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Katarzyna Bagan-Kurluta
University of Białystok
kbkurluta@wp.pl

A few Comments on the Rights of the Child as Depicted in the Book by Błażej Kmieciak "Prawa dziecka jako pacjenta" [Rights of Child as a Patient]

Wydawnictwo C.H. Beck, Warszawa, 2016, pp. 292

Reading Błażej Kmieciak's book, the reader asks the question why the child needs their rights. The answer to this question may be twofold. To protect the child who is as precious and exceptional as any human being or, additionally, to protect other values such as family or public interest. The author himself confirms the occurrence of certain discord between the values writing that children rights compete with family and State interests. This way we reach the core of the problem, namely the fact that the child is usually a member of a family based on the relation of subordination, where children are subordinated to their parents, as well as a part of the community – its future and next generation. Hence, this evokes a debate on the wording (tone) of the term of parental authority, doubts related to the introduction of changes in terminology resulting from the willingness to underline the importance of another element of the relation between the child and parents – instead of authority, care or responsibility[1]. Despite the tendencies observed by the author in the book that emphasize more partner-like family relations, he shares the opinion of J. Ignatowicz and M. Nazar[2] saying that "the term of authority strengthens respect for parents, which is of considerable importance when individuals with not fully developed

1 Compare the justification for amending the Family and Guardianship Code from 7 December 2007, print No. 629, p. 7 [uzasadnienie zmiany kodeksu rodzinnego i opiekuńczego z 7 grudnia 2007 r., druk nr 629, s. 7], http://ww2.senat.pl/k7/dok/sejm/022/629.pdf (accessed: 13 March 2017).

2 J. Ignatowicz, M. Nazar, Prawo rodzinne, Warszawa 2006, p. 284.

personality are subject to the duty of care. This entails a special obligation of parents to provide safety and security to children under their care" (p. 210-211). Apparently, such an attitude is not uncommon. The reasons to the amended Family and Guardianship Code of 2007 set forth that "Parents should have "executive" powers in relation to the child and his or her property who, due to their physical, psychological and intellectual condition and a lack of (or little) life experience is not able to make independent decisions in a manner assuring his or her wellbeing (interest). Parental authority does not exclude considering the child's opinion or co-deciding about the child's matters. Hence, it is doubtful whether replacing the term "authority" with "care" would have a significant "edifying" tone. We cannot disregard social and moral realities (the instable system of assessments and values, a decline and lack of moral authority (models) at the time of accelerated social and moral changes). [..] The terms "care" and "parental responsibility" excessively expose only some aspects of the complexity of the rights and duties embracing the legal situation of parents in the relation towards the child and third parties."

However, to support arguments for the change of terminology it can be said that in international instruments that originated at least during the last two decades of the 20th century, the notion of parental responsibly has been successfully applied[3]. It seems that this term illustrates parents' duties towards the child in the best way; it is indeed responsibility for children because parents are responsible for the child's actions. But above all, parents are responsible for development of a small and then young man so that he or she becomes a fully competent (that is not hurt, or emotionally and physically humiliated) adult. The term of authority (power) is associated with something achieved with the use of force, physicality, or violence while domestic violence is forbidden and parents are obliged to fulfil or help the child to fulfil his or her rights. It is not without reason that parents are called the children right's guardians, which is explicitly underlined by the author. On the other hand, due to the State interest, it is purposeful to quote the opinion held by L. Petrażycki, which was also used by the dissertation's author in a slightly different context. "Law is a psychological factor of social life and it acts psychologically. Its action involves, first of all, triggering and suppressing incentives to different actions and omissions thereof (motivational or impulsive operation of law). Secondly, it strengthens and develops some inclinations and features of a human character and weakens and eradicates

3 Compare Recommendation No. R (84) of 28 February 1984 on parental responsibility adopted by the Committee of Ministers of the Council of Europe; M. Safjan (ed.), Standardy prawne Rady Europy. Teksty i komentarze, t. I – Prawo Rodzinne, Instytut Wymiaru Sprawiedliwości, Warszawa 1994, p. 201 and following, Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, done at The Hague on 19 October 1996.

other"[4]. The issues depicted in B. Kmieciak's work refer to the sphere which is often the target of the State scheduled activity regarding limitation or increase of a birth rate, which entails penalization or legalization of abortion, restriction of legalization of surrogacy, etc. The author does not mention this. He has not included this problem in his work even though it is undeniably related to the subject matter of his paper.

Błażej Kmieciak asked himself more than one question and successfully found the answer thereto taking into account not only the perspective of law but also social sciences, in particular pedagogy, psychology and sociology. These questions are as follows: 1) What are the child's rights as a patient? 2) Can we discern a different scope of the rights the child is provided with pursuing the analysis of his or her development as a human being? 3) How are the child's rights protected during the provision of medical services? 4) What areas of the minors' rights are most often violated? 5) Can we perceive the emergence of "new children's rights" at the beginning of the 21 century? 6) How does the edifying and informative function of law affect development of the children's rights culture?

As a human being , the child is entitled to all rights that can be rationally distinguished from the entire catalogue of human rights as those inherent to an immature man. Generalizing and not pursuing an unnecessary analysis of these rights here, it can be said that children enjoy human rights and additionally those which are to protect their distinctness from adults and their exceptional sensitivity – so-called sector rights. Attempting to define human rights, the element of their universal necessity has evoked certain doubts[5]. However, in the context of multiculture, it meant that human dignity may be respected while man is entitled to specific rights even without the existence the catalogue of human rights, human rights as such and any rights called likewise. Despite this, both UN Covenants on Human Rights[6] and the European Convention on Human Rights and Fundamental Freedoms[7] are popular (common) and a number of countries signatories thereto is significant. In

4 L. Petrażycki, O ideale społecznym i odrodzeniu prawa naturalnego, (in:) O nauce, prawie i moralności. Pisma wybrane, Warszawa 1985, p. 157.

5 See the definition of human rights: a set of situationally stratified, natural human capacities, as to individual, but socially determined, equal, inalienable, temporarily permanent, subjectively universal, subjectively and territorially (and to some extent also culturally) necessary and always arising from the natural to every man of personal dignity. B. Gronowska, T. Jasudowicz, C. Mik, Prawa człowieka. Dokumenty międzynarodowe, Toruń 1996, p. 364.

6 International Covenant on Civil and Political Rights – 169 states-parties, https://treaties.un.org/Pages/ViewDetails. aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (dostęp 13/03/2017), International Covenant on Economic, Social and Cultural Rights – 165 states-parties, https://treaties.un.org/Pages/ViewDetails. aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (accessed: 13 March 2017).

7 45 ratifications within the Council of Europe, 2 signatures without the following ratification, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=f2GPfawW (accessed: 13 March 2017).

some countries, as in Great Britain, the legislation is evaluated with regard to the compliance with human rights derived from the European Convention on Human Rights and Fundamental Freedoms, which is one of the most important sources of law in the country whose system of law, paradoxically, is unwritten – the common law system[8]. Moreover, the Convention on the Rights of the Child is the most popular one among all international conventions worldwide[9].

According to P. Aries, the author of the book "*Centuries of Childhood*" (1962), the concept of childhood as a stage or circumstances distinct from adulthood appeared in the second half of the 17th century[10]. Perhaps it happened mainly due to the fact that John Locke[11], one of the pillars of the philosophical concept of human rights, became interested in childhood. On the other hand, the need to equip children with rights was first expressed not so long ago – as late as at the beginning of the 20th century – by Englantyne Jebb, a founder of the organization *Save the Children*[12]. Next declarations of children's rights of 1923[13] and 1959[14] as well as the Convention of the Rights of the Child of 1980 together with Protocols have designated quite permanently the range of protection. Despite being a little man, the child may also be a patient. Hence, if we accepted a wide range of the children rights' protection ensuing from the Convention, and such an intention may be derived from a very great interest of the countries therein and the highest number of its signatories as compared to any other international instrument worldwide, we should absolutely agree with the opinion expressed by Błażej Kmieciak in the book saying that "as a patient, the child, similar to an adult, enjoys the full right to respect for dignity, intimacy, access to health services adequate to the current state of medical knowledge, experience of death as inoffensively and painlessly and as possible, etc." (p. 282).

Although the author's considerations mainly refer to the Polish legal order, in some issues he reaches beyond this areas, for instance with regard to consent for the child's treatment, or foreign examples concerning new challenges. Within the context

8 Under Human Rights Act of 1988, which article 6 (1) provides that it is unlawful any action of a public authority contrary to the rights arising from the Convention. See: A. Gillespie, The English Legal System, Oxford 2009, p. 139-174, C. Elliott, F. Quinn, English Legal System, Harlow 2008, p. 253-275.

9 196 States Parties, outside the US, which have not yet ratified the Convention see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (accessed: 13 March 2017).

10 See: D. Archard, Children: Rights and Childhood, Nowy Jork 2015, p. 24.

11 *Ibidem*, p. 1-16

12 J. Starczewski, Z historii opieki nad dzieckiem. Karta praw dziecka, "Dom Dziecka" 1958, No. 4, p. 194, K. Bagan-Kurluta, Przysposobienie międzynarodowe dzieci, Temida2, Białystok 2009, p. 307.

13 J. Starczewski, *op. cit.*

14 Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

of referring to foreign legal solutions, I wish he presented differences that could result from the mutual comparison of two concepts of the beginning of human life protection: the first one, supported by the author, which is based on the regulation ensuing from Art. 2 of the Act on the Ombudsman for Children (from conception to the age of majority)[15], and second one, based on the definition of a child under Art. 1 of the Convention on the Rights of the Child (a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier)[16]. Within this context, the author rightly repeats after M. Andrzejewski that a ban on abortion would be an essential foundation upon which the term "child" should be analyzed[17]. All the more, due to the lack of the legislator's consistency on the limit of the child's protection in criminal and civil law as well as the Act on Infertility Treatment (in the light of which embryos will live a separate life, abstracted both from the child and the woman, not mentioning the man)[18], and the use of terms "embryo", "foetus" or "conceptus" with regard to the prenatal period.

The work consists of six chapters. The first two are introductory – they refer to the child as a human being and beneficiary of human rights and patient's rights. The first chapter is devoted to the rights of the child as compared to human rights as well as the category of these rights and the child as an immature man. The next part of this chapter titled *Children's rights – selected aspects* (§ 4), appears to be mostly limited to the presentation of the rights from the theoretical perspective (in different contexts and aspects – the same terminology has been mistakenly used here in the title of the chapter and the title of the subchapter, which is not only a repetition (*Children's rights – selected aspects*) but, additionally, it does not provide the reader with any information – it does not present the background against which the author wants to analyze these rights). The second chapter titled *Children's rights and patient's rights* consists of two parts: the first one devoted to the patient's rights, and the second one – to the minor patient's rights, while the latter one refers to the sources of the rights' protection and selected institutional actions to defend them. The subchapter concerning the examples of activities discusses solely those undertaken by the Ombudsman for Children and Patient Ombudsman. It could have been shown in the title and, additionally, indicated whether other institutional activities simply do not exist, or those selected are for some reason the most essential. In this part the author refers to a very interesting issue, namely why patient's rights were regulated as late as

15 Act of 6 January 2000 on the Children's Ombudsman (Journal of Laws 2015, item 2086 as amended [Ustawa z 6 stycznia 2000 r. o Rzeczniku Praw Dziecka, Dz.U. z 2015 r., poz. 2086 ze zm.].

16 Convention on the Rights of the Child adopted by the General Assembly of the United Nations of 20 November 1989 (Journal of Laws 1991, No. 120 item 526, as amended) [Konwencja o Prawach Dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych 20.11.1989 r. (Dz.U. z 1991 r., Nr 120, poz. 526 ze zm.)].

17 M. Andrzejewski, Prawna ochrona rodziny, Warszawa 1999, p. 172.

18 Ustawa z dnia 25 czerwca 2015 r. o leczeniu niepłodności, Dz.U. z 2015 r., poz. 1087.

at the end of the 20th century. He rightly sees the causes thereof by quoting A. Doroszewska "in wider transformations of social life related to the emergence of consumer movement and increased awareness of inherent consumer rights"[19]. It seems that similar to the reference to the increasing child's awareness discussed by the author in connection with new challenges for the minor patient's rights, it can be well stated that ICT revolution carried out by traditional media and the Internet brought about changes in the relation between a patient and doctor from the relation: an object of medical treatment – a decision-maker of supernatural or nearly divine power, into the relation: an informed demanding patient – a man without the attribute of divinity using therapeutic methods. Three further chapters are, in sequence, devoted to: the child's right to medical services, the minor patient's right to information, and the child's right to give consent for the provision of health services. I do not really know why chapter III titled *The child's right to health services* is followed by the introductory subchapter to be continued by another one titled *The child's right to health services – selected aspects*. What is more, chapters III and IV refer solely to the patient's right to health services in life threatening circumstances discussed in chapter II but not generally to the right to health services. It is a pity that subchapter III devoted to the challenges and dilemmas does not discuss the issue of girls' vasectomy (not only in connection with danger to the child's life). This extremely controversial topic was the subject of the doctrinal and jurisdictional debate in the common law countries – Great Britain, the USA and Canada[20]. Interestingly and importantly enough, in two landmark judgments on the vasectomy of girls at the beginning of puberty, the issue of the so called basic human right to reproduce have been presented differently. In the first judgment, Judge Heilbron ruled that vasectomy should be banned as it is contrary to the child's interest and irreversibly and non-therapeutically deprives the child of the right to reproduce[21]. On the other hand, in the second judgment, Lord Justice Hailsham decided that the basic human right to reproduce does not matter at all if a person lacks capacity to make an informed decision with regard to matters related to pregnancy and giving birth to a child[22]. The admissibility of depriving the child of a future possibility to reproduce remains

19 A. Doroszewska, Socjologiczne aspekty praw pacjenta – analiza wybranych problemów, (in:) T. Mróz (ed.), Uwarunkowania prawne, ekonomiczne i socjologiczne funkcjonowania wybranych systemów ochrony zdrowia, Białystok 2011, p. 122.

20 Re D (Sterilisation) [1976] Fam 185, Re B (A Minor) (Wardship: Sterilisation) [1988] AC 199, Re P (A Minor) (Wardship: Sterilisation) [1989] 1 FLR 182, T v T [1988] Fam 52 And many other later cases.

21 Re D (Sterilisation) [1976] Fam 185. The case concerned an 11-year-old girl suffering from Sotos syndrome. Compare: A. Bainham, S. Cretney, Children. The Modern Law, Bristol, 1993, p. 255-257.

22 Re B (A Minor) (Wardship: Sterilisation) [1988] AC 199, a case called Jeanette's case regarding a 17-year-old girl with a five-year-old mentality. See: A. Bainham, S. Cretney, *op. cit.*, p. 257-259.

controversial even if her mental conditions differ from the norm. Disregarding unfortunate historical associations evoked by vasectomy carried out on mentally ill people, the question arises here whose interest is protected through vasectomy, and whether it is actually the child's interest. What is more, I think that discussing legal aspects (are there any illegal ones the author does not depict?) of the protection of the child's rights in the prenatal stage (§ 4) and legal aspects of in vitro conception just in this chapter is not really reasonable. For instance, there are considerations therein on embryos as patients – this may evoke doubts as to their other rights (if they have any) apart from the right to medical services. Furthermore, the part devoted to the patient's right to information contains very interesting comments on intimacy and confidentiality and unaccompanied visits at the doctor's, in particular from the point of view of children during puberty on the threshold of adulthood. Failure to report this in medical records is particularly interesting and controversial. It implies concealed prescription of contraceptives, attestation of untruth and doctor's criminal liability for it. It would be reasonable here to refer to the British case law and analyze the judgment in the case of Gillick v. West Norfolk & Wisbech Area Health Authority[23] and its impact on further proceedings in similar cases. The author's critique of the model of cumulative consent adopted in Poland is worth considering. However, in the context of the child's increasing maturity developing with the lapse of time, it seems debatable to apply the formula used for a medical experiment (a written consent of the child's statutory representative and, if the child attained 16 years of age, or did not attain 16 years of age and is able to sufficiently understand the situation and express his or her opinion on the participation in the experiment – his or her written consent too) "as standard conduct with regard to any surgeries and other medical interventions the minor is subject to. Since the child is not fully mature, he or she is not able to (and it should be assumed they should not be able to) make decisions themselves" (p. 236-237). Chapter VI (*The child's rights in medicine, new questions – new challenges)* refers to three contemporary challenges identified by the author. They embrace: 1) sex-changing treatment for children (double mastectomy of a minor female patent) in Poland; 2) withholding any medical and nursing treatment of the disabled or terminally ill children; 3) surgical limitation of physical development of profoundly physically and intellectually disabled children – in both cases in relation to foreign cases (Ashley Treatment and the case of Nancy Fitzmaurice). It seems that a new challenge faced by the contemporary world is the application of in vitro conception procedures, anonymity of genetic material donors, or the use of medical procedures in surrogacy (surrogate motherhood). This thesis, perhaps too premature in Poland, or paradoxically to late (due to the implementation of the Act on Infertility

23 [1985] UKHL 7 (17 October 1985). Por. K. Bagan-Kurluta, U. Drozdowska, Significance of minors' capacity assessment in the Polish and English law, Progress in Health Sciences . Dec 2015, Vol. 5, Issue 2, p. 149-159.

Treatment), refers well to the situation in many countries – and the author does not limit his considerations in this part of the book to Poland. Presenting examples of new challenges, he refers to two foreign cases (with regard to three examples contained in the book). It is true that the author perceives and depicts in the conclusion the novelty of the situation resulting from the development of medical science. He writes that this entails "the necessity to ask new questions about the rights of the child as a patient also in a similar biotechnological situation which, as depicted, has apparent impact on the future of an already born child" (p. 285). Writing about the perspective of new rights of the child-patient, the author points out to a certain type of exceptionality of in vitro method "during which a child is not only "created" but also diagnosed. He or she is then an "element/part" of actions undertaken during this procedure".

The work is abundant with conclusions, which have been included not only in the final part. It is absolutely worth noticing those which concern the child deciding about himself or herself – the exclusion of parents from a decision-making process, leaving the child alone with a doctor without a natural "guarantor" obliged to fight for his or her rights", but also abortion, prenatal adoption, a different range of protection depending on the branch of law and child's development (prenatal and postnatal stage), a distinction between the child's lack of or limited capacity to legal action and a possibility of expressing efficient consent for treatment by him or her. Another debatable issue raised by the author is the question about the future legal situation of a child-patient at the moment of being born by the biologically alien woman within the aspect of a possible protection of the child's right to healthcare corresponding to the up-to-date state of medical knowledge as well as the right to identity, family life, etc.

Summing up, Błażej Kmieciak's book is a very interesting approach to the problem of the rights of the child as a patient. It is a part of incessant interest in the rights of the child as a discipline of science and legislative achievement in the form of the Convention as well as another voice in the discussion on how to counteract their violation. The rights of the child are considered from the perspective of their compatibility with the rights of parents and state interest. None of the legal acts adopted so far have implied the child's empowerment. The child remains an element of the family and an individual building the society's future. The legislator decides about the legal framework of the child's consent for treatment, which has been presented in the publication, as well as the minimum age of acquiring legal competence to marry, obtain a driving licence, have sexual intercourse not fearing litigation, drink alcohol, and vote[24]. Some decisions of the legislator may appear peculiarly hilarious, e.g. why it has been decided that an 18 years old American has the right to marry but may not (for another three years) drink alcohol. These detailed regulations at

24 D. Archard, *op. cit*., p. 23.

least partially remain outside the sphere of the conventionally established catalogue of rights whereas they certainly belong to the sphere of the State's legislative empire. The legislator essentially decides about the range of liberties enjoyed by the child within the limits of the Convention. Although it is difficult to talk about the child's empowerment, the rights of the child have been empowered from human rights in their conventional catalogue. Their empowerment means that the child is entitled to them regardless of his or her dependence on parents. The best proof thereof is the judgment of the European Court of Human Rights in the case of Mennesson and others v. France[25] and in the case of Labbassee v. France[26]. The Court ruled that in France a lack of possibility to register a child born in result of the surrogacy contract does not violate the right to family life of adults (sociological parents) while at the same time it violates such a right with regard to children. Applications submitted by the parents and children were interconnected for obvious reasons and they were examined together while the Court's judgment confirms separateness of the rights of the child and the rights of adults (in this case of the sociological parent) and their independence. The right of the child should empower the child's interest and wellbeing; their fulfilment should entail the fulfilment of child's welfare. Yet, it is not always like this, and not always protecting the child legally means acting in compliance with the child's interest. Błażej Kmieciak's book considers this problem to a large extent. It was written at the time of changing morality as well as unquestionable acceptance of the child's welfare as a prerequisite in the proceedings dealing with such matters. The subject may be presented in many contexts and the introduction of various distinct legal solutions may be advocated for. The author has successfully realized his own concept.

25 Mennesson v. France, Application No. 65192/11), the judgment of 26 June 2014, http://hudoc.echr.coe.int/eng#{"fulltext":["Mennesson"],"documentcollectionid2":["GRANDCHAMBER", "CHAMBER"],"itemid":["001-145389"]} (accessed: 6 April 2017).

26 Case of Labassee v. France, Application No. 65941/11) the judgment of 26 June 2014, http://hudoc.echr.coe.int/eng#{"itemid":["001-145180"]} (accessed: 6 April 2017).