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TADEUSZ SMYCZYŃSKI
and
MAREK ANDRZEJEWSKI

HUMAN RIGHTS – THE RIGHTS OF THE CHILD

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Marek Andrzejewski: The role of Professor Tadeusz Smyczyński as a drafter of the UN Convention on the Rights of the Child[1]

1. INTRODUCTORY REMARKS

The United Nations (UN) Convention on the Rights of the Child[2] has introduced and/or supported many positive changes in the perceptions of children, the way of thinking about children and childhood, children's relations with the adult world, the duties of the state and its various agencies towards children, and international legal standards for their protection. The first draft of the Convention was prepared by Polish lawyer Prof. Tadeusz Smyczyński; his contribution to this piece of legislation, nonetheless, was later attributed to others, especially those who did not participate in the process as lawyers but as politicians, particularly because he never cared about fame.

2. PERSONAL DEBT

Writing this article is an opportunity for me to fulfill a moral obligation to Professor Smyczyński. This is because, in addition to informing readers about his unquestionable merits, I have serious personal reasons I would like to confess.[3]

1 Originally published in *Acta Universitatis Sapientiae Legal Studies,* 2024, No. 1.
2 Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, Journal of Laws 1991, No. 120, item 526.
3 The article is an expanded version of a paper of the same title delivered on November 30, 2023 at the international conference: Children's Rights Days 2, held November 30-December 1 in Budapest.

I met him in 1982, at the same time when I was hired to work in the Family Law Group at the Institute of State and Law of the Polish Academy of Sciences (then headed by its founder, Prof. Zbigniew Radwański). Prof. Smyczyński had only recently been awarded his habilitation, which he earned in 1978. As an independent researcher, he was authorised to take on the duties of a scientific supervisor in doctoral procedures. By the decision of Prof. Radwański, I became the first doctoral student of the protagonist of this study. I wish everyone a supervisor as kind, dedicated, and competent as Prof. Smyczyński was for me. I also used much of his advice and guidance when writing my habilitation sometime later. Prof. Smyczyński was helpful to me even when I started having my own doctoral students; I recall with gratitude my involvement in several team research projects headed by Prof. Smyczyński. In particular, I appreciate the fact that I was involved in the workgroup preparing successive editions of the highly regarded academic textbook, titled *Family and Guardianship Law*.[4]

When I visit him or talk to him on the phone, Smyczyński thoughtfully addresses topics concerning the current social and political situation in Poland and the world. He often talks about current affairs in the context of history, in which he is an expert.

3. PROFESSIONAL CAREER OF PROF. SMYCZYŃSKI [5]

Tadeusz Smyczyński was born on February 24, 1938, in Gniezno, Poland. His father, a University of Poznań graduate, worked as a high government official. Smyczyński began his elementary school education in 1945. After 10 years, he obtained his high school diploma and eventually became a law student at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań.[6] He completed his studies in 1960, when he wrote his master's thesis titled *Abstract Legal Acts and the Will of the Parties*, under the supervision of Prof. Alfred Ohanowicz; the latter was, in turn, a prominent Polish civilist

4 Smyczyński and Andrzejewski, 2022.
5 Andrzejewski et al, 2008, pp. VII-X.
6 Radwański, 2006.

of Armenian descent, a pre-war senator, the founder (from scratch) of Poznań civil studies at the University of Poznań, and a dean of the Faculty of Law and Administration between 1945–1960. Smyczyński's master's thesis must have been of a high standard since it was subsequently published, something extremely rare at the time.[7]

Immediately after graduating from the university, Smyczyński first completed his judicial apprenticeship and then his lawyer's apprenticeship. During this time, he also worked as a legal advisor and lawyer, and prepared his doctoral dissertation—titled *Perpetual Usufruct*—which fell into the category of property law. In fact, Prof. Smyczyński is an expert in civil law as a whole, not just family law. He defended his thesis at his *alma mater* in 1968. The aforementioned Prof. Radwański, perhaps the greatest among Polish civilists and a recipient of the highest Polish state decoration (i.e. the Order of the White Eagle),[8] was also the supervisor of Smyczyński's doctoral dissertation. One of the many contributions of Prof. Radwański was the encouragement he offered to Smyczyński to pursue his scientific work. Moreover, when Prof. Radwański established, in 1973, the Department for the Study of Legal Institutions (located in Poznań) as a branch agency of the Institute of State and Law of the Polish Academy of Sciences (located in Warsaw), he also called upon Smyczyński to join the department. From that moment on, Smyczyński became a full-time researcher, albeit he continued his law practice as a legal advisor in parallel to his scientific work for about 10 more years.

Prof. Radwański headed the Department for the Study of Legal Institutions and its subdivision (the Family Law Group) until 1984, which was the year when the then Associate Prof. Smyczyński, took over both these functions. He held these positions for 24 years until his retirement in 2008. In 1995, he was hired by the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, where he taught family law and inheritance law. He also taught at the Faculty of Law and Administration of the University of Szczecin from 2005 to 2015, even after he retired in 2008. As a retiree, he still worked as a

7 Smyczyński, 1961, pp. 45-50.
8 Olejniczak and Panowicz-Lipska, 2013, pp. 311–317.

scientist, wrote papers, and conducted seminars and lectures on family and inheritance law for several, and consecutive, years. Due to Prof. Smyczyński's academic achievements, he is regarded as the foremost living Polish expert in family law. Therefore, he was assigned the task of editing two volumes of the monumental work published by the C.H. Beck Publishing House in cooperation with the Institute of Legal Sciences of the Polish Academy of Sciences, entitled *System of Private Law*. The editor of the entire project, which includes more than 25 volumes (each of more than 1,000 pages), was Prof. Radwański, and the two volumes entrusted to Prof. Smyczyński are Vols. XI and XII, which are entirely devoted to family and guardianship law.[9]

4. LEGISLATIVE WORK

For lawyer-scientists, participation in lawmaking is an important criterion for the practical application of their knowledge. Any related undertakings are also a great challenge and involve great responsibility, as they require a comprehensive and in-depth knowledge of the law and a good understanding of those issues that the legislative work is intended to address. The drafting of legislation involves partaking in the creation of the future framework upon which society will function in the areas to be regulated. This entails the need to predict the behaviour of people and the institutions that will apply the given legislation. able to predict the behavior of people as well as the institutions that will apply the given legislation.

Prof. Smyczyński's achievements in the field of lawmaking are significant. His first professional 'foray' into this area was the drafting of the UN Convention on the Rights of the Child, which will be discussed at length below. Out of Prof. Smyczyński's various experiences in lawmaking, it is worth noting, first, the approximately 15-year period (1995–2010) during which he worked in the Family Law Group, operating within the framework of the Commission for the Codification of Civil Law of the Minister of Justice.[10] The group included a small

9 Smyczyński, 2014a; Smyczyński, 2011.
10 Andrzejewski, 2017, pp. 21–35.

number of family law experts who prepared several amendments to the Family and Guardianship Code. These amendments were necessitated by the regime change in Poland in 1989 and the subsequent social changes affecting the functioning of society. Another reason that prompted the amendments to domestic law, including the Family and Guardianship Code, was the need to align domestic law with international standards set by, among others, the provisions of the UN Convention on the Rights of the Child.[11] The group thus prepared a series of amendments.[12] It was recognised that, despite the political system changes, civil law and its various articles should undergo a slow change contingent on emerging needs, either by amending old regulations or introducing new ones. Only rules closely linked to the socialist system were removed immediately, even if they were not many. Parallel to the work on the amendments, the group was also involved in creating a new Civil Code,[13] a process headed by Prof. Radwański. However, after Prof. Radwański's death in 2012, the intensity of the creation of this new Civil Code faltered.

Prof. Smyczyński made a special contribution to the creation of the Family and Guardianship Code's provisions on matrimonial property regimes and alimony obligations.[14] These are areas in which he had a long-standing interest, conducted in-depth research, and to which he devoted many publications, particularly focusing on the alimony obligation and its relationship with social benefits. This broad issue was even the topic of his habilitation, titled *Parents' Maintenance Obligation to the Child and State Social Policy*.[15]Furthermore, he received the title of full professor in 1991 after publishing a book on the relationship between the alimony obligation and the social security system, the *Alimony of Family Members in Light of the Social Security System*.[16]

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11 Smyczyński, 1997, pp. 293–303.; 1997a, pp. 239–254.; 1995, pp. 98–115.
12 Ignatowicz and Nazar, 2016, pp. 63–68.
13 Radwański, 2006.
14 Smyczyński, 2014, pp. 13–30.
15 Smyczyński, 1978.
16 Smyczyński, 1989. The title is a translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources were made by the author.

5. 'AND THE STORY ABOUT THE PREPARATION OF THE DRAFT CONVENTION IS AS FOLLOWS ...'

The task of drafting the UN Convention on the Rights of the Child was entrusted to Prof. Smyczyński shortly after he earned his habilitation degree in 1978. To understand why the task was significant in Poland, and why some of its topics were particularly important to Prof. Smyczyński, it is necessary to recreate the milieu of those times—in other words, to provide a short characterisation of the social and political context in which Poland, Europe, and the world found themselves.

The UN declared 1979 to be the Year of the Child. Poland, like most countries in Central Europe, was then ruled by a communist regime, fully dependent on the Union of Soviet Socialist Republics, and was generally not experiencing a favourable period—as were other Central European countries. During this period, the Soviet Union was implementing the so-called Brezhnev Doctrine[17] (named after the leader of the USSR from 1964 to 1982) of limited sovereignty, which meant that sovereignty was held to the extent that the authorities in Moscow would see fit. Importantly, democracy was even more limited in these countries than their sovereignty; the authorities eagerly obeyed the orders issued in Moscow, not expressing any objections to those orders that limited, or outright violated, human rights. Furthermore, even if at times the Polish authorities eased the restrictive approach to a society whose resistance to communist ideology was increasing,[18] this was done mostly to build or uphold proper relations with Western European countries and the United States of America. This was dictated by the circumstance that the Polish economy, inefficient at the time, could not function without loans from these countries. These lenders made their agreements contingent on respect for human rights by the Polish authorities, albeit international opinion was well aware that these rights were, unfortunately, being violated in Poland. At the time, James 'Jimmy' Carter was the president of the United States of America (1977–1981), and he strongly emphasised the importance of

17 Brezhnev Doctrine. Soviet History. Available at: https://www.britannica.com/event/Brezhnev-Doctrine (Accessed: 22 February 2024)

18 Roszkowski, 2003, pp. 328–344.

protecting human rights. These rights were also at the centre of attention of the Conference on Security and Cooperation in Europe.[19]

At the same time, a small yet determined anti-communist opposition operated illegally in Poland, carrying out its activities openly despite the risks of detentions, arrests, imprisonment, beatings, and dismissals, among other forms of repression. It also published uncensored, and therefore illegal (i.e. as every printed word was expected to be censored according to ideological criteria crafted by the government), magazines and books. These underground activists brought to light all cases of people who were imprisoned for their views, informed the West about the education system based on the communist agenda, ruthless censorship, and repression against the Catholic Church,[20] and reported on others acts of oppression. It was only under pressure from the opposition and Western countries that the Polish authorities of the time ratified the 1966 UN International Covenant on Civil and Political Rights in 1977.

On the one hand, the authorities were annoyed by the diplomatic and economic pressure, the opposition's actions, and the social activism of the Catholic Church, but were also neither willing nor going to change their operational methods of dealing with civil freedoms and rights. On the other hand, they were looking for a way to improve their image in the world and to gain the favour of Western countries, which would then respond positively to requests for economic support. Accordingly, the Polish authorities took advantage of the UN General Assembly's resolution of December 21, 1976, which proposed to establish 1979 as the Year of the Child. Below is Prof. Smyczyński's position on the matter, as recorded in an essay written on the occasion of the 20th anniversary of the Convention:

> On such occasions, spectacular ideas often arise to announce some propaganda action, some social research, or even to pass a piece of legislation, a declaration, a convention. Such was the opportunity that the then authorities of the People's Republic of Poland, already immersed in economic crisis and social conflicts (...) wanted to take

19 Ibid., pp. 227–228 and pp. 265–267.
20 Friszke, 1994.

> advantage of, and they seized the initiative to enact a convention on the rights of the child in the international forum. Thus, in the party-state apparatus, a draft convention was created at lightning speed, which was a verbatim repetition of the text of the 1959 Declaration on the Rights of the Child. This was an obvious legal 'hoax', since a convention, as an act that is supposed to be binding for states, has to be formulated in a completely different language than a declaration, which is only an appeal and a set of demands that would be good to implement. The authorities of the People's Republic of Poland counted on the naivety of international bodies, which, however, criticized the project as an act of propaganda devoid of any substantive value. Thus, the alleged concern and humanitarianism of the People's Republic of Poland, in the form of a convention on the rights of the child, enacted on the initiative of the People's Republic of Poland, was revealed and the initiative failed.[21]

Under these circumstances, in 1978, officials of the Polish Ministry of Foreign Affairs turned to the director of the Institute of State and Law of the Polish Academy of Sciences, Professor Adam Łopatka, for support in carrying out the task they had undertaken for the UN. It is purposeful to mention this name because, in Poland, it is often Łopatka who is credited with the creation of the Convention,[22] even if his role involved mostly political and diplomatic activities.[23] He was a high-ranking Communist Party activist, the Minister of Religious Affairs, and known for his fight against the Catholic Church. His undisputed contribution to drafting the Convention was that he entrusted the task to the right person—young (then 41 years old) Associate Professor Smyczyński, an employee of the institute under his authority.

This is how the protagonist of this article encountered the opportunity to undertake a spectacular task. Even if the practicalities of the task were difficult to predict, it was clear from the beginning

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21 Smyczyński, 2012, p. 11.

22 Wikipedia, Adam Łopatka [online]. Available at: https://pl.wikipedia.org/wiki/Adam_%C5%81opatka (Accessed: 28 January 2024).

23 Krawczak-Chmielecka, 2017, pp. 11–23.

that its scale could be of a dimension that a lawyer could only dream of. Thus, Professor Smyczyński decided to seize the opportunity. I remember the communist times as grey and dispiriting, but there were situations, from time to time, in which ambitious and competent people could rise to the occasion and accomplish things that ushered in light and a sense of hope and faith.

It is obvious that one would like good things, and such is the UN Convention on the Rights of the Child, to arise from lofty motives. However, scientific articles should not be used to create myths but to analyse reality as it was—or is. The Polish legal literature takes pride in the fact that it was Poland that took the initiative to enact a document dedicated to the rights of the child. For me, the basis for satisfaction is that a Pole created a good project, especially since it is a person close to me. The political context of the issue does not bring glory to my country; quite the opposite, the low intentions of communist activists at the time can easily cause downright embarrassment.

The efforts of Polish politicians to convince officials at the UN to entrust Poland with the preparation of a draft UN Convention on the Rights of the Child were undergirded by some pathos as well. The officials invoked the internationally-recognised figure of Dr. Janusz Korczak (1878–1942) and cast themselves as continuers of the ideas he advocated. This outstanding Polish–Jewish doctor, educator, writer, and promoter of respect for the dignity of the child endorsed respect for children and their rights in his writings and educational work.[24] He was in charge of an 'orphanage' in Warsaw, on Krochmalna Street, which during the Second World Warwas moved to Sienna Street, in Warsaw's ghetto. The Germans eventually transported the children living there to the Treblinka extermination camp and murdered them. Korczak voluntarily went with his pupils, becoming forever a symbol of doing as one preaches, right up to his death.[25]

In the fall of 1978, the UN Commission on Human Rights[26] began to work on the draft prepared by Prof. Smyczyński, which he had had

24 Smolińska-Theiss, 2015, pp. 26–33.
25 Olczak-Ronikier, 2011.
26 Wiśniewski, 1999, p. 13.

less than half a year to devise. It was then that a special characteristic of Prof. Smyczyński became apparent, and which I later had the opportunity to observe many times. Smyczyński always set about his tasks without delay, almost immediately, and never deferred them to the last minute. This aroused both admiration and irritation, with the latter being displayed especially by Smyczyński's numerous colleagues who often began to collect materials when the deadline for handing in the texts, in their joint collective projects, was approaching. Professor Smyczyński always had his part ready to go to print when the project's deadline approached.

Due to this trait of Prof. Smyczyński's personality, the draft of the Convention was written quickly, affording him some time to discuss and edit it. It was paramount to Prof. Smyczyński that the prepared document be free of the errors committed two years earlier by officials of the Ministry of Foreign Affairs. As a result, Prof. Smyczyński presented a strictly judicial draft, written with linguistic rigor, as precise as possible, and devoid of embellishments unnecessary in legal acts—especially of pathos. After the draft was discussed at the Institute of State and Law of the Polish Academy of Sciences and then at the Ministry of Foreign Affairs, it was submitted to the UN Commission on Human Rights in Geneva.[27] At that moment, the news was sent out into the world that, in the Year of the Child, communism-building Poland proved that it respected human rights by submitting the promised draft of the UN Convention on the Rights of the Child.

Later that year, Prof. Smyczyński participated in an expert seminar held at the initiative of the UN in The Hague, the Netherlands, where his project was debated and he made a persuasive case for the proposed solutions.[28] His persuasiveness in the debates was due not only to his excellent competence in law but also his proficiency in French and German, as—at that time—international official communications were not yet dominated by English.

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27 Andrzejewski et al., 2008, p. VIII.
28 Ibid., p. VIII.

6. IMPORTANT AND MORE IMPORTANT ISSUES

The Convention was adopted by the UN General Assembly on November 20, 1989, and has been ratified by nearly every country in the world. While this widespread ratification reflects a global consensus on the importance of ensuring children's well-being and protecting their rights, it also serves as a stark reminder of the hypocrisy of those in power who often fail to uphold these principles in practice.

To discuss the contents of the Convention is, nonetheless, beyond the scope of this paper, as my study is about the role played by the drafter of the project, and thus his version of the story should stay the main point of focus. In the fall of 2023, I asked Professor Smyczyński about how the final text of the Convention compares to the original he drafted. Which issues of the draft arouse the biggest disputes? How does he recall that time? He began by reflecting on the provisions for children's rights in areas such as education, healthcare, social rights, and protection from exploitation, among others. In fact, he had already previously described this issue in his critical notes about the changes introduced by the UN agencies, as follows:

> [A] prescriptive standard has been adopted, which many countries of the world are not immediately able to meet. Surprisingly, poor countries from the so-called third world ratified the convention quickly and often without reservations, while Western countries, with more advanced civilization level and economy, took a long time to think about it and eventually they formulated reservations and declarations.

In his opinion, the language of the articles from no. 23 upwards did not match the standard set for legal texts. The juridical wording of social legislation was watered down during the proceedings at the UN. Instead of a precise text, the result was what Professor Smyczyński called 'a wish-list that no country will ever fulfil'. Yet, all countries, save for the United States, ratified the Convention. It is telling that the standard hardly attainable by any country, let alone the poorer ones, did not pose an obstacle to Convention ratification.

Prof. Smyczyński's view of social law is specific because his scientific 'motherland' is civil law. He knows this area very well since it is to civil law, to a large extent, that he has devoted the two aforementioned monographs and many significant scientific articles. The fuzziness of the language of the provisions of the Convention on Social Rights both hurts and irritates a civilist brought up on the Polish Code of Obligations of 1932,[29] which was a legislative achievement of the highest degree, and on the Civil Code of 1964,[30] which is still in force and—despite its enactment in a period unfavourable for Polish law—is also highly regarded from the point of view of legislative standards. Importantly, Prof. Smyczyński learned law and what is known as the scientific methodology from the monumental figures of Polish civil law, the aforementioned Profs. Ohanowicz and Radwański. For them, the precision of language was a value of the highest order.

In our private conversation mentioned above, we quickly dropped the issue of social rights aside, as Prof. Smyczyński moved on to the issues that were then most important to him. His central concern in the UN Convention on the Rights of the Child was the description of who a child is. This topic is of great importance—it has been so in the past, it is so in current times, and will be so in the future—and is discussed in different ways in almost every country worldwide. This is an area where divergent views clash, starting from demands for fully consistent legal protection of the life of the unborn child from the moment of conception, going through the forcefully articulated demand to guarantee the legal freedom to perform abortions throughout pregnancy, and ending with a demand for the legal permissibility of killing the child after birth. The latter is essentially an act of murder, which has been—euphemistically so—called postnatal abortion.[31]This debate also finds room for a view, which is postulated by some important political bodies, that women's access to abortion is a human right. However, in Prof. Smyczyński's recollections of the period 45 years

29 Decree of the President of the Republic of Poland of 24 October 1934; Code of Obligations, Journal of Laws, No. 82, item 598.

30 Act of 23 April 1964 – The Civil Code; consolidated text, Journal of Laws, 2023, item 1610.

31 Giubilni and Minevra, 2013, pp. 261–263.

ago when he drafted the Convention, the level of hypocrisy was lower than it is today. During the expert debates held in 1979, when defining the subject of protection of the child in the Convention, the following three approaches to the issue competed:

1. a child, meaning a person from birth to adulthood;
2. a child, meaning a human being below the age of maturity;
3. a child, meaning a human being from the moment of conception until maturity.

It should not be surprising that the bone of contention was not when a child reaches maturity, but when the life of the child begins. In negotiating the contents of international agreements, an important element is to obtain the broadest possible consensus (content agreement). It became clear during the negotiations that the issue of the concept of the child would be a stumbling-block for the Convention, a document that by virtue was expected to have a wide impact internationally and a chance of being ratified by as many countries as possible. Then the following question may emerge: How can this idea be accomplished by passing legislation giving protection to the lives of children conceived and unborn? It should be remembered that, at that time, liberal abortion laws were dominant in many countries. Prof. Smyczyński recalled that, with this in mind, supporters of protecting the lives of unborn children did not emphasise option 3 above; in fact, this option was not even considered. It was feared that this could turn many countries where the abortion mentality was already predominant away from the Convention. One of the countries was Poland, where about 450,000 abortions were performed each year at that time (for about 550,000–630,000 live births).[32]

The dispute over the content of Art. 1 of the Convention was therefore between the prior options 1 and 2. Unsurprisingly for many, the variant proposed by Prof. Smyczyński won. Among the speculations as to why this happened, the thesis of the significant role of the Holy See, under Pope John Paul II, is very tenable. The variant adopted in Art. 1 of the Convention reads, 'For the purposes of the present Convention, 'child' means any human being below the age of eighteen

32 Dyczewski, 1988, pp. 99–128.

years'. The phrase 'a child means any human being' is very different from the competing 'a child means a human being from birth'. This difference becomes more evident if the adopted content is read in conjunction with the preamble. The normative meaning of the preamble is sometimes(admittedly) questioned, but it is beyond dispute that its content lays down the direction for interpreting the provisions in doubtful situations. That is why it is so significant that the preamble states that the Convention was enacted to 'protect the rights of the child both before and after birth'.

Given the extreme divergences of the views on the protection of unborn children, including the significant differences between countries in their attitudes towards abortion, it is difficult to imagine that a better (more pro-life) content for the Convention might have been negotiated. Euphemisms such as pregnancy and foetus do not feature in the text of the Convention, and the word 'child' is used to name the unborn child as well; since it refers to a child, it means that it is about a human being; since it is about a human being 'both before and after birth,' it means that we are dealing with the continuum of life of the same person. The topic related to the status of the child before birth is clarified by the content of Art. 6, which refers to the child's right to life 'both before and after birth.'

Looking back over several decades, Prof. Smyczyński recalled with satisfaction the adoption of such content of the regulations in question, and not any other one, and added that it was the maximum of what could be obtained through negotiations. Unfortunately, the content of the Convention did not prevent the development of pro-abortion legislation in many countries and the scope of abortions that John Paul II called the 'civilization of death'. Given Prof. Smyczyński's series of publications on the legal status of the conceived child throughout the 1980s and 1990s, it is certain that he was very well prepared for the debate on this issue when writing the draft convention.

Nearly equally as important a problem in the drafting of the Convention was the regulation of the status of parents. On this issue, Prof. Smyczyński always had a clear-cut view of the family as a group of people bound together by ties of marriage, consanguinity, and affinity, where children are protected by their parents, who have primacy

in their upbringing. The role of the state is thus to support the family, not to replace it in carrying out its functions.

Accordingly, the content of the Convention's provisions reflects the idea that a happy childhood is one in the family, the consequence being that the protection of children's rights presupposes state action directed at protecting the family; in other words, a state that wants to protect the child must have a pro-family policy. This issue is addressed particularly in Arts. 5 and 18, and in the relevant section of the preamble; according to the latter, the Convention was adopted with the belief that the family is the basic unit of society and the natural environment for the development and well-being of all its members, especially children. As such, 'it should be given the necessary protection and support to enable it to fulfill its duties in society to the fullest extent.' The preamble further states that the family is the natural and optimal environment for the full and harmonious development of a child's personality, as well as that the child should develop in the family and 'in an atmosphere of happiness, love and understanding'.

The consequence of such an assumption is the content of Art. 18 of the Convention, according to which the state must make its best effort 'to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'. Thus, it is incumbent on the parents to safeguard the best interests of the child, and the role of the state is to ensure proper assistance to parents in the performance of their child-rearing duties. For children whose parents are engaged in professional work, the state should ensure that parents have access to institutions and facilities that assist them with childcare responsibilities. As previously noted, parent–child relationships are also addressed in Art. 5:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community [...] 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.

Prof. Smyczyński argues that the Convention protects the child and sees their place within the family, in that they should be cared for by parents supported by the state. Indeed, the child is described in

the Convention inside the family, not outside or beside it, with parents both having primacy in the upbringing of the child and bearing the responsibility to support and raise the child. In a thus defined approach, it is possible to extrapolate the idea that the UN Convention on the Rights of the Child is not, as many would want it to be and interpret it in this erroneous way, a tool to fight against parents. The content of this international agreement hence provides a strong normative basis to forestall the attitude of activists who understand it as a tool to fight the adult world. Of course, this adult world is sometimes a source of oppression and even violence for the child at the hands of parents, relatives, and other adults, and this is recognised by the provisions of the Convention, such as in Art. 19. However, the rule governing the functioning of families and parent-child relationships is as it outlined in the preamble.

In Prof. Smyczyński's writings, the parent–child relationship was first studied in reference to the child support obligation. This topic of obligation was a focus of not only his habilitation dissertation but also several of his significant studies and articles. The ideas contained in them were in time introduced into the Family and Guardianship Code.

After the Convention was passed, Professor Smyczyński published several important articles on the legal status of the *nasciturus*.[33] Of particular note is the monograph he edited, entitled *Assisted Human Procreation. Legislative Issues*,[34] in which he published four texts on the status of the artificially conceived child ('The Concept and Legal Status of the Human Conceived Being', pp. 9–26; 'Nasciturus in Light of Legislation on the Termination of Pregnancy', pp. 27–38; 'Axiological Bases for the Permissibility of Assisted Human Procreation', pp. 161–174;'Theses on the Draft Legal Regulation of Medically Assisted Procreation and Legal Protection of the Human Embryo', pp. 175–178). In this monograph, a question is posed from a legal perspective about the relationship between ethics and technology concerning artificial procreation; specifically, the question arises as to whether it is

33 Smyczyński, 1990, pp. 77–87,; 1990a, pp. 9–28,; 1991, pp. 48–56.; 1993, pp. 73–85.; 1989a, pp. 3–28.

34 Smyczyński, 1996.

permissible to pursue every technical possibility, or if a sense of distance should be maintained from certain technological advancements due to the moral dilemmas they may pose.

Professor Smyczyński's view on the parent-child relationship and the importance of the child's right to live in the family was very well reflected in the structure of another monograph he edited, named *Convention on the Rights of the Child. Analysis and Interpretation.*[35]This is perhaps the most important Polish legal work on the rights of the child, wherein more than a dozen authors have written commentaries on various regulations of the Convention. The book as a whole is divided into three parts: the first—'The General Issue'—contains articles on the genesis of the document, the role of the preamble, the concept of the child, their mental development and the concept of the child's well-being. The second—'The Child's Right to a Family'—consists of articles on establishing the child's descent from the father and mother, the right to be raised by parents, the right to foster care, and the right to adoption. The titular child's right to the family was singled out in a separate section to give it a much higher profile than the other rights of the child collected in the dozen or so articles found in the third section, titled 'The Right of the Child to the Family. Children's Rights in Detail'.

Noteworthy in this monograph are the research methodology employed and the approaches to presenting the results. Prof. Smyczyński set it as a requirement for the authors to begin discussing a given right by first showing the universal standard of its protection adopted in the UN Convention on the Rights of the Child and possibly in other international documents. The next step was to discuss the European standard of protection based on international documents enacted for Europe, especially Council of Europe documents, the Hague Conventions, and others. Against this background, the authors were next required to show the regulations adopted in Polish law and indicate the scope of implementing these standards into the Polish national legal system.

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35 Smyczyński, 1999.

The two aspects that were the most important for Prof. Smyczyński during the drafting of the Convention, namely the legal status of the child and the legal position of their parents, still remain so for him. He confirmed this in the conversation held with me in the fall of 2023 (See VI). He also reiterated this view during our many scientific discussions and conferences. Prof. Smyczyński has a sober perspective on the world and has never been under any illusion that the enactment of the UN Convention on the Rights of the Child was the endpoint of the legal effort to ensure the most effective protection of children's rights. He follows the activities of individual states and knows the rulings of various courts and tribunals that create exceptions to the standards adopted in the Convention. He also recognizes that the legal status of parents with respect to their children is systematically undermined, often in the wake of the overly paternalistic biases of the authorities of individual states (which are becoming increasingly ideologised). He is deeply concerned that with the blurring of the view of the child's right to a family, the child's right to life from the moment of conception is also being undermined. According to Professor Smyczyński, the Convention's content supports efforts to protect children's rights but falls short of offering an effective safeguard against the increasingly intense philosophical, political, and legal disputes—particularly between pro-life and pro-choice perspectives—regarding the status of children and families. What is telling in that debate is that the legal protection of the conceived child has not been affected by the full and widely available empirical knowledge about the development of the child in the prenatal stage. The debate reached the point where the possibility of abortion (euphemistically called the 'termination of pregnancy') is sometimes referred to as a human right.

Some trends observed in the debates surrounding the Convention diverge from its assumptions. This is evident in the fact that an objection is raised against the UN Convention on the Rights of the Child, particularly in the claim that it fails to include the right of the child... to have an abortion. In Polish feminist legal literature, the Convention has been criticized as an anachronistic document because it does not address so-called reproductive human rights (the right to reproductive health), including the access of the child (girls) to abortion. The

argument posits that since children may engage in sexual activity and may face unwanted pregnancies, they should be granted their human right to reproductive health, including abortion access.[36] It is worth noting that Prof. Smyczyński did not recognize such a 'right' and did not include it in his draft. I am confident that that if he were to write another draft today, he would not include this aberrant idea either.

7. AT THE END

It follows from the decades-long experience of dealing with the legal protection of the family, including the rights of the child, that the causative power of the law should be approached with humility. One should not fall into a trap of discouragement on the one hand, and should have a sound view of the world, its problems, and the possibility of solving them through the law, on the other. Fully aware of this attitude, Prof. Smyczyński concluded his essay on the meaning of the Convention on the Rights of the Child with the following words:[37]

> The fate and well-being of the child, however, depends not only on how the legal norms are formulated, that is, on the laws themselves but also on the fact of how they are implemented, which depends on all those acting on behalf of children and on the economic possibilities to fulfill these noble demands.

Professor Smyczyński's words can be interpreted as a call to action for those concerned about children. We must recognize that this is an ongoing and never-ending endeavor.

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36 Ważyńska-Finck, pp. 71–73.
37 Smyczyński, 2012, p. 17.

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Tadeusz Smyczyński: Is there a need for a Convention on the Rights of the Child? Origins and functions of the Convention[1]

1. UNTIL THE 20TH CENTURY, children were treated peculiarly; they were considered an object of family endeavour, to ensure genealogical and sometimes dynastic continuity, and to continue the custody and multiplication of family property, but were hardly valued in themselves. Moreover, children were dressed as small adults (as we observe in paintings portraying ruling families, and children from other social groups); S. Wyspiański was the first to paint the sleeping Staś in all his childlike charm. Children were valued as future adults, future soldiers, and often as the much-needed labour force on the family farm, or as support in old age, and seldom as small developing human beings, who arouse warmth in people in their immediate environment, except perhaps in their mother in early childhood. A public statement by a lawyer (being in a childless marriage) stated that children do not matter because of their youthful age; they only matter when they become adults. Perhaps a note of sarcasm and concealed grief from unfulfilled fatherhood echoed here. This manner of thinking about children was not unfamiliar to the public, as in France, even adults were allowed to be adopted for the continuation of a family without children (Article 340 of the Napoleonic Code), instead of children, as children were not useful for multiplying the family's assets.

1 Originally published in Polish: Smyczyński, T. (2012) 'Czy potrzebna jest Konwencja o prawach dziecka? Geneza i funkcja Konwencji' in Andrzejewski, M. (ed.) *Prawa dziecka. Konteksty prawne i pedagogiczne*. Poznań: Wydawnictwo Naukowe UAM, pp. 9-18.

Parental feelings existed in the private, intimate sphere and not in the legal sphere. The family was perhaps an overly autonomous group, as enormous power was exercised by the father, and the public authority probably intervened only when a crime had been committed. With the development of society, social sciences, particularly psychology, children were becoming gradually recognised as persons who, owing to their immaturity and dependency, require care for subsistence or survival as well as for upbringing. Nevertheless, the law treated children as objects cared for by parents, or sometimes by other relatives, and not as young persons who mature into independence and expand the sphere of their autonomy until the age of majority. Children were completely dependent on their parents or others, both in early childhood and at older age. This is not surprising, as even a wife (an adult) was largely subordinate to her husband in many family matters. It was the husband who managed his wife's property, decided where the family would live, had a decisive voice in the affairs of the children, and so on.

In the twentieth century, particularly after the experience of World War I, the plight of children drew attention and, consequently, their self-identity and legal subjectivity began to be recognised. This was expressed in the brief Declaration on the Rights of the Child enacted by the League of Nations in 1924. However, it was only after the atrocities of the two totalitarian regimes – the fascist and the communist – before and during World War II that the political initiative was freed to develop and enact international legislation such as the Geneva Conventions for the protection of children and family in armed conflict, the Universal Declaration of Human Rights (1948), the Declaration on the Rights of the Child (1959), and later the two International Covenants on Human Rights of 1966. These international documents contain directives that formulate human rights as individuals and order to protect and respect them. A child is also a human being (sic!), a human being with their own specific needs, a human being not yet mature for independence, requiring affection, presence and constant care of those closest to them – their mother and father. An average human with a developed, natural personality can cater to these needs of a child without knowing about the existence of

conventions and codes. This stems from the natural bonds between parents and children, and the natural reflexes of an adult towards a weaker, less capable person, particularly a young child. However, in reality, in a diverse and multicultural world, children are treated according to local customs, religions, ideas about social ties, intergenerational ties, and so on. Thus, it was considered necessary to formulate some minimum (universal) standard for the protection of children, their rights as separate individuals in any society. The United Nations declared 1979, the International Year of the Child. On such occasions, often spectacular ideas arise to announce a propaganda campaign, some social research, or even to pass a piece of legislation, a declaration or a convention. The authorities of the People's Republic of Poland (PRL) at the time, already struggling with an economic crisis, social conflicts (strikes in the Ursus factory and in Radom, fight against the democratic opposition), intended to take advantage of such an opportunity, and initiated a convention on the rights of the child at the international forum. Thus, in the party-state apparatus, a draft convention was created in a brief period, which was a word-for-word repetition of the text of the 1959 Declaration of the Rights of the Child. Legally speaking, this was a clear mistake, as a convention, as a binding act of the state, must be formulated in a completely different language than a declaration which is only an appeal and a set of demands that would be beneficial to implement. The authorities of the PRL counted on the naivety of international bodies, which, however, criticised the project as a propaganda act with no merit. Thus, PRL's plan to promptly earn benefits on the alleged care and humanitarianism in the form of the Convention on the Rights of the Child, passed on the initiative of the People's Republic of Poland, failed. Naturally, such a draft was rejected. Thereafter, officials from the Ministry of Foreign Affairs met the director, Professor Adam Łopatka of the Institute of Legal Sciences (INP) of the Polish Academy of Sciences (PAN), and requested him to draw a legal draft of such a convention. A new strictly jurisprudential draft (which I drafted) was presented to the Human Rights Commission in Geneva. After discussion at the INP, the draft was submitted for discussion in the subsequent international procedure. Ten years later, in 1989, it was passed by the United Nations General Assembly

and placed for signature. Our project – in its part dealing with the legal status of the child as a person – continues to stand firm without major changes. Its part on children's rights such as those in the field of education, meeting livelihood needs, health care, social rights, protection from exploitation, was adopted as a postulatory standard, which many countries worldwide are unable to meet immediately. Surprisingly, poor countries from the third world ratified the convention promptly and often without reservations, whereas countries with a high level of civilisation and economy deliberated on it for a long time and formulated reservations and declarations.

Thus, the question arises whether there was and is a need for a convention concerning only children, as a distinct social group, in international political practice, for laws of the individual countries of the world better focusing on the welfare of children. Is it a suitable tool for improving the lot of children? Let me answer it straight away: such a piece of legislation was definitely required. **First**, because other conventions, declarations deal with the protection of adults in general (such as the 1966 Covenants on Human Rights, the European Convention on Human Rights and Fundamental Freedoms, the conventions of the International Labor Organization), and do not regulate legal positions from the perspective and welfare of children. **Second,** the child is not simply an object of protection from the perspective of the interests of adults, such as parents, other relatives, guardians, educators, but they are also the subject of the law and the subject (addressee) of the actions of adults, which has not been clearly emphasised so far. **Third**, because the child is a human being with special needs that arise from the fact of their constant physical and particularly mental (in terms of personality) development and maturation, they are not a statistical object. The protection of the child must consider the dynamics of the development of their humanity, that certain phenomena fade away and some of the consequences of negligence, mistakes of those responsible for childcare are irreversible. **Fourth**, the Convention defines the rights of the child regarded as a subject of law. It identifies natural and legal persons governed by public law responsible for their implementation and observance, and the child as entitled to express their opinion on matters concerning them. In the

international legislations, no universal legislation is found dedicated exclusively to the child as a member of the family and society. The importance of the Convention is evidenced by the process of implementing its norms into national legislation in Poland and other countries that have ratified it. It inspired the amendment of many major laws, such as the Civil Code, the Family Code, the Code of Civil Procedure, but also other laws or regulations of lower rank, such as school and hospital regulations. The necessity to consider the needs of children in various, practical situations in life has been recognised.

2. IT IS WORTH INDICATING THE FUNDAMENTAL DIRECTIVES of the Convention that shape the defined rights of children, postulate certain behaviours of others for the benefit of children, so that their rights are protected and realised in everyday life.

Who is considered a child according to the Convention and who is to be protected? A child is any human being below the age of 18 years unless according to national law, majority is attained earlier. The compromise concerns the designation of the beginning of the child's existence as a subject of the rights expressed in the Convention and the adoption of the term 'human being': a child conceived and developing during their mother's pregnancy is certainly considered a human being. The compromise on terminology respects the issue of abortion and the different approaches to solving it in state laws. Using the preamble of the Convention, it must be stated that even before birth the child enjoys protection, and in the Convention itself we have clearly formulated the inalienable right of every child to live. However, it is not clear how this wording of the Convention can be reconciled with the statutory permission of aborting a pregnancy, particularly at the request of a pregnant woman. Some states have made reservations or declarations on this issue (e.g. France stipulates that the Convention cannot be interpreted against the permission of voluntary termination of pregnancy, whereas Argentina recognises the concept of the child from the moment of conception).

Owing to the fact that the child is a subject, a birth certificate should be drawn up with the child's name immediately after birth. This implies that at birth the child is a registered legal entity. Their

existence is recognised by civil and administrative law, and they are a person who cannot disappear without legal consequences. The danger of failing to register a newborn and of missing other elements of its identity is evident in some countries where this issue is either neglected or barely respected. In this respect, the authorities of international control have obtained a legal instrument to combat the criminal use of unknown children (with parental consent as organ donors for transplants even in poor countries).

The birth certificate indicates not only the mere fact of the child's birth, but also the child's marital status, their descent from the mother and also most commonly from the father. The persons representing the parents are generally consistent with the actual biological origin. If it is otherwise, the child is granted the right to know their real origins. In practice, it is particularly about the option that they have the right to demand to identify their father or mother, if the parents or one of them is unknown, or if they were conceived in vitro and were borne by a surrogate mother. The same issue concerns the case of a total, anonymous adoption. The question arises whether a child has an absolute right to know their biological or even genetic parents. The Convention itself states that the right to know one's parents is exercised when possible. It is not clear whether this is a legal possibility, that is, whether the law recognises the right and establishes a procedure to identify the biological origins of the child, or whether it is an objective possibility – or usually the impossibility for objective reasons, as it is simply impossible to establish who is their father or mother. The Polish family law, since its reform in 2008, recognises claims aimed precisely at establishing the origins in accordance with the biological truth, however, avoids contradictions between legal paternity (maternity) and the real, biological one. The rule of secrecy is preferred only in regard to adoptive parents, particularly in case of anonymous adoptions. At the ratification of the Convention, the Government of the Republic of Poland made a reservation that this right of the child is subject to limitation by national law, which ties this secrecy to the welfare of the adopted child. It is difficult to determine which solution serves the welfare of the child better. In any case, the child, upon reaching the age of majority, may see their birth certificate (Article 48,

Paragraph 4, of Marital Status Act.) However, it is difficult to disclose the secret of paternity in case of heterologous insemination, because the donor of the semen is unknown. Such a donor provides his semen for insemination of unknown women, and the intermediary actor in this system of the reproductive cells is the doctor performing the insemination procedure. Regardless of how one assesses the question of the permissibility and legal effects of such treatments in their various combinations, it remains a highly debatable issue.

A child has the right to be raised in his natural family. This **right of the child to a family,** stems from several articles of the Convention. These articles require that a child, for reasons against their best interest, not be separated from their parents, however, if necessary, require to ensure that the child maintains regular contact with their parents (Article 9). Another provision makes parents responsible for their child's upbringing and development (Article 18). For a happy childhood, does a child need ideal parents both in terms of their level of personality and property? Certainly, a child needs suitable parents and the satisfaction of his essential, justified needs of life, but there are cases of interventions of family courts (not only in Poland), by which a child is placed to an unknown family, because it appears to the judge, or rather the guardian or social worker, that the child is not well in their own family. However, in overprotective states, too, some type of imperative can be perceived in the actions of public authorities to excessively intervene in family affairs. For example, cases such as *Olsson v. Sweden* and *Johanson v. Norway* adjudicated in Strasbourg, in which the Court of Human Rights criticised the removing of children from their natural families and placing them in various foster families. The court stated that the social welfare authority's interference violated the rights of the parents, who supposedly could not ensure the child's proper development and upbringing. Further, the Court stated that the personal **bond between parents and their children is** of such **significant value that everything must first be done to bring help to the child without depriving it of its natural family environment.** This is where respecting the child's subjectivity lies, that is, listening to the child's own opinion on such an important issue for them, their feelings, their wish to stay with parents. Contrary to some beliefs, a

child values attachment and love for parents and siblings more highly than material goods. A family's modest living conditions should not be sufficient to justify removing a child from their home. The Convention on the Rights of the Child and the aforementioned rulings of the Court of Human Rights provide clear support for this position. A child's right to be raised in a family environment is also a rationale for relegating institutional care to the background when a child is temporarily or permanently deprived of their family environment (Article 20 of the Convention). However, even in such a case, family forms of foster care are preferred, that is, a foster family related to the child, or a foreign family adopting a child with the assurance of cultural, ethnic, linguistic continuity. The postulate of parental priority is a rationale for other rules of conduct, mandating that this state of exclusion of the child from the natural family be monitored to facilitate the return to it, rather than considering this disconnection as permanent. Authorities appointed to decide on these matters, particularly the guardianship court, should help the child's family to remove the cause of the child's previous inefficiency.

The deliberations and the analysis of the provisions of the Convention clearly indicate that the parents are the first and most important 'guardians' of the child from the moment of birth. This is the nature of things, and the law only confirms this condition. The state does not grant parents the right to raise a child, because the duty of parents to care for a child is a natural fact. The state is only a guardian to ensure that parents do not abuse their powers to the detriment of the child. It is desirable that the state, too, should not abuse its powers over the autonomous family. However, the question arises as to **whether a child can oppose their rights to their parents,** if the parents duly fulfil their duties. Certain social circles, particularly activists (despite acting with favourable intentions), attempt to interpret the Convention in a manner that weakens parental authority and pits the rights of the child against the parents. There was an attempt in the Senate in the 1990s to introduce a legal norm into the Family and Guardianship Code that would allow the child to take a position before the court – as if they were an 'opponent in a litigation' case – to accept the child's claim against the parents in matters of parental authority. It should

be clarified that the Convention on the Rights of the Child not only formulates the child's right to be raised by his parents, **but precisely entrusts them to guide the child in exercising and protecting his rights (Article 5)**: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, 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.'

Thus, there is no basis for weakening the position of parents or confronting the rights of parents and the child. However, the child should be heard on matters concerning him. During the debate over Germany's ratification of the Convention, pertinent comments were made about the Convention's strange and – as it was expressed – nonsensical wording, for example, that a child, within the framework of the right to freedom of expression, may seek, receive and impart information and ideas of all types, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice (Article 13 of the Convention). Elsewhere, the Convention prohibits arbitrary or unlawful interference in the sphere of a child's private life, or in their correspondence.

Therefore, what role can parents play when they perceive that their child's interactions with peers or adults who have a harmful influence on the child are unsafe? Justified parental interference bears the hallmarks of arbitrariness, but that is what parental authority is all about. In formulating Article 13 of the Convention, there appears to have been a lack of balance in the assessment of the child's situation between the legitimate respect for the child's person and the need for parents and others responsible for the child to protect the child as an immature person. A reasonable application and interpretation of these directives of the Convention is expected. Thus, it is noteworthy that the aforementioned provision of the Convention has met with reservations from several countries, including Poland. The tenor of these reservations aims to exercise these rights with respect for parental

authority in accordance with customs and traditions regarding the child's place within and outside the family.

3. IN CONCLUSION OF THE DISCUSSION SO FAR, it would be useful to answer the questions posed at the beginning. To the first of these, whether there was a need to develop a Convention on the Rights of the Child, despite the existing human rights conventions and covenants, I have already affirmatively answered and briefly reasoned. The child is not an object of possession or disposal of either the state or the parents. Let us add, following François Mitterand, President of France, that no one has the right to have a child. This implies that a couple requesting in vitro fertilisation in various combinations of this procedure cannot invoke their 'right to have a child.' The idea of the need for a universal legal act as a model for national regulations of the status of the child within and outside the family is substantiated by subsequent law reforms in countries that have ratified the Convention. Under the influence of the Convention, the European Convention on the Protection of the Rights of the Child was enacted in 1996, and its chief ideas were incorporated into the Constitution of the Republic of Poland in 1997. The Polish Family and Guardianship Code and the Code of Civil Procedure were amended several times, however, without undue haste, because our family law corresponded in essential respects to the principles of the Convention. It was not tainted by totalitarian ideology, as was the case particularly in some former socialist countries. With several revisions of this law, as well as medical, educational laws, the subjectivity of the child has been emphasised, particularly in relations with third parties, however, the rights of the child within the family have also been clarified beyond the two-generation family. The last major reform of family law occurred in 2008, however, the related problems are the subject of a separate paper. However, the fate and well-being of the child does not alone depend on how the legal norms are formulated, that is, on the laws themselves. The decisive factor is their implementation, which hinges on all those working for the benefit of children and on the economic capacity to fulfil those noble demands.

Tadeusz Smyczyński: Normative Basis for the Protection of Children's Rights[1]

'A happy child doesn't need laws, codes, but loving and sensible parents, as well as kindness and active interest from others involved with the child.'

I. NO SOCIETY, PARTICULARLY IN MODERN TIMES, can do without legally regulating the lives of its citizens, including that of its youngest citizens. In the field of family legal relations of persons and property, the legislator establishes sanctions for undesirable and harmful behaviour, as well as a certain model for desirable and required behaviour in social practice. Civil law regulates a person's subjectivity as a member of society, his/her marital status, place and role as a single person or spouse, as a parent of a particular child and as the child of a particular parent. The law provides for the intervention of a competent authority in the exercise of parental rights if there is reasonable suspicion of a threat to the well-being of the child. Criminal law protects children from harmful behaviour by adults, however, it should also effectively protect against harmful behaviour by children's peers.

However, we have had such a law for a long time and it appears that there is no need to create further legal acts. It is noteworthy that until recently, the idea of the child as a subject of law was rather

1 Originally published in Hliwa, R., Schulz, A.N. (eds) (2003) Human rights. Family rights: 30 years of the Poznan Department of the Institute of Law Sciences of the Polish Academy of Sciences. Poznan: Foundation "Promotion of Human Rights - Research and Teaching", pp. 73-79.

questionable and uncertain and was dealt with as an object of protection by adults. This continues today, for example in the form of the parents' right to have personal contact with the child, whereas no legislation is found regarding the child's right to have contact with the parents (a conclusion derived from Article 113 and Article 58 § 1 of the Family and Guardianship Code). The tragic experiences of humanity affected by totalitarianism have inspired a worldwide movement towards individual rights, including children's rights. In particular, this concerns the protection of the autonomy of the family and the rights of parents to raise their children and shape their personality while respecting their beliefs, national and religious traditions, and so on. However, the child also needs protection in democratic societies, where we can observe the phenomena of family pathology, the harmful effects of misunderstood freedom of speech on the child, conflicts related to the exercise of freedom by some, and the violation of the freedom of another person (the child).

On a global scale, frequent disregard for the human rights of children is observed; those rights that are inherent, not bestowed, and the respect of which cannot be postponed until a later time, such as the right to life, health protection, protection against sexual abuse by any person, the right to alimony, protection against alcohol and drugs. This implies that it is insufficient to have a moral assumption, a belief in the duties of responsible parents towards children, or the expertise and goodwill of those dealing with children (teachers, judges, doctors, educators). Legal acts are required at various levels in the hierarchy, which shape the legal model of children's situations, shape their rights and duties, provide sanctions for specific acts, and indicate the path of corrective or preventive action.

II. THE HIGHEST-RANKING LEGISLATION is the Constitution of the Republic of Poland. Other acts create a detailed legal order, are adopted to implement constitutional norms and should be consistent with the Constitution. Moreover, international treaties are incorporated into the national legal order by virtue of the Constitution (Article 91). Accordingly, the Convention on the Rights of the Child and the ratified European conventions relating to children, together with the

Civil Code, Family and Guardianship Code, and other laws regulating family relations, have established a legal system that protects children's rights. The protection of these rights is explicitly guaranteed by the Constitution in the following words: 'Everyone has the right to demand that public authorities protect children's rights against violence cruelty, exploitation and demoralisation' (Article 72(1)). These words suitably capture the intentions of the legislator and the source of risk to the child. It is about protecting the child from harm in the broadest sense, both in the short and long term. The protection of children is among the most important values protected by the Constitution. By ratifying the Convention on the Rights of the Child, the Polish legislature has adopted measures to adapt Polish law to the requirements of the Convention, and the Constitution itself expresses similar thoughts and directives.

The Convention on the Rights of the Child contains legal formulations expressing general principles and directives addressed only to states as well as norms directly expressing the rights of the child as a person. Most stipulations of the Convention can be implemented based on domestic law, which is a tool for implementing the ideas expressed in the Convention into everyday practice.

III. THE NORMATIVE BASIS FOR THE PROTECTION of children's rights is a body of legal norms, the core of which is directly applicable and constitutes national law, deriving its inspiration, axiology, and interpretation from the Constitution and treaties ratified by Poland. Owing to the general nature of the wording of the Constitution and the Convention on the Rights of the Child, there is an impression that these norms are difficult to interpret and apply effectively in a reasonably uniform manner. This belief appears particularly at the intersection of the rights of children and the rights and duties of parents and others responsible for children. This raises the question of whether the rights of children are antagonistic to parental rights and responsibilities or whether they can conflict with parents and others responsible for children (such as teachers and educators). Respecting children's rights is the responsibility of the state, parents, and various social and private institutions dealing with children. However, it

is the state that should create a legislation and interpret it in such a manner as to ensure the protection of the child, as a person, citizen and member of the family.

The Family and Guardianship Code plays a fundamental role in the parent-child relationship. The Convention on the Rights of the Child assigns a significant role to the family as the place where children should be safe, and their rights are respected and protected from outside violations. Moreover, based on the Convention, the right of the child to a family was created. Consequently, the role of the family in a child's life is that the child is entrusted to the parents, and they are responsible for the child. This raises the question of the importance that should be attached to certain children's rights in the context of parental competence and responsibility. We can mention such Convention rights as, for example, the right to freedom of thought, conscience and religion, the right to freedom of association, the right to receive and impart all information, the right to education (choice of profession), and the right to live in a family and to be in contact with both parents.

Some of these acts may appear conflicting. However, this can be avoided by adopting a reasonable interpretation of conventions and family law as a whole in accordance with the intentions of the creators. The instrument for protecting children by parents is the institution of parental authority. The duties arising therefrom relate to the custody of the child and property; it is the parents who raise and guide the child (Articles 95 and 96 of the Family and Guardianship Code); that is, they shape the child's personality according to their beliefs and worldviews. Granting such powers to parents protects the autonomy of the family from outside interference, from a totalitarian state, as well as democratically made decisions that may violate the privacy and autonomy of the individual and the family. Article 5 of the Convention on the Rights of the Child entrusts parents first and foremost with ensuring that their children's rights are respected. Parents are entitled to guide their children in terms of their peer contact and membership in social organisations. Moreover, it is impossible to exclude interference with the child's privacy, justified by specific circumstances, when there is a fear of a threat to the child's well-being, of which the child himself/herself is unaware (such as drug addiction,

succumbing to the negative influences of the environment). Appropriate parental actions, demanding certain information from the child, and preventing the child's reprehensible behaviour are not unlawful actions, but rather the exercise of custody over the child. Parents exercise parental authority until the child reaches the age of majority, and neither the Convention on the Rights of the Child nor the Family Code relieves them of this responsibility earlier.

The Polish Constitution places an emphasis on the role of the family somewhat differently than the Convention, as it emphasises the right of parents to decide on the direction of their child's upbringing and the child's exercise of the 'freedom rights' referred to above. [2] It appears that providing parents the final authority in their relationship with their children is an apt solution, and it does not contradict the purpose and 'spirit' of the Convention on the Rights of the Child. The autonomy of the child must give way to the competence of the parents, unless they threaten the well-being of the child. Further, it is noteworthy that the Convention is a universal legislation and is thus a compromise approach to the 'parent-child' relationship, that is, the sphere of social relations shaped by customs, tradition and many other factors specific to a particular society. It has been aptly stated that both the Convention on the Rights of the Child and the Constitution of the Republic of Poland reflect the evolution of the relationship between parents and children, and there is widening acceptance of the thesis that parents should consider reasonable and mature views of the child when guiding the child.[3]

In addition, it should be clearly noted that other persons taking care of children as part of specific educational tasks, providing entertainment, treatment, or recreation are also responsible for children. When fulfilling compulsory schooling, ensuring the child's participation in organised recreation, and placing the child in a medical facility, parents entrust the child to other persons who perform specific tasks for the child. The teacher, educator, and doctor provide a certain part of their custodial care for the child. The aforementioned persons

2 Wójcik, 1999, p. 69.
3 ibid.

not only educate, organise recreation, entertain, or treat the child, but also continue the parents' educational tasks to the necessary extent during the parents' absence; above all, they are responsible for the child's safety, as well as for the third party to whom the child caused damage (Article 427 of the Civil Code). More often, we learn about the helplessness of school management and teachers, despite the grossly reprehensible behaviour of students at the school itself, in boarding school, or during a school trip. Consequently, audacity and arrogance towards teachers, violence towards younger students, and the sense of impunity of students primarily cause harm to the children themselves and younger adolescents. It is sufficient to mention a child's alcohol poisoning, drug intoxication or accidents during school trips. Controlling the child in this regard under circumstances justified by the given situation does not violate his/her privacy or dignity; in contrast, it often helps protect children from harm. The actions of teachers, educators, and medical staff should be characterised by restraint, but the action itself is not unlawful; it is a desirable action, allowing the person to avoid being charged with guilt while supervising a child. There is no doubt that the actions of teachers (educators) should be characterised by impartiality and objectivity, fair treatment of all students, and responsibility for their safety. Demeaning and ridiculing treatment of the students is excluded, not to mention physical punishment and physical coercion. However, a loophole in educational law has been recognised, and a legal basis for the use of physical coercion in exceptional circumstances has been advocated, such as student violence against younger children, in cases of self-harm and vandalising property.[4] Teachers must not be powerless and uncertain about the legality of the measures used in situations that are dangerous to the student or to the school community.

Finally, let us add that parents have a duty to cooperate with state authorities and people and institutions dealing with children. Certainly, parents have the primary authority to raise and guide their children; however, a similar educational approach to matters of principle is desirable. If parents disregarded the signals and information

4 Tokarczyk, 1999, p. 304.

from teachers or educators regarding their children's clearly reprehensible behaviour, there would even be grounds for notifying the guardianship court.

Furthermore, it is necessary to recognise the need to protect the child from threats to his/her well-being (violations of his/her rights) by parents and the previously mentioned persons caring for the child. This statement also applies to punishing children particularly physically. There is no clear legal basis for the ban on spanking, although a more serious prohibition of corporal punishment can be derived from the provisions of the Constitution as it falls under the prohibition of violence and cruelty (Article 72 (1)). However, it is noteworthy that the prohibition of corporal punishment (Article 40 of the Constitution) refers to the system of punishment administered by a competent public authority and by people other than parents. However, I believe that even the parental use of this punishment should be circumspect and avoided. Indeed, it is true that parents who use frequent and severe physical punishment against a child are a model of aggression for the child, shaping aggressive attitudes and behaviour in the child.[5]

Protecting children from mistreatment also applies to psychological punishment. The reaction of adults to a child's reprehensible behaviour is often to ridicule, insult, and humiliate the child, particularly in front of other people. A child, even at preschool age, is severely affected by adult conduct, which leaves trauma in the child's psyche. At younger ages, the effects of such behaviour by parents or teachers are easier to deal with than in adolescent children. The aforementioned adult behaviour that is harmful to the child is more often the result of a lack of knowledge about the methods of raising a child, rather than ill will, a lack of sensitivity and understanding of the child's psyche, or even the result of relieving their own complexes or weaknesses in relationships with other people. A sad reflection comes to mind here: training is required even in a simple profession, but no training is required to raise a child in a family. Public television, which reaches the broadest masses in society, including those who do not read popular magazines, could play a useful role in this regard.

5 Wójcik, 1977, p. 29.

Psychologists should identify other methods of improving children's behaviour because physical punishment is undesirable; nor is impunity a solution to this situation.[6]

Children should be particularly protected from demoralisation and sexual exploitation by adults. Unfortunately, paedophilia (sometimes with the acquiescence of the child's parents themselves), child molestation, and sexual abuse within the family are poorly combated. However, the harm caused to the child in such cases is difficult to repair.

Psychologists agree that early events in a child's life have a strong impact on their further development and have long-lasting effects.[7] The sexual exploitation of a young child and an adolescent child is simply a criminal act against their evolving psyche and delicate emotional spheres. This is because, during adolescence, there is conscious acceptance of a certain value system, a choice of life attitude, self-analysis, and assessment of one's own experiences, and a sense of identity is formed. Brutal intrusion into the delicate sphere of a child's sexuality (rape), as well as sexual molestation and acts of indecency with a child, are unacceptable violations of the dignity and autonomy of a yet immature person.[8] Sexual maturity does not mean mental maturity, which is more important than sexual or physical maturity (fitness). Thus, it appears that the age of 15 years for determining criminal responsibility for illicit acts involving a minor (Article 200 of the Penal Code)[9] can be questioned.

Further, the Convention on the Rights of the Child notes the need for measures for the mental and physical rehabilitation and social reintegration of a child who has been the victim of any form of neglect, exploitation, or ill treatment (Article 39). This includes both the child victim and perpetrator of the reprehensible act. The state is obliged to take measures to facilitate rehabilitation and reduce or eliminate negligence. Children who have been harmed by physical violence and sexual exploitation should be cared for by psychologists.

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6 On this subject, see Gordon, 1993, p. 156, et seq.

7 Wójcik, 1999, p. 51 and the literature cited therein.

8 Please note that owing to mental incapacity, an adult becomes incapacitated, despite the fact that he/she is physically (biologically) healthy.

9 Łopatka, 2000, p. 38.

IV. IT IS WORTH CONSIDERING THE PROTECTION of the child in court proceedings that are initiated most often because of the regulation of legal relations in the Family and Guardianship Code. The question of whether a child is a participant in the proceedings within the meaning of the Code of Civil Procedure has also been analysed by the Supreme Court, which is inclined to take the position that a child in parental authority cases is not a participant in the proceedings.[10] A contrary conclusion can be drawn from Article 573 § 1 of the Code of Civil Procedure, which authorises a person under parental authority to take action in proceedings concerning his/her person. Therefore, a child with limited legal capacity (over 13 years of age) is a participant in the proceedings. However, special provisions allow exclusion of the minor's personal participation in the court session if there are educational reasons for doing so (Article 573 § 2 of the Code of Civil Procedure). If neither parent can represent the child, the court will appoint a guardian. In an overwhelming number of cases of deprivation or limitation of parental authority, educational considerations result in the exclusion of the child's personal participation in the proceedings. However, whenever a child can already express his/her own opinion (with the help of a psychologist, or an older child - directly before the court), the court is obliged to hear the child (Article 576 § 2 of the Code of Civil Procedure).

A certain disregard for the child's right to be heard on matters important to him/her can be seen in proceedings for the dissolution of marriages. The demand to exclude a child from conflicts between his/her parents should be accepted unreservedly. A child may not be a witness in his/her parents' divorce trials. However, the court, when declaring a divorce, is obliged to decide the fate of the joint minor children and entrust one of the parents with the personal exercise of parental authority. In this respect, the court has shaped children's place and fate in the family for years. The divorce court should be aware of the child's opinion about the bond between father and mother,

10 Ruling. SN of 3.5.1979 OSNCP 1979- pos.230; of 16.12.1997 III CXP 63/97, not published.

particularly if there is a dispute over the child between the divorcing spouses. Psychologists' opinions would often lead to the elimination of spousal disputes without harming the child. Multifaceted socio-legal research has been conducted in this regard, and it is worth using the results to formulate assumptions and directions for the reform of both substantive and procedural divorce law.[11]

The child's hearing on this important issue follows directly from Article 12 of the Convention on the Rights of the Child. The child is also the subject of the 'parents-children' legal relationship and has his/her own entitlement to contact each of his/her parents. The situation after divorce and placing the child, most often with the mother, is generally not conducive to the child. I believe that the aforementioned Convention is a sufficient basis for legislators to ensure that the child's future fate is heard of in a broken family in the provision of civil procedures in divorce cases.

The Convention on the Rights of the Child clearly calls for the protection of a child's personal status and, in particular, the establishment of his or her descent from specific parents. However, the right to know one's origin is not absolute, but is realised 'as far as possible' (Article 7(1)). A child's right to know his/her origins is most often realised through the judicial determination of paternity or maternity, although this may only comprise obtaining actual knowledge of who the father or mother is. A claim to determine the origin of a child (including maternity) is sometimes evaluated in terms of another value: the stabilisation of the child's existing personal status. The paternity of a child can be determined at any given time. Regarding maternity, there is no clear normative determination in the Polish civil law. However, the Latin *paremia mater semper certa est*, is no longer sufficient. For the sake of the child, it should be clarified that the mother is the woman who gave birth to the child. Further, the denial of motherhood is also based only on the interpretation indicated by the Supreme Court in several rulings and not on a legal norm.[12] Considering the

11 Stojanowska, 1997, p. 96., et seq.

12 Resolution of the Supreme Court (7) of 7.6.1971 OSNCP 1972, item. 42 supporting the earlier decision of the Supreme Court of 5.6.1968 OSNCP 1969, item 55.

consistency of the law, it would be appropriate, as with the denial of paternity, to specify a mandatory time limit that would restrict the current indefinite possibility of demanding the denial of maternity. Otherwise, the child may be at risk of destabilising his/her personal status with regard to maternity, which, it must be clearly stated, in the case of the woman entered into the child's birth certificate as his/her mother, was the result of false information.

Considering the child's right to know both parents, it is necessary to ensure the possibility of establishing the paternity of a man who does not evade paternity but is hindered by the mother's objection when intending to recognise the child or her lack of legal action to establish paternity when the child is a minor. In such a case, the right method to remove this dissonance would be to grant the father locus standi in the proceedings, of which he has so far been deprived. However, for many legal reasons, the idea of omitting the mother's consent to recognise the child was wrong. The Constitutional Court has recently resolved this dilemma. Difficulties in determining a child's personal status and threats to the well-being can arise from the conception and birth of a child because of assisted reproduction. This issue has not yet been regulated in Poland, even in the areas of family and legal consequences, although doctors perform such procedures. Specific legal doubts, not to mention ethical objections, arise from assisted reproduction at the request of a single woman and the insemination of a woman (including a widow) after the death of a sperm donor. In the first case, the child is from the beginning, deliberately 'doomed' to a single-parent family with no possibility to establish paternity. A similar situation arises during postmortem insemination. In both cases, the proponents of such procedures, as well as the woman wanting the child, satisfy their own selfish interests and have no regard for the well-being of the child to be born. For this reason, most countries that regulate assisted reproduction have banned the medical insemination of a single woman, or a widow with her deceased husband's sperm, or surrogacy. In any case, future Polish legislation on this issue must not only consider the interests of those trying to conceive 'their' child but

also the well-being and interests of the child to be born, which is the central point of reference when evaluating this issue.[13]

V. TO CONCLUDE, I would like to emphasise the momentous, inspiring, and directive role of the Convention on the Rights of the Child and, above all, the Constitution of the Republic of Poland, whose principles and values are implemented by lower-ranking laws. There is no fundamental contradiction between the Convention and Poland's domestic legal system. Above all, the interpretation of the Convention must not be an instrument for antagonising children, parents, or other persons responsible for children. However, it must be clarified that the rights of the child may be brought against the parents, state, and local government bodies, and any other person in the event of exceeding their authority, in the event of abuse of parental rights, or in the event of passivity, failure to perform parental duties, or obligations imposed on other persons responsible for children. The adult world is responsible for the upbringing of children; therefore, observing children's rights also depends on their attitude.

13 These issues are discussed by Dyoniak, 1996, and Smyczyński, 1996, p. 39, p. 141. and p. 161, et seq.

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Tadeusz Smyczyński: The concept of the child and its subjectivity[1]

THE CONCEPT OF THE CHILD

The term 'child' is certainly ambiguous. Its meaning can be associated with childhood, as a period of a person's life, of physical and mental immaturity, where maturity is achieved by each person at different times. Thus, it refers to one who, because of his age, has not yet reached independence, and according to the preamble to the Convention – by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth.

The term 'child' is encountered in different contexts and in relation to the various rights that are formulated in specific legal norms. Thus, the protection of the child is considered by both, the convention of ILO regulating the working conditions of adolescents and the norms contained in the Human Rights Covenants and other statutes of international law that deal with the protection of women and mothers on account of a child already born or about to be born.[2] Consequently, it is vital to clarify the concept of the child, considering both international legal norms and domestic law on child protection.

1 Originally published in Polish: Smyczyński, T. (1999) 'Pojęcie dziecka i jego podmiotowość' in Smyczyński, T. (ed.) *Konwencja o prawach dziecka. Analiza i wykładnia*. Poznań: "Ars Boni et Aequi".

2 Article 10, Paragraph 2 of the Covenant on Economic Rights; Article 25, Paragraph 2 of the Universal Declaration of Human Rights, 2 – 1948; ILO Maternity Protection Convention, 1952 (No. 103); ILO Minimum Age (Underground Work) Convention, 1965 (No. 123).

First, it is important to note that a child maturing towards independence in life goes through many developmental phases: the child's mental development, and the ability to learn and become aware of the surrounding reality, which expands as the child matures. Modern psychology recognises factors in the prenatal period which affect the development of the child after birth. This justifies the thesis that the development of the child is continuous and the separation of developmental periods is of secondary importance.[3] However, when analysing the Convention, particularly two questions are raised about the concept of the child as an 'object' of protection and addressee of the rights formulated therein. These are: 1) Does the concept of a child also refer to a foetus? 2) Is a teenage person, a minor in terms of age, a child? These questions have raised numerous disputes before and during the preparation of the Convention on the Rights of the Child.[4]

ad 1). The clarification of this issue can be based on the answer to the question, 'When does a human being begin to exist?' and particularly whether one is a human being from the moment of conception or from some other moment of prenatal development or from the moment of birth. To determine an answer that satisfies everyone, is extremely difficult. However, there is no doubt that from the moment of conception and also from the nidation of the embryo, human development begins, in the course of which birth is only an event that opens a new phase of human life. Based on this philosophical and ethical assumption supported by medical knowledge, national legislatures sometimes grant legal subjectivity (capacity) to a conceived child on the condition that the child is born alive. Regardless of such explicitly granted legal capacity, the legislature particularly in the area of civil law recognises the rights of compensation for damage suffered before birth (Article 446-1 of the Civil Code), as well as the right of inheritance (Article 927 § 2 of the Civil Code), and finally the right of the conceived child to be recognised by the father (Article 75 of the Civil Code). Therefore, it is about the human being whose birth is being expected. Thus, the foetus

3 Zebrowska, 1972, p. 25.

4 Łopatka, 1991, pp. 17–20.; rapport sur l'enfance, New York 1971 Nations Unieś, p. 2.; Uwagi Międzynarodowego Komitetu Czerwonego Krzyża do projektu Konwencji o prawach dziecka E/CN 4/1324, 6 XII 1978, p. 58.

is a human being particularly in this biological-existential sense of the term. Such a concept is also contained in Article 1 of the Convention on the Rights of the Child, according to which a child means 'every human being below the age of eighteen years...'. However, the content of this provision is a compromise between the position of those who demanded explicit wording that a child is a human being from conception, and the stance of those countries that defend the legality of abortion. The definition of the concept of the child remaining ambiguous, France, Argentina, Guatemala and the Holy See made an appropriate reservation. Although France's reservation refers to Article 6 of the Convention, which proclaims the child's inherent right to life, its implementation undoubtedly involves the question, whether the concept of a child refers to prenatal life. In contrast, the reservations of the other countries aforementioned are aimed at respecting human life from conception. In this regard, the view has been expressed that the state ratifying the convention decides from what point in time a human being is a child, 'subject to the reservation, however, that it certainly cannot be later than the moment of the child's separation from the mother's body.'[5] Granting the state such far-reaching authority to determine its binding by the convention is difficult to approve, all the more so since a fundamental human right is at stake, that is, the child's right to life and survival. Moreover, it is difficult to sensibly defend the view that a child before birth has the right to life and simultaneously allow the legislature to limit it according to the will of the child's parents and particularly their mother.

Therefore, it appears that the Convention on the Rights of the Child is the basis for interpretation towards the defence of the life of the conceived foetus considering the broad concept of the child as a human being, their inherent and inalienable right to life, and the reference in the preamble of the Convention to the 1959 Declaration of the Rights of the Child stating the necessary care and protection of the child before birth.

Concerning this, it is worth mentioning that the Constitutional Court, in a ruling on 28 May 1997, ref. K 26/96, stated that certain

5 Łopatka, ibid, p. 19.

provisions of the 1996 amendment of the 1993 law[6] were not in accordance with the Constitution, insofar as the protection of life in the prenatal stage is made dependent on the decision of the ordinary legislature, and insofar as it allows the termination of pregnancy owing to life conditions or the woman's difficult personal situation. The relevant regulations have expired.[7]

ad 2). The question of how long a person is considered immature and in need of protection owing to being a child, is worth considering. The period of adolescence that follows childhood is extremely important in the life of a person, who biologically and psychologically matures during this time. This period generally marks the emergence of sexual maturity followed by mental maturity. Thus, an adolescent is subject to the same protection as required by the status of a minor. This demand is also fulfilled by the Convention on the Rights of the Child, where Article 1 recognises a person below the age of 18 years as a child, unless under national law, majority is attained earlier.

In addition, in assessing the concept of the child as a physically and mentally dependent and immature person, one should be guided by the subsidiary criterion of need, the satisfaction of which the specific legal norm aims at. In this regard, it is significant to note the norms of international law that provide some protection using terms such as a person under 18 years of age,[8] juvenile,[9] dependent child,[10]

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6 Act on Family Planning, Protection of the Human Foetus and the Conditions of Permissibility of Abortion of 17.01.1993, Official Journal No. 17, item 78, revised: Official Journal of 1995 No. 66, item 334, of 1996, No. 139, item 646.

7 Announcement by the President of the Constitutional Court, dated 18.12.1997, on the lapse of Articles 1(2), 1(5), 2(2), 3(1), and 3(4) of Amendment of the Act on Family Planning... of 17.01.1993, Official Journal of 1997, No. 157, item 1040.

8 Article 1 Point iii, Point d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by the UNGA on September 7, 1956; Article 6, Paragraph 5, of the International Covenant on Civil and Political Rights.

9 Article 10, Paragraph 2, Point b) and Article 14, Paragraph 4 of the International Covenant on Civil and Political Rights.

10 Article 10, Paragraph 1, of the International Covenant on Economic, Social and Cultural Rights.

children and adolescents[11] and so on. In any case, the criterion of minority should be considered when analysing the rights of the child. This is because it indicates a lack of full legal capacity, and most closely matches the requirements set by doctors, psychologists and sociologists regarding the special needs of the child. This criterion is the most objective and the easiest to apply.

SUBJECTIVITY OF THE CHILD

The legal subjectivity of every human being is indicated by Article 6 of the 1948 Universal Declaration of Human Rights. This evident demand is reiterated in Article 16 of the Covenant on Civil and Political Rights.

After the enactment of the Convention on the Rights of the Child, there was a particularly strong emphasis on the fact that it finally explicitly recognised the child not as an object 'in the hands' of parents, relatives or public authorities, but as a separate entity within the family and other social groups. In particular, the child's subjectivity is based on the recognition that they are a person who, owing to their immaturity, deserves special protection and care from adults. This care was entrusted to parents by nature itself, and the state by its legislation alone confirms this state of affairs. To emphasise the child's subjectivity as a person, the Convention grants them certain rights, which are derived from human and civil rights as a whole. Among these rights, one has a peculiar content, namely **the child's right to a family**. This is because the family generally provides optimal environment for the child to enjoy other rights, particularly those concerning their physical and spiritual development, formation of their personality and satisfaction of emotional needs. Moreover, the child's subjectivity is indicated by other provisions of the Convention and, in particular, those concerning the obligation to draw up a child's birth

11 Article 10, Paragraph 3 of the International Covenant on Economic, Social and Cultural Rights, Article 4 and Article 19 Point d) of the Resolution and the Declaration on Social Progress and Development adopted by the UNGA on December 11, 1969; in addition, Article 10 of the European Social Charter of 1961 uses the phrase: 'les jeunes y compris les enfants d'age scolaire.'

certificate immediately after birth, to receive a name and acquire a nationality (Articles 7 and 8). This involves establishing the child's identity and individuality as a person, their marital status and nationality. Further, respect for the child's subjectivity is served by the child's right to be heard on a matter concerning them, if they are capable of forming their own views (Article 12 of the Convention).

In Europe, the regional standard for respecting the subjectivity of the child is set by several legal acts issued by bodies of the Council of Europe. Reference should be made here to Recommendation 874 (1979) on the 1979 European Charter on the Rights of the Child and Recommendation 1121 (1990) on the Rights of the Child. These Recommendations indicate the need to treat a child as a subject in their relations with persons and institutions of public law and in civil law transactions, as well as in relations within the family. The 1990 Recommendation is particularly significant. It encourages states to ratify the 1989 Convention on the Rights of the Child as a universal legal instrument for the protection of children, while indicating the need to develop further legislation to supplement the Convention in the area of child protection in legal proceedings.

The primary result of this recommendation is the European Convention on the Exercise of Children's Rights, adopted in 1996. As indicated in the preamble to this convention, it promotes the fulfilment of the obligation under Article 4 of the convention adopted by the UN in 1989, that is, that States Parties undertake measures at the legislative, executive, levels to realise the rights of the child as formulated in this convention. The European Convention of 1996 is primarily concerned with protecting the interests of children in proceedings concerning them, before the various bodies that adjudicate their own affairs and affairs in the context of their family. Appropriate procedural solutions should ensure that a child with sufficient understanding has relevant information, has their views heard, and at their request, has a representative appointed if, in a given legal proceeding, their legal representative (parents, guardian, custodian), owing to the nature of the case or a conflict of interest, cannot represent them. The Convention obliges states to consider the possibility of granting children additional rights, such as naming a representative, or a person to appear

alongside them in the proceedings to help express their opinion in the case, and finally, exercising all or part of the rights of a party to the proceedings. The Convention's explanatory memorandum indicates that the term 'representative' refers to individuals, the lawyer appointed in the case or a public body or organisation dedicated to the protection of the child and family.

The convention leaves it up to states to legislate detailed procedural solutions, in particular to determine the degree of sufficient understanding by the child which enables them to exercise these rights. However, one should be cautioned against using the rights of the child in question to undermine the authority of parents and settle parental authority cases according to the adversarial model of proceedings, in which the plaintiff is the child and the defendant is the parents. Certainly, considering the child's opinion is desirable in cases of entrustment, restoration of parental authority, prohibition of personal contact with the child, and removal of the child (Article 579 of the Code of Civil Procedure). However, even in these cases, the child's position cannot bind the court, but should be one of the important factual elements affecting the outcome of the case, particularly for the protection of the child's emotional ties with family members.

MARITAL STATUS

Marital status determines that one belongs to a family, as it indicates whose child, whose parent, and whose spouse (*status familiae*) one is. In addition, the determination of marital status helps determine a person's identity, that is, indicates the characteristics that make individuals unique and distinguish them from other people. Article 7 of the Convention requires the preparation of a birth certificate immediately after the birth of a child. The birth certificate generally reveals a child's descent from specific parents. Additionally, Article 7 orders the national legislature to immediately disclose the birth of a new human being and thus ensure their legal protection.

In Polish legislation, the aforementioned order is implemented by Article 38, Paragraphs 1 and 2, and Article 39 of Civil Status Record

Act.[12] These regulations determine the persons required to report the birth of a child in the following order: the father, the doctor or midwife or other person present at the birth, the mother, if her health permits it. If the child is born in a hospital or other facility, this obligation applies to the hospital or facility. The birth of a child must be reported to the registry office (RO) within 14 days of the birth, and the birth certificate should be prepared on the day of the report (Article 16 of Civil Status Record Act).

The birth certificate indicates the child's birth, as well as the child's marital status and other individualising characteristics of a person such as name and surname.

FIRST NAME AND SURNAME

The child is assigned a first name by the parents exercising parental authority. These issues are normalised by the Civil Status Record Act (CSRA) to a small extent and only in case of lack of parents' decision about the child's first name, or in case of refusal to accept the parents' statement on the choice of name. In the first case, the head of the RO writes one of the names normally used in the country in the birth certificate and adds a relevant note about it (Article 50, Paragraph 2 of CSRA). The idea is that the child should not be left undefined in terms of such an important feature, as the first name. However, in the second situation, the parents' freedom of choice of the child's name must not result in assigning the child more than two first names, a first name that is ridiculous, indecent, in a diminutive form, and a first name that does not distinguish the child's gender. The role of the state body (head of the RO) is to protect the legal order at the level of identification of citizens.

Considering the equal rights of the child's father and mother, the parents should agree on the child's name. If there is no agreement on this important matter of the child, the dispute shall be resolved by the court at the request of one or both parents. I believe that if the parents

12 Civil Status Record Act 29.09.1986, Official Journal No. 36, item 180, later amended (abbreviated as CSRA).

suggest different first names, the head of the RO should instruct them about the possibility of resolving this matter in court (under Article 97, Paragraph 2, of the Family and Guardianship Act). In addition, the refusal to register a child's first name is an administrative decision, which can be appealed through administrative proceedings.

THE CHILD'S NATIONALITY

This element of the child's legal status is indicated by the Convention in Article 7, Paragraphs 1 and 2. Citizenship indicates that a person belongs to a particular state, which also implies the relevant protection of the state over its citizens. The indicated provision of the Convention requires states to create domestic legislation that ensures the acquisition of nationality for the child and prevents the lack of any nationality (stateless person).

In Polish law, the fundamental legal norm in this matter is Article 34, Paragraph 1, of the Polish Constitution, according to which citizenship is acquired by birth from parents who are Polish citizens (*ius sanguinis*). Aspects of acquiring citizenship are regulated in detail by the Polish Citizenship Act of 15.02.1962 (Official Journal No. 10, item 49, as amended). The mere descent of a child from parents being Polish citizens results in the child acquiring that citizenship, whether one or both of them are Polish citizens. However, if the parents of the child do not have the same citizenship, they may, within three months of the child's birth, declare that they select for the child the citizenship of a foreign country of which the other parent is a citizen, provided the law of that country makes the child acquire their citizenship (Article 6, Paragraph 1, of the Act). The idea is that while maintaining the freedom to select the child's citizenship, the child should not become stateless. Should the parents with different citizenships disagree as to their child's nationality, either of them may request the family court to settle the matter (Article 6, Paragraph 2, of the Act). Such a case is certainly an important matter for the child on which the court will rule in non-contentious proceedings (Article 582 of the Code of Civil Procedure). This court also decides on the child's citizenship if

the custodial parent changes their citizenship from Polish to foreign while the other parent, a Polish citizen, does not agree to change the child's citizenship (Article 13, Paragraph 4, of the Act).

However, it is noteworthy that children who have become citizens of a foreign country because of the aforementioned declaration by their parents may, after reaching the age of 16 years, revert to Polish citizenship by making an appropriate declaration upon which the competent authority will issue a decision on its acceptance (Article 6 Paragraph 2 of the Act).

A child born of parents of different citizenships can become a citizen of both Poland and the country of citizenship of the other parent. Although the 1962 Act prefers the acquisition of Polish citizenship, it allows parents to select the citizenship of a foreign country for their child within 3 months of birth. The view has been expressed that in the absence of such a declaration, the child has simultaneous citizenship of both countries.[13]

Court rulings that resulted in change of paternity shall be considered in determining the child's citizenship, however, once the child becomes 16 years old, the change of citizenship may be made only with the child's consent (Article 7, Paragraph 2, of the Act).

Failure to establish a child's descent from identified parents cannot result in a child's lack of citizenship. Based on this principle, the legislator respects the child's place of birth (*ius soli*). The child, if born or found in Poland, acquires Polish citizenship when both parents are unknown or their citizenship is undetermined or they do not have any citizenship (Article 5 of the Act).

Children under parental authority receive their parents' Polish citizenship, which has been granted to them (Article 8, Paragraph 4, of the Act). If this citizenship was acquired by only one of the parents, it also applies to the child under their exclusive parental authority, or the other parent is a Polish citizen or has given consent before a competent authority for the child to acquire Polish citizenship. However, in these cases too, the consent of a child over 16 years is required. Similar rules apply to the acquisition of Polish citizenship by the children

13 Ramus, 1968, p. 289.

of repatriates or the acquisition of foreign citizenship (Articles 12 and 13 of the Act). Thus, Polish legislation prevents the phenomenon of statelessness and favours the acquisition of Polish citizenship by the child. Finally, it respects the autonomy of the child growing up on the loss of Polish citizenship owing to the decision on the citizenship of their parents. However, a question can be raised as to whether it would be desirable to lower the age limit for consent and set it at 13 years, that is, the age of acquisition of limited legal capacity. However, a minor's understanding of a matter of public-legal nature such as citizenship requires more mental maturity than simply performing certain civil-legal acts or even consenting to adoption.

THE CHILD IS A PERSON

A child as a minor does not have legal capacity at all (until the age of 13 years), or this capacity is limited (from 13 to 17 years), that is, they cannot act independently in legal transactions, and the parents are their legal representatives before other persons. Let us suppose that according to Polish law, a minor of 13 years of age can decide some of their own affairs, such as consenting to adoption, changing their name, and having their blood drawn for evidentiary purposes. A minor according to the law is always a subject, and doubts about the appropriate treatment of a minor relate to everyday life, including family life, rather than the formal legal position of the child. Therefore, is it not more appropriate to speak of the child as a person entitled to all the rights due to a human being, rather than as a subject of the law? The idea is that the child should also be treated in the family as a person whose conduct and fate is directed by their parents, who also influence the child's decisions that the child could make on their own, and who sometimes decide against the child's will. However, it is important to remember that parents and other authorised persons are in charge of the child's person, not some type of a 'living thing'. The Convention on the Rights of the Child particularly emphasises this very directive of conduct towards the child and obliges states to provide appropriate guarantees. Finally, it should be noted that consideration for the person of the child is emphatically expressed in the

overarching demand to respect the welfare of the child. The best understood interests of the child are a natural imperative to care for an immature and dependent person **as an individual that is valuable in their own right**. However, continuing this thought we conclude that in family relations, too, we need to be reminded that the child is a subject of the law, and their subjectivity sometimes needs to be contrasted with their parents. Such a need usually arises in connection with the divorce or separation of parents. Additionally, a normal consequence of a child growing up is the expansion of their own autonomy, which parents often fail to notice. The Family and Guardianship Code essentially ignores this fact when regulating parental authority, as if there was no difference between an infant, a seven-year-old child, and a sixteen-year-old person.[14] However, in reality, it is the adolescent child who manifests their own autonomy at the level of relations with parents, third parties. Thus, their subjectivity is increasingly noticeable. However, it has existed from the very beginning, only the role of parents and other persons entitled to the custody of the child is changing – from a predominantly custodial to a function of gradual reduction of parental interference in the sphere of the child's affairs and preparing the child for independence.

14 Sokołowski, 1987, p. 7.

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Marek Andrzejewski: The specificity of children's rights[1]

HUMAN RIGHTS ARE INHERENT and inalienable rights. They are not bestowed by any authority, as their source is the inherent dignity of a human being.[2] The above statement applies not only to adults but also fully applies to children. Similar to adults, children are subjects of their human rights. This is because these rights are not bestowed upon them (e.g. by adults) but are inherent[3].

The origins of the concept of human rights can be traced back to the views of philosophers of antiquity, and, then, the Middle Ages, to understand its rapid development in modern times at the end of the 18th century and again after World War II to the contemporary era.[4] Yet, the history of reflection on children's rights—and, even more so, the history of practical action in this regard—is barely a century-old episode in this long period.[5] It took a long process of profound civilisational changes, slowly affecting the change in the position of the child in the family and society,[6] to finally arouse sensitivity among successive generations of adults to the rights of the child and respect for their subjectivity.

1 Originally published in Polish: Andrzejewski, M. (2003) 'Fragment książki' in Andrzejewski, M. *Ochrona praw dziecka w rodzinie dysfunkcyjnej (dziecka – rodzina – państwo)*. Kraków: Kantor Wydawniczy Zakamycze, pp. 37-51.

2 Complak, 2001.; Chmaj, 2002, pp. 11–13.; Id. Chmaj, 2002a, pp. 73–90.; Gronowska, 1998, pp. 86–87.; Michalska, 1994, pp. 63–65.; Piechowiak, 1996, pp. 97–100.; Weston, 1984, pp. 262–263.; Ruling of the Constitutional Court of 28.05.1997 r. (K. 26/96, OTK 1997, No. 2, Item 19).

3 Piechowiak, 1998, pp. 21–24.

4 Weston, ibid, pp. 257–262.

5 Michalska, 1985, pp. 1–8.; Kolankiewicz, 2002, pp. 127–130.

6 On this subject, vide: Aries, 1995, pp. 130–136., pp. 167–190.; Flandrin, 1998, pp. 157–170.; Verhellen, 1999, pp. 14–16.

The development of the protection of children's rights can be shown by pointing to the emergence of various—more or less important—documents. Among the most important ones is the Geneva Declaration of the Rights of the Child, adopted in 1924 by the League of Nations. This non-legally binding act was based on the premise that 'children require special care both because of their own immaturity, and also because of their dependence on their parents' social and economic circumstances'.[7] Of major importance were also the conventions of the International Labour Organization containing standards for children's participation in labour relations, followed by the UN Universal Declaration of Human Rights of 10 December 1948, the UN Declaration on the Rights of the Child of 1959, the two UN Covenants on Human Rights of 1966, the European Social Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, containing individual provisions for the protection of the rights of the child as a member of the family.[8] These documents consistently expanded the horizon of thinking about the protection of children's rights, drawing, by their very existence and functioning, closer to the moment of the Convention on the Rights of the Child adopted by the UN on 20 November 1989.

The Convention on the Rights of the Child contains a catalogue of rights drawn up to ensure that children have their basic needs met, that they are protected (cared for) from harm by others, and that they participate subjectively in legal proceedings that affect them.[9] Of all the provisions of the Convention on the Rights of the Child, the latter (Article 12 and, to a lesser extent, Articles 13–16) are credited with breaking new ground, due to their unambiguous identification of the child as the subject of their rights. This breakthrough is manifested in abandoning the previously dominant way of expressing the protection of children's rights according to the formula of 'The child is entitled

7 Michalska, 1985, pp. 1–2.

8 More extensively: Smyczyński, 1991.; Id. Smyczyński, 1999a, p. 39. sqq.; Hammarberg, 1990, pp. 97–99.; Lachs, 1989, pp. 546–547.

9 Hammarberg, 1990, p. 100.; Id. Hammarberg, 1995, pp. 291–292.; Alderson, 2000, pp. 23–24.

to...' in favour of 'The child has the right to...'.[10] If the cited idea that the words we use can create reality is true, the rank of the indicated changes in the wording of momentous documents goes far beyond the realm of semantics, especially because the tendency to express the protection of children's rights in this way is perpetuated by the wording of the provisions and meaning of the Convention on the Exercise of Children's Rights and, as far as Polish domestic law is concerned, Article 72 of the Constitution of the Republic of Poland of 2 April 1997. This provision has been aptly described as a counterpart to Article 12 of the Civil Code, that is, an expression of conscious advocacy of the obligation of state bodies to treat the child in a subjective rather than an objective manner.[11]

The idea of protecting the rights of the child and, even more so, the idea that the child should be treated as a subject of their rights still face numerous, primarily mental, barriers. Recognising the positive developments, there can be no illusion that the idea in question has been proliferated. When we say that it is becoming more widely recognised, we still mostly refer to the content of several recently issued documents, the expansion of the circle of adults who understand the importance of the issue, and the emergence of organisations and social institutions working to protect the rights of children.[12]

The essence of the protection of human rights comes down to creating such a social order within which the relationship between the state and the individual is based on respect for the inherent rights of citizens. Related to this is the obligation of the state to carry out active measures to guarantee these rights.[13] This is indicated, among others, by the wording of international documents cataloguing human rights, in which the rights of citizens are often expressed by imposing a corresponding obligation on the state party to the treaty. Such an approach emphatically shows that human rights and freedoms are realised in their relationship with the state.

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10 Smyczyński, 1994, pp. 68–69.; Verhellen, 1999, p. 15.; Milieteig-Olssen, 1990, p. 150.; Vide Jarosz-Żukowska, Wojtatowicz, and Żukowski, 2002, p. 278.

11 Smyczyński, 1999, vol. 2, p. 319.

12 Verhellen, 1999, p. 13. sqq.

13 Osiatyński, 1994, p. 15. sqq.; Cf. rev. Kowalczyk, 1996, p. 260.

A child who is a subject of the law, similar to an adult, directly faces the state. However, no one, much less a child, functions independently in the world, in the sense that they do not belong to any group. On the contrary, in a typical situation, everyone is a member of not one but many diverse groups. Their existence is an element so important for describing the social order, including the description of citizen-state relations, that these groups are said to fill the space between the individual and the state.[14] Belonging to group(s) affects an individual's position in their relationships with other individuals, with groups of individuals, and in their relationship with the state. The peculiarity of the protection of children's rights—in addition to the obvious fact of the child's vulnerability due to their young age, lack of experience, sometimes helplessness, and so on—is related to the fact that they belong to a family and their peculiar position in this group, especially the relationship linking the child to their parents.[15]

Having stated the thesis of the child's subjectivity and their belonging to the family in the above few paragraphs, it is necessary to pause a little longer at the issue of the mutual relationship between the two statements. In particular, it is necessary to address the question of whether the peculiarities of the state-individual/child relationship—of which perhaps the most essential element is the child's functioning in the family and, inextricably linked to this, the child's subjection to parental authority—does not contradict the idea of the subjective treatment of children.

I believe that there is no contradiction between the indicated aspects of the legal situation of the child; moreover, it is more appropriate to talk about their mutual complementarity rather than the contradiction between them for better protection of children's rights. Indeed, in a typical situation, the fact that a child is a member of a family (being a child of their parents, who have rights, duties and powers over them as a result of the exercise of parental authority) has a decisive, positive impact on ensuring that their rights are protected to the highest extent; this fact is a prerequisite for defining their situation as

14 rev. Kowalczyk, 1996, pp. 260–263.
15 Sackett, 1991, pp. 259–260.

consistent with their welfare (best interests).[16] This thesis is reflected in the regulations on child-family-state relations contained in international documents that set standards for protecting human rights. The most well-known treatises have devoted little space to the family and the situation of the child.[17] The International Covenant on Economic, Social and Cultural Rights[18] (Article 10, Paragraph 1) and the International Covenant on Civil and Political Rights[19] (Article 23, Paragraph 1)—referring to Article 16 of the Universal Declaration of Human Rights—define the family as the natural and fundamental group unit of society, which should be assisted in the care and upbringing of children. In turn, Article 26 of the Declaration gives parents a prior right to choose the direction of their children's education, while Article 12 adds that 'No one shall be subjected to arbitrary interference with his privacy, family (...). Everyone has the right to the protection of the law against such interference or attacks'. In turn, Article 18, Paragraph 4, of the International Covenant on Civil and Political Rights obliges state parties to have respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions. This role of parents is also underscored by Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[20] formulating the right of parents 'to ensure such education and teaching in conformity with their own religious and philosophical convictions'.[21]

The referenced legislation explicitly formulates two important principles that shape the relationship between the state and the family and relate to the relationship between parents and children. The first one is the principle of family autonomy from state influence, and the second one is the principle of parental primacy in rearing children. This is quite significant, given that thanks to this, these principles

16 Stojanowska, 2000, p. 44.; Radwański, 1991, pp. 64–65.
17 Grześkowiak, 1997, p. 11.
18 Official Journal 1977 No. 38, Item 169.
19 Official Journal 1977 No. 38, Item 167.
20 Official Journal 1993 No. 61, Item 284.
21 On this subject: Harris, O'Boyle, and Warbick, 1995, pp. 544–547.; Wildhaber, 1993, pp. 531–551.; van Dijk, and van Hoof, 1998, pp. 643–655.

have become part of the preambles of all subsequent family-related conventions, resolutions, and recommendations, as well as the relevant sections of the constitution—Poland being an example—setting the axiological standards of the solutions adopted there.

Among universal documents on human rights, the issue of family and child protection was also taken up extensively in the Charter on the Rights of the Family, promulgated by the Holy See in 1982.[22] The Charter does not have the character of an international legal document but is a statement of the Church's social doctrine. This statement is significant both because of its particular form and the persuasive power (mainly originated from the adoption of this very form) of the statements it contains. One of the guiding thoughts of the Charter is to oppose the tendency to view the family in a segmented way, that is, to emphasise the rights of individual family members, especially women and children, without taking into account the fact that they form a group. The Charter addresses issues of childhood, motherhood, and fatherhood in the context of the family conceived as a community. Notably, this feature is also easily discernible in the content of the Convention on the Rights of the Child. This document, the name of which suggests that it concerns only children, expresses, as unambiguously as the Charter, respect for the bond between parents and children and the special role of parents expressed primarily in their primacy in child-rearing. This has given rise to the accurate view that the leading—according to the Convention—role of parents in the realisation of children's rights indicates that the exercise of these rights is linked to parental authority.[23]

In addition, the preamble and provisions of the Convention on the Rights of the Child emphasise the importance of the family, which is crucial for understanding the guiding idea of the document.[24] The preamble states 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

22 For more on this topic, (see:) Dyczewski, 1997.; Stadniczenko, 1999, pp. 19–31.; Mazurkiewicz, 1987, pp. 261–278.

23 Smyczyński, 1999, p. 320.; Id. Bączyk, et al., 1997, pp. 297–301.

24 Michalska, 1985, p. 12.

protection and assistance so that it can fully assume its responsibilities within the community', while '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'. References to these guiding thoughts can be found in almost all of the Convention's detailed regulations, just as the idea of guaranteeing a child's upbringing within the family is consistently uttered.[25]

Such a starting point led to further, more specific statements, such as that 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 (Article 5).

One of the most significant consequences of the role of the family understood in this way is the child's right to be raised by their parents, as expressed in the Convention (Article 7(1), as well as Article 8(1), Article 18),[26] most often referred to in the literature as the child's right to a family or the right to live in a family.[27] Another corollary is the thesis that the state, whose duty is to support families (Article 18, Paragraph 2), just like anyone else, should not replace parents in the performance of their duties unless it is necessary.[28] Indeed, the paramount role of parents in upbringing is also manifested in the imposition of obligations on them towards their children,[29] and this includes responsibility for providing for the child's livelihood (Article 27, Paragraph 2), also when it comes to meeting the needs of children with disabilities, for whom assistance must be provided, after 'taking

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25 Ibid. p. 12.

26 Smyczyński, 1993, p. 67.; tenże, Smyczyński, 1991, pp. 121–125.

27 Vide e.g. Smyczyński, 1999b, the second part of which was given the title "The child's right to a family". However, there are authors who, discussing the rights of the child, including the rights of the child placed outside the family, omit this right in their studies.
Vide Czyż, 2000.; Czyż, and Rdzanek-Piwowar, 2000.; Łopatka, 2000. On the right to family reduced to the right to joint placement of siblings in institutions and to contact between children and their families during their stay in the institution, see Kowalska-Ehrlich, and Bulenda, 1995, pp. 63–84.

28 Andrzejewski, 1999.

29 Smyczyński, 1993, pp. 73–77.

into account the financial resources of the parents or others caring for the child' (Article 23).[30]

Reading the abovementioned (and many other) provisions of the Convention brings one closer to grasping this peculiar feature of protecting the rights of the child, which is the transfer (i.e., the assumption or implementation of something through the mediation of something or someone[31]) of the Convention to the primary and natural reality for the child, that is, the family. This reality is structured because of the child's descent from these (and not other) parents, the child's emotional and legal connection with them, the child's enjoyment of the right to live in a family, and the child's subjection to the parental authority exercised by their parents, who have primacy in their upbringing. In other words, the human-state relationship, which includes the issue of human rights and freedoms, in the case of a human child, is experienced through the mediation of the family. The mechanism of this mediation works both ways. On the one hand, the child/citizen stands before the state as a member of the family (through their family, formally manifested in the institution of statutory representation of parents in relation to the child); on the other hand, the state—to effectively protect the rights of children—undertakes activity on their behalf, making the family the main addressee of its undertakings (acts through the family).[32]

A writer on children's rights, in addition to capturing model situations, must not lose sight of possible and, in practice, often occurring undesirable situations. They are characterised by the conflict between the principle of protecting the best interests of the child and

30 Andrzejewski, 1999a, p. 327. sqq. Similarly, the issue of economic support for children in need through the realisation of the child's right to benefit from the social security system is regulated by Article 26, Paragraph 2, of the Convention on the Rights of the Child.

31 Szymczak, 1992, p. 117.

32 The idea is captured by the statement: 'This is because society has an interest in ensuring that it continues for future generations, that it passes on to them the cultural values that determine national distinctiveness and the social attitudes that promote overall prosperity. The Convention on the Rights of the Child is overflowing with provisions that impose relevant obligations on the state either directly on its bodies or indirectly through the family environments in which children are raised'. – Radwański, 1997, p. 184. sqq.

those of family autonomy, and the primacy of parents in raising the child. Although the totality of the regulations of the Convention on the Rights of the Child allows an interpretation that they oblige to respect the interests of parents that are—by definition—pursued in the interests of the child,[33] the autonomy of the family from external influences, emphasised in international documents, cannot be absolutised. In particular, it cannot be understood in such a way as to exclude the possibility of state intervention aimed at preventing the disadvantage of a child residing in a family,[34] including the intervention that amounts to separating the child from the family (Article 9, Paragraph 1, and Article 20 of the Convention on the Rights of the Child).

Thus, the Convention on the Protection of the Rights of the Child recognises the possibility of situations in which the interests of the child will be separate from those of the parents and advocates treating the interests of the child as paramount in such cases.[35] Making the interests of the child paramount is rendered possible by the fact that conflict assessment is the responsibility of the state through the court or institutions under the court's supervision. The state interprets the 'interests of the child' in that particular situation, which would otherwise be done by the parents.[36]

Noteworthy is the prudent approach adopted by the Convention to these family conflicts. The expression of respect for the primacy of the parents in the upbringing of the child and the secondary role of the state to the parents in the laws on interference in the parent-child relationship can be considered symptomatic (more on this in Chapter IV). Notably, however, in the provisions of the treaty on the protection of children's rights regarding the behaviour of parents who have sometimes been guilty of much against their children, the vector of these regulations has not been directed against such

33 Radwański, 1997, p. 55.
34 Smyczyński, 1991, p. 124.; Cf. Sokołowski, 1999, p. 265.
35 Radwański, 1991, p. 54.; Stojanowska, 2000, p. 33.; Buquicchio-de Boer, 1990, p. 83.; Cf. Article 24 of the Charter of Fundamental Rights of the European Community (sic. orig.!) and commentary thereon in: Hambura, and Muszyński, 2001, pp. 123–126.
36 Radwański, 1991, p. 54.; Stojanowska, 2000, pp. 33–38.

parents. This was probably done to avoid hasty and overly restrictive actions against the parents, as the consequences would be detrimental primarily to the child. Both formal[37] and substantial criteria for interference were indicated, making its admissibility conditional on the best interests of the child, and making the placement of the child outside the family conditional on creating a situation in which, for their own sake, the child cannot remain with their parents. In addition, it grants the child separated from their parents the right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' (Article 9, Paragraph 3, of the Convention on the Rights of the Child[38]) and to return to the family.

Thanks to such regulations, the Convention is applicable to situations with a wide variety of difficulties, ranging from those that require minor corrections (i.e., the vast majority of them) to those that require firm action. The latter, by the way, are more concerned with those provisions of the Convention that impose the obligation to stand firm against violence against children and their exploitation.

This prudent approach manifests the protective function of the Convention,[39] and the message contained in this act for domestic lawmakers refers to proven patterns in many countries of effective state encroachment into the relations linking the parties to civil law relations only when these relations do not function at all or function poorly, for example, to the detriment of one of the parties. A good example of this mechanism is the genesis of social insurance created in the second half of the 19th century to quiet the sentiments of employees extremely exploited within the framework of the employment relations (which were formally and doctrinally equal civil legal relations) and—as a contemporary example—the genesis of the alimony fund-like institutions operating in many countries, created as a result

37 The European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996, deals with procedural guarantees in detail (Official Journal of 2000, No. 107, Item 1128). Vide Ryng, 1996.

38 See on this subject Grudzińska, 2000, pp. 56–66.

39 Stojanowska, 1997, pp. 22–33.

of the failure of those obliged to pay alimony.[40] In the aforementioned examples, the purpose of the state's activity was not to take on the obligations of the obligated entities under these civil law relations but to ensure the fulfilment of these obligations as the stronger entity refused to fulfil them.

The situation is similar in the analysed civil case, in which the improper exercise of parental authority and causing a threat to the best interests of the child as a result of abuse and/or neglect is an essential element. According to the regulations adopted by the Convention, the role of the state is to guarantee the proper functioning of the parent-child relationship. Under civil law, the guarantor/creditor becomes obligated to act, if the debtor of the underlying relationship does not fulfil their obligation. It is not their role to recover the debt duly paid by the debtor but neither can they show passivity towards the attitude of a debtor who is failing to fulfil their duty but whom they had previously trusted and made credible for the creditor by granting him a suretyship. The state interferes in the parent-child relationship in case of custody of the child by participating in it or completely taking over, when it is forced to do so to protect the threatened or violated interest of the child. If the threat to the child's interest disappears, the state withdraws from the tasks performed as the 'surety' to protect the child's rights, and the duties in this regard are again carried out by the 'debtor', that is, the parents.

Emphasising the child's location in the family and its subordination to parental authority, as well as perceiving the protection of children's rights as rights mediated by the family, does not imply the intention to depreciate the child's legal position at the expense/in the interest of the parents. This approach to children's rights is also not, in my opinion, similar to a draft definition or a *de lege ferenda* demand, that is, a description of a situation that does not actually exist but should. This is because it is a perception of the child-parent relationship and the optimal way to protect the rights of the child respecting what is natural, obvious, and desirable in this relationship given elements such as the age of the child, their limited discernment, and their

40 Andrzejewski, 1995, pp. 22–27.

dependence on the attitude of their parents.[41] However, to abstract the child from the family (e.g., to analyse the scope of protection of their human rights or to emphasise the individual nature of the child-state relationship) would be an attitude that disregards reality. Thus, it is artificial and doomed to fail in the attempt to develop a rational model of state interaction with children living in dysfunctional families.[42]

The description of the child-family relationship adopted here finds a parallel in several other (non-legal) aspects of the functioning of the family, including scientific studies and projects for practical action in social policy, social work, and especially in pedagogy and psychology. This is also evident in modern ways of therapeutic activities,[43] in which, for example, addiction therapy involves both the addict and their family. Similar approaches can be found in recommended methods for supporting people with disabilities. These recommendations point to the need to strengthen their loved ones. The psychological and pedagogical considerations in family therapy also emphasise this need by recommending interactions with all members of the family. All of these cases focus on supporting a particular person, but it is also seen as a prerequisite for generating the family group's own self-help capabilities.[44]

Activities that devalue the importance of the parent-child relationship and the role of parents and the family, leading to antagonising children with the world of adults, are at odds with the reading of the Convention adopted in this work and with understanding the protection of children's rights as rights mediated through the family.[45] This approach to protecting children's rights—perhaps contrary to the intentions of the representatives of this way of thinking and ac-

41 The legitimacy of analysing the legal situation of a child as a member of a family group, especially as a child of the parents, is supported by the regulations of international catalogues of 'adult' human rights that have been adopted in the Convention on the Rights of the Child. On this matter: Smyczyński, 1997, pp. 299–301.

42 This was also pointed out in the Marxist view of the issue, (see:) Balcerek, 1986, pp. 298–302.

43 Strojnowski, 1997, pp. 307–314.

44 Kawula, 1998, p. 84.; Ostrihanska, 1999, pp. 105–133.

45 On this subject: Andrzejewski, 1997, pp. 105–110.

tion—objectively harms this protection. Contrary to the seemingly obvious thesis that children's rights —as an integral part of human rights—must not be contrasted with the rights of adults,[46] activities aimed in this very direction can easily be found both in journalism and social practice, and its spectacular manifestation is the functioning of the Children and Youth Party, which states to be inspired by the Convention.[47]

It is also necessary to share the view that the regulations adopted in the Convention on the Rights of the Child do not give rise to the position that their validity depletes the scope of parental authority.[48] This view is expressed by circles that, of course, do not formulate it based on an analysis of the provisions of the Convention; instead, they are reviving concerns about the aforementioned social actions that antagonise children with the adult world.

The rejection of the approach that amounts to abstracting the child from the family in favour of perceiving the child's human rights as mediated through the family is an attitude often used when analysing family law and related regulations. The regulations that apply to them regarding the relationships between family members and between them and other entities are formulated and, then, analysed in the doctrine, considering the position of individuals in the family and the protection of the family as a group.[49] For example, we can highlight this very feature of several provisions of the Family and Guardianship Code concerning:

- marriage (allowing a woman under the age of 18 to marry is permissible if it would be in the best interests of the family so formed),
- management of the joint property of spouses (the obligation of joint management and the need for the spouse's consent to perform an act that exceeds ordinary management),

46 Łopatka, 1999, p. 23. (cit. per: Santos Pais, 1991, p. 37.)

47 In the literature, this initiative has met with both approval (Walc, 1997, p. 25.; Socha-Kołodziej, 1994, pp. 40–41.), and critics (Andrzejewski, 1999, pp. 104–105.; Id. Andrzejewski, 1997a, p. 41).

48 Smyczyński, 2001, p. 291.

49 On the concept of family rights: Ignatowicz, 2001, pp. 39–88.

- divorce (its inadmissibility when it is contrary to the welfare of joint minor children or the principles of social intercourse, such as the welfare of others, especially stepchildren),
- alimony awarded to the family in fulfilment of the obligation set forth in Article 27 of the Civil Code,
- abolition of the community of property and many others by court decision.

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- Article 26, Paragraph 2, of the Convention on the Rights of the Child.
- Article 24 of the Charter of Fundamental Rights of the European Community.
- The European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996, deals with procedural guarantees in detail (Official Journal of 2000, No. 107, Item 1128).

Marek Andrzejewski: Rights of the Child – Reflections on the meaning of the idea and its devaluation[1]

The specificity of the Rights of the Child, or why the Convention on the Rights of the Child is a pro-family document

Human rights are rights and freedoms that are not bestowed by authority, as their source is human dignity[2]. As such, they are inalienable rights. This applies to the rights of every human being, both adults and children[3]. The essence of the protection of human rights comes down to creating a social order within which the relationship between the state and the individual is based on respect for these inherent rights and freedoms of citizens. It is the responsibility of the State to carry out activities to guarantee these rights[4]. This duty of the authorities is reflected, among other things, in the wording of international documents cataloguing human rights, in which the rights of citizens are often expressed by imposing a corresponding obligation on the state party to the treaty.

1 Originally published in Polish: Andrzejewski, M. (2012) 'Prawa dziecka – rozważania o sensie idei i jej dewaluacji' in Andrzejewski, M. (ed.) *Prawa dziecka. Konteksty prawne i pedagogiczne*. Poznań: Wydawnictwo Naukowe UAM.

2 See further in: Osiatyński, 2011.; Chmaj, 2002, pp. 11–13.; Chmaj, 2002, pp. 73–90.; Michalska, 1994, pp. 63–65.
Compare in: Weston, 1984, pp. 262–263.; Michałowska, 2007, pp. 11–20.

3 Piechowiak, 1998, pp. 21–24.

4 Osiatyński, 1994, p. 15. sqq.; Cf. in: Kowalczyk, 1996, p. 260.

No one, especially a child, functions in the world independently without belonging to a group. In a typical situation, everyone is a member of many different groups. This affiliation is important for describing the citizen-state relationship, as these groups fill the space between the individual and the state. Belonging to group(s) affects an individual's position in their relationship with the state. The peculiarity of the protection of children's rights is related to the fact that they belong to a family and the special relationship linking them to their parents[5]. Being subject to parental authority does not contradict the idea of subjective treatment of children. We should rather talk about the mutual complementarity of these elements of the legal situation of children in creating the fullest possible protection of their rights. Indeed, in a typical situation, the fact of being a member of a family has a decisive and positive impact on ensuring the protection of the child's rights and is a prerequisite for defining the child's situation as consistent with the child's welfare (best interests)[6]. This is reflected in numerous international regulations on child-family-state relations[7], especially in their passages formulating the principle of the family's autonomy from the state's influence, the principle of the primacy of parents in the upbringing of children, and the principle of subsidiarity.

The Convention on the Rights of the Child emphasises the subjectivity of the child, which is reflected in the semantics of its provisions. It no longer contains paternalistic formulations that the child is granted such and such rights but states that the child possesses these rights[8]. The preamble to this document states that the family, as 'the basic cell of society and the natural environment for the development and well-being of all its members, especially children (...), should be given the necessary protection and support so that it can fully fulfil its responsibilities in society', while 'the child, for the full and harmonious development of his or her personality, should grow up in a

5 Sackett, 1991, pp. 259–260.
6 Stojanowska, 2000, p. 44.; Radwański, 1991, pp. 64–65.
7 More on this topic in: Harris, O'Boyle, and Warbick, 1995, pp. 544–547.; Wildhaber, 1993, pp. 531–551.; van Dijk, and van Hoof, 1998, pp. 643–655.
8 Verhellen, 1999, p. 13. sqq.; Jacyno-Czuj, and Szulżycka, 1999.

family environment, in an atmosphere of happiness, love and understanding'. References to these guiding thoughts can be found in almost all of the Convention's detailed regulations. It also consistently utters the idea of guaranteeing a child's upbringing within the family. States that have acceded to the Convention have assumed the obligation to 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 child exercising the child's rights (Article 5). From the provisions of the Convention, it is also easy to interpret the child's right to be raised by their parents (most often referred to as the child's right to a family or the right to live in a family[9]) and the particularly important thesis that the state, whose duty is to support families (Article 18, Paragraph 2), should not replace parents in the performance of their duties unless it is necessary[10]. Indeed, the paramount role of parents in relation to their child is also manifested in the imposition of obligations on them towards their child, and this includes the responsibility for providing for the child's livelihood (Article 27, Paragraph 2). This includes meeting the needs of children with disabilities, for whom assistance must be provided, while 'taking into account the financial resources of the parents or others caring for the child' (Article 23)[11].

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9 See Article 7, Paragraph 1, as well as Article 8, Paragraph 1, and Article 18 of the Convention. Notably, in the most important Polish commentary to the Convention (Smyczyński, 1999) the entire second part was given the title 'The right of the child to the family'.
However, there are authors who, while discussing the rights of the child, including the rights of the child placed outside the family, omit this right in their studies; see e. g. in: Czyż, 2000.; Czyż, and Rdzanek-Piwowar, 2000.; Łopatka, 2000.
On the right to a family reduced to the right of not separating siblings in foster care and to children's contact with their families while in care, see in: Kowalska-Ehrlieh, and Bulenda, 1995, pp. 63–84.

10 Andrzejewski, 1999.

11 Andrzejewski, 1999, p. 327. sqq. Similarly, the issue of economic support for children in need through the realization of the child's right to benefit from the social security system is regulated by Article 26, Paragraph 2 of the Convention on the Rights of the Child.

The solutions adopted in the Convention make it possible to capture the peculiarity of the protection of children's rights, which is the transfer (i.e., the assumption or implementation of something through the mediation of something or someone[12]) of these rights to the primary and natural reality in which the child lives, that is, in the family. This family reality is built by the child's descent from these very parents, the child's emotional and legal bond with them, the child's enjoyment of the right to live in a family, and the child's subjection to the parental authority exercised by their parents, who have primacy in their upbringing. In other words, in the case of the child, the human-state relationship appears as the child's relationship with the state experienced through the family.

When analysing the rights of the child, it is necessary to keep in mind undesirable situations, the feature of which is the conflict between the duty to protect the best interests of the child, the autonomy of the family, and the primacy of parents in raising the child. Although it is possible to interpret the totality of the Convention's regulations as an obligation to respect the interests of the parents, which are—by definition—pursued also in the interests of the child[13], the autonomy of the family in relation to external influences cannot be understood in such a way as to exclude the possibility of state intervention aimed at preventing the disadvantage of a child residing in a family[14], including the intervention that amounts to separating the child from the family (Article 9, Paragraph 1, and Article 20 of the Convention on the Rights of the Child). The provisions of the Convention consider situations in which the interests of the child are separate from those of the parents and, in such cases, advocate treating the interests of the child as paramount[15]. Here, of course, the assessment of the conflict is not the responsibility of the parents but of the state, which – through the

12 Szymczak, 1992, p. 117.
13 Radwański, 1991, p. 55.
14 Smyczyński, 1990, p. 124.; Cf. Sokołowski, 1998, p. 265.
15 Radwański, 1991, p. 54.; Stojanowska, 2000, p. 33.; Buquicchio-de Boer, 1990, p. 83.; Cf. art. 24.; Hambura, and Muszyński, 2001, pp. 123–126.

courts or institutions subject to court supervision – indicates the best interests of the child[16].

The Convention addresses these family conflicts with caution. The respect for the primacy of parents in child rearing and the subservient role of the state towards parents expressed in the laws on interference in the parent-child relationship can be considered symptomatic. Notably, the vector of regulations on the behaviour of parents who have sometimes been culpable towards children has not been directed against them. This was probably done to avoid hasty and overly restrictive actions directed at parents as being unfavourable to the child in the first place. Formal criteria[17] and substantive criteria for interference were indicated, making its admissibility dependent on the best interests of the child, and the placement of the child outside the family was made conditional on creating a situation in which the child could not remain with their parents for their own sake. Also formulated is the right of a child separated from their parents 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' (Article 9, Paragraph 3 of the Convention)[18] and to return to the family.

Emphasising the child's location in the family and their subjection to parental authority, as well as perceiving the protection of children's rights as rights mediated by the family, does not imply the intention to depreciate the child's legal position at the expense/in the interest of the parents. This approach to children's rights is also not, in my opinion, similar to a drafting definition or a *de lege ferenda* postulate, that is, a description of a situation that does not actually exist but should. This is because it makes it possible to view the child-parent relationship with respect for what is natural, obvious, and desirable in this relationship, given such elements as the child's age, their limited discernment, their dependence on the attitude of their parents,

16 Radwański, 1991, p. 54.; Stojanowska, 2000, pp. 33–38.

17 The issue of procedural guarantees is dealt with in detail by the European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January, 1996. (Official Journal of 2000, No. 107, item 1128). Vide in: Ryng, 1996.; Ryng, and Żegadlo, 2007.

18 This topic has recently received an in-depth study in: Justyński, 2011.

and so on.[19] However, an interpretation of the Convention's provisions that would have at its core the abstraction of the child from the family would presuppose a disregard for this reality and would, thus, be an artificial and ill-fated attempt to develop a rational model of the state's influence towards children living in dysfunctional families[20]. I consider actions that devalue the importance of the parent-child relationship and the role of parents and the family, leading to antagonising children with the adult world[21], are contrary to the message of the Convention and the proper understanding of the protection of children's rights. Such an approach harms this protection. Contrary to the seemingly obvious thesis that children's rights—as an integral part of human rights—must not be contrasted with those of adults[22], actions aimed in this very direction can easily be found in both journalism and social practice. A spectacular manifestation of it is the functioning of the Children and Youth Party (Partia Dzieci i Młodzieży) in Poland. This organisation, although its very existence proves the instrumental treatment of children by adults (unironically, for example, only adults are members of this party), claims to be inspired by the Convention[23].

It should also be emphasised that the validity of the regulations adopted in the Convention does not deplete the scope of parental authority[24]. Such concerns are expressed by circles that —of course—do not formulate it based on an analysis of the provisions of the Convention; instead, they are reviving concerns about the aforementioned social actions that antagonise children with the adult world.

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19 The legitimacy of analysing the legal situation of a child as a member of a family group, especially as a child of the parents, is supported by both the regulations of international catalogues of 'adult' human rights, and the catalogue of rights adopted in the Convention on the Rights of the Child. On this matter: Smyczyński, 1997, pp. 299–301.

20 This was also pointed out in the Marxist view of the issue in: Balcerek, 1986, pp. 298–302.

21 On this topic, see in: Andrzejewski, 1997, pp. 125–131.

22 Łopatka, 1999, p. 23. (cit. per: Santos Pais, 1991, p. 37).

23 In the literature, this initiative has met with both approval (Walc, 1997, p. 25.; Socha-Kołodziej, 1994, pp. 40–41.) and critics (Andrzejewski, 1999, pp. 104–105.; Andrzejewski, 1997, p. 41.)

24 Smyczyński, 2001, p. 291.

HOW TO TALK TO CHILDREN ABOUT THEIR RIGHTS OR INFORMATION VS. FORMATION

When the United Nations General Assembly passed the Convention on the Rights of the Child, I was working as an educator in a village near Poznań. In the flurry of duties, few matters reached me other than those closely related to the alumni and the organisation of their life in the orphanage. It was 1989, and I perceived both the Polish and European breakthrough events associated with the overthrow of communism as if from behind a wrapper of down-to-earth thoughts focused on solving hundreds of childish issues. Later, when I returned to scientific work and, therefore, to conferences, important lectures and speeches, seminars, earning degrees, and so on, I did not happen to work with a commitment comparable to that of my every day at the orphanage, although I very much enjoy the scientific work and activities with students.

The Convention on the Rights of the Child 'came' to me shortly after its ratification (1991), along with a Supervisor from the Board of Trustees, which was no longer the Board of Trustees for Education and Upbringing, as the second part of the name was deemed unnecessary in the education system. I did not find out whether she held a chat with the facility's alumni about the Convention and children's rights on her own initiative, in consideration of so-called necessary public demand, or perhaps for some other reason. The Supervisor approached the idea of a pep talk with vigour, and her great pedagogical zeal equalled her legal incompetence. The message the children received from her was extremely one-sided. The hour-long enumeration of rights captivated even the humblest children, ready now to enter the barricades to fight a terrible and decisive battle against the oppressive adult world. This effect was partly derived from the fact that the Supervisor did not consider the specific situation of the children to whom she was speaking. This is because it must be remembered that an institution's alumni live where they do not want to be at all and, by the nature of the situation, are more claimant-oriented than their standard peers. The children received a simple message that the great organisation of the United Nations has given them

a long catalogue of rights—and only rights— and that adults have to guarantee all these rights to children.

At the time, I observed a great number of events that indicated that the action of deforming children's consciousness by failing to tell them about their rights and the law, in general, was widespread. The educational forces, supported by the media, promoted the Convention in more or less the same uncomplicated way as this lady from the Board of Trustees did when chatting with my pupils. At that time, there were still no scholarly studies about this document or any in-depth reflection on it. In this situation, it was primarily those who thought they could handle the subject who spoke up. They were right—they thought they were.

The helplessness I felt when observing the demoralisation of children by means of silly talk and mediocre media products made me realise that an adult, in dealing with children, takes responsibility not only for the substantive content of what they are talking about but also for what the children will understand from it. Everyone (including children) needs to know the rights to which one is entitled because only then can the old postulate—'know your rights and exercise them'— come true. However, it is also important to know these rights very well, not too superficially, which means to know them in their complexity. A young person's knowledge of alcohol is limited to the understanding that alcohol puts one in a state of pleasant raucousness. A young person cannot foresee intoxication and its effects. Thus, for unprepared young people to not get intoxicated by the law in a similar way that my alumni did that evening, and that they do not abuse it, they must be given knowledge more complete than the superficial one that amounts to handing them a list of rights. This is because giving information to a child must be part of the responsibility for educating them (for how and who we raise them to be). In this particular case, information reduced to the presentation of a list of rights has created more confusion than order in the minds of children. Indeed, an educationally and cognitively honest message should attempt to describe the legal situation of the child, of which children's rights are an element, and not be limited to a list. Just as the Convention is an element of the legal system (i.e. part of a larger

whole), the rights of the child are part of the larger whole, which is this legal situation. Within this system are norms contained in many other legal acts, such as the Family and Guardianship Code and the Juvenile Justice Proceedings Act, to name just the most important ones.

For example, let us point out that the Family and Guardianship Code, whose guiding principle is to protect the child's welfare, places the child within the family, not above it. Moreover, it imposes an obligation on the child to obey their parents. I emphasise this norm, which is obvious to lawyers because when more than a decade ago an educator wrote a book about raising a child to obey[25], he brought upon himself the outrage of his scientific community and the mockery of the most important press media in the 90s. In addition, the aforementioned code stipulates that a child who earns any income from their property has to use it to meet his needs, relieving their parents to this extent of the obligation to support their child, and if this income is greater than the needs of the child, it should be used to meet the needs of their siblings and family. In turn, the Juvenile Justice Proceedings Act is a legal response to the reprehensible behaviour of children and adolescents, manifested in the commission of criminal acts or as a function of their demoralisation. These and many other legal norms provide precisely that desirable context in which the information provided to children about their rights should be set. This creates an opportunity to avoid harmful oversimplifications and perhaps will result in an increase in civic maturity in the young audience.

I recently met the aforementioned Supervisor lady—a nice and good person, by the way. Despite the passage of many years, she remembered that evening spent at the orphanage. She was plagued by guilt over her lecture two decades ago. She had them right after saying goodbye to the children. I remember the smoky office where, feeling how she had failed as a teacher, she smoked half a pack of cigarettes before getting herself to the point where she was able to sit behind the wheel and drive away.

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25 Sławiński, 1994.

THE CRISIS OF THE IDEA OF HUMAN RIGHTS OR PERHAPS ITS END

Until recently, the idea of protecting human rights was a carrier in Poland. Under this ideological banner, communism was fought[26] in order to finally 'tear out the bars, the teeth of the wall'[27]. Human rights were also among the most important strands of the teaching of John Paul II. The message of His first pilgrimage to Poland in 1979, as well as several other statements in many countries or at international organisations, should be mentioned. It could be stated that John Paul II spoke about human rights throughout his pontificate and, in a special way, during his travels to countries ruled by authoritarian or totalitarian regimes that were equally or even more authoritarian than the one in communist Poland.

When we regained independence, however, something about the protection of human rights began to gnaw, and a process of erosion began in this matter. On the one hand, as in the entire so-called democratic world, the governmental and non-governmental infrastructure of institutional forms of human rights protection was being expanded[28], while, on the other hand, the idea of human rights was being exploited by institutions and individuals who, in fact, ridiculed the protection of human rights due to the absurdity of their proclaimed slogans that had nothing to do with human rights and sometimes outright contradicted them. Severe examples on various levels were and are numerous. Attempts were made, for example, to tell the public that

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26 The Covenants on Human Rights, adopted in 1966, were referred to by all the democratic opposition organisations operating illegally in the 1970s and 1980s, and one (the Movement for the Defence of Human and Civic Rights) made them part of its name.

27 A line from the song *Mury (Walls),* the lyrics to which were written by J. Kaczmarski.

28 I am referring to the establishment of offices, among others, Ombudsman, Ombudsman for Children, the creation of positions of inspectors called ombudsmen in school boards, the creation of organisations such as the Committee for the Protection of Children's Rights, the Helsinki Foundation for Human Rights, and many others (I do not mention here the practice of their functioning, which, in addition to good deeds, also included activities that were somewhat controversial).

the worst of the communist leaders, who trampled on the rights of citizens for years and even decades, were men of honour, while their victims, when they demanded their tormentors be punished, were simply frustrated people driven by alleged feelings of revenge. The acquittal of leaders who have the death of citizens on their conscience has become a peculiar judicial habit in the Third Republic, the scorching manifestations of which can be observed to this day.

The abovementioned reference to the executioner-victim relationship, as ridiculing human rights, does not apply only to figures who have made a bad mark in history and to judges hearing cases brought against them. This issue has surprisingly manifested itself in legislation on common crimes. I am among those who do not agree with the idea of protecting human rights understood as strengthening, beyond all measure (and in the first place), the protection of the rights of defendants and prisoners while lacking due sensitivity to the legal position of their victims. Especially at the beginning of the 1990s, many prosecutors and judges (disregarding the draconian punishments they handed down to decent people just a few years earlier) behaved as if they dreamed of a position at the Helsinki Foundation in their old age. The contemporaneous Criminal Code was the same as under the communist regime (enacted in 1969), the acts were the same, the judges were the same, and the sanctions were several times less. Today, no one will examine how much in such conduct was the triumph of the idea of human rights, which might have transformed the judges' mindset, and how much was their opportunism.

The feats performed by judges in taking care of the peace of the communist leaders were equalled by the activities of bailiffs (also working within the judiciary). Their attitude did not differ from the judges' approach when it came to providing as much welfare as possible to alimony debtors. It must be admitted that they—hardly confronting the debtors—contributed to the economic misery of more than half a million children futilely waiting for child support.

Continuing on the thread of the violation of children's rights by judiciary representatives, it should be noted that child victims of sex crimes were interrogated many times over the years by prosecutors and judges who had no respect whatsoever for the trauma these children

experienced each time. Because of the many, arguably more important, problems that democratic Poland had to deal with, the legislation on the one-time interview of sexually abused children was only passed in 2005; even then, its requirements, albeit rather low, are often not met[29].

To complete the whole picture, it is worth pointing out—related to the abovementioned problematics—the legally permitted publication of magazines inciting paedophilia in Poland (e.g. the 'Lolity extasy' magazine and its various mutations). Despite appeals to the Ministry of Justice, this peculiar manifestation of pimping received no response from law enforcement. Nor were any legislative steps taken against the possibility of granting legal permission to publish such publications in Poland. Protecting children from sexual abuse loses out to the freedom of speech of those who encourage to harm children.

We also have a history of spectacular lessons in ridiculing the idea of human rights by educators. In this context, I have pointed earlier to the Children and Youth Party. Another sign of destruction a few years ago was demonstrations by high school students in Warsaw who, supported by their teachers, convened demanding protection of students' rights and the development of education, where the following slogan—'put the minister in a sack and throw the sack into the lake'— was raised on a banner; the media showed its contents many times over, without condemning the demonstrators' stupidity. In their social activism, the demonstrators failed to notice that they were proving the pedagogical success of the murderers of Father Jerzy Popiełuszko. Just recently, another generation of high school students demonstrated in the capital. Again, they ostensibly in the name of their rights and the good of education, demanded the minister to be impaled, a reference to her name. Once again, they were accompanied by their supportive teachers.

In the name of the children's rights to who knows what, children were harnessed to strike against the decision to close a foster care facility. The fact that the building was condemned, that is, close to collapsing, and that the staff (the inspirers of the protest) did not have the required licences to work, meant nothing. The alumni of another

29 See the findings on this topic in: Trocha, 2011.

orphanage were also successfully persuaded to protest against the appointment of the director. In the pages of the high-circulation press, the founder of an association, with the protection of children's rights in its name, has argued that the appointment of a director in a situation where the children have their own favourite is unlawful because it contradicts the principles of social intercourse, which, according to her, was a violation of Article 5 of the Civil Code. The level of legal absurdity matched the level of pedagogical disaster.

When we talk about children's rights, we cannot help but mention the daily violence that children suffer from adults, including those closest to them[30]. This is a culturally entangled and difficult issue to resolve. Legislative action alone would not help much, even if it went in the right direction. The scale of the problem can be attested to by the fact that 80% of adults have experienced corporal punishment from their parents. It is easy to guess that almost all of them believe that they have grown up to be decent people, and given this, they also often commit aggression against children or do not have enough motivation within themselves to condemn the aggressive behaviour of others. It is, thus, understandable that 40% of teachers believe that corporal punishment is justified[31].

In the context of devaluing the idea of human rights, especially the rights of children, the demand to grant homosexual couples the right to adopt children (following the example of several leading countries)[32] should be mentioned. This is—promoted by the world's progressive forces—a formula for ensuring the right to a family for those children over whom no one is exercising parental authority. In my opinion, however, this is an example of adoption law coming full circle and returning to the concept of adoption established in ancient Rome, when it served the interests of the adopters and not the interests of the child, as it was preached and attempted throughout the 20th century.

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30 A number of publications have been devoted to this topic, among which it is worth noting in particular: Kwak, and Mościkier, 2002.

31 Broadly on society's attitudes toward punishing children in: Krajewski, 2010, pp. 17–36.

32 This is the case, for example, in: Śledzińska-Simon, 2009, pp. 141–156.; Differently – and in my opinion aptly – in: Łączkowska, 2005, pp. 70–79.

In parallel to promoting the realisation of a child's right to live in a family as a right to adoption by homosexual couples, there are parental authority cases in Polish courts where the juridical system appears to be oppressive towards families that need support rather than legal sanctions. To intensify the state of danger in families, the legislator introduced the possibility of taking children away from their parents by the so-called 'social police', who are representatives of a professional group completely unprepared to make such decisions[33]. Work on this law proceeded at miraculous speed, compared, for example, to the Family Support Act, which was introduced in 2006 and has not been passed to date (May 2011). Such are the apparent priorities in family policy.

Over the past two decades, amazing things have happened (and are still happening) in the field of social human rights. Some, as delighted by the workings of the invisible hand of the market as they were irritated that the author of the reform that bears his name has still not been granted a Nobel prize in economics, refused to see the economic and cultural degradation of regions of the closed state-owned farms (about 1/4th of the country). Others brought aid to these areas in such an inept manner that they helped few but made many people self-satisfied and addicted to social aid. The scale of the problem exceeded the worst predictions. On the 600th anniversary of the Victory at Grunwald, it was announced that just in the municipality of Grunwald (as well as in several surrounding areas) as many as about 70% of households are permanent recipients of cash benefits from welfare services, and this figure has been stable for years[34]. In reflecting on human rights, notably, there is a second generation of children living in these areas who have never seen either their parents or

33 Fortunately, the laws regulating these actions are not in place, for the economic burden of coming into force was placed on local governments, but these cannot afford to create this social police force. One might dread to think what would happen if Polish local governments were rich.

34 According to GUS (the Central Statistical Office), there are more than 300 municipalities in Poland (out of a total of approximately 2,200) in which 20% or more of households live on social benefits. Among them are some in which the percentage reaches 70% – Czubkowska, and Klinger, 2010, p. A8.

grandparents earning a living by working. Living in poverty, they are less likely to succeed in life than their peers. This success is all the more illusory because they do not have good upbringing role models, on the contrary, they receive the message that without work, it is possible to live somehow. The fate of these children is the strongest basis for the statement that the youngest has paid the greatest price for the transformation[35].

Examples of ridiculing the idea of protecting human/children's rights can be enumerated. Prudent promotion is becoming increasingly scarce. The forms of defending them and raising their importance are also often perplexing. There are numerous actions claiming to be inspired by the idea of protecting children's rights, which ridicule the very idea and are often conducted in violation of these very rights.

On the occasion of Children's Day, there is a lot of talk about children and their rights, and a spectacular manifestation of efforts to promote these rights is—held almost every year in the Polish Parliament building—the spectacle of the proceedings of the so-called Children's Parliament. The phrase 'so-called' is not coincidental, as the very election of children's deputies follows the election procedure of members of the socialist parliament until 1989 when they were selected by the political bureau of the Communist party and not elected by the people. Members of the Children's (pseudo)Parliament deliver speeches arranged in advance with teachers during directed deliberations, and the media are amazed by this Potemkin village, located on Wiejska Street; *nomen est omen* as 'wiejska' translates to 'rural' in English. The beneficiaries of this event are—to state the obvious—politicians eagerly posing for photos with the children with whom they look so great.

It is also difficult to agree, for example, with films and reports shot with the intention of protecting children's rights, which, by design—in the name of viewership—violate children's privacy, especially by using their images. This is particularly true of the numerous productions involving children in foster care. They should be protected by qualified personnel,

35 Kocik, 2010, pp. 217–233.; Tarkowska, 2009.; Domański, 2002, especially pp. 73–79.; Balcerzak-Paradowska, 1999.

whose duty is to deny reporters' unceremonious intrusion into the difficult family situations of the children. Unfortunately, in practice, principals and educators are complicit in unlawful journalism[36].

I also do not accept the presentation of research on children, especially those who have come to live in dysfunctional families or live in foster care. When I read on the front page of the newspaper about sexual abuse of orphanage alumni, I think of the difficulties with which alumni of such institutions will go to school the next day. I also know that almost no reader will point out that it is impossible to know, based on the text alone, whether the studies referenced in the article are about situations in which a resident of the orphanage was the victim of sexual abuse or whether the resident responded to questions thinking they were about whether they had any knowledge of anyone who had ever done such harm in general. The text also did not say whether, if sexual abuse had already occurred, it happened while the child resided at the institution or perhaps earlier, that is, before they were placed there, or if they experienced it while being raised in an orphanage, that is, whether it had happened at the orphanage, during vacations spent at home, or at a summer camp. Nor was it stated what the researcher meant by asking children about sexual abuse. In a study published in the spring of 2011, its author reported in a radio interview that the concept was not specified at all in the survey to avoid the drastic nature of the research. Thus, the journalist did not ask a simple question about what was the subject of her research from which she drew such drastic conclusions. However, this was not important to the interviewees; their only goal was to shout out the thesis that orphanages must be closed. Throughout the conversation, this was the only thought they tried (probably successfully) to demonstrate, disregarding the issues in the methodology of the empirical research[37].

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36 Extensively on this topic in: Andrzejewski, 1997, pp. 38–52.

37 As a long-time educator, I am aware of the many problems associated with the life in orphanage. I also have no doubt that *living there is* difficult. As a researcher, I am also in favour of conducting research on children who live in institutions, but I also know that there are ethical and methodological rigours in conducting and presenting such research. In the case at hand, I oppose the research that labels children from institutions. Moreover, I hardly know anything about the methodology, because it is not presented, suggesting that I believe at their word that the methodology was sound. I see no reason for that.

Media actions related to orphanages prompt the opinion that when defending children, one must not behave as if they belonged to nobody, being children without identity or roots[38]. They do belong to someone. Each resident of an orphanage belongs to someone, and above all, each of them has their own inherent dignity as a person, which must not be violated even in the name of the noble goal of protecting children's rights or in the name of raising money to further the activities of the organisation that is conducting the research.

For the promotion and in-depth reception of children's rights, considering the importance of the issue, it is crucial how the Convention on the Rights of the Child and other documents in this field are treated by courts, government institutions, and local governments. It is really telling how rare it is to see the invocation of this Convention as the basis for the court rulings issued. Only occasional references to international documents can be found in the justifications for court decisions[39]. Only the Ombudsman for Children and the Ombudsman for Human Rights, in their interventions, and the Constitutional Court in its rulings and justifications for its rulings, do not have any inhibitions about building their position based on individual documents setting standards for the protection of human rights[40].

It is time to ask whether these rights and the idea of protecting them are useful to the vulnerable seeking protection today or whether this protection can be provided to them to the same extent without referring to human rights. Perhaps this protection—similar to so many others—had its part to play in history, and its last notes have already played out and are just now echoing, after which it will be drowned out by pieces of another ideology.

The claim that the idea of human rights is going through a crisis is not controversial. The main theme of a weighty monthly periodical was recently formulated as follows: 'Human rights – suspended until further notice?'[41] A couple of years ago, Leszek Kołakowski seriously posed the question: 'Why do we need human rights?' I read

38 I have written extensively on this topic in: Andrzejewski, 2008.
39 Zieliński, 2004, p. 533.
40 See, for example, in: Jaros, 2002, especially Part II.
41 ZNAK Miesięcznik journal, 2008, Nr 643.

in a profound scientific study about the devaluation of the idea of human rights that its concept has become diluted because nowadays anything can be attached to this slogan without unnecessary justification, as long as you shout it loudly and have wealthy protectors[42]. In another periodical, the author lists a catalogue of failures in the field of human rights, stressing that the list is long and 'often embarrassing', as it includes two genocides in the 1990s, racial discrimination, famine, and the avoidance of cooperation with the international system of protection of human rights by many governments[43].

A peculiar contribution to the depreciation of human rights has been made by several researchers of human rights, especially those multiplying entities beyond the need in the form of concepts of successive generations of these rights[44]. This diminishes the importance of the idea while serving to proliferate conceptual chaos. Thus, paraphrasing Kisielewski's famous *bon mot* about the socialist economy—that its state is not a crisis but a result—, we can say that we are not dealing with a crisis of human rights but with the result of their marginalisation. It would only be a different and tertiary matter to identify the creators of this state of affairs and to attribute a percentage share in its achievement to various satraps, bureaucrats, and so on, individuals who are intrinsically hostile to human rights, as well as to naive propagators and ill-advised scholars who have led astray the reflection on what is inherent in a human being in street demonstrations under increasingly foolish slogans.

In R. Legutko's essay entitled *Prawo do wszystkiego* reads among other things:

In his recent book *Human Rights and the Image of God,* Roger Ruston wrote that without embedding human rights in some stronger conception of human beings showing their developmental potential, entitlements will turn into subjective demands directed at the state and society. This process, by the way, is already happening: entitlements are slowly becoming the whims of a spoiled child who has

42 Freeman, 2002, pp. 11–12.

43 Kędzia, 2003, p. 7.; On the law's limited effectiveness against religious persecution, see in: Sokołowski, 2011.

44 Cornides, 2010, p. 5. sqq.; Wroczyński, 2009, p. 53 sqq.

been amazed by the development of civilisation and has discovered a wonderful way of not thinking about the consequences of his whims. Proliferated beyond measure, divested of ethical and philosophical context, given over to the arbitrary rule of lawyers and ideologues, the powers not only lead a man to ignore responsibility for the consequences of his actions, but relieve him of the obligation to explain what he has said and done.[45]

Perceiving pathologies in promoting human rights is not the affliction of only representatives of conservative currents of thought. It is indicated by key sentences from the aforementioned essay by Leszek Kołakowski, who wrote so at the beginning of the century:

The doctrine of human rights, besides the fact that it can be easily employed – like all good principles – for the worst purposes, still has a peculiar and dangerous side. It has popularised in our civilisation an atmosphere of infinite claims clothed in the language of these laws. Whatever I wish for, whatever I would like, I think I am entitled to under human rights law. (...) A man living on social benefits claims that he has the right to get aphrodisiacs for free because, after all, he has the right to sexual pleasure. (...) In our culture, all claims – justified or unjustified, reasonable or absurd, grown out of real and painful poverty or out of mindless envy – can be presented in terms of human rights and by violations of these rights.[46]

More optimism and faith in the power of the ideology of human/child rights can still be found in some statements of educators[47]. In academic reflection, children's rights occasionally become an inspiration for interesting research[48]. However, teachers who encounter students in their daily practice (e.g., often aggressive, disrespectful to teachers, and rejecting school as a source of oppression) also increasingly boldly voice their disapproval of this idea; many treat students' rights as a threat to school order and the peace of the

45 Legutko, 2005.; See also critics in: Bała, and Wielomęski, 2008.; Czachorowski, 2003.

46 Kołakowski, 2003.

47 See reflections on this topic in: Śliwerski, 2007, especially Chapter 4.; Marczykowska, Markowska-Gos, Solak, and Walc, 2006.

48 Jarosz, 2009.; Segiet, 2009.; Kartowicz, 2009.

institution and see them particularly undermining the position of the teacher in relation to the student[49]. The reality of respecting students' rights in schools can be measured in various ways. For several years, the undersigned has been asking students during a lecture, as well as students of already more than a dozen cycles of postgraduate courses for educational management, about the fundamentals of an educational organisation, the way in which representatives of student governments are created, and how their supervisors are selected. It goes in a manner consistent with the provisions of the Law on the Education System in 3–5% of schools. In the remaining 95%, the rights of students to democratically elect a representative of student government are disregarded. The pedagogical supervision—as frequent as no other—does not see a problem here. Young people are introduced to school to be uncivil and disregard the law and rights[50]. In part, the reason for this can be traced to teachers poorly trained to understand and protect children's rights, which is related to the small number of reliable studies on the subject addressed to this audience[51]. It is also worth noting that the issue of children's rights is reflected in the curricula of a few pedagogical departments of Polish universities.

In concluding these considerations, I have pointed out that the idea of protecting children's rights provides a formal basis for upholding the protection of children, that it also provides a basis for NGOs to act (less if the case requires prudence), sets standards for creating statutory regulations, is relatively easy to understand, which makes it possible for disseminating actionable information about children's rights to serve as a way to raise the legal education level of society, and so on. If I list a few more benefits of these rights, it will still not outweigh the importance of the saddening statements contained in the quoted, condensed opinions of philosophers, which

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49 Interesting and representative of this trend of thinking is, for example, the website: www.edu-lex.pl

50 The widespread ignorance of children's rights among teachers has long been pointed out (e.g. Miłkowska-Olejniczak, 1994, p. 97. sqq.) and, thus far, there has been no radical change for the better in this regard.

51 A work in all terms highly recommended to educators is: Hart et al., 2006.

I consider accurate. These are all the more saddening because human rights are perhaps (or perhaps it is only appropriate to speak of it in the past tense) the most important common humanistic denominator for the modern world, but their use as a tool in politics has led to the devaluation of this idea[52].

52 See reflections on this topic in: Kędzia, 2003, pp. 33–34.

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Legislative materials:

- Article 26, Paragraph 2 of the Convention on the Rights of the Child.
- European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January, 1996. (Official Journal of 2000, No. 107, item 1128).