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The Child in Constitutional Rights and Freedoms of the Individual

Dziecko w regulacjach konstytucyjnych praw i wolności jednostki

ABSTRACT

This study seeks to demonstrate how rights and freedoms of the child have been regulated in the area of Polish constitutional law. The author notices the legal subjectivity of the child and the fact of attaching the axiological priority to the value of dignity. Based on these observations, she finds that the child as a human being should enjoy the same scope of rights stemming from the very human essence and innate dignity of the child like an adult. The author also points out that the currently applicable Constitution of the Republic of Poland of 2 April 1997 does not define the concepts of "the child", "rights of the child", or "best interests of the child". The lack of an unambiguous definition of the concept of "the child" in the Polish Constitution has been critically assessed, as prompting a potential danger in this aspect, related to a redefinition of this concept.

Keywords: rights of the child; best interests of the child; constitutional rights and freedoms of the individual

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INTRODUCTION

The Constitution of the Republic of Poland of 7 April 1997[1] is both the supreme legal act in the hierarchy of the national law and the most significant one, also due to its special role of the axiological foundation of the legal order. This general rule within the political system of the State determines the basic principles of the system and civil rights and freedoms, including the rights of the child.

The issue of protection of the rights of the child is subject to a multitude of scientific studies. Of particular attention are the constitutional provisions regarding the special care of the youngest members of our society. In view of the emerging dilemmas of legal and ethical nature on the status of children and their empowerment, the key issue seems to be the resorting to the supreme legal act governing fundamental rights and freedoms of individuals, including those referred to as children.

This study is intended to show the manner in which the constitutional legislature determines the legal situation of children. The article aims to underline the role of the Polish Constitution as a legal act that contains legal norms of particular legal force, which form the axiological basis for ensuring the best possible standard of children care. The main research method used herein is the formal-dogmatic method involving an analysis of legal acts and interpretation of the norms of applicable law. The historical method and the analytical method have been used as auxiliary methods. Its application consisted in analysing the selected literature on the subject, thereby allowing the presentation of views of scholars in the field of constitutional law and other researchers working in the area discussed herein. Of subsidiary significance for preparing the paper was the linguistic analysis of legal acts and legal hermeneutics.

RESEARCH PART

The Polish constitutional legislature did not define the concept of "the child". It is worth noting that none of the constitutions previously in force in the Republic of Poland contained such a definition. For example, Article 103 of the Act of 17 March 1921 – Constitution of the Republic of Poland[2] states that "Children without adequate parental care, neglected in terms of upbringing, have the right to care and assistance from the State, as specified by law. Depriving the parents of authority over a child can only occur with a judicial ruling. Separate laws regulate maternity care. Work of children under 15 years of age, night work for women, and young

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 25.12.2025).

[2] Journal of Laws 1921, no. 44, item 267.

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workers in industries harmful to health is prohibited. Permanent employment of school-aged children and young people is prohibited". Although the word 'children' appears in the text of this fundamental law, we do not find its explanation therein. In the case of the legal regulation in question, particularly problematic is the use of the terms "the child" and "young people" without a clear distinction.

It might therefore seem that the manner the term "the child" is understood in the currently applicable Constitution would be determined by the rulings of the Constitutional Tribunal. However, decoding this concept seems to pose certain problems. In its judgment of 28 April 2003, the Constitutional Tribunal indicated that the concept of rights of the child in the provisions of the Polish Constitution should be understood as a requirement to ensure the protection of the interests of a minor, who in practice can pursue them only to a very limited extent.[3]

However, some reflections on the way the concept of "the child" is understood arise from the analysis of individual constitutional regulations. The legislature pointed out in Article 70 (1) of the Polish Constitution that everyone has the right to education. Education up to the age of 18 is compulsory. According to Article 65 (3), the permanent employment of children under 16 years of age is prohibited. It should also not be ignored that in Article 62 (1), the constitutional legislature grants the right to vote after the age of 18. This may lead to the conclusion that, under the Polish Constitution, a child is a person who is under 18 years of age.[4] At the same time, the question should be asked: From what point in time do we have to deal with a child whose rights are protected under constitutional regulations? It could be stated that the lack of a lower age limit for a child should be interpreted as covering them by protection from the very beginning of life, i.e. from the moment of conception. Such an interpretation would be consistent with the ordinary legislature's understanding of the concept of "the child". Currently, the Act of 6 January 2000 on the Ombudsman for Children[5] clearly specifies when the person we are dealing with is a child. In accordance with Article 2 (1) of this Act, a child is any human being from conception to adulthood. The legislature does not differentiate between the ways in which conception occurred (whether naturally or artificially), thus granting the status of the child to every human being with no exceptions.[6]

Although there is no clear indication of who we should call a child in the Polish Constitution, the term itself appears in its text several times. Article 48 provides that parents have the right to raise their children in accordance with their own beliefs.

[3] Judgment of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK ZU 2003, no. 4A, item 32.

[4] Likewise E.H. Morawska, *Ochrona praw dziecka w świetle art. 72 Konstytucji RP. Uwagi na tle orzecznictwa Trybunału Konstytucyjnego*, "Kwartalnik Prawa Publicznego" 2007, no. 4, p. 127.

[5] Consolidated text, Journal of Laws 2023, item 292, as amended.

[6] K. Jastrzębska-Wójcicka, *Konstytucyjny obowiązek zapewnienia szczególnej opieki zdrowotnej dzieciom i jego realizacja w praktyce*, Toruń 2023, p. 17.

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This upbringing should take into account the degree of child's maturity, as well as freedom of conscience and religion and other beliefs. Pursuant to Article 71 (2), the mother before and after the birth of a child is entitled to special assistance from the public authorities to the extent determined by law. In accordance with Article 72 (1), the Republic of Poland ensures the protection of the rights of the child. Everyone has the right to demand from public authorities the protection of a child against violence, cruelty, exploitation and demoralisation. Furthermore, Article 72 (2) provides that a child who is deprived of parental care has the right to care and assistance by the public authorities. Article 72 (3) provides that, in determining the rights of the child, public authorities and persons responsible for the child are required to hear and, where possible, take the child's opinion into account. Special attention should also be paid to Article 72 (4), which stipulates that the competence and method of appointing the Ombudsman for Children must be regulated by a statute.

The Polish Constitution does not omit issues related to child development, ensuring freedom of conscience and religion in the process of raising a child (Article 48 (1) and Article 53 (3)), the right to education (Article 70 (1) and (3)) and welfare assistance (Article 71), but also protection against economic exploitation, expressed in the prohibition of permanent employment of children under 16 years of age (Article 65 (3)). Another very important guarantee is also Article 68 (3), according to which public authorities are obliged to provide special health care to children, pregnant women, disabled and elderly persons.

It seems at this point that Article 18 of the Polish Constitution, according to which marriage as a union between a woman and a man, family, motherhood and parenthood are under the protection and care of the Republic of Poland, serves as a systemic constitutional principle, thus determining the position of the family in the state.[7]

It should be emphasized that Article 72 of the Polish Constitution is the cornerstone of the child protection system, obligating public authorities to particular concern. The Constitutional Tribunal's judgment of 15 November 2000 states that "The protection of children's rights and family life is of paramount importance. This is clearly indicated also by the constitutional provisions".[8] The rights of the child appearing in this regulation are undoubtedly an essential component of the human rights system. In the process of evolution of legislation, alongside the variability and diversity of views on the fundamental rights of individuals, certain pan-historical assertions can be noted, based on the most basic values constituting the universal heritage of humanity.[9] Guarantees for the protection of the rights of the youngest are particularly

[7] *Ibidem*, p. 46.

[8] Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK 2000, no. 7, item 260.

[9] R. Matysiuk, R. Rosa, *Prawa człowieka – prawa dziecka. Podstawy filozoficzno-aksjologiczne i pedagogiczne*, Siedlce 2009, p. 194. Similarly H. Skorowski, *Chrześcijańska interpretacja praw człowieka. Prawo własności w katolickiej nauce społecznej*, Warszawa 1992, p. 4.

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visible in the area of constitutional law. M. Balcerek accentuates that child's rights are a set of entitlements arising from civil rights applicable in a given society. These rights determine the status of the child in society, the state, and the family.[10]

The principle of the child's best interests is particularly important in shaping the protection of children's rights. The concept of "best interests of the child" does not appear in the Polish Constitution. Instead, the legislature uses the term "best interests of the family". Pursuant to Article 71 (1) of the Polish Constitution, the State takes into account family welfare in its social and economic policy. Families in difficult material and social situations, especially large and single-parent families, have the right to special assistance from public authorities. Analysing Article 72 of the Polish Constitution, it can be concluded that "best interests of the child" constitute an independent constitutional value, forming part of the broader value of "best interests of the family".[11] This should lead to the conclusion that it will enjoy similar constitutional protection as the best interests of the family.[12]

The best interests of the child have not received a legal definition in Polish law. This term is generally understood as a value or a set of values that, due to their nature, require preferential treatment compared to the interests of other natural and legal persons.[13] The conceptual category of "the best interests of the child" appears to be ambiguous and multi-dimensional.

In its judgment of 28 April 2003, the Constitutional Tribunal stated that "The Constitution does not (…) define independently the elements determining the best interests of the child. The best interest of the child is a kind of constitutional general clause, which should be reconstructed by reference to constitutional axiology and general tenets of the system. From this point of view, the content of Article 18 of the Constitution, placed among the basic principles of the constitutional order, guaranteeing protection and care of the Republic of Poland for marriage, family, maternity and parenthood, is important. The directive to protect the best interests of the child is a fundamental, overriding principle of the Polish family law system, to which all regulations governing relations between parents and children, including legal mechanisms concerning affiliate issues, are subordinate. The concept of 'rights of the child' in the provisions of the Constitution should be understood as an obligation to ensure the protection of the interests of a minor who, in practice, can pursue them himself or herself to a very limited extent. The best interests of

[10] M. Balcerek, *Prawa dziecka*, Warszawa 1986, p. 25.

[11] B. Banaszak, M. Jabłoński, [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku*, ed. J. Boć, Wrocław 1999, p. 132.

[12] M. Florczak-Wątor, *Komentarz do art. 72*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warszawa 2019, pp. 241–242.

[13] P. Krakowiak, *Odmowa wydania dziecka a dobro dziecka. Kilka uwag na gruncie art. 12 i 13 Konwencji Haskiej z 1980 r.*, [in:] *Dobro dziecka w ujęciu interdyscyplinarnym*, eds. E. Kabza, E. Krupa-Lipińska, Toruń 2016, p. 197.

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the child is also the value that determines the shape of other institutional solutions, especially under the Family and Guardianship Code".[14] It should be noted that the recognition of "the best interests of the child" as a general clause consciously introduces a freedom whose limits are outlined by the constitutional axiology and the adopted systemic tenets.[15] The clause of the best interests of the child is therefore a classic first-type general clause, which empowers the authority applying the right to make an individual assessment on a case-by-case basis, using non-legal criteria.[16]

The scholarly opinion defines the best interests of the child much more precisely. According to W. Stojanowska, "the best interests of the child as a concept is at the heart of all provisions on children's rights, being the proverbial 'spirit of the law'. It is an instrument for interpreting both the norms contained in the Constitution and the national laws of the signatory states. It is also a guideline for the creation and application of law, a criterion for assessment in decision-making in matters concerning children, and for resolving conflicts between interests of the child and interests of other persons, especially parents. It is a general clause of a narrower scope, within the framework of another, broader clause, namely the clause of social coexistence".[17] An analysis of constitutional legal provisions and views of scholars reflected in the literature on the subject leads to the conclusion that the best interests of the child boil down primarily to ensuring that the child grows up in a complete family in conditions befitting human dignity. It is crucial to recognise the child's subjectivity and to provide them with special care from the state. It can therefore be concluded that the best interests of the child are interpreted primarily as having a superior character and constitutes the core of all provisions on the rights of the child.[18]

Under the provisions of the current Polish Constitution, it is therefore obvious that the child is a separate entity with constitutional rights and freedoms. However, when considering rights and freedoms of the child as an individual, it cannot be forgotten that the child is a human being. The above logical and indisputable statement leads to the conclusion that they are also entitled to human rights derived from their inherent dignity. It is worth emphasizing that the basis for human rights in the Polish legal system, including rights of the child, is constitutional regulations, particularly Article 30 of the Polish Constitution, which enshrines the inalienable dignity of

[14] Judgment of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK ZU 2003, no. 4A, item 32.

[15] M. Jaworska-Wołyniak, *Pojęcie „dobro dziecka" w praktyce funkcjonowania sądów administracyjnych*, "Przegląd Prawa i Administracji" 2022, vol. 130, p. 161.

[16] K. Jastrzębska-Wójcicka, *op. cit.*, p. 49.

[17] W. Stojanowska, *Dobro dziecka w aspekcie sprawowanej nad nim władzy rodzicielskiej*, "Studia nad Rodziną UKSW" 2004, no. 1, p. 55.

[18] The same view also in K. Mendecka, *Klauzula dobra dziecka w Konwencji o prawach dziecka i w prawie polskim (wybrane problemy)*, "Acta Universitatis Lodziensis. Folia Iuridica" 2016, vol. 77, p. 31.

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a human being. According to this regulation, "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". It is one of the provisions opening the text of the Polish Constitution to non-constitutional norms and values.[19] What is particularly important is that "the obligation to respect and protect human dignity can be read as a directive for dynamic interpretation of the Constitution. This provision generates the possibility of adapting the protection of human rights to threats that the authors of the Constitution did not foresee when creating detailed constitutional provisions concerning human rights".[20]

As M. Dercz rightly points out, "there is also no doubt that the child is included within the term 'everyone' used in the Constitution and may be included in the term 'citizen of the Republic of Poland' (naturally after meeting the statutory formal criteria)".[21] A consequence of such approach is assumption that the child as "everyone" and "Polish citizen" is subject to any constitutional regulations addressed to these categories. In this context, Article 37 (1) of the Polish Constitution, according to which whoever is under the authority of the Polish State enjoys the freedoms and rights guaranteed in the Constitution, is particularly important. This approach to the issue of constitutionally guaranteed rights of the child will lead to the conclusion that the above-mentioned regulation will also apply to children. In this case, the phrase "under the authority of the Polish State" used by the constitutional legislature needs to be made more specific. The Constitutional Tribunal provided such an explanation in its judgment of 15 November 2000[22] wherein it has decided that this term should be understood primarily in the territorial aspect. A consequence of the above considerations must therefore be the conclusion that the protection of a child under the provisions of the Polish Constitution is not fundamentally dependent on the child having Polish citizenship, although exceptions from this principle provided for in the Constitution itself are possible.[23] The argumentation presented herein, resulting primarily from the analysis of constitutional regulations and the case law of the Constitutional Tribunal, leads to the conclusion that the child as a person has a wide catalogue of rights and freedoms guaranteed by the Polish Constitution. However, it should be pointed out as a side note that there are some obvious limitations of a neutral nature. The most obvious example is the age requirement introduced in relation to active and passive suffrage, which

[19] As in L. Garlicki, *Prawo konstytucyjne*, part 1, Warszawa 1997, pp. 57–58.

[20] K. Wojtyczek, *Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym*, [in:] *Godność człowieka jako kategoria prawa (opracowania i materiały)*, ed. K. Complak, Wrocław 2001, p. 205.

[21] M. Dercz, *Konstytucyjne prawo dziecka do szczególnej opieki zdrowotnej*, Warszawa 2016, p. 37.

[22] Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK 2000, no. 7, item 260.

[23] P. Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 96.

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determines the possibility of participation in elections.[24] Moreover, it is clear that the legal situation of children, i.e. persons under the age of 18, may be differentiated according to the child's stage of development, needs and abilities.[25] In this context, it is worth pointing to, e.g., Article 65 (3) of the Polish Constitution, according to which permanent employment of children under the age of 16 is prohibited. According to Article 48 (1) of the Polish Constitution, parents have the right to raise children in accordance with their own beliefs. This upbringing should take into account the degree of child's maturity, as well as freedom of conscience and religion and other beliefs. This is inevitable proof of nuancing the legal situation of children by the constitutional legislature.

CONCLUSIONS

The Polish Constitution addresses rights of the child in a quite general manner. The Constitution neither clearly defines the concept of the child nor lists the rights and freedoms to which children are entitled. However, it is undoubtedly a benchmark and a basis for guaranteeing special rights and freedoms to the youngest members of our society. As the fundamental law, the most important legal act in force in the Republic of Poland, the Constitution sets the direction of state policy in the area of rights of the child, and an in-depth systemic analysis is required to understand its normative content.

It should seem indisputable that the child, as an immature and dependent individual requiring support, is reliant on the entity that exercises care over them, possessing the appropriate authority in this regard. First and foremost, it should be noted that children are subject to parental authority, and it is the parents who most significantly influence the child's well-being through a series of decisions concerning their life. According to constitutional regulations, the State's role, besides supporting the family, is to intervene in parental care in cases of child neglect or abuse of parental authority. The limits of this intervention are defined by the principle of proportionality, which comprises both formal and material requirements arising from Article 31 (3) of the Polish Constitution.

The essential conclusion arising from this discussion is the emphasis on the legal subjectivity of the child and granting axiological primacy to dignity. It should be stressed that the human being – the child – should have the same range of rights arising from the essence of humanity and inherent dignity like an adult.

[24] See Article 99 (1), Article 99 (2) and Article 127 (3) first sentence of the Polish Constitution.

[25] See L. Garlicki, *Komentarz do art. 72*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, vol. 3, Warszawa 2003, pp. 1–7.

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A detailed elaboration of the constitutional scope of rights of the child is provided by the legal norms in force in Poland, including primarily those of statutory level. It is worth emphasizing in this context that Polish legislation is also essentially in line with the established international standard of rights of the child. This is an evident consequence of the fact that the Republic of Poland is a party to the Convention on the Rights of the Child, adopted on 20 November 1989 by the UN General Assembly.[26]

It is evident in view of the considerations presented herein that state authorities have the obligation to ensure the best possible standard of protection of rights of the child, as they require special care due to their immaturity and vulnerability. The analysis of the regulations presented above leads to the conclusion that certain risks arising from the decisions of the constitutional legislature should be identified. Although the Polish Constitution guarantees children a broad catalogue of rights and freedoms, a kind of risk remained. It must be taken into account that the lack of a clear definition of the term "the child" in the Polish Constitution entails serious consequences. Its specification at the level of ordinary legislation means that it can actually be changed without particular difficulties through amendments. It should also be emphasized that any possible challenging its provisions may lead to a complete redefinition of the discussed term. Therefore, it seems that to ensure the stability and certainty of constitutional regulations concerning children's rights and freedoms, it would be crucial for the constitutional legislature to clearly define this subject of protection by including the definition of the term "the child" in the text of the Polish Constitution.

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[26] Convention on the Rights of the Child, New York, 20 November 1989, UNTS, vol. 1577.

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ABSTRAKT

W artykule podjęto próbę ukazania, jak uregulowane zostały prawa i wolności dziecka na gruncie prawa konstytucyjnego. Autorka dostrzega podmiotowość prawną dziecka oraz przyznanie wartości, jaką jest godność prymatu aksjologicznego. Bazując na tych spostrzeżeniach, uznaje, że jako człowiek dziecko powinno dysponować takim samym wachlarzem praw wynikających z istoty człowieczeństwa i przyrodzonej mu godności jak dorosły. Autorka zwraca także uwagę, że obowiązująca Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. nie definiuje takich pojęć jak: „dziecko", „prawa dziecka" czy „dobro dziecka". Krytycznej ocenie poddano brak jednoznacznej definicji pojęcia „dziecka" w ustawie zasadniczej, dostrzegając w tym zakresie potencjalne zagrożenie związane z jego zredefiniowaniem.

Słowa kluczowe: prawa dziecka; dobro dziecka; konstytucyjne prawa i wolności jednostki