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*The normative construct of "the good of the child" and its judicial application*

Abstract

The good of the child is a common normative criterion in the Polish legal system. Its presence is noticeable in the application of the law relating, inter alia, to the family and guardianship law, civil law, constitutional law, penal law, and administrative law. The universality of this criterion is also determined by the influence of international law on the Polish legal system manifested predominantly by Poland's membership in international organisations established to protect human rights, entering into major international treaties on child protection, and respecting international and supranational court decisions.

The area of research has been narrowed down to the application of this normative construct, determination of its content and typology in view of the issues of objectivization. This study aims at demonstrating how the normative construct that incorporates the good of the child operates in the law application processes. Defined by the aims of the study, parallel analyses are made to determine how courts understand and perceive the good of the child as a normative category and whether the content of the construct is subject to objectivization in the course of taking judicial decisions.

The normative construct which includes the good of the child is an inter-branch structure, since it occurs in normative regulations pertaining to different branches of law. However, given the undefined nature of the phrase, the meaning of the good of the child cannot be determined with adequate precision. Another key feature of the phrase in question is its interdisciplinary character. The phrase can be easily found in psychology, pedagogy, sociology, etc.

This is a comparative and practical study in the field of the theory of law. Its comparative aspect extends to normative, axiological, and judicial fields. The practical aspect is linked to the analysis of judicial decisions of common courts, the Supreme Court of Justice, Voivodship Administrative Courts, the Supreme Administrative Court, the Constitutional Tribunal, the European Court of Human Rights, and the European Court of Justice. The theoretical aspect covers considerations relating to the nature of reference to the good of the child and to the process of objectivization of the construct in law application processes.

The inclusion of the good of the child in the operative interpretation of the law is not only a theoretical issue but also a practical one. The good of the child constitutes the foundation of numerous legal regulations which, ostensibly, do not refer to this criterion. The major normative acts where this category is present include the Declaration of the Rights of the Child adopted by the

League of Nations in 1924, a.k.a. the Geneva Declaration of the Rights of the Child, and the Polish Constitution of 1997. The criterion of the good of the child as part of the normative structure is present, inter alia, in the Declaration of the Rights of the Child of 1959 and in the Convention on the Rights of the Child of 1989. While referring to the normative acts on the protection of the good of the child, it can be indicated that the said criterion should be linked with the right of the child to a happy childhood and with the notion of humanity. Apparently, this is the context in which the changes described in this study should be interpreted.

The study has three distinct aims. The first one is to demonstrate how courts understand the good of the child. The second one is to determine whether courts perceive the good of the child as a general clause or as a principle of law and to show how courts apply this normative construct. Equally important is to indicate the role the construct plays in the law application processes. The third aim is to answer the question whether objectivization of the axiological content of the analysed criterion occurs at the stage of law application by courts.

Within the terms of reference of the first aim, the following items were specified: a) analysis and description of legal dogmatics and judicial decisions in terms of understanding the normative criterion of the good of the child; b) specification of differences in the perception of the good of the child in legal dogmatics and judicial decisions; c) analysis of legal dogmatics, normative acts, and judicial decisions in terms of hypothetical categorization of meanings attached to the phrase in question; d) comparison of the criterion of the good of the child with other extra-legal criteria; e) determination whether other criteria similar to the one in question are present in the Polish legal order.

The second aim was itemised as follows: a) determination whether the normative construct of the good of the child should be treated as a general reference clause or rather classified as a normative clause distinct from a general one; b) demonstration of the role of the good of the child in individual stages of the law application process; c) determination whether the normative construct that includes the good of the child criterion functions as a meta-construct.

Within the framework of the third aim, the following questions were raised: a) Is the criterion of the good of the child subject to objectivization in the course of judicial decisions taken by courts, and if so, how is it carried out? b) What are the consequences of treating the good of the child as an objective criterion?

While summarising the discourse, references were made to the objectivization of the phrase in question where the subjective meaning of the phrase acquires a more objective content, i.e. independent of the individual. It should be indicated that in the course of application of law a



parallel process occurs which consists in rationalising statements in the context of cases pertaining to children.

The research conducted is not restricted to family law only. Given the interdisciplinary value of the construct, research must be expanded to be exhaustive. A comprehensive approach to the objectivization of the good of the child and determining the features of the construct as a clause or as a principle of law will be of the essence. Moreover, the state of the art heretofore relating to the application of the notion of the good of the child requires systemizing and considerable supplementation with respect to individual branches of law. Research on the normative construct per se and its application has not as yet been conducted. Thus, it has a lot of cognitive and practical value.

The following research hypotheses were formulated in the course of the present study:

1. Is it possible to determine exhaustively the content and eventually define the notion of the good of the child on normative grounds through legal dogmatics and jurisprudence?
2. Is the criterion of the good of the child superior to other extra-legal criteria and therefore has a priority position?
3. Can the criterion of the good of the child be part of a principle of the law and of a general reference clause?
4. What role does the criterion of the good of the child play in law application processes?
5. Does the objectivization of the good of the child occur in the course of application of law by courts?

The study comprises six chapters. The first one, an introduction to jurisprudence and theoretical analyses, aims at determining how to understand and define the notion of the good of the child on normative and dogmatic planes. Given the lack of legal and dogmatic definition of the term, its understanding is largely contextual. Chapter Two shows the good of the child as an axiologically entangled criterion, since it can be a component of a principle of law as well as of a general reference clause. Taking into account the theoretical approach to the research conducted, it was essential to assign the criterion as an element of a meta-clause or a meta-principle of law. The third chapter focuses on comparing the criterion in question with other references such as the best interest of the child, the good of the family, good habits, and principles of social coexistence. A content and relations-based comparative analysis was performed and the criteria were set in line with the subsequent assumptions. Intuitively, the notion of the best interest of the child is similar to the good of the child. 'The good of the family' as 'the best interest of the child' are specific criteria of the family and guardianship law. 'Good habits' is a phrase associated with private law while

'principles of social coexistence' seem to have a far wider reference than all the other criteria under analysis. In Chapter Four the notion of the good of the child is shown against the background of judicial decisions in a variety of cases including family, administrative, criminal, etc. The next chapter focuses on the role of the good of the child criterion in law application processes including the context of judicial discretion. The last chapter deals with objectivization.

The following research methods were employed: a) comparative – applied in comparing the meanings of the notion of the good of the child used in various branches of the law, in the normative aspect, in legal dogmatics and in jurisprudence; b) intuitive – applied in the formulation of hypotheses, in the justification of the good of the child in law application processes and in describing the process of objectivization; c) critical analysis – employed in the analysis of legal dogmatics and jurisprudence, and d) conceptual analysis – applied while determining the meaning of the construct of the good of the child and while defining the process of objectivization.

The research tools and techniques employed to collect research data included an analysis of judicial decisions, literature on the subject matter, legal dogmatics, and normative regulations. While performing said analyses and handling the results obtained the following methods were used: comparative analysis used while juxtaposing various meanings of the term in question in judicial decisions, dogmatics, and normative regulations on the one hand and discussion and scientific debate on the other. The results collected were presented and discussed at scientific conferences, both home and abroad, as well as at meetings of the Chair of Theory and Philosophy of Law at Maria Curie Skłodowska University in Lublin.

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