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THE CONCEPT OF CHILD AND ITS LEGAL SYNONYMS IN POLISH CRIMINAL LAW

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Summary: Criminal law, which uses the strictest measures at the disposal of the legislator, requires particular caution in the interpretation of the concepts appearing in the repressive law. The concept of a child in criminal law cause many problems of interpretation, as it appears in many legal acts in a different sense. The publication is devoted to presenting the concept of a child in various legal acts and reflecting on the different meanings of the descriptions of the child made by the legislator and the legitimacy of the differentiations made by him. The question arises as to whether the creation of many different concepts describing a child is justified.

Keywords: child, minor, youthful, legal synonyms, interpretation.

1 Introduction

Any discussion on criminal law aspects relating to the child must take into account the normative scope of the concept of the child or the corresponding synonyms used by the legislator. It appears that the otherwise clear and comprehensible concept of „child" poses numerous interpretative difficulties at the level of law.[1]

This study will focus on an analysis of the Polish regulations. This will allow for the identification of similarities and differences between Polish legal system and international human rights standards. More importantly, the comparative model of this study will also make it possible to check which legislative solutions

1 Cf. GRONOWSKA, Bożena, JASUDOWICZ, Tadeusz, MIK, Cezary, *O prawach dziecka*, Comer, Toruń 1994, p. 11.

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fit into international law and at the same time are functional, correct and effective for a proper response to acts committed against children and by children.

Firstly, the child and the synonymous concepts in the Polish legal order is defined not by reference to the characteristics of such a person, but strictly formally by determining the age at which the attribute of childhood is updated. Although such a system seems unambiguous and free from burdensome arrangements made for each person (as regards having specific characteristics, e.g. lack of maturity), it is full of pitfalls and uncertainties, as will appear below. Problems may also arise from the designation of a specific moment, e.g. reaching the age of 18 (the question is whether it is the midnight that marks the beginning or ending of day, or it is rather a specific time related to the time of birth). In the Polish system, this issue has not been clearly resolved.[2]

2 About the concept of a child on an international basis

A proper analysis of legal terms cannot ignore comments on the concept of the child included in the Convention on the Rights of the Child. Pursuant to its Art. 1, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." As concluded in the Implementation Handbook for the Convention on the Rights of the Child: "Setting an age for the acquisition of certain rights or for the loss of certain protections is a complex matter. It balances the concept of the child as a subject of rights whose evolving capacities must be respected (acknowledged in articles 5 and 14) with the concept of the State's obligation to provide special protection."[3]

Given that in the course of work on the Convention it was impossible to achieve unanimity as to the declaration on the beginning of the child's life, a formula was adopted which did not prejudge that issue, and the Chairman-Rapporteur of the Working Group submitted a declaration on its behalf stating that the Working Group did not seek to prejudge the interpretation of Art. 1 or any other provision of the Convention.[4] It leads to a certain ambiguity because the preamble to the Convention states that „the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Nonetheless, the literature review

2 Cf. further: NAWROCKI, Mariusz, *O sposobie ustalania dolnej granicy wieku odpowiedzialności karnej*, Państwo i Prawo 2019, no 9, pp. 85–93.

3 *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, 2007, p. 1. [online]. Available at: http://www.unicef.org.tr/files/bilgimerkezi/doc/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, Accessed: 28.11.2019

4 DETRICK, Sharon (eds.) *The United Nations Convention on the Right of the Child. A Guide to the "Travaux Preparatoires."* Dordrecht – Boston – London 1992, Cambridge University Press, p. 110.

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shows that the entire content of the Convention is focused on the promotion and protection of the rights of the born child.[5]

The acceptance of the principle that a person ceases to be regarded as a child upon attaining the age of eighteen is in essence maximalist. It mainly takes into account the European and North American standards. In the course of work on the Convention, numerous delegations brought forward proposals for the age limit to be fixed at 15 or even 14 years of age (which would correlate with the completion of compulsory schooling and the right to found a family in force in some countries).[6] In order to take into account the experience of different countries and reach an agreement, a flexible formula was adopted allowing for a conclusion that childhood ends before the age of 18, with no permissible minimum age limit being set. Various attempts were made to determine the child's maturity, but in the absence of consensus, no criterion for such maturity was specified in the Convention.[7] Still, "the Committee has emphasized that, when States define minimum ages in legislation, they must do so in the context of the basic principles within the Convention, in particular the principle of nondiscrimination (Article 2, for example challenging different marriage ages for boys and girls), as well as the principles of best interests of the child (Article 3) and the right to life and maximum survival and development (Article 6). There must be respect for the child's "evolving capacities" (Article 5): in General Comment No. 7 on "Implementing child rights in early childhood," the Committee on the Rights of the Child underlines that "young children are holders of all the rights enshrined in the Convention."[8]

In his analysis of the provisions of the Convention regarding the concept of the child, Adam Łopatka raises the question whether a country being in compliance with the Convention may assume that childhood ends later than upon attaining the age of 18. It is important in the light of Art. 41 of the Convention reading as follows: "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State." The answer to that question depends on whether we recognize that care, attention, and adequate legal protection necessary for a physically and mentally immature person are beneficial to the person who reached

5 ŁOPATKA, Adam, *Kto jest dzieckiem?* In ŁOPATKA, Adam, (eds.), *Konwencja o prawach dziecka a prawo polskie. Materiały z konferencji naukowej zorganizowanej w gmachu Sejmu RP w dniach 19–20 maja 1991 r.,* Warsaw 1991, p. 19.

6 MICHALSKA, Anna, *Międzynarodowa ochrona praw dziecka w ONZ*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 1985, no. 1, pp. 12–13.

7 BALCEREK, Marian, *Międzynarodowa ochrona praw dziecka*, Warsaw: Wydawnictwa Szkolne i Pedagogiczne, 1988, p. 155.

8 *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, 2007, p. 1. [online]. Available at: http://www.unicef.org.tr/files/bilgimerkezi/doc/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, Accessed: 28.11.2019

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maturity. Adam Łopatka is of the opinion that what is beneficial for a child can be embarrassing and become a burden for a physically and mentally mature person.[9]

Irrespective of the age criterion adopted in the Convention, individual provisions of the Convention relate to children in selected age categories, taking into account the special needs of a child at a certain age, its particular sensitivity, as well as the growing independence of the child. By way of illustration, the youngest children are referred to in Art. 7 point 1 of the Convention stating that a birth certificate should be issued immediately after birth at which point the child has the right to a name and right to acquire a nationality. In contrast, as regards combating the illicit transfer and non-return of children abroad (Art. 11), no age limits are set. That is different in the case of the participation of children in warfare. Pursuant to Art. 38 (2) of the Convention, States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen do not take a direct part in hostilities.

3 About the concept of a child in Polish criminal law

In Polish criminal law, the term child is virtually non-existent. The Criminal Code uses that concept only a few times and, it seems, more often in the sense of a descendant rather than young being. Currently, in Polish substantive criminal law, the concept of the child as a victim is synonymous with the concept of a **minor**, whereas the term **juvenile** is used to describe a child who commits a prohibited act. It must be acknowledged that the legislator has not been entirely consistent in that area, and the historical development of the above terms and their ranges are a good illustration of the past and present terminological chaos.

The first part of this article will present ways to define the child as a victim in the Polish criminal codes adopted in the 20th century. They include the pre-war Criminal Code of 1932, the socialist Criminal Code of 1969 and the currently effective Criminal Code of 1997, which has thus far been subject to numerous amendments. The following list includes concepts that refer directly to non-adult victims or concepts that relate both to adult and child victims.

Thus, the Criminal Code of 1932 applied the following concepts do define non-adult victims:

- juvenile under the age of 15 (Art. 213), juvenile under the age of 17 (Art. 158, Art. 199, Art. 246) and juvenile under the age of 21 (Art. 212),
- child (Art. 200, Art. 212, Art. 226),
- person under the age of 15 (Art. 203)

9 ŁOPATKA, Adam, *Kto jest dzieckiem?* In ŁOPATKA, Adam, (eds.), *Konwencja o prawach dziecka a prawo polskie. Materiały z konferencji naukowej zorganizowanej w gmachu Sejmu RP w dniach 19–20 maja 1991 r.,* Warsaw 1991, pp. 20–21.

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and as a *sui generis* synonym for non-adult:

- person to whom a duty to take care or provide supervision is owed (Art. 242 § 2, Art. 243), as well as:
- person being in a relation of dependence (Art. 246).

The provisions of the Criminal Code of 1969 applied the following terms:

- child (Art. 149, Art. 186 § 1),
- person to whom a duty of care is owed (Art. 160 § 2, Art. 163),
- person under the age of 15 (Art. 176, Art. 177, Art. 187),
- minor (Art. 184, Art. 185, Art. 188).

The Criminal Code of 1997 uses the following conceptual grid in the analyzed area:

- person helpless due to that person's age (Art. 53 § 2, Art. 189 § 2a, Art. 207 § 1a),
- children (Art. 118 § 2, Art. 211a),
- child (Art. 149),
- person to whom a duty to take care is owed (Art. 160 § 2),
- minor (Art. 115 § 22, Art. 199 § 2, Art. 202, Art. 204 § 4, Art. 208); and minor under the age of 15 (Art. 197 § 3 item 2, Art. 200, Art. 200a, Art. 210, Art. 211),
- infant (Art. 149 in the former wording effective for a relatively short period of time).

The above list shows the course of the evolution of the wording of the youngest victims. A characteristic feature of the Criminal Code of 1932 lies in its use of the term juvenile for both the victim and the perpetrator. The definition of a juvenile may partially be reconstructed on the basis of Art. 69–72 of the Criminal Code of 1932, in the light of which a juvenile is a person up to the age of 21. The liability of a juvenile was dependent on the following time limits: committing an act before reaching the age of 13, between the age of 13 and 17 and after attaining the age of 17. Other time limits were important to classify juveniles as victims from the perspective of the protection of their rights, namely: being under 15, 17 and 21 years of age. It should also be noted that in addition to the concept of a juvenile, the code also includes the category of „a person under 15 years of age," which somewhat undermines the system outlined above. That terminological disorder was exacerbated by the fact that in other provisions the legislator used the term „child." Notably, the dictionary entry for the term child has two basic meanings: „1. human being from birth to adolescence; 2. human descendant regardless of age, son or daughter."[10] The legislator of 1932 used the concept of the child in the first sense, and therefore as a synonym for the then concept of juvenile. At the same time, the legislator applied the term "child" also

10 Available at:https://sjp.pl/dziecko, Accessed at: 27.01.2019.

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in the second sense to denote the offspring (e.g., both of these situations occur when criminalizing the so-called prostitution-related offenses – Article 212). It was certainly not the most appropriate legislative procedure. In contrast, the terms "person to whom a duty to take care or provide supervision is owed" and "person being in a relation of dependence" seem to be fully justified given that they appear in provisions that apply not only to the youngest. Above all, the cited terms define a certain relation between the perpetrator and the victim, which becomes an important element of the determination of prohibited acts.

The legislator preparing the Criminal Code in 1969 abandoned the use of the term juvenile to denote the victim, introducing instead the concept of „minor" derived from the Civil Code. To further complicate matters, the Criminal Code of 1969 also features the concept of „person under 15 years of age" in as many as three regulations. Thus, the attempt to organize the subject matter ended in moderate success. The positive elements surely include the abandonment of the use of the term „child" to identify the non-adult victim. The provisions using the concept of child (Art. 149 – infanticide and Art. 186 § 1 – failure to provide maintenance) indicate the relation between the perpetrator and the victim rather than focus on the age of the victim.

Given the above, it is astonishing that the legislator preparing the Criminal Code in 1997 strayed from the chosen path to reintroduce the concept of child in the sense of a non-adult person (cf. e.g. Article 118 § 2 of the Criminal Code – extermination), while eliminating entirely the concept of „person under the age of 15," which should be noted with appreciation. The amendment adopted in 2015 introduced a new concept of "person helpless due to that person's age" in order to strengthen, as it was declared, the criminal protection of the child. Putting aside the assessment of the appropriateness of such a solution (in particular in the context of the place where such wording appears in various code regulations),[11] it should be noted that the phrase „person helpless due to that person's age" is not a close synonym for the concept of a child or minor. Truly, it may apply to some adults (in particular, the elderly) who have more or less limited physical, mental or intellectual efficiency due to their age. At the same time, not every child (minor) may be deemed helpless due to age. In the case of a child who is physically, intellectually and mentally mature and is independent and resourceful, the category "person helpless due to that person's age" clearly does not apply. Therefore, in cases where the legislator uses this concept in a specific provision, that provision will apply to all children (minors) and each time the court will have to examine whether the injured child is indeed helpless.

11 Further analysis of that concept and its functions are presented in the following article: SITARZ, Olga, BEK, Dominika, *Czy zasadnie i skutecznie ustawodawca podwyższył poziom ochrony małoletnich? Krytyczna analiza nowelizacji kodeksu karnego z 23 marca 2017 r.*, Forum Prawnicze 2017, vol. 6, no 44, pp. 8–24.

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Another very serious interpretative problem arises from the establishment of time limits of the concepts of minor and juvenile. Seemingly, as these are normative terms, the matter seems simple – the relevant laws set these limits. However, that is not the case.

With regard to the concept of the minor, it is necessary to determine precisely the start of childhood. It is the moment that radically differentiates the criminal law response to the violation of the subject's interests. The principles of liability in Polish criminal law are established differently depending on whether the subject's interests are violated before or after its birth. By way of example, violations of interest in the form of life may be indicated. If committed before childbirth, such a violation is referred to as an abortion. Then only intentional conduct is punishable and a pregnant woman is not liable to a penalty if she performs the abortion herself. In comparison, the killing of a child after its birth constitutes murder or, alternatively, infanticide and is punishable both when committed intentionally and unintentionally. The mother also bears criminal liability, but in the case of infanticide, i.e., during and under the influence of delivery, the penalty is significantly mitigated.

There have thus far been three main theories in the science of criminal law determining the start of childhood / initial moment of a born person. Those three groups of views situate the moment when a conceived child becomes a human being within the meaning of criminal law during childbirth, although they relate it to its various phases. The earliest indicated moment is the beginning of labor (so-called obstetrics criterion). While remaining within the limits laid down in the Criminal Code, that view specifies the widest scope of protection. Representatives of the other views see that moment when a newborn child starts to breathe independently with its own lungs (so-called physiological criterion), sometimes adding the condition of complete physical separation from the mother's body, or at the moment of complete or partial leaving the mother's womb (so-called physical or spatial criterion). The latter cases naturally foresee a narrower scope of protection compared to the obstetrics criterion.[12] All in all, in line with the case law of the Supreme Court, the full criminal law protection should be given from „a) the beginning of (natural) delivery, b) in the case of surgical caesarean section terminating pregnancy at the request of a pregnant woman – from the first medical activity directly aimed at carrying out such surgery, c) in case of medical necessity to perform a caesarean section or other alternative termination of pregnancy – from the occurrence of medical premises of such necessity."[13] It is thus a moment well in advance of what is typically understood as „birth," but such regulations stem from the intention of granting the child before its birth the same level of protection as after the birth. Meanwhile, the Supreme Court noted the disparity in the criminal law protection of the life of an unborn child during

12 Resolution of the Supreme Court of 26.10.2006, I KZP 18/06, Lex.
13 Decision of the Supreme Court of 30.10. 2008, I KZP 13/08, Lex.

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a normal pregnancy ending in natural delivery and in the event of the pregnancy ending with a Caesarean section, but as announced in its judgment, that disparity can only be removed by the legislator.[14] Pursuant to the Constitution of the Republic of Poland, the rulings of the Supreme Court do not constitute a source of law, but given the fact that it supervises the operation of common and military courts in the area of adjudication and it enjoys high prestige, its judgments have a huge impact on the interpretation of law and its application.

The indication of the upper limit of minority is only seemingly easier. When seeking to establish that limit – in the absence of relevant regulations in the Criminal Code – lawyers consistently draw on civil law which defines that term. Account should after all be taken of the legal consequences of incorporating into criminal law a civil law term which is subject to a specific modification pursuant to yet another act. More precisely, the provision of Art. 10 of the Civil Code stipulates that an adult is any individual who attained eighteen years of age and that a minor becomes an adult upon marriage. Pursuant to Art. 10 of the Family and Guardianship Code, for valid reasons, the guardianship court may allow a woman who has reached the age of sixteen to marry, where the circumstances indicate that the marriage will be in the best interest of the newly established family. The question thus arises whether the concept of a minor in criminal law should be understood only in accordance with the provisions of the Civil Code (which means a person under 18 years of age), or in accordance with (the whole) civil law system, which in essence means any person up to the age of 18, unless it is a woman who attained the age of 16 and got married upon consent of the court. In other words, the issue is whether marriage of a girl concluded before she reaches the age of 18 changes her status in criminal law, i.e. deprives her of the status of a minor. As a case in point, let us imagine treating a 17-year-old bride (i.e. after she entered into marriage) to an alcoholic drink at her wedding reception, whilst the provision of Art. 208 of the Criminal Code states: „Who induces a minor to become an inveterate drinker by providing him/her with an alcoholic drink, facilitating its consumption or persuading him/her to consume such beverage, shall be subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years."

14 Decision of the Supreme Court of 30.10.2008, I KZP 13/08, Orzecznictwo Sądu Najwyższego – Izba Karna I Wojskowa 2008, no. 11, pos. 90, with a critical comment by A.T. Olszewskiego, Lex.

In connection with the thesis of the Supreme Court raising some issues concerning the disparity in the protection of health (and life) of a healthy and unhealthy fetus (where a caesarian section is necessary) and the related postulate advanced by T. Sroka. In his opinion, "an intervention by the legislator appears to be necessary in order to extend the scope of the criminal law protection of human life against unintended attempts at that legal interest to include every case where a conceived child developed the capacity to love independently outside the mother's body." – SROKA, Tomasz, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*. Warsaw: Wolters Kluwer Polska, 2013, p. 82.

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One should not lose sight of the general reservation expressed by the Committee on the Rights of the Child: "in some States Parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention. The Committee strongly recommends that States Parties review, and where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys. (…) The Committee on the Rights of the Child has repeatedly emphasized to many States Parties that the age of marriage for both girls and boys must be the same to conform with article 2 of the Convention."[15] In 1994 the Committee on the Elimination of Discrimination against Women (CEDAW) made a General Recommendation on equality in marriage and family relations, which proposes that the minimum age for marriage should be 18 for both women and men.[16]

Giving further consideration to the temporal scope of the concept of a (minor) child in Polish criminal law, one cannot ignore the fact that the special criminal law protection is not always extended to the entire period of childhood (minority). Criminal law divides the time of minority into periods – a certain behavior is a crime if it concerns children of a certain age or is a crime punishable by a more severe penalty when it involves a child. By comparison, in the situation where children are older, the behavior defined in such a provision does not constitute a crime or misdemeanor.

The following time periods in childhood differentiating protection can be indicated:

a. birth – granting the so-called full criminal law protection (for instance, the unintentional causing of death of a newborn child is a crime, while it does not constitute a crime in the prenatal phase);
b. the first 24/48 hours of life – up to that point in the life of the child, the mother incurs a lighter penalty in the event of the child being killed under the influence of delivery (Art. 149 of the Criminal Code);
c. up to 7 years of age – allowing a child to remain unattended on a public road constitutes a petty offense (Art. 89 of the Code of Petty Offenses);
d. up to 10 years of age – the organization of traffic of a column of such pedestrians on the road in conditions of insufficient visibility constitutes a petty offense (Art. 12 item 7.2 of the Road Traffic Act in conjunction with Art. 97 of the Code of Petty Offenses);

15 *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, 2007, p. 8. [online]. Available at:
http://www.unicef.org.tr/files/bilgimerkezi/doc/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, Accessed: 28.11.2019
http://www.unicef.org.tr/files/bilgimerkezi/doc/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf

16 Ibidem.

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e. up to 13 years of age – allowing a child, inter alia, to lead animals on a hard road is a petty offense (Art. 37 item 4.2 of the Road Traffic Act in conjunction with Art. 97 of the Code of Petty Offenses);
f. up to 15 years of age – engaging in sexual intercourse or another sexual activity with a minor who has not attained that age is a crime (Art. 200 of the Criminal Code); however, rape of a minor under 15 years of age is a qualified crime and thus punishable by a more severe penalty (Art. 197 § 3 of the Criminal Code);
g. up to 17 years old of age – neglect of upbringing responsibilities while caring for a child up to that age leading to demoralization is a crime (Art. 105 of the Criminal Code);
h. up to 18 years of age – for instance, providing a person of that age with an alcoholic beverage is a crime (Art. 208 of the Criminal Code); whereas, among others, deriving material benefits from prostitution practiced by a minor is a qualified crime, thus punishable by a more severe penalty (Art. 204 § 3 of the Criminal Code).

The indicated age limits are proof that the legislator recognizes the growing maturity of children providing them with greater freedom and opportunity to exercise control over their interest. The legislator is also well aware of the lack of the need for prescribing maximum protection in some areas in view of the evolving resourcefulness and independence of children.

The protection of the child in the prenatal phase should be recognized as a separate issue of criminal law protection. The concept of the minor examined above does not include that phase of life. In legal language, the study of civil law often uses the term *nasciturus*, but much less often the term a man *in statu nascendi* or *conceptus*. In general, the causing of death of a conceived child constitutes a criminal offense in Polish criminal law (with three exceptions),[17] as is the case with causing a bodily injury. A conceived child or, in other terms, life in the prenatal phase is also subject to time limits. The establishment of limits in that case is by no means easy either, and the matter is further complicated by the fact that the Polish Criminal Code uses two terms "the conceived child" and "pregnancy," which are to a certain extent synonymous, even in one provision of law. Another difficulty lies in the fact that the Act providing for the extraordinary possibility of terminating pregnancy uses the term fetus.

It is most commonly assumed that pregnancy is a woman's condition from conception to delivery.[18] The beginning of pregnancy is determined slightly dif-

17 *Act of 7 January 1993 on Family Planning, Human Fetus Protection and Conditions of Permissibility of Abortion*, Journal of Laws. 1993 no. 17 pos. 78.

18 Cf. for instance GIEZEK, Jacek. In GIEZEK, Jacek (eds), Kodeks karny. Część szczególna. Komentarz, Warsow: Wolters Kluwer, 2014, p. 199.
The definition proposed by M. Królikowski, which appears to be isolated, states that pregnancy is a biological and personal relation between the woman and the conceived child taking place in her organism, occurring upon fertilization and lasting until the delivery

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ferently in medical sciences – implantation of a fertilized egg (blastocyst) in the uterine endometrium (nidation)[19] or outside the uterus (most often within the fallopian tube – the so-called ectopic pregnancy). The acceptance of one of the two competing interpretations of the term „pregnancy" is of utmost importance for the criminal assessment of the use and provision of contraceptives that prevent the implantation of a fertilized egg in the uterus (including the intrauterine device). It appears that the statutory differentiation of the prenatal phase made in the provision of Art. 152 into „pregnancy" (§1) and „conceived child" (§3) allows for the application of the indications accepted in medicine to the interpretation of the provision of law.[20] All in all, a conceived child means a human being from the moment of conception (regardless of the possibility of medical determination of its existence in the first hours of that phase).

In the simplest terms, pregnancy and also the status of a conceived child end with the birth of the child. That is the moment of adjustment of the theories cited above determining the moment of birth, as well as the theses of the Supreme Court which points to the three aforementioned moments of the full implementation of criminal law protection, and therefore the end of the prenatal phase.

In the light of criminal law, the prenatal phase is divided into two periods, which means that periodization also occurs at that stage. The turning point is reached once a conceived child develops the capacity to live independently outside the mother's body. Consequently, the perpetrator's criminal liability for abortion in the first or second phase of pregnancy is different. The provision of Art. 152 § 3 provides for the so-called qualified type – the perpetrators of the defined acts (i.e. termination of pregnancy, aiding and abetting) are subject to a more severe criminal liability regime in the event where the conceived child has developed the capacity to live independently outside the mother's body. It is assumed that the fetus acquires that capacity after 6 months of pregnancy. Pursuant to the criteria adopted by the WHO, the fetus acquires the capacity to survive outside the mother's body in the 21st week of pregnancy, after reach-

– KRÓLIKOWSKI, Michał. In: KRÓLIKOWSKI, Michał, ZAWŁOCKI, Robert, *Kodeks karny. Część szczególna*. Vol. I, Warsaw: C.H. Beck, 2013, p. 243.

19 PLEBANEK, Ewa, *Przestępstwa aborcyjne – praktyczna interpretacja znamion czynności wykonawczej*, Prawo i medycyna 2011, no. 4, p. 35.

20 Also M. Safjan points to nidation as the start of pregnancy indicating the change occurring in the woman's body since that moment, which allows for the determination of pregnancy – SAFJAN, Marek, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warsaw: Uniwersytet Warszawski, 1990, p. 317. However, it appears that the argument of functionality should be of a secondary nature in relation to medical indications, also KONARSKA-WRZOSEK, Violetta. In: KONARSKA-WRZOSEK, Violetta (eds.), *Kodeks karny. Komentarz*, Warsaw: Wolters Kluwer, 2016, p. 745.
R. Kubiak is of a similar opinion arguing that the Act on Family Planning and Art. 152 do not apply to abortifacients given that there can be no pregnancy before nidation (implantation of a fertilized egg) – KUBIAK, Rafał, *Prawo medyczne*, Warsow: C.H. Beck, 2014, pp. 496–497.

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ing a body weight of 500 grams.[21] In the opinion of B. Michalski, the indicated qualifying element implies such a stage of development of a conceived child that the organs performing basic life functions, in particular breathing, are fully formed.[22] A. Zoll adds that the issue concerns the chance of survival of the child using appropriate devices (e.g. an incubator) after removing it from the mother's body.[23] Under this approach, it seems that the limitation of the qualified type by specifying the capacity to live outside the mother's body by means of adding the wording „independently" is totally unnecessary. Moreover, the interpretation of that article must lead to *contra legem* conclusions or a breach of the prohibition of *per non est* interpretation.

The figure opposite to the injured child in criminal law regulations is the child perpetrator of a prohibited act. The legal synonyms (to some extent) of the concept of a child perpetrator of a criminal act are the terms **juvenile** and **young adult**. The age limits for a juvenile established in the Criminal Code differ from those set by the Act on Juvenile Delinquency Proceedings and are entirely distinct from the age limits for a minor.

The Criminal Code, regardless of the provisions of civil law, establishes the age for adulthood at 17 years of age (Art. 10 § 1). The exceptional liability of a minor aged 15–17 is provided for in § 2 of that provision stating that a juvenile who having attained the age of 15 commits an offense specified in Art. 134, Art. 148 § 1, 2 3, Art. 156 § 1 3, Art. 163 § 1 3, Art. 166, Art. 173 § 1 3, Art. 197 § 3, Art. 252 § 1 2 and in Art. 280 may be liable under the rules set out in the code, provided that the circumstances of the case and the degree of development of the perpetrator, his properties and personal conditions give grounds for it, in particular, where the previously applied educational or corrective measures proved ineffective.

The Act on Juvenile Delinquency Proceedings indicates three categories of young offenders referred to as juveniles. The first category includes persons younger than 18 years of age who show symptoms of demoralization and there is a need to prevent and combat their demoralization. The minimum age for juveniles displaying signs of demoralization is not provided by the Act on Juvenile Delinquency Proceedings (1982). In the opinion of P. Daniluk and J. Mierzwińska-Lorencka, it is a solution fully legitimate and reasonable. The need to initiate appropriate proceedings in the juvenile case due to demoralization should determine the real purpose of preventing demoralization.[24] The literature

21 KANIA, Agnieszka Maria, *Kontrowersje związane z kryminalizacją przerywania ciąży. Część I*, Nowa Kodyfikacja Prawa karnego, 2011, vol. Tom XXVII, no 3325, p. 102.

22 MICHALSKI, Bogdan. In WĄSEK, Andrzej (ed.), *Kodeks karny. Część szczególna. Vol. I. Komentarz*, Warsaw: C.H. Beck, 2004, p. 271.

23 ZOLL, Andrzej. In ZOLL, Andrzej (ed), *Kodeks karny. Część szczególna. Tom II, Komentarz do art. 177–227*, Cracow: Zakamycze, 1999, p. 336.

24 DANILUK, Paweł, MIERZWIŃSKA-LORENCKA, Joanna, *Responsibility of a Juvenile for a Prohibited Act under Polish Law,* International and Comparative Law Review, 2016, Vol. 16, No. 2, pp. 109–110.

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review provides another justification for the lack of lower age limit for signs of demoralization. T. Bojarski writes that it is difficult to indicate below what age a child will not need help. It is not surprising, therefore, that judicial practice records juvenile proceedings even involving children under the age of nine.[25]

The second category includes juveniles who committed a punishable act after having reached 13 years of age, but before having attained the age of 17. The lower limit of 13 years refers to the division of juveniles adopted in the Criminal Code of 1932 in which division into two age groups of juveniles was made, i.e. up to the age of 13 as acting without discernment, and from 13 to 17 years as a group of juveniles for whom the statutory presumption assumed that they act with discernment, although exceptions were possible. The upper limit set at 17 years of age bears a close relation to the principle laid down in the system of criminal law that a person may be held criminally liable only when at the time of the commission of the offence they attained at least the age of 17.

The last category of juveniles are persons under the age of 21, where the rules of the Act on Juvenile Delinquency Proceedings are applicable for the purpose of the implementation of educational or correctional measures imposed by the court. Juveniles who after having reached the age of 17 commit a punishable act or after having attained 18 years of age show other signs of demoralization cannot be subject to the regulation, even though the educational or correctional measures were carried out earlier. In terms of the performance of educational or correctional measures, the rules of the Act on Juvenile Delinquency Proceedings shall apply to a certain category of "adult offenders" who have committed a prohibited act such as an offence, fiscal offence or fiscal petty offence at the age of criminal responsibility (after having attained 17 years of age, but before having attained the age of 18) if the criminal court hearing the case deems it appropriate instead of imposing a punishment or educational or correctional measures intended for juveniles. The literature and case law review indicates that the definition of that category of offenders as juveniles is wrong. In fact, as regards young adults who are treated as if they were juveniles, the provisions of Polish criminal law clearly indicate that the attainment of 17 years of age marks the end of the period of being juvenile.[26]

The above Polish solutions must be confronted with the provisions of the Convention on the Rights of the Child referred to above. Article 40(3)(a) of the Convention proposes "the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." In its

25 BOJARSKI, Tadeusz. In BOJARSKI, Tadeusz, KRUK, Ewa, SKRĘTOWICZ, Edward (ed.), *Ustawa o postępowaniu w sprawach nieletnich. Komentarz*, Warsaw: Wolters Kluwer 2014, p. 41.

26 DANILUK, Paweł, MIERZWIŃSKA-LORENCKA, Joanna, *Responsibility of a Juvenile for a Prohibited Act under Polish Law,* International and Comparative Law Review, 2016, Vol. 16, No. 2, pp. 109–110.

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General Comment No. 10 on "Children's rights in Juvenile Justice," the Committee urges States not to set the minimum age at too low a level and to continue to raise the age to an internationally acceptable level. It is clear, from the Initial and Periodic Reports of States Parties and from the reports of discussions with the Committee, that the definition of the age of criminal responsibility is often blurred. In some States, it appears, paradoxically, that children can be liable under criminal law for major offences at a younger age than they can be liable for minor offences. The Committee has, in several cases, underlined that a minimum age must be defined in legislation. For many States, the Committee has urged that the age should be raised, and the Committee has welcomed proposals to set the age at 18. For example: "The Committee urges the State Party to raise the minimum age of criminal responsibility and to ensure that children aged 15 to 18 years are accorded the protection of juvenile justice provisions and are not treated as adults."[27]

Polish criminal law also uses the term "young adult" referring to a young offender, who is not always a child, although the ranges of these two terms overlap. The legislator adopted the criterion of the child's age at the time when the judgement is pronounced and, simultaneously fulfilling the postulates advanced in the doctrine, determined the status of young adult in the 1997 Criminal Code by reference to the age of the perpetrator at the time of commission of the offense.[28] Pursuant to the provision of Art. 115 § 10 of the Criminal Code, a young adult is a perpetrator who has not attained 21 years of age at the time of the commission of a prohibited act and 24 years of age at the time of pronouncing the judgment in the first instance. Within the meaning of criminal law, juveniles committing an offense, i.e., at the age of 15–17, shall simultaneously be deemed to be young adults as long as the judgment in their case is pronounced in the first instance before they attain the age of 24. In the event where for any reasons the criminal proceedings are prolonged and the sentence is pronounced after such a specified period, the perpetrator shall no longer hold the status of young adult (still remaining a juvenile). Notably, not all young adults are juveniles. If, at the time of the commission of the act, the perpetrator is, for instance, 18 years old, whereas at the time when the judgment is pronounced attains the age of 23, then he/she is a young adult, but not a juvenile. Those differentiations are of relevance for imposing a penalty for a committed offense and, above all, for serving a penalty of deprivation of liberty.

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27 *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, 2007, p. 10. [online]. Available at: http://www.unicef.org.tr/files/bilgimerkezi/doc/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, Accessed: 28.11.2019

28 MAJEWSKI, Jarosław, Komentarz do art. 115 of the Criminal Code. In WRÓBEL, Włodzimierz, ZOLL, Andrzej (ed), *Kodeks karny. Część ogólna. Tom I, Część II. Komentarz do art. 53–116*, Warsaw: Wolters Kluwer, 2016, LEX/el.

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4. Conclusions

In conclusion, an analysis of the Polish solutions regarding the establishment and definition of childhood limits reveals a profound lack of coherence between the limits set in the case of harm and in the case of perpetration. The legislative decisions take into account the slowly evolving maturity of a young person on the physical, mental, intellectual and, above all, social level in a somewhat diverse and arbitrary manner. With certain terminological chaos (synonymous meanings of different terms) and a lack of precision, the overall assessment of the Polish regulations in that area is not overly positive.

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