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Legal Protection of the Unborn Child

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Legal Protection of the Unborn Child

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Introduction

The Convention on the Rights of the Child, adopted on November 20, 1989 by the United Nations General Assembly, already in its preamble clearly provides that “the child [...] needs special safeguards and care, including appropriate legal protection, before as well as after birth.”¹ Poland ratified the Convention on April 30, 1981.² Therefore, a reasonable question emerges as to whether the conceived child (*nasciturus*) is subject to legal protection under the Polish legal system? And if so, what does this protection involve? What is the scope of this protection? The issue undertaken in this article will be limited to presenting the position of the Polish doctrine on the civil-law situation of the *nasciturus*, and the actual scope of the protection of the conceived child will be determined on the basis of the Polish law regulations currently in force.

¹ Moreover, Art. 1 of the Convention specifies that the term “child” means every human being below the age of 18 years. Consequently, since the human fetus is unquestionably “a human being,” then the protection provided also covers *nasciturus*; see T. SMYCYŃSKI: *Konwencja o prawach dziecka*. Warszawa 1994, p. 10.

² Ratified by the Republic of Poland on 30 April 1981, Dz.U. of 1991, No. 120, item 526 as amended.

1. Who is the subject of the legislator's protection?

The first problem to face is to identify the subject of protection. It seems odd that the Polish legislator is unable not only to indicate time frames of the beginning of the human life that is subject to protection, but also to use a uniform term to define *nasciturus*, that is, the form of human life before birth,³ applying instead such notions, as, for example: conceived child,⁴ unborn child,⁵ conceived but yet unborn child,⁶ unborn descendant,⁷ fetus, pregnancy,⁸ child in the labour period,⁹ conceived child capable of living independently outside the body of the pregnant woman.¹⁰ In the doctrine of criminal law alone there are a multitude of various concepts defining the beginning of human life based, among others, on the following criteria:

— **developmental criterion** — according to which the fetus becomes a child when it is able to live independently outside the mother's body;

³ Such definition of *nasciturus* was proposed by: T. SMYCZYŃSKI: "Pojęcie i statut prawny dziecka poczętego." *SP*, 1989, vol. 4, p. 25.

⁴ Art. 75 of the Family and Guardianship Code: "It is possible to recognize paternity before the birth of a *conceived child*."

⁵ Art. 142 of the Family and Guardianship Code: "If the paternity of a man not being the mother's husband has been authenticated, the mother may demand that this man *before the birth of the child* sets aside an appropriate sum of money for the cost of maintaining the mother for three months during pregnancy and the cost of maintaining the child during the first three months after the birth. The date and manner of payment of this amount is determined by the court."

⁶ Art. 182 of the Family and Guardianship Code: "A custodian may be appointed for a *conceived but yet unborn child*, if it is necessary to protect the child's future rights. The custodianship ceases as soon as the child is born." Art. 599 of the Code of Civil Procedure: "The guardianship court competent for appointing a custodian for a *child conceived but yet unborn* is the court competent for the place of residence or stay of the mother."

⁷ Art. 994 §2 of the Civil Code: "In the calculation of the legitimate portion due to the descendant, gifts made by the testator when he/she had no descendants shall not be added to the estate. However, this shall not apply when the gift was made less than three hundred days before *the birth of the descendant*."

⁸ Art. 10 §3 of the Family and Guardianship Code: "If a woman becomes pregnant, her husband cannot claim the annulment of marriage for reasons of age."

⁹ Art. 149 of the Criminal Code: "A mother who kills *her child during the period of labour* under the influence of its course, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years."

¹⁰ Art. 152 §3 of the Criminal Code "Whoever commits an act specified in § 1 or 2, after the *conceived child became capable of living independently outside the pregnant woman's body*, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years."

- **obstetrical criterion** — according to which the fetus becomes a child (human being) at the moment when labour starts (actual labour pains occur);
- **physical criterion** — according to which the fetus becomes a human being from the moment of partial or total evacuation from the mother's womb;
- **physiological criterion** — according to which the moment of human birth is the moment of starting independent breathing (with lungs).

In view of such a conceptual disorder and the lack of precision in determining the beginning of the human life, it seems illusory to refer to the legal protection of *nasciturus*.

2. Civil law situation of *nasciturus* in the doctrine

The Polish civil-law doctrine also does not provide for a uniform position towards legal protection of the unborn child. Four trends concerning views on the civil-law situation of *nasciturus* can be established in the doctrine, according to which the situation of *nasciturus* as a matter of principle is subject to legal protection, but it does not have full legal capacity. At this point, the following views can be distinguished.

2.1. *Nasciturus* has no legal capacity

Although supporters of the view claiming no legal capacity of *nasciturus* do not share the early-Roman idea assuming that *nasciturus* is only a part of the body of the mother (*pars viscerum matris*), they refer to a later Roman principle expressed in the following words: *Nasciturus pro iam nato habetur, quoties de commodis eius agitur*. According to this principle, a human fetus is covered by legal protection by applying a fiction stating that the results of life birth extend backwards.¹¹ In the same vein, for instance the child that was to be born was provided with the possibility to gain material advantage (mainly securing the right to inheritance)

¹¹ See K. KOLAŃCZYK: *Prawo rzymskie*. Warszawa 1973, p. 164; L. ŚWITO: "Osobowość prawna *nasciturusa* w prawie kanonicznym i polskim." *Prawo Kanoniczne*, 1997, vol. 40, no. 1—2, p. 233.

by establishing a special custodian to care for its interests. However, the advocates of this idea do not recognize any other rights and obligations of the unborn as living beings.

2.2. *Nasciturus* has legal capacity subject to the condition precedent

According to the view claiming that *nasciturus* has legal capacity subject to the condition precedent, subjective rights before the child birth do not exist yet, and consequently, they cannot be exercised, but are only secured for the future. Only after the birth of a live child is the statutory condition satisfied. The child acquires full legal capacity, and therefore its statutory rights emerge at this moment, for example the right to inheritance.¹²

2.3. *Nasciturus* has legal capacity subject to the condition subsequent

Legal capacity subject to the condition subsequent ensures stronger protection for *nasciturus*, assuming that it has general legal capacity, but on the condition subsequent, and not precedent. Under this theory, *nasciturus* is entitled to subjective rights, which expire if the child is not born alive. The subjective right of *nasciturus* exists already before its birth, and after the childbirth, this conditional subjective right is transformed into an absolute subjective right vested to an already born child, and still constitutes the same substantive right. For instance, *nasciturus* conditionally inherits the bequest after the testator who had died before its birth, and since the moment of birth, it still holds the same inheritance, but now unconditionally. This theory builds a stronger position of *nasciturus*, since it is based on the assumption of the continuity of the existence of human being from the conception to the death. Birth does not constitute an event that changes the existing humanity of a person.

¹² Art. 927 § 2 of the Civil Code: “However, the child that had been conceived before the moment of opening the will may be a heir provided that it is born alive.”

2.4. *Nasciturus* has full legal capacity

The final approach assumes full legal capacity, as expressed in Art. 8 § 2 of the Civil Code, introduced by the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion of January 7, 1993.¹³ The norm of this article granted *nasciturus* full legal capacity with regard to non-material rights (such as life, health, civil status rights, particularly descent from specific parents), and a conditional capacity to property rights. However, an amendment to the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion introduced three years later¹⁴ resulted in repeal of Art. 8 § 2 of the Civil Code, depriving *nasciturus* of legal capacity.

Nevertheless, it should be emphasized that in the years 1993—1996, legal capacity granted to *nasciturus* did not ensure its full protection, since the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion admitted in Art. 7.2 — under certain conditions — the possibility of abortion. Depriving *nasciturus* of the right to life was possible when pregnancy endangered the mother's life or health; when the death of a conceived child resulted from actions undertaken to save the mother's life, or to counteract serious damage to mother's health, the threat of which was confirmed by the opinion of two other doctors; if prenatal tests indicated severe and irreversible damage to the fetus; if there were strong grounds for believing that the pregnancy was the result of a criminal act, for example rape or incest. As applicable legislation concerning abortion did not change, it is impossible to talk about full legal protection of *nasciturus*.

3. Polish law

While analysing the regulations of the Polish law, it should be stated that the scope of legal protection of *nasciturus* is not full and comprehensive, but concerns first of all its material rights.¹⁵ This manifests itself

¹³ Dz.U. of 1993, No. 17, item 78.

¹⁴ Act of 30 August 1996 amending the Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion and amendment of some other acts, Dz.U. No. 139, item 646.

¹⁵ See the decision judgment of the Constitutional Tribunal of May 28, 1997 in case K 26/96.

in granting *nasciturus* the right to inheritance,¹⁶ the legitimate portion of inheritance,¹⁷ alimony claims,¹⁸ and the possibility to establish a custodian to protect its future rights.¹⁹ A partial recognition of the subjectivity of *nasciturus* is also granted by the Polish legislator in regulations that make it possible to recognize the unborn child,²⁰ grant alimony for a pregnant mother²¹ or forbid annulment of marriage on the grounds of pregnancy.²² A partial protection of the life of *nasciturus* is also referred to in regulations that forbid killing the child during the labour,²³ prohibit abortion with a breach of the applicable abortion law,²⁴ or forbid using

¹⁶ Art. 927 § 2 of the Civil Code “the child who had been conceived at the moment of opening the estate can be a heir if it is born alive.”

¹⁷ Art. 994 § 2 of the Civil Code: “In the calculation of the legitimate portion due to the descendant, gifts made by the testator when he/she had no descendants shall not be added to the estate. However, this shall not apply when the gift was made less than 300 days before the birth of the descendant.”

¹⁸ Art. 754 of the Code of Civil Procedure: “The court may, even before the child is born, secure future alimony claims related to establishment of paternity, referred to in Art. 141 and Art. 142 of the Family and Guardianship Code, by obligating the obligor to pay an appropriate sum of money for the cost of maintaining the mother for 3 months in the period of labour and of maintaining the child during for the first 3 months after birth [...]”

¹⁹ Art. 599 of the Code of Civil Procedure: “The guardianship court competent for establishing a custodian for the child conceived but yet unborn is the court competent for the place of residence or stay of the mother”; Art. 182 of the Family and Guardianship Code: “A custodian may be appointed for a conceived but yet unborn child, if it is necessary to protect the child’s future rights. The custodianship ceases as soon as the child is born.”

²⁰ Art. 75 of the Family and Guardianship Code: “It is possible to recognize paternity before the birth of a conceived child.”

²¹ Art. 142 of the Family and Guardianship Code: “If the paternity of a man not being the mother’s husband has been authenticated, the mother may demand that this man before the birth of the child sets aside an appropriate sum of money for the cost of maintaining the mother for 3 months during pregnancy and the cost of maintaining the child during the first 3 months after the birth. The date and manner of payment of this amount is determined by the court.”

²² Art. 10 § 3 of the Family and Guardianship Code: “If a woman becomes pregnant, her husband cannot claim the annulment of marriage for reasons of age.”

²³ Art. 149 of the Criminal Code: “A mother who kills her child during the period of labour under the influence of its course, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.”

²⁴ Art. 152 of the Criminal Code “§1. Whoever, with consent of the woman, terminates her pregnancy in violation of the law shall be subject to the penalty of deprivation of liberty for up to 3 years. § 2. The same punishment shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so. § 3. Whoever commits an act specified in § 1 or 2, after the conceived child has become capable of living independently outside the pregnant

violence towards a pregnant woman.²⁵ Thus, Polish legislation not only lacks regulations that could be — as the Convention on the Rights of the Child postulate — an expression of “special safeguards and care” about a child “before as well as after birth,” but due to the effective Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion that permit abortion, *nasciturus* is not guaranteed even such rights as *natus*, since it is deprived of the most important right to life.

Conclusions

The situation of *nasciturus* in Polish law is problematic. On one hand, Polish law partially protects some rights of the conceived child. On the other, the amended Act on Family Planning, Protection of the Human Fetus and Conditions of Permissibility of Abortion deprives it of one of the most basic rights — the right to life. Without the right to life, exercising by *nasciturus* of any other rights is a fiction. Therefore, the Polish law currently in force does not guarantee *nasciturus* full legal capacity and thus does not provide it with satisfactory protection. Consequently, the Convention on the Rights of the Child of November 20, 1989, although it was ratified by Poland on 30 April 1981, is not complied with at the point concerning full legal protection of the conceived child.²⁶

woman’s body shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years.”

²⁵ Art. 153 of the Criminal Code: “§ 1. Whoever, through the use of force against a pregnant women or by other means, without her consent, terminates the pregnancy, or by force, an illegal threat or deceit induces her to terminate the pregnancy shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years. § 2. Whoever commits the act specified in §1 after the conceived child has become capable of living independently outside the pregnant woman’s body, shall be subject to the penalty of the deprivation of liberty for a term of between one year and 10 years.”

²⁶ In the Canon law there are two legal norms referring to the legal protection of *nasciturus*:

Can. 1398 CIC provides for a penalty of excommunication for actual killing of a human fetus.

Can. 871 CIC requires that aborted fetuses should be baptized, “if they are alive in so far as this is possible,” therefore grants them with the ability to receive baptism, as any other person already born who has not been baptized yet.

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LUCJAN ŚWITO

Legal Protection of the Unborn Child

Summary

The article undertakes the issues of legal protection of the conceived child in Polish law. The analysis of Polish legislation and the Polish doctrine concerning the civil law situation of *nasciturus* leads to the conclusion that Polish law currently in force is contrary to the Convention on the Rights of the Child of November 20, 1989 which demands legal protection of a child both before and after birth. On the one hand, Polish law partially protects certain rights of the conceived child, and on the other — deprives it of the most fundamental rights, the right to life. Without the right to life, exercising any other rights by *nasciturus* is a fiction.

LUCJAN ŚWITO

La protection juridique d'un enfant conçu

Résumé

L'article aborde la question de la protection juridique d'un enfant conçu, dans le droit polonais. L'analyse entreprise à propos de la législation polonaise et de la doctrine polonaise relative à la situation civile *nasciturus* conduit à la conclusion que le droit polonais en vigueur est en contradiction avec la Convention relative aux droits de l'enfant du 20 novembre 1989 qui exige la protection juridique de l'enfant aussi bien avant et après sa naissance. D'un côté, le droit polonais protège partiellement certains droits d'un enfant conçu, de l'autre, il lui retire un des droits les plus fondamentaux : celui à la vie. En effet, si un enfant conçu en est privé, sa possibilité de profiter d'autres droits n'est qu'une fiction.

Mots clés : *nasciturus*, enfant conçu, droit à la vie, grossesse, fœtus

LUCJAN ŚWITO

Tutela giuridica del bambino concepito

Sommario

L'articolo intraprende le questioni della tutela giuridica del bambino concepito nel diritto polacco. L'analisi eseguita della legislazione polacca e della dottrina polacca sulla situazione civile-giuridica del *nasciturus* porta alla conclusione che la legge polacca vigente è in contraddizione con la Convenzione sui diritti dell'infanzia del 20 novembre 1989 che esige la tutela giuridica del bambino sia prima, sia dopo la nascita. Da un lato la legge polacca difende parzialmente alcuni diritti del bambino concepito, dall'altro lo priva di uno dei diritti più fondamentali, il diritto alla vita. Senza il diritto alla vita la fruizione da parte del *nasciturus* di altri diritti è quindi una finzione.

Parole chiave: *nasciturus*, bambino concepito, diritto alla vita, gravidanza, feto