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On Children's Rights

SUMMARY

The idea of children's rights emerged in the seventeenth and eighteenth centuries. As a legal institution recognized around the world, children's rights appeared at the turn of the nineteenth / twentieth century. Nowadays, we observe the large and ever growing process of their codification, both at the national and international level. One can find dozens of binding international agreements, numerous documents belonging to the so-called "soft law" and many domestic law acts regarding child rights issues and defining standards for their protection. Individual units, institutions and states are committed to their implementation and respect. The article presents the normative universal definition of childhood, the concept of children's rights, the evolution and codification process of children's rights and the means of their protection.

KEYWORDS – CHILD, CHILDHOOD, RIGHTS, CHILDREN'S RIGHTS, PROTECTION

STRESZCZENIE

Wokół praw dziecka

Koncepcja praw dziecka narodziła się w XVII i XVIII wieku. Jako instytucja prawna uznana na całym świecie, prawa dziecka pojawiły się na przełomie XIX i XX wieku. Obecnie obserwujemy rozległy i stale rosnący, zarówno na poziomie krajowym, jak i międzynarodowym, proces ich kodyfikacji. Uchwalono dziesiątki wiążących umów międzynarodowych, wiele dokumentów międzynarodowych o charakterze niewiążącym oraz wiele krajowych aktów prawnych dotyczących praw dziecka i wyznaczających standardy w zakresie ich ochrony. Poszczególne jednostki, instytucje i państwa są zobowiązane do ich implementacji i poszanowania. Artykuł przedstawia normatywną, powszechną definicję dzieciństwa, koncepcję praw dziecka, proces rozwoju i kodyfikacji tych praw oraz środki ich ochrony.

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“The twentieth century began with children having virtually no universal rights but ended with children having the most powerful legal instrument, a Convention that not only recognizes but protects their human rights.”¹ The adoption of the Convention on the Rights of the Child on the 20th November 1989² marked the culmination of a long process that led to universal recognition of children’s rights. Nowadays, there is no doubt that children have rights and individuals, institutions and countries are obliged to implement and respect them. This is evidenced by a large and ever growing process of their codification, both at the national and international level. One can find plenty of binding international agreements, thousands more documents belonging to the so-called “soft law” and many domestic law acts regarding child rights issues and defining standards for their protection.

The article presents the normative universal definition of childhood, the concept of children’s rights, the evolution and codification process of children’s rights and means of their protection.

What does it mean to be a child?

In order to talk about children’s rights we need to explain who “a child” is.³ This article does not consider different conceptions of childhood held across the world, instead it presents the normative universal definition of “a child” incorporated into the Convention on the Rights of the Child. According to Article 1 of the CRC “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is

¹ E. Manful, *The Development of Children’s Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, Lewiston – Queenston – Lampeter 2010, p. 57.

² United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S. 3 [hereinafter the CRC].

³ For thorough presentation on international definition of a child see: M. Prucnal, *Who is a child? International definition of a child*, in: *The Sovereignty of Children in Law*, eds. F. Malekian, K. Nordlöf, Newcastle upon Tyne 2012, p. 69-87.

attained earlier.”⁴ The Convention’s definition of “a child” was based partly on the age limit criterion. The drafters of Article 1 indicated only the upper age limit of childhood, stating that in principle childhood ends with the attainment of the age of eighteen years. Expressing respect for cultural and traditional diversities reflected in national regulations,⁵ they agreed on situations when national law allows earlier than at eighteen years attainment of majority. They have not determined the childhood lower age limit. Thus, we are confronted with three approaches referring to the interpretation of Article 1 of the CRC. The first approach equates the beginning of childhood with the moment of child’s conception. The second one – with the moment at which the embryo becomes a foetus or with a specific period of its development in the womb. The third one, which is the dominant doctrinal view, equates it with the moment of child’s birth.⁶ The CRC does not, however, restrict discretion of each State party to provide under their domestic law wider definition of “a child” and thus including every human being from the moment of conception.⁷

What does it mean to have rights?

The concept “right” can be approached from different directions. “A right” can be described either as a claim or entitlement.⁸ To have rights understood as legitimate claims indicates that there is a corresponding duty or obligation, that there is a claim on someone who is obliged to assist the rights-bearer in securing

⁴ Article 1 of the CRC, *supra* note 2.

⁵ The principle of respect for cultural and traditional diversities of different societies was reflected in the 11th preambular paragraph to the CRC which reads “taking due account of the importance of the traditions and cultural values of each people,” see the CRC, *supra* note 2.

⁶ G. Van Bueren, *The International Law on the Rights of the Child*, The Hague – Boston – London 1998, p. 35; S. Detrick et al., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, Dordrecht – Boston – London 1992, p. 57.

⁷ Article 41 of the CRC, *supra* note 2.

⁸ P.E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Dordrecht – Boston – London 1992, p. 13-16; E. Manful, *The Development of Children’s Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, *supra* note 1, *op. cit.*, p. 22-23.

his or her rights.⁹ A person has rights (synonymous with claims, correlative of duties and obligations) to perform acts when others are under a correlative duty or obligation to permit these acts or to restrain from preventing them.¹⁰ To have rights described as entitlements means that the right-bearer is protected from the action or inaction of others. In other words, the behaviour of others is restricted on the basis of rights = entitlements granted to right-holders.¹¹

There are two main competing theories as both to the nature and function of rights – “interest” (welfare) theory and “choice” (will) theory. According to “interest” theorists, to have rights means that others have duties which protect interests of the rights-holder. The rights-holder is entitled to put certain duties on others (people, institutions) which guarantee the protection of his or her interests.¹² Thus, it is the duty of others to ensure the rights of the rights-holder. Proponents of “choice” theory are of the view that to have rights means to have the ability to make a choice, “to have the power to enforce or waive the duty to which the right corresponds.”¹³ According to “choice” theorists it is the rights-holder who is able to make rational decisions and thus it is the rights-holder who is under an obligation because he or she is the one whose choice is protected by the right.¹⁴

Philosophers make a distinction between legal (positive) and moral (negative) rights. This distinction is based on the attributes and ways of creation of rights. Legal (positive) rights are rights which are created by and exist under the law of the state. Moral (negative) rights are not codified in the law, they are

⁹ Ibidem.

¹⁰ P.E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, *supra* note 8, op. cit., p. 14.

¹¹ E. Manful, *The Development of Children’s Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, *supra* note 1, op. cit., p. 23.

¹² J. Bentham, *Anarchical Fallacies*, in: ed. J. Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, Oxford 1987, p. 198-229; E. Manful, *The Development of Children’s Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, *supra* note 1, op. cit., p. 23-24.

¹³ H.L.A. Hart, *Esseys on Bentham*, Clarendon Press 1982, in: E. Manful, *The Development of Children’s Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, *supra* note 1, op. cit., p. 24.

¹⁴ Ibidem.

acknowledged to all the people and they stem from the moral values and principles of social groups.¹⁵

Moral rights impose a negative duty on others, the duty not to interfere with a person's activity in a certain area (...). Whilst legal rights impose a positive duty on others, the duty to help a person, to have or to do something based on agreed rules and laws.¹⁶

What are children's rights?

The distinguishing feature of children is their incompetence to bear full responsibility for their actions.¹⁷ Thus, most of their rights are actually their entitlements, their privileges rather than their legitimate claims. Because of their special needs, capacities and interests which differ significantly from those of adults, children are considered to be incompetent to claim a right. Claiming the welfare of children as a right is the task of adults who act on behalf of children. "Therefore, for children, rights are mainly to protect their interests that others perform a duty or an obligation owed them"¹⁸ ("interest" theory). In this way children are dependent on adults as having power over their lives and thus having more power to protect children's interests than children themselves. Thus, children's rights "give children a claim which puts obligation on others to perform a duty, or give children the entitlement to be protected from behaviour of others."¹⁹

On the other hand, we shall distinguish between children's rights safeguarded by adults and those which empower children to make decisions and take actions for themselves ("choice"

¹⁵ J. Feinberg, *Social Philosophy*, Prentice-Hall 1973; D. Archard, *Children: Rights and Childhood*, Routledge 2004, p. 53, in: E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 25-26.

¹⁶ E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 25-26.

¹⁷ P.E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, supra note 8., op. cit., p. 17.

¹⁸ E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 32.

¹⁹ Ibidem, p. 33.

theory). Many philosophers think, however, that children's rights to make choices are constrained. In their opinion, a child cannot be the best judge of what is for his or her own good or interest, instead there are adults who specify the best interest criteria of children's choices. Thus, children are allowed to make their choices and express their opinions but within the criteria established for them by adults.²⁰

Frameworks of children's rights

Frameworks of children's rights can be divided into entitlement and interest frameworks. Entitlement framework theory is represented by M. Freeman who argues that children, according to their capability, are entitled to participate in decisions and choices affecting them. The author distinguishes four types of rights understood as entitlements for children. These are: 1) rights to welfare (which include right to: nutrition, health, education and non-discrimination); 2) rights to protection (which include right to: protection from neglect, harm, abuse and exploitation); 3) right to be treated like adults (which includes right of a child to make his or her decisions according to the changing capacity of a child) and 4) rights against parents who impede "the societal expected development of the child."²¹

Interest framework theory is represented by J. Eekelaar who argues that everyone, thus also children, is entitled to claim for themselves rights protecting their interests. He is of the view, however, that children are unable to recognize their best interests and therefore this role falls to adults who decide on behalf of children what serves them best. Eekelaar distinguishes three kinds of interests which build the basis of children's rights. These are: 1) basic interests (which include physical, emotional and intellectual care); 2) developmental interests (which include among others education and health services) and 3) autonomy interests

²⁰ Ibidem, p. 34-36.

²¹ M. Freeman, *The Rights and Wrongs of Children*, Frances Pinter 1983, in E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 38-40.

(which include for example child's freedom to present her or his views, freedom to choose his or her own lifestyle).²²

The contemporary concept of children's rights

Among authors who describe the contemporary concept of children's rights are two Polish scholars whose concepts this article refers to. These are Marian Balcerek and Elżbieta Czyż.

Balcerek states that children's rights constitute set of entitlements granted to children which stem from civil rights of community and which determine the status of the child in her or his state, society and family.²³ Children's rights give the child a status of special protection and simultaneously they inform adults about their responsibilities towards children. The catalogue of children's rights indicates also what the needs of the child are and what adults should do in order to provide each child with the necessary conditions for her or his proper development, education and preparation for life in society. At the same time children's rights constitute the catalogue of children's privileges in the adult world, which enable her or him to a privileged functioning as poor, inept and immature being.²⁴

Czyż argues that children's rights belong to human rights category and they reflect the dignity and uniqueness of the child as a human individual. She underlines that children's rights should not be confused with child's basic needs (for example her or his need for growing up in a happy family, her or his need for love). Children's rights should be seen in relation individual – the authority. It is not sufficient for the state to confirm children's rights existence under its legal system rules, but it is necessary that the state provides children with the possibility of exercise of their rights as well as with the effective procedures for children's right enforcement. Children's rights should not be discussed in the parent – child relationship. Children are subject to parental

²² J. Eekelaar, *The Emergence of Children's Rights*, "Oxford Journal of Legal Studies" 1986, 6(2), 161, in: E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 40-42.

²³ M. Balcerek, *Międzynarodowa ochrona dziecka*, Warszawa 1988, p. 18.

²⁴ Ibidem, p. 22.

authority and it is primarily parents who decide about upbringing and worldview of their children. The state helps the family in securing the appropriate conditions for the development of the family. It plays, however, only subsidiary role. The state is therefore obliged to respect the rights and duties of parents primarily responsible for the development and upbringing of their children. The state should protect the autonomy of the family and should not interfere with it, as long as parents do not neglect a child or do not abuse their parental authority.

Children's rights are subject to restrictions, but only such as are prescribed by law and are necessary in a democratic society because of national and public security, the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others people. Children's rights being based on universal human rights belong to all children irrespective of their race, gender, creed etc. Children cannot be deprived of their rights nor can children's rights be suspended.²⁵

An interesting conception on children's rights concept is presented by K.A. Bentley who makes the distinction between rights which children have as human beings and rights which they have in terms of their status as children (by virtue of their age) rather than as human beings. She states that most of the rights granted to children are granted to children because of their status as human beings and not strictly on the basis of their status as children. She describes these rights as "children's humans rights" and includes in their catalogue for example: the inherent right to life; protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Children's humans rights are of course non-derogable (inalienable) rights – they cannot be limited, deprived or suspended. On the other hand she argues that children have also their proper "children's rights" which are "those rights which children are deemed to have *qua children* rather than as human beings, or refugees, or any other rights-generating category."²⁶ She describes them as derogable rights as they "are constituted by limitations that are placed on children in terms of the exercise of their liberty, as the practice in question is one that is regarded

²⁵ E. Czyż, *Prawa Dziecka*, Warszawa 2002, p. 5-7.

²⁶ K.A. Bentley, *Can there be any universal Children's Rights?*, „International Journal of Human Rights” 2005, vol. 9, no. 1, p. 110.

as inappropriate for children to be engaging in by virtue of their youth.”²⁷ Children's rights catalogue includes, among others: protection of children from engagement in hostilities; protection from the illicit use of narcotic drugs and psychotropic substances or the rights to be protected from economic exploitation and from performing any hazardous work or the one that is likely to interfere with the child's education, or to be harmful to the child's health or her or his physical, mental, moral, spiritual or social development.²⁸

Evolution of children's rights and their protection

“Tracing the development of children's rights over the centuries' reveals “that the status of the child within the family has changed with the introduction of State laws to protect the child from the sole control of the father.”²⁹ “In the past children were generally treated as the property of their parents, with rights falling somewhere between those of slaves and those of animals.”³⁰ Fathers could treat children the way they wanted and the State offered no protection against child abuse.

The history of children's rights begins in nineteenth and early twentieth century. In 1819 England passed a law prohibiting the employment of young children in factories, mines and agriculture. In 1908 England adopted the Law on the protection of maternity and child care called the Children Act of 1908, Children's Charter or Habeas Corpus of Children. In 1904 France passed the law “Sur la Service des Enfantés assistés providing care of children and young people up to 21 years of age.” In 1912 Belgium issued “Law for the Protection of Childhood” (“Loi du 15.V.1912 sur la protection de l'enfance”). Among the central Europe countries in this period only Hungary introduced legal system of childcare of abandoned, neglected and delinquent children. The national

²⁷ Ibidem, p. 110-111.

²⁸ Ibidem, p. 109-121.

²⁹ E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 18.

³⁰ M.G. Flekkøy, *A Voice for Children*, Jessica Kingsley Publishers 1991, in: E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 10.

legislative process on the rights of the child was accompanied by the development of associations of criminologists, judges, child care workers seeking to set up special institutions for the education and care of children, to mitigate the criminal law in relation to minors, etc. Among them there were the Society for the Juvenile founded in 1865 in France and the UK Charity Organization Society formed in 1869. Simultaneously international conferences and congresses began to be organized. In 1883 in Paris the International Congress on the Care of Abandoned and Homeless Children was held.³¹ In 1890 in Berlin the participants of Criminologists' Congress established the International Union of Criminologists who started discussion on the problem of juvenile delinquency. In 1900 in Chicago the first juvenile court has been created.³² In 1905 in France the International Bureau for the Care of abandoned and released from prison children has been opened (Bureau International des oeuvres de patronage des des enfants et libérés abandonnés).³³

In 1922 in Brussels L'Association Internationale pour la Protection de l'Enfance has been established. Its role was described as "fight with everything that could harm children in their proper physical, moral and social development."³⁴ In 1919 the first organizations in the world to protect children – Save the Children in England and Radda Barnen in Sweden have been formed. In 1920 the International Association for Children – Union Internationale de Secours aux Enfants (UISE) has been founded. Its main activity focused on helping child war victims. The Union has also initiated creation of an international legal document that would guarantee protection of children's rights. It was "Geneva Declaration on the Rights of the Child" adopted by the League of Nations in 1924. Subsequent years have brought further congresses, conferences devoted to children's rights and their protection.

³¹ E. Kantowicz, *Ochrona praw dziecka w kontekście działalności UNICEF*, Warszawa 1997, p. 19-20.

³² E. Czyż, *Prawa Dziecka*, supra note 25, op. cit., p. 9.

³³ E. Kantowicz, *Ochrona praw dziecka w kontekście działalności UNICEF*, supra note 31, op. cit., p. 21.

³⁴ M. Balcerek, *Międzynarodowa ochrona dziecka*, supra note 23, op. cit., p. 74-77.

The most important event in the first several years of the post-war period, contributing to the dissemination and popularization of the idea of children's rights in the world, has become the International Declaration on the Rights of the Child, approved and adopted by the United Nations General Assembly on the 20th November 1959.³⁵ Thirty years later the United Nations adopted the Convention on the Rights of the Child which is currently the most important document in the field of child protection, defining standards for this protection that are binding to almost every country in the world.³⁶

The catalogue of children's rights

The history of children's rights

shows the development of the rights of children from protection rights in the factories and abuse in homes, to provision rights in the aftermath of wars and disasters to rights to participation. It clearly shows that the description of children's rights has been changing depending on the issues in the polity at a particular time. Industrialization introduced protection rights, with the two World Wars came provision rights and the civil rights movement focused on participation rights, but the concept evolved inclusively of the other previous categories of rights.³⁷

The contemporary catalogue of children's rights includes the three abovementioned categories of rights: protection, provision and participation rights. They can be found both in international and national legislation. However, it is the UN Convention on the Rights of the Child of 1989 that constitutes the core base of this catalogue and acts as the children's rights protection basic scheme that should be established under national law of Convention's member States.

³⁵ E. Kantowicz, *Ochrona praw dziecka w kontekście działalności UNICEF*, supra note 31, op. cit., p. 22-24.

³⁶ State Parties to the Convention: 193 countries: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (access: 27.01.2014).

³⁷ E. Manful, *The Development of Children's Rights in Africa and Europe. Comparing Legislation in Ghana and Northern Ireland*, supra note 1, op. cit., p. 21.

The catalogue of rights entrusted to children under the CRC provisions includes civil, social, cultural and political rights. Among civil rights we can find: the inherent right to life (Article 6); the right of a child to be registered immediately after birth; 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 (Article 7); the right of the child to preserve his or her identity, including nationality, name and family relations (Article 8); the right to express views freely in all matters affecting the child, to be heard in any judicial and administrative proceedings affecting the child (Article 12); the right to freedom of expression (Article 13); the right to the protection of the law against interference with child's privacy, family, or correspondence, or to unlawful attacks on his or her honour and reputation (Article 16); protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 11, 19, 32-37; Optional Protocol to the CRC of 2000 on the sale of children, child prostitution and child pornography); protection of children affected by armed conflict (Article 38 and 39; Optional Protocol to the CRC of 2000 on the involvement of children in armed conflict). Among children's social rights there are: the right of the child to the protection of his or her health (Article 24 and 25); the right to benefit from social security, including social insurance (Article 26); the right of every child to an adequate standard of living (Article 27); the right of the child to rest and leisure (Article 31). Among cultural rights we can find: the right of the child to education (Article 28 and 29); the right to access to information (Article 17) and among children's political rights: the rights of the child to freedom of association and to freedom of peaceful assembly (Article 15). The CRC grants also children special rights to protection in the event of their disability (Article 23), in the case of deprivation of the child's family environment (Article 20 and 21). It underlines the rights of refugee children (Article 22) and children belonging to ethnic minorities to preserve their own culture, religion and language (Article 30). It also includes special treatment provisions of minors who have fallen into conflict with the law (their right to defense, the prohibition of the death penalty and life imprisonment) (Article 40).³⁸

³⁸ United Nations Convention on the Rights of the Child, *supra* note 2.

The protection of children's rights

At the beginning of the twenty-first century, the essential question posed in the context of children's rights is the question of their implementation and protection. We can observe four spheres of action undertaken in order to provide child's rights implementation and protection. They exist both at national and international level and they include: the creation of the law, the monitoring of compliance with national/ international obligations, the enforcing of violations of these obligations and helping/ supporting children whose rights have been violated. Since the first decade of the twentieth century we have been observing a large and ever growing process of the codification of children's rights, both at the national and international level, One can find dozens of binding international agreements, plenty more documents belonging to so-called soft law and many domestic law acts regarding child rights issues and defining standards for their protection.³⁹ Simultaneously, special institutions have been established to monitor compliance with the legal standards for the protection of children's rights that bind individual units, institutions and states. At the international level this role falls mainly to the Committee on the Rights of the Child, the African Committee of Experts on the Rights and Welfare of the Child, the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations High Commissioner for Human Rights (UNHCHR), the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and the United Nation Special Representatives of the Secretary-General on Children. At the national level this role is performed by the Ombudsmen for Children and national governmental and nongovernmental organizations acting in favor of children's rights protection. These organisations play also an important role in helping and supporting children whose rights have been threatened or violated. Their role has been strengthened by institutions responsible for enforcement of children's rights' violations. At the national level this function

³⁹ At international level function of creating legal standards in the field of children's rights in universal dimension falls mainly to the United Nations Organization and the International Labour Organisation and in regional dimension – to the Council of Europe, European Union, Organization of American States and African Union.

is being played by national courts and at the international level mainly by the African Committee of Experts on the Rights and Welfare of the Child, the United Nations Committee on the Rights of the Child and the International Criminal Court.

In the field of children's rights protection a very important principle is the cooperation of international and national institutions' which is one of the guaranties of the protection's effectiveness.

Conclusion

One hundred years ago we were creating first major codifications on the rights of the child. We have entered in the twenty-first century not only with countless international and national legal documents concerning children's rights, but also with the legal definition of "a child," with numerous concepts of "the rights of the child," with a broad catalogue of children's rights, with many institutions protecting children's rights and enforcing their violations. In the historical, legal, sociological, psychological perspective a lot has changed in the context of children's rights and their protection. We have many means, which at least theoretically create ideal conditions for the development of children and their protection. Are those conditions realized also in practice? The answer – fuller and closer to the truth, seems to be possible – as was in the case of laying the foundation of the existence and protection of children's rights, with a longer passage of time.

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