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Personal family law a challenge for the State

Abstract: In this paper, the author presents an approach to family law through the personal right of each family member to subjectivity, thus indicating that the challenge of the State is to take into account the family subjectivity, as an institution and community, both in law and family policy. He addresses the issues of Europeanization, harmonization of family law in Europe, and at the same time shows that the family, which has its fundamental value as a subject of human rights, must be taken into account within the respect of national identities of EU Member States. He presents the draft Family Code (2018) prepared in Poland, which takes into account the need for changes in the approach to family law.

Keyword: Family, national identity, human rights, draft Family Code /2018/

1.

Family in the awareness of Polish society still constitutes a value. A value is a feature which is of an extraordinary importance to something or someone, significance, meaning or a set of features considered good, worth realizing, i.e.: spiritual, moral, religious values. Every state is based on values that can be specific to it and closely related to the culture of a given society.

The family is presented as a basic environment for human birth and development, a basic group of social life, a basic element of the common good. The number of citizens and their quality depends on the family. Therefore, it is the value of a nation. "National" means: referring to a nation, typical for that nation, belonging to it. Examples: flag – national, tradition – national, culture – national. As far as the meaning of words is concerned, it should be assumed that "national values are a set of characteristics, distinguishing a nation, of particular importance, which a nation accepts and considers particularly important and valuable." The characteristics of a nation are: language, common history, culture, tradition, religion, but also legal property: the system. According to J. Kmita, culture is nothing else but a social regulator of actions. The essence of culture are normative beliefs occurring in a given community. Therefore, culture is understood as a certain system of values and standards that determines the way of self-organization of the life of a social group. It is possible to say that values and standards constitute the basic framework of individual and group activity, internal and external. It is emphasized that national identity is cultural unity and the will to belong to a country. Many politicians today do not take into account these statements, commonly accepted for centuries, in their activities. Their actions weaken the natural bond between the family and society and the State.

They build the so-called State of Law, basing it on the individual and extensive administration, forgetting about the personal dimension of family law.

Insufficient care for the family creates a difficult living situation for many families. It leaves the family alone, in the performance of its multiple functions, which require more and more financial outlays and skills, and promotes the formation of an unfavorable

situation for the family stability. The consequences of this state of affairs start to appear, threatening both the personal development of citizens and the social and state life. Among others, the natural growth of society is decreasing, selfish and antisocial attitudes are spreading, the atomization and anomy of social life is developing, and eventually the demand for new forms of dictatorship may increase.

Many years ago J. Auleytner pointed out that social policy without values faces ethical nihilism, which was manifested by repeated attempts to make it a kind of political sociotechnics, determined by technical and ad hoc solutions to selected issues within the economic system.

The family should be represented as a community of individuals – and at the same time as an extremely important social institution – which is often neglected today. The family should be presented as a link between private and public life, as a carrier and creator of the culture of society, as a keystone for generations. Finally, showing the family as a creative element of social and state life, guaranteeing their sustainability and development.

The law as an element of culture reflects the behaviors divided in a given community, due to the different interests of individuals. In different cultures, socially important issues may be regulated in various ways, but a person as a social being cannot live without the recognition of common social rules, including legal rules, in the long run. Therefore, the law, as a certain social phenomenon, constitutes a kind of universal factor of social harmony and balance.

In the general chaos, because this is how the current political, economic and social situation can be defined, the family is a fundamental factor of stability, spiritual support as well as service and material help for the individual. This is a positive phenomenon, but it is unknown how long it will last. The family needs help and

if state aid comes in time and strengthens the pro-family attitude of people and state institutions, if it strengthens the position of the family in society, then the development of family phenomena will follow a positive direction, desired by the majority of society.

The principle of respect for national identity in the EU, to which Poland joined as a sovereign state after the national referendum, should be recalled. The changes introduced by the Lisbon Treaty are worth mentioning. In accordance with the wording of Article 4(2) TEU[1]: The Union shall respect the equality of the State in relation to the Treaties, as well as its national identity, inseparably linked to its fundamental political and constitutional structures, including with regard to regional and local self-government. The TEU regards respect for the national identities of the Member States as one of the fundamental principles on which the EU is based. Reference to national identities is also included in the preamble of the Charter of Fundamental Rights, which underlines that the EU respects *the diversity of cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels*. The CFR states that the EU respects *cultural, religious and linguistic diversity*. The reference to diversity of cultures and traditions of the different peoples of Europe indicates that the EU is based on individual and diverse states, which have their own distinctiveness and have their own culture and traditions. The term "national identity" is generally associated with a nation and its specific characteristics.

In Poland, we are currently dealing with a multicentric legal system, including the system of national law and the *acquis communautaire*. This violates the traditional system vision,

[1] Treaty on European Union https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:12012M004&from=EN (access 20.05.2020)

gives rise to many conflicts of competence, and even addresses ideological issues (e.g. a constant discussion on the sovereignty of individual states).

The concept of Europeanisation, closely related to the integration processes of the EU Member States, covers all processes, including harmonization and unification, occurring in the legal systems of these countries in relation to the membership of this organization, and in particular those resulting from law-making activities. It should be noted that there is no answer to the seemingly fundamental question of the scope or subject matter of possible harmonization or unification. The question is whether the whole of private law is to be covered or its individual selected parts, such as contract law, family law or succession law? What are the criteria for making such a choice? This also raises questions on the competence of the European Union's institutions to introduce regulations resulting in the unification of private law. As it is well known, harmonization and unification in particular show fundamental differences between them. There is an ever-present question on how far the approximation or harmonization of the legal systems of individual States should go, as well as the related interference of the legislation established by EU bodies in these systems. Therefore, harmonization, especially in the EU aspect, does not only mean the adoption of formal regulations, but also requires a change in the hierarchy of values, legal awareness and vision of the legal order of individual states.

It is assumed that society is currently undergoing transformation. It is structurally modified by the legal system. The created legal constructions interfere in human relations, giving them a shape in their resemblance. People begin to see the world through the prism of rights and duties, even in areas of life where this would have been unthinkable until recently.

The processes of taking over by law the regulation of social relations, which until now have been regulated by other standards, are called the legalization or juridical process. The very view that the law can regulate any area of life is referred to as universalism regulating the law. However, what is interesting, the quantitative growth of law is seen here as a positive phenomenon.

According to S. Veitch, the reason for such an understanding of reality is the mistaken assumption that the law is the solution to existing problems. However, this reality is different – it is a significant part of it. However, it is a paradox that this law is usually rid of all "social" morality. What is interesting, when speaking about the "crisis of the law," J. Kochanowski indicated the lack of morality of this law.

Jurisdiction is sometimes described as a "regulation by the legislator of almost each its field, as if without this regulation it could not develop normally, and as if before this regulation it would not develop." It appears mainly in totalitarian systems, but increasingly frequent it can also be seen in liberal regimes. J. Habermas even calls it the "colonization" of society by law.

The consequence is harmonization, unification, Europeanisation of law.

Its theoretical basis is a positivist vision of law, which identifies the concept of law with state law. If so, there is no law other than that established by an appointed body, such as moral law.

The number of laws created (the greater or lesser standard-forming potential of individual societies) depends on many factors, including the degree of homogeneity of culture, the degree of society's integration, group solidarity, internal communication, social structure, the efficiency of institutions, etc.. Change in the system's foundations, acrology, philosophy of life.

The adoption of the new Constitution in 1997 and the need to adapt Polish law to the European law are also considered relevant.

However, it can be argued that the factors given are overestimated. Despite the passage of years from the date of Poland's accession to the European Union, the number of newly created laws is not decreasing, but on the contrary is increasing.

It is worth to emphasize that the recognition of family as a fundamental value and as an entity entitled to human rights in the light of international standards does not raise the slightest doubt. However, on the other hand, there is a lack of consistency both in terms of national law and international standards.

The notion of "family" is immanently related to the word "to give birth," and what is more – without a link to the problem of "giving birth" there is virtually no place for a family category.

Starting with Article 16(3) of the Universal Declaration of Human Rights[2] and through further treaty provisions, there is a recognition that the family is the natural and fundamental unit of society and is entitled to protect the parties in society and the State.

Taking into account both universal and regional standards, including European ones, there can be easily found a solid confirmation that the family is to be that foundation, that stone of all social construction, that its meaning and social value for the nation, for the state and for all mankind is also of absolutely fundamental importance. The importance of a group, initial and fundamental community, without which the general social organism is not created at all and without which it cannot survive.

The law is intended to enable society to function in a possibly non-conflicting way. It should not only take into account a moral factor, but also a pragmatic, "reasonable" factor, as well as

[2] Universal Declaration of Human Rights https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (access 20.05.2020)

a balance of compromise in case of conflict between these factors. Therefore, it can be stated that one of the main objectives of law is to introduce order, social and legal.

The nation, as a sovereign, acting through its various institutions and as if not believing in the abilities of individuals (which is quite right, since society is composed of people with very different development levels, with very different responsibility levels and very different levels of life autonomy), has created institutions to guard the conditions for existence and development, both for the individual, the person and the community from the family onwards.

The Polish writer M. Dąbrowska wrote that "without sanctions, without duty, without hope of rewards and without fear of punishment, we are to be moral just the sense of responsibility for our own fate and the fate of another person. The awareness of the existence of other people and their closer ties with them must be a sufficient stimulus and indicator of behaviour." The research results from the sociology of law suggest that, in a society with an unstable moral system, the claim-and-force function of the established law is increasing, and the central imperative of moral responsibility is decreasing. The family, as never before, requires kind, discreet support, help and care. Although the family is the oldest and basic community, a natural community, its structure, personal composition, principles, models of mutual relations, relationships, ways of carrying out tasks and duties, responsibility depends to a great extent on the society in which it exists.

Despite the declarations, a man in social life is not an objective to which the state with all its administrative and judicial apparatus should serve in the personal fulfilment of his humanity. While recognizing the family as a fundamental and natural community

of human society, it should be given the greatest possible care and legal protection. All this should be aimed at strengthening and helping the family to fulfil its functions and tasks.

It is worth recalling that already in the 70s of the 20th century, J. Jakubowski drew attention to the relations between international family law and human rights, studying the relations between covenants on human rights and private international law. Although he only marginally referred to the issues and personal law, mainly focused on the influence of human rights on international family law.

In the academic community of A. Mickiewicz University in Poznań at the turn of the 80's and 90s of the 20th century, instead of accepting the conflict-of-law nature of international family law, an attempt was made to shape the substantive standards of international family law. In the latter case, human rights were the starting point. For these reasons, it was not limited to private standards, but public and legal standards were also drafted.

The team made a critical analysis of the existing state of affairs and, against this background, came to the conclusion that it is necessary to draft a convention on family rights, which could be the starting point of a Polish diplomatic initiative aimed at codifying family rights in one act of international law.

The content of international legal regulations was assessed from the point of view of the needs of contemporary family.

In the authors' opinion, human rights do not originate from the grace of state power, but are objective and result from the very essence of humanity. For this reason, the text of the Convention should avoid positivist phrases such as "the state provides for the family" and prefer the "natural law" phrases such as "every family has a right."

2.

The family is the most complete community from the human relationships point of view. There is no bond that binds people more closely together than a marital and family bond in which mutual obligations are equally deep and comprehensive and where their violation is more painful to human sensitivity: women, men, children, parents.

Historical experience shows that changes and innovations in these areas of law should be introduced with particular caution. Any legislative intervention in fields of law that concern the personal sphere of human being can only be undertaken in the face of a real necessity.

It should be noted that Poland and its families have passed through different railroads, influenced by the philosophy of law and ideology over the centuries.

The Second Polish Republic inherited from the invaders received four codes that were significantly different from each other. The unification and codification of law is one of the main tasks that the Second Republic had to face. Reborn after more than one hundred and twenty years of captivity, Poland inherited from the partitioners diverse, often conflicting civil law systems. Particularly visible differences between the adopted legislation can be seen on the example of matrimonial personal law.

On the territory of Poland, there were three types of marital law known throughout Europe at the time: secular, religious and mixed. In order to unify the law, a Codification Committee was established by the Act of 3 June 1919. Its priority task, in addition to unifying the law governing economic transactions, was to draw up a law on matrimonial personal law uniform throughout the country. However, such a law did not enter into force during the inter-war period.

Two drafts were then prepared, Karol Lutostański's draft /1932/, Zygmunt Lisowski's draft /1934/, which did not enter into force. After the Second World War, Poland was influenced by Soviet ideology /USSR/.

It is important to be aware that "Family law is a branch of law that regulates social relationships established to meet the intimate and personal needs of every human being in order to share life, raise children and realize personal happiness. Building a family home. It is a branch of law with an ancient origin, the rules of which were created and were closely related to people's religious beliefs, morals and customs, and the economy." Attention is drawn to the need to adapt the rules of civil procedure in family matters precisely because of their specificity and the need to protect family ties. Today's understanding of the family and children's rights in the context of human rights is radically different from that of half a century ago. It is enough to point to the Convention of 20 November 1989 on the Rights of the Child to recognize that in family relationships we are dealing with an autonomous entity. The European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996. The concern of society and of the State for the family is expressed primarily in the shaping of a law guaranteeing the stability of marriage and the family, so that the family is the school of a richer society, with autonomy and personality. To this end, a draft Family Code was prepared by the Codification Committee of the Ombudsman for the Rights of the Child, which was submitted in 2018 to the legislative and executive authorities.

The codification work undertaken in the Second Republic of Poland was an important legacy of Polish legal thought. They were used after the end of war in efforts to unify family law, which ended with the adoption of four decrees:

- marital law[3];
- family law[4];
- guardianship law[5];
- matrimonial property law[6].

Family Code[7] normalized the whole of family law relationships in one legal act. However, it was criticized for various reasons, especially for its excessive laconic nature, hindering the application of its provisions in judicial practice. As a part of works on the codification of civil law, a new draft of family law was prepared, which was adopted in 1964 as the Family and Guardianship Code[8].

In the 60s of the 20th century there were debates on the separation of family law from civil law. The discussion determining family law as a part of civil law took place over half a century ago. The influence of time makes it worthwhile to discuss the issue again.

Family law included in the Family and Guardianship Code is a section of civil law, although it is included in a separate codification act. Such a legislative solution was influenced by political and ideological reasons, not theoretical and doctrinal ones. The Family and Guardianship Code regulates both property and personal relations between family members. However, the Civil Code, especially in its general part, contains the so-called personal law.

[3] Marital law, decree of 25.09.1945 (Journal of Laws No 48, item 270).

[4] Family law, decree of 22.01.1946 (Journal of Laws No. 6, item 52, as amended).

[5] Guardianship law, decree of 14.05.1946 (Journal of Laws No. 20, item 135).

[6] Matrimonial property law, decree of 29.05.1946 (Journal of Laws No 31, item 196, as amended).

[7] Family Code of 27.06.1950. (Journal of Laws No 34, item 308 as amended).

[8] Family and Guardianship Code of 1.01.1965 (Journal of Laws No 9, item 59).

However, above all, family law relationships are regulated in the Family and Guardianship Code by the civil method, as well as relations in the field of property, inheritance and contract law. The consequence of the fact that family law belongs to civil law is the direct application of regulations.

The literature argues that it is easier to agree with the family law code separation than with the code autonomy, if the Civil Code standards are also applied, provided that the Family and Guardianship Code regulations stipulate so, or regulate some issue differently.

Family law can be perceived in three ways: from the point of view of the best interests of a child, the interests of parents, or it can be understood in such a way that the child is recognized as a state good. If, under the influence of human rights development and the rights of a child in particular, the last two points of view are not acceptable today, then a conclusion remains that there is a need to choose a method of regulation that will allow the family matter to be settled through the prism of the best interests of a child. General civil law does not provide such a result.

Family matters are settled by the district court (common), which is a guardianship court[9].

The idea of family courts for a long time was shaped abroad, in Poland since the 1970s.

In the district courts, family departments have been established to hear cases not reserved for the jurisdiction of the district courts. Apart from cases under the Family and Guardianship Code, family departments were also entrusted with some cases under the Act of

[9] Article 569 § 1 of the Code of Civil Procedure of 17.11.1964 (Journal of Laws No 43, item 296).

19.08.1994 on mental health protection[10], the Act of 29.07.2005 on counteracting drug addiction[11], the Act of 01.07.2005 on collection, storage and transplantation of cells, tissues and organs[12], the Act of 26.10.1982 on upbringing in sobriety and counteracting alcoholism[13]. Such a wide range of issues and their entanglement in family relations requires from the judge, apart from legal knowledge, knowledge of non-legal issues and only at a basic level to understand and evaluate statements and opinions of experts assisting family judges, parties and children.

The combination of parental authority cases, contacts, passport authorization, the child's residence, etc., is prevented by the different composition of the court. This is an ideal example of how the standards of substantive law are dominated by those of procedural law. Whereas it should be quite the opposite. It is the standards of procedural law that must implement the standards of substantive law. In substantive law, the best interests of a child assume that there are no factual arguments to divide family problems into separate cases. This is a very harmful phenomenon.

Parental responsibility creates an opportunity for the family judiciary not to create a procedural and formalized practice, separated not only from international trends but also from parents' expectations. Parents who come to court are not at all interested in the procedure in which their problems are solved. For them, all submitted motions are one family problem, which should be recognized comprehensively in one proceeding, without being divided into procedures and cases.

[10] Unified text: Journal of Laws of 2017, item 882

[11] Consolidated text in Journal of Laws of 2017, item 783 as amended.

[12] Consolidated text in Journal of Laws of 2017, item 1000.

[13] Consolidated text in Journal of Laws of 2016, item 487 as amended.

It should be noted that the States parties to the European Convention on the Exercise of Children's Rights have undertaken to give the judicial authority in proceedings concerning children the right to appoint a separate representative to represent the child, if justified – a lawyer.

The approach to family law as a civil law section inevitably leads to the conclusion that there is a need for an autonomous branch of law. This does not mean that the genetic relations between family law and civil law are questioned. However, it is worth noting that the method of regulation adopted today in the current Family and Guardianship Code results in the fact that there are no codified principles of this law with the principle of the child's best interests at the forefront in family law.

Family law does not operate with such concepts as justice, equality, equivalence of benefits, will autonomy, etc. All these foundations of civil law are overshadowed by the best interests of a child and are replaced by concepts such as ensuring the child's existence and development, through love, acceptance and security. However, the recognition of family law as a section of civil law means that in the current Code of the Family and Guardianship, the issue of raising a child is addressed from a purely juridical point of view, where there is no reference to happiness, love, joy of the child. There is also no basic catalogue of children's rights that would define the best interests of a child.

In the *Commentary on Family Affairs*, it was argued that the traditional approach to family law as a part of civil law does not withstand the criticism of science. It is a specific barrier to the development of family law, a measurable example of which is the lack of codified principles of this law that is based on axiology. Even the principle of the best interests of a child is not given the rank of the supreme principle of family law. This is the result of the

above mentioned limitations, because since family law is part of civil law, the Family and Guardianship Code does not contain an autonomous general part. Instead of the supreme codified rules of family law, there are codified rules of civil law in family law. The problem is that such principles as will autonomy of the parties, legal relationship, equivalence of benefits, equality of parties, enforceability of judgments, adequacy of causal relationship – this is a network of notions unfamiliar in fact to the law, which by its very nature, each problem captures from the perspective of the best interests of a child.

3.

Noting the draft of Family Code prepared by the Committee for the Codification of Family Law at the Ombudsman for the Rights of the Child, it should be emphasized that the time that has passed since the codification of family law in 1964 (in another legal system) and its numerous amendments require an interest in this issue. The discussion which took place at that time determined family law as a part of civil law. The current understanding of children's rights, human rights, family rights is different (the socio-political and economic conditions in the 1960s were different) than in the period of its creation, and a different paradigm was used. Science perceives the world through new theories, evolutions of science and new currents of thought.

In the institution of marriage, families focus on the findings of different sciences and therefore the approach to them required openness to interdisciplinary research. It can be stated that this interdisciplinarity of approach has become a necessary *modus operandi* for the creation of rules defining their functioning, being an object of interest and debate on the issues of relations between

normative systems, between material, procedural and executive sources of law and the meaning of the human/child with his dignity and constitutive features as the basis of family law. The concept of the Code includes elements corresponding to the personal nature of the human being, while at the same time it indicates an important premise in legal science on external integration.

The inspiration and basis for building the concept of family law as a branch of law has been sought for many years. The Commission has worked intensively – and socially – for six years. An interdisciplinary approach to the issues covered by this law has been adopted, using the approaches of creative legal pedagogy.

The proposed reform of family law should result in a new philosophy of understanding legal and family issues in the Republic of Poland, contributing to the creation of a family law system. The lack of codified principles of family law impoverishes the interpretation of family law and the jurisprudence of family courts.

Wiktor Osiatyński believes that in parent-child relations there is an analogy to human rights. He recognizes that human rights apply where there is inequality between the parties (as in the situation of an individual – State), as well as where there is a permanent subordination of one of the parties and the possibility of using (and abusing) coercive power. These elements are present in the relationship between parents and children on a permanent basis. When drawing attention to the notion of parental authority, he considers it blurred, hence it is difficult to point out clear boundaries and moments of crossing them. Moreover, the issue concerns the most personal bonds within the family, the integrity and autonomy of which are rightly protected by law and, finally, the subordinate and weaker party to the parental relationship is often unable to determine its rights in situations of interest and abuse of parental authority. However, despite these difficulties, the child

should have rights that protect him from drastic abuse of parental authority, violence and violation of dignity.

The Convention on the Rights of the Child and other enforcement measures[14] emphasize that it is with parenthood that responsibility is associated, indicating the constitutive feature of a parent who is committed to being responsible. This responsibility is ontological in nature as it is related to human being.

In order to interpret the law properly, and especially the family law, it is necessary to perceive the human being. The human right standard is to recognize the subjectivity of a child and to recognize the best interests of a child, his interest as superior. In accordance with these principles, legal relations between parents and the child must be shaped and the interests of family and child must be protected as fully as possible.

Various experts, professional bodies and social bodies representing various interests of social groups, e.g. Association of Family Judges, associations of professional curators, activists of non-governmental organizations, including TPD, took part in the study, directly influencing detailed solutions of the draft normative act of the Family Code.

Analytical effort was undertaken by considering different approaches, as a result of which the project was based on the classical philosophy of responsibility, philosophy of law, including a communicative vision of law, ethics, human rights, including family and family rights. The inspiration was sought, among others, in the idea of the Comprehensive Law Movement (genesis, philosophical, psychological, sociological, organizational, normative contexts)

[14] European Convention on the Exercise of Children's Rights, 1996. https://rm.coe.int/168007cdaf (access 20.05.2020)

and by addressing those issues which constitute an important link with the proposed Family Code.

The central focus of the draft Family Code is on the family and child as well as family life within the meaning of the European Convention on Human Rights Article 8 and the Convention on the Rights of the Child.

Human rights protection documents have been used, as well as the concept of rights as a person and as a duty to relate to each other. Such a philosophical perspective expands too narrow paradigm of the positivist understanding of the established law and, as a result, the lack of tools to capture the essence of rights and to explain them. The legal aspects of subjectivity in terms of the Convention on the Rights of the Child are pointed out, which mainly concern the recognition of the social status of a child. On the basis of the catalogue of rights derived from the Convention on the Rights of the Child, both at the material, procedural and executive level of the draft Code, provisions have been formulated on the subject of rights, as well as individual goods due to the child and the family, constituting protection areas.

Nowadays, when it is obvious that human rights start with the rights of a child, this draft Family Code is an attempt to return to the discussion on the separation of family law from civil law.

The draft Code consists of 483 articles that are substantially linked, with a preamble, from Book 1, which contains general provisions on family law, and in it the principles of family law as well as legal definitions (dictionary of terms). Book 2, entitled *The Family*, contains all the content that needs to be regulated in this respect. It consists of the following titles of introductory provisions: Relationships creating a family and other care and educational

environment (marriage, maternity and paternity, adoption, foster care), a child in the family (preliminary regulations, parental responsibility, performance of duties and rights resulting from parental responsibility, supervision over the performance of rights and duties resulting from parental responsibility, the child's habitual residence, representation of the child, management of the child's property, the child's surname, maintaining relations with the child). The order of the individual titles in the Book is noticeable, the first one includes the content related to the formation of the family, the second one regards the status of a child in the family.

Book 3 is entitled *Marriage*, which contains legal regulations of the institution of marriage as the basic form of creating a family. It consists of the following titles:

- preliminary provisions, rights and personal obligations of the spouses,
- matrimonial property regimes (statutory property regime, contractual property regimes, property separation, property separation with equalization of the properties, compulsory property regime),
- separation,
- cessation of marriage.

Book 4 concerns alimony. Book 5 is about custody and guardianship. Book 6 is entitled *Family and guardianship proceedings*. It consists of the following titles:

- declaratory proceedings (preliminary regulations, hearing the child, conciliation and mediation),
- matrimonial proceedings (preliminary legislation, matrimonial matters, cases of separation and divorce, other matrimonial matters),

- matters between children and parents and other persons with responsibilities such as parents (preliminary provisions, matters of the child's origin, other relevant matters of the child, matters of adoption, matters for returning a child for whom parental responsibility is exercised or for returning a person under guardianship, guardianship proceedings in the case of placement in foster custody, matters relating to relations with the child, proceedings for the protection of the child's rights to life and health when a pregnant woman consumes alcohol or uses psychoactive substances, proceedings in matters of custody and guardianship, proceedings for recognition and declaration of enforceability of foreign judicial decisions).

Book 7 regulates the *Enforcement Proceedings*. The first title contains preliminary provisions, the scope and purpose of the enforcement procedure. The following titles set out the enforcement authorities and their jurisdiction, the issues of enforcement, the rights and obligations of the participant in enforcement procedure, the supervision of the exercise of duties and rights arising from parental responsibility, the supervision of custody, the participation of guardian in relations with the child and the cooperation of enforcement authorities with public administration and other entities.

The Code as a legal act is to be what governs action and interpersonal relationships – the rule and measure of action, organizing them for the purpose of the best interests of a family and its development, where the end of relationships are human beings. The subjects of a legal relationship are personal entities (wife, husband, mother, father, child, sibling, etc.), where the law defines the relationship of a person to a person by reason of the

natural referral of one human being to another. A person is indicated as a subject of rights along with all his personal emoluments (ability to know intellectually, freedom, subjectivity, dignity, love, completeness) and to understand human rights, the rights of a child as inter-personal relationships permeated by the obligation to act or to refrain from acting for the best interests of a person.

The preamble of the draft Code, which expresses specific objectives, should be particularly emphasized. Its content reads: "With respect to human dignity, the Republic of Poland protects the best interests of the child and the family, supports the family, including marriage, as well as parenthood, in accordance with the principle of subsidiarity creates conditions for the proper functioning of the family. Bearing in mind the unique role of family law in the protection of children's rights and freedoms, family rights and its multi-faceted nature in the process of lawmaking and application:

- taking into account the commonly recognized values set out in the Constitution of the Republic of Poland and the applicable acts of international law, in particular the inherent dignity of human beings as a source of their rights;
- acting for the best interests of a child and to provide him with decent living conditions in the family, which is his natural environment, and to meet his physical, mental, social and moral needs which shape his personality;
- taking into account the need to provide the child with an educational environment that guarantees his comprehensive development;
- recognizing the family as a fundamental community of persons and a social institution;
- aiming to strengthen the position and functions of families, preferring dialogue and mediation as a tool for resolving family conflicts and disputes;

- taking into account the particular role of family judiciary in protecting these values and the need to implement and develop its ideas;
- respecting the axiological unity of law and the consequent need for consistency of family substantive, procedural and enforcement law, the following is hereby decided [hereinafter referred to as the draft Code]."

According to the Commission, the preamble is of a legal nature by virtue of its binding meaning for the interpretation of the Article part of the Act, which is the Code. In general terms, the preamble is intended to justify the normative solutions adopted in the Act and is a means of bringing the law closer to the public. It has specific functions: persuasive, educational and communicative.

Therefore, the preamble may be a convenient communication technique, it may constitute a link between the law and its social environment, it indicates the unique role of family law in the protection of child and family rights and its multidimensionality in the process of lawmaking and application. The preamble of the draft Family Code formulates the premises on which the family law system is based and is an integral element of a normative act meeting the requirements of legal language. The work on the project was accompanied by legal realism based on in-depth theoretical reflection, which is not a simple compromise between juspositivism and jusnaturalism. General clauses – such as: the best interests of a child, the best interests of a family, personal dignity – are to acquire real content in the practical application of law. Nowadays, the educational role, apart from the protective and organizational function, is considered to be one of the main functions of the law, with the realization of the former function being strongly conditioned by the realization level of remaining functions.

The Commission was guided by the idea that all legislative interventions in the fields of law that concern the personal sphere of human being can only be undertaken in the face of a real necessity, including in the direction of responsibility. Emmanuel Levinas probably expressed the truth most deeply about the fact that the measure of a person's humanity is his responsibility for the life of another person. It is so important today, when we are dealing with post-true, post-political, post-humanism in a country with a changing political, social and economic system, which is manifested in the transformation of positive law regulations. The role of the philosophy of law, which tries to answer fundamental questions regarding law-related issues, should play a significant, if not an essential role. It should be noted that the philosophical approach to law, characterized in particular by the domestic legal practice (but probably also by a large part of dogmatics), is the result of a long process which started with the development of socialist system in Poland after the Second World War. The world at the turn of the 3rd millennium is full of progress and threats, the fall of authorities, which affects the functioning of families. The family is a bridge between an individual and society.

It is a small social group in which there are direct contacts, face to face, relations between its members are close, full of emotions. The social interest argues for the appreciation of the family by sacrificing a special normative act regulating family rights.

The very exercise of power implies asymmetrical relations, and therefore not power, but responsibility and dialogue must become a source of upbringing in the family. The modern world calls for responsibility. It is Hans Jonas who believes that parental responsibility is the closest example of natural responsibility,

established by the nature. He states that "responsibility is first and foremost the responsibility of people for people, and this is the archetype of all responsibility."

H. Jonas defines artificial responsibility as contractual responsibility. By means of the idea of subjectivity he reveals the concept of responsibility. The responsibility of the parental role can be presented in aspects:

- protective, built on a retrospective perspective of responsibility,
- productive, i.e. generating good results,
- preventative, i.e. preventing bad consequences.

Therefore, responsibility is aimed at generating good results, it is combined with creative imagination and positive expression in everyday life. Parental responsibility is understood as an answer to the best interests of a child.

The draft Code points to responsibility in human activity, not parental authority, as a timeless archetype of responsibility, emphasizes the relationship between parent and child. Responsibility is associated with the duty of parents, dialogue, freedom, justice, personal dignity, truth. The emphasis on parental responsibility is a reference to the contemporary concept of the philosophy of responsibility.

The responsibility of parents for the fate of their child and his development was pointed out, among others, by Tadeusz Kotarbiński in the Meditations on Decent Life, "when neither teachers nor ombudsmen of the authorities bear personal responsibility for what happens to the child, the parents bear this co-responsibility, being co-responsible for his begetting." He claims that parents' responsibility for a child is an imperative, not just an expression of their good will.

Conclusion

It is in the public interest to strengthen the family role, increase its rights. Respect for the cultural diversity and traditions of the peoples of Europe constitutes a certain commitment for Member States to preserve and develop this diversity. On the other hand, the EU is obliged to protect it at transnational level so that integration processes do not restrict the individual development of countries.

According to R. Arnold, each State is based on values that can be specific to it and closely related to the culture of a given society.

The recognition of a paradigm of human rights, in which the raison d'être of their existence is the structure (nature) of human being, does not exclude the recognition that human rights are fundamental principles of social life which guarantee the existence and development of society. However, the important point is that it is the social relationships that are built for the sake of a person, and not a person who receives rights for the sake of social relationships.

There is not a single provision in Polish law that grants family and as such active legal subjectivity. However, there are numerous norms defining the active rights of parents, and thus their legal subjectivity.

Although the family is entitled to certain rights, it cannot fully exercise them because it is not considered a separate legal entity, but only an object of legal protection.

Also in other modern legal systems and international law there is no explicit recognition of the legal personality of the family. Only the rights of parents and children are mentioned. In legislation there is a far-reaching individualization of rights and the subject of rights is generally only the human individual. Generally, the family rights are not recognized, but only the rights of individuals:

parents and children (each individually). Social subjectivity is not automatically legal subjectivity.

The norms ordering the protection of family and its rights are contained in Polish law in the Constitution of the Republic of Poland. Article 18 states “Marriage as a relationship between a man and a woman, family, motherhood and parenthood are under the protection and care of the Republic of Poland.”

The family is at the foundation of all human communities, all societies and communities, hence a separate Family Code should become immediately after the Constitution the most important legal act shaping the model of the Polish family, but the starting point should be parenthood – appropriate parenthood, mutual responsibility, appropriate relationship.

Responsibility should be the basis of ethical human action, respecting the autonomy of the entity, indicating the basic references, which are responsibility for their own actions and responsibility for the world, as is particularly evident in the age of globalization. Alongside concepts such as truth or freedom, responsibility becomes a kind of new paradigm of thought. In the thoughts of phenomenologists or philosophers of dialogue, such as Max Scheler, Nicolai Hartmann, Franz Rozenzweig, Martin Buber, the aforementioned Hans Jonas, or Emmanuel Lévinas, the notion of responsibility no longer means merely taking on the effects of own actions, but becomes the source experience of a man, constituting him as a person. Therefore, human life is a constant response to various issues that lead to “responding to…,” becomes “responsible for…”

This paradigm was taken into account when shaping the draft Family Code /2018/. The currently binding Family and Guardianship Code /1964/ was adapted to the eternal development level, both social and economic as well as cultural and axiological-ideological.

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