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Application of the Clause of the Good of the Child: Reflections Inspired by the Decision of the Supreme Court on the Creation of Foster Families

Stosowanie klauzuli dobra dziecka. Rozważania inspirowane postanowieniem Sądu Najwyższego dotyczącym tworzenia rodzin zastępczych

ABSTRACT

The article concerns the good of the child clause. Once the sense of the clause was specified, the focus of the article was shifted onto the issue that is closely related to the practice of judicial decisions undertaken by courts, namely to the criteria under which the courts apply this clause. To illustrate the issue, it was necessary to make references to the achievements of the theory of law concerning the linguistic interpretation and functional interpretation and, in particular, the relationship between them. The background and inspiration for the considerations is the decision of the Supreme Court issued a few years ago, in which the obvious thesis was propounded that if the linguistic interpretation leads to absurd conclusions, contradicting the assumption of the rationality of the legislator's actions and contradicting the axiology of the legal system, then the conclusions should be abandoned and the decisions should be made on the basis of the good of the child clause. The author however claims that the Supreme Court has erroneously interpreted Article 42 of the Act of family support and foster care. He supports his claim saying that in the discussed case there were no grounds for rejecting the norm interpreted with the use of linguistic interpretation methods. Moreover, the author asserts that the Supreme Court has improperly applied that functional interpretation since, referring to the constitutional value of the good of the child, it did not in fact protect it, and by its decision the court made the person who did not meet the legal and moral criteria obtain the status of a foster family.

Keywords: good of the child clause; foster family; linguistic interpretation; functional interpretation

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RESEARCH PROBLEM

The clause of the good of the child is a topic that can and should be evoked without any extraordinary justification. As the most important principle of family law, it is primarily a legal issue, but in recent years valuable studies on its subject have also been written in pedagogy and sociology, thus providing an integral perspective of a few disciplines on a common category.[1]

This article was inspired by the decision of the Supreme Court of 24 November 2016[2] and – to a lesser extent – the decision of the Constitutional Tribunal of 14 November 2017.[3] The Supreme Court opted for the admissibility of establishing foster families by persons who do not meet the prerequisites specified in Article 42 of the Act of 9 June 2011 on family support and foster care,[4] if it is in the best interest of the child. Likewise, the Constitutional Tribunal supported this idea, as it did not arouse any controversy. Yet the controversies arise once we read the justification of the Supreme Court's decision. The first issue is connected with the interpretation of the provision laying down the statutory conditions for the creation of a foster family, and the second – the indication of the criterion/criteria which would allow to depart from these conditions; in fact, the latter issue boils down to determining the circumstances, in which respect for the literal wording of the provision would lead in a given case to solutions contrary to the principle of the good of the child. The latter case would allow (or order) a decision based solely on this principle. The justification of the Supreme Court's decision also encourages an attempt to reconstruct the way it undertook to understand the principle of the good of the child presented in the judgement (what was the good of the child in this case?). By invoking the general clause to question the content of the regulation, it is possible to focus attention on the relation between the linguistic and functional method of interpretation. All the problems discussed in this context also illustrate transformations taking place in the relationship between the legislative and judicial powers as a result of the influence of conduct described as legal activism, particularly judicial activism.

[1] See M. Arczewska, *Dobro dziecka jako przedmiot troski społecznej*, Kraków 2017; K. Kamińska, *Dobro dziecka w dyskursie państwo–rodzina. Inaczej o przemocy domowej*, Kraków 2010; J. Kusztal, *Dobro dziecka w procesie resocjalizacji. Aspekty pedagogiczne i prawne*, Kraków 2018.

[2] II CA 1/16, OSNC 2017, no. 7–8, item 90.

[3] SK 64/19, OTK-A 2017, item 82.

[4] Consolidated text, Journal of Laws 2020, item 821, as amended; consolidated text, Journal of Laws 2021, item 159, hereinafter: the Act.

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FACTS

In order to address the theoretical issues with reference to the court's decision, it is paramount to present the essential facts of the analyzed case.

At the end of 2012, Marcin P. applied for the establishment of a foster family for his stepdaughter Sandra F. (his second wife's daughter). At the time, he had three children from his first marriage (he divorced in 2008), for whom he did not pay alimony or maintain contact with until the Supreme Court's decision (2016), i.e., for 8 years.

After the said divorce, he entered into another marriage. From an earlier relationship, his wife had a daughter, Sandra F. (born 2006), to whom he became stepfather. From the second marriage, the couple had a child together, Susanna (Sandra's half-sister).

After the death of his second wife (autumn 2012), Marcin P. entered into an informal relationship with Paulina P., who had two children of her own. The family of six was supported by the salary of the applicant (about PLN 3,000) and various social benefits.

In 2012 Marcin P. applied to be appointed a foster family for Sandra. He was refused a referral for an orientation training on the grounds that he did not meet the conditions set out in Article 42 of the Act, in particular that he had not paid maintenance for his three children from his first marriage.

It was also argued that he has limited parental authority over these children, but in the course of the court proceedings it was rightly assumed that the word "limitation" used in the divorce judgement relates to the situation of all the family members for the time after the divorce. A parent who does not live with the child has – for this reason – limited possibilities of influencing the child, but this cannot be equated with the restriction of parental authority ruled on the basis of Article 109 of the Family Guardianship Code[5] on the grounds that the parent poses a threat to the good of a child.[6] Another thing is that the long-term absence of contact and evasion of maintenance fulfill the prerequisite for depriving him of parental authority over these children.

In November 2012, the District Court temporarily appointed Marcin P. as a foster family as a form of warrant for securing the claim till a valid conclusion of the proceedings would be reached, and by virtue of a decision of March 2014,

[5] Act of 25 February 1964 – Family and Guardianship Code (consolidated text, Journal of Laws 2020, item 1359), hereinafter: FGC.

[6] T. Smyczyński, M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2020, p. 184; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, Warszawa 2013, p. 471; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, p. 371; J. Pawliczak, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Osajda, vol. 5, Warszawa 2017, Article 58, pp. 746–752.

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it appointed him as a guardian for his stepdaughter. In December 2014, however, the same District Court denied Marcin P.'s request to create a foster family for her. This decision was based on information obtained from the school that Sandra, her half-sister, and the children of the applicant's partner had told teachers about the violence used against them by Marcin P. and his partner. According to the children, they had been "spanked, shouted at and threatened, and Sandra had been spanked with a hand or a belt or knelt on bags of peas". As a result, the children were afraid to go home after class. On the basis of this information, proceedings were instituted to restrict Marcin P.'s parental authority, and the local social welfare center assigned a family assistant to both cohabiting partners because they were not fulfilling their child-rearing function in an appropriate manner (Article 8, Articles 14 to 17 of the Act).[7] In the course of the proceedings, the family diagnostic and consultation center issued an opinion certifying strong emotional bonds between Sandra and her half-sister, stating that the girls should grow up together.

Marcin P. filed an appeal against the decision that refused him the right to establish him as a foster family. Hearing the appeal in 2014, the District Court took into account the evidence from Sandra, then 8 years old. She said that she treated the applicant as a father and his partner as a mother, trusted them, and that her half-sister was the most important person in her life.

Based on the collected material, the District Court assumed that due to the legal and factual custody and upbringing of Sandra F. by the applicant and – as it was put – for the sake of continuity in this upbringing, the best interests of the stepdaughter called for the creation of a step-family for her. It asked the Supreme Court whether Marcin P. could be appointed a foster family even though he did not meet the conditions set forth in Article 42 of the Act. He received an affirmative answer.

In the decision of 14 November 2017, the Constitutional Tribunal addressed the same question received from a different case. It was asked by a District Court in the context of an application for the establishment of a foster family submitted by a person with a criminal record and who had also been deprived of parental authority in the past, and who therefore did not meet the conditions set out in Article 42 (1) of the Act. However, the evidence implicated that the applicant currently warrants a proper performance of the foster family function, and he feels a strong emotional bond with the minor. Moreover, the criminal judgements and the decision depriving the applicant of parental authority were passed a long time ago, and since that time the applicant's attitude to life had undergone a positive change.

In its justification for the decision, the Constitutional Tribunal reported favorably the Supreme Court's position discussed in this article. However, it did not adjudicate the incompatibility of Article 42 of the Act with Articles 2 and 72 of

[7] On the conditions of appointing a family assistant, see S. Nitecki, [in:] *Ustawa o wspieraniu rodziny i systemie pieczy zastępczej. Komentarz*, eds. S. Nitecki, A. Wilk, Warszawa 2016, pp. 94–103.

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the Polish Constitution,[8] and only noted that the Supreme Court had not adopted a resolution clarifying the legal issue presented, but had taken over the case for consideration and had issued a decision on the case. In these circumstances, the issue of the application of the principle of the good of the child in the context of Article 42 of the Act should, in the Tribunal's view, be left to jurisprudence.

THE PREREQUISITES FOR BECOMING FOSTER FAMILIES

In order to assess how legitimate it is to depart from the content of the regulations specifying the prerequisites for the establishment of a foster family – so as to make a judgement solely on the basis of the good of the child clause – it is necessary to lay out the content of these prerequisites and the *ratio legis* of their establishment. In particular, it applies to those prerequisites which were, or should have been, assessed by the Supreme Court in the given case, because by referring to the applicants' personality traits they provide a basis for assessing the legitimacy of entrusting a given person with the function of a foster family.[9] These prerequisites include the warranty of proper performance of foster care, fulfilment of the maintenance obligation established by an executory document, no criminal record for an intentional offence, and full exercise of parental authority the applicant has never been deprived of in the past.[10]

The other prerequisites include also full legal capacity, health condition enabling performance of adequate care (in the pedagogical sense) over the child, residence in the territory of the Republic of Poland, as well as adequate living and housing conditions. Moreover, a candidate for a foster family should live near the family of the child and cannot be in conflict with that family. These eligibility prerequisites are not mentioned in the provisions of the Act, but since the statutory goal of foster parenthood is reintegration of a child with his or her family, such a conflict, as well as a distant place of residence, would lead to a contradiction with this idea.[11]

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[8] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended), hereinafter: the Polish Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.10.2021].

[9] Z.W. Stelmaszuk, *Kodeks etyczny rodzin zastępczych*, "Problemy Opiekuńczo-Wychowawcze" 1998, no. 8.

[10] More on the foster care eligibility prerequisites specified in Article 42 of the Act, see S. Nitecki, *op. cit.*, pp. 239–249; M. Andrzejewski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, Warszawa 2013, pp. 774–788; S. Łakoma, *Instytucja rodzin zastępczych w prawie administracyjnym*, Łódź 2014, pp. 168–182.

[11] M. Andrzejewski, [in:] *Kodeks rodzinny i opiekuńczy*..., pp. 787–788.

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The most important eligibility prerequisites – warranty for adequate performance of foster family functions (Article 42 (1) (1) of the Act)[12] – was established in order to eliminate from foster care persons who have low motivation, who are known to dislike children, who disrespect their identity, including relations with parents and other relatives, who are inefficient in raising children or show symptoms of significant mental disorders, etc. When the said prerequisite was introduced at the time when legal foundations for the foster care reform were laid down (at the end of the 1990s), 12% of the then functioning foster families were affected by alcoholism, violence or other ills commonly referred to as social pathology.[13] This prerequisite then did not turn out to be an effective tool as it did not rule out cases of placing children in foster families with persons who did not meet this criterion, among other reasons due to disregard for it by the courts.[14]

The prerequisite for the fulfilment of maintenance obligations by persons intending to create a foster family (Article 42 (1) (3) of the Act) has been established in order to reduce the risk of creating such families for economic reasons, e.g., to use the sums received to satisfy the needs of the child for the foster parents' own needs. In addition, non-compliance with the maintenance obligation is a morally discrediting behavior, because non-compliance is a form of (economic) violence,[15] and the use of violence against one's own child contradicts the possibility of conferring on the debtor the title of a foster family for another child.

Similarly discrediting a candidate is (current or past) termination of their parental authority. In practice, this is most often the case of grandparents seeking to create a foster family for their grandchildren as a consequence of their (i.e., grandparents') own children's parenting failure. It is not uncommon for such parents to repeat the behavior of their parents (here said grandparents), such as gross neglect and/or abuse of parental authority or passivity towards the child in foster care (Article 111 §§ 1 and 1a FGC).

Hence a person with limited parental authority cannot be established as a foster family. The purpose of spelling out this prerequisite is to avoid a contradiction

[12] The word "guaranty", used in this provision, was devoid of its meaning applied in in civil law, but as in colloquial speech where it functions alongside the word "warranty". See S. Łakoma, *op. cit.*, pp. 172–174.

[13] *Informacja Ministerstwa Edukacji Narodowej dotycząca przeglądu rodzin zastępczych w 1995 r.*, Warszawa 1996 (January, unpublished official document).

[14] Najwyższa Izba Kontroli, *Informacja o wynikach kontroli realizacji wybranych zadań w zakresie pomocy społecznej przez administrację samorządową powiatów*, Warszawa 2003; Najwyższa Izba Kontroli, *Działania powiatów w zakresie tworzenia i wsparcia rodzin zastępczych*, Warszawa 2016, pp. 40–50.

[15] Convincing arguments about the ethical rank of maintenance obligation are presented in M. Boczek, *Obowiązek alimentacyjny – przymus państwowy czy powinność moralna?*, [in:] *Problemy małżeństwa i rodziny w prawodawstwie polskim, międzynarodowym i kanonicznym*, eds. M. Sztychmiller, J. Krzywkowska, M. Paszkowski, Olsztyn 2017, pp. 115–128.

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between the simultaneous validity of two judgements: on the restriction of parental authority issued because of violation or danger posed to the good of the child (Article 109 § 1 FGC) and on the creation of a foster family by the same person for the good of another child. However, if the order on the restriction of parental authority was revoked before the applicant applied for the creation of a foster family, his application may be considered if the person gives a warranty for duly performing the function of a foster family.

Strong axiological justification provides solid bases for the consistent application of the conditions. This might be helpful in developing high ethical, pedagogical, social and psychological standards of foster parenthood, or at least in excluding the possibility of creating foster families by people who because of their character traits are not cut out for this difficult function. Departure from this prerequisite necessitates a particularly strong axiological justification and precise indication of the criterion specifying why reliance on this particular prerequisite is necessary to achieve this goal.

UNDERSTANDING OF THE PRINCIPLE OF THE GOOD OF THE CHILD

1. Rhetorical traps

Much has been written about the understanding of "the good of the child"[16] with the focus mostly on the attempt to formulate its ontological essence in a way that almost corresponds to the criteria of definitions of the term. The high level of generality of such formulations sometimes makes it difficult to determine whether persons using the term "the good of the child" give it the same or different meaning. For this reason, broader, more descriptive formulations seem to be more useful and closer to capturing its essence.

A different kind of misunderstanding is caused by expressions containing an authoritative statement that something (some action, decision) is or is not in line with the best interests of the child, but without justifying this choice. This is to create the impression that the solution that is in line with the best interests of the child is the one indicated by the speaker. This is a kind of begging the question

[16] Z. Radwański, *Pojęcie i funkcja „dobra dziecka" w polskim prawie rodzinnym i opiekuńczym*, „Studia Cywilistyczne" 1981, vol. 31; T. Sokołowski, *Prawo rodzinne. Zarys wykładu*, Poznań 2016, p. 3; idem, *Ochrona praw ze stosunków prawno-rodzinnych*, [in:] *Aksjologia prawa cywilnego i cywilnoprawna ochrona dóbr*, eds. J. Pisuliński, J. Zawadzka, Warszawa 2020, pp. 205–235; W. Stojanowska, *Rozwód a dobro dziecka*, Warszawa 1979; M. Bieszczad, *Dobro dziecka jako klauzula generalna – ustalenie znaczenia pojęcia dobra dziecka w XXI w.*, "Monitor Prawniczy" 2019, no. 17, pp. 946–950.

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rhetoric or putting a spin on reality rather than an honest argumentation.[17] Referring to the principle of the good of the child requires an explanation according to what criterion/criteria such a solution to the problem, not a different one, was chosen.

2. "The optimal configuration of the state of affair"

The good of the child is a general clause, i.e. a particular kind of indefinite phrase referring to values or judgements functioning in a social group and it provides that these judgements or values be taken into account when applying the law.[18] Out of the ways of understanding the concept of "the good of the child" formulated in the doctrine, the most accurate is to describe it as the optimal configuration of the essential elements of the state of affairs concerning the child, i.e. a solution consistent with the best interests of the child, but specifying this general formula.[19]

Creating this state of affairs in a manner consistent with the best interests of the child involves making efforts to create this configuration both at the time of taking the decision (e.g., the court's decision) and, or rather especially, for the future. Emphasizing the importance of showing care for the child's future is justified by the dynamics of childhood, that is, the child's rapid and comprehensive development. Such an approach highlights the responsibility for the child (understood philosophically and pedagogically) as a desirable attitude of parents exercising parental authority over the child and of the actions of other parties (institutions, relatives)[20] supporting parents. As regards some detailed issues of the configuration, the one to be highlighted is the need of the child to grow up in a stable environment, which encompasses "both material (housing, financial) and emotional, psychological [stability], including the place in the family, ties with parents and siblings […] and the stability of the school place and peer group".[21] In the absence of clear negative features in the existing environment (family, siblings, school, peers), the court should counteract the milder manifestations of any dysfunctionality revealed therein not to further destabilize the situation so as to avoid placing the child outside the family.[22]

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[17] On the postulate on non-arbitrariness on the process of interpretation, see O. Bogucki, *Sprawiedliwość wykładni prawa*, "Acta Iuris Stetinensis" 2019, no. 2, pp. 15–21.

[18] Z. Radwański, A. Olejniczak, *Prawo cywilne. Część ogólna*, Warszawa 2011, p. 45.

[19] T. Sokołowski, *Prawo rodzinne…*, p. 3.

[20] "Responsibility" is a term used in international documents, especially by the Council of Europe. It has been postulated that this concept should be introduced to the Family and Guardianship Code instead of "parental authority" (though in its scope responsibility is much wider). Reservations about this change are voiced on the grounds of Polish and legal language since the term "responsibility" in Polish has also negative connotations (responsible for something like a damage, criminal act, before the court, etc.), which makes it difficult to reconcile the legal and pedagogical rank of a parent with such implications of the term.

[21] T. Sokołowski, *Prawo rodzinne…*, p. 3.

[22] *Ibidem*.

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3. The good of the child placed in foster care

In the case of establishing foster care, it is particularly difficult to find an optimal configuration of all the elements of the state of affairs determining the situation of the child, due to a high number of actors involved.[23] In literature, an opinion has been formulated that models of solving family legal problems which involve more than four actors are *per se* dysfunctional.[24] When a child is placed in foster care, there are even more actors involved (parents acting jointly or separately, child, foster family or foster care institution, family court, administrative body in charge of organizing foster care, court-appointed family guardian, family assistant, sometimes also social organizations). Another problem is that the relevant legal regulations are included in civil law as well as administrative law (e.g., organization of foster care, organization of courts), and consistent application of regulations from different branches of law always causes problems. In such situations, it is difficult to develop good solutions, especially if we consider the problems that might arise in the relationship between the family court and the administration of foster care. In many cases, a solution consistent with the best interests of the child will be the optimal one, which does not mean that it is a good one. The very name "foster care" implies imperfection of the situation in which a child placed there will find itself (foster care is a substitute).[25] A childhood spent without parents, as a consequence of their dysfunctional behavior, may be dramatic and unhappy, but it may also be difficult "only" in fragments (e.g., during a family crisis). In the space between the hardship and the drama, there is room for the search for the good of the child, that is, for the optimal configuration of the elements of the situation in which the child finds itself.

4. The good of the child – a trouble for lawyers

In Poland, the protection of the rights of the child, including the imperative to be guided by the child's best interests when dealing with all matters concerning the child, has a constitutional rank (Article 72 of the Polish Constitution). The good of the child is commonly understood as the main principle of the Polish family law in the directive sense, which means that it requires such actions that would enable

[23] Idem, *Ochrona praw…*, pp. 209–211; M. Andrzejewski, *Sytuacja prawna wychowanka pieczy zastępczej*, [in:] *Status osoby małoletniej – piecza zastępcza, kontakty, przysposobienie*, ed. M. Andrzejewski, Warszawa 2020, pp. 15–77.

[24] T. Sokołowski, *Ochrona praw…*, p. 211.

[25] M. Arczewska, *Społeczne role sędziów rodzinnych*, Warszawa 2009; M. Andrzejewski, *Współpraca sądów rodzinnych z instytucjami pomocy społecznej w umieszczaniu dzieci poza rodziną*, "Państwo i Prawo" 2003, no. 9, pp. 87–97; M. Rymsza, *Reformowanie systemu opieki zastępczej w Polsce. Od konsensu do konfrontacji*, [in:] *Pomoc społeczna wobec rodzin. Interdyscyplinarne rozważania o publicznej trosce o dziecko i rodzinę*, ed. D. Trawkowska, Toruń 2011, pp. 105–122.

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achievement of the optimal configuration of situation.[26] Reflections on the principles of private law emphasize the immersion of its regulations in ethics, which is the key to justice, especially in relation to judicial decisions.[27] The good of the child, as indicated above, is a general clause, i.e. a particular kind of an indefinite phrase, ordering modification of particular regulations in such a way that "in the scope of application of particular norms, the evaluations functioning in the society are taken into consideration".[28]

Alongside the search for a precise determination of the ontological essence of the good of the child, another important issue is to indicate how (methodology) to achieve (work out) in a given case this optimal configuration in the situation concerning the child. This optimal configuration consists of mutual relations among many subjects, legal issues, as well as psychological, pedagogical, medical, social, philosophical and other elements, which are often more important than the legal ones. The assessment of a solution as consistent or inconsistent with the good of the child (irrespective of whether this evaluation is expressed by a judge, administrative body, or lawyer-scholar) usually goes beyond the professional competence of lawyers. This applies especially to family legal problems, the essence of which is to create the future of individuals and families (e.g., permission to enter into marriage), limitation of parental authority, determination of the situation of the child after the judgement of divorce or separation, placement of the child in foster care, adoption).

Understanding the limitations resulting from professional competence should encourage lawyers to work out ways to use the knowledge of professionals from those fields which in a given case are closest to the essence of the problem, e.g. psychology, pedagogy, sometimes medicine and other so-called subsidiary sciences of jurisprudence.[29] The term "subsidiary" in the above-quoted fragment means that a lawyer-researcher cannot do without their help.[30] Lack of openness to knowledge

[26] M. Nazar, *O znaczeniu adekwatnego rekonstruowania zasad prawa rodzinnego*, [in:] *Prawo cywilne – stanowienie, wykładnia i stosowanie. Księga pamiątkowa dla uczczenia setnej rocznicy urodzin Profesora Jerzego Ignatowicza*, ed. M. Nazar, Lublin 2015, pp. 272–276.

[27] A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2018, pp. 81–82.

[28] M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2017, pp. 121–122; Z. Radwański, M. Zieliński, *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, "Przegląd Legislacyjny" 2001, no. 2, pp. 11–16; M. Sala, *Klauzula generalna zasad współżycia społecznego*, [in:] *Studia z filozofii prawa*, ed. J. Stelmach, Kraków 2001, pp. 200–202; W. Gromski, [in:] A.F. Bator, W. Gromski, S. Kaźmierczyk, A. Kozak, Z. Pulka, *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, Warszawa 2006, p. 178.

[29] M. Andrzejewski, *O naukach pomocniczych prawoznawstwa w orzekaniu w sprawach rodzinnych*, [in:] *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, eds. A.M. Arkuszewska, J.M. Łukasiewicz, A. Kościółek, Toruń 2016, pp. 80–97.

[30] Idem, *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych – komentarz prawny*, [in:] *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, ed. A. Czerederecka, Kraków 2016, p. 136.

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from outside the law can lead to expressing opinions or making judgements based on intuition or personal life experiences, which thus can be simplified, erroneous and harmful.

CRITIQUE OF THE SUPREME COURT'S APPLICATION OF THE GOOD OF THE CHILD CLAUSE

1. Theoretical basis for the application of functional interpretation

The issue of the application of general clauses directs attention to the functional interpretation of legal provisions. The positions of legal theorists on the relationship between the linguistic interpretation and the functional interpretation are not fully consistent. The differences observed concern the order in which each method is applied. According to the derivative conception of interpretation, a provision should be analyzed by applying simultaneously the rules of linguistic, systematic and functional interpretation.[31] Even in the case when the wording (phrase, word) is unambiguous in the view of linguistic interpretation, the process of interpretation should be carried out also according to the rules of functional interpretation. This is necessary if the findings made on the grounds of linguistic interpretation lead to questioning the assumption of the rationality of the legislator's actions, and, in particular, if they lead to findings that are axiologically inconsistent with the objectives of the legal text in question.[32] "In a situation where the linguistic meaning destroys […] the identified unshakable values, the linguistically clear meaning of the interpreted phrase must be altered in such a way that axiological consistency be ensured (either broadening or narrowing interpretation)".[33]

In other theoretical approaches to the interpretation, one can find a slight or sometimes strong distance to the simultaneous use of methods of interpretation, in favor of giving priority to linguistic interpretation.[34] They tend to indicate a priority of that linguistic interpretation over systematic and functional interpretations which should have a subsidiary character and thus be used to resolve doubts only in interpretation which cannot be resolved on the basis of linguistic interpretation. In these exceptional situations, "systemic or functional interpretation allows us finally to justify such an interpretative result which deviates from the clear and obvious

[31] M. Zieliński, *op. cit.*, p. 301.

[32] *Ibidem*, pp. 301–302.

[33] *Ibidem*, p. 302. See also A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, pp. 150–157.

[34] L. Morawski, *Zasady wykładni prawa*, Toruń 2010, pp. 72–96; G. Jędrejek, *Wykładnia przepisów prawa cywilnego*, Warszawa 2020.

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linguistic sense of the provision".[35] Furthermore, "the interpreter is permitted to depart from the linguistic sense of a provision in cases when the linguistic sense is manifestly contrary to fundamental constitutional values […], when the linguistic interpretation leads to a result which, in the light of universally accepted values, must be regarded as grossly unfair, unjust or nullifying the *ratio legis* of the provision interpreted, when the linguistic interpretation leads ad absurdum, [as well as] in the situation of a manifest legislative error".[36]

2. Faulty linguistic interpretation of Article 42 of the Act

The thesis of the Supreme Court on the admissibility of resorting to the good of the child clause in order to depart from the conclusions reached by the interpretation of Article 42 of the Act predicated solely on the rules of linguistic interpretation is based on the above-mentioned theoretical views. This is evidenced, i.a., in the statement contained in the justification of the decision that resorting to the good of the child clause is permissible when "such a step finds a strong axiological basis inferred primarily from constitutional values". Resorting to the findings obtained through the application of the rules of linguistic interpretation would be appropriate only if the same result was obtained through the application of extra-linguistic methods of interpretation, in particular the functional interpretation.

On the basis of the theory of law and the accuracy of the thesis on the criterion of admissibility to depart from the literal reading of the provision, it is not possible, however, to determine either the accuracy of the decision or of the arguments included in its justification.

To assess the accuracy of the Supreme Court's decision, it is paramount to answer the question: On the basis of the findings in the evidence proceedings, did the rules of linguistic interpretation actually lead to conclusions that were absurd, and therefore unjust, because they were contrary to the good of the child clause seen as a constitutional value, which would allow (or perhaps require) to ignore the literal reading of Article 42 of the Act? The question so posed must be answered in the negative. This is because the Supreme Court's view that the conclusions of linguistic interpretation must be rejected was built on a grossly erroneous interpretation of the provision. Moreover, refusal to appoint a foster family because the standard prerequisites for foster family were not met would not lead in the given case to an

[35] L. Morawski, *Zasady wykładni*..., p. 75.

[36] *Ibidem*, pp. 87–88. Similarly G. Jędrejek, *op. cit.*, p. 103; T. Stawecki, *Złota reguła wykładni*, [in:] *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, eds. A. Choduń, S. Czepita, Szczecin 2010, p. 114 ff. On the functional interpretation directives, see Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, pp. 292–298.

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absurd ruling contrary to the constitutional principle of protecting the best interests of the child. Such a decision would be fully formally and axiologically justified.

The reasoning presented in the justification of the decision ignores the importance of the prerequisites for the creation of a foster family and their axiological justification. What is more, the most significant fact which helps to negate the decision of the Supreme Court is that the justification for the judgement ignores the most important prerequisite for creation of a foster family, namely the guarantee that the applicant will meet the obligations connected with fulfilling the tasks of a foster family (Article 42 (1) of the Act). There is no mention of it. It was overlooked by the party which refused to accept the applicant for orientation training for foster family candidates, and subsequently it was bypassed by courts at all levels. This is all the more surprising given that the collected evidence included (overwhelmingly negative) information about the applicant's personality, which should have raised doubts whether the applicant fulfills this most important subjective prerequisite for the creation of a foster family. Even if for the Supreme Court, the evidence on the lack of personality predisposition of the applicant was not compelling, this aspect certainly should not have been passed over in the justification. The Supreme Court should have explicitly stated that the applicant met or did not meet the prerequisites in question. A selective view of the circumstances of the case resulted in an erroneous decision and underpinned the weakness of the argument presented in the decision. No strong opinion on a regulation should be sustained if it is formulated only on the basis of selected, and not the most important, fragments of a provision.

Not only did the Supreme Court fail to reflect on the prerequisite of the applicant's personal suitability to serve as a foster family, but it also overlooked other circumstances unfavorable to the applicant; namely:

- it failed to assess the applicant's eight-year period of lack of contact with three children from his first marriage, which, depending on the circumstances, constitutes grounds for limiting or depriving him of parental authority, or for imposing sanctions listed in the Act on assistance to persons entitled to maintenance, including, i.a., withholding his driver's license, as well as imposing a criminal sanction under Article 209 of the Criminal Code,[37]
- it failed to address the statements made by teachers and social workers that the applicant and his common-law wife had used violence against the children; in particular, the court did not subject this behavior to legal, moral or pedagogical analysis,
- it ignored the fact that a family assistant was appointed for the applicant and his partner, though a condition for such a move is an alleged failure on their

[37] Act of 6 June 1997 – Criminal Code (consolidated text, Journal of Laws 2020, item 1444, as amended).

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part to accurately perform their care and upbringing functions with respect to the children.[38]

Of all the eligibility prerequisites listed in Article 42 (1) of the Act, the Supreme Court noted only that the applicant had failed to fulfil his maintenance obligation. What should be mentioned, however, is that in the justification the Supreme Court used two times a term depreciating the importance of the issue, stating that the applicant does not fulfil "only" the maintenance obligation. By this rhetorical device, it was suggested that failure to meet this obligation does not have a significant legal and moral weight; in particular, it does not undermine the credibility of the applicant as a person worthy of becoming a foster family. In this way, the Supreme Court joined the ranks of those who show leniency towards a pathological attitude of long-term evasion of maintenance of one's own children.[39]

In analyzing the applicant's suitability to serve as a foster family, the Supreme Court took into account the positive opinion expressed by his stepdaughter at the hearing before the District Court. It did not, however, address the contradiction between that statement made by the then 8-year-old child and the negative statements about the applicant that she (together with her half-sister and the children of the applicant's concubine) had made to teachers several months earlier. At the hearing, the child did not mention violence, and spoke in a way that was optimal for the interests of the applicant's stepfather. The earlier confession made to the teachers seems to have more credibility as it was spontaneous, which we cannot say about the statement made when answering the court's questions. Moreover, it cannot be excluded that the content of these answers was inspired by the applicant. The content of the justification also fails to indicate that the District Court heard the minor in the presence of an expert psychologist, which leads to the assumption that the credibility of the child's statements was assessed solely by a lawyer, i.e., a person who may have an intuition useful for assessing the credibility of the child's behavior, but lacks professional competence in this respect.

The hearing of the child in civil proceedings (Article 216^1 and Article 576 § 2 of the Civil Procedure Code[40]) should be held in the presence of a psychologist who would advise on the wording of the questions asked, and then help interpret

[38] It should be noted that were the family to refuse to consent to the appointment of an assistant, the assistant might be assigned pursuant to Article 109 § 2 (1) FGC, which limits parental responsibility.

[39] Judgement of the Constitutional Tribunal of 22 September 2009, P46/07, OTK-A 2009, no. 8, item 126; D.J. Sosnowska, *Alimenty a prawo karne. Praktyka wymiaru sprawiedliwości*, Warszawa 2012, pp. 81–94; A. Korcz-Maciejko, *Ustawa o pomocy osobom uprawnionym do alimentów*, Warszawa 2010, p. 106. Quite recently a notorious maintenance debtor used to be a political leader. This fact did not bother his supporters, and during the Congress of Women Association he received a standing ovation.

[40] Act of 17 November 1964 – Civil Procedure Code (consolidated text, Journal of Laws 2021, item 1805).

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the meaning and reliability of the answers, taking into account the child's level of development and understanding of the situation.[41] The participation of a psychologist will not rule out making mistakes both in the way of communication with the child and in the interpretation of his or her words, gestures or silence. There is no consensus among psychologists about the evaluation of various research tools and ways to interpret research results.[42] Nevertheless, participation of a psychologist allows us to avoid many mistakes that a lawyer/judge acting alone cannot avoid.

To continue the legal-psychological thread, it should also be pointed out that in the proceedings, at no stage, expert psychological evidence was presented regarding the applicant's parental attitude, which should have been done in such a difficult case. Its absence leads us to believe that the Regional Court trusted the applicant *a priori*, in spite of possessing many disturbing facts about him. Especially when considering rejection of the results of the linguistic interpretation and ruling on the basis of the clause of the good of a child, the court should have prepared a strong empirical argument.

Deficiencies in the evidence, erroneous evaluation of the evidence gathered, including the omission of the condition that the applicant provide a guarantee that he will properly perform the function of a foster family, resulted in a ruling that a person who should not perform that function was granted the status of a foster family.

3. The axiological aspect

By demonstrating the flaws of the interpretation of Article 42 of the Act, it can be concluded that the Supreme Court's rejection of the standard prerequisites had no grounds; neither was it justified in this situation to base the judgement solely on the – peculiarly understood – principle of the good of the child. The research

[41] P. Sikora, *Uwzględnienie rozsądnych życzeń małoletniego jako wyraz zasady dobra dziecka w sprawach opiekuńczych dotyczących kontaktów z dzieckiem*, [in:] *Realizacja ochrony prawnoprocesowej w ujęciu statycznym i dynamicznym*, ed. E. Marszałkowska-Krześ, Wrocław 2020, pp. 90–91; A. Gadomska-Radel, *Wysłuchanie dziecka w postępowaniu cywilnym*, "Zagadnienia Społeczne. Studia i Materiały" 2014, no. 2, p. 98; A. Czerederecka, *Psychologiczne kryteria wysłuchania dziecka w sprawach rodzinnych i opiekuńczych*, "Rodzina i Prawo" 2010, no. 14–15, p. 22 ff. In the context of convincing arguments expounded in the doctrine, it is quite surprising to detect no trace of a psychologist in empirical studies devoted to child's court-based hearings. See M. Łączkowska-Porawska, *Sytuacja prawna małoletniego dziecka, które ukończyło 13 lat w przypadku rozwodu jego rodziców – analiza z uwzględnieniem badań aktowych*, "Prawo w Działaniu. Sprawy Cywilne" 2020, no. 44, pp. 62–65.

[42] Aware of the weaknesses of their methods of action, including the attitudes of superficiality and even nonchalance observed in practice, psychologists formulated a document entitled "Standards of psychological opinion in family and childcare cases". If the prerequisites set therein were taken into account it might be possible to achieve a high level of objectivity of research and formulate conclusions that would better serve the administration of justice. See *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, ed. A. Czerederecka, Kraków 2016.

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purpose of this article does not allow this statement to be the final conclusion of the present deliberations. Actually, the assessment of the relevance of the judgement was useful for the reconstruction of the Supreme Court's understanding of the clause of the good of the child. For this purpose, in the following remarks, a fictional situation is assumed that the Supreme Court was right to reject the conclusions stemming from the linguistic interpretation in the name of protection of the constitutional value, which is the principle of the good of the child (Article 72 of the Polish Constitution). It remains to be shown how in this particular case the good of the child would manifest itself as a value which would allow an applicant who does not meet the prerequisites set out in the provision to create a foster family.

If it was in the best interest of the minor Sandra to be brought up together with her half-sister and to ensure continuity in her upbringing in the applicant's family, then the protection of the child's best interest understood in this way did not require to establish the applicant a foster family, since the minors had always lived together: first in the family created by Marcin P. and their mother, and later in the family of Marcin P. and his concubine. In this context, the opinion on the bond between them – in particular the opinion of the family diagnostic and consultation center that the girls should grow up together – was unnecessary. The bond between siblings is of great importance to the decisions made, especially in divorce and separation judgements. It is also important in foster care placement cases, but only if the placement of siblings with different foster families or in foster care is being considered. The opinion in question could become important evidence, e.g., in a case for the restriction of parental authority for Marcin P., if the court decided that – due to his and his cohabiting partner's insufficiency in child-raising – the stepsisters should be placed outside the applicant's family.

If continuation of upbringing of minor Sandra in her hitherto family environment was an important value for the Supreme Court, then it should have considered application of measures supporting the parental competence of applicant and his partner – for example by establishing the supervision of a probation officer, or by directing them to adequate therapy, etc. – in order to strengthen the help of the family assistant already appointed. In this respect, establishing Marcin P. as a foster family changed nothing in the situation of the minor Sandra.

4. Economic and ethical consequences of a flawed decision

The economic aspect of the case was not raised by the Supreme Court in the justification. Considering all the circumstances of the case, it is reasonable to assume that the applicant was motivated by economic reasons in applying for a foster family status. The allowance paid to cover the living expenses of a foster child in such a family amounted to about PLN 1,000, and his earnings were about PLN 3,000. Background information on the applicant's family's economic situa-

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tion and, above all, his personality traits may suggest that if he had not obtained the status of a foster family, he would have been able to take steps to place his stepdaughter outside his family. This could result in the separation of the minor from her half-sister and the disruption of continuity of parenting by the applicant. However, if the Supreme Court had in fact considered such a scenario (this issue does not appear in the reasoning), it should have rather leaned towards interference in parental authority of Marcin P. (over his daughter) and to enhance the protection of his stepdaughter from him, rather than to strengthen his legal position as a foster family entrusted with legal custody.

To draw a complete picture of how the good of the child is treated when establishing a foster family, it is important to discuss the economic aspect of the case (maintenance payments to the foster child), which was not mentioned in the statement of reasons. In the case in question, the central focus became the admissibility to depart from the conclusions drawn from the linguistic interpretation, while the provisions of the maintenance law and social law (important for foster parenthood to select suitable persons) were marginalized. By establishing Marcin P. a foster parent, the Supreme Court supported the attitude described as pathological resourcefulness, i.e., the ability to effectively obtain social benefits, often – as in the case in question – without any basis in the law. The decision of the Supreme Court, which was justified by the need to protect the good of the child, in its essence protected only the interest of the applicant by realizing his economic goal. After all, the applicant, as a stepfather, belongs to the group of persons obliged to maintain his stepdaughter (Article 144 § 1 FGC). Moreover, as her legal guardian and an appointed foster-parent, he is entitled to apply for maintenance from Sandra's father, who is the first order of obligation, or possibly from her grandmother (Article 112^1 § 1 FGC). As the person who is further in line to maintain her (Article 140 § 1 FGC), he can also apply for a recovery of maintenance claims from the minor's father for the amount he had spent so far on her maintenance. In this case, because of establishing him a foster family, the family-law obligation to maintain Sandra was imposed onto the society. This is a form of demoralization of the members of her family, since maintenance obligations have priority over social benefits.[43] The polar opposite position taken by the Supreme Court in its judgement is also contrary to the constitutional principle of subsidiarity.

[43] M. Andrzejewski, *Świadczenia socjalne a obowiązki alimentacyjne członków rodziny w świetle zasady pomocniczości*, "Praca i Zabezpieczenie Społeczne" 2019, no. 11; M. Safjan, *Instytucja rodzin zastępczych. Problematyka organizacyjno-prawna*, Warszawa 1982, p. 200.

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CONCLUSIONS AND DOUBTS

In the case considered by the Supreme Court and analyzed in this article, the rules of linguistic interpretation did not lead to absurd findings that were contrary to the constitutional axiology, in particular, to the principle of the good of the child. Rather, the findings led to the conclusion that it is inadmissible to allow a person who is a permanent maintenance debtor, who has no contact with his children (from his first marriage) and whose upbringing skills are inadequate in relation to the children with whom he currently lives, to create a foster family. The evidence collected in this case provided grounds for interference in the sphere of his parental authority (Article 109 § 2 (5) FGC), and not for making him a foster family.

When interpreted functionally, Article 42 of the Act in the case adjudicated by the Supreme Court leads to the same conclusion reached by the rules of linguistic interpretation, namely that there are no grounds for granting Marcin P.'s motion.

The way in which the Supreme Court comprehends the principle of the good of the child, as expressed in the justification of the judgement, raises objections. This is because no axiological arguments for rejecting the result of linguistic interpretation have been demonstrated. First and foremost, in order to protect the relationship between the half-sisters and to continue the upbringing of the child in the stepfather's family – as such were the goals declared by the Supreme Court – the establishment of a foster family in the person of Marcin P. was unnecessary, as both girls lived together with the applicant.

The function of a foster family can be entrusted only to persons who can guarantee the fulfilment of the tasks involved.

The decision to create a foster family by Marcin P. protects only the interests of the applicant, and not the interests of his stepdaughter. The child gained nothing as a result of the decision, and would lose nothing if the application were dismissed. The applicant, on the other hand, had obtained the socially prestigious status of a foster family, despite the fact that he lacked the legal and moral qualifications to do so, and – in consequence – had become the recipient of public funds to cover the maintenance costs of the child in a foster family.

As a consequence of the flawed judgement, family members (father, stepfather and grandmother) were effectively relieved of their maintenance obligations towards the child and the burden of the child's maintenance was shifted onto the shoulders of society. Such a decision is contrary to Article 135 § 3 FGC and the constitutional principle of subsidiarity. Social benefits cannot replace family-legal maintenance obligations.

Due to the specificity of family legal problems, to solve them it is necessary to take into account non-legal knowledge from other areas involved in the case. Legal intuition, which should not be underestimated, should give way to knowledge

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drawn from professionals from different fields. In this case, such knowledge was gathered to at least a sufficient degree, but was misinterpreted.

In the case heard by the Constitutional Tribunal, the inquiring court correctly invoked the principle of the good of the child as the basis for departing from findings made solely on the basis of linguistic interpretation. It did so in the best interest of the child who was emotionally attached to the applicant whose attitude (despite embarrassing events in the past) did not raise any doubts about his chances of coping with the tasks entrusted to foster families. In this case, reliance on the literal reading of Article 42 of the Act could lead to a decision contrary to the best interests of the child, whereas the criteria of functional interpretation might make it possible to avoid such an outcome. In this case, however, it is not possible to make strong statements due to the lackadaisical description of the facts on the grounds of the decision.

The conclusion formulated by the District Court (the court asking the question) that the Constitutional Tribunal should declare that Article 42 of the Act is contrary to Articles 2, 32 and 72 of the Polish Constitution and Article 3 of the Convention on the Rights of the Child[44] does not deserve approval. This is because there can be no such contradiction if the correct application of the rules of interpretation leads to just (taking into account the good of the child) solutions.

LAST, BUT NOT LEAST

We can speak of legal interpretation as long as lawyers analyze the legal text that serves as a basis for their actions. Lawyers go beyond the limits of their craft if they ignore the text of the law or formulate conclusions based on mental constructs built upon an imaginary text that does not exist in the law. In other words, when they claim that the norm formulated by them exists despite the fact that there are no provisions from which it can be interpreted, or when they claim that a given norm does not exist despite the existence of provisions in which it is codified; when they forget that what "the legislator wanted to enact is expressed […] in what the legislator enacted"[45] and not in what the interpreter implies that it has enacted. One of the signs of yielding to the temptation of judicial activism is the downgrading of the word, i.e. the content of the provision/provisions, in favor

[44] Convention on the rights of the child adopted by the United Nations National Assembly on 20 November 1989 (Journal of Laws 1991, no. 120, item 526).

[45] M. Zieliński, *Wykładnia prawa*…, p. 87 along with the resolution of the panel of seven judges of the Supreme Court of 17 January 2001, III CZP 49/00, OSNC 2001, no. 4, item 53. Cf. M. Zirk-Sadowski, *Postmodernistyczna jurysprudencja?*, [in:] *Z teorii i filozofii prawa. Ponowoczesność*, ed. M. Błachut, Wrocław 2007.

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of one's own intellectual expression. It leads to an undesirable switching of roles, or at least to an undesirable stepping out of one's role – someone who is a judge (and sometimes a scholar) pretends to be a kind of legislator constantly acting in the role of a judge or a scholar.[46] Such associations were evoked by reading the reasoning of the Supreme Court's judgement in question.

Much has been written on the issue of activism, as the subject is fundamental to the position of the judiciary, the social role of judges, concepts of interpretation, and even the political system of states and the functioning of international structures.[47] While some show enthusiasm for activism and encourage other judges to become more activist, others are critical of this approach or remain reserved. Presumably, activism deserves flexible evaluations depending on what arena and how it manifests itself. It is not questionable if it contributes to the search for the correct interpretation of regulations, but it is disturbing if it is a form of displaying political disapproval (the postulate of dispersed control of constitutionality by common courts).[48] This reservation, however, does not apply to the judgement discussed here, which is a manifestation of activism without political overtones.

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[46] On the position (power) of an interpreting judge, see A. Machnikowska, *Zasada niezawisłości sędziów a wykładnia prawa*, [in:] *Wykładnia prawa. Tradycja i perspektywy*, eds. M. Hermann, S. Sykuna, Warszawa 2016, pp. 237–259.

[47] B. Banaszak, M. Bednarczyk, *Aktywizm sędziowski we współczesnym państwie demokratycznym*, Warszawa 2012; T.T. Koncewicz, *Filozofia europejskiego wymiaru sprawiedliwości. O ewolucji fundamentów unijnego porządku prawnego*, Warszawa 2020; M. Wieczorkowski, *Problem aktywizmu i prawotwórstwa sędziowskiego w świetle współczesnych teorii interpretacji*, "Przegląd Prawniczy Uniwersytetu Warszawskiego" 2018, no. 2, pp. 169–200; L. Morawski, *Aktywizm sędziowski a sprawy polskie*, "Prawo i Więź" 2016, no. 2, pp. 7–13; G. Maroń, *Sędziowie jako „arbitrzy moralni" i „moraliści" na przykładzie wybranych orzeczeń sądów karnych*, "Prokuratura i Prawo" 2020, no. 10–11.

[48] With approval of political motives but with criticism of this form of activism, see A. Sulikowski, K. Otręba, *Perspektywy podjęcia rozproszonej kontroli konstytucyjności przez sądy powszechne*, "Państwo i Prawo" 2017, no. 11, pp. 33–43.

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ABSTRAKT

Artykuł dotyczy klauzuli dobra dziecka. Po omówienia jej sensu uwagę skoncentrowano na zagadnieniu mającym ścisły związek z praktyką orzeczniczą sądów, a mianowicie na kryteriach stosowania przez nie tej zasady. Wymagało to nawiązania do dorobku teorii prawa dotyczącego wykładni językowej i wykładni funkcjonalnej, a zwłaszcza relacji między nimi. Tłem i inspiracją dla rozważań jest wydane kilka lat temu postanowienie Sądu Najwyższego, w którym wypowiedziano oczywistą tezę, że jeżeli wykładnia językowa prowadzi do wniosków absurdalnych, sprzecznych z założeniem o racjonalności działań prawodawcy i przeczących aksjologii systemu prawa, wówczas należy od nich odstąpić, formułując orzeczenie na podstawie klauzuli dobra dziecka. Autor zarzuca Sądowi Najwyższemu błędy w interpretacji kluczowego art. 42 ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz twierdzi, że w omawianej sprawie brak było podstaw do odrzucenia normy wyinterpretowanej metodami wykładni językowej. Ponadto zarzuca Sądowi Najwyższemu niewłaściwe zastosowanie wykładni funkcjonalnej, skoro powołując się na wartość konstytucyjną, jaką jest dobro dziecka, w istocie dobra tego nie chronił, a wyrokiem spowodował uzyskanie statusu rodziny zastępczej przez osobę, która nie spełniała prawnych i moralnych po temu kryteriów.

Słowa kluczowe: klauzula dobra dziecka; rodzina zastępcza; wykładnia językowa; wykładnia funkcjonalna