

CHILD'S LEGAL SECURITY

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Summary. This article defines the concept of child's legal security. In addition, an analysis of the child's legal security concept was carried out taking into account the aspect of objectivity and subjectivity. The analysis of the child's legal security concept has been enriched with examples of legal provisions in which a given aspect of the child's legal security is implemented.

Key words: child, child's security, child's legal security, hearing a child, a child's opinion and reasonable wish

INTRODUCTION

The subject of this article is the legal security of the child. The main objective of the research, which pursued this study is to define the concept of child's legal security. Hitherto, the legal doctrine has not received due attention to this issue. Even if the notion of child's legal security is sporadically employed, it is generally used without attentive scientific reflection on the understanding of this concept. Moreover, this concept is often understood intuitively. However, due to the importance of the issue, it is worth taking the effort to formulate the definition of the child's legal security.

The following step that brings us closer to a more comprehensive understanding of this concept should be its insightful analysis. Analysing the concept of child's legal security is the next research goal of this work.

The analysis of the child's legal security concept will be enriched with the indication of examples of specific legal provisions in which a given aspect of the child's legal security concept is implemented.

1. LEGAL DEFINITION OF A CHILD

The child is the foundation and hope of every community. It ensures its continuation and development, and therefore efforts are made to provide it with optimal living and development conditions. These activities are perspective.

The very concept of a child I understand in such a manner as it regulates Art. 2 of the Act of 6 January 2000 on the Ombudsman for Children,¹ expressing the legal definition of a child² “1. Within the meaning of the Act, a child is every person from the moment of conception until the age of majority. 2. The age of majority is set forth in separate regulations.” According to Art. 10 of the Act of 23 April 1964, the Civil Code,³ the age of majority can be achieved in two ways: 1) by coming-of-age (Art. 10 § 1 of CC: “An adult is any individual who has attained eighteen years of age”); 2) by marriage (Art. 10 § 2 of CC: “A minor becomes an adult on marriage. He does not lose that status in the event of the marriage being annulled”). Art. 10 § 1 of the Act of February 25, 1964, the Family and Guardianship Code⁴ refers to the age of marriage, namely it states that “Cannot enter into marriage a person not over 18 years old. However, for important reasons, the guardianship court may allow a woman aged sixteen to be married, and the circumstances indicate that marriage will be in accordance with the welfare of the family.”

In the context of the aforementioned provisions of the concept of legal security of the child applies to every human being from conception until they reach adulthood, so in principle, to 18 years of age, and in the case of a woman’s marriage after the age of 16.

2. THE CONCEPT OF CHILD’S SECURITY

The very notion of security in the most basic sense is understood as the opposite of the state of emergency. Therefore, when talking about the child’s security, it is necessary to identify all types and sources of threats that pose a danger to the child’s life and development, taking into account the individual stages of its maturation. Undoubtedly, other types of risks may occur at the stage of prenatal life (here, first and foremost, protection of the child’s own life and health, but also to safeguard the child’s property interests), other types of threats may occur during early childhood (at this stage there is concern for proper development and upbringing of a child), while others in a teenage age

¹ Journal of Laws of 2017, item 922.

² On the legal definition of a child, see Olszewski 2011, 205–16; Szuba 2018, 379–90.

³ Journal of Laws of 2019, item 1145 [henceforth cited as: CC].

⁴ Journal of Laws of 2017, item 682.

(at this stage, special attention should be paid to protection against dangers affecting the possibility of achieving social maturity).

Protection against threats may be implemented by various means. These resources can be divided into: first, those that are in the sphere of factuality, for instance, the concern of parents or guardians of the child to provide the child with living and development conditions. Secondly, those that are in the sphere of normativity, and so above all it is about legal norms, although we can also include moral norms here.

Speaking about the child's legal security, we are in the sphere of normativity, not factuality. The protection of a child against various types of threats is constituted by law.

3. THE CONCEPT OF CHILD'S LEGAL SECURITY

The notion of child's legal security, that I intend to present, is a more concrete definition of the concept of human legal security. By legal security of a human being, I understand the state achieved by means of a positive law, in which the human life goods and interests are protected in the most total and effective way possible [Potrzyszcz 2013, 405].

Such defined legal human security can be considered in two aspects: first, as legal security in an objective sense, meaning a state in which the essential human life and interests are protected by means of legal measures and a system that ensures the effectiveness of these means. Legal security understood in an objective sense can arise regardless of the awareness of persons who are subjects of legal protection. Secondly, legal security may be considered in a subjective sense as a sense of human legal security. The awareness of a given entity that feels safe under the rule of law plays an important role in building and strengthening this feeling [ibid., 405–406].

Referring this general concept of human legal security to the situation of a child, we can define the concept of child's legal security taking into account the specific situation of a child over the entire timespan of its development. It is therefore a long period from its conception to adulthood. At this stage, the development of the child's psyche leads from a state of complete lack of awareness and the possibility of using reason to the state of full maturity manifested by full consciousness and the possibility of using reason. In the concept of child's legal security, the dynamics of child development processes should be taken into account.

Hitherto, the general definition of the concept of child's legal security proposed in this article has not been present in the legal literature. I claim that legal security of a child is the state achieved by positive law, in which the child's life goods and interests are protected (guarded) as closely as possible in an entire and effective way.

Due to the developmental stages of a child's life and the levels of awareness associated with them, the legal security of a child should first and foremost be understood as its legal security in the objective sense. Legal security of a child in an objective sense is a state achieved by means of legal measures, in which the child's life goods and interests are protected in the most total and effective manner possible and when the system guaranteeing the effectiveness of these legal measures is efficient. In this aspect, the child is a passive subject of legal security [Potrzeszcz 2015, 76–93] e.g., it does not show any activity towards securing its life goods and interests, because it is at a stage of development where it is still impossible. In the prenatal period, as well as in early childhood, the child is completely vulnerable to threats. It is also impossible, at this stage of child's development, to talk about its sense of legal security, which is associated with the awareness of its life situation and knowledge of its rights, as well as the possibility of taking active steps to benefit from legal protection. Only reaching a certain level of maturity allows to take into account also the concept of child's legal security in a subjective sense, identified with a sense of legal security.

Child's legal security understood in the objective sense refers primarily to the protection of the child's life and health by means of legal standards. Primarily, the following argumentation of the Polish Constitutional Tribunal should be recalled, which in the judgment of May 28, 1997,⁵ before the Polish Constitution entered into force, stated that “the constitutional regulations in force in Poland do not contain a provision directly related to the protection of life. This does not mean, however, that human life is not a constitutional value. The basic provision from which constitutional protection of human life should be derived is Art. 1 of constitutional provisions upheld, in particular the principle of a democratic state of law. Such a state realizes itself only as a community of people, and only people may be the right subjects of rights and obligations established in such a state. The basic attribute of a man is his life. Depriving life, therefore, annihilates man as a subject of rights and obligations. If the content of the principle of the rule of law is a set of basic directives derived from the essence of a democratically established law and guaranteeing its justice, then the first such directive must be to respect in the rule of law the value without which any legal subjectivity is excluded, i.e. human life from the beginning of its creation. The democratic state of law as the prime value puts man and the good for him the most precious. Such a good is life, which in a democratic state of law must remain under constitutional protection at every stage of its development. The value of a constitutionally protected legal right, which is human life, including life developing in the prenatal phase, cannot be differentiated. There are no sufficiently precise and

⁵ Reference number: K 26/96.

justified criteria to allow such a diversification depending on the development phase of human life. Since its creation, human life has become a constitutionally protected value. This also applies to the prenatal phase. The inclusion of this phase of human life by constitutional protection is confirmed by the United Nations Convention on the Rights of the Child ratified by the Polish Republic on 30 September 1991, the preamble of which states in the tenth paragraph, referring to the Declaration of the Rights of the Child that a child due to its physical and mental immaturity requires a special care, especially proper legal protection, both before and after birth. The inclusion of this rule in the preamble of the Convention must lead to the conclusion that the safeguards contained in the Convention also apply to the prenatal phase of human life. [...] Its declaration stating that human health should be subject to legal protection also in the prenatal phase is directly confirmed in the Convention on the Rights of the Child. Article 24 paragraph 1 of the Convention states that States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health [...]. The second paragraph of this article states, however, that States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to: [...] d) ensure appropriate pre-natal and post-natal health care for mothers. Notwithstanding the wording of paragraph 10 of the preamble to the Convention, in the light of which the concept of a child used in the Convention should also cover a child before birth, Art. 24 provides a direct indication that the right to use the best possible state of health also includes a child conceived. Only by that means can you explain the consequences of paragraph 2 commitment to provide mothers with pre-natal care. This obligation was not introduced because of the interest of the pregnant woman herself, but, as clearly stated in Art. 24 sec. 2 in principio, to ensure that this (i.e. the law referred to in paragraph 1) is fully implemented. Clearly, this concerns guarantees for a child conceived to benefit from the best possible health.”

The quoted argumentation of the Constitutional Tribunal remains valid also on the basis of the currently binding Constitution. This was confirmed by the Constitutional Tribunal itself in the judgment of September 30, 2008⁶: “Human life is a value with the highest rank in our civilization and legal culture. The value of a legal good, which is human life, is not subject to differentiation under the Constitution. In Polish and foreign constitutional law, the importance of the right to legal protection of life as the basic right of the individual, conditioning the possession and implementation of all other rights and freedoms is emphasized. The meaning of the right to life, however, goes beyond the individual and subjective context understood in this manner. As stressed by the Constitutional Tribunal in its judgment of May 28, 1997

⁶ Reference number: K 44/07.

(reference number K. 26/96), protection of human life also remains in close connection with the clause of a democratic state ruled by law. «Such a state is realized only as a community of people, and only people may be the right subjects of rights and obligations established in such a state. The basic attribute of a man is his life. Depriving life, therefore, annihilates man as a subject of rights and duties. If the content of the principle of the rule of law is a set of basic directives derived from the essence of a democratically law and guaranteeing its justice, in that case the first such directive must be to respect in the rule of law the value without which any legal subjectivity is excluded, i.e. human life from the beginning of its creation».”

A clear example of a legal provision serving the legal security of a child in the objective sense is Art. 927 § 2 of CC relating to inheritance. Under this provision, “a child that has already been conceived when the succession is opened can be an heir if it is born alive.” This provision protects the child’s property interests, which by nature is not aware of this protection.⁷

Whereas, the sense of the child’s legal security, and hence legal security in a subjective sense, depends on the level of its legal awareness. The study of this feeling requires an individualizing approach that takes into account the circumstances of each case. At a certain stage of development, a child can actively participate in securing its life goods and interests. It may, to a certain extent, become an active subject of legal security.

Applicable law allows the child to take action to secure its life goods and interests within the institution of the hearing. According to Art. 216¹ of the Act of November 17, 1964, the Code of Civil Procedure⁸ “§ 1. The Court in matters relating to the person of a minor child will listen to them if his mental development, health, and degree of maturity permits. The hearing takes place outside the meeting room. § 2. The Court as appropriate, the development of mental health and the degree of maturity of the child will take into account its opinion and reasonable wishes.” As emphasized in the doctrine, from the content of Art. 216¹ of CCP it follows, according to a linguistic interpretation and rules of logic, that the court will take into account the opinion and the reasonable wish of the minor. Therefore, taking into account the child’s opinion should be based on the evaluation of four elements: circumstances, mental development, state of health and degree of maturity, while taking into account the child’s wishes, should be based on the same four criteria as the sentence, and additionally it should be reasonable [Muszczyńska 2018, 15].

However, Art. 576 § 2 of CCP states that “the Court in matters relating to the person or property of the child will listen to them if his mental development, health, and degree of maturity allow it, taking into account as far as possible its reasonable wishes. The hearing takes place outside the meeting room.”

⁷ About the position of *nasciturus*, see: Dyoniak 1994, 49–61.

⁸ Journal of Laws of 2018, item 1360 [henceforth cited as: CCP].

The institution of hearing a minor child was introduced into the Polish legal order under the Act of 6 November 2008 amending the Act – the Family and Guardianship Code and certain other acts.⁹ In procedural proceedings, the basis for the hearing is Art. 216¹ of CCP, while in non-litigious proceedings such basis is based on Art. 576 § 2 of CCP.

The introduction of the institution of hearing a minor child to the Polish legal order was a consequence of the adoption by the General Assembly of the United Nations and subsequent ratification by Poland of the Convention on the Rights of the Child.¹⁰ Art. 12 of the Convention provides that “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” In addition, in civil cases, the practical dimension of court duties in the discussed area in the Council of Europe member states is determined by the provisions of the Council of Europe Convention on the Exercise of Children’s Rights,¹¹ of which Poland is also a party. Likewise, the Constitution of the Republic of Poland of April 2, 1997¹² provides in Art. 72 para. 3 that “organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child” [Cieśliński 2015, 221–22].

Regardless of the aforementioned remarks, it should be stated that greater importance for the protection of child’s life goods and interests will have the understanding of the child’s legal security in the objective sense, because it allows for a critical analysis of applicable legal provisions from various branches of law in terms of their suitability and effectiveness in protection of child’s life interests and interests.

In the concept of child’s legal security, law serves a tool of protection. For the reason that we demand the tool to be as perfect and effective as possible, its quality, which consists of a set of features guaranteeing legal certainty, is not without significance. The catalogue of features desired for reasons of legal certainty ought to include, among others, clarity of legal provisions, their specificity, openness of the law, its accessibility, codification, promulgation, stability, coherence, systemic transparency, predictability, uniformity of judicial and administrative application of the law, respecting the principle of non-retroactivity.

⁹ Journal of Laws No. 220, item 1431.

¹⁰ Journal of Laws of 1991 No. 120, item 526 [henceforth cited as: the Convention].

¹¹ Journal of Laws of 2000 No. 107, item 1128.

¹² Journal of Laws No. 78, item 483, as amended.

This catalogue is not closed. Along with the development and dynamics of the socio-political and economic environment in which positive law functions, different standards of legal certainty may be formulated. In particular, the catalogue of measures leading to legal certainty may be extended.

Legal certainty is a means to achieve the child's legal security. You cannot identify these two concepts. When the law is certain, and therefore possesses aforementioned characteristics, then we have half the success achieved. Half, because the certainty itself, as it is of a formal nature, is not enough to talk about achieving the child's legal security. To achieve the child's legal security, we still need the right to be content-wise. Only the combination of both factors – formal and substantive law allows us to state that we have achieved a certain acceptable level of child's legal security.

It should also be emphasized that in a specific socio-political reality, the implementation of the idea of child's legal security is at a certain level. Legal security in general, and in particular the child's legal security is a gradual value. It may be achieved to a greater or lesser extent. It is essential to guarantee the level of legal security was adequate for the child's needs and to the standards of a democratic state of law.

CONCLUSION

In conclusion, this article must therefore raise the question: Does the existing legislation provide an efficient and effective protection of child's security? In search of the answer to this question is not about a simple statement of the rules of different branch provenance, but rather to tap into the essence of the problem, and thus to the issue of the purpose of establishing such regulations and the value (values) that they are supposed to protect. This in turn affects the essence of law and its axiological foundations. Child's legal security is decisive for its life and development opportunities.

Ensuring the welfare of the child should be in everyone's interest. In order to provide it, the legislator refers to various spheres of its life, regulating them under civil, criminal and administrative law. The analysis of these regulations should lead to the identification of possible deficiencies in the legal system and to indicate the necessity of implementation of adequate modifications to the applicable law in order to improve the legal security of the child.

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BEZPIECZEŃSTWO PRAWNE DZIECKA

Streszczenie. W niniejszym artykule zostało zdefiniowane pojęcie bezpieczeństwa prawnego dziecka. Ponadto została przeprowadzona analiza pojęcia bezpieczeństwa prawnego dziecka z uwzględnieniem aspektu obiektywności i subiektywności. Analiza pojęcia bezpieczeństwa prawnego dziecka została wzbogacona o przykłady przepisów prawnych, w których realizowany jest dany aspekt bezpieczeństwa prawnego dziecka.

Słowa kluczowe: dziecko, bezpieczeństwo dziecka, bezpieczeństwo prawne dziecka, wysłuchanie dziecka, zdanie i rozsądne życzenie dziecka

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