CHILDREN'S EUROPEAN CITIZENSHIP JOURNAL

http://www.csmcd.eu

Published by the Centre for Social Management and Community Development in cooperation with the European Childnetwork

Children's European Citizenship
Volume 1, Number 1 (new series)
©2011 CSMCD

Children's Right to Life in Polish Penal Law

Dominika Lorek, Olga Sitarz

States Parties recognize that every child has the inherent right to life. States parties shall ensure to the maximum extent possible the survival and development of the child. (Convention on the Rights of the Child, Art.6)

ABSTRACT

The right to life is a fundamental and primeval right. It is a point of departure for enjoying all the fundamental rights and freedoms a human being is entitled to by his/her birth. In the wide range of values protected by law it constitutes a 'condition' to get access to all the other ones protected by European and International Human Rights Law. Thus, it might seem that the protection and guarantee of this right should not raise any doubts. Indeed, most of the European countries provide general constitutional guarantees of the right to life and through penal regulations the level of protection is strengthened by regulating different crimes against life (homicide, infanticide etc). The question we are tackling in this paper is if, within the frame of Polish law and regulation, the right to life is defended in full scope or rather in separate articles of criminal law, or other regulations belonging to different branches of law, or, figuratively speaking, "switch off" the aforementioned defence.

KEYWORDS: children's rights, the right to life, human rights, Polish penal law

Introduction

The right to life is a fundamental and primeval right. It is a point of departure for enjoying all of the fundamental rights and freedoms of a human being. In the hierarchy of values protected by law, especially by Human Rights Law, 'life' and the right that protect it –the right to life- is the 'condition' to get access to all the other ones promoted and guaranteed by the European and International Human Rights instruments. Due to its centrality, it might seem that the protection and guarantee of the right to life should not raise any doubts. Indeed, every country provides among its legal and penal regulations for ones which introduce criminality for homicide, naturally including infanticide. Nevertheless, it should be pondered whether the right to life is defended in full scope or rather is it that separate articles of criminal justice, or ones belonging to other branches of law, enfeeble or, figuratively speaking, "switch off" the aforementioned defence.

©2011 CSMCD

The right to life in Polish criminal law

It is worth noting that in the year 1998 UNICEF has compiled the "Implementation Handbook for the Convention on the Rights of the Child" in which we read that "[m]any legal systems recognize the particular crime of infanticide as a distinctly defined form of homicide with reduced penalties. The ostensible intention is to provide a special defence for mothers suffering psychological trauma as a result of the process of birth. But by denoting a special and lesser crime, such laws appear to discriminate against children as victims of homicide"[1].

In Poland a rudimentary legal article which evokes such doubts is the regulation concerning infanticide. According to article 149, "[a] mother who commits infanticide in the period of confinement, under its influence is liable to a penalty of deprivation of freedom, ranking from 3 months to 5 years" whereas article 148 § 1 in case of murder provides for a penalty of detention adjudicated for no less than 8 years, a penalty of 25 years of detention or a life sentence. It is necessary to be emphasized that, although infanticide is punished with a penalty of deprivation of freedom, it is possible nevertheless, by virtue of article 58 § 3 to be penalized with a fine or restriction of liberty instead of imprisonment. Whereas, in accordance with article 69, there exists a possibility of a conditional stay of the carrying out of the sentence when the court "conditionally suspends the performance of the imposed penalty", which is what courts generally do.

Poland is not the only one among European countries to provide limited criminal responsibility of a mother for infanticide during the process of childbirth. It is crucial to indicate that it is possible to distinguish a number of basic patterns/models of treating infanticide on the basis of European legislation[2]:

- Model I is characterized by a lack of separate article providing for penalty for infanticide; infanticide should be thus qualified as manslaughter (with exceptional articles which define a type of an aggravated form of manslaughter) or homicide treated less severely than the corresponding standard homicide. Such solutions exist within criminal justice of Germany, France, Turkey and Hungary.

[1] Implementation Handbook for the Convention on the Rights of the Child, prepared for UNICEF by Rachel Hodgkin & Peter Newell, UNICEF 1998, p. 92
[2] Vide: Agnieszka Księżopolska-Breś, Odpowiedzialność karna za dzieciobójstwo w prawie polskim, Warszawa 2010, s. 28-50

- Model II provides for a separate article concerning infanticide, according to which extenuations include extra-labour causes (e.g. moral and material desertion of a mother of a newborn baby). An example of such regulation is article 578 of Italian penal code.
- Model III which utterly omits influence of any factors on a parturient, either perinatal or bearing no relation to labour. The sole additional attribute of the act is time (most often the confinement period) which determines a mitigated penalty. Such model was applied in penal codices of Bulgaria, Ukraine, Estonia, Norway, Albania and the Federation of Bosnia and Herzegovina.
- Model IV which provides a separate article concerning infanticide, according to which the mitigating circumstances are time as well as the mental state of the mother. It is of utmost importance that the aforementioned circumstances constitute an alternative – thus, an infanticide may take the advantage of a more lenient provision if she performed the act during the period of confinement or under the influence of specified circumstances. Such solution was accepted in Switzerland, Sweden, Macedonia, Lithuania, Moldova and Russia.
- Model V in which the article concerning infanticide bears the attributes of time and influence of perinatal circumstances, where both of the aforementioned attributes must appear jointly, for it to be treated less severely than the corresponding standard homicide.
- Model VI which completely omits time as one of the attributes of an offence thus creating the type of homicide treated less severely than the corresponding standard homicide solely on the basis of mental or physical state of the mother (caused by confinement or occasionally also lactation). Regulations of this kind can be found in penal codices of Malta, Finland or the British act of infanticide from the year 1938.

Even this brief review indicates that substantial majority of European countries consider homicide of a new-born baby as an offence treated less severely than the corresponding standard offence. How is such approach being justified?

In principle, in Polish literature there appear two views which justify infanticide as the type of murder treated less severely than the corresponding standard offence. The

first of them is based upon the belief that parturition and its course constitute a situation of such specificity, that it evokes a postpartum shock which might result in weakening or even elimination of maternal instinct. Many works in psychology and psychiatry are being referred to as being indicative of disorders such as postpartum blues, postpartum depression an postpartum psychosis. Infanticides were also diagnosed as having schizophrenia, moderate mental retardation, psychopathy as well as symptoms of the so called "foetus rejection".
According to the second group of views it is the social considerations (poverty, fear of shame) which underlie the treatment of infanticide as the type of murder treated less severely than the corresponding standard offence. We may also find supporters of mixed conceptions, who consider that both aforementioned groups of contributors are essential from the point of view of Polish regulation by law. When adjudicating on cases of infanticide of a newborn child, Polish courts represent also the third group, despite that the applied fragment of article 149 clearly states "in the period of confinement, under its fluence".

Simultaneously, the conducted research explicitly indicates the minor influence of labour and its course on the decision of infanticides. First of all, the research carried out by M.O'Hara and A.M.Swain towards the end of the nineties shows that complications during labour nave minor impact on an ensuing development of emotional disturbances. Concurrently, many results indicate that the substantial majority of infanticides are female country dwellers – usually very young, with elementary or vocational education, spinsters, unemployed or studying. It should be stressed that infanticides concealed the fact of their conception, almost never made use of a doctor's help during pregnancy and parturition took place at home. [3] A research into 50 cases conducted by T. Kotlarczyk indicates that in 40 of the instances the infanticides were led by fear of the family's reaction (especially of being thrown out) or fear of losing prospects for regular life (particularly for entering into marriage). In rare cases women were driven by fear of worsening of their financial status.[4] It is also worth to turn the attention to the very interesting statistical data which illustrates the intensity of this crime in Poland. In the thirties the number of revealed cases of infanticide was reaching

[3] Agnieszka Księżopolska-Breś, Odpowiedzialność karna za dzieciobójstwo w prawie polskim, Warszawa 2010, s. 210-252
[4] Tadeusz Kotlarczyk, Przestepczość kobiet: aspekty kryminologiczna i penitencjarne, Wydawnictwo Prawnicze, Warszawa 1984.

a thousand per year, whereas during the fifties it decreased tenfold and we can still observe its fall.[5] The latest data indicates that in the year 2008 as many as 33 cases of infanticide were revealed, in the year 2009 – 28 and in 2010 only 26.[6] In this time span Poland underwent significant changes in e.g. the political and socio-economic system as well as in the mentality of women and accessibility of legal abortion. However, what has definitely not changed, is the physiology of confinement (bar the availability of pain-relieving agents). Thus a question arises: why did the number of infanticides after the Second World War decrease so dramatically? One fundamental answer comes to one's mind – the true criminogenic factor of infanticides committed on newborn children are phenomena not related to labour (social, economic etc.)

Thus it is time to pose a number of crucial questions:

1. **Why create a separate type of offence**, if – assuming that the expression "influence of confinement" indicates perinatal factors – one encounters a lack of convincing research related to the actual influence of the course of confinement on a parturient to such a far-reaching extent, that it eliminates the maternal instinct? Regulations concerning diminished responsibility or declaration of lunacy would suffice in such extreme and exceptional instances. To exemplify, article 31 paragraph 1, states that "[a]ny person who, through mental disease, retardation or any other disaster of mental faculties could not, at the moment of committing the act, understand its meaning or direct its conduct does not commit an offence". Whereas, according to paragraph 2 of the same article "[i]f, at the moment of committing the offence, the offender's ability to understand the meaning of the act or to control the conduct was limited to a considerable degree, the court may apply an extraordinary mitigation of penalty". What might facilitate the legal and penal appraisal of infanticide committed on newborn children is a separate provision relating to homicide treated less severely than the corresponding standard homicide, namely homicide under emotional strain. As we read in article 148 paragraph 4, "[a]ny person who kills another person under the influence of strong emotion, justified by the circumstances is liable to a penalty of deprivation of freedom, ranging from 1 year to 10 years." For it is also worth to remember, that the element which creates the type of homicide

[5] O Sitarz, Ochrona praw dziecka w polskim prawie karnym na tle postanowień Konwencji o prawach dziecka, Katowice 2004, s.63.
[6] www.satytstyka.policja.pl

©2011 CSMCD

treated less severely than the corresponding standard homicide (or an aggravated form of homicide) should be characterized by certain incidence and manifest appropriate social significance. Simultaneously, doubts lodged in regard to individual attributes (course of confinement, influence of confinement and the interrelation between them) render the creation of the aforementioned, privileged type especially impermissible.

2. **Do circumstances not related to labour constitute an appropriate justification of infanticide as an offence treated less severely than the corresponding standard offence** (in a broader understanding of the term "influence of confinement" or after an appropriate change of the provision) when they indeed influence the motivation of the offenders? What is worth noticing, is that all the circumstances referred to in the research (especially difficult personal situation, loss of a partner, lack of secured material property, fear for one's own and a child's future) which might, after all, produce psychic disturbances of a mother, may surface several years after parturition as well as refer to numerous different acts and, finally, do not have to afflict only the mother. A father of a newborn child may be exposed to the experience of a corresponding shock, when, for instance, he learns of the child's severe retardation and the mother's death during delivery.
3. Should not things such as the change of position of women in contemporary world, the change of social mentality towards illegitimate children and the promotion of adoption provoke reflection that **the provision providing for infanticide is simply no longer necessary**?

There is unlikely any doubt, that the privileged types of offences enfeeble the legal and penal protection of a given interest. Provisions providing for decreased punishability in instances of infanticide lower the standard of protection of the life of a child. The same applies to provisions concerning e.g. euthanasia which lower the standard of protection of lives of untreatable patients. Nevertheless, the problem lies in balancing the values which underlie such lowering of a standard. Thus, the final question (in this section of the text) is as such**: Is it not that the creation of the offence of infanticide (and its principles) excessively discriminates the life of a child?**

All the data indicated above convinces that such discrimination of children in initial stages of their lives is completely ungrounded. What is more, provisions concerning infanticide do not (contrary to textbook platitudes) supplement the legal and penal protection of a child's right to life. Quite the opposite – they enfeeble it. Therefore, only the abolishment of the separate provision concerning infanticide shall provide the right to life of every newborn child with full protection of the law.

It is also worth to note that we can speak about a peculiar strengthening of the protection of a child's life in its initial stage (or even before birth) on the example of regulations of some of the countries. And so, e.g. article 170 item 2 of the German penal code provides for criminal liability of a person obliged to maintain a pregnant woman, if the said person reprehensibly refuses it and thus causes the woman to resolve on termination of pregnancy. The Turkish penal code contains a provision according to which an offender who deserts a gravid wife (or any other woman that he is aware of to be bearing his child) is thus liable to penalty of deprivation of freedom ranging from 3 months to one year. Whereas § 241 of the Norwegian penal code provides for criminal liability of a man who, although aware that a woman fertilized by him has an intent to kill the foetus or the child, or commits other crime by endangering the life of the child, does not take action to prevent it. On the other hand, the penal code of Switzerland says that "whoever deserts an unmarried woman, whom he fertilized, thus exposing her to risk of deprivation is liable to penalty of depravation of liberty."[7] It is also in this regard where the Polish regulation displays considerable inadequacies. The only regulation comparable with the aforementioned ones is article 209, which criminalizes evading the alimony obligation: "Any person who persistently avoids the duty of care, charged to him by force of law or of a judicial judgment and fails to maintain their next of kin or another person and thereby exposes this person to the impossibility of satisfying his basic needs is liable to a fine, a penalty of restriction of freedom or deprivation of freedom of up to 2 years". However, due to the usage of the expression "persistently" and the judicial practice, it shall have little significance for the protection of a newborn's life. In the Polish system there exists also a legal and penal duty of informing the penal prosecution agencies about attempts or commissions of selected offences, yet this catalogue omits infanticide instead containing the murder from article 148.

[7] Agnieszka Księżopolska-Breś, Odpowiedzialność karna za dzieciobójstwo w prawie polskim, Warszawa 2010, s. 210-252

Right to life is linked with the obligation of a country to provide to the maximum extent possible the survival and development of the child. Therefore, children's health protection is also of significance. Almost every legislation provides for penalty in cases of an attempt on health; it is the same in Poland. The fundamental provisions defending the aforementioned legal interest are articles 156 and 157 of the penal code, which regulate liability for severe and other impairment of health. The codex does not distinguish the children's health protection here, however, the mentioned provisions obviously concern also children. What is also forbidden is e.g. "exposing another person to a direct of loss of life or a severe impairment to his health. If the perpetrator has a duty of care over the person exposed to danger, he is liable to a higher penalty" (article 160 § 1 and 2).

Parents and guardians generally wish for the child's well-being, yet if they harm the child, they certainly deserve to be punished. The matter complicates, when the parent, who is led by good intentions, takes a decision which is unfavorable for the child's health. It sometimes happens that the parent's behavior, which is harmful from the medical point of view, stems from his or her outlook on life. In such case the parent's right to an autonomous execution of parental authority lies in conflict with protection of health of this child and often also with its right of self-determination expressed in, inter alia, article 12.1 of The Convention on the Rights of the Child: „States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." It is also worth to note, that in the Polish Declarations and Reservations to The Convention on the Rights of the Child. Polish authorities declare "Republic of Poland considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12 to 16, shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family."[8] From this point of view, among special cases there are refusals of transfusion for children of Jehova's Witnesses as well as cases of parents treating their children solely with homeopathic medicine. These problems are universal and are not restricted to Poland and Europe.

[8] Declaration of the Republic of Poland, Convention on the Rights of the Child

Jehovah's Witnesses believe that blood transfusion is forbidden for them by Biblical passages such as: "Only flesh with its soul - its blood - you must not eat" (Genesis 9:3-4); "[You must] pour its blood out and cover it with dust" (Leviticus 17:13-14); and "Abstain from . . . fornication and from what is strangled and from blood" (Acts 15:19-21). While these verses are not stated in medical terms, Witnesses view them as ruling out transfusion of whole blood, packed RBCs, and plasma, as well as WBC and platelet administration. However, Witnesses' religious understanding does not absolutely prohibit the use of components such as albumin, immune globulins, and hemophiliac preparations; each Witness must decide individually if he can accept these.[9]

While an adult person has full right of self-determination and can consciously decide upon refusal of blood transfusion, a child is, in this respect, partially dependent on parents or guardians. According to the Polish regulation (article 34 of the act on the profession of medical practitioners and stomatologists) the doctor may perform the operation or apply a method of treatment or diagnostication which poses high risk for the patient, only after obtaining written consent preceded with providing the patient with accessible information on the diagnosis and applied method. In case of a person who has not attained majority, such consent is given by his or her statutory representative; whereas in case of lack of the representative or if communication is impossible, the decision falls on the guardianship court. If the patient is 16 years of age, then his written consent is also required. A problem appears, when the patient and his or her parent are in disagreement or if lack of consent of the statutory representative poses a threat to the life of a child. The Polish legislator regulated also such situations. In case of such doubts, the doctor may appeal to the guardianship court for consent to an operation. In situations of utmost urgency, the doctor may act without the approval of a statutory representative or court, although he should consult another doctor and immediately inform either a statutory representative, the actual guardian or the court, about the operation. Thus, in case of a parent's refusal to transfuse blood of a child, regardless of the reason for refusal, the doctor may turn to the custodian court for consent upon the operation. Such a regulation solves the legal side of the problem and

[9] *Jehovah's Witnesses and the Question of Blood.* Brooklyn, NY, Watchtower Bible and Tract Society, 1977, pp. 1-64. from the Jehovah's Witnesses Official Web Site, http://www.watchtower.org/e/hb/article_06.htm (19.04.2011 r.)

simultaneously exempts the doctor from criminal liability,[10] and, what is crucial, allows to save the lives and health of children regardless of their parents' world view. The Polish solution should be assessed positively. Of course it does not eliminate the conflict between the parents' child-rearing convictions and the willingness to save this child's life, yet it solves the legal problem by bestowing primacy upon the child's right to life.

Another issue which is worth to bring up, and which, so far, seems to be far from being regulated, is the question of homeopathy. Homeopathy, as a method of treatment, arouses numerous controversies. To become convinced of it, it is enough to search for "homeopathy" on Wikipedia, where, from the very first lines, we read that „[h]omeopathy is a form of alternative medicine in which practitioners treat patients using highly diluted preparations that are believed to cause healthy people to exhibit symptoms that are similar to those exhibited by the patient. The collective weight of scientific evidence has found homeopathy to be no more effective than a placebo." Simultaneously, there worldwide exist societies dealing in propagation and usage of homeopathic methods in treatment of various chronic diseases and, what is more, homeopathic preparations are officially recognized as therapeutic agents .[11]

In Poland, according to article 21 of the Pharmaceutical Legislation from the 6th of September 2001, homeopathic drugs are subject to simplified procedure of authorizing for sale. Furthermore homeopathic products do not require evidence of therapeutic efficacy. Those preparations are obtainable without prescription and are not reimbursed by the state. Diverse legal position of homeopathy in countries of Europe and the world is monitored by the World Health Organization and was described in a study entitled "Legal Status of Traditional Medicine and Complementary/Alternative Medicine".[12]

It could, of course, be said that, since dilutions used in homeopathic preparations are of such enormous proportions, there is nothing to fear because even if they fail to help, they will certainly cause no harm. The risk appears, however, when homoeopathist substitutes for traditional methods of treatment. The course of research established above requires us to concentrate upon one of the newly discovered issues, namely the

[10] Art. 192. § 1 Any person who performs a medical operation without a patient's consent is liable to a fine, a penalty of restriction of freedom or a penalty of deprivation of freedom of up to 2 years.
§ 2. The prosecution is started at the request of the wronged person.
[11] http://www.cedh.org/home/uk/ (20.04.2011r.)
[12] http://whqlibdoc.who.int/hq/2001/WHO_EDM_TRM_2001.2.pdf (20.04.2011 r.)

dilemma over whether to allow parents freedom of a risky, though legal, way of treating children, or to limit their autonomy in this regard in order to protect the lives and health of children. The case is serious, insomuch as in many countries, including Poland, homeopathic drugs are obtainable without prescription, regardless of the doctor's instructions. The simple fact, that those preparations are accessible only in chemist's, raises the conviction about their therapeutic efficacy.

In order to depict the problem it will be favorable to quote an example, such as the, probably most expressive, case from Australia, which took place in the year 2009. The Indian-born couple were found guilty in the Supreme Court of their baby daughter's manslaughter by treating her with homeopathic remedies instead of conventional medicine in the days before her death in May 2002. The infant girl died of complications due to eczema. Her father, homeopath, told the police: "Conventional medicine would have prolonged her life ... with more misery. It's not going to cure her and that's what I strongly believe."[13]

How would a situation analogous to the one in Australia end in Poland? And what would be the outcome in other European countries? Can usage of drugs described in the law as "medicinal products" result in criminal liability? Can a parent, who personally decided on such treatment, bear such responsibility? It seems that, in the current regulatory environment and with current knowledge of homeopathy, one could not level charges against parents who trusted this method. Even if we focus on unintentional offences such as e.g. unintentional manslaughter (article 155 of the penal code), unintentional impairment of health (articles 156 § 2 and 157 § 3 of the penal code.) or unintentional exposing to a direct danger of loss of life (article 160 § 3 of the penal code), their application will be impossible. According to article 9 § 2 of the penal code, a prohibited act is committed unintentionally if the offender, without having an intention to commit it, perpetrates it as a result of failure to show due diligence required in the given circumstances, although he foresaw the possibility of committing the act or could have foreseen it. This means that, while assessing the parents' behavior, it should be pondered if they transgressed the rules of cautious conduct, what resulted in either death, detriment to health or exposure to such consequences and also if "they foresaw such result or could have foreseen it." Since homeopathy is both legal and promoted in

[13] http://www.smh.com.au/national/parents-guilty-of-manslaughter-over-daughters-eczema-death-20090605-bxvx.html ; http://www.dailytelegraph.com.au/news/baby-glorias-parents-guilty-of-her-death/story-e6freuy9-1225723856950 (20.04.2011 r.)

the media, and, whereas it is the doctors themselves who have doubt about its efficacy, one should not expect laymen to consciously resolve this dilemma and foresee the negative consequences of applying only this method of treatment. It is simultaneously hard to dispute the parents' right to chose one of the available courses of treatment.

It seems that, for a more complete protection of life and health of a child, it would be necessary to change this scope of regulations by law. The potential prohibition of sale of homeopathic drugs would meet with a justified accusation of restricting competition. Probably a more befitting solution would be to clearly separate homeopathy from medicine and (as the Supreme Medical Council postulates) dispense with the term "medical product" as used with regard to homeopathic drugs. A uniform stand of the world of medicine and reliable information on principles of operation of homeopathy, combined with a legal ban on using the term "medicine" and the like with homeopathic preparations, would all serve as a basis to expect from the parents to increase their caution for such method of reacting to disease. Only a clear definition of the rules of conduct concerning legal interests such as life and health of a child will allow holding parents responsible for violating or jeopardizing these interests. It is worth noting, that the unclear regulatory environment gives rise to similar issues also in case of preventive vaccination of children, application of controversial diets or methods of the so-called holistic medicine and the like.

Conclusion

To sum up, it should be recognized, that both the existence of article 149 concerning infanticide and the authorization of the sale of homeopathic drugs, enfeeble the legal and penal protection of a child's life. This means that, in spite of the principles of the protection of the life of the child declared by the Polish state, on the plane of the penal code, the aforementioned protection is incomplete and so, in this scope, the state does not realize its obligations stated in the Convention on the Rights of the Child.

REFERENCES

HODKING R., NEWELL P., 1998, *Implementation Handbook for the Convention on the Rights of the Child,* UNICEF, New York.

KSIEZOPOLSKA-BRES A., 2010, *A Odpowiedzialność karna za dzieciobójstwo w prawie polskim*, Wolters-Kluver, Warszawa

©2011 CSMCD

KOTLARCZY T., 1984, *Przestepczość kobiet: aspekty kryminologiczna i penitencjarne,* Wydawnictwo Prawnicze, Warszawa

SITARZ O., 2004, *Ochrona praw dziecka w polskim prawie karnym na tle postanowień Konwencji o prawach dziecka*, Katowice.

Authors' affiliation:
Dominika Lorek and Olga Sitarz are affiliated with the University of Silesia in Katowice, Poland, Law School.