

Karolina Mendecka

*The best interest of a child. Between the common good and the individual  
interest*

SUMMARY

*(Dobro dziecka. Między dobrem wspólnym a dobrem jednostki)*

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prof. Bartosz Wojciechowski

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The standard of the best interest of a child has gained widespread recognition. It is universally applied in adjudication by courts and tribunals in cases concerning children, as well as widely adopted by administrative authorities and legislative bodies. The phrase “best interest of a child” is also broadly used in social sciences, psychology and pedagogy. This thesis aims to investigate what is behind the meaning of this term from the perspective of the philosophy of law and the political philosophy.

The analysis is based on a premise that what is best for a child pertains not merely to a child’s “interest”, but to the very concept of “good”. This interpretation is based on two findings. Firstly, the Polish legislator uses the term that can be loosely translated as “the good of a child”. Secondly, courts of law, while referring to the principle, interpret it not only in relation to the child’s “interests” but in fact they base their decision on what is “good” for the child. The main difference between the two is that “interests” are provisional, diversified and are usually only beneficial to the given individual in certain circumstances, whereas the notion of “good” is objective, moral and inherently rooted in values. However, despite the discrepancy in terminology, in the thesis “interest” and “good” are used interchangeably, in line with the purpose and object of the research.

Arriving at a conclusion of what is good for a child seems to be impossible without reaching to the primordial sources. However, one has to ask – what are those sources exactly? For Friedrich Nietzsche’s the answer is simple – Greek myths. He famously argued that there are two opposing elements: Apollonian and Dionysian. Apollonian aspect represents the individual, order, rational thinking, logic and law. The Dionysian element represents nature, unconsciousness, instinct, chaos, urges – there are no rules. The Nietzschean concept is not only applied to the Greek tragedy, but also to the whole world and – to us. Everything and everyone consist of both Apollonian and Dionysian elements. Although it is acknowledged in the thesis that this classification is considerably rigid, it nonetheless offers an insightful perspective on the topic of this dissertation and is a thought-provoking starting point for this topic.

The deliberations start with an observation that from the very beginning philosophers were deeply invested in what “good” actually means. In particular, it had been debated whether “good” should be interpreted from the individualistic or communal standpoint. The early days of philosophy can be divided into the classical and Hellenistic period. In the classical period, the definition of good was communal –

the ancient republic was considered to be a common good that overrides every other interest (this belief was shared by Socrates, Plato and Aristotle). Later, during the Hellenistic period, *poleis* were destroyed, which brought chaos, serfdom and disarray. At the same time, when the shape and condition of the state became shattered, philosophers started to preoccupy themselves with the individual and consequently adopted the individual perspective on good (especially epicures and stoics).

The way of thinking about the concept of good shifted again with the arrival of Christianity. From that moment, for centuries the doctrine was centered around God and the common good (scholastic thinkers, especially Saint Augustine and Saint Thomas Aquinas, had the biggest influence on the philosophy and the concept of “good” during that time). The individualistic view on what is good was reintroduced yet again during the Enlightenment and developed by utilitarianism and liberalism. However, later on, it was brought to end by totalitarian regimes.

Currently, the two perspectives on the concept of good, individualistic and communal, seem to exist next to one another in political philosophy. One of the most prominent debates in contemporary moral philosophy is the discussion between liberals and communitarians. The communitarian critique pertained to the theory by John Rawls, who famously argued that the concept of “good” and the “good life” has to be left to the individual. Rawlsian philosophy and the response from communitarians are what made the debate between the two concepts of good revived. In the thesis, the main arguments from the most prominent contemporary communitarian and liberal philosophers pertaining to the notion of good are discussed. It is argued, in line with Nietzschean dichotomy, that liberals tend to give preference to the Apollonian element, whereas communitarians – to the Dionysian.

Addressing this dispute aims to assist the main subject of the dissertation, mainly: what really is in the best interest of a child. It is observed that a child, like every other human being, has a dual nature: it is an individual and a member of a community. Each child relies heavily on others, especially the family, but also on the society and the state. Accordingly, the changing concept of a child from the philosophical perspective is discussed and the situation of children in the family is evaluated. Most of all, the philosophical approach of what is good for a child is also broadly discussed. The theoretic and philosophic discussions are supplemented with the legal perspective on the subject (particularly the status of a child, family and a child’s best interest in law).



The main finding of the dissertation is that there needs to be a balance between the individualistic and communal aspects while interpreting what is good for a child. It stems from the Nietzschean theory – the philosopher argued that there has to be a harmony between Apollonian and Dionysian elements. Therefore, the balancing act is also necessary for interpreting what is best for a child – otherwise, the standard is set up to fail.

The thesis is divided into four main Chapters, Introduction and Conclusion. Chapter I attempts to analyze the most critical philosophical theories about the subject of “good”. It covers the Ancient, scholastic, as well as utilitarian and liberal philosophies. A separate section is dedicated to Immanuel Kant’s philosophy on good, goodwill and categorical imperatives. Additionally, the existentialism is addressed, especially Søren Kierkegaard’s and Nietzsche’s perspective on what “good” means. The ideas of contemporary philosophers (e.g. Tischner’s and Elzenberg’s) along with notable female philosophers are assessed. It is concluded that although to this day it has not been unequivocally established what “good” means, it can be said, with a dose of certainty, that “good” does exist.

Chapter II is dedicated to the debate between liberals and communitarians. In the introductory sections, the concept of individual interests and the common good (and its roots in the Catholic doctrine) are discussed. The individualistic approach to good and good life is analyzed through the theories of John Rawls (who highlighted the importance of justice and fairness), Ronald Dworkin (who supported the ethical individualism), John Gray (who represents liberalism *modus vivendi*), Joseph Raz (who emphasize the importance of the individual well-being) and finally John Nozick (libertarian, who stressed the gravity of the individual freedom).

These liberal reasonings, which grant the primacy to the individual, are contrasted with the shared appreciation of the notion of the common good by communitarians. While liberal philosophers believe that the moral imperative only makes sense if it comes from within, the communitarians argue that the guidance from a community is essential. Although philosophers themselves often dismiss their involvement in this political doctrine, in literature it is generally believed that Michael Sandel (a “republican communitarian”, who stresses the importance of the community), Charles Taylor (who distinguishes indirect, direct and public common good), Amitai Etzioni (who believes in the “golden rule”), Michael Walzer (who emphasizes the necessity of balancing between interests of the individual and the community) and

Alasdair MacIntyre (who believes that common good is a virtue) are communitarians. Therefore, their theories on good and common good are thoroughly discussed in the thesis. It is argued that recently there has been a shift in the attitude toward the notion of the community and the common good in the philosophical sphere, as insightfully described by Will Kymlicka and Andrzej Szahaj.

Chapter III addresses three main topics: the concept of a child, the perception of a child as a member of a family and the notion of what is best for a child. Each topic is approached from the philosophical and legal angle. It is determined that for centuries, a child was not a subject of interest of philosophers – it was left to be handled by the father alone. Accordingly, it is widely discussed how and why the patriarchal family was detrimental to the status of children and mothers. Only fairly recently, a child started to be taken into consideration by philosophers (Locke, Rousseau, Kant). In particular, the feminist philosophers – especially Simone de Beauvoir and Judith Butler have to be credited for their contributions in this regard.

The other half of the third Chapter is dedicated to the analysis of both international and domestic laws that address a child, its position in the family, and most importantly – the best interest of a child standard. In particular, Article 3 of the Convention on the Rights of the Child is examined in detail, along with other provisions from various international, regional and Polish legal documents.

The final, fourth Chapter addresses the normative construct of the best interest of a child. In literature, some authors claim that it is a principle of law, whereas the others – that it is a general clause. It is determined that although the principle and the general clause, in fact, pertain to different levels of the theoretical discourse, it can be said that in theory the principle limits the scope of the interpretation (i.e. Apollonian approach), whereas the general clause allows for a broad interpretation of what is good for a child (i.e. in Dionysian spirit). In this Chapter, the judiciary of the European Court of Human Rights, Inter-American Court of Human Rights, the Constitutional Tribunal of Poland, the Supreme Court of Poland and the Supreme Administrative Court of Poland are analyzed in regard to the principle/general clause of the best interest of a child.

The last section of Chapter IV is dedicated to the notion of what is good for the child from individualistic and communal perspectives. It summarizes and concludes the findings of the dissertation. It is established that in all actions concerning children their particular interests have to be taken into consideration (their well-being, physical but also financial safety) along with moral and ethical aspects. It has to be remembered that

a child is a part of a community – the family, the society and the state. Therefore, the communal angle of what is good for a child has to always be considered as well.

Finally, the last part sums up the dissertation arguing that although there is no clear and undisputed definition of the best interest standard, there are some factors that need to be taken into account. In particular, the individual and communal perspectives on what is good for a child undoubtedly have to be assessed. Ultimately, a child is a *carte blanche*, it is neither good nor bad – yet. Our role, as legislators, judges, parents and caretakers, is to safeguard that the best interest of a child principle is rightfully taken into consideration so that each child is able to decide whether he or she wants to be a good person and contribute to the common good, in the future.

Maudecke  
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