



# The Role of Prof. Tadeusz Smoczyński as a Drafter of the UN Convention on the Rights of the Child

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**Abstract.** The author describes the role played in the creation of the United Nations Convention on the Rights of the Child by Prof. Tadeusz Smoczyński, a Polish lawyer who all his life was associated with the Institute of Legal Sciences of the Polish Academy of Sciences, but whose merits are not widely known even in Poland. The author, who is a disciple of Prof. Smoczyński, describes the latter's career, his enormous scientific achievements (especially in the area of family law), and the role of his teachers, who were the outstanding civilists profs. Alfred Ohanowicz and Zbigniew Radwański. In describing Prof. Smoczyński's work on the draft United Nations Convention on the Rights of the Child, the author also considers the specific socio-political context of the 1970s and 1980s. The specific characteristics of doing research and scientific work in Poland over more than half a century before and after the 1989 regime change are also addressed. Particular attention is paid to the main topics of the work on the draft Convention, including debates on the two key issues of the meaning of child (Who may be considered a child? Who do the rights contained in the Convention concern?) and the parent-child relationship (What role should be assigned to the state? How active should it be in relation to the family and the child?). For Prof. Smoczyński, these were the most important issues on which he focused, and they also had a significant impact on the content of the formulations adopted in the Convention. They are still fundamental, and the dispute over the protection of the lives of unborn children and the legal position of parents is currently gaining momentum. At the end, the author presents Prof. Smoczyński's views on the Convention and its role as expressed in a conversation they had in the fall of 2023. On the one hand, Prof. Smoczyński feels satisfied with the results of his erstwhile work, but, on the other, regrets that the world is moving in the wrong direction on the issues dearest to him.

**Keywords:** Tadeusz Smoczyński, UN Convention on the Rights of the Child, child, family, legislation

## 1. Introductory Remarks

The United Nations (UN) Convention on the Rights of the Child<sup>1</sup> has introduced and/or supported many positive changes in the perceptions of children, the way of thinking about children and childhood, children's relations with the adult world, the duties of the state and its various agencies towards children, and international legal standards for their protection. The first draft of the Convention was prepared by Polish lawyer Prof. Tadeusz Smoczyński; his contribution to this piece of legislation, nonetheless, was later attributed to others, especially to those who did not participate in the process as lawyers but as politicians, and particularly because he never cared about fame.

## 2. Personal Debt

Writing this article is an opportunity for me to fulfil a moral obligation to Prof. Smoczyński. This is because, in addition to informing about his unquestionable merits, I have serious personal reasons to which I would like to confess.<sup>2</sup> I met him in 1982, at the same time when I was hired to work in the Family Law Group at the Institute of State and Law of the Polish Academy of Sciences (then headed by its founder, Prof. Zbigniew Radwański). Prof. Smoczyński had only recently been awarded his habilitation, which he earned in 1978. As an independent researcher, he was authorised to take on the duties of a scientific supervisor in doctoral procedures. By the decision of Prof. Radwański, I became the first doctoral student of the protagonist of this study. I wish everyone as kind, dedicated, and competent a supervisor as Prof. Smoczyński was for me. I also used much of his advice and guidance when writing my habilitation sometime later; the prof. was helpful to me even when started having my own doctoral students, and I recall with gratitude my involvement in several team research projects headed by Prof. Smoczyński. In particular, I appreciate the fact that I was involved in the workgroup for the preparation of successive editions of the highly regarded academic textbook, titled *Family and Guardianship Law*.<sup>3</sup>

When I visit him or talk to him on the phone, the prof. thoughtfully addresses topics concerning the current social and political situation in Poland and the world. He often talks about current affairs in the context of history, in which he is an expert.

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1 Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, *Journal of Laws* 1991, No. 120, item 526.

2 The article is an expanded version of a presentation of the same title delivered on November 30, 2023, at the international conference titled *Children's Rights Days 2*, held between November 30 and December 1 in Budapest, Hungary.

3 Smoczyński and Andrzejewski, 2022.

### 3. The Professional Career of Prof. Smoczyński<sup>4</sup>

Tadeusz Smoczyński was born on February 24, 1938, in Gniezno, Poland. His father, a University of Poznań graduate, worked as a high government official. Smoczyński began his elementary school education in 1945. After 10 years, he obtained his high school diploma and eventually became a law student at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań.<sup>5</sup> He completed his studies in 1960, when he wrote his master's thesis titled *Abstract Legal Acts and the Will of the Parties*, under the supervision of Prof. Alfred Ohanowicz; the latter was, in turn, a prominent Polish civilist of Armenian descent, a pre-war senator, the founder (from scratch) of Poznań civil studies at the University of Poznań, and a Dean of the Faculty of Law and Administration between 1945 and 1960. Smoczyński's master's thesis must have been of a high standard since it was subsequently published, something extremely rare at the time.<sup>6</sup>

Immediately after graduating from the university, Smoczyński first completed his judicial apprenticeship and then his lawyer's apprenticeship. During this time, he also worked as a legal advisor and lawyer, and prepared his doctoral dissertation – titled *Perpetual Usufruct* –, which fell into the category of property law. In fact, Prof. Smoczyński is an expert in civil law as a whole, not just family law. He defended his thesis at his *alma mater* in 1968. The aforementioned Prof. Radwański, perhaps the greatest among Polish civilians and a recipient of the highest Polish state decoration (i.e. the Order of the White Eagle),<sup>7</sup> was also the supervisor of his doctoral dissertation. One of the many contributions of Prof. Radwański was the encouragement he offered to Smoczyński to pursue his scientific work. Moreover, when Prof. Radwański established in 1973 the Department for the Study of Legal Institutions (located in Poznań) as a branch agency of the Institute of State and Law of the Polish Academy of Sciences (located in Warsaw), he also called upon Smoczyński to join the department. From that moment on, Smoczyński became a full-time researcher, albeit he continued his law practice as a legal advisor in parallel to his scientific work for about 10 more years.

Prof. Radwański headed the Department for the Study of Legal Institutions and its subdivision (the Family Law Group) until 1984, which was the year when the then Associate Prof. Smoczyński took over both these functions. He held these positions for 24 years, until his retirement in 2008. In 1995, he was hired by the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, where he taught family law and inheritance law. He also taught at the Faculty of Law and Administration of the University of Szczecin from 2005 to 2015, even

4 Andrzejewski *et al.* (eds.), 2008, pp. VII–X.

5 Radwański, 2006a.

6 Smoczyński, 1961, pp. 45–50.

7 Olejniczak and Panowicz-Lipska, 2013, pp. 311–317.

after he retired in 2008. As a retiree, he still worked as a scientist, wrote papers, and conducted seminars and lectures on family and inheritance law for several, and consecutive, years. Due to Prof. Smyczyński's academic achievements, he is regarded as the foremost living Polish expert in family law. Therefore, he was assigned the task of editing two volumes of the monumental work published by the C.H. Beck Publishing House in cooperation with the Institute of Legal Sciences of the Polish Academy of Sciences, entitled *System of Private Law*. The editor of the entire project, which includes more than 25 volumes (each of more than 1,000 pages), was Prof. Radwański, and the two volumes entrusted to Prof. Smyczyński are vols. XI and XII, which are entirely devoted to family and guardianship law.<sup>8</sup>

## 4. Legislative Work

For lawyer-scientists, lawmaking participation is an important criterion for the practical application of their knowledge. Any related undertakings are also a great challenge and involve great responsibility, as they require a comprehensive and in-depth knowledge of the law and a good understanding of those issues that the legislative work is intended to address. The drafting of legislation involves partaking in the creation of the future framework upon which society will function in the areas to be regulated. This entails the need to be able to predict the behaviour of people and the institutions that will apply the given legislation.

Prof. Smyczyński's achievements in the field of lawmaking are significant. His first professional 'foray' into this area was the drafting of the UN Convention on the Rights of the Child, which will be discussed at length below. Out of Prof. Smyczyński's various experiences in lawmaking, it is worth noting, first, the approximately 15-year period (1995–2010) during which he worked in the Family Law Group, operating within the framework of the Commission for the Codification of Civil Law of the Minister of Justice.<sup>9</sup> The group included a small set of family law experts who prepared several amendments to the Family and Guardianship Code, which were required as a result of the regime change of 1989 in Poland and the ensuing social changes that occurred in the functioning of society. Another reason that prompted amendments to domestic law, including the Family and Guardianship Code, was the need to align domestic law with international standards set by, among others, the provisions of the UN Convention on the Rights of the Child.<sup>10</sup> The group thus prepared a series of amendments.<sup>11</sup> It

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8 Smyczyński, 2014a; Smyczyński, 2011.

9 Andrzejewski, 2017, pp. 21–35.

10 Smyczyński, 1997a, pp. 293–303; 1997b, pp. 239–254; 1995, pp. 98–115.

11 Ignatowicz and Nazar, 2016, pp. 63–68.

was recognised that, despite the political system changes, civil law and its various articles should undergo a slow change contingent on emerging needs, either by amending old regulations or by introducing new ones. Only rules closely linked to the socialist system were removed immediately, even if they were not many. Parallel to the work on the amendments, the group was also involved in creating a new Civil Code,<sup>12</sup> a process headed by Prof. Radwański. However, after Prof. Radwański's death in 2012, the intensity of the creation of this new Civil Code faltered.

Prof. Smoczyński made a special contribution to the creation of the Family and Guardianship Code's provisions on matrimonial property regimes and alimony obligations.<sup>13</sup> These are areas in which he had a long-standing interest, conducted in-depth research, and to which he devoted many publications, especially to the alimony obligation and the relationship between this obligation and social benefits. This broad issue was even the topic of his habilitation, titled *Parents' Maintenance Obligation to the Child and State Social Policy*.<sup>14</sup> Furthermore, he received the title of full professor in 1991 after publishing a book on the relationship between the alimony obligation and the social security system, the *Alimony of Family Members in Light of the Social Security System*.<sup>15</sup>

## 5. 'And the Story about the Preparation of the Draft Convention Is as Follows...'

The task of creating the draft of the UN Convention on the Rights of the Child was entrusted to Prof. Smoczyński just as he obtained his habilitation degree in 1978. To understand why the task was significant in Poland, and why some of its topics were particularly important to Prof. Smoczyński, it is necessary to recreate the milieu of those times – in other words, to provide a short characterisation of the social and political context in which Poland, Europe, and the world found itself.

The UN declared 1979 to be the Year of the Child. Poland, like most countries in Central Europe, was then ruled by a communist regime, fully dependent on the Union of Soviet Socialist Republics, and was generally not experiencing a favourable period – as were other Central European countries. During this period, the Soviet Union was implementing the so-called Brezhnev Doctrine<sup>16</sup> (named after the leader of the USSR from 1964 to 1982) of limited sovereignty, which meant that sovereignty was held to the extent that the authorities in Moscow

12 Radwański, 2006b.

13 Smoczyński, 2014, pp. 13–30.

14 Smoczyński, 1978.

15 Smoczyński, 1989. The title is a translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources were made by the author.

16 Brezhnev Doctrine. Soviet History (no date).

would see fit. Importantly, democracy was even more limited in these countries than their sovereignty, with the authorities eagerly obeying the orders issued in Moscow and not expressing any objections to those orders that limited, or outright violated, human rights. Furthermore, even if at times the Polish authorities eased the restrictive approach to a society whose resistance to communist ideology was increasing,<sup>17</sup> this was done mostly to build or uphold proper relations with Western European countries and the United States of America. This was dictated by the circumstance that the Polish economy, inefficient at the time, could not function without loans from these countries. These lenders made their agreements contingent on respect for human rights by the Polish authorities, albeit international opinion was well aware that these rights were, unfortunately, being violated in Poland. At the time, James 'Jimmy' Carter was the President of the United States of America (1977–1981), and he strongly emphasised the importance of protecting human rights. These rights were also at the centre of attention of the Conference on Security and Cooperation in Europe.<sup>18</sup>

At the same time, a small and illegal but active anti-communist opposition was in operation in Poland, conducting its activities openly and without regard to detentions, arrests, imprisonment, beatings, sackings, among others. It also published uncensored, and therefore illegal (i.e. as every printed word was expected to be censored according to ideological criteria crafted by the government) magazines and books. These underground activists brought to light all cases of people being imprisoned for their views, informed the West about the education system being based on the communist agenda, ruthless censorship, and repression against the Catholic Church,<sup>19</sup> and reported on others' act of oppression. It was only under pressure from the opposition and Western countries that the Polish authorities of the time ratified the 1966 UN International Covenant on Civil and Political Rights in 1977.

On the one hand, the authorities were annoyed by the diplomatic and economic pressure, the opposition's actions, and the social activism of the Catholic Church, but were also not willing nor going to change their operational methods of dealing with civil freedoms and rights. On the other hand, they were looking for a way to improve their image in the world and to gain the favour of Western countries, which would then respond positively to requests for economic support. Accordingly, the Polish authorities took advantage of the UN General Assembly's resolution of December 21, 1976, which proposed to establish 1979 as the Year of the Child. Below is Prof. Smyczyński's position on the matter, as recorded in an essay written on the occasion of the 20<sup>th</sup> anniversary of the Convention:

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17 Roszkowski, 2003, pp. 328–344.

18 Id., pp. 227–228 and 265–267.

19 Friszke, 1994.

On such occasions, spectacular ideas often arise to announce some propaganda action, some social research, or even to pass a piece of legislation, a declaration, a convention. Such was the opportunity that the then authorities of the People's Republic of Poland, already immersed in economic crisis and social conflicts (strikes in Ursus and Radom, the fight against the democratic opposition), wanted to take advantage of, and they seized the initiative to enact a convention on the rights of the child in the international forum. Thus, in the party-state apparatus, a draft convention was created at lightning speed, which was a verbatim repetition of the text of the 1959 Declaration on the Rights of the Child. This was an obvious legal 'hoax', since a convention, as an act that is supposed to be binding for states, has to be formulated in a completely different language than a declaration, which is only an appeal and a set of demands that would be good to implement. The authorities of the People's Republic of Poland counted on the naivety of international bodies, which, however, criticized the project as an act of propaganda devoid of any substantive value. Thus, the alleged concern and humanitarianism of the People's Republic of Poland, in the form of a convention on the rights of the child, enacted on the initiative of the People's Republic of Poland, was revealed and the initiative failed.<sup>20</sup>

Under these circumstances, in 1978, officials of the Polish Ministry of Foreign Affairs turned to the director of the Institute of State and Law of the Polish Academy of Sciences, Prof. Adam Łopatka, for support in carrying out the task they had undertaken for the UN. It is purposeful to mention this name because in Poland it is often Prof. Łopatka who is credited with the creation of the Convention,<sup>21</sup> even if his role involved mostly political and diplomatic activities.<sup>22</sup> He was a high-ranking Communist Party activist, the Minister of Religious Affairs, and known for his fight against the Catholic Church. His undisputed contribution to drafting the Convention was that he entrusted the task to the right person – young (then 41 years old) Associate Prof. Smoczyński, an employee of the institute under his authority.

This is how the protagonist of this article encountered the opportunity to undertake a spectacular task. Even if the practicalities of the task were difficult to predict, it was clear from the beginning that its scale could be of a dimension that a lawyer could only dream of. Thus, Prof. Smoczyński decided to seize the opportunity. I remember the communist times as grey and dispiriting, but there were situations, from time to time, in which ambitious and competent people

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20 Smoczyński, 2012, p. 11.

21 Wikipedia, Adam Łopatka (no date).

22 Krawczak-Chmielecka, 2017, pp. 11–23.



could rise to the occasion and accomplish things that ushered in light and a sense of hope and faith.

It is obvious that one would like good things, and such is the UN Convention on the Rights of the Child, to arise from lofty motives. However, scientific articles should not be used to create myths but to analyse reality as it was – or is. The Polish legal literature takes pride in the fact that it was Poland that took the initiative to enact a document dedicated to the rights of the child. For me, the basis for satisfaction is that a Pole created a good project, especially since it is a person close to me. The political context of the issue also does not bring glory to my country; quite the opposite, the low intentions of communist activists at the time can easily cause downright embarrassment.

The efforts of Polish politicians to convince officials at the UN to entrust Poland with the preparation of a draft UN Convention on the Rights of the Child were undergirded by some pathos as well. The officials invoked the internationally recognised figure of Dr Janusz Korczak (1878–1942) and cast themselves as continuers of the ideas he advocated. This outstanding Polish–Jewish doctor, educator, writer, and promoter of respect for the dignity of the child endorsed respect for children and their rights in his writings and educational work.<sup>23</sup> He was in charge of an ‘orphanage’ in Warsaw, on Krochmalna Street, which during the war was moved to Sienna Street, in Warsaw’s ghetto. The Germans eventually transported the children living there to the Treblinka extermination camp and murdered them. Korczak voluntarily went with his pupils, becoming forever a symbol of doing as one preaches, right up to his death.<sup>24</sup>

In the fall of 1978, the UN Commission on Human Rights<sup>25</sup> began to work on the draft prepared by Prof. Smoczyński, which he had had less than half a year to devise. It was then that a special characteristic of Prof. Smoczyński became apparent, and which I later had the opportunity to observe many times. Smoczyński always set about his tasks without delay, almost immediately, and never deferred them to the last minute. This aroused both admiration and irritation, with the latter being displayed especially by Smoczyński’s numerous colleagues – who often began to collect materials when the deadline for handing in the texts was approaching – in his joint collective projects. Prof. Smoczyński always had his part ready to go to print when the project’s deadline approached.

Due to this trait of Prof. Smoczyński’s personality, the draft of the Convention was written quickly, affording him some time to discuss and edit it. It was paramount to Prof. Smoczyński that the prepared document be free of the errors committed two years earlier by officials of the Ministry of Foreign Affairs. As a result, Prof. Smoczyński presented a strictly judicial draft, written with linguistic

23 Smolińska-Theiss, 2015, pp. 26–33.

24 Olczak-Ronikier, 2011.

25 Wiśniewski, 1999, p. 13.



rigour, as precise as possible, and devoid of embellishments unnecessary in legal acts – especially of pathos. After the draft was discussed at the Institute of State and Law of the Polish Academy of Sciences and then at the Ministry of Foreign Affairs, it was submitted to the UN Commission on Human Rights in Geneva.<sup>26</sup> At that moment, the news was sent out into the world that, in the Year of the Child, communism-building Poland proved that it respected human rights by submitting the promised draft of the UN Convention on the Rights of the Child.

Later that year, Prof. Smoczyński participated in an expert seminar held at the initiative of the UN in The Hague, the Netherlands, where his project was debated and he made a persuasive case for the proposed solutions.<sup>27</sup> His persuasiveness in the debates was due not only to his excellent competence in law but also his proficiency in French and German, as at that time international official communications were not yet dominated by English.

## 6. Important and More Important Issues

The Convention was adopted by the UN General Assembly on November 20, 1989. It has been ratified by almost all countries worldwide, although this record stands as much a representation of the consensus over the principles that children should live well and their rights be protected as a testament to the hypocrisy of those in power.

To discuss the contents of the Convention is, nonetheless, beyond the scope of this paper, as my study is about the role played by the drafter of the project, and thus his version of the story should stay the main point of focus. I asked Prof. Smoczyński in the fall of 2023 how the final text of the Convention compares to the original he drafted. Which issues of the draft arouse the biggest disputes? How does he recall that time? He began by reflecting on the provisions for children's rights in the areas of education, healthcare, social rights, protection from exploitation, among others. In fact, he had already previously described this issue in his critical notes about the changes introduced by the UN agencies, as follows:

[A] prescriptive standard has been adopted, which many countries of the world are not immediately able to meet. Surprisingly, poor countries from the so-called third world ratified the convention quickly and often without reservations, while western countries, with more advanced civilization level and economy, took a long time to think about it, and eventually they formulated reservations and declarations.<sup>28</sup>

26 Andrzejewski *et al.*, 2008, p. VIII.

27 *Id.*, p. VIII.

28 Smoczyński, 2012, p. 11.

In his opinion, the language of the articles from no. 23 upwards did not match the standard set for legal texts. The juridical wording of social legislation was watered down during the proceedings at the UN. Instead of a precise text, the result was what Prof. Smoczyński called ‘a wish-list that no country will ever fulfil’. Yet, all countries, save for one, ratified the Convention. It is telling that the standard hardly attainable by any country, let alone the poorer ones, did not pose an obstacle to Convention ratification.

Prof. Smoczyński’s view of social law is specific because his scientific ‘motherland’ is civil law. He knows this area very well since it is to civil law, to a large extent, that he has devoted the two aforementioned monographs and many significant scientific articles. The fuzziness of the language of the provisions of the Convention on Social Rights both hurts and irritates a civilist brought up on the Polish Code of Obligations of 1932,<sup>29</sup> which was a legislative achievement of the highest degree, and on the Civil Code of 1964,<sup>30</sup> which is still in force and – despite its enactment in a period unfavourable for Polish law – is also highly regarded from the point of view of legislative standards. Importantly, Prof. Smoczyński learned law and what is known as the scientific methodology from the monumental figures of Polish civil law, the aforementioned profs. Ohanowicz and Radwański. For them, the precision of language was a value of the highest order.

In our private conversation, we quickly dropped the issue of social rights aside, as Prof. Smoczyński moved on to the issues that were then most important to him. His central concern in the UN Convention on the Rights of the Child was the description of who a child is. This topic is of great importance – it has been so in the past, it is so in current times, and will be so in the future – and is discussed in different ways in almost every country worldwide. This is an area where divergent views clash, starting from demands for fully consistent legal protection of the life of the unborn child from the moment of conception, going through the forcefully articulated demand to guarantee the legal freedom to perform abortions throughout pregnancy, and ending with a demand for the legal permissibility of killing the child after birth. The latter being essentially an act of murder, but which has been euphemistically called postnatal abortion.<sup>31</sup> This debate also finds room for a view, which is postulated by some important political bodies, that women’s access to abortion is a human right. However, in Prof. Smoczyński’s recollections of the period 45 years ago when he drafted the Convention, the level of hypocrisy was lower than it is today. During the expert debates held in 1979, when defining the subject of protection of the child in the Convention, the following three approaches to the issue competed:

29 Decree of the President of the Republic of Poland of 24 October 1934; Code of Obligations, *Journal of Laws*, No. 82, item 598.

30 Act of 23 April 1964 – The Civil Code; consolidated text, *Journal of Laws*, 2023, item 1610.

31 Giubilni and Minevra, 2013, pp. 261–263.

1. a child, meaning a person from birth to adulthood;
2. a child, meaning a human being below the age of maturity;
3. a child, meaning a human being from the moment of conception until maturity.

It should not be surprising that the bone of contention was not when a child reaches maturity but when the life of the child begins. In negotiating the contents of international agreements, an important element is to obtain the broadest possible consensus (content agreement). It became clear during the negotiations that the issue of the concept of the child would be a stumbling-block for the Convention, a document that by virtue was expected to have a wide impact internationally and a chance of being ratified by as many countries as possible. Then the following question may emerge: how can this idea be accomplished by passing legislation giving protection to the lives of children conceived and unborn? It should be remembered that, at that time, liberal abortion laws were dominant in many countries. Prof. Smoczyński recalled that, with this in mind, supporters of protecting the lives of unborn children did not emphasise option 3 above; in fact, this option was not even considered. It was feared that this could turn many countries where the abortion mentality was already predominant away from the Convention. One of them was Poland, where about 450,000 abortions were performed each year at that time (for about 550,000–630,000 live births).<sup>32</sup>

The dispute over the content of Art. 1 of the Convention was therefore between the prior options 1 and 2. Unsurprisingly for many, the variant proposed by Prof. Smoczyński won. Among the speculations as to why this happened, the thesis of the significant role of the Holy See, under Pope John Paul II, is very tenable. The variant adopted in Art. 1 of the Convention reads, 'For the purposes of the present Convention, 'child' means any human being below the age of eighteen years'. The phrase 'a child means any human being' is very different from the competing 'a child means a human being from birth'. This difference becomes more evident if the adopted content is read in conjunction with the preamble. The normative meaning of the preamble is sometimes (admittedly) questioned, but it is beyond dispute that its content lays down the direction for interpreting the provisions in doubtful situations. That is why it is so significant that the preamble states that the Convention was enacted to 'protect the rights of the child both before and after birth'.

Given the extreme divergences of the views on the protection of unborn children, including the significant differences between countries in their attitudes towards abortion, it is difficult to imagine that a better (more pro-life) content for the Convention might have been negotiated. Euphemisms such as pregnancy and foetus do not feature here, and the word 'child' is used in relation to the unborn

32 Dyczewski, 1988, pp. 99–128.

child; since it refers to a child, it means that it is about a human being; since it is about a human being ‘both before and after birth’, it means that we are dealing with the continuum of life of the same person. The topic related to the status of the child before birth is clarified by the content of Art. 6, which refers to the child’s right to life ‘both before and after birth’.

Looking back over several decades, Prof. Smoczyński recalled with satisfaction the adoption of such content of the regulations in question, and not any other one, and added that it was the maximum of what could be obtained through negotiations. Unfortunately, the content of the Convention did not prevent the development of pro-abortion legislation in many countries and the scope of abortions that John Paul II called the ‘civilization of death’. Given Prof. Smoczyński’s series of publications on the legal status of the conceived child throughout the 1980s and 1990s, it is certain that, when writing the draft convention, he was very well prepared for the debate on this issue.

Nearly equally as important a problem in the drafting of the Convention was the regulation of the status of parents. On this issue, Prof. Smoczyński always had a clear-cut view of the family as a group of people bound together by ties of marriage, consanguinity, and affinity, where children are protected by their parents, who have primacy in their upbringing. The role of the state is thus to support the family, not to replace it in carrying out its functions. Accordingly, the content of the Convention’s provisions reflects the idea that a happy childhood is one in the family, the consequence being that the protection of children’s rights presupposes state action directed at protecting the family – in other words, a state that wants to protect the child must have a pro-family policy. This issue is particularly addressed in arts. 5 and 18 and in the relevant section of the preamble; according to the latter, the Convention was adopted with the belief that the family is the basic unit of society and the natural environment for the development and well-being of all its members, especially children. As such, ‘it should be given the necessary protection and support to enable it to fulfill its duties in society to the fullest extent’. The preamble further states that the family is the natural and optimal environment for the full and harmonious development of a child’s personality, as well as that the child should develop in the family and ‘in an atmosphere of happiness, love and understanding’.

The consequence of such an assumption is the content of Art. 18 of the Convention, according to which the state must make its best effort ‘to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child’. Thus, it is incumbent on the parents to safeguard the best interests of the child, and the role of the state is to ensure proper assistance to parents in the performance of their child-rearing duties. For children whose parents work professionally, the state should provide parents the opportunity to use services of institutions and facilities that support

parents in childcare tasks. As mentioned, parent–child relations are also covered by Art. 5:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community [...] in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Prof. Smoczyński argues that the Convention protects the child and sees their place within the family, in that they should be cared for by parents supported by the state. Indeed, the child is described in the Convention inside the family, not outside or beside it, with parents both having primacy in the upbringing of the child and bearing the responsibility to support and raise the child. In a thus defined approach, it is possible to extrapolate the idea that the UN Convention on the Rights of the Child is not, as many would want it to be and interpret it in this erroneous way, a tool to fight against parents. The content of this international agreement hence provides a strong normative basis to forestall the attitude of activists who understand it as a tool to fight the adult world. Of course, this adult world can sometimes be a source of oppression and even violence for the child at the hands of parents, relatives, and other adults, and this is recognised by the provisions of the Convention, such as in Art. 19. However, the rule in the functioning of families and parent–child relations is as described in the preamble.

In Prof. Smoczyński's writings, the parent–child relationship was first studied in reference to the child support obligation. This topic of obligation was a focus of not only his habilitation dissertation but also several of his significant studies and articles. The ideas contained in them were in time introduced into the Family and Guardianship Code.

After the Convention was passed, Prof. Smoczyński published several important articles on the legal status of the *nasciturus*.<sup>33</sup> Of particular note is the monograph edited by the prof. entitled *Assisted Human Procreation. Legislative Issues*,<sup>34</sup> in which he published four texts on the status of the artificially conceived child ('The Concept and Legal Status of the Human Conceived Being', pp. 9–26; 'Nasciturus in Light of Legislation on the Termination of Pregnancy', pp. 27–38; 'Axiological Bases for the Permissibility of Assisted Human Procreation', pp. 161–174; 'Theses on the Draft Legal Regulation of Medically Assisted Procreation and Legal Protection of the Human Embryo', pp. 175–178). In this book, a question is posed from a legal perspective about the relationship between ethics

33 Smoczyński, 1990a, pp. 77–87; 1990b, pp. 9–28; 1991, pp. 48–56; 1993, pp. 73–85; 1999, pp. 3–28.

34 Smoczyński, 1996.

and technology concerning artificial procreation; specifically, is it permissible to do everything technically possible, or should one show distance from technical achievements given the moral dilemmas?

Prof. Smoczyński's view on the parent–child relationship and the importance of the child's right to live in the family was very well reflected in the structure of another monograph he edited, named *Convention on the Rights of the Child. Analysis and Interpretation*.<sup>35</sup> This is perhaps the most important Polish legal work on the rights of the child, wherein more than a dozen authors have written commentaries on various regulations of the Convention. The book as a whole is divided into three parts, the first being 'The General Issue' and containing articles on the genesis of the document, the role of the preamble, the concept of the child, their mental development and the concept of the child's well-being. The second, 'The Child's Right to a Family', consists of articles on establishing the child's descent from the father and mother, the right to be raised by parents, the right to foster care, and the right to adoption. The titular child's right to the family was singled out in a separate section to give it a much higher profile than the other rights of the child collected in the dozen or so articles found in the third section, which is titled 'The Right of the Child to the Family. Children's Rights in Detail'.

What is worth emphasising about this monograph is the research methodology and result presentation approaches adopted. Prof. Smoczyński set it as a requirement for the authors to begin discussing a given right by first showing the universal standard of its protection adopted in the UN Convention on the Rights of the Child and possibly in other international documents. The next step was to discuss the European standard of protection based on international documents enacted for Europe, especially Council of Europe documents, the Hague Conventions, and others. Against this background, the authors were next required to show the regulations adopted in Polish law and indicate the scope of implementing these standards into the Polish national legal system.

The two aspects that were the most important for Prof. Smoczyński during the drafting of the Convention, namely the legal status of the child and the legal position of his parents, remain so for him. Prof. Smoczyński has a sober view of the world and has never been under any illusion that the enactment of the UN Convention on the Rights of the Child was the endpoint of the legal effort to ensure the most effective protection of children's rights. On many occasions, at our systematically held seminars in the Family Law Group (later called the Poznań Center for Family Law and Children's Rights), we discussed the activities of individual states and the rulings of various courts and tribunals that create exceptions to the standards adopted in the Convention. The legal status of parents in respect to their children is systematically undermined, often in the wake of the overly paternalistic biases of the authorities of individual states (which are

35 Smoczyński, 1999.

becoming increasingly ideologised). With the blurring of the view of the child's right to a family, the child's right to life from the moment of conception is also being undermined.

The content of the Convention provides support for efforts to protect children's rights, but it does not provide an effective backstop in the face of increasingly fierce philosophical, political, and legal disputes – waged between pro-life and -choice currents – over the status of the child and family. What is telling in that debate is that the legal protection of the conceived child has not been affected by the full and widely available empirical knowledge about the development of the child in the prenatal stage. The debate reached the point where the possibility of abortion (euphemistically called the 'termination of pregnancy') is sometimes referred to as a human right. An objection against the UN Convention on the Rights of the Child is even made today, claiming that it does not express the right of the child... to have an abortion. In Polish feminist legal literature, it has been argued that the Convention is an anachronistic document because it does not express so-called reproductive human rights (the right to reproductive health), including the right of the child (girls) to abortion. Since children may have sexual intercourse, unwanted child pregnancies may also occur; therefore, they should be allowed to exercise their human right to reproductive health in the form of abortion.<sup>36</sup> It is a fact that Prof. Smoczyński did not see such a 'right' and did not include it in his draft. I can state beyond any doubt that if he were to write another draft today, he would not include this aberrant idea either.

## 7. At the End

It follows from the decades-long experience of dealing with the legal protection of the family, including the rights of the child, that the causative power of the law should be approached with humility. One should not fall into a trap of discouragement on the one hand and should have a sound view of the world, its problems, and the possibility of solving them through the law on the other hand. Fully aware of this attitude, Prof. Smoczyński concluded his essay on the meaning of the Convention on the Rights of the Child with the following words:<sup>37</sup>

The fate and well-being of the child, however, depends not only on how the legal norms are formulated, that is, on the laws themselves but also on the fact of how they are implemented, which depends on all those acting on behalf of children and on the economic possibilities to fulfill these noble demands.

36 Ważyńska-Finck, pp. 71–73.

37 Smoczyński, 2012, p. 17.



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