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Survival rights in the Convention on the Rights of the Child

The background research about the children's survival is frightening. According to the UNICEF, nearly half a million children die each year because of malnutrition, disease and the progress slowdown in the developing world. The statistics show that every minute 12 children at the age of 5 die in the world.¹ There is still an unresolved problem and an ongoing question about the security of children's rights in the 21st century. It is unquestionable that children are not excluded from human rights in general. As human beings they have the same rights as other members of society. The problems are with the execution of these rights. Children's rights, treated as general human rights, are generally submerged in the rights of children's legal guardians. Therefore, when they are executed as group rights, children are not protected

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¹ *Child health and community health systems*, http://www.unicef.org/health/index_child-survival.html (03.03.2016).

properly because they are discriminated against adults in society and in their families. The reason for such behaviour is society's approach to children as to non-separate, equally valuable individuals. Each time when conflict occurs between children's and adults' rights, children lose.² This was the main reason why after the Second World War, the Polish government made attempts to protect children better.

1. The Convention on the Rights of the Child – the idea

The idea of the type of a convention regulating this issue is rooted in the 1959 UN Declaration of the Rights of the Child,³ in which Poland also played a major role. However, it was not enough for the Polish government. Still remembering the sufferings of World War II, on 17 January 1978 Poland issued a letter to the Director of the UN Division of Human Rights. Eugeniusz Wyzner, the Permanent Representative of Poland to the UN Office at Geneva, attached an explanatory memorandum thereto. In the memorandum, the Polish government wrote: "The government of the Polish People's Republic is fully convinced that today, i.e. almost twenty years after the proclamation of the principles of this Declaration by the General Assembly, the conditions to take further and more consistent steps by adopting the internationally binding instrument in the form of a convention, have been already created. The development of the international cooperation in different areas shows that both the care of the child, and its rights should not lag behind the elaboration of the international legal rules in other spheres."⁴

The next step taken by the Polish government was sending the UN a draft of the Convention on 7 February 1978. Then the discussion was opened and on 14 February 1978 Poland, Austria, Bulgaria, Colombia, Jordan, Senegal and the Syrian Arab Republic requested that the Secretary General

² T. Kaime, *The Convention on the Rights of the Child: a cultural legitimacy critique*, Groningen 2011, pp. 10–20.

³ The Declaration of the Rights of the Child, proclaimed by General Assembly Resolution 1386 (XIV) of 20 November 1959, <http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> (03.03.2016).

⁴ United Nations, *Legislative history of the Convention on the Rights of the Child*, vol. 1, Geneva 2007, p. 33.

would transfer the Polish draft of the Convention to member states, inviting them to communicate him their views, observations and comments until 30 June 1978.⁵

The idea of putting all children's rights into one document was not new. In 1924, the League of Nations adopted a similar declaration, as the United Nations did in 1959. But this was merely a declaration⁶ concerning children's rights. Children's rights were also mentioned in a couple of other UN documents concerning general human rights⁷ which preceded the creation of the convention, like the International Covenant on Civil and Political Rights⁸ or the Convention on the Elimination of all Forms of Discrimination against Women.⁹

The Convention on the Rights of the Child,¹⁰ with a preamble and 54 articles, was adopted by the United Nations General Assembly by its resolution 44/25 on 20 November 1989, and came into force on 2 September 1990. The adoption of the Convention in November 1989 ended a 10 years'

⁵ United Nations, *Legislative history...*, p. 35.

⁶ The general differences between a convention and a declaration are the intention of the parties to create a binding document or not. Declaration is generally not legally binding for the signatories. So this term is used in the titles of international documents when parties deliberately chose not to create the binding documents, but only wanted to decelerate some ideas or provisions. Conventions, on the other hand, are formally binding for the signatories when the ratification process reaches a certain number of countries. Conventions, in general, are open to all members of the international community to join. A convention or a treaty created instruments that allowed its enforcement, *Introduction to the Convention on the Rights of the Child*, <http://www.unicef.org/crc/files/Definitions.pdf> (20.12.2014).

⁷ *Fact Sheet No. 10 (Rev.1), The Rights of the Child*, Committee on the Rights of the Child, first session, in October 1991 (see Official Records of the General Assembly, Forty-seventh Session, Supplement No. 41 [A/47/41], annex III), p. 1, <http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> (11.12.2016).

⁸ In Polish: Międzynarodowy Pakt Praw Obywatelskich i Politycznych otwarty do podpisu w Nowym Jorku dnia 19 grudnia 1966 r., („Dziennik Ustaw Rzeczypospolitej Polskiej” (henceforth Dz. U.) z 1997 r. Nr 38, poz. 167). The document was published in the official “Journal of Laws” of 1977 No. 38, item 167.

⁹ In Polish: Konwencja w sprawie likwidacji wszelkich form dyskryminacji kobiet przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 18 grudnia 1979 r., Dz. U. z 1982 r. Nr 10, poz. 71.

¹⁰ The Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force on 2 September 1990, in accordance with article 49, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (03.03.2016).

discussion on the children's rights issues, which started exactly in 1978 when the Polish government submitted its draft to the United Nations.¹¹

2. Definition of a child under the Convention

According to the article 1 of the Convention: "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." This definition may be found artificial but for the convention's proposes, it is adequate and created an international regime which became the guideline for individual states. In different legal systems, the minimum age of the adulthood is diversified. For example in the Polish legal system it is 18 years (article 10),¹² whereas in Cuba – 16 years, and in Iran – 15 years.¹³ It is also worth adding that in some systems children can be treated as adults in some particular situations. Whereas in Poland, a child at the age 15 can be hired, for example, in the UK, a 10 year old child can be arrested and charged with a crime.¹⁴ Taking all into account, it can be said that in general most of states respect the 18-year-old barrier of adulthood, but in some cases they lower the age of majority. They have different reasons for doing so and use different explanations. There are sometimes historical reasons behind it.

3. Children's rights under the Convention

The easiest way to summarise the classification of the children's rights is to say that each researcher has their own method. There will be classification according to children membership and needs in the community, or classification based on substantive, cover, political, economic, and social

¹¹ See more about the process: Z. Grocholewski, *Prawa dziecka w międzynarodowych deklaracjach i nauczaniu Kościoła*, "Śląskie Studia Historyczno-Teologiczne" 2001 nr 34, pp. 47–59.

¹² Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz. U. z 2015 r., poz. 20182 z późn. zm. (the Family and Guardianship Code, "Journal of Laws" of 2015, item 2082 as amended).

¹³ UNICEF, *The state of the world's children 2011: adolescence – an age of opportunity*, New York 2011, pp. 9–12, <https://www.unicef.org/sowc2011/> (11.12.2016).

¹⁴ Age of criminal responsibility, <https://www.gov.uk/age-of-criminal-responsibility> (03.03.2016).

rights.¹⁵ There are also some researchers like Tomasz Kornecki, who do not classify them at all but just describe them in general.¹⁶ This last position follows the intention of the UN Committee on the Rights of Child who has stressed a couple of times that children's rights should not be divided and ought to be read together. However, contrary to the Committee's position, most lawyers and researchers classify the rights listed in the Convention into four groups: survival rights, membership rights, protection rights and empowerment rights. The structure and context of these rights suggest also their gradation, putting survival rights before all others. Each group is complex and much broader than it looks like at first glance. For example, membership rights cover all rights which are connected with children's needs in the community and family, whereas empowerment rights, coming from the Islamic countries, secure the child's position as a valuable and effective member of the community in which he/she lives, by allowing them to preserve their right to self-determination.¹⁷

The gradation of children's rights comes from the content of ideological principles which are behind each group of rights. The group of survival rights has the predominance over others.

4. What are survival rights?

Human rights, also called universal rights, belong to each member of society. In this world, we can separate basic human needs and rights. These needs are necessary to exist and preserve human dignity, and are derived from the basic "right to life." This term also covers the rights to all those things without which life will be impossible.¹⁸

The last position makes survival rights an open catalogue of all other rights, sometimes not connected with the first approach to the right to life. An example is the right to immunisation (vaccination rights). To have the

¹⁵ J. Fortin, *Children's rights and the developing law*, Cambridge 2005, pp. 35–36.

¹⁶ T. Kornecki, *Prawa dziecka w prawie polskim – wybrane zagadnienia*, in: *Prawa dziecka: perspektywa Kościoła*, red. P. Kroczek, Kraków 2015, pp. 63–69 (*Annales Canonici Monographiae*, 3).

¹⁷ J. Fortin, *Children's rights...*, p. 41.

¹⁸ E. J. Porter, B. Offord, *Activating human rights*, Bern 2006, pp. 34–36.

right to life means to have an access to medication that saves our life and protects it against a disease. The other example of mixing different categories of rights is the right not to be tortured, which traditionally belongs to social and political rights whereas here this is a typical survival right.¹⁹ The question arises where the right to life comes from, what its source is?

The right to life is the source of all other rights and the oldest one. The beginning of the idea that humane life should be protected dates back to the 13th and the 14th centuries B.C. Judaism was the precursor of the modern idea of rights because of Moses who gave Israel the Decalogue. This is important to add that in the 13th century BC, when Moses was writing the Decalogue, the right to life did not exist. The king or the chief of the tribe was the owner of human lives and he decided about his subjects' life or death. The commandment "You shall not kill" was the pioneer of the modern concept of the right to life.²⁰

At the same time when the Ten Commandments were granted, in ancient Greece, Hippias of Elis, a sophist, originated the idea of natural law, criticising the concept of positive law. The Greeks are regarded founders of the theory of natural law. The next big step in the process of "discovering" survival rights was the 18th century and the works of Thomas Hobbes, Samuel von Pufendorf and Hugo Grotius. The last one deprived natural law from the concept of social nature of each human who is peaceful and social. These led him to conclude that each man has a self-preservation instinct which protects him/her against death. Hobbes, who created the concept of a primitive society, which is self-organising in order to protect each individual, developed this idea. This led to the sentence that there is a major rule of preserving life as the most valuable possession. This means that the state is obliged to protect human life at all cost, and when it does not fulfil its duties, man is no longer liable to pledge allegiance to the state.²¹

The first legal bidding document confirming the right to life was indirectly expressed in British Habeas Corpus Act of 1679, and directly in section 1 of the Virginia Constitution of 1776.²² Finally, the process of recognition of the

¹⁹ E. J. Porter, B. Offord, *Activating human rights*, pp. 36–37.

²⁰ R. Grabowski, *Prawo do ochrony życia w polskim prawie konstytucyjnym*, Rzeszów 2006, pp. 21–22.

²¹ R. Grabowski, *Prawo do ochrony życia...*, pp. 29–31.

²² The Constitution of Virginia, June 29, 1776, the Resolution of the House of Delegates of the 24th February 1816. Richmond, pp. 3–6: "That all men are by nature equally free and

right to life was finalised by the declaration of the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217: The Universal Declaration of Human Rights. Article 3 thereof states: “Everyone has the right to life, liberty and security of person.”²³

5. Children’s survival rights

The Convention on the Rights of the Child is the second document in which the right to life is mentioned *expressis verbis*. The most significant is article 6, which secures the child’s right to life. It states that: “children have the right to life a full life; it is government duty to ensure that a child has survived and developed healthily.” According to this regulation, each child is eligible to full and undisturbed life. The international community agreed that each child’s right to life is inherent and that signatory parties should do whatever is in their power to secure it. This is also the widest and the most broadly interpreted right. As a prediction of all other rights, the right to life is a dynamic concept leading to secure child’s healthy development. This single right covers the right to health, safety, and protection against malnutrition and poverty.²⁴

Pursuant to article 18, parents and the government are responsible for the well-being of the child and for bringing him/her up, while considering what is best for each child, not for children in general. The main responsibility for bringing up the child is held by parents, but if they are not able to fulfil their duties by themselves, the government of the country where they reside should provide them full support. The governments are also obliged to check if the child is properly cared for by the parents or other persons who look after him/her. It is also the government’s responsibility to assure that each orphaned child/all orphaned children, whose parents are not able to take care of them, are given an upbringing that respects their language, culture and religion.

independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

²³ M. Zubik, *Wybór dokumentów prawa międzynarodowego dotyczących praw człowieka*, Warszawa 2008, pp. 11–12.

²⁴ G. Van Bueren, *The international law on the rights of the child*, London 1998, pp. 293–295.

According to article 21, this rule applies also to adopted children. The other children's survival rights are secured in the articles 23 and 24. The first of these two articles refers to disabled children. This is a simple regulation that can be summarized in one sentence: Disabled children have the right to live a full and independent life. According to article 23, there is the government's responsibility to organise special care for such children and support them in ways that their lives will be exactly the same as their peers without disabilities.

Both survival and development rights can be derived from article 24. This article ensures children's rights to good quality health care, clean water, nutritious food and clean environment. All these factors are necessary for the child's well-being and proper development. On the other hand, without food, water and health care, a child will be not able to survive. The same qualification occurs in article 27 of the Convention. The Convention secures, for children, the right to have such living standards that meet their mental and physical needs. Once again, this is the parents' responsibility to create proper living conditions for their child, and only when parents are not able to do it, the government should support them. This second observation allows to conclude that the Convention brings into force the principle of subsidiarity. The general obligation to secure children's survival rights rests on parents, and it is their duty to take care of their children. Only in such situations when parents are not able to do it, the government is obliged to help them. The role of the government is broader, because whilst the parents' role is to take care of their children, the government's task is to ensure that they do it correctly, without violation of the Convention of the Right of the Child. The state breaks the Convention rules when it does not establish appropriate control mechanisms over parents or other people and institutions whose duty is to take care of children. One can also add to the survival rights the right to have a registered name and nationality, the right not be separated from their parents, and the right to present their own opinion when adults take decisions that can affect the child, while this opinion²⁵ should be taken into account by adults.²⁶

²⁵ This particular right is the most ground-breaking children's right. Generally children's opinion is not taken into account in most important cases, which are conducted by the courts.

²⁶ *Children's rights: international laws*, <http://www.loc.gov/law/help/child-rights/international-law.php> (20.12.2014); cf. article 94 § 4 and article 1131 § 1 of the Family and Guardianship Code.

Children's survival rights are the right to life and to have their most basic needs met (e.g. adequate standard of living, shelter, nutrition, medical treatment). All these rights should be interpreted in the best interest of the child. Pursuant to article 3, this interest is the primary concern which obliges us to such an interpretation.²⁷ In one of the most famous judgments in *S v. M*, the South African Constitutional Court argued that: "A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word 'paramount' is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child,' and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin, it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests."²⁸ This statement is more than accurate when it talks about the survival rights. The child's right to life cannot become an empty rhetorical phrase. Becoming meaningless, the child's basic rights will not be protected.

6. Summary

The Constitution of the Republic of Poland in article 38 says: "The Republic of Poland shall ensure the legal protection of the life of every human being."²⁹ In

²⁷ T. Kaime, *The Convention on the Rights of the Child: a cultural legitimacy critique*, p. 106.

²⁸ *S v. M*, section 25 (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007), <http://www.saflii.org/za/cases/ZACC/2007/18.pdf> (11.12.2016).

²⁹ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. Nr 78, poz. 483, z późn. zm. (The Constitution of the Republic of Poland of 2nd April, 1997, "Journal of Laws" No. 78, item 483 as amended). The translation of the Constitution is taken from the official website of the Sejm (the lower chamber of the Polish parliament), <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (11.12.2016).

constitutions of many countries this freedom is secured and life is protected. Some constitutions, like the Polish one, also describe in detail particular life situations which they try to prevent. These are general norms, which according to article 30 of the Polish Constitution apply to all people who are under Polish jurisdiction. This is sad that in modern world the right to life, being the basic prerogative of each human, still needs to be protected. Regrettably, there are still states where human life has no value, especially of children, being the most valuable members of society. The rights of the child, expressed in the Convention, were adopted by the ca. 99% of states in the world. This brings hope that children's basic survival rights will be finally sufficiently protected and no child will be ever deprived of them.

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