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The Legal Content of Parental Authority in Polish Family Law

1. INTRODUCTORY REMARKS

The questions raised, regarding the definition and structure of parental authority constitutes one of the fundamental reasons for debate in family law. Various concepts have been presented in the Polish doctrine for years. The reasons for that state of affairs are numerous. First of all, the Polish Parliament omitted writing a legal definition of the concept of parental authority in the Family and Guardianship Code[1]. At the same time, the provisions of the Code that refer to parental authority often tend to employ general clauses and vague expressions. They include above all the clause of the best interests of the child and of social interest (Article 95(3) FGC), the concept of custody (Article 95(1) FGC), the upbringing of the child (Article 95(1) and 96(1) FGC), the guidance and management of the child (Article 96(1) FGC), the dignity of the child (Article 95(1) FGC), the child's obedience (Article 95(2) FGC) or the degree of its maturity (Article 95(2) FGC). The use of such expressions in legal regulations for the purpose of determining the meaning of parental authority may lead to creating a definition of *ignotum per ignotius*. Additional difficulties in adopting a uniform concept of parental authority arise from the Parliament's inconsistency in using various terms. Furthermore, the Code was subject to amendments in recent years, which considerably expanded the norms defining parental authority, adding a number of new, vague concepts[2]. Finally, it ought to be noted that attempts at differentiating between parental authority and other parents' and children's rights and duties, such as the right of access, or even the maintenance obligation, may cause numerous doubts.

For the above reasons, it is worth summarising the findings of the family law doctrine to date, with regard to defining the concept of parental authority and to assess the relevant amendments of the recent years.

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[1] The Family and Guardianship Code of 25 February 1964, Journal of Laws of 2017, Item 682, hereinafter referred to as FGC.

[2] Among other things the concept of "the dignity of the child" – Article 95(1) FGC *in fine*. They will be further analysed in this article.

2. THE DEFINITION AND SCOPE OF PARENTAL AUTHORITY

According to one of the most frequently cited definitions, an analysis of the entire regulatory structure of the Family and Guardianship Code, and in particular Articles 95(1), 96 and 98(1) FGC, leads to the conclusion that **parental authority is the entirety of rights and duties of parents with regard to their child, whose purpose is to ensure the child due care and to protect its interests**[3]. T. Smyczyński defines parental authority very similarly: he calls it the **entirety of parents' rights and duties with regard to their minor child, whose purpose is to ensure care over its person and property**[4]. According to J. Strzebińczyk, on the other hand, **parental authority is a legal instrument that predominantly allows the parents to affect the child's ultimate physical and mental shape**[5]. The definitions referred to above clearly emphasise the function of parental authority, which is to secure that the principle of the best interests of the child is fulfilled. It should be noted, however, that such wording only partly explains the meaning of the concept in question. It refers to the area of parental rights and duties, and fails to indicate the boundaries between parental authority and other rights and duties of parents and children.

In this context, the jurisprudence and doctrine defining parental authority in the category of a legal relationship should be noted. The resolution of the Supreme Court of 26 January 1973 points out that parental authority encompasses the entirety of parents' rights and duties with regard to their child and means the legal relationship to which parents and children are the parties; it is a special type of relationship, where the children are dependanton the parents[6]. An extensive theory that distinguishes as many as three types of legal relationship covered by parental authority was proposed by T. Sokołowski. According to this author, parental authority is a complex legal relationship of authority between the parents and the child, a subjective right of the parents in relation to third parties and a relationship of administrative nature between the parents and the state[7].

Differing opinions have been expressed in relavant literature as to the possibility of applying the concept of subjective right when defining parental authority[8]. The notion was countered with arguments referring to the duty to exercise parental authority in the best interests of the child, and not of the entitled person[9]. A detailed

[3] J. Ignatowicz [in:] *System prawa rodzinnego i opiekuńczego*, J.St. Piątowski (ed.), Wrocław–Warszawa –Kraków–Gdańsk–Łódź 1985, p. 804; K. Jagielski, *Istota i treść władzy rodzicielskiej*, „Studia Cywilistyczne" 1963, Vol. III, pp. 100–102; B. Dobrzański [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, M. Grudziński and J. Ignatowicz (eds.), Warszawa 1966, p. 590; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 340; cf. also the discussion of definitions and opinions in: J. Słyk [in:] *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające FGC*, K. Osajda (ed.), Warszawa 2017, p. 1198 et seq.; the author of this article repeats some of his opinions and interpretations expressed in that text.

[4] T. Smyczyński, *Prawo rodzinne i opiekuńcze. Analiza i wykładnia*, Warszawa 2001, p. 288.

[5] J. Strzebińczyk [in:] *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011, p. 235.

[6] Resolution of the Supreme Court of 26 January 1973, II CZP 101/71, OSNCP 1973, No. 7–8, Item 118.

[7] T. Sokołowski, *Władza rodzicielska nad dorastającym dzieckiem*, Poznań 1987, p. 93; cf. T. Sokołowski [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 646.

[8] Cf. the list and classification of views in: H. Dolecki, *Ingerencja sądu opiekuńczego w wykonywanie władzy rodzicielskiej*, Warszawa 1983, pp. 24–25; cf. also A.N. Schulz, T. Smyczyński, *Rodzinne prawa podmiotowe i ich ochrona na obszarze stosunków między rodzicami i dzieckiem* [in:] *Prawo XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, W. Czapliński (ed.), Warszawa 2006.

[9] A. Łapiński, *Ograniczenia władzy rodzicielskiej*, Warszawa 1975, pp. 22–23.

analysis of the issue noted here exceeds the scope of this article. It ought to be remarked, however, that the dispute seems to be of significance chiefly in terms of theory and research. However, it does not determine the scope and manner of exercising parental authority in practice, since even the authors who supported the concept of parental authority as a subjective right indicate that its individual elements constitute the parents' duty[10].

As has been mentioned above, developing the definitions of parental authority and specifying its nature render it possible to indicate its function, and thus to determine the direction of interpretation of the individual provisions which use general clauses and vague expressions. It seems that this is what the Supreme Court had in mind, when it emphasised in the Recommendations on increasing the protection of the family of 9 June 1976, that the concept of parental authority, according to the Polish Parliament was of fundamental importance to the assessment how guardianship courts should adjudicate in related matters. According to the Supreme Court, parental authority **is above all, the entirety of parents' duties with respect to their child, while the parents' rights with regard to the child are in a way a secondary element of that authority**[11]. It appears that, despite the divergences visible in the theories present in the doctrine, it is not in dispute that parental authority must be perceived as the parents' duty, which is fulfilled to the extent determined by the components (content) of parental authority and serves the purpose of ensuring that the principle of the child's best interest is fulfilled. The element of authority in the institution in question guarantees the effectiveness of the actions undertaken by the parents, as confirmed by the child's duty of obedience provided for in Article 95(2) FGC[12].

From the perspective of the application of the law, i.e. when indicating the particular rights and duties of the parents and children, and the extent of intervention of the guardianship court, it is crucial to define parental authority by specifying its structure (content, components). The subject literature and the judicial pronouncements of the Supreme Court generally adopt the theory of three elements, where parental authority encompasses care of the person of the child, care of the child's property and representation of the child (statutory representation by the parents)[13]. This division is based on the entirety of the regulations of the Family and Guardianship Code. The phrasing of individual provisions, however, does not unambiguously justify adopting such a structure of parental authority. Thus, Article 95 (1) FGC uses the expression "in particular", which indicates that the elements of parental authority are listed only as an example. Moreover, the provision lists the following components: care of the person of the child, care of the child's property and its upbringing. Thus the grammatical interpretation leads to the differentiation between the notions of care and upbringing. Article 96 FGC, on the other hand, lists the upbringing of the child among such attributes of parental

[10] Cf. K. Jagielski, *Istota*…, pp. 102 and 104.
[11] Resolution of the Supreme Court of 9 June 1976, III CZP 46/75, OSNCP 1976, No. 9, Item 184.
[12] Cf. also J. Słyk [in:] *Kodeks*…, pp. 1199–1200.
[13] Cf. e.g. resolution of the Supreme Court of 9 June 1976, III CZP 46/75, OSNCP 1976, No. 9, Item 184; K. Jagielski, *Istota*…, pp. 122–123; J. Ignatowicz [in:] *System*…, pp. 804–805; T. Sokołowski, *Władza*…, p. 21; J. Strzebińczyk [in:] *System*…, p. 267; J. Słyk [in:] *Kodeks*…, p. 1210.

authority as *directing* the child, caring for its physical and mental development, and preparing it for socially beneficial work in accordance with its abilities. Scholars have accurately pointed out the Parliament's inconsistency, as the notion of upbringing the child is meant now as an element of the content of parental authority (Article 95 FGC), now as a manifestation of the exercise of said authority (Article 96 FGC)[14]. Therefore it is difficult to specify the mutual semantic relations between the imprecise concepts used by the Parliament that are covered by the so called personal element of parental authority.

The controversy in Poland's family law doctrine results from the divergent ways of interpreting regulations that refer to such notions that have been adopted over time. Such interpretations may involve reconstructing the complex relations between them, while assuming their logical coherence, or it may be functional and allow for interpretative liberty that corresponds to the specific problems of parental authority, which by its very nature is difficult to define in legal categories.

The first approach may lead to conclusions that can hardly be reconciled with life experiences, and the commonly accepted meaning of words in everyday language. In particular, it would be necessary to adopt different definitions of the concepts of care, *directing* the child and its *upbringing*[15].

Accepting the interconnections of the concepts listed above renders it possible to avoid logical problems, yet is difficult to justify on the basis of grammatical interpretation. The problems discussed above definitely show the need for an amendment that would bring order to the relevant regulations.

Adopting a specific model of content (structure) of parental authority allows for further interpretation of the concepts it encompasses. According to K. Jagielski, custody of the child involves care, to provide the child with appropriate living conditions, to protect it from dangers, and to ensure its correct development[16]. J. Ignatowicz, on the other hand, construes the personal element of parental authority as including the duty to bring the **child** up (and distinguishes between physical and mental upbringing), the duty to direct **it,** and the care to provide the **child** with appropriate living conditions and safety. At the same time, the author admits the possibility of the semantic scopes of those components to intertwine[17].

The subject literature proposes also a more extensive typology of components of parental authority's personal element. Assuming that the semantic scopes of the individual elements are conjuctive, T. Sokołowski lists: 1) upbringing, i.e. the personal shaping of the child's personality, its emotional attitudes and intellectual predispositions; 2) directing, construed as determining where the child stays, supervising its lifestyle, deciding on the child's participation in non-family groups, choosing and verifying information; 3) caring for the child's physical surroundings; 4) caring for the physical aspect of the child; 5) coordinating the child's physical and mental abilities[18].

[14] J. Strzebińczyk [in:] *System*…, p. 266.
[15] A detailed analysis of the discussed notions in subject literature concerning family law was carried out by T. Sokołowski, *Władza*…, *passim*.
[16] K. Jagielski, *Istota*…, pp. 124, 126, 128.
[17] J. Ignatowicz [in:] *System*…, p. 813.
[18] T. Sokołowski, *Władza*…, pp. 32–33; T. Sokołowski [in:] *Kodeks*…, pp. 650–652 and 656–664.

The notions discussed above visibly manifest an attempt to specify the most possible, precise, conceptual framework that defines parental authority as far as the care of the child is concerned. It seems that an advantage of the analytical representations of the personal element of parental authority is that they exemplify the components of care of the child. This exemplification expands and specifies the vague concepts referred to in the discussed provisions of the Family and Guardianship Code. It explains their meaning and determines the scope of parental authority. Nevertheless, due to the inevitable interconnection of the individual elements, these propositions do not constitute classifications in the logical sense. Therefore, their usefulness in the practical application of family law regulations is limited. By way of example, a court decision to limit one parent's authority to care for the mental aspects of the child's development would be imprecise and unfit for its application due to the possibility of various interpretations.

In this context, a different proposition of conceptualising the personal element of parental authority is worth noting – one, which takes into account the character of the parents' rights and duties. According to J. Strzebińczyk, the care of the child entails: 1) purely factual actions that are required by the best interests of the child, and are not clearly covered by the content of other family law relationships between parents and children; 2) formal decisions that are made by the parents chiefly in the child's best interests, and significantly affect his or her non-financial legal status[19]. The author accurately distinguished between purely factual actions, whose diversity practically precludes developing their typology, and actions aiming at shaping the child's legal situation.

Equally accurate and corresponding to the definitions of parental authority as the entirety of the parents' rights and duties proposed in subject literature is the negative specification of the personal element, namely as any parents' actions taken with regard to the child, except for actions arising from legal relationships beyond the extent of parental authority.

Further problems with interpretation are related to the element of the care of the child's legal possessions referred to in Article 95. The legislator omitted to specify in this provision what the exercise of this type of care involves. More extensive regulations with regard to those issues are comprised in Articles 101–105. What draws attention, in this context, is the terminological difference in comparison to Article 95.

Article 95 of the FGC uses the expression "care of the child's property", while the remaining provisions employ the term "management of the child's property". Some authors do not draw any conclusions with regard to interpretation on account of this differentiation, and use the concepts of care and management of the property interchangeably[20]. Another idea has been proposed, as well, according to which the relation between the concepts of care of the property, and the management of the property corresponds to the relation between the concepts of parental authority and its exercise. In addition, management is only one form of exercising

[19] J. Strzebińczyk [in:] *System*…, p. 283.
[20] Cf. eg. K. Jagielski, *Istota*…, p. 139; J. Ignatowicz [in:] *System*…, p. 820 et seq.; T. Smyczyński, *Prawo*…, p. 303.

care of the property[21]. T. Sokołowski unequivocally supports the differentiation between the two concepts and the interpretation of the concept of care of property as a broader category which comprises management[22].

Functional considerations offer a more favorable use of the concept of management in the broad sense, which includes components that some authors exclude from its scope[23]. This approach makes it possible to avoid interpretative complications arising from attributing different meanings to the concepts of care of the child's property and its management. However, the use of the expression "care" by the Parliament in Article 95 indicates a special nature of management of the child's property, which ought to serve not only economic purposes (increasing the assets or maintaining their value), but also the best interests of the child and the family in which it is raised[24].

3. THE MANNER OF EXERCISING PARENTAL AUTHORITY

From the perspective of the characteristics of parental authority, no less relevant than determining its structure, is indicating the statutory directives of its exercise by the child's parents. Among the provisions which regulate the matter, in particular, Article 95 of the FGC deserves attention. It has been subject to significant amendments in the recent years. The provision entails:

1) the definition of the care exercised by the parents and of the upbringing of the child as a right and duty;
2) the directive of exercising parental authority in accordance with the best interests of the child, as well as social interests (Article 95(3));
3) the duty to respect the child's dignity and rights (Article 95(1));
4) the child's duty to obey its parents (Article 95(2));
5) the child's duty to hear the parents' opinion and recommendations in the best interests of the child in matters in which he or she can make independent decisions and declarations of will (Article 95(2));
6) the parents' duty to hear the child's view in significant matters concerning his or her person and property (Article 95(4));
7) the parents' duty to take into account the child's reasonable wishes in significant matters concerning his or her person and property (Article 95(4)).

It should be emphasised in the first place that the Parliament defined the exercise of care by the parents and the upbringing of the child predominantly as their duty, and only secondarily as a right. Such an approach leaves no doubt as to the fundamental principles of the statutory model of parental authority, which ought to be exercised in the spirit of responsibility for managing the child's affairs. The parents' rights are secondary, and serve the purpose of fulfilling their duties.

[21] J. Strzebińczyk [in:] *System*..., p. 284.
[22] T. Sokołowski [in:] *Kodeks*..., pp. 652–653.
[23] According to T. Sokołowski, managing the net income from the child's property or supervising the child's financial situation are outside the scope of care of the child's property, cf. T. Sokołowski [in:] *Kodeks*..., pp. 652–653.
[24] J. Słyk [in:] *Kodeks*..., p. 1212.

Undoubtedly, the most important factor that determines the manner of exercising parental authority is the clause referring to the best interests of the child. This value constitutes the chief (general) principle of the entire family law and refers to all family law relationships[25]. Attempts have been made in subject literature to define the concept of the best interests of the child by means of indicating concrete values it includes, such as for instance physical development or preparation for work for the benefit of society.

On the basis of a detailed analysis of the provisions of the Family and Guardianship Code, W. Stojanowska presented a definition of the concept in question. According to her, "the term 'best interests of the child' within the meaning of family law provisions means a set of intangible and tangible values, necessary to ensure the normal physical and mental development of a child, and to work corresponding to his or her abilities; these values are determined by many various factors, whose structure depends on the content of the applied legal norm and the particular, current situation of the child; so construed best interests of the child concurs with social interest"[26]. According to this approach, the concept of the best interests of the child is characterised by elasticity typical for general clauses, which allows it to be adapted to particular situations (actual facts). Moreover, the definition specifies the relation between the best interests of the child, as well as the social interests mentioned in Article 95(3). These two values may not stand in contradiction to each other, and are naturally coincidental.

The definition cited above was perfectly concurrent with the view expressed in the decision of the Supreme Court of 24 November 2016[27], according to which "there is no statutory definition of the expression 'best interests of the child'. It should be given meaning in particular factual circumstances, especially if they indicate that the child has found himself or herself in a situation that requires interference from other entities, including the court. In particular, it entails the right to the protection of life and health, and to any actions from others that should ensure conditions for peaceful, normal and undisturbed development, respect and dignity, and participation in the process of decision-making with regard to the child's situation; importantly, the list is not closed". The Supreme Court applies here the principle of the precedence of the best interests of the child over other values protected by family law. The ruling of 25 August 1981[28] includes the opinion that "the court deciding on parental authority ought to be guided above all by the best interests of the child or the social interest and not by the interest of one or both parents"[29].

The amendment of the Family and Guardianship Code of 2008[30] added another criterion to Article 95(1) of the FGC determining the manner of exercising parental authority. It introduced the requirement of respect for the child's dignity and rights. According to the explanatory memorandum to the governmental draft,

[25] So: J. Ignatowicz [in:] *Prawo*..., p. 43.
[26] W. Stojanowska, *Rozwód a dobro dziecka*, Warszawa 1979, p. 27.
[27] Decision of the Supreme Court of 24 November 2016, II CA 1/16, unpublished.
[28] Ruling of the Supreme Court of 25 August 1981, III CRN 155/81, unpublished.
[29] Cf. also decision of the Supreme Court of 5 January 1999, III CKN 979/98, unpublished.
[30] Act of 6 November 2008 amending the Family and Guardianship Code and some other acts, Journal of Laws 2008, No. 220, Item 1431.

the alteration had a pedagogical, persuasive and normative character. It was also said that the new duties were not directly applicable[31].

It can be doubted whether the "pedagogical" and "persuasive" regulation in its amended form would be effective, therefore, whether adopting such an amendment was advisable. The Parliament's expectation that a code provision lacking a direct sanction, and employing an imprecise concept could have a social impact that would shape the citizens' awareness seems unfounded.

The inalienable dignity of the child and its rights are derived from overriding legislation[32]. The place of those normative acts in the system of law, and the language they use give them a greater chance to serve the purposes indicated in the explanatory memorandum cited above. However, even in this case, serious doubt is justified. As for the normative character, it ought to be particularly emphasised that, in the light of the doctrine and jurisprudence to date, the respect for the child's dignity and rights undoubtedly falls into the standard of exercising parental authority discussed above as determined by the principle of the protection of the best interests of the child. Moreover, the said standard by far exceeds the requirement to respect the child's dignity and rights. Respect for dignity that concerns all persons alone could turn out to be insufficient in family relationships.

Similarly, no legal significance can be attributed to the obligation to observe the law (respect the child's rights) proclaimed in the Family and Guardianship Code. Consequently, the amendment in question definitely deserves a negative evaluation: it is an example of bad legislation, which breaks up the conceptual network of family law without serving any purpose[33].

The child's duty of obedience to its parents corresponds to the element of authority in parental authority, which allows the parents to bring the child up and to direct it. It is accurately indicated in the subject literature that the duty of obedience further constitutes a factor which renders it possible to ensure the child's safety[34]. The provisions of the Family and Guardianship Code do not instruct how the parents may enforce their children's obedience. The Parliament introduced an evident limitation in that respect in Article 96^1 of the FGC, which prohibits corporeal punishments. Any measures applied by the parents should be assessed by the court in light of the principle of the best interests of the child, commonly accepted social norms and the findings of science, in particular of developmental and educational child psychology.

In addition, the 2008 amendment expanded the content of Article 95 (2). The duty of obedience of the child was supplemented by the duty to hear the parents' advice and opinion expressed in the child's best interests in matters in which he or she can make independent decisions and declarations of will. According to the explanatory memorandum to the government draft, the expansion of the provision follows the principle of a "rational partnership of the parents and the adolescent children", which entails the obligation to hear the view of the other party within the family law relationship.

[31] Bill on the amendment of the Family and Guardianship Code and various other acts, Sejm paper of the 6th term of office No. 888, p. 11.
[32] Cf. e.g. the statements in the preamble of the Convention on the Rights of the Child and in Articles 30 and 48 of the Polish Constitution.
[33] Cf. J. Słyk [in:] *Kodeks*..., pp. 1214–1215.
[34] T. Sokołowski [in:] *Kodeks*..., p. 649.

Yet some doubts as to the interpretation of this regulation may arise. A literal reading of the amended content of Article 95(2) could lead to the conclusion that in the cases when the child may make independent decisions and declarations of will[35], he or she is not obliged to obey his or her parents, but merely to hear their opinion and advice. Such interpretation, however, would be contrary to the principle of the best interests of the child, and difficult to reconcile with the construction of parental authority, which is exercised until the child reaches adulthood. The idea that a thirteen-year-old who regularly engages in minor legal transactions contradictory to his or her best interests, e.g. purchases junk food, is not obliged to obey his or her parents in that regard, would be hardly acceptable. According to the functional and systematic interpretation, then, the child is obliged to obey his or her parents for the entire period of their parental authority. This duty is complemented by the duty to hear their opinion and advice in matters in which the child can make independent decisions and declarations of will.

The indicated interpretation problems mean that the discussed amendment should be assessed as definitely failed and ineffective, and even contrary to the principle of the best interests of the child.

The principle of "rational partnership" is additionally fulfilled by Article 95 (4), which was added in 2008, and which provides for the parents' duty to hear the child's view prior to making any decisions in major matters concerning both the child's person and his or her property, and for the duty to take the child's reasonable wishes into account, if possible. The regulation does not render the principle it expresses dependent on the child having reached a specific age. The legislator used the criteria of mental development, medical condition and degree of maturity, which are subjective. That in turn may cause that the regulation will be applied to younger children, as well.

The explanatory memorandum to the government draft law mentioned above refers to Article 72(3) of the Polish Constitution. Importantly, the regulation stipulates that, in the course of establishing the rights of a child, public authority bodies and persons responsible for children are obliged to hear the child's views. The material scope of Article 95(4) is much more extensive and covers all major matters related to the child. In comparison to Article 12 of the Convention on the Rights of the Child, which guarantees the child the right to express his or her views freely in **all** matters affecting him or her, Article 95(4) FGC limits the right of the child to being heard.

The phrasing of Article 12 of the Convention on the Rights of the Child should be perceived as more fitting. The treatment of the child as a subject and respect for the child's dignity correspond with hearing him or her in all matters in which he or she is capable of expressing his or her views, the more so that hearing itself does not give rise to the unconditional obligation to act according to the child's demands, as indicated by the expressions "if possible" and "reasonable wishes"[36].

[35] For example, according to the provisions of the Civil Code, a contract of the type that is generally concluded in minor everyday matters becomes valid upon its performance, unless it results in a gross detriment to the party without legal capacity (Article 14(2) of the Civil Code).

[36] J. Słyk [in:] *Kodeks*..., pp. 1216–1217; J. Słyk [in:] *Meritum. Prawo rodzinne*, red. G. Jędrejek, Warszawa 2017, pp. 775–776.

Another doubt may appear with regard to Article 95(5), which distinguishes the category of the child's major matters, and Article 97(2), where the expression "'significant matters of the child' is used" The principles of grammatical and logical interpretation require that different legal terms be attributed to different meanings[37]. However, the general nature of these concepts, and the function of both regulations are no basis for a precise differentiation between them. "Major" matters are therefore also "significant" matters, such as the choice of the field of study at the university level, medical treatment, a summer camp, i.e. matters exceeding current everyday issues.

The divergence among the regulations of the Family and Guardianship Code, the Polish Constitution and the Convention on the Rights of the Child mentioned above does not, as it seems, have far reaching practical consequences due to the lack of a direct sanction in Article 95, its general, guiding character and the duty to follow the principle of the best interests of the child in each case. Still, even in this event, critical remarks with regard to the amendment may be made. The modification contains strikingly imprecise expressions and – if we follow the systematic and functional interpretation – fails to introduce any vital change to the legislation.

4. PARENTAL AUTHORITY – TERMINOLOGICAL ISSUES

The remarks made in the previous sections let us move on to one more issue of fundamental nature, which is related to assessing the accuracy of the term "parental authority" used in Polish law with regard to the content of the legal relationship in determines.

The debate on the choice of the right term that would specify the discussed area of legal relationships between parents and children continued even during the drafting of the currently effective Family and Guardianship Code.

It was pointed out that introducing the term "parental care" would be justified ideologically, as it would draw a border between socialist law on the one hand, and feudal and bourgeois law on the other, as well as better reflect the primacy of the best interests of the child[38].

Likewise, some authors at present – albeit using different arguments – find it necessary to change the Code's terminology with regard to parental authority. They suggest that the expressions "parental care" or "parental responsibility" be used.

The need for modification is justified with the necessity to put greater emphasis on the child's qualities as a subject in its relationship with its parents. Moreover, the "educational advantage" of the proposed new terms is brought up[39]. The term "parental responsibility" could stress the nature of parental authority, while the currently used expression "emphasises what is secondary", namely the parents' rights. Another argument that supports the use of the term "parental responsibility" is the use of that expression in international legislation[40]. The concept of parental

[37] T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 1995, p. 124.
[38] K. Jagielski, *Istota*…, pp. 98–99.
[39] J. Strzebińczyk [in:] *System*…, p. 242; the author supports the concept of parental custody.
[40] J. Ignaczewski [in:] *Władza rodzicielska i kontakty z dzieckiem*, J. Ignaczewski (ed.), Warszawa 2010, pp. 27 and 29; cf. also the analysis of acts of international law in: M. Michalak, P. Jaros, *Prawo dziecka do obojga rodziców*, „Dziecko Krzywdzone" 2014, Vol. 13, No. 3, p. 32 et seq.

authority is claimed to present the child as a "subordinate" and the parents as "usurpers of that power". Consequently, it allegedly causes a "dissonance between the natural rights of the child and those of the parents"[41].

When it comes to the first idea, i.e. the term "parental care", it ought to be pointed out that in fact, its use would not result in any significant change of the current legal situation. The word "care" is related predominantly to the area of parental rights, as well. The concept of parental authority is rooted in public awareness. A potential change would rather cause confusion with regard to the citizens' legal understanding. At the same time, is seems doubtful whether it could in any way affect the stance taken by parents.

The term "parental responsibility" is supported by arguments referring to international law. For instance, according to Article 2(7) of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338 of 2003, p. 1), parental responsibility means all rights and duties relating to the person or the property of a child, in particular rights of custody and rights of access. Thus, the scope pf parental responsibility in the cited legal act is much more extensive than that of the concept of parental authority in the current Polish legislation. An automatic exchange of these notions would cause an inconsistency in the legal system. Certainly, a radical change of the system of family and guardianship law could be considered, where one concept would unify all rights and duties arising from kinship[42]. Yet the advisability of such a radical reform is doubtful, and in any event, propositions of terminological changes should be preceded by presenting a consistent system of regulations that would redefine the relations between parents and children.

One of the requirements of correct legislation is using – where possible – expressions whose meaning is commonly accepted. It should be noted that the term "parental responsibility" is ordinarily construed as bearing responsibility – including liability – for the child's actions (the damage he or she causes). Using this term in a different meaning would be unintelligible to the addressees of the regulation. It is also doubtful whether a change of terminology used in the code would result in the correct functioning of institutions such as the limitation or withdrawal of "parental responsibility". Parents against whom such measures would be taken could in fact even feel rewarded (freed from responsibility).

As has been pointed out, in the light of the unambiguous statutory wording and of the findings of the doctrine and the jurisprudence, the concept of parental authority involves both duties and rights of the parents. Moreover, the Parliament consistently emphasises the area of duties, and lists them in the first place. The expression "parental responsibility", on the other hand, can hardly refer to rights, which undoubtedly constitute a component of the legal relationship between parents and children.

It appears that the criticism of the current regulations is caused by an overestimation of the impact of terminological changes on the application of law, and

[41] M. Michalak, P. Jaros, *Prawo*…, p. 37.
[42] J. Ignaczewski seems to express such need [in:] *Władza*…, p. 29.

by a misinterpretation of the word "power", which is associated with power that is unconditional, categorical, absolute. Yet in the circumstances of a modern democracy following the rule of law, the notion may and should be associated with duty and responsibility, as well as with actions deprived of arbitrariness. Undoubtedly, parents who bear responsibility for their child are equipped with rights that show traits of authority with regard to the child – and these rights allow the parents to bear this responsibility. Thus, there is no competition between parents' rights (authority) and their duties with respect to the child. The former serves the purpose of ensuring the fulfilment of the latter[43]. The view that the protective function of parental authority is crucial and that the essence of the problem is not whether "the child should be subordinated to the parents, but whether parental authority is construed and exercised according to the best interests of the child"[44] deserves full support.

5. CONCLUSION

The limitations of this paper preclude a more extensive analysis of all structural problems of parental authority. Nonetheless, the above considerations support an amendment of the provisions of the Family and Guardianship Code. Contrary to the 2008 amendment, however, the new modification should bring order to the legal regulation of parental authority, eliminate inconsistencies among individual provisions, and increase the precision of the legal language. It could go towards adopting the theory present in the doctrine which distinguishes care of the child and its property, as elements of parental authority. That would require deleting the words "in particular" used in Article 95 (1) as well as the expression "and to bring up the child". The deletion of the latter would not alter the legal situation, since the parents' duty to bring up their child arises currently from Article 96(1) of the FGC.

Removing expressions introduced by the 2008 amendment seems complex. Such change is justified by the arguments listed above, in particular by the inaccuracies and contradictions, and the need for precise language in the provisions of the Family and Guardianship Code. However, deleting these passages could be perceived as withdrawing from the values they proclaim, which as such raise no controversy. That will probably be the reason why the regulations will remain unaltered for a long time.

In addition, the reservations presented above provoke a more general reflection on amending the Family and Guardianship Code. Family law regulates an exceedingly vital area of human life, where the adoption of specific axiological premises plays a tremendous role. That is why the code includes numerous vague concepts and general clauses. Yet this manner of regulation, which makes family law so specific, or even unique, does not allow for latitude in shaping the legal language of the act. Quite contrarily, it is necessary to determine a precise conceptual network that will render it possible to develop a uniform interpretation of legal norms in court practice. The introduction of new, vague concepts must

[43] J. Słyk [in:] *Kodeks*..., p. 1201.
[44] H. Haak, *Władza rodzicielska. Komentarz*, Toruń 1995, p. 34.

always be subject to deep scrutiny and detailed analysis with regard to their impact on the already existing regulations. It seems that no such analysis and reflection accompanied the introduction of the amended provisions on parental authority discussed in this article.

Abstract

Jerzy Słyk, *The Legal Content of Parental Authority in Polish Family Law*

The article constitutes a synthetic analysis of the legal content and the definition of parental authority in the Polish legal system. In the first section, the author discusses the relevant scholarly findings, and quotes and comments on the existing definitions of parental authority, and the theories of its structure (content). The second section outlines and analyses the principles of exercising parental authority provided for by Polish family law. The considerations are centred around the recent amendments of the regulations that determine the manner of exercising parental authority, which are subjected to critical assessment. In the final section, the author takes into account the previous considerations, and refers to the propositions of terminological changes concerning the institution of parental authority, in particular the notions of replacing the aforementioned term with the expression "parental responsibility". The author also offers arguments against such a modification.

Keywords: *parental authority, care of the child, parental responsibility, best interests of the child*

Streszczenie

Jerzy Słyk, *Konstrukcja prawna władzy rodzicielskiej w polskim prawie rodzinnym*

Artykuł stanowi syntetyczne ujęcie problematyki konstrukcji prawnej i definicji władzy rodzicielskiej w polskim systemie prawnym. W pierwszej części autor analizuje dorobek doktryny w tym zakresie przytaczając i omawiając sformułowane dotychczas definicje władzy rodzicielskiej, a także koncepcje jej struktury (treści). W drugiej części omówione zostały przewidziane w polskim prawie rodzinnym zasady dotyczące wykonywania władzy rodzicielskiej. Uwagi zostały skoncentrowane na dokonanych w ostatnich latach zmianach przepisów determinujących sposób wykonywania władzy rodzicielskiej, które poddane zostały krytycznej ocenie przez autora. W ostatniej części, uwzględniając poczynione wcześniej ustalenia, autor odnosi się do propozycji zmian terminologicznych dotyczących instytucji władzy rodzicielskiej, w szczególności zastąpienia tego pojęcia terminem „odpowiedzialność rodzicielska", opowiadając się przeciwko takiej zmianie.

Słowa kluczowe: *władza rodzicielska, piecza nad dzieckiem, odpowiedzialność rodzicielska, dobro dziecka*