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ON THE RIGHTS OF SMALL CHILDREN RAISED OUTSIDE FAMILIES

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The most important legal documents which set out the rights of children are: the Constitution of the Republic of Poland, the United Nations Convention on the Rights of the Child and laws which detail and implement their rights in specific situations: regulation of family relationships (the Family and Guardianship Code), marital/family status (the Registry Office Records Act), education (the Act on the Education System), social care (the Social Care Act, the Act on Family Support and Foster Care System), and many others.

The United Nations Convention on the Rights of the Child stresses the **subjectivity of the child**, while at the same time pointing out the parents' and the state's obligation to protect children. Since the adoption of the Convention, the child became an individual subject of the law, within the family and within the society. To underscore the child's subjectivity as a person, the Convention grants children specific rights, which stem from the overall rights of human beings and citizens.

Preamble of the United Nations Convention on the Rights of the Child states that, „the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”⁽¹⁾ In this manner, it points out to the values which should be protected by the legal order, defines the obligations of the parents and conditions in which a child should be raised. The constitution of Poland and international human rights pacts guarantee the parents the right to raise their children in line with their own beliefs, while at the same time obligating them to protect the child as a person and his or her assets.

„From all the norms written in the Convention [on the Rights of the Child] the **child's right to a family** was derived – to be raised in a family, to remain under his or her parents' care. The existence of such a right induces the formulation of several conclusions. The first one is of fundamental importance for the Convention's concept itself and applies to the child's subjectivity, both from the legal standpoint and in its colloquial interpretation. The second conclusion takes into account the existence of the related obligations of the parents towards the child, necessary to enforce this right. Thirdly, the Convention obligates the states that they should enable the fulfillment of the child's right to a family, through the appropriate legislation, as well as through their pro-family legal, social and economic policy. Finally, the last conclusion takes into account the fact that raising a child in a family should always prevail over placing the child in an institution. Simultaneously, the Convention expresses preference for natural parents over foster and adoptive family.“⁽²⁾

Sometimes children do not grow up in their own families. This special situation may occur when the child is orphaned, abandoned or left by his or her parents, when a court intervenes into the exercise of parental authority, and also at the request of the parents who decide to entrust the care of their child to another person. The analysis of the child's rights in such a situation requires the confrontation between the rule of the child's welfare and protection with the rule of autonomy of the family and parental rights; taking a stance on the issue of intervention into the parental authority, involving separation of the child from his or her parents; and the assessment of the implementation of the child's rights in the case of such separation. In practice, such considerations can refer to children placed in educational care facilities, in foster families, under long-term care in special care and curative institutions or in nursing facilities. The point of reference for the analysis of these issues are legal documents implemented in Poland, which guarantee these rights, oblige the state and its institutions to undertake specific actions, and the citizens to act in the appropriate manner. Aside from the Constitution, the Convention and Polish legislation, these documents include also the Resolutions and Recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. Several of them deserve special attention in this context: the European Convention on the Adoption of Children of 1967, the European Convention on the Legal Status of Children born out of Wedlock of 1975, the European Convention on the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980, Recommendation (1990) 1121 on the rights of children, Recommendation (1984) 4 on parental responsibilities, Recommendations (1977) 33 and (1987) 6 on the placement of children in foster care, Recommendation (1991) 9 on emergency measures in family matters, Recommendation (2003) 1601 on Improving the lot of abandoned children in institutions and Recommendation (2005) 5 on the rights of children living in residential institutions.

Child outside a family

A placement of a child outside a family occurs “in a situation where the child is outside the family environment, day and night, for a longer period of time.”³⁾ The decision on such act can be taken by the child’s parents or by the competent authorities, acting for the sake of the child’s wellbeing. In Poland such authority are the Family Courts. The reason for such separation can be a threat to the child, which makes it impossible to leave him or her in the family. A child separated with his or her family due to harm or neglect may be placed in a foster family or in an educational care facility: of family, intervention or socialization nature; and if this is warranted by specific health, educational or care needs, in a care and curative institution, a nursing facility, a special purpose school and education center, a sociotherapy center or in a youth fostering center. Placement of a child outside a family should be avoided, as far as possible, with the aid of preventive measures. Placement in an institution should be considered as the extremity, only when absolutely necessary⁴⁾ and only after all other means to help the child within the family failed or were ineffective⁵⁾. Small children should be placed in family-type foster environment: foster families, specialist families, shelter families, family-type children’s homes. The development needs of the earliest childhood include being raised in close, permanent relations with a few persons, with whom the child can establish a specific relationship and form a bond – the basis for later emotional and social relationships, the basis for the safe and trusting self. The best way to help a small child is to provide early assistance to his or her family, supportive actions delivered in the local environment, the possibility to provide day care. In case of necessity to place a small child outside his or her family, he or she should be placed in a well-prepared foster family⁶⁾. The selection of the family or institution in which the child is to be placed should be done in accordance with the needs and best interests of the child, and such decision should be preceded by a multi-disciplinary diagnosis of the family situation. A special right of the child is the **„right to be placed outside the family solely for the fulfillment of needs which have been defined as indispensable on the basis of the multi-disciplinary assessment“**⁷⁾. Neither poverty nor disability in the family should not be the only reason for removing the child and placing him or her in foster care. In a crisis, emergency situation, possibilities for emergency assistance for the family should be created, and where the separation is really necessary – for fast legal proceedings and for enforcement of verdicts⁸⁾. The moment of intervention and the duration of foster procedure are especially important in the case of small children, in particular with respect to babies and children under three years of age which should always be placed in family-type environments. If it is necessary to place them in institutions, duration of their stay should not last over three months, and all decisions should be made in the shortest time possible. Unfortunately, the emergency decisions taken in situations where the child

is threatened are not preceded by a multi-disciplinary diagnosis of the family, and the foster care proceedings, meant to take a final decision on the child's situation, takes months and sometimes even years.

Even if the intervention is made in a correct and rapid manner, it is not always possible to find foster care candidates who would be ready to assume care of the child in cooperation with his or her parents. In such cases, placement of the child in an institution becomes unavoidable. For small children, a good environment is found in emergency-type foster families, and among the care facilities, there are emergency centers which are ready to take in babies waiting for adoption for the time that their parents need to make a fully informed and deliberate decision on adoption.

The placement of a child in an institution or foster family should be accompanied by support provided to his or her parents in order to reintegrate the family, and where this is not possible or does not give the desired results – attempts should be made to place the child in an adoptive family. Work with the child and his or her family is subject to periodic assessment performed by special teams appointed under the rules set forth in the Regulation of Minister of Labor and Social Policy on the educational care facilities and foster families⁹⁾. These teams, after a multi-disciplinary evaluation of the situation of the child and the family, as well as the justification for the child's stay outside his or her family, make decisions regarding the child's further fate.

The recent years have seen a positive change in the form of more places in emergency intervention centers or in homes for single mothers – institutions where the child can be placed together with his or her mother in sudden, crisis situations, in cases of violence or homelessness.

The right to identity

The child's subjectivity, his or her elementary rights as a person involve the definition of who the child is, who are his or her parents, the establishment and legal confirmation of these facts in the form of a birth certificate. This is the child's identity. This right determines the first parental duties and lays out the core direction of the state's social policy. Within 14 days from the child's birth, his or her parents should have a **birth certificate issued for him or her**. If they cannot do this, the obligation lies with the hospital where the child was born. If the child is abandoned, investigation is commenced to determine who his /her parents are. Its focus is not only to find the perpetrators of the abandonment, but first and foremost to establish the child's identity.

In this context, legalization of the opportunity to abandon the child in an anonymous manner – through the so-called „windows of life“ – is controversial. This form, known in many countries of Medieval Europe as the „circle of foundlings“ was a manner to entrust unwanted children into the public care, popular from the

12th to the 19th century. Those windows were being closed in the years 1840–1870 and replaced by „open admission offices“ where the parents, revealing reasons for their hardships, were able to obtain assistance and benefits. Therefore, in light of the Convention, the return to these old forms which allow the parents to avoid their elementary duties at the cost of the child's identity is inexplicable. Especially as the law offers the opportunity to leave the child at a hospital or a care institution, and to discreetly take care of matters which allow an adoptive family to assume care of him or her. It should be stressed that anonymity deprives the child of family ties, does not offer the possibility of determining one's identity. The „windows of life“ legalize such situation, contrary to the provisions of the Convention on the Rights of the Child. A false identity recorded in the birth certificate and lack of family ties may disrupt the development of personality and have its consequences for the child's sense of identity, self-evaluation and self-esteem. It can be said that the child's right to identity is set against the parent's right to abandon the child; and if the spirit of the law states that the child's best interests should always be respected, the parents should not be offered such an opportunity. Parents who do not want or cannot raise their child have the legal opportunity to make a declaration of will to entrust that child to an adoptive family, but their obligation is to define his or her identity – even if it is to be changed after the adoption verdict is given. It is the child's right to know that identity, which does not mean that he or she would like to profit from the right to get to know his or her parents.

Such declaration of will may be made by the parents before a judge, not earlier than upon the lapse of six weeks from the date of the child's birth. All the institutions and persons involved in the proceedings are obliged to maintain discretion, and the fact that the child was adopted may be kept secret from everyone – with the exception of the child in question. Upon coming of age, an adopted child has the right to see his or her original birth certificate and to learn the identity of his or her biological parents.

Quite frequently, adopted persons visit orphanages, searching after many years the story of their lives, their roots. They seek any information about themselves, ask about persons who could remember them, want to know their past. The Convention on the Rights of the Child and the amended Polish legislation allows them to gain access to documents regarding their own childhood. Meetings with such persons and listening to their stories are a convincing proof of how important it is for a person to know his or her personal history, to find information on who he or she really is and to learn who the parents were. Such right was granted to adopted children only recently. The children left in the „windows of life“ are deprived of that right, similarly as of the right to meet their parents and siblings. A state which ratifies the Convention is obliged to establish such legal vehicles and institutions which allow an adopted child to establish his or her actual, biological origins.

When parents wish to entrust their child to another family

If the parents are unable to raise a child on their own, they can request assistance in placing him or her in an adoptive family. If they do not indicate a person who could adopt the child and are ready to entrust him or her to an unknown person, such declaration, known as the “anonymous adoption declaration”, launches the process of search for an adoptive family. Until the child is placed in such a family, he or she can stay with an emergency-type foster family or in a care institution. A vast majority of these children is adopted, but sometimes a child does not find a person willing to adopt him or her – especially if the child is ill, handicapped, with severe problems. Despite the fact that the declaration of biological parents is frequently referred to as the “renouncement of parental authority”, if the child is not adopted, the biological parents remain his/her legal parents and still have obligations and rights towards their child. They still have child support obligation, still make decisions on matters that are vital for their child. Their will to have the child adopted results in the termination of their family relationship only if the adoption verdict is given. That is why it is important to act prudently when accepting declarations of will from parents whose children have a slim chance for adoption. If the parents are completely not interested in such a child and do not maintain contacts with him/her, it becomes necessary to deprive them of parental power and to establish a legal guardian for the child, who would be able to make decisions regarding his or her treatment and rehabilitation.

For the ill and disabled children, specialist foster families are the best form of foster care. Although appropriate legal conditions have been created, as well as a system of training and support, the number of such families is still too small in relation to demand for them. It seems that the difficult access to healthcare services, long waiting periods for doctors’ visits and consultations are an insurmountable obstacle for parents who are ready to provide care for children with special needs. Most of such children end up in institutions: orphanages, pediatric nursing homes, special purpose school and education centers or care and therapy facilities. The best solution would be to develop outpatient care, provide appropriate quality of health and educational care adapted to the needs of such children, to establish day care centers combined with appropriate support for the parents. Perhaps in that way it would be possible to limit the number of disabled children placed in round-the-clock care institutions.

Special rights of a child separated from the family

A child placed in a foster family or in an institution has the right to **maintain regular contacts with his or her family**. Therefore it is necessary to determine, in each case, the persons entitled to visit the child, as well as the rules for such visits. Such decisions are particularly important for babies, who are not able to express their opinions on the visitors, and there must be an absolute certainty on who and what for is seeing the child. Visits of relatives take place in the care centers, and in

the case of children placed in foster families or in family-type children's homes, where there is no approval for on-premises meetings – at an agreed, neutral place such as the adoption center, welfare center, district family support center. Sometimes the court determines that the visits should be supervised by the relevant personnel, if parents require support or if there is any kind of threat from them. Upon the approval of the court, the biological parents may also take the child for walks or for some longer time to their home. A child placed in an institution and staying temporarily with his or her parent's remains under the custody of that institution, which is obliged to check the conditions in which the child is staying and whether the child's needs are fulfilled. The placement of a child in an institution should be accompanied by intensified work with the family, focused on the family's reintegration and social integration. If these actions fail, steps should be taken to enable adoption of the child.

Siblings have the right to stay together or to maintain regular contacts. The obstacle to such contacts – the division into age groups during admittance into institutions – which had been in place for many years, was finally removed. Nowadays, even if an institution specializes in providing care for small children, it has the opportunity to accept older siblings, and vice versa – institutions caring for older children should not refuse the admittance of the small kids, if only they are able to provide the appropriate conditions. If due to important reasons, such as disease or disability, the siblings have to be placed in different care institutions, they must be guaranteed regular contacts. Sometimes there is a conflict of interests: for example, when there are many siblings and the search for an adoptive family that would take all of them gives no results. In such case, for the sake of the child's right to be raised in a family, the siblings are separated and placed in two or more families that declare their willingness to maintain contacts with each other. It also happens frequently that siblings are placed in institutions at various moments of their lives and not always have joint experiences, or even awareness of each other's existence. In such case, before attempting to rejoin these children, it should be carefully considered whether this would really be in their best interest.

The right to the respect of ethnic, religious, cultural and language origins in the Polish institutions and foster families applies primarily to foreign children. Foreign children who stay in institutions or foster families on the basis of a court verdict have the right to the respect for their identity, religion and language. Implementation of this right requires that they should be given the opportunity to learn their mother tongue and to be brought up in the spirit of religion declared by their parents. This is not observed, due to the inability to employ the appropriate personnel for one or a few children. As for respect for religious beliefs, the institutions try to accommodate the parents' wishes regarding the child's diet or participation in religious ceremonies. Religious upbringing in the spirit of Islam or the Orthodox Church is possible with the

participation of parents, relatives or friends, and becomes difficult if the child does not have such people near him/her.

A serious problem regarding foreign children is how to guarantee them rights equal to rights of Polish children. A foreign child does not always have a birth certificate or an identity document, therefore it might be difficult to obtain the PESEL (Polish national identification number), and residence registration is possible only for three months. The procedure tied to regulating a foreign child's family situation is lengthy, stay in Poland not always may be legalized, and the road to Polish citizenship is long. Frequently it is not possible to determine the location where the child's parents are staying, and it is also not possible to designate a legal guardian. It is necessary to develop regulations that would guarantee durable solutions for unaccompanied foreign children – such as guaranteeing the establishment of a legal guardian or offering them a chance for adoption. This is especially important in the case of small children, left completely alone and deprived of contacts with their parents.

Protection against discrimination applies in particular to disabled children. They should be given equal opportunities and rights in terms of education, which should match the capacities of each child, and its organization – the child's health condition. Disabled children placed in foster families and institutions should have access to integration or special kindergartens and schools, because aside from implementing their right to education, such solution means for them social integration, contacts with peers, becoming open to the world and prepared to live outside the institution.

For each child placed in an institution, **an individual work plan** should be drafted, meant to develop the autonomy and talents of the child, to prepare him or her to independent life, fulfill his or her needs and guarantee harmonious development. Such a plan is drafted immediately after the child's admission and if possible, under consultation with his or her parents. It is regularly verified – at least every six months – in line with the changing situation. In the case of older children, it is **necessary to take into account their right to express their opinion and to participate in the making of decisions that apply to them**. Unfortunately, research of family court files regarding the matters of children show that minors, even those over 13 years of age, are not heard, and no information about their opinions is gathered¹⁰⁾.

Older children should be entitled to express their opinion on the living conditions at the given institution. An individual plan for work with a small child should take into account his or her relationships with the parents, relatives or other significant persons. Each of the children placed in an institution should have a designated, responsible person who would care specially for the needs of that child. It is also important to take into consideration every child's health and development situation and to care for access to good quality healthcare and specialist classes, according to needs. The caring and educational influence of the team of employees

providing care for the children should be a consistent, integrated process agreed, as far as possible, with relatives of the child. It should also ensure protection of the child against all forms of violence, neglect and abuse, and provide appropriate control measures.

For such plan, adapted to the needs of a small child, to have a chance for implementation at the care and educational institutions, it is necessary to provide **sufficient numbers and stability of personnel, high professional standards, training opportunities and appropriate remuneration**. A very important postulate – one that is very hard to achieve – is to employ a gender-differentiated, multi-disciplinary team. There is not enough men providing care for children, and many institutions do not have sufficient numbers of specialists. Foster families also complain of lack of access to specialist assistance.

The care and educational work focuses on the individual rights of the child. The child's best interest does not mean only the fulfillment of his or her needs, but also the guarantee of subjectivity – the right to respect and protection of dignity, to be heard. The rule of protecting the child's welfare appears to be the supreme one. If the interests of the parents and of the child differ, utmost care should be given to providing the best possible protection for the child.

Children placed in foster institutions or families should be informed of their family situation, their rights and obligations. They should participate in the decision-making process, on a level appropriate for their age and maturity. All information should be provided in a manner adapted to the child's capacities, and in the case of foreign children – in a language they understand. It is necessary to make sure that the child understands fully his or her situation and whether it is aware of what is happening to his or her parents. Similarly, the parents should be informed on the place of residence and of the condition of their child – with the exception of cases where this would be contrary to the child's interests. At the same time, the privacy of children needs to be protected, and the family intimacy respected by acting in a discreet manner and limiting third party access. The child has the right to choose a person he or she can trust, the right to counseling and also to lodge complaints and appeals regarding any decisions.

In order to ensure proper quality of the care and educational work, it is necessary to develop codes of ethics, as well as to establish an effective system for controlling the placement procedure and for monitoring the justification for keeping the children away from their families. Analysis should cover, to the same extent, work with the children themselves as well as the support provided to families, taking into account opinions of the directly interested persons – the children, the parents and the persons or institutions organizing the assistance. Such ongoing analyses should be supplemented by long-range research of the long-term and far-reaching consequences of interventions which result in separation of the child from the family. The research should also cover various forms of assistance.

NOTES

1. Convention on the Rights of the Child, preamble.
2. Smoczyński Tadeusz, Prawo dziecka do wychowania się w rodzinie, [w:] Konwencja o Prawach Dziecka. Analiza i wykładnia (The Child's Right to be Raised in a Family, [in]: Convention on the Rights of the Child – Analysis and Interpretation), a collective work edited by T. Smoczyński, Ars boni et aequi, Poznań 1999, page 151.
3. Droits des enfants placés et en situation de risque, Rapport rédigé par M. Bragi Gudbrandsson, Edition du Conseil de l'Europe, s.17.
4. Recommendation (2003) 1601 on improving the lot of abandoned children in institutions
5. Recommendation (2005) 5 on the rights of children living in residential institutions, Council of Europe, Committee of Ministers; also the Social Care Act, Journal of Laws of 2004, no. 64 item 593
6. Browne, Kevin et al. Mapping the number and characteristics of children under three in institutions across Europe at risk of harm. Polish version edited by M. Kolankiewicz, Wydawnictwo Akademickie Żak, Warsaw 2007.
7. Recommendation (2005)5, op.cit.
8. Recommendation (1991) 9 on emergency measures in family matters – Council of Europe, Committee of Ministers.
9. Regulation of Minister of Labor and Social Policy on the educational care facilities and foster families, Journal of Laws of 2007, no. 201 item 1455; and the Regulation of Minister of Labor and Social Policy on foster families, Journal of Laws of 2004, no. 233 item 2344 and Journal of Laws of 2007, no. 201 item 1456 10. 10. Borkowska Karolina, Prawo dziecka do wypowiedzi w sprawach rozpatrywanych przez sąd rodzinny (A Child's Right to Speak in Cases Tried by the Family Court), The Faculty of Education, University of Warsaw, Master's Thesis under the guidance of Maria Kolankiewicz

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