

# Tomasz Gałkowski

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## The Right of the Child to Life and to Preserve His or Her Identity

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TOMASZ GAŁKOWSKI

Cardinal Stefan Wyszyński University, Warsaw, Poland

## The Right of the Child to Life and to Preserve His or Her Identity

**Key words:** the child's right to life, the child's right to identity, Convention on the Rights of the Child, the Polish legal order

In this article two rights of the child are juxtaposed: the right to life and the right to preserve his or her identity. The right to life is the foundation of all other rights which were formulated in the Convention on the Rights of the Child, adopted and opened for signature in 1989,<sup>1</sup> and each of them could be discussed in relation to the child's right to life. Adopting this stance, I will deal with both the mentioned rights and, at the same time, point out their mutual implications.

The subject of both the rights is a child, which term, as it is described by the Convention, means every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier.<sup>2</sup> The Convention does not define the beginning of childhood but only its conclusion. The question of the beginning of life and defining its subject as a child, is open to acknowledging that conception is such a moment. This does not rule out discussion about establishing a later time for the beginning of a person's life.

Considering the right to preserve one's identity will constitute the main subject of the present article since, as it turns out, the right to life and the life of a person during the prenatal period do not result in the right to preserve identity. On the other hand, the legal definition of per-

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<sup>1</sup> Convention on the Rights of the Child (November 20, 1989) — <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 4.6.2014).

<sup>2</sup> Art. 1.

sonal identity shows there are some implications for the person's life before his or her birth. Therefore, the question that follows is: Does the child's right to life always result in his or her right to preserve identity?

## From protection of the child to his or her rights

The first attempts at protecting the rights of the child on the ground of national legislation were made in Great Britain in 1819. Robert Owen, an activist of the socialist movement and pioneer of the cooperative movement, proposed a ban on employing small children in mines, factories and farming, which resulted in enacting a law called the Children Act in 1908. Subsequent acts protecting children were passed in Hungary (1901), France (1904) and Belgium (1912). In terms of their content they referred to social assistance for children, the character of which was philanthropic.

Next, attempts to protect the rights of the child, on an international scale, took on the form of tutelary activity. In 1920 in Geneva L'Union Internationale de Secours aux Enfants (UISE — International Save the Children Union) was founded. Its purpose was, among other things, the legal regulation of the child's rights on an international scale. The commitment of the Union led to the approval, by the League of Nations General Assembly on September 26, 1924, of the first international act protecting human rights, namely, the Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, in which five demands rather than laws were formulated as responsibilities of humankind towards the child.<sup>3</sup>

Concern for the rights of the child resulted in establishing, in 1922, the Association Internationale pour la protection de l'enfance. In the statutes of this Association, the protection of the child included improvement

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<sup>3</sup> "By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva', men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed: 1. The child must be given the means requisite for its normal development, both materially and spiritually; 2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; 3. The child must be the first to receive relief in times of distress; 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; 5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men" — <http://www.un-documents.net/gdrc1924.htm> (accessed 4.6.2014).

of his or her social situation, being safeguarded against negative influences in educational environments, taking care of homeless and orphaned children and struggling with the signs of abnormalities in their development.<sup>4</sup> Next, the basic rights of the child were included in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, which states in Art. 25 clause 2: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” However, the Declaration of the Rights of the Child adopted by UN General Assembly in 1959 was the first to express and formulate clearly the fundamental principles concerning protection of the rights of the child. Declaration of the Rights of the Child pointed out that the child is an independent person with his or her own interests, needs and rights. Therefore, the child is not only the subject of care and attention but the subject of rights which should be respected.

## Individual identity and its status

Identity is a notion which is meaningful for many theories in which the subject of research is the human being, community, citizen, nation or culture. Philosophical depiction of identity,<sup>5</sup> in which identity means “being the same person” and deals with defining “what existence is,” has a special meaning for the legal definition of the person. Both these dimensions emphasize unity of the person in an ontological sense (being the same person), the consequence of which is responsibility for his or her actions. Thus, the person not only has identity, which is determined

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<sup>4</sup> Cf. art. 4, Dz. U. z 1929 r. Nr 49, poz. 403.

<sup>5</sup> Legal concept of identity might also be the subject of theological interest within theology of law. Pope John Paul II in *Letter to Families “Gratissimam sane”* wrote about identity using the following words: “This rich and meaningful formulation first of all confirms what is central to the identity of every man and every woman. This identity consists in the *capacity to live in truth and love*; even more, it consists in the need of truth and love as an essential dimension of the life of the person. Man’s need for truth and love opens him both to God and to creatures: it opens him to other people, to life ‘in communion’, and in particular to marriage and to the family. In the words of the Council, the ‘communion’ of persons is drawn in a certain sense from the mystery of the Trinitarian ‘We’, and therefore ‘conjugal communion’ also refers to this mystery. The family, which originates in the love of man and woman, ultimately derives from the mystery of God. This conforms to the innermost being of man and woman, to their innate and authentic dignity as persons” (no. 8b).

by the ability to think back and being aware of the actions whose perpetrator is one's true "self" (the unity of consciousness), as well as responsibility for one's deeds, but the person is identical as long as he or she is defined as a unity.<sup>6</sup> To describe the unity of a man, John Locke introduces the term of the person, pointing out that personal unity is the unity of a particular person, which is different from the sum of its parts.<sup>7</sup>

The concept of identity with reference to people forming national and international community, allows their individualization with a view to defining their status, including above all legal capacity and capacity for legal action. From this aspect legal individualization of the person is a requirement which results from respect for human dignity and, at the same time, determines the position of parties in legal relations. A set of traits that make human individualization possible is described as the identity of a natural person.<sup>8</sup> The identity of a natural person is established: (1) after the child's birth by drawing up a birth certificate, or (2) by pursuing the rights of marital status. Individual identity influences the definition of the legal status, which consists of: political status (citizenship), marital (family) status which indicates that an individual is a member of a particular family and personal status (first name, surname, age, sex, state of health).<sup>9</sup>

## Developing the right of the child to preserve his or her identity

Recognizing the legal subjectivity of the child requires deciding on the criteria which determine it and allow for the personalization (individualization) of the subject of rights and responsibilities. The consequence of

<sup>6</sup> Cf. R. FERBER: *Podstawowe pojęcia filozoficzne*. Vol. 2. Kraków 2008, p. 81.

<sup>7</sup> Cf. J. LOCKE: *An Essay Concerning Human Understanding* [web edition published by eBooks@Adelaide; <https://ebooks.adelaide.edu.au/l/locke/john/l81u/index.html>], (Polish trans. *Rozważania dotyczące rozumu ludzkiego*. Warszawa 1955), II, 27, 26.

<sup>8</sup> Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z 7 grudnia 2007 r. zmieniające rozporządzenie w sprawie szczegółowych zasad sporządzania aktów stanu cywilnego, sposobu prowadzenia ksiąg stanu cywilnego, ich kontroli, przechowania i zabezpieczenia oraz wzorów aktów stanu cywilnego, ich odpisów, zaświadczeń i protokołów (Regulation of the Minister of the Interior and Administration passed on December 7, 2007 amending the regulation concerning specific principles of drawing up and keeping civil registry records, their inspection, storage and security and standard forms of vital records, their copies, certificates and reports), Dz.U. Nr 235, poz. 1732.

<sup>9</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości w polskim porządku prawnym*. Warszawa 2013, p. 79.

individualization is the determination of specific rights and duties. Thus, the subject of law stops functioning as a quite unidentified part of the community. Personalization (individualization) of the person, whose foundation lies in the dignity of every human being proclaimed in the Universal Declaration of Human Rights, has significance for determining the legal status of the person together with the rights and responsibilities he or she is entitled to and allows for legal protection.

The first recommendations concerning personalization were made in the Declaration of the Rights of the Child adopted by UN General Assembly in 1959, where, for the first time, in Art. 3, there appeared the formulation of what was later known as the right of the child to preserve his or her identity, which was thus phrased: “the child shall be entitled from his birth to a name and a nationality.”

Assuming this point of view, the European Court of Human Rights (formerly the European Commission of Human Rights), pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms drafted in 1950, on more than one occasion issued statements based on its Art. 8.1: “Everyone has the right of respect for his private and family life, his home and his correspondence.” The right to respect for one’s family life described in this article is not limited to the ties of blood, marriage or adoption, but comprises common and liberating laws, which aim at protecting one’s privacy, including, among many other laws,<sup>10</sup> the law to find one’s own identity.<sup>11</sup> The Tribunal expressed its opinion about the right to preserve one’s identity while dealing with the issues of sex change, concluding that the surname is a means of personal identification and indicates family ties, so it concerns the private family life of an individual,<sup>12</sup> thus acknowledging the right of an adopted person to seek information which allows him or her to find their identity and live a stable private life.<sup>13</sup>

The necessity to identify a child was proclaimed by the United Nations General Assembly on December 16, 1966 in the International Covenant on Civil and Political Rights,<sup>14</sup> which, in article 24.2, contains the following expression: “Every child shall be registered immediately after birth

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<sup>10</sup> The array of these rights is not a closed matter. It includes, for instance, the right of parents and their children to be in contact with each other, the right of parents to take a stand on the issue of their child’s adoption, the right to live in the country of origin.

<sup>11</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości...*, pp. 96—98.

<sup>12</sup> Cf. M.A. NOWICKI: *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*. Warszawa 1998, p. 256.

<sup>13</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości...*, p. 98.

<sup>14</sup> The Covenant was adopted by Poland in 1977 (Dz.U. Nr 38, poz. 167).

and shall be given a name” and “every child has the right to acquire a nationality” (24.3).

The right of the child to preserve identity, the scope of which was much broader, was formulated in the Convention on the Rights of the Child adopted by the UN General Assembly in 1989<sup>15</sup> in Art. 7<sup>16</sup> and in 8.<sup>17</sup>

The development of the right to preserve one’s identity reflected in international documents beginning with the right of the child to identification through surname and citizenship (Declaration and International Covenant) acquired wider scope and was expressed in the right to have a first name, surname, citizenship and getting to know, in so far as it is possible, one’s parents and family relations. The above expressions contain their aim, that is, the situation in which the child cannot function as a stateless person, thereby losing those rights connected with his or her citizenship. The purpose of ensuring the right to identity is for the protection of the rights of the child, which the state is obliged to restore.

In the above quoted documents the child’s subjectivity was clearly emphasized and therefore he or she is entitled to have a birth certificate drawn up immediately after birth as well as to be given a surname and citizenship. The right to preserve one’s identity has its foundations in the fundamental law, which is, in a constitutional sense, the right to life, that in turn belongs to the array of personal liberties and rights. It guarantees the possibility of taking advantage of other things that the child is entitled to, including the right to preserve identity. Referring to what was mentioned earlier in terms of the concept of identity, one can say that recognizing one’s own life (I live by myself), that is “being the same person” is connected with the right to getting to know the one who lives and acts (“what existence is”).

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<sup>15</sup> Poland ratified the Convention in 1991 (Dz.U. Nr 120, poz. 526) and thus it became an element of the binding legal system.

<sup>16</sup> “1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

<sup>17</sup> “1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

## The content of the right of the child to preserve identity

The Convention on the Rights of the Child determines the child's identity in reference to the following categories: the child's first name and surname, citizenship, family relations or descent of the child. The identity of the child begins at the moment of making a civil registry record. A human being, by virtue of his or her dignity, has an inherent right to a record in those civil offices which reflect the truth concerning his natural origin. Acquiring civil status, the child acquires recognition through his or her identity. As a personal right, the child is subject to legal protection which constitutes the condition for pursuing one's rights.

Nevertheless, there are situations in which marital status is different from the actual one. In this case the legal status is more important. Yet, it does not exclude the possibility of pursuing the actual state. That is why, within the right of the child to preserve identity one can distinguish the right to (a) have one's own identity through drawing up a birth certificate according to the actual state, (b) establishing identity (the right to get to know one's parents), which was clearly stated in the Convention in Art. 7,5, and (c) and to protect that identity (Art. 8,1).

In the Polish legal order, regulations directly demanding personalization of the human being, do not exist. Indirectly, this gap was filled with the rules of the family and administrative law created while dealing with the system of binding regulations as a whole.<sup>18</sup> The legal doctrine which discusses the right to preserve one's identity also focuses mainly on the subjective right to find out the truth about it, using the term of biological identity, that is, the actual biological origin and not the genetic one.<sup>19</sup>

## The right to maintain identity

Polish legislation, abiding by the statement of the Convention which prescribes immediate compilation of an appropriate birth certificate after the child's birth, does not allow situations in which a child would not possess one.<sup>20</sup> Polish law is explicit about the necessity of having a name

<sup>18</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości...*, p. 89.

<sup>19</sup> Cf. *Ibidem*.

<sup>20</sup> The law on the certificates of personal status passed on September 29, 1986 (Art. 38, 1) states that the birth of a child should be registered within 14 days from the day of birth.



and a surname.<sup>21</sup> Furthermore, the regulation concerning Polish citizenship appears to be sufficient because the child holds Polish citizenship from the moment of birth if at least one of his or her parents is a Polish citizen.

## The right to establish one's own identity

The right to establish one's identity, which is connected with finding out about the descent of the parents, is much more complicated in Polish legislation. Determining the origin of parents is essential, since it conditions the existence of legal relations between the child and his or her parents. Hence establishing the descent of the parents is a pre-condition for the right to preserve identity. In this respect, the Convention in Art. 7,1 allows passing laws which can hinder or even make it impossible to exercise the right to get to know one's parents since it states "as far as possible."

Ratifying the Convention on September 30, 1991, in reference to the above article, Poland asserted that "the right of the adoptee to get to know his or her natural parents will be limited by legally binding solutions which allow adoptive parents to keep the child's descent a secret."<sup>22</sup> Confidentiality of adoption was juxtaposed with the right of the child to find out about his or her identity resulting from birth.

Another element which hinders establishment of identity resulting from birth is the issue concerning methods of assisted reproductive technology. The Polish Family and Guardianship Code introduced a method of assisted procreation by means of the so-called medical procedure, whose scope was not precisely defined.<sup>23</sup> In the doctrine this regulation is interpreted as the possibility of assisting reproduction in case of the husband's inability to conceive a child because of infertility (for example through heterologous artificial insemination). Interpretation arrived at only from a doctrinal perspective is likely to turn out to be insufficient, since a med-

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<sup>21</sup> It is guaranteed by the Family and Guardianship Code, Art. 72, 88, 89 and the regulations on the certificates of personal status (Art. 50. 1,2), which in article 40 specify personal details necessary to draw up the certificate of birth.

<sup>22</sup> Dz.U. Nr 120, poz. 526.

<sup>23</sup> "Zaprzeczenie ojcostwa nie jest dopuszczalne, jeżeli dziecko zostało poczęte w następstwie zabiegu medycznego, na który mąż matki wyraził zgodę" (Denying paternity is not permissible if the child was conceived as a consequence of a medical procedure which the mother's husband consented to), Art. 68.

ical procedure might be extended so that it becomes a method of procreation which ignores parents, that is, a human couple.<sup>24</sup> With the increasing number of conceptions made *in vitro* and due to the diversity of legal and genetic origin, the right of the child to preserve identity becomes especially significant.

The above problem is connected with the issue of determining the so-called natural origin, which according to Polish law and doctrine, is identified with biological (not genetic) origin, that is, descent of the child from parents, namely a human couple. The mentioned change in Art. 68 of the Family and Guardianship Code (Pol. Kodeks rodzinny i opiekuńczy — k. r. i o.) concerning the impossibility of denying paternity if the child was conceived as a consequence of a medical procedure which was accepted by the mother's husband shows that, in case of establishment of the child's marital status with regard to his or her father, the legislator gave priority to the genetic origin of the child over the biological one. When it comes to maternity, the legislator favoured biological origin stating that "the woman who gave birth to the child is the mother."<sup>25</sup> The marital status of the child is determined on the basis of the natural (biological) origin, namely from a human couple. As for the possibility of getting to know genetic origin with regard to fatherhood, it is only a relative establishment of the legal civil status. Polish legislation, when establishing the marital status favours biological origin, making a *ius tantum* presumption. In this situation, however, the person does not lose the right to find out the truth about his or her birth and genetic father, which is rooted in his or her dignity since this right exists regardless of the knowledge of an individual about his or her descent. This situation also occurs in case of surrogate motherhood. The right to establish one's identity concerns biological origin and not genetic one. The existing right of the child to get to know his or her genetic origin means that one cannot regard concealing it for the child's sake as a good thing. This right is also based on personal liberty and human dignity.<sup>26</sup>

Modern methods of medical intervention with regard to the beginning of human life and bearing a child give rise to the impression that, as far as the right to establish identity is concerned, the category of genetic origin outweighs the biological one. However, in this situation there is a clash between the right to establish one's identity and the right of an anonymous donor of the genetic material, which leads to the negation of

<sup>24</sup> Cf. M. ANDRZEJEWSKI: *Prawo rodzinne i opiekuńcze*. Warszawa 2004, p. 121.

<sup>25</sup> Cf. k.r.o. Art. 61.

<sup>26</sup> Cf. L. STECKI: "Prawo dziecka do poznania swego pochodzenia genetycznego (dwugłos)." *Państwo i Prawo* 1990, vol. 10, pp. 65—76.

the right to establish identity at its very core by the procedures of medically assisted procreation.

The right of the child to establish identity is also confirmed by Polish legislation in the case of “an infant unable to survive, born live, but had lived for less than 24 hours.”<sup>27</sup> By live births we should understand “the total excreting or extracting of an infant from the mother’s body, regardless of pregnancy duration, who after such excretion or extraction is breathing or shows signs of life, such as, heartbeat, the pulsating of the umbilical cord or distinct voluntary muscle contractions, no matter whether the umbilical cord was cut or the placental lining separated from the uterus of the mother.”<sup>28</sup> An infant that was born live acquires legal status and becomes the subject of rights and responsibilities.

Individualization of the person by the drawing up of a birth certificate in accordance with natural origin is the content of the right to preserve identity. However, making such a registration is not always synonymous to this right. According to Polish legislation, there is the possibility of giving a name and a surname to the stillborn child by making a record in the Registry Office. Nevertheless, in this situation one cannot talk about the right of the child to preserve identity because it was stillborn and does not become a natural person in the legal sense. In compliance with the regulation issued by the Minister of Health on 21 December 2006, a health certificate may be drawn up upon the parents’ request irrespective of pregnancy duration.<sup>29</sup> Issuing a health certificate by a medical facility is equal to the duty of drawing up a birth certificate in the Registry Office with an annotation that the child was stillborn. Yet, a death certificate cannot be issued if it is not possible to ascertain the presence of fetus tissue and determine the sex of the child. Lack of data concerning the sex of the child makes it impossible to choose a name and determine the inflection pattern of the surname and thereby issuing a birth certificate.

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<sup>27</sup> Cf. art. 66 ust. 1 a.s.c.

<sup>28</sup> Załącznik do rozporządzenia Ministra Zdrowia z dnia 17 września 2004 r. nr 2 (The annex to the regulation issued by the Minister of Health on 17 September 2004), Dz.U. Nr 219, poz. 2230.

<sup>29</sup> Cf. § 1 ust. 2. pkt 1 rozporządzenia Ministra Zdrowia z dnia 21 grudnia 2006 r. *zmieniającego rozporządzenie w sprawie wzoru karty zgonu oraz sposobu jej wypełniania* (§ 1 p. 2 p. 2 of the Regulation of The Minister of Health of 21 December 2006 *amending the regulation concerning death certificate and the way it should be filled in*), Dz.U. z 2007 r. Nr 1, poz. 9.

## The right to protect identity

A form of the right to identity is the right to preserve it, “including citizenship, surname, family relations,” which is stated in Art. 8, section 1 of the Convention. The degree of protection of this right is as important as the one to establish identity. With regard to preserving citizenship, the Polish Constitution states that “a Polish citizen cannot lose Polish citizenship unless he or she renounces it” (Art. 34,2). When it comes to minors who remain in the exclusive custody of a person or persons who do not have Polish citizenship, renouncing it occurs upon the request of his or her legal representatives.”<sup>30</sup>

Examples of state legislation prove that legal protection of the right to preserve identity stands in contradiction to the international law acknowledging the right to get to know one’s identity. This situation occurs in the case of the law of the adopted child to get to know his or her parents. This possibility is expressed in the phrasing of Art. 7, section 1 of the Convention, in which the statement “if it is possible” was added. Poland, making a stipulation to Art. 7 of the Convention, limited the right of the adopted child to get to know his or her biological parents by “legally binding solutions allowing adoptive parents to keep the child’s descent secret.” Adoption, whose aim is the child’s good, understood as ensuring him or her proper upbringing in a family, deprives the child of his or her former identity. Such a possibility, with the decreed right of the child to identity, was provided for by the Convention in no. 8.1. It states that actions aiming at maintaining identity must be taken in compliance with the law. The institution of adoption functioning in Polish law provides for the possibility of changing the child’s identity. In an artificial way, adoption creates a new relationship, on the basis of which a new legal relation within the family develops, as the equivalent of a natural family relation. In case of exploiting solutions which forbid finding out about one’s natural origin, which is connected with the loss of the former name and surname, the basic right to preserve identity is negated.<sup>31</sup> Different forms of adoption determine the maintaining of certain elements defining the identity of the person.<sup>32</sup> The act, issued on September 11, 1956 Law on

<sup>30</sup> Art. 47, ust. 2 Ustawy z dnia 2 kwietnia 2009 r., *o obywatelstwie polskim* (Art. 47, 2 of the act of 2 April 2009 *on Polish citizenship*), Dz. U. z 2012 r., poz. 161.

<sup>31</sup> The sources of such action can be found in the idea of anonymity, whose full form was provided in the European Convention on the Adoption of Children of 1967, Dz.U. z 1999 r., Nr. 99, poz. 1157.

<sup>32</sup> Partial adoption results only in a relation between an adoptive parent and an adoptee and in the future his or her lineal descendants. Complete adoption results in

Acts of Civil Status (Pol. Prawo o aktach stanu cywilnego — a.s.c.<sup>33</sup>), introduced the substitution of names and surnames of the adoptee in favour of the surname of the adoptive parents, with the possibility of getting to know personal data of adoptive parents in the short-form copies of these acts. Thereby, educational and social considerations were given priority over the postulate of objective truth of entries on birth certificates. If adoption is dissolved, the adoptee gains the right to get to know his or her biological parents. He or she has not this right in case of complete adoption if a new birth certificate was drawn up for the adoptee with the possibility of putting down new and complete personal data of the child as well as the personal data of adoptive parents as parents.<sup>34</sup> Thus, the child gains a new identity and a new origin, which permanently breaks the ties with biological parents. In the event of complete adoption there is a possibility of including adoptive parents as the child's parents in the short copies of the birth certificate. In the complete certificate there is an annotation about adoption and natural parents. The other possibility includes drawing up a new birth certificate upon the request of the adoptive parents. However, the previous certificate is not revealed and its copies are not issued. Only the amendment to the regulation on acts of civil status of 1995 introduced the right of an adoptee, who attained majority, to have access to the original birth certificate revealing his or her natural origin, although it can differ from the actual (genetic) one.<sup>35</sup>

Gaining a new identity as a consequence of adoption by drawing up a new birth certificate or making an entry in the already existing one, does not result in the loss of the former civil status and the possibility of pursuing its rights, including establishing or denying natural origin. The fact of adoption only breaks the legal bond which does not influence the existing natural ties. The prohibition on pursuing the rights of civil status concerns only a complete adoptee<sup>36</sup>, which, as a consequence, leads to the total lack of the possibility of pursuing it.<sup>37</sup>

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mutual rights and responsibilities between an adoptee and the relatives of an adoptive parent and ceasing of rights and responsibilities between the child and his or her relatives. Complete adoption which cannot be dissolved on the basis of consent to adoption (giving the child up to be adopted by an unknown person in the future) signed by parents who decide to put their child up for adoption. Cf. E. HOLEWIŃSKA-ŁAPIŃSKA: "Przysposobienie." In: *Wielka Encyklopedia Prawa*. Warszawa 2000, pp. 820—822.

<sup>33</sup> Dz.U. Nr 141, poz. 189.

<sup>34</sup> Cf. J. IGNATOWICZ: "Tajemnica przysposobienia w ujęciu prawa o aktach stanu cywilnego z 29 września 1986 r." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1987, vol. 2, p. 2.

<sup>35</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości...*, p. 251.

<sup>36</sup> Art. 124 k.r.o.

<sup>37</sup> Cf. H. PIETRZAK: *Prawo do ustalenia tożsamości...*, pp. 262—264.

The loss of the right to preserve identity by covering up the tracks of the actual origin, results in depriving the person of that right, but at the same time gives rise to the right to preserve the new identity which is the consequence of adoption. Evaluation of the institution of adoption functioning in the Polish legal order leads to the conclusion that protection of biological and adoptive parents' interest has an advantage over the protection of the child's interest, although it is justified with the latter. According to international legislation, based on acknowledging human dignity and basic rights, including the right to establish identity, it seems appropriate to postulate that an adult should have full access to all the data concerning his or her descent. Establishing one's origin in accordance with biological truth is significant in the proper "establishment of civil status in terms of filiation."<sup>38</sup>

## The right to life

The right of the child to preserve identity has its foundations in the basic right to life, which belongs to the array of personal rights and liberties. Subsequent articles of the Convention refer to the consequences of this right. I will discuss only these aspects of the right to life which are connected with the right to identity.

The right to acquire identity comes into existence the moment a newly-born child comes into the world. However, I will draw attention to those legal aspects which allow the child developing in the mother's womb to acquire this right. Legislators, both international and Polish, recognize the fact of human existence regardless of the debate on the beginning of human life, as early as before birth and attend to it with legal care. Humanity results from possessing a human genotype, which came into existence as a consequence of being born of a man and a woman,<sup>39</sup> it is primal in relation to the concept of a natural person, which comprises a shorter span of time from the perspective of law.<sup>40</sup>

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<sup>38</sup> T. SMYCZYŃSKI: "O potrzebie ustalenia pochodzenia dziecka zgodnie z tzw. prawdą biologiczną." In: *Finis legis Christus. Księga pamiątkowa dedykowana Księdzu Profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*. Eds. J. WROCEŃSKI, J. KRAJCZYŃSKI, vol. 2. Warszawa 2009, p. 1266.

<sup>39</sup> Cf. Z. RADWAŃSKI: *Prawo cywilne — część ogólna*. Warszawa 2004, p. 148.

<sup>40</sup> Cf. T. SOKOŁOWSKI: "Sytuacja prawna nasciturusa w art. 9 Projektu Kodeksu cywilnego." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2009, vol. 2., p. 186.

Characteristic of the protection of human life before birth is the legal definition of a “human being” contained in the Explanatory Report on the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (known as the Convention on Human Rights and Biomedicine) 4 April 1997.<sup>41</sup> A human being is a person at every stage of development, including the prenatal period. The same statement may be found in the ruling of the Constitutional Tribunal of 28 May 1997 in which it is said that “legal protection of life begins as early as at the moment of conception of every human being” and “the value of life as a commodity protected constitutionally does not depend on the phase of development.”<sup>42</sup>

Despite the above statements, complete and absolute protection of human life has not been legally determined. Initiated at the turn of the 19th and 20th centuries, the trend of liberalization of protection of human life so far guaranteed in the penal codes and based on the juxtaposition of the *nasciturus*' rights and other rights protected by law (the mother's well-being) led to handing over the competences connected with protecting life to special acts. Influenced by the situation at the moment they were being passed, they gave rise to the fact that human life took on a relative character.<sup>43</sup>

Legal protection of the life of the *nasciturus* is regulated in different ways: from the model absolutely forbidding abortion to the model allowing exceptions from absolute protection of human life in the prenatal stage. There are also legal systems in which abortion can be performed on demand. In the latter one, the legal status of the *nasciturus* is not equal to a born person but requires additional defining.<sup>44</sup>

Despite diversity within legal doctrine for the concepts of a conceived child and a natural person having legal capacity, the legislator provides the *nasciturus* as well as a live-born person with legal protection.<sup>45</sup> Then, however, the child's parents are not his absolute representatives when the attributes of parental power cannot be attained; for instance, due to lack of the legal possibility of establishing the child's origin (with the exception of the presumption of the married couple's descent) or the

<sup>41</sup> Poland signed the document on May 7, 1999, but is not a party to the Convention, because it has not been ratified.

<sup>42</sup> K 26/96, OTK 1997, nr 2, poz. 19.

<sup>43</sup> Cf. H. PIETRZAK: “Prawo do życia, jego nienaruszalność i nie rozporządzalność. Aspekty prawno-karne.” *Prawo Kanoniczne*, 2013, vol. 56, no. 2, pp. 147—149.

<sup>44</sup> *Ibidem*, pp. 149—150.

<sup>45</sup> For example, a child conceived at the moment of opening the estate can be the heir or the legatee if he or she comes into the world alive — Art. 927 § 2, k.c. (Civil Code); paternity of the conceived child can be established through the act of acknowledgement; for a stillborn child a certificate of birth can be drawn up.



potential danger to the life of the *nasciturus* because of action taken to procure an abortion, which is not included in parental power. In this situation, the Polish legislator provides for the possibility of appointing a *ventris* guardian (*curator ventris*).<sup>46</sup> The purpose of this position is to protect the well-being of the unborn child which is reinforced by public interest.<sup>47</sup> The child's well-being means guarding the "future rights of the child" which he or she will be entitled to after acquiring legal status (birth), as long as there is a real threat of any violation (for example taking steps aiming at abortion or medical interventions which would harm the health of the fetus). The guardian carries out tasks whose purpose is protection of the life and health of the conceived child, the violation of which might result in a demand, from a statutory representative, to redress the losses suffered by the child before birth.<sup>48</sup> Appointing a *ventris* guardian equals acknowledging a conditional legal capacity and the capacity of the conceived child to perform actions in court proceedings.

Both legal declarations and legislative activity prove, at least conceptually, the value of life from the moment of birth and action is taken in order to protect it. However, human life becomes the subject matter of a contract and is subject to relativization and legal compromise. Similar statements can be made about the right to preserve identity which, as a basic right resulting from human dignity, is not adequately observed. It is also not possible to ignore some contradictions which are considered beyond legal solutions. The human being becomes a natural person the moment he or she is born, and as a result acquires legal status and becomes the subject of rights and responsibilities. Moreover, he or she acquires civil status and identity which is confirmed by drawing up an official birth certificate. Such an identity, however, is also acquired by a stillborn whose birth certificate was recorded. It proves that he or she was recognized as a living being regardless of the developmental phase of prenatal life. This living being was acknowledged to be a human who, *de facto*, is not entitled to have identity, but who acquires it as a dead person. To prove that the *nasciturus* is treated as a person from the moment of birth, he or she is granted rights, the execution of which may be watched over by a *ventris* guardian. Therefore, is not granting the *nasciturus* these rights equal to recognizing him or her as a human

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<sup>46</sup> Art. 506 and 470 k.p.c., Dz.U. Nr 43, poz. 296 z późn. zm. Appointing a guardian occurs according to a routine procedure the moment there are legal foundations to it or upon the request of an indicated person. The guardian can be one of the parents if there is no conflict of interest between him or her and the child.

<sup>47</sup> Art. 182 k.r.o.

<sup>48</sup> Cf. Art. 446 k.c.



being who acquires legal status only after birth? The concept of personal identity is much broader than the concept of the right to preserve identity. Opening oneself to cognition enlightened by faith one could add that this identity is shaped in God's creation of man in His own image and is reflected in life in accordance with this act and conception by the Creator.

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TOMASZ GAŁKOWSKI

## The Right of the Child to Life and to Preserve His or Her Identity

### Summary

The subject matter of the essay is discussing the development of the child's right to identity and referring it to the child's right to life. The subject of both rights is the child, who according to the Convention on the Rights of the Child adopted in 1989 means "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Thus, in the description of the Convention the issue of the beginning of life of the person-child remains open. In accordance with this thought the author of the study analyses some regulations of the Polish legislation, which grant the child certain rights as early as in the pre-natal period. However, the right to life and the life of the person in the pre-natal period do not result in the right to identity, which is acquired at the moment of birth. On the other hand, legal description of personal identity indicates that it has its implications also in reference to pre-natal life of the person. The author attempts to answer the question concerning the relationship between the right to life and the right to identity — whether the child's right to life always gives rise to the right to identity or whether only the birth of the child influences this right.

TOMASZ GAŁKOWSKI

## Le droit de l'enfant à la vie et celui de garder son identité à lui / à elle

### Résumé

Le présent article aborde la question de la formation du droit de l'enfant à son identité et sa référence au droit de l'enfant à la vie. C'est bel et bien l'enfant qui est le sujet des deux droits. Selon l'article 1<sup>er</sup> de la Convention relative aux droits de l'enfant de 1989, « un enfant s'entend de tout être humain âgé de moins de dix-huit ans, sauf si la majorité est atteinte plus tôt en vertu de la législation qui lui est applicable ». Selon la définition de la Convention, la question concernant le début de la vie de l'homme-enfant est restée par conséquent ouverte. Conformément à cette idée, l'auteur du présent article analyse quelques réglementations de la législation polonaise qui accordent certains droits à l'enfant déjà à la période prénatale. Le droit à la vie et la vie de l'homme au cours de la période prénatale n'entraînent pas cependant le droit à l'identité qui est acquis au moment de la naissance. D'autre part, la définition juridique de l'identité personnelle indique qu'elle a ses implications également à l'égard de la vie humaine prénatale. L'auteur essaie de répondre à la question concernant le rapport entre le droit à la vie et celui à l'identité : le droit de l'enfant à la vie entraîne-t-il toujours le droit à l'identité et est-ce seulement la naissance de l'enfant qui influence ce droit ?

**Mots clés :** droit de l'enfant à la vie, droit de l'enfant à l'identité, Convention relative aux droits de l'enfant, ordre juridique polonais

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TOMASZ GAŁKOWSKI

## Il diritto del bambino alla vita e al mantenimento della propria identità

### Sommario

L'argomento dello studio è quello di presentare la formazione del diritto del bambino all'identità e il suo riferimento al diritto del bambino alla vita. L'oggetto di entrambi i diritti è il bambino che, conformemente all'art. 1 della Convenzione sui diritti dell'infanzia del 1989, è definito come "ogni essere umano avente un'età inferiore a diciott'anni, salvo se abbia raggiunto prima la maturità in virtù della legislazione applicabile". Nella definizione della Convenzione nel contempo è rimasta aperta la questione dell'inizio della vita dell'uomo-bambino. Conformemente a tale pensiero l'Autore dello studio analizza alcune norme della legislazione polacca che, già nel periodo prenatale, riconoscono al bambino alcuni diritti. Il diritto alla vita e la vita dell'uomo nel periodo prenatale non comportano tuttavia il diritto all'identità che viene acquisito al momento della nascita. D'altro canto la definizione giuridica dell'identità personale indica che ha le sue implicazioni anche rispetto alla vita umana prenatale. L'Autore cerca di dare una risposta alla domanda relativa al legame tra il diritto alla vita e il diritto all'identità: il diritto alla vita del bambino genera sempre il diritto all'identità? E solo la nascita del bambino influisce su tale diritto?

**Parole chiave:** diritto del bambino alla vita, diritto del bambino all'identità, Convenzione sui diritti dell'infanzia, ordine giuridico polacco