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Legal Aspects of the “Windows of Life”

Abstract: This study addresses a very important and controversial issue of the legal aspects of the so-called “windows of life’s” operation and functioning. The authors present the concept of windows of life as well as explain key issues that arise in discussions on the topic. Based on the content of the Convention on the Rights of the Child, they present a doctrinal approach to the terms of the right to life and the right to an identity. Another issue considered by the authors is granting primacy to one of those rights. The authors attempt to decide whether, from the point of view of the child’s welfare, it is more important to save his life or protect his identity and the opportunity to learn about his ancestors and biological origin. Furthermore, the article presents arguments for and against the need for the windows of life. The authors examine the views of the doctrine and practitioners, reflect on the meaning of life and existence of the windows, and present their legal regulation. In summary, the authors draw conclusions from their considerations and present proposals *de lege ferenda*.

Keywords: window of life, the right to life, the right to an identity, Convention on the Rights of the Child

1. Introduction

The problem of abandoning newborn children was common already in ancient times¹. However, in the wake of time and development of Western civilization, it has become a phenomenon that is clearly negatively evaluated both from the moral and legal point of view. Due to this, already in the Middle Ages, the idea of the so called

1 I. Żuber, *Expositio infantis (porzucenie dziecka) w antycznym Rzymie*, (in:) Andrzej Pasek (ed.) *Dziecko i jego pozycja prawna w dziejach*, Wrocław 2014, pp. 29-68.

“windows of life” emerged². Newborn children are abandoned in contemporary times as well. Driven by strong emotions and overwhelmed by the burden of responsibility to raise their own child, mothers often kill or abandon their offspring. In response to this negative phenomenon, “the windows of life” have emerged in Poland too. The first contemporary institution of this type was established on 19 March 2006 in the Single Mother House in Krakow at 39 Przybyszewski Street³. Now there are 58 such centres in Poland. Windows of life are usually established within monasteries and orphanages, where mothers may anonymously leave their children. From the very beginning, windows of life were assumed havens (places of safety) both for mothers in a difficult life situation and their newborn children they were either unable or unwilling to take care of. After undergoing appropriate adoption procedures, these children have a chance of finding safety and home in a new family. The public initially approved of the idea of windows of life and their operation as they undeniably served children’s welfare. According to their supporters, they are an instrument of protection of every human’s inalienable right to life. Nevertheless, discussion thereon was incited by the Recommendations of the UN Committee on the Rights of the Child announced in Poland in 2015. Pursuant to their assumptions, Polish authorities should ban the operation of windows of life and focus on the popularization of alternative forms of relinquishing one’s rights to the child⁴. From the legal perspective, the core of the dispute was the Committee’s decision according to which the idea of windows of life violates Art. 8 of the Convention on the Rights of the Child⁵, which guarantees children the right to an identity. The same the Committee has inspired lawyers to reflect on the question whether priority should be granted to the right to life or the right to an identity. In the light of the above circumstances, considerations of legal aspects of the operation of windows of life and finding the answer to the above question appear absolutely reasonable.

2. The right to life and the right to an identity – definitions

Pursuant to Art. 6 par. 1 of the Convention on the Rights of the Child, States Parties recognize that every child has the inherent right to life. According to the opinion expressed in the literature, the right to life should be understood as the creation of conditions that allow man to survive and a lack of consent for arbitrary

2 A. Żok, I. Rzymska, Problem okien życia – analiza etyczno-prawna, “Poznańskie Zeszyty Humanistyczne”, 2015, t. XXV, p. 20.

3 <http://www.caritas.pl/okna-zycia-w-polsce/> (accessed: 3 January 2017).

4 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPOL%2f-CO%2f3-4&Lang=en (accessed: 6 January 2017).

5 The Convention on the Rights of the Child adopted by the General Assembly of the United Nations on the 20 of November 1989 (Journal of Laws of 1991, No. 120, item 526 [Dz. U. 1991, Nr 120, poz. 526]).

deprivation of life of a person under specified age⁶. Due to this, any action undertaken by States Parties that are Signatories to the Convention aimed at rescuing each single child’s life should be recognised as action in compliance with the Convention’s assumptions and principles. Concurrently, such action will be a manifesto against arbitrary deprivation of children’s life.

On the other hand, pursuant to Art. 8 par. 1 of the Convention on the Rights of the Child, States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. As underlined by the doctrine, identity is a proof of one’s existence – one’s distinctiveness⁷. Directives providing a newborn child with the right to an identity have been expressed in Art. 7 par. 1 of the Convention. Pursuant to it, the child shall be registered immediately after birth. Furthermore, the child shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. Hence, it is worth noticing that the right to an identify should not be limited to equipping a child with personal data such as a name, surname or number in a relevant register because a widely understood concept of identity embraces the child’s right to be aware of their origin too.

3. Positive evaluation of windows of life’s operation

At the beginning of considerations about positive aspects of windows of life’s operation, we should ask about the legal nature of leaving a child in such a window because this institution is not legally regulated. Hence, doubts may arise as to the fact whether a mother leaving a baby in the window of life does not commit an act specified in Art. 210 § 1 of the Criminal Code, which sets forth that whoever despite a duty of care to a minor person under fifteen years of age or to a person who is helpless by reason of his mental or physical condition abandons such a person shall be subject to the penalty of deprivation of liberty for up to three years⁸. Pursuant to the judgment of the Supreme Court of 4 June 2001, the offence of abandonment means “an act of abandoning a child and ceasing to take care of him or her and failure to provide such care by other people. Thus, the essential factor of “abandonment” is leaving a person who should have been taken care of stranded while it means not only an omission to provide care over a minor or helpless person but also preventing

6 G. Michałowska, *Międzynarodowa ochrona praw dziecka*, Warszawa 2016, p. 39.

7 *Ibidem*, p. 42.

8 The Act of 6 June 1997 – The Criminal Code (consolidated text Journal of Laws of 2016, item 1137 as amended) [Ustawa z dnia 6 czerwca 1997 r. – Kodeks Karny (tekst jedn. Dz.U. z 2016 r. poz. 1137 ze zm.)].

such a person from being granted instant support”⁹. Due to this, it should be acknowledged that leaving a child in a place where a chance of helping him or her is slight, e.g. in a forest or country track, is subject to penalty¹⁰. Hence, leaving an infant in the window of life cannot be treated as a crime of abandonment since the child is immediately taken care of by specialists as these places are heated and equipped with a bell, which informs carers about a child being placed in the window. A child left in the window of life is immediately taken to hospital. The window’s carers inform the adoption centre about the abandoned child, which immediately informs a court about this fact while concurrently submitting two requests with the court: to issue a decision on the custody of the child and on granting him or her an identity, i.e. a name and surname¹¹.

The right to an identity is closely connected with another aspect of windows of life’s legal operation in the Republic of Poland. As already mentioned above, in 2015 the UN Committee on the Rights of the Child requested Poland to abolish the windows of life. According to the Committee, the idea of the windows of life which enable to abandon a child anonymously violates the child’s right to an identity, and therefore contradicts the Convention on the Rights of the Child. The right to an identity, by all means, derives from inherent and unalienable human dignity, and it is a vital element of every individual’s private sphere. A possibility of being aware of one’s own identity, perceived by the doctrine as personal right, is protected by the content of Art. 30 and 72 of the Constitution¹² as well as international regulations, among others Art. 7 of the Convention on the Rights of the Child¹³. On other hand, however, as far as windows of life are concerned, we deal here with the protection of the right to life, which is mentioned in Art. 38 of the Constitution, or Art. 6 of the Convention on the Rights of the Child. It is undeniably the main argument raised by the supporters of the discussed institution. Furthermore, another argument for the windows of life may be the fact that we cannot talk here about full deprivation of human right to an identity because it is a wide notion while the right to know one’s own ancestors is only its part. Due to windows of life’s anonymity, although a child left there is deprived of a biological dignity, thanks to a new family he or she has a chance

9 The judgment of the Supreme Court of 4 June 2001 V KKN 94/99, “Krakowskie Zeszyty Sądowe” 2002, No. 2, item 9.

10 A. Kilińska-PękaKacz, *Przestępstwo porzucenia dziecka*, “Prokuratura i Prawo” 2016, No. 4, p. 26. Differently: S. Hyps (in:) M. Królikowski, R. Zawłocki, *Kodeks karny. Komentarz*. Tom I, Warszawa 2013, p. 776.

11 <http://www.caritas.pl/okna-zycia-w-polsce/> (accessed: 3 January 2017).

12 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended) [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 ze zm.).

13 A. Wilk, *Akt urodzenia*, Warszawa 2014, Lex, T. Smyczyński (ed.), *Konwencja o prawach dziecka – analiza i wykładnia*, Poznań 1999, p. 42.

of developing a sense of belonging to a given social group. We should also remember that the literary reading of the above quoted Art. 7 par. 1 of the Convention on the Rights of the Child stipulates the child shall have the right from birth to know and be cared for by his or her parents "as far as possible". Hence, situations when a biological identity of a child will remain unknown for the sake of higher value/interest or under extraordinary circumstances are admissible. Therefore, the Convention on the Rights of the Child will not be violated.

We should consider here whether we may compare the windows of life to the institution of necessity common to criminal law¹⁴. According to its assumptions, preserving a higher value we can sacrifice a lesser value. Referring this expression to the windows of life, it can be acknowledged that saving a child's life, we sacrifice his or her right to a biological identity. There are absolutely no doubts that life is a fundamental and primary value without which the right to an identity will not exist at all. Apparently, this assumption will be true if a child is left in the window of life instead of being a victim of infanticide or abortion. The windows of life's founders have never intended to replace the procedure of child's adoption. Windows of life are a peculiar safety valve when, for different reasons, mothers cannot cope with the situation they have found themselves in. The accuracy of this statement can be confirmed by informative events carried out by the institutions in charge of the windows of life. One of the Internet portals, in the article of March 2016, informed about Caritas initiative, which prepared fifty thousand leaflets addressed at women in a difficult situation, often hiding their pregnancy. The leaflet informed them that if they are not able to raise a child they will give birth to, they may leave him or her in hospital after delivery¹⁵. The leaflets were distributed to such places as Municipal Service Centres, parishes or institutions for the poor. The Care and Education Facility "Jedynka", taking care of Białystok window of life, also holds events organized to make women aware of the above problem. The authors interviewed the Head of this institution for the needs of this article¹⁶. He confirmed that the Facility holds

14 <http://stacja7.pl/rodzina/okno-zycia-jeszcze-jedna-szansa-dla-matki-i-dziecka/> (accessed: 3 January 2017).

15 *Ibidem*.

16 The interview with Jacek Przesmycki, director of "Jedynka" the educational and care institution, conducted on January 2, 2017; During the conversation, the director of the institution emphasized that the problem of windows of life is an extremely complex issue. According to the interlocutor, "windows of life" are not an ideal solution. However, due to the fact that they allow to save life, one should notice the need for their existence. In his opinion, people and institutions that stand in the position that the windows of life should be eliminated do not consider the problem comprehensively. The director of the institution understands the arguments regarding the protection of the right to know his own identity, but in his opinion saving life is the overriding goal. He also argued that in the case of leaving the child in the window of life, both the police and the courts take action immediately. The director of the institution confirmed that in situations where the mother of the child who was left reports to the institution running the window of life,

educational events for social groups the centre is working with due to its statutory tasks. He further underlined that even though windows of life's activity is certainly useful, they should be indeed a last resort as there are other, more advantageous institutions envisaged by the provisions of the Polish law for the benefit of a child.

Windows of life appeared in Poland to commemorate ideas advocated by John Paul II and extend the action the Pope had initiated already in the 1970s to save unborn children's lives¹⁷. Clerical institutions, such as Order of Sisters of Mercy of the Holy Family in Kętrzyn, run most of the 58 currently operating windows¹⁸. They do not intend to compete with legal institutions regulating adoption. It can be confirmed, *inter alia*, by above-mentioned informational events they hold. Their main purpose to save life in extraordinary situations that are perceived by mothers as hopeless. Police statistics may confirm that the windows of life work as an alternative for infanticide. In 2004, 19 cases of the act committed under Art. 149 of the Criminal Code were reported. In 2014 there were only 4 such acts¹⁹.

The argument for preserving the windows of life in social space is also their effectiveness despite a lack of special legal procedures. It is acknowledged by the Head of Białystok "Jedynka", where two children were left until 1 January 2017. These situations happened on 12 January 2014 and on 14 August 2016. Now the boys are in new adoptive families. Hence, it is wrong to believe that the adoptive procedure takes years in case of an infant left in the window of life.

4. The critique of windows of life's operation

Opinions about windows of life's operation, however, are not socially uniform. There are several arguments against keeping such places.

Most of all, many people believe that the idea of "windows of life" contradicts regulations of unquestionable foundation of the protection of the child's rights – the Convention on the Rights of the Child. Art. 8 par. 1 thereof stipulates that States Parties undertake to respect the right of the child to preserve his or her identity,

it is possible to verify whether she is actually his mother. In his opinion, in such situations, one should not punish a mother who has recovered and wants to regain her child. According to the director of the institution, the functioning of the windows of life is not intended to encourage mothers to abandon children, but it is a symbol of the fact that there are ways to get help in difficult situations. In his opinion, there is a need to create a mechanism by which the mother could get back her child even after a long time. Summing up, the interlocutor stressed, however, that as long as the windows of life fulfill their role and thus save their lives, their liquidation would not be the right step.

17 <http://www.oaza.pl/cdz/index.php/pl/obrona-zycia/748-okno-zycia-ratowanie-adopcja.html> (accessed: 3 January 2017).

18 <http://www.caritas.pl/okna-zycia-adresy/> (accessed: 4 January 2017).

19 <http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63417,Dzieciobojstwo-art-149.html> (accessed: 4 January 2017).

including nationality, name and family relations. Within this context, the admissibility of windows of life's operation by the Polish legislator undeniably infringes the right of children left therein to preserve their identity, especially with regard to a possibility of meeting their biological parents and being aware of their own origin. A basic role of the right to know one's identity is simply our awareness of who we are, where we are from, and what our tradition (background) is. Nevertheless, we should not forget that the awareness of one's identity also embraces knowledge about our health and potential dangers resulting from genetically linked diseases. A lack of any information within the above scope may evoke numerous negative effects in the future threatening health and life of the child left in the window of life. The authors believe that this argument becomes less credible if we compare the right to an identity with the right to life, which should be treated as a priority within the discussed context.

Another controversial aspect of the windows of life's operation is a lack of legal regulations limiting a group of entities entitled to run them. Due to this, there are no practical obstacles for individuals lacking professional skills and experience to undertake this task. Moreover, moral motifs behind carrying out such an activity are not controlled at all. Nevertheless, the practice shows that currently either clerical orders or orphanages run such places. So far, there have been no objections or reservations as to their operation or activity. Hence, the argument of a harmful impact of a lack of legal regulations limiting a group of entities entitled to run windows of life appears wrong. These institutions are opened in places where there is always someone on duty, day and night without a break, so that when a child appears, police and emergency medical services are informed instantly. A child remains in the window of life for only several minutes because the entity in charge of the window must promptly react to the appearance of the infant therein and immediately notify appropriate institutions about it. Further custody of the child is provided in compliance with the order (decision) of a guardianship court. Nevertheless, the above aspect may evoke some fears. If the Polish legislator decides anytime to introduce legal regulations concerning the windows of life, the issue of entities admitted to run such places should be their crucial element.

What is more, we can wonder whether leaving a child in the window of life *de facto* prolongs the adoptive procedure. Apart from carrying out standard actions, state bodies should first undertake activities aimed at the establishment of the child's identity and finding his or her biological parents. Nevertheless, it results from the interview conducted by the article's authors that the adoptive procedure of children left in the windows of life is very efficient. It is commonly known that many adoptive families await newborn children. Due to this, finding an adoptive family for a newborn infant is not a problem. The child may almost instantly find himself or herself in the custody of their future parents. On the other hand, finding the child's biological mother is merely limited to reporting this fact to the police, which, due to

a lack of sufficient data, are usually not able to undertake real and efficient operational activities.

Furthermore, we should consider whether leaving a child in the window of life is reversible. It should be emphasized here that if adoptive procedure is initiated after the child's birth, his or her mother is legally guaranteed to have minimum 6 weeks since the child's birth to reconsider her decision²⁰. If the child is left in the window of life, irreversibility of this act cannot be considered too. The practice knows cases of mothers who after leaving the child changed their mind and regained the right and custody of the child²¹. It can happen thanks to the determination of a family relation between the child left in the window of life and the mother looking for her offspring with the help of DNA tests.

Another issue arising controversy is the fact that practically anyone may anonymously leave a child in the window of life. Hence, a person who does not even have parental rights to the child can do it. Parents, especially a mother, may be separated from their child against their will, e.g. under duress of third parties. On the other hand, driven by extreme emotions, a mother may deprive the child's father of disposing his parental rights. The authors believe that the claim according to which the windows of life enable third parties to leave a child against their legal guardians' will is not true. Such conduct fulfils the features of the act under Art. 211 of the Criminal Code, i.e. a crime of abduction. Hence, it is wrong to blame the idea of the windows of life for the situation when, e.g., the mother's partner who does not want her to raise a newborn child takes him or her away and leaves the child in the window of life. He could also take the child and leave him or her in a forest. Hence, this argument is as unreasonable as the claim according to which, e.g., we should abolish large supermarkets because they encourage thieves to steal.

Furthermore, it is argued that the windows of life lead to an increasing phenomenon of out-of-hospital deliveries. It is emphasized that mothers who plan to leave a child in the window of life do not want to have contact with healthcare service because such a contact results in drafting relevant perinatal documents. It implies, however, numerous threats. A lack of specialist midwifery care may threaten health and life of both the mother and the child. The authors think, however, that it is wrong to perceive the windows of life as institutions increasing the phenomenon of out-of-hospital deliveries. Windows of life are not responsible for a woman's decision not to deliver a baby in hospital. What decides about it are individual tragedies and dramas

20 Art. 119² of the Act of 25 February 1964 – Family and Guardianship Code (consolidated text Journal of Laws of 2017, item 682) [Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (tekst jedn. Dz.U. z 2017 poz. 682)].

21 <http://www.dziennikwschodni.pl/zamosc/dziecko-z-okna-zycia-w-zamosciu-wroci-do-matki,n,1000012315.html>; <https://ekai.pl/wydarzenia/polska/x25785/kielce-dziewczynka-z-okna-zycia-wraca-do-domu/> (accessed: 5 January 2017).

the windows of life are somehow to alleviate. Such places are used, e.g., by women who reside within the territory of the Republic of Poland without a legal permit, and are scared to have contact with any state institutions. The window of life is a message for them: "You are not able to take care of your child? Don't be afraid. Don't hurt him or her. Bring the child here. He or she will be safe here".

The windows of life opponents also argue that, contrary to common belief, there is no relation between opening such places and a decreasing number of victims of infanticide. According to the statistics, a decline therein has been observed since 2000, that is already a few years before the first window of life was created²². Since it is not possible to find out the motifs of women who did not decide to kill their own baby, the dispute is unresolved. The authors believe that the future life of a few dozen children left so far in the windows of life has been protected just thanks to the fact that these windows operate in social space. You cannot prejudge what would have happened to these children if windows of life had not existed. Yet it is very probable that some of them could have died.

5. Conclusions and postulates

A reliable assessment of the windows of life must specify their underlying assumption. These institutions are created to provide mothers in profound difficulties with a possibility of leaving their children anonymously in a safe place so that they do not have to hurt them. We talk about exceptional situations here. The window of life is a place for women who often hide their pregnancy, or do not want or cannot deliver a baby in hospital, or are unable to take care of their child after birth. It is a place for mothers who, at the same time, do not see another possibility of solving a difficult situation because they are often paralyzed by shame and fear. Just in such cases the windows of life provide newborn babies with a chance to survive in adoptive families awaiting them. Concurrently, they make biological mothers believe they have not done anything wrong.

Are the windows of life an ideal solution? Certainly not. They deprive a child of the right to know their own biological identity and inherited genetic features, which may evoke negative effects in the future. On the other hand, however, a child is guaranteed the right to life and be raised in a family. Moreover, children are given a chance of developing their own new identity with the support of the environment they are going to grow up within and future education.

Windows of life are institutions serving both mothers and children. Obviously, they are not free of faults but, overall, there are more positive aspects than negative consequences of their operation. In the light of the above comments, it should be

22 <http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwno/63417,Dzieciobojstwo-art-149.html> (accessed: 4 January 2017).

emphasized that the creation of new windows of life is not a solution to sometimes extremely difficult situations of mothers. Nevertheless, we should not abolish already existing ones. Most of all, we should stop blaming the windows of life for pathologies and social problems. We should ask ourselves why a woman would rather abandon her baby anonymously in the window of life than take advantage of traditional instruments envisaged by the law. Why don't we create an alternative for the windows of life, persuade society about their usefulness and wait until they bring effects before closing them. Otherwise, we will leave emptiness many women in difficulties will not be able to fill in a way we would expect them to. Perhaps a good solution would be the institution of anonymous adoption. The notion of anonymity should be understood here as a situation when after becoming mature a child might not find out full personal data of his or her mother (parents) but only such information as ethnic origin, age, blood type, or prior illnesses. Thanks to this, we would be able to balance the child's right to find out his or her biological identity and the mother's (parents') right to remain anonymous.

From the legal perspective, the windows of life are interesting insofar as despite a lack of any legal regulations, they are able to operate very efficiently and professionally. In the authors' opinion, they ideally show that social relations and ensuing legal relations do not have to be fortified by a series of laws. The operation of windows of life proves that a good will of individuals, social groups and the whole society is sufficient to generate actions for the common good. Moreover, the windows of life confirm that no legal regulation can do as much to protect each human's fundamental right to life as wise and responsible conduct of people.

BIBLIOGRAPHY

- Hypś S., (in:) M. Królikowski, R. Zawłocki, Kodeks karny. Komentarz. Tom I, Warszawa 2013.
- Kilińska-Pękacz A., Przestępstwo porzucenia dziecka, "Prokuratura i Prawo" 2016, No. 4.
- Michałowska G., Międzynarodowa ochrona praw dziecka, Warszawa 2016.
- Smyczyński T. (ed.), Konwencja o prawach dziecka – analiza i wykładnia, Poznań 1999.
- Wilk A., Akt urodzenia, Warszawa 2014.
- Żok A., Rzymska I., Problem okien życia – analiza etyczno-prawna, "Poznańskie Zeszyty Humanistyczne" 2015, t. XXV.
- Żuber I., *Expositioinfantis* (porzucenie dziecka) w antycznym Rzymie, (in:) A. Pasek (ed.), Dziecko i jego pozycja prawna w dziejach, Wrocław 2014.
- <https://ekai.pl/wydarzenia/polska/x25785/kielce-dziewczynka-z-okna-zycia-wraca-do-domu/> (accessed: 5 January 2017).
- <http://stacja7.pl/rodzina/okno-zycia-jeszcze-jedna-szansa-dla-matki-i-dziecka/> (accessed: 1 January 2017).

<http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63417,Dzieciobojstwo-art-149.html> (accessed: 4 January 2017).

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPOL%2fCO%2f3-4&Lang=en (accessed: 6 January 2017).

<http://www.caritas.pl/okna-zycia-adresy/> (accessed: 4 January 2017).

<http://www.caritas.pl/okna-zycia-w-polsce/> (accessed: 3 January 2017).

<http://www.dziennikwschodni.pl/zamosc/dziecko-z-okna-zycia-w-zamosciu-wroci-do-matki,n,1000012315.html> (accessed: 5 January 2017).

<http://www.oaza.pl/cdz/index.php/pl/obrona-zycia/748-okno-zycia-ratowanie-adopcja.html> (accessed: 3 January 2017).