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Criterion "The Good of the Child" in the Legal Order

Between the Normative Structure and Judicial Case Law

Author:
Katarzyna Hanas


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KATARZYNA HANAS

Abstract The good of the child in the course of the operative interpretation constitutes not only a theoretical and legal issue, but also a practical one. The "good of the child" is the basis for the formulation of numerous legal provisions, which seemingly do not refer to this criterion. However, important normative acts that indicate the presence of this category are: the Declaration of the Rights of the Child, adopted by the General Assembly of the League of Nations in 1924, the so-called Geneva Declaration and the Constitution of the Republic of Poland of 1997. The criterion of "the good of the child" as an element of the normative structure appears, for example, in the UN Declaration on the Rights of the Child of 1959 and the Convention on the Rights of the Child of 1989. In referring to the content of normative acts whose subject-matter is the "good of the child", it can be pointed out that the indicated criterion should be associated with the child's right to a happy childhood and the concept of humanity. Therefore it seems that the term in question must be interpreted in precisely this tone.

Keywords: • the good of the child • the child's rights • the welfare of the child • judicial case law

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Content

Foreword

The criterion of the "good of the child"[2] is a normative structure commonly found in the Polish legal order. Its presence in the Polish law can be found in the process of applying the law in relation to various cases, for example in the field of family and guardianship law, civil law, constitutional law, criminal law, administrative law. The impact of international law on the Polish legal order also determines the universality of this criterion. This impact is manifested primarily in the accession of the Republic of Poland to international organizations aimed at protecting human rights, accession to international agreements of particular importance in the field of child protection, as well as its respect for the jurisprudence of international and supranational courts.

In the theoretical and legal understanding the term criterion may constitute an element of constructions such as the general reference clause and the principle of law. There are two concepts present in the work, i.e. normative construction and extra-legal criterion. We do believe that their importance should be signalled already in the introduction. It is precisely "the normative construction, i.e. a construction that is explicitly included in the text of a legal act (legal provision) and through which the legislator communicates with the addressees of the norms as to the inclusion of extra-legal criteria in decisions on the application of the law or »compliance« with the law",[3] or the authorisation to apply extra-legal criteria, that constitutes the reference clause (within the framework of the civil law culture)[4]. On the other hand, the extra-legal criterion is an undefined category, constituting an element of the normative structure[5]. With regard to the good of the child, treated as a criterion, the work will use phrases such as: value, return, expression, category, reference.

The research issues were limited to the judicial application of the normative structure, determining its content and proper standardization due to the perception of the objectivization issues. The work designed in this manner constitutes an attempt to demonstrate how the normative structure operates in the decision-making process of applying the law, with the criterion of good of the child as its element. The analysis, determined by the objectives of the work, is two-track one, aimed at determining how courts understand and perceive the good of the child as a normative category, as well as

2 The name of the criterion "the good of the child", as well as the names of other criteria, will be written in quotation marks throughout the work, if it occurs in the denominator.
3 L. Leszczyński, *Stosowanie genernych klauzul odsyłących*, Kraków 2001, p. 22.
4 Ibidem, pp. 22 et seq.
5 Ibidem, p. 22.

whether the content of the construction finds its objectivization in the decision-making process.

The normative structure taking into account the element of the good of the child is interdisciplinary in its nature, as it can be found in normative acts covering various branches of law. Due to the vague nature of the term "the good of the child ", its meaning cannot be precisely determined. Another feature of the concept itself is interdisciplinarity, because the "good of the child" can be found, for example, in psychology, law, pedagogy, sociology.

The present work is theoretical, legal, comparative and practical in its nature. The comparative aspect concerns the following areas: normative, axiological and jurisprudential. The practical aspect is related to the analysis of the case law of common courts, the Supreme Court, provincial administrative courts, the Supreme Administrative Court, the Constitutional Tribunal, the European Court of Human Rights and the Court of Justice of the European Union. On the other hand, the theoretical and legal aspects refer to the considerations made as to the nature of the reference to the good of the child and the process of objectivizing this structure in the process of applying the law.

Taking into account the good of the child in the course of the operative interpretation constitutes not only a theoretical and legal issue, but also a practical one. The "good of the child" is the basis for the formulation of numerous legal provisions, which seemingly do not refer to this criterion. However, important normative acts that indicate the presence of this category are: the Declaration of the Rights of the Child, adopted by the General Assembly of the League of Nations in 1924, the so-called Geneva Declaration and the Constitution of the Republic of Poland of 1997. The criterion of "the good of the child" as an element of the normative structure appears, for example, in the UN Declaration on the Rights of the Child of 1959 and the Convention on the Rights of the Child of 1989. In referring to the content of normative acts whose subject-matter is the "good of the child", it can be pointed out that the indicated criterion should be associated with the child's right to a happy childhood and the concept of humanity. Therefore it seems that the term in question must be interpreted in precisely this tone.

The issue of childhood has its rich history. Research in this field was conducted, among others, by P. Ariès[6], D. Archard[7], B. Smolińska-Thesis[8]. T. Buck[9], L. Liegle[10] and J.

6 P. Ariès, *Historia dzieciństwa. Dziecko i rodzina w dawnych czasach*, Gdańsk 1995, passim.
7 D. Archard, *Children. Rights and Childhood*, 3rd Edition, New York 1993, passim.
8 B. Smolińska-Thesis, *Dzieciństwo w małym mieście*, Warszawa 1993, passim.
9 T. Buck, *International Child Law*, 2nd Edition, London–Sydney–Portland– Oregon 2015, passim.
10 L. Liegle, *Welten der Kindheit und Familie. Beiträge zu einer pädagogischen und kulturvergleichenden Sozialisationsforschung,* Weinheim und München 1987, passim.

Izdebska[11] also refer to childhood. In turn, A. Rosner[12] describes the state of research on childhood in historical terms, also referring to the works by M. Delimata[13] or D. Żołądź-Strzelczyk[14]. The interdisciplinarity of this issue further proves the complexity of the issue[15]. It seems that understanding what childhood is and looking at the history of this period implies a proper understanding of the good of the child, the rights of the child and other related concepts[16]. Understanding childhood and a clear awareness of the child's subjectivity also have impact on the proper understanding of the relationship between the children and the world around them, which translates into the judicial application of the law.

M. Michalak and P. J. Jaros[17] also refer to the concept of childhood. They state that childhood is a period that precedes adulthood. Adolescence can also be distinguished before adulthood. In addition, in Polish law features many definitions of the concept of a child due to the diversity and specificity of legal regulations. In addition to this concept, the legislator also uses the term "youth", emphasizing a certain distinctiveness of one of the groups from the other ones. However, the criterion of the good of the child seems to be so broad that it also covers this group of young people. An explanation of this fact can be found in the Convention on the Rights of the Child, which in its art. 1[18], states that a child is any human being under the age of eighteen.

We identified three main objectives of our work. The first is to demonstrate how the courts understand the concept of "the good of the child". Secondly, to indicate whether

11 J. Izdebska, *Dziecko – dzieciństwo – rodzina – wychowanie rodzinne. Kategorie pedagogiki rodziny w perspektywie pedagogiki personalistycznej*, Białystok 2015, passim.
12 A. Rosner, *Jak badać dzieciństwo i prawa dziecka*, „Przegląd Historyczny" 2005, 96/2, passim.
13 M. Delimata, *Dziecko w Polsce średniowiecznej*, Poznań 2004, passim.
14 D. Żołądź-Strzelczyk, *Dziecko w dawnej Polsce*, Poznań 2002, passim.
15 S. L. Stadniczeńko emphasizes the interdisciplinary nature of childhood research. Among the scientific disciplines dealing with the indicated issues, he mentions, among others, the history of childhood, the anthropology of childhood, the sociology of childhood, psychology. He also notes that the issues addressed are focused on the ethical aspects of the good of the child, the theory of cognitive and moral development, the rights of the child, children's folklore, children's philosophy of life, literature and art. He refers to the evolution of childhood and the rights of the child in the contextof philosophy and anthropology (*Historyczne i prawne antecedencje dotyczące pojęć dzieciństwa i praw dziecka*, [in:] D. Makiłła [sc. ed.], M. Wilczek-Karczewska [cooperating author], *Z historii ustroju i konstytucjonalizmu Polski. Księga Jubileuszowa dedykowana w osiemdziesiątą rocznicę urodzin Profesora Mariana Kallasa*, Warszawa 2018, pp. 716 et seq.).
16 On the evolution of the rights of the child, cf. M. Balcerek, *Prawa dziecka*, Warszawa 1986, pp. 10 et seq.
17 Authors of individual chapters, e.g. M. Michalak (*Korczakowskie prawo do społecznej partycypacji dziecka. Dziecięce obywatelstwo*, [in:] S. L. Stadniczeńko (sc. ed.), *Konwencja o Prawach Dziecka. Wybór zagadnień (artykuły i komentarze),* Warszawa 2015 , pp. 15–20) or P. J. Jaros (*Definicja dziecka*, [in:] S. L. Stadniczeńko (sc. ed.), *Konwencja o Prawach Dziecka. Wybór zagadnień*…, op. cit., pp. 51–62), emphasize the significance of childhood as an important period of human life. The advantage of this publication is to draw attention to the connection between this value and the Convention on the Rights of the Child. The concepts of childhood, humanity, dignity, interests, rights and good correspond closely with each other, indicating how the child's good should be interpreted.
18 Convention on the Rights of the Child of 20 November 1989. (JoL of 1991, No. 120, item 526), hereinafter: CRC.

courts perceive the good of the child as a general clause or a principle of law, how they apply this normative structure, and also what role it plays in the decision-making process of applying the law. The third research objective is to answer the question: is the axiological content of the indicated criterion objectified at the stage of judicial application of the law?

The conducted research was not limited to the branch of family law. Due to the interdisciplinary nature of the structure, it proved necessary to extend the research in order to comprehensively address the topic. A comprehensive view of the process of objectifying the good of the child and defining the features of this structure as a clause or a principle of law will be crucial. In addition, the current state of knowledge regarding the application of the concept of the good of the child needs to be systematized and significantly supplemented in relation to individual branches of law. The research subject we have undertaken, one that concerns the normative structure itself and its application, was not subject to wider studies to date. These issues are therefore of both cognitive and practical significance.

As part of the research, the following research questions were formulated: (1) Is it possible to determine the comprehensive content and define the concept of the good of the child on the basis of the normative level through the perspective of legal dogmatics and in court case law? (2) Is the criterion of the good of the child superior to other extra-legal criteria, i.e. does it have priority? (3) Can the "good of the child" be part of both a principle of law and a general reference clause? (4) What role does the criterion of "the good of the child" play in the decision-making process of the application of the law? (5) Is there a process of objectifying the good of the child during the judicial application of the law?

This work consists of five chapters. The first one includes the characteristics of the good of the child in both theoretical and dogmatic legal terms. The second and third chapters present the strictly theoretical and legal aspect and emphasize that the "good of the child" may be both an element of the principle of law and a general reference clause. In addition, in terms of undertaken theoretical and legal considerations, it was necessary to standardize the good of the child as an element of a metaclause or a meta-principle of law. In the third chapter, in addition, this criterion has been compared with other references, such as: "best interests of the child", "good of the family", "good manners" and "the principles of social coexistence". Comparative analysis takes place in terms of content as well as relationships. The list of criteria was compiled in accordance with subsequent assumptions. With regard to the concept of the interest of the child, this criterion seems to be similar to the concept of the good of the child. The "bests interests of the family" is characteristic, as is the "good of the child", for family and guardianship law. In turn, "good manners" is a phrase associated with private law. On the other hand, the "principles of social coexistence" seem to be a broader reference than the remaining analyzed criteria. The fourth chapter presents the role of the good of the child in the

decision-making process of applying the law. The last part of the work – chapter five – concerns the objectivization process.

In the course of our research we applied the following methods: (1) conceptual analysis method – applied for determining the meaning of the concept of the good of the child, as well as defining the objectivization process; (2) critical analysis method – used when analyzing the views of legal dogma and for case law analysis; (3) comparative method – applied when comparing the meanings of the concept of the good of the child in various branches of law, both at the normative level, in the legal dogmatics and judicial jurisprudence. The list of judgments takes into account only those items that seemed adequate from the point of view of elaboration and is included in the footnotes. On the other hand, the analysis was carried out on the basis of a much richer research material and extended with a preliminary analysis of the decisions of district and regional courts.

Research techniques and tools used to collect data as part of research work included: analysis of court case law, analysis of theoretical and legal literature, dogmatic and legal literature, as well as analysis of normative acts. In turn, the methods applied during the analysis and elaboration of the results were: comparative analysis – used in comparing the meanings of the concept of the good of the child in jurisprudence, dogmatic and normative acts, as well as scientific discussion and dispute – the elaborated research results were presented and discussed during scientific conferences on both international[19] and national[20] scale, as well as during the meetings of the Department of Theory and Philosophy of Law of UMCS.

19 The results of the research were presented, among others, during:
-29th World Congress of the International Association for Philosophy of Law and Social Philosophy „Dignity, Democracy, Diversity" w Luzern (Switzerland) in the presentation entitled: *Judicial discretion and the welfare of the child,*
-30th World Congress of the International Association for Philosophy of Law and Social Philosophy "Justice, Community and Freedom" in Bucharest (Romania), in the presentation entitled: *The Influence of the Normative Construct "the Good of the Child" on the Flexibility of the Process of Law Application,*
- international conference "Application of law – human rights – mediation" in Kazimierz Dolny, presentation entitled: *Selected aspects of the protection of children's rights in the case law of the European Tribunal of Human Rights;*
-International Scientific Conference "Resilience and transformations of the legal systems – in the time of crises (a Polish and Hungarian approach) - 2nd Polish-Hungarian Legal Studies Conference" in Lublin, in the presentation entitled: *The Alimony Fund as a Guarantor of the Well-Being of the Child in Judicial Enforcement of Alimony;*
-International Scientific Conference "The legal and social aspects of development and safety of the child", presentation entitled: *Rola metakonstrukcji normatywnej "dobro dziecka".*
20 XXIII Convent of Departments of Law Theory and Philosophy entitled "Państwo – społeczeństwo – kultura: formalne i nieformalne źródła prawa", presentation entitled: *„Dobro dziecka" jako generalna klauzula odsyłająca – aspekty teoretyczne i prawne,* and also during a National Science Conference entitled "O pojmowaniu prawa i prawoznawstwa w wystąpieniu: *Kształtowanie jednolitości orzecznictwa w odniesieniu do dobra dziecka* and the 10th Congress of Young Theoreticians and Philosophers entitled "Teoretyczne i praktyczne aspekty wykładni prawa" in the presentation entitled: *Obiektywizowanie kryterium dobra dziecka w toku sądowego stosowania prawa.*

Finally, in order to explain terminological issues to the reader, the translation "the good of the child" was finally adopted. In the literature, jurisprudence, normative acts and websites there are also translations reading "the well-being of the child" and "the welfare of the child".

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Part I

The Reference to the Good of the Child as a Normative Structure

Chapter I

Criterion of the Good of the Child in Normative Regulations

1 The subjective and objective aspects of the concept

Over the years, the meaning of the concept of the good of the child has remained essentially unchanged, as evidenced by a similar and, in principle, schematic treatment of issues affecting children.

There is an abundance of references in the case-law to the good of the child, which is generally understood in material terms. This perspective of understanding the phrase manifests itself in looking at the child's person and needs through the prism of parents' interests. In addition, the "good of the child" is not interpreted in conjunction with the criterion of the rights of the child, as well as the child's right to a happy childhood. On the other hand, in the subjective approach, this child and its needs would be most important, if we were to look at the prism of the rights of the child in particular as a human being, a citizen[21].

The latter way of perceiving the good of the child will boil down to departing from the understanding of this concept as a set of interests of a material and non-material nature (i.e. in accordance with the view of S. Kołodziejski or W. Stojanowska). Therefore, the good of the child should be understood as a postulated and current situation of the child with a focus on the full protection of their rights, taking into account the dignity of the child, their emotional development, as well as broadly understood environmental relations. The perception of the good of the child through the prism of the state and situation is closest to the subjective understanding of the good of the child.

Still the courts have not developed a habit of further defining this term. They merely consider the meaning of that expression in context, on the basis of the facts of the case.

21 Thus, for example, attempts to introduce the institution of parental responsibility, to explicitly emphasize in the normative regulations the principle of protecting the child's good or the institution of the child's lawyer in the Polish law. In principle, the above solutions are a good direction for changes, but to a large extent the approach to the person of the child will change in the long term. One can look at the law in a different way: through its proper application, i.e. one that would involve changing the direction of the decision and changing the mentality in the field of adjudication. More broadly in the draft of the new Family Code, subsection 2.2.

Each interpretation of this concept should confirm the exceptional nature of the child's situation in a particular case[22].

Only few decisions resort to understanding the good of the child as previously developed by the dogma of law. This does not change the fact that the references to the views formulated by W. Stojanowska and S. Kołodziejski still prevail. We should only consider their applicability in the context of the contemporary case law. These views were also formed in isolation from the provisions of the Convention on the Rights of the Child. In this case, the approach to the good of the child perceived through the prism of the child's and parents' interests prevails. Nevertheless, in criminal proceedings, for example, one should be cautious about the good of the child, considering it also from the point of view of the accused's rights to counsel.

Difficulties in determining the material and subjective scope of the discussed concept result from its vagueness. It is therefore difficult to formulate a definition that would be both universal in nature and detailed. The definition, or rather the definition of what should be understood as the good of the child, will always contain vague phrases in its content. Until now, views in this regard have boiled down to vague statements and pointing out that the "good of the child" is a set of interests, values, and even that it can be treated as a postulated situation. At present, the Polish system lacks a normative definition of the good of the child, but the ongoing work on the new Family Code will have its consequence in form of introduction thereof. According to the proposal, "the good of the child" is "a state in which the child achieves proper, holistic and harmonious mental, physical and social development, with respect for their dignity and the resulting natural rights. This good is shaped in particular by positive personal relationships, family relationships and educational situations"[23]. The introduction of definitions in family law will determine the direction of understanding of the indicated concept in this area. It cannot be ruled out that this definition will be translated into other branches, due to the specificity of family and guardianship law. Family law regulates the rights and obligations of family members, including the relationship between parents and children. There is no doubt that the criterion of the "good of the child" applies in various cases, many times reaching beyond family law. The above is a consequence of the fact that the situation of a child cannot be regulated by narrowing the normative framework only to a certain area of law. The confirmation of the above is the statement that the "good of the child" is the basis for the creation of normative acts relating to the child's situation[24].

22 The Supreme Court in the order of 24 November 2016, case ref. no. II Ca 1/16 stated that "there is no statutory definition of the concept *of the good of the child*. Its understanding depends on the specific factual circumstances of the child. Account should be taken in particular of the right to protection of life and health, to development in a fair and undisturbed manner and to respect for dignity and to participate in the decision-making process".
23 Cf. footnote 61 in this work.
24 W. Stojanowska, *Dobro dziecka…,* op. cit., p. 55.

From the perspective of individual entities, i.e. lower courts, administrative bodies, participants in proceedings, the perception of the good of the child is different. Courts see this criterion in the context of a particular case, in principle without departing from the established case-law. On the other hand, the participants on the one hand notice a threat to the good of the child, and on the other an instrument to protect their interests.

The distinction between the subjective and material approach to the good of the child is also related to the lack of, or rather difficulties in formulating legal definitions of this concept. It is complex and should be interpreted contextually. The above implies that due to the interdisciplinary characteristic and interdisciplinary nature, the "good of the child" may be interpreted differently, depending on the legal environment. For example, the "good of the child" will take on a different meaning in the context of contacts with the parent, others under the Act on juvenile delinquency proceedings, and others, bearing in mind the content of the Convention on the Rights of the Child. Contrary to appearances, shaping the child's situation in accordance with its good may be difficult due to controversial social issues, such as abortion, euthanasia, surrogacy, taking the child away from parents.

2 Criterion as part of a legal provision

2.1 Constitutional law

The fact that the construction of the "good of the child"[25] occurs in the normative acts of various branches of law determines its inter-branch nature[26]. The distribution of regulations throughout the entire legal system affects a different understanding of the good of the child in different areas of law. Interpretative differences in the content of the indicated construction are a consequence of the specificity of a given branch of law and the nature of relationships that affect the child's situation. For example, a child can function as: a family member, a student, a patient, a beneficiary of social benefits and

25 "The reference clause (within the culture of statutory law) is a normative construction, i.e. a construction that is explicitly included in the text of a legal act (legal provision) and through which the legislator communicates with the addressees of norms regarding the inclusion of extra-legal criteria in decisions on the application of the law or 'observance' of the law" (L. Leszczyński, *Stosowanie generalnych klauzul*..., op. cit., p. 22). The normative structure should not be confused with the term of criterion used in the work. The extra-legal criterion is a category undefined by law. Cf. ibidem.

26 In addition to the interdisciplinary characteristic, the criterion of the good of the child indicates the interdisciplinary or interdisciplinary nature of this concept. "The good of the child" is the subject of interest, among others, in such disciplines as: psychology, pedagogy or sociology. "The good of the child" in an interdisciplinary perspective was presented, for example, in the following publications: A. Błasiak, E. Dybowska (ed.), *W trosce o dobro współczesnego dziecka. Wybrane zagadnienia*, Kraków 2014, passim; E. Kabza, K. Krupa-Lipińska (ed.), *Dobro dziecka w ujęciu interdyscyplinarnym*, Toruń 2016, passim; K. Kamińska, *Dobro dziecka w dyskursie państwo – rodzina, inaczej o przemocy domowej*, Kraków 2009, passim; E. Włodek, Z. Solak, T. Gurdak, *Dobro dziecka. Perspektywa pedagogiczna i prawna*, Kraków 2017, passim. The work will present only the understanding of the good of the child as a criterion occurring in legal sciences.

perform various social roles, which in turn affects the shaping of its legal situation already at the stage of creating and then applying the law.

The legislator uses the normative structure of "the good of the child" to direct entities applying the law to the obligation to provide full protection to the person of the child during the process of applying the law. As W. Stojanowska argues, the "good of the child" as an overriding value should be taken into account when applying any provision of law regulating the legal situation of the child[27]. Although the claim has been made in relation to the provisions of the Family and Guardianship Code, it can also be applied to the entire legal system. It follows from the foregoing that the normative acts governing the situation of children should be created in the spirit of protecting the value of the good of the child by introducing institutions conducive to this, regulating the actions taken by legal entities in order to implement the good of the child, as well as harmonising the rights and obligations of these entities with the child, so that they are not contradictory. Children, due to their age, lack of experience and knowledge of life, as well as lack of the ability to make accurate assessments, are in a much weaker position than adults. For this reason, they should be given special protection, as they are still learning to live in society.

In the legal system there exist normative acts, in which: (1) the construction of "good of the child" constitutes a visible part of the legal provision; (2) "good of the child" does not occur as an element of the normative structure, but the linguistic context of normative acts indicates the occurrence of extra-legal values that should be taken into account when assessing the child's situation; (3) there are other constructions, whose scope of meaning is somewhat similar to the scope of the good of the child e.g. "the good of the student", "the good of the minor", "the good of the juvenile" – derivative constructions.

In addition, at the level of normative acts, we can observe that legal norms relating to the good of the child clearly correspond and complement each other. The above is a consequence of the interdisciplinary nature.

The context in which the "good of the child" occurs can be characterized by quoting fragments of the normative text that is subject to interpretation[28]. The content of the normative construction of "good of the child" is difficult to determine and should be interpreted taking into account the content of the legal provisions with which it is related, other expressions used in the normative act to which it is related, as well as the hierarchy of sources of law and the hierarchy of values.

27 W. Stojanowska, *Władza rodzicielska pozamałżeńskiego i rozwiedzionego ojca. Studium socjologiczno-prawne*, Warszawa 2000, p. 32.
28 A. Malec, *Zarys teorii definicji prawniczej*, Warszawa 2000, p. 19.

Referring to the constitutional provisions, it should be stated that the normative structure "the good of the child" does not appear as an element of the legal provision in art. 72 of the Polish Constitution[29].

In art. 72 of the Constitution, the constitutional legislator, in accordance with the literal wording of the legal provision, introduces the protection of the rights of the child. The lack of a clear reflection of the good of the child in the form of a normative construction does not mean that this value was omitted from the branch of constitutional law. The *ratio legis* of a provision drafted in this manner is to direct the actions of the state and other entities in accordance with the good of the child as a legally protected value[30].

As it follows from art. 72 of the Constitution, the legislator clearly establishes the protection of children's rights due to their weaker position. This was expressed in the form of a principle of law. Due to its inclusion in the normative act with the highest legal force, it is of a systemic nature. The first subsection introduces a general obligation for the state to protect the rights of the child, as well as the right of each subject to demand such protection. It follows from the second subsection that, in principle, the child should be provided with care at the level of the family, and only subsequently from the State. According to the intention of the Constitution, it can be assumed that the fullest protection will be implemented in the family as the basic social cell[31].

It is the responsibility of the decision-makers to hear the child's reasonable wishes and opinions. In this way, the legislator draws attention to the manifestation of autonomy of will. According to W. Borysiak, the constitutional provision creates a clear obligation in this respect and emphasizes the constitutional and legal subjectivity of the child[32]. The

29 Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) of 2 April 1997 (JoL of 1997 No. 78 item 483); hereinafter: the Constitution.

30 The position on the interpretation of the provision in the direction of the existence of the constitutional value of the good of the child is widely accepted by the legal doctrine. Cf. e.g. W. Borysiak, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, t. 1: *Komentarz*, art. 1–86, Warszawa 2016, p. 1650; as well as E. H. Morawska, *Ochrona praw dzieci w świetle art. 72 Konstytucji RP: uwagi na tle orzecznictwa Trybunału Konstytucyjnego*, „Kwartalnik Prawa Publicznego" 2007, 7/4, p. 144. According to S. Kalus, who notes that the source of the principle of the good of the child is the Constitution (cf. S. Kalus, *Konstytucyjne źródła zasad polskiego prawa rodzinnego*, [in:] I. Bogucka, Z. Tobor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*, Kraków 2003, pp. 113–114.

31 This protection can adopt a variety of forms, from, for example, ensuring that the child is actually cared for, to exercising certain parental rights (consent to medical treatment, protection of the child's privacy in the information society and in the face of technological developments, protection of the child against violence). Cf. e.g. E. Jarosz, *Ochrona dzieci przed krzywdzeniem. Perspektywa globalna i lokalna*, Katowice 2009, passim; J. Gligorijević, *Children's Privacy: The Role of Parental Control and Consent*, "Human Rights Law Review" 2019, vol. 19, issue 2, passim.

32 W. Borysiak, op. cit., p. 1656. In addition, reference should be made to the judgment of the Constitutional Tribunal of 21 January 2014, case file ref. SK 5/12, Legalis nr: 815910, in which the authority indicates that art. 72 s. 3 of the Constitution assumes a limitation of the rights of the child. It consists in the absence of a sanction for non-compliance by subjects of law with the obligation to listen to the child.

right to be heard should therefore be exercised in proceedings concerning the determination of children's rights, although the legal provisions do not explicitly provide for legal consequences of breach of this obligation[33]. It is only possible to postulate the introduction of such an order, and any resignation from its implementation should be dictated by the good of the child.

Furthermore, the content of art. 72 of the Constitution corresponds to other provisions of our Basic Law that relate to human rights and freedoms. The child as a human being has, among others, the right to inviolability and respect for dignity[34] (art. 30 of the Constitution), right to respect and protection of human freedom (art. 31 of the Constitution), equality before the law and non-discrimination (art. 32 of the Constitution), equal rights (art. 33 of the Constitution), protection of life (art. 38 of the Constitution). As a member of the state society, the child has the right to acquire Polish citizenship (art. 34 of the Constitution) and the right of state provided care abroad (art. 36 of the Constitution). Other freedoms and rights concerning children include, among others: the right to healthcare in the context of providing special care, as well as promoting the development of physical culture in children and adolescents (art. 65 of the Constitution), the right to succession (art. 64 of the Constitution), the right to education along with the obligation to continue education until the age of 18, as well as the right of parents to select the place of education of their children between a public and a non-public institution (art. 70 of the Constitution).

2.2 Family law

In the Polish Family and Guardianship Code (KRO)[35], the construction of the "good of the child" occurs, among others, in the content of the provisions on the termination of marriage, separation, determination of the child's origin, parental authority, contacts with the child or adoption. The existence of this construction solely in relation to the indicated issues does not mean that the formation of other legal family institutions does not take into account the value of the good of the child.

With regard to the regulation on the dissolution of marriage, the "good of the child" is treated as a negative premise for a divorce[36]. The content of the provision includes a concept partially identical to the good of the child, as the legislator uses plural constructions, protecting the common good of minor children of spouses. The value

33 Ibidem, p. 1656.
34 The concept of dignity is referred to, e.g. by W. Dziedziak, *Godność człowieka jako podstawa sprawiedliwości*, "Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2019, t. 66, nr 1, pp. 87–99, passim, as well as: idem, *O prawie słusznym. Perspektywa systemu prawa stanowionego,* Lublin 2015, passim.
35 The Act of 25 February 1964 – Family and Guardianship Code (full text in JoL of 2020, item 1359); hereinafter: KRO.
36 A. Olejniczak, [in:] H. Dolecki, T. Sokołowski (eds.), *Kodeks rodzinny i opiekuńczy*, wyd. 2, Warszawa 2013, p. 409. Cf. art. 56 § 2 KRO.

subject to exposition concerns children in general and their mutual interest. In the course of the divorce process, the good of an individual child is also taken into account. A similar regulation is found in art. 61^1 KRO with respect to separation.

The legislator also refers to more specific issues, such as the regulation of parental authority and contacts. In this case, the good of the child manifests itself in the right of the child to contact both parents, as well as not to separate siblings. However, in connection with the good of the child, different decisions may be made than those preferred in the indicated legal provision, e.g. limiting the number of meetings or indicating the manner of communication, as by phone only. The exercise of parental authority manifests itself primarily in the right of the parent to co-decide about the child's person and in the actual impact on the child's upbringing process. This right may be restricted if leaving both parents in power could adversely affect a minor, for example in the result of abuse. In addition, "Parental authority should be exercised as required by the good of the child and the public interest"[37]. In this case, the two conditions for the exercise of parental authority appearing side by side require their joint interpretation. The public interest should be linked to the good of the child and not be in conflict with it. The court will have the power to change the decision on parental authority precisely due to the good of the child. The legal basis for such a change is the Art. 106 KRO. We find another example of interfering in the exercise of parental authority for the sake of the child in the content of art. 107 KRO. The proper shaping of parental authority and contacts will affect the child's subsequent development. Parents' and courts' decisions on the situation of the child, irrespective of the cases, should be directed to the future, so as to ensure proper emotional, physical and social development.

In order to protect the good of the child, the legislator introduced certain powers for the prosecutor, who, pursuant to art. 61^{16} KRO and art. 86 KRO may bring an action for the confirmation or denial of maternity as well as the confirmation or denial of paternity and the determination of the ineffectiveness of the recognition of paternity if the "good of the child" so requires. On the basis of the above-mentioned provisions, the child has the right to establish a bond with the father and mother. In this context, a correct determination may refer to the determination of biological or non-biological bonds, depending on what will correspond, in the given actual state, with the good of the child.

In the provisions of the Family and Guardianship Code, the legislator clearly creates the obligation of obedience of the child to parents.[38] According to the legislator, both the obligation of obedience, which the regulation creates, and following the recommendations of parents are consistent with the good of the child. The above results from the content of the parental authority, which should be exercised taking into account the discussed condition. With age, the children acquire new rights, e.g. to make

37 Art. 95 § 3 KRO.
38 Art. 95 § 2 KRO.

declarations of will and co-decide about themselves, which is consistent with their development. Abusing the rights of the child, including preventing it from freely expressing its opinion on a given subject, will be contrary to the good of the child.

The legislator constantly emphasises the importance of the relationship between parents and children. Even in the absence of full legal capacity, parents can effectively care for the minor.

We find the general guideline for courts in the content of art. 109 § 1 KRO, in which the legislator uses the phrase: "Shall the good of the child be at risk, the guardianship court will issue appropriate orders"[39]. Decisions regarding the protection of the good of the child consist in making specific decisions, for example: the obligation to work with a family assistant, referring the minor to a daily support facility, determining what activities cannot be carried out by parents without the court's permission or subjecting the exercise of parental authority to constant supervision by a probation officer. Shall the adopted measures prove ineffective and "the good of the child" is seriously threatened, the court may decide to place the child in the foster care system pursuant to art. 112^3 KRO. In this provision, the legislator specifies that a serious threat to the good of a child occurs when, in particular, their life or health is threatened, e.g. in the result of the phenomenon of domestic violence. Interpreting the § 2 *a contrario* the premise of poverty alone will not constitute a violation of the good of the child. Taking care of the bond between parents and children is therefore a special obligation imposed by the legislator. In relation to the placement of the child in foster care, it will be in their good to entrust the care of the child to relatives in order not to significantly modify the educational environment, as this could negatively affect the development of the minor.

In turn, establishing contacts, if the child is permanently staying with one of the parents, is determined by the parents themselves, guided by the good of the child and taking into account their reasonable wishes. In accordance with art. 113^1 KRO only in the absence of such agreement on the subject of contacts these should be adjudicated by the court. What is also consistent with the good of the child, if there is a premise for it, is to issue specific decisions by the courts, e.g. a prohibition to meet with the child, a prohibition to take the child outside the place of their permanent residence, a prohibition to communicate remotely, a restriction of contacts to specific ways of remote communication or a permission to meet with the child only in the presence of a specific person. The reason for issuing such a decision is the occurrence of objective circumstances that have an impact on the child's emotional development, e.g. the phenomenon of domestic violence.

(2) In the 1946 decree - Family Law (PR)[40] the construction of "the good of the child" appeared in relation to the exercise of parental authority, which was to be exercised as

39 Ibidem.
40 Decree of 22 January 1946. – Family Law (JoL of 1946, No. 6, item 52); hereinafter: PR.

required by the good of the child and the interests of society (art. 20 § 3 PR). This content of the provision made the understanding of the content of the construction dependent on the public's perception of what is good for minors. In the light of art. 40 PR, in the event of negligence or acts threatening the good of the child by the parents, the guardianship authority could issue orders necessary to remedy these deficiencies. In art. 22 § 2 PR, which makes it necessary to appoint a guardian, in the event of a conflict of interests of the child and even one of the parents, there was a construction of "protection of the rights of the child", as well as "the bests interests of the child". Considerations regarding the connotation of these two concepts with the good of the child will be analyzed later in the present work.

However, in the 1950 Family Code (KR), the[41] construction of "the good of minor children" appeared, among others, in art. 29 § 2 KR as a negative premise for divorce. Compared to the current regulations, this structure does not contain the adjective "common", which means that during a divorce the interests of all children raised by spouses should be taken into account. The "good of the child" construction, without additional terms, was used in art. 54 KR with regard to the exercise of parental authority. The regulation in this respect is similar to the one currently in force, because parental authority was to be exercised as required by the "good of the child" and the interest of society. The discussed structure also appeared in art. 63 KR in relation to the prohibition of personal contact of the child with a parent deprived of parental authority on the grounds of the good of the child. In the indicated provision, the legislator indicates that the child had the right to contact the parent, however, due to the good of the child, their mutual communication could be limited, e.g. to the form of correspondence. In art. 65 KR, on the other hand, in the context of adoption, there was a phrase similar in meaning, i.e. "the good of a minor". The content of another provision, i.e. art. 81 KR, included the phrase "the good of the minor" in relation to the appointment of a guardian.

It is interesting to note that the codification works on the draft of the new Family Code was completed in July 2018[42]. The creators of the project refer to the criterion of the good of the child, and express it already in the Preamble to the new normative act[43]. This criterion should be considered as the purpose of the interpretation of legal provisions. The construction of "the good of the child" was expressed in the preliminary

41 The Act of 27 June 1950 Family Code (JoL of 1950, No. 34, item 308); hereinafter: KR.

42 The text refers to the draft of the Family Code of the Children's Ombudsman, [online:] http://brpd.gov.pl/sites/default/files/kodeks_rodzinny_projekt_z_uzasadnieniem.pdf [accessed: 8.07.2020].

43 About the basic values emphasized in the draft code: B. Sitek, *Czy potrzebny jest nowy Kodeks rodzinny?*, [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych*…, op. cit., pp. 143 et seq..; A. Łabno, *Konstytucyjny obowiązek ochrony rodziny w Rzeczpospolitej*, [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych…,*op.cit., passim; and also E. Bielak-Jomaa, *Prawo dziecka do prywatności. Some remarks on the background of the draft Family Code*, [in:] S. L. Stadniczeńko, M. Michalak (eda.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych…,*op. cit., passim.

provisions. It follows from art. 2 of the draft that it is the duty of the state to protect the rights of the child and at the same time to protect the autonomy of the family. Whereas, in accordance with art. 3 the interference of public authorities in family relations is limited by the principle of subsidiarity and precisely to ensuring the protection of the good of the child. The originators of the project clearly indicated the presence of the principle of the good of the child in the legal system[44]. This principle was literally placed at the beginning of the normative act. Such a legislative procedure is aimed at demonstrating the significance of the good of the child in relation to other normative criteria. In addition, from art. 8 of the draft, it follows that the principle of the good of the child takes precedence over other principles. Determining the content of the construction of the good of the child will occur, each time, in the course of the decision-making process in relation to a specific factual state. It should be pointed out, after T. Biernat, that "the process of creating the law should be relevant to the normative environment, take into account the dynamics of normative content and trends determining changes in the normative environment"[45].

The ready regulations take many practical issues into account. This means that changes in the field of separation of family law from civil law and the creation of a separate branch of law are emphasized. The project promoters pay attention to the special role of family justice due to "interference" and making decisions concerning children. The issue of dispute resolution was resolved in such a way that the family courts would also rule in the appeal proceedings[46]. At the same time, the publications emphasize that it is in the public interest to value the family by developing a special normative act[47]. Another important change is the introduction of the institution of parental responsibility instead of parental authority, which has so far emphasized the patriarchal nature of the child-parent relationship[48].

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44 A. Korybski, *Znaczenie i funkcje zasad prawa w projekcie Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych…..,* op. cit., passim; A. Solak, *Kategoria „punktu wyjścia" i kategorie pokrewne w przesłaniu projektu Kodeksu rodzinnego Rzecznika Praw Dziecka z myślą o dobru dziecka i dobru rodziny* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych….,*op. cit., passim; A. Rękas, *Mediacja jedną z naczelnych zasad prawa rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych….*op. cit., passim.
Another principle emphasized in the proposed regulations is the principle of the good of the person in care. Cf. S. Kalus, *Opieka – nowy komentarz,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych….,*op. cit., p. 357 et seq.
45 T. Biernat, *Projekt Kodeksu rodzinnego – problemy legislacyjne,* [in:] S.L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,*op. cit., p. 254.
46 S. L. Stadniczeńko, *Podstawy aksjologiczne i intelektualne kształtowania projektu Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (ed.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,*op. cit., p. 33.
47 Ibidem, p. 34.
48 On the institution of parental responsibility: Ibidem, pp. 57 et seq.; M. Michalak, *O odpowiedzialności dorosłych wobec dzieci – korczakowskie przesłanie w pracy Rzecznika Praw Dziecka,* [in:] S. L. Stadniczeńko, M. Michalak (ed.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach*

The project should be assessed positively[49]. First of all, it clearly corresponds to the provisions of international law and refers to the basic criteria and rights of the child, i.e. the right to dignity (as a basic human right), the good of the child (as one of the basic extra-legal criteria in the legal order), as well as the child's right to childhood (which remains in relationship with other rights of the child and forms the basis for their understanding)[50]. At the same time, the new code emphasizes the philosophical, theoretical, educational and pedagogical approach[51]. Against the background of the new regulations, it seems that the principle (order) of hearing, as well as the prohibition of punishing the child, will also be important[52]. In addition, the institution of the child's lawyer offers a new and promising solution[53].

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*aksjologicznych.…,*op. cit., passim; B. Smolińska–Thesis, *Kodeks rodzinny i opiekuńczy a pedagogika okresu PRL,* [in:] S. L. Stadniczeńko, M. Michalak (ed.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,*op. cit., pp. 159 et seq., and also philosophically on responsibility: J. Oniszczuk, *Odpowiedzialny człowiek i świat samowoli. Tragedia Króla Edypa i Antygony,* [in:] S. L. Stadniczeńko, M. Michalak (ed.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,*op. cit., passim.

49 M. Nazar (*Projekt nowego kodeksu rodzinnego i postulaty gałęziowego wyrębnienia prawa rodzinnego*, "Przegląd Sądowy" 2019, nr 7-8, pp. 7 et seq.) commented, in a rather critical manner, on the draft of the new code. Furthermore, there is also the pessimistic opinion on separation of family law from the civil law by P. Fiedorczyk (*Projekt Kodeksu rodzinnego na tle wcześniejszych polskich projektów prawa rodzinnego w ostatnim stuleciu. Uwagi historyka prawa,* [in:] S. L. Stadniczeńko, M. Michalak [ed.], *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,*op. cit., p. 186). On its positive aspects and those requiring adaptation: H. Ciepła, *Postępowanie w sprawach rodzinnych i opiekuńczych,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,* op. cit.; and also M. Posłuszna-Owcarz, A. Sobiesiak, *Adopcja w kontekście praw dziecka w projekcie Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,* op. cit.

50 At the basis of each of the solutions contained in the proposed normative act, there is reflection of the value of the good of the child (e.g. A. Rękas, K. Stasiak, *Postępowanie wykonawcze w projekcie Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak [eds.], *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych…,* op. cit., pp. 401 et seq.).

51 On pedagogical and educational processes: T. Przesławski, *Prawne ujęcie interpretacji procesów pedagogiczno-wychowawczych w kontekście projektu Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych...,* op. cit., passim.

52 Cf. J. Smoleń, *Psychologiczne aspekty podejścia do dziecka i rodziny w projekcie Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,* op. cit., pp. 201 et seq.

53 On practical issues related to the introduction of the institution of the child advocate: K. Mizak, *Systemowe ujęcie prawa materialnego, procesowego i wykonawczego w projekcie Kodeksu rodzinnego* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,* op. cit., passim; a także o tej instytucji: J. Stadniczeńko, *Instytucja adwokata dziecka w projekcie Kodeksu rodzinnego,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych.…,* op. cit., passim.

2.3 Civil and Criminal Procedure

In the Polish Code of Civil Procedure (KPC)[54], the construction "the good of the child" appears in art. 579^1 § 3 sentence 2 KPC. However, in art. 586 § 4 KPC "the good of the child" is a prerequisite for the court adjudicating on admission to a specialized institution in order to obtain an opinion. Procedural norms, due to their nature, are intended to implement the norms of substantive law and in this case they promote the proper implementation of the child's right to contact both parents, as well as the right to being brought up in a family. This means that the court should take such actions that are primarily aimed at protecting the good of the child, and the actions taken are aimed at facilitating this task.

In art. 575^1 KPC, the phrase "the good of a minor" was used, as a prerequisite for a closed court hearing. The construction "good of the minor" is a variation of the good of the child typical for the civil law branch, as in civil law relations there is also the concept of "minor". This is a construct that indicates a narrower scope of application or normalization. Since the legislator uses a structure different from the "good of the child" in a single normative act, it can be assumed that it does so consciously. Therefore, their content cannot be regarded as completely identical. Returning to the discussion of this regulation, it should be stated that the aim is to implement the child's right to respect for their private life, family life or dignity. On the other hand, art. 577 KPC states: "The guardianship court may change its decision even if it is final, if the good of the person concerned requires so"[55]. The construction indicated in this provision is broader in content than the "good of the child", because it also includes the "good of the person in care", and therefore not only children. In art. 590 KPC "the good of the person under care" is included in the content of the oath made by the guardian, who undertakes to perform activities, taking into account this premise. In art. 598^{12} KPC the legislator introduces the phrase "the good of a person subject to parental authority" in relation to a child who is taken away from the parent. In the aforementioned provision, the legislator states that it is the duty of the probation officer to take care of the "good of the person subject to parental authority" during the performance of activities related to collection. For this purpose, it indicates two elements that are clearly contrary to the good of the child, i.e. the emergence of physical or moral harm. The provision uses the word "especially", which allows to formulate an assessment that this catalogue of violations remains open.

The attention of recipients is drawn to the content of art. 216^1 KPC, where the legislator exercises the child's procedural right to voice their opinion. Although there is no explicit reference to the good of the child in the provision, the child's right to express their opinion is often highlighted in material and procedural law. Such numerous repetitions

54 Act of 17 November 1964 – Code of Civil Procedure (full text in JoL of 2020, item 1575); hereinafter: KPC.
55 Ibidem.

of regulations on expressing opinions only confirm how important, from the point of view of the good of the child, is the right to co-decide on their fate and to shape the legal and factual situation in accordance with their good. A similar regulation is found in the further part of KPC, in art. 576 § 2, in relation to the hearing of the child in matters concerning their person or property. These regulations correspond to the Constitution and the European Convention on the Exercise of Children's Rights.

It is not different in art. 398^3 § 2 KPC, as the Children's Ombudsman may lodge a cassation appeal if the rights of the child were infringed. This fact has its systemic consequences, because in art. 72 of the Constitution, the term "protection of the rights of the child" was used, and the Ombudsman was established as the body that upholds these rights. The content of this phrase is much more specific than "the good of the child", because it refers to all rights and freedoms set out in international agreements, the Constitution and laws. A similar regulation is found in the content of art. 424^2 KPC, which provides, among others, for the possibility of lodging a complaint concerning the illegality of a final decision by the Children's Ombudsman.

(2) However, in the very content of the Code of Criminal Procedure (KPK),[56] the legislator refrained from use of the discussed construction. Nevertheless, it is necessary to present some important observations about the good of the child relating to it. As in the case of KPC, in art. 521 § 2 of KPK the Children's Ombudsman may appeal if the decision violates the rights of the child. The Ombudsman's actions are dictated by the concern for the good of the child also in the context of criminal proceedings.

Art. 23 KPK states: "In the case of a crime committed to the detriment of a juvenile, in cooperation with the juvenile or in circumstances that may indicate the demoralisation of the juvenile or a worsening impact on them, the court, and in the preparatory proceedings, the prosecutor notifies the family court in order to consider the measures provided for in the provisions on juvenile proceedings and in the Family and Guardianship Code"[57]. The provision thus formulated establishes two directions of protection: firstly, when the child is injured and needs special protection; second, if it is the perpetrator of a particular prohibited act and it is necessary to take into account the correct, i.e. in accordance with its best interest, application of measures against it. In addition, the KPK refers to the KRO, in which the "good of the child" is constructed, as well as to the Act on Juvenile Proceedings[58] and thus to the good of the juvenile.

In criminal proceedings, the protection of the child's good is implemented through the actions of not only the court, the prosecutor or the Children's Ombudsman. Certain

56 Act of 6 June 1997 – Code of Criminal Procedure (full text JoL of 2021, item 534); hereinafter: KPK.
57 Ibidem.
58 Act of 26 October 1982 on Proceedings in Juvenile Cases (full text JoL of 2018, item 969); hereinafter: PNU.

rights in the light of art. 51 KPK are performed for the aggrieved by a statutory representative or a person under whose permanent care the victim remains.

The legislator also provided for two separate methods of interrogation, i.e. of a juvenile offender (art. 185b KPK) and the aggrieved minor (art. 185a KPK), which is also a manifestation of the protection of the value of the good of the child. Although the content of the regulations does not include the discussed construction or any other similar expression, the aforementioned regulations are important for the protection of the good of the subjects concerned by the proceedings.

2.4 Law on juvenile delinquency proceedings

The Polish Act on Juvenile Delinquency Proceedings (PNU)[59] uses the construction of "the good of the juvenile" in place of the "good of the child". This construction differs in terms of its content from "the good of the child" as it concerns juveniles. The term "juvenile", in accordance with art. 1 § 1 and § 2 point 1 PNU, covers persons who are under the age of 18, and who show signs of demoralisation; persons who have committed a criminal act after the age of 13, but under the age of 17; as well as persons up to the age of 21, in respect of whom the execution of educational or corrective measures has been ordered[60]. Therefore, the meaning of the term includes a selected group of subjects, which can be only partially identical to the good of the child, i.e. only when talking about people under 18 years of age. The child's upper age limit is widely accepted in both national and international regulations.

In art. 3 § 1 PNU, the legislator explains what the good of the juvenile may correspond to, mentioning the pursuit of beneficial changes in the personality and behaviour of the juvenile and, if necessary, aiming at the proper fulfillment of their duties by parents or guardian. In the provision, next to the phrase "the good of the juvenile", there is the criterion of "public interest". By reporting precisely the content of the provision, in § 2, the legislator lists the premises related to the court's proceedings in juvenile cases, i.e. the personality of the juvenile, and in particular: age, health condition, degree of mental and physical development, traits of character, as well as behaviour and the causes and degree of demoralization, the nature of the environment and the conditions of upbringing of the juvenile. These conditions may be objective in their character, which will be confirmed or contradicted by the results of the analysis of judicial case-law, carried out below.

Whereas, in accordance to the article 16 § 2 sentence 1 of the PNU: "In particularly justified cases, if the criminal act of a juvenile is closely related to the act of an adult, and the good of the juvenile does not prevent the joint conduct of the proceedings, the

59 Act of 26 October 1982 on Proceedings in Juvenile Cases (full text JoL of 2018, item 969).
60 A. Haak-Trzuskawska, H. Haak, *Ustawa o postępowaniu w sprawach nieletnich. Komentarz*, Legalis 2015, art. 1, nb 2–3.

prosecutor initiates or conducts an investigation". Excluding a case from separate proceedings protects the juvenile from total demoralization and also protects their right to respect for their dignity and good name. Another provision, which includes the "good of the juvenile", is the art. 32q PNU. In its content, § 1 reads as follows: "The victim may be present at the trial or hearing, unless it is contrary to the good of the juvenile, or educational considerations"[61]. Therefore, the "good of the juvenile" is so important that it should be treated as a directive whenever the court applies educational and corrective measures. This means that good should be understood as "shaping the proper development of a juvenile's personality, in accordance with social standards of conduct"[62].

2.5 Convention on the Rights of the Child and other instruments of international law

In the light of the Convention on the Rights of the Child[63] drawn up in English, the terms *the welfare of the child* and *the well-being of the child*were used. The first of them, in the Polish language version, occurs in the Preamble in relation to the objectives of specialized international organizations and has been translated as "prosperity". Then, in the context of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children*as "the good of the child". However, in art. 36 CRC in connection to the phenomenon of child exploitation also as "the good of the child". In the Preamble, one can also find the construct of "the well-being of all its members".

However, according to Art. 3 CRC, the addressees of the standards undertake to "provide the child with protection and care to the extent necessary for *his or her well-being*, taking into account the rights and obligations of his or her parents, legal guardians or other persons legally responsible for it (...)"[64]. It is worth noting that the Convention refers to parental responsibility and not to authority, which indicates a different nature of the relationship between the child and the person responsible for the child. It seems that the concept of parental authority is associated with the patriarchal nature of relationships.

Whereas, in art. 9 s. 4 CRC *the well-being of the child* construct occurs in relation to obtaining information on the place of residence of family members in the event of deportation, imprisonment, exile, etc. In art. 17 CRC, the phrase "the welfare of the child in social, spiritual and moral terms" was also used in the context of access to all information and materials from national and international sources. Furthermore, in art.

61 Act of 26 October 1982 on Proceedings in Juvenile Cases (full text JoL of 2018, item 969).
62 Cf. the judgment of the Supreme Court of 18 September 1984, case ref. no. III KR 237/84, LEX No.: 17574.
63 Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526). English text: Convention on the Rights of the Child, [online:] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [accessed: 20.07.2020].
64 Ibidem.

20 of the CRC, the legislator indicates that the good of the child are best protected at the level of the family, and only then is the state supposed to ensure the right to special protection and assistance. However, the phrase "good" is used only in the Polish language version, while in English it is used as its *own best interests*. Compared to the good of a juvenile in PNU, art. 37 letter c sentence 2 of the CRC states: "In particular, every child deprived of liberty will be separated from adults, unless the opposite solution is considered to be in the child's highest good (...)"[65]. In this case, similarly to art. 20 CRC, in the English version there is a *child's best interest*. Whereas the article 40 s. 4 CRC states: "Diversity of institutions such as care, counseling, supervision, probation, placement in a foster family, education and vocational training programs, and other alternatives to institutional care will be made available to ensure proper treatment of children, in a manner appropriate to their well-being, and at the same proportional to both the circumstances and the offence committed"[66].

Welfare and *well-being* should be distinguished by describing the former as "welfare" and the latter as "good".

The construction of the "best interests of the child", or rather "best safeguarding of interests of the child", is presented in art. 3, s. 1 KPD (*the best interest of the child)*, in art. 9 s. 1 KPD "the best interests of the child", as well as in art. 18 s. 1 of the KPD "the safeguarding of the best interests of the child", in art. 40 s. 1 and 2 (b) (iii) KPD "the best interest of the child". The concept of interest cannot be equated meaningfully with the good of the child at the stage of linguistic interpretation due to the prohibition of synonymous interpretation. At this stage of the work, one can put forward the thesis that the "good of the child" is the basic construction in relation to the interests of the child and determines their understanding. Considerations on this subject will be taken up in the third chapter of the present work, following a thorough examination of the views of the dogma of law.

(2) In the Convention for the Protection of Human Rights and Fundamental Freedoms[67] in Art. 6 section 1 of the ECHR, there is a construction of "the good of minors" as a prerequisite for excluding the press and the public from all or part of the trial. In the English version, this construction is referred to as *the interests of juveniles*. However, in art. 5 of Protocol No. 7[68], which provides, inter alia, for equal rights and obligations of parents towards children, the construction "the good of the child" was used in the

65 Ibidem.
66 Ibidem.
67 Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (JoL of 1993, No. 61, item 284); hereinafter: ECHR. English text with the content of Protocol No. 7: European Convention on Human Rights, [online:] https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed: 20.07.2020].
68 Protocol No. 7 to the ECHR drawn up on 22 November 1984 in Strasbourg (JoL of 2003, No. 42, item 364).

context of the adoption by the State of measures of a nature necessary to protect the well-being of children. In the English version, however, there is *the interests of the children*, i.e. a different normative structure from the ones mentioned in the above examples, which confirms the thesis previously put forward about the basic nature of the good of the child.

(3) The European Convention on the Adoption of Children[69] is also of significance. Although the normative act contains provisions relating to children, it is necessary to indicate those in which the structure in question appears. Already in the Preamble, the legislator refers to "[70] *the welfare of the children* adopted". Whereas, in art. 8 s. 1 there is "*the best interest of the child*". The analysis proves that the content of the construction of the good of the child is significantly narrowed down and, under the Convention, refers to adopted minors.

(4) In the Preamble to the European Convention on the Exercise of Children's Rights[71], "the good of the child" refers to the need to protect and promote rights, to receive relevant information from parents, and to the role of parents in the protection of children's rights and *the best interests of children*. However, in art. 1 s. 2 of the ECECR in relation to the *ratio legis*. The text of the Convention indicates procedural rights concerning a minor. These include, for example: the right to be informed; the right to express one's position in the course of proceedings; the right to request the appointment of a special representative; the right to request the assistance of specific persons who would facilitate the expression of the position; the right to appoint a separate representative; the right to appoint one's own representative, to exercise all or some of the rights of a party. These rights correspond to those granted in the national proceedings. "The welfare of the child" also appears in art. 2 (d) ECECR as regards the definition of the expression "relevant information". Then, in accordance with art. 6 ECECR, the courts take a decision in accordance with the best interest of the child, taking their opinion into account. Pursuant to art. 8 ECECR "the good of the child" has been translated as *the welfare of the child*, and in accordance with art. 10 ECECR as *the best interest of the child*.

(5) In the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of

69 European Convention on the Adoption of Children, done at Strasbourg on 24 April 1967 (JoL of 1999, No. 99, item 1157). English text: European Convention on the Adoption of Children, [online:] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006ff60 [accessed:20.07.2020].
70 Ibidem.
71 European Convention on the Exercise of the Children's Rights, done at Strasbourg on 25 January 1996. (JoL of 2000, No. 107, item 1128); hereinafter: ECECR. English text: European Convention on the Exercise of Children's Rights, [online:] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdaf [accessed: 20.07.2020].

Children, the "best interests of the child"[72] criterion is used as a guideline for decision-makers in the situation of the youngest. This construction is included in the Preamble, which states that [73]"the best interests of the child should be taken into account in the first place". Pursuant to art. 8 s. 1 of the COJ "the best interests of the child" is a prerequisite for the transfer of jurisdiction to the authority of the other state. The indicated regulation refers to "a better assessment of the best interests of the child in a particular case"[74]. A provision similar to that last one is introduced by the legislator in art. 9 s. 1 CoJ in relation to a request to the authority of another country to take over jurisdiction *(the child's best interests*). In art. 10 s. 1 (b) CoJ, there is the phrase "if the jurisdiction is in the best interests of the child[75]", which would mean having real conditions to determine the most appropriate situation for the child. Whereas, in accordance to the article 22 CoJ – "The application of the law indicated in the provisions of this chapter may not be waived, unless its application is clearly contrary to public order, taking into account the best interests of the child[76]" – there are two semantically different phrases. "Public order" as a prerequisite for departing from the application of certain provisions should be assessed in accordance with the best interest of the child. A similar regulation is introduced by the content of art. 23 s. 1 (d) of the CoJ, which among the grounds for refusal of recognition states that "if the recognition is clearly contrary to the public order of the requested state, taking into account[77] the best interests of the child", as well as art. 28 sentence 2, stating that "The enforcement of measures shall be carried out in accordance with the law of the requested State, within the limits provided for by that law, taking[78] into account the best interests of the child". In turn, from art. 33 s. 2 it follows that the "good of the child" has been translated as (*the child's best interests*).

(6) In the Declaration of the Rights of the Child, the concept of the good of the child is used in relation to the general objective which should guide the decision-makers on the situation of children. The criterion of "good of the child" should be taken into account when drawing up normative acts, as well as during the process of raising a child. In order to understand the child's good correctly, we should refer to the Preamble to the Declaration, which refers to the 1924 Geneva Declaration and the Universal Declaration of Human Rights. The purpose for introduction of protection follows from the content of the Preamble. The creators of the Declaration emphasize that the child is not fully

72 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children done at the Hague on 19 October 1996 (JoL of 2010, No. 172, item 1158), hereinafter: CoJ. Text in English: 34: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [online:] https://www.hcch.net/en/instruments/conventions/full-text/?cid=70 [accessed: 20.07.2020].
73 Ibidem.
74 Ibidem.
75 Ibidem.
76 Ibidem.
77 Ibidem.
78 Ibidem.

physically and mentally mature, and therefore requires care and protection. Protection is based on dignity and respect for human rights, as well as ensuring a happy childhood[79].

(7) Furthermore, the construction of the "good of the child" does not appear in the content of regulations of th Convention on the Civil Aspects of International Child Abduction the[80]. However, its Preamble contains a reference to *the interests of children*, which is essential in all matters relating to the child's care.

(9) In the Convention on the Rights of Persons with Disabilities, the[81] construction "the good of the child" appears in Art. 23 s. 2, which provides guarantees of the rights and obligations of persons with disabilities in the field of childcare, guardianship, trust, adoption or similar institutions, in which concerns for *the best interests of the child* will be paramount. It follows from art. 7 s. 2 CRPD, it that "in all activities concerning children with disabilities, the best interests of the child should be the primary consideration"[82]. Furthermore, in art. 23 s. 4 CRPD, the legislator guarantees the upbringing of a disabled child or a child in a family in which one of the parents is disabled. In this way, the child is provided with such rights as: the possibility of raising in the family, the right of contact with parents, the right to identity. Separation of the minor can only take place if *the best interests of the child*speaks for it.

3 Dogmatic views in law

(1) The dogmatics of law attempted to clarify the meaning and categorize the normative structure "the good of the child"[83]. The understanding of its content is diverse. It is the

79 This is the concept used by the creators of the Declaration of the Rights of the Child.

80 Convention on the Civil Aspects of International Child Abduction done at The Hague on 25 October 1980 (JoL of 1995 No. 108, item 528); hereinafter: KCA. English text: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, [online:] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 [accessed: 20.07.2020].

81 Convention on the Rights of Persons with Disabilities, adopted in New York on 13 December 2006 (JoL of 2012, item 1169); hereinafter: CRPD. English text: Convention on the Rights of Persons with Disabilities – Articles, [online:] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html [accessed: 20.07.2020].

82 Ibidem.

83 The subchapter will describe examples of approaches to the criterion of the "good of the child" formulated by the dogmatics of law. The analysis of legal literature, as well as other literature that undertakes research on the child, childhood, good of the child, children's rights in various contexts, provides a lot of information on how to perceive the good of the child in various problematic approaches. It is also worth mentioning the following publications: G. Michałowska, *Międzynarodowa ochrona praw dziecka*, Warszawa 2016, passim; B. Walaszek, *Dobro dziecka jako przesłanka niektórych uregulowań kodeksu rodzinnego i opiekuńczego PRL*, „Studia Prawnicze" 1970, nr 9, passim; T. Jędrzejczyk, *Legalizm czy dobro dziecka – problem pierwszeństwa zasad konstytucyjnych przy odebraniu dziecka z rodziny w sytuacji kryzysowej*, „Ogrody Nauk i Sztuk" 2016, nr 6, passim; D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford 2013; E. E. Sutherland & L. A. Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child. Best Interest, Welfare and Well-being*, Cambridge 2016. On the example of the indicated studies, there is a contextual reference to problems affecting children, which gives us an image of the good of the child.

context of the specific regulations that will determine the characteristics of good of the child. In addition, in the dogmatics of law, there is an assertion that the "good of the child" is a general clause. Still others note the existence of the principle of the protection of the good of the child.

Discussion of individual views on the understanding of the good of the child should begin with W. Borysiak, who indicates that "the good of the child" is a value protected by the art. 72 of the Constitution, as well as an imperative in the interpretation of all provisions concerning the youngest[84]. In his opinion, the duty to protect the good of the child rests with the parents, public authorities, as well as other entities, including the Children's Ombudsman[85]. He also points out that the catalogue of entities safeguarding the good of the child is a wide one. This is important in that it allows to provide children with the widest possible protection. It also points out that the well-being of the child plays "a key role in the development of future generations and the possibility of passing on traditions to it"[86]. "The good of the child" will also supplement the criterion of the good of the family under art. 18 of the Constitution[87]. W. Borysiak refers to the opinions of L. Garlicki and M. Derlatka, who claim that the realization of the child's good boils down to ensuring "growing up in a full family in conditions corresponding to the dignity of the human being, respecting the subjectivity of the child and ensuring the necessary assistance and care from public authorities"[88]. They assume that the "good of the child" will mean shaping the future situation of children in the most favourable family conditions. W. Borysiak also notes that art. 72 s. 1 of the Basic Act introduces the constitutional principle of protecting the good of the child.

The representatives of dogmatics draw attention to the overriding nature of the child's good in the branch of family and guardianship law[89]. This can also be seen on the level of normative acts, and in particular in the international ones. J. Kosik points to the leading role of the principle of good of the child in relations between parents and children[90]. He argues that, on the one hand, the "good of the child", treated as a principle of family law, should play a prominent role, but, on the other hand, when this phrase is not explicitly included in the provisions, the interests of parents may be exposed instead[91]. Therefore, it must be stated that making the principle of law a valid

84 W. Borysiak, op. cit., pp. 1650, 1661.
85 Ibidem, p. 1650.
86 Ibidem, p. 1657.
87 Ibidem, p. 1658.
88 Ibidem, p. 1662, as well as L. Garlicki, M. Derlatka, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej, t. 2: Komentarz, art. 30 86*, Warszawa 2016, p. 780.
89 W. Borysiak (op. cit., p. 1659) argues his position as identical to the jurisprudence of the Constitutional Tribunal, pointing to the judgments of the Constitutional Tribunal: of 28 April 2003, case ref. no. K 18/02, LEX No. 78052; of 11 October 2011, case ref. no. K 16/10, LEX no.: 992832; of 21 January 2014, case ref. no. SK 5/12, LEX No: 815910.
90 J. Kosik, *Problem przywrócenia władzy rodičicielskiej w świetle kodeksu rodzinnego i opiekuńczego*, "Palestra" 1973, nr 10, p. 1468.
91 Ibidem, p. 1468.

argument in the process of applying the law is necessary and indicates the correct interpretation. This is important, for example, in situations such as those described above.

On the other hand, W. Stojanowska argues that the "good of the child" should be the basic premise of all court decisions regarding the children, especially as regards the exercise of parental authority over them by their parents"[92]. She refers to the "good of the child" as an instrument of interpretation[93]. Such a statement is accurate because this criterion indicates the direction of decision-making by the entity that shapes the legal situation of minors. In her opinion, this criterion is superior in relation to other regulations, as can be seen on the example of art. 3 KPD[94]. In addition, it notes the superiority of the value of the good of the child in each normative act[95]. In the next statement, she indicates that the "good of the child" belongs to the general clauses, which fall within the other clauses[96]. In her opinion, in the case of the good of the child, these are the "principles of social coexistence"[97]. However, in order to unambiguously verify the statement of W. Stojanowska, it is necessary to check how the indicated structure is applied in court case law.

As the "good of the child", according to W. Stojanowska, "constitutes the nucleus of all provisions on the rights of the child, being the proverbial 'spirit of the law'"[98], she thus indicates that this criterion does not have to be expressed literally in the content of the provisions. According to another view of this author, the concept of the good of the child "within the meaning of family law means a complex of intangible and material values required to ensure the correct physical and spiritual development of the child and to properly prepare it for work in accordance with its talents, while these values are determined by many different factors, the structure of which depends on the content of the applicable legal norm and the specific, currently existing situation of the child, assuming the convergence of the child's good with the social interest"[99]. This is one of the most frequently cited statements and it has met with widespread acceptance. However, this understanding of this concept was negated by Z. Radwański[100].

According to another term formulated by J. Marciniak, "the good of the child" means "personal interests, i.e. concern for his physical and spiritual development and proper

92 W. Stojanowska, *Dobro dziecka w aspekcie sprawowania nad nim władzy rodzicielskiej*, „Studia nad Rodziną" 2000, nr 4/1(6), p. 55.
93 Ibidem, p. 55.
94 Ibidem, p. 56.
95 Ibidem.
96 Ibidem.
97 Ibidem.
98 Ibidem, p. 55.
99 W. Stojanowska, *Rozwód a dobro dziecka*, Warszawa 1979, p. 27.
100 W. Stojanowska quoted her argumentation in this regard in the publication: *Władza rodzicielska*..., op. cit., p. 44.

preparation for work according to their talents and in accordance with the social interest, as well as the property interests of the minor manifested in the appropriate management of their property, the proper use of the income derived from it and preserving the substance of this property as intact as possible"[101]. The above statement resembles the one formulated by W. Stojanowska, because it was based on personal and property elements. In addition, in the quoted statement, there is the term "interests" as one of the constituents of the concept of good of the child.

In turn, A. Rydzewski emphasizes the importance of the good of the child in proceedings in the subject of transferring the minor to one of the parents. He states that it is precisely that condition that is decisive when the decision on the issue is made[102]. According to him, the "good of the child" is the overriding indication that determines both the content and the exercise of parental authority[103]. Such a statement emphasizes the important role of the criterion of the good of the child in the decision-making process of the application of the law emphasized by dogmatics.

"The set of values, both spiritual and material, which are required for the correct: a) physical development of the child; b) spiritual development of the child, both in its intellectual and moral aspect; c) proper preparation for work for society"[104]is the approach formulated by S. Kołodziejski. He assumed that it was possible to explain what the good of the child meant, by taking into account the rights of minors and the obligations of parents[105]. W. Danielewicz-Prokorym referred to the above-mentioned statement. However, in the context of the discussed subject of parental authority and contacts between a parent and a child, she does not explain why she made such a choice[106].

A. Olejniczak explains the concept as "a positive assessment in the social hierarchy of values of the situation of a child from the point of view of satisfying the entirety of its needs, both tangible and intangible"[107]. This statement is the closest to what was elaborated in the course of the analysis of normative acts. Therefore, the good of the child should be perceived as the determination of the child's postulated and current situation, taking into account the obligations of parents, the social interest and the application of appropriate mechanisms. With regard to divorce matters, the author also

101 J. Marciniak, *Treść i sprawowanie opieki nad małoletnim*, Warszawa 1975, p. 10.
102 A. Rydzewski, *Problematyka uczestnictwa małoletnich w postępowaniu przed sądem opiekuńczym w sprawach z zakresu „władzy rodzicielskiej"*, „Rejent" 1997, nr 11(79), p. 87.
103 Ibidem, p. 97.
104 S. Kołodziejski, *Dobro wspólnych małoletnich dzieci jako przesłanka odmowy orzeczenia rozwodu*, „Palestra" 1965, nr 9, p. 30.
105 Ibidem, p. 24.
106 W. Danielewicz-Prokorym, *Władza rodzicielska a kontakty z małoletnim dzieckiem. Instytucja pieczy naprzemiennej na mocy ustawy z dnia 25 czerwca 2015 r. o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz ustawy – Kodeks postępowania cywilnego (Dz.U. 2015, poz. 1062)*, "Miscellanea Historico-Iuridica" 2015, nr 1, p. 375.
107 A. Olejniczak, op. cit., p. 409.

argues that the protection of the child's good should not be too far-reaching and make the adoption of a divorce decision dependent on the interests of entities other than the spouses themselves[108]. The above statement is also valid in the context of separation. Moreover, in his view, it is crucial to favour the protection of the good of the child over others in view of time constraints[109]. A. Olejniczak also notes that the concept of the good of the child "derives from the basic directive of family law, which requires that the interests of the child be taken into account as the overriding principle (the principle of the good of the child) when shaping family relations"[110]. He indicates the source of the good of the child, deriving it from the existing principle of family and guardianship law. This confirms the overriding nature of this criterion in this area of law.

In turn, T. Żyznowski states that "the good of the child belongs to the values derived by the Constitutional Tribunal from the text of the Constitution of the Republic of Poland, constituting – in the case law of the Tribunal – a model (basis) for the control of the constitutionality of laws"[111]. This means that the discussed criterion is also noticed in constitutional law, and W. Stojanowska's statement about their fulfillment of the "spirit of the law" finds its confirmation. In addition, T. Żyznowski points out that "the good of the child brings together a whole set of both spiritual and material values, as well as various factors required for the proper development of the child"[112]. Thus, he refers to the views of W. Stojanowska and S. Kołodziejski, formulating a similar approach to the good of the child.

By the concept of the good of the child, H. Haak understands "the situation of the child, where it is a situation postulated in the light of the moral doctrine dominant in our society, and more precisely specified in legal regulations and established judicial jurisprudence"[113]. In the further part of the statement, we read that this is a model that is idealistic in nature, because the child is raised in a family, preferably natural, that ensures the satisfaction of emotional and material needs[114]. In each case of creating a child's situation, there is a need to take into account specific conditions: age, gender, abilities, health condition, character traits, emotional ties with the environment, as well as mental sensitivity[115]. H. Haak therefore focuses primarily on the possibility of reproducing that situation, as referred to in the first sentence of the first paragraph. In his subsequent statement, it can be read that he accepts the views defined in dogmatics

108 Ibidem.
109 Ibidem.
110 Ibidem.
111 T. Żyznowski, [in:] A. Marciniak, K. Piasecki (ed.), *Kodeks postępowania cywilnego*, t. 2: *Komentarz. Art. 367–729*, wyd. 7, Warszawa 2016, p. 824.
112 Ibidem, p. 824.
113 H. Haak, *Władza rodzicielska. Komentarz*, Toruń 1995, p. 49.
114 Ibidem.
115 Ibidem, p. 50.

and jurisprudence, related to the relationship between the good of the child and the social interest[116].

After F. Zedler, H. Haak he points out that the connotational limits of the good of the child are set by the content of art. 96 § 1 sentence 2 KRO, which states that parents "are obliged to take care of the physical and spiritual development of the child and prepare it properly for work for the good of society according to its talents"[117]. Definition of limits of good of the child seems difficult to establish. The dogmatics of the law, however, tends to define it, even though it is a difficult task to perform. It is necessary to take into account the changing social environment, hence the notice, and consequently the impact of other criteria on the understanding of the good of the child.

Another view, this time formulated from the point of view of the Children's Ombudsman P. J. Jaros, is that in Polish law there is a principle of the good of the child, the Ombudsman is guided with in the performance of his duties. He points out that "the good of the child" is "taking all actions in the best interests of the child"[118]. At the same time, in his opinion, in the Convention on the Rights of the Child, the directive is the main criterion for action by public and private entities[119]. P. J. Jaros refers to two definitions formulated in the dogmatics of law, namely by S. Kołodziejski and W. Stojanowska, without referring to them critically in any way.

H. Babiuch also referred to the definition of W. Stojanowska[120], additionally emphasizing that the "good of the child" should be in harmony with the interests of parents. This view is not isolated because it results from the judicial case-law referred to by the author. At the same time, she emphasizes that the principle of the good of the child, which in here opinion is present, is most fully implemented in the natural family[121]. In case of threat to the value in form of the good of the child, it is possible to deviate from the above reasoning and shape the situation of the minor so that it is consistent with their best interests. Therefore, it is difficult to imagine the return of a child of several years to a natural family, if it was brought up by the persons who adopted it, creating the best conditions for emotional development. The nomenclature

116 H. Haak (ibidem) referring to the views of A. Strzembosz (*Nowa ustawa o postępowaniu w sprawach nieletnich. Próba komentarza*, Warszawa 1983, p. 46), indicates that "The interest of the child should be taken into account only if it does not contradict the »good of the child«, when, without violating its good, the interest of other people or social groups is also taken into account since, apart from the good of other people, nothing can constitute a social interest".
117 Ibidem, p. 50, and also F. Zedler, *Sądy rodzinne. Wybrane zagadnienia organizacyjne i procesowe*, Warszawa 1984, p. 63.
118 P. J. Jaros, *Rzecznik Praw Dziecka w Polsce. Ukształtowanie Rzecznika Praw Dziecka w Polsce jako organu państwowego. Komentarz do ustawy o Rzeczniku Praw Dziecka*, Warszawa 2013, p. 8.
119 Ibidem, p. 75.
120 H. Babiuch, *Konstytucyjne prawa rodziców w zakresie wychowania dziecka,* [in:] M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, p. 182.
121 Ibidem, p. 183.

applied by H. Babiuch in the form of the principle of the good of the child should be related, as results from the context of statements, to family law, as well as constitutional law.

In the opinion of J. Ignaczewski, the "good of the child" should be understood on the basis of the realities of the case and jurisprudence[122]. First of all, he refers to the order of the Supreme Court, which states that "taking into account the provisions on the obligations of parents towards children, it is possible in the simplest form to reduce the 'good of the child' to providing it with conditions of personal (spiritual) development and material existence"[123]. At the same time, J. Ignaczewski supplements this definition with elements developed by judicial practice, i.e. "neither parent should usurp exclusivity for what is best for the child, and not reserve a particularly privileged position in relation to the other parent; the child for full and harmonious development should be brought up in a family environment, in an atmosphere of happiness, love and understanding; the child should be guaranteed – as an individually shaped individual – to be brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity, traditions and cultural values; proper directing of the child should be implemented in a manner consistent with the child's developing abilities, while ensuring life and development conditions for the child; a minor child needs to be safeguarded stability and continuity of parenting conditions, the experience of love of their parents, consistency in parenting interactions, satisfying their cognitive needs, as well as shaping a positive image of their own person"[124]. J. Ignaczewski also notes that there are certain premises that should be taken into account when assessing the good of the child, e.g. age, characterological features, gender, family relationships, sense of security, sensitivity[125], and at the same time he calls them objective. As can be seen, the existence of premises is confirmed in the course of the analysis of the achievements of the dogmatics of law in the field of perception of the good of child.

According to K. Piotrowska, the principle of the good of the child belongs to the basic principles of family and guardianship law[126]. At the same time, she points out, as a judge with years of experience, that "the good of the child" is "a bottomless pit - place one can throw everything in"[127]. One can see in this statement what difficulties in dogmatics and practice are caused by defining this concept due to the vague nature of the phrase.

The criterion of the good of the child results from the provisions of family and guardianship law, the Constitution, as well as international regulations[128]. T. Żyznowski

122 J. Ignaczewski, *Komentarz do spraw o kontakty z dzieckiem*, Warszawa 2011, p. 64.
123 Order of the Supreme Court of 11 January 2000, case ref. no. I CKN 327/98, LEX: 39852.
124 J. Ignaczewski, op. cit., p. 64.
125 Ibidem, p. 64.
126 K. Piotrowska, *Dobro dziecka w orzecznictwie sędziego rodzinnego*, „Iustitia" 2017, nr 1, p. 11.
127 Ibidem, p. 11.
128 T. Żyznowski, op. cit., p. 824.

does not formulate any new definitions of the good of the child, but only generalizes the view of the dogmatic of law, on what this concept actually means. He also refers to the view of A. Zieliński, who claims that in cases of minors, the proceedings should take place in a closed session. It boils down to a broad approach to the premise of the good of the child[129], which guarantees that this approach will concern not only the indication of individual elements constituting the content of its structure, but also the entire instrumentation that aims to protect the child. It should also be recalled that "the good of the child in cases concerning the amendment of a decision on parental authority and the manner of its enforcement has been defined as an overriding value precedent even to the authority of the judiciary"[130]. Authority here should be understood as judicial infallibility.

An interesting observation is made in the publication by J. Wisłocki, who includes the good of minors as a value occupying a superior position in the social hierarchy, and subjected to protection under the legislation of the People's State[131]. It follows from the above that individual representatives of dogmatics try to classify the good of the child as a criterion of particular importance for the entire legal system.

According to T. Sokołowski, the good of the child should be understood as "the optimal configuration of elements of their interest"[132]. The author refers to the definition formulated by Z. Radwański, who also assesses that the concept of the good of the child means the postulated situation[133]. The author qualifies the good of the child as a general clause[134]. At the same time, for him the construction constitutes a principle of family and guardianship law, because the legislator is guided by this directive in creating all the institutions of the branches of family law[135].

(2) The dogmatics of the law encounters difficulties in establishing a single definition of the good of the child due to the vague nature of the phrase. However, each of the quoted statements refers to concepts such as: value, directive, premise, assumption. This multi-facetedness of the criterion indicates its abstract and vague character, as well as its particular role in the process of applying the law. This role consists in determining the direction of the judge's interpretation. In addition, the terms "clause" and "principle" are also relatively common.

129 Ibidem, p. 824, an also A. Zieliński, *Sądownictwo opiekuńcze w sprawach małoletnich*, Warszawa 1975, pp. 114 et seq.
130 T. Żyznowski, op. cit., p. 690.
131 J. Wisłocki, *Dziecko a rozwód. (Artykuł dyskusyjny)*, „Palestra" 1957, nr 1/2, p. 40.
132 T. Sokołowski, *Ochrona interesu majątkowego dziecka*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1985, z. 2, p. 115.
133 Z. Radwański, *Pojęcie i funkcja „dobra dziecka" w polskim prawie rodzinnym i opiekuńczym*, „Studia Cywilistyczne" 1981, t. 31, p. 19.
134 Ibidem, pp. 4–5.
135 Ibidem, pp. 6–8.

From the theoretical and legal point of view, such categorization is important from the point of view of the axiological significance of the good of the child for the legal order. Dogmatics seeks to maintain the status of the good of the child as a principle, initially for family and guardianship law, and then also for constitutional law, the application of which also has an interpretative effect on other branches of law, since the entry into force of the Constitution. This impact is justified by the principle of primacy of the Basic Law over other acts.

The dogmaitcs of law also defines the good of the child in the context of the Convention on the Rights of the Child. Determining what is the good of the child takes place through the prism of interests as well as the rights of the child.

The opinions and observations of the dogmatics of law can be catalogued. Firstly, one can distinguish opinions focusing on the indication of elements that make up the content of the content of the very construction of the good of the child, i.e. interests, values, good. Secondly, it can be concluded that the good of the child means the postulated situation or the direction of actions taken. The dogmatics of law attempt to define the good of the child in general, and not in relation to a specific case. From the perspective of the findings, it is necessary to formulate one type of approach that will be focused on assessing the factual and legal situation of the child. This is necessary because the "good of the child" is assessed differently in each case.

When discussing individual views, we can pay attention to certain elements that form the content of the construction of good of the child. W. Borysiak explicitly speaks about the fact of noticing its constituent elements, e.g. the correct shaping of affinity ties[136]. Other elements shaping the content of the construction of the good of the child, which can be distinguished from the author's statement, are, for example: the child's right to know their biological identity, ensuring an adequate level of life and development, protection at the family and state level, protection against violence, exploitation and demoralization, hearing the child in the course of exercising their rights[137]. It seems that such elements cannot be exhaustively identified due to the specificity of the criterion itself.

In many cases, in order to characterize the good of the child, dogmatics refers not only to legal provisions, the views of other lawyers, but also to judicial case law. After analyzing individual views, we notice that there is a visible tendency towards generalizing the meaning, searching for extra-legal values, referring to other systemic constructions, etc.

In the law, there are concepts identical to the good of the child, the meanings of which are closely related to the material and subjective scope of the normative act. For

136 W. Borysiak, op. cit., p. 1662.
137 Ibidem, p. 1659.

example, if such an act concerns matters related to teaching and education, the semantic scope of the good of the child will be shaped from this perspective and will be related to students educated at the respective stages of education.

One of the constructions with a similar content to the discussed good of a child is the "good of common minor children". The expression in question occurs in relation to the provisions governing divorce. The term "common" indicates the bond of each of the children with both parents. According to J. Gajda, this construction includes: minor children born in marriage, children adopted by both spouses, children of one of the spouses adopted by the other and extramarital children for whom an act of recognition of paternity has been made or paternity has been judicially established[138]. In addition, he notes that dogmatics of law proposes to extend the subjective scope to extramarital children, children from a previous marriage, the *nasciturus* and children of age with disabilities[139]. In the first two cases, in order to consider the children as common, they should be adopted by both spouses. Nevertheless, when talking about the welfare of common minor children, we are talking about siblings, who come from common parents.

The concept to which the dogma of law refers is the good of *nasciturus*. According to A. Olejniczak, this concept cannot be equated with the content of the construction "the good of common minor children", because the meaning of the latter expression includes only children from the moment of their birth[140]. In his opinion, the protection of the interests of *nasciturus* can take place only in the result of the application of the clause of the principles of social coexistence[141], which in fact is a criterion that can be categorized as a criterion that includes the good of the child or the good of *nasciturus*.

The concept that was juxtaposed by S. Kołodziejski with the so-called good of minors is the good of adult children[142]. The author analyses this concept in terms of the possibility of a divorce between spouses when they are still caring for their incapacitated child[143]. In conclusion, he points out that minors should be understood as "not only children who are under the age of 18, and also children who have not reached the age of majority by marriage, but also those who, although having reached the age of majority, remain completely or partially incapacitated"[144]. He draws our attention, above all, to a certain attribute of dependence and lack of appropriate discernment in perceiving reality.

138 J. Gajda, [in:] K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, wyd. 5, Warszawa 2018, p. 486.
139 Ibidem, p. 486, as well as the publication indicated by J. Gajda: W. Stojanowska, *Rozwód a dobro dziecka…,* op. cit., p. 120.
140 A. Olejniczak, op. cit., pp. 410–411.
141 Ibidem, p. 411.
142 S. Kołodziejski, op. cit., pp. 26–27.
143 Ibidem, p. 27.
144 Ibidem, p. 30.

The provisions of the Act on Juvenile Delinquency Proceedings include the construction "the good of the juvenile". According to V. Konarska-Wrzosek, the good of the juvenile is a general directive of a superior nature[145]. A. Krukowski, on the other hand, understands the good of the juveniles "as achieving beneficial changes in their personality and behaviour, which would enable them to properly develop and function in their personal and social life, in accordance with social expectations expressed towards people of the same age category and in the period of their maturity"[146]. On the other hand, K. Gromek points out that the good of the juvenile is the main rule of conduct in juvenile cases, which is expressed, among others, in the pursuit of beneficial changes in his personality and behaviour in relation to the juvenile and to the proper fulfilment by parents of their obligations, taking into account the principle of individualization. Therefore it consists in considering all objective premises when deciding the case, such as: age, character traits, behaviour, nature of the environment, conditions of upbringing, causes and degree of demoralization, health condition, as well as the degree of mental and physical development[147]. At the same time, in the content of art. 3 PNU, there is an additional, construction of the social interest[148], that is complementary to the good of the juvenile. The relationship between these two constructions boils down to their remaining in a state of non-contradiction on the plane of later factual findings[149]. K. Gromek refers to the view of A. Krukowski, who claims that "the proper development of the personality of the juvenile and their conduct in accordance with social standards is undoubtedly the good of the juvenile and remains in the social interest"[150].

Regarding the explanation of what the good of the juvenile is, it is impossible not to refer to the views of A. Strzembosz, who claims that this good consists in "shaping a conscious and honest citizen with a comprehensive development of personality and talents, with socially desirable attitudes and a sense of responsibility, a citizen prepared for socially useful work"[151]. In his opinion, the good of a minor is a general directive, which sets the purpose of applying all the measures provided for in the Act on juvenile proceedings. It considers all court decisions contrary to the interests of the minor to be incorrect[152]. Although these assessments were formulated by A. Strzembosz at the time of the design and entry into force of the new juvenile legislation, they remain valid to present date. First of all, shaping the legal situation of minors for the future should

145 V. Konarska-Wrzosek, [in:] P. Górecki, V. Konarska-Wrzosek, *Postępowanie w sprawach nieletnich. Komentarz*, Warszawa 2015, pp. 43 et seq.
146 A. Krukowski, [in:] A. Krukowski (ed.), K. Grześkowiak, W. Patulski, E. Warzocha, *Ustawa o postępowaniu w sprawach nieletnich*. *Komentarz*, wyd. 2, Warszawa 1991, pp. 24–25.
147 K. Gromek, *Komentarz do ustawy o postępowaniu w sprawach nieletnich*, wyd. 2, Warszawa 2004, p. 86.
148 Ibidem.
149 The feature of non-contradiction in the relations between the construction of "social interest" and "the good of the juvenile" is noted by K. Gromek (ibidem).
150 Ibidem, as well as A. Krukowski, [in:] *Ustawa o postępowaniu w sprawach nieletnich. Komentarz*, p. 25.
151 A. Strzembosz, *Nowa ustawa…,* op. cit., p. 50.
152 Ibidem, p. 46.

guarantee their social rehabilitation and shape correct attitudes, and also respect for the reality surrounding them, including the legal reality.

4 "The good of the child" as an axiological criterion

The "good of the child" as a criterion, as well as an element of the normative construction, has many features[153]. They determine the nature of the good of the child in the process of creating and applying the law, as well as allow for its categorization as an element of the normative structure. In addition to the interdisciplinarity of the criterion and the construction, as well as the interdisciplinarity of the criterion itself, other characteristic features described below can be distinguished. These features have impact on the categorization of the structure, the element of which is the "good of the child". These characteristics are: constitutional, conventional, statutory, as well as superiority and priority.

In analyzing the jurisprudence, as well as the views of practitioners and theorists, we can see that the good of the child, perceived as a criterion, is attributed the feature of constitutionality. Such a term is initially misleading, because the very construction of "the good of the child" fails to appear in the Polish Basic Law. The justification for using such a nomenclature, and not another nomenclature, is therefore to emphasise the importance of the good of the child as an extra-legal criterion, one that does not need to be expressly articulated in legal provisions. Consequently, this criterion is located high in the hierarchy of extra-legal criteria. In addition, the consequence of the constitutionality characteristic is the interdisciplinary nature of the criterion. The constitutional, and thus significant, nature of the good of the child determines the direction of creating the law, and subsequently its application. The significance of the criterion is further evidenced by the confirmation of the constitutional nature of the good of the child in case law and literature, the application of international conventions, and sometimes referring to the jurisprudence of the European Court of Human Rights.

The conventional nature of the good of the child concerns both the criterion and the construction. It is present, among others, in the Convention on the Rights of the Child, as well as other international conventions. Bringing the good of the child to the rank of a criterion of international law indicates its significance. The consequence of the occurrence of this feature is its translation into the systemic nature of the good of the child.

In addition to the features of constitutionality and conventionality, it is worth mentioning another one, i.e. the statutory nature of the good of the child. The

153 On the criterion of the good of the child as an element of the principle of law and the general reference clause, cf. K. Hanas, *Dobro dziecka jako element szczególnej konstrukcji normatywnej – próba kategoryzacji*, [in:] T. Barankiewicz, T. Barszcz, K. Motyka, J. Potrzeszcz (eds.), *Studia nad formalnymi i nieformalnymi źródłami prawa*, Lublin 2020, pp. 71–79.

construction of the "good of the child" is scattered in numerous normative acts, which further confirms its universal nature. This fact has also impact on the strengthening of the functioning the good of the child as a criterion. This means that in the course of judicial application of the law, it is used in the course of interpreting the law.

The features of superiority and priority are visible at the normative level and in the course of adjudication by courts. This applies both to the facts of a civil, administrative and criminal nature, as well as to proceedings in juvenile cases. Priority for the good of the child should be treated as a guideline/indication when resolving conflicts between criteria. These collisions must be resolved for the benefit of the child's person in such a way as to protect their good. Priority and superiority are therefore not specific to each criterion. Legal dogma and jurisprudence draw attention to these features, and they are further confirmed by the Convention on the Rights of the Child. In the further part of the work we will use the phrase "the principle of priority of the good of the child", referring to the adjudication process itself and indicating the obligation to consider the criterion of the good of the child with priority over remaining extra-legal criteria[154]. This priority applies not only to family and guardianship law, but also to other areas of the legal system, e.g. constitutional law, criminal law, juvenile law or administrative law. The stabilisation of the child's situation and the protection of their rights and good require the application of the indicated principle. On the other hand, referring to the feature of the superiority of this criterion, one must consider whether the construction itself that contains an element of the good of the child should not be treated as a metaclause or a meta principle.

154 In one of the judgments, the Supreme Court states that "The order to protect the good of the child is a basic principle of Polish family law originating in art. 72 s. 1 of the Constitution. Any regulation of the relationship between parents and children is subject to this principle. Provision of Article 3, s. 1 of the United Nations Convention on the Rights of the Child of 20 November 1989 (JoL of 1991, No. 120, item 526) formulates the principle of preferential treatment of the interests of the child in relation to the interests of parents and other persons and orders, in all activities concerning children undertaken by public and private social welfare institutions, courts, administrative authorities or legislative bodies, to treat the best protection of the interests of the child as an overriding matter. This preference is absolute" – judgment of the Supreme Court of 11 February 2016, case ref. no. V CSK 302/15, LEX No.: 2023169. Preferential treatment for the protection of the good of the child is of particular importance here.

Chapter II

The "Good of the Child" Criterion as an Element of the Principle of Law

1 Principle of law – theoretical and legal issues

There are many terms in the legal language and in the legal language that can be combined with the term "principle". The first association concerns the connection of this term with the principles of social coexistence. The principles of social coexistence constitute an example of a reference to extra-legal values. Another meaning concerns the principles of legislative technique, which constitute guidelines for the legislator. In turn, in the judiciary, an important legal instrument that exists in connection with the discussed subject matter are resolutions of the Supreme Court having the force of the principles of law, which is the subsequent meaning of the discussed concept. These meanings can be multiplied, but they do not relate *strictle* to the theoretical and legal construction of principles of law. Conceptual analysis consisting in the adoption of a specific definition of the principle of law will form the basis for its consideration in the further part of the work.

The principle of law, in the basic sense adopted in the monograph of S. Wronkowska, M. Zieliński and Z. Ziembiński, is a kind of directive of proceedings, as well as the "central idea" of the legal system or a part of it [155]. According to M. Kordela, the principle of law is a form of an order to implement values[156]. The above definitions undoubtedly emphasize the understanding of the principle of law as a way of acting, focused on the protection of a specific value. The author distinguishes between descriptive, directive and evaluative principles[157]. The first of them will constitute "a set of sentences in the logical sense, referring to a coherent fragment of the applicable legal status selected according to a specific criterion"[158]. The principles covered by a directive must be regarded as "a set of legally binding rules of conduct"[159]. These principles can be classified in a transparent way as norms of a nature that is superior to the legal system or its parts[160]. On the other hand, the latter group of principles should be

155 Cf. S. Wronkowska, M. Zieliński, Z. Ziembiński, op. cit., pp. 9, 25.
156 Cf. M. Kordela, op. cit., pp. 101 et seq.
157 Ibidem, pp. 23 et seq.
158 Ibidem.
159 Ibidem, pp. 25 et seq.
160 Cf. S. Wronkowska, M. Zieliński, Z. Ziembiński, op. cit., p. 28.

understood as those principles that "do not refer to sentences in the logical sense and directives, but also include classic phrases expressing approval or disapproval of something"[161]. At the same time, among the principles described by M. Kordel, she mentions the principle of the good of child[162]. By adopting such an assumption, one can see a transition from the value outside the legal system to assessment, which is made within the derivative phase of interpretation.

Emphasizing the features of the principles of law, it can be stated after L. Leszczyński and G. Maroń that these structures are characterized by "above-average axiological, functional and hierarchical significance"[163]. These features distinguish the principles of law from "ordinary" norms, called norms-rules, indicating the preference of the former over the latter.

Bearing the above definitions, often found in theoretical and legal literature and adopted by the dogma of law as a determinant of the understanding of the principles of law, in mind, it becomes necessary to proceed to characterize the principle of protecting the good of the child. The issue, which is important from the point of view of the purpose of the present work, concerns the features of the principle of protecting the good of the child and the area of occurrence of such a principle, the element of which is "the good of the child".

2 The "good of the child" criterion as an element of the principle

Although in the theoretical and legal literature the principles of law were subject to a broad description , these works contain only minute references to the good of the child, treated as an element of the aforementioned construction[164]. This issue still seems to be relevant, since the status of this criterion as an element of the principle of law has not yet been fully clarified. When perceiving the principles of law in the perspective of the good of the child, we should ask about the area of functioning of the principle of

161 Ibidem, pp. 30 et seq.
162 Cf. M. Kordela, op. cit., pp. 30 et seq.
163 L. Leszczyński, G. Maroń, *Pojęcie i treść zasad prawa oraz generalnych klauzul odsyłających. Uwagi porównawcze*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2013, nr 60, pp. 81 et seq.
164 Most often, the principle of protection of the good of the child is referred to by legal dogmatists dealing with family and guardianship law (relevant bibliographic positions listed in the work). The fact of referring to the good of the child in the form of clauses and principles is a natural act, as the good of the child generally lead to the creation of provisions of this part of the legal system. The analysis of normative acts and judicial jurisprudence in the context of the occurrence of the good of the child made it possible to notice two levels of reference to this criterion. The first, much more case-oriented, concerns the narrow sub-branches of the legal system, i.e. family and guardianship law, as well as proceedings in juvenile cases. There we find, respectively: the principle of protection of the good of the child and the principle of protection of the good of the juvenile. The second approach renders it possible to see the specificity of applying the provisions relating to the good of the child through the prism of the Constitution and international conventions. Adopting the latter perspective, it can be pointed out that the principle of protection of the good of the child, as well as the principle of protection of the good of the juvenile, indicate a subjective approach to the issue of the application of the law with a focus on the child's person.

protecting the good of the child in the legal system. An important issue is therefore the issue in which branches of law we can talk about the principle of protection of good of the child. Subject literature still lacks systematization of this issue.

Considering the principles as a norm, systematization should begin with indicating the features of this norm. According to J. Wróblewski, in order to determine whether a given norm has the status of a principle, it is necessary to look at its features, i.e. hierarchical superiority in the structure of the entire system, content superiority, social significance and the role of a particular character, fulfilled by the norm within the structure of a legal institution[165]. Although the author clearly emphasises that the norm must meet the features listed by him in order to be considered a principle of law, it should also be noted that it is necessary to combine these considerations with the location of the criterion of the good of the child in individual parts of the legal system.

Bearing in mind the location of the good of the child in the legal system, the feature of the supremacy of the rule may certainly concern the area of family and guardianship law, as well as issues related to proceedings in juvenile cases. The criterion of the "good of the child" in these two areas becomes so evident that its role is not undermined in any way. The subject literature contains no questioning of the fact that what is present in this first area of the legal system is the principle of protection of good of the child, while in the latter we find the principle of protection of good of the juvenile[166].

While in relation to proceedings in juvenile cases, it is easy to find a norm-principle, because it is expressed directly in the law, it is more difficult to do so in family and guardianship law. In this case, the situation was clarified by legal dogmatists, and the principle of protecting the good of the child was classified as an assessment statement[167].

According to B. Czech, the principle of protection of the good of the child refers to regulating the situation of children in the area of the family and guardianship code, as

165 Cf. K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa…*, op. cit., pp. 92–93. In addition, J. Wróblewski (*Zagadnienia teorii wykładni...*, op. cit., pp. 255–260) also distinguishes the principles of law in the strict sense "based on the legal text" and principles-postulates, i.e. those "not based on the legal text".

166 Cf. in the first chapter in this work, in particular the views of Z. Radwański or K. Gromek. K. Gromek (op. cit., pp. 86 et seq.) indicates that the general principle of the Act on juvenile delinquency proceedings is the principle of the good of the juvenile. Obviously, sticking to the linguistic precision adopted in the work, one should talk about the principle of protecting the good of the juvenile. We find opinions in the context of the principle of protecting the good of the child by B. Czech ([in:] K. Piasecki (ed.), *Kodeks rodzinnyi opiekuńczy. Komentarz*, wyd. 5, Warszawa 2011, pp. 391 et seq.), who claims that the source of this principle is the Constitution and the Convention on the Rights of the Child. The existence of the principle of the good of the child (actually: the principle of protecting the good of the child) is also noted by W. Klaus in the monograph *Dziecko przed sądem. Wymiar sprawiedliwości wobec przestępczości młodszych nieletnich*, Warszawa 2009, pp. 253 et seq. This issue is also discussed in: K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, wyd. 5, Warsaw 2018, p. 47, as well as in: M. Kordela, op. cit., p. 30.

167 Cf. M. Kordela, op. cit., pp. 30 et seq.

well as to the code of civil procedure. Importantly, he observes that this principle is relevant in situations where it concerns the application of provisions which do not refer to the good of the child[168]. The statement made is correct, for example, because it confirms the assumption made previously about the multitasking role of the good of the child already in the process of creating the law.

The attribution of good character to the child: interdisciplinary, interbranch, conventional, constitutional, statutory, priority and superiority imply the axiological significance of this criterion. It seems that the issue of the superiority of the criterion has not been fully explained, because in constitutional law, in the area of civil law, excluding family and guardianship law, criminal law or administrative law, the good of the child cannot always play a leading role.

Referring to the constitutional law in the first place, it must be stated that both the Constitutional Tribunal and the Polish courts are of the opinion that the "good of the child" is a constitutionally protected value[169]. However, in the case of the Constitution, and *stricte* in art. 72 s. 1, the principle of protecting the rights of the child was expressed instead of the principle of protecting the good of the child. It seems reasonable that the "good of the child", in conjunction with the rights of the child, affects the subjective perception of minors and juveniles. The "good of the child" should therefore imply an understanding of any other criterion linked to the person of the child. Here the "good of the child" serves as an assumption of the functioning of generally applicable regulations.

Since the substance of the basic law includes the protection of the rights of the child, and also makes the good of the child one of the overriding criteria in the Polish legal system, such a state of affairs significantly affects other regulations of lower power[170]. Due to the function it has, the Constitution determines the scope of influence and the rank of the criterion in external relations thereof with other criteria in relation to the

168 Cf. B. Czech, op. cit., p. 392.

169 In the literature, T. Żyznowski pointed out that the "good of the child" is a constitutionally protected value, which was repeatedly shown in the jurisprudence of the Constitutional Tribunal (relevant bibliographic positions listed in the present work, in addition, e.g. the judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186) In addition, P. Kędziora also treats "the good of the child" as the basic value of family law (cf. P. Kędziora, *Dobro dziecka jako podstawowa wartość prawa rodzinnego: rozważania na tle praktyki orzeczniczej sądów powszechnych*, [in:] R. Sztychmiler, J. Krzywkowska, M. Paszkowski [sc. ed.], *Problemy małżeństwa i rodziny w prawodawstwie polskim, międzynarodowym i kanonicznym*, Olsztyn 2017, passim).

170 The issues raised by the Constitutional Tribunal in the course of adjudication concerned problems oscillating around various areas of the legal system, e.g. the judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No. 740186 (denial of paternity), judgment of the Constitutional Tribunal of 21 January 2014, case ref. no. SK 5/12, Legalis No. 815910 (exclusion of the possibility of exercising rights by a parent of a minor child who is an injured party in criminal proceedings against the other parent), judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No. 1469045 (no right of the aggrieved party to appeal in juvenile proceedings).

Basic Law[171]. However, the question arises as to whether it is possible to organise norms and principles within the Constitution. Certainly, everything boils down to distinguishing one principle, i.e. the principle of a democratic state governed by the rule of law, and the material impact of this principle includes all other norms, including the principle of protecting the rights of the child and the principle of protecting the good of the child.

On the other hand, in criminal law, the protection of the good of the child manifests itself, for example, in the context of penalising acts committed against minors, including: making alcohol available to minors, failure to pay child support, abandonment or abduction of a minor, as well as in the context of procedural regulations[172]. In the case of criminal law, it is rather difficult to talk about the dominance of all provisions by the principle of the protection of the good of the child. Here, one should use the guideline developed by M. Zieliński, consisting in resorting to the reductive reasoning from a given provision about its purpose[173]. In such a situation, the principle of protection of the good of the child applies to a narrow group of provisions that are aimed precisely at protecting the good of the child.

Administrative law is similar to the case of criminal law, for example, if the case under consideration concerns the regulation of the status of a child or indirectly affects their situation. In administrative law, or rather in the application of the provisions of the indicated branches of law, the "good of the child" criterion should be derived from the Convention on the Rights of the Child or other acts of international law. In the case of the case-law of administrative courts, great emphasis is placed on the rights of the child, thus determining the understanding of the good of the child in general. As a rule, the Supreme Administrative Court and provincial administrative courts boldly use the criterion of the good of the child or the rights of the child in the decision-making process of applying the law[174]. This criterion is usually derived from the Constitution or the Convention on the Rights of the Child and through this activity the authorities demonstrate the impact of higher-order provisions on the direction of adjudication by administrative courts.

In the area of civil law, other than family and guardianship law, the good of the child may be present, for example, in cases concerning the awarding of sums by way of compensation to a minor, rejection of inheritance or protection of personal rights. It seems that it is difficult to deny the child protection in these situations, which finds its confirmation in the direction of adjudication. The question arises as to whether the

171 The impact can be seen on the example of judgments of the Constitutional Tribunal, as well as judgments of other courts, e.g. in relation to the criterion of public order, the good of the justice system, etc.
172 Cf. the judgment of the Supreme Court of 11 May 2012, case ref. no. IV KK 30/12, Legalis No.: 492155.
173 Cf. M. Zieliński, *Wykładnia prawa*…, op. cit., p. 347.
174 Cf. e.g. the Judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17, Legalis No. 1742125; judgment of the Supreme Administrative Court of 29 August 2018, case ref. no. II OSK 1041/18, Legalis No. 1825975.

principle of the protection of the good of the child can therefore also be treated as a civil law principle of significant importance. This question should be answered in the affirmative, looking at how cases involving children are resolved.

Material superiority boils down to looking at the system through the prism of constitutional and international law. The conventions to which the Republic of Poland is a party affect the shape of the regulations due to the regulation of the role of international agreements in Polish law. In the normative reality and practice of applying the law, one can see the hierarchical superiority of some norms, as discussed by J. Wróblewski[175]. This hierarchism translates into material superiority.

3 The system-wide principle of protecting the good of the child

In Polish regulations, it is difficult to find a regulation that would unambiguously result in the principle of protecting the good of the child, which would have an impact on all branches of law. Therefore, the following questions should be asked: is there a systematic principle of protecting the good of the child in Polish law?[176], can such a principle be distinguished in individual branches or sub-branches of law?, and is the criterion of the "good of the child" an element of the principle of law?

Reference should be made to the fact that the "good of the child" may be an element of a principle of law. The above depends primarily on the legislator and their idea of what the system they create will look like. In the manner in which they formulate legal provisions, as well as the content of the recitals of normative acts, one can notice the presence of the criterion of the good of the child in the law-making process and then in the process of applying the law. What is of particular importance is the Preamble to the Convention on the Rights of the Child, which refers to other acts of international law[177].

The principle of protection of the good of the child may form the basis for creating other principles that must be consistent with it, e.g. the principle of protecting the rights of the child, the principle of protecting the best interests of the child[178]. This construction is present in the Polish legal system. It has so far been demonstrated that:

175 J. Wróblewski, *Zagadnienia teorii wykładni…,* op. cit., p. 327.

176 J. Wróblewski (*Zagadnienia teorii wykładni…*, op. cit., p. 327) spoke about the consequences of recognizing such a structure as a general principle of law, indicating the systemicity of such a structure, and at the same time its content superiority over other norms. A system of law built of norms-principles and norms-regulations is a logically coherent whole, based on the processes of emergence, hence the possibility of deriving values.

177 For example, to the Declaration of the Rights of the Child (the so-called Geneva Declaration), the Declaration of the Rights of the Child of 1959, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on Social and Legal Principles.

178 According to S. L. Stadniczeńki: "The Convention on the Rights of the Child assumes that the principle of the good of the child means all actions taken in the best interests of the child." (S. L. Stadniczeńko,

a) whereas this rule-provision stems from a specific provision[179];
b) it can be derived from numerous provisions of generally applicable law[180];
c) it results from normative acts affecting the entire legal system[181];
d) the case-law assigns the role of a principle to a specific norm[182];
e) the presence of this principle is accepted by the dogmatics of law[183].

It is worth emphasizing that Polish law is also affected by the case law of the European Court of Human Rights and the Court of Justice of the European Union[184]. If the aforementioned decisions refer to the principle of the protection of the good of the child, it should be assumed that this principle applies. The results of analyzes made on the basis of jurisprudence, normative acts and views on the dogmatics of law demonstrate that the principle of protection of the good of the child is related to every branch of law.

In art. 72 of the Constitution there is reference to the principle of protection of the rights of the child. Obviously, this principle cannot be dissociated from the criterion of the good of the child due to the role played by this criterion in the process of creating the law. The opposite view as to the emergence of the principle of protection of the child's good from the Constitution is presented by R. Łukasiewicz, who, despite pointing to the presence of the good of the child as the basis for the formulation of art. 72 of the Constitution, still, derives the principle of the good of the child, not the principle of the protection of the rights of the child from this provision[185]. In turn, the theorem adopted by him, formulated on the basis of art. 18, art. 47, art. 48, art. 71 and art. 72 of the Constitution, stating that these provisions constitute "one of the bases for the reconstruction of the principle of the good of the child in force in Polish law", is fully acceptable.

Urzeczywistnianie dobra dziecka, [in:] S. L. Stadniczeńko (sc. ed.), *Rzecznictwo praw dziecka w Polsce*, Konin 2002, p. 12).

179 E.g. Art. 3, s. 2 of the Convention on the Rights of the Child of 20 November 1989. (JoL of 1991, No. 120, item 526), the Act of 26 October 1982 on Juvenile Delinquency Proceedings (full text JoL of 2018, item 969).

180 Act of 25 February 1964 – Family and Guardianship Code (full text JoL of 2020, item 1359).

181 E.g. Art. 3, s. 2 CRC.

182 Examples of judgments in the list at the end of the work.

183 Cf. the first chapter of the present work.

184 Cf. e.g. the judgment of the CJEU of 19 April 2018, case ref. no. C-565/16, case of Alessandro Saponar and Kalliopi-Chloi Xylina, Legalis No.: 1785422 (succession law), judgment of the CJEU of 28 June 2018, case ref. no. C-512/17, HR case, Legalis No.: 1811644 (family law), judgment of the EU Court of 12 December 2018, case ref. no. T-283/17, SH v European Commission, Legalis No. 2255652 (child allowance). In addition, in the case of the impact of EU law, one can talk about the process of Europeanisation of law, i.e. adapting national law to Community law (cf. T. Biernat, *Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie,* [in:] T. Biernat (ed.), *Europeizacja prawa*, Kraków 2008, pp. 7–12). It seems that this also translates into the process of applying the law, as well as the formation of the principle of protecting the good of the child as a systemic structure.

185 Cf. R. Łukasiewicz, *Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia*, Warszawa 2019, pp. 73–77.

The tendency to derive the principle of protection of the good of the child from the Constitution can be seen on the example of some decisions of higher courts. At this point, it is worth quoting a fragment of one of the judgments of the Supreme Court: "In the Polish legal system, the principle of the good of the child has its source in art. 72 of the Constitution of the Republic of Poland, and also constitutes the basis for the KRO regulations regarding the child's interest and care. Any decision adopted on matters which may concern the interests of the child shall be based on the protection of his or her best interests"[186].

The constitutional nature of the value, as well as its connection with various branches of law, confirms the systemic nature of the principle of protection of the good of the child.

4 The principle of protection of good of the child and other principles of law

In addition to the principle of protection of good of the child, there are also other principles that can be interpreted from legal provisions. For example, from art. 3, s. 1 of the Convention on the Rights of the Child we may draw the principle of the best protection of the interests of the child. This principle also has its translation on the Polish legal order. This means that this norm must be consistent with constitutional norms, as well as with other norms resulting from the provisions of generally applicable law[187]. In addition, the importance of the principle of securing the best interests of the child arises from the content of that legal provision, which its decisive for its overriding character.

From the content of art. 3, s. 2 of the Convention on the Rights of the Child, we may interpret one more principle, namely the principle of the protection of the good of the child. The two interdependent rules (protecting the child's good and protecting the child's best interests), are placed in a single legal provision and as they both programmatic in their nature, they need to be interpreted jointly.

In addition, there is another principle of law that should be mentioned on this occasion in the European Convention on the Exercise of the Rights of the Child. From the art. 1 s. 2 follows the principle of promoting rights, granting children procedural rights and ensuring the exercise of these rights, or simply the principle of protecting procedural rights. The introduction of such a large catalogue of rules into the international law system indicates universal protection of children.

186 Order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, Legalis No. 1765977.
187 The ratification of the Convention on the Rights of the Child was approved by the Act of 21 September 1991 on the ratification of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 (JoL of 1991, No. 16, item 71). According to the provisions of the Basic Law, such a convention constitutes part of the national legal order and therefore national legal norms cannot conflict with it.

Against the background of the above considerations, it is now necessary to draw attention to several important circumstances. First of all:

a) the guiding principle for drawing up the provisions of international conventions concerning children is that of the "good of the child" criterion;
b) the criterion of "good of the child" normally follows from the preamble of the international agreement concerned[188];
c) one of the fundamental normative acts of international law is the Convention on the Rights of the Child, which lays down the principle of the protection of the good of the child;
d) with reference to the previous item, the Convention on the Rights of the Child is usually referred to in the preamble to other international agreements, which indicates its important role in the development and application of the law[189].

Referring to the last of the assumptions, it is worth noting that the specificity of creating international conventions, i.e. taking part in the agreement of this act by individual states or partners joining the ratification process, indicates the importance of such an act in subsequent processes of application and compliance with the law. The importance of the provisions of the Convention is evidenced not only by its subject matter, but also by the fact that the scope of application of the Convention is wide. The introduction of international standards is important in that it allows for the development of a common position in the field of protection of a given subject matter.

It is difficult to say which of the following principles, i.e. the best protection of the child's interests, the protection of the good of the child or the protection of the child's rights, will become dominant. It seems that the principle of protection of the good of the child most fully reflects the specificity of a given regulation. This norm will affect the correct understanding of other principles and vice versa.

It should be noted that each of the areas in the legal system, relating to the situation of the child, has its own principle. These principles combine a common element, i.e. the criterion of the good of the child, that coexists or remains dependent on the hierarchy of legal sources. The principle of protecting the rights of the child results from constitutional law, the best protection of the interests of the child and the protection of the good of the child - from the Convention on the Rights of the Child, and the latter is also derived from the Constitution. Thus, the feature of systemicity affects the principles shaping/directing the interpretation of the provisions of specific areas of law,

188 Although the preamble to a normative act is not legally binding, it indicates the need to refer to specific values. There is no obstacle to the court referring to the axiology expressed in the preamble in the justification of the judgment. It is assumed that the preamble is an "ideological manifesto of the legislator, expressing its axiology and expectations of what use should be made of the institution of rights and obligations expressed in concise, of necessity, regulations." (S. Wronkowska, *Kilka uwag o językowym aspekcie wykładni konstytucji,* [in:] M. Hermann, S. Sykuna, *Wykładnia prawa. Tradycja i perspektywy*, Warszawa 2016, p. 77).
189 For example, in the preamble to the European Convention on the Exercise of the Rights of the Child of 25 January 1996 (JoL of 2000, No. 107, item 1128).

as well as sub-branch principles (the principle of protection of the good of the child in family and guardianship law or the principle of protection of the good of the juvenile in juvenile proceedings). The principle of protection of the good of the child is also related to narrow areas of law, e.g. in relation to crimes committed against children. In these cases, the principle can be inferred from the direct impact of constitutional and conventional provisions.

5 The "the good of the child" criterion as an element of the meta principle

A meta-principle is a normative construction that is important due to its axiological, hierarchical and functional significance in relation to other principles. With regard to the good of the child, it is difficult to treat it as a meta principle when referring to the entire legal system.

In family and guardianship law, as well as in juvenile law and international law, clauses with an element of the child's good exist alongside other constructions, including the principles of law, and have a clear connection with them. This translates into determining a clearer axiological boundary[190]. The role of the principle of the protection of the child's good and the protection of the minor's good is significant, as can be seen in the jurisprudence, as well as in dogmatics. In the case of other branches of law, the impact of the conventional principle of protection the good of the child on the Polish legal system seems to be strong. However, the attribution of the principle of the protection of the good of the child to the system-wide meta-principle of the legal system is not fully justified. The norm-principle would have to be characterized by content and hierarchical superiority comparable to other meta norms-principles (and the starting point should be the principle expressed in art. 2 of the Constitution). Similar observations can be made in areas of law other than family and guardianship law or the law on juvenile proceedings. The meta-principle of the rules referring to the good of the child can only apply to a narrow group of regulations. Examples may also include regulations penalising behaviour that affects the person of the child, as well as certain regulations of international law relating to minors.

190 L. Leszczyński, G. Maroń, *Pojęcie i treść zasad prawa*…, op. cit., p. 86.

Chapter III

The "Good of a Child" as an Element of a General Reference Clause

1 The general clause referring to the good of the child

The general clause is an example of a normative construction characteristic for the continental legal orders. This construction has its roots in private law[191]. The subject literature indicate various meanings of this concept[192]. L. Leszczyński lists six definitions of the concept of the general clause that apply in the context of the specific research objective[193]. Therefore, translating the considerations regarding the good of the child into the definitions of general clauses developed by L. Leszczyński, it should be stated that the closest approach, from the point of view of the present work, is to treat the general clause as a normative structure, as well as "one of the ways of extra-legal

191 E.g. M. Stubenrauch, *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche,* t. 1 i 2, Wien 1898, passim; P. Tuor, *Das Schweizerische Zivilgesetzbuch*, Zurich 1934, passim; M. Rumelin, *Die Billigkeit im Recht*, Tubingen 1921, passim.

192 The issue of general clauses has been widely described in theoretical and dogmatic legal literature. An example of such works are: L. Leszczyński, *Stosowanie generalnych klauzul …*, op. cit.; R. Piszko, *Prawo a normy pozaprawne. Typy relacji*, Szczecin 2000, pp. 27–52; L. Leszczyński, *Tworzenie generalnych klauzul…,* op. cit., passim; A. Choduń, A. Gomułowicz, A. Skoczylas, op. cit., passim; E. Rott-Pietrzyk, *Klauzula generalna rozsądku w prawie prywatnym*, Warszawa 2007, passim, or J.W. Hedemann, *Die Flucht in die Generalklauseln, Eine Gefahr für Recht und Staat,* Tubingen 1933, passim.

Clauses are still an excellent tool for the legislator, as well as for entities applying the law to introduce freedom of application of the law. Clauses may change their meaning due to the impact of other criteria, principles of law, culture, their social environment. The impacts take on different intensities, e.g. due to the adopted state policy on the protection of individual values, that is visible on the example of political discourse and new normative acts adopted. An even greater potential for the good of the child manifests itself when this criterion is also an element of the principle of law. This means that the legislator, in this way constructing norms – principles, strengthens the character of the criterion, which becomes much more important, due to the hierarchy of the norm – principle.

It is also worth noting the assumption that the entire legal provision or only phrases appearing in legal provisions may be both referred to as a general clause. J. Nowacki (*Problem blankietowości przepisów zawierających klauzule generalne*, [in:] G. Skąpska (ed.), *Prawo w zmieniającym się społeczeństwie*, Kraków–Toruń 1992, p. 127) indicates that the clause, according to the first of the meanings, may be the entire provision, e.g. of art. 5 KC, as it contains two indeterminate phrases. This statement is somewhat true if the entire provision is treated as a fairly spacious normative structure. However, when looking at the dogmatics of law through the prism of theory of law, it should be noted that there is a recognized definition, according to which the general clause is included in the legal provision. Cf. E. Gniewek, P. Machnikowski (ed.), *Kodeks cywilny. Komentarz*, wyd. 8, Warszawa 2017, p. 15.

193 Cf. L. Leszczyński, *Stosowanie generalnych klauzul*…, op. cit., pp. 28–30.

reference"[194]. Determining the content of the normative structure "the good of the child" on the basis of this definition takes the context into account.

However, in the second case, the application of the "good of the child" structure will be based on the search for elements of the content of the reference. According to L. Leszczyński, "the reference (reference clause) is the fragment of a separate grammatical unit of the legal text (legal provision), which indicates the authorization to use extra-legal criteria, while the very name of these criteria, which forms part of the clause, determines the type of extra-legal reference and the resulting direction of assessment"[195].

The third aspect in which this issue can be considered is the treatment of the general clause as a reference to an assessment system, expressing the guiding principle, which indicates the regularity characterising the system of law as a whole[196]. In this case, the definition exposes, on the one hand, the search for elements constituting the content of the construction of the good of the child, which is characterized by uniformity and repeatability, and, on the other hand, the existence of a principle of law requiring the implementation of the protection of the good of the child.

The fourth and final distinction is the perception of the general clause through the prism of its location in the normative act[197]. The location of the reference determines the use of the principle of priority of the criterion of the good of the child in the course of adjudication, and also indicates its position in relation to other extra-system criteria. It seems that the use of the principle of priority results from: shaping the provisions in accordance with the good of the child and placing it in the preamble of normative acts, as well as in their initial provisions.

Resorting to the good of the child in the course of operative interpretation in various theoretical and legal forms affects – firstly – judicial discretion[198], secondly – the functioning of the institutions of the legal system[199], and thirdly – the application of other criteria[200]. Application of the criterion renders the case law of the regulations

194 L. Leszczyński, *Tworzenie generalnych klauzul*…, op. cit., p. 10.
195 Ibidem, pp. 10-11.
196 Cf. L. Leszczyński, *Stosowanie generalnych klauzul*…, op. cit., pp. 29, 30.
197 Cf. ibidem, p. 30.
198 Cf. Chapter Five of this the present work. An example of a decision is the judgment of the Supreme Administrative Court of 10 October 2018, case ref. no. II OSK 2552/16, Legalis No.: 1831972. In the decision, the Supreme Administrative Court took into consideration concerning transcription of the child's birth certificate.
199 E.g. the resolution of the Supreme Court of 22 November 2017, case ref. no. III CZP 78/17, Legalis No.: 1684119. The resolution concerns the revocability of court decisions in custody cases for the good of the child.
200 E.g. the judgment of the Supreme Court of 12 October 2017, case ref. no. IV SK 660/16, Legalis nr: 1695698. In this judgment, examples of contradictions between a legal act and the principles of social coexistence were indicated. Their underlying cause is a violation of the good of the child.

largely relaxed[201]. Otherwise, the child could suffer negative consequences as a result of a specific judicial decision.

In the context of general reference clauses, the role of this construction is emphasized, consisting in making the practice of applying the law more flexible. However, on the example of the good of the child, it is possible to make a further thesis, namely that clauses are one of the tools that make it easier for courts to make the law more flexible, but the basis for relaxing the case law is, above all, properly derived criteria that must be taken into account in the course of adjudication.

The reference to the good of the child together with other similar references, such as: "the good of the juvenile", "the good of the minor", etc. constitute examples of references to extra-legal criteria[202]. Theoretical and legal subject literature point to their blank character[203].

The use of general clauses by the legislator, including a reference to the good of the child, is a *sine qua non* condition for the effective creation and application of the law, as well as its observance[204]. The considerations concerning the good of the child as part of the general clause require some systematisation. In addition, it is a structure with quite characteristic features, strongly associated primarily with a narrow part of the legal system, i.e. family law, aimed primarily at protecting the person of the child in relations to their closest ones. The fact that the good of the child derives primarily from family law does not limit the possibility of applying this value in other cases involving children.

During the first contact of the entity applying the law with the criterion of the good of the child, the general nature of the reference is visible. The scope of generality changes with modifications that are made either at the stage of law making or in the first stages of its application process. This means that at the lawmaking stage we can already notice, that the semantic scope of the good of the child may be shaped somewhat differently. The simplest example is the juxtaposition of the starting clause "good of the child" with a construction similar to it, and it can even be said that its derivative, i.e. "good of the

201 E.g. the resolution of the Supreme Court of 22 May 2018, case ref. no. III CZP 102/17, Legalis No. 1770406, to the extent that this decision concerns the postponement of the deadline for submitting a declaration of rejection of the inheritance on behalf of the minor. This declaration should be submitted immediately after the final conclusion of the proceedings for permission to make a declaration on the rejection of the succession on behalf of the minor.

202 For example, J. Nowacki (*Problem blankietowości przepisów*…, op. cit., p. 127) classifies the "good of the child" as a general clause alongside such constructions as: "good manners", "good faith", "principles of social coexistence ", " social interest".

203 L. Leszczyński (*Tworzenie generalnych klauzul*…, op. cit., pp. 26 et seq.) indicates the explicitly referring nature of the clauses. The opposite position, according to which general clauses are not of a referring nature, is presented, for example, by S. Tkacz (*Klauzula „sprawiedliwość" w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2000, p. 13) or E. Rott-Pietrzyk (op. cit., p. 282).

204 Order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, Legalis No. 1481980.

minor". As can be seen, in the latter case, the scope of the reference is narrower in relation to the first, due to another area of regulation (substantive or subjective) of the normative act in which the clause occurs.

The meaningful scope of the general reference clause "the good of the child" may be freely modified by the legislator by extending or limiting the substantive or subjective scope of the content of this construction. Subjective modifications occur when the author of the normative text uses a reference, e.g. by narrowing the concept of the child to a minor or introducing an additional term, e.g. in the case of the construction of "common minor children"[205]. Extension can occur when the subjective scope also includes the unborn child[206]. On the other hand, the substantive scope is shaped by a specific category of cases, e.g. it refers to the facts related to the education of the child or the regulation of their financial situation.

The general nature of the reference renders the content of the structure difficult to specify. Concretizing the meaning, or any determination of it at all, even if it is imprecise, is based on taking into account numerous circumstances. These are, in particular: the interests of the child, their current situation and forecasts of the future situation, the interests of other participants. It should be pointed out that every procedural activity should be carried out with respect for the child's good. Isolation of specific elements constituting the content of the good of the child may aim at treating each case too tritely. Interestingly, courts, in willing to distinguish the elements constituting the content of the good of the child, do so in such a way so that the element itself remained of a general nature and can be adapted to the individual factual condition[207].

Components of the good of the child cannot be exhaustively listed, but they can nevertheless be catalogued. At this point, it should be noted that one can distinguish such constituent elements as: proper shaping of ties with closest ones, proper regulation of contacts, ensuring actual care, ensuring the child's upbringing in a safe family environment, invariability of marital status, enabling the child to receive education at an appropriate level, protection against threats from third parties (abduction, violence), protection of the child's property interests. Cataloguing takes place in different ways, e.g. the elements can be systematized in connection with a given branch of law or its part, e.g. elements resulting *stricte* from civil law, family law relations, as well as those

205 In addition to the criteria created by the legislator, one can also distinguish those that are created by the dogmatics of law and jurisprudence, and then reproduced in the justifications. An example of such a criterion is the "good of the unborn child".
206 There are situations when the "good of the child", according to the dogmatics of law, will not be related to the good of the unborn child. This takes place in the context of e.g. art. 56 KRO. This means that the assessment of the occurrence of a negative premise for a divorce will only be possible between an already born child and its parents. Cf. M. Manowska, [in:] J. Wierciński (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2014, p. 506.
207 Cf. judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, Legalis No. 81476.

related to prohibited acts. Another proposed division may be the separation of property and personal elements[208].

These components should be created in relation to a specific factual state. However, when creating them, then when specifying the universal nature of the component and finally in relation to their specific factual state, the premises subject to objectivization should be taken into account, such as, for example: age, cognitive abilities of the child and the environment in which they grow up.

Therefore, one may wonder whether it is possible to indicate the elements of the structure of a general clause. There is no doubt that as a structure it must have a material form, which means that it is part of a legal provision, contains a reference to extra-legal values and consists of components of a general nature that determine the content of such a structure.

Returning to the considerations about the blanketness of the reference to the good of the child, the proper naming of its constituent element will be associated with reaching beyond the system of law, to values. The legislator directs the entity applying the law to a specific interpretative path, in this case "the good of the child". It is only by reference to values that an assessment can be made of whether a given circumstance is approved or disapproved of. The optic of the reference should be applied to those behaviours of entities that affect the child even indirectly. The reference to the good of the child indicates a child-friendly condition in which the child achieves full development.

Sometimes in case law, one can notice a tendency to change the directions of adjudication, which is related to the subjective treatment of the good of the child. Changes in the direction of the case-law are rather not linked to the spontaneous application of general reference clauses, but to the principles of law[209]. The justification seems logical, because the criteria that are part of the principles of law are axiologically significant.

The jurisprudence presents us with the duality in the arguments of the participants of court proceedings in relation to the "good of the child" construction found in the legal provisions. Many of those participants perceive the general clauses in terms of danger and basis for violation of their rights. On the other hand, others perceive this type of constructions as an opportunity for flexible adjudication, and still others for forcing their arguments. It is the task of the courts to centralise the claims of the parties or to reject them altogether for the protection of individual values, but always in connection with the good of the child[210].

208 Cf. with chapter four of this work.
209 Cf. judgment of the Supreme Administrative Court of 10 October 2018, case ref. no. II OSK 2552/16, Legalis No.: 1831972.
210 Judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045.

2 System-wide general clause referring to the good of the child – in the context of family law

"The concept of the good of the child is not defined in the Family and Guardianship Code (KRO), and it is commonly understood as a set of spiritual and material values necessary for correct physical and spiritual development, both in intellectual and moral aspects, as well as proper preparation for work for the benefit of society"[211] – the thesis formulated in this way should begin our reflection on the good of the child in jurisprudence. As we can see, the general clause "the good of the child" is strongly related to the branch of family and guardianship law. This approach, which boils down to distinguishing elements of the good of the child, is not a novelty neither in dogmatics nor in jurisprudence. S. Kołodziejski characterized the concept in a similar way. W. Stojanowska, as well as other representatives of dogmatics, also speak in a comparable tone[212]. As we can see, in the above fragment of the judicature, the Supreme Court uses the achievements of dogmatics, sharing the previously developed position. Similar terms, although occasionally, are also used by other courts, which proves a certain schematicity in the understanding of the good of the child. This schematicity boils down primarily to a narrow understanding of this expression, without taking into account the subjectivity of a human being.

The Supreme Court postulates a commonly accepted way of understanding the good of the child. First, in the justifications of the judgments, as well as in the arguments put forward by the courts of the parties to the proceedings, such an understanding of the concept has already been clearly established. Secondly, the universality in this case may be understood as a reference to the views of the good of the child formulated by the dogmatics of law. Thirdly, the "good of the child", the meaning of which was cited at the beginning of this subsection of the present work, also has a universal context. This means that an approach of such a general nature can be applied to a number of factual situations, primarily in relation to family and guardianship law, through constitutional law, social security law, educational law, criminal law, up to international law. In the case of other areas of law, the meaning alters somewhat. For example, in the context of medical law, the denotation of the good of the child should be related to the issues of protection of life and health, as well as ensuring mental comfort during the performance of health services or respect for dignity, awareness of consent to medical procedures, the right to information and decision-making about one's health. In turn, the meaning of good of the child, or rather the good of a juvenile in juvenile proceedings, will be read in relation to the issue of social rehabilitation and restoring the proper child's functioning in society. Differences in the field of children are visible primarily in the case law of the Supreme Court, common courts and the Constitutional Tribunal.

211 Order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, LEX No.: 2483681.
212 Cf. the first chapter in this work.

In addition, the case-law states that the "good of the child" is the overriding objective of the regulation concerning minors[213]. As a rule, the above thesis is put forward in relation to matters in the field of family and guardianship law, but the described criterion should not be equated with this one area of the legal system only. In this respect, the good of the child, as a objective of the regulation, can be referred to in a broader sense, e.g. in relation to family and guardianship law or the law on juvenile proceedings, as well as in relation to certain provisions relating to the situation of children. In the first case, the protection of the good of the child and the protection of the minor's good, respectively, are treated as principles of law. In the second approach, the "good of the child" determines the purpose of individual regulations[214]. It follows from the above that the criterion in question may affect the meaning of individual provisions, still not dominate the direction of interpretation of the entire act. In view of such a statement, if, in the course of the application of the law, it is necessary to investigate the situation of the minor, the "good of the child" should be given priority in this particular[215].

The Supreme Court and common courts draw attention to the possibility of deriving the principle of protection of the good of the child directly from the Polish Constitution, and they sometimes also refer to international regulations. This means that the good of the child does play a particular role not only in family matters, but also in relation to other branches of law. For example, in the branch of criminal law, in both procedural and substantive legal provisions, we find mechanisms aimed at protecting the good of the child. An example may be the prohibition on representing a minor victim by a parent in proceedings in which the other parent is suspected or accused of committing a crime to the detriment of minor children[216]. On the basis of the analyzed judgments in the field of procedural and substantive criminal law, we can conclude that direct references to the discussed value are not present. The above does not mean, however, that the legislator does not realize the need to ensure the protection of this good, e.g. by: the right to hear the child, the right to information provided in an accessible and understandable form, the right to participate in the proceedings with the participation of its representative[217].

213 Order of the Supreme Court of 9 August 2016, case ref. no. II CSK 742/15, LEX No.: 2095936.

214 In the opinion of M. Zieliński, the distinction in the scope of references to the purpose of the normative text and reducing reasoning from a given provision about its purpose allows to determine the meaning of a given phrase. At the same time, he draws attention to the study of the tendency of objectives, assuming that over the years the *ratio legis* has changed (M. Zieliński, *Wykładnia prawa*…, op. cit., p. 347).

215 The superiority and priority attributed to the good of the child in the case law is important in the cases of conflicts of interest that occur. These two features can also be derived from the Convention on the Rights of the Child. The term "superiority", which appears in many studies, and according to the dictionary of the Polish language is defined as "standing higher in some hierarchy", "a concept covering another concept of a smaller scope". On the other hand, the priority is "having priority; the main, leading, first-rate, first-plan" (M. Szymczak [ed.], *Słownik języka polskiego*, t. 1: A–K, op. cit., pp. 252 et seq.).

216 Resolution of the Supreme Court of 30 September 2015, case ref. no. I KZP 8/15, LEX No.: 1797965.

217 O. Trocha draws attention to the special role of the child in criminal proceedings, which primarily emphasizes the role of the Convention on the Rights of the Child with a focus on regulations relating to the protection of the interests of the child. She indicates that ensuring proper protection for a child in criminal proceedings is linked to knowing what is happening and what will happen, what will affect the course of those proceedings and the right to be heard. It seems that proper protection will consist precisely in the cooperation

The Supreme Administrative Court and provincial administrative courts proceed similarly, observing the non-negligible impact of good of the child on the process of applying the law. Contrary to appearances, the Supreme Administrative Court and provincial administrative courts repeatedly use the term in question in various contexts, e.g.: social benefits, tax reliefs, citizenship. This means that the value of the child's good is also important for public law as a fundamental or complementary argument in justifying the court's position. The "good of the child" seem to form the basis for the functioning of the rules not only directly but also indirectly affecting the situation of the child.

There are frequent references to the good of the child in the case law of the Supreme Administrative Court[218]. This confirms that this criterion is common to all branches of law. Following our analysis of the 2009-2019 case-law, we conclude that the "good of the child" appears more frequently in the most recent jurisprudence. The use of the criterion in the argumentation is due to the use of rules of systemic, purposeful, functional and axiological interpretation. It follows that the courts must, in a way, extend the application of the provisions and extend the scope of a norm to situations that were note foreseen by the legislature. The basis for formulating jurisprudence theses is primarily the Constitution, acts of international law and EU law. What is of significance for the administrative courts in some cases is also the case-law of the European Court of Human Rights relating to the good of the child. Referring to the good of the child results primarily from the specificity of the discussed cases and the need to emphasize public law issues also in connection with the family law or family-related sphere.

3 The metaclause referring to the good of the child

The reference meta-clause is a normative structure essential for the respective part of the legal system, forming the basis for determining the content of other criteria in this area of the system[219]. The mere fact that the Constitutional Tribunal calls the good of the child a constitutional general clause certainly testifies to the importance of this construction, but it seems that it is not a metaclause in constitutional law.

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of the prosecutor, the court, persons associated with the administration of justice, as well as parents or guardians taking care of a child. In such a case, the child's psychological comfort is ensured, as well as taking care of its safety in numerous situations (O. Trocha, *Ochrona małoletniego pokrzywdzonego w postępowaniu karnym. Perspektywa prawna*, [in:] L. Mazowiecka (ed.), *Dziecko uczestniczące w postępowaniu karnym*, Warszawa 2015, pp. 11–40).

218 The fact of referring to the criterion of the good of the child by administrative courts is also noted by S. Nitecki, *Dobro dziecka i dobro rodziny w orzecznictwie sądów administracyjnych,* [in:] S. L. Stadniczeńko, M. Michalak (eds.), *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych*..., op. cit., passim.

219 L. Leszczyński and G. Maroń (*Pojęcie i treść zasad prawa*…, op. cit., p. 86) for example, distinguish the meta-clauses included in art. 2 of the Constitution, art. 7 KPA, art. 5 KC, art. 58 KC or art. 65 KC.

The "good of the child" as a general clause occurs with high frequency in family and guardianship law, which is enough to prove its essential nature. In juvenile proceedings, however, the spirit of the Act is "the good of the juvenile". The same is true for international law in the area of the rights of the child. In the course of applying the law, these constructions are translated into the content of other normative criteria. On the example of the good of the child, we can see the possibility of "adapting" the structure to a specific reality, and even an attempt to dominate the operation of other structures, e.g. the principles of social coexistence, the legal order or the good of the family. These three parts of the legal system, apart from the general metaclauses, also feature principles of law that include, respectively, the good of the child or the good of a minor, as their components. These principles strengthen the operation of metaclauses. On the other hand, we also witness the functioning of norms and principles reconstructed from the provisions of the Constitution and international conventions in other areas of law. Such norms include the principle of protecting the goof of the child, because it has a stronger effect than the general clauses or metaclauses.

4 The "good of the child" criterion and other general reference clauses

4.1 "The good of the child" and "the best interests of the child"

The “good of the child” and the “best interests of the child” may sound similar, but it is difficult to talk about their semantic identity. "Interest" in normative regulations, views of doctrine and theory of law occurs in many configurations, e.g. as: "social interest", "social interest", "public interest", "interest of the Republic of Poland", "legal interest", "interest of parents", "interest of a child", "interest of a minor" or "interest of a taxpayer". The preamble to the Constitution of the Republic of Poland uses the construction "the good of the Human Family", which should be understood universally and referred to a society treated as a community of people, which also includes children.

The term "interest" means: benefit, utility, profit, profitable thing, enterprise that brings a material benefit[220]. On the other hand, "good" can be understood as what is assessed as: successful, useful, valuable, as well as any means, values necessary for human development, conducive to this development. Among the vocabulary terms of good, one can distinguish: business, prosperity, happiness, benefit, utility[221]. The sound of the above terms is positive and indicates the benefits that can be achieved by an individual. On the other hand, these benefits may have the nature of property and non-property. These include, for example, granting a cash benefit, admitting a child to a kindergarten, agreeing to a life-saving medical procedure. Taking a specific action alone will not always be aimed at satisfying the interests and protecting the good of the child. However, it may have the opposite effect to the intended one and harm the minor's good. It is only in the result of satisfying the interests of the minor that it can be

220 M. Szymczak (ed.), *Słownik języka polskiego*, t. 1: A–K, Warszawa 1978, p. 799.
221 Ibidem, p. 404.

concluded that the "good of the child" is properly protected, i.e. a certain state is achieved that determines the correct development of the child.

In normative texts, the constructions of "the interests of the child", as well as "the interests of the child" occur primarily in the branch of international law or in EU law. This construction was also encountered in Poland in the period preceding the adoption of the Family and Guardianship Code of 1964[222].

The normative acts lack a regulation identifying the good of the child with the best interests of the child. Therefore, there are problems with the distinction of these concepts. Despite the prohibition of synonymous interpretation, these criteria are treated as identical[223]. The current practice of interchangeable use of the concepts of good and interest results from their vague nature, which gives the interpreter freedom of interpretation. The act of assigning the good of the child and the best interests of the child a similar or identical meaning may be taken by the creator of the normative text, formulating legal definitions. However, in some cases, the "good of the child" may be semantically equivalent to the best interests of the child. Such a result can only be achieved by a properly carried out subsumption[224].

Moving on to the definition of the "best interests of the child", it should be stated that it occurs in various contexts, e.g. with regard to the design of the foster care system, the recognition and enforcement of custody decisions, the exercise of children's rights. There are different configurations of the phrase "the child's interest" in the regulations, which boil down to emphasizing the importance of this criterion. Polish normative acts, as well as translations of the international conventions into Polish, include the following constructions: "the best interests of the child"[225], "the important interests of the child"[226], "the best understood interests of the child"[227], "the best protection of the interests of the child"[228], as well as the phrase "the highest interests of the child"[229]. The English

222 Cf. the first chapter in this work.
223 The content of normative acts shows that the legislator clearly distinguishes between interest and good, e.g. in the Convention on the Rights of the Child. This means that there is no legal provision that equates these criteria. Such a trend can also be seen on the example of some judicial decisions, including: the order of the Supreme Court of 24 November 2016, case ref. no. II Ca 1/16, LEX no.: 2216088, as well as in the judgment of the Supreme Administrative Court of 6 March 2018, case ref. no. II OSK 1677/17, LEX No.: 2499745.
224 E.g. the judgment of the Constitutional Tribunal of 16 May 2018, case ref. no. SK 18/17, LEX No.: 2486896.
225 Convention on the Rights of Persons with Disabilities of 13 December 2006. (JoL of 2012, item 1169); the Act of 9 June 2011 on supporting the family and the foster care system (full text in JoL of 2020, item 821).
226 The Act of 12 December 2013 on foreigners (full text JoL of 2020, item 35).
227 Act of 9 June 2011 on supporting the family and the foster care system (full text in JoL of 2020, item 821); Convention on the Rights of the Child of 20 November 1989. (JoL of 1991, No. 120, item 526); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000 (JoL of 2007, item 494).
228 Cf. art. 3 KPD. In the indicated provision, there is a construction of *the best interests of the child*. This means introduction of a slightly different translation.
229 Ibidem.

language version of the Convention on the Rights of the Child uses the phrase "*the best interest of the child*". In addition to the aforementioned construction, there is also another one: "*the well-being of the child*", translated as "good", as well as the construction "*the welfare of the child*", which should be identified rather with prosperity or good in a material sense thereof. The lack of terminological consistency can already be seen in the English language version, and the Polish version only introduces even greater confusion in this regard. Returning for a moment to the considerations from the previous paragraph of the present work regarding the prohibition of synonymous interpretation, it is worth noting that the thesis about the lack of meaningful identity of good and interests has been confirmed. It is therefore difficult, in accordance with the principles of correct interpretation, to attribute similar meanings to completely different phrases: *the best interest of the child, the well-being of the child* or *the welfare of the child*.

Compared to the interests of the child, the "good of the child" is a state that should be strictly referred to the person of the child as a human being. This state is most fully implemented when the interests of the child are properly and thoughtfully satisfied. Therefore, the concept of treating the best interests of the child as a set of interests seems to be insufficient and, apart from the above, with regard to the prohibition of identifying the meaningful good with the interest, it seems to be incorrect to interpret. When comparing the interest with the good, it should be stated that the first is of a tangible nature, so the aim is for the child to obtain certain benefits, e.g. cash benefit, inheritance, contact with the parent, grandparents, siblings. The above considerations and the thesis that the "good of the child" is not semantically identical to the interest of the child, contradicts the views of R. Łukasiewicz, who claims that "the best interest of the child will be precisely the optimized interest, which is identical to the concept of the good of the child"[230]. The claim was accepted in relation to the distinction between subjective and objective interest, but these concepts will still be different in meaning.

In fact, courts often give "the best interests of the child" priority over the interests of others, such as parents.[231] Nevertheless, a certain point of view should be adopted here. The "interests of the child" may be linked to the interests of the various actors in a given case, but they may be completely separate from those interests. The perception of the child's interests will be different by parents, grandparents, a judge, a doctor, a psychologist or a probation officer.

The case law of the European Court of Human Rights is an extensive source in the understanding of the concept of the interests of the child. In the jurisprudence of Polish courts and the Constitutional Tribunal, the concept of the best interests of the child is not so emphasized as in international jurisprudence. The European Court of Human

230 R. Łukasiewicz, op. cit., pp. 68–70.
231 Judgment of the ECtHR of 10 January 2017, application No.: 32407/13, K. Nowakowski v. Poland, LEX No: 2184932.

Rights, when dealing with cases related to the legal systems of different regions of Europe, has a real impact on shaping the preferences of the case-law of national courts, while respecting the legal aspects of the functioning of individual institutions developed in the respective country.

In the judgments of the European Court of Human Rights, the following wording can be noted: "The best interests of the child consist of two aspects. On the one hand, this interest indicates that the child's family ties should be maintained, except in those cases where the family has proved to be particularly dysfunctional. It follows that family ties can only be broken in very exceptional circumstances and everything must be done to protect personal relationships and, where appropriate, to 'rebuild' the family. On the other hand, it is clearly in the 'interest of the child' to ensure its development in a healthy environment and the parent cannot be entitled under art. 8 ECHR to obtain the implementation of such measures that would harm the health and development of the child"[232]. At the same time, to a large extent, the Court's considerations resemble combining the aspect of the best interests of the child with the good of the child. However, there is no indication that there is a sign of equality between the two criteria. This can only occur in case of a specific factual state, following interpretation. Returning to the analysis of the above-mentioned excerpt from the justification, it can be seen that the Court indicates how the interests of the child are satisfied and, consequently, the protection of the good of the child is implemented. In the further part of the judgment, attention should be paid to the passage concerning the assessment by the Court of the judgments of national courts. The assessment in this case was to analyse "the entire family situation and a number of factors, in particular of factual, emotional, psychological, property and medical nature, as well as to make a balanced and reasonable assessment of the respective interests of each and every person, with a view to constantly developing the best solution for the abducted child in the context of the application for its return to its country of origin"[233]. The Tribunal emphasizes premises that are objective or can be subjected to objectivization that affect the subsequent understanding of the content of the structure of good of the child. For example, it will be in the child's interest for the child to return immediately to the parent after the other parent has abducted it, to arrange for meetings with the parent at a specific frequency, to determine the child's place of residence with the parent away from the place of residence of the parent who is violent or abuses alcohol. The same applies to household members who use verbal or physical aggression, as well as economic violence.

232 Excerpts from the case law have been translated from the English language version: judgment of the ECtHR of 6 July 2010, application No. 41615/07, Neulinger and Shuruk v. Switzerland; and ECtHR judgment of 19 September 2000, application No.: 40031/98, Gnahoré v. France.
233 Judgment of the ECtHR of 6 December 2007, application No.: 39388/05, Maumousseau and Washington v. France; ECtHR judgment of 6 July 2010, application No.: 41615/07, Neulinger and Shuruk v. Switzerland.

The "interest of the child" may also manifest itself in the need to maintain its relationship with its family, parents, unless they are not appropriate[234]. Therefore, socially approved models of understanding the interests of the child appear in the jurisprudence. For example, the most appropriate way to pursue the "best interests of the child" would be to maintain a relationship with the parents on an equal footing, except for justified exceptions[235]. Correct shaping of such ties will secure proper development of the child. It will also be in the child's interest to consent to a medical procedure in the event of a threat to its life or health. Only taking a specific action affects the shaping of his physical or emotional state in the long term. On the basis of the above reasoning, it is possible to discern the differences between interest and good.

According to the European Court of Human Rights, the concept of best interests of the child includes respect for its rights and dignity[236]. In its case-law, it is ever more frequent that it refers to the rights and dignity of the child. The Court clearly indicates here the need to emphasize the subjectivity of the child as an individual.

In addition, in the opinion of T. Sokołowski, the concept of the good of the child cannot be equated with the child's best interests, which is "the sum of partial interests, but it constitutes the optimal configuration of elements of interest for the respective child"[237]. In turn, A. Wedel-Domaradzka equates the best interests of the child with the concept of the good of the child. She states that "in Polish law and dogmatics, reference to the concept of the good of the child dominates, and it is a term equivalent to the best interests of the child"[238]. In proving the correctness of her thesis, the author refers to the decision of the Constitutional Tribunal of 28 April 2003 (case ref. no. K 18/02), in the justification of which we find the two analyzed concepts[239]. Still, after careful reading of the justification, it can be concluded that the Tribunal does not use the concepts in question interchangeably, but seeks to draw a line between them. In turn, the Supreme Court states that the "interest of the child" corresponds to the concept of the good of the child, which appears in Polish law[240]. The Convention on the Rights of the Child should not affect this understanding of the terms, as they are not identified anywhere in its content. Also, the European Court of Human Rights never undertakes to interpret the

234 Judgment of the ECtHR of 19 September 2000, application No.: 40031/98, Gnahore v. France.
235 Judgment of the ECtHR of 10 January 2017, application No.: 32407/13, K. Nowakowski v. Poland.
236 An explanation of what the " best interests of the child" is formulated in relation to the resolution of a case of violence against a child. Violence explained with tradition, domestic customs cannot be accepted due to the dignity of the child (ECtHR judgment of 3 October 2017, application No.: 23022/13, D.M.D. v. Romania).
237 T. Sokołowski, op. cit., p. 115.
238 A. Wedeł-Domaradzka, *Koncepcja „best interest of the child" w prawie oraz praktyce organów strasburskich – kontekst praw ojca*, "Polski Rocznik Praw Człowieka i Prawa Humanitarnego" 2015, nr 6, p. 147.
239 Ibidem, p. 147.
240 Order of the Supreme Court of 20 October 2010, case ref. no. III CZP 72/10, LEX No.: 786940; Order of the Supreme Court of 16 January 1998, case ref. no. II CKN 855/97, LEX no.: 32579; resolution of the Supreme Court of 12 June 1992, case ref. no. III CZP 48/92, LEX No.: 3775.

provisions in isolation from the provisions of other international normative acts[241]. In the case of children, it refers primarily to the Convention on the Rights of the Child, the Hague Convention on the Civil Aspects of International Child Abduction, the Charter of Fundamental Rights and other acts of law. The above unification results rather from a different structure of institutions appearing in the legal orders of different states, as well as translation differences. Nevertheless, it appears that there is a difference in understanding of the two concepts. They should also be interpreted in relation to specific cases, so we must check what is in the child's interest and how his or her good will be shaped.

On the other hand, the jurisprudence of the Constitutional Tribunal formulated the claim that through the use of the construction "the good of the child", the legislator gives priority to the interests of the child[242], and that "the good of the child" is to emphasize the interest of the minor, which is associated with ensuring appropriate upbringing and development[243]. In the case of the first thesis, it is about giving priority to the interests of the child whenever the legislator applies the "good of the child" construction. The above position should be approached in a critical manner. First of all, one must bear in mind the rationality manifested in taking into account the interests of other entities, as well as the proper interpretation of the good of the child. Secondly, the "good of the child" will not always be adequately safeguarded if absolute priority is given to the interests of the child, which may be understood differently in certain environments. In the case of the second statement, the Constitutional Tribunal emphasizes the relationship between interest and good, however, distinguishing both of these concepts.

In the event of a conflict of interest, the European Court of Human Rights points out that, in the process of applying the law, a balance should be struck so as to give overriding importance to the best interests of the child[244]. The term "best" should be considered in relation to the interests of other entities, because only then can their importance be assessed. The nature and seriousness of the interests of the child may lead to the situation that they will be treated with priority. However, the ideal situation is to take into account the interests of all stakeholders in a given case and to work out a compromise.

As a normative construction, both the "good of the child" and the "best interests of the child" are, in principle, considered to be two different general clauses[245]. However, as is clear from this chapter, there is no shortage of views on the similarity of the two clauses. The Supreme Court states that in the Polish legal system there is a principle of protecting the good of the child (the child's interest). In relation to the criterion of good

241 Judgment of the ECtHR of 6 July 2010, application No. 41615/07, Neulinger and Shuruk v. Switzerland.
242 Order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193.
243 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
244 Judgment of the ECtHR of 16 July 2016, application No. 39438/13, Nazarenko v. Russia.
245 E.g. the order of the Supreme Court of 24 November 2016, case ref. no. II Ca 1/16, LEX No.: 2216088.

and interest, the Supreme Court also uses the term "primary value" or "superior value"[246]. Ascribing a similar character to the child's interest, which results from the lack of uniformity of jurisprudence in the scope of clearly distinguishing both criteria, as well as the impact of the Convention on the Rights of the Child, and more precisely art. 3, s. 1 thereof, that introduces the principle of the best interests of the child. In art. 3, s. 2 there is also another norm-principle, i.e. the principle of protecting the good of the child.

The Supreme Administrative Court points to the need to apply the principle of the best interests of the child and refers to the Convention on the Rights of the Child in this respect[247]. In this way, it reaches for the value of the good of the child, which is the basis for creating and applying the law[248]. In the case of administrative courts, the principle of protecting the good of the child and the rights of the child is much more often inferred.

The "best interests of the child", similarly to the "good of the child", is an indeterminate phrase and a criterion which forms part of the general reference clause. Both of these criteria also appear as elements of the principles of law.

4.2 "Good of the child" and "the good of the family"

"The good of the family", unlike the good of the child, appears in the Polish basic law[249], so it has a stronger constitutional overtone than "the good of the child", to which only jurisprudence and dogma have attributed this feature. In addition, as an element of the normative structure, this criterion occurs in conventions and laws on various subjects of regulation[250]. It follows from the above that the good of the family can also be attributed the features of interbranch nature and interdisciplinarity[251]. "The good of the family", in the form of a general reference clause, is less frequent in the law than "the good of the child". On the one hand, this can be treated as a complete coincidence,

246 Order of the Supreme Court of 20 October 2010, case ref. no. III CZP 72/10, LEX No.: 786940.
247 Judgment of the Supreme Administrative Court of 29 August 2018, case ref. no. II OSK 1041/18, Legalis No.: 1825975.
248 Judgment of the ECtHR of 6 July 2010, application No. 41615/07, Neulinger and Shuruk v. Switzerland.
249 "Good for the family" appears in art. 71 of the Constitution, s. 1: "The state, in its social and economic policy, takes the good of the family into account (...)". This provision, in conjunction with art. 72 of the Constitution may be a complement to the value of the good of the child.
250 "The Good of the Family" as a construction occurs, among others, in the Act of 25 February 1964. – Family and guardianship code (full text JoL of 2020, item 1359) or in the Act of 9 June 2011 on supporting the family and the foster care system (full text JoL of 2020, item 821).
251 Selected publications referring to the good of the family in the interdisciplinary and interbranch contexts are: Feja-Paszkiewicz, *Dobro rodziny – ujęcie konstytucyjne (wybrane zagadnienia)*, [in:] J. Jaskiernia, K. Spryszak (eds.), *Polski system ochrony praw człowieka 70 lat po proklamowaniu Powszechnej Deklaracji Praw Człowieka. Osiągnięcia – bariery – nowe wyzwania i rozwiązania*, Toruń 2019; Z. Glapa, A. Sołtyk, *Cel – dobro rodziny: dokonania polityki społecznej lat siedemdziesiątych*, Warszawa 1979; D. Jaroszewska-Chorąś, A. Kilińska-Pękacz, A. Wedeł-Domaradzka (eds.), *Rodzina i prawo*, Bydgoszcz 2017; B. Szluz, A. Szluz, M. Urbańska, *Współczesna rodzina: aspekty społeczno-prawne*, Rzeszów 2017.

and on the other hand, the "good of the family" is a typical constitutional clause, which in itself has a large impact on the provisions of the law of lower power. The "good of the child" and the "good of the family" are the basic normative constructs for the branches of family and guardianship law, as they constitute the axiological building blocks for this part of the legal system. "Good of the familly" is also included in the provisions on family-related assistance programmes, and has recently acquired a strong political tone. On the other hand, the criterion of "the good of the child" is not so politically entangled.

The "good of the family" should therefore be perceived in the same way as the "good of the child" in subjective and objective terms. In the subjective categories, it will be about its proper functioning as a social cell, taking into account the rights of its members, while in the substantial perspective, the family is perceived through the prism of its interests.

The concept of a family should be understood as a community that undergoes certain transformations along with the development of society. For example, L. Garlicki[252] introduces a distinction between a full family, i.e. including children (child) and parents, as well as an incomplete family, i.e. a single parent raising a child and this child. A family can also be formed by same-sex couples and their children, as well as other people, e.g. grandparents or unrelated carers, who also have the obligation to provide the child with proper development conditions.

In court case law, the family is treated as a legally protected good, a value accepted socially, while the right to family life and the related maintenance of ties as a personal good[253]. The Supreme Court states that "the family bond plays a significant role, providing family members with, among others, a sense of stability, mutual support covering the material and intangible sphere, and guarantees mutual assistance in raising children and providing them with educational opportunities"[254]. The justification for such a claim can be found in the case-law, which proves that the special role of the family in society is granted by the provisions of constitutional rank[255].

Due to certain similarities to the good of the child (concerning the axiological and constitutional nature of the criteria), also the good of the family can be discussed in terms of values, assumptions, goals, directive. This may translate, as in the case of the good of the child, into the creation of various constructions by the legislator. However, the "good of the child" should be treated in the process of applying the law as an

252 L. Garlicki, M. Derlatka, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej, t. 2: Komentarz, art. 30 - 86*, LEX 2016, nb. 6.
253 Decision of the Constitutional Tribunal of 13 July 1993, case ref. no. P 7/92, LEX No.: 25440.
254 Judgment of the Supreme Court of 14 January 2010, case ref. no. IV CSK 307/09, LEX No.: 599865.
255 Judgment of the Court of Appeal in Szczecin of 10 April 2018, case ref. no. I ACa 965/17, LEX No.: 2499252.

overriding criterion in relation to the good of the family or a criterion having an equal position with the good of the family. This means that depending on the situation, a specific positioning of these two criteria in the hierarchy of values should be adopted.
The relationships between the "good of the child" and the "good of the family" are therefore as follows:

a) these criteria are complementary;
b) these criteria are in contradiction with each other.

The justification for the supplementation relationship results from the fact that the minor is a member of the family community, which provides him or her with a pattern of functioning in adult life. Some values, goals and assumptions may therefore be common to both this community and the child, e.g. respect for privacy, etc. In addition, constitutionalists point to visible links between art. 72 and art. 71 of the Constitution due to the need to protect minors, including those who do not remain under the care of parents or guardians[256]. Furthermore, the fundamental role of the family should be emphasized as conducive to the protection of the good of the child, and only then as an auxiliary role for the state[257].

The good of the family will be mentioned when the good of all its members perceived as a group is ensured, albeit with special protection for the good of the child. The child is not able to predict the consequences of individual decisions, therefore their person should always be taken into account in the course of proceedings on their matters, even if there is a need to take into account other criteria in the course of applying the law. Hence the justification for giving this criterion the attribute of superiority or priority over other values. The fact that the compared phrases are correlated with each other results from the position of the child as a family member. The family is treated as the basic social cell and development environment of all its members, including children[258]. Even the Constitutional Tribunal notes that in Art. 72 s. 1 of the Constitution, the value of the good of the child is incorporated, complementing the wider value of the good of the family[259].

The criterion of the good of the child may remain in contradiction to the good of the family. Such situations occur, for example, in family matters in the context of establishing paternity. According to the Constitutional Tribunal, "the right to establish

256 W. Borysiak, op. cit., pp. 1650, 1661.
257 The relationship between the good of the child and other values, e.g. motherhood or paternity, are emphasized, for example, in relation to the drafts of new normative acts or adopted amendments. In the above case, it is best to compare childhood with motherhood and fatherhood, however, the meaningful scope of this concept would be limited to the early years of the child (M. Szymczak [ed.], *Słownik języka polskiego*, vol. 1: A–K, op. cit., p. 498). The "good of the child", on the other hand, can be treated relatively broadly.
258 Cf. the Act of 6 January 2000 on the Children's Ombudsman (full text JoL of 2020, item 141); Convention.
on the Rights of the Child of 20 November 1989. (JoL of 1991, No. 120, item 526).
259 Judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045.

parenthood fits into the broader context of the right to protection of family life and presupposes the protection of the entire family and the good of all its members. The legislator, when specifying the right of the father to establish paternity, must take into account not only his good, but above all the "good of the child" and the "good of the family". In some situations, these goods may collide. It is therefore up to the legislator to carefully balance all these goods. 'Good of the child' may justify limiting the possibility of establishing biological parentage"[260]. In such a situation, the Tribunal demonstrates how the "good of the child" can affect the content of the rights of others in the process of applying the law.

The right to maintain family ties is treated by the courts as a personal good[261]. The above is a manifestation of the protection of the child's good, the good of the family, as well as the rights of parent or parents. The jurisprudence emphasises that ensuring the stability of family relationships for the sake of the child, as well as the child's interest, has a direct impact on the fate of the family[262]. In this case, attention should be paid to the correlations between the above-mentioned criteria and it should be stated that the boundaries between the interests of the child and parents are determined by the good of the child. This circumstance is emphasized by the statement that the biological bond between father and child is not subject to absolute constitutional protection[263]. From the point of view of the child, the most important thing is to form family ties, but such arrangements do not always have to be in compliance with biological truth[264], and "the rights of the child" cannot be equated with the rights of the biological father[265].

It is worth emphasizing that in court case law, a comparative approach to the good of the child and the good of the family occurs in the context of the pro-family policy conducted by the state[266].

The "good of the family" is also implemented as maternity protection. This is the case, for example, in the case of taking care of the mother of a child just before childbirth in order to ensure the proper course of pregnancy, as well as the development of the child after birth[267]. In this case we see the strong impact of the discussed criterion on the good of the child.

260 Judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186.
261 Judgment of the Supreme Court of 7 July 2017, case ref. no. V CSK 609/16, LEX No.: 2332331.
262 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
263 Ibidem.
264 Ibidem.
265 Judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052; judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
266 Judgment of the Supreme Administrative Court of 5 April 2017, case ref. no. II FSK 573/15, LEX No.: 2261656.
267 Judgment of the Supreme Administrative Court of 26 February 2015, case ref. no. I OSK 1876/13, LEX No.: 2086858.

In the jurisprudence, the role of parents and family in shaping attitudes in children is repeatedly emphasized. It is primarily in the family environment that needs required for the functioning of children should be satisfied, and only then by the state, for example, such decisions are made in the case of deciding on financial needs and granting benefits. A reduction of part of the fee in the case of using kindergarten benefits by two or more children from one family may be a manifestation of caring for the good of a large family[268]. In this example we see the mutual correlations between the compared criteria. Firstly, it facilitates the functioning of the family, and secondly, only then is the "good of the child" implemented in the form of ensuring each of the minors the right to education.

The "good of the child" and the "good of the family" also allow for the possibility of modifying the content of the rights of individual subjects[269]. Due to the weaker position of the child in relation to other subject, the criterion that exists in the legal order is to have a strong impact on the legal environment.

Caring for the good of the family manifests itself in satisfying the needs of the family as a community and also the individual needs of its members. Both in dogmatics and jurisprudence, we noticed that the first group of needs includes, for example, the provision of housing, fuel or electricity, while the second group includes: provision of food, clothing, healthcare[270].

In the context of the good of the child and the good of the family, courts tend to refer to previous resolutions, issued while the Constitution of the People's Republic of Poland was still in force, the validity of which leaves much to be desired. In one of such resolutions of the Supreme Court, the concept of a socialist family was used in the context of the principles that characterize it. These principles are: "protection and strengthening of the family, with particular emphasis on the good of the child, recognition of this good as a criterion of social interest, implementation of equal rights of spouses, shaping a serious relationship with family responsibilities, expressing itself in raising the significance of the educational role of the family, preventing arbitrary dissolution of marriage, emphasizing the attention to maintenance obligations, protection of the interests of non-marital children, determining the role of the principles of social coexistence in family law, emphasizing the duty of courts to resolve matters related to marriage and family in a particularly thorough manner"[271]. In the resolution,

268 Resolution of the Supreme Administrative Court of 11 December 2012, case ref. no. I OPS 6/12, LEX No: 1230397.
269 As an example, establishing bonds and forming interpersonal relationships, including family relationships in connection with the values of: the good of the child and the good of the family (e.g. the judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX no.: 78052; judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186).
270 J. Gajda, op. cit., p. 219; judgment of the Court of Appeal in Szczecin of 22 December 2017, case ref. no. I ACa 627/17, LEX No.: 2491861.
271 Resolution of the Supreme Court of 9 June 1976, case ref. no. III CZP 46/75, LEX No.: 1966.

the "good of the child" is considered to be a principle, in addition to the principle of protecting the family's good. However, the concept of a family was understood through the prism of the policy of a socialist (welfare) state, as well as the criterion of the good of the child related to the good of the family.

In the theory of law, the "good of the family" is an element of the general reference clause, a principle of law, as well as the program norm of a social nature[272]. This is very similar to the situation that exists in the case of protection of the good of the child. The universality of these criteria and the existence of various normative structures indicate the obligation to constantly take them into account in applying and complying with the law. Characteristic of these clauses is the axiological entanglement caused by reference to extra-legal values[273].

4.3 "Good of the child" and "good manners" and "principles of social coexistence"

"Good manners" is a construction that is generally found in laws whose task is to regulate issues related to economic activity. The Polish legislator placed this structure, among others, in the Commercial Companies Code (KSH) (e.g. art. 422 KHS)[274], the Civil Code (e.g. art. 70^5)[275], the Act on Combating Unfair Competition (art. 3)[276], the right on entrepreneurs (PP) (art. 10 PP)[277].

The construction of "good manners" fails to appear in legal regulations in the vicinity of the good of the child. In addition, there were no attempts to compare their content in the dogmatics of law. Seemingly "good manners" can be treated as a criterion completely different in content from the good of the child. Comparing these two concepts, one can notice similarities, for example, in situations where the child is acting as a consumer or even an entrepreneur, because they inherited or were given a business.

"Good manners" are understood in jurisprudence as "rules of conduct consistent with ethics, morality and socially approved customs"[278]. This general statement indicates a

272 W. Borysiak, op. cit., pp. 1650, 1661.
273 A. Szot indicates at least three areas in which axiological connections should be investigated. These are: the plane of extra-system axiology, then the coexistence and existence of specific relationships between systemic and extra-system axiology, as well as the unity of systemic and extra-system axiology (A. Szot, *Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2016, LXIII, 2, pp. 293–294).
274 Act of 15 September 2000 the Code of Commercial Companies (full text JoL of 2020, item 1526); hereinafter: KSH.
275 Act of April 23, 1964 - Civil Code (full text JoL of 2020, item 1740).
276 Act of 16 April 1993 on combating unfair competition (full text JoL of 2020, item 1913), hereinafter: ZNK.
277 Act of 6 March 2018 -- Entrepreneurs' Law (JoL of 2021, item 162), hereinafter: PP.
278 Judgment of the Court of Appeal in Warsaw of 6 April 2018, case ref. no. VII AGa 836/18, LEX No.: 2505759.

reference to moral norms accepted in the society, which should form the basis for shaping legal relations. When analysing judgments and the descriptions contained therein, we notice numerous situations or behaviours that are inconsistent with the content of this criterion. Thus, misinformation or provoking misconceptions of the consumer, the use of their ignorance or naivety, the formation of an obligation relationship contrary to the principle of equivalence of the parties constitute examples of violations of "good manners"[279]. In another ruling, a Court of Appealstated that the concept ofgood manners "is sometimes equated with the 'principles of social coexistence', still in addition to the reference to traditional ethical and moral norms, it also includes a functional and economic aspect; it is about moral and customary norms used in business activities in the scope of the manner of implementing competitive activities"[280]. L. Leszczyński states that in the case of good customs, the legislator combines elements of moral assessments and customs[281].

According to K. Kopaczyńska-Pieczniak, the Polish legislator does not often refer to the criterion of good manners, which results from the need to ensure certainty of trade. However, it does not completely refrain from introducing vague phrases, such as: "the interest of the company" or "important reasons". As the author rightly points out, the "good manners" clause also includes the more specific phrases referred to above[282]. It seems that there is a relationship between "good manners" and these other more specific phrases, but cases of contradiction between these criteria are not excluded.

The essence of good manners is broadly understood respect for other people[283]. From this perspective, it can be concluded that this criterion is understood both substantially and subjectively, i.e. in such a way that the actions taken by the entities cannot harm the beneficiaries of the rights.

This concept should be associated with the perception of the so-called merchant's honesty or good practices. Interestingly, any behaviour, even if it is lawful, does not necessarily have to be in accordance with good manners[284]. A similar qualification of behaviour can be made in the case of an assessment based on the principles of social coexistence.

An interesting observation was formulated by A. Szpunar, who claims that "good manners" are objective in their nature. This author argued his opinion that

279 Ibidem.
280 Judgment of the Court of Appeal in Warsaw of 28 February 2018, case ref. no. VII AGa 184/18, LEX No.: 2490096.
281 L. Leszczyński, *Tworzenie generalnych klauzul*…, op. cit., p. 20.
282 K. Kopaczyńska-Pieczniak, *Dobre obyczaje i zasady współżycia społecznego w prawie spółek handlowych*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G" 2016, LXIII, 2, p. 94.
283 Judgment of the Regional Court of 27 March 2017, case ref. no. XVII AmC 1749/16, LEX No.: 2323534.
284 Judgment of the Court of Appeal in Kraków of 13 December 2017, case ref. no. I ACa 642/17, LEX No.: 2474296.

the criterion was not related to moral norms[285]. However, it should be noted that it is difficult to speak of a feature of objectivity in the full sense of the term in the case of general reference clauses. The reference is extra-legal, hence the values, norms and assessments cannot be equated with objectivity.

"Good manners" should be perceived as a general reference clause separate from the other constructions. The criterion of good manners does not exist in the form of a principle of law. Rather, it is a criterion of a typically civilistic nature. This character determines that these criteria differ slightly.

"Good manners" may be linked to the good of the child if the actual circumstances of the case relate to the situation of the minor. In addition, if we assume that "good manners" are similar to the principles of social coexistence and are gradually introduced into the Polish legal order[286], we can point to similar relationships as in the case of the good of the child and the principles of social coexistence.

In turn, the principles of social coexistence can be defined as customary norms of social life[287]. This reference is characteristic of the socialist period[288] and, despite numerous amendments, it has not been replaced by another one[289]. According to I. Kamiński, this is a normative equitable construction[290].

It occurs in various branches of law, hence its location determines the feature of inter-branchality. This construction is encountered, for example, in civil law as a standalone structure (art. 428 KC), as well as in connection with the socio-economic purpose of the

285 A. Szpunar, *Nadużycie prawa podmiotowego*, „Prace Komisji Prawniczej" 1947, nr 2, pp. 64 et seq.
286 In the literature, it is assumed that "good manners" slowly replace another construction – i.e. "principles of social coexistence". (Cf. e.g. L. Leszczyński, *Dobre obyczaje zamiast zasad współżycia społecznego*, „Rzeczpospolita" 1998, nr 25, passim; P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds.), op. cit., p. 18; and also Z. Radwański, M. Zieliński, op. cit., pp. 28 et seq.). It seems that such a change could be necessary only because of the association and connection of this clause with the socialist period. Due to the quite wide spectrum of applications, both "good manners" and "principles of social coexistence" can be understood in different ways. It seems that since these two clauses function side by side in normative acts, as in the case of the good of the child and the "best interests of the child", one can risk stating that due to the prohibition of synonymous interpretation, they cannot be understood in the same manner. In addition, referring to the contextuality of the occurrence of "principles of social coexistence", it should be noted that this structure occurs in various parts of the legal system. One can notice a narrower scope of application of good manners than the "principles of social coexistence" in the current legal reality, which does not change the fact that "good manners" can displace the competitive clause.
287 M. Szymczak, *Słownik języka polskiego*, t. 3: R-Ż, Warszawa 1981, p. 770.
288 Z. Ziembiński, *Zasady współżycia społecznego w projekcie kodeksu cywilnego PRL*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1960, z. 4, passim; Z. Ziembiński, *Argumentacje moralne stosowane przez prawników*, "Etyka" 1967, z. 2, passim; A. Łopatka, Z. Ziembiński, *Próba systematyzacji zasad współżycia społecznego wg orzecznictwa S.N.*, ,"Państwo i Prawo" 1957, nr 4–5; passim J. Litwin, *Zasady współżycia społecznego w orzecznictwie Sądu Najwyższego*, "Nowe Prawo" 1953, nr 12, passim; J. Nowacki, *Z problematyki zasad współżycia społecznego*, "Nowe Prawo" 1954, nr 7–8, passim.
289 L. Leszczyński, *Tworzenie genernych klauzul*…, op. cit., p. 160.
290 I.C. Kamiński, *Słuszność i prawo. Szkic prawnoporównawczy*, Kraków 2003, p. 62.

law (art. 5 KC) or with established customs (art. 65 § 1 KC); in labour law (art. 8 KP – twinning the provision of art. 5 KC), in family and guardianship law – next to the good of common minor children (art. 56 § 2 KC, or art. 61^1 § 2 KRO) or on its own (art. 144 § 1 and 2 KRO); as well as in the Act on Juvenile Delinquency Proceedings (in art. 4 § 1 PNU).

The "principles of social coexistence" act as an exception or premise (e.g. when the court does not rule on the dissolution of the marriage through divorce, which is also a feature similar to the good of the child). In civil law and labour law, this criterion is the basis for assessing the behaviour of entities in terms of abuse of subjective law[291].

It is a spacious structure in terms of its content. This is why the Polish legislator is willing to introduce this criterion into the law and why it should have the specific function of safeguard against unfair decisions. This is confirmed by the position expressed by the Supreme Court, which draws attention to the "coexistence" of this criterion with the branch of civil law and the need to take it into account in every pending case[292]. With such an idealistic approach adopted, all the criteria that the court took into account in the case should be characterized and compared with the principles of social coexistence. In addition, this structure appears in the regulations due to legislative habits[293].

P. Machnikowski claims that the principles of social coexistence should be understood as "moral assessments expressed in the form of standards of conduct justified by these assessments (moral norms), regulating the behaviour of some people towards others"[294]. The next part of the quote reads: "Moral assessment is the experience of giving approval or disapproval to a human act because of the extent to which it contributes to the fair good of other people"[295]. The author refers here to the fact that the constitutionally protected values are good and justice. He also mentions other specific values, such as life, freedom, autonomy, dignity or integrity of the family[296]. After analyzing the criterion of the principles of social coexistence based on jurisprudence, T. Bukowski claims that they should be understood as the basic principles of ethical and honest conduct[297]. All of the above views are based on interpersonal relationships of trust[298].

According to B. Wojciechowski, the "principle of social coexistence" as well as the "socio-economic purpose of the law" are two general clauses of a general nature that

291 P. Nazaruk, [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2013, pp. 27–31.
292 Resolution of the Supreme Court of 20 April 1962, case ref. no. IV CO 9/62, LEX No.: 105619.
293 L. Leszczyński, *Tworzenie generych klauzul*…, op. cit., pp. 160-161.
294 P. Machnikowski, op. cit., p. 15.
295 Ibidem.
296 Ibidem, p. 16.
297 T. Bukowski, *Klauzule generalne w prawie cywilnym. O konieczności stworzenia katalogu zasad współżycia społecznego*, „Monitor Prawniczy" 2008, nr 24, pp. 1300 et seq.
298 Similarly: P. Machnikowski, op. cit., p. 16.

should be taken into account by courts when resolving each and every case. In his opinion, the process of applying the law that takes into account both of these constructions is much more flexible than in the case of the application of other general clauses[299]. With regard to cases where it is necessary to apply the criterion of the good of the child, the above argument can be disputed, since, first of all, the "good of the child" has a very similar impact on the process of applying the law. Secondly, it can be assumed, however, that the "principles of social coexistence" may strengthen the functioning of the good of the child in the course of an operative interpretation.

The construction of the principles of social coexistence is, both by dogmatics and jurisprudence, treated as a general reference clause[300]. According to L. Leszczyński, "the principles of social coexistence" (as well as "good manners") are one of the equitable criteria referring to moral patterns[301]. "Principles of social coexistence" are also typified by M. Kordel, who combines them with the principles of law as a normative structure. In her final statement, she notes that these principles will be of a nature of reference to extra-legal values, which falsifies their perception as an element of the principle of law[302].

Observing the relationship between the good of the child and the principles of social coexistence in court case law does not pose a difficult task. The contradiction of a legal act with the principles of social coexistence will consist, among others, in the fact that "the agreement fails to respect a specific prohibition that has a deep axiological – moral justification, i.e. its content or purpose is a morally prohibited one, and when it does not contain the content resulting from a moral norm, e.g. violates human freedom, freedom of economic activity, equality of parties, freedom of competition, harms the family or the 'good of the child'"[303]. Therefore, many dependencies can be captured, and the violation of the good of the child forms part of the phrase: "contradiction with the principles of social coexistence".

Therefore the "good of the child" can most likely be treated as one of the principles of social coexistence[304], and even as part of these principles. The content of the "good of the child" construction is detailed in its nature and it is further focused on specific actions of the court in the context of the assessment of the child's situation. However,

299 B. Wojciechowski, *Dyskrecjonalność sędzowska – studium teoretycznoprawne*,Toruń 2004, p. 73.
300 It happens that "principles of social coexistence" are treated as principles of law. Among those speaking in this tone, is, inter alia A. Stelmachowski (*Wstęp do teorii prawa cywilnego*, Warszawa 1969, pp. 110 et seq.).
On the other hand, M. Kordela believes that the "principles of social coexistence" have a referring character and this attribute indicates their proper categorization as a clause (M. Kordela. op. cit., pp. 194 et seq.).
301 L. Leszczyński, *Kategoria słuszności*…, op. cit., p. 47.
302 M. Kordela, op. cit., pp. 194, 195.
303 Judgment of the Supreme Court of 12 October 2017, case ref. no. IV CSK 660/16, LEX No.: 2401827.
304 Judgment of the Supreme Administrative Court of 26 March 2018, case ref. no. II OSK 2446/17, LEX No.: 2495234.

when we consider the priority given to the good of the child, the order to protect that good must necessarily form the content of the principles of social coexistence.

The principles of social coexistence can be treated as ancillary: as a supplement to the court's arguments. Otherwise, judicial decisions could be challenged, as there would be decisions that could be formulated in a different direction due to the principles of social coexistence. Therefore, whenever the case involves a minor or a juvenile, their well-being must always be taken into account. Therefore, "principles of social coexistence" can only be ancillary in its character.

In the Act on juvenile proceedings, the discussed construction occurs as a criterion for assessing the child's behaviour from the point of view of its compliance with moral standards. The fulfillment of the condition of violation of the principles of social coexistence may result in the application of the provisions of the Act on juvenile delinquency proceedings. According to A. Strzembosz, an example of such behaviour will be the aggressive behaviour of the juvenile towards, for example, the elderly [305].

In many court decisions, there is the issue of surrogacy, discussed in terms of its compliance with the principles of social coexistence. In Polish law, a surrogacy agreement is invalid because the child is treated as part of the transaction[306]. What becomes evident in this case is both its contradiction with the principles of social coexistence and the good of the child. Making comments in terms of the analysis of art. 65 KC on the interpretation of declarations of will, it should be pointed out that it is precisely the interpretation of declarations of will that should be directed towards the protection of the child's good, which is also consistent with the principles of social coexistence.

The relationship between the good of the child and the principles of social coexistence allows for the formulation of the thesis on the extended scope of the reference. It is not only a reference to extra-legal values, but also to moral principles not incorporated into the legal system. This fact is also reflected in the theoretical legal literature. According to Mr Lang, the reference adopts two forms. Firstly, by means of value phrases (i.e. intermediate reference of the first degree), e.g. "the good of the child". Secondly, one can still refer to specific ethical principles or moral norms (direct reference of the second degree), e.g. "principles of social coexistence"[307]. Moral norms do not have a conditional nature, they occur without the necessity of interference from the legislative, or any other body, they apply to a person once they accept themselves, crossing the

305 A. Strzembosz, *System sądowych środków ochrony dzieci i młodzieży przed niedostosowaniem społecznym*, Lublin 1985, p. 133.
306 Judgment of the Supreme Administrative Court of 6 May 2015, case ref. no. II OSK 2372/13, LEX No.: 1780419.
307 W. Lang, *Prawo i moralność*, Warszawa 1989, pp. 214 et seq.

borders of moral norms may meed with negative valuation by public, they are connected with intentions of a human person[308].

The thesis put forward by the Supreme Court – Chamber of Labour in the context of art. 8 of the Polish Labour Code. First of all, that authority stated that art. 8 KP constitutes a general clause. Such systematisation follows from the construction of a provision that is itself relatively general and can cover a wide range of factual situations as well as from the fact that it consists of two different general reference clauses. Moreover, according to the Supreme Court, "the interpretation of the law does not allow for the introduction of restrictions on its application by way of case-law. Any attempt to exemplify possible situations under this provision would be contrary to the meaning of general clauses in the legal system. In other words, since the legislator introduces general clauses, the Supreme Court cannot make their interpretation binding. This would constitute a limitation on the functions of the general clauses, which is not foreseen by the legislator. The interpretation and application of art. 8 KP is the responsibility of the common court, dealing with an individual case"[309]. Such a position should be assessed positively, because the direction of interpretation should be determined by reference, as well as by the content of the preamble to a given act, taking into account the *ratio legis*, the legal and social environment, as well as the facts of the case.

308 M. Ossowska (*Podstawy nauki o moralności*, Warszawa 1966, pp. 294 et seq.) cites several features distinguishing moral norms from legal norms. As she claims, moral norms ,"reach into the depths of a human being and look into their intentions".
309 Order of the Supreme Court of 20 September 2013, case ref. no. II PK 93/13, LEX No.: 1618734.

Part II

Criterion of the Good of the Child in the Judicial Application of the Law

Chapter IV

The Criterion of the Good of the Child in the Decision-making Process

1 Determination of the facts

Factual findings in the course of judicial application of the law initiate with the presentation of its version by the entity initiating the proceedings, and then, as a result of the procedural steps adopted, these findings are supplemented[310].

With regard to cases involving children, the factual phase results from the decision-making model. This means that in its course, evidentiary actions are carried out until it is considered that the facts have been properly established.

However, it may turn out that in the course of the process of applying the law, the features of priority and superiority of the criterion of the good of the child will be revealed already in the said phase. This should be understood as a situation in which factual findings are made in a different way, without resorting to a specific source of evidence, or the discussed value blocks the process of factual findings.

Presenting the above situation on the example of a decision, one can indicate, for example, the order of the Supreme Court of 29 July 2016, case reference number V KK 2/16[311]. According to that adjudication, the lower court withdrew from the questioning of the minor because of the destructive effect of that procedural step on her mental condition. Therefore, in the course of the proceedings, it turned out that despite the existence of an evidentiary source, it was not possible to carry out an action aimed at making additional findings in the case.

The inconspicuous role of the child's good lead to a situation where the court has to face a conflict of values. In the above-mentioned decision, the court considered the conflict between the rights of to present defence and the good of the child. In this case, the protection of the rights of the victim was supported by the fact that the victim was a minor whose good is protected, and at the same time the case concerned a sexual

310 L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2004, pp. 65–71.
311 Cf. the order of the Supreme Court of 29 July 2016, case ref. no. V KK 2/16, LEX No.: 2108517.

offence. Therefore, blocking the making of findings by means of interviewing of the minor witness was properly justified and demonstrated on the example of a collision of values.

Courts, when deciding to use the criterion of the good of the child at the stage of factual findings, take into account primarily the nature of the goods that may be threatened in the a result of a specific decision. In addition, the current situation of the child and the impact of a specific activity on shaping their condition in the future are also analyzed.

We will witness this collision of values in every departure from making findings due to the good of the child. Therefore, there is no ideal solution or decide to take such a step. When a threat to the child's good arises at the stage of making factual findings, the court should consider abandoning a specific evidentiary action aimed at establishing the fact.

As regards the "blocking" of findings, this is never the case relating to all the factual elements. Courts in the process of applying the law will always base their decisions on facts due to the fact that the interpretation is closely related to a specific procedural situation.

In another decision, this time issued by the Supreme Administrative Court on 30 October 2018, in the case with reference number II OSK 1868/16, commented in the fourth chapter and regarding the recognition of the child's birth certificate in the situation of their birth by a surrogate, blocking the findings of facts due to good of the child will consist in deviating from the determination of facts, that in the court's opinion, have no relevance for achievement of the purpose of the proceedings. The Supreme Administrative Court stated that "for the legal status of the child, including the possibility of confirming the possession of Polish citizenship on the basis of art. 4 of the Act of 1962, it does not matter whether they were born by a surrogate mother, but the fact that a human being is born endowed with natural and inalienable dignity, and has the right to citizenship if one of their parents is a Polish citizen "[312]. In this way, the court justified its withdrawal from making factual findings, at the same time finding justification thereof in the axiology and legal provisions.

In another case that was finally considered by the Supreme Court under case ref. no. II CSK 87/11, regarding denial of paternity, the court refuses to conduct DNA tests due to the lack of legal and factual premises for this[313]. The child's father failed to prove, by means of any other evidence that he and his daughter have no biological connection. In the realities of such a proceeding there should be a circumstance that justifies the

312 Cf. the judgment of the Supreme Administrative Court of 30 October 2018, case ref. no. II OSK 1868/16, Legalis No.: 1860297.
313 Cf. the judgment of the Supreme Court of 19 October 2011, case ref. no. II CSK 87/11, LEX No.: 1027165.

paternity of another man. Therefore, for the sake of the minor, there were no grounds for conducting the test.

The "blocking" of phase of factual findings has its positive and negative sides. In the event of interference with the findings of fact due to the good of the child, the court should explain the reason for application of this criterion and the omission of certain findings. The Supreme Court speaks in a similar tone, which indicates that the withdrawal from the hearing of the adopted for its good should be duly justified[314]. It seems that this has not only procedural consequences, but also consequences for the child. In the first case, the procedural effect is the impossibility of thorough judicial review of the decision taken by the court. Conversely, the consequences for the child may indicate that their current or future situation has not been fully taken into account.

2 Operative interpretation

2.1 Validation findings

In the course of judicial application of the law, the derivative approach is used to present the course of the operative interpretation[315]. The derivative concept of the interpretation of the law was shaped by M. Zieliński according to its prototype formulated by Z. Ziembiński[316]. Currently, L. Leszczyński presents a validation and derivative approach, consisting in determining the type of source, specific identification, determining the scope of influence and mutual relations between different sources, derivating standards from given source/s, also covering the phase of decisive reduction[317].

All relevant decision-making processes shall be preceded by the phase of initial validation findings. This stage does not differ from the model approach to the decision-making process.

Preliminary interpretative findings, which constitute an unavoidable stage of the proceedings, are based on the first contact with the case and the impressions of the court. This is part of the validation findings phase or a pre/subphase, which is not visible in the justification of the decision, may still have its consequences in the further course of the procedure. It may influence the search for and selection of the sources of

314 Cf. the order of the Supreme Court of 22 June 2012, case ref. no. V CSK 283/11, LEX No.: 1232479.
315 M. Zieliński writes about other concepts of law interpretation in Poland in his publication *Wykładnia prawa*..., op. cit., pp. 70 et seq.
316 More broadly on this topic: Z. Ziembiński, *Logiczne problemy prawoznawstwa*, Warszawa 1966; and also M. Zieliński, *Wykładnia prawa*…, op. cit., pp. 87 et seq.
317 L. Leszczyński, *Operatywna wykładnia prawa a wielość normatywnych podstaw decyzji stosowania prawa (przepis, kryterium otwarte, precedens)*, [in:] L. Leszczyński, A. Szot (eds.), *Wykładnia operatywna prawa – perspektywa teoretyczna i dogmatyczna*, Toruń 2017, pp. 11–31.

the normative basis for the decision[318]. In addition, the discretionary experience of the judge, which is shaped in the course of the case, may also translate into the assessments made during this phase. However, this is difficult to prove due to the fact that we analyse court decisions, and did not conduct surveys.

Preliminary interpretative findings are related to the judge's contact with the evidence and the arguments presented in the pleadings. Already at the moment of referring by the parties or participants of the proceedings to the good of the child, the court is somehow directed to make considerations precisely in terms of assessing the situation of minors or juveniles. At this stage of the proceedings, it is important to clarify exactly what constitutes a violation of the good of the child in the respective case.

For example, in the judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17, at the stage of interpretative findings, the authority encountered the following facts and arguments of the parties[319]. The authority of the first instance refused to grant the right to a parental benefit for a minor child, referring to the content of the Act on State aid in raising children. However, the parental benefit was granted for the remaining children. According to the authority, the applicant did not meet the conditions of the Act because he is not the father of this child and is not his legal guardian. An appeal was brought against the decision, in which the applicant referred to the decisions of the family court, from which it was apparent that he was the guardian, and also referred to the protection of the good of the child and the good of the family. The Local Government Board of Appeal annulled the decision and discontinued the proceedings due to the applicant's lack of legal interest in granting such a benefit from public funds. Finally, the case was referred to the provincial administrative court, which referred to art. 4 s. 2 of the Act on State aid in raising children, resolving the issue of legal interest, but also referred to the criterion of the good of the child. At the same time, it emphasized that the benefit is aimed at satisfying the needs of the minor, taking care of their good and protection.

The example of such a decision presents the subsidiary role of the criterion of the good of the child already at the stage of the applicant's argumentation, as well as the corrective role of art. 72 s. of the Constitution and art. 3, s. 1, art. 20 and art. 27 of the Convention on the Rights of the Child in the argumentation of the court. It can be concluded that the criterion of "the good of the child" appears in the arguments of the parties in cases of different nature relatively often. Since the court repeats the arguments of the party, it seems that this criterion has an impact on the process of applying the law from the moment of preliminary interpretative findings.

318 A. Korybski, L. Leszczyński, op. cit., pp. 157 et seq.
319 Judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17, Legalis No.: 1742125. Based on the aforementioned judgment, the manner of interpretation by the court in individual stages of the decision-making process will be shown.

Then there is the phase of proper validation findings, consisting in selecting the appropriate sources of law (validation elements) on which the court will be able to base its subsequent decisions[320]. The basic source of law in the culture of statutory law is a legal provision. Therefore, the courts base their decisions on statutory provisions, supplementing the normative basis of art. 72 of the Constitution (program norm), as well as more and more often art. 3 of the Convention on the Rights of the Child and other provisions contained in international law. Referring to acts of higher order strengthens the argumentation due to the social significance of the legal norms contained therein, and also directs the proceedings.

Returning to the above example of not granting a parental benefit, it is necessary to emphasize the general nature of the criterion of the good of child, which affects the interpretative processes. In fact, the Provincial Administrative Court referred to the relevant provision of the Act, but in the justification of the judgment it referred to a constitutional provision formulating the principle of protection of the rights of the child, a convention provision containing the principle of the best protection of the interests of the child, and provisions referring in their content to the good of the child. It should be remembered that the child protection principle can also be derived from the provisions of the Convention on the Rights of the Child, which should also be emphasized in this particular case. In each factual state of the case concerning minors or juveniles, it is necessary to find three elements accentuating the application of the principles of law, i.e. subject to the protection of the child's right, decoding their interest, as well as assessing the child's situation in the spirit of the good of the child (a state in which the child achieves correct development in all possible aspects).

In the case of matters related to the situation of children, the main validation arguments should be distinguished, which may constitute an independent normative basis for the decision and arguments complementing the former. These validation arguments may be:

a) a legal provision that contains no reference to the good of the child;
b) a legal provision containing a reference to the good of the child or another similar criterion;
c) a legal provision containing a norm-principle (e.g. the principle of the protection of the rights of the child, the principle of securing the best interests of the child), usually these norm-principles appear as a complement to argument from (a) and (b);
d) a legal provision containing a programme snorm in combination with another provision which expresses subjective rights.

The analysis of the jurisprudence proves that a legal provision will always constitute the basic validation argument, sought by means of systemic and structural rules. Still only the legal regulations may be the source of different arguments, e.g. extra-legal criteria,

320 L. Leszczyński, *Operatywna wykładnia prawa*…, op. cit., pp. 11–31.

which are an element of the principles of law and general reference clauses. The validation supporting argument will therefore be the open criteria, in this case the "good of the child" and the principles of law. Reaching for open criteria takes place through the application of axiological rules. One more combination can be noticed when, referring to the principle of protecting the good the child, courts apply systemic-axiological rules or, in deriving the value subject to protection, courts also do so using purposeful rules.

The rules applied in the course of the proceedings in this phase are therefore systemic-structural, systemic-axiological, as well as purposeful and axiological rules due to the occurrence of the "good of the child" as an element of the principles of law and general reference clauses[321].

It seems that at the validation stage, systemic and structural rules dominate, which results from the court undertaking activities that consist primarily in searching for elements of the future normative basis. On the other hand, the role of systemic-axiological rules boils down to searching for the principles of law. The entity interpreting the regulations always applies at least two types of tools (interpretative rules). This means that the interpretation of the regulations always takes place, or at least should take place at this stage, using two types of tools (rules). It can be seen from the sentences and justifications of the judgments that the normative basis, in principle, is based on statutory provisions due to their casuistic nature, and only later constitutional and conventional provisions are applied, as a complementary validation argument. The use of complementary elements allows for the introduction of the criterion of the good of the child into the arguments, where there are no general reference clauses present. In addition, referring to the principles of law and program norms obliges the court to interpret in such a way that all validation elements are logically consistent with each other. It should be noted that all the time the court moves within the legal provisions and derives other arguments from them, and in the case of the analyzed cases it then applies axiological rules.

In this phase, one can therefore see the following combination of rules in relation to the search for accessory validation arguments in relation to the provision:

a) in the case of legal provisions containing a reference to the good of the child, systemic and structural rules (acting as basic rules) and axiological rules apply. Sometimes at this point, one can also notice a reference to legal provisions that are the carrier of legal principles (system-axiological rules are applied for this end). Sometimes it is also strengthened to refer to the rules of purpose when the court refers to the *ratio legis* of the provision, a group of provisions or an area of the legal system;

321 Cf. L. Leszczyński, *Zagadnienia teorii…*, op. cit., pp. 117–118.

b) in the case of legal provisions that do not contain references to the good of the child, systemic and structural rules apply, as well as axiological rules (when the court refers to the open criterion, deriving it from another legal provision), and often also systemic and axiological rules (when it is the principle of law that is derived) or purposeful rules (when the court refers to the good of the child as a directive, the assumption for formulating a legal provision).

In the case of the criterion of the good of the child, it is very often an element of the principle of law and at the same time an element of the general clause. Therefore, the application of systemic-axiological rules is combined with the simultaneous application of axiological rules.

The above-mentioned arguments are normative, but in the case of the value in form of the good of the child they are always combined with axiology. Depending on the rules of interpretation applied by the legislator, this axiology may be more or less accentuated depending on the complexity of the case and the movement on the border of normatively irreconcilable problems, that is ethical problems. Cases of this nature are the typical *hard cases*[322] and require careful assessment.

The stage of searching for validation arguments is important because the subsequent reconstruction of the normative basis of the decision will be based on these specific – separated sources. From the point of view of the analyzed cases, the most important criteria will be: "the good of the child", "the good of the juvenile", "the good of the common minor children", "the best interests of the child", "the rights of the child", etc. It should be noted that these elements may be subject to some modifications during the subsequent stages of the decision-making process.

Making validation findings in individual branches of law is similar. In family and guardianship law, this criterion functions as an element of the general reference clause and as an element of the principle of law. It seems that rules have the dominant significance in the process of application of law in family law. The Constitutional Tribunal refers to art. 72 s. 1 of the Basic Act (principles of protection of the rights of the child) and other provisions of the Constitution, assisting itself with the provisions of international law in the course of interpretation. Hence the Tribunal's reference to the principle of the protection of the good of the child. In administrative law, the criterion should be sourced from the Constitution or a specific convention, e.g. Convention on the Rights of the Child. The same happens in criminal law. The function of systemic principles is to navigate in the area of norms of a given normative act and to hierarchize these norms, or to reach beyond this act or branch of law.

322 Cf. S. Sykuna: *Trudne przypadki*, [in:] Jerzy Zajadło (ed.), *Leksykon współczesnej teorii i filozofii prawa*, Warszawa 2007, pp. 339 et seq.

2.2 Reconstruction and construction phase

In the course of the process of reconstructing the normative basis of the decision, following the phase of validation arrangements, the meanings are clarified and the individual behaviour pattern is determined[323].

In this phase, the court clarifies the conceptual apparatus using semantic and syntactic language rules[324]. These rules will be used as basic, but each time they need to be supplemented with different tools. This means that the proper interpretation of the normative text, in relation to a given factual state, will depend on the application of also systemic, axiological and teleological rules due to the occurrence of the value of the child's good that is axiologically entangled[325].

Decoding the meaning of the good of the child takes place contextually, taking into account the entire normative statement, as well as the place (normative act or specific area of the normative act) from which this criterion is derived. Although the clarification of meanings takes place taking into account language rules, here again we should also emphasize the role of axiological rules and referring to the rights of the child.

In this phase, the relationship between the good of the child and other criteria, e.g. the principles of social coexistence, the good of the family, the good of the justice system, etc., is also balanced. The connections must be shaped in such a way that they do not interfere with the discussed value, and the "good of the child" does not change its meaning from subjective to objective. If these relationships are contrary to the good of the child and this contradiction cannot be eliminated by means of specific rules of interpretation, and the "good of the child" is at stake and the current and future situation of the child cannot be properly defined, the principle of priority should be applied.

Settlement of the conflict of values is not the only problem that occurs in the phase of reconstructing the normative basis of the decision. The legislator hierarchizes the criteria, yet it proves difficult to systematize them all within one or more catalogues, as well as to precisely determine the relationships between them. Referring these issues to the good of the child, based on the findings made earlier, it can be concluded that this is the overriding criterion, and the relationship with other criteria varies depending on the factual circumstances of the case. It is only after the facts of the case are known that it

323 A. Korybski, L. Leszczyński, op. cit., pp. 160 et seq.
324 Ibidem.
325 L. Leszczyński, in describing the decision-making model of applying the law, indicates that the reconstruction of individual behavioural patterns boils down to determining the scope of application of the norm and the scope of normalization using language rules treated as basic, as well as systemic, structural and systemic-axiological rules (A. Korybski, L. Leszczyński, op. cit., pp. 160 et seq.).

can be verified whether the "good of the child" will be more important than the "good of the family" or "good manners".

After the clarification of meanings, the individual behavioural pattern is reconstructed, consisting in determining the scope of normalization and the application of the legal norm[326]. When adjudicating on the child's good, the court is obliged to think about the future, i.e. about how the child's situation will be shaped in the future (the perceptual role of interpretation[327]). Therefore, this criterion must be correctly interpreted by the prism of individual rights. The court is obliged to determine the scope of application of the norm both in terms of its subjective and objective aspects. By applying this criterion, the court modifies it. For example, in relation to the child's cumulative consent to a medical procedure, it is necessary to make a scope modification and derive the criterion of the minor patient's good during the application of the law. The "good of the child" has a general nature in the initial phase. Then, due to the reconstruction of the normative basis of the decision, a more detailed modification of this criterion is derived, e.g. "the good of the minor patient", "the good of the disabled child", "the good of the student", etc.[328]

In turn, in the phase of constructing the normative basis of the decision, and then in the phase of decision reduction, norms and principles play an important role, the content of which is read using language rules and systemic rules. The reconstruction of the normative basis of the decision is the result of determining the legal status in the decision-making process of the application of the law[329]. Those findings therefore do not cover the entire norm, but only parts of that norm supplemented by the relevant elements. Normative basis for the decision in the case of the judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17[330] will consist of the provisions of the act on state aid in raising children, as well as art. 72 s. of the Constitution and art. 3, s. 1, art. 20 and art. 27 of the Convention on the Rights of the Child.

326 A. Korybski, L. Leszczyński, op. cit., pp. 160 et seq.
327 At this point, it should be signalled that M. Zieliński drew attention to the perceptual role of the interpretation, distinguishing its two varieties: primary and final. This thread will be developed in the further part of the work devoted to the justification of the decision (M. Zieliński, *Wykładnia prawa*…, op. cit., pp. 66 et seq.).
328 M. Kordela calls the emerging criterion a value – consequence (M. Kordela, op. cit., p. 121). Values – consequences will, in principle, function as jurisprudence criteria, i.e. those that appear in the justifications of judgments and can then be applied as a complementary validation element.
329 L. Leszczyński, *Zagadnienia teorii*…, op. cit., pp. 62–65.
330 Judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17, Legalis No.: 1742125.

2.3 Reduction phase

At this stage, the courts are obliged to pay attention to the correct shaping of the child's situation so that their good is not violated. Their situation should be shaped in accordance with international standards.

Returning to the example of the case law – the judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17[331] – it must be stated that the role of the criterion of the good of the child boils down to analysing the evidence in terms of the child's situation and "imposing" these results on the resulting normative basis of the decision.

The application of the criterion of the good of the child requires a precise assessment of the facts by the court in terms of compliance with the criteria preferred by the legislator. It should be assumed that the basis for the court's action is to make a double assessment. First, there should be general approval or disapproval of the behaviour in relation to the preferred social patterns. Secondly, the assessment should address the specific case and answer the question: is the specific behaviour compliant with the "good of the child"?

Indeed, interpreting the provisions and referring them to a particular case, i.e. the situation of a particular child, requires reaching for the criterion of the "good of the child" and its appropriate modification in the previous stages. This reaching takes place at earlier stages of interpretation and takes place through the use of general reference clauses or by resorting to principles of law that require the entity applying the law to act in a specific manner.

The final stage of orientation and concretization occurs precisely in the reduction phase, when the reconstructed norm of an abstract and general nature is "imposed" on the facts of the case. The result must be directed at the person of the child, as well as the proper and responsible shaping of their current and future situation, which indicates an apragmatic approach to the interpretation of the law.

It seems that in the case of the good of the child, it is necessary to interpret according to the *omnia sunt interpretanda* principle. This means that the principle of *clara non sunt interpretanda* will be insignificant, as even apparently regulated cases become complicated when the child's situation should be shaped in the course of the court's interpretation[332]. At the same time, on the example of the judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17,

331 Ibidem.
332 More on the *omnia sunt interpretanda* rule in, e.g.: A. Korybski, L. Leszczyński, op. cit., pp. 153 et seq.; K. Płeszka, *Wykładnia rozszerzająca*, Warszawa 2010, pp. 187 et seq., and also M. Zieliński, *Aspekty zasady clara non sunt interpretanda*, [in:] S. Wronkowska, M. Zieliński (eds.), *Szkice z teorii prawa i szczegółowych nauk prawnych*, Poznań 1990, pp. 174 et seq.

there is a tendency to make a literal interpretation of the provisions. Only the courts of higher instance approach the interpretation in a much more precise way.

2.4 Justification of the court decision

Most of the interpretative actions are evident in the justification of the court's decision. From the content of the justification, it can be concluded which rules of interpretation were applied by the court, which elements were used as validation elements and how the normative basis of the decision was reconstructed. In the result of the operative interpretation, the justifications of judgments should reflect the entire thought process used in reconstructing the norm and constructing the normative basis of the decision, an also present the phase of decision reduction.

The justification primarily shows the perceptual role of the interpretation of law in the final approach, which was emphasized already at the beginning of the chapter of the work. It should be pointed out that proper shaping of the child's situation should be aimed at taking such actions that the demand for proper determination of the situation is met each time, and the final decision is reflected in the final stage of the decision-making process.

Some decisions demonstrate how the courts interpret on the basis of arguments (theses) taken from other adjudications. It should be remembered that the interpretative processes leading to the final decisions was made at a specific time and with a specific legal status, socio-economic environment or otherwise placed normative constructions (principles of law and general clauses). Therefore, reference to the theses of other judgments should be made with a high degree of caution, taking into account changes and with the separation of certain universal jurisprudence standards. The justifications do not always indicate why the courts decided to quote the thesis selected by them. On the one hand, such, and not other, interpretative actions are related to strengthening the argumentation and demonstrating a firm attitude as to maintaining the current line of jurisprudence, and on the other hand, it occurs without explaining the legitimacy of such duplication[333]. It seems that not all of the theses should be treated as jurisprudence standards suitable for their further reproduction and treating them as validation arguments.

The justifications lack, although it is slowly changing, reference to the texts of international conventions. What deserves our attention is the, frequently quoted in the present work, art. 3 of the Convention on the Rights of the Child, as well as, as ancillary, Principle 2 expressed in the Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1959, which reads: "The

333 For example the judgment of the Provincial Administrative Court in Gliwice of 13 March 2018, case ref. no. IV SA/Gl 1160/17, Legalis No: 1742125; judgment of the ECtHR of 16 December 1999, application No.: 24724/94, T. v. United Kingdom.

child shall enjoy special protection, and legislation and other measures shall provide it with all opportunities and facilities for healthy and normal physical, mental, moral, spiritual and social development, in conditions of freedom and dignity. Laws adopted for this purpose should take the good of the child first and foremost into account"[334]. The Declaration shows how legal provisions should be interpreted to reflect a correct understanding of the good of the child.

The justification of the decision to apply the law also has another dimension in case of the good of the child. In addition to providing knowledge on how to apply the discussed criterion, it also allows for organizing and systematizing the existing knowledge. Therefore, we can talk about the didactic role in the case of judgments on this matter. The jurisprudence provides the theory and dogmatics of law with feedback, which is the translation of the standards developed by them into jurisprudence processes. It also shows the addressees of future decisions in similar cases how their situation can be shaped. The didactic role of the interpretation was described by M. Zieliński, who distinguished two varieties: didactic – clarifying and didactic – explanatory, consisting in translating the legal text from an incomprehensible language into one that is understandable for a given subject[335]. This dimension of the didactic role of the law confirms the communicative nature of the law between the legislator and the addressee of the legal norm, as well as the addressee of the subsequent decision on the application of the law. In fact, the task of the court is to make an intelligible interpretation of law aimed at the protection of constitutional values, including the good of the child.

M. Zieliński also distinguishes the corrective, complementary and streamlining role of the interpretation process. Generally speaking, the corrective role is to eliminate linguistic ambiguity of phrases, the complementary role is to infer norms from the provisions or add normative elements to the legal text, and the streamlining role is related to the functioning of vague phrases and narrowing the scope of imprecision[336].

Moreover, the meaning of the very concept of the good of the child cannot be precisely defined without reference to other elements. This means that the rules of interpretation do not operate in a vacuum, and legal provisions must be read in a specific context, i.e. in the environment of other provisions and in a specific factual state. Only then can generalizations and thought processes be carried out. Some justifications refer to the views of the dogmatics of law in order to present how the criterion of "the good of the child" has been understood so far.

The inclusion of the good of the child as an element of the principle-law directs the process of applying the law, and thus shows the addressees of the decision that such interpretative measures should be taken in order to maintain the standards adopted by

334 Declaration of the Rights of the Child of 20 November 1959.
335 M. Zieliński, *Wykładnia prawa*…, op. cit., pp. 236 et seq.
336 Ibidem, pp. 238 et seq.

the legislator. On the other hand, the general clause, provided that it would occur without connection with the principle of law, which at the stage of proceedings on the situation of the child seems to be rather impossible, is only intended to render interpretative processes more flexible.

Chapter V

Objectivising the Content of the Criterion in Judicial Case-law

1 The application of the law and the issue of objectifying the content of the criterion of the good of the child

1.1 Introductory issues

"Objective", as defined by dictionaries, means "characterized by objectivity, free from prejudice; impartial"[337]. The second meaning is: "existing independently of the comprehending entity"[338]. These definitions indicate that there is no relationship between the object and the subject making the assessment. Antonim of this word is "subjective", defined as "conditioned by personal considerations, views, sensations; arising from individual views; non-objective, biased"[339]. It is therefore not difficult to conclude that objectivity is a state independent of any subjective statements, feelings, opinions, reasoning. The definition quoted above, or rather the definition of "something" objective as existing independently of the cognizant entity, will be crucial in adopting the optics of further considerations.

The term "objective" appears in judicial case-law, for example, in relation to guilt or the fact of violation of a legal norm[340], the "good of justice system" and the objective and reliable manner of examining the case[341], the fact of conducting business activity[342], the principle of objective truth[343] and many others. On the other hand, in relation to the good of the child, the discussed issue is related to the determination of facts taking into account the premises of an objective nature. This means that courts relatively often use the term "objective" to describe a given state of affairs. This frequency of reference to this feature occurs at the time of assessment or determination of the facts. It follows, first of all, that these entities, in argumentation of their ratio, need to implement them

337 M. Szymczak (ed.), *Słownik języka polskiego*, t. 2: L–P, op. cit., s. 411.
338 Ibidem, p. 411.
339 M. Szymczak (ed.), *Słownik języka polskiego*, t. 3: R–Ż, op. cit., p. 365.
340 Compare in the judgment of Regional Court (SO) - the Court of Competition and Consumer Protection of 9 September 2016, case ref. no. XVII AmE 27/15, LEX No.: 2188979.
341 Cf. in the order of the Supreme Court of 5 June 2019, case ref. no. IV KO 44/19, LEX No.: 2684891.
342 Cf. in the judgment of the Provincial Administrative Court with office in Opole of 27 May 2019, case ref. no. I SA/Op 403/18, LEX No.: 2682383.
343 E.g. the judgment of the Supreme Administrative Court of 21 March 2018, case ref. no. I GSK 148/16, LEX No.: 2473404.

and convince both the addressees of the decision and a wider range of entities. Secondly, when making findings of fact, the court emphasises the correctness of the steps taken to that end[344].

In the above examples, it can be seen that in the course of judicial application of law, two phenomena may occur, i.e. the first – related to making factual findings, and the second – to assessments.

Objectivisation is a process occurring in the course of the application of the law by public authorities and means the transition from subjective to the most objective perception, and in the case of this work – the perception of the good of the child. This process initiates the moment the authority comes into contact with the case material. On the example of the analysed case-law, it is difficult to capture the moment ending the discussed process. We can therefore conclude that the objectivization of the criterion concerns two planes.

First, in relation to a particular case, objectivization occurs in the course of the application of the law by the court. A special role in this process should be attributed to the proper determination of the facts, as well as to the assessment of these circumstances, taking into account the premises shaping the understanding of the good of the child. It should also be pointed out that, on the one hand, this process is partly related to the purely functional and organizational attributes of the court (impartiality, independence and autonomy), and on the other hand, to the values of the legal system (primarily uniformity). For the purposes of this work, this plane of objectivization will be called individualized, due to the reference of this process to a specific factual condition.

The second plane concerns not so much objectivization as strengthening the role of the so-called objective premises in court case law[345]. Objectivisation in this case is related to the value of uniformity of application of the law. The analysis of the jurisprudence demonstrates that this sphere of objectivization can also be referred to shaping the precedent practice in the field of referring to the good of the child.

It is not without reason that objectivization is understood in this work as a process. This means that in the course of judicial application of the law, it is difficult to talk about the complete objectivization of the criterion of the good of the child due to its strong connection with extra-legal axiology and court assessments. In addition, members of the

344 Z. Ziembiński (*Wstęp do aksjologii dla prawników*, Warszawa 1990, p. 61) indicates the position of ethnocentrism consisting in recognizing values as objective, if they are widely accepted in a given social environment. Professor Ziembiński also refers to the absolutization of value, consisting in referring to the evaluation authority. These two approaches are cited as ways of moving away from subjectivity. One should remain sceptical about these views as they are related to subjectivity and dependence on human activities.
345 The premises shaping the understanding of the content of the "good of the child" will not be of a purely objective nature, which will be explained later in the work.

judiciary make an assessment of reality from their own point of view, in accordance with their life experience. In addition, the composition of the judiciary is based on material provided by the parties and on legal provisions created during the legislative process by the competent authorities. The members of these bodies are also people, which means that we cannot attribute the characteristic of objectivity to normative acts. It is therefore irrelevant whether one, three or five judges took part in the panel of the Court. The number of adjudicators may but must not rationalise the common legal assessment.

The definition of objectivization presented above is no different from the dictionary understanding of this term, which should be understood as giving something objective features[346]. Giving objective features is therefore not an accomplished activity, but a complex, dynamic process taking place in the framework of time. Therefore, there is no doubt that objectivity should be equated with independence from the cognizant subject and assessments.

The fact that objectivization takes place in a specific time space means that it takes place in the process of applying the law. The complexity of this process stems primarily from the diversity of court actions aimed at establishing the facts, e.g. taking evidence, etc. Dynamism, on the other hand, consists in objectifying the premises to a different degree, depending on the complexity of the legal problem and the factual state. The objectivization process will depend on the nature of the case, e.g. divorce, contacts, criminal, administrative cases, etc. In addition, in the course of the proceedings, there will also be subjective elements, e.g. the possibility of issuing a discretionary decision, the use of decision-making freedom, differences in the perception of the case by individuals, the subjective nature of evidence and many others.

Considerations in the field of objectivization processes largely concern the nature of individual concepts treated as objective according to some researchers. For example, E. Rott-Pietrzyk indicates reason as an objective criterion[347]. She justifies her position by eliminating arbitrary judgments by applying this criterion, promoting uniformity of case-law and thus certainty in the application of the law[348]. Her reflections are focused primarily on the philosophical nature of objective concepts. However, it seems that in this case it proves difficult to treat reason as a completely objective criterion. Rather, it is only a formalized criterion, and its content may be subject to the process of objectivization in the course of the process of applying the law.

E. Rott-Pietrzyk's opinion is not sufficient to capture the phenomenon of objectivization, which should be looked at from the point of view of both the theory and practice of law. The author additionally refers to the so-called cult theory of values,

346 M. Szymczak (ed.), *Słownik języka polskiego*, t. 2: L–P, op. cit., s. 411.
347 E. Rott-Pietrzyk, op. cit., pp. 62 et seq.
348 Ibidem.

according to which values refer to objective, social assessment standards[349]. The concept of the existence, in the Polish legal system, of objective concepts adopted by this author can be negated or confirmed only in the course of more detailed research undertaken in the context of objectivization of various criteria. It should be stated that it is difficult to talk about objective assessment standards without categorizing them or explaining what these standards actually are and how they depend on the assessments made. It is also difficult to observe any objective criteria, since their interpretation depends on the assessment of the interpreting entity. The observations made by E. Rott-Pietrzyk should be called an attempt to rationalise the content of a given criterion and then the direction of the decision[350].

In turn, the works of M. Pichlak indicate that objectivization should be understood as a tendency to treat values as external objects independent of the beliefs of entities applying the law[351]. According to this author, objectivity is a spacious concept and occurs in many contexts[352]. M. Pichlak states that objectivity can be referred to: truth, neutrality, impartiality, intersubjectivity, justice, certainty, equity, and also understood as something external[353]. Showing so many reference points of objectivity is a report of research performed in this area by a team of scientists led by L. Rodak[354], as well as an

349 Ibidem, p. 53, and also W. Lang, *Aksjologia prawa*, [in:] B. Czech (ed.), *Filozofia prawa a tworzenie i stosowanie prawa*, Katowice 1992, p. 128.

350 In the case of making a decision that is based on the assessment of a given state of affairs, we may be tempted to state that in the course of the decision-making process, the content of a given criterion or the final decision is, or at least should be, rationalised. Therefore, in the context of the expert's opinion, it can also be pointed out that the expert makes a rational assessment, which is based on the criterion of expertise. In this case, it is difficult to talk about a completely objective tool for making factual findings, because the expert opinion remains a human creation. rationalisation also takes place in the case of conducting environmental interviews. rationalising, and in the case of a process carried out and fully shaped called rationalisation, consists in understanding a given state of affairs in terms of reason and knowledge. The opposite is to make judgments based largely on emotions. The same (rationalised) nature should therefore be attributed to the judgments both in terms of the direction of the decision and the reasoning put forward in the justification. The rationalisation will certainly be manifested by the issuing of a decision by an judicial authority that remains impartial and independent in relation to the addressee of the decision to apply the law. It will also be a manifestation rationalisation to ensure that children are properly represented in their interests. For example, "the best interests of the child" in matters related to legal actions between children under parental authority or between the child and one of the parents or his/her spouse may not be represented by the parent (Judgment of the Supreme Court of 28 March 2018, case ref. no. IV CSK 426/17, LEX No.: 2521616).

351 M. Pichlak, *Między aksjologią a ontologią dyskursu konstytucyjnego. Obiektywizacja wartości w prawie*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2014, XCVI, p. 39.

352 Ibidem, pp. 43 et seq.

353 Ibidem, pp. 42 and 43.

354 Works on the process of objectivization in law, by L. Rodak, which should be indicated, for example, are: V. Breda, L. Rodak (eds.), *Diverse Narratives of Legal Objectivity. An Interdisciplinary Perspective*, Frankfurt am Main – Berlin – Bern – Bruxelles – New York – Oxford – Wien 2016, passim; L. Rodak, P. Żak, *Justice and Objectivity as balancing principles*, „Wroclaw Review of Law. Administration & Economics" 2015, vol. 5, nr 1, pp. 79–94; L. Rodak, *Objectivity of legal facts from semantic point of view*, „Studies in Logic, Grammar and Rhetoric" 2012, vol. 28, pp. 127–147; L. Rodak, M. Stępień, *Jak badać wiele obiektywności?: przyczynek do dyskusji nad metodologią prawno-porównawczych badań orzecznictwa*, [in:] O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych?*,

attempt to present the multifaceted nature of this concept. The way in which the objectivity and objectivization will be understood will depend on particular research.

M. Pichlak recalls his proprietary ways of interpreting objectivity as a fact and moral ideal, and also refers to various trends, specifying what objectivity is, e.g. to the idealization theory, the concept of "*modest objectivity*", recommended by J. Coleman and B. Leiter, or to realism and conventionalism[355]. The multiplicity of theories in the field of objectivization confirms, above all, the complexity of this issue in the context of a different perception of what is objective or which can be subject to objectivization.

M. Pichlak's work on objectifying values in law analyse this subject manner in a transparent manner. It is worth referring to the views of P. Berger on externalisation, objectivization and internalisation[356]. These considerations resemble more an approach based on rationalising internal beliefs. To explain why this is the case, we must indicate how these processes are interlinked. According to P. Berger, the subjective meanings are firstly manifested (externalisation), then objective features are acquired by these meanings as independent of individuals (objectivization), and at the very end this objectified reality or meaning is accepted by the individual (internalisation)[357]. To adopt Mr Berger's point of view would be nothing more than to artificially separate the assessments from the individual and artificially analyse them in the context of objectivization. It should be noted that here the reality is perceived and analyzed from the perspective of the individual and it is difficult to speak, in the final version, about the objectified reality, i.e. the completed or complete phenomenon.

These views are cited primarily to present the contrast between various theories and the need for a prudent approach to the issue of objectivization. This is because only some of the phenomena, states of affairs, can be objective, while any other related to human activity – only subject to objectivization to a greater or lesser extent, depending on the number of subjective and objective elements therein.

From the theoretical and legal perspective, it is worth referring to the concept of interpretative objectivization described by L. Rodak[358]. In her work entitled *Objective interpretation as conforming interpretation*, she analyses the views on the process of

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Warszawa 2012, pp. 274–280; L. Rodak, *Pojęcie i koncepcje obiektywności*, [in:] T. Pietrzykowski (eds.), *W kręgu teorii prawa i zagadnień prawa europejskiego*, Sosnowiec 2007, pp. 80–94.

355 M. Pichlak, *Obiektywność w prawie – podejście instytucjonalne jako alternatywa dla dominujących stanowisk teoretycznych*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 2, pp. 108–124, and also B. Leiter, *Objectivity, Morality, and Adjudication*, [in:] B. Leiter (ed.), *Objectivity in Law and Morals*, Cambridge 2000, pp. 66 et seq.; S. Svavarsdóttir, *Objective Values: Does Metaethics Rest on a Mistake?*, [in:] B. Leiter (ed.), op. cit., pp. 144 et seq.; K. Greenawalt, *Law and Objectivity*, New York–Oxford 1992, passim.

356 Cf. M. Pichlak, *Między aksjologią a ontologią…*, op. cit., p. 40, as well as the literature quoted there, i.e.: P. Berger, *Święty baldachim. Elementy socjologicznej teorii religii*, Kraków 1997, pp. 30–49.

357 Cf. M. Pichlak, *Między aksjologią a ontologią*…, op. cit., p. 40.

358 L. Rodak, *Objective interpretation as conforming interpretation*, „Oñati Socio-Legal Series" 2011, v. 1, no 9, pp. 3 et seq.

objectivization taking place in law. We also find an interesting observation here, in the form of the distinction between *strong*, *modest* and *minimal objectivity*[359]. The first manifestation of objectivity is closely linked to the object, and is also independent of the subject in terms of perception of reality and existence. In turn, *modest objectivity* refers to an entity operating in ideal epistemological conditions. On the other hand, *minimal objectivity* indicates the acceptance of a given state of affairs by the majority, which conditions the feeling of objectivity[360].

The first of the manifestations of objectivity, proclaimed by realists, is distinguished from the other two by the lack of dependence on the subject[361]. The entity assessing a given state of affairs, regardless of whether it is a certain community or an impartial court, always introduces a sense of subjectivity. In the theory of law and judicial practice analyzed on the basis of case law, one can see the "demand" for objectivity, which seems to be closer to rationalising assessments than to objectifying them. rationalisation can be seen in the introduction of evaluation elements in various forms, e.g. in the way of arguing, balancing the rationale, referring to the principles, knowledge, etc.

According to L. Rodak, objectivity will be a semantically capacious concept, differentiated in terms of meaning, depending on the discourse and adopted assumptions of the research work[362]. Pointing to these issues, he refers to a quotation from *Leksykon filozofii klasycznej*, treating objectivity as taking on importance depending on the author and the problematic context[363]. Bearing in mind the subject of this work, it is reasonable to take into account the concept of *strong objectivity.*

After presenting the views on objectivization, it should be noted that with regard to the criterion of the good of the child, this process takes place in the course of the application of the law by courts. However, it is not advanced enough to talk about a complete objectivization of the good of the child, primarily due to the feature of the uncertainty of this criterion. A similar position, however, generally with regard to constitutional values, is adopted by M. Pichlak[364]. Besides, after C. Znierski, the values themselves should be considered as a projection of emotion, intellect and will[365]. P.

359 Ibidem, pp. 3 et seq., and also L. Rodak, *Solidaryzm i/jako obiektywizm*, [in:] A. Łabno (ed.), *Idea solidaryzmu we współczesnej filozofii prawa i polityki. W poszukiwaniu nowych form solidaryzmu społecznego*, t. 1, Warszawa 2012, pp. 27–29.
360 L. Rodak, *Objective interpretation as conforming*…, op. cit., p. 4.
361 Ibidem.
362 L. Rodak, *Solidaryzm…*, op. cit., p. 27.
363 Ibidem, as well as a reference to: J. Herbut (ed.), *Leksykon filozofii klasycznej*, Lublin 1997, pp. 404–406.
364 Cf. M. Pichlak, *Między aksjologią a ontologią*…, op. cit., p. 40.
365 C. Znamierowski, *Oceny i normy*, Warszawa 1957, pp. 194–195.

Winczorek has a similar view, approving the subjective way of thinking about values, and thus rejecting objectivist views[366].

This subsection will demonstrate that objectivization can be graduated, which largely indicates the dynamics of this process. In addition, it is always connected with a specific factual situation, hence the conclusion that it is not possible to objectify the criterion of the good of the child in general, because there is a lack of consideration of the circumstances of a given case and locating it in the specific procedural situation.

1.2 "The good of the child" in the process of objectivization

The characterization of the good of the child criterion from the previous chapters of this work allows us to look at the issue of objectivization of the child's good. It seems that this is one of the most important criteria in the Polish legal order, expressed in conventions and national normative acts. The analysis of theoretical and legal literature and jurisprudence proved that it is intended to mitigate formalism related to the application of law. This criterion is so strong that, in certain cases, it may lead to a change in the final judicial decision. In addition, it is an example of an indefinite phrase. This means that a legal problem is always defined in relation to a specific case and only then is it finally assessed in the context of compliance with the good of the child. Therefore, the state in which the child achieves normal development is created. Determination of the facts[367] takes place taking into account the premises of the so-called objective nature, which will be referred to below. It should also be pointed out that the "good of the child" is an abstract concept, which determines its individual interpretation in every case.

In addition, from the point of view of the objectivization process, it is important to distinguish the position of the facts determined by the court in the course of the decision-making process from the facts that have occurred in reality. The fact-finding process itself may be subject to the risk of error. Some of them, such as age, can be indicated as simply and correctly as possible, which demonstrates the objective nature of the premise. In the case of others, it may be much more difficult, e.g. determining the child's health status in the context of postoperative complications must be based on the opinion of an expert. On the other hand, the opinion of an expert is a product of a man

366 P. Winczorek in his publication entitled *Konstytucja i wartości* presents two approaches to the nature of values. These are objectivistic and subjective approaches. In order to support his claims about a subjectivistic approach to values, he cites publications, e.g. C. Znamierowski (op. cit., passim.) or J. Tischner (*Mysenie według wartości*, Kraków 1993, passim). On the other hand, in relation to objective concepts, he points to the following works: W. Böckenförde, *Wolność – państwo – kościół*, Kraków 1994, passim; R. Ingarden, *Wykłady z etyki*, Warszawa 1989, passim. Cf. P. Winczorek, *Konstytucja i wartości*, [in:] J. Trzciński (ed.), *Charakter i struktura norm konstytucji*, Warszawa 1997, pp. 35–57.

367 In dictionary terms, "fact" should be understood as "what has happened or is happening in reality; an event, a phenomenon; a specific state of affairs" (M. Szymczak [ed.], *Słownik języka polskiego*, t. 1: A–K, op. cit., p. 567).

who, while analysing the situation impartially and on the basis of facts, is not entirely objective, or freed from subjective factors.

In the process of objectivization, an important issue is the analysis of the subjective or objective nature of the law, the qualities of judicial bodies (independence, impartiality), duplication of arguments related to the "good of the child", treating the decision as issued by a court, and not an individual.

The child's situation can be viewed from five different perspectives. The first concerns the legislator, who creates the normative environment. According to the second, the "good of the child" should be perceived from the perspective of the parties and participants in the proceedings. The third plane is the interpretation made by the court, which will act as an "observer" and resolve the case from a perspective that is independent of the beliefs of the participants in the proceedings. The fourth is the perspective of assessing the situation from the point of view of a specific social or professional group, e.g. mediators, foundations (Helsinki Foundation for Human Rights). The last plane concerns the child's perception of their situation and constitutes the most important one of them all. The child has the right to express its opinion on the situation in which he or she is.

At the outset, the subjective character of the law established by the legislator should be accepted. It is justified, for example, by the inability to objectify human activities and thus the content of the legal provisions. The legislator is not an objective actor, but a lawmaker proceeding in accordance with their own ideas about the surrounding reality. Even the assumption of a rational legislator is an ideal that has nothing to do with objectivity[368]. Already at this stage, there is a human factor that does not allow for law-making that is free from assessments. In addition, the normative text is the result of interpersonal cooperation. It is difficult to indicate objective elements occurring at the stage of drafting acts, because most of these activities are characterized by subjectivity, as well as taking care of individual interests, and it is not always possible to talk about rationalising the activities of individuals. This last statement is valid when, for example, the legislative process has not been properly agreed.

The policy of creating the law has its clear impact on the processes of its application by courts. This means that the court is based on "material" originating from the legislator. The scope of regulation and application of a legal standard may be defined more or less precisely. Usually, legal provisions contain indeterminate expressions, numerous

368 The very concept of a rational legislator, which occurs in three approaches, i.e. dogmatic, sociological and as a de facto, institutional legislator, is also idealistic. In principle, it is a model type of ideal legislator, guided by knowledge and assessments (cf. M. Zieliński, *Wykładnia prawa*…, op. cit., pp. 299 et seq.; and also: L. Nowak, *Interpretacja prawnicza: studium z metodologii prawoznawstwa*, Warszawa 1973, passim; Z. Ziembiński, *Teoria prawa*, Warszawa 1972, passim). The definition emphasizes the feature of rationality by referring to the criterion of knowledge.

references to extra-legal values or legal principles emphasizing the axiological framework of the legal system, which makes it necessary to perform an interpretation (thought process) each time. In the course of interpretation, the question must be answered: what is compliant with the good of the child in a given case? The analysis of the latter is carried out in relation to a specific factual situation, which in turn concerns: the whole situation of the child or only incidentally, i.e. when the "good of the child" should be taken into account as one of the elements of the assessment. Next, the court determines what should be understood by this concept in the respective case, taking into account:

a) characteristics of the child (e.g. age, place of residence, siblings, etc.);
b) the fact concerning the child (e.g. medical treatment, adoption, foster care, use of violence);
c) the entire set of facts, not directly referring to the child, affecting its situation (e.g. divorce).

Since objectivization will have a source in the factual elements determined by the court, it is worth taking a closer look at these elements. The moment these facts are distorted in the course of the decision-making process, i.e. incorrectly determined, the objectivization process will also be burdened with an error. Proper, and therefore in accordance with reality, shaping of these elements affects other phases of the decision-making process. This means that the court can assess and give a ruling in the most rational manner possible.

Correct determination of the facts in the context of the objectivization process consists in the court basing on the criteria established in jurisprudence and dogmatics[369]. These criteria, also called premises in the present work, will concern the objectivization of the good of the child in the individual sense. Assuming that objectivization is closely related to establishing facts, this process does not take place in relation to the good of the child in general. At this point, reference should be made to judicial decisions that indicate the need to apply the premises in order to correctly determine, i.e. in accordance with reality, the elements of the facts. For example, in one of its judgments, the [370]Constitutional Tribunal distinguished these criteria, i.e.: the characteristics of the child, age and gender, the right to be brought up by both parents, the qualifications and educational abilities of parents, their previous relationship to themselves and to the child, the possibility of taking care of the child, as well as the circumstances whether one of the parents does not spread aversion to the other parent and their environment. The Tribunal has found that those conditions are repeated in case-law and facilitate the interpretation of the concept of the good of the child. It should be agreed with the conclusion of the Tribunal that "the above-mentioned catalogue of factors resulting from the case-law of the courts constituting the determination of its content indicates a

369 In chapters one and four of the present work, we repeatedly indicated the criteria, which in the opinion of courts and dogmatics should be called objective.
370 Cf. order of the Constitutional Tribunal of 9 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193.

uniform, strict, and based solely on objective criteria, understanding thereof"[371]. As can be seen, the Tribunal is searching for such premises or elements that will be helpful in determining the situation of the child in a given case in a way that is as rational as possible.

The jurisprudence and dogmatics of law clearly indicate the existence of premises that are helpful in determining the content of the construction of the good of the child in a particular case, without denying their nature as objective or partially objective. The selection of these conditions depends on what is the subject of the proceedings and what is the nature of the case.

It should be borne in mind that there are conditions which can be hardly named objective. Many of them have their normative source in an official document. They can also be formulated in an indeterminate manner. This applies, for example, to the criteria of admission of a child to a kindergarten or school[372], referring to the principles of medical knowledge[373] or the principles of determining income[374].

It seems that in these cases it is impossible to speak of a complete objectivization of the premises shaping the good of the child for two reasons. Firstly, these criteria, e.g. in the case of formulating requirements for the admission of a child to kindergarten, are not objective criteria themselves. Sometimes it is difficult to determine whether they are fully rationalised, i.e. whether they were developed by consensus, preceded by prior negotiations before their inclusion in a normative act or an official document. These criteria are primarily formalised and easy to control in the course of an instance proceeding. Secondly, when referring to the principles of medical knowledge, it proves difficult to create an exhaustive catalogue of such principles. After all, these principles can be dynamic and change under the influence of the development of medicine, therapeutic approach, etc.

It is much easier to determine, for example, the child's biological origin using DNA tests (negligible risk of error) and then assess what solution will be compliant with the good of the child. As you can see, the origin of the child here can be established as objectively as possible.

Objectivization of the good of the child is also visible in the case concerning the recognition of register office records in the case of the birth of a child by a surrogate.

371 Ibidem.
372 Cf. in the judgment of the Provincial Administrative Court in Kraków of October 24, 2017, case ref. no. III SA/Kr 800/17, LEX No.: 2400085; in the judgment of the Provincial Administrative Court in Gliwice of 19 September 2017, case ref. no. IV SA/Gl 597/17, LEX No.: 2371267.
373 Cf. in the judgment of Court of Appeal in Łódź of 14 March 2018, case ref. no. I ACa 938/17, LEX No.: 2502558.
374 Cf. in the judgment of the Provincial Administrative Court in Wrocław of 4 December 2018, case ref. no. IV SA/Wr 424/18, LEX No.: 2603616.

The recognition of a child's birth certificate by an authority of another country and the failure, for the good of the child, to make an origin determination do not distort the objectivization process. The fact is, for example, that a child adopted by same-sex parents will not originate from one or any of them. It is only an assessment of this state of affairs in terms of what will be good for the child, and therefore the recognition or non-recognition of the birth certificate is already a subjective issue.

The examples presented above, i.e. regarding the conditions for the child's admission to kindergarten, the performance of DNA tests to determine the child's origin, as well as the recognition of the register office record, perfectly illustrate the dimensions of objectivization of good of the child, or rather the conditions shaping this concept. As we witness here, it is already at the stage of factual findings, that full objectivization is not present. The dimensions of objectivization are different due to the presence of evaluation elements.

It should be assumed that in the course of the judicial application of the law, there is a process of objectivization, which may take a weaker or stronger dimension in relation to the good of the child. These dimensions should always be analysed in relation to a specific factual situation due to the emerging differences as to the facts. Therefore, the weaker dimension of objectivization occurs in cases where findings on facts are made on the basis of an analysis of evidence based on subjective beliefs, e.g. determinations on the emotional state of the child, etc. A stronger dimension of objectivization takes place, when subjective beliefs can be eliminated and the findings based on evidence that has an objective overtone in principle.

Certainly, the objective premise can be age, and partially objectified: cognitive abilities, conditions in which a child is raised, etc. Any other circumstances that require determination in the result of mental analysis using reliable legal tools in the form of environmental interviews[375], documents, research results, as well as on the basis of a court decision shaping or confirming the current situation of the child[376], are partially objective.

375 E.g. the judgment of the Provincial Administrative Court in Gliwice of 24 April 2017, case ref. no. IV SA/Gl 1129/16, LEX No.: 2285817.

376 It follows from the case-law that public administration bodies are not competent, among others, to make arrangements concerning the actual exercise of parental authority, the child's place of residence, the child's remaining in alternate custody or the fulfillment of the maintenance obligation. Such findings should result from a court decision (e.g. cf. with the judgment of the Provincial Administrative Court in Lublin of 14 December 2017, case ref. no. II SA/Lu 510/17, LEX No. 2431158, as well as in the judgment of the Supreme Administrative Court of 10 April 2017, case ref. no. I OSK 778/17, LEX No.: 2423136). The above thesis requires a brief reflection in the context of the objectivization process discussed in the present chapter. A court decision will be a tool for the authority making a specific decision, which creates or confirms a specific state of affairs. It follows from the above statement adopted in the decisions of administrative courts that the role of final court decisions is therefore based on the confirmation and stabilization of the states of affairs adopted by the court.

Another circumstance should be noted, which obviously does not strengthen the objectification process, but shows a contrast between the facts established by the court in the result of verification of various circumstances and the assessments made by the parties or participants in the proceedings. Courts rely on material provided by other entities that perceive the child's situation through their own prism. These assessments are often different, and this is due to the fact of having an interest in such an activity.

M. Romanowski claims that it is impossible to objectivize the rationality of an individual, because it would require "entering" their mind [377]. His article was written in the perspective of private law and focuses to a large extent on the freedom of legal subjects to make choices. It is worth emphasizing that these considerations remain valid from the point of view of the good of the child.

It seems that the objectivization of the premises shaping the understanding of the good of the child occurs in a similar way in various branches of law. It follows that, in case of good of the child, making factual determinations is crucial for the objectivization process. An additional instrument in this field, which may provide knowledge of the circumstances of the case, is hearing the child. Such an obligation results from the provisions of generally applicable law. First of all, the Constitution, the Convention on the Rights of the Child and the Convention on the Exercise of Children's Rights play the crucial role in this respect. The principle of listening to a child, the expression of opinion by a child or other forms of communication with a child are reflected in laws from various branches of law. As you can see, the autonomy of the child's will or its manifestations are not only related to private law. This means that an additional subjective element appears in the course of judicial application of the law.

There can be no total objectivization occurring in the course of the decision-making process due to the complexity of many activities resulting from the actions of individuals and their assessments of reality.

However, if the discussed process were perceived through the prism of *modest objectivity*, recommended by J. Coleman and B. Leiter, then objectivization should be captured in terms of the court's impartiality and the characterization performed in this direction. These claims should be analysed in the context of changes in legal, social and political reality.

The concepts of impartiality and objectivity may seem identical due to the presence of two aspects at the level of spoken language. Turning to the definition of objectivity, one aspect is about impartiality and the other is about independence from evaluation and opinion. In legal literature, the issue of identification of these two concepts has not been completely resolved. However, it should be repeated after M. Cieślak that impartiality

377 M. Romanowski, *Błądzić jest rzeczą ludzką – czyli o tym, czy można i należy prawnie obiektywizować racjonalność jednostki*, „Monitor Prawa Handlowego" 2015, nr 3, p. 7.

and objectivity are different concepts, as objectivity concerns the attitude of the judge to a given case, while impartiality indicates the attitude towards the parties to the proceedings[378]. The opposite view is presented by J. Wróblewski, who identifies impartiality with objectivity[379]. In turn, in one of its judgments, the European Court of Human Rights states that "the principle of impartiality is an important element of trust that courts should enjoy in a democratic society. This principle is generally defined as a lack of prejudice or bias and can be assessed in many ways. Impartiality within the meaning of Article 6 (1) is assessed in a dual approach: the first is an attempt to establish that judge's personal conviction in a given situation, the second is to ensure that the judge provides sufficient guarantees to eliminate any reasonable doubt in this regard"[380].

Due to the diversity of views, as well as the fact that this is not entirely about objectivity, which was presented above in relation to the views of J. Wróblewski, it should be stated that both identifying the meaning of impartiality and objectivity, as well as negating the relationship between the two concepts, the attitude of the judge and his attitude towards the parties will always introduce subjective elements to the decision-making process.

The position of the judge, consisting in impartial determination of what is beneficial for the child in a given case, is the subject of rationalisation. Firstly, because the authority seeks to balance the arguments of the parties. Secondly, if the composition of the panel consists of more than one person, then as a result of the deliberation and voting, the criterion of reason will prevail, leading to the assessment of what is beneficial for the child in a given case, e.g. in spiritual, moral or social terms.

The lack of objectivization is also evidenced by the possibility for a judge to express a dissenting opinion. The use of this institution aims to show additional interpretative possibilities. Besides, the very name of the institution indicates that the semantic sentence will be identical to the assessment. It should be emphasized that shaping the direction of interpretation takes place primarily in the consciousness of the judges, who probably have their ideas about the reality surrounding them. Such a state of affairs may result, for example, from differences in general knowledge and knowledge regarding a given normative text, as well as from experience[381]. However, drawing conclusions from this would require conducting thorough empirical research on the impact of some (personal) factors on the direction of the decision.

It seems that in the course of the process of applying the law, on the one hand, there is objectivization in relation to shaping the understanding the good of the child in a

378 M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1971, p. 299.
379 J. Wróblewski, *Wartość a decyzja sądowa*, Wrocław–Warszawa–Kraków–Gdańsk 1973, p. 155.
380 Cf. judgment of the ECtHR of 2 March 2010, application No. 54729/00, Adamkiewicz v. Poland.
381 A. S. Greene, *The missing Step of Textualism*, „Fordham Law Review" 2006, 74, pp. 1927–1928.

particular case, and on the other – rationalisation, which is partially visible already at the stage of establishing facts, and takes on a real shape in the phase of subsumption.

2 Factors weakening the objectivization process – justification of the court decision

2.1 Rendering the process of applying the law more flexible

At this point, the question should be asked: to what extent, in the case of objectivization, can we talk about the realisation of the value of flexibility in the application of the law?

The value of flexibility "refers to the category of adequacy of acts of application of law in relation to the changing social reality (social environment of law) and the resulting changing needs, interests, values and social assessments, while on the other hand – to the separateness of factual states determined and qualified in the decision-making process"[382]. This is the value of applying the law, which remains in relation to extra-legal values, including the good of the child. This means that the role of values (occurring as an element of various normative constructions) is to search, as M. Safjan claims, *ius aequum* for each specific case[383].

Flexibility in the application of the law is primarily related to the issues of decision-making discretion, arising naturally or artificially[384], the value of equity and the value of justice in the application of the law. The consequences of discretion or the application of the criteria indicated in the previous sentence affect the court's assessment, and not the determination of facts.

When defining the concept of a decision-making discretion, it must be stated that it involves the freedom granted to the authority and the possibility of selecting a solution from among many others[385]. L. Leszczyński distinguishes four types of discretion in decision-making, i.e. open, intentional, targeted, controlled[386]. The first one is characterized by visibility in the legal provision, and is achieved by the formulation of general reference clauses and the introduction of the structure of administrative recognition. The intended discretion is the result of the legislator consciously constructing it. The targeted discretion is focused on specific extra-legal criteria. On the other hand, the manner of using the decision-making discretion, which can be verified

382 A. Korybski, L. Leszczyński, op. cit., p. 171.
383 M. Safjan, *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, „Państwo i Prawo" 1990, nr 11, p. 51.
384 A. Korybski, L. Leszczyński, op. cit., pp. 174–177.
385 More broadly in the context of decision-making discretion: B. Wojciechowski, op. cit., pp. 61 et seq.
386 L. Leszczyński, *Zagadnienia teorii* .., op. cit., p. 46.

in the instance process, determines another type of discretion, i.e. controlled discretion[387].

As regards the criterion of the good of the child, which is part of the principle of law and the general reference clause, there is, in principle, open, intentional, targeted and controlled discretion. The issue of controllability characteristic requires comment. In the case of the good of the child, this issue is facilitated by the coexistence of a general systemic principle of the good of the child alongside the "good of the child" clause. This principle facilitates instantaneous control in such a way that it sets the direction of interpretation and orders the protection of the child's good. In family and guardianship law, in juvenile law and international law, the decision-making discretion is open, intentional, controlled and targeted. In constitutional, criminal and administrative law, as well as in the rest of civil law, this discretion does not have the characteristics of being open and intentional. This means that the legislator is unlikely to introduce the good of the child in the form of a general reference clause, which means that this criterion should always be inferred.

Presenting the issue of the possible impact of flexibility in the application of law on the objectification process, it is necessary to refer to the judgment of the Provincial Administrative Court in Lublin of 30 November 2004, case ref. no. II SA/Lu 546/04. In this decision, the authority determined the factual situation, according to which the decision of the Head of the Municipal Social Welfare Centre, issued under the authority of the Head of the Municipality, denied the right to family benefit and allowances to this benefit. The decision in question was upheld by the Local Government Board of Appeal. In determining the facts of the case, the administrative authority indicated that the applicant is a citizen of Ukraine, and she does not have refugee status or permission to settle in the territory of the Republic of Poland. In addition, she resides in Poland. It also follows from the justification of the decision of the Provincial Administrative Court that the applicant has a daughter who is a Polish national. In addition, it can be concluded that the amount of income generated by the applicant was also established in the course of the proceedings. After making the findings of fact, the administrative body proceeded to assess them in terms of generally applicable provisions of law. The need to refer to the value of good of the child was discussed only by the Provincial Administrative Court, which stated that the purpose of the regulation is to grant financial assistance that is to serve the good of the child. Here the "good of the child" corresponds to the constitutional principle of equal treatment of citizens and justice[388].

In the presented decision, it is possible to indicate in a simple a manner what were the factual findings made in the course of applying the law and whether the premises shaping the good of the child were objectified. In that regard, it can be concluded that

387 Ibidem.
388 Judgment of the Provincial Administrative Court in Lublin of 30 November 2004, case ref. no. II SA/Lu 546/04, LEX No.: 8150037.

the established elements of the facts (in so far as no other circumstances have yet been established in the case-file) are of an objective nature. The objectivity of these conditions is based on possible simple ways of establishing the facts, e.g. by means of official documents confirming the given circumstance. Only subsequently comes the evaluation of the situation of the child based on extra-legal criteria. The flexibility of applying the law therefore consisted in deriving the good of the child by referring to the purpose of regulation and constitutional values. Otherwise, adjudging in isolation from the extra-legal criteria could lead to different conclusions.

As can be seen from the above example, the objectivization process can be separated from the evaluation elements, which will be related to the flexibility of the application of the law. However, the sphere of facts should be closely related to the objectivization process. The value of flexibility is linked to the rationalisation process and depends on the use of tools (decision-making discretion, administrative recognition), which lead to a free interpretation due to the changing social environment and spatiotemporal dynamics of the application of the law.

2.2 Discretionary power of the judge

Referring to the concept of discretion[389], one can refer to the definition of J. Stelmach, who, using a dictionary explanation, claims that judicial discretion should be understood as "the possibility of recognizing (by a judge) as a legal norm a norm other than the one previously recognized as a legal norm (rule)". He analyzes the concept of judicial discretion based on positivist and non-positivist concepts of law[390]. In the case of "soft" positivism, judicial discretion simply exists, while in the case of non-positivism it is unlimited (extreme concepts) or subject to certain limitations only (concepts that adopt some positivist assumptions)[391]. In turn, A. Kozak perceives discretion from the external ("political") and internal ("legal") perspectives. The latter is precisely linked to the judicial decision and concerns the behaviour of the subject interpreting the text and issuing the decision[392]. B. Wojciechowski points out that there is a narrow and broad approach to judicial discretion. The narrow approach concerns the freedom of choice of legal consequences formulated in an alternative way. The broad approach is related to the thought process, assessment of facts, interpretation of legal norms, defining their relationships and sometimes creating law[393].

389 The basic works concerning judicial discretionality are: W. Staśkiewicz, T. Stawecki (eds.), *Dyskrecjonalność w prawie*, Warszawa 2010, passim; B. Wojciechowski, op. cit., passim; D. J. Galligan, *Discretionary Powers. A Legal Study of Official Discretion*, New York 2011, passim.
390 J. Stelmach, *Dyskrecjonalność sędziowska w pozytywistycznych i niepozytywistycznych koncepcjach prawa*, [in:] W. Staśkiewicz, T. Stawecki (eds.), op. cit., s. 54.
391 Ibidem, pp. 55 et seq.
392 A. Kozak, *Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa*, [in:] W. Staśkiewicz, T. Stawecki (eds.), op. cit., pp. 59. et seq.
393 B. Wojciechowski, op. cit., pp. 16–17, 66.

The legislator grants the judge discretionary power already at the time of creating the law by introducing vague phrases into the normative text, the interpretation of which depends on the judge's view of the case. In fact, the sources of discretionary powers are found not only in the indicated phrases.

Our findings demonstrate that in the Polish legal order, judicial discretion in relation to the determination of the child's situation is the consequence of:

a) introducing the normative structure "the good of the child", as well as other similar structures, such as: "the good of the student", "the good of common minor children", "the good of the juvenile" into the legal provisions;
b) introduction of the normative structure "the best interests of the child" into the legal provisions;
c) the application by judges of provisions of international law containing normative constructions, such as *the well-being of the child*, *the best interest of the child*, *the welfare of the child*, and other related constructions;
d) the inclusion in the text of the provisions of the construction, which are not a derivative of the construction similar to the "good of the child", whose semantic ranges include a reference to the value of the good of the child.

Judicial discretion largely stems from the legislative intentions and diversity of the general reference clauses introduced in the normative text. Interpretation may be made only in relation to the good of the child[394] or in relation to two or more extra-legal criteria[395], e.g. the good of the child and the public interest. In the latter case, the understanding of the phrase will depend on the interrelationship between the two criteria. For example, the obligation to carry out preventive vaccination is in accordance with the good of the child and the public interest. In this case, the Supreme Administrative Court referred to the content of the provision indicating the grounds for exercising parental authority[396]. It should be noted that shaping the decision-making discretion in the context of the good of the child may affect the freedom to use other extra-legal criteria and vice versa. In fact, the criterion of the "good of the child" has an impact on the determination of legal consequences during the decision-making process.

The principles of law play a special role in the process of applying the law. This role consists in guiding the interpretation due to the axiological, functional and hierarchical significance of the principles in relation to other norms[397].

394 E.g. the judgment of the Supreme Administrative Court of 22 June 2017, case ref. no. II OSK 2366/16, Legalis No: 1649542.
395 E.g. the judgment of the Supreme Administrative Court of 12 July 2017, case ref. no. II GSK 3611/15, Legalis No.: 1672604.
396 Ibidem.
397 Cf. L. Leszczyński, G. Maroń, *Pojęcie i treść zasad prawa*…, op. cit., p. 81.

It is worth mentioning that in relation to the proceedings in cases of children, courts are increasingly willing to use the principles of law as an auxiliary validation argument and thus introduce the criterion of "the good of the child" into their decision-making process. This means that the "good of the child" treated as an element of the principle of law has a strong impact on the decision-making process, starting from validation findings and ending with the justification of the decision to apply the law itself. The same applies to the principle of protecting the rights of the child or the principle of the best protection of the interests of the child. In the course of interpretation, it is sufficient to indicate the legal provision from which the principle of law derives. An example illustrating the strength of the impact of the discussed criterion is the judgment of the Supreme Administrative Court of 30 October 2018 in the case with ref. no. II OSK 1868/16[398]. The facts concerned the legal situation of a child raised by same-sex parents, born by a surrogate, who acquired citizenship by law. The Voivode, refusing to issue a decision confirming the granting of Polish citizenship, previously demanded information leading to the determination of the child's origin. This decision was upheld by the minister, who made a number of arguments. First of all, he stated that the concept of a parent in Polish law is of a legal nature, Polish law does not know the institutions of "single-sex parents", "surrogate mother", and the agreements on surrogacy are invalid. In addition, he pointed out that in Polish law same-sex couples do not have parental rights. According to the authority, the California birth certificate did not confirm the real origin of the child and was contrary to Polish law. The arguments of the authorities were supported by the Provincial Administrative Court, referring firmly to the public order clause expressed in the act of 4 February 2011. – Private international law. According to the court, the principles of the Polish legal order are that the child may have at most two parents (a mother – a woman and a father – a man, emphasizing either their biological ties or those created in the result of adoption), and that the child cannot be the subject of a contract and be deprived of its identity related to natural origin. Consequently, the NSA (the Supreme Administrative Court) took a different position. The court stated that in the present case it is important that "(...) a human being is born, endowed with a natural and inalienable dignity, which has the right to citizenship if one of the parents is a Polish citizen". At the same time , the NSA referred to the criterion of the good of the child, which it derived from art. 3, s. 1 of the Convention on the Rights of the Child. The indicated legal provision refers to the construction of *the best interest of the child*. Despite this, the jurisprudence shows a tendency to refer to the good of the child precisely through the principle of law expressed in art. 3, s. 1 of the Convention, which is confirmed by the fact that the axiological building block of this regulation is based on the discussed criterion.

The example of the above decision shows a strong orientation, as well as analyzing the case in terms of its future legal consequences. Taking into account the criterion of the good of the child as the basis of applicable legal principles in the decision-making

398 Judgment of the Supreme Administrative Court of 30 October 2018, case ref. no. II OSK 1868/16, Legalis No.: 1860297.

process on the application of the law is mandatory from the point of view of correct interpretation.

It follows from the foregoing that the judge's discretion in dealing with cases concerning a child is, in principle, wide-ranging. The reason for this perception of discretion is that, according to the judicial authorities, the "good of the child" must be regarded as a directive, an objective, a premise, a value, a condition. Such a state of affairs is also justified by the existence of a principle, the element of which is the "good of the child", aimed at strongly directing the process of applying the law.

The issue of decision-making discretion, judicial activism and the attribute of judicial independence can be linked to judicial discretion. Reading discretion in the context of the presented issues shapes both its understanding and scope, broadly. The reasons for such a state of affairs may be different and may be conditioned not only by the "visibility" of the good of the child in the legal regulations. Discretion in the application of the provisions on children is always present and results mainly from the specificity of the cases related to a child. It can be concluded that when cases involving a child are settled, this should be done with prudence and on several occasions, balancing the interests of all the participants in the proceedings, taking this criterion into account.

Judicial discretion is connected with freedom of judgement, which should not be confused with arbitrariness. Therefore, judicial discretion should also be treated in terms of skilful and experience-based interpretation of legal provisions using, or rather reconstructing the normative basis of the decision based on the principles of law and normative constructions referring to extra-legal criteria, as well as taking into account the purpose and function of the provision. For example, noticing in the very provisions of a general reference clause, without linking it to a principle of law, may lead to inappropriate inference and thus to a distortion of the outcome of the interpretation. Therefore, it is not enough to "reach" beyond the legal system for values and to make an interpretation on the basis thereof, but there is also a need to verify the thought process with constitutional and conventional norms-principles, and sometimes also to rely on the purpose of regulation.

The decision of the Supreme Court of 31 January 2018 issued in case with ref. no. IV CSK 442/17 can constitute an example here[399]. The order concerns the recognition of the decision of the Danish court on the abolition of joint parental authority and entrusting it to the minor's father. The court of first instance recognised the foreign decision, claiming that such action would not infringe the good of the child. Only the Court of Appeal stated that the effect of the recognition of the decision would be contrary to the Polish public order. The Supreme Court, developing the arguments presented previously by the Court of Appeal, pointed out that "the basic principles of

399 Order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, Legalis No.: 1765977.

public order should be understood as fundamental constitutional principles regarding the socio-economic system and the primary principles governing particular areas of substantive or procedural law, which cannot be automatically identified with the substantive legal conditions for the application of a specific legal institution"[400]. It adopted as such a principle the protection of the child's good, which in the case in question argued in favour of not recognising the decision due to the dominant role of the mother in the child's upbringing.

Furthermore, in the context of the limitations of judicial discretion, one should recall the view regarding taking into account the purpose of a given act of law, reaching for values, provisions of generally applicable law or functioning within the framework of the judicial application of law defined and adopted by the court, as well as the application of the principles of law (including the principle of a democratic rule of law, the demand for uniformity of jurisprudence or certainty of law)[401]. The above should be considered in terms of guiding discretion rather than its limitation, which is related to the earlier distinction between the concepts of freedom and margin of adjudication. In addition, the criterion of the good of the child sometimes breaks away with the formalism[402] associated with ongoing court proceedings, which also confirms the thesis that it cannot be treated in terms of limiting discretion.

The indicated freedom of adjudication is influenced by the character of the phrase "the good of the child", which can in fact be interpreted in many ways, taking into account the context manifested in taking into account, for example, other principles, general clauses, program norms, the specificity of the respective branch of law.

The "good of the child" criterion:

a) guides the operative interpretation;
b) counteracts freedom of interpretation and introduces a margin thereof[403];
c) it must not be regarded as a restriction of the law, but as a means of directing judicial activism (that is to say, the discretionary power of the judge is not absolute but, in cases involving children, it is determined by the content of the construction of the good of the child);
d) should result in constant verification of the existing case-law and theses presented by the representatives of the dogmatics of law.

Referring to the content of the justifications, it must be stated that the subjects participating in the proceedings rarely refer to the norms and principles contained in the

400 Ibidem.
401 B. Wojciechowski points out that the objective of the act limits judicial discretion due to the task of the judicial authority to achieve this goal (cf. B. Wojciechowski, op. cit., p. 199).
402 E.g. the order of the Supreme Court of 24 November 2016, case ref. no. III CZP 68/16, Legalis No.: 1533167; order of the Supreme Court of November 24, 2016, case ref. no. II CA 1/16, Legalis No.: 1565006.
403 B. Wojciechowski also speaks in this tone, claiming that a judge, within the scope of their discretionary power, cannot make arbitrary and discretionary choices (B. Wojciechowski, op. cit., pp. 197 et seq.).

conventions (e.g. art. 3 of the Convention on the Rights of the Child) or constitutional norms (e.g. art. 72 of the Constitution). However, if they do so, the arguments they put forward are not always consistent with a proper understanding of the good of the child, i.e. aimed at their development and protection of their rights. Sometimes it is also the case that the courts wrongly use the judicial discretion granted to them. This means that instead of taking into account the content of norms and principles and deriving value using systemic rules, courts create an understanding of the good of the child in a arbitrary manner. It should be emphasized that the principles of law do not limit judicial discretion, but only direct it. It is this direction that provides the aforementioned freedom of judgment[404]. At this point, it is worth recalling the assessment expressed by A. Strzembosz, who considers all court decisions contrary to the interests of the minor to be incorrect[405]. Therefore, the correct interpretation of legal provisions, i.e. in the spirit of respect for the good of the child (in the case of the above assessment – the good of a minor), through proper shaping of the attitude and respect for rights, is an expression of the correct exercise of judicial discretion and fully expresses it.

Judicial discretion in the case of the child's good is thus manifested in the skilful combination of the extra-legal and normative planes. The boundary (axiological boundary) between one area and the other, i.e. between the axiology of the legal system and open axiology, becomes blurred[406]. The connections between open and intra-system axiology result from the coexistence of principles and clauses, with the very criterion forming an element thereof, as well as from the creation of legal principles containing a reference. The connections between open and intra-system axiology result not only from the coexistence of principles and clauses, the very criterion forms, but also from the axiological entanglement of the good of the child and its connection with the category of children's rights. The criterion itself is part of an open axiology due to its reference to extra-legal values. The strong influence on interpretative activities is caused by the fact that the "good of the child" is an element of a principle of law, as well as results from acts of international law and statutory provisions.

404 E.g. the order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, Legalis No.: 1765977; order of the Supreme Court of 24 November, 2016, case ref. no. II Ca 1/16, Legalis No.: 1565006; order of the Supreme Court of 29 July 2016, case ref. no. V KK 2/16, Legalis No.: 1508201; judgment of the Supreme Administrative Court of 30 January 2018, case ref. no. I OSK 611/16, Legalis No.: 1740445; judgment of the Supreme Administrative Court of 12 July 2017, case ref. no. II GSK 3611/15, Legalis No.: 1672604; judgment of the Supreme Administrative Court of 30 October 2018, case ref. no. II OSK 1868/16, Legalis No.: 1860297; judgment of the Supreme Administrative Court of 15 October 2010, case ref. no. I OSK 1024/10, Legalis No.: 328643.
405 A. Strzembosz, *Nowa ustawa...*, op. cit., p. 50.
406 L. Leszczyński, *Kategoria słuszności*…, op. cit., p. 52.

2.3 Dissenting opinion

Submitting a dissenting opinion as the right of each judge allows for expressing an opinion on the content of the decision[407]. This institution, in matters concerning children, can play an important role for several of reasons mentioned below.

Cases involving children, due to their axiological value, are complex and require careful assessment in the context of establishing facts. The court is required to know the techniques related to the method of justification, it must be proficient in the use of the rules of interpretation, as well as it has to refer to its own experience. Also the form, in which the dissenting opinion is expressed, is worth noticing. It is a statement assigned to a specific judge, written in the first person of singular in the form of a critical opinion as to the content of the justification.

In the case of a dissenting opinion in cases involving children, the assessment may concern subsumption or making legal findings. This is, in fact, the formulation of the judge's own assessment as to the manner in which the provisions are justified and interpreted. Sometimes this assessment may be related to the determination of the facts when it comes to the assessment of the source of evidence. In such a situation, the dissenting opinion will weaken the objectivization process, which is primarily related to the phase of making factual findings.

A dissenting opinion may also provide an incentive for the parties to avail themselves of legal remedies and to review the decision due to the good of the child. In one of the decisions, the Supreme Court addressed this type of case and stressed that the plea raised in the appeal on cassation relates essentially to the application of the general reference clause of "the good of the child". It cannot be argued, in absolute terms, that a breach of the principle of the protection of the good of the child cannot constitute a basis for a cassation appeal. However, in the decision in question, the Supreme Court explicitly referred in its argumentation to the theses on the priority of the good of the child and the factual findings made. Therefore, it pointed to the correct way of interpreting the concept[408].

It should be pointed out that there are only a handful dissenting opinions in Polish judgments, and certainly not many in relation to cases involving children. Evidently, their preparation could contribute to a different view on the understanding of the criterion of the good of the child, sometimes also forming a source of inspiration for the legislator.

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[407] On the institution of dissenting opinion: M. Wojciechowski, *Uzasadnienie zdania odrębnego jako wypowiedź dialogiczna na przykładzie wybranych orzeczeń Trybunału Konstytucyjnego,* Archiwum Filozofii Prawa i Filozofii Społecznej 2018, 1, pp. 69 – 82.

[408] Order of the Supreme Court of 30 April 2021, case ref. no. II CSK 87/21, LEX No.: 3252528.

2.4 Perception of the good of the child by the participants in the process of applying the law

The objectivization process may be weakened by the actions of the parties and participants in the proceedings. As already mentioned, the situation of the child can be perceived from the perspective of the legislator, parties and participants in the proceedings, court, social or professional group (mediators, foundations) and the child.

In the course of applying the law, the court decides whether to carry out certain evidence presented by the parties in the pleadings or submitted during the court hearing. Nevertheless, it should be stressed that some sources of evidence may distort the facts, which the court intends to establish. This is the case, for example, in family matters, in which the parties or participants themselves present their own way of understanding the good of the child through the prism of their procedural situation. These subjects very often refer in their claims to their own interpretation and invoke a violation of the principle of the protection of the good of the child.

The European Court of Human Rights points out that state authorities should strike a balance between the interests of the child and those of parents in such a way as to attach particular importance to the *best interests of the child* in the*balancing process*, depending on their nature and seriousness. Therefore, parents must not undertake activities that could harm the child's development and health[409]. The definition of the nature of interests concerns the distinction between substantive and intangible interests, as established in the case-law of the courts. Values such as health, life, safety, etc. should be taken into account when adjudicating.

The Polish Constitutional Tribunal also notes that the proper implementation of "good of the child" in the proceedings leads to the appointment of a probation officer in the event of referring an indictment concerning a parent in connection with a crime committed to the detriment of a minor and thus it is necessary to exclude the possibility of the other parent representing the child[410]. The legislator decided on the need to protect the good of the child from the threat of the other parent not taking their interests into account. The adopted solution is also to promote the protection of the good of the family and prevent conflicts of values, including constitutional ones. An important argument from the point of view of this work is the emphasis of the Tribunal on the role of parents who act as a "buffer between the child and the outside world"[411], and also

409 Judgment of the ECtHR of 26 February 2004, application No. 74969/01, Görgülü v. Germany. The judgment of the ECtHR of 18 February 2014, application No. 28609/08, A.L. v. Poland, drawn up in the Polish language version, states: "Undoubtedly, the recognition of what is in the »child's best interest« is decisive in cases of this kind; the »good of the child«, depending on its nature and weight, may prevail over the interests of parents". When it comes to balancing, its subject can be only the exclusion of interests, and not the "good of the child" understood as a state.
410 Judgment of the Constitutional Tribunal of 21 January 2014, case ref. no. SK 5/12, Legalis No.: 815910.
411 Ibidem.

help "determine its position in the world, guided by its good, respecting its opinion, beliefs and distinctiveness, but filtering them by their own experience and knowledge, which the child naturally does not posess"[412]. It seems that this role will be played by every representative of the child.

The views expressed by the Tribunal on the good of the child are influenced by the position of the authorities speaking in the case. The Tribunal has repeatedly held that it shares or rejects a particular position in a case on the ground that the "good of the child" constitutes a value to be safeguarded[413]. Thearguments used by the Tribunal in other decisions are often highlighted by the various parties in the case[414].

2.5 The "good of the child" and other open criteria

The relationship between the "good of the child" and other extra-legal criteria is shaped in the course of making legal status determinations. It is then that the court notices the presence of other values, then determines the meaning of the concepts and their relations to each other, which consists in deciding which of them has a superior meaning. These criteria are already initially named in the course of factual findings and at this stage the question of their compilation may arise.

Relating the good of the child to other extra-legal criteria weakens the objectivization process. This is a typically appraisal activity and is associated with rationalisation. In

412 Judgment of the Constitutional Tribunal of 11 October 2011, case ref. no. K 16/10, LEX No.: 992832.
413 E.g. the judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045.
414 As a side not, it is worth emphasizing how authorities other than the Constitutional Tribunal perceive the good of the child and understand its content. Below, we can quote the position of the Speaker of the Sejm, who claims that "the good of the child" is a general clause strictly related to art. 72 of the Constitution: "(...) the basis and main objective of the Act on the Proceedings in Juvenile Delinquency Matters and all the instruments provided for therein is the good of the child, sometimes also called the good of the child. The Law on juvenile proceedings resigned from repression as a means applied to juveniles, indicating that the basic directive that should be followed by the court when examining the case of a juvenile perpetrator is their good understood as shaping their correct personality, in accordance with social standards of conduct, because it is fully in the social interest and as such constitutes the good of the juvenile. According to the Speaker of the Sejm, the use of criminal repression against a juvenile, and in particular custodial sentences, could be dysfunctional and cause a deepening of their demoralization, creating a sense of harm and frustration. This would certainly not facilitate the rehabilitation of the juvenile, which would be detrimental to their good and social interest" (judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045). The arguments used by the applicants in assessing the perception of the good of the child are also quite original. For example, it may turn out to be unfair for a female judge to make a decision, in the opinion of a father claiming his rights in court. In this respect, additional research should be carried out, as it is difficult to see how the differential composition of adjudicating panels, consisting of exclusively women and men, as well as mixed panels of judges, would work. At the moment, it seems reasonable to assume the impartiality, objectivity and uniformity of judicial decisions. Without deciding on the results of such research, it should be stated that these are only assumptions that can in fact be refuted. What can be concluded from the above examples is that the "good of the child" will rather be perceived through the prism of the interests of entities who care about the direction of the decision.

the course of judicial application of the law, extra-legal criteria may be complementary. In addition, it is worth considering whether the criterion of the good of the child will have the character of a dominant criterion, or if it will perform rather an accessory function.

Referring to the complementarity of extra-legal criteria, it is necessary to demonstrate how they operate in individual areas of the legal system. In family and guardianship law, an example of supplementation may be the lack of contraindications to divorce due to the lack of conditions for violating the good of the child and the principles of social coexistence[415]. In administrative law, when it comes to granting cash benefits, the "good of the child" coexists alongside the good of the family. These two values are usually complementary[416]. In the case examined by the Criminal Chamber of the Supreme Court, concerning a physician, who subjected hospitalized minors to other sexual activities, the "patient's good" is equated with the good of minor children[417]. On the other hand, in the proceedings against the Social Insurance Institution in the case of non-payment, the "good of the child" is the same as the interest of the society (category mentioned by the court)[418].

Courts relatively often relate the discussed value to other extra-legal criteria. This is because, in these specific cases, the "good of the child" forms part of each of these criteria and, in addition, they are specific in their nature. The last feature is that the protection of the good of the child is unique and should be ensured absolutely because of their lack of objective possibilities to exercise their rights and understanding of the world surrounding them. Besides, violations of the good of the child generate serious sanctions. An example could be the recognition that the punishment imposed against the perpetrator is too lenient[419].

Depending on the branch of law, the discussed value may be a separate or additional criterion. In tax law, the "good of the child" is rather ancillary. It occurs in the argumentation of the parties as an element complementing the value of the good of the family or in comparison with other values: parenthood, motherhood[420]. Sometimes administrative courts do not refer to the good of the child despite presence of this criterion in the participants' arguments. This usually happens in cases where, on the basis of the legal provisions themselves, a legal problem can be solved for the benefit of

415 Judgment of the Court of Appeal in Łódź of 27 September 2017, case ref. no. I ACa 168/17, LEX No.: 2387005.
416 Judgment of the Provincial Administrative Court in Gliwice of 1 September 2018, case ref. no. IV SA/Gl 382/18, LEX No.: 2555090.
417 Judgment of the Supreme Court of 19 March 2015, case ref. no. SDI 2/15, LEX No.: 1663831.
418 Judgment of the Supreme Court of 7 December 2017, case ref. no. II UK 619/16, LEX No.: 2434458.
419 Judgment of the Supreme Court of 19 March 2015, case ref. no. SDI 2/15, LEX No.: 1663831 - to the extent that the disciplinary penalty imposed is too lenient in the face of the seriousness of the disciplinary act, which also constitutes an offence.
420 Judgment of the Constitutional Tribunal of 12 April 2012, case ref. no. SK 62/08, LEX No.: 824141.

the minor without the need to relate the extra-legal criteria to each other[421]. In criminal law, the criterion of "the good of the child" may be corrective and strengthening for the interpretation, as well as affecting the course of the proceedings. For example, in the event of a discrepancy between the recording presented by the mother and the testimony of the aggrieved child as a witness. Both the "good of the justice system" and, above all, the protection of the good of the child, require that the evidence be taken in accordance with Article 185a of the Code of Criminal Procedure[422]. In family and guardianship law, the criterion in question is dominant, e.g. in the case concerning the recognition of a judgment of a foreign court, it was compared with public order[423]. However, in matters relating to constitutional law, the nature of the criterion depends on the type of legal provisions referred to by the applicant or which are subject to review by the Constitutional Tribunal.

It seems that it is difficult to clearly indicate in which cases the "good of the child" will be of a corrective nature, and in which cases it will strengthen the interpretation. As a general rule, where the situation of the child is directly affected, the "good of the child" should be the basic criterion. On the other hand, in cases that indirectly take the child's situation into account, the "good of the child" strengthens or corrects the way legal provisions are understood.

3 Factors strenghtening the objectivization process – justification of the court decision

3.1 Uniform application of the law

Recent studies confirm the existence of a kind of precedent character of judgments in the statutory law order, despite the fact that this feature has so far been associated with the *common law system*[424].

The precedent in the theoretical and legal sense is a legal category, which, according to J. Wróblewski's views, is a decision normatively or actually influencing the making of a different decision[425]. It distinguishes four key types of precedents: sensu *strictissimo*,

421 Order of the Supreme Administrative Court of 15 December 2017, case ref. no. II OZ 1550/17, LEX No.: 2411480.
422 Judgment of the Supreme Court of 1 February 2008, case ref. no. V KK 231/07, LEX No.: 354853.
423 Order of the Supreme Court of 21 January 2018, case ref. no. IV CSK 442/17, LEX No.: 2483681.
424 Works in this area were created in Lublin as part of the research project entitled *Potencjał argumentacji precedensowych w polskim porządku prawnym (ujęcie teoretyczno-porównawcze)* financed by the National Science Centre under the supervision of prof. dr. hab. Leszek Leszczyński. As part of the project, the following monographs were created: *Precedent sądowy w polskim porządku prawnym* edited by L. Leszczyński, B. Liżewski and A. Szota, as well as *Precedens w procesie orzekania. Perspektywa sędziowska w ujęciu porównawczym (Precedent in the judical proces. Judges' Perspective in a Comparative Approach)* by L. Leszczyński and J. M. Marshall.
425 J. Wróblewski, *Precedens i jedolitość sądowego stosowania prawa*, „Państwo i Prawo" 1971, p. 525.

sensu *stricto*, sensu *largo* and sensu *largissimo*[426]. The first of these consists in repeating the original decision (the first one) in a successive decision on the application of the law. A sensu *stricto* precedent means taking such actions that consist in deriving another decision from the original decision by means of reference rules. The third type of precedent consists in justifying the decision with the same rules as those used to justify the original decision. Lastly the sensu *largissimo* precedent indicates the justification for the decision to apply the law by other means than in the case of the sensu *stricto* and sensu *largo*[427] precedents. The publication entitled *Precedens sądowy w porządku prawa stanowionego* also distinguishes the following precedents: binding and non-binding precedents, *de jure* and *de facto*, persuasive and illustrative, abstract and concrete, decision-making and interpretative, law-making and those not creating law[428].

L. Leszczyński also notes that in the Polish legal system the term "precedent" is associated with another expression, i.e. "an earlier (other) decision"[429]. The above proves that different types of precedent are a common category in Polish jurisprudence. In turn, M. Zirk-Sadowski claims that "(...) the term 'precedent' used in our language has its specific meaning, resulting from our legal culture. This term occurs in different meanings depending not only on the legal system in which it appears, but also on the basis of a different theoretical justification for such decisions[430]". The literature in the field of theory of law indicates that the precedent in the *common law* system is a different legal category due to the lack of the *stare decisis* rule in stated law order in relation to the issued judgments, nor the *decidendi ratio* and the *orbiter dictum*[431].

Most simply, the term precedent was defined by N. MacCormick and R. Summer, who stated that it is such a court decision that forms the model (basis) for subsequent decisions[432].

The precedent characteristic of judgments concerning the good of the child is related to the value of uniformity of case law. In the context of the good of the child, the repetition of elements of judicial case-law primarily concerns issues such as:

a) pointing out the role of the good of the child in the decision-making process of applying the law in the context of classifying this criterion as a value, as well as the premise, exception, assumption, etc.;

426 Ibidem, as well as L. Leszczyński, *Precedens w porządku prawa stanowionego. Ujęcia polskiej nauki prawa*, [in:] L. Leszczyński, B. Liżewski, A. Szot (eds.), op. cit., p. 7.
427 Types of precedents are discussed in: L. Leszczyński, *Precedens w porządku prawa*…, op. cit, pp. 7 et seq.
428 Ibidem, pp. 8 et seq.
429 Ibidem.
430 M. Zirk-Sadowski, *Precedens a tzw. decyzja prawotwórcza*, „Państwo i Prawo" 1980, p. 70.
431 M. Myślińska, *Precedens w orzecznictwie Trybunału Konstytucyjnego*, [in:] L. Leszczyński, B. Liżewski, A. Szot (eds.), op. cit., pp. 44 et seq.
432 N. MacCormick, R. Summer, *Interpreting Precedents. A Comparative Study*, Dartmouth 1997, p. 1.

b) the priority given to the good of the child;
c) classifying the good of the child as an element of the principle of law and the general reference clause;
d) referencing dogmatic and legal approaches to the good of the child;
e) referring to the premises constituting the understanding of the good of the child;
f) recourse to the rights of the child by means of systemic and axiological rules;
g) presenting solutions to a similar legal problem on the example of other court decisions.

In the case law of the courts of appeal, the Supreme Court, provincial administrative courts, the Supreme Administrative Court, the Constitutional Tribunal and the European Court of Human Rights, there is a precedent character of referring to the good of the child, and the indicated aspects of referring to the discussed criterion do not change.

The European Court of Human Rights refers to its own judgments, or rather to the standards expressed there[433], which is related to the specificity of the order created within the Council of Europe[434]. These judgments analyse the facts related to their subsequent assessment in terms of the good of the child. The feature of precedence concerns emphasizing the value of the good of the child and the best interests of the child in the decision-making process of applying the law, which consists in treating the good of the child as an important value from the point of view of the adjudicator[435].

The Court's jurisprudence standards, reproduced in subsequent judgments, are typically subjective in their nature. They are constructed on the basis of specific facts and then used by the Court in further deliberations. A characteristic feature of the judgments of the Court is the duplication of many standards in a single judgment. This certainly has a persuasive character.

As noted by B. Liżewski, the construction of the jurisprudence standard by the authority is based on formulating fragmentary patterns of behaviour, which only as a set form a compiled whole[436]. This is also how the precedents set by the Strasbourg Court should be understood. In the opinion of M. Balcerzak, judgments of the European Court of Human Rights have the status of interpretative precedents due to their impact on the

433 Judgment of the ECtHR of 18 January 2018, application No.: 28481/12, Kamińska v. Poland, ECtHR judgment of 10 January 2017, application No.: 32407/13, K. Nowakowski v. Poland.
434 The specificity of the order of the Council of Europe lies in the fact that the source of law in its case are the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as well as the additional protocols to the Convention. The content of the Conventions and Protocols is of a general nature, hence the knowledge on the understanding of such general provisions is provided by the jurisprudence of the European Court of Human Rights.
435 Cf. e.g. the judgment of the ECtHR of 25 January 2011, application No.: 18830/07, Płaza v. Poland.
436 B. Liżewski, *Precedens w orzecznictwie Europejskiej Trybunału Praw Człowieka,* [in:] L. Leszczyński, B. Liżewski, A. Szot (eds.), op. cit., pp. 119 et seq.

interpretation of standards beyond an individual decision[437]. In addition, he points out that there are *de facto*precedents in the case-law of the Court, which, he argues, "co-designate the content of the obligations of states under the Convention (...)"[438] The above comments made by B. Liżewski and M. Balcerzak are correct because the theses from individual judgments of the European Court of Human Rights constitute an important argument in other individual cases settled in Strasbourg.

The precedent nature of referring to the good of the child in the jurisprudence of the Constitutional Tribunal consists primarily in the use of theses from its own judgments[439]. In cases involving children, it happens that the Constitutional Tribunal also refers to the judgments of the European Court of Human Rights[440] or the Supreme Court[441]. In connection with the above, there is a tendency to use internal precedents, described in the first sentence of the paragraph of this work, and to the occurrence of external precedents, i.e. referring to the rules from decisions of another body than the adjudicating body[442]. On the one hand, the Tribunal, referring to the theses of its judgments, upholds the current considerations made previously, does not argue with them, and indicates their validity. Whereas in relation to the theses from judgments of other bodies, it demonstrates that its opinion is not isolated.

In addition, it is worth mentioning that the Constitutional Tribunal has a different role than other national courts. It is to adjudicate on the following matters: compliance of international laws and agreements with the Constitution; compliance of acts with ratified international agreements, the ratification of which required prior consent expressed in the Act; compliance of legal provisions issued by central state bodies with the Constitution and ratified international agreements and laws; compliance with the Constitution of the objectives or activities of political parties; constitutional complaint (art. 188 of the Constitution). The control exercised by the Constitutional Tribunal generally occurs in relation to a specific factual situation. The role of these factual circumstances boils down to illustrating the issue of constitutionality of regulations on a

437 M. Balcerzak, *Oddziaływanie wyroków Europejskiego Trybunału Praw Człowieka w sferze* inter partes i erga omnes, [in:] A. Śledzińska-Simon, M. Wyrzykowski (eds.), *Precedens w polskim systemie prawa*, Warszawa 2010, p. 165.
438 Ibidem.
439 E.g. the judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186.
440 For example, in the judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186; in the judgment of the Constitutional Tribunal of 16 July 2007, case ref. no. SK 61/06, LEX No.: 299991.
441 For example, in the judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
442 F.G.E. Sundberg, *The European experience of human rights proceedings: the precedent value of the European Court's decisions*, „Akron Law Review" 1987, no. 20, p. 631.

specific example[443]. The "good of the child" will therefore be a criterion (premise) for the assessment made by the Constitutional Tribunal.

In the jurisprudence of Polish common and administrative courts, references to other decisions are external and internal in their character. A characteristic feature here is the settlement of cases on the basis of a specific factual state, but also the instance control, which allows to verify the findings made by the courts. In addition, the Supreme Court and the Supreme Administrative Court adopt resolutions aimed at resolving a legal issue, but they still bind it to a specific factual situation[444]. A slightly different situation arises in the case of a request for clarification of legal provisions, the application of which has caused divergences in the[445]case-law of administrative courts or common courts[446]. In this case, the authority shall assess the legal provisions.

There is a tendency in the jurisprudence to self-reference, as described in the literature[447]. According to M. Balcerzak, this is a reference to the rule from the previous judgment in an unconstrained manner, which can be identified with a non-binding precedent[448]. In the case of the good of the child, the courts refer to the theses that generally explain a specific legal problem, e.g. in the context of consenting to a medical procedure and thus repealing the unlawfulness of medical intervention and leading to the abolition of liability for the procedure, but not excluding liability for a mistake in the medical art[449]. There are also theses that directly refer to the child's situation, e.g. the possibility of changing the final decision[450].

In the analyzed case law, the courts do not state reasons for referring to their earlier decisions. In this way, it can be assumed that they emphasize their position, indicate uniformity and certainty in the application of the law, and endorse the existing jurisprudence. The practice of referring to several judgments may indicate the acceptance of long-standing judicial practice.

443 E.g. the judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
444 E.g. the resolution of the Supreme Court of 13 May 2015, case ref. no. III CZP 19/15, LEX no.: 1679823; resolution of the Supreme Court of 20 June 2012, case ref. no. I KZP 9/12, LEX No.: 1168741.
445 For example, the resolution of the panel of seven judges of the Supreme Administrative Court of 11 December 2012, case ref. no. I OPS 6/12, LEX no.: 1230397; resolution of the panel of seven judges of the Supreme Administrative Court of 9 December 2013, case ref. no. I OPS 3/13, LEX No.: 1408519.
446 For example, the resolution of the panel of seven judges of the Supreme Court of 5 June 2012, case ref. no. III CZP 72/11, LEX No.: 1230228; resolution of the panel of seven judges of the Supreme Court of 14 November 2014, case ref. no. III CZP 65/14, LEX No.: 1551373.
447 M. Balcerzak, op. cit., p. 174, as well as the literature indicated there, e.g. E. Lambert, *Les effets des arrets de la Cour europeenne des droits de l'homme*, Bruxelles 1999, pp. 397 et seq.
448 M. Balcerzak, op. cit., p. 174.
449 For example, in the judgment of the Constitutional Tribunal of 11 October 2011, case ref. no. K 16/10, LEX No.: 992832.
450 For example, in the resolution of the Supreme Court of 22 November 2017, case ref. no. III CZP 78/17, Legalis No.: 1684119.

Returning to the theses listed at the beginning of the present subsection of the work and related to the good of the child, it should be stated that only in the case of referring to the premises constituting the understanding of the good of the child, one can talk about the phenomenon of objectivization and thus their consolidation. It also seems that in other cases objectivization does not occur due to the characteristics of the described process already presented in this work. In relation to the analysed case-law, objectivization does not take place outside the factual pattern, i.e. in the case of a reference to the good of a child treated as an abstract concept. For example, the adoption of a resolution at the request of a competent authority in the field of clarification of legal provisions is in fact an assessment of the entity applying the law.

It should be noted that the judgment does not end the objectivization. Based on the analyzed judicial case-law, two more moments relevant to the ongoing trial can be captured. Firstly, in the course of the judicial review in relation to a given case (i.e. before the decision is finalised), as well as in the course of adjudication in other cases in connection with the uniformity of application of the law.

J. Wróblewski links the uniformity of the application of law with court decisions, which means that courts issue decisions of the same type in certain types of cases[451]. The value of uniformity in the application of the law can be considered in terms of both content and form[452]. In the first place, courts react in a similar or identical way to a given factual situation on the basis of the same legal situation[453]. In the second approach, uniformity means that a specific type of case evokes the same reasoning in the course of the decision-making process, the same type of interpretative validation and reconstruction findings, and thus reaching the same type of decisions[454]. According to J. Wróblewski, the uniformity of court decisions is a correlation of another value, i.e. certainty of judicial application of the law[455].

From the point of view of judicial jurisprudence in the field of the good of the child, uniformity will be manifested in:

a) the development of uniform case-law standards in the field of understanding the good of the child;
b) applying similar reasoning, taking into account systemic-axiological and axiological rules;
c) using the premises shaping the understanding of the criterion.

The question to be asked concerns the impact of uniformity in the application of the law on the objectivization process in relation to the conditions shaping the understanding of

451 J. Wróblewski, *Wartości a decyzja sądowa…*, op. cit., p. 130.
452 A. Korybski, L. Leszczyński, op. cit., p. 180.
453 Ibidem.
454 Ibidem.
455 J. Wróblewski, *Wartości a decyzja sądowa…*, op. cit., p. 129.

the child's good. The subject of this work determines the need to assume that the issues of uniformity and objectivization juxtaposed in mutual relations should be analyzed in the optics of a particular case. The reason for that will be presented below.

The well-established line of jurisprudence created by the practice of applying the law perpetuates certain ways of thinking in terms of perceiving the good of the child (jurisprudence theses). Therefore, the development of uniform jurisprudence is not objectivization, but a typically rationalised process. This is because they arise in the result of the thought process and thus combine with subjectivity. On the other hand, the objectivization process should be strictly related to the factual findings.

Attention should also be paid to the view on the duplication of templates, assessments and opinions. Namely, F. Longchamps referred to the issue of the impact of law on human behaviour, seeing the potential in the repeatability of certain beliefs, theories, assessments or norms. He believed that it was obvious that they are objectivized in the consciousness of people who interact with each other. Moreover, according to him, the normative structure itself is something objective[456]. Following this line of thinking, it must be stated that the repeatability of some elements, e.g. jurisprudence theses or approved approaches to the good of the child, could indicate objectivization or objectification. In such a case, there could be an objectivization of the criterion of "the good of the child" in general terms. However, the claims that lead in this direction must be regarded as wrong. The imperfection of the presented argumentation will result from the fact that at the source of the repeated formulation there is the variability of the social environment, values, legal norms. This means that each time it proves necessary to assess the respective state of affairs, in accordance with the internal worldview. The statements of P. Berger concerning externalisation, objectivization and internalisation, which have already been mentioned, do not confirm the objectivization process either, but only the rationalisation that is taking place.

In turn, referring to the methodological concept of objectivity that was used by L. Rodak, and formulated by J. G. Postem[457], one should pay attention to the imperfection of the objective features of legal discourse formulated by him. These features are:

a) the form and content of the arguments determine their acceptance by all reasonable participants in the discourse;
b) the arguments must be assessed and put forward fairly;
c) discourse participants accept the consequences and criticism, and are involved in the trial in good faith, avoiding premature judgments;
d) the participants are willing to participate in the process;

456 The views of F. Longchamps reported in the following work: E. Skorczyńska, *Luka w prawie. Istota zjawiska oraz jego znaczenie dla prawa administracyjnego*, Warszawa 2017, pp. 60 et seq.
457 L. Rodak, *Solidaryzm…*, op. cit., p. 27, as well as a reference to G. J. Postema, *Objectivity Fit for Law*, [in:] B. Leiter (ed.), op. cit., p. 213.

e) the participant's participation must not be restricted and the discourse itself should continue until an agreement is reached.

These elements indicate the role that communication plays in the application of law and the importance of individual arguments. In fact, the power of discourse presented by J. G. Postem, and by L. Rodak inspired by his research, as well as others, such as F. Longchamps, is significant, but not sufficient in the context of the present work. In this research, it is also about showing the concept of so-called objectivity *as publicity*, based on the exchange of arguments, and maybe that is why it is worth asking for replacing the term "objectivity" with another concept, i.e. rationality.

The process of applying the law is not a set of simple, schematic activities, but it also requires a contextual approach and analyzing different elements each time (e.g. referring to values, linking to assessments, arguments of the parties and participants in the proceedings). There is a place for objectivization understood in this strong sense, forming the basis or part of the process of rationalisation, or, using the term adopted by J. G. Postem, the *as publicity* objectivity. In turn, L. Rodak and M. Stępień note the existence of the so-called objectivity argument[458]. It is possible that applying such an argument and proving in the discussion that something is objective instead of rational, strengthens the authority of power. However, it seems that combining these two phenomena is less than convincing. Something that has occurred may be objective, but what is rational, for example, is to decide on the use of a specific legal remedy.

The uniformity of the case-law therefore certainly affects the objectivization of the good of the child in an individual sense, but only by distinguishing or noticing the existence of objective premises shaping the understanding of this criterion and consolidating the practice in the scope of its application.

Uniformity can also be noticed in the judgments of courts of appeal issued during the judicial review. In the course of the review, the courts refer to the correctness of the arrangements made before the body of the first instance, which affect the creation of the child's situation[459].

It should be noted that in there are both decisions similar to each other, but also those that have nothing to do with uniformity in circulation. The lack of uniformity in the application of the law does not affect the process of objectivization of the good of the child. This means that factual findings are made in each case, while the issue of

458 L. Rodak, M. Stępień, op. cit., pp. 274–281.
459 Examples of judgments: judgment of the Supreme Administrative Court of 17 November 2017, case ref. no. I OSK 1046/17, LEX No.: 2417898; judgment of the Supreme Administrative Court of 4 October 2017, case ref. no. I OSK 778/17, LEX No.: 2423136; judgment of the Supreme Administrative Court of 22 August 2017, case ref. no. I OSK 947/17, LEX No.: 2339734; judgment of the Supreme Administrative Court of 11 December 2017, case ref. no. I OSK 1506/17, LEX No.: 2436040.

correctness in the assessment or qualification made in terms of maintaining uniformity constitutes a separate issue. The case is similar with a change in the jurisprudence line, which in the process of applying the law does not negate the phenomenon of objectivization in the strong sense thereof.

3.2 "Defining" the good of the child in jurisprudence (precedent significance of theses)

3.2.1 The case law of the Supreme Court

It follows from the case-law that the "good of the child" should be interpreted in conjunction with various legal regulations or read in certain realities of the facts. In the first case, it is possible to observe the normative context, i.e. the systematic understanding of the good of the child and the correlations between legal provisions within one legal act or individual areas of law. A frequent activity of the Polish Supreme Court, and also the Supreme Administrative Court, which will be discussed later, is to refer to constitutional and conventional norms using systemic-axiological as well as systemic-structural rules. Contextual definition in the reality of a specific factual state boils down to determining how to understand the good of the child in an individual case.

In legal transactions, there are judgments whose fragments of justifications are suitable for repeated reproduction in order to emphasize the role of the good of the child. One of the decisions in which the court indicates how it understands this concept is the order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17. It distinguishes two aspects constituting the content of the construction of the good of the child, i.e. the material and spiritual/emotional aspects, while in another fragment of the same decision other components can also be indicated, which should be treated in more detail. The "'good of the child" therefore covers the whole sphere of the most important personal matters of the child, such as physical and spiritual development, appropriate education and upbringing, and preparation for adult life. This criterion also has a clear material dimension, which consists in the need to provide the child with means of subsistence and for achievement of personal objectives, and, where the child holds property, also in taking care of their financial interest[460]". The Supreme Court developed a dogmatic understanding of the concept of the good of the child in such a way that as part of the personal aspect, it distinguished:

a) physical development of the child;
b) spiritual development of the child;
c) adequate education;
d) proper upbringing.

460 Order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, LEX No.: 2483681.

As part of the material aspect, the Supreme Court adopted:

a) providing the child with the means to live and achieve personal goals;
b) caring for the child's property.

The adjudication of the situation should be as flexible as possible and adapted to the child's current life situation with a perspective set onto its future. The direction of this flexibility should be determined by the "good of the child", i.e. the "state" in which the child achieves proper and harmonious development, taking into account their rights, respecting dignity, as well as the right to a happy childhood[461].

In another decision, the Supreme Court states that the understanding of the concept of the good of the child "depends on the specific factual circumstances in which the child is located. Account should be taken in particular of the right to protection of life and health, to development in a fair and undisturbed manner and to respect for dignity and to participate in the decision-making process"[462]. Apart from the specific facts, the right to protection of life and health consists, for example, in ensuring access to appropriate medical care, ensuring protection from parents, providing childcare in a manner free from domestic violence and protection against external violence. In turn, proper and undisturbed development means creating conditions in which the child can develop emotionally and intellectually. The autonomy of the child's will, which manifests itself in the co-decision about its own situation, has an extremely important impact on the shaping of the child's situation. This element is introduced, among others by the Constitution, EU regulations, provisions of international law, provisions of medical acts[463]. The autonomy of the child's will boils down to expressing one's own opinion, view, consent to a specific action – usually cumulative, alongside another subject, objection in a specific subject. The consent procedure may be formalised (e.g. as hearing a child, expressing written consent to a medical procedure) or non-formalised (in everyday situations).

461 The definition of the good of the child formulated for the purposes of the new Family Code emphasizes the state in which the child achieves correct, holistic and harmonious mental, physical and social development, with respect for their dignity and the resulting natural rights. This good is shaped, in particular, by positive personal relationships, family relationships and educational situations". The second sentence emphasizes above all the ways of shaping this state, putting the extra-material sphere in the fore.

462 Order of the Supreme Court of 24 November 2016, case ref. no. II Ca 1/16. Lex No.: 2216088.

463 A child is a person who also has the right to express their opinion about themselves. A number of rules define the manifestations of such codecision. For example, the Constitution, in art. 72 s. 3 states that "organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child". Furthermore, in art. 4a of the Act on Family Support "Entities performing tasks under this Act, in particular, assessing the situation of a child placed in foster care and qualifying the child for adoption, are obliged to listen to the child, if their age and degree of maturity allow it and, as appropriate, take their opinion into account". Another example is the consent of the minor to, among others, medical procedures, surgical procedures, the use of a method of treatment or diagnosis posing an increased risk to the patient, conducting a medical experiment in accordance with the Act on the professions of doctor and dentist.

Occasionally, in the grounds of the judgments, the courts indicate that the "good of the child" requires an analysis of both their current and future situation. This second way of understanding the good of the child is also confirmed by jurisprudence[464].

In the achievements of appellate courts, the "good of the child" occurs in the context of, for example, violation of personal rights. The protection of the "good of the child" is manifested in the award of compensation or reparation, which underlines the protection of the child's financial interests[465]. Here, the decisions mainly concern medical errors, including birth defects or post-accident claims that result in the disability of the child[466]. In one of the decisions, the Court of Appeal in the case for compensation for the child after the death of the parents, lists which values and rights have been violated or what negative consequences have occurred in the result of unlawful act, e.g.: lack of care and care on the part of the parent; lack of their help in future upbringing; a sense of orphanage; a sense of lower value towards peers; loneliness and life difficulties of the child who, during adolescence and also later, will not benefit from the support of one or, in dramatic cases, both parents; suffering and disruption of the sense of security; the prospect of life without the support of the parent[467]. The example of this decision proves that the parties' task is precisely to demonstrate how the current life situation of the child has changed in the result of the death of the parent and how it will look in the future.

In the justifications of the Supreme Court's judgments, there is also a reference to the good of the conceived child. In one of the judgments in which this term appears, the recipient's concealment of the child's biological origin was caused by fear of the use of violence. Preventing abuse of family members is of particular importance here, which strengthens the concern for the good of the children and the good of a non-biological child[468]. It should be emphasized that courts are usually cautious in extending the good of the child onto a conceived being. Such a restrained attitude results primarily from ethical disputes, which seem to be unresolvable. Nevertheless, the legislator is trying to adopt compromise solutions in this regard[469].

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464 Order of the Supreme Court of 22 June 2012, case ref. no. V CSK 283/11. Lex No.: 1232479.
465 Judgment of the Court of Appeal in Warsaw of 15 September 2017, case ref. no. I ACa 1027/16, LEX No.: 2381493.
466 In one of the judgments, the Court of Appeal refers to the statement that a "sick child means a sick family", which takes into account the impact of the minor's situation on the family sphere (Judgment of the Court of Appeal in Białystok of 17 August 2017, case ref. no. I ACa 835/14, LEX No.: 2390584).
467 Judgment of the Court of Appeal (SA) in Łódź of 27 July 2017, case ref. no. I ACa 1782/16, LEX No.: 2365591.
468 Judgment of the Supreme Court of 10 August 2017, case ref. no. II CSK 871/16, LEX No.: 2420321.
469 It seems that some sort of a solution is, for example, the introduction of art. 1 of the KPD, which reads as follows: "For the purposes of this Convention, 'child' means any human being under the age of eighteen years, unless he or she has previously attained the age of majority in accordance with the law relating to the child." The Convention, as an act of international law, the application of which is agreed by the multicultural States, should be interpreted in accordance with the interests of all actors. Therefore, it is not possible to introduce

In another judgment, relevant from the point of view of the good of an unborn child, the Supreme Court used the principle of protecting the good of the child in order to protect the rights of the *nasciturus*. A child conceived, provided that it is born alive, should be treated in the same way as a child born, if the spheres of their rights, in the opinion of the Court, overlap[470]. The principle will therefore apply on a conditional basis. There is also a compromise solution in the case-law regarding the protection of the good of the unborn child. "The protection of the life of an unborn child as a human life begins with the occurrence of medical indications for caesarean section surgery, and the requirement of such protection by the physician as the guarantor from the moment of the emergence of threat to the foeuts to the extent justifying the probability of the need to perform such surgery"[471]. Of course, such a solution can be approved and denied, but it is rather impossible to find an ideal solution in this respect, which can be proposed in a normative act.

Also noteworthy is the thesis formulated by the Supreme Court of "accepting a child for upbringing", understood as the actual care of the child (care for the good of the child), regardless of the formal status of its guardian[472]. The protection of the good of the child is manifested by an appropriate selection of employees in educational institutions, upbringing institutions, orphanages[473], which will also provide the child with actual care and a sense of security. The constituent element here is to provide the child with actual care[474].

By using the normative structure of the "good of the child", courts can "reach" for extra-legal values, without which it would not be possible to issue a relevant decision. These values are: life or health (when a child co-decides on the process of their treatment or the court issues a substitute consent for a medical procedure); safety (the value is emphasized in cases of domestic violence); emotional ties with parents, grandparents, siblings (these values are visible in family and guardianship law cases); care (in family cases) or dignity (providing medical services). The protection of the above-mentioned values has a normative overtone. It can be inferred from the provisions governing the protection of natural rights. Strengthening this protection may be the criterion of the good of the child occurring as an element of a legal provision in the form of a reference or deriving values using systemic-structural, systemic-axiological and axiological rules from the Convention on the Rights of the Child, art. 72 of the Constitution or other normative acts.

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rigid regulations that impose the need to regulate issues that may be difficult to resolve from an ethical point of view.

470 Judgment of the Supreme Court of 30 November 2016, case ref. no. III PK 17/16, LEX No.: 2188646.

471 Judgment of the Supreme Court of 27 September 2010, case ref. no. V KK 34/10, LEX No.: 612469.

472 Judgment of the Supreme Court of 14 December 2017, case ref. no. II UK 644/16, LEX No.: 2435652.

473 Judgment of the Court of Appeal in Gdańsk of 13 September 2017, case ref. no. III APa 11/17, LEX No.: 2416072.

474 Judgment of the Supreme Court of November 18, 2014, case ref. no. II UK 52/14, LEX No.: 1567479.

In the jurisprudence of the Supreme Court, its constituent element was emphasized, consisting in the proper regulation of contacts. In proceedings concerning contacts or determining the child's place of residence, there is a tendency towards objectification of the child, as a rule, from the perspective of parents[475]. The application of the criterion of the good of the child allows, for example, to depart from the statutory requirements for a candidate for a foster parent[476]. In a similar tone, the Supreme Court expresses itself in another decision, arguing that entrusting foster care to a candidate who does not have specific qualifications may prove to be a justified solution from the point of view of the good of the child[477]. Providing the child with proper care, understood as an actual one performed by appropriate persons, i.e. those who know or are properly trained, is another element constituting the content of the good of the child construction. In this way, values such as: love, care, security, proper mental development are realized. The child's situation should be shaped in such a way as to eliminate possible abstract threats that may occur in the near future and pose a threat to the good of the child.

The jurisprudence of the Supreme Court also includes the thesis about the inseparability of the adoption relationship due to the premise of the good of the child[478]. In similar cases, the courts pay attention to meeting the child's emotional needs, as well as creating appropriate family conditions. The children and their development are destructively affected by constant changes and lack of a sense of belonging to a specific family that provides them with appropriate conditions for development. Any disturbance in the child and any parenting problems associated with it cannot constitute the basis for terminating the adoption relationship, unless the "good of the child" supports it. A situation in which this premise is applied may occur, for example, when the child has been adopted by a guardian with mental health issues or alcohol addiction. The element constituting the content will be ensuring the child's upbringing in a safe family environment, as well as the invariability of the marital status.

The correlations between the interests of the child victim and those of the accused are evident in the context of the exercise of the rights of the defence. The courts emphasize that "the exercise of the right of defence in all its forms provided for in the procedural law is not an absolute good, dominating over all other goods also protected by law, including the obligation to protect the rights of the victim. This is particularly the case when it comes to victims of sexual crimes, and the need for this protection is further increased when the victim of such acts is a minor child. Particular sensitivity and the

475 Judgment of the Supreme Court of 28 January 1999, case ref. no. III CKN 137/98, LEX No.: 1214379.
476 Order of the Supreme Court of 24 November 2016, case ref. no. III CZP 68/16, LEX No.: 2153394.
477 Order of the Supreme Court of 24 November 2016, case ref. no. II CA 1/16, LEX No.: 2216088.
478 Judgment of the Supreme Court of 13 September 2017, case ref. no. IV CSK 191/17, LEX no.: 2398362; judgment of the Supreme Court of 11 March 1976, case ref. no. IV CR 29/76, LEX No.: 7808; judgment of the Supreme Court of 5 April 1972, case ref. no. I CR 679/71, LEX No.: 7079; judgement of the Supreme Court of 24 November 1971, case ref. no. I CR 512/71, LEX No.: 1345; judgment of the Supreme Court of 17 June 1970, case ref. no. II CR 227/70, LEX No.: 6751.

lack of fully formed defence mechanisms require protecting the victims of this category from the so-called secondary victimization resulting from their repeated involvement in procedural activities"[479]. The thesis cited was formulated in relation to the withdrawal from the interview of a child victim. The Court introduce the criterion of the "good of the child" and points out that the subsequent hearing of a minor may be connected with negative experiences[480] and thus is unnecessary in proceedings[481].

Therefore, the cross-section of cases in which courts refer or may refer to the good of the child is broad. The Supreme Court very often refers to the theses relating to the treatment of the best interests of the child as a value, including the value expressed in the Constitution, as well as in the Convention on the Rights of the Child. Through such actions, it demonstrates the position and superiority of this criterion in the legal order. The "good of the child" therefore determines the obligation for courts and other bodies to act efficiently[482]. A delay in regulating the child's situation may also cause undesirable effects and violate their interests.

On the basis of the jurisprudence of the Supreme Court, as well as the courts of appeal, it can be concluded that the "good of the child" is a common criterion applicable to various cases. It may act as an element of the main principle of Polish family law and is taken into account in any proceedings concerning a child[483]. This criterion also constitutes a component of: the basic assumption when interpreting the provisions relating to the relationship between parents and children, the prime principle expressed in the Constitution, the principle of family law, as well as the basis of all regulations concerning children, the basis of court decisions and decisions interfering with the child's essential interests[484]. This criterion is an element of: the principle of the protection of the good of the child[485], the basic principle of the legal order[486], the primary directive on maintenance proceedings, the proper implementation of which must consist in a thorough analysis of the child's needs[487].

In some decisions, the courts call the structure in question the principle of protecting the good of the child, without departing from the idea that it is also the basic rule used in the interpretation of regulations. The Courts also take the view that this directive applies even where the rules indirectly regulating the legal situation of the child are

479 Order of the Supreme Court of 29 July 2016, case ref. no. V KK 2/16, LEX No.: 2108517.
480 Ibidem.
481 Judgment of the Supreme Court of 11 May 2012, case ref. no. IV KK 30/12, Legalis No.: 492155.
482 Cf. e.g. art. 7 ECECR.
483 Order of the Supreme Court of 31 January 2018, case ref. no. IV CSK 442/17, LEX No.: 2483681.
484 Ibidem.
485 Resolution of the Supreme Court of 16 September 2015, case ref. no. III CZP 47/15, LEX No.: 1790271.
486 Order of the Supreme Court of 22 January 2015, case ref. no. III CSK 154/14, LEX No.: 1648183.
487 Judgment of the Supreme Court of 18 April 2013, case ref. no.. SNO 6/13, LEX No.: 1415511.

interpreted[488]. In addition, there are theses in the jurisprudence that the primary principle is to protect the rights of the child and their good[489].

The courts point to the special role of the good of the child in the context of the application of substantive and procedural law. This is a criterion that influences the judicial decision-making process. Sometimes, in the justification of the decision, it will not be referred to as the good of the child, but from the way the legal issue is presented, it can be noticed how the court implements the protection of the child's person.

3.2.2 Case-law of the Supreme Administrative Court

As a rule, administrative courts are not in the habit of formulating a definition of a given concept. The determination of what is the "good of the child" takes place contextually, in relation to the factual circumstances of a given case, rarely specifying the elements constituting the content of this construction.

At the stage of issuing the decision, the courts can only hypothetically, referring to the already developed jurisprudence, indicate how the legal and factual situation of the child should be shaped, taking into account the public law optics, but at the same time not enclosing themselves exclusively in the area of administrative law.

Looking at the jurisprudence of the Supreme Administrative Court (NSA) and provincial administrative courts, in principle, the "good of the child" appears more often in the arguments of the parties. Whether or not it constitutes a strong argument in support of a particular position depends, in fact, on how closely the facts under consideration are linked to the interests of the child. In many cases, the parties refer to the good of the child, but the administrative courts do not develop this issue in justification of their rulings.

The parties perceive the good of the child through the prism of their experiences and ideas about what its protection should look like. For example, in the opinion of the parents, the violation of the good of the child by the headmaster occurs due to the fact that the teacher, who in their opinion is a qualified teacher, was not employed[490]. On the one hand, the issue concerns civil and employee issues, and on the other hand, the sphere of management and the administrative and legal sphere. The facts concerned a complaint against the conduct of the headmaster of a school which the NSA considered

488 Resolution of 8 March 2006, IIICZP 98/05, LEX No.: 172365; resolution of the Supreme Court of 24 February 2011, case ref. no. III CZP 137/10, LEX No.: 707481.
489 Resolution of the Supreme Court of 13 March 2008, case ref. no. III CZP 1/08, LEX No.: 361241.
490 Judgment of the Supreme Administrative Court of 3 January 2013, case ref. no. I OSK 1762/12, LEX No.: 1360824, as well as the following judicial decisions: judgment of the Supreme Administrative Court of 14 December 2017, case ref. no. I OSK 375/17, LEX No.: 2431163; judgment of the Supreme Administrative Court of 19 October 2016, case ref. no. I OSK 1052/16, LEX No.: 2167982: in which the protection of the good of the child is presented from the perspective of dismissal of the director of the facility.

admissible. The court indicated that shaping the future situation of the child should be in accordance with the will of the parents. Only hiring a specific teacher will, in their opinion, have a better impact on the further development process. However, this aspect should be looked at from a different perspective and should take into account the interests of the facility, the interests of potential candidates for the selected position, as well as other conditions, including employment opportunities of the employer and the predispositions of the candidate. The "good of the child" should be perceived through the prism of these factors, which certainly limit the absolute nature of the child's good. The administrative courts state that the fact of employing a teacher at school, who in their opinion is a great teacher, has an impact on the good of the child and the realization of the right to education in safe and friendly conditions[491]. Therefore, parents should make suggestions in this regard and subject them for the consideration of the school supervisor as well as the teacher.

Moving in the area of educational law, it should be emphasized that the "good of the child" may constitute an argument against the liquidation of an educational institution[492]. If the courts go in this direction, it is worth noting that the "good of the child" may also constitute an argument for the creation of an educational institution, e.g. in a smaller town where there is demand for such, and due to the distance, students must commute to another town. Moving in the area of educational law, the NSA notes that one should be guided by the constitutional principle of the good of the child in the course of admitting to school children with a decision on the manner of their special education[493]. In addition, the introduction of reductions or rebates in the scope of the fee paid for a kindergarten depending on the number of children from one family attending this institution, in the opinion of administrative courts, does not violate the constitutional principle of equal treatment. The content of such a resolution positively corresponds to the principle of protecting the good of the family and protecting the rights of children. According to the courts, the best protection of the interests of the child is expressed in access to education at all levels[494]. The protection of this value is also influenced by the availability of various types of paths or courses of education. In one of the judgments issued a few years ago, the NSA commented on the individual course of study. It would seem that such a mechanism should always have a positive impact on the achievement of the good of the child. However, according to the NSA, in such cases "the good of the child must be properly understood as it will not always be consistent with the good of the student to grant consent to the individual course of

491 Judgment of the Supreme Administrative Court of 3 January 2013, case ref. no. I OSK 1762/12, LEX No.: 1360824.
492 Order of the Supreme Administrative Court of 18 September 2012, case ref. no. I OZ 691/12, LEX No.: 1328752.
493 Judgment of the Supreme Administrative Court of 5 November 2015, case ref. no. I OSK 2173/15, LEX No.: 1989880.
494 Judgment of the Supreme Administrative Court of 26 July 2012, case ref. no. I OSK 997/12, LEX No.: 1218496, as well as in relation to free education, e.g.: the judgment of the Supreme Administrative Court of 4 July 2012, case ref. no. I OSK 784/12, LEX No.: 1392339.

study"[495]. Consent to such a solution is discretionary and therefore "objective premises", i.e. the student's educational abilities and opportunities, should also be taken into account[496].

In another decision, the applicant's arguments emphasized that the suspension of the enforcement of the decision should be dictated by the good of the minor, since depriving the child of their residence registration may have consequences that will prove difficult to overcome. The purpose of the court's action was to safeguard the interests of the child, which the complainant details. These will be: obtaining a passport, submitting documents to the junior high school, securing benefits from the maintenance fund and a scholarship for the child[497].

In the context of matters related to the co-financing of kindergartens in the framework of budgetary or EU projects in the public procurement procedure, the "good of the child" is defined as justifying "the care and teaching of the child by persons already known to them"[498]. Although the content of the applicable provisions of the Act on Public Procurement Law as a prerequisite for the use of the simplified procedure for conducting the procedure did not include the "good of the child", due to the specificity of some cases, e.g. subsidies for kindergartens and schools, the criterion discussed herein could not be an additional argument for the use of a specific procedure[499]. The above confirms that the Supreme Administrative Court and provincial administrative courts boldly set new jurisprudence directions.

In matters related to the change of the name of the child, the Supreme Administrative Court emphasizes that the following are subject to an in-depth analysis: the family situation, the emotional attachment of the child to the parents, as well as the attitude of the parents to the child, the subsequent serious consequences and the fact whether the change of name will allow for stronger identification with the family[500]. These are preconditions that may be subject to objectivization and will facilitate the determination of what the "good of the child" is[501].

In other cases, the importance of the good of the child is emphasized by administrative courts, e.g. in the case of using preferential rules for calculating income tax of single

495 Judgment of the Supreme Administrative Court of 15 October 2010, case ref. no. I OSK 1024/10, LEX No.: 744909.
496 Cf. chapter six of this work.
497 Order of the Supreme Administrative Court of 20 September 2011, case ref. no. II OZ 795/11, LEX No.: 1069166.
498 Judgment of the Supreme Administrative Court of 8 November 2017, case ref. no. II GSK 604/16, LEX No.: 2411827.
499 Ibidem.
500 Judgment of the Supreme Administrative Court of 16 January 2015, case ref. no. II OSK 1433/13, LEX No.: 1753348.
501 The issue of the actual objectivity of the premises will be addressed in the sixth chapter of the present work.

parents[502]. In this situation, this discussed criterion is invoked in the explanatory memorandum as an element reinforcing the argumentation. According to the NSA, the aim of the legislator was to protect children who grew up in incomplete or broken families, although the very situation in which such children are found is, in the opinion of the court, not desirable. The legislator therefore indirectly protects the interests of minors by granting them the possibility to benefit from tax preferences. It can be noted that in this case, the protection of the good of the child corresponds to the protection of the good of the family. However, there are rulings in cases concerning tax credits, in which the "good of the family" is primarily exposed. This is because, in the opinion of the Supreme Administrative Court, the relief for raising a child is primarily the implementation of the principle of art. 71 of the Constitution[503]. Helping single parents raise a child and indirectly minors is conducive to the implementation of the pro-family policy of the state. When it comes to the implementation of legislative assumptions, one should remember about the consistency between the program norms, the aim of which should be to protect, as in the above case, the good of the family, but also indirectly the rights of the child under art. 72 of the Constitution. In the case of the implementation of the pro-family policy, the "good of the child" plays an indirect role, because the legal circumstances do not refer *stricte* to the minor.

As a rule, all family members, and not only the child, benefit from the improvement in the economic situation, regardless of the form which it would take: whether through the granting of a periodic benefit, a one-off benefit or in other forms. The justification for granting the benefit solely and exclusively to the child is therefore not correct if the interest of the person supporting the child is exposed. It should be noted that it is difficult to separate these two spheres, i.e. financing the needs of the child and the needs of parents. Therefore, in order to properly secure the needs of the child, it is worth postulating that the funds go to educational institutions where children attend and are spent for specific purposes, e.g.: free meals, medical, speech therapy or psychological assistance, subsidies for trips.

In the case of examining the cases of the minors' parents, the "good of the child" should also be taken into account in matters of expulsion of a foreign parent[504] or granting

502 Judgment of the Supreme Administrative Court of 5 April 2017, case ref. no. II FSK 573/15, LEX No.: 2261656, judgment of the Supreme Administrative Court of 26 July 2016, case ref. no. II FSK 590/16, LEX No.: 2076390; judgment of the Supreme Administrative Court of 23 April 205, case ref. no. II FSK 675/13, LEX No.: 1665976.

503 Judgment of the Supreme Administrative Court of 10 November 2015, case ref. no. II FSK 2163/13, LEX No.: 1828129.

504 Here, the Supreme Administrative Court refers to the jurisprudence of the European Court of Human Rights, indicating that the "good of the child" should be considered in terms of the seriousness of the difficulties that the child may encounter in the country to which it will be expelled – the judgment of the Supreme Administrative Court of 6 March 2018, case ref. no. II OSK 1677/17, LEX nr: 2499745; ECtHR judgment of 21 December 2001, application No. 31465/96, Şen v. The Netherlands; ECtHR judgment of 1 December 2005, application No. 60665/00, Tuquabo-Tekle and others v. Netherlands; ECtHR judgment of 24 November 2009, application No. 1820/08, Omojudi v. United Kingdom; ECtHR judgment of 30 July 2013,

protection to such a person[505]. This should also take into account the process of integrating the child into the local community, attachment to culture and the environment, as well as whether the rights of the child will not be violated. The Supreme Administrative Court and provincial administrative courts draw attention to the process of child adaptation as one of the important elements of such cases. However, the fact that courts create certain models of conduct does not mean that at the time of adjudication it cannot appear that a criterion other than the "good of the child", e.g. the "good of the family", "social interest", etc. will be favoured. However, in principle, the "good of the child" has the priority.

In matters relating to the provision of means of subsistence for children, the administrative courts argue that "child support serves the protection of the good of the child by providing means for its decent maintenance, upbringing or education"[506]. The NSA has repeatedly stressed that when granting social benefits, attention should be paid to whether the child has secured basic housing needs, guaranteed food, clothing, footwear, cleaning products, etc.[507] The finding of such circumstances is relevant as the obligation to provide additional benefits to each child cannot be passed on to the State. The criteria for granting additional funds should be measurable and not be part of the discretionary decisions of individual authorities. In this respect, the legislator should also bear the subsidiary role of the state in mind. This is because from the very art. 72 s. 2 of the Constitution of the Republic of Poland results the servile role of the state in providing conditions for the child's development, which is also mentioned by W. Borysiak[508].

When applying the rules on deductions of concessions and the determination of the proportion of these deductions between parents of minor children in the field of personal income tax, state authorities, including courts, should determine the following circumstances. First of all, courts should examine whether parental authority was exercised, determine the role of the parent in the child's life – their impact on emotional and intellectual development, the existence of concern for meeting material and intangible needs, the fact of participating in the life of children, concern for the good of the child, support, ensuring safety, broadening horizons, developing interests.[509] These are important factors from the point of view of the situation of children, because their

application No. 948/12, Berisha v. Switzerland. Cf. the judgment of the Supreme Administrative Court of 31 May 2016, case ref. no. II OSK 2259/14, LEX No.: 2108469.

505 Judgment of the Supreme Administrative Court of 22 June 2017, case ref. no. II OSK 2366/16, Legalis No: 1649542.

506 Judgment of the Supreme Administrative Court of 30 January 2018, case ref. no. I OSK 611/16, LEX No.: 2464367.

507 Judgment of the Supreme Administrative Court of 8 February 2017, case ref. no. I OSK 1766/15, LEX No.: 2284775.

508 W. Borysiak, op. cit., p. 1666.

509 Judgment of the Supreme Administrative Court of 26 May 2017, case ref. no. II FSK 503/17, LEX No.: 2310415.

determination indicates not the mere fact of having parental authority, but its proper exercise. The above elements should also be considered in terms of the objectivization process described.

One of the judgments shows how the NSA mitigates procedural formalism, because due to the good of minor children, manifested in economic protection in the form of a procedural initiative, the authority abandoned the award of costs of cassation proceedings[510]. Similarly, procedural formalism is mitigated in the jurisprudence of the Supreme Court and common courts.

The above examples clearly illustrate that the NSA attaches great importance to the protection of the child's property interests, even if there would in fact be no conflict between the interests of the child and the parent. Apart from the issue of granting benefits or deducting concessions, the courts point out that in cases of giving the parent the right to use the property, the court should grant permission to do so, as this will go beyond the scope of ordinary administration of the child's property[511].

In terms of subjecting the child to protective vaccination, the NSA states that "in the reality of a democratic rule of law, both the good of the child and the social interest clearly require that the child's parents use the achievements of modern medicine in a manner free from ideological prejudices and voluntarily subject the child to protective vaccination, among others, in order to avoid the use of coercion by state authorities to perform this obligation (...) and at the same time to protect the rights of the child, whose protection is provided for by the Republic of Poland (art. 72 s. 1 of the Constitution)"[512]. Therefore, in certain aspects, when looking through the prism of the good of the child, the life and health of the child should be protected more than the freedom of parents' beliefs. Despite the fact that the subject of vaccination is recent, the courts clearly indicate the need to protect the good of the child and, consequently, its physical health. Without prejudging the rationale of any of the parties, courts, when issuing a ruling against this background, cannot, without well-founded reasons, depart from the established jurisprudence line and to, only and solely for the sake of the child, understand it exclusively in accordance with the beliefs of the "anti-vaccine movement". On the one hand, it is necessary to take into account the technology and development of medicine, and on the other hand, the protection of the child, which corresponds to this development.

510 Judgment of the Supreme Administrative Court of 5 April 2017, case ref. no. II FSK 623/15, LEX No.: 2261657.
511 Judgment of the Supreme Administrative Court of 26 April 2012, case ref. no. II GSK 471/11, LEX No.: 1406664.
512 Judgment of the Supreme Administrative Court of 12 July 2017, case ref. no. II GSK 3611/15, LEX No.: 2356400, judgment of the Supreme Administrative Court of 12 July 2017, case ref. no. II GSK 3542/15, LEX No.: 2356399.

In one of the judgments concerning the granting of a specific subsidy, the NSA states that the "good of minor children" will be achieved when they have secured basic housing needs, guaranteed food and, on the basis of the applicant's own claims, clothing, footwear and cleaning products provided by the father of the children. It was also just to draw attention to the fact that the applicant had made contradictory statements regarding the maintenance of children by the father. The adjudicating court takes the view that, since the ordered maintenance is not sufficient to cover the basic needs of minors, consideration should be given to applying for an increase in child support. When analysing such facts, one should first take into account protection at the level of the family, and only later at the level of the state.

Referring to the above principle of the subsidiary role of the state, it should be emphasized, after the court of first instance, that it is the responsibility of parents to support their children in the first place and this burden cannot be shifted to social assistance. Moreover, it is apparent from the decision that the applicant has, for years, been dependent on social assistance and has not shown any initiative to improve her living situation. At the same time, it can be stated that she is so used to using external financial assistance that she does not see the need to find a job and change this state of affairs. Her attitude was also not changed by the fact that she completed courses and obtained a B-category driving licence thanks to the funds of the Municipal Social Welfare Centre and the European Union, thanks to which she significantly increased her chances of finding a job[513].

In order to determine the current and postulated situation of the child, it is important that the place of its permanent residence entered in the population register reflects the place of its actual residence[514]. It is not only about legal protection of its interests, but also about the security sphere of such a minor, which may affect their civil law situation.

An interesting decision regarding the regulation of the issue of citizenship was made in the context of the birth of a child by a surrogate. In the justification of the decision, the NSA pointed to the need to link the legal status of the child with the fact that it is a human being endowed with natural and inalienable dignity, who has the right to citizenship, in a situation where one of the parents is a Polish citizen[515]. Apart from the

513 Judgment of the Supreme Administrative Court of 8 February 2017, I OSK 1766/15, LEX No.: 2284775.
514 Judgment of the Supreme Administrative Court of 17 October 2013, case ref. no. II OSK 1182/12, LEX No.: 1559330.
515 Judgment of the Supreme Administrative Court of 30 October 2018, case ref. no. II OSK 1868/16, Legalis No.: 1860297. The facts concerned the legal situation of a child raised by same-sex parents, born by a surrogate, who acquired citizenship by law. The Voivode, refusing to issue a decision confirming the granting of Polish citizenship, previously demanded information leading to the determination of the child's origin. This decision was upheld by the minister, who made the following arguments. First of all, he indicated that the concept of a parent in Polish law is of a legal nature, Polish law does not know the institutions of "single-sex parents", "surrogate mother", and the agreements on surrogacy are not valid. In addition, he pointed out that in

issue of ethicality of concluding agreements on surrogate motherhood, which undoubtedly violate the dignity of the child, reducing them to being the subject of socially unacceptable practices, and apart from the issue of the validity of such a contract in the light of Polish law, refusal to confirm citizenship would primarily violate the good of the child, its interests and the right to citizenship as a human right. The Supreme Administrative Court pointed out that the applicant's origin from a Polish citizen was determined on the basis of the provisions of foreign law, an also the agreement on surrogacy was concluded outside the country. The NSA considered that citizenship in this case was acquired *ex lege*, which should not be challenged. In addition, the NSA pointed out that the good of the child should be treated as a superior value, the decisions of the authorities should be made in accordance with this criterion, and any decisions detrimental to the good of the child lead to violations of both the Convention on the Rights of the Child and the Convention for the Protection of Human Rights and Fundamental Freedoms. In the decision, the court emphasised the essence of the prohibition of discrimination on the basis of the "birth census", which consists in that it is not important, from the point of view of the good and rights of the child, who gave birth to the child.

Next, from the point of view of the freedom of economic activity, it is important to rule that the freedom of economic activity consisting in the sale of alcohol is combined with the protection of the rights of the child, and above all the prevention of demoralization[516]. When licensing the sale of alcohol, the authority should take into account the location of the point of sale of alcohol products in relation to the premises where there are minors present.

In the jurisprudence of administrative courts, determining the nature of the "good of the child", as well as typing it as a construction, is very similar to how it is done by common courts and the Supreme Court. The "good of the child" is treated as a value, is of a constitutional and overriding nature[517], a premise, expressed in regulations[518], a

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Polish law same-sex couples do not have parental rights. According to the authority, the California birth certificate did not confirm the real origin of the child and was contrary to Polish law. The arguments of the authorities were supported by the Provincial Administrative Court, referring firmly to the public order clause expressed in the act of 4 February 2011. – Private international law. According to the Provincial Administrative Court, the principles of the Polish legal order are that the child may have at most two parents (a mother – a woman and a father – a man, emphasizing either their biological ties or those created in the result of adoption), and that the child cannot be the subject of a contract and be deprived of its identity related to natural origin. The argument concluding the Authority's position was the reference to the Resolution of 17 December 2015 on the 2014 Annual World Report on Human Rights and Democracy, as well as the case law of the European Court of Human Rights on surrogacy and adoption by same-sex couples.

516 Judgment of the Supreme Administrative Court of 17 March 2016, case ref. no. II GSK 2302/14, LEX No.: 2066297.

517 Judgment of the Supreme Administrative Court of 30 January 2018, case ref. no. I OSK 611/16, LEX No.: 2464367; judgment of the Supreme Administrative Court of 25 May 2016, case ref. no. I OSK 2016/14, LEX No.: 2082494; judgment of the Supreme Administrative Court of 13 March 2009, case ref. no. I OSK 905/08, LEX No.: 580368.

fundamental principle, resulting from the Family and Guardianship Code[519], and the protection of the good of the child constitutes a constitutional order[520]. On the basis of the case-law, it can be seen that the "good of the child" has a considerable impact on the interpretation of public law. For any administrative matter which even indirectly affects the situation of a child, reference should be made to the conventional principle of the protection of the good of the child, as well as to the constitutional principle of the protection of the rights of the child. These principles affect public law provisions and have a corrective role in relation to the interpretation made. The omission of the act of taking into account the principle of law in the interpretation "distorts" the interpretative process and does not allow for a review of the decision. The understanding of the good of the child by administrative courts is related to the criterion of the rights of the child. This means that the "good of the child" should be understood from the point of view of the individual (child, juvenile, student, etc.), and not the interests themselves.

3.2.3 The Constitutional Tribunal

In the jurisprudence of the Constitutional Tribunal, the content of the construction of the good of the child is shaped on the basis of constitutional norms, most often in connection with family law norms. The Tribunals rarely creates elaborate descriptions relating to the good of the child. In its opinion, "the good of the child is a value determining the shape of other institutional solutions, including, above all, the Family and Guardianship Code"[521]. In addition, thus value is of a constitutional nature[522]. This means that it can be interpreted from the provisions of the Basic Law, however, assigning it such an attribute has far-reaching effects consisting in placing it among the most important values of the Polish legal system.

According to the Tribunal, the "good of the child" as a value can be interpreted from the provisions of the Constitution, including: art. 48 s. 1 (establishing the obligation of parents to take into account the degree of maturity, freedom of conscience and religion and the child's beliefs in the process of their upbringing); art. 68 s. 3 (concerning the obligation of public authorities to provide special healthcare for children); art. 72 (guaranteeing the protection of children's rights)[523].

518 Judgment of the Supreme Administrative Court of 8 November 2011, case ref. no. II GSK 604/16, LEX No.: 2411827.
519 Judgment of the Supreme Administrative Court of 19 January 2017, case ref. no. I OSK 1674/17, LEX No.: 2468105.
520 Judgment of the Supreme Administrative Court of 16 April 2014, case ref. no. I OSK 525/13, LEX No.: 2005803.
521 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
522 Judgment of 28 October 2015, case ref. no. U 6/13, LEX no.: 1821116; judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186; judgment of the Constitutional Tribunal of 16 May 2018, case ref. no. SK 18/17, LEX No.: 2486896; judgment of 16 July 2007, case ref. no. SK 61/06, LEX No.: 299991; judgment of the Constitutional Tribunal of 18 May 2005, case ref. no. K 16/04, LEX No.: 155506.
523 Judgment of the Constitutional Tribunal of 18 December 2008, case ref. no. K 19/07, LEX No.: 467443.

The proper understanding of the good of the child in a particular case is based on the so-called premises[524]. These are: age, gender, characteristics of the child, mutual relationship of parents to each other and the child, right to be brought up by both parents, parents' qualifications and parenting abilities[525], parents' approach, parents' criminal record for crimes against the family, as well as others that may affect the child's perception of the environment, the parents' fulfillment of specific obligations, reports and observations of third parties[526].

In its statements, the Tribunal, specifying what the "good of the child" is, refers to other normative regulations, including international normative acts, the Constitution and the laws in force, its own judgments, judgments of the Supreme Court, the European Court of Human Rights or views on the dogmatics of law[527]. References to own jurisprudence, as well as judgments of other courts, strengthen the arguments and play a stabilising role. This function consists in confirming the recipients as to the equity of court decisions issued and the perception of the judgments through the prism of legal certainty.

The Tribunal treats the good of the child as a value which determines the shape of institutional solutions. This imposes an obligation on the legislator to draw up normative acts in a spirit of respect for this value. In turn, the reference to other values by the use of the "good of the child" construction in the legal provision determines the direction of the interpretation made by the authority. The values emphasized by the Tribunal are: proximity and stability of family relations, child safety, decent upbringing conditions, development conditions[528], love, happiness, understanding, upbringing in a family environment[529].

The regulations are to be interpreted in the spirit of the good of the child, since it is the duty of the Tribunal to protect constitutional values. It should be noted that the direction of interpretation of the provisions can be observed at every step, when the authority

524 Order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193. The issue of the existence of premises shaping the understanding of the good of the child was discussed in the sixth chapter of this work.
525 Ibidem.
526 Order of the Constitutional Tribunal of 14 July 2016, case ref. no. Ts 87/16, LEX No.: 2071197.
527 Order of the Constitutional Tribunal of 14 November 2017, case ref. no. P 13/17, LEX No.: 2406905; order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193; judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045; judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186; judgment of 11 October 2011, case ref. no. K 16/10, LEX No.: 992832; judgment of the Constitutional Tribunal of 22 July 2008, case ref. no. P 41/07, LEX No.: 402811, judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
528 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
529 Ibidem.

indicates that individual institutions cannot be applied without taking into account the condition of the good of the child[530].

In general terms, the Tribunal refers to an understanding of the good of the child which, as it claims, emphasises the minor's interest[531]. The term "interest" used by the Tribunal to explain what the term in question means is an indeterminate phrase to which the dogmatics of law has often referred. The use of this expression partly explains the meaning of the good of the child, because the example of interest is much easier to cite. The jurisprudence distinguishes between property and non-property (intangible) interests. Among the latter, we can mention, for example, the existence of family ties and the right to biological identity[532]. On the other hand, property issues can include maintenance or inheritance issues[533].

Therefore, it is appropriate, from the point of view of the good of the child, to properly shape the family ties. According to the Court, the most complete implementation of this element takes place in a biological family with the possibility of departing from such an assumption, when it is necessary for the good of the child[534]. As a rule, the marital status of the child should be shaped so that it does not alter[535]. The "good of the child" is to determine the priority of stabilizing the family ties thus established, even if it is not certain that this state corresponds to the child's true origin[536].

As regards religion and the shaping of the child's worldview, the Tribunal considers that it is the parents, in accordance with the normative regulations, who have the right to decide on the choice of religion. The reasonable wishes of the children should be taken into account only when they do not remain under parental authority or custody[537]. Of course, one can argue with the position of the Tribunal, which does not take into account issues related to the expression of an opinion by a child after a certain age, especially since the constitution requires the child to be heard and, whenever possible, their opinion to be taken into account.

With regard to the understanding of the concept of the good of the juvenile, the Tribunal, following the Supreme Court, states that "the basic directive to be followed by

530 Order of the Constitutional Tribunal of 20 January 2017, case ref. no. Ts 101/16, LEX No.: 2403888, judgment of the Constitutional Tribunal of 22 November 2016, case ref. no. K 13/15, LEX No.: 2152312, judgment of the Constitutional Tribunal of 25 July 2013, case ref. no. P 56/11, LEX No.: 1354561.
531 Judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
532 Ibidem.
533 Ibidem.
534 Judgment of the Constitutional Tribunal of 16 May 2018, case ref. no. SK 18/17, LEX No.: 2486896; judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207; judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186.
535 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
536 Ibidem.
537 The problem raised in the decision of the Constitutional Tribunal of 30 January 1991, case ref. no. K 11/90, LEX No.: 25357, concerned the teaching of religion in schools.

the court when examining the case of a juvenile perpetrator is their good, understood as the formation of their correct personality, in accordance with social standards of conduct that are fully in the public interest and as such constitute the good of the juvenile"[538]. In the opinion of the Tribunal, the principle of protection of the good of juveniles is equivalent to the principle of protection of the good of the child and is therefore subject to constitutional protection[539]. This seems to be the correct statement, because the "good of the juvenile" is the "good of the child", but within the meaning of the Juvenile Delinquency Proceedings Act. The denotation of this phrase is therefore narrowed down for the purposes of the act. The Tribunal, after M. Korcyl-Wolski, defines the good of a minor as "a state of affairs that creates optimal opportunities for a minor to meet mental and physical needs and to develop talents and acquire skills in accordance with the requirements of law and generally acceptable principles of morality, which should allow them to gain independence and life stability in the future and to occupy a place in society corresponding to these possibilities"[540]. The above wording is similar to the characterization of the good of the child understood in a general way.

Currently, the Tribunal speaks categorically on matters that are controversial for the public opinion. One of such rulings was to signal to the legislator the lack of regulations regarding the treatment of embryos of single women and anonymous donors before the date of entry into force of the Infertility Treatment Act. According to the Tribunal, filling a gap in the law would be in accordance with the good of the child, which as a directive was specified in art. 4 of the aforementioned act. In a dissenting opinion to this decision, the term good of an embryo was used[541]. The legislator did not decide to extend the protection, including the phrase "good of the embryo", which sporadically appears in dogmatics, in the semantic range of the good of the child. At the moment, it is also problematic to extend protection to a child conceived due to ethical disputes that seem legally insoluble.

In the case of marriage by persons with disabilities, due to their mental retardation or mental illness, the Tribunal considers it justified to maintain the prohibition in the applicable scope, arguing that the protection of marriage, parenthood and the family should be considered from the point of view of the good of the child. Referring to the views of the dogmatics of law, the authority maintains that restrictions of rights and freedoms are justified from the perspective of other entities[542]. On the one hand, the above example demonstrates that there is discrimination against people with disabilities,

538 Judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045, as well as the judgement of the Supreme Court of 18 September 1984., III KR 237/84, LEX No.: 17574.
539 Judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045.
540 Ibidem.
541 The following reference is made to the issue of the good of the conceived child: the order of the Constitutional Tribunal of April 18, 2018, case ref. no. S 2/18 Lex No.: 2480881, as well as the order of the Constitutional Tribunal of 18 April 2018, case ref. no. K 50/16, LEX No.: 2480880.
542 Judgment of the Constitutional Tribunal of 22 November 2016, case ref. no. K 13/15, LEX No.: 2152312.

but on the other hand, that it was necessary to take into account the protection of children and their good. Looking at the substance of the case in terms of the consequences that may occur in the future, it is necessary to establish a hierarchy of interests in such cases. Children are particularly protected because of their age, and the need to prepare them for independent functioning in society indicates the obligations imposed on specific entities. It should be emphasized that restrictions on persons with disabilities are not absolute, and thus, in the absence of a threat to the family and the good of the child, marriage may be concluded by a person with intellectual disabilities.

Otherwise, failure by the legislator to recognise the aggrieved party as a party in proceedings pending under the Juvenile Delinquency Proceedings Act will not constitute a violation of their interests[543]. In proceedings involving children, the readaptation and rehabilitation of the minor perpetrator is important, and the "good of the child" (juvenile) constitutes the overriding objective of the proceedings. Therefore, as the Court argues, there is no question of retaliation or retribution within the meaning of criminal law[544]. Proceedings concerning juveniles shall be structured in such a way as to best protect them. Therefore, granting the victim additional rights could create such opportunities that in the longer or shorter term would lead to a violation of the good of the child (good of the juvenile). In the result, a substitute for retaliation would be introduced, used by the victims. Any attempt to formalise proceedings in juvenile cases on the model of criminal law regulations should be assessed negatively. This could lead to treating juveniles on an equal footing with other offenders. Therefore, the "social interest" will also be in favour of limiting the position of the victim in such proceedings.

In proceedings in the field of limitation of parental authority, the "good of the child" is the prerequisite for the court to issue a decision. According to the Court, the legislator uses this premise when its will gives priority to the best interests of the child[545]. The Court reproduces the reasoning of the previous judgment, stating that the rights of parents are inherent and natural in nature, but that they should be exercised under the control of the State and society for the good of the child[546].

The analysis of the case-law leads to the conclusion that the "good of the child" may be an element of two different normative constructions, i.e. the general reference clause and the principle of law. In fact, it happens that in one decision, the Constitutional Tribunal uses different terms[547], which indicates dualism in the perception of the normative structure with the element of the good of the child.

543 Judgment of the Constitutional Tribunal of 29 June 2016, case ref. no. SK 24/15, Legalis No.: 1469045.
544 Ibidem.
545 Order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193.
546 Ibidem.
547 Examples of such judicial decisions are: the judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.

On the other hand, the Tribunal's use of the term "principle of the good of the child" instead of "principle of the protection of the good of the child" constitutes a kind of simplification.

In addition, according to the Court, "the good of the child" is "a specific constitutional general clause, the reconstruction of which should be carried out by reference to constitutional axiology and general systemic assumptions"[548]. The above statement can be understood in two ways. Firstly, the Tribunal, by the term "constitutional", emphasizes the importance of the expression undefined in the legal order and points to the filling of its content with constitutional values, especially since literally the "good of the child" does not appear in the Polish basic law. Secondly, the term "general clause" may have been used accidentally, given the fact that the theory of law treats the good of the child as an element of the indefinite reference, and therefore a general clause. In other decisions, the Tribunal categorizes the good of the child simply as a general clause, as it provides flexibility of order and this is determined by the issue of reference to extra-legal values [549].

Numerous descriptions of situations can be found in the jurisprudence showing that the "good of the child" is treated as a prerequisite that is decisive in terms of the shape of formal family ties[550].

According to the Tribunal, Polish law includes an order for the protection of the good of the child, which is "the basic, overarching principle of the Polish family law system, to which all regulations in the sphere of relations between parents and children are subordinated, including legal mechanisms regarding issues of their ties"[551]. Sometimes it also emphasizes that the principle of protecting the good of the child is constitutional in its nature[552]. This is probably due to the function attributed to the good of the child, as well as the fact that this criterion constitutes the basis for the regulation under art. 72 of the Constitution. In one of its judgments, the Tribunal found that an order protecting the good of the child applies to other branches of law, such as criminal proceedings[553].

548 Judgment of 11 October 2011, case ref. no. K 16/10, LEX No.: 992832; judgment of 21 January 2014, case ref. no. SK 5/12, Legalis No.: 815910; judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207.
549 Order of the Constitutional Tribunal of 8 July 2016, case ref. no. Ts 89/16, LEX No.: 2071193.
550 Judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
551 Judgment of the Constitutional Tribunal of 21 January 2014, case ref. no. SK 5/12, Legalis No.: 815910; judgment of the Constitutional Tribunal of 26 November 2013, case ref. no. P 33/12, Legalis No.: 740186, judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207; judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
552 Order of the Constitutional Tribunal of 2 June 2010, case ref. no. Ts 287/09, LEX No.: 1229625; judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207; judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
553 Judgment of the Constitutional Tribunal of 21 January 2014, case ref. no. SK 5/12, Legalis No.: 815910.

The Tribunal has often emphasised the primacy of the principle of the good of the child[554]. Such a thesis was put forward in relation to the examined cases in the field of family and guardianship law. It follows from the above that the principle of protection of the good of the child, which should be said, sticking to the terminological correctness adopted in this work, is certainly a fundamental principle of family and guardianship law. The relationship between parents and children will therefore be assessed from the point of view of the "good of the child" and shaped accordingly[555].

The analysis of the jurisprudence of the Constitutional Tribunal proves that the "good of the child" affects the interpretation of the provisions of criminal law, administrative law, etc. In addition, it is repeatedly elevated to the rank of a metacriterion due to its connection with conventional and constitutional provisions, as well as its dispersal in numerous acts.

3.3 Reference to the rights of the child

"Rights of the child" is a formalised criterion, which means that they appear in the normative text as an element of the legislative structure. However, in the context of the analyzed judgments, it proves difficult to attribute the value of objectivity to this concept due to its natural axiological entanglement, as well as the lack of references to objective states of affairs that would be independent of the evaluating entity. The fact that "the rights of the child" are, in principle, expressed in law does not mean that they should be attributed the characteristic of a criterion that is completely independent of the assessments made by the entity applying the law. The mere fact that they are always subject to interpretation and assessment by a judicial authority highlights a certain aspect of subjectivity. This does not mean that in the process of applying the law there will be no objectivization of the "rights of the child".

It should be pointed out that this criterion interacts with other criteria, including the good of the child. This can be seen on the example of the constitutional principle of protecting the rights of the child or on the level of the provisions of the Convention on the Rights of the Child. The "good of the child", which is a directive, a premise, a prerequisite for making and applying the law, forms the basis for a proper interpretation of legal norms, and thus provides a starting point for understanding other criteria, such as the best interests of the child or the rights of the child. The above can be illustrated on the basis of the thesis adopted by the Provincial Administrative Court in Warsaw, which proceeded on the legitimacy of refusing to grant a temporary residence permit to

554 Judgment of the Constitutional Tribunal of 17 April 2007, case ref. no. SK 20/05, LEX No.: 270207; judgment of the Constitutional Tribunal of 28 April 2003, case ref. no. K 18/02, LEX No.: 78052.
555 With regard to the proper shaping of relationships, and above all family law relationships, the parties argue that the application of the good of the child has its consequences in the form of limiting their rights due to the vague nature of this concept.

a minor[556]. In its deliberations, the Court took into account the aspect relating to the rights of the child, referring to specific patterns, i.e. the protection of the right to privacy. It referred to the jurisprudence of the European Court of Human Rights in the case-law, emphasizing the important role of maintaining family ties between parents and a minor child, as well as the concept of the child's best interests under the Convention on the Rights of the Child. In consequence, interpreting the child's best interests criterion in connection with the right to privacy and noticing the aspect of the child's situation leads to a proper understanding of the good of the child (the postulated and current situation of the child related to its development). It should be noted that the authority analyses the provisions on the basis of their contextual understanding. The phrase "the rights of the child" is connotatively capacious, and in the course of the interpretation it can be noted that many of these rights, unlike the criterion of the good of the child, are guaranteed in conventional, constitutional and statutory provisions. At the same time, this increases the impression of moving only in the area of the legal system. However, referring to the rights of the child also indicates the need to resort to extra-legal criteria, which requires assessment in every case.

The technique used in the interpretation of regulations, consisting in referring to the jurisprudence standards of the international Court and finding validation elements also in the provisions regulating fundamental human rights, is not the basis for formulating the thesis on objectivization of the good of the child. A clear orientation of the understanding of this criterion may be a manifestation of the rationalisation of interpretation processes. The fact of codifying human rights in legal regulations allows for interpretation based on systemic and structural rules, as well as systemic and axiological rules, due to the principle of protection of children's rights in Polish law. The role of axiological rules, which introduce elements of extra-legal axiology into the process of applying the law, cannot be completely ignored.

It is difficult to verify the scope of objectivization taking place in the course of decision-making processes. There are no tools to measure this phenomenon. It is worth emphasizing that the dimension of the process of objectivization of the criterion of children's rights is comparable to objectivization of the good of the child. Taking the previous findings on the lack of objective character of these two criteria into account, and also the total lack of its separation from the assessments, it should be concluded that the objectivizaiton process itself is possible taking into account the objective or partially objective premises referred to in the previous subsection of the present work.

556 Judgment of the Provincial Administrative Court in Warsaw of 9 June 2017, case reference number: IV SA/Wa 263/17, Legalis No. 1674809.

3.4 Existence of premises that shape the content of the good of the child

What is common in the case-law are the criteria/conditions treated as objective or subject to objectivization, which fill the content of the construction of the good of the child[557]. They can be divided into:

a) related to the person of the child: educational abilities and opportunities, emotional and intellectual development, development of interests, curiosity of the world, age, gender, characteristics of the child (e.g. disability), psychological predispositions and conditions, susceptibility to influence;
b) related to the family environment: material situation of the family, emotional attachment of the child to parents, parent-child relationship, fact of identification with the family, the fact of exercising parental authority, the role of the parent in the child's life, the existence of care for the child's material and intangible needs, the fact of participating in the child's life, support, ensuring safety, broadening the child's horizons, the fact of spending time together, understanding and acceptance, shaping appropriate patterns of behaviour, the child's relationship with the parent, perceiving contacts with the parent, guiding the child's needs, building and strengthening proper ties with the children, the environment noticing the manifestations of parental care, the mutual relationship of parents to each other, the fact of parenting by both parents, qualifications and parenting abilities, the sense of security and stability, the parent's criminal record for crimes against the family, as well as others that may affect the child's perception of the environment;
c) related to the external environment: relations with peers, observations of third parties.

These premises, called objective in the jurisprudence and dogmatics of law, are a permanent element in the argumentation of courts. They facilitate shaping the most appropriate state for the child, in which it will achieve proper development. However, as a rule, it is difficult to attribute a completely objective character to them.

3.5 The role of resolutions in unifying the practice of applying the law – a case study

On 2 December 2019, the Supreme Administrative Court in case II OPS 1/19 adopted a resolution in a panel of seven judges, the content of which states that it is not permissible to transcribe a foreign birth certificate in which persons of the same sex are entered as parents. This resolution was adopted due to the legal question by the Supreme Administrative Court of the following content: "Do the provisions of art. 104 s. 5 and art. 107 s. 3 of the Act of 28th November 2014 on Register Office Records (full text JoL of 2018 item 2224; hereinafter: p.PrASC) in connection with art. 7 of the Act of 4 February 2011. Private international law (Journal of Laws of 2015, item 1792;

557 Cf. chapter six of the present work.

hereinafter: p.p.m.), allow the transcription of a foreign birth certificate of a child, in which persons of the same sex are entered as parents?[558]"

The facts of the case were set out as follows. The applicant applied to the Head of the Register Office for a transcription of her son's birth certificate. In this document, two women with Polish citizenship were entered as parents. In addition, the applicant requested that the record be supplemented by the place and date of birth of the mother and the other parent, in the absence of these data in the transcribed document. As it can be assumed, the authority refused to transcribe it, followed by the Provincial Administrative Court, citing a contradiction with the principles of the Polish legal order and upholding the decision of the administrative body.

Focusing on the thread regarding the violation of the good of the child, it should be stated that the NSA's argument concerns only the legal context and lacks axiological reflection, consisting in referring to the violation of the child's rights and the good of the child. Although the NSA refers to the category of the child's interests, it does so briefly. It states that it is in the interest of the child for the Head of the Register Office to give the child a PESEL number. However, in the context of issuing official documents, it claims that the Polish birth certificate is not required for this purpose.

This reflection concerns primarily the issue related to the understanding of the public order clause, by which the NSA understands the principles of the socio-political system and the main principles of individual branches of law. However, the court forgets that the criterion of the good of the child is a universal value and affects all areas of the legal system. The obligation to protect this value expressed in the form of an order within individual branches of law exists and is approved in the jurisprudence and dogmatics of law. The principle of protection of the good of the child is also one of the main norms of family and guardianship law, while the principle of protecting the rights of the child results from constitutional law. The obligation to protect the good of the child also arises from international law.

The NSA does not attempt to determine what consequences the adopted resolution may have for the observance of children's rights in the future, and also forgets about the protection of minors due to immaturity, weakness, i.e. beings who do not understand legal complexities. A child must not be discriminated against on the basis of their parents' beliefs and background. In addition, the additional argument is that the criterion of "the good of the child" often breached the schematic understanding of legal provisions or formalism.

It should be noted that the opposite view than that of the NSA was expressed by the Ombudsman, who challenged the way the court presented the possibility of protecting

558 Ibidem.

the child's interest in the form of submitting a foreign birth certificate to administration authorities in order to obtain a PESEL number and Polish documents. The Ombudsman stated that the practice in this area is different and that, consequently, the courts dismiss the actions for leaving the application for a child passport without examination, arguing that such an action is not eligible[559]. The situation of children may change in this respect, but until then there will be a real threat to the "good of the child".

The consequences of adopting this resolution may be twofold. First of all, if the administrative bodies and courts respect its content and look for other ways to protect the child's good and rights, e.g. by treating birth certificates of children drawn up outside Poland on an equal basis with those issued in Poland, assigning PESEL number ex officio without undue delay and many others, these values will be relatively protected. Secondly, another possibility concerns omitting the effects of the resolution, which poses a real threat to the fulfilment of the value of the good of the child.

The role of resolutions in the process of applying the law is of considerable importance, as they unify the practice of applying the law. It seems that the resolutions of the Supreme Administrative Court and the Supreme Court will not solve the interpretation issues completely, but only guide the process of applying the law. They may be important primarily in the context of developing premises shaping the content of the good of the child, issues of an administrative nature (such as the one presented above), as well as emphasizing the subjective understanding of the criterion.

559 Cf. *Transkrypcja zagranicznego aktu urodzenia dziecka rodziców tej samej płci niedopuszczalna* [online:] https://www.rpo.gov.pl/pl/content/NSA-transkrypcja-zagranicznego-aktu-urodzenia-dziecka-rodzicow-tej-samej-plci-niedopuszczalna [accessed: 20.07.2020].

Conclusion

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One of the basic conclusions of the conducted research is the negation of the possibility of creating an exhaustive definition of the good of the child, which is rendered difficult for several important reasons. These are: the vague nature of the phrase, the variety of factual states relating to the situation of the child, as well as the multiplicity of normative acts of various branches of law. For this reason, only general conceptualizations of this expression were formulated in the dogmatics of law and in judicial case-law.

Normative acts enable a contextual understanding of the good of the child. This means that, depending on the scope of the legal act in question, the "good of the child" may be understood differently in the area of family and guardianship law, labour law, criminal law, etc.

The analysis of jurisprudence and views presented by the dogmatics of law reveals that two approaches to this criterion can be distinguished, i.e. subjective and objective. Subjective – takes into account the harmonious development of the child, the right to a happy childhood, respect for dignity and other rights in the current and future perspective. On the other hand, the objective is simply to protect the interests of the child, which are not always treated in conjunction with the above elements. In addition, the child's interest is often equated with the interests of parents.

At the same time, one can point to the general and specific terms of the discussed concept. The general understanding of the good of the child is not related to the factual state, but functions in isolation from facts and law as opposed to its specific understanding.

When determining the special significance of the good of the child, it should be based on premises that may be subject to objectivization, as well as constitutional elements. The latter are not a complete set and can be distinguished from judicial case-law, as well as on the basis of normative acts. Therefore, the "good of the child", in general terms, is nothing more than a repetition of the orders and prohibitions of specific proceedings contained in normative acts, formulated in the jurisprudence and by dogmatics of the law, in a more or less detailed way, and more specifically: a prohibition of discrimination against children on the basis of: gender, age, origin, disability, beliefs of parents, etc.; ensuring the implementation of the right to life and health protection,

including the possibility of using medical care, scientific solutions promoting health, the possibility of expressing one's opinion on the method of treatment, taking into account the child's degree of recognition; or ensuring the possibility of obtaining citizenship, obtaining a name and surname.

In turn, the premises that are subject to the objectivization process and at the same time shape the content of the structure "good of the child" can be divided into: related to the child's person, related to the family environment, and related to the external environment.

These premises, called objective in the jurisprudence and dogmatics of law, are a permanent element in the argumentation of courts. They facilitate shaping the situation that is most appropriate for the child, in which it will achieve correct development. However, as a rule, it is difficult to attribute a completely objective character to them.

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The "good of the child" interacts with various extra-legal criteria. The determination of the significance of each of them takes place in the course of judicial application of law.

The criteria of the child's best interests and rights affect the understanding of the good of the child and its proper categorization in substantial and subjective terms. By compiling these concepts, it is possible to take into account specific individual interests of the child and its rights when interpreting the good of the child. These three criteria may form part of the general reference clauses and principles of law. In view of the prohibition of synonymous interpretation, those terms should not be equated with each other.

In turn, the relating of the good of the child to the good of the family indicates two types of dependencies, i.e. supplementation and contradiction. Complementing will consist in treating the good of the family as a concept broader than the discussed value of the child's good. Contradictions may arise, for example, in cases for establishing or denying paternity. It should be pointed out that both values are of a constitutional nature, except that the "good of the family" stems directly from the basic law.

The reference to the principles of social coexistence will also include proceedings ordering the protection of the good of the child. It is therefore a universal concept, which also covers the described value in its scope.

If the reference to good manners is treated as an equivalent to the principles of social coexistence, it can be concluded that these are similar constructions. However, "good manners" are not as common a criterion, as their original version, already occurring in the socialist period. "The good of the child" is rather not directly compared with good

manners. However, due to the similarity of the principles of social coexistence to good manners, the content of the normative structure is included in the latter clause.

The "good of the child" is of priority importance and it is superior to other extra-legal criteria, in the sense that it strengthens and corrects the argumentation, and cannot be overlooked in the interpretation process. In addition, the "good of the child" will affect the understanding of individual extra-legal criteria.

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"The good of the child" is a constitutional, statutory and conventional criterion. It can also be ascribed the features of priority and superiority. Priority for the good of the child should be treated as a guideline/indication when resolving conflicts between criteria. These collisions must be resolved for the benefit of the child's person in such a way as to protect their good. On the other hand, the feature of superiority will categorize the good of the child as a meta-principle and a meta-clause.

The criterion of the good of the child may form part of the general reference clause. It may also serve as an assumption, premise, exception, objective or directive. The "good of the child" clause, depending on the nature and scope of the regulation, may appear as "the good of the minor", "the good of the juvenile", "the good of the patient", etc. The discussed value serves as a binding, integrating, dynamizing for the process of applying the law.

The criterion of the good of the child is an element of the principle of law, characteristic of family and guardianship law, and the law on proceedings in juvenile cases. In the dogmatics of law and jurisprudence, it is also assumed that this construction occurs in the area of constitutional law. The principle of protection of the good of the child is systemic in nature. Such a character of this principle is determined by the fact that:

a) it results from the provisions of the Convention on the Rights of the Child, which, due to the rank of acts of international law, affects the Polish legal system;
b) it is referred to it by the courts of higher instance in cases involving different branches of law, as well as by the European Court of Human Rights and the Court of Justice of the European Union;
c) it is accepted by the dogmatics of law primarily as a principle of family law, law on juvenile proceedings and constitutional law, and the Constitutional Tribunal further emphasizes the role of this principle.

The Constitution makes the good of the child one of the overriding criteria in the Polish legal system. Despite the fact that from the art. 72 s. 1 of the Basic Act follows the principle of protection of the rights of the child, however, the combined interpretation of this provision with other constitutional regulations leads to the conclusion that the Constitution also expresses the principle of protection of the good of the child. In the case of criminal law, it is rather difficult to talk about the dominance of all provisions

by the principle of the protection of the good of the child, and such a statement can only be referred to a narrow group. The situation in administrative law is similar to that of criminal law regulations. In the area of civil law, other than family and guardianship law, the "good of the child" may be present, for example, in cases concerning the awarding of sums by way of compensation to a minor, rejection of inheritance or protection of personal rights. Nevertheless also here the principle of protection of the good of the child is of particular significance.

We can speak of the metaclause of the good of the child in family and guardianship law, as well as in the light of the Act on juvenile proceedings and international law regulating the situation of the child. In these areas of law, we can also speak about meta principles. In other areas, in relation to a narrow group of legal provisions, the "good of the child" can be described as an element of a meta principle, for example, in relation to criminal law provisions penalising acts detrimental to the person of the child. However, the attribution of the principle of the protection of the good of the child to the system-wide meta-principle of the legal system is not fully justified. The norm-principle would have to be characterized by content and hierarchical superiority comparable to other meta norms-principles (and the starting point should be the principle expressed in art. 2 of the Constitution). A similarity exists in the case of the good of the child metaclause, which apparently dominates only in some areas of law.

"Good of the child" is a criterion of an axiological extra-legal nature. However, due to its presence at the same time as an element of legal principles and general reference clauses, it connects the systemic (internal) with the extra-systemic (external) plane. This means that in the process of applying the law, extra-legal axiology constitutes an element facilitating interpretation and rendering court practice more flexible. It also affects the perception of judicial discretion from the point of view of greater decision-making freedom.

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The discussed value takes part in the process of applying the law in the course of making factual and legal findings and is visible in the justification of the decision.

Courts, when deciding to use the criterion of the good of the child at the stage of factual findings, take into account primarily the nature of the goods that may be threatened in the result of a specific decision. The current situation of the child and the impact of a specific activity on shaping their condition in the future are also analyzed. At the moment of threat to the good of the child, the court may refrain from the determination of a specific fact. The "blocking" of findings never takes place in relation to all factual elements, as this stage is required for further proceedings.

In the course of making legal findings leading to shaping the normative basis of the decision, the court searches for basic validation elements, which are legal provisions,

and then supplements them with principles of law and reference criteria. In relation to the good of the child, systemic, purposeful and axiological rules are important.

"The good of the child" in the process of applying the law in legal arrangements has a basic function if it is listed in the legal provision as the only condition for making a specific decision. In addition, if the case concerns a child, the role of this criterion is also a priority. "Good of the child" can also correct or strengthen interpretative processes. Correction of these processes takes place when the decision is aimed at protecting the child. On the other hand, the strengthening acts as a demonstration that the actions taken to establish the legal status are correct in the light of the applicable normative regulations and in accordance with the principles of equity and justice. It is then that the "good of the child" occurs in interpretative processes as an element of the principle of law expressed in conventional or constitutional provisions.

In the validation phase, one can observe the following combination of rules in relation to the search for accessory validation arguments in relation to the provision:

a) in the case of legal provisions containing a reference to the good of the child, systemic and structural rules (acting as basic rules) and axiological rules apply. Sometimes, at this point, one can notice a reference to legal provisions that are the carrier of legal principles (system-axiological rules are applied for this end). Sometimes it is also strengthened to refer to the rules of purpose when the court refers to the *ratio legis* of the provision, a group of provisions or an area of the legal system;
b) in the case of legal provisions that do not contain references to the good of the child, systemic and structural rules apply, as well as axiological rules (when the court refers to the open criterion, deriving it from another legal provision), and often also systemic and axiological rules (when it is the principle of law that is derived) or purposeful rules (when the court refers to the good of the child as a directive, the assumption for formulating a legal provision).

Apart from the above in the process of applying the law decoding the meaning of the good of the child takes place contextually, taking into account the entire normative statement, as well as the place (normative act or specific area of the normative act) from which this criterion is derived. Although the clarification of meanings takes place taking into account language rules, here again we should also emphasize the role of axiological rules and referring to the rights of the child. In this phase, the relationship between the good of the child and other criteria, e.g. the principles of social coexistence, the good of the family, the good of the justice system, etc., is also balanced. Relationships must be shaped in such a way that they do not interfere with the discussed value of the "good of the child".

In turn, in the phase of constructing the normative basis of the decision, and then in the phase of decision reduction, norms and principles play an important role, the content of which is read using language rules and systemic rules.

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In the course of judicial application of the law, the good of the child becomes objectivized. Objectivization is a process that involves moving from a subjective to an objective understanding of a given criterion. It is a dynamic process, a complex one, related to a specific factual state.

Objectivization takes place on two levels. First, in the course of the application of the law by the authority in relation to a particular factual situation. Secondly, in combination with the value of uniformity in the application of the law, as well as with regard to judicial review. It is a plane related to strengthening the role of the premises shaping the understanding of the good of the child. The process referred to above is weakened by reporting the good of the child to other extra-legal criteria, as well as the use of decision-making discretion by the court, which in turn determines the flexibility of applying the law. At the same time, the link between the good of the child and the rights of the child strengthens the connections with extra-legal axiology, which also weakens objectivization.

Other factors that determine the subjective but rational approach to the interpretation of the provisions are: the nature of the law, which is a product of man; the qualities of the courts (independence, impartiality); the repetition of arguments related to the "good of the child"; the treatment of a decision as issued by a court, and not an individual.

The child's situation can be viewed from five different perspectives. The first concerns the legislator, who creates the normative environment. According to the second, the "good of the child" should be perceived from the perspective of the parties and participants in the proceedings. The third plane is the interpretation made by the court, which will act as an "observer" and resolve the case from a perspective that is independent of the beliefs of the participants in the proceedings. The fourth - is the perspective of assessing the situation from the point of view of a specific social or professional group, e.g. mediators, foundations (Helsinki Foundation for Human Rights). The last plane concerns the child's perception of its situation.

Objectivizing the good of the child takes place alongside the process called rationalisation, related to the evaluation sphere and the criterion of reason. Objectivization, on the other hand, is independent of the entity making the assessment, it should be connected with the facts and concerns the premises shaping the proper understanding of the good of the child.

"The good of the child" treated as a value will never be an objective criterion, because in a sense it always constitutes a construct of the human mind. In the process of judicial application of law, there will be a process of objectivization of the good of the child, which will not be fully accomplished.

Correct determination of the facts in the context of the objectivization process consists in the court basing on the criteria established in jurisprudence and dogmatics. These criteria, also called premises in the present work, will concern the objectivization of the good of the child in the individual sense. Assuming that objectivization is closely related to establishing facts, this process does not take place in relation to the good of the child in general.

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