can be, on the basis of a court decision, placed in a guarded centre for foreigners together with other family members. While issuing a decision on placement in a guarded facility for foreigners under Art. 88 of the Act on Granting Protection to Foreigners, the court specifies the term of stay for the period between 30 to 60 days. However, this period may be extended by a decision of the court, for a period not exceeding 6 months (Art. 89, par. 5 AGPF).

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[20] A. Gorlach, M. Pryczyńska, K. Przybysławska: *Detencja dzieci cudzoziemskich w Polsce. Raport na temat realizacji międzynarodowych i krajowych standardów dotyczących detencji dzieci cudzoziemskich*. Centrum Pomocy Prawnej im. Haliny Nieć, March 25, 2011, http://www.pah.org.pl/m/1915/Detencja%20dzieci%20cudzoziemskich%20w%20Polsce.pdf (accessed 1.3.2014).

Current[21] regulations governing detention of foreigners were introduced after protests that took place in guarded facilities for foreigners in October 2012, during which foreigners questioned the conditions in the facilities, and the relations between them and Border Guard officers and after a wave of criticism which then emerged in media concerning the operating principles of guarded facilities for foreigners.[22] One of the most important changes introduced in the context of those events and related to the detention of foreigners is that a court rules on placing a foreigner in a guarded centre after a hearing with the foreigner (Art. 401, par. 1 FA). Additionally, measures alternative to detention have been introduced (also in case of persons applying for international protection), such as reporting to a competent authority, payment of a security deposit, depositing a travel documents or the need to stay in the place designated (Art. 398, par. 3 FA). It has been forbidden to place unattended minors under 15 staying in Poland in the centre for foreigners, while the court examining the request to place an unattended minor foreigner above the age of 15 is obliged in each case to take into account, in particular, the degree of the minor's physical and mental development, personality traits, the circumstances of the detention and personal conditions in favour of placing a minor foreigner in a guarded centre (Art. 397, par. 2 and 3 FA). A foreigner should be placed in a guarded centre for the shortest possible period — not longer than 3 months, with a possibility of extension only in strictly defined cases to maximum one year (Art. 403, par. 1, 3, 6 FA). Border Guards authorities have been entitled to issue a decision on a return obligation, which facilitates implementation of procedures carried out towards foreigners, and thus shortens the time of stay in a guarded centre needed to carry out expulsion procedure. An obligation has been introduced to provide a common room for a foreigner staying in a guarded centre with a minor under his/her care (414 par. 3 FA) while the court, examining a request to place a foreigner along with a minor

[21] The Act on Foreigners of December 12, 2013 replaced the Act on Foreigners of June 13, 2003 (Dz. U. of 2011 No. 264, item 1573 as amended). The new act entered into force on May 1, 2014. The Act on Granting Protection to Foreigners was amended for instance by Art. 484 of the Act on Foreigners of 12 December 2013 (Dz.U. 2013 item 1650) and the Act of June 26, 2014 amending the Act on Granting Protection to Foreigners in the Territory of the Republic of Poland and Certain Other Acts (Dz.U. 2014item 100).

[22] See e.g.: Stowarzyszenie Nomada: "Jesteśmy ludźmi. Strajk głodowy cudzoziemców w ośrodkach strzeżonych w Polsce. Dlaczego nie możemy być obojętni." See: http://nomada.info.pl/jestesmy-ludzmi-dlaczego-nie-mozemy-byc-obojetni-na-protest-cudzoziemcow-w-osrodkach-strzezonych-w-polsce/ (accessed 1.3.2014); cf. *Protest głodowy w ośrodkach dla uchodźców, a los nielegalnych imigrantów nikogo nie obchodzi*, http://natemat.pl/36515,protest-glodowy-w-osrodkach-dla-uchodzcow-a-los-nielegalnych-imigrantow-nikogo-nie-obchodzi (accessed 2.3.2014).

foreigner under his/her custody in a guarded centre shall be guided by the wellbeing of this minor (Art. 401, par. 4 FA). The possibility of free movement of foreigners within the premises of a centre has been introduced, with the exception of the places to which the administration has denied access; access to the Internet in guarded centres has been provided (Art. 415, par. 11 FA); minors staying in a guarded centre were granted the right to participate in teaching and educational activities and in recreational and sports activities (Art. 416, par. 2 FA); and the legality and regularity of placing the foreigners in the detention centres and their stay in those centres was subject to the full supervision of the penitentiary judge (Art. 426, par. 1 FA). The possibility to issue a decision on releasing a foreigner from a guarded centre by the Border Guard authority to which a given centre is subordinated has also been introduced (Art. 406 FA, previously in such situation a decision on release could be issued only by the court upon a motion of the Border Guard authority, which extended the stay of a foreigner in the centre). An additional premise, previously absent in the Act on Foreigners for issuing a decision on release is now the physical and psychological condition of a foreigner that could justify the presumption that a foreigner has experienced violence (Art. 400, point 2 FA).

All of the above changes are unquestionably a shift in a right direction. Nevertheless, it is difficult to state that the legal solutions existing in the territory of the Republic of Poland as regards the detention of minor foreigners comply with the above-mentioned normative standards concerning protection of children's rights, particularly protection from violence. Forcing children whose only "fault" is their illegal stay in Poland to be placed in rooms with bars in windows, behind barbed wire, under constant supervision under conditions resembling prison isolation, constitutes a clear violation of those standards.

Regardless of the foregoing, objections are also raised due to the fact that regulations concerning placement of minors in guarded centres for foreigners and norms governing their stay in those centres are not only unclear and imprecise, but even raise doubts as to their compliance to the legal order applicable in the Republic of Poland.

The currently effective act on foreigners, just like the previous one, does not clearly specify whether in relation to minor foreigners under 17 years of age provisions of the Code of Criminal Procedure[23] should be applied, or — as in case of Polish citizens — the Act on Juvenile Delinquency Proceedings,[24] and therefore whether in cases of minor foreign-

[23] The Code of Criminal Procedure Act of June 6, 1997 (Dz.U. of 1997, No. 89, item 555 as amended), hereinafter CCP.

[24] The Act on juvenile delinquency proceedings of June 26, 1982 (Dz.U. of 1982, No. 35, item 228 as amended), hereinafter JDP.

ers, decision concerning placing, extending the stay or release from the guarded centre should be made in the criminal division or in the family and minors division of the district court. As the practice shows, in most courts, in case of placing minor foreigners staying in the territory of the Republic of Poland together with parents, the decisions concerning placement, extending the stay or release of both adults and children are taken by criminal divisions,[25] although sometimes decisions in the matter are also taken by the family court.[26] Under the Act on Foreigners of 2003, it was observed in the literature[27] that in such a case it is more appropriate for the criminal courts to issue a decision on the basis of regulations of the Code of Criminal Procedure, since the Act on Foreigners does not refer in any place to regulations on juvenile delinquency proceedings, while with reference to detention, it directly states that in the matters not regulated by the act, the provisions of the Code of Criminal Procedure should be applied. This argumentation can be also referred to the Act on Foreigners in the currently effective form, since this act does not refer to regulations of the juvenile delinquency proceedings either, while in Art. 404 it directly states that "The provisions of the Code of Criminal Procedure shall apply to the proceedings on placing a foreigner in a guarded centre, to the detention of foreigners in detention centres, to the extension of the foreigner's stay in a guarded centre or in a detention centre for foreigners and to the release of a foreigner from a guarded centre or a detention centre for foreigners […]."

However, the above question is not the only doubt that exists in the matter under analysis. Significant doubts are also raised as to whether in each case, detention of a minor can be appealed against and therefore whether it is subject to control by a court of higher instance. It may seem that a question formulated in this way should be answered positively, since the right to appeal against the decision to place a foreigner in a guarded centre is provided in Art. 401, par. 6 of the Act of Foreigners. However, the point is that although in case of an attended minor foreigner the right to appeal can be exercised on his/her behalf by his/her guardians, in case

[25] Thus, for instance: decision of the District Court for Kraków Krowodrza in Kraków, IX Criminal Division of April 14, 2010, file ref. No. IX Ko 41/10/K; decision of the District Court in Kętrzyn, II Criminal Division, of April 30, 2012, file ref. No. II Ko 427/12; decision of the District Court Gdańsk-Północ in Gdańsk, XI Criminal Division of December 2, 2010, file ref. No. XI Ko 163/10. All the above data are quoted after: T.A. Dębowczyk, J. Oleszkowicz: "Praktyka sądowa stosowania detencji cudzoziemców w Polsce." In: *Stosowanie detencji wobec cudzoziemców…*, p. 26, footnote 57.

[26] And so, for instance, a decision of the District Court in Chełm, III Family and Minor Division, dated 14 January 2011, file ref. No. III Nsm 8/11. Quoted after: T.A. Dębowczyk, J. Oleszkowicz: *Praktyka sądowa…*, see above, p. 26, footnote 57.

[27] Ibidem, p. 26.

of an unattended minor, it is difficult to establish who could do it. The Act on Foreigners does not regulate this issue. The rights of an unattended minor foreigner to appeal against a decision concerning placement in a guarded centre for foreigners are not provided *expressis verbis* in the provisions of the Code of Criminal Procedure Although Art. 459 § 3 CCP provides that parties, as well as the person whom the decision directly concerns, are entitled to appeal against it, considering the general rules of the criminal procedure it should be claimed that it refers to persons over 17. Pursuant to Art. 10 § 1 of the Penal Code, whoever commits a prohibited act after having attained the age of 17 years (except juveniles, who after attaining the age of 15 committed acts specified in Art. 10 § 2 of the Penal Code) shall be liable under the provision of the Penal Code, while under Art. 52 § 2 of the Code of Criminal Procedure if the aggrieved person is a minor, his/her rights shall be exercised by his/her statutory representative or a person who has custody of the aggrieved person. Therefore, although an unattended minor foreigner who has attained the age of 17 may appeal against the decision concerning detention on his/her, a minor foreigner who has not attained this age is not entitled to this right. At the same time, it should be mentioned that this principle concerns not only an appeal against the decision of the district court for placement in the guarded centre for foreigners, but it should also be referred to the decision on application other measures alternative to detention, including decision of the Border Guard authority issued in this matter (Art. 398 § 4 FA).

In the light of the above remarks, it is impossible not to have doubts whether the principle expressed in Art. 72 of the Constitution, stating that a child deprived of parental care shall have the right to care and assistance provided by public authorities, is actually applied towards minor foreigners staying in the territory of the Republic of Poland and whether the normative solutions adopted in the Act on Foreigners with reference to unattended minor foreigners guarantee maintenance of one of the most fundamental rights, that is, the right to a trial. In this context, it should be recalled that Art 45, par. 1 of the Constitution explicitly states that “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.” This principle is supplemented by Art. 77, par. 2 of the Constitution providing the prohibition to bar any person the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights and Art. 78, under which each party has the right to appeal against judgments and decisions made in the first instance. The right to a trial expresses the idea of ensuring every person the right to present their case before state authorities — courts — providing a guarantee of making just,

impartial and correct decisions. This is a universal principle of an international character. Pursuant to Art. 6, par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." At the same time it should be emphasized that in case Enea vs. the Republic of Italy[28] ECHR clearly stated that in any case when individual civil rights are restricted, there should be a possibility to challenge in judicial proceedings, and the court should issue a decision taking into account the nature of the restriction and its potential consequences.

It is difficult to axiologically assess the differences concerning the actual possibility to appeal against a decision concerning personal rights of minors staying under the custody of a family or guardians in comparison to unattended minors. It is also difficult to find the compatibility with the principle of equality before the law expressed in Art. 32 of the Constitution.

Apart from doubts indicated above, the Act on Foreigners does not either provide an answer to the question whether minor foreigners staying in guarded centres (attended or unattended) are subject to the obligation to comply with the rules of stay under pain of disciplinary liability specified in Art. 421 of this Act. Therefore, if the provisions of the Executive Penal Code are applied in proceedings for measuring out a disciplinary penalty — as provided in Art. 423 of the Act on Foreigners — which, as a matter of principle, does not apply to person under 17 years of age, then the above regulation seems to indicate that even if minor foreigners are obliged to comply with the rules of staying in the centres, as specified in Art. 419 AF and 420 AF, it is without disciplinary consequences referred to in Art. 421 AF.

Finally, when analysing the situation of minor foreigners, it should be pointed out that pursuant to Art. 397, par. 1, point 2 FA in case of detention of an unattended minor foreigner staying within the territory of the Republic of Poland, the Border Guard requests a court to place it in a care and education centre or in a guarded centre. The Act on Foreigners does not provide any criteria which would specify in which cases the Border Guard should request the court to place a minor in a care and education centre and in which criteria for a guarded centre. Although

[28] Application No. 74912/01, decision of the Grand Chamber of September 17, 2009. Review of the decisions of the European Court of Human Rights http://ms.gov.pl/pl/orzeczenia-etpcz/download,503.0.html (accessed 15.3.2014). More on this subject in: M.A. Nowicki: *Wokół Konwencji Europejskiej: Komentarz do Europejskiej Konwencji Praw Człowieka*. Warszawa 2013, pp. 518—527.

Art. 397, par. 3 AF provides that an unattended minor foreigner may be placed in a guarded facility if he/she has reached the age of 15, it does not follow from this provision that each unattended minor foreigner who has reached the age of 15 has to be placed in a guarded facility. This, in turn, means that the decision concerning requesting a competent court to place a minor (above 15 years of age) in a specific facility is exclusively vested in the authority that has detained the minor.

The above remarks therefore lead to the conclusion that although the law in Poland nominally protects all children from violence, in case of minor foreigners staying in the territory of the Republic of Poland and subject to detention, this protection is highly unsatisfactory. The Polish legal order still lacks appropriate normative solutions which could, on one hand secure migration procedures, and on the other, ensure actual compliance with national and international standards concerning protection from maltreatment of all children, including children who are illegally staying in Poland.

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Małgorzata Tomkiewicz

Legal Protection of the Child from Violence and the Detention of Minor Foreigners in Poland

Summary

Legal protection of the child in its normative dimension, including the protection of minors against violence, is one of the fundamental principles of contemporary legal systems, which is rooted in numerous acts of Polish and international jurisprudence. The abundance of regulations in this scope indicates that legal system in Poland shields minors against violence comprehensively and — as it seems — universally. However, there arises a question whether the law protects to the same extent minor foreigner residing in the territory of the Republic of Poland, particularly those who are subjected to the procedure of placing them in guarded camps for foreigners; which is followed by the question: Are the standards of the said protection identical in the case of minors who are subjected to detention along with their family members, and in the case of minors who are unattended?

By means of the analysis of the legal solutions currently in force, the present article tries to answer the above questions.

Małgorzata Tomkiewicz

La protection juridique de l'enfant contre la violence face à la détention des étrangers mineurs en Pologne

Résumé

La protection des droits de l'enfant dans la dimension normative, y inclus la protection des mineurs contre la violence, est l'un des principes fondamentaux des systèmes juridiques contemporains, enraciné dans de nombreux actes de l'ordre juridique national et international. La multitude des réglementations concernant le thème analysé montre que le droit en Pologne protège les mineurs contre la violence d'une façon qui se caractérise par de multiples aspects et qui semble être universelle. Cependant, on peut se poser la question si ce droit protège contre la violence au même degré les étrangers mineurs séjournant sur le territoire de la République de Pologne, surtout ceux qui — conformément à la procédure — sont placés dans des centres d'accueil pour demandeurs d'asile. Les standards de cette protection sont-ils les mêmes pour les mineurs placés en détention avec les membres de leurs familles ou avec des tuteurs et pour ceux qui sont seuls ?

L'auteure de l'article essaie de répondre à ces questions tout en analysant des mesures juridiques en vigueur.

Mots clés : mineurs, violence, protection juridique, étranger, détention

Małgorzata Tomkiewicz

La tutela giuridica del bambino dalla violenza e la reclusione degli stranieri minorenni in Polonia

Sommario

La tutela dei diritti del bambino nella dimensione normativa, tra cui la tutela delle persone minorenni dalla violenza, è uno dei principi fondamentali dei sistemi giuridici contemporanei, radicato nei numerosi atti dell'ordine giuridico nazionale e internazionale. La molteplicità delle regolamentazioni che esistono nella materia analizzata indica che il diritto in Polonia tutela i minorenni dalla violenza sotto vari aspetti e — a quanto pare — in modo generale. Tuttavia nasce la domanda: il diritto tutela in grado uguale dalla violenza gli stranieri minorenni che soggiornano sul territorio della Repubblica Polacca, in particolare quelli che sono soggetti alla procedura di sistemazione nei centri sorvegliati per gli stranieri? Gli standard di tale tutela sono uguali nel caso dei minorenni che sono soggetti a reclusione insieme ai membri della famiglia o ai tutori come pure nei confronti di quelli che sono privi di assistenza?

L'articolo, attraverso l'analisi delle soluzioni giuridiche vigenti, intraprende un tentativo di risposta a tali quesiti.

Parole chiave: minorenni, violenza, tutela giuridica, straniero, detenzione

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Does the Catholic Vision of the Principle of Subsidiarity Pertain to Polish Family Law?

Keywords: principle of subsidiarity, family, Polish law, family law, canon law, sovereignty of family

1. The family in view of the State and the Church

Family, as a legal institution, occupies a prominent place in the legal systems of the State and the Church. The Church appreciates the family as the "one of the most precious of human values."[1] In turn the State, by recognizing the Universal Declaration of Human Rights,[2] and accepting, as a part of Polish legal system the International Covenant on Economic, Social and Cultural Rights,[3] treats the family as "the natural and funda-

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[1] John Paul II: *Apostolic Exhortation "Familiaris consortio"* (22.11.1981). *Acta Apostolicae Sedis* (hereinafter: *AAS*) 74 (1982), pp. 81—191, (hereinafter FC), no. 1: *Ecclesia sibi conscia matrimonium et familiam unum e bonis pretiosissimis generis hominum esse*.

[2] The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, http://www.un.org/en/documents/udhr/index.shtml (accessed 24.2.2004).

[3] In Polish legal system the law is titled: Międzynarodowy Pakt Praw Gospodarczych, Społecznych i Kulturalnych otwarty do podpisu w Nowym Jorku dnia 19 grudnia 1966 r. z dnia 19 grudnia 1966 r. (Dz.U. = *Dziennik Ustaw Rzeczypospolitej Polskiej [The Journal of Laws of the Republic of Poland]* of 1977 No. 38, item. 169); English version: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (accessed 24.2.2004).

mental group unit of society" (Art. 10, no. 1).[4] Even more, the Polish law regards the family as the "irreplaceable institution that brings to life new generations and creates proper milieu for their upbringing and for the development of every member of the family."[5] Both Parties in the Concordat of 1988 declared in Art. 11 their will to "co-operate for the purposes of protecting and respecting the institution of marriage and the family, which are the foundation of society."[6]

Because of its importance, the family is entitled to a wide protection and assistance. The family needs help in many forms from both societies, the Church and the State, to achieve the goals of the family and fulfill its mission.

Unfortunately, there is a problem that has mounted up in recent years in Poland. There are a lot of reported cases of transgression or limiting of rights of the family, for instance deprivation of custody of the child, by the public administration authorities, that is, the State or local government officials.[7] The situation cannot be accepted from the Church point of view.

No one can *a priori* deny a good will on the side of the State, but one can ponder over the reason of such situations, and ask the following questions: Do the two parties in question — the Church and the State — unfortunately differ in understanding what is good for the family, and how to provide necessary help for the family? Is the State's policy on the family the core of the problem or is it the state law, its interpretation and application?

The aim of the paper is to examine whether, in context of relation between the State and family, the principle of subsidiarity, as it appears in the Catholic teaching, is applied to the Polish law. The problem can be formulated in a different way: Do the Church and the State have divergent attitudes to the autonomy of the family?

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[4] See Art. 16 of the Universal Declaration of Human Rights.

[5] Original text: "[Rodzina jest] niezastąpioną instytucją powoływania do życia kolejnych pokoleń i tworzenia właściwego środowiska do ich wychowywania oraz do rozwoju każdego z członków rodziny," Uchwała Sejmu Rzeczypospolitej Polskiej z dn. 30 sierpnia 1996 r. w sprawie polityki państwa na rzecz rodzin (*Monitor Polski* No. 55, item. 502). The law was repealed October 20, 1997.

[6] Konkordat między Stolicą Apostolską i Rzecząpospolitą Polską, podpisany w Warszawie dn. 28 lipca 1993 r. (Dz.U. of 1998 No. 51, item 318); here: art. 11 in Polish: "Układające się Strony deklarują wolę współdziałania na rzecz obrony i poszanowania instytucji małżeństwa i rodziny będących fundamentem społeczeństwa."

[7] See K. Markiewicz B. Przymusiński interview with A Bodnar: "Politycy wierzą w magiczne zaklęcia." *Iustitia* 12 (2013), no. 2, pp. 92—97; see the statement of the prosecutor's office in Kraków, http://www.krakow.po.gov.pl/decyzja-prokuratury-dotycząca-rodziny-b.html (accessed 25.2.2014).

The presentation has not only an academic dimension. Due to many profound and rapid changes that have affected the society and culture, the family has had to face numerous problems, challenges and difficulties. To overcome them, both the Church and the State, must cooperate, not be the rival parties.

2. Sovereignty of the family

The term "sovereignty of the family" means that the family enjoys *ex natura* the true autonomy. The autonomy in question manifests in independence of the family in many dimensions of its life and functions in any society, for example, the State or the Church. There is an opinion that sovereignty of the family cannot be restricted or repealed by any authority whatsoever.[8] The council teaches that "it has always been the duty of Christian married partners but today it is the greatest part of their apostolate to manifest and prove by their own way of life the indissolubility and sacredness of the marriage bond, strenuously to affirm the right and duty of parents and guardians to educate children in a Christian manner, and to defend the dignity and lawful autonomy of the family" (AA 11).

The sovereignty of the family relies on the marriage, which can be validly contracted only by a man and a woman who give their matrimonial consent as a free act of will. They give and accept one another for the purpose of establishing a marriage (can. 1057 § 1 and § 2).[9] The human power of freedom is expressed, in case of marriage, by everyone's right to marry (*ius connubii*). The right is transferred to the family as freely established community.

Another foundation of the sovereignty of the family is the fact that the family is a self-organized social structure. The family, without any external regulations from church law or state law, without possessing legal personality, simply functions.[10]

Article 6 of the Charter of the Rights of the Family states that "the family has the right to exist and to progress as a family. Public authorities

[8] W. Górlaski: "Family as a sovereign institution," *Ecumeny and Law* 2 (2014).

[9] Cf. P.J. Viladrich: "Rodzinna suwerenna." *L'Osservatore Romano* (Polish edition) 28 (1997), p. 53; cf. *Letter*, no. 16.

[10] See A. Grzejdziak: "Prawo do wychowania w rodzinie." In: *Prawa i wolności obywatelskie w Konstytucji RP*. Eds. B. Banaszak, A. Preisner. Warszawa 2002, p. 464.

must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family."[11] It means that the family is to be protected from any form of intrusion from the outside. The above-mentioned "lawful independence, privacy, integrity" constitute the sovereignty of the family.

This affirmation of the family's sovereignty as an institution and the recognition of the various ways in which it is conditioned naturally leads to the subject of family rights.[12] The rights in question do not pose a threat to the state, because "the sovereignty of the family is essential for the good of society."[13] "The family and society have complementary functions in defending and fostering the good of each and every human being. But society — more specifically the State — must recognize that 'the family is a society in its own original right' and so society is under a grave obligation in its relations with the family to adhere to the principle of subsidiarity.'"[14] This statement urges us to answer the following question: What is the Catholic vision of the principle of subsidiarity?

3. The principle of subsidiarity

The principle of subsidiarity is quite well presented in the church teaching and in canon law.[15] Roughly speaking, the principle orders that

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[11] Art. 6 of the Charter of Rights of the Family of 1983 (original version: Carta dei diritti della famiglia, *Enchiridion Vaticanum*, vol. 9. Eds. B. Testacci G. Mocellint. Bologna 1988, pp. 538—552.

[12] *The Letter to Families "Gratissimam sane"* from John Paul II written in the Year of the Family in 1994 (original version: *AAS* 86 (1994), pp. 868—925), (hereinafter *Letter*), no. 17.

[13] *Letter*, no. 17.

[14] FC, no. 45.

[15] See, e.g., W. Bertrams: "De principio subsidiarietatis in iure canonico." *Periodica de re morali* 46 (1957), pp. 13—65; M. Kaiser: "Das Prinzip der Subsidiarität in der Verfassung der Kirche." *Archiv für Katholisches Kirchenrecht* 133 (1964), pp. 3—13; *De principio subsidiarietatis in iure canonico*, *Acta conventus internationalis Canonistarum Romae diebus 20-25 maii 1968 celebrati*. Vatican 1970, pp. 297—306; J. Krukowski: "Zasada pomocniczości w prawie kanonicznym." *Zeszyty Naukowe KUL* 14 (1971), no. 4, pp. 51—57; J. A. Komonchak: "Subsidiarity in the Church: the State of the Question." *The Jurist* 48 (1988), pp. 298—349; J. P. Johnson: *The Principle of Subsidiarity in Catholic Social Thought*. Atlanta 1994; A. Leys: *Ecclesiological Impacts of the Principle of Subsidiarity*. Kampen 1995; R. M. Harrington: *The Applicability of the Principle of Subsidiarity According to the Code of Canon Law*. Ottawa 1997; J. W. Montgomery: *Christ our Advocate. Studies in Polemical Theology, Jurisprudence and Canon*

the bigger society or the society of a bigger potential is obliged to bring help (*subsidium*) to the smaller society or the society of lesser potential, or even to the individual. The bigger society can act on its own initiative or when asked. On the other hand, the principle also instructs that the first one cannot reserve for itself the activity that can be successfully completed by the latter one.[16]

The Papal enunciation really worth mentioning in the context of the principle is the *Encyclical Letter "Quadragesimo anno"* (1931) of the Pope Pius XI.[17] The Pope pronounced that "the supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly," and "in observance of the principle of subsidiary function, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State."[18]

Touching the same kind of topics, that is, economic and social justice, Pope John Paul II in the *Encyclical Letter "Centesimus annus"* (1991)[19] reminded that "here again the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good."[20]

Canon law, as the manifestation and practical application of the Church's theological teaching, many times expresses the principle of subsidiarity.[21] In context of the family, the principle in question is presented

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Law. Bonn 2002, pp. 71—80; P. Blickle, T. O. Hueglin, D. Wyduckel: *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft: Genese, Geltungsgrundlagen und Perspektiven an der Schwelle des dritten Jahrtausends*. Berlin 2002; J. Krzywda: "Hierarchiczny ustrój w Kościele a zasada pomocniczości." In: *Ecclesia et Status*. Eds. A. Dębiński, K. Orzeszyna, M. Sitarz. Lublin 2004, pp. 467—483.

[16] Entry "Pomocniczość." In: H. Vorgrimeler: *Nowy lekyskon teologiczny*. Trans. T. Mieszkowski, P. Pachciarek. Warszawa 2005, p. 275; cf. J. Krukowski: *Administracja w Kościele. Zarys kościelnego prawa administracyjnego*. Lublin 1985, p. 53; G. Ghirlanda: *Wprowadzenie do prawa kościelnego*. Trans. S. Kobiałka. Kraków 1996, pp. 76—79.

[17] Pius XI: *Litterae encyclicae "Quadragesimo anno"* (15.5.1931). *AAS* 23 (1931), pp. 177—228; here p. 203; English translation and numbers taken from: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html (accessed 24.2.2014).

[18] *Quadragesimo anno*, no. 80.

[19] John Paul II: *Litterae encyclicae "Centesimus annus." AAS* 83 (1991), pp. 793—867.

[20] *Centesimus annus*, no. 48.

[21] See, for instance, *Preafatio*, *Codex Iuris Canonici* auctoritate Ioannis Pauli PP. II promulgatus, *AAS* 75 (1983), part II, p. XXII, principle no. 5 of the revision of the Code;

in can. 793 § 1. The provision states that "Catholic parents have […] the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the Catholic education of their children," and in § 2 of the same canon the legislator wrote that "parents have moreover the right to avail themselves of that assistance from civil society which they need to provide a Catholic education for their children."

There are many subjects that can successfully assist the family. Among them one can count: the Church, the state, the school, the institutes of consecrated life or the societies of apostolic life, associations, associations of Christ's faithful, the foundations, other institutions, but also means of social communication, and singular persons.[22] They all can provide, to some extent, help, "for parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters concerning their schooling and the entire gamut of socialization. Subsidiarity thus complements paternal and maternal love and confirms its fundamental nature, inasmuch as all other participants in the process of education are only able to carry out their responsibilities in the name of the parents, with their consent and, to a certain degree, with their authorization."[23] The authorization means that the listed subjects are to be seen only as subsidiary ones. The parents must not make the other subjects perform all duties for them, and also the subjects must not appropriate parents' rights.

In summation it can be said that, in the light of the church teaching included in doctrinal enunciations and canon law, the principle of subsidiarity in the context of the relations between the family and the state can be described as: *what family can do, let it do it.*

Looking at the principle of subsidiarity according to Polish law, it must be here noticed that the Preface to the Constitution of the Republic of Poland (1997)[24] proclaims that among many principles of the Polish legal and political system there is the principle of subsidiarity. According to the law, the principle must govern cooperation between the public authorities, and also must create social dialogue and work for "the

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the principle is included in can. 301 § 2, can. 315, can. 374 § 1, can. 381 § 1, can. 1653; see *Communicationes* 1 (1969), pp. 80—82.

[22] See P. Kroczek: *Wychowanie: optyka prawa polskiego i prawa kanonicznego*. Kraków 2013, pp. 93—103.

[23] *Letter*, no. 16.

[24] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. No. 78, item. 483 as amended). The translation of the Constitution is taken from the offical website of Polish Sejm (the lower chamber of the parliament of Poland), http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed 19.6.2013).

strengthening the powers of citizens and their communities."[25] The Polish Constitutional Tribunal referring to the Preface of the Constitution said that the principle in question must be understood in all of its complexity. It means that it is the foundation of the strength of rights of the citizens and their communities for solving their problems, but also the principle is the urge for acting by the state or central authorities in the matters that cannot be solved by the local authorities or citizens.[26]

The fact that Poland is a member of the European Union has a huge significance for the legal system in Poland.[27] Recently the Lisbon Treaty (2007) brought significant changes in Polish laws.[28] The Preface of the Treaty states that the principle of subsidiarity is the principle that should govern the state-citizens relations.[29] In the context of the family it means that the state cannot assume the assignments that can be successfully accomplished by the family itself. The state has the duty to help the family in these areas or in such situations where the family cannot help itself and needs the assistance.[30]

The juxtaposition of the principle of subsidiarity from the State's and the Church's points of view leads to conclusion that both the State and the Church value the principle in question. They can cooperate together realizing the principle by the means they possess, for instance, legal ones. It is possible because, although "the Church and the political community in their own fields are autonomous and independent from each other. Yet

[25] Preface to the Constitution of the Republic of Poland (1997); it is worth underling, that normative character of the preface of law is debatable, see P. Kroczek, P. Skonieczny: *Preamble of Law: Perspective of Legislator and Interpreter*. Manuscript to be published in *Angelicum*.

[26] The Judgment of the Polish Constitutional Tribunal of 18 February 2003, K 24/02, Legalis — System of legal information, Wydawnictwo C.H. Beck, (hereinafter: Legalis), no. 56022; see more about the Judgments of the Polish Constitutional Tribunal in this matter — A. Dobek: "Zasada pomocniczości orzecznictwie Trybunału Konstytucyjnego." In: *Państwo — koncepcje i zadania*. Eds. M. Sadowski, P. Szymaniec. Series: Wrocławskie Studia Erazmiańskie. Wrocław 2008, pp. 155—168.

[27] The access of Poland to EU took place in 2004.

[28] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, Dz.U. of 2009 No. 203, item 1569. The Treaty has entered into force in Poland on December 1, 2009; English version: *Official Journal of the European Union* C 306, 17 December 2007, 2007/C 306/01. For more friendly referral, see Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union* C 326, 26th October 2012, 2012/C 326/01.

[29] The principle in question is present many times in the Treaty of Lisbon, for instance, Art. 5, Art. 12, Art. 69, Art. 352; see also the Protocols to the Threaty, for instance, Protocol no. 1: art. 3, Protocol no. 2 in general states on the application of the principles of subsidiarity and proportionality.

[30] Cf. J. Kroszel: *Rodzina. Społeczeństwo. Gospodarka rynkowa*. Opole 1995, p. 38.

both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all" (GS 76). This well known statement of the latest council, in the context of family, means that, both the Church and the State, are to cooperate for the sake of the people who are at the same time, both the faithful and the citizens, and live in canonical marriages and in secular ones. The responsibility for the people and their families belongs both to the State and the Church. No Party can be discharged or discharge itself from the duty (cf. GS 14, GS 20, GS 43, GS 76).[31]

The partnership in question brings many benefits. For instance, when a mutual cooperation exists between the two systems of law, state law is supported by canon law, and vice versa. It is possible because some rules of the Polish law, for example, the rule of the good of a child, the rule of the stability of marriage, and the rule of equal rights of the spouses, have their analogical counterparts in the system of canon law.[32] In this cooperation one can see the realization by the State and the Church of the principle of subsidiarity. The families need both the Church and the State.[33]

It can be said that the principle of subsidiarity, in context of family, is presented in church teaching and in canon law, as well as, in the State's system of governance and principles of Polish legal system. The understanding of the principle is quite similar. It is useful to see if the constitutional principle is implemented in the provisions of Polish law.

4. The analysis of some provisions of Polish law

As the hierarchy of the sources of universally binding law of the Republic of Poland orders, one has to start from the Constitution itself (see Art. 87 item 1 of the Constitution). Two provisions are of essence for the discussed subject.

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[31] P. Kroczek: "Wzajemne odniesienie Kościoła i państwa w nauczaniu Jana Pawła II — aspekt prawny." *Bielsko-Żywieckie Studia Teologiczne* 11 (2010), pp. 124—125.

[32] P. Kroczek: "Prawo kanoniczne wsparciem dla polskiego prawa rodzinnego: teoretyczne podstawy i praktyczne przykłady." *Bielsko-Żywieckie Studia Teologiczne* 14 (2013), pp. 131—145

[33] J. Krukowski: *Polskie prawo wyznaniowe*. Warszawa 2008, pp. 73—74.

The first is Art. 18 of the Constitution which states that "marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." This general rule is transformed in Art. 47 of the Constitution into the right, which states that everyone shall have the right to legal protection of his family life. On the basis of these two provisions alone one can say that the autonomy of family is well safeguarded in the most important Polish law, that is, in the Constitution. According to the commentary of the Polish Constitutional Tribunal, the state, and especially its legislative bodies, has a serious obligation to take any possible action to "strengthen the bonds among the persons who make the family, and especially the bonds among the parents and the children and between the spouses."[34] No action can be taken by the state, according to the Constitutional Tribunal, that would even indirectly blunt the bonds among the members of the family.[35]

The principle of subsidiarity is expressly formulated in Art. 3, item 3 of the Act of June 9, 2011 on supporting family and the system of foster care.[36] The cited provision states that "all the tasks within the realm of offering support to family and the system of foster care are realized in accord with the principle of subsidiarity."[37] Already cited the Act of February 25, 1964 — the Family and Guardianship Code in Art. 1123 orders that placing the child into foster care, family or institutional one,[38] can be done only after exhaustion of all provided by law forms of help for the parents of the child. The aim of the state and other institutions cannot be to replace the parents, but to assist them in fulfilling their essential parental duties, and in preventing possible threats to the family.[39]

In result, the state administration bodies and other institutions must respect autonomy of the family and not interfere with its rights. For

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[34] "[…] umacniają więzi między osobami tworzącymi rodzinę, a zwłaszcza więzi istniejące między rodzicami i dziećmi oraz między małżonkami"; the Judgment of the Polish Constitutional Tribunal of 18 May 2005, K 16/04, Legalis no. 68617.

[35] The Judgment of the Polish Constitutional Tribunal of April 12, 2011, Legalis no. 311533

[36] Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej (Dz.U. No. 149, item 887 as amended), (hereinafter: the Act of 2011 on supporting family)

[37] Art. 3, item 3 — "Zadania z zakresu wspierania rodziny i systemu pieczy zastępczej są realizowane zgodnie z zasadą pomocniczości."

[38] See art 34 of the Act of 2011 on supporting family.

[39] Cf. T. Smyczyński: "Prawo dziecka do wychowania w rodzinie." In: *Prawa dziecka po przystąpieniu do Unii Europejskiej. Materiały z konferencji Rzecznika Praw Dziecka, Warszawa 16 czerwca 2004 r.* Eds. M. Potapowicz, M. Krauzowicz, P. Przybylski. Warszawa 2004, p. 49.

instance, the Commissioner for Children's Rights, who is the constitutional institution for protection of the rights of the child (see art. 72 of the Constitution), must in all his actions respect the responsibility, rights and duties of parents (Art. 1 item 2 of the Act of January 6, 2000 on the Commissioner for Children's Rights[40]), and must take into consideration that the natural milieu of education and upbringing of the offspring is the family (Art. 1 item 3 of the Act of January 6, 2000 on the Commissioner for Children's Rights).

Of course, the autonomy of the family is not absolute. In situations or circumstances provided in laws by the legislator, the state has the rights for intervention in life of the family. The constitution states that "limitation or deprivation of parental rights — which are the core of the family bond — may be effected only in the instances specified by statute and only on the basis of a final court judgment" (Art. 48, item 2 of the Constitution). Elaboration of these situations or circumstances is in the other laws like: the Act of February 1964 — the Family and Guardianship Code[41] or the Act of July 29, 2005 on preventing violence in the family.[42]

In summation, it can be said that the legislative principles of Polish law system simply implement in family law the principle of subsidiarity in a way that happens to agree with the Church's vision. The above cited provisions confirm such statement. Presenting the provisions of some Polish laws, it is worth adding the resolution of Polish Sejm of August 30, 1996 about the state policy on the family. The document instructs public authorities to treat the family as "self-directed institution that takes the main responsibility for shaping the conditions of life and for lot of their members."[43] Although, the document is not a normative one, in the sense that it is not a source of legal norms, it clearly shows *mens legislatoris* of members of the Polish parliament. The sentences of the document are in accord with Catholic teaching. The other laws regulate the autonomy of family and limit the state's role to subsidiarity level.

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[40] Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka (Dz.U. No. 6, item 69 as amended).

[41] Ustawa z dnia 25 lutego 1964 r. — Kodeks rodzinny i opiekuńczy (Dz.U. No 9, item 59, as amended).

[42] Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie (Dz.U. No. 180, item 1493 as amended).

[43] Uchwała Sejmu Rzeczypospolitej Polskiej z dn. 30 sierpnia 1996 r. w sprawie polityki państwa na rzecz rodzin (Dziennik Urzędowy Rzeczypospolitej Polskiej *Monitor Polski* (Official Gazette of the Republic of Poland *Monitor Polski*) No. 55, item 502). It was repealed October 20, 1997; original text: "[Rodzina jest] samodzielną instytucją ponoszącą główną odpowiedzialność za kształtowanie warunków życia i los swoich członków."

It can be added that the quite similar understanding of the principle of subsidiarity as presented above used to be voiced by the European Court of Human Rights. The judgments and decisions of the body underline the autonomy of the family.[44]

5. Conclusion: Postulate *de lege lata*

Trying to answer to the question whether the principle of subsidiarity used in the Polish family law agrees with the Catholic vision of subsidiarity, one can say reply affirmatively. Looking at the letter and spirit of the provisions of the Polish family law it is justified to say that Polish legislator, rather unintentionally, respects the Catholic vision of sovereignty of the family.

On the other hand, as it was mentioned at the beginning, there have been in recent years many examples of the decisions concerning the family made by the state or local government officials that do not respect the sovereignty of the family. It can be stated that they simply infringe the rights of the family to be an autonomous community.

The conclusion is that in Poland there is no need to formulate any postulates *de lege ferenda* to protect the autonomy of the family life. It is enough to stick to the law, the letter and spirit, as it is. But it is expedient to formulate postulates *de lege lata* and demand from the state and local government authorities that in the process of interpretation and application of law they show more respect for the principle of subsidiarity already included in the current law. By doing this they will provide for welfare of their children, welfare of their families, but also the Church, and the Society.

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[44] See, for example, The European Court of Human Rights, Judgment of 24 March 1988, case of Olsson v. Sweden (no. 1), application no. 10465/83; partly dissenting opinion of Judges Ryssdal, Thór Vilhjálmsson, and Gölcüklü: "The separation of children from their parents through a care decision taken by a State authority is certainly a serious interference with family life. In this respect it is important to protect parents and children against arbitrary intervention. The State concerned must be able to demonstrate that the views and interests of the parents have been duly taken into account and that the whole decision-making process is such as to ensure that the measures adopted are necessary to safeguard the children's interests," *Legalis* no. 135629.

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Piotr Kroczek

Does the Catholic Vision of the Principle of Subsidiarity Pertain to Polish Family Law?

Summary

In Polish law, among many constitutional principles, there is the principle of subsidiarity. In the context of family, the understanding of the principle in Polish legal system and in the Catholic teaching is quite similar. The aim of the article is to examine if the principle in question is present in the provisions of family law. The conclusion is that sovereignty of families is well safeguarded in Polish law by the means of the principle in question. To protect autonomy of family, one must not demand that the laws be changed, but rather that the principle be respected in application of the family law.

Piotr Kroczek

La vision catholique du principe de subsidiarité est-elle présente dans le droit familial polonais ?

Résumé

Parmi bien des principes constitutionnels étant en vigueur dans le système juridique polonais se trouve le principe de subsidiarité. Dans le contexte familial, la compréhension de ce principe dans le droit polonais et dans le droit canonique est pareille. L'objectif de l'article est d'examiner si le principe, dont il est question, est présent dans les

réglementations de la vie familiale. Le résultat de nos recherches est le suivant : la souveraineté de la famille est bien prémunie dans le droit polonais par le principe de subsidiarité. Pour protéger la famille, il ne faut donc pas revendiquer des changements dans les réglementations, mais il faut plutôt exiger que le principe de subsidiarité soit appliqué dans le droit familial.

Mots clés : principe de subsidiarité, famille, droit polonais, droit familial, droit canonique, souveraineté de la famille

Piotr Kroczek

La visione cattolica del principio di sussidiarietà è presente nel diritto polacco sulla famiglia?

Sommario

Tra i molti principi costituzionali vigenti nel sistema giuridico polacco si trova il principio della sussidiarietà. Nel contesto della famiglia la comprensione di detto principio nel diritto polacco e nel diritto canonico è simile. Lo scopo dell'articolo è quello di analizzare se il principio menzionato è presente nelle norme del diritto sulla famiglia. La conclusione delle ricerche è la seguente: la sovranità della famiglia è ben protetta nel diritto polacco dal principio di sussidiarietà. Pertanto per tutelare la famiglia non occorre esigere modifiche alle norme, ma piuttosto occorre esigere che il principio di sussidiarietà sia applicato nel diritto sulla famiglia.

Parole chiave: principio di sussidiarietà, famiglia, diritto polacco, diritto familiare, diritto canonico, sovranità della famiglia

Part Three

Reviews

Ecumeny and Law, vol. 3 (2015)
pp. 345—349

Kobieta w Kościele i w społeczeństwie (Woman in the Church and Society) Ed. Andrzej Pastwa. Księgarnia św. Jacka, Wydział Teologiczny UŚ. Katowice 2014, 166 pp.

In his introduction entitled "Kobieta i mężczyzna: człowieczeństwo w swej pełni" (The Man and the Woman: The *Humanum* in Its Entirety), Andrzej Pastwa gives the common theoretical background of the texts presented in the reviewed volume *Kobieta w Kościele i w społeczeństwie* (Woman in the Church and Society). The author emphasizes the natural difference between women and men, which makes their status divergent yet, at the same time, complementary in social and individual family life. The current era of globalization, present in societies worldwide, necessitates, according to Pastwa, a new anthropological model, the one that will cater to the need for mutual tolerance amongst people based on fundamental rights of every person.

The eleven studies of the volume deal with various aspects of the relationship between women, men, society, Church, and law, etc. Interdisciplinary nature of the problems analysed therein is further reflected by original approaches of individual contributors who represent a variety of academic disciplines, such as: philosophy, sociology, psychology, legal studied, and theology. The presented texts consider the main theme — the role of women — mainly from the perspective of: (1) individual life and experience of a woman (Stanisława Mielimąka, Urszula Nowicka), (2) the role of women and family life (Monika Menke, Elżbieta Szczot), and (3) professional status and protection of women's rights (Helena Hrehová, Linda Ghisoni). In the study "Trud stawania się kobietą" (The Challenges of Becoming a Woman) Stanisława Mielimąka describes contemporary

model that differentiates sex and gender, and expresses doubts about its validity. The author points out various challenges in the life of a woman that she has to cope with. The role of integration and disintegration, along with the prevalence of personality disturbances in women, belong to phenomena of high risk in women's lives. The author believes that reflecting upon these issues can help to regain integrity and health in the development of the woman's personality.

Unique and especially virtuous capacity of the woman is presented by Urszula Nowicka in her text "Czy istnieje samotność w Kościele? Kilka refleksji o tożsamości kobiety konsekrowanej i niezamężnej" (Is There Solitude in the Church? Some Reflections on the Identity of Consecrated and Unmarried Women). The study considers the phenomenon of solitude related to the status of an unmarried or a consecrated woman. Nowicka stresses the need to differentiate this state in woman's life from loneliness — a state of being alone in a negative sense. By rethinking the status of consecrated and unmarried woman, the author indicates towards a better understanding of the good which can stem from it.

In the article "Kanoniczne przygotowanie do małżeństwa: refleksja nad przygotowaniem kobiety do pełnienia zadań małżeńskich i rodzicielskich" (Canonical Preparation for Marriage: Reflections on Preparing Women to Assume Marital and Parental Functions), Monika Menke deals with an important stage in the woman's life — preparation for marriage. The author embeds all aspects of this preparation procedure in the context of the purpose of marriage as presented in the *Pastoral Constitution of Vatican II "Gaudium et spes"* — the good of the spouses (*bonum conjuguum*) and the birth and upbringing of children (*bonum prolis*). As emphasized in the text, preparing for marriage is a life-long process, starting already in childhood, initiated by family upbringing, and continued over the years of school education. The study is based on John Paul II's teaching on women, particularly women in the Church and canon law, marriage and parental functions of women elaborated in his *Apostolic Letter "Mulieris dignitatem."*

Issues and solutions for maternity protection in the European Union regulations are, in turn, analysed in the following study "Ochrona macierzyństwa kobiet aktywnych zawodowo w Unii Europejskiej" (Protection of Working Women's Maternity in the European Union) by Elżbieta Szczot. The author discusses the directives implementing the principle of equal treatment and prohibition of discrimination, equal pay, the prohibition of night-shift work and hazardous and dangerous conditions, as well as the protection of motherhood. The text reveals a number of problematic issues of employing pregnant women and the needs concerning their work conditions. Reconciliation of women's family life with work respon-

sibilities in the context of the Catholic Church's teaching, is considered a great challenge in contemporary society. When analysing the role of the woman, Elżbieta Szczot consciously uses a metaphor of the woman as "the heart of the family," and surely, as in the case of the human body — a family without the heart cannot survive.

In her study "Il compito delle donne nella promozione dei diritti dell'uomo" (The Task of Women in the Promotion of Human Rights) Helena Hrehová reflects on the task and share of women in the progress of human rights. Since women have been suffering injustice for centuries, according to the author, they constantly sought to solve this ethical problem referring to the biblical, anthropological — philosophical and historical — legal context. Even in contemporary societies, inequality is in this field of human rights still evident, not so much *de iure*, but more in practice. Analogically, as a result of recognition of the third gender *neuter*, defending of the right of the woman-mother, who is now marginalized and reduced to "the responsible [person] number two," becomes relevant again. Equality and rights are for all, inequality is embarrassing. The author also reminds us about the need to answer such fundamental questions as: Who are we as human beings? Why do we associate natural human rights with the existential status of each person? For Hrehová, the human craving for power and domination, the lack of responsibility and modesty derives from a crucial misunderstanding of God's intentions. The author points to Jesus' attitude towards women, the fact that in all of His teachings and behaviour one can find nothing that reflects the discrimination against women prevalent in his day. On the contrary, his words and works always express the respect and honour due to women — the "daughters of Jerusalem." As witnesses of various manifestations of discrimination in our everyday lives, we are able to fight for our rights and especially for the rights of women and children. One can only agree with Hrenová claiming that we do not need new theories or documents — what we do need primarily is to live a genuine life based on mutual respect and tolerance.

Marie Kolářová in her article "La condizione della donna nel Codice di diritto canonico" (Conditions of Women in Church as Viewed by Canon Law) defines the reasons why women were not granted the same rights as men. She highlights selected ecclesiastical documents that relate to the status of women in the Church. The dividing line is, according to the author, the line between clergymen and laymen, and not the line between men and women. Similarly as in the text by Hrehová, the author points out the difference between the law and current practice and suggests possibilities for the real emancipation of women. In the study "Cooperazione della donna all'esercizio della potestà di giurisdizione nei tribunali

ecclesiastici" (The Cooperation of Women in the Exercise of the Power of Jurisdiction in Ecclesiastical Tribunals) Linda Ghisoni takes us through the history and evolution, starting from Roman law and culminating in the Code of Canon Law of 1983, which finally led to the inclusion of women in the ecclesiastical tribunals. The author enumerates the roles that a woman can play in Church tribunals and emphasizes distinctive characteristics of the presence of women in them. Ghisoni argues towards prospects *de iure condendo* for an extension of the tasks assignable to women in ecclesiastical tribunals.

Małgorzata Tomkiewicz contributes to the discussed subject matter in the text "*Mater semper certa est*? Macierzyństwo zastępcze w świetle regulacji prawa europejskiego i w prawie polskim" (Surrogacy in the Light of the European Law Regulations and in Polish Law). The author ponders upon the possibility of using a third party both in the process of insemination (donation of genetic material) as well as for pregnancy which led to the distinction and division of maternal roles with respect to the same child between different women. New types of motherhood that have appeared in contemporary society — genetic, biological, social and legal motherhood, have raised questions concerning sensitive ethical and legal issues. The fundamental problem lies, according to the author, in a question whether surrogacy is a phenomenon that is socially desirable and whether it is legally permissible. The main concerns also relate to the child's affiliate relations born as a result of the use of artificial reproductive technology. It is not clear what is the legal nature of the agreement binding the donor of genetic material and a *surrogate* mother with people who *order a child*. Surrogacy, claims Tomkiewicz, can proliferate as a result of commercialization, and therefore what seems to be of immense importance, is the return to traditional Christian values of a human being as a person.

Another two studies from the discussed volume are concerned with theoretical perspectives on the subject matter of women's rights in contemporary society. In the article "Nowy feminizm jako odpowiedź na nowożytny kryzys wspólnotowości" (New Feminism as a Response to the Modern Crisis of Community) Aneta Gawkowska presents major arguments of New Feminists who base their theories on John Paul II's theological anthropology of sexuality and theology of the woman. New Feminism is considered as a kind of personalistic humanism which centres its attention on the human person realizing his or her nature within relations of personal self-giving. Assumptions of male and female equality, difference, and being complementary to each other with the specific female sensitivity towards the human and relational issues, form the basis for the New Feminism's theoretical argumentation and practical postulates.

New Feminists offer a perspective of reconciliation of men and women within many areas often perceived to be antagonistic, such as social roles and spheres of life associated with men and women, body and spirit, nature and culture, sex and gender, the individual and the social. In order to overcome the modern crisis in the lives of people, Gawkowska calls for constituting a new kind of social philosophy, which does not try to substitute the one-sided concept of freedom with any equally one-sided view of the social bond to others, but it attempts the reconciliation of values which seem to be complementary.

The study by Elżbieta Adamiak, "Nauczanie Jana Pawła II o kobietach w kontekście teologii feministycznej" (John Paul II's Teaching about Women in the Context of Feminist Theology), retrieves crucial historical moments of feminist thinking. For the author, feminist theology begins with the interest in the women's issue at the end of the 19th century. The article is concerned mainly with the analysis of the crucial parts of the apostolic letter on the dignity and vocation of women *Mulieris dignitatem*. Adamiak also pays attention to specific anthropological issues and theological conclusions concerned with the language used when referring to God.

In the study "Niepokalana — kobiecość na nowo pisana" (Immaculate — Femininity Written Anew), Alicja Kostka claims that the Essentials content of the title of Mary as Immaculate refers to all women as an internal code of the new femininity offered by God as a manifestation of his faith in the creation. Immaculate is a promise of fulfilled femininity in the order of redemption — the gift of integrity, fullness of relationships, the mission of woman in relation to man and her primary reference to God. The author's message is to translate the gift of Immaculate into the Church in order to promote a fuller presence of the women.

Authors of the presented volume commonly realize that the problem of the status of women in the society and the Church is far from being easy to tackle. In spite of that reader can feel optimism springing from the faith in reviving the truth about the marriage of a woman and a man, interpreted in the context of the Theology of Creation. The leitmotiv shared by the authors of this volume as expressed through the ideas of John Paul II from his *Apostile Letter "Mulieris dignitatem"* has been spread by Pope Benedict XVI in "promoting a culture that recognizes the dignity that belongs to women, in law and in concrete reality."

Silvia Gáliková

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W orbicie zasady „odpowiedzalnego rodzicielstwa”. Adekwatne zrozumienie pojęcia bonum prolis *wyzwaniem dla współczesnej kanonistyki* (Within the Orbit of the “Responsible Parenthood” Principle. Appropriate Understanding of *bonum prolis* as a Challenge for Contemporary Canonistics) Ed. Andrzej Pastwa. Katowice 2014, 133 pp.

Marriage under Catholic doctrine is viewed as a gift of the Creator who has defined its basic features (unity and inseparability). The personal dimension of marriage allows to develop a deep and intimate relationship between a man and a woman (*totius vitae consortium*), the nature of which is the focus on the benefit of the spouses, on the conception and education of children. The fruit of the marriage should be responsible procreation (*procreatio responsabilis*) as the way for spouses to participate in God’s creative act. The topic (*bonum prolis* as responsible parenthood) is dealt with in a monograph edited by Andrzej Pastwa, a professor at the University of Silesia in Katowice. Eight authors, both canonists and theologians, contributed to the publication, in which they deal with the concept of *bonum prolis* from theoretical and practical point of view (some of the authors are members of ecclesiastical tribunals handling the discussed issue in its negative dimension, that is, the exclusion thereof).

The principle of the good of descendants is included in the first contribution by Wojciech Góralski entitled “Istotna treść pojęcia *bonum prolis*” (The Fundamental Substance of *bonum prolis*). The author briefly sums up the canonical tradition and describes various aspects of the pro-

creative goals of matrimony in a positive manner. The core of what is required, so that marital consent actually creates the marriage bond (*vinculum matrimoniale*), is in this context *intentio prolis*. The authors draws the objective principles of marriage from the Scriptures, particularly from the fragments concerning the creation of humanity as male and female (Genesis 1: 27—28; Genesis 2: 18) and the excerpts from the 7th chapter of the First Epistle of Saint Paul, Corinthians (p. 19). The author emphasizes that the essence of marriage has not changed even in current canonistics. The new Code of Canon Law dated 1983 only expresses it in a more superior way than CIC 1917, the essence being the situation when the goals of marriage are not favourable to one another. Procreation is an element that characterizes the marital relationship and distinguishes it from other interpersonal relationships. The theoretical considerations are based on the jurisprudence of the Roman Rota (p. 21). The individual features of the will of spouses, which are contained in the intention to adopt offspring, and actions that oppose this plan, are examined gradually here. Wojciech Góralski (following H. Franceschi) characterizes *bonum prolis* as being not static because it is firstly about openness to conceiving a child and consequently the further educational steps of the spouses-parents, which change with the children growing up. Within the context of the expression of marital consent, it identifies the good of the descendants with mutual transfer and adoption of the procreative dimension of masculinity and femininity themselves, and thus, the acceptance of fatherhood and motherhood between the spouses (p. 29).

The author of the second contribution, Henryk Stawniak, examines the topic "Prawo do potomstwa? Godna prokreacja a zapłodzenie *in vitro*" (The Rights of Parents to Conceive Offspring? Natural Procreation as Opposed to In Vitro Fertilization). He attempts to sum up the rights and responsibilities of spouses in relation to their descendants in the light of the alleged rights to offspring at any cost. He points out that absolutism and the removal of the context in the case of one right (to offspring) is in the case of in vitro fertilization a violation of other rights: the right to intimate cohabitation, personal commitment and acceptance of a marriage partner (p. 36). The work highlights the difference between co-operation of parents in the creative work of God and His representation. From this perspective, the marital agreement does not include offspring as such, but potentiality, possible motherhood and fatherhood (*proles in suis principiis*) (p. 37). Not only the right of parents to offspring, but also children's right to a dignified procreation includes additional aspects and rights. This is the right to conception and birth in matrimony based on the nature of men and women by the act *humano modo*, a way of mutual

self-giving of the spouses (p. 39). In this context, in vitro fertilization, that is, the separation of the act of love from the possibility of conception, is understood as the opposite of the gift of procreation.

The third author is the editor of the entire monograph, Andrzej Pastwa. In his paper “Niezdolność do wypełnienia zadań rodzicielskich i wychowawczych” (Incapability of Fulfilling Parental and Educational Obligations) following the thesis that the upbringing of offspring is based on the provisions of the code as part of the essence of marriage (*substantia matrimonio*) and an essential element of marriage, as well as in the case of its absence, it is also a specific reason for annulment of marriage (cf. can. 1055 Section (§) 1, 1101 Section (§) 2, 1095 n. 3). It refers to specific mental anomalies which may affect the willingness of one of the spouses in such an extent that they can be the cause of annulment of marriage on the grounds of an inability to carry out the tasks of parenthood and upbringing (p. 55). It is based on the statements of the Roman Rota, which mentions expressly: incest, transsexuality and transvestism, homosexuality and other sexual anomalies; alcoholism, drug abuse, anorexia and bulimia, personality disorders, HIV/AIDS, religious deviance associated with membership in a satanic sect. It also analyses their negative impact on matrimony and family.

The study by Leszek Adamowicz of the John Paul II Catholic University of Lublin is focused on “*Bonum prolis* w małżeństwach mieszanych” (*Bonum prolis* in Mixed Marriages), the marriage of people with different religious affiliations, analysed in light of the Instructions of the Polish Bishops’ Conference on Premarital Preparation dated 1989 (p. 73). The author sums up the Church doctrine on the obligation of parents to educate their children also in the religious dimension, which can be problematic in the case of mixed marriages. The author also presents the project of the Declaration of the Catholic Church and the Polish Ecumenical Council, which is attempting to develop a common position on the part of churches regarding Christian marriage (p. 76). In the last part of his contribution, he highlights the potential threat to the good of the descendants of mixed marriages (particularly, the overall lack of religious education) and using the example of the Swiss *Recommendations for a Pastoral Conversation with Potential Spouses in Relation to the Baptism and Religious Education of Children* he shows which direction the premarital preparation could take in Poland (p. 79).

Subsequent reflections by Tomasz Rozkrut on “Dowodzenie wykluczenia *bonum prolis*” (Proving of Exclusion *bonum prolis*) constitute analyses concerning judicial interpretation and the application of selected jurisprudence of the Roman Rota tribunal (p. 87). The said jurisprudence is the model resolution for the Church lower courts (p. 92). For this reason, the

author discusses the specific statements using the topic of the good of the descendants from 2003, bringing it closer to Polish readers.

Another author, Piotr Majer, in his paper "Wykluczenie, nadużycie i niekorzystanie z prawa do aktów otwartych na zrodzenie potomstwa" (Exclusion, Misuse and Non-Use of the Right to Sexual Acts Open to Procreation) answers the questions related to exclusion, overuse or failure to use rights to the birth of offspring (contraception, natural methods). He seeks the answer to the question as to whether and to what extent are the morally permissible methods of family planning consistent with the integrity of marital consent in the dimension of openness to the birth and upbringing of descendants. He also asks whether and to what extent such marriages in which the spouses due to religious motives, temporarily or permanently, exclude sexual cohabitation are consistent with this objective.

Professor at the University of Warmia and Mazury in Olsztyn, Lucjan Świto, in his contribution "Czasowe wykluczenie potomstwa a wykluczenie dobra potomstwa" (Temporary Exclusion of Offspring and Exclusion of the Offspring's Well-Being) describes situations when couples do not intend to exclude the good of the descendants entirely but want to postpone it for a certain time or until the fulfilment of certain conditions (achieving a certain material level, completing their studies, finding a better job, etc.) for accepting children in their marriage. He seeks an answer to the question: In which cases the temporary exclusion of offspring affects the validity of marital consent, and in which it does not?

The monograph concludes with a treatise by a scholar from the Pontifical University of John Paul II in Cracow, Aleksandra Brzemia-Bonarek, analysing and summarizing the issue of "*Bonum prolis* w wyrokach coram Sobański" (*Bonum prolis* in the Sentences *coram* Sobański) handed down at the Metropolitan Court in Katowice in the 1990s. She introduces to the reader the thinking and reasoning of a prominent Polish canonist Remigiusz Sobański, who worked, inter alia, for over 50 years as an ecclesiastical judge.

If we want to evaluate the submitted monograph, we must conclude that it presented many opinions and perspectives (in both positive and negative dimensions) from the standpoint of which canonistics approaches the concept of the good of the descendants. This broadly conceived issue is anchored in both the doctrine of the Church magisterium of *bonum prolis* and in the jurisprudence of the Roman Rota and lower courts. The purpose of this good of the descendants as the goal of marriage is not merely understood as biological reproduction. The authors approach the problem using the prism of the personalist concept of marriage, which

anchors it deeper. Responsible parenthood involved in the creative work of God should include the good of all parties concerned: both the mutual good of the spouses and the good of the child. Thanks to its multi-layered character, the publication may contribute to the formation of both workers at ecclesiastical courts and the general public understanding of the good of the descendants in the Catholic Church.

Monika Menke

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Grzegorz Grzybek: *Etos życia*
Wychowanie do małżeństwa w założeniach etyki rozwoju
(The Ethos of Life. The Marriage Education in the Premises of the Development Ethics)
University of Rzeszów Publishing House
Rzeszów 2014, 176 pp.

The book by Grzegorz Grzybek, *Etos życia. Wychowanie do małżeństwa w założeniach etyki rozwoju* (The Ethos of Life. The Marriage Education in the Premises of the Development Ethics), is characterized by a very clear structure and a well-thought-out division of the publication's contents. The book's introduction gives its main assumptions and familiarizes the Readers with basic terms. Even though a particular structure is visible due to the main five chapters of the book, separate titles have been given to the fragments of distinctive reasoning of the author, and distinguished as subchapters. Grzybek's dissertation also contains the conclusions, the complementary bibliography, as well as the bibliography presenting current achievements of the author.

In the introduction, the emphasis is put on the fact that this particular book is supposed to conform to a series of the author's monographic publications, in which "the development ethics" constitutes the title category and a leitmotif. Grzegorz Grzybek credits the concept to himself, and he claims to have elaborated it in other articles and monographs. Simultaneously, the author examines the selected ethical concepts in the pedagogical context — the education (upbringing) and care.

Etos życia… widens the scope of Grzybek's reflection by focusing attention on the issues of marriage education and relationships created between the people of opposite sexes, especially in a form of marital relationships.

What is quoted and examined in the monograph, is surely the pluralism of worldviews, or the polyphony of different standpoints. Even more so, the author does not introduce any form of ideologically-motivated censorship, the presence of which would have radically narrowed and reduced the field of the issues discussed. Understood in this way, the intellectual openness of the author, even to views which are very often considered mutually exclusive, should be obviously appreciated by the Readers. Broadening of the intellectual horizons is one of the significant and positive aspects of the publication reviewed herein.

Of a special interest to the author seem to be the differences and similarities between the male and female way of perceiving the world. At the same time, he consistently asks for a possibility to overcome more radical differences and agreeing on differences, without blurring or diminishing them. Yet, he does not hesitate to point out the controversies (however, without formulating his conclusions in authoritative or dogmatic manner). He inspires the readers much more to self-reflection in this subject, in order to inspire on the way to building their own ethos of life.

The crucial issue, for both the authors and the readers, should be self education of spouses; it really deserves to be called the "ethics of development," being a significant question of pedagogy, particularly the-ethos-of-life pedagogy. According to the author, spouses — creating a special unity — should self-educate themselves and each other, in order to form their male and female images. It a challenge concurrently difficult and fascinating for both a husband and a wife, especially when one looks at it through the prism of the current culture of "fragile marriages," devoid of self-education. Therefore, self education is an issue of utmost importance for ethics, especially ethics of education, and education theory, which definitely deserves to be further analysed.

Taking into consideration the subject mentioned in the title of the monograph, the author consciously confronts his thoughts and the main thesis with the attitudes that are presented in the debate concerning the gender ideas, which reverberates in today's society. However, taking this position towards the subject connected with the public debate about the gender dispute is most of all necessary as well as helpful for the author, in order to present more clearly his own convictions and doubts relating to the married life and proper rules of marriage education. What is more, Grzegorz Grzybek is able to surprise the readers and prompt deeper reflection in them; he makes them re-examine their standpoints and think for themselves.

The further analysis — going beyond the reviewed monograph — is required for the pointed out relationships between the dynamics of the married life and the — more widely understood — dynamics of the fam-

ily life, between education and self-education to a marriage as well as education and self-education to a family life. One should not blur the autonomy of the married life and the individual nature of the marriage relations between a man and a woman. Simultaneously, one should not isolate to an extreme the married life from the family life and its unique ethos features. Some differences and relations are very subtle and require making thoughtful differences, but one has to also bear in mind the broad context of the matter and the diversity of relationships. Reading the reviewed monograph encourages a reader to do — further — examination of the subject.

Both interesting and inspiring seems to be the category of over-intellectual emotions as one of the instrumental elements that allow to grasp and determine the dissimilarity in the way of experiencing and perceiving the world by a man and a woman.

The relations between manhood (bravery) and tenderness are accurately depicted and deserve further elaboration and analysis, using the investigating capacity, provided by phenomenology. In the discussion about love in a married life, the author should make a more thorough reference — also a critical one — to Max Scheler's analysis concerning the essence and form of fondness, in it also love, as a special kind there of. In the tension analysis between happiness and pleasure in the marriage, a more thorough reference to thoughtful considerations of Władysław Tatarkiewicz should be done. The said investigation concerns various kinds and concepts of happiness and pleasure.

Reading the reviewed monograph brings an issue that the Author — in his organizational capacity — could undertake the systematic seminars, on which the questions that he arises and examines in the context of "development ethic" can be discussed from different points of view. Other publications and books by Grzegorz Grzybek constitute a good inspiration to run such seminars, one can say, they even require such seminars by virtue of the "development" category exposed in them. The pluralism of the views, which are connoted and presented in the reviewed monograph can also be reflected in papers and discussions led during seminars entitled: "development ethics."

I encourage the author to organize and run such seminars, because the experience of many generations of scientists say that it is a proven way of intellectual development and creating the intellectual maturity. After all, these are the premises and demands formulated within the frameworks of the term "development ethics."

Marek Rembierz

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pp. 361—363

Od konfliktu do komunii
Luterańsko-katolickie upamiętnienie Reformacji w 2017 roku
Wydawnictwo Warto. Dzięgielów 2013, 85 pp.

The work *Od konfliktu do komunii. Luterańsko-katolickie upamiętnienie Reformacji w 2017 roku* published by Wydawnictwo Warto (Dzięgielów 2013), connected with the Centre for Mission and Evangelisation of the Evangelical Church of the Augsburg Confession in Poland, is a translation of another document worked out during the Lutheran-Catholic ecumenical dialogue. The report, entitled in the original: *From Conflict to Communion. Lutheran-Catholic Common Commemoration of the Reformation in 2017/Vom Konflikt zur Gemeinschaft. Gemeinsames lutherisch-katholisches Reformationsgedenken im Jahr 2017*, was created in 2013 and is dedicated to the upcoming anniversary of 500 years of the Reformation, which falls on the year 2017.

The report is divided into six chapters. The first one includes reflections on the character of commemorating the Reformation in contemporary context. The second deals with history and current state of research on Martin Luther's character and theology, as well as on Wittenberg Reformation, conducted both by the Evangelical and Catholic side. In this part, there is also an overview of the initiatives concerning ecumenical research on the Reformation's heritage up to now.

The third chapter presents a picture of the Lutheran Reformation and the Catholic Response from the ecumenical dialogue's perspective. It points to such crucial areas as the question about the meaning of the notion of "reformation," its causes, trial against Luther, unsuccessful attempts at staving off the crisis, condemnation of Luther and the events of the Diet of Worms, as well as the beginnings of shaping of the independent Ref-

ormation movement and “the Augsburg Confession” interpreted as a step towards unity which failed, which was confirmed by the Smalcald War. In the background of this historical description appear key issues of the Reformation’s theology: justification *sola gratia, sola fide*, the authority of Scripture, role of practical reforms (catechisms, hymnbooks). The chapter is concluded by a description of Catholic reactions in form of the statements of two Councils: of Trent and the Second Vatican Council. The former is characterized in more detail. Decisions of the Council of Trent concerning such key issues as Scripture and tradition, Justification, the sacraments and pastoral reforms, were presented. Whereas *Vaticanum II* is presented as a council of change, which moves away from the polemical tone and opens the Catholic Church to the ecumenical movement.

Chapter four presents essential topics of Martin Luther’s theology in the light of the results of the Lutheran-Catholic dialogues. Among them there are such questions as: Justification, Eucharist, Ministry, as well as Scripture and Tradition. The presentation of the research results on the significance of medieval heritage (including monastic and mystical theology) for Luther’s theology has an introductory character here.

From the perspective of the preparations for the jubilee of 2017, the fifth chapter is the key one. In it, it was pointed to Baptism as the basis for unity, and of the Common Commemoration of the event of Reformation. It was shown that it can be a reason for shared joy in the gospel, as well as for regret and lament. Hence, Christ’s Prayer for unity was cited, and then reflection on principles of evaluation of the past was undertaken. The chapter is concluded by the confession of sins against unity by both sides of the dialogue. The whole document is concluded by chapter four, which has a summarizing character and includes Five Imperatives for the Lutheran-Catholic ecumenical relations, which have their significance not only in the context of celebrating the 2017 jubilee.

Issuing of the report characterized above in Polish must be praised not just as an initiative continuing consequent presentation of the ecumenical output of the Lutheran-Catholic ecumenical dialogue in Polish, but also because of the important presentation of the present state of research, both Evangelical and Catholic, on Lutheran Reformation, included in the text. Until now such materials were available in Polish only in a limited scope.[1] The report can be treated as a compendium of knowledge on the arrangements of the Lutheran-Catholic dialogue within the scope of such topics as Justification, Scripture and Tradition, Eucharist and Ministry.

[1] Cf. H. A. Obermann: *Marcin Luter. Człowiek między Bogiem a diabłem*. Trans. E. Adamiak. Gdańsk 2004; O. H. Pesch: *Zrozumieć Lutra*. Trans. A. Marniok, K. Kowalik. Poznań 2008

As far as the formal side is concerned, disappointment should be expressed that the publishers did not keep the standards used so far in publishing the texts of the Lutheran-Catholic dialogue.[2] A reviewer's evaluation is missing, and so is a reliable scientific review that would ensure the Polish localization of the text along with footnotes. Because of that, the Polish reader is referred to German critical editions of the symbolical books, the texts of the Council of Trent or the Second Vatican Council, as well as the Lutheran-Catholic dialogue. At the same time, information about the existing, excellent Polish editions of these texts is missing.[3] This lack makes it difficult for interested readers to deepen their knowledge, for which a document with such overview character should be a natural encouragement. Controversy is also arisen by the translation of the word *Communion* with the Polish *komunia*, which in a Lutheran reader evokes unambiguous associations with the Sacrament of Altar, and this way makes the stress on community character, underlined in the German original with the word *Gemeinschaft*, less visible.

Jerzy Sojka

[2] See: *Bliżej wspólnoty. Katolicy i luteranie w dialogu 1965—2000*. Eds., introd. and trans. K. Karski, S. C. Napiórkowski. Lublin 2003.

[3] *Księgi wyznaniowe Kościoła Luterańskiego*. Bielsko-Biała 2003; *Dokumenty Soborów Powszechnych*. Vol. IV. Eds. A. Baron, H. Pietras. Kraków 2004; *Sobór Watykański II. Konstytucje, dekrety, deklaracje. Tekst polski. Nowe tłumaczenie*. Poznań 2002; *Bliżej wspólnoty. Katolicy i luteranie w dialogu…*

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Piotr Jaskóła: *Problem małżeństwa w relacjach ewangelicko-rzymskokatolickich Historia i perspektywy nowych rozwiązań* Opole 2013, 310 pp.

The problem of mixed marriages, that is, marriages contracted between persons of different religions or denominations, is a serious problem from the perspective of any Church or other religious organization. In Europe, nowadays, the marriages in question are quite common, especially in the regions where there is a blend of different religions or denominations, like in the Silesian region, and because of the increase in the emigration movements.

The Catholic Church and the Evangelical Church of the Augsburg Confession in Poland do not look favourably upon the mixed marriages. It is mainly because the lack of unity in the spiritual matters can dent the unity of the whole marriage. Of course, the Churches must, in some measure, tolerate the mixed marriages and make special pastoral and legal solutions for the couples. The problem is also an important subject of ecumenical discussions.

This preliminary statement leads to the first conclusion that the author of the reviewed book, Rev. Piotr Jaskóła, professor of theology at the Opole University (Poland), was brave enough to take up a challenging and demanding job of trying to fathom the described problem. He has been successful. His book is a very up to date study.

His book consists of three essential chapters. The first one is titled: "Biblical principles of the teaching on marriage." In very compact way, it presents the most important elements of the Biblical teaching on marriage. The chapter is divided into two parts. The first one refers to the Old

Testament. The author dedicates his attention to the archetype of marriage. The next subject that he refers to is matrimony in the perspective of the theology of covenant. And, at the end, Rev. Jaskóła looks at the marriage from institutional-legalistic perspective. The second part of the chapter is, of course, focused on teaching of the New Testament. Testimony on marriage in Gospel and testimonies in the Apostolic Letters are presented. Trying to evaluate the chapter, one can say that the raised subjects are not a novelty in the literature. The problems are quite well known but, and it must be underlined, the author very intelligently picks up the most important fields of the teaching, which can be points of discussion and agreement between the Catholics and the Protestants.

The next chapter of the reviewed book is titled: "Reformation teaching on marriage." In about 50 pages the author summarizes the teaching of the Reformers: Martin Luther and John Calvin, as well as the teaching contained in the *Evangelical Confessional Books* and the *Reformed Confessional Books*.

The third chapter is a logical and historical continuation of the former one. It is entitled: "The Catholic answer to the reformation teaching on matrimony." There is presented mainly the teaching of the Council of Trent and the Roman Catechism.

The following two chapters, that is, the fourth and the fifth, contrary to the previous three chapters, are not exclusively devoted to one specific confession. They offer combined, that is, the Catholic-Evangelical perspective on marriage. Chapter four is entitled: "Matrimony in the contemporary Evangelical and Catholic catechisms." It is a presentation of matrimony in *Evangelical Catechism for Adults* and *Catholic Catechism of Adults* and *Catechism of the Catholic Church*. Chapter five, "The Churches towards the problem of mixed marriages," offers theological and legal perspective on the mixed marriages that is contained in the most important legal and theological documents of the Churches in question, like: *The Official Policy of the Evangelical-Augsburg Church in Poland*, the Code of Canon Law 1917 and 1983, and some others documents.

After the duly done presentation of the positions of the two Churches, the author decides to confront their teachings and find common points between the Catholics and the Lutherans. The sixth chapter of his book is titled: "Common perspectives of Evangelical and Catholic teaching on matrimony — basis of ecumenical solutions." The author gathered therein and compared the Catholic and the Evangelical views on marriage from creationist, sacramental, Christological, and ecclesiological perspectives.

The final chapter of the reviewed work is titled: "Towards new ecumenical solutions." This part of the book is of special significance. It shows the foundations and possible ways of common, that is, Catholic

and Evangelical effort to work on mixed marriages as the problems of mutual importance.

One small element of the book must be mentioned here, that is, a 5-page "Conclusion: theology of blessing as a basis for the theology of the Evangelical-Catholic Matrimony." It deals with an important but, unfortunately, marginalized in the literature problem of understating God's presence in every marriage in form of His blessing.

The book, as everyone would expect from an academic publication, contains also a list of used abbreviations and a long list of cited documents, books and articles in bibliography. A very useful part of the book is the Appendix that contains excerpts of the essential and more frequently cited documents of the Catholic and Lutheran side.

Although Rev. Piotr Jaskóła is a theologian and his book has mainly dogmatic and ecumenical character, one must admit that he utilizes the juridical argumentation very efficiently. He understands deeply — which is, as a matter of fact, not very common knowledge among theologians — that legal norms are the emanation of theological truths.

It is worth underlining that the author very skillfully presents this multifaceted problem from the historical perspective and also offers prospective solutions, which can be expressed in form of *de lege ferenda* postulates.

To sum up, one can say that the book by Rev. Professor Piotr Jaskóła is a thoroughly written book. It should be recognized as a book of special importance for Catholic-Lutheran relations, particularly in the face of the serious problems that concern marriage and family in the contemporary world.

Last but not least, one must make a postulate that, if not the entire book, then at least the findings and conclusions, should be published in a language other than Polish to facilitate exerting more influence by the book on the European ecumenical movement.

Piotr Kroczek

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Silvia Gáliková, born in Bratislava, Slovakia in 1962. She is a lecturer at the Department of Philosophy, Faculty of Arts, Trnava University in Trnava. During the years 1983—1988, she studied philosophy at the University of Pavol Jozef Šafarik in Košice and obtained PhD in 1988. In the years 1992—1993 she studied at St Antony's College in Oxford, UK, and in 1994—1995 at the Department of Philosophy, University of Ottawa, Canada. She is currently a lecturer-professor at the Department of Philosophy, Trnava University and also a senior research fellow at the Department of Analytic Philosophy, Institute of Philosophy, Slovak Academy of Sciences, Bratislava. Her specializations are philosophy of mind and consciousness and cognitive science.

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Jacek Kurzępa, Professor, PhD, born on October 5, 1961, in the Lubusz Land, sociologist, who long ago perfected his academic skills as an educator. After some time, as a result of "intellectual drift," and as a consequence of the tumultuous changes over the transformation period in Poland, he went over to social sciences while not losing the pedagogical sensitivity. In his academic work, he focuses on sociology of adolescence, accompanying adolescents participating in various movements and at different places, be it during the "Woodstock Station" Festival, Przystanek Jezus, Campo Bosco or in the Bolków Castle. He studies young people and advances theses and proposes interpretations of both – themselves and the world they inhabit. The creator of a concept related to prevention programmes, analyses and monitoring of the phenomena of young generation dysfunctional and risk behaviours, called Falochron (breakwater), that was implemented and realized over the years 2006—2009 in Lower Silesia, as part of a project aimed at counteracting juvenile prostitution. Additionally, since 2010 he has been co-authoring the Falochron programme for Silesia (http://falochron.metis.pl/). He is an implementer of diagnoses in a great many local governmental units, related to the threats following drug usage and alcohol consumption among adolescents, the so-called monitoring of threats posed by psychostimulants in local communities. In October 2015 he has been elected a member of the lower chamber of the Polish parliament (Sejm). Among his significant publication are: *Młodzież pogranicza — Juma* (The Youth who Live at the Borderline — Juma) (Zielona Góra 1998), *Młodzież pogranicza — świnki* (The Youth who Live at the Borderline — Świnki) (Kraków 2001), *Falochron. Zintegrowany program wczesnej profilaktyki wobec zachowań ryzykownych dzieci i młodzieży* (Falochron — An Integrated Early Prevention Programme in the Face of Children and Adolescent's Risk Behaviour) (Wrocław 2006), *Zagrożona niewinność* (Threatened Innocence) (Wrocław 2007), *Socjopatologia pogranicza* (Sociopathology of the Borderland) (Zielona Góra 2007), *Młodzi, piękne i niedrodzy…: młodość w objęciach seksbiznesu* (Young, Beautiful and Inexpensive. Adolescence Embraced by Sex Business) (Kraków 2012).

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