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UNIVERSITY OF MISKOLC, FACULTY OF LAW
3515 MISKOLC-EGYETEMVÁROS, HUNGARY
Tel.: +(36) (46) 565-111/13-53
E-mail: editor.eis@uni-miskolc.hu

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TÍMEA BARZÓ[*]

Enforcing children's right to self-determination in health care: theoretical and practical issues raised by the refusal of age-related compulsory vaccinations in Hungary

ABSTRACT: Anti-vaccination is a world-wide movement that has, unfortunately, found followers in Hungary as well. Anti-vaccination advocates attempt to postpone or outright avoid compulsory vaccinations for their children in various ways. On the one hand, these parents do not cooperate with family pediatricians, family nurses, and vaccinating doctors, and on the other hand, possession of medical documentation or certification without having actually had the vaccinations administered is an increasingly common phenomenon. One of the harmful consequences of the anti-vaccination movement is the increased incidence of epidemic outbreaks in developed countries, not just in developing ones.[1] The question arises as to in what form and under what procedural framework a minor child's right to self-determination in medical procedures should be enforced and whether the child's parent, as the child's legal representative, has the right — and if so, within what legal framework — to decide and even refuse, with regard to their child, a medical treatment or invasive intervention that is compulsory or recommended by a doctor. The case of refusal of age-related compulsory vaccinations is also of particular importance. The paper deals in more detail with the legal background of the arguments and counter-arguments and the practical problems involved.

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[*] Professor, University of Miskolc, Faculty of Law, Hungary, timea.barzo@uni-miskolc.hu.
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[1] Epidemics have arisen in places where they had not occurred for a long time since the advent of compulsory vaccination. Specifically, cases have been reported in countries that previously reported having successfully suppressed certain diseases, such as the United Kingdom, Albania, Greece, and the Czech Republic, although these four countries had earlier announced to have successfully stamped out the disease. The number of measles cases doubled between January and June 2019 compared to the same period in 2018. Available at:
https://www.informed.hu/betegsegek/pediatrics/infections/morbilli/terjed-a-kanyaro-vilagszerte-225911.html (Accessed: 16 October 2023).

KEYWORDS: self determination, children rights, compulsory vaccinations, refusing a medical treatment, health authority's decision.

1. Legal framework for refusing a medical treatment or intervention that a child needs

According to the Hungarian Health Act,[2] a medical treatment or intervention that a child needs, that is, where its absence would likely result in *serious or permanent impairment* to the minor patient's health condition, cannot be refused.[3] However, legislators did not want to completely exclude the possibility of refusing care in cases where a minor has unappeasable pain due to a terminal and incurable disease. Hence, while allowing the disease to follow its natural course, it is possible to refuse life-supporting or life-saving interventions, but only if the child suffers from a serious disease which, according to the current state of medical science, will lead to death within a short period of time even with adequate health care and is incurable. In such cases, the entitled parent (legal representative) or other relatives may refuse care as indicated in the Health Act via a statement incorporated into a public deed or a fully conclusive private deed, or, in the case of the representative's inability to write, in a declaration made in the joint presence of two witnesses. In the latter case, the refusal must be recorded in medical documentation that shall be certified with the signatures of the witnesses. In such a case, however, the health care provider is obliged to bring an action to obtain the required consent of the relevant court, and the treating doctor is obliged to provide the care justified by the ill child's state of health until a final and binding court decision is made.[4]

In case of direct danger to life, medical providers do not need to attempt to have the relevant court invalidate a parent's declaration of refusal before performing the required intervention. In order to comply with his or her obligation, the treating doctor, if necessary, may also seek the assistance

[2] Act CLIV of 1997 on Health (Health Act).

[3] Section 21(1) of the Health Act; Hidvégine Adorján and Simkó-Sári, 2017, p. 121.

[4] Palliative care for children is a special area that is closely related to that for adults. Palliative care for children can take place at times when a child is suffering from a disease that is life-limiting (e.g., muscular dystrophy) or life-threatening (e.g., advanced cancer). In such cases, it is ideal for the child to receive the required care in their family home with the pediatric palliative team constantly available and accessible. Hidvégine Adorján, Simkó-Sári and Ohár, 2021, p. 210.

of the police.[5] The procedure that replaces the court's ruling in this case entails the court acting through a non-contentious proceeding held on a priority basis. The proceeding is free of charges because of the subject matter.[6] However, the person making the declaration of refusal may withdraw the declaration at any time, without any formal obligation.

In a case that started in 2014, the parents refused the administration of age-related compulsory vaccines to their infant, refrained from choosing a family pediatrician, refused the family nurse's services, and denied a social worker entry into their home; consequently, the child protection authority took their child into protective custody.[7] In the same year, it was also declared in a normative way that in the case of a minor with no or limited capacity, the health care services of the general practitioner, the family pediatrician, and the family nurse cannot be refused.[8] It is the obligation of the family pediatrician or, where there are mixed districts, that of the general practitioner, to provide primary health care to minor children[9] up to the age of 19 years.

For the child's healthy development, the legal representative is obliged to cooperate with the general practitioner and the family pediatrician and ensure that the child attends screening, status, and check-up examinations at the times determined by the general practitioner and the family pediatrician. If the legal representative fails to fulfil this obligation, the health authority, on the initiative of the general practitioner or the family pediatrician, may order an investigation involving the family and child welfare authority, if necessary.[10] In cases where the general practitioner or the family pediatrician, as part of the child protection referral system,

[5] The question arises as to how doctors shall act in the case of a conflict with an incapacitated or partially incapacitated patient's legal representative. It is the doctor's duty to protect patients with no or limited capacity to consent against the decisions of persons who have not decided in the patient's best interest; thus, legislation should provide appropriate redress regarding this issue as well. Doctors, in practice, may be faced with a conflict of obligations when they are required to provide care, for example to a child, that is in line with professional standards and to which the legal representative has also given consent. Can a doctor be obliged by the court to provide or withhold health care against their own professional conviction? Dósa, 2012, p. 185.

[6] Sections 20(3)-(8) and 21 of the Health Act.

[7] Court Resolution BH2017.101.

[8] Section 21(1)(a) of the Health Act.

[9] Section 8(2)(a) of Act CXXIII of 2015 on Primary Health Care (Hereinafter Health Care Act).

[10] Section 8(1)-(2) of the Health Care Act.

detects that the child is at risk, they must indicate it to the family and child welfare service and initiate an authority proceeding in the cases specified in Act XXXI of 1997 on the Protection of Children and Guardianship (Child Protection Act). In order to prevent harm and eliminate the risk threatening the child, the general practitioner and the family pediatrician caring for the child and the family nurse responsible per the child's place of residence are obliged to cooperate and mutually inform each other.[11]

In the case of medical interventions required by law, such as age-related compulsory vaccination, the parent's (legal representative's) consent is not required.

On the basis of today's dominant scientific worldview, the World Health Organization is running a global campaign advocating children's immunization, and Hungarian legislation is in line with this framework. The strategic goal of the World Health Organization is to reach 95% immunization coverage worldwide. Hungarian statistics are more favorable than that, with the local vaccination system having internationally acknowledged results.[12]

2. Parental refusal of age-related compulsory vaccinations

The Hungarian vaccination system has a well-defined legislative background. Age-related vaccinations are administered at specific ages and in specified combinations according to the vaccination calendar included in the methodological letter published and renewed annually by the National Public Health Center (Nemzeti Népegészségügyi Központ).[13] Vaccines and their administration to children are free of charge; costs are covered by the central budget.[14]

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[11] Section 8(3)-(3)(a) of the Health Care Act.

[12] Joint Report of the Commissioner for Fundamental Rights and the Deputy Commissioner for Fundamental Rights and Ombudsman for Future Generations on Case AJB-3119/2014, p. 9.

[13] The vaccine against smallpox (variola) was the first vaccine to be introduced and was used until 1980 when the WHO declared the world free of smallpox. Dósa, Hanti and Kovácsy, no date, *Great Commentary.* (Hereinafter: Great Commentary) Explanation of Section 57 of the Health Act.

[14] Together with other epidemiological health care services, compulsory vaccinations shall also be provided to individuals residing in Hungary as part of the "basic health package." Thus, the administration of age-related compulsory vaccinations is free of charge for a child settled in Hungary even if the child does not yet have a social security number. Section 142 of the Health Act.

The effective family nurse system has a crucial role in the Hungarian vaccination scheme. It is the local family nurse's duty[15] to register the children living in their area of care who are subject to compulsory vaccination and to notify the children's legal representatives, typically parents, about the due date of compulsory vaccination and provide related information including the exact method, purpose, place, and time of vaccination.[16] The legal representative is obliged to ensure the presence of the minor person who is subject to vaccination.[17] In a case where, for any reason, the parent is unable to be present with the child at the place of the vaccination at the indicated time, the family nurse is obliged to report this without delay. In this case, the minor's legal representative will be informed of the new date of vaccination. The reason for the absence might be that the compulsory vaccination was already administered to the child elsewhere or the child was permanently exempted from vaccination. The parent is obliged to declare such facts and provide credible supporting evidence. It is essential that parents keep their children's vaccination documentation and present it to the doctor on occasions of new vaccination and screening and check-up examinations. In the event of a lost or damaged Healthcare Book, the data comprising the Vaccination Data Sheet shall be replaced by the vaccinating doctor on the basis of the vaccination records.[18]

The vaccinating doctor is also obliged to keep records of the children subject to vaccination who fall under their responsibility of care and shall report to the family nurse[19] and the health authority all data on missed vaccinations in a given month (what vaccinations, who missed them and for what reason).

In case where the parent does not comply with their obligation even after receiving a written notice, and the family nurse's call and the information provided by the vaccinating doctor are not effective either, the state health administration will order the vaccination by decision.[20] In such cases, the authority does not have discretionary powers as the law contains

[15] Section 15(1) of the Decree 18/1998 (VI. 3.) NM of the Minister of Public Welfare (MPW) on the Epidemiological Measures Necessary for the Prevention of Infectious Diseases and Epidemics (Hereinafter: MPW Decree).

[16] The family nurse is obliged to report administered and missed vaccinations to the health authority on a monthly basis. Mohai and Pénzes, 2018, pp. 87-89.

[17] Section 14(1) of the MPW Decree; Section 58(6) of the Health Act.

[18] Section 14(1)-(4) of the MPW Decree.

[19] Section 8(3)(b) of the Health Care Act.

[20] Section 58(7) of the Health Act.

the following clear obligation: It must ensure that the requested vaccination is carried out by the means available. In a case where the authority obliges the legal representative to have the compulsory vaccine administered to the child, it sets an appropriate time limit to realize that, and it also informs the parent of the legal consequences applicable in the event of non-compliance.

The decision ordering the vaccination was immediately enforceable until 20 June 2007 irrespective of legal remedy.[21] However, a serious legal debate developed regarding the immediate enforceability of the health authority's decision ordering the vaccination, in which the Supreme Court finally ruled that developing active and passive immunity to infectious diseases is a public interest that justifies the ordering of immediate enforcement.[22] However, the Constitutional Court classified the legal provision on the immediate enforceability of the decision as unconstitutional because it considered that the immediate enforceability of the first-instance decision ordering the administration of vaccination, irrespective of the specific circumstances and the irreversibility of the intervention, disproportionately restricted the right to legal remedy recognized in Section 57(5) of the Constitution.[23] Thus, according to the provisions currently in force, the health authority's decision ordering vaccination can be declared immediately enforceable only in the case of an immediate epidemiological risk in respect of the scope of vaccination determined by the emergency, and otherwise not.[24]

3. Sanctions applicable in cases of refusal of compulsory vaccination

If the parent still does not comply with the decision, the health authority will institute infringement proceedings[25] in which it may impose a health fine,[26] the amount of which may range from HUF 30,000 to HUF 5,000,000.

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[21] Section 58(3)-(4) of the Health Act.
[22] Court Decision BH 2004.37.
[23] Constitutional Court Decision 39/2007 (VI. 20.) AB.
[24] Section 58(7) of the Health Act.
[25] Pursuant to Section 239(1)-(3) of Act II of 2012 on Minor Offenses, Offense Procedures and the Registration System of Offenses, those who violate health legislation regarding vaccination, infectious diseases, infectious patients, or persons suspected of being infected, epidemiological surveillance or control and disinfection, or a health provision issued under such legislation, commit an offense, for which the procedure falls within the competence of the state health administration.
[26] Section 13/A(5) of Act XI of 1991 on Health Governance and Administration Activity.

According to a report from the ombudsman in 2016, the practice of continuously imposing fines on those declining compulsory vaccination is, in the unanimous opinion of the health authorities consulted, an insufficient deterrent for parents. Instead, it leads to the development of such an unequal legal situation in which parents who refuse vaccination and have a better financial situation "can buy off" the exemption of their children from the compulsory vaccination scheme by paying the fine(s); hence, there is a need for proportionality, graduality, and consistency in this area.[27]

A long-used sanction was kindergartens refusing admission to children who had not been vaccinated. Previously, a child could only be admitted to kindergarten education if their guardian could produce a medical certificate stating that the child "could enter the community," which meant that the child had received age-related compulsory vaccines. However, the 2016 ombudsman's report declared that a child's admission to kindergarten cannot be made dependent on the receipt of compulsory vaccinations required at the child's age. At the same time, the head of the kindergarten is responsible for ensuring that the kindergarten has an appropriate health service, whereby the kindergarten's doctor is obliged to check the receipt of compulsory vaccinations in respect of all children admitted to the kindergarten and must also take the necessary measures in the event of any vaccination deficiencies.[28]

For lack of human rights violations, the European Court of Human Rights (ECHR) dismissed a number of cases brought by parents in the Czech Republic, alleging that they had been fined by the authorities for refusing their children's compulsory vaccinations and that kindergartens had refused their children's admission. As in Hungary, it is a general legal obligation to vaccinate children in the Czech Republic, and parents who fail to do so can be fined. Although, according to the ECHR, the execution of a refused medical intervention may harm the related person's right to privacy, it is a necessary and proportionate restriction to protect the health rights of others, particularly children (i.e., the development of herd immunity). Pursuant to the ECHR's decision, the lawful refusal of kindergarten admission is a measure of prevention rather than punishment for the parents. However, as taking part in education is essential for children's personal development, children of compulsory schooling age can attend educational

[27] Report of the Commissioner for Fundamental Rights on the case AJB-361/2016, p. 16.
[28] Report of the Commissioner for Fundamental Rights on the case AJB-361/2016, p. 18.

institutions in the Czech Republic even in the absence of compulsory vaccinations.[29]

A precedent-setting judgement was made in Hungary on the question of whether parents who actively, intentionally, and habitually prevent their minor child from receiving age-related vaccinations can be convicted of the offense of "endangering a minor." In this particular case, it was clearly established that the parents, by this behavior, had thwarted their child in developing a more complete immunity to the diseases the vaccinations are intended to prevent, thus exposing the child to risk in the form of there being a chance of becoming infected with the pathogens of such diseases due to environmental circumstances. However, the expert opinion also found that, due to compulsory vaccination, the occurrence of these diseases is very low in practice; thus, there is relatively little chance that, in the absence of vaccination, the child involved in the case could actually become infected, thereby putting their physical development at immediate risk. The offense of endangering a minor is a result crime, which means that its commission is conditional on actual endangerment of the minor's physical development.[30] It is, however, a fact that the possibility of infection is extremely low, exactly because of the public health situation that has been achieved through vaccination; therefore, it could not be established that, in the absence of vaccinations, the child concerned was at risk of serious infections that would have endangered their physical development. The remote (theoretical) possibility of danger was insufficient to establish the offense; thus, in the absence of a situation actually endangering the child's physical development, the crime of endangering a minor could not be established in respect of the parents.[31]

Finally, refusal of compulsory vaccination may lead to an authority measure ordering the child's removal from the family and his or her temporary placement on the grounds of child endangerment if the parent fails to have the compulsory vaccination administered to the child and hinders its implementation in every possible way. In one specific case,

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[29] *Case of Vavřička and Others v. the Czech Republic* App. No. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, 8 April 2021. Available at: https://hudoc.echr.coe.int/fre?i=001-209039 (Accessed: 16 October 2023); Lápossy, 2022, p. 6.

[30] The concept of danger is of dual origin: Besides the child's lack of immunity to specific diseases (as a risk factor), a real possibility of actual infection (as a risk factor) is also required.

[31] Principled Court Resolution EBH2009.2029.

parents tried to prevent their infant child from being vaccinated by hiding the child, and they did not cooperate at all with health and child protection authorities, to such an extent that they did not fulfil their obligation to do so even despite a final decision. The enforcement was obstructed by failing to cooperate and by isolating and hiding the child from the competent authorities, and by referring to foreign residence. The authorities first ordered that the child be taken into protection, but as serious endangerment persisted, the second-instance child protection authority decided to remove the child from the family and place him or her in temporary foster care. The Curia also confirmed in its decision that the fact that health and child protection services had completely lost sight of the child implied such serious endangerment that could only be averted by taking the child into temporary care.[32]

In another case, the child's endangerment and, consequently, the decision to take the child into protection and appoint a family carer was based on the parents' refusal to present the child for administration of compulsory vaccinations, their failure to request the services of a family nurse, and their failure to choose a family pediatrician for their child (although, when the child was ill, they took the child to four different pediatricians a total of 14 times). Furthermore, the parents only appeared to cooperate with the Child Welfare Center, but they did not apply its advice, and the father did not allow the family carer into their home. The Curia confirmed the principle established by the lower courts that the choice of a general pediatrician is a child's right under the freedom to choose a doctor but an obligation for parents. Health care is much more efficient if the same doctor regularly sees the child and knows the medical history as said doctor has a better chance of identifying possible diseases earlier based on the symptoms. Failure to administer compulsory vaccinations to a child is tantamount to endangerment that may require an order to take the child into protection because it may hinder or impede the child's physical development. There is no need to call an expert to confirm the "danger" required for protection, which can be established without further proof in the case of failure or refusal to administer compulsory vaccinations since the child's physical, mental, and emotional or moral development does not have to be impaired in order to determine endangerment.[33]

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[32] Paragraphs [26]-[27] and [39] of Principled Court Resolution EBH2018. K21.

[33] Paragraph [21] of Court Resolution BH2017.101.

However, legislation is not as strict everywhere in Europe as it is in Hungary, which has led to an increase in vaccine hesitancy throughout the continent. In a resolution adopted in April 2018, the European Parliament noted that epidemiological data from Member States have shown important gaps and that vaccine hesitancy has reached worrying proportions.[34] Although vaccination is estimated to prevent around 2.5 million deaths worldwide each year, Europe's vaccination coverage rate is still declining, which has led to a significant increase in measles epidemics and related deaths in many European countries.[35]

4. Arguments against the administration of compulsory vaccinations[36]

A primary argument concerns people's liberties with respect to the state's authority. Anti-vaccination assumed an organized form as early as the 19th century when those concerned claimed unjustified restrictions on human liberties. These groups were not so much protesting against vaccinations as against the practice of making them compulsory; such protest has been established upon various ideological grounds, the essence of which is that making vaccinations compulsory deprives parents of their freedom of choice. Even on this premise, the question has arisen as to whether the extent of the restriction is proportionate to the goal it is intended to achieve.

Possible harmful consequences. Another important anti-vaccination argument is that compulsory vaccinations might also cause serious damage to health. However, vaccination safety has improved significantly over time, and the occurrence of infectious diseases has decreased. As infectious diseases become less common, parents are less and less likely to recognize and perceive the risks of infectious diseases; thus, their fears about them also understandably diminish. For this reason, the complications of infectious diseases are not the focus of parents' concerns but rather the vaccinations and, thus, unclear chronic conditions (i.e., possible autoimmune diseases).

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[34] European Parliament Resolution of 19 April 2018 on vaccine hesitancy and the drop in vaccination rates in Europe (2017/2951(RSP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0188_HU.html (Accessed: 16 October 2023).

[35] Great Commentary explanation of Section 57 of the Health Act.

[36] Mohai and Pénzes, 2018, p. 84.

However, there are also people who question the effectiveness of compulsory vaccinations. As already mentioned, the radical reduction in the occurrence of diseases that are preventable with vaccines is apparent to all. However, some of those who deny vaccination do not attribute this phenomenon to vaccines but to the improvement of hygiene and living conditions. Unfortunately, if the number of unvaccinated people in a community increases, or if they mix with vaccinated people in higher proportions, then vaccinated people are also more likely to contract infectious diseases. However, when such mixture is low level, the unvaccinated form "insular" communities that serve as a starting point for local outbreaks.[37]

In recent decades, it has become increasingly common in Hungary, as well as elsewhere, for parents to attempt to avoid the administration of compulsory vaccinations to their children on various grounds. Among vaccine-skeptic parents, there are some who argue for the freedom to raise children, the inviolability of privacy, and the right to raise and care for their children as they wish, according to their conscientious and religious convictions. This freedom is limited by the provisions on compulsory vaccination, which deprive parents of the right to raise their children according to their conscience and to decide to refuse the administration of the vaccine they consider dangerous to their child.[38] The Constitutional Court already addressed this issue in 2007[39] and ruled that vaccinations can be considered invasive health interventions executed for public health and epidemiological purposes. The decision declared that compulsory vaccinations are suitable and necessary means to, on the one hand, ensure children's proper physical, mental, and moral development and, on the other, protect society as a whole against infectious diseases and epidemics. The judicial practice developed along the lines of the Constitutional Court's decision is also consistent in that objective legal norms protecting the child and thus the health of the society cannot be set aside because of the parent's subjective convictions. The legal obligations and responsibility concomitant with being a parent are more pronounced than parental rights, which are limited by law. Moreover, parents are only entitled and obliged to exercise their parental rights to custody in line with the rules of guarantee, that is, in

[37] Ibid. pp. 85-86.
[38] Paragraph [5] of Court Resolution BH2020.147.
[39] Section V, Paragraph 3.6 of Constitutional Court Decision 39/2007 (VI. 20.) AB.

the interest of their child's proper physical, mental, and moral development.[40]

In several cases, parents who assert a claim refer to the infringement of the right to freely choose a doctor. Section 8(1) of the Health Act does indeed declare the right to free choice of a doctor as a general rule; however, the phrase “unless an exception is provided by law” clearly creates the possibility of derogation from the general rule. Based on the provisions in Section 5(5) and (9) of the MPW Decree, it clearly follows that, in the case of in-school campaign vaccinations, the right to free choice of a doctor, under Section 8(1) of the Health Act, may be restricted, not only by law but by any legislation. Hence, the right to free choice of a doctor as a general rule does not apply in the case of in-school campaign vaccinations, and the law allows for this.[41]

The other argument based on which parents have refused to cooperate in their children’s immunization through compulsory vaccination is on grounds of violation of the child's right to bodily integrity.[42] According to parents, the obligation to administer vaccinations is an intervention in the children’s bodily and psychological integrity and simultaneously the parents' right to choose their children’s care and education. It is a general point of reference that the use of binding and coercive legal instruments can only be a last measure to achieve public health objectives. According to parents, failure to receive a vaccination or revaccination does not endanger the individual or the community to the extent that it is necessary for the state to enforce vaccination, especially if the vaccine may have side effects. It has been argued that the health authority should consider, on a case-by-case basis, whether the child’s individual interest with respect to being vaccinated (as a benefit) and the social interest from the viewpoint of protecting the community outweigh the constraint or harm resulting from

[40] Szendrői, 2020, p. 193.

[41] Paragraph [17] of Court Resolution BH2020.343.

[42] In a specific case, the parents argued that the vaccination scheme, based on the administration of age-related compulsory vaccinations and defined by the Health Act and related statutory provisions, both unnecessarily restricts fundamental constitutional rights and violates the vaccinated person's right to bodily integrity. The Curia established as a matter of principle that, in cases where the procedure followed by the health authority (the decision requiring vaccination) complied with the law, it could not concurrently constitute a substantive violation of personality rights. At the same time, the Constitutional Court did not find that the referred legislation was unconstitutional. Paragraphs [24]-[25] of Court Decision BH2020.147.

use of a coercive measure.[43] The Curia balanced these interests in several cases and found that vaccine administration does indeed violate the bodily integrity of the vaccinated person if they oppose the vaccination. At the same time, however, it must also be examined whether there is an interest that justifies this infringement, that is, whether the individual's right to bodily integrity can be restricted in order to promote their own interests or those of a larger community. In general, the Curia has shared the position of the Constitutional Court, which has already been cited,[44] based on scientific knowledge that the individual and social benefits of institutionalized vaccination far outweigh the potential harms and risks that may arise as side effects in vaccinated children as non-vaccination usually poses a much greater risk to children's health than the vaccines themselves. The correct outcome of the balancing of interests is therefore that individual rights, such as the right to bodily integrity, can be constitutionally limited in the case of vaccinations. Should the possibility of a restriction be realized through the application of a balancing of interests, this excludes the declaration of infringement on personality rights and the application of the legal consequences associated with the infringement of personality rights.[45] Parents with the capacity to make decisions cannot refuse vaccinations on behalf of their children either. In such cases, the state, instead of the family, must provide children with the protection and care necessary for their proper physical, mental, and moral development, and therefore, the state must protect children's autonomous interests, even against the parents.[46]

Another common argument among vaccine-skeptics is that vaccination poses a risk to the health of the vaccinated child and can, in extreme cases, lead to death or permanent damage to health. If a person subject to compulsory vaccination suffers serious damage to his or her health, disability, or death in connection with the vaccination, the state will compensate him or her or his or her dependents.[47] Though infrequent, there may be pathological complications of compulsory vaccinations, for which legislators, because of the binding force involved, place responsibility on the state. The law imposes an obligation to compensate only in the case of a "person subject to compulsory vaccination," so there is no such obligation

[43] Paragraph [3] of Court Decision BDT2018.350.
[44] Section V, Paragraph 3.6 of Constitutional Court Decision 39/2007 (VI. 20.) AB.
[45] Paragraphs [28]-[29] of Court Decision BH2022.147.
[46] Court Decision BDT2018. 3950.
[47] Section 58(7) of the Health Act.

incumbent on the state in respect of damages arising in connection with optional vaccinations.[48]

Age-related compulsory vaccinations (BCG, diphtheria, whooping cough, and polio) have been considered by the court to be invasive interventions which, as a general rule, cannot be refused; however, the right to information is also granted to the person to be vaccinated or to his or her legal representative.[49] Compensating the damage caused by a vaccination is compensation because the vaccine recipient suffers a health impairment or death despite the health care provider's lawful proceeding. The state's obligation to compensate gives rise to a claim for damage on an objective basis.[50] This means that if it can be proved that a patient suffered serious damage to his or her health, disability, or death and any of these can be casually linked to the vaccine, he or she or his or her dependents will be compensated by the state. However, proving causality is often difficult.[51] In one specific case, a ten-month-old child had been given Sabin drops during his or her hospitalization at a medical institution, after which the child became paralyzed. The paralysis mainly affected the child's limbs. According to the then Ministry of Health, there was no medical failure, but a

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[48] Barzó, 2019, pp. 393-413.

[49] Curia Judgement Kfv.III.39.058/2012/9.

[50] Gyöngyösi, 2002, p. 246.

[51] This was also the case in a lawsuit in which the person concerned received a vaccine against hepatitis B, produced by Sanofi Pasteur, within the period late 1998 to mid-1999, after which the person was diagnosed with multiple sclerosis in November 2000. Before his death, the patient filed a lawsuit seeking compensation from Sanofi Pasteur for the damage caused by the vaccine that had been administered. The proceeding court (cour d'appel de Paris) dismissed the action on the grounds that causation had not been proven. The French Cour de cassation (court of cassation), proceeding on the basis of the submitted request for review, referred the case to the Court of Justice of the European Union as a preliminary ruling procedure, and the latter court declared that the administration of the vaccine and the occurrence of the disease were close in time, and, furthermore, there was no personal or family medical history in connection with the disease. Additionally, a significant number of cases have been recorded where administration of this vaccine resulted in the disease subject in the lawsuit. Based on the above, the court concluded that administration of the vaccine was the most likely explanation for the occurrence of the disease; therefore, the vaccine did not provide the safety that could be reasonably expected. It is for national courts to ensure that the possible evidence put forward is indeed sufficiently serious, precise, and consistent to allow a clear consequence to be drawn regarding that the defect in the product is the most likely explanation for the damage. Judgment in Case C-621/15. N. W and Others v. Sanofi Pasteur MSD SNC and Others Press Release No. 66/17 of the Court of Justice of the European Union (Luxembourg, 21 June 2017).

very rare vaccination complication, for which the state was obliged to pay compensation for all the damage that was not reimbursed by the social security system.[52]

It is worth noting that, contrary to the rules laid down for damage caused in connection with the donation of blood or the use of blood products, the relevant legal provision here provides that the state's obligation to compensate is independent of whether the damage occurred with or without compliance with professional rules. However, if serious damage to health following administration of a vaccine can be causally linked to the professional misconduct of a health care provider (general practitioner, family pediatrician, etc.), the health care provider is liable under the relevant civil and health law rules. A health care provider breaches a professional rule if, for example, he or she does not ensure before administering a vaccine that the child is not suffering from a disease or that the child's general health has not deteriorated to such an extent that administration of the vaccine should be delayed. Of course, in this case, the health care provider's liability is not objective.[53] It is also important to note that, although only the person who has suffered a health impairment or, in the event of death, his or her dependent relatives are entitled to compensation from the state, the parents or siblings of a child who has suffered a serious health impairment can, for example, also claim damages and compensation from the health care provider who has committed professional misconduct under the relevant civil law rules.

In a specific case, a procedure carried out at the ombudsman's office examined whether the established practice of using cell lines from surgical

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[52] Court Resolution BH1981.455.

[53] The rules of the Civil Code on liability for non-contractual damages [Section 6(519)] and on sanctions for violating personality rights shall be appropriately applied to claims for damages arising in connection with health care services and to claims for violations of personality rights. Section 244 of the Health Act. The health care provider must therefore prove that it is not at fault in order to be exempt. This generally means showing the behavior that is generally expected in a given situation. However, the standard of care in suits for health care compensation is higher: All patients, regardless of the reason for seeking care, must be treated with the diligence expected of those involved in their care and in accordance with professional and ethical rules and guidelines. Section 77(3) of the Health Act. A health worker shall perform health care activities with the diligence normally expected in the given situation, within the framework of professional requirements, in compliance with ethical rules, to the best of their ability and conscience, on a level determined by the material and personal conditions available to them, and in accordance with their professional competence. Section 5(1) of the Health Act.

abortions for the production of the combined measles, mumps, and rubella (MMR) vaccine used in Hungary is a violation of parents' freedom of conscience. The ombudsman's report stated that, by virtue of freedom of conscience, the state may not force anyone into a situation that would bring him or her into conflict with himself or herself a situation incompatible with an essential conviction defining a person. Furthermore, the state has a duty not only to refrain from such coercion but also to allow, within reasonable limits, alternative conduct, that is, by furnishing the realistic possibility of exercising freedom of conscience by providing and accepting other vaccines under the same material conditions.[54]

5. Postponement of compulsory vaccination and permanent exemption

The law allows for the temporary postponement of compulsory vaccination if vaccination is not possible because of the patient's health condition or if vaccination is likely to have an adverse effect on the patient's health or existing illness and a change in the patient's health condition that would allow the patient to be vaccinated is expected within a period of time that does not risk the public health interests relating to vaccination. This is up to the treating doctor to decide based on the current medical condition of the child to be vaccinated. In this case, however, the missed vaccination must be administered as soon as the contraindication regarding the child's health condition ceases to exist, and the postponement of compulsory vaccination must be reported to the health authority.[55]

Permanent exemption from compulsory vaccination can be initiated with the competent health authority jointly by the treating doctor and the legal representative of the minor to be vaccinated. Exemption can only be

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[54] According to the report, the complainants, who are committed to law-abiding behavior, have made a legitimate request to the authorities to apply for an alternative vaccine in order to exercise their freedom of conscience, as guaranteed by the Fundamental Law, as the alternative vaccine they found on their own initiative was identical in its active ingredients to the vaccine in circulation in Hungary, as acknowledged by the Hungarian authorities, and their vaccinating doctor agreed to administer the vaccine to their children. Regarding funding, the report considered it an equitable solution for the state to provide financial support equal in proportion or in degree to the price subsidy of the state-acknowledged and compulsory vaccine for those who are obliged to vaccinate and are forced by conscience to choose between law-abiding behavior and the exercise of freedom of conscience and religion. AJB-3119/2014. See more details in: Láncos, P. L., 2015, pp. 55-69.

[55] Section 58(1) of the Health Act.

granted if vaccination is not possible due to the health condition of a sick child or if vaccination is likely to adversely affect the child's health or existing illness and no change in the child's health condition is expected in the foreseeable future. The medical opinion of the treating doctor justifying the exemption must be attached to the request.[56] The health authority makes the final exemption decision. During the exemption procedure, no notice or authority order for the administration of the compulsory vaccination may take place and if an authority decision has already ordered vaccination, said decision cannot be enforced until the exemption procedure has been finalized.[57]

The Curia has explained in several judgements[58] that, under the law, exemption from compulsory vaccination is only possible in a narrow range of cases and that the law puts the obligation on the person obliged to take vaccination (or his or her legal representative) to prove all the circumstances that justify the exemption. If, after a comprehensive and careful investigation, the forensic expert appointed in the lawsuit concludes that the child does not have any illness or condition that would contraindicate the administration of age-related vaccines, there should be no exemption.[59] In a particular case, the parents applied for their child's permanent exemption from compulsory vaccination on the grounds that they had learned that a 12-year-old girl had died in Szeged as a result of vaccination. From the perspective of responsible parents, their fears should be understandable and reasonable to everyone. However, the Curia clearly declared that exemption from compulsory vaccination can only be granted if there is a contraindication concerning the person of the applicant, and the parents did not present such a case. Reference to a death unrelated to the specific case and a general assessment of the potential risk of vaccination cannot serve as a basis for granting an exemption.[60]

Despite the consistent jurisprudence of the Constitutional Court and the Curia, legal disputes over the refusal of age-related compulsory vaccinations for children are prevalent in Hungary. Parents and their legal representatives keep generating new arguments and explanations. Among the latest of such attempts, is when parents refrain from taking their child to

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[56] Section 58(3) of the Health Act.
[57] Great Commentary explanation of Section 58 of the Health Act.
[58] Kfv.III.37.962/2015/5., Kfv.VI.37.199/2016/13., Kfv.II.37.080/2016/9.
[59] Paragraphs [15]-[17] of KGD2018. 112.
[60] Paragraph [15] of KGD2018. 113.

the in-school vaccination program organized by the educational institution's vaccinating doctor for some reason (e.g., illness), and then, in the official procedure, they claim that their child has already been vaccinated by another doctor and attach a certificate from the "vaccinating doctor" to support this claim. In these cases, however, it is not uncommon for the authenticity of certificates supposedly issued by a doctor to be called into question. This is particularly true in cases where, every time there is an in-school vaccination campaign, parents, by all means, try to prevent having their child vaccinated by the school doctor and elect to take their child to a doctor in another part of the country supposedly to receive the vaccine(s). A child with false documentation may be at serious risk if, for example, during the treatment of an injury with a risk of tetanus infection, they are not vaccinated even though a tetanus prophylaxis is required according to the professional protocol for unvaccinated persons.[61] The MPW Decree specifies the identity of the vaccinating doctor for all age-related compulsory vaccinations in order to prevent such cases:

> The vaccinating doctor is the general practitioner and the family pediatrician of the child obliged to be vaccinated, the school doctor in the case of a school vaccination campaign, the doctor of the occupational health service, the clinical vaccination adviser, the doctor at the vaccination center authorized to administer international vaccinations. [...] Age-related compulsory vaccination can be administered at vaccination centers.[62]

Children are therefore vaccinated by their family pediatrician until they are 6 years old, as some children are still in kindergarten at that age, whereas others are in primary school. However, from mandatory school age

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[61] In such a case, a serological test requested by the health authority can partly determine whether, with regard to the vaccination claimed in the documentation, there can be antibodies detected in the child's blood protecting against the examined infection. There is also a Curia decision which states that, according to the law, the obligation to vaccinate is not linked to the level of antibodies but to age, and even if antibodies can be detected, the obligation to vaccinate is not overruled and parental consent is not required either. Curia Kfv. 37.374/2017/7. In particular, doubts regarding the vaccinating doctor's certificate arise in cases when the doctor's practice is extremely far away from the child's place of residence, or the doctor no longer has a license. Mohai and Pénzes, 2018, pp. 96-97.

[62] Section 5(9) of the MPW Decree.

onward, age-related compulsory vaccinations must be carried out in the framework of school vaccination campaigns, in which case the school doctor is considered to be the vaccinating doctor, even in cases of replacement vaccination, as the recording and follow-up of the vaccination cannot be achieved with similar effectiveness without organizing in-school vaccination campaigns. With respect to this, the Curia has also retained in force a first-instance judgement that refused the parents' action for annulment of the health authority's decision requiring vaccinations to be administered by a vaccinating doctor.[63] This was also confirmed by the Constitutional Court in its decision in the case of an 11-year-old child, in which, applying the general test of fundamental rights protection, the court stated that the vaccination of children of a given age (11 years and over) and the recording and follow-up of vaccination cannot be achieved with similar effectiveness without organizing in-school campaigns.[64]

In another case based on similar facts, the administration of a child's compulsory age-related vaccination to be carried out within the framework of an in-school campaign was not executed through the authorized school doctor. In addition to imposing a fine, the health authority ordered the parents to "re-administer" the vaccinations through a vaccinating doctor (school doctor), on the grounds that the vaccination of the child could not be considered proper immunization with regard to the person of the vaccinating doctor who administered it, the unidentifiability of the vaccination site, the lack of vaccination documentation, and the fact that the efficacy of the vaccination had become questionable as vaccines' particular sensitivity of vaccines made it impossible to control compliance with storage, transport, and usage rules. In this case, the Curia stated that "The failure to properly comply with the administrative obligations cannot be identified with the fact of non-vaccination," rendering it necessary to examine whether, in the case of this lawsuit, the purpose of vaccination, that is, active or passive protection against a specific infectious disease for the child, had developed–

[63] The parent wanted to have his or her child vaccinated by a doctor of his or her own choice (i.e., a family pediatrician), invoking the right to free choice of a doctor. Paragraph [16] of Court Resolution BH2020.343.
[64] Paragraph [80]-[84] of Constitutional Court Resolution 3114/2022 (III. 23.) AB.

–as if this protection exists, the legal objective has been achieved and no further obligation can be imposed with regard to that.[65]

6. Conclusions

Individuals or organizations that reject vaccinations and propagate their denial have built up (pseudo)scientific or even "philosophical" systems that may seem very convincing and logical to laymen, but the authenticity and veracity of the information they communicate, promote, disseminate, and transmit is highly doubtful. Presently, the most important issue regarding the maintenance of the compulsory vaccination scheme is the extent to which the state, in its duty to protect institutions, can help parents recognize and perceive their participation in compulsory vaccination not as an act performed under compulsion but as cooperation that is based on information and is beneficial to all.[66]

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[65] The first vaccine was administered by the family pediatrician and the second by a doctor who did not have a valid operating record in Hungary and was not entitled to perform independent medical activities. Paragraph [8], [33]-[34] of Court Decision BH2021.293.
[66] Report of the Commissioner for Fundamental Rights on Case AJB-361/2016., p. 14.

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CÉDRIC FOUSSARD* – MARIANA DE KLERK-PÉREZ CRUZ** – ANGELA VIGIL***

Consequences of the COVID-19 Pandemic on Child Justice Systems

ABSTRACT: The COVID-19 pandemic, declared a global health emergency in 2020, presented unique challenges for child justice systems worldwide. Children in detention facilities faced increased health risks, prompting efforts to expedite their release and protect their well-being. The pandemic disrupted normal legal proceedings, making it difficult for legal professionals, judges, and authorities to maintain contact with children in the justice system. In response, some countries introduced safety measures during court hearings, such as physical barriers, to protect children from the virus. Others turned to digital technology, conducting remote hearings to reduce the risk of viral transmission. While digitalization offers efficiency and cost-effectiveness, questions regarding fair access to justice and data security have arisen. This article explores the potential long-term impact of digital justice on child justice systems beyond the pandemic. The pandemic's effects on children in detention, their rights in crisis situations, the roles of child justice professionals, and the adoption of virtual courts are discussed, highlighting the evolving landscape of child justice post-pandemic.

KEYWORDS: Covid19, Child justice, justice systems, digital justice, children rights.

1. Introduction

On March 11, 2020, the outbreak of the novel coronavirus was declared a pandemic by the World Health Organization. Two months later, with 5.5 million confirmed cases and over 350,000 deaths recorded, the COVID-19 pandemic became a global emergency, posing profound social, economic, and political challenges for all countries and sectors.

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* Terre des Hommes, Switzerland, cedric.foussard@tdh.ch.
** Terre des Hommes, Switzerland, mariana.perez@tdh.ch.
*** Baker McKenzie, US, angela.vigil@bakermckenzie.com.
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In the justice system, places where individuals were deprived of liberty in potentially crowded and unsanitary conditions, were immediately flagged as high-risk settings where the virus could easily spread with potentially disastrous results for detainees. Health experts warned that individuals in poor health were more affected by COVID-19, and research suggested that children deprived of liberty were likely to carry a higher burden of ill health than those in the community. Accordingly, during the pandemic's peak, rapid action[67] was taken to encourage authorities to accelerate the release of children from custodial settings to protect them from the virus.[68]

Children's special needs and sensitivities place those held in detention at an increased risk of physical and emotional harm, even under the best circumstances. The COVID-19 pandemic presented extreme risks to detained children and the institutions responsible for ensuring their safety and well-being.

The pandemic has greatly affected the child justice system. During the first wave of the pandemic, legal professionals, judges, magistrates, lawyers, and other authorities could not contact children. Courts in many countries, as in other public areas, were closed to prevent the spread of the virus, and court hearings were not allowed. In addition, strains were placed in other institutions, such as places of detention where the children were held. Such institutions may also experience limited resources and staff shortages.[69]

The pandemic forced child justice systems to adapt quickly. It challenged states to find the best workable solutions for continuing proceedings, especially if child-friendly justice methods and children's rights were respected.

Most countries worldwide have invested in health safety measures in response to this pandemic. The measures generally included applying physical distancing rules, regular use of hand sanitizers and handwashing, and mandatory wearing of face masks in public spaces.[70]

During legal proceedings, some countries decided to provide additional protection against the virus for children; otherwise, proceedings were conducted similarly. For instance, in the Netherlands, children accused or suspected of crime were summoned to court to safeguard the right to a

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[67] See Global Initiative on Justice with Children, 2020.
[68] France 24, 2020.
[69] World Health Organization Regional Office for Europe, 2020.
[70] See World Health Organization Regional Office for Europe, 2020.

fair trial. In contrast, physical protection, such as transparent plastic walls between the child and professionals, was set up to prevent the possible transmission of the virus. Thus, some countries have interpreted a child's right to a fair trial by ensuring the child's presence during court hearings while maintaining physical protection against the virus.

Other countries have used digital technology to keep the wheels of child justice turning.[71] Instead of organizing hearings in the presence of a child in person, it was decided to digitalize the judicial proceedings using technological tools such as a video conferencing platform, a virtual meeting, and a telephone. Digital technology allows judges to communicate remotely with children in conflict or in contact with the law. Bangladesh, the United Kingdom, and Mexico were among the countries that allowed remote hearings[72] instead of in-person court hearings in the early stage of the pandemic. Thus, since then, some countries have decided to opt for digital reform of their justice systems, while others prefer to guarantee a child's right to a fair trial by preserving traditional ways.

Digitalization of the justice system, in particular remote hearing, may be cost-effective and possibly efficient, but several fundamental questions have to be considered in terms of fair access to justice. For example, what is lost by not having face-to-face physical proceedings, and is data securely protected? The pandemic has forced justice systems to become resilient and to adapt to the adverse context. The question is whether digital justice might become a new normal in child justice systems even after the pandemic, whether this would be desirable, and what the new child safeguards in a changed digital justice system should be?

2. The COVID-19 pandemic brought extreme risk to children in detention and the institutions responsible for ensuring their safety and well-being

Almost three years after the pandemic's beginning, it appears clear that the direct and indirect impacts of the global COVID-19 pandemic are not borne equally, hitting the most marginalized and vulnerable the hardest. As an infectious disease that affects people in close proximity and without access to high-quality sanitation, COVID-19 inevitably affects prison populations. The consequences of long and repeated lockdowns and the lack of general

[71] See Mockevicute, 2020.
[72] See Foussard, Vigil and Perez, 2023.

communication with the outside world directly affected the detainees' mental health. In the early stages of the health crisis, if the impact of COVID-19 on prison populations garnered some international attention, this attention mainly focused on adults. Children in detention have been overlooked despite being disproportionately vulnerable to health risks from the conditions in which so many are held.

As underlined by the Global Study on Children Deprived of Liberty,[73] detained children are likely to suffer health problems, making them even more susceptible to severe COVID-related illnesses. While adult prisoners were released to reduce possible outbreaks,[74] despite the efforts of some countries, children in detention centers around the world largely remained in overcrowded facilities at the beginning of the pandemic. These children are often in facilities without access to good-quality water and sanitation infrastructure, with limited access to basic resources such as soap, all compounded by overcrowding, making social distancing impossible. Indeed, the Pandemic presented extreme risks to children in detention and the institutions responsible for ensuring their safety and well-being. Indeed, COVID-19 affected detention center employees and detained children, furthering the strain on any remaining staff to maintain operations while increasing the standard of care required to attend to unwell children.

If COVID entered the detention center via any one of the many support staff or visitors, steps taken to mitigate the spread of infection severely restrict children's movement and activities, leading to prolonged periods of isolation – with potentially severe consequences for children's mental health and wellbeing, children who in many cases are already likely to suffer from mental health issues. Nevertheless, during times of stress and crisis, children seek more attachment and emotional support and would need more contact with the outside world rather than being held in a kind of "double confinement." This stress was felt even more acutely by children in detention, who were already at risk of psychosocial and developmental problems and suffered from high rates of mental health issues. Indeed, COVID-19 containment measures, such as restrictions on visitors to detention facilities, have exacerbated children's feelings of powerlessness and isolation. Such trauma and distress directly impact developing children's metabolic and immune systems, placing them at an even greater risk of contracting a disease during the pandemic and later in life.

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[73] See Nowak, 2019.

[74] See Elinson and Paul, 2020.

3. Rights of children in conflict with the law in times of health crises

International child rights standards, outlined in the UN Convention on the Rights of the Child (hereinafter referred to as: CRC), establish that children up to the age of 18 years are entitled to certain fundamental human rights, including the right to be free from unreasonable deprivation of liberty, and mandate that child justice systems must act in the best interests of children. Deprivation of liberty must only ever be used as a last resort and only in the least restrictive manner to protect the child and community. No evidence suggests that children's best interests in detention were paramount during this global COVID-19 pandemic.

Indeed, the CRC in its Article 3.3 stipulates that States 'shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards …, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.' Additionally, the International Covenant on Economic, Social, and Cultural Rights (hereinafter referred to as: ICESCR) Article 12(2)(c) provides that 'State parties shall take the steps necessary treatment and control of epidemic, endemic, occupational and other diseases.' Rule 13 of the Standard Minimum Rules for the Protection of Prisoners (hereinafter referred to as: SMR) states that 'facilities shall meet all requirements of health.' Finally, The Universal Declaration of Human Rights (hereinafter referred to as: UDHR), in Article 25(1) requires that 'Everyone has the right to a standard of living adequate for the health and well-being of himself.'

Likewise, intergovernmental organizations have been attentive to the situation of children in conflict with the law, such as the Council of Europe, through its Guidelines on child-friendly justice that should be applied without limitation due to the restrictive context. The guidelines set out nine principles according to which child justice should be 'accessible, age appropriate, speedy, diligent, adapted and focused on the needs of the child, should respect the right to due process, should respect the right to participate in and to understand the proceedings, respects the right to private and family life and the right to integrity and dignity.'[75]

[75] See Council of Europe, 2010.

Child justice systems are bound to respect the key principles set by international standards and norms, which include the principles of non-discrimination,[76] best interests of all children under 18 years of age, proportionality, the primacy of diversionary measures to judicial proceedings, participation of the child, proceedings without delay, presumption of innocence, and detention as a measure of last resort. These principles must be respected under all circumstances, even in health emergencies and the consequent restrictions.[77]

Article 35 of the EU Charter of Fundamental Rights provides that 'everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices' and that a 'high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.' National laws and practices have suggested numerous hygiene practices that people should adopt to avoid exposure to COVID-19.

Nevertheless, as stated earlier, children in detention facilities do not have access to gloves, masks, hand soaps, sanitizers, and other basic supplies to protect themselves.[78] Children were kept at risk in confined conditions with an inadequate supply and had no opportunity to avoid exposure. On both global and regional levels, there is agreement that children need special protection during times of crisis, such as during a pandemic.

At the court level, the need to keep the wheels of child justice turning forced courts to find creative ways to remain open and, in some cases, to re-open after shutdowns in many parts of the world after the first wave of COVID hit the world. For many courts, this meant conducting proceedings and trials through virtual platforms so that parents, children, court workers, judges, lawyers, and anyone involved in the system could participate in court proceedings to ensure the safety of their own spaces without traveling to a live courtroom. Although these virtual proceedings took varying forms and degrees, they all relied on virtual communications in one way or another. Studies have shown that the opportunity to appear in court in person significantly impacts children's rights, particularly their participation rights. Even when children attend hearings in person, they encounter

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[76] See UNICEF, no date.
[77] See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2020.
[78] See Justice with Children, 2020b.

significant difficulties in understanding the proceedings and the seriousness of their situation. Virtual hearings have created new challenges to implementing fair access to justice for children. The unusual circumstances due to the pandemic required certain adjustments to criminal proceedings; nevertheless, those adjustments should be made in the child's best interest and have a child-centered and child-rights approach.

4. The role of child justice professionals during COVID-19

Professionals interacting with children in conflict with the law have the unique ability and responsibility to exercise good judgment and adapt, to the extent possible, the current processes and behaviors in their specific spheres of work that could help children in conflict with the law in every challenging context, including during the pandemic. The Global Initiative on Justice with Children developed a set of Operational Guidelines for Professionals Interacting with Children in Conflict During COVID-19,[79] which are divided into three chapters addressing the following three broad categories of professionals who interact with children in conflict with the law: Social Workforce, Security Forces and Legal Professionals.

4.1 Role of security forces during COVID-19 health emergency

According to the Operational Guidelines for Security Forces: 'Access to Justice for Children and Youth in Times of COVID-19: Diverting Children from Judicial Proceedings and Facilitating Reintegration,'[80] security forces should limit direct contact with children and use such contact only if the child presents a risk to their security or the security of others. Handcuffs should never be used with children, and the use of force is only a last resort. Child-friendly language and well-adapted communication techniques were essential to all proceedings. During the pandemic, it was vital to ensure that all protection and hygiene rules (washing hands regularly, maintaining a distance of at least two arm lengths with children, and wearing a non-medical mask or face covering) remained applicable in all facilities. If supplies are available, children should be tested for COVID-19 before detention.

Regarding the role of security forces and their interaction with other professionals, the Justice with Children's Operational Guidelines

[79] See Global Initiative on Justice with Children, 2020.
[80] See Justice with Children, 2020a.

recommended that during legal proceedings for children, security forces work with other professionals, especially justice professionals, health personnel, and social workers. It is certain that during and after the pandemic, the interaction mechanisms may have been impacted or changed. Thus, security forces 'should be proactive to maintain, activate or enhance these areas for collaboration and coordination, while having the best interests of the child in mind. Professionals should consider and use various alternative forms of communication with youth and with each other (e.g., phone calls, text messages, and emails).'[81]

4.2 The role of social workforces during COVID-19 health emergency: key adaptations to child's case management

The key objectives of the social workforce interacting with children in conflict with the law during the COVID-19 pandemic were to continue ensuring the well-being of the child by using appropriate safeguards to prevent or diminish the risk of exposure to COVID-19 and applying the best interests of the child throughout the process by maximizing the chances of reintegration, having a positive impact on the child during the pandemic.[82]

Their role was to fully accompany the child, manage all case information and progress, maintain continuous communication, and provide legal counselling to the child and his or her family. Their role was also extended to ensure tailor-made reintegration plans, provide social reports to justice actors regarding judicial review, undertake an important advocacy role to expedite the release of children from remand or detention and sustain this measure in the aftermath of the pandemic.

Two key adaptations to the case management approach to be considered by social workforce professionals were to mainstream the reintegration approach concerning all the different steps of the case management process, as well as to maintain (or establish), to the extent possible, alternative pathways and services for case management responses for children in conflict with the law.[83]

During the COVID-19 pandemic, social workforce personnel were called upon to identify appropriate and available means of communication and regular support for children and their families. They had to create a space (in-person or remotely) to follow up with their children and identify

[81] See Justice with Children, 2020a.
[82] Justice with Children, 2020c.
[83] See Council of Europe, 2020b.

signs of stress and means of self-care. Regarding remote meetings, they had to apply child safeguarding standards and measures.

4.3 The role of legal professionals during the COVID-19 health emergency: towards the generalization of remote hearing?

According to the Global Initiative on Justice with Children's Operational Guidelines for Legal Professionals, there were five essential principles of action for legal professionals during the COVID-19 health emergency that are still applicable for the after covid era: (1) the child's right to participate, (2) ensuring communication with the child, (3) the child's right to confidentiality, (4) prioritize access to justice in person or consider digitized court processes, and "streaming" access for cases involving children, and (5) advocate for the release of all children in all circumstances as detention should only be used as a last resort.

As specified by the Operational Guidelines, there are some general considerations for legal professionals preparing to handle a case involving a child in detention during the lockdown. Some of these considerations advocate the expansive use of technology to keep cases moving while preserving due processes. Moreover, where necessary, a child should have someone to advocate orally or in writing/digitally. In addition, during the most serious phase of the pandemic, legal professionals should have created a collaborative plan to advocate swiftly reducing the number of children in detention centers at all stages of the proceeding.

At the diversion stage: prioritizing diversion at all stages of the system was especially important during the pandemic and lockdown. Diversion programs were offered using digital means. Alternatively, diversion programs were deferred until after the immediate crisis, when they could be resumed with the required health and safety measures in place.

At the pre-trial stage: legal professionals were encouraged to advocate for children to be prioritized for any executive order for the release of detainees. The argument for the pretrial release of children during the pandemic was especially strong, based on the conditions under which children are detained, clothed, fed, have access to hygiene and health care, and have the opportunity to interact with their families, visitors, and other children.

At the post-trial stage: Focus on the child's rights for any "failure" to protect confined youth from a likely COVID-19 outbreak. Children should

be provided with a physical environment and accommodation conducive to the reintegration aim of residential placement.

5. European justice systems and institutional reactions to children in detention during the COVID-19 pandemic

The European Commission (hereinafter referred to as: EC) coordinated a common response[84] to the COVID-19 pandemic. On May 6, 2020, the EC Coordinator on the Rights of the Child shared a few actions put in place at the operational level in response to COVID-19, including the exercise of procedural rights of suspects and accused persons in Europe.

As direct communication with lawyers, interpreters, or third parties (while suspects or accused persons were deprived of liberty) became more difficult, the use of audio and video conferencing or other remote tools was encouraged. In addition, the EC recommended adopting safety measures, such as glass protection at police stations or in detention facilities, to enable exercising the right of a lawyer and interpreter.

For European institutions, it was clear that despite the outbreak, the procedural rights of suspects and accused persons needed to be respected to ensure fair proceedings. Limited derogations provided by the directives in the case of imperative requirements had to be interpreted restrictively by the competent authorities and, in any case, never employed on a large scale.[85]

As a result of the COVID-19 outbreak, national prison administrations were under pressure to limit the impact of the virus on closed and vulnerable prison environments. Measures to avoid spreading the virus included temporarily suspending all family visits and activities with outside persons, such as sports, professional, or vocational training. Prisoners suffered from a lack of activities and visits, which made it challenging to keep the staff motivated and prevent riots.[86] In particular, Member States that faced high rates of prison overcrowding were compelled to make difficult decisions regarding a possible early release.[87]

The European Parliament Intergroup on Children's Rights released a statement on the impact of COVID-19 on children on 15 May 2020, calling the EC and Member States to take several actions, including putting in place

[84] See European Commission, 2021.
[85] See Requejo Isidro, 2020.
[86] See Illinois Department of Corrections, 2020.
[87] Council of Europe, 2020b.

specific measures to tackle increasing domestic violence against children, as well as the impact of violence that children experience in the household as witnesses, such as campaigns to end violence against children; reinforce cooperation and information sharing through ad hoc funding of EU agencies, including by setting up special emergency numbers; and ensuring that children in institutions and detained children are assisted in community-based facilities by the trained professionals and that alternative measures such as hosting families are facilitated during the COVID-19 outbreak with reduced staff.[88]

6. After the COVID-19 pandemic: are virtual courts becoming the new normal?

The COVID-19 pandemic has brought so much tragedy worldwide, but as with so much necessity, it has become the mother of invention. The COVID-19 pandemic forced justice systems to evolve in several ways. COVID-19 created an extraordinary context in the world and justice systems, as it has brought about several specific constraints and challenges in interactions, the use of physical space, and judicial procedures. The notion of virtual trials or other court proceedings came to life during the pandemic to help the courts continue to function. In addition, judicial systems face a crisis of funding, shortage of personnel, urgency to invest in technological devices, and licensing of video platforms to keep the processes running. Virtual court proceedings and trials have become the norm in this context. As the world grapples with this health crisis, different courts have adopted different paths. To guarantee the child's right to justice during and as the pandemic aims to sunset, some jurisdictions have held hearings in person while maintaining physical protection from viruses, while others have decided to digitize court proceedings using technological tools.

Child justice systems are bound to respect key principles set forth by international law, standards, and norms, including non-discrimination, the best interests of the child, proportionality, primacy of alternative measures to judicial proceedings, participation, proceedings without delay, the presumption of innocence, and detention as a measure of last resort.[89] These principles must be respected in all circumstances and may not be subject to

[88] See Child Rights Intergroup, 2020.
[89] See United Nations, 1989.

any exceptions or derogations, including during times of crisis or change or when adopting new modalities or using technology.

While recognizing that general principles for child justice must apply in remote hearing proceedings and virtual courts is certain, some legitimate questions arise: First, does replacing certain in-person proceedings with remote hearings impact substantive outcomes in child justice proceedings? Second, what is the impact of technology use on factors that affect substantive outcomes? Justice systems have adopted the potentially misguided idea of techno-solutionism, believing that the problem of delayed hearings could be solved by switching to online hearings without considering special protections for children in these proceedings.

Certainly, there are advantages to using remote hearings in criminal proceedings involving children. However, from whom do they benefit? One obvious advantage is linked to health concerns during a pandemic. Research has revealed other advantages, including that video proceedings have enabled legal aid organizations to serve previously underserved geographical areas and have opened up greater opportunities for pro bono representation.[90] In certain cases, children may find online proceedings can reduce anxiety normally associated with attending court in person. There may be positive effects of using video links to reduce the risk of revictimization by avoiding direct contact with the offender for child victims and witnesses.[91]

While these positive elements are encouraging, the concerns and risks of remote hearings must be considered seriously. Research suggests that remote hearings have exacerbated issues related to children's effective participation in the justice process. They can make lawyer-client relations more difficult, undermining communication and the relationship of trust between the lawyer and the child, as well as the lawyer's capacity to provide adequate support and assistance. The digital divide that causes inequality in access to services and rights during remote hearings has also been highlighted as a challenge, further disadvantaging underserved communities and children.[92] Finally, children expressed frustration and anxiety regarding a lack of understanding, privacy, and access to lawyers and support persons associated with video proceedings.[93]

[90] See Brennan Center for Justice, 2020.
[91] See Lynch and Kilkelly, 2021.
[92] See National Juvenile Defender Center, 2021.
[93] See Juvenile Justice Initiative, 2021.

Three main areas concerning the use of video platforms were considered. The first is access to education and family visits during liberty deprivation. The second relates to monitoring, inspection, and access to complaint mechanisms, and the third refers to access to the judicial system and fair trials.

Suppose video platforms can certainly be used partially to maintain the systems working in case of an emergency or to follow up actions or programs delivered in persons. In that case, the current interpretation of children's rights and international standards should advocate that in-person court proceedings should be the norm, while a hybrid system using remote technologies could be used only as support.

7. Conclusion

It is indisputable that the processes required to identify, understand, and uphold children’s best interests are multifaceted and complex, and these processes are undoubtedly further complicated by the constraints imposed by the pandemic.

Inevitably, the protocols and ethics underpinning the work of child justice professionals may not always align and may even be in conflict. In addition to caring for their children, they must protect their children’s fundamental human rights.[94] International human rights law may require a sole, unencumbered focus on the child’s right to a fair trial, which implies considering how justice professionals use new technologies, such as remote hearing, in times of crisis and afterward. This raises essential questions about how systems and advocates are committed to children’s best interests during crises and, consequently, how court proceedings evolve.

[94] Council of Europe, 2020a.

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LILLA GARAYOVÁ[*]

The Right to Play: Interpretation through the Lens of the Convention on the Rights of the Child[**]

ABSTRACT: Children's rights are human rights. When internalizing this mantra, it is crucial to understand that children are not only the youngest and most vulnerable population group but also that they have their own particular needs. To ensure that these needs are met, we must recognize an additional subset of human rights that are unique to children. These are comprehensively represented in the United Nations Convention on the Rights of the Child, including, among others, the right to protection from all forms of violence, the right to play, and children's right to express their views in matters affecting them. Children's rights, however, require more than just an understanding of the relevant theory and implementation of these rights is lagging dangerously behind what is optimal. This shortcoming is further amplified in cases involving certain so-called forgotten rights, and even among these, the right to play is undoubtedly the red-headed stepchild of the Convention that is often overlooked and constantly undervalued.

KEYWORDS: right to play, children's rights, protection of children, parental responsibility, parental care, parental rights and obligations.

1. Introduction

Children's rights are human rights. It is no easy feat to write an introduction to such an elusive, often forgotten topic. It is, however, apt to start with this reminder before we delve into the topic at hand—to emphasize the nature of this specific subset of human rights that exist to ensure that all children are

[*] Vice-dean, associate professor, Department of International Law, Faculty of Law, Pan-European University, Tomasikova 20, 821 02 Bratislava, Slovakia, ORCID: 0000-0002-7999-4823; researcher of the CEU Professor's Network 2022, lilla.garayova@paneurouni.com.
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treated with respect, equality, and human dignity and are free of discrimination, recrimination, or intimidation. All humans are born free and equal in dignity and rights, and to ensure that these human rights are appropriately protected with regards to children, we need to consider children's fragility, vulnerability, and age-specific needs and tailor these rights specifically to children accordingly. Human rights—and therefore children's rights are fundamental to advancing our society. Children are frequently referred to as "our future," and though that is true and might even sound like an idealistic statement, we must not forget that children need protection now; that is, children's protection should not be deferred to "tomorrow" on the premise that they are our future. Rather, child protection is an immediate matter because, first and foremost, children are human beings right now, in this moment, and they are equal to adults in human dignity and fundamental rights.

According to the United Nations Children's Fund's (UNICEF) flagship report, The State of the World's Children,[1] there are currently 2.4 billion children in the world, meaning that one-third of the world's population is under the age of 18 years. Over 2 billion of these children live in developing countries (UNICEF Data, n. d.), where, often, even their most fundamental rights are violated. Thus, protecting children's rights is a human imperative upon which our entire society depends, and only by effectively protecting children's rights can we ensure that children are able to live up to their full potential. It is the wider community's responsibility to ensure that children are raised in nurturing and loving families and that their basic needs are met, and it is crucial that policymakers understand the necessity of specific rights to protect children from discrimination and all the threats to which they are vulnerable. This special set of human rights is embodied in the Convention on the Rights of the Child and its Optional Protocols.

The 54 articles of the Convention spell out the basic human rights to which children are entitled. These include, among others, freedom of expression, freedom of thought, conscience, and religion, the right to be heard, the right to privacy, and the right to protection from violence. There is an ongoing debate on the Convention's effectiveness in general and whether a treaty can serve the goal of protecting children's rights globally or whether there is a more efficient mechanism for this purpose. It is true that many countries with significant shortcomings regarding the protection of

[1] UNICEF, 2021, p. 259.

children's rights are parties to the Convention and that the reservations that certain countries have attached to the Convention are contrary to the Convention's original intent.[2] We shall not forget, however, the incredibly significant impact the Convention has had since its drafting. Several states have used the Convention to strengthen and enhance their domestic legislation already in force.[3] The Convention has also played a role in the creation of dozens of independent human rights institutions in 38 countries.[4]

Though huge strides have been made in the past 34 years, progress still needs to be accomplished regarding implementing the Convention. Certain rights occupy a more favorable position than others, and we can generally conclude that the right to play is among those that are usually the last to be addressed. In fact, the right to play is considered to be a neglected right. It is often forgotten by the States Parties implementing the Convention, by academics researching children's rights, and even by the UN Committee on the Rights of the Child.[5] This historic lack of engagement has led to nary any implementation of this right among the Convention's provisions. Despite the developments of the past 34 years, the right to play is still generally undervalued and frequently overlooked in theory and in practice as well. Research, however, clearly shows that play is fundamental to children's development and well-being.

2. The definition of play

Oh, it was child's play! *Gyerekjáték*![6] *Kinderspiel*![7] *¡Juego de niños!*[8] 児戯.[9] Across many languages, we often use the term "child's play"

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[2] State Parties that have attached reservations declaring that they will not apply the provisions of the Convention on the Rights of the Child (hereinafter referred to as: CRC) that they deem incompatible with Sharia law include, among others, Afghanistan, Egypt, Iran, Iraq, Kuwait, Saudi Arabia, Syria, etc.
[3] According to the UNICEF press release 'Despite Progress, Children's Rights Far from Universal,' more than half of the State Parties had incorporated the provisions of the CRC into their domestic laws and a third of the State Parties had incorporated CRC provisions into their national constitutions.
[4] UNICEF, 2004.
[5] Hughes, 1990.
[6] Hungarian.
[7] German.
[8] Spanish.
[9] Japanese.

dismissively to express that an undertaking is way too easy of a task—but can child's play be reduced to that? Wider interdisciplinary research has shown that play is a concept that has unacknowledged depth and importance and is thus crucial to children's individual development as well as to societal development as a whole. Play teaches children how to function as members of society and how the rules of a system work and guides them to develop a sense of self-respect and respect for others. Children develop all of these crucial skills that they need to flourish through play, more precisely through unstructured, spontaneous, and self-chosen play. So, what is play?

Play is not easily defined in terms of any single characteristic; it involves a plethora of characteristics and features, including emotional, mental, and behavioral. Friedrich Wilhelm Fröbel, the German pedagogue who laid the foundations of modern education by focusing on children's unique needs and abilities, made an early attempt to define play in 1887. According to him, play is

> the highest expression of human development in childhood, for it alone is the free expression of what is in a child's soul. Children have an innate ability to be curious and to investigate and to play to find things out.[10]

The Dutch cultural theorist Johan Huizinga, who, in the opening pages of his 1938 work *Homo Ludens*, explores the relationship between culture and play, made one of the first attempts to precisely define play. Huizinga ascribed such great importance to play that he went as far as suggesting that *homo ludens*, or playing man, might be a more appropriate classification term for our species or subspecies in the human taxonomy than *homo sapiens*, or wise man. He defined play as follows:

> Play is a free activity standing quite consciously outside "ordinary" life as being "not serious," but at the same time absorbing the player intensely and utterly. It is an activity connected with no material interest, and no profit can be gained by it. It proceeds within its own proper boundaries of time and space according to fixed rules and in an orderly manner.[11]

[10] Froebel, 1887.
[11] Huizinga, 1938.

From his definition, we can derive the features that characterize play, namely freedom, being distinct from ordinary life, demanding order, being bound by its own rules, and being connected with no material interest. He argued that the most essential element of play is simply fun. Players 'plainly experience tremendous fun and enjoyment.'[12]

The seminal Russian psychologist Lev Vygotsky examined the role of play in children's learning, and in his 1967 essay 'Play and Its Role in the Mental Development of the Child,' defined play as an activity that the child desires and which always involves an imaginary situation and its own rules. He argued that play improves children's well-being in the social, emotional, cognitive, and physical aspects as well. He formally defined play as

> an adaptive mechanism promoting cognitive growth. It creates the zone of proximal development. In play[,] a child always behaves beyond his average age, above his daily behaviour; in play it is as though he were a head taller than himself.[13]

Mihaly Csikszentmihalyi, a Hungarian professor of psychology, defined play as

> a state of experience in which the actor's ability to act matches the requirements for action in his environment. It differs from anxiety, in which the requirements outnumber the ability, and from boredom, in which the requirements are too few for the ability level of the actor.[14]

Csikszentmihalyi emphasized the flow experience of play, in which players lose track of time, personal worries, and their external surroundings.

Julie Ozanne and Lucie Ozanne (2017), researchers at the University of Canterbury, defined play by contrasting it with what it is not: 'Play does not involve work; it is not realistic, it is not serious, and it is not productive.'[15]

Play theorist Brian Sutton-Smith (1997) devoted his lifetime to researching the cultural significance of play and concluded that play 'is a

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[12] Ibid.
[13] Vtgotsky, 1978.
[14] Csikszentmihalyi and Bennett, 1971.
[15] Ozanne and Ozanne, 1997.

pleasure for its own sake, but its genetic gift is perhaps the sense that life, temporarily at least, is worth living.'[16]

Stuart Lester and Wendy Russell (2010), from the University of Gloucestershire, asserted that

> Play is a behaviour that is distinguished by specific features that represent a unique way of being: a way of perceiving, feeling and acting in the world. The act of playing, where children appropriate time and space for their own needs and desires, has value for developing a range of flexible and adaptable responses to the environment.[17]

As Swiss child psychologist Jean Piaget (1962) said: 'Play is the work of children.' In the words of Fred Rogers, American author and TV producer: 'Play is often talked about as if it were a relief from serious learning. But for children, play is serious learning.'

It is clear from the above that there is no shortage of definitions of play, though it is likely much easier to compile a list of games than it is to define play itself. All of these definitions suggest features of play, what play is, and what play is not. However, after reviewing them all, we still face the following question: What makes play a fundamental right of the child?

Having reviewed the definitions psychologists, educators, and game theoreticians have provided, we shall look at the legal definition of play. The Convention on the Rights of the Child recognizes the right to play in its Article 31, and the UN Committee on the Rights of the Child (2013) published its General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, and cultural life and the arts, which is our only source of interpretation of Article 31. The main objective of General Comment No. 17 is to enhance understanding of Article 31 of the Convention and of the right to play in general. It attempts to differentiate and define the concepts of leisure, rest, recreation, and play. We find a rather broad definition of play here that does not resolve the lack of conceptual clarity regarding the right to play. The definition of play provided here is as follows:

Children's play is any behavior, activity or process initiated, controlled and structured by children themselves. Play is non-compulsory,

[16] Sutton-Smith, 1997.
[17] Lester and Russell, 2010.

driven by intrinsic motivation and undertaken for its own sake, rather than as a means to an end. It may take infinite forms, but the key characteristics of play are fun, uncertainty, challenge, flexibility and non-productivity. While play is often considered non-essential, the Committee reaffirms that it is a fundamental and vital dimension of the pleasure of childhood and is an essential component of children's development.[18]

This is indeed a very broad definition that raises a few questions. If play is indeed 'any behavior initiated and structured by children,' do we conclude that all activities started and governed by children constitute play? On the plus side, the definition of the Committee does reiterate a few key concepts that academic literature has highlighted as well. Just like the definitions that preceded it, the Committee's definition also stresses the voluntary nature of play. The phrase 'initiated, controlled and structured by children themselves' is included precisely to emphasize the voluntary element of play that is crucial when enjoying this right. Another important feature we can derive from the Committee's definition is the non-productive nature of play. This is a motive we have seen in other definitions as well: Play is driven by intrinsic motivation, and according to the Committee, it should be "undertaken for its own sake."

3. The evolution of the right to play

As the most frequently disregarded right, the right to play is often consigned to oblivion. Of the key international human rights treaties, a mere two recognize the right to play, namely the Convention on the Rights of Child and the Convention on the Rights of Persons with Disabilities, both of which view it as a child-specific right. There is no adequate right to play in general human rights theory that would apply to adults as well. The provision that most closely mimics the right to play is perhaps Article 7 of the International Covenant on Economic, Social and Cultural Rights, which declares the right to rest and leisure.

However, given our exploration of the definition of play in the previous section, we know that play is a distinct concept that the Convention explicitly differentiates from rest, leisure, and recreation.

Conceptualization of play as a child's right is guaranteed today under Article 31 of the Convention on the Rights of the Child (1989), which

[18] General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts.

states: 'States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.'

To understand how Article 31 of the Convention came to be, we need to retrace history and examine the evolution that led to the drafting of Article 31. The Geneva Declaration of the Rights of the Child is an international document that was drafted by Eglantyne Jebb, adopted by the League of Nations in 1924, and extended by the UN in 1959. The Declaration, in a sense, was the herald of the Convention, which followed in 1989. The Declaration did not include the right to play; it did, however, discuss the child's 'means requisite for its normal development, both materially and spiritually.'[19] In 1946, after World War II, the UN decided to adopt the Declaration instead of drafting an entirely new document. The Declaration was amended in 1948 and then significantly expanded in 1959. It was during the drafting phase of this expanded version in 1959 that the first discussions regarding the right to play arose. The Third Committee of the General Assembly discussed the proposed amendments widely in 1959.[20]

The draft of the Declaration as proposed by the Commission on Human Rights included Principle VII which stipulated that the child is entitled to receive free and compulsory education, at least in the elementary stages. The education of the child shall be directed to the full development of his personality and the strengthening of respect for human rights and fundamental freedoms; it shall enable him, enjoying the same opportunities as others, to develop his abilities and individual judgement and to become a useful member of society.

The right to play was not included in the draft of the expanded version at the time when three countries, namely Mexico, Peru, and Romania, proposed the expansion of Principle VII. The third paragraph was adopted per those three countries' proposal, and it states: 'The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall be under an obligation to ensure the enjoyment of this right.'[21] This amendment views play as a supplementary concept to education that should contribute to the child's healthy development. The amendment is critically important because

[19] Declaration of the Rights of the Child, 1924.
[20] United Nations General Assembly, 1959.
[21] United Nations Commission on Human Rights, 1959.

it is the first reference to the right to play in legal history. Though the conceptualization of the right to play appears to be limited in scope here, the reference to education in the phrase ‘directed to the same purposes as education’ still makes it a milestone in legal history. In our current interpretation of the right to play, we tend to emphasize its voluntary nature and non-productivity, which this definition clearly contradicts. Even in 1959, representatives from Poland, Romania, and Saudi Arabia cautioned about linking the principles of education and play, stressing that, historically, play has not been present in educational settings, and it would therefore be a limitation to include this link in the final text of the Declaration.[22] These concerns were not reflected in the final text of the Declaration.

Twenty years later, in 1979, the UN decided to commemorate the anniversary by proclaiming 1979 as the International Year of the Child[23] with the general aim ‘to provide a framework for advocacy on behalf of children and for enhancing the awareness of the special needs of children on the part of decision-makers and the public.’[24] Poland seized this opportunity to revive the discussion about drafting a new Convention on the Rights of the Child, and on 7 February 1978, Poland submitted a draft convention to the Commission on Human Rights.[25] To date, this has been the most important initiative that Poland has undertaken in the field of human rights. It bears mentioning that Poland was in a particularly fragile position after World War II. The war inflicted unimaginable suffering on children in Poland, violating their fundamental human rights. Thousands of children were displaced during the war, and children of Jewish and Gypsy origin endured indescribable atrocities in concentration camps. Polish children at large were starving, had no access to education or health care, and were forced to work. These tragic circumstances sensitized Polish experts to the question of children’s rights and led to their pioneering the change in the conceptualization of children’s rights. UNICEF, the UN agency responsible for providing humanitarian aid to children worldwide, was also founded as a result of the Polish Dr. Ludwik Rajchman’s initiative. Furthermore, delegates from Poland were highly involved in the issue since they were

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[22] Ibid.
[23] United Nations General Assembly, 1978.
[24] Ibid.
[25] United Nations Commission on Human Rights, 1978.

actively and directly involved in drafting the Declaration. The combination of these factors allowed the Polish delegation to spearhead this change.

Poland proposed recalling the Declaration and adopting a new, binding international legal instrument in the form of a convention, which provides a higher level of protection, that would be based on the key principles and ideas protected by the Declaration. In December 1978, the General Assembly moved forward with the proposal and included the question of a convention on the rights of the child in its work agenda at its thirty-fourth session. Thus, the preparatory work for the draft convention started in the form of an open-ended working group with yearly meetings. The documented preparatory work for the Convention provides a wealth of information on the interpretation and the emergence of the right to play as we see it defined today in Article 31.

The first Polish draft did not have the same structure as the current Convention, but regarding content, Article VII of the first draft is comparable to the current Article 31. The draft Convention's Article VII reads: 'The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.'[26]

No explanation was given as to why the right to play was worded differently than in the 1959 version of the Declaration; however, based on the discussions held around the time, it is clear that the intent was to change the rhetoric in order to stop interpreting the right to play as a luxury right and start viewing it as a right that is vital to the development and well-being of all children, not only in the theoretical sense but also in the practical sense as well.

When the Commission on Human Rights opened the first call for comments, several comments were received that addressed Article VII and the right to play. Among these, the Society of Comparative Legislation wanted to keep the link between education and play, as acknowledged through the inclusion of the phrase 'directed to the same purposes as education,'[27] just as it was in the 1959 Declaration.

The comment from Norway suggested reorganizing the paragraphs of Article VII so that the Article would start with the right to play, thus giving it its due weight in the first paragraph as opposed to including it in the third paragraph. The Norwegian suggestion was not only to change the placement

[26] United Nations Commission on Human Rights, 1978.
[27] United Nations Commission on Human Rights, 1978.

of the right to play but also to slightly modify the wording of the paragraph so that it would read:

> Children, including children of preschool age, shall have full opportunity of play, social activities and recreation, as a means to ensure their full mental and physical development. Society and the public authorities shall endeavour to promote the enjoyment of this right.

This wording places particular emphasis on children of preschool age, and contrary to the comment from the Society of Comparative Legislation, it shifts the emphasis from play in the context of education to play in the context of mental and physical well-being.

The Federal Republic of Germany indicted which rights from the Convention they viewed as rights of the individual to be provided for in the broadest sense and which ones they viewed merely as undertakings on the part of the States. According to the German comment, the right to play was considered to only be discretionary undertaking.

The United Nations Educational, Scientific and Cultural Organization asserted that the right to play should be based to a greater extent on the Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It by 'taking up the idea of protecting and enhancing all forms of cultural expression such as national or regional languages, dialects, folk arts and traditions both past and present, and rural cultures as well.'[28]

The Commission on Human Rights made a second call for comments.[29] One of the responses regarding the right to play came from New Zealand.[30] They did not dispute the intent behind the Article but noted that they did not fully grasp the distinction between play and recreation. They also questioned the use of the phrase "full opportunity" and asked whether it meant merely physical access to playgrounds or ensuring that children have sufficient time to play or whether it had another meaning.

In the first round of comments, France, similar to Norway, raised concerns about the linkage of the concepts of play and education. According to the French comment, educational games should be encouraged, but it

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[28] Office of the United Nations High Commissioner for Human, 2007.
[29] United Nations Secretary-General, 1979.
[30] United Nations Secretary-General, 1980.

should be stressed that there is a need to play games that are not part of a curriculum.

After considering all the comments, Poland revised the draft version of the Convention. In this revision, the content of Article VII was moved to Article 18. This was not only a change in location; it also included significant rewording. The reworded draft of Article 18 was as follows:

> The child shall have full opportunity for recreation and amusement appropriate to his age. The parents and other persons responsible for the care of the child, educational institutions and state organs shall be obliged to implement this right.[31]

A key change we can observe here is the removal of the link between play and education, which was a desired change. A negative change, however, was the exclusion of the phrase “right to play” and its replacement with “right to amusement.” This was particularly odd since none of the comments from the delegations had even mentioned “amusement,” and Poland provided no explanation for the change. After this revision, Poland submitted another version that changed the structure and wording again. The second revision replaced the term “amusement” with leisure—again without any explanation. The second revision was as follows:

> The States Parties to the present Convention undertake to ensure to all children opportunities for leisure and recreation commensurate with their age. Parents and other persons responsible for children, educational institutions and state organs shall supervise the practical implementation of the foregoing provision.[32]

This second reworded version went forward to the first reading of the Draft Convention on the Rights of the Child. During the first and second readings, this Article was still referred to as Article 17. Numerous proposals were submitted to the working group. These first proposals and comments still included no direct reference to the right to play. A modification in this

[31] Poland, Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People’s Republic to the United Nations in Geneva, E/CN.4/134 (17 January 1980).
[32] United Nations Secretary-General, 1981.

regard was first proposed by the Canadian delegation, which suggested reintroducing the right to play and rewording the Article as follows:

> 1. Every child has the right to rest and leisure, to engage in play and recreation and to freely participate in cultural life and the arts.
> 2. Parents, States Parties, educational institutions and others caring for children shall take steps to implement this right, including making reasonable limitations on school and working hours.[33]

This proposal was significant not only because it revived the right to play but also because it suggested limiting children's school hours, thus contributing to clarifying the question New Zealand posed regarding how States Parties should ensure that children have "full opportunity" to exercise the right to play. Subsequently, two more proposals were received, one from a group of non-governmental organizations and the other from the United States (which also omitted the phrase "the right to play"). The US proposal stated: 'The States Parties to the present Convention recognize the importance of recreational and cultural activity to the well-being and balanced development of the child.'[34]

After reviewing all of the proposals and comments, the working group began discussing the drafting of Article 17 and based these discussions on the proposals from Canada and the United States, both cited above. During the discussions, several delegations suggested minor changes, and some technical revisions were suggested and approved. In the second reading of the draft Convention in 1989, no further substantive changes were adopted, and the working group finally accepted Article 17 as follows:

> 1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
> 2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall

[33] United Nations Commission on Human Rights, 1984.
[34] Office of the United Nations High Commissioner for Human Rights, 1985.

encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

The 2007 Office of the United Nations High Commissioner for Human Rights' (OHCHR) publication Legislative History of the Convention on the Rights of the Child (1989) contains the detailed transcript of the proposals and comments from the delegations, as well as the working group's discussions on each article of the Convention. This historical overview of the preparatory works of the draft Convention is extremely valuable in understanding the intent behind the Convention's provisions, and it provides additional layers of interpretation of each article.

This short summary of the legislative evolution of the right to play has shown that the journey was not without challenges, and it included many twists and turns. Wording the Article was only the first step. When it comes to the question of its implementation, it is clear that the bigger obstacles lie in practically implementing this right. Concerns that governments were not properly addressing their obligations to uphold Article 31 led to the publication of General Comment No. 17 (on the child's right to play, leisure and recreation). The General Comment defines play as behavior initiated, controlled, and structured by children and as non-compulsory and driven by intrinsic motivation and states that play has the key characteristics of fun, uncertainty, challenge, flexibility, and non-productivity.[35]

4. Content of the right to play

As mentioned earlier, the right to play is a child-specific human right. Article 1 of the Convention contains a definition of the child and defines children as all human beings below the age of 18 years. The Convention also states that all children have the rights set out in the Convention until their eighteenth birthday 'unless under the law applicable to the child, majority is attained earlier.' This limitation allows for a margin of appreciation to account for differences in national legislation in terms of the age of majority due to cultural differences. Given the tendency to equate play with infancy, it is important to interpret the right to play in this context and understand that it is generally applicable to all children under the age of 18 years.[36]

[35] United Nations Committee on the Rights of the Child, 2013.
[36] Convention on the Rights of the Child, 1989.

As stated in this paper's introductory section, children's rights are human rights. Based on human rights theory, it is well-established that human rights are universal, inalienable, indivisible, interrelated, and interdependent. Therefore, children's rights are also universal, inalienable, indivisible, interrelated, and interdependent. According to Article 2 of the Convention, these rights apply to all children equally without discrimination of any kind, that is, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Indivisibility and interdependency are of particular interest because they tell us that human rights are equal in importance and that none can be fully enjoyed without the others. This leads us to a potential examination of the right to play in the context of the other rights in the Convention. This is one of the routes we can take when examining the content of the right to play.

Another way of interpreting the content of this right is through linguistic analysis of the Article itself. The way the Article is worded provides a glance into the intent behind it. The Article refers to the right to engage in play, showcasing the active aspect of the right to play, where play is something in which children engage, ergo take part in actively. The term "participating freely" clearly refers to the voluntary element of play; it is something children do because they want to, not because they are forced or instructed.

The content of the right to play may also be examined as an obligation of the state. As discussed, human rights (and thus children's rights) cannot be viewed in isolation. The general obligation clause of the Convention is in its Article 4, which states that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.' It is clear that Article 31 also has to be interpreted in the context of Article 4, which emphasizes the state's role and legal responsibility to protect and implement this right appropriately. This is a particularly challenging feat, especially given the visible erosion of this right in our day-to-day lives.

Play is extremely beneficial for children; some of the benefits are evident immediately, that is, while children play, whereas others take time to develop. Nevertheless, it is through play that children learn about themselves and the society in which they live; further, through play, children experience and learn to deal with their emotions, and the beneficial impact of this has been well researched. Play builds confidence, resilience,

flexibility, self-respect, and respect for others, which are key in maintaining a child's social relationships. Despite all of these benefits, we can observe a gradual deterioration of children's right to play. Their access to play has been severely impacted in recent years by traffic, technology, social media, pandemic lockdowns, the closure of playgrounds, educational pressure, and in extreme cases, humanitarian and/or military conflict, which affects children immensely. Within the confines of the family, even in the safest countries, we see a growing fear for the safety of children, resulting in an urge to overprotect them—which ultimately leads to diminished access to play.

A recent European survey found a significant reduction in the length of school break times since 1995.[37] The authors reported that recesses have been reduced by 45 minutes per week for children in school aged six years to 10 years and by 65 minutes per week for children aged 11 years to 16 years. The main explanation schools provided for the reduction of break times has been that it is a necessary concession to create more time to cover the increasingly demanding curriculum. A key finding of the survey was that 60% of primary and secondary schools said that children will often miss a full break or lunch time due to perceived misbehavior or simply due to having to catch up on schoolwork.

All of these factors combined are contributing to the gradual erosion of the right to play, and it is crucial for policymakers to step up and address the changing circumstances in which we interpret the content of that right. Children's diminishing opportunities to play definitely constitute a concerning matter, and we need to advocate for a rights-based approach to children's play based on Article 31 of the Convention. The right to play is still often regarded as a luxury right or a right of privilege; this view reflects clear intransigence on the part of governments—a situation that needs to change. The right to play should not remain a neglected right, and it simply cannot be the last in line to be honored once all the child's other needs have been fulfilled. Play is a fundamental human right specific to children, that is, an integral component of the Convention serving to reinforce its four key principles: non-discrimination,[38] the best interest of the child,[39] the right to

[37] Blatchford and Baines, 2019.
[38] Art. 2 of CRC.
[39] Art. 3 of CRC.

life, survival, and development,[40] and the right to express views in all matters affecting the child.[41]

Once we take a look at the implementation of this right in different jurisdictions, we have to agree with the International Play Association's (2010) observation that the right to play is one of the least known, least understood, and least recognized rights of childhood, and consequently, it is one of the rights that is the most consistently ignored, undervalued, and violated in today's world.

The second part of this study, which is expected to be published in the near future, will deal with the international comparative legal perspective of the implementation of the right to play across various countries and whether General Comment No. 17 has had any bearing on how this right is implemented, as well as whether the content of the right to play has been understood across several countries' national legislation. This paper has underlined the neglected nature of the right to play, a fact that will be even more apparent when looking at the implementation of this right. Most States Parties fail to fulfill their obligations to uphold Article 31. Even the ones that do have a reference to the right to play mostly only refer to it in the context of play facilities and urban planning—which is far from exhausting the content of this right. To ensure the realization of this right, policies should highlight not only play facilities, which need to be easily accessible and safe, but also the mental and temporal aspects of play.

An unfortunate but interesting piece of evidence confirming the overlooked status of this right is that most countries are not even able to provide statistical data on it. When the States Parties were asked to report on the percentage of children in leisure activities or the number of public play facilities in communities and whether they are located in rural or urban settings, despite the obligation to do so, most States Parties could not provide any statistical information. This observation is crucial because, in order to improve something, you first have to measure it.[42] Therefore, it is time to emphasize just how critical it is to foster the right to play. Children's rights have to be viewed holistically; thus, policies that ignore the right to play cannot be developed in favor of children. This is even more apparent in developing countries, where children are often mistreated and their rights are frequently violated.

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[40] Art. 6 of CRC.
[41] Art. 12 of CRC.
[42] Adamson, 2007.

5. Conclusions

It is through play that children learn about themselves, the world around them, and their role in society. Through play, they are able to develop the key competencies they need to flourish. It is our responsibility to protect children’s right to play and ensure that they can enjoy it fully to help each child develop into a complete person physically, psychologically, and morally. Because the right to play is the red-headed stepchild of the Convention, it is crucial to talk about this right, widely educate people about its importance, and advocate for its implementation. A society that understands children’s right to play will ultimately be happier, healthier, and more alive than one without play. It is not just children who learn through play; if we follow them in their play and observe for a moment, it gives us an opportunity to learn everything we need to know about them: their dreams, their desires, their fears, who they are, what they can do, and who they would like to become. It is our duty, as parents, caregivers, policymakers, academics, and simply adults, to fulfill their needs and respect their rights –including the fundamental right to play.

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[30] Vygotsky, L. (1967) ‘Play and its role in the mental development of the child’, *Soviet Psychology*, 5(3), pp. 6–18; https://doi.org/10.2753/RPO1061-040505036.

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MÁRIA HERCZOG*

Training of Professionals on Child Rights

ABSTRACT: It is universally recognized that children have rights that are inalienable and indivisible. All children are entitled to be aware of and excercise their rights The exposure, experience and education that children receive in their formative years determines their development and well-being. The United Nations Convention on Rights of the Child (UNCRC) set the guiding principles and its implementation, including awareness raising, education about child rights for all, including children themselves, parents, professionals and the public. The ultimate aim of the education, training on child rights for professionals is to sensitize, inform them and ensure that they are working with children in line with the principles and requirements of the UNCRC and other relevant child rights related treaties and documents. There has been so far limited efforts made to train all professionals in contact with children to learn about child rights and skills on how to implement them, involving children, raising awareness of their rights and support the use of them in their everyday life. Children play a central role in shaping the present and future, with adults offering the support required, for children's well-being and to reach their full potential, so that in collaboration, children and adults can strengthen and transform our world. To achieve this vision, children, parents, professional and the public needs to be aware of child rights and implement them properly. The article provides an overview of the current situation worldwide and describes a number of programs, trainings provided as promising practices.

KEYWORDS: awareness child rights education, professionals, training.

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* Chair and program director of Család, gyermek, ifjúság Egyesület (Family, Child, Youth Association), visiting senior lecturer at ELTE Law Faculty, Vocational Training Center and ELTE Faculty of Social Sciences, Interdisciplinary PhD course, President of the Executive Committee of Child rights Connect.
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1. Introduction

The United Nations Convention on the Rights of the Child (UNCRC) is the most widely ratified human rights instrument in the world, and its adoption since 1989 has influenced and shaped, in many ways, the approaches to children, policies, and conversations concerning their participation in decision-making on issues that affect them, and their education as active citizens.

Recognition of the importance of childhood, ensuring safe, caring, and joyful early years of life, and partnership between children and adults require knowledge and appropriate application of children's rights by all those who come into contact with children, including parents, professionals, and the media. Knowing child rights and understanding their relevance are also essential for the wider public.

In its reporting and consultations with States parties, the UN Committee on the Rights of the Child focuses on whether States are fulfilling their obligations to 'undertake to make the principles and provisions of the Convention widely known, through appropriate and active means, to adults and children alike.'[1] In the questionnaire provided to the state parties for preparing the simplified reporting, the expectation is more specifically formulated: '...measures taken to make the principles and provisions of the Convention and its Optional Protocols widely known to adults and children through dissemination, training and integration into school curricula.'[2]

In this article, we focus on the training of professionals on children's rights, highlighting the importance of ensuring that parents as well as the general public understand children's rights, especially as they vary and are often subject to misunderstandings and misinterpretations. However, there is often a lack of a child rights-based approach, recognition, and application in daily practice in all areas. The interpretation that children must first learn about and fulfill their obligations and only then become "entitled" to exercise their rights is very common. This is contrary to both human rights and children's rights approaches, according to which rights are unconditional for all human beings, including children, and do not have to

[1] Art. 42 of the UNCRC.

[2] 19 (g), Guidelines on reporting (2015), Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/040/49/PDF/G1504049.pdf?OpenElement (Accessed: 18 September 2023.)

be earned; respect for them is a fundamental condition in all cases. 'Every person has the same rights as a result of common humanity. We are all equally entitled to human rights without discrimination. These rights are interrelated, interdependent, and indivisible.'[3]

According to a survey by the UNICEF Hungarian Committee

> only one in three children were aware that they have special rights other than those of adults, but 88% of children thought it was important for them to know their rights. Half of the children surveyed thought that adults did not give them a say in issues that affected them, and one in five thought that adults did not respect children.[4]

A study was conducted in 16 countries with almost 18,000 eight-year-old children on their understanding of their rights and their opinions about respect for their rights. Only a minority of the children were aware of child rights, while most felt that their rights were respected. There was significant variation of responses to every dimension of the investigated rights. Three indicators were found to be relevant: family deprivation, home climate, and school climate are all connected to children's awareness and self-assurance. The authors' hypothesis that children's rights outcomes are influenced by at least three factors–family background, school, and the wider community–including local and national level factors, is accurate.

These findings further enhance the conviction that raising awareness in the widest possible circles in society and providing training to all those working with children can lead to desired outcomes, that is, to educate children on their rights so they can exercise them.[5]

2. Education programs for professionals

Professionals working with children include all those who come into contact with children in the course of their activities, including but not limited to health, early childhood care, education, all other forms of education, social

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[3] *Child rights and human rights explained*, UNICEF, Available at: https://www.unicef.org/child-rights-convention/children-human-rights-explained (Accessed: 18 September 2023).

[4] Lux, 2014.

[5] af Ursin and Haanpää, 2018, pp. 1425–1443.

services, child protection, administration, law enforcement, justice, and humanitarian organizations. We have very little or incomplete knowledge and information about where and how children's rights are taught in various professional, basic, and further training courses globally, and there is a great need for research and assessment in this area.

Despite the widely recognized and ratified UNCRC, its implementation is still very limited in most countries, and the Committee on the Rights of the Child can only make recommendations during consultations and concluding observations for the state parties. There are hardly any resources to monitor and evaluate in a systemic way the implementation of the Convention and the concluding observations made; neither the Committee itself nor international and national experts, NGOs, and advocates are in a position to do so.

A wide range of professionals need thorough knowledge of children's rights to develop a common language for a child rights-based approach using the concepts, frameworks, principles, and values used in the Convention and its related documents, optional protocols, recommendations, and comprehensive commentaries. This language should be child- and user-friendly so that it is accessible and understandable. Professionals can help children, parents, and the wider public be aware, understand, accept, and apply children's rights.

There have been several attempts to raise awareness of the need to prepare professionals to learn and teach about child rights and implement them in their practice. The focus has been primarily on educators and only in a limited way on other professionals.

In 2015, UNICEF conducted a study covering 26 countries about teaching and learning child rights. The experts prepared an online survey to collect data on teachers' education on children's rights, including early childhood education and care services, and primary and secondary school educators, looking at an overview of teaching child rights in all these settings by trained professionals. A literature review and collection of case studies were also part of the research done.

The literature review identified several issues about the lack or partial availability of different level policies supporting child rights education, including the need for training and knowledge/skills sharing with teachers to create change and the needed attitude, that could be combined with other education agendas and topics. In case policymakers and teachers are aware of these options, relationships and networks are essential to introduce child

rights education. Possible interpretations and implementations have received an ideological dimension that needs to be considered and addressed.[6]

The survey was a follow-up to learn about the impact and the possible implementation of the Child Rights Education Toolkit, developed by UNICEF in 2014. It provides the opportunity to professionals in formal education settings from early years services until secondary education to empower both adults and children to take action advocating for and applying these at the family, school, community, national, and global levels.[7]

According to the survey, only 11 countries have an entitlement to teach and learn about child rights; in seven countries, some schools or regions include partial child rights education. Rights are linked to responsibilities and not to the UNCRC. In many countries, the central government has no entitlement to influence the national curriculum and lacks any coordination mechanisms to implement Article 42 of the UNCRC. None of the 26 countries could ensure teacher training on child rights or familiarity with the UNCRC.[8]

The International Institute for Child Rights and Development (IICRD) is a Canadian charity that was established to expand the capacity of professionals to use a child rights-based approach and support children to reach their full potential and learn about participation and leadership. Their aim is 'to enhance the capacity of individuals, organizations, governments and young people to transform systems to fulfill their rights as defined by the UN Convention on the Rights of the Child.'

> Their vision is for children and youth to play a central role in shaping the present and future, with adults offering the support required, so that in collaboration, children and adults can strengthen and transform our world. To achieve this vision, we believe that the approach to children's rights must change.[9]

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[6] Jerome et al., 2015, p. 7.
[7] UNICEF, 2014a.
[8] Jerome et al., 2015, pp. 8–9.
[9] *About Us,* International Institute for Child Rights and Development, IICRD, Available at: https://www.iicrd.org/about-us (Accessed: 18 September 2023).

They provide training worldwide to implement child-centered practices by expanding the capacities of professionals working with children.

The Child Rights Education for Professionals (CRED-PRO) 'is an international training program to improve the well-being, development, and health of children throughout the world by infusing a child rights approach in all aspects of the professional services and policy applied to children and youth.'[10] CRED-PRO is present in 11 countries and four regions, not only providing training but also actively improving the health and well-being of children with a rights-based vision, following the UNCRC principles and values, and working together with local stakeholders. They produce online training materials that are accessible to all professionals and those interested in learning about child rights and their implementation. Ambition is the provision of basic programs adaptable to different professionals, practitioners, and those working in policymaking and research. Considering the different cultures and economic and social structures, the programs are open to modification and are inclusive, sensitive, and flexible. The organization has been struggling with limited resources and interest, however, it is hoped that free, accessible online materials will create openness and attract funders and professionals to use these resources, exchange experiences, and further develop international, national, and local cooperation.

The UN High Commission for Human Rights has developed human rights education materials and training programs for both formal and informal education, including professionals. They also provide resources and information-sharing platforms that contribute to the education of professionals, practitioners, and advocates. This activity is based on Resolution 59/113 of the UN General Assembly in 2004 on the World Program for Human Rights Education to enhance the implementation of these programs in all sectors. It is extended to the second, third, and fourth phases until 2024 to focus on youth empowerment through human rights education.[11]

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[10] *Child Rights Education for Professionals* (CRED-PRO), IICRD, Available at: http://www.iicrd.org/projects/child-rights-education-professionals-cred-pro#sthash.567iWKiH.dpuf (Accessed: 18 September 2023).

[11] *Human Rights Education and Training*, United Nations, Available at: http://www.ohchr.org/en/resources/educators/human-rights-education-training (Accessed: 18 September 2023).

3. Programs in Europe

Several regional programs have been provided to European professionals. The Council of Europe project 'Building a Europe for and with children'[12] was launched in 2006 based on the decision made a year earlier by the representatives at the Third Summit of the Heads of States and Governments of the Council of Europe. The Strategy on the Rights of the Child 2012-2015 created a vision for the Council of Europe on its role and activities, relying on earlier policies and practices, government requests, and the outcomes of consultations and feedback from stakeholders. As a follow-up among other projects, an e-learning program was developed to support primarily legal professionals to be trained in different areas of human rights, called Human Rights Education for Legal Professionals (HELP)[13] as part of the Child Rights Strategy of the Council of Europe 2022-2027.

The Council of Europe 2030 strategy for the youth sector is based on the central roles of youth participation, human rights education, and intercultural dialogue in the activities of the Youth Department, including children from the age of 13.[14]

A training manual called "Compass" was developed and published in 2002[15] and has since become a reference book for those working with young people in different areas. It has so far been translated into more than 30 languages, and in some countries, it has been a resource reference for rights education in several settings, including schools. In addition to the success of the manual, it faced challenges when rejected by those not in favor of the implementation of human rights and their complexities. Following this success story, another manual was developed in 2007, focusing on human rights education for children called "Compasito."[16] Both manuals primarily support educators and trainers in learning how to teach human rights and how to implement them in formal and non-formal education. A fully revised and updated edition of "Compasito" will be published in 2021, following several consultations, an online survey on experiences, necessary changes,

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[12] *Building a Europe for and with children*, Council of Europe, Available at: https://www.coe.int/t/dg3/children/ (Accessed: 18 September 2023).
[13] *Human Rights Education for Legal Professionals*, Council of Europe, Available at: https://help.elearning.ext.coe.int (Accessed: 18 September 2023).
[14] Council of Europe, 2022.
[15] Brander et al., 2020.
[16] Gomes et al., 2020.

and pilot training programs. It is available online in three languages (English, French, and Russian) and in several other languages, changing quickly as more translations are made.[17]

“Compasito” presents child rights within the broader context of human rights through the process of enabling children, particularly those aged 5–13, to understand their own rights and that everyone has human rights while advocating that children need more protection and have more and somewhat different rights.

> The UNCRC identifies the human rights relevant to children. Learning about and experiencing children’s rights helps children understand what human rights are about, understand that they are right holders themselves, and adapt and apply their rights to everyday life. These are the key aims of human rights education.[18]

Providing nonformal educational methodology and structure with theoretical and practical support for educators who use the manual, similar to the CRED-PRO program, this program allows an opportunity for adaptation based on local needs and culture. It is based on the joint activities of adults and children, and most of them require trained professionals to facilitate the program and develop knowledge and skills. Learning about human rights and child rights enables children to defend their rights and respect the equality, equity, and dignity of themselves and others.

The Council of Europe has provided partnerships and project opportunities to several international and national organizations in the area of child rights education and training for professionals and children.

‘Training Professionals Working with Children in Care’ was a two-year partnership (2015-2016) between SOS Children’s Villages International, the Council of Europe, Eurochild and partners in Bulgaria, Croatia, Estonia, France, Italy, Latvia, Hungary, and Romania. This project aimed to improve the living conditions and life prospects of children and young people living in alternative care by providing care professionals with continued training on applying a child rights-based approach to their work. The training was based on two guidelines prepared for children by SOS

17 Brander et al., 2009.
[18] Gomes et al., 2020, p. 9.

Children's Villages International and the Council of Europe titled 'Securing Children's Rights and Discovering Your Rights.'

A handbook was also prepared: 'Realizing Children's Rights: A Training Manual for Care Professionals Working with Children in Alternative Care, based on the experiences and best practices of different European countries.' International training workshops for two trainers from each country were also conducted by a team of international experts, followed by national training held for 842 care professionals from various care-providing organizations.[19]

With additional funding provided by the EU, SOS Children's Villages International, and Eurochild began developing 'A European Recommendations on the Implementation of a Child-Rights Based Approach For Care Professionals Working With and For Children' as another output of the program.[20]

4. EU funded programs

The European Union launched its Child Rights Strategy[21] in March 2022, based on consultations with over 10,000 children. The thematic areas of the strategy focus on child participation in political and democratic life, socioeconomic inclusion, health and education, combating violence against children and ensuring child protection, child-friendly justice, digital and information society, and the global dimension of children outside the EU.

So far, there is no specific program aimed at training professionals in child rights. However, the mainstreaming of child rights in different EU policies have started and been encouraged. Several grants and programs have provided opportunities to develop national and regional programs for professionals and children themselves to run training in child rights-related topics, but there is no available catalogue of those programs. Therefore, we cannot provide detailed information on their content and ability. Nevertheless, some examples demonstrate their richness and diversity.

A specific 5 hours training course was conducted on the basic knowledge and skills for a meaningful inclusion of child rights principles and practices in EU Development Cooperation[22]. It is an interesting example

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[19] SOS Children's Villages, no date.
[20] SOS Children's Villages, 2016.
[21] European Commission, 2022.
[22] UNICEF, 2014b.

that hopefully would be just the start of an EU-wide program providing training opportunities for professionals in different sectors, based on the EU Child Rights Strategy and its targets.

'Children as Champions of Change: Ensuring Children's Rights and Meaningful Participation' funded by the European Union Rights, Equality and Citizenship Program and implemented by seven UNICEF National Committees: Ireland as a lead partner, Austria, France, Germany, Iceland, the Netherlands and Portugal. Partner organizations will implement several activities individually and jointly to raise awareness about child rights, Child Rights Schools, and child participation between 2021 and 2023, including training for professionals and children.[23]

The project, titled 'Unlocking Children's Rights: Strengthening the capacity of professionals in the EU to fulfil the rights of vulnerable children', involved partners from ten European countries, including Coram Voice and Coram Children's Legal Centre from the UK, FICE Bulgaria, Czech Helsinki Committee, the University College Cork, Children of Slovakia Foundation, Estonian Centre for Human Rights, European Roma Rights Centre (Hungary), Fondazione L'Albero della Vita (Italy), Empowering Children Foundation (Poland), Social Educational Action (Greece), and Family, Child, Youth Association (Hungary).[24] The aim was to develop a comprehensive learning system, including face-to-face training modules, e-learning packages, and an online knowledge-sharing resource for professionals working with children in residential care facilities, detention centers, and justice systems across the EU. An accompanying advocacy and dissemination guide was developed to identify how training could be integrated into existing training in different sectors, registration, and accreditation systems.

Following the project, national partners could accredit the training programs and invite professionals to participate in the translated and adapted versions.[25]

In every country most presumably there are vocational courses, trainings designed and provided to different professionals. However, to our knowledge, no collection of those opportunities has been gathered. It seems

[23] *EU-UNICEF Child Rights Education Project (2021)*, UNICEF & the European Union, Available at: https://www.unicef.org/eu/eu-unicef-child-rights-education-project (Accessed: 18 September 2023).

[24] Coram Children's Legal Centre, 2016.

[25] Család, gyermek, ifjúság Közhasznú Egyesület, 2020.

that no country has designed a comprehensive system for teaching child rights to all those working with children, considering the different needs of relevant professionals.

5. Formal higher education programs

A growing number of universities worldwide provide MA programs for professionals interested in and working on child rights. The courses are most often affiliated with law faculties and schools, but do not aim to reach legal professionals only, covering all other areas and expertise. In many instances, the courses are combined with specific areas of child rights, such as child welfare and protection, the early years of development and care, and humanitarian crises.

There is no information gathered on the presumably hundreds of courses incorporating child rights into the undergraduate curricula; however, according to the scarce information available, they seem to be partial, limited, and do not support professionals effectively to learn how to implement child rights in their practices, how to empower children to be aware of their rights, and the implementation options.

CREAN is a network of more than 30 European universities that offer MA courses on child rights as an interdisciplinary study and strengthens the areas of research, policies, and practices. CREAN enhances the promotion and exchange of research information, facilitates co-operation and knowledge sharing in service provision, and supports members in learning from each other through individual and group activities.[26]

Several emblematic programs are known for those interested in vocational training for portrayals of child rights. Master of Laws: Advanced Studies in International Children's Rights (LL.M) at Leiden University is conducted in English, attracting a large number of international students, focusing on the legal aspects of child rights, offering specialization among others in children and families, migration, juvenile justice, and digital technology.[27]

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[26] *About*, Children's Rights European Academic Network, CREAN, Available at: https://crean-network.org/index.php (Accessed: 18 September 2023).

[27] *International Children's Rights (Advanced LL.M.)*, Universiteit Leiden, Available at: https://www.universiteitleiden.nl/en/education/study-programmes/master/international-childrens-rights (Accessed: 18 September 2023).

The Centre for Children's Rights Studies at the University of Geneva, Switzerland, is well known for its wide range of programs in child rights, including A Master’s Degree in Children’s Rights Studies, a Master of Advanced Studies (MCR), a Certificate of Advanced Studies in Children’s Rights (DAS), and Dimplomas on Advanced Studies (DAS). Their summer school, the ‘Children at the Hearts of Human Rights’ is popular as many well-known child rights experts and former members of the UN Committee on the Rights of the Child are teaching there. Their special focus is on those planning to work in child and human rights national and international organizations.[28]

The Queens University program focuses on research and child rights and provides unique opportunities. There is a growing demand for postgraduate programs on children's rights that focus on an interdisciplinary approach, including research and child rights-based research methodologies. The program also intends to provide high-level knowledge and skills in children's rights law and the practice of value to those working with and for children in different sectors and areas.[29]

In Hungary, the Eötvös Lóránd Tudomány Egyetem (ELTE) Law Faculty Institute for Post-graduate Legal Studies accredited a post-graduate course on child rights in 2020. The two-year course provides complex knowledge of the approach and solutions to children's rights issues in each branch of law and other professions in health, education, social services, child welfare, and protection.[30]

Similarly, a four-semester MA Child Rights program is offered by Babes-Bólyai University in Cluj, Romania, both in English and Romanian, attracting international students as well, especially as they are members of CREAN and have a long history of teaching child protection at different levels.[31]

[28] *Intercultural Centre in Child Rights*. Available at: https://www.unige.ch/cide/en/ (Assessed: 18 September 2023)
[29] *MSc Postgraduate Taught Children’s Rights*, Queen’s University Belfast, Available at: https://www.qub.ac.uk/courses/postgraduate-taught/childrens-rights-msc/ (Accessed: 18 September 2023)
[30] *Gyermekjogi szakjogász*, ELTE JOTOKI, Available at: https://jotoki.elte.hu/content/gyermekjogi-szakjogasz.t.428 (Accessed: 18 September 2023).
[31] *Faculty of Sociology and Social Work*, Babes-Bólyai Universtiy, CREAN, Available at: https://crean-network.org/index.php/membership/members/babes-bolyai-cluj-napoca (Accessed: 18 September 2023).

In Central and South America, the Latin American Network of Master's study program Children's Rights (RMI) offers inter-institutional opportunities at various universities in nine countries in cooperation with Save the Children Sweden (SCS).[32]

The Department of Social Sciences at Africa University is a regional center of excellence. As a pan-African institution, it is inviting students from all countries in the region in collaboration with UNICEF to promote the Master of Science in Child Rights and Childhood Studies program from an African perspective.[33]

Universities in the Asia-Pacific region seem to provide child rights studies together with human rights courses in several countries such as Hong Kong, Taiwan, Thailand, Cambodia, Indonesia, Japan, Australia, and New Zealand.[34]

In North America, Canada has also offered programs at different universities on human rights and child rights, combined or separately, such as at the University of Manitoba, since 2019.[35] The US, the only country that signed but has not ratified the UNCRC, has received Human Rights MA courses at a number of universities, for instance, Columbia University,[36] Binghamton University,[37] and Arizona State University,[38] to name a few,

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32 Latin American Network of Master study programmes in Children's Rights, Available at: https://www.childwatch.uio.no/events/courses-and-training/programmes/latinamerican-masters-network.html (Assessed: 18 September 2023).

[33] *Master of Science In Child Rights and Childhood Studies*, Africa University, Available at: https://www.africau.edu/programmes/MasterofScience%20inChildRightsandChildhoodStudies.html (Accessed: 18 September 2023).

[34] *6 Human Rights Law Schools in Asia*, Human Rights Carriers, Available at: https://www.humanrightscareers.com/magazine/human-rights-law-schools-in-asia/ (Accessed: 18 September 2023).

[35] *Master of Human Rights*, University of Manitoba, Available at: https://umanitoba.ca/explore/programs-of-study/master-human-rights-mhr (Accessed: 18 September 2023).

[36] *MA Human Rights Studies*, Human Rights Carriers, Available at: https://www.humanrightscareers.com/masters/ma-human-rights-studies/ (Accessed: 18 September 2023).

[37] *Master of Science in Human Rights*, Binghamton University State University of New York, Available at: https://www.binghamton.edu/human-development/human-rights/index.html (Accessed: 18 September 2023)

[38] *Social Justice and Human Rights, MA*, Human Rights Carriers, Available at: https://www.humanrightscareers.com/masters/social-justice-and-human-rights-ma/ (Accessed: 18 September 2023).

covering child rights as well, while Harvard is offering an online course explicitly on child rights.[39]

Other Universities are also offering courses online, such as the University of Geneva on Interdisciplinary Introduction to Children's Human Rights,[40] the Celsius Center for Excellence, and the University of Stratchclyde, Scotland, a very popular online course that is currently not available, titled 'Getting care rights for all children: Implementing the UN Guidelines for the alternative care of children.'[41]

All used The Massive Online Open Course (MOOC) technology. These courses are available for free on the Coursera platform, making them accessible to everyone with interest. Those attending courses must pay for a certificate only when they need it.

6. Summary

The training of professionals aims to help them know, understand, and apply the principles of the UNCRC and the obligations of adults and the state towards children. They should promote the rights of children and share their knowledge as widely as possible with communities, politicians, policymakers, and the media so that everyone is aware of and applies the child rights approach and children's rights in programs, policies, training materials, and their practical implementation.

Anyone should be responsible and accountable for ensuring the application of child rights and human rights, respecting principles, and values, and taking them seriously. It is everyone's responsibility to ensure the right to non-discriminatory, inclusive, quality of life, development, and identity of children, providing protection from ill treatment, violence, abuse, torture, and intimidation. Ensuring the rights of children as equal citizens, listening to them, and taking their views into consideration in all matters affecting them and considering their interests in all decisions would make it

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[39] *Child Protection: Children's Rights in Theory and Practice*, Harvard University, Available at: https://pll.harvard.edu/course/child-protection-childrens-rights-theory-and-practice?delta=0 (Accessed: 18 September 2023).

40 *MOOC - Interdisciplinary introduction to children's human rights*, Université de Genève, Available at: https://www.unige.ch/cide/en/enseignement/mooc-interdisciplinary-introduction-childrens-human-rights/ (Accessed: 18 September 2023).

[41] *Getting Care Right for All Children: Implementing the UN Guidelines for the Alternative Care of Children*, CELCIS, University of Strathclyde Glasgow, Available at: https://www.futurelearn.com/courses/alternative-care (Accessed: 18 September 2023).

possible to mainstream child rights and make it a general language and practice.

There are several challenges to communicating and implementing children's rights. Teaching children about their rights and enabling them to exercise them is only feasible if the adults around them are aware of their rights and feel confident about living accordingly.

If adults feel that they cannot exercise their own rights or the rights of others, or even if they believe that not everyone has the same rights, then they do not recognize or respect the rights of children.

Children learn and follow the pattern of what they see and experience from the behavior, lifestyle, and reactions of the adults around them, not from what they tell them, so it is of paramount importance that they see and perceive that adults respect themselves and others and know and respect human rights and children's rights. This is the best way to transfer knowledge and skills.

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[2] Brander, P., De Witte, L., Ghanea, N., Gomes, R., Keen, E., Nikitina, A., Pinkeviciute, J. (2020) *Compass, Manual for Human Rights Education with Young People*. 2nd edn. Strasbourg: Council of Europe Publishing [Online]. Available at: https://rm.coe.int/compass-eng-rev-2020-web/1680a08e40 (Accessed: 18 September 2023).

[3] af Ursin, PK., Haanpää, L. (2018) 'A Comparative Study on Children's Rights Awareness in 16 Countries', *Child Indicators Research*, 11(1), pp. 1425–1443; https://doi.org/10.1007/s12187-017-9508-1.

[4] Gomes, R., Schneider, A., Keen, E., De Witte, L., Rutai, Zs. (2020) *Compasito, Manual for Human Rights Education with Children*. 3rd edn. [Online]. Available at: https://rm.coe.int/compasito-3rd-edition-isbn-8794-0/1680a4d571 (Accessed: 18 September 2023).

[5] Jerome, L., Emerson, L., Lundy, L., Orr, K. (2015) *Teaching and learning about child rights: A study of implementation in 26 countries*. Belfast: Queens University & UNICEF [Online]. Available at: https://www.unicef.org/media/63086/file/UNICEF-Teaching-and-learning-about-child-rights.pdf (Accessed: 18 September 2023).

[6] Lux, Á. (ed.) (2014) *Jogod van a jogaidhoz!* UNICEF Magyar Bizottság [Online]. Available at: https://unicef.hu/wp-content/uploads/2014/11/kutatasi_osszefoglalo_UNICEF_gyermekjog_fin.pdf (Accessed:18 September 2023).

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ERIKA PEHR KATONÁNÉ[*]

The right of children to adoption in light of the European Convention on Human Rights

'It's a good world if it's a good world to be a child in.'
(Balázs Véghelyi)

ABSTRACT: Each country applies its own national rules on the authorization and possible termination of adoption. Nevertheless, the practice of adoption is based on commonly agreed-upon principles and values, including the best interests of the child, which also affect the final fate of the child. The primary aim of adoption worldwide is to establish kinship between the adopter, his or her relatives, and the adopted child to ensure that the child is brought up in a family. Adoption remains the most appropriate legal instrument to replace birth families. International adoption is a secondary option that can occur when domestic adoption measures fail, with the exception of adoption by relatives and spouses. The protection of human rights is an important area in the wide range of activities of the Council of Europe, which was founded in 1949. The European Convention on Human Rights (ECHR), adopted in Rome in 1950, is an international norm that can be directly invoked and applied in the legal systems of states, including Hungary. The ECHR is a framework convention and therefore the substance of each right is expounded in the case law of the European Court of Human Rights (ECtHR). The case law of the ECHR is rich and authoritative in the field of fundamental rights protection and has ruled on several socially important issues, including adoption in the area of family law. The intention to adopt can be interpreted as the creation of a family because a family can be created through adoption, but the ECHR does not provide a substantive right to adoption.

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[*] Associate professor, Faculty of Law, University of Pécs, Hungary, erika.pehr@t-online.hu, https://orcid.org/0000-0002-6823-217X.
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KEYWORDS: adoption, child, child's best interest, family, marriage, discrimination, ultima ratio, case law.

1. Introduction and relevance of the topic

There are no uniform rules on adoption within the Council of Europe; each country applies its own national rules on the authorization and possible termination of adoption. Nevertheless, the practice of adoption is based on commonly agreed-upon principles and values, including the best interests of the child, which also affect the final fate of the child. Based on international conventions, Hungarian legislation has also declared the right of the child to be raised by his or her parents and to be provided with special substitute protection in the form of family, family placement, domestic adoption, or, if this fails, international adoption, if the child cannot be left with his or her birth family. The primary aim of adoption worldwide is to establish kinship between the adopter, his or her relatives, and the adopted child to ensure that the child is brought up in a family, even if the child has no birth parents, or the parents are unable or unwilling to bring up the child properly.[1] The law protects the best interests of the child primarily by protecting the child's placement and upbringing in a family environment where this is lacking, by seeking to make up for it. Adoption remains the most appropriate legal instrument to replace birth families.

International adoption is a secondary option that can occur when domestic adoption measures fail, with the exception of adoption by relatives and spouses. The secondary nature of international adoption was confirmed by the Convention on the Rights of the Child adopted in 1989,[2] the Hague Convention on Adoption in 1992,[3] and the Civil Code adopted in 2013.[4] The basic national rules on adoption are contained in the Fourth Book of the Civil Code–the Book of Family Law (hereinafter referred to as: CC or the Book of Family Law).

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[1] Katonáné Pehr, 2018, p. 1.

[2] Act LXIV of 1991 Convention on the Rights of the Child, signed in New York on 20 November 1989; 1989 of New York (hereinafter referred to as: the Convention on the Rights of the Child).

[3] Act LXXX of 2005 on the Protection of Children in the Field of Intercountry Adoptions and the on Protection of Intercountry Adoptions and Cooperation in Respect of Such Adoptions, done at The Hague on 29 May 1992 (hereinafter referred to as: the Hague Convention on Intercountry Adoption).

[4] Act V of 2013 on the CC.

Mária Neményi and Judit Takács conducted a study between 2012 and 2014 at the regional child protection service in Budapest and found that the actors in adoption encounter discrimination at several levels. On the one hand, at the level of regulation, certain family forms are excluded from the beginning, while others are preferred. On the other hand, 'public opinion tends to view socially constructed family forms, which are not based on blood ties, as abnormal or deviant and to contrast them with the "real" family, which is usually formed by heterosexual couples and their biological children.'[5]

The protection of human rights is an important area in the wide range of activities of the Council of Europe, which was founded in 1949. The European Convention on Human Rights (hereinafter referred to as: ECHR), adopted in Rome in 1950, is an international norm that can be directly invoked and applied in the legal systems of states, including Hungary.[6] The ECHR lays down non-derogable rights that states may not infringe, such as the right to life, and protects rights and freedoms that may be restricted by law only where this is strictly necessary in a democratic society, such as the right to liberty and security or the right to respect for private and family life.[7] All State parties to the ECHR have incorporated its provisions into their domestic law in some way. Although few articles specifically address children's rights, many of the ECHR's provisions apply to children.[8]

The ECHR is a framework convention and therefore the substance of each right is expounded in the case law of the European Court of Human Rights (ECtHR).[9] The ECtHR is a judicial body of the Council of Europe that hears applications from individuals and receives interstate applications. Currently, 47 countries have undertaken[10] efforts to guarantee fundamental rights and freedoms protected by the ECHR. The case law of the ECHR is

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[5] Neményi and Takács, 2015, pp. 69–70.

[6] In Hungary, the Convention – and several of its additional protocols – were promulgated by Act XXXI of 1993.

[7] See Emberi Jogok Európai Bírósága (2022) Az Európai Emberi Jogi Egyezmény – Élő jog. Available at: https://echr.coe.int/Documents/Convention_Instrument_HUN.pdf (Accessed: 20 January 2023).

[8] Bereczki, 2021, p. 39.

[9] The judgments are available on the Court's website in the so-called HUDOC search system, mainly in English and partly in French.

[10] See Emberi Jogok Európai Bírósága (2022) Az Európai Emberi Jogi Egyezmény – Élő jog, pp. 22–23. Available at: https://echr.coe.int/Documents/Convention_Instrument_HUN.pdf (Accessed: 20 January 2023).

rich and authoritative in the field of fundamental rights protection and has ruled on several socially important issues, including adoption in the area of family law.

The following sections will consider the international legal framework for adoption and then examine some pertinent adoption decisions in the ECHR case law and presents related provisions of Hungarian adoption rules.

2. Framework on international adoption

International conventions have significantly facilitated the development of adoption rules. There have been many conventions on international adoption, but the question of its necessity and appropriateness has divided public opinion for decades and is still not unanimous. Many see it as a new opportunity for children to be brought up in a permanent family environment after unsuccessful domestic adoption, while others see it as a way of infringing on children's rights (e.g., loss of identity and disruption of the continuity of upbringing) by allowing international adoption.[11] However, recently, there has been a growing emphasis on "last resort," which is in line with one of the principles of international adoption, subsidiarity. The principles of international adoption also imply a greater emphasis on the effective functioning of national child protection systems.[12]

A seminar on international adoption was held in Leysin, Switzerland, in 1960, where the first principles of adoption were laid down, namely that the best interests of the child, not the parents, are paramount in adoptions and that international adoption is an ultima ratio. These principles served as the basis for subsequent national and international documents.

The Council of Europe called for a revision of the 1967 European Convention on the Adoption of Children, which resulted in the revised Convention on the Adoption of Children, signed in Strasbourg on November 27, 2008 (hereinafter referred to as the European Convention on Adoption), which Hungary signed on November 29, 2010, but has not been promulgated since then. However, the 1967 European Convention on Intercountry Adoption was also an important instrument of the Council of Europe in the field of adoption, as it harmonized the substantive law of the Member States and laid down the most basic standards on adoption.[13]

[11] Kálmán, 2018, pp. 51–54.
[12] Marschalkó, 2013, p. 272.
[13] Katonáné Pehr, 2018, para. 49.

Article 21 of the Convention on the Rights of the Child lays down the basis for international adoption by stating that adoption abroad may be considered as other means of providing the child with the necessary care if the child cannot be adequately placed in his or her country of origin and the best interests of the child are paramount. The Hague Adoption Convention deals in the most detail with international adoption It provides that adoption can only take place when it can be shown that all possible forms of care have been exhausted in the child's country of origin and that international adoption is in the best interests of the child. The adoption procedure between Hungary and the signatory State Parties is simplified as it will not require the authorization procedure of both States Parties will only be able to contact each other through the central authorities of the states.

In Hungary, international adoption was first regulated by Act No. 13 of 1979 on Private International Law and bilateral international conventions with several foreign countries. Subsequently, the Convention on the Rights of the Child, the Hague Convention on the Adoption of Children, and the current Act XXVIII of 2017 on Private International Law completed the rules in addition to the provisions of the Book Family Law.

The Book of Family Law defines international adoption in accordance with the Hague Adoption Convention, where it is not nationality or habitual residence that is relevant but the fact that the adoption results in a change in the child's habitual residence. Accordingly, an international adoption is one where the child is permanently transferred to another country as a result of the adoption, irrespective of the nationality of the adopter and whether the child's nationality changes.[14] Foreign adoption, except for adoption by a relative or spouse, may only be secret. Adoptions covered by the Hague Convention on Intercountry Adoption may occur only if the authorities of the receiving state have established, inter alia, that prospective adoptive parents meet the conditions for adoption and are fit and proper for adoption. The Hague Adoption Convention opens up the possibility of recognizing adoptions made in another Contracting State; it seeks to avoid the need to repeat the adoption process, which also means that adoption, made in accordance with the provisions of the Convention, must be recognized as such by the operation of law. Recognition may be refused only when it is manifestly contrary to the public policy of the country with regard to the best interests of the child.[15]

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[14] Art. 4:129(1) of the CC.

[15] Katonáné Pehr, 2018, para. 57.

However, the legal concept of adoption and the legal effect of whether adoption terminates the relationship between the adopted person and the birth parents, which fundamentally affects the parent-child relationship, differs from one country to another. In this respect, a distinction is made between incomplete adoptions, where the child's links with his or her original family are maintained, and full adoptions, where the adopted child takes on the status of the adoptive parents' biological child; that is, the adoption terminates the parental rights of the biological parents.

Problems of conflict of laws may arise because some states recognize either full or incomplete adoption, with some countries having both forms of adoption simultaneously, such as France and Italy. The minimum rule in Article 27 of the Hague Convention on Adoption is intended to unify this divergent practice by providing that, where the legal effect of an adoption authorized in the state of origin does not extend to the termination of the pre-existing parent-child relationship, it should be possible for the host state to convert it into an adoption with a legal effect that terminates the relationship between the adopted child and the birth parent.

3. The European Court of Human Rights on family law in general

The European Court of Human Rights is the court established to monitor compliance with the European Convention on Human Rights. Based in Strasbourg, the ECtHR was the most important human rights forum in Europe. The Convention protects, among other things, the right to respect for private and family life,[16] the right to marry and found a family,[17] and the prohibition of discrimination.[18] The previous practices of the ECHR also laid down a number of principles that have contributed to the development of children's rights,[19] as the best interests of children have become a

[16] Art. 8 of the ECHR.
[17] Art. 12 of the ECHR.
[18] Art. 14 of the ECHR.
[19] These have been discussed in the UN Committee on the Rights of the Child's Comprehensive Commentary No. 14, which states that the "best interests" of the child are threefold. First, the child's substantive right to have his or her best interests assessed as a primary consideration. Second, a fundamental principle of interpretation, i.e., where a legal provision is open to more than one interpretation, the interpretation of the law which will most effectively serve the best interests of the child should be taken as the basis. Third, it is also a procedural rule, as in the decision-making process involving a child, the potential

consideration. Most children's rights cases are related to Article 8 of the ECHR; however, other articles may also play a role in protecting children's rights.

Changes in the family structure are constantly taking place in society, resulting in a more diverse structure at certain times and a more homogeneous structure at others. Since the mid-20th century, social changes have led to diverse family structures as well as increased mobility between family forms.[20] Apprehensively changing life situations call for a new approach, as new, previously unaccepted, alternative family forms have taken their place alongside marriage as the traditional family form. There is a widespread view that the pluralization of family forms leads to the destabilization and subsequent disintegration of the family institution. This approach is often based on the "confusion" between marriage and family.[21] 'Marriage, however, has lost its monopoly as a legitimation of the couple and the family, while at the same time, the role of parenthood and with it the family is growing in importance in Europe.'[22]

Practices in different countries are divided on what kinds of couples can adopt jointly. Adoption by a same-sex spouse is generally recognized, but adoption by unmarried same-sex or same-sex partners differs. We can ask: what types of relationships can be considered a "family;" who can form a family and what type of family the state wants to promote and create through adoption?[23]

Article L of the Fundamental Law, as amended several times, states that 'Hungary protects the institution of marriage as a community of life

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negative and positive effects of the decision on the child concerned must be assessed and explained in detail in the reasons for the decision of the court or authority.

[20] The main social trends affecting family structure in recent decades are well known: fertility levels have fallen below replacement levels; the timing of childbearing has been postponed; childbearing often occurs outside marriage; the timing of marriage is being postponed and relationships have become more fragile. Rácz, 2020, pp. 16–22.

[21] Harcsa, 2014, pp. 2–12.

[22] Vaskovics, 2002, pp. 360–361.

[23] Czech, Lithuanian, Romanian, Slovakian law excludes same-sex couples from adopting, and Polish law explicitly prohibits joint adoption. English, Belgian, Danish, Finnish, French, Dutch, Norwegian, Spanish, Swedish and Danish law also allows for same-sex adoption by same-sex partners other than married couples. In addition to the above countries, e.g. Estonian, German, Italian, Slovenian legislation also allows for adoption by one same-sex partner of the other's biological child. In Romania, a joint adoption is possible if the same-sex partner has been co-parenting the half-orphan child of the cohabiting partner for 5 years. Pehr, 2018, para. 30.

between one man and one woman, based on voluntary consent, and the family as the basis for the survival of the nation.' Family relationships are based on marriage and parent-child relationships with the mother being a woman, and the father, a man as Hungary supports childbearing. However, the above-mentioned interpretation of Article L of the Fundamental Law does not fully cover all family relations. The "principle of protection of the family" enshrined in the Book of Family Law expresses that family law protects the family as a community, i.e., it recognises the relationship between individual family members. This protection extends both to relationships established by law (marriage, adoption by descent, guardianship, etc.) and to other forms of cohabitation (e.g., step-parent-child or foster-parent-child relationships). The protection of the family as a community is closely linked to the principle of harmony between family and individual interests. The ECHR also states that the interests and rights of children in family relationships, including adoption, afforded enhanced protection.

Article 8 of the ECHR, the right to respect private and family life, declares a broad but elusive human right in the legal relationships of paternity, custody, contact, and adoption. As far as family law relationships are concerned, in line with modern life relationships, the Convention covers not only life relationships formally recognized by the state but also parental custody and contact issues relating to children from relationships other than cohabitation, from partnerships to adoption matters. The ECHR examines the concept of family on a case-by-case basis, taking into account, for example, the degree of consanguinity, the fact of actual cohabitation, the existence of financial or other dependencies, etc., in addition to marriage.[24]

It should also be stressed that the ECHR does not replace national authorities, because its task is to protect human rights and monitor their implementation by examining the conformity of the effects of national legal interpretations with the Convention. The ECtHR's practice impacts the development of national family law, not least in terms of ensuring that changes in family law move in the same direction. In several cases, the ECHR uses comparative legal analysis to examine whether European solutions have reached a common understanding of the issue in question– that is, whether there is a common denominator. The discretion of national authorities is wide when there is no consensus among Member States on a given issue.

[24] Winkler, 2003, p. 27.

However, the ECHR cannot annul national rules or decisions, nor can it oblige a state to do or refrain from doing something. However, the ECtHR case law provides guidance to ensure that similar disputes in particular areas of law are resolved at the national level and do not need to be referred to. The individual decisions and the principles and reasons for them guide national, and therefore domestic, decisions, and subsequent decisions of the ECHR if they can be applied to the new case.[25]

The Convention on the Rights of the Child was implemented primarily through the relevant provisions of the ECHR and its practices. It should be noted that although ECHR jurisprudence is influenced by the Convention on the Rights of the Child, its adoption is not automatic or systemic, but is often a reference point, particularly to the best interests of the child, which are paramount, that is, in the long term.[26]

4. Some cases from the adoption practice of the Strasbourg Human Rights Court

In the Convention, the family as a fundamental human rights institution is reflected in Article 8 “the right to respect for private and family life” and Article 12 “the right to marry,” and the ECHR case law refers to these articles together, however, if there is no infringement of Article 8, then Article 12 is excluded. The relationship between the two articles is therefore characterized by a *lex generalis* and a *lex specialis*, with Article 12 having diminished practical importance. In several of its decisions on adoption, the ECtHR examines Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 8, which discusses individual cases. According to the practice of the ECtHR, discrimination can be said to exist if it is not applied for a legitimate reason and purpose and if it goes beyond what is necessary to achieve the aim pursued, that is, if it is disproportionate.

The first and second paragraphs of Article 8 are distinguishable. While the first paragraph declares, in general, the right to respect private and family life, the second paragraph states that this right may be restricted by the State in justified cases.

Restriction may be based solely on the law when the interests of national security, public safety, or economic well-being in a democratic society so

[25] Dudás, 2018, pp. 21–24.

[26] Szentgáli–Tóth, 2018, p. 8.

require, for the prevention of disorder or crime, or for the protection of public health, morals, or the rights and freedoms of individuals.[27] However, the ECHR does not define the concept of a democratic society, which is a matter for the ECtHR to interpret. However, according to the practice of the ECtHR, two conditions must be fulfilled. First, the intervention must be in the public interest and must comply with the requirement of proportionality.[28]

As explained earlier, the concept of family life can only be achieved through an understanding of the ECtHR case law. The manner in which family relationships are defined and understood varies widely from one legal system to another. However, the ECtHR consistently recognizes as a family relationship the family ties that actually exist and examines them individually in light of the circumstances of each case.[29] European family forms are also pluralizing as traditional and new family forms coexist in societies.

The correct interpretation of Article 8 is that the State not only has a passive obligation of non-intervention but also an active obligation on the Member State concerned, which is to respect family life.[30] This article is one of the most flexible provisions of the ECHR as the content of the rights it protects evolves dynamically. According to Dudás, there are four protected areas: privacy, family life, home, and private correspondence, and concepts that have autonomous meaning in ECtHR practices.[31]

The intention to adopt can be interpreted as the creation of a family because a family can be created through adoption, but the ECHR does not provide a substantive right to adoption. However, the interpretation of privacy under Article 8 is sufficiently broad to include the right to establish and maintain relationships with another person. These interpretations of the ECtHR are also discussed in individual cases.

[27] Raffai, 2016, pp. 84–85.
[28]. Grád and Weller, 2011, p, 449,
[29] In X and Others v Austria, the ECtHR held that same-sex partners living together *de facto* on a long-term basis constitute "family life" within the meaning of Article 8 of the European Convention, in the same way that cohabitation between same-sex partners in the same situation would constitute family life. *Case of X and Others v. Austria* App. No. 19010/07, 19 February 2013.
[30] Grád and Lakatos, 2012, pp. 32–33.
[31] Dudás, 2021, pp. 225-226.

4.1. Case of Kearns against France[32]

4.1.1. Situation

The mother declared that she wished to place her child in state care, requested confidential treatment of her case, and consented to the adoption of the child under the French Civil Code. Months later, the applicant filed an action seeking annulment of the decision to adopt her child and place the child with her. The court rejected the application. The applicant claimed that the authorities had violated her right to respect her private and family life under Article 8 and referred her to the ECHR.

4.1.2. ECtHR decision and assessment of the case

The ECtHR held that the provision of the French Guardianship and Family Code which allows a two-month period for the withdrawal of parental consent to the adoption of a child - a "renunciation" - does not constitute a disproportionate interference with the rights of the child and the parents and therefore does not violate Article 8 ECHR. Indeed, this period seeks to strike an appropriate balance among the interests of the child, birth parents, and adoptive parents, where the best interests of the child are paramount. The ECHR also held that it does not follow positive State obligations under Article 8 that a professional interpreter must be provided for the declaration of the adoption of the child if hospital staff who speak the mother's mother tongue are present and provide adequate information and language translation.

It was in the child's best interests to develop a stable emotional relationship with the newly adopted family as quickly as possible. The ECHR also found that there was no common denominator in the practice of Member States and that, although the discretion of the State parties was wide, the period for withdrawal of the declaration varied from ten days to three months in practice in some countries. a two-month period was considered sufficient to allow the mother to make a responsible decision on the fate of her child.

The French authorities provided the mother with sufficient and detailed information as well as language assistance not required by law, written information on the legal consequences of the parental declaration,

[32] *Affair E Kearns v. France* App. No. 35991/04, 10 January 2018.

and the possibility of withdrawing it, including the deadline. The decision to refuse to return the adopted child was, by law, aimed at protecting the rights and freedoms of the child, and therefore had a legitimate purpose.

4.1.3. The Hungarian legislation

The revocability of parental consent for adoption has always been a sensitive issue in adoption regulations. According to the Book of Family Law a parent's consent to the open or secret adoption[33] of a child may be withdrawn uniformly within six weeks of the child's birth to allow the child to be raised by the parent or another relative. Parents must be informed of the possibility of withdrawal.

Based on this declaration, the guardianship authority shall immediately obtain information about the circumstances of the child's upbringing and the validity of the parent's or other relatives' undertakings to raise the child. Parental custody shall otherwise cease when the child reaches six weeks of age, but if the declaration relates to a child over six weeks of age, parental custody shall cease with the declaration. The termination of parental custody is always established by a decision of the guardianship authority.[34]

4.2. Case of E. B. against France[35]

4.2.1. Fact

The applicant's kindergarten teacher was in a long-term relationship with a same-sex psychologist partner and wanted to adopt the child. The authorities rejected her request, despite the fact that sole adoption was possible under French law. In the application submitted to the ECtHR, the applicant referred to a violation of Articles 8 and 14.

4.2.2. ECJ decision and evaluation of the case

The ECtHR ruled that the decision conflicted with Article 8, which states the protection of family life, and Article 14, which prohibits discrimination

[33] Katonáné Pehr, 2018, para. 46.
[34] Arts. 4:125–126. of the CC.
[35] *E.B. v. France* App. No. 43546/02, 22 January 2008.

since the authorization of adoption was denied based on the applicant's sexual orientation. The ECtHR has confirmed that with regard to the rights covered by Article 8 of the ECHR, discrimination based on sexual orientation can only be justified on the basis of particularly convincing and compelling arguments, and the reference to the lack of a role model of the opposite sex is neither sufficiently convincing nor compelling enough that this on the basis of which the authorization of adoption can be refused.[36]

Since French law allows single persons to adopt children, it also opens up the possibility of adopting single homosexuals as applicants. The state may not act in a discriminatory manner during the application. Article 8 of the ECHR does not guarantee the right to find a family or adopt it but includes the right to establish and maintain relationships with other persons. The provisions of French law do not contain a requirement that adoption must be undertaken by persons of the opposite sex; therefore, adoption cannot depend on the sexual orientation of a single parent. [37]

4.2.3. The Hungarian regulation

According to the Civil Code and the Book of Family Law, a child can be adopted primarily by spouses – in the case of adoption by relatives and the parent's spouse–and under certain conditions by a single person–that is, only a married woman and man can be adoptive parents. An adoptive person can be a person who has reached the age of 25 years, has the capacity to act, is older than the child by at least 16 years and at most 45 years, and whose personality and circumstances are determined as suitable. In the case of submitting an application for the adoption of a child over 3 years of age, the adoption can be granted for the benefit of the child, even if the age difference between the adoptive parent and child is no more than 50 years. Age differences must be disregarded in cases of relative or conjugal adoption. ‘The Book of Family Law attaches particular importance to marital status at the time of adoption.’[38]

However, in exceptional cases, it is possible for someone to adopt the child alone. However, to establish the suitability of the person intending to adopt, the consent of the minister responsible for family policy is also required. When giving consent, the Minister considers the interests of the

[36] O’flaherty and Fisher, 2008, p. 8.
[37] Polgár, 2008, pp. 90–91.
[38] Katonáné Pehr and Filó, 2022, p. 201.

child, considering Article XVI of the Constitution of Hungary to the provisions of paragraph (1) of the Article (see Point 3).

In the case of adoption by a single person, raising a child is the sole responsibility of the parents, and for the sake of the child, an imaginary mother or an optional imaginary father must be registered for adoption. According to The Book of Family Law, you cannot adopt a person who is subject to a final court judgment terminating parental supervision, who is subject to a final court judgment prohibiting him from public affairs, or whose child has been removed from the family and taken into foster care.[39]

4.3. Fretté's case against France[40]

4.3.1. Facts

The applicant submitted several applications for the adoption of a child, which were rejected by the authorities. Following this appeal, the court annulled the authorities' rejection decision on the basis that the applicant would be suitable for raising a child, based on preliminary examinations. The authority that made the original decision appealed to the Council of State, which invalidated the court's decision and cited the applicant's lifestyle. The applicant contested this decision because, in his opinion, the decision arbitrarily interfered with his private and family life protected by Article 8 of the ECHR, as it was based solely on an a priori unfavorable value judgment regarding his sexual orientation.

4.3.2. ECJ decision and evaluation of the case

Primarily referring to the states' freedom of judgment, the ECtHR considered the explanation given by the French state to be objective and reasonable and, based on this, ruled that the refusal of the adoption application was not based on discrimination. According to the decision of the ECtHR, the French authorities did not violate Article 14 of the ECHR in conjunction with Article 8 by refusing consent to the adoption request of the single homosexual applicant because the reason for the refusal was not sexual orientation but the health and rights of the children the state intended to protect.

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[39] Art. 4:121 of the CC.

[40] *Fretté v. France* App. No. 36515/97, 26 February 2002.

According to the ECtHR, there is no common denominator in the practice of the state, and there is no consensus in the field of enabling or prohibiting adoption by single adults or single homosexual persons. Therefore, the discretion of state parties must be widened and the priority interests of children must be protected to achieve a balance. Therefore, the French authorities' decision to deny adopter eligibility does not violate the principle of proportionality.

According to the ECtHR, national authorities make legitimate and reasonable decisions when the right to adoption is limited by the interests of the adoptable child, even though the applicant's intentions are legitimate. Adoption means that 'we provide a family for the child, not a child for the family, and whoever is selected by the state as an adopter must provide the most appropriate home for the child in all respects.'[41] In these states, there is a debate about the interests and mental vulnerability of the child in adoption cases. In the present case, the applicant's "lifestyle" does not provide sufficient assurance that he would be able to provide adequate family, educational and psychological conditions for receiving a child.

The judgment was accompanied by concurring and separate opinions.

According to concurring opinions, it would have been easier for the ECtHR to reject the application of the intending adopter based on the inapplicability of Article 14 of the ECHR than to declare it applicable but intact because Article 8 does not provide an independent right to adoption or family formation. According to separate opinions, the ECtHR must exercise supervision in the field of rights provided by Article 14 of the ECHR because the reason for the French refusal was absolute, and therefore it was not possible to examine real interests.

4.3.3. The Hungarian regulation

According to the Book of Family Law, a child can be adopted primarily by spouses – in the case of adoption by relatives and the parent's spouse–and under certain conditions by a single person–that is, only a married woman and man can be adoptive parents. "The Book of Family Law attaches particular importance to marital status at the time of adoption. "[42]
However, in exceptional cases, it is possible for someone to adopt the child alone. However, to establish the suitability of the person intending to adopt,

[41] *Fretté v. France* App. No. 36515/97, 26 February 2002, para. 42.
[42] Katonáné Pehr and Filó, 2022, p. 201.

the consent of the minister responsible for family policy is also required. When giving consent, the Minister considers the interests of the child, considering Article XVI of the Constitution of Hungary to the provisions of paragraph (1) of the Article.
In the case of adoption by a single person, raising a child is the sole responsibility of the parents, and for the sake of the child, an imaginary mother or an optional imaginary father must be registered for adoption.

4.4. Emonet's case against Switzerland[43]

4.4.1. Facts

A stepfather decided to adopt his orphaned and sick foster daughter so that they would become a legal family. The Cantonal Court in Geneva approved the adoption, but the registry office informed the mother that, as a result of the adoption, parental custody of her daughter was terminated because they were not married. The applicants went to court, and in the appeal procedure, the Federal Court found, based on the Swiss Civil Code, that the joint adoption of cohabiting couples was excluded, and that members of cohabiting couples could adopt each other's children.

In a petition submitted to the ECHR, applicants referred to a violation of their right to respect family life.

4.4.2. ECJ decision and evaluation of the case

According to the ECtHR, respecting the right to family life requires the consideration of real ties beyond biological relationships. However, Swiss laws did not allow the adoption of the child of a live-in partner; therefore, the ECtHR found a violation of Article 8 of the ECHR. The ECtHR emphasized that, for the purposes of Article 8 of the ECHR, the concept of "family" cannot be limited to relationships based on marriage, it includes the so-called de facto "family ties" when partners live together without marriage.

According to the ECtHR's interpretation, Article 8 not only protects the individual from arbitrary intervention by the State but also imposes a positive obligation on authorities in certain cases. Although the right to adopt is not part of the ECHR, this does not mean that the State has any

[43] *Emonet and Others* v. *Switzerland* App. No. 39051/03, 13 December 2007.

obligation to establish or maintain family relationships. According to the principles derived from the ECtHR case law, where a family bond with a child can be established, the State must act in such a way as to enable the development of this bond and create the possibility of the child's integration into the family with appropriate legal safeguards. The ECHR also emphasized that it is not the task of national authorities to decide on the affected parties in what form they wish to live their lives together.[44]

4.4.3. Hungarian regulation

Hungarian law does not prohibit adoption by single people, but it specifically prefers adoption by married couples; European countries are united in this regard, since it is in the interest of every minor child to grow up in a complete family. However, in Hungary, adoption by two persons, as a special case of adoption, is only allowed if they are spouses and not cohabitants; therefore, Article 4:123 paragraph 2 of CC also stipulates that only the spouse of the adopter may adopt the adopted child during the existence of the adoption. Therefore, a child adopted jointly or separately by both spouses, or one spouse adopting the child of the other spouse, is considered a common child. The Book of Family Law of the Civil Code does not allow joint adoption of cohabitants or registered cohabitants.

It is definitely in the best interests of the child if he has a legal relationship with both parents.[45] It should be possible to adopt a partner's child in a narrower range in the case of partners of the opposite sex on the basis that a long-term partnership refers to the seriousness and durability of the relationship,[46] which results in a situation similar to that of a family based on marriage from the child's point of view.

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[44] Polgár, 2008, pp. 89–90.
[45] Katonáné Pehr, 2018, para. 28.
[46] In Hungary, the registered partnership name made the terminology of partnerships somewhat opaque, which was further complicated by the possibility of registering de facto partnerships before a notary public.

4.5. The case of I.S against Germany[47]

4.5.1. Facts

After birth, the applicant consented to the adoption of her children in a notarized document and agreed orally with the foster parents to a semi-open adoption because she wanted to remain in contact with her children. After the adoption was approved, she filed a lawsuit to revoke the decision and observe his child.[48] The German court rejected her claims because she prioritized the rights of the children. Subsequently, the mother from Vérsérint filed a complaint with the European Court of Human Rights, claiming that her right to respect for family life had been violated because even though they had agreed on semi-open adoption, she was still not allowed to see the children.

4.5.2. ECJ decision and evaluation of the case

The ECtHR found that the determination of remaining or newly formed rights between the mother, the adoptive parents, and her biological children, even if they are outside the scope of "family life," is an important part of the identity of the biological mother, thus according to Article 8 of the ECHR affected his "private life." The ECtHR also found that the applicant's mother's parental rights over her biological children were terminated with the "declaration of resignation," which she made in full awareness of the legal and factual consequences. In view of this, the decision of the German authorities was proportionate, giving more weight to the private and family interests of adoptive families. It also found that Article 8 of the ECHR does not provide biological parents with "sight" of children after adoption. The German Court correctly placed children's rights in the foreground, giving them the opportunity to develop. The contested German decisions did not violate the Convention when the mother's right to contact and obtain information was denied. The ECtHR emphasized that although German law allows "open" and "semi-open" forms of adoption, they require the written consent of the adoptive parents they depend.

The two dissenting opinions of the judges related to the judgment also concluded that legal regulations and the participants of the adoption process

[47] *I.S. v. Germany* App. No. 31021/08, 5 June 2014.

[48] Contact according to the rules of the Hungarian legal system.

must always be provided with thorough and comprehensive information because this is a positive state obligation contained in Article 8 of the ECHR. If such a disagreement arises, the State must not fulfill its obligations.[49] Protecting families is the primary goal.

4.5.3. Hungarian regulation

In relation to adoption, both in practice and science, there are increasing discussions about the relationship between the biological parent and the adoptive parent; that is, the openness of adoption (this is not the same as the concept of open adoption), which is closely related to the legal effects of adoption and the right of the child to know his or her origin. According to the, The Book of Family Law of the Code Civil with adoption ceases the rights and obligations of the biological parent and relatives arising from the blood relationship with the adopted child. However, there are situations where the child is not completely removed from the blood family; therefore, the legislator is mindful of the legitimate interests of the wider circle of relatives (for example, grandparents), which makes adoption open.[50] Therefore, according to the rules of The Book of Family Law, within the framework of the legal effects of adoption, the maintenance of contact with parents or relatives is allowed within a very narrow circle after conjugal or relative adoption.

Pursuant to the Book of Family Law, adoption does not affect the right to contact relatives if one of the spouses adopts the child of the other spouse, and if the marriage from which the child originates ends in the death of the spouse, the right of contact of the relatives of the deceased spouse is not affected by the adoption.

When both parents are deceased, the child is adopted by the relative of one parent, and the right of contact of the relatives of the other parent is not affected by adoption.

In addition, in the case of open adoption, the guardianship authority may, in exceptionally justified cases, authorize the biological parent who

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[49] Indeed, Art. 8 of the ECHR provides procedural guarantees in addition to the obligation to effectively protect fundamental rights and human rights. In the ECtHR's practice, this primarily means the enforcement of the right of the affected parties to be properly informed and to express their opinion. Szeibert, 2014, pp. 31–36.

[50] Katonáné Pehr and Herger Csabáné, 2021, p. 193.

consented to the adoption of his child by the other parent's spouse to maintain contact.[51]

4.6. Söderback's case against Sweden[52]

4.6.1. Facts

Söderback met the applicant's child only a few times, so the relationship between them essentially ceased. Despite this, he did not give consent for the adoption of his child and asked the court to allow him to see the child. The mother's husband initiated the adoption of the child, whom he had raised since she was eight months old, and whom the child considered her father. The Swedish court ruled that adoption was in the best interests of the child and that there were no obstacles. The applicant claimed that the court's decisions violated her right to respect her family life as guaranteed by Article 8 of the ECHR.

4.6.2. ECtHR decision and assessment of the case

The ECtHR unanimously ruled that Article 8 of the ECHR (right to respect for private and family life) was not violated by allowing the adoption of a child whose mother's husband had raised since the age of eight months, without the consent of the natural father, that is, the biological father.

The ECtHR found that the decision to authorize adoption interfered with the applicant's right to respect private life guaranteed by Article 8(1). Such interference is a breach of the Convention unless it is provided by law for the legitimate aims listed in Article 8(2) and can be regarded as necessary. The ECHR found that the Swedish District Court granted adoption based on the provisions of the Family Code and that it was in the best interests of the child.[53] Therefore, there is no doubt that the measure was provided by law and served a legitimate purpose. The ECHR went on to examine whether it could be considered "necessary in a democratic society."

[51] Art. 4:133 of the CC.

[52] *Söderbäck v. Sweden* App. No. 113/1997/897/1109, 28 October 1998.

[53] According to Art. 3, custody of the child from birth is shared between the parents if they are married and between the mother if the parents are not married. If a spouse wishes to adopt a child under the age of 18 of the other spouses, the consent of the other parent is not required if the latter has not been involved in the upbringing of the child. After the adoption, the right of access of the biological father is also terminated.

Having regard to the adoption as an objective, it cannot be said that the adverse effects of the adoption on the applicant's relationship with the child were disproportionate. Swedish court proceedings struck a fair balance between the competing interests involved. The court's decision served a legitimate aim, and the restriction did not go beyond what was necessary.

The ECtHR also found that the Swedish court had only confirmed the de facto family relationship between the child and the adoptive father, which had existed for more than five years, given that the father had neither exercised custody of the child nor otherwise participated in his upbringing.

4.6.3. Hungarian legislation

According to the Book of Family Law, adoption requires the consent of the person intending to adopt, the child's legal representative, the child' parents, and the adoptive spouse. In accordance with the protection of human rights, a parent may be deprived of this right only if his or her parental authority has been terminated by a court or if other circumstances, as defined by law, arise which may lead to the waiver of parental consent.[54]

According to the Book of Family Law, parental consent is not required for adoption: subject to a final court judgment terminating parental custody or whose foster child has been declared adoptable by the guardianship authorities.

Who is not incapacitated as a minor? Those whose identity is unknown or whose whereabouts are unknown and efforts to trace him or her have been unsuccessful, and those who, to be brought up by another person, leaves his or her child in a place designated for that purpose by a health establishment without revealing his or her identity and does not present himself or herself within six weeks of collecting the child.[55]

4.7. Bogonosovy's case against Russia[56]

4.7.1. Facts

After the mother's death, the child of a divorced Russian couple was raised by the grandfather, the applicant, who was appointed as the guardian. The

[54] Katonáné Pehr, 2018, para. 19.
[55] Art. 4:127(1) of the CC.
[56] *Bogonosovy v. Russia* App. No. 38201/16, 5 March 2019.

child's relatives were also involved in the child's upbringing and later applied for adoption. The applicant's grandparents requested a review of the adoption decision because the deprivation of their right to contact was contrary to the best interests of the child. The court of first instance (which dismissed the application and the court of appeal (which upheld it) held that the adoption order did not provide for the grandfathers and grandchildren to maintain a family relationship and that the grandfathers could not claim the right to contact under the Family Law Act.

The applicant then brought an action to the Court of Justice, alleging a breach of Article 8 of the ECHR, which guaranteed the protection of private and family life.

4.7.2. ECtHR decision and assessment of the case

The ECtHR held that refusal to consider a grandparent's application for post-adoption contact constituted a violation of Article 8 ECHR. The ECtHR has held that a grandparent-grandchild relationship based on previous cohabitation falls within the scope of protection of family life under Article 8 and must therefore be protected by the States Parties.

The ECHR explained that under the Russian Family Code, adoption terminates the family relationship with the former ascendants unless the court expressly orders the maintenance of the family relationship in the best interests of the child at the request of the ascendant. No such requests were made by the grandfathers. However, the Russian courts could have made an order to maintain the family relationship in the best interests of the child, i.e., supplemented the decision, but they did not do so, but "made" the applicant believe that he could assert his right of access in other proceedings. It also found that the Russian Supreme Court had failed to examine the merits of the grandfathers' appeal against the annulment of the adoption and that, by refusing to examine the merits of the case, the court had failed to respect the applicant's family life, which, according to the unanimous decision, led to a violation of Article 8 of the ECHR. The ECtHR awarded the applicant EUR 5,000 as non-pecuniary compensation.

4.7.3. Hungarian legislation

According to the, The Book of Family Law of the Code Civil with adoption ceases the rights and obligations of the biological parent and relatives

arising from the blood relationship with the adopted child. However, there are situations where the child is not completely removed from the blood family; therefore, the legislator is mindful of the legitimate interests of the wider circle of relatives (for example, grandparents), which makes adoption open. Therefore, according to the rules of The Book of Family Law, within the framework of the legal effects of adoption, the maintenance of contact with parents or relatives is allowed within a very narrow circle after conjugal or relative adoption.

Pursuant to the Book of Family Law, adoption does not affect the right to contact relatives if one of the spouses adopts the child of the other spouse, and if the marriage from which the child originates ends in the death of the spouse, the right of contact of the relatives of the deceased spouse is not affected by the adoption.

When both parents are deceased, the child is adopted by the relative of one parent, and the right of contact of the relatives of the other parent is not affected by adoption.

In addition, in the case of open adoption, the guardianship authority may, in exceptionally justified cases, authorize the biological parent who consented to the adoption of his child by the other parent's spouse to maintain contact.

5. Summary thoughts

The ECtHR and its case law is part of the European legal order, and case law shapes the interpretation of the ECHR. The modernist practice of the ECHR has led to an increasing number of precedent-setting decisions and thus to an evolving body of law that also affects children's rights. The ECHR aims to establish a more uniform European benchmark; however, within this, state parties are developing their jurisprudence according to their national rules and historical roots. However, it should not be overlooked that adoption is not only a legal issue; other non-legal factors also play an important role, in particular, the interests and personalities of the child who wishes to adopt and the child who is to be adopted, the future family relationship that can be established between them, and the motivation for adoption.[57]

The importance of the ECHR jurisprudence is that changes in family law move in the same direction. It is also important that Hungarian legal

[57] Lápossy and Tasi, 2018, p. 16.

practitioners interpret the law in conformity with the ECtHR case law on family law, including adoption.

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SUZANA KRALJIĆ*

Child marriages - yesterday, today, tomorrow?

ABSTRACT: Child marriage is a formal or informal union involving a child or person under the age of 18. It is currently associated with violations of human rights, particularly the rights of children. The consequences of child marriage are long-term and relate to gender equality, health, and education, among others. Therefore, efforts are being made in national and international jurisdictions to eliminate harmful (traditional) practices. While individual countries have raised the marriageable age to 18, many still allow exceptions. Slovenia is one such example. In this article, the author analyzes the approach to the abolition of child marriage at the international and comparative law levels and is particularly critical of the current Slovenian regime.

KEYWORDS: marriageable age, early marriage, education, health, poverty.

1. Introduction

Until approximately the 20th century, child or early marriages were very common and thus strongly embedded in particular societies. Child marriage was justified by lower average life expectancy, which meant that children entered the reproductive phase more quickly. However, since premarital relations were not socially acceptable, early marriage was, as it also allowed for a faster means of reproduction. Girls were usually married as soon as they reached puberty, often even earlier.[1] In the 20th century, people began to realize the vulnerability that children could be exposed to through child marriage. Thus, fundamental shifts and actions were initiated to protect children, as a vulnerable social group, by all effective and appropriate

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* Full Professor, Faculty of Law, University of Maribor, Slovenia, suzana.kraljic@um.si.
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[1] Sen Nag, 2017.

measures against traditional practices that are harmful to their health. Child marriage undoubtedly represents one such harmful practice.[2]

This article analyzes the international instruments that form one of the fundamental pillars of the human rights system in the fight against child marriages. This article also provides an overview of the current context of child marriage in selected regions (e.g., Africa). Although child marriage is still prevalent in Africa and Asia, that it is also possible under Slovenian law cannot be ignored. Therefore, an analysis of the current legal regulations in Slovenia and the possibility of abolishing child marriage in line with the United Nations 2030 Global Sustainable Development Goals (SDGs), both globally and in Slovenia specifically, are presented.

The term "child marriage" describes a formal or informal partnership in which one or both spouses are minors.[3] The term "early marriage" is often used synonymously with "child marriage," but there is a crucial difference. Early marriage involves persons under the age of 18 who, although they have reached the age of majority or acquired full legal capacity before the age of 18 by entering into a formal marriage, are still under the age of 18 in terms of chronological age.[4] Early marriage is also defined as a marriage contracted in a country where the age of majority is reached earlier, thus enabling the marriage to be legally entered. Early marriage, and hence child marriage, is also recognized under Slovenian law (see Chapter 3.1.). For the purposes of this article, the common term "child marriage" is used to refer to all such case.

A "forced marriage"[5] is any marriage entered into without the full and free consent of at least one of the spouses. "Forced marriage" is a form of

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[2] "Harmful traditional practices" that are detrimental to children's health and also sought to be eliminated include female genital mutilation, scarification, corporal punishment, honor killing, using children in forced begging, bonded labor and sexual slavery, accusing children of witchcraft, forced feeding, stoning, virginity testing, and breast ironing, among others (see United Nations, 2016, pp. 23-32).

[3] Ahmed, 2015, p. 8.

[4] United Nations – General Assembly, 2014, p. 3; Beker, 2019, p. 23.

[5] Forced marriage as gender-based violence is also mentioned in the following directives: (a) Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (*OJ L 315, 14.11.2012, pp. 57–73*) – para. (17); (b) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims,and replacing Council Framework Decision 2002/629/JHA (*OJ L 101, 15.4.2011, pp. 1–11) – para. (11); (c)* Council Directive 2003/86/EC of 22 September

domestic violence, since it violates the right to decide whether, when, and whom to marry freely.[6] Forced marriage also refers to a marriage in which one or both spouses cannot terminate or leave because of coercion or strong social or family pressures.[7] Forced marriage is more broadly defined than child marriage, as an adult can also be forced to marry. In many cases of child marriage, marriages are also forced, and in some cases, the child cannot consent to marriage. Marriage can also be contracted against a child's will. Child marriages are also often “arranged marriages,” planned for the child by parents or other persons who care for the child. However, arranged marriages are not only for children but can also take place for adults.[8]

Children are often too young when they enter a marriage and thus are neither physically fit for the “tasks” ahead (e.g., childbirth, household work, etc.) nor intellectually mature enough to understand the meaning and consequences of marriage. They are also often exposed to domestic violence, rape, abuse, and exploitation, among others. There is no doubt that child marriage violates children's rights and is a source of various abuses, which often leave children with long-term physical and emotional consequences that they may suffer from throughout their lives.

2. International approaches to addressing child marriage

In the 20th century, the legal requirement for consent to marriage found its way into the most important international human rights instruments, seeking to eradicate it. These international instruments delegate to States Parties the responsibility to take appropriate measures to protect children from child

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2003 on the right to family reunification. *(OJ L 251, 3.10.2003, pp. 12–18) – see Art. 4 para. (5): ‘In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.’; (d)* Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) *(OJ L 337, 20.12.2011, pp. 9–26), which does not explicitly mention forced marriage, although it is certainly possible to classify forced marriage as an act of persecution if the conditions provided in Art. 9 are met.*

[6] FRA, 2014, p. 3.

[7] United Nations – General Assembly, 2014, p. 4.

[8] Aleksić, 2015, p. 18; Narat et al., 2014, p. 23.

marriage. Specifically, the eradication was to be achieved by defining a minimum age at marriage and requiring free and full consent.

In 1948, the Universal Declaration of Human Rights[9] (hereinafter, UDHR) recognized the right to free and full consent to marriage for both intending spouses (Article 16 paragraph (2) of UDHR). Article 16 paragraph (1) also clarifies that men and women of full age have the right to marry and to found a family without any limitation of race, nationality, or religion, and they are entitled to equal rights to marriage, during marriage, and at its dissolution. Therefore, an appeal was sent to the States Parties to raise the age of marriage to the age of majority. In most countries, the age of majority also means that a person is sufficiently mature to make an informed decision about entering into marriage. It should be noted that the age of majority does not preclude a forced or arranged marriage.

In addition, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) binds States Parties in Article 2:

> …the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.[10]

In 1962, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage was adopted.[11] According to Article 1 paragraph (1), marriage should not be legally entered into without both parties' full and free consent, and consent must be given in person, after due publicity, and in the presence of an authority competent to solemnize the marriage and witnesses, as provided by law. Moreover, Article 2 requires States Parties to take legislative measures to establish a minimum age for marriage. Those who have not yet reached the minimum age shall not

[9] United Nations (no date).

[10] *OHCHR Supplementary Convention on the Abolishion of Slavery.* Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/supplementary-convention-abolition-slavery-slave-trade-and (Accessed: 5 January 2023).

[11] *OHCHR Convention on Consent to Marriage.* Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-consent-marriage-minimum-age-marriage-and (Accessed: 5 January 2023).

lawfully marry unless the competent authority has granted dispensation from the minimum age limit for serious reasons, and in the interests of the intending spouses.[12]

In 1966, the International Covenant on Civil and Political Rights[13] (hereinafter, ICCPR) and the International Covenant on Economic, Social, and Cultural Rights[14] (hereinafter, ICESCR) were adopted. Both of them refer to the right to marry. Article 23 paragraph (2) of the ICCPR recognizes the right to marry equally for men and women when they are of marriageable age, and that marriage may only be contracted with the free and full consent of both intending spouses (Article 23 paragraph (3) ICCPR and Article 10 paragraph (1) ICESCR). The ICESCR is silent on the minimum age; however, as child marriages are often arranged or forced, Article 10 can also be used to prevent child marriages.

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women[15] (hereinafter, CEDAW) contains provisions that directly and indirectly oblige states to prohibit child marriage. Article 2 requires States Parties to pursue appropriate measures to eliminate and prohibit all forms of discrimination against women, explicitly obliging states to eliminate customs and practices against women.[16] Based on equality between men and women, States Parties are to ensure the equal right of women to marry, to choose a spouse freely, and to marry of their own free will and with their full consent (Article 16 paragraph (1) point (b)

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[12] *OHCHR Convention on Consent to Marriage.* Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-consent-marriage-minimum-age-marriage-and (Accessed: 5 January 2023).

[13] *International Covenant on Civil and Political Rights:* Uradni list RS, 35/92 – MP, 9/92; Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (Accessed: 5 January 2023).

[14] *International Covenant on Economic, Social, and Cultural Rights:* Uradni list RS, 35/92 – MP, 9/92; Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (Accessed: 5 January 2023).

[15] *Convention on the Elimination of All Forms of Discrimination Against Women:* Uradni list RS – MP, 9/92; Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (Accessed: 5 January 2023).

[16] In Indonesia, the practice of “merarik” has been greatly reduced due to the involvement of religious and village leaders in media campaigns. “Meriarik” involves kidnapping a girl if the girl's parents do not agree to the marriage or if the bride price or dowry is too high and is also often used to kidnap girls for sexual slavery and trafficking (United Nations – General Assembly, 2014, p. 11).

CEDAW). Article 16 paragraph (2) of the CEDAW addresses child marriage directly, stating that the betrothal or marriage of a child has no legal effect. However, necessary measures, including legislative measures, should be taken to establish a minimum age for marriage and make it compulsory to register the marriage officially. CEDAW arises from the need for a holistic approach to early marriage, and all the implications of such practices, from the restriction of personal freedom to its impact on health and education, must be considered.[17]

In 1989, the Convention on the Rights of the Child[18] (hereinafter, CRC) was adopted; however, it does not explicitly mention child marriage. Nevertheless, it is possible to draw protection from four of its fundamental principles: non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, development, and protection (Article 6); and the right to be heard (Article 12). Specifically, Article 24 paragraph (3) of the CRC explicitly obliges States Parties to abolish traditional practices harmful to children's health by all effective and appropriate measures. The UN Special Rapporteur "on the sale of children, child prostitution, and child pornography" states that child marriages may be considered as the sale of children for the purpose of sexual exploitation, which is contrary to the Optional Protocol to the Convention on the Rights of the Child on the sale children, child prostitution and child pornography[19] and Article 35 of the CRC.[20]

Article 23 paragraph (1) of the Convention on the Rights of Persons with Disabilities[21] also peripherally addresses the issue of child marriages, requiring States Parties to take effective and appropriate measures to ensure the right of all persons (including children) with disabilities of marriageable age to marry and found a family based on the free and full consent of the intending spouses.

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[17] UNICEF, 2001, p. 3.

[18] *Convention on the Rights of the Child*: Uradni list RS – MP, 9/92. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (Accessed: 5 January 2023).

[19] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.* Available at: https://childrens-rights.digital/hintergrund/index.cfm/topic.280/key.1617 (Accessed: 8 May 2023).

[20] United Nations – General Assembly, 2014, p. 5.

[21] *Convention on the Rights of Persons with Disabilities:* Uradni list RS, št. 37/08; Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities (Accessed: 7 January 2023).

Moreover, regional charters also address the issue of child marriages. The African Charter on the Rights and Welfare of the Child[22] (hereinafter, ACRWC), a regional international treaty adopted in 1990, explicitly prohibits child marriage and the betrothal of girls and boys. Article 21 paragraph (2) states that effective actions (including legislative action) should be taken to set the minimum age of marriage at 18 years and to ensure compulsory registration of all marriages in an official registry. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women[23] (2003) provides that States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Specifically, Article 6(a-b) indicates that States shall enact appropriate national legislative measures to guarantee that no marriage occurs without the free and full consent of both parties, and that the minimum age of marriage for women is 18 years. The ASEAN Declaration on Human Rights[24], an Asian regional instrument, also provides in Article 19 that a man and a woman of full age have the right to marry based on their free and full consent.

Article 9[25] of the Charter of Fundamental Rights of the EU[26] (hereinafter, CFREU) refers to national rules on the right to marry.[27] Such regulations are reflected in Article 12 of the European Convention on Human Rights[28] (hereinafter, ECHR), according to which the right to marry is subject to national laws governing its exercise. Although national laws govern marriage, this critically does not mean that the conditions for

[22] *African Charter on the Rights and Welfare of the Child,* OAU Doc. CAB/LEG/24.9/49 (1990), entered into force, 29 November 1999; Available at: http://hrlibrary.umn.edu/africa/afchild.htm (Accessed: 5 January 2023).

[23] *OHCHR Protocol on the Rights of Women.* Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf (Accessed: 5 January 2023).

[24] *ASEAN Human Rights Declaration.* Available at: https://asean.org/asean-human-rights-declaration/ (Accessed: 5 January 2023).

[25] See Article 9 of the CFREU (right to marry and right to found a family): '*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*.'

[26] *Charter of Fundamental Rights of the EU*: Uradni list 2010/C 83/02.

[27] In Case *C-230/21*, 17 November 2022, the CJEU wrote that the fact that underage girls are married can mean that they are exposed to a serious form of violence, such as child marriage and forced marriage.

[28] *European Convention on Human Rights:* Uradni list RS – MP, št. 7/94; Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 5 January 2023).

exercising this right are entirely within the competence of State authorities.[29] In *R. and F. v. United Kingdom*, the European Court of Human Rights (hereinafter, ECtHR) judged:

> The matter of conditions for marriage in national law cannot, however, be left entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry…Any limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.[30]

The ECtHR also referred to the issue of child marriage in the matter of *Janis Khan v. the United Kingdom*, holding that

> …marriage cannot be considered simply as a form of expression of thought, conscience or religion…The obligation to respect the legal marriageable age does not constitute a denial of the right to marry, even if the individual's religion permits marriage at a younger age.[31]

The ECtHR also addressed the issue of child marriage in *Z. H. and R. H. v. Switzerland*[32]. In that case, the applicants applied for asylum in Switzerland as a married couple, having contracted their marriage in a religious ceremony in another country when the first applicant was 18 years old and the second was 14 years old. Swiss authorities found that the applicants' religious marriage was invalid under their national law due to the young age of the second applicant, which was incompatible with Swiss public policy. The ECtHR held that neither Article 8 nor Article 12 of the ECHR could be interpreted as imposing an obligation on any Contracting State to recognize a marriage, religious or otherwise, contracted by a 14-year-old child.[33]

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[29] Draghici, 2015, p. 1.
[30] *R. and F. v. United Kingdom* App. No. 35748/05, 28 November 2006.
[31] *Janis Khan v. the United Kingdom* App. No. 11579/85, 7 July 1986.
[32] *Z.H. in R.H. v Switzerland* App. No. 60119/12, 8 March 2016.
[33] *Z.H. in R.H. v Switzerland* App. No. 60119/12, 8 March 2016, Art. 44.

The 2011 Istanbul Convention on preventing and combating violence against women and domestic violence[34] expands on this notion, by defining the term 'woman' as including girls under 18 (Article 3 point (f)). Article 37 of the Istanbul Convention[35] appeals to States Parties to take the necessary legislative or other measures to ensure that the intentional act of forcing an adult or child to marry is made a criminal offense. Moreover, State Parties are encouraged to take the necessary legislative or other measures to criminalize the intentional act of luring an adult or child into the territory of a Party or State other than their residence, with the intent to force them into marriage.[36] Slovenia, as a State Party to the Istanbul Convention, enacted such a legislation in 2015, adding Article 132a to the Criminal Code[37], which regulates forced marriage or the establishment of a similar union.

3. National approaches

In 2017 and 2018, the European Parliament adopted the "Resolution of 4 October 2017 on ending child marriage"[38] (hereinafter, Resolution 2017) and "Resolution of 4 July 2018 Towards an EU external strategy against early and forced marriages–next steps"[39] (hereinafter, Resolution 2018). Both resolutions appeal to EU Member States that still allow marriages under the age of 18 (for example, with parental consent) to set 18 as the minimum age for marriage. The two resolutions stress that child, early, and forced marriages must be treated as severe violations of children's human

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[34] *Istanbul Convention on preventing and combating violence against women and domestic violence*: Uradni list RS – MP, 1/15; Available at: https://rm.coe.int/168008482e (Accessed: 8 May 2023).

[35] *Istanbul Convention on preventing and combating violence against women and domestic violence*.

[36] Council of Europe: *Convention on Preventing and Combating Violence against Women (Istanbul Convention)*, p. 4. Available at: https://rm.coe.int/children-rights-and-the-istanbul-conventionweb-a5/1680925830 (Accessed: 14 January 2023).

[37] *Criminal Code*: Uradni list RS, št. 50/12 – official consolidated version, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP.

[38] *Resolution of 4 October 2017 on ending child marriage*. Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0379_EN.html (Accessed: 20 January 2023).

[39] *Resolution of 4 July 2018 Towards an EU external strategy against early and forced marriages–next steps.* Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0292_EN.html (Accessed: 20 January 2023).

rights and fundamental freedoms,[40] and that such marriages also constitute violence against women and children. National legislation should address these violations proportionately and effectively (Resolution 2018, para. (6)).[41]

The EU countries are unanimous regarding the legal age for marriage (marriageable age, German Ehemündigkeit, French nubilité, and Spanish nubilidad), set at 18 years. However, most EU Member States still allow marriage at a younger age. Thus, differences between countries exist regarding the lower age of marriage and who must consent (e.g., parents or courts).

Regarding the minimum age of 18, Belgium, Denmark, Finland, France, Germany, Ireland, the Netherlands, Sweden, and Finland do not allow for any exceptions. However, countries that regulate the possibility of marriage under the age of 18 differ. Some countries set the age of marriage to 15 (Slovenia, Estonia, Lithuania) or 16 (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Spain, Romania). Most EU countries that allow marriage before the age of 18 provide for an exception in the form of consent granted by a court (e.g., Slovenia, Croatia, Bulgaria, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Luxembourg, Malta, Poland, Slovenia, Bulgaria, Cyprus, Estonia, Hungary, Luxembourg, Malta, and Poland), while Austria, Cyprus, and Romania allow marriage with parental consent.

3.1. How does Slovenia approach child marriage?

Precise data on the marriages of minors from the Statistical Office of the Republic of Slovenia (SORS) are not available because the lower limit for data collection is set at 19 years (i.e., under 20); however, it is encouraging that the number of such marriages has fallen sharply in all cases (groom, bride, or both) from 1995 to 2021. The most significant decline was observed in marriages involving brides aged 15–19 years.

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[40] In particular, violations of the right to freedom of expression with regard to consent to marriage, the right to integrity and to physical and mental health, the right to education, the right to equality, the right to autonomy and physical integrity, and freedom from exploitation and discrimination.

[41] Among the actors that are particularly active in working to end child marriage are "Girls Not Brides: The "Global Partnership to End Child Marriage," the "Child Marriage Research to Action Network" (CRANK) and the "Child Marriage Monitoring Mechanism"– (see Chalasani, 2021, p. S6).

Table 1: Number of marriages before the age of twenty[42]

	1995	2000	2010	2015	2021
Groom	48	31	28	20	12
Bride	538	220	138	92	62
Both	23	22	16	9	5

Article 24 paragraph (1) of the Slovenian Family Code[43] (hereinafter, FC) provides that a child cannot enter into marriage. A child is defined according to Article 5 of the FC, as a person who has not yet reached the age of 18, unless they have acquired the full capacity to contract. Thus, 18 years is accepted as the general legal limit for separating a child from an adult, and the onset of adulthood is linked to an objective criterion (chronological age). Upon reaching the age of majority (18 years), a person is legally presumed to have the full capacity to contract and thus to understand the meaning and consequences of marriage. However, Article 24 paragraph (2) of the FC provides for a so-called "overlooking minority" (in Slovene *spregled mladoletnosti*). For justified reasons, the court may authorize the celebration of a marriage by a child who has already reached the age of 15. The child should have attained such physical and mental maturity that they are capable of understanding the meaning and consequences of the rights and obligations arising from marriage. In a non-contentious civil procedure, the court may decide to overlook the minority of one or both intending spouses and allow marriage to occur if the following conditions are cumulatively fulfilled:

a) minimum age;
b) justified reasons;
c) physical and mental maturity ability to understand the meaning and the consequences of the rights and obligations arising from marriage.

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[42] Statistical data obtained from SORS (Statistical office of the Republic of Slovenia) [Online]. Available at: https://pxweb.stat.si/SiStatData/pxweb/sl/Data/-/05M1016S.px (Accessed: 6 January 2023).

[43] *Family Code* (Slovene: Družinski zakonik): Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.

3.1. Minimum age

Setting a chronological age of marriage (18) should protect children from unwanted marriages and their consequences. The court will place significant focus on the assessment of the child's physical and mental development, nevertheless, as chronological age is simply a starting point. Thus, under the Non-Contentious Civil Procedure Act[44] (hereinafter, NCCPA-1), a court may allow a child over the age of fifteen to marry if the other three conditions from the Article 24 of the FC are met.

When the new FC was adopted in 2017, Slovenia did not immediately define 18 as the age of marriage, without the possible exception currently provided for in the FC. This is especially since Slovenia belongs to a minority of countries with the lower age limit of 15 (Estonia and Lithuania). Other countries have a limit of 16.

3.1.2. Justified reasons

The presence of justified reasons must be satisfied before a court will allow a minor (who is older than 15 years) to get married. It is expected that in each individual case, there must be several coexisting reasons (e.g., maturity of the minor, pregnancy, retreat to a safer environment, or domestic violence). The non-contentious court will evaluate all the relevant reasons that could justify granting permission for marriage. In this regard, Article 24 paragraph (2) of the FC does not define the term "justified reasons". Thus, "justified reasons" constitutes a legal standard that the non-contentious court must satisfy on a case-by-case basis, and the subjective and objective circumstances of each individual case guides the court. For example, the court will evaluate the minor's views, wishes, expectations, maturity, motives, and arguments relevant to marriage. The choice of an intending spouse can also be a critical circumstance that assists the court in understanding the minor's personality.[45] The court may also consider possible pregnancy or domestic violence. Under Article 7 of the NCCPA-1, which refers to the "principle of ex officio investigation," the court must also establish facts not alleged by the parties to the proceedings for the child's marriage and take evidence not offered by the parties. Moreover, according to Article 6 paragraph (2) of the NCCPA-1, the non-contentious

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[44] *Non-Contentious Civil Procedure Act* (Zakon o nepravdnem postopku): Uradni list RS, št. 16/19.

[45] Alinčić et al, 2007, p. 39.

court must, of its own motion, take all measures to protect the rights and legal interests of the child.

3.1.3. Physical and mental maturity to understand the meaning and consequences of the rights and obligations arising from marriage

There is a legal presumption of maturity at the age of 18, which relates only to the child's mental maturity. At 18, the child acquires the full capacity to contract and legal emancipation occurs, at which point the general age for marriage is also reached. However, when a child under 18 but over 15 wishes to marry, attaining both physical and mental maturity is examined by the court in a non-contentious civil procedure.[46]

One particular feature is the verification of physical maturity, which is not a condition for the existence of a general capacity to contract. As marriage may also be linked to pregnancy and the resulting parenthood[47], the minor's short- and long-term well-being must undoubtedly be evaluated. Thus, under Article 29 of the FC, the non-contentious court must obtain the opinion of the social work center.

The court also examines whether the minor who wishes to enter into marriage has mental maturity enabling them to understand the meaning and consequences of the rights and obligations arising from marriage (Article 24 paragraph (2) of FC). If the court finds that the minor has the capacity to understand, they will be lawfully able to give informed and free consent to the celebration of marriage.[48]

3.1.4. Court's decision

The procedure for overlooking the minority must be initiated by a child's application who has already reached the age of fifteen and wishes to enter marriage (Article 76 paragraph (1) of NCCPA-1). The court then determines whether the conditions for overlooking the minority, as prescribed in Article 24 of the FC, are fulfilled. If the court finds that the conditions are fulfilled, the child's minority will be overlooked and permission to marry will be granted. Therefore, granting permission means that the legal restrictions,

[46] Kraljić, 2019, p. 95.
[47] Novak, 2017, p. 57.
[48] Baxter, 2019, p. 76.

constituting the conditions for marriage, have been lifted, and the marriage is valid.[49] Upon entering marriage, the minor will acquire the full capacity to contract, constituting a milestone between childhood and adulthood. Therefore, if a child enters into marriage before the age of 18, they are no longer considered a child in legal terms.

The court's permission applies only to marriage with the person named in the decision as the minor's intending spouse. The court's decision (with permission) cannot be used for any other eventual marriage before the age of majority, as the permission results from the specific circumstance individually evaluated by the court.[50]

However, if the court finds that the conditions for overlooking minority are not met, marriage permission will not be granted, and any marriage entered into by a child without the court's permission is void. However, it may remain valid if the court before which the annulment proceedings are pending finds that circumstances would allow the marriage to be accepted, or if the child has reached the age of 18 during the proceedings (Article 52 of the FC).

To guarantee the best interests of the child, the FC provides several safeguards for the child who wishes to marry before the age of 18, and thus legal certainty, as follows:

a) A civil servant of the administrative unit must warn the applicants of the conditions that must be fulfilled for the marriage to be valid (Article 30 paragraph (2) of the FC);

b) A social work center shall give an opinion on the entering of marriage of a minor (Article 29 of the DC in conjunction with Article 79 of the NCCPA-1).

c) A court must decide on whether to overlook the minority(Article 24(2) of the FC);

d) A registrar, before whom the marriage shall be solemnized, must first verify the identity of the intending spouses (Article 37 paragraph (1) and Article 39 paragraph (1) of the FC).

[49] Kraljić et al., 2022, p. 325.
[50] Kraljić et al., 2022, p. 338.

4. The impact of child marriage on a child's life

4.1 General

Child marriage has been actively addressed internationally for many years; however, a ban on child marriage means little for at risk children, if it is not transposed into national law and enforced by national courts.[51] Child marriage is not only a violation of the right to free and full consent to marriage, but also a violation of other children's rights (e.g., the right to education, freedom of expression, protection from all forms of abuse, and protection from harmful traditional practices).

Though most countries today set the age of marriage to 18, some countries (Equatorial Guinea, Gambia, Saudi Arabia, Somalia, South Sudan, and Yemen) do not set an age of marriage at all.[52] In 2014, 147 countries allowed children under the age of 18 to marry, either with parental consent, court permission, or by following cultural practices or religious laws. Of the 147 countries, 54 allowed girls to marry at a younger age than boys.[53]

Specific regions in Africa and Asia that are strongly affected by child marriage typically face high poverty and mortality rates, low levels of education, increased maternal morbidity, and lower life expectancy.[54] Most child marriages occur in Sub-Saharan Africa[55] and South Asia[56]; however, they are also present in=parts of Latin America and pockets of Eastern Europe.[57] However, child marriages, especially among girls, also occur in high-income countries. In a study conducted in the United States, approximately 1% of the 15-17 year-olds surveyed were married.[58]

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[51] Ebobrah and Eboibi, 2017, p. 334.
[52] Gray, 2016.
[53] United Nations – General Assembly, 2014, p. 14.
[54] Ahmed, 2015, p. 8.
[55] In Sub-Saharan Africa, the Republic of Congo ranks first with 74% of girls (only 5% of boys) marrying before the age of 18. This is followed by Niger (70% girls; 5% boys), Congo (56% girls; 12% boys), Uganda (50% girls; 11% boys), and Mali (50% girls; 5% boys) UNICEF, 2001, p. 4; Ahmed, 2015, p. 9; Deane, 2021, p. 2; Efevbera and Bhabha, 2020, p. 1548.
[56] In Ethiopia and in some parts of West Africa, marriage at seven or eight years is not uncommon. In Kebbi State, (Northern Nigeria) the average age of marriage for girls is just over eleven years, against a national average of 17. It could also be that many young brides are second or third wives in polygamous households; UNICEF, 2002, p. 4.
[57] UNICEF, 2001, p. 4.
[58] See Koski and Heymann, 2018, p. 59 ff.

Although the global prevalence of child marriage has declined[59], the fight against child marriage has repeatedly been influenced by crisis. In times of crisis, the needs of adolescent girls and child marriages are often overlooked, which often leads to an increase in child marriages. This has already occurred during the Ebola outbreak,[60] And the COVID-19 pandemic has further contributed to the increase in poverty in some regions of the world. Consequently, the number of child marriages is expected to increase in the coming years. This is particularly problematic for countries that experience extremely high rates of child marriages. In some countries, the onset of the COVID-19 pandemic has led to the closure of safe houses that provided at least some protection for girls at risk of various forms of violence (e.g., in Niger, Congo, Uganda, and Kenya).[61] Furthermore, in times of conflict and natural disasters, parents may marry off their daughters as a last resort to ensure the family's income in times of economic crisis. In food-insecure Kenya, these girls are called "famine brides." In Sri Lanka, Indonesia, and India, young girls married "tsunami widowers" to obtain government subsidies to marry and start a family. During the wars in Sudan, Liberia, and Uganda, girls were abducted and delivered to warlords as "bush wives," or even offered by their families in exchange for protection.[62]

Countries where early or child marriage persists also have poor Millennium Development Goals (MDG) indicators. Although significant strides have been made in some countries and regions to reduce child marriage (e.g., South Asia), no region has eliminated it as a form of harmful traditional practice until today. For example, due to the extremely rapid population growth in sub-Saharan Africa, the number of child marriages is expected to rise.[63]

4.2. Consequences for children

Both young boys and girls have been subject to child marriages, with far-reaching long-term consequences for children. Child marriages involving only one marriage partner below the age of 18, usually the female, are also very common. The frequency of child marriages involving girls below 18

[59] The last decade has seen a worldwide decline in child marriage. While a decade ago one in four girls (25%) was married before the age of 18, today the number is approximately one in five (20%); UNICEF, 2018, p. 3.
[60] See Deane, 2021, p. 10 ff.
[61] UNICEF, 2021, p. 5.
[62] UNFPA, 2012, p. 12.
[63] UNICEF, 2018, p. 4.

has always been higher than those involving boys[64] and is often the result of entrenched gender inequality. As a result, the global prevalence of child marriage among boys is one-sixth of that among girls. The consequences for boys are reflected in their poor preparation for specific responsibilities, such as caring for the family, early fatherhood, and a lack of access to education and career opportunities.[65]

As discussed earlier, child marriage is particularly prevalent in the poorest regions or countries; therefore, poverty is often one of the reasons for early or child marriages. Marrying a daughter can mean having one less person to feed, clothe, or educate. In some cultures, there is a bride price, and the bride's parents receive payment at the time of marriage, which they can use for other children, the family, or even their own needs. Younger girls receive a higher bride price because they have more years to bear children.[66] Therefore, early marriage is often seen as a means to reduce the financial burden on parents and as a source of income. [67]

Girls who marry before the age of 18 are more likely to experience domestic violence and are less likely to attend school, often dropping out of school altogether after marriage. This results in illiteracy and lower educational attainment, and thus, a lack of future opportunities for both personal and professional development.[68]

There are also health-related consequences, which for girls include not only mental health problems but also adverse health effects due to early (teenage) pregnancy and childbirth. Pregnant girls aged 15-19 are twice as likely to die in childbirth as those aged 20-30, and girls under 15 are five to seven times more likely to die during childbirth or to have a stillbirth. This id due to physical immaturity, where the girls' pelvis and birth canal are not yet fully developed.[69] Girls and women victims of child, early, and forced marriages often cannot make decisions about their sexual and reproductive health or lack accurate information about it. This compromises their ability to make decisions about the number and spacing of their children and to negotiate the use of contraceptives, putting them at greater risk of contracting sexually transmitted diseases and HIV.[70] Moreover, due to

[64] Sen Nag, 2017.
[65] UNICEF, 2022.
[66] Bish, 2021.
[67] Deane, 2021, p. 7.
[68] Aleksić, 2015, p. 18.
[69] Ahmed, 2015, p. 9; UNICEF, 2022.
[70] United Nations – General Assembly, 2014, p. 9.

prolonged and/or obstructed labor, many girls become victims of morbidities, such as obstetric fistula, with girls who give birth before the age of 15 having an 88% risk of developing a fistula. Patients with fistula are usually young girls from socially disadvantaged groups with poor access to emergency obstetric care. Girls can also face incontinence or fecal discharge, emitting a foul odor and making them social outcasts.[71]

In addition to these health problems, research in the United States has shown that girls who marry before the age of 18 are at higher risk of mental health problems (e.g., suicidality) and substance abuse (e.g., smoking, drugs, alcohol, and pills) later in life.[72]

Finally, child marriage deprives children of their childhood, who, despite their youth and physical and mental immaturity, are thrust into the adult world. Girls are usually married to men much older than them, which also undermines their autonomy because of the age difference. They must take on household and family tasks that they cannot match, exposing them to misunderstandings from their partners and families, and thus to further physical, psychological, economic, and sexual violence. Moreover, they are often subjected to social isolation, completely cut-off from their biological families.[73] As child marriage affects a girl's health, future, and family, it also has significant economic costs at the national level, with major implications for development and prosperity.[74]

5. Final thoughts

Although Slovenia has also acceded to international treaties that directly or indirectly address child marriage and its abolition, it is still among the countries where child marriage is possible. Despite the safeguards built into national legislation to protect children and their interests and well-being in the event of marriage before the age of 18, it cannot be ignored that Slovenia has not followed international treaties in its regulations. Slovenia's regulations are also not in line with the SDGs, which call for global action to eliminate this violation of human rights by 2030; however, this target remains a few years away. Thus, Slovenia has the opportunity to amend its regulations to ensure that the child's rights are respected in this area as well.

[71] Ahmed, 2015, p. 9; UNICEF, 2022.
[72] Koski and Heymann, 2018, p. 59.
[73] Deane, 2021, p. 7.
[74] UNICEF, 2022.

The UN's Committee against Torture has recognized that child marriage can constitute cruel, inhuman, or degrading treatment, especially when governments have not set a minimum age of marriage in line with international standards.[75] From this point of view, we can also conclude that the Slovenian FC is not in line with international standards.

Countries that allow child marriage should aim to raise the age of marriage to 18 for girls and boys without exception; moving away from gender-based discrimination in this respect. In so doing, it should be understood that child marriage cannot be justified on traditional, religious, cultural, or economic grounds.[76] Education plays an important role in the elimination of child marriages and can significantly contribute to improving a person's future personal and professional capabilities and autonomy. Therefore, if a minor is already married, efforts should be made to encourage further education.

Building on the SDGs, there is strong global interest in ending child marriages by 2030; however, it is difficult to believe that child marriages will be entirely eliminated by 2030. Notably, despite existing international treaties that bind the contracting states and domestic legislation on this topic, child marriage remains a problem in many countries. Of course, there are still countries that are a long way from the goals promoted in the SDG agenda. Legislative changes to make 18 the minimum age for marriage, with no exceptions, is perhaps only a first step. It is also necessary to ensure that people, communities, and even countries are made aware that child marriage violates human rights and, particularly, the child's rights. Something as deeply rooted in certain societies as child marriage, must be approached much more broadly and at a legislative level. There is a need to change people's mindsets, which sometimes means intervening in deeply-rooted traditional customs and rituals, contributing to the high number of child marriages. Child marriage is often linked to religion or even seen, in certain contexts, as the only way for girls and women to live or survive. Slovenia, as a state party to all major international human rights treaties, especially the CRC, does not, in principle, face such (traditional) problems. Thus, amending the FC, and thus raising the age of marriage to 18 without exception, should not be too big a step to take. In any case, raising the age of marriage would be a significant step forward in achieving SDG 5.3 and to guarantee and respect human rights, particularly those of the child.

[75] United Nations – General Assembly, 2014, p. 5.
[76] United Nations – General Assembly, 2014, p. 6.

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ATTILA LÁPOSSY*

Behind the protection: Key Issues of the Child's Capacity to exercise Fundamental Rights

ABSTRACT: The study attempts to reveal from a dogmatic-analytical point of view, the issues related to the child's capacity to exercise fundamental rights based in practice-oriented approach, with case law examples. This children's rights focus is part of the larger research: the FULCAP research project aims to develop a complex concept and doctrine of legal capacity for fundamental rights (as a concept map) and to construct a normative concept of legal capacity for fundamental rights. The research seeks to answer how the definition of legal capacity for fundamental rights could be constructed, among others such as that of children. Namely the legal capacity of a child requires that the child enjoy a certain level of capacity to exercise rights and be able to exercise his or her fundamental rights. Based on the results of this research, the first part of the study identifies and examines the key factors that affect the child's capacity to exercise rights, the direct exercise of rights, or restrict it. First, the relevance of age and maturity; second, the parental rights and obligations; and finally, other factors: institutions, values, and public interest. The second part of the study tries to shed light on these factors using the example of the exercise of children's freedom to assembly and its limitations. Finally, the study sets up an "exercise of rights scale" and delineates the possible alternative legal solutions in the context of exercising the children's freedom of assembly.

KEYWORDS*:* children's rights, legal capacity of fundamental rights, best interest of the child, decision-making capacity, parental rights/obligations, proportionality, freedom of assembly.

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* Assistant lecturer, PhD., Department of Constitutional Law, Faculty of Law, Eötvös Loránd University, Hungary, lapossy@ajk.elte.hu.
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1. Introduction

When we talk about children's rights, we consider the child's vulnerable position against the state's obligation to protect those rights, from which the automatic limitation of children's rights by the state is just a small step. The vulnerability of children, especially young children, is difficult to dispute. This, however, results in a situation where everyone always wants to "protect children," which can result in situations where children's capacity to exercise their fundamental rights is undermined. This approach runs counter to the fundamental guarantee that the person, including the child, is entitled to autonomy, it ensures that he or she is the subject of the decision affecting him or her and not the mere instrument of it. Nevertheless, certain difficult questions arise. How and according to what criteria can the issue of the child's exercise of fundamental rights and their limitations be analyzed? Who exactly has the responsibility to protect children, from what and why, and on what basis can we talk about the responsibility and obligation of parents, families, the state, or even society in relation to the protection of children?

The present study does not attempt to answer all these questions, but it attempts to reveal, as embedded in larger research and from a dogmatic point of view, the issues related to the child's capacity to exercise fundamental rights based on case law examples. Issues related to the exercise, protection, and limitation of children's rights can only be discussed within the framework of a global dialogue, the cornerstone of which are the principles of the UN Convention on the Rights of the Child (hereinafter, UNCRC), which have become part of the fundamental rights practice in Europe, for example, the practice of European Court of Human Rights (hereinafter, ECtHR).

The UNCRC is important as it throws new light upon the image of the child: a subject of human rights, which fundamentally influences policymaking, legislation, research, and planning around the world, at regional, national, and local levels.[1] The UNCRC undoubtedly recognized children as rights holders and provided them with individual rights. Children's rights in the UNCRC are often divided into three groups, described as the three P's: provision, protection, and participation. The first "P" is Provision, a right that enables children's growth and development including rights to adequate housing and education, and this can include

[1] Invernizzi and Williams, 2011.

childcare and play, leisure, arts, and recreation. The second "P" is Protection: these protect children against exploitation and abuse, and allow intervention when either occurs. Finally, the third "P" is Participation, which includes rights that enable children to participate in making decisions that affect them; it also includes the right to an opinion.[2] Children's rights can also be approached from the perspective of the four basic principles of the UNCRC: non-discrimination, the best interest of the child, the right to survival and development, and the four basic principles of the child**.**[3] Children's views are also an important element in determining what is in their best interest. The meaning of the child's best interests has remained indeterminate and opaque, so it tends to be invoked from different sides to justify sometimes opposing decisions.[4]

Children's rights can also be defined as the legal guarantee of securing the most important needs of children, including the prevention of interventions that threaten children. Children cannot be properly protected without being provided with food, housing, care, health services, education, or the opportunity to participate in decision-making regarding their own lives and society. The interaction between different types of rights is also important for the protection of children.[5] Children are autonomous agents who have the right to make mistakes. As human beings, children naturally have the right to be protected, however, they should not be prevented from exercising their self-determination, voice, and choice.[6]

2. About the Fundamental Rights Concept of Legal Capacity (FULCAP) Project: the aims and the concept

The Eötvös Loránd University Department of Constitutional Law (Budapest, Hungary) leads the FULCAP research project.[7] This research aims to develop a complex concept and doctrine of legal capacity for fundamental rights (as a concept map) and to construct a normative concept

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[2] Hammarberg, 1990, pp. 97–105.
[3] Lundy and Byrne, 2017.
[4] Vandenhole, 2017.
[5] Sandberg, 2018.
[6] Archard, 2014, p 123.
[7] Project no.132712 has been implemented with the support provided by the Ministry of Innovation and Technology of Hungary from the National Research, Development and Innovation Fund, financed under the Researcher-initiated research projects funding scheme. More information: https://alkjog.ajk.elte.hu/fulcap_otka.

of legal capacity for fundamental rights. The research seeks to answer how the definition of legal capacity for fundamental rights could be constructed and, among others, its application vis-à-vis restricted capacity to exercise fundamental rights, such as that of children.

The aim of this research is also practice-oriented: to develop a doctrinal framework directly applicable in the practice of courts and other fundamental rights forums. One way of doing this could be to use civil law terms to conceptualize legal capacity for fundamental rights. However, this is rendered inappropriate by the different functions of these two branches of law.

While civil law regulates a person's property and personal relations on a horizontal basis, fundamental rights are intended to guarantee the freedom and dignity of individuals (children) against the state. The concept of the capacity to exercise fundamental rights should be in line with the UNCRC. Since a restriction on the exercise of fundamental rights are a restriction on fundamental rights itself, it must be justified by proportionality. The legal capacity of a child requires that the person enjoy a certain level of capacity to exercise rights and be able to enjoy and exercise his or her fundamental rights. If they are merely subjects of rights without the capacity to exercise them, then they fall short of having meaningful legal capacity from a fundamental rights perspective. Representatives' (e.g. "parents") decision-making cannot be understood as a form of exercise of fundamental rights. Their role is based mainly on the state's obligation to protect vulnerable people, and in the case of children, on parental rights and responsibilities.

One of the great dilemmas in the field of children's rights can perhaps be described most simply: these rights are inherent in the fact that they apply to subjects who, on the one hand, lack the full autonomy of adults, but on the other hand, are subjects of rights.[8] A child would have a real, complete capacity to exercise fundamental rights if he or she could exercise the given fundamental right directly, without the intervention of another external actor, especially the parent, with the limitations that apply to everyone; if it is violated/restricted, he or she is able to assert his or her fundamental right independently, to request a remedy before the relevant, appropriate fundamental rights protection forums.[9]

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[8] '...children, who, on the one hand lacks the full autonomy of adults but, on the other, are subjects of rights.' CRC Committee, General Comment No. 12: The Right of the Child to Be Heard (UN Doc CRC/C/GC/12, 2009).

[9] Lápossy et al., 2022.

Three key factors exist: first, the relevance of age and maturity (1); second, the parental rights and obligations (2); and finally, other factors: institutions, values, and public interest (3).

1. Ensuring children's autonomous exercise of fundamental rights is an exception; it applies to a specific narrow group of persons (e.g., children between 16 and 18 years of age) and/or to the exercise of a specific fundamental right (e.g., health, self-determination) in practice or in law. One of the reasons for children's limited capacity to exercise fundamental rights is their limited level of understanding due to their limited maturity. There are significant differences in the level of understanding and maturity within the category of children and also within the "age groups" within that category (categories in the UNCRC's practice, such as young children and adolescents). These factors develop during childhood; as the child matures, so does their capacity to make decisions and, consequently, their capacity to exercise fundamental rights. At a given age, the capacity to make decisions varies according to the situation and kind of decision. The long-term consequences of the decision and the risks involved are also relevant; a public and sensitive situation for the exercise of fundamental rights (e.g., participation in a political demonstration) may be a relevant factor.

Children's age is one of the determining objective factors of maturity. One option is that the law sets a generally lower age of legal capacity, the attainment of which is an irrebuttable presumption of the child's maturity and the psycho-social development that goes with it (for example, the exercise of the child's right to health or information self-determination). There may be a situation where the presumption is rebuttable, and the exercise of the child's rights can be considered if the child's decision would be against their best interest (e.g., concerning contact with a separated parent). Regarding the third option, the court making the decision may consider the child's maturity and exercise of fundamental rights on an individual basis. In such a case, it is not sufficient that the child is of a certain age, additional psychosocial developmental aspects must be examined (e.g., maturity tests in the field of health self-determination). The presumption of maturity in regulation is problematic because of its inflexibility and discriminatory nature. Children above the age limit cannot be denied the exercise of their rights even if they are not mature enough, while those below the age limit cannot exercise their rights even if they are mature. In the first case (presumption), to exclude arbitrariness, it is a requirement that the statutory regulation establishing the restriction in the

form of an age limit must be based on scientific facts (verified research results), considering the current state and consensus of the scientific community. In the second case (individual basis), it is important to examine the role of facts and the examination of the actual decision-making capacity of children, which are also expected to be based on scientific evidence; however, it must be stressed that they remain legal decisions.

Examining maturity on an individual basis is a flexible solution for addressing the differences between children. However, there is a risk of arbitrary and inconsistent practices, ad hoc decisions, and the prominent role and influence of non-legal factors. In many countries, professional guidelines and specific tests are being developed to standardize discretionary practice and reduce inconsistencies, for example, the exercise of children's right to medical self-determination. In the absence of regulations or practices, parents may determine whether the child is sufficiently mature.

2. The exercise of fundamental rights by children is inseparable from their parental rights and obligations. Parenting is, by its very nature, a specific, two-faced legal institution. On one hand, it is a subjective right that imposes limits on state interference. On the other hand, it is a legally enforceable obligation for parents in relation to their children. Parents in this context only cover the child's biological or adoptive parent. Other legal representatives of the child, in particular the guardian appointed by the state, cannot be considered holders of parental rights. A person acting in the name and on behalf of the state is bound by fundamental rights, and cannot invoke parental rights vis-à-vis the state.

The parents' right to make decisions regarding the child's upbringing and the child's fundamental rights are interdependent and can be exercised with regard to each other. The interaction between these, possibly competing, rights are typically not regulated by law. However, there are examples where legislation explicitly states that the parent has the right to decide on matters relating to the child's fundamental rights (for example, the law explicitly gives the parent the right to decide on the child's education and health care and on the processing of the child's personal data, especially for younger children). Another possibility is that a joint decision between the parent and child is needed. In this case, the child is required to prove that the parent has consented to the exercise of his or her rights or has accepted

the child's decision (e.g., in cases of abortion requests, it is common to require such joint decision-making).

Parental responsibility is the duty, opportunity, and authority of the parent to guide the child in the exercise of his or her rights concerning his or her decision-making ability, age, competence, and autonomy. The relationship between parents and children can be described and modelled in several ways, particularly as a trust-based relationship. Accordingly, parents may determine the content of parenting autonomously and primarily according to their own convictions. Parenting is, however, also an obligation in relation to the child, meaning that parental rights must be exercised with regard to and in the best interests of the child (hereinafter, BIC). Therefore, the exercise of the child's fundamental rights means that, as a general rule, it is the trusted parent who is entitled and competent to determine what is in the best interests of the child.

It should be noted that, according to the CRC Committee, the child's best interests are threefold. First, BIC (UNCRC Article 3) is a substantive right. The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered to decide on the issue at stake and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children, or children in general. Second, BIC is a fundamental, interpretative, and legal principle. If a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be selected. Third, BIC is a rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.[10] In fundamental rights practice, it is difficult to properly distinguish between the substantive (subjective right) and procedural elements of the BIC, whether it is the State or parents who intervenes in the exercise of the child's fundamental rights.

Within the framework of the parent's right to raise the child, the determination of the best interests of the child can be either subjective (the

[10] CRC Committee, General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (UN Doc CRC/C/GC/14, 2013). Although parents are not explicitly mentioned in Art. 3 para 1, the best interests of the child 'will be their basic concern' (Art. 18 para. 1).

parent freely decides) or objective (determined by the state in a normative way or through individual decisions). Owing to the civil law logic of the child's declaration of rights (age limits), there is a practical difficulty in many fundamental rights exercise decision situations: the parental statement is a valid requirement or the child cannot even make a valid statement in the first place.

An exception is when the state determines the best interests of the child. Such state interference restricts both the fundamental rights of the child and the parents' rights, significantly affecting the right to family life and privacy, as well as the requirement of the state's neutrality of ideology (e.g., cases of school choice and education). Therefore, such restrictions require strong justification. State intervention may be justified when the interests of the child and the parent appear to be in conflict, so the parent cannot be expected to make an unbiased decision in the best interests of the child. A typical legal solution to this situation is to appoint a professional guardian to protect the child's interests.

However, in the absence of procedural capacity, professional assistance, or representation, children without parental consent or involvement are typically unable to initiate proceedings to enforce their fundamental rights through courts or other forums. In such a context, the representation of children is not guaranteed independently of their parents (e.g., ECtHR cases on compulsory vaccination). When exercising the parent's right to make decisions in the best interests of the child, the child's views must be heard and considered regarding the child's maturity. Maturity and decision-making capacity are linked to parental rights/obligations, as the parent must consider the child's evolving capacities, progressive development, and increasing autonomy. This obligation forms a counterweight against arbitrary proceedings.

3. In addition to the above, the exercise of fundamental rights by children may be legitimately restricted to protect the functioning of the social institutions concerned by the exercise of fundamental rights (e.g., freedom of contract and security of property transactions, the right to vote and the electoral system, marriage, and registered partnerships), and the public interest behind them. The specific legal solutions used (e.g., setting minimum age limits for the exercise of fundamental rights) are similar; in this case, it is not the child's lack of decision-making ability that counts, but the impact of the exercise of the law and its consequences for the functioning of individual institutions. However, certain state interventions

(regulations) based on public interest limit the right or obligation to educate both the child and parent. In such cases, the restriction of the child's fundamental rights should be examined according to a proportionality test.

Proportionality is generally accepted as a measure of the restriction of fundamental rights. It follows from the very nature of fundamental rights and from the conflicts that FRs are subject to limitations (except for absolute rights). Based on the proportionality principle, a limitation of a fundamental right must be connected to a legitimate aim (e.g., the protection of another fundamental right or a specific public interest), the means used (in which the limitation is manifested) must be suitable to serve the legitimate aim, and the least restrictive measure must be chosen among the alternatives. Moreover, the importance of the legitimate aim and harm on the side of the affected fundamental rights must be proportional. According to the literature, proportionality, as the appropriate method that indicates the acceptable extent for the limitations, is justified based on arguments related to democracy, the rule of law, the conflict of legal principles, and the particularities of legal interpretation. Moreover, based on its origins in the practice of the Federal Constitutional Court of Germany in recent decades, the proportionality principle has become a central paradigm in the practice of courts dealing with fundamental rights cases worldwide, especially in Europe. It is important to emphasize that proportionality binds all branches of power (legislative, executive, and judiciary). However, if we consider the applicable, legally binding UNCRC and compare them to the European Convention of Human Rights (ECHR), including the case law of the ECtHR, we can identify common grounds as well as differences and sometimes disharmony between the regimes.

In addition to proportionality, the question of the state's neutrality in relation to the exercise of children's rights and the limitations of children's rights deserve special attention. The ideological neutrality of the state affects the entire concept of legal capacity for fundamental rights. Ideological neutrality essentially requires the state not to take a position on the question of a good life. Decision-makers (legislators and judges) need to be aware of their position on the neutrality behind their decisions. This ensures that the answers to the different questions of the concept of legal capacity for fundamental rights are coherent. This principle comes into play when the person concerned does not exercise or enforce their rights themselves and in the preceding question, when assessing decision-making capacity. What is considered to be in the best interests of the child that

influences the content of parents' parental rights and the possibility of state intervention? An outcome-based conception of decisional capacity, or best interest-based substitute decision-making, implies the definition of a good decision.

On the one hand, the premise that the state-public power restriction on the exercise of rights based on being a child (i.e., being under the age of 18) has no "self-legitimacy," i.e., it cannot be automatically accepted in any case (cf. restriction in the child's own interest, the child's self-defense), but must be constitutionally justified, can be defined as a basic premise. All situations of restriction and decisions of public authority (rules, practices, individual decisions) involving state intervention affecting the exercise of fundamental rights by children must follow the proportionality requirement. If a child's capacity to exercise his or her rights is incomplete as a result of state intervention, it must be classified as a limitation of rights, which can be considered constitutional if it is consistent with the fundamental rights limitation clause. The constitutionality of the exercise of rights is generally not accompanied by a separate, explicit clause in each constitution, and lacks a mature set of criteria in European fundamental rights practice.

3. The exercise of children's fundamental rights, possible alternatives to its limitation, and their consequences - examples from the area of the freedom of assembly

Freedom of assembly, as a classical, first-generation right that can be enforced against the state and the right to collective communication, can serve as an appropriate example for examining aspects related to the exercise of the child's fundamental rights.[11]

Everyone has the right to freedom of a peaceful assembly, which is an essential component of democracy. The right to peaceful assembly includes the right to hold meetings, sit-ins, rallies, events, or protests. States should enable and protect the exercise of this fundamental right through various means including supportive legal frameworks. Freedom of assembly ensures that all people in a society can express opinions between civil society, political leaders, and the government. Essentially, we can say that children, just like adults, have the right to peaceful assembly, which includes

[11] It is no coincidence that the first of the vignettes containing fictitious children's rights cases produced in the framework of the FULCAP Project was also the assessment of the exercise and restriction of the right of assembly.

participating in a demonstration and even organizing a demonstration. This raises the question of how BIC can be determined in the context of attending a demonstration or perhaps organizing it, as well as which actor, parent, or state has the appropriate competence to decide this question in a general or concrete way. Should anyone allow a child to go to the demonstration or announce a demonstration? If so, should it be required by law or judged by the assembly authority (e.g., police or local government) or court?

Under international law, children can rely on the protection offered by Article 15 of the UNCRC, which includes the right to freedom of peaceful assembly. According to Article 15, State Parties recognize the rights of the child to freedom of association and freedom of peaceful assembly. Article 15 also states that no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law, which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

This raises the question of whether an age limit that prevents children from participating in a peaceful assembly is a reasonable restriction. Based on the practice of the CRC Committee in some countries, there are laws limiting children's rights to association and peaceful assembly during certain hours – curfews often imposed to prevent unaccompanied children from being out of their homes after a certain time in the evening, and often related to the age of the child. Such blanket restrictions on children's rights do not appear to fall within the very limited restrictions allowed in Article 15. Some States indicated in their Initial Reports that there is an age below which children are not permitted to join associations or to do so without the agreement of their parents.

The CRC Committee has recommended that a considerable number of State Parties should amend laws that prevent persons below a certain age from organizing outdoor meetings, as such laws are contrary to the rights enshrined in Article 15.[12] The UNCRC does not categorize children by age but recognizes the concept of the 'developing capacity of the child', the principle that children's capacities develop. The child can exercise his/her own rights, as opposed to adults exercising their rights on their behalf.[13]

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[12] For example, Concluding Observations to Turkey (CRC/C/R/CO/2–3 2012, para. 38).

[13] According to the Article 5 of the UNCRC States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally

Article 15 primarily considers the right to protest for older children who can form views and have attended a protest, because they wish to make a point about the issue in question. In practice, these individuals will likely be adolescents; however, this is not to assert that it might never be appropriate for younger children to form views and attend a protest.[14]

Although the CRC Committee's specific findings refer to the right of association and its limitations under the UNCRC, they can also be considered relevant from the perspective of the right of assembly.[15] It is often observed that children often have difficulty participating in assemblies, as they often face first-line resistance from parents or caregivers, mainly from the state. The CRC Committee notes academic and legal arguments that children may have an enhanced right to participate in peaceful assemblies because they are generally unable to vote; therefore, a peaceful assembly is a means to bring about change.[16]

This raises the question of whether an age limit that prevents children from participating in a peaceful assembly is a reasonable restriction. The CRC Committee has taken the position that this is not an acceptable form of restriction, even if it is done to protect children. Indeed, in practice, many States do place additional restrictions on children when it comes to freedom of peaceful assembly, and the CRC Committee has frequently pointed this out to State parties. The CRC Committee has recommended that a considerable number of State Parties should amend laws that prevent persons below a certain age from organizing outdoor meetings, as such laws are contrary to the rights enshrined in Article 15 of the UNCRC.

According to the European Commission for Democracy through Law (Venice Commission) while certain restrictions may be placed on the exercise of the right to assemble by children, in view of the responsibilities of organizers or relevant safety concerns, any such restrictions must follow the requirements set out in international human rights instruments. In particular, when adopting any limits to the organization of or participation

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responsible for the child, to provide, 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.

[14] Daly, 2013, p. 7.

[15] UNICEF, 2007.

[16] See the Concluding Observations to Hungary: 'Ensure that children enjoy their right to freedom of expression including when participating in peaceful demonstrations, and do not suffer negative consequences, such as charges of petty offences by the police.' (CRC/C/HUN/6 2020, para 29).

in a peaceful assembly by children, full account needs to be taken of the best interests of the individual child and his/her evolving capacity. In addition, the right to freedom of assembly includes the right to choose not to participate in assemblies. It is particularly important as children are protected from coercive participation in assemblies.[17]

According to the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) panel of experts on the freedom of assembly in light of the important responsibilities of the organizers of public assemblies, the law may set a certain minimum age for organizers owing to the evolving capacity of the child. The law may also provide that minors organize a public event only if their parents or legal guardians consent to their doing so.[18]

The *ECtHR* explicitly asserts the right of children to attend gatherings in public spaces. As the Court noted in Christian Democratic People's Party *v.* Moldova, it would be contrary to the parents' and children's freedom of assembly to prevent them from attending events, in particular, to protest against government policy on schooling.[19]

Although the focus of the cited case was not the exercise of children's fundamental rights, their capacity to exercise fundamental rights, the ECtHR noted that

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[17] *Joint guidelines on freedom of peaceful assembly (3rd edition), CDL-AD (2019)017rev.* Venice Commission. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e (Accessed: 1 February 2023).

[18] *Guidelines for drafting laws pertaining to the freedom of assembly, Second edition.* OSCE Office for Democratic Institutions and Human Rights (ODIHR), p. 58.
Available at: https://www.osce.org/files/f/documents/4/0/73405.pdf (Accessed: 1 February 2023);
Examples: Section 5, Finland's Assembly Act (1999): A person who is without full legal capacity but who has attained 15 years of age may arrange a public meeting, unless it is evident that he/she will not be capable of fulfilling the requirements that the law imposes on the arranger of a meeting. Other persons without full legal capacity may arrange public meetings together with persons with full legal capacity. Article 6 Law on Public Assemblies of the Republic of Moldova (2008) Minors of age 14 and persons declared to have limited legal capacity can organize public assemblies together with persons with full legal capacity. The Hungarian Assembly Act does not establish age limit either for participating in a demonstration or for organizing a demonstration.

[19] European Union Agency for Fundamental Rights and Council of Europe, 2022.

> … Where the presence of children is concerned, the Court notes that it has not been established by the domestic courts that they were there as a result of any action or policy on the part of the applicant party. Since the gatherings were held in a public place anyone, including children, could attend. Moreover, in the Court's view, it was rather a matter of personal choice for the parents to decide whether to allow their children to attend those gatherings and it would appear to be contrary to the parents' and children's freedom of assembly to prevent them from attending such events which, it must be recalled, were to protest against government policy on schooling. Accordingly, the Court is not satisfied that this reason was relevant and sufficient.[20]

Daly draws attention to the fact that there are a variety of reasons for neglecting these rights [right of assembly]. Daly also points out that children are generally more vulnerable than adults, which makes the facilitation of such freedom rights counterintuitive for many. Children are usually cared for by adults, and according "freedom" rights to children raises fears for some commentators that the family unit may be undermined when children are empowered. The reluctance to engage in freedom rights for children has also been due to assumptions about children's capacities. Children's capacities are generally less developed than those of adults; therefore, one could argue that children are more likely than adults to make poor judgment calls. For example, they may be more susceptible than adults to manipulation by groups that seek to recruit them. Daly also mentions that children may also face greater physical danger than adults in public demonstrations because they are generally of smaller stature and have less developed capacities.[21] In many instances, children are "brought along" to protest by their parents or other adults.

In 2017, the Fundamental Rights Agency of the European Union (FRA) reviewed the rules on the age of exercise of rights for children in EU Member States in detail, many of which specifically concerned the exercise of fundamental rights (the possibility of marriage, political participation, consent to data processing, or consent to medical treatment without parental consent). In doing so, for example, the FRA concluded that children cannot,

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[20] *Christian Democratic People's Party v. Moldova* App. No. 28793/02, 14 February 2006. para. 74.

[21] Daly, 2016, p. 10.

generally, independently initiate legal proceedings before they reach the age of majority, usually 18 years, and the full procedural capacity that this entails, with a few limited exceptions, and that the rights of children to be heard in court proceedings vary considerably between and within states and in different areas of law. In the cited analysis, the FRA did not make a comparison specifically regarding the right of assembly.[22]

Brando and Lundy draw attention to the following regarding the limitations of children's right to assembly and age limits. Age-based differential treatment is not necessarily wrong; what we are concerned about, and claim, is that, particularly in the case of age-based differential treatment of children, there tends to be a lack of accountability for the reasons given to restrict rights and a generalized lack of justification as to why certain forms of differential treatment are required and directed specifically towards children. It is often taken as a given both in law and social life that children can have many of their political and civil freedoms justifiably restricted due to their assumed vulnerability or because of their assumed incapacity. According to the authors, this belies the fact that civil and political rights can only be restricted in several specific ways. Children can be treated differently from others based on their age, if the differentiation is proven to have a legitimate aim, to be a necessary solution to achieve that aim, and to be proportional.[23] The authors argued that such state interventions (restrictions) are often arbitrary and discriminatory, which is worth considering.

In the context of exercising the right of assembly of children, several alternative solutions are possible, along the lines of the considerations set out earlier.

One of the quasi-endpoints of the "exercise of rights scale" is the child's capacity to exercise fundamental rights freely (i.e., without child-specific restriction), in which other external actors, in particular the parent and the state, do not interfere: in this example, the child can exercise freedom of assembly by observing the rules and limits that apply to everyone else, i.e., he or she can be either an organizer or a participant in a demonstration. With this option, the state typically does not regulate this issue by law, as it is silent about it (i.e., it does not prohibit it, but it also does not allow it specifically for the child). The role of the parent can be to assist and support the child's exercise of his or her rights, explaining to the

[22] FRA, 2017.
[23] Brando and Lundy, 2022.

child the rules for participating in demonstrations in accordance with his or her unfolding abilities, and possibly accompanying the child in case any risks arise. A separate issue may arise in the organization or announcement of a demonstration, where it may also be necessary to involve the state (or the parent) for the adolescent child to exercise this right. A fundamental dilemma is whether this supportive, helping attitude can be enforced against the parent by any means on the part of the state.

One alternative to the free exercise of rights may be when the parent decides within the scope of his or her parental right/obligation, considering the disadvantages, risks, and maturity of the child, and whether the child can exercise freedom of assembly in the given context. It is important to point out once again that, in such a case, the parent is not exercising the child's right to assemble, but his or her parental right/obligation. As indicated earlier, this decision may be optional from the parent's point of view (there is typically no normative requirement in this case), but the parental decision – as a validity requirement – may also be mandatory by the state (or by the court in an individual case). The mandatory parental decision may be shared with the child (joint decision), for example, the consent of the parent is required by the state, or it may be reserved exclusively for the parent. The imposition of a mandatory parental decision by the state on participation in a demonstration may present a practical difficulty, and it is not clear who would be responsible to exercise control, how such control will be exercised, and whether, if necessary, the child participates in the demonstration with the knowledge and consent of the parent and whether this obligation can be simply placed on the organizer of the demonstration. A child's declaration of rights to organize a demonstration may be easier for the state to require parental approval. In this case, the question arises as to how the child can really force the parent to decide whether or not to take part in the demonstration, since the silence of the parent also leads to the child not being able to exercise his or her freedom to assemble. There is a dilemma as to whether it is possible to provide the child with an independent, accessible means of redress against a parent's decision to refuse to participate in a demonstration or organize it. The parent’s right/obligation is limited by the child's right to be heard; that is, the parent is obliged to listen to the child's opinions and views and take them into account in his or her consideration.

The third possible option is for the state to make its own decision on whether children can be participants or organizers of demonstrations, which

is another constitutionally extreme quasi-endpoint of the scale, according to which children cannot exercise their freedom of assembly at all. However, total, automatic exclusion, especially with regard to participation, is not compatible with the cited standards of children's rights and human rights. A more typical solution is that the state establishes a minimum age limit for the exercise of a fundamental right, that is, allowing a child to be a participant or organizer of a demonstration, for example, from the age of 14 or 16 years. By setting a normative age limit, the state clearly restricts both the right of assembly of children who have not yet reached a given age and the rights of their parents, so that the proportionality test must be applied to its examination. This type of regulation and automatism, in the absence of adequate evidence, also raises the problem of age-based discrimination among children. In the case of the minimum age for exercising the right as a presumption, it does not matter whether the child is sufficiently mature, for example, in relation to the risk of deciding to participate in a demonstration. No matter how the parent judges the best interests of the child in exercising the right to assemble. The only relevant factor is whether the child has reached the age limit or not. A more flexible solution could be if the legislator allows the rebuttal of the presumption in the matter of the exercise of rights; that is, the court applying the law can decide that the child can be the organizer of a demonstration.

Another consideration may be that if the state makes the child's right to organize demonstrations subject to a minimum age limit by law, it does not consider the child's maturity and decision-making ability (weighing the best interests of the child), but on the grounds of the public interest. That is, the state, as a legitimate objective, intends to limit the exercise of this right of the child specifically based on responsibility, financial responsibility, and, in general, the protection of rallies associated with the organization of demonstrations (all this is difficult to justify in connection with participation).

The State may also decide not to set a minimum age limit in the law, but to leave it to the court to determine the exercise of the child's right to assembly in the event of a dispute. This means that automatism is eliminated; however, it raises the question of the legal basis on which the judge can examine the maturity and decision-making capacity of the child in relation to a demonstration. A potentially arbitrary solution may exist not in automatism but in a lack of predictability. Instruments for standardizing

judicial practice, taking into account the function of children's right to assembly, could reduce the risks arising from insecurity.
One thing this brief analysis demonstrates is there is no bomb-proof solution for the development of regulations and practices regarding the capacity of children to exercise the right of assembly. However, inertia and silence should not follow from all this; on the contrary, it is important to identify and analyze in a meaningful way the constitutional and fundamental rights aspects relating to the child's capacity to exercise fundamental rights. The first step to this is to accept that a restriction based on the child's capacity to exercise fundamental rights, in particular, the legal setting of minimum age limits cannot be a blank cheque,' and must always be duly certified by the State. In the context of the justification of state intervention, it is of paramount importance to apply the proportionality test and to consider the principle of state neutrality in relation to intervention in parenting rights/obligations. Within the framework of the FULCAP Project, we would like to contribute to the search for answers using our dogmatic-analytical approach.

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ÁGNES LUX[*]

Children's right to remedy, as part of their protection

ABSTRACT: A complaint mechanism is a procedure and tool by which children who believe that their rights have been violated seek a remedy and end to the violation. The right to remedy is a core human right, and the basic dimension of children's access to justice and the recognition that children are full citizens are crucial to being protected. In most cases, independent children/human rights institutions (ICRIs) function as ombudsman offices, which are (mostly) complaint driven. If an institution has broad competence, it should determine within its structure either an identifiable commissioner or special unit/division responsible for children's rights. A complaint can also be seen as an essential and direct source of information about children's lives and problems, as well as a tool for ICRIs to propose amendments to policies and legislation. However, research has clearly shown that children and young people comprise a very small proportion of ICRI complaints. Why is that so? There is a lack of information and trust in public institutions. This may be due to the belief that complaints are not taken seriously, and perhaps due to fear of negative or retaliatory consequences. Therefore, complaint mechanisms are not sufficiently accessible to children and should be made more child-friendly. There is an important new international forum of complaints that can be analyzed here: the UN Committee on the Rights of the Child. Here, individuals or groups can make complaints regarding the violation of children's rights since the Third Optional Protocol of the UN Convention on the Rights of the Child entered into force.

KEYWORDS: children's rights, right to remedy, complaint mechanisms, UN CRC, UN Committee on the Rights of the Child.

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[*]Research fellow, HUN-REN Centre for Social Sciences, lux.agnes@tk.hu; Assistant professor, ELTE Faculty of Social Sciences, lux.agnes@tatk.elte.hu; https://orcid.org/0009-0005-8060-1336.
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1. Introduction

The UN Convention on the Rights of the Child (UN CRC), adopted in 1989, recognizes children as autonomous human rights bearers. As such, they also have the right to remedy, which is a fundamental human right and a critical element of the recognition of children as a sovereign actors.

The UN Committee on the Rights of the Child (CRC Committee),[1] which has the mandate to monitor the implementation of the CRC, sees a complaint mechanism as a mandatory feature of independent children/human rights institutions (ICRIs). Based on non-binding recommendations, every country should establish a body that can handle complaints submitted by anyone, including children. These complaint mechanisms should be accessible, free of charge, non-discriminative, and child friendly. However, it is not easy for a public body to be child friendly.

2. Right to remedy: An effective complaint mechanism is part of access to justice and protection

> Independent, safe, effective, easily accessible and child-sensitive complaint and reporting mechanisms should be established by law in compliance with international human rights norms and standards, in particular the Convention on the Rights of the Child. Where such mechanisms already exist, States should secure their availability and accessibility for all children, including children deprived of their liberty, without discrimination of any kind. In addition, States should ensure that complaint and reporting mechanisms act in an effective and child-sensitive manner and pursue the best interests of the child at all times.[2]

The right to remedy is particularly important for vulnerable children and young people (e.g., children who are abused, those living in care/closed

[1] The UN Committee on the Rights of the Child (CRC Committee). Available at: https://www.ohchr.org/en/treaty-bodies/crc (Accessed: 1 February 2023).

[2] Access to justice for children. Report of the United Nations High Commissioner for Human Rights. 16 December 2013. Para 55. Human Rights Council. Twenty-fifth session Agenda items 2 and 3. A/HRC/25/35.

institutions, those who belong to a minority, and those in conflict with the law). To use their right to remedy effectively, they must know their rights, recognize any abuse of these rights, and complain. The promotion of the content of the UN CRC (also as part of national laws) is mainly a task for state parties, but in most cases they fail at it (see the various concluding observations of the CRC Committee).

It is also clear that being aware of these rights as a crucial precondition of the effective use of the right to remedy is also a form of abuse prevention and protection. The Global UN Study on Violence Against Children (2006) states that:

> there is a well-publicized, confidential and accessible mechanisms for children, their representatives and others to report violence against children. […] All children, including those in care and justice institutions, should be aware of the existence of mechanisms of complaint. Mechanisms such as telephone help lines, through which children can report abuse, speak to a trained counsellor in confidence and ask for support and advice should be established and the creation of other ways of reporting violence through new technologies should be considered.[3]

3. The roles of national children/human rights institutions in the realization of the right to remedy

National human rights institutions (NHRIs) and ICRIs function, in most cases, as ombudsman offices, which are based (mostly) on complaints, but studies show that children and young people do not turn to these institutions for various reasons (e.g., a lack of information, a lack of trust in public institutions/adults, etc.).[4] There need to be systems in place that make trusted adults explicitly available to children and help them feel confident in speaking out.

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[3] Pinheiro, P. S., 2006, p. 21.
[4] Lux, 2020, p 3.

CRC Committee in General Comment No. 2.[5] reaffirms that NHRIs shall have the power to consider individual complaints and petitions and carry out investigations (either can be ex officio), including those submitted on behalf of or directly by children. Children (and every citizen) must receive proper information and exercise their rights. NHRIs are tasked with promoting fundamental human rights and informing the public.

Despite the fact that children make up a significant proportion of the population worldwide (in some countries, even the majority of the population), they usually have limited access to public goods and services, and institutions tailored to adults are ill-suited to providing a children's rights perspective.[6] For this reason, and due to their age and evolving capacities, children are a vulnerable group; thus, a special category of subjects requiring special protection should be brought under the umbrella of the institutional ombudsman protection of fundamental rights. Not to mention the additional vulnerability enhancing characteristics that affect a child's status and need to be protected (e.g., girl children, children in care, children in conflict with the law, children from disadvantaged or minority groups, children with migratory status, etc.). For vulnerable groups in general, including children, access to legal aid can be described as an "inverted pyramid" phenomenon, i.e., the most vulnerable groups have, for various reasons, the fewest opportunities and the least room to articulate their problems and to ask for help, let alone find a solution· An inverse proportionality often exists between the severity of social problems and the ability to articulate them and have them addressed.[7]

Children are highly exposed to relationships of dependence on adults when exercising their rights. Children are constantly evolving beings during their unique and unrepeatable life stages and are therefore particularly vulnerable to rights violations. In most societies, children's voices go unheard.[8]

For this reason, many countries have established a system of so-called specialized ombudsmen to protect the rights of vulnerable social groups with particular needs. Former Hungarian Commissioner for Data Protection

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[5] See UN CRC Committee. General Comment No. 2. (2002) *The role of independent national human rights institutions in the promotion and protection of the rights of the child*. CRC/GC/2002/2, 15 November 2002, para 13.

[6] UNICEF. (2012). *Championing Children's Rights.* Introduction, p. 2.

[7] For more on vulnerable groups, see Hajas, B., and Szabó, M. (eds.) (2013) *Their Shield Is the Law*. Budapest, pp. 9–33.

[8] Gran, 2011, p. 223.

László Majtényi believes[9] that there are two cases in which it is advisable to entrust the protection of a constitutional right to a specialized ombudsman: firstly, when the infringement of a constitutional right poses a particularly serious threat to the freedom of citizens and the self-defense reflexes of civil society are not strong enough. He found this to be the case for data protection. However, he also calls for the establishment of a parliamentary commissioner to stop the rapid destruction of the environment at a global level. In my view, although Majtényi does not explicitly mention the need for ombudsman-type protection of children's rights in the work cited above, the need to protect children as a subset of the "large minority" of society, a group of entities with limited capacity to defend themselves and to articulate their interests, fulfils the first criterion and provides a clear constitutional justification for the establishment of a specialized ombudsman. This is confirmed by the fact that, looking at a map of the European Union, there are only two countries where there is no independent institution for children's rights with national powers.

The UN CRC states that all persons under the age of 18 years are considered children for its purposes. It is precisely because of their age that children under 18 years need greater protection from society and help from adults to recognize, articulate, and assert their rights and interests. Therefore, in recent decades, many states have entrusted this specific task to the ombudsman general. However, many countries have opted to set up independent ombudsman institutions to effectively represent and protect children's rights.

Many other arguments can be listed (within or beyond the scope of human rights) in favor of the specific institutional protection of children's rights. For example, the lack of adequate protection for children at the outset can be very costly at the level of society as a whole later on (events in early childhood have a strong impact on later life, e.g., the possible emergence of deviant behavior, reoccurrence of abuse, etc.). Children are more affected by governments' actions or lack of actions, as there is no such thing as a "child-neutral" policy and almost all policy decisions have an impact on children. Children are often faced with the fragmentation of services, which can result in, at best, the duplication of care (which is unnecessary and costly) or, at worst, a lack of care. Children lack lobbying power to influence decisions that affect them at the policymaking level. In most states, children do not

[9] Majtényi, 1992, p. 12.

have adequate access to complaint mechanisms because they are unaware of them or do not know when or how to access them.

In 2002, the CRC Committee issued General Comment No. 2 on the role of independent national human rights institutions in the protection and promotion of children's rights,[10] which highlights the role of NHRIs in the protection of children's rights under Article 4 of the UN CRC. The CRC Committee encourages the establishment of ICRIs or ombudspersons/commissioners for children's rights in state parties, possibly in a constitutional manner, to play a role in the implementation of the UN CRC. The purpose of this General Comment was to call on state parties to review their existing institutions in terms of their status in accordance with the UN Paris Principles, which set minimum standards for human rights institutions and their effectiveness in carrying out child protection functions.

General Comment No. 2 argues that even in the case of NHRIs with broad competencies, in the absence of a separate Children's Rights Commissioner/Ombudsman, there is a need to appoint a person responsible for children's rights or to establish a separate unit to monitor, promote, and contribute to the effective and independent protection of children's rights as a key benchmark in policymaking and decision-making.

As the CRC Committee stated in its General Comment No. 5 on the implementation of the Convention issued in 2003:[11]

> the promotion of the full realization of all rights of all children under the Convention is the goal. This is to be achieved through legislation, the establishment of governmental and independent coordinating and monitoring bodies, comprehensive data collection, awareness-raising, training and the development and implementation of appropriate policies, services and programmes. One of the reassuring results of the adoption of the Convention and its near universal ratification is the widespread establishment at national level of new child-focused and child-sensitive bodies, structures and activities: children's rights

[10] UN CRC Committee. General Comment No. 2. (2002) *The role of independent national human rights institutions in the promotion and protection of the rights of the child.* CRC/GC/2002/2, 15 November 2002.

[11] UN CRC Committee. General Comment No. 5 (2003) *General Measures of Implementation of the Convention on the Rights of the Child.* CRC/GC/2003/5, 03 October 2003.

groups within governments, ministers for children, inter-ministerial committees on children, parliamentary committees, child impact analysis, children's budgets, children's rights reports, joint activities of NGOs, NGOs in the field of children's rights, children's rights ombudsmen, children's rights commissioners, and so on.

Eight years before the adoption of the UN CRC, in 1981, the Norwegian Ombudsman for Children, the first institution of its kind in the world, started an "avalanche," not only in the region but worldwide. Many ICRIs were set up, especially as a result of the UN CRC and the other international recommendations detailed above, initially in countries with democratic traditions where the individual was recognized as a holder of rights.[12]

The stable democracies of Western Europe have typically established a separate ombudsman for children, where the executive appoints an ombudsman who takes a children's rights approach (including taking the principle of child participation seriously). There were also many variations in this group in terms of the tasks they performed. In the UK and Austria, the commissioner has a particular focus on child protection issues (e.g., the English children's commissioner has a statutory duty since 2014 to provide advice, information, and assistance to children who are removed from their families or in need of protection), while Nordic countries focus more on *advocacy* and may not act on individual cases or handle individual complaints.

In Central and Eastern European countries, as the adoption of the UN CRC coincided with regime changes and subsequent political changes affecting fundamental institutions, constitutional institutions for the protection of fundamental rights, such as the ombudsman, were enshrined in the constitutions. The ombudsman is elected by parliament (for example, in Hungary, by a two-thirds majority[13]) and, as an independent institution, typically has wide powers to investigate public services and authorities and may often have recourse to the Constitutional Court.

In terms of competence, the picture is more varied despite the fact that, in principle, most institutions operate based on the UN Paris

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[12] UNICEF. (2012). *Championing Children's Rights.* Introduction, p. 234.

[13] Article 30 of Hungary's Fundamental Law refers to the Commissioner for Fundamental Rights.

Principles.[14] Most of them have the right to give opinions on legislative initiatives, and most deal with individual complaints (with the exception of Scandinavian ombudsmen).

The handling of individual complaints and the conduct of inquiries in all institutions allows for direct contact and requests for information, which recipients endeavor to meet within a reasonable time. The number of complaints and referrals received can vary from a few hundred to a few thousand per year, depending on the size of the country, the proactivity of the office, and the availability of other redress forums. The available data may also vary depending on the reporting system used by the institution (for example, the Hungarian Ombudsman does not record whether the complainant is an adult or a child). Typically, there are no formal constraints on the submission of complaints and institutions try to be flexible (complaints can be submitted in person or by letter, email, or telephone). In general, the majority of complaints come from adults (parents, grandparents, and other caregivers), with a smaller, almost negligible number of complaints from children. The need to deal with individual complaints has also emerged in countries where it was not previously possible; for example, the Scottish Parliament passed a new Children Act in the summer of 2014,[15] which also enshrines children's rights and gives the Scottish Children's Commissioner the power to investigate individual complaints, which came into force in 2016.

Easily accessible complaint procedures and the capacity to take necessary action are necessary to ensure effective redress. Access is particularly important for these procedures because of the special status of children; however, in many cases, they face obstacles.

According to the CRC Committee, the implementation of Article 12 of the UN CRC, which ensures participation, also involves ensuring effective child-friendly complaint procedures. Children must have access to complaint mechanisms in all areas of their lives: in the family; outside the family; in alternative care; in school; and in all other institutions, services, and opportunities important to them. The CRC Committee, in supporting the establishment of independent children's rights institutions, has also urged

[14] Principles relating to the Status of National Institutions (The Paris Principles). General Assembly resolution 48/134. Adopted 20 December 1993.

[15] Children and Young People (Scotland) Act 2014. Available at: http://www.legislation.gov.uk/asp/2014/8/contents (Accessed: 23 January 2023).

states to put appropriate complaint procedures in place and check that children have access to other complaint procedures.[16]

The Committee's General Comment No. 2 considers the provision of an accessible complaint procedure as a mandatory element for independent national children's rights institutions. The examination of complaints is also a direct source of information for institutions on the lives of children and the enforcement of their rights, which can provide an orientation for the ombudsman's work and highlight systemic operational problems.

As mentioned above, in the field of individual complaints and inquiries, all European ombudsman-type institutions can also be approached by children, at least for information that does not require parental or guardian authorization. However, it is not always possible for the office to pursue inquiries or complaints ex officio. However, an important indicator is that the lowest number of complaints and inquiries comes from children, which raises the question of how accessible or even known these institutions are to children, in addition to the legal possibility of access.

The norms regulating most institutions do not specifically mention children as possible complainants, but identify a broader category (for example, "anyone" can lodge a complaint with the Hungarian Ombudsman[17]). In the case of autonomous ICRIs, the regulatory norm may also specifically single them out (such as in Mauritius).[18]

The majority of ICRIs[19] act on their own initiative in so-called ex officio investigations of children's rights violations, in which case no direct involvement is necessary. Investigations may also be launched based on media reports or other persons not named in the legislation.

An example of a special solution is the mandate of the Irish Children's Ombudsman, which cannot investigate a complaint from a child unless a parent or other legal guardian representing the child provides permission. The problem with this provision is that the ombudsman cannot act effectively (or at all) if the parent or guardian commits an offence. The Norwegian Ombudsman can be approached by anyone; however, as a general rule does not investigate complaints without the consent of the child

[16] Herczog, 2009, p. 117.

[17] According to paragraph (1) of Article 18 of Act CXI of 2011 on the Commissioner for Fundamental Rights, '*Anyone* may apply to the Commissioner for Fundamental Rights...' (emphasis added).

[18] Art. 6 (j) of the Ombudsperson for Children Act, No. 41 of 2003, Mauritius – 'investigate complaints made *by a child.*' (emphasis added).

[19] UNICEF. (2012). *Championing Children's Rights.* Introduction, p.116.

concerned. This provision was developed because, in most cases, adults lodge complaints with the institution, which is a way of giving children a voice in decisions that affect them.

The accessibility of the complaint procedure is influenced by, among other factors, the way the institution can be reached, its physical location, and how it informs children and adults about the possibility of complaining.

The way in which complaints are lodged varies across Europe, but overall, it follows less strict and fixed rules than other legal procedures. The ombudsman's procedure is free of charge and does not require legal representation. Most institutions can be contacted by email, telephone, or in person.

The complaint procedure has a "quasi-judicial" character.[20] In most cases, the findings of the investigation of a complaint may be condemnatory, but the recommendation is not legally binding.

For all institutions, it is essential to ensure that referrals are responded to as soon as possible in an ethical and child-centered manner. For example, the French Children's Rights Ombudsman, which operated independently until 2011, worked with an interprofessional team of lawyers, social workers, and psychologists to determine the best solution for each complaint in the best interests of the child.

The nature of violations of children's rights, their different perceptions by adults, and the fact that the ombudsman acts in the interest of good administration to prevent future maladministration make it particularly appropriate to deal with complaints in a timely manner:

> Time is perceived differently by children and young people than by adults. A month can seem like an eternity to them. Children and young people are constantly growing and changing, so the procedures for them need to be faster than those for adults.[21]

Of course, the reasonable timeliness of the action depends on the nature of the complaint and the complexity of the problems it raises. Prompt

[20] In a state, other bodies (quasi-judicial bodies), sometimes not even state bodies, can perform a judicial function (quasi-judicial or judicial function) at the same time as the judiciary. For more on this, see Constitutional principles of the judiciary. In: Dezső, M., Fürész, K., Kukorelli, I., Papp, I., Sári, J., Somody, B., Szegvári, P. and Takács, I. (eds.) (2007) *Alkotmánytan I.,* Budapest: Osiris Kiadó).

[21] UNICEF. (2012). *Championing Children's Rights.* Introduction, p. 120.

reactions are not common among institutions, but a good practice can be if a special department has been set up to respond and act within maximum of 72 hours to serious, irreversible violations that come to their attention and require immediate action.

Child-friendly (and essentially client-friendly) complaint handling requires that the child (as well as the adult) be regularly informed about the status of the case.

As a general practice, if the office does not have jurisdiction over the matter, it may refer it to a body with jurisdiction and competence without delay.

Nearly a quarter of the institutions in UNICEF's 2013 comprehensive survey, mostly in common law countries, provide case representation and can bring test cases to court. Commissioners in Croatia, France, and Hungary are allowed by law to initiate proceedings in cases of suspected criminal offences and may also apply to the Prosecutor General under certain legal conditions.

A seemingly insoluble paradox is that if the ombudsman does their job "well," more and more people will come to them with their problems and in turn increase the caseload of the offices, which are usually limited and rather small. Moreover, the legal nature of the office does not often result in a remedy for specific infringements, since it tends to improve future institutional functioning and law enforcement through its actions rather than identifying the shortcomings of regulators. Its actions are therefore not always satisfactory in relation to the violations detected, particularly in cases of child abuse, where the ombudsman's competence is almost lost among the competing authorities, while remedies and assistance for child victims often arrive too late.

Measuring the effectiveness and efficiency of measures taken following the investigation of complaints or *ex officio* investigations is particularly difficult, partly because of capacity constraints and competence limitations, which prevent the evaluation of the activity, and partly because the lack of legally binding force of the recommendation leaves room for flexible interpretations of the measures.

4. New international forum on the right to remedy: UN CRC Committee and the Third Optional Protocol

The Third Optional Protocol to the Convention on the Rights of the Child[22] (hereinafter the Third Protocol) creates the possibility for citizens of state parties (including children) to complain to the Geneva body of violations of children's rights when the remedies available at the national level have been exhausted or are not available. In addition to investigating individual and/or group complaints, the CRC Committee can also conduct country visits in relation to systemic violations that emerge from the case. The Protocol was adopted by the UN General Assembly in December 2011, ratification was opened, and, following the ratification of the tenth state, the protocol entered into force on April 14, 2014. Currently, there are 50 State Parties (mostly in South America and Europe) and 15 signatory states; in 133 countries, no action has been taken so far.[23]

The Third Protocol identifies in its Preamble independent national children's rights institutions at the regional and national levels as complaint forums for violations of children's rights, whose activities are complementary to those of the Protocol. The Preamble further encourages states to establish effective and child-sensitive redress forums and institutions.

The "Optional Protocol" is by its nature optional, facultative, and only binding to those states that have ratified it. Accordingly, only a state that has accepted the Third Protocol as binding upon it may complain to the CRC Committee about a violation of the UN CRC and Optional Protocols after exhausting the available remedies at the national level (unless they are unavailable, ineffective, or would take too long to exhaust).

The Third Protocol moved into a noticeably more sensitive area, but also filled a significant gap in the UN's redress system. Before this, of all treaty bodies, only the CRC Committee was unable to receive individual complaints about violations of the provisions of the UN CRC. Despite the

[22] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/138.
Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx (Accessed: 23 January 2023).

[23] Ratifications can be tracked on the UN High Commissioner for Human Rights website. Available at: http://indicators.ohchr.org/ (Accessed: 23 January 2023).

importance of monitoring, the lack of enforcement often makes the CRC Committee's work (and the UN framework) a target for criticism.[24]

The CRC Committee is mandated by the Third Protocol to develop its own sufficiently child-centered procedures for dealing with complaints, which include procedural safeguards to exclude the possibility of the child complainant being manipulated by a third party, and the possibility of rejecting a complaint that is not in the best interests of the child. The Protocol also provides that the state party must guarantee that no one will be disadvantaged because he or she has brought his or her case to the Committee.

An individual complaint[25] must identify the specific violation of the child's rights, the responsibility of the state, and where and how it was violated. If a third party, rather than the child, acts on behalf of the child, it must be shown that the child has given consent to the complaint (the legislation allows for some bona fide exceptions to this; for example, if the child is too young to do so). The CRC Committee may, in cases where the complaint alleges that the rights of the child were seriously violated or may be at risk, take interim measures requiring the state to take immediate steps to protect the child before the end of its proceedings. As a matter of routine, the CRC Committee requests that the state party provide written information within six months on the violation situation and the measures taken or intended to be taken. The parties should endeavor to reach a mutually favorable solution, respecting the UN CRC and the Protocols, before the conclusion of the CRC Committee's procedure, as explicitly authorized in paragraph 9 ("friendly settlement"). If this is done, the CRC Committee will consider the case closed and terminate its proceedings. The duration of the procedure is not specified; paragraph 10 states that the procedure should be completed as quickly as possible. It should be noted that the Committee has not been given any resources to investigate and deal with complaints; this is left to the members and secretariat in the current resource-constrained environment. It is also important to note that the majority of complaints

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[24] Kilkelly, 2010, pp. 246–247; Bolton, 1990, p. 120; Ramesh, 2001, pp. 1948–1950.

[25] Working methods to deal with individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure [Online]. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/WorkingMethodsOPIC.pdf (Accessed: 5 February 2023).

received do not meet the criteria for the complaint mechanism and are therefore not investigated but are communicated to the complainants.

The Third Protocol also provides the possibility for a state party to report an infringement by another state party to the Committee, which must receive an explanation from the state party concerned within six months of its request (paragraphs 11–13). It should be noted that at the time of writing, no such procedure had been followed before any of the treaty bodies.

With the Third Protocol coming into force, there are now six UN treaty bodies[26] that can open an ex officio investigation if they have reliable information that there is a serious or systematic violation of the provisions of the UN CRC and its Protocols, and they will call on the state concerned to cooperate with the investigation and provide the necessary information. This procedure can only be initiated against a state that recognizes the CRC Committee's jurisdiction in this respect and did not request an opt-out when adopting the Third Protocol. The CRC Committee appoints one or more of its members to conduct the investigation, which may include a country visit if necessary—something that is possible if the costs are covered and the inviting party is not opposed—and then prepares a report. The CRC Committee reviews the report and sends it along with its recommendations to the state party, which will have six months to respond, after which the CRC Committee may ask about the measures taken. The procedure itself is confidential and not public, and the recommendations of the CRC Committee are, of course, not binding to the state party.

The possibility of lodging a complaint (or, to use the terminology of the protocol, communication) has filled a gap in the procedures of other treaty bodies. Not only has it put the CRC Committee on an equal footing in every respect with similar UN bodies, but it also has symbolic force in the sense that children's participatory rights under the Convention should be considered in the same way as rights under any other treaty addressed to adult subjects.

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[26] The Committee against Torture (article 20 of CAT); the Committee on the Elimination of Discrimination against Women (article 8 of the Optional Protocol to CEDAW); the Committee on the Rights of Persons with Disabilities (article 6 of the Optional Protocol to CRPD); the Committee on Enforced Disappearances (article 33 of CED); the Committee on Economic, Social and Cultural Rights (article 11 of the Optional Protocol to ICESCR); and the Committee on the Rights of the Child (article 13 of the Optional Protocol [on a communications procedure]) to the CRC. Available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate (Accessed: 22 May 2023).

All communications received under the Optional Protocol and submitted by children will be forwarded without delay by the CRC Committee Secretariat (Petitions Section) to the Committee's Working Group on Communications, including those that seem inadmissible. The Petitions Section transfers these communications to the Working Group in the original language, confirming the receipt of these communications from the complainant as soon as possible (within a maximum of two weeks). Responses to letters received from children are drafted using child-friendly language.[27]

If we analyze the cases that have come before the CRC Committee since 2019,[28] it can be found that the usual subjects are as follows: the greatest share comes from various issues (e.g., deportation or lack of access to services, problematic age-assessment procedures) related to unaccompanied minors (see cases, e.g., 80/2019, 128/2020 [Switzerland]; 131/2020 [Finland]; and 132/2020, 149/2021 [France]), deportation of failed asylum seeker children/families (see cases 102/2019, 120/2020, 125/2020, 126/2020, [Switzerland]; 103/2019 [Denmark]), institutionalization or placement in care (see cases, e.g., 135/2021, 137/2021 [France]; 139/2021 [Czech Republic]; 146/2021 [Italy]), and some cases relate to issues of juvenile justice (see case 89/2019 [Argentina]).

In October 2021, the CRC Committee published its long-awaited decisions on admissibility in the so-called "climate change case" (Sacchi et al. v. Argentina et al.). Along with this decision, the CRC Committee published an open letter to children and young complainants and a child-friendly version of the decision for the first time. Before this historic verdict, in September 2019, sixteen child human rights defenders and climate activists (including the iconic Greta Thunberg) from all over the world submitted a petition against five UN CRC state parties: Argentina, Brazil, France, Germany, and Turkey. These countries are the world's five largest issuers and, by ratifying the Third Protocol, have recognized the CRC Committee's competence to receive communications. In this case, the CRC Committee said that states have extraterritorial jurisdiction over harm caused by carbon emissions, though it ultimately found the petitioners'

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[27]Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/WorkingMethodsOPIC.pdf (Accessed: 3 May 2023).

[28] Available at: https://www.ohchr.org/en/treaty-bodies/crc/individual-communications (Accessed:3 May 2023).

communication inadmissible due to their failure to exhaust their national-level remedies.

It was a milestone for the following reasons: first, it was a clear and real form of child participation, as the complainants were children and young people; second, it was the first ruling of the Committee on Climate Issues. 'Though the decision has been lauded for expanding the jurisdiction of human rights law, such a doctrinal shift may give rise to unintended consequences in other areas of international law.[29]'

5. Summary

To develop and maintain a child-friendly complaint mechanism, preliminary requirements must be considered. The mechanism, either at the national level (in the case of ICRIs) or international level (the CRC Committee), shall be directly and easily accessible, known by children and by those working with children, and as informal as possible. The UNICEF NHRI Toolkit (2018: 14) states that each complaint submitted concerning a child rights violation should receive an answer declaring that the complaint has been taken seriously and acted upon and, if not, the reasons should be provided and other options offered for redress or support relevant to the situation. Timely handling of complaints is an essential component of child friendliness, especially in cases submitted by children or those that have direct effects on children. A child-centered approach requires the accessible fora served, the child to be informed of the procedure, status of the complaint, and outcomes.

An ICRI receives and handles complaints based on its mandates and competencies. These details vary according to the institution and country of origin, and still some institutions do not have a mandate to handle individual complaints, however it is an essential element of practicing the fundamental tight to remedy and also a useful source of information for ICRIs too.

The growing number of state parties of the Third Protocol and, in parallel, the emerging caseload of the CRC Committee related to individual complaints, clearly show that effective complaint mechanisms are a vital part of protection systems and provide a new space for further research.

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[29] 'Sacchi v. Argentina. Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test', *Harvard Law Review*. Available at: https://harvardlawreview.org/2022/05/isacchi-v-argentina/ (Accessed: 24 January 2023).

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BALÁZS PUSKÁS*

Sexual Abuse of Minors in the Catholic Church: USA and Europe**
A comparative analysis of abuse reports

ABSTRACT: The year 2002 marked a pivotal moment in the American Catholic Church when a scandal erupted in Boston, unveiling a systemic crisis of clerical sexual abuse. This event unleashed a tidal wave of revelations that rippled through the Church, shattering the prevailing facade of "business as usual" and exposing a hidden stream of abuse that had flowed beneath the surface for decades. This paper examines the profound impact of the Boston scandal on the Catholic Church, both in the United States and in Europe.

This study delves into four reports from Europe and the United States, shedding light on the extent of the issue in each region. It aims to bridge a gap in the literature by providing a comprehensive analysis of these reports, emphasizing that the problem is not exclusive to the Church but is a societal issue. The examined reports reveal varying rates of abuse and abusers across countries, highlighting the need for a broader societal approach to combat child abuse.

This research underscores the importance of confronting the issue transparently and acknowledges the critical role played by independent investigations, such as the John Jay Report. The data from these reports are essential in dispelling misconceptions and fostering a fact-based understanding of clerical abuse.

In conclusion, this comparative analysis examines key findings from reports in the United States, France, Germany, and Ireland, highlighting both similarities and differences.

KEYWORDS*:* Catholic Church, abuse, minors, clergy, religious personnel, reports.

* Senior Research Fellow, St. Stephen Institute, Hungary, puskastbalazs@gmail.com.

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1. Introduction

In 2002, a huge scandal broke out in the American Catholic Church, in Boston.[1] The years that followed showed the extraordinary importance of the case; it is not an exaggeration to say that this was the moment from which the tide of sexual abuse, which had been present as a hidden stream for decades, broke to the surface with elemental force, and swept away like a tsunami the previously prevailing "business as usual" automatism related to abuses, first in the American Church and then around the world.

As it turned out, it was not just that one Catholic priest had abused minors in an isolated case; the problem was systemic:[2] The Cardinal of Boston Bernard Francis Law kept the priest offender in office even after cases were revealed, and even tried to cover up the cases by transferring the abusive cleric—as we now know, with little success, since the priest went on to abuse additional victims in his new post.

Following the incident, Cardinal Law resigned from his post[3], and was replaced by a puritan Capuchin monk, Sean O'Malley: he sold the bishop's palace[4] and tried to help the victims by all means possible, both financially and morally. He declared zero tolerance for similar cases, and enacted draconian rules for the protection of minors.

In 2004, the United States Conference of Catholic Bishops (hereinafter, USCCB) decided to take an unprecedented step; it invited an independent institution[5] to investigate cases that had occurred in the past decades. At the same time, to clean up the Church, prevent further cases,

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[1] *Church allowed abuse by priest for years.* Boston Globe. Available at: https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html (Accessed: 02 June 2022).

[2] Engel, 2002.

[3] Getlin and Baum, 2002.

[4] Mehren, 2004.

[5] 'In June 2002, the entire body of Catholic bishops of the United States approved the Charter for the Protection of Children and Youth at their General Assembly in Dallas. The Charter established the National Review Board, which was tasked with preparing a descriptive study of the nature and extent of sexual abuse of minors by priests, with the full cooperation of dioceses. The National Review Board commissioned the City University of New York's John Jay College of Criminal Justice to conduct research, summarize the data collected, and issue a summary report to the United States Conference of Catholic Bishops on the findings. This report from John Jay College is published by the undersigned. (Msgr. William P. Fay, General Secretary' Available at: https://www.bishop-accountability.org/reports/2004_02_27_JohnJay_original/ (Accessed: 02 June 2022)).

and protect minors, the conference and the individual dioceses, archdioceses, and religious orders took other concrete steps, such as creating regulations and developing strict procedures that they implemented across the US.

Following the American case, similar scandals erupted in almost every part of the world, and the Catholic Church continued to make serious efforts to deal with them – on the one hand, centrally, through measures taken by the Holy See, and[6] on the other hand, through the actions of local church communities, episcopal conferences, and religious orders.

As a result, the picture began to become clear: The Church and the wider public gained insight into the depth and quality of the problem over the past 70 years, and the reasons and factors that facilitated these types of crimes in the Church became visible.

On the other hand, at the same time, regulations were created, training aimed at raising the awareness of victims and deepening the topic in general appeared, the Pontifical Gregorian University[7] developed an internationally accredited training portfolio related to child abuse.[8] Pope Francis proclaimed zero tolerance, prescribed cooperation with secular authorities, and obliged bishops and religious orders to develop and implement appropriate regulations and procedures, as provided for in "You are the light of the world."

The Holy See also modified the Canon Law, Book VI of the Code. This book underwent significant changes;[9] among other things, the scope of relevant Church law was extended to include lay people employed by the Church.

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[6] In 2019, Pope Francis issued his apostolic letter entitled "You are the light of the world," which aims to "prevent sexual abuse of minors and vulnerable persons within the Church. Pope Francis took this action motu proprio, but it was born as a result of the meeting held in the Vatican in February, which was attended by the presidents of the episcopal conferences and the main religious superiors. 'The papal decree contains innovative elements that serve better cooperation between the Holy See and dioceses,'
„Ti vagytok a világ világossága" – Ferenc pápa motu propriója az Egyházon belüli visszaélések ellen. Magyar Kurír. Available at: https://www.magyarkurir.hu/ferenc-papa/-ti-vagytok-vilag-vilagossaga-ferenc-papa-motu-proprioja-az-egyhazon-beluli-viszgeelesek-ellen (Accessed: 02 June 2022).

[7] Pontifical Gregorian University. Available at: https://www.unigre.it/en/. (Accessed: 02 June 2022).

[8] https://iadc.unigre.it/wp-content/uploads/2017/09/Elearning_Flyer_15.pdf. (Accessed: 02 June 2022).

[9] Fóris, 2021.

Globally, the Catholic Church has taken serious and effective steps to make it safer for minors. It can perhaps be stated that today, there is no other organization that takes the protection of children and vulnerable adults as seriously as the Roman Catholic Church. No other organization has taken action against the abuse of minors in such a wide manner.

As mentioned earlier, this issue emerged with the breaking of silence within the American Catholic Church. The American bishops crushed all their fears and horrors and said that they were willing to face the demon hiding in the bosom of the Church, they were willing to call the trouble by its name, and accepted that this meant that they would have to take responsibility, pay a lot of money to many victims, and change the paradigm regarding the treatment of abuse cases and the attitude towards victims.

The first step on this path was an independent research, called the John Jay Report.

This was followed by even more research worldwide, as a result of which a serious and profound transformation and purification began in the Catholic Church. These reports played an important role for local churches and the Holy See, leading to the measures I have already mentioned above. After all, to defeat evil, we must first call it by its name, and these reports have done just that.

The purpose of this study is to present the results of three European and one US report. On the one hand, this study fills a gap in that we often mention these “country reports” in professional and Church circles, but as far as I know, no summary analysis of them has been published in such depth.

At the same time, I also consider it important that the knowledge of these reports can help the reader gain a correct, factual knowledge of Church abuses. It is clear from the reports that it is not true that this is a problem “invented by liberals,” just as it is not true that “all priests are pedophiles.” Let me note in parentheses that sexual abuse is a problem across modern and postmodern societies, and although the involvement of the Church is indisputable, reforming the Church is not enough to eliminate the phenomenon. The majority of abuses take place in the secular world (according to the European Commission, in 2020, 1 in 5 children is sexually abused in the EU[10], and the number of abuses has increased by 70% since 2010), so it would be very necessary for the leadership of each country and the international organizations with the appropriate powers (UN, EU, etc.)

[10] European Commission, 2020. p. 1.

to take a similar approach to confrontation to that done in the Catholic Church.

In the following, I examine four documents: American, Irish, German, and French reports. I am aware that many other reports have been published, including in Australia, Chile or Poland. The examination of these may be the subject of a subsequent analysis, in which I focus exclusively on the reports indicated above.

The primary sources I used from the reports was the executive summaries. However, I also highlighted some important findings from the detailed chapters. I did not search thoroughly for other analytical sources, although I used a few. My main intention is to present factual material in the reports in a form that can be compared to each other as much as possible. Therefore, the following chapters are based on the main four sources, that is, the reports themselves, with some exceptions.

2. USA—the John Jay report

This report was conducted by the John Jay Institute of Criminal Justice, part of the City University of New York. This highly prestigious institute published the results of a 291-page study that analyzed the sexual abuse of minors by clergy (priests and deacons) in the USA. This study was based on answering questions posed by the USCCB. The research was commissioned by the Bishops' Conference in June 2002. Data collection began in March 2003, and the report was handed over to the client in June 2004.[11]

2.1. The questions—areas of research

The USCCB asked the research organization to investigate a one-and-a-half-page set of questions, divided into four categories. (1) Examining the number and nature of sexual abuse accusations faced by the Catholic Church in the USA between 1950 and 2002. (2) Collecting information about the alleged perpetrators: church status, age, number of victims, and the response of the Church and secular authorities to the accusations made in relation to them, among other things. (3) Collecting information about alleged victims: the nature of their relationship with the perpetrator, the nature of the abuse, and the distribution of allegations over time and (4) Collecting information on the financial consequences of the abuses for the Church.

[11] John Jay College, 2004, p. 3.

2.2. Research team and methodology

The researchers had three fields of expertise: forensic psychology, criminology, and behavioral science.[12]

The methodology was based on questionnaires, which were formulated separately for the heads of dioceses, religious orders, and other Catholic organizations. Although there was resistance at the beginning, in the end, a very high number of those who were contacted answered the questionnaires: 97% of the dioceses (this is an exceptionally good rate for a questionnaire survey; moreover, the quality of the answers was also very high according to the evaluators), and 60% of the orders, which represented 80% of the religious persons.[13] The questionnaires were diverse and included questions about the clergy, the victims, the committed acts, and the diocese/religious order.

Owing to the sensitivity of the topic, the questionnaires were first sent to the consulting firm Ernst & Young, who stripped them of any personally identifiable information so that the researchers only received clean data.[14]

The questionnaire covered three areas based on these questions. Each diocese or religious order was required to complete three questionnaires. The first concerned the institution itself, the second concerned the priests accused of sexual abuse, and the third concerned the incidents themselves. A joint examination of the three types of questionnaire provided a comprehensive picture of the individual institutions and revealed the depth of the problem.[15]

The first questionnaire was the “Diocese Profile,” consisting of 10 questions. Of these, five dealt with the demographics of the given institution and the other five with problematic cases. Respondents were also asked, among other questions, how many accusations were made, how many were found to be unfounded, and how many were withdrawn.

The “Clerical Questionnaire” consisted of 17 questions and 18 follow-up questions and focused on individual priests who had been implicated in established or alleged cases of sexual harassment of minors at any time during the examined period. The questions revolved around the priest’s life

[12] John Jay College, 2004.
[13] John Jay College, 2004.
[14] Ibid.
[15] John Jay College, 2004, p. 13.

history, where he attended seminary, whether he was transferred during his training, whether he had substance abuse problems, whether he had been sexually abused himself, and so on. Some questions also investigated what happened after the report of abuse: was the priest disciplined or transferred, reported to the authorities, banned from working with youth, sent to therapy, etc.

Finally, the "Victim Questionnaire" was about survivors of sexual abuse. This meant that if five reports were made against a certain priest, five questionnaires had to be completed, one for each victim. This questionnaire had two parts. The first part included questions about the victim themself: gender, age at the time of the incident, and age at the time of the report. They were also asked about the nature of the incident and the behavior of the Church, and the secular authorities after the report. In the second part, an attempt was made to reveal the financial circumstances of the incident: how much did the therapeutic treatment cost (for both the victim and the perpetrator), how much compensation had to be paid, what were the legal costs, and so on.[16]

The questionnaires were cleaned of all personal data and evaluated by the research team. The previously mentioned very high percentage of responses (97% in dioceses and 80% in religious orders) was mainly due to the fact that the President of the Bishops' Conference sent a letter to all institutions asking for smooth and transparent cooperation with the independent research organization, and the overwhelming majority of the institutions complied with this.

2.3. Prevalence of sexual abuse of minors among priests and deacons

2.3.1. Overall prevalence of sexual abuse of minors in the United States

First, the John Jay Report attempts to provide statistical data on incidents in wider society to convey the depth of the Church's problems. Several studies have been conducted and the results have been noted to vary slightly; however, the following data have been reported.

27% of women and 16% of men said they had experienced childhood sexual abuse during the study period (1992–2000). In the investigated cases, 42% of men and 33% of women had never spoken about the abuse they had suffered. 12.8% of women and 4.3% of men had reported sexual abuse as a

[16] John Jay College, 2004, p. 15.

child to police. 15.3% of women and 5.9% of men had experienced some form of sexual violence. Only 5.7% of the cases had been reported to the police, and no one had been informed about 26% of the incidents before the investigation began.

In summary, girls are abused much more than boys, and girls are more likely to report what happened to them than boys. However, the number of cases reported to the police is very low for both sexes, as stated above.[17]

2.3.2. Sexual abuse by priests, deacons, and religious personnel

A) Statistics of occurrences

According to the data, 4,392 priests were accused of sexual abuse during the investigation period. It was difficult to calculate the percentage of active priests accused, because there were no exact figures available for the number of active priests who served between 1950 and 2002. Several sources were used to estimate the total number of priests.

Dioceses and religious orders were asked to provide data on the number of priests they had employed during the period under review. According to the results, 109,694 people were employed, which means that 4.0% of the total employees were abusers.

The other data were obtained from a Church database, the Center for Applied Research in the Apostolate (CARA) database, in which 94,607 priests were counted between 1960 and 2002; during this period, the number of offenders was 4,127, for a rate of 4.3%.

When the diocesan and religious order data were examined separately, the results showed that 4.3% of diocesan priests were accused of sexual abuse while 2.5% of religious order personnel were accused of sexual abuse. Based on the CARA database, these rates are 5% and 2.7%, respectively.

Regarding the reports, the research could not find out what percentage of incidents were reported. It is interesting, however, that while less than 13% of survivors reported the incidents within a year of their occurrence, more than 25% of those who did so more than 30 years after the abuse (see more later).

The number of victims who reported sexual abuse committed by a priest or religious member of the Church during the examination period was

[17] John Jay College, 2004, p. 25.

10,667; that is, each abusive priest abused two to three children on average.[18]

As for the geographical distribution of cases, there was no significant difference in terms of offender rates; the lowest rate by region was 3%, the highest was 6%.

B) Time distribution of cases

According to previous research examining repeated cases of abuse in the 1970s, it perpetrators were reported in 1970; however, most incidents were recorded in 1980.[19]

Cases of abuse often last for several years. More than 38% of the cases went on for less than a year, 21.8% lasted more than a year but less than two years, 28% lasted 2–4 years, and 10.9% lasted 5–9 years.

At the time of the reports, one-third of the cases were reported before 1993 and another third between 1993 and 2002, while within just one year the last one-third of the reports had been made, in 2002–2003.[20]

C) The costs

By 2004, the Church had spent more than $500 million on victim compensation, therapy for victims and perpetrators, and legal fees, according to the report.

D) Profile of offending priests

The majority of offending priests, 68%, were ordained between 1950 and 1979. The proportion of those who were ordained before 1950 was 21.3%, the remainder, 10.7%, were ordained as priests after 1979.

Of 37% of the perpetrators participated in therapy programs, most were enrolled in treatment specifically for perpetrators of sexual violence, and some were sent for individual therapy. Priests with several victims were more likely to enter such programs than those with few or only one victim. Interestingly, the severity of the act of violence did not correlate with whether they received treatment; those who forced children have vaginal, anal, or oral sex did not receive treatment in a higher proportion than those who were touched them through their clothing.[21]

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[18] John Jay College, 2004, p. 4.
[19] John Jay College, 2004, p. 5.
[20] John Jay College, 2004, p. 5.
[21] John Jay College, 2004, p. 6.

Offender behaviors were classified into more than 20 categories. The most common were indecent touching through clothing (53%), reaching under clothing (45%), oral sex performed by the priest (26%), undressing the victim (26%), and sex in which the priest penetrated the victim (22%). Most perpetrators abused their victims in several categories, and it can be said that the number of those who stopped at the mildest category was very small (on a similar note, the proportion of those who “only” verbally committed sexual abuse or showed pornographic content to their victim was 1.5%).

In most cases (41%), the scene of the crimes was the rectory; 16% of the cases took place in the church and 12% in the victim’s home. Approximately 10% of the cases took place in a school or in a car.

The majority of the offending priests had behavioral problems, according to the witnesses; the most common were personality disorders. Offenders’ agez increased on average over time: while in the 1950s through 1970s, the offenders were typically in their thirties (the average age was 37–38 years in these decades), between 1980 and 1990, the average age of perpetrators was 42 years, and from the 1990s onward, 48 years.[22]

56% of offenders were reported for a single victim, 27% for 2–3 victims, 14% for 4–9 victims, and 3.5% had abused more than 10 victims.[23]

E) Notifications and other activities following the cases

During the report, the police made contact with a quarter of the perpetrators.The number of those who were finally prosecuted was 384, nearly 10% of all perpetrators. Those who were finally convicted were 252, of whom 100 went to prison, which is 2% of all the perpetrators.

Half of reports were made by the victims themself, one-quarter by the victim’s lawyer, and the remainder by family members (mostly the parents). In half of the cases, the report was made to the diocese/religious order, and in a quarter to the authorities. In the latter reports, the archived files show that in just under half of the cases, at least one attempt was made to investigate – the visited institute made at least one response. unfortunately, however, no response was made to slightly more than half of the victims (50.3%).[24]

[22] John Jay College, 2004, p. 44.
[23] John Jay College, 2004, p. 51.
[24] John Jay College, 2004, p. 93.

Police made contact with a quarter of the perpetrators; the number of those who were finally prosecuted was 384, and those who were finally convicted numbered 252, of whom 100 went to prison, which is approximately 2% of all accused priests.[25]

Many reports were made quite late compared to the abuse (this is quite common across abuse cases in general). According to the report, victims reported less than a quarter of the cases within 10 years of the incident; half of the reports were made after 10–30 years and another quarter more than 30 years after the incident.[26]

F) Typology of victims

The study showed that 81% of the more than 10,000 victims were male, while only 19% were female; in terms of their age, they could mostly be categorized as prepubescent or pubescent: most victims were boys aged 11–17 years, the average age was 12.6 years, and showed an increasing trend over the decades (John Jay College, 2004, p. 70).

G) Causes of sexual abuse in perpetrators

In a detailed appendix, the document also provides an analysis of why individuals may develop a morbid attraction to children and why they may act on it criminally. Several theories are listed: biological, psychodynamic, behavioral, attachment, cognitive-behavioral, integrated, and special theories related to priest offenders. Of these, the last two are the most interesting.

Integrative theory admits some aspects of all other theories may be true of a given perpetrator, in ways that may vary among perpetrators.[27] According to this theory, four main characteristics lead to sex crime.

The first is so-called emotional congruence, which means that a person is emotionally damaged, suffers from an infantile or minority complex, and is therefore able to establish relationships with children more easily than with adults.

The second is the awakening of the offender's sexual desires for the child. Finkelhor sees the reason for this primarily in socialization, which can also be his own experience: the perpetrator himself was a victim of sexual abuse in his childhood, and the experience drove him towards children.

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[25] John Jay College, 2004, p. 7.

[26] John Jay College, 2004, p. 94.

[27] Finkelhor, 1984, cited in John Jay College, 2004, p. 168.

The third aspect is explained by blockade theory: In essence, something blocks emotional and sexual contact with adults. This can be traced back to childhood and youth trauma, and the lack of development of socialization skills.

The fourth factor is a lack of restraint, enabling the offender to cross the line of child molestation. According to Finkelhor, three predisposing factors play roles in this process: cognitive disorders, drug use, and stress.

Regarding priest offenders, the opinion of researchers is that there is no clear and unambiguous answer as to why some priests molest children. However, there is agreement that childhood trauma is important in many cases, as well as childhood abuse of the priest perpetrator. It is conceivable that emotionally burdened clergy who are impaired in their psychosexual development, restricted by celibacy, and have a deep sense of shame, as well as possible minority complex arising from inability to meet the Church’s moral expectations, may become abusers.[28]

3. Ireland: The Ryan Report

Norbertine monk Brendan Smyth’s child abuse case caused great uproar in 1995 and initiated a child abuse scandal in Ireland to such a degree that it resulted in a paradigm shift in societal and Church perception of child abuse. The case shook Ireland so deeply that the Attorney General and the Prime Minister were forced to resign. The problems that emerged as a result of the incident primarily affected schools, particularly boarding schools.[29] Smyth was sentenced to 12 years in prison for 74 counts of sexual abuse of 20 students over 36 years.

In 2000, the Prime Minister, Bertie Ahernfounded the Commission to Inquire into Child Abuse (hereinafter, CICA), or the Ryan Commission (formerly the Laffoy Commission; it was run by Mary Laffoy and then Sean Ryan, “which then published its 2,600-page assessment report (Ryan Report) after nine years of work,” in 2009.[30]

The report investigates religious, state-funded institutions in Ireland that deal with minors, mainly industrial schools, orphanages, and correctional institutions; the range of abuse investigated (not only sexual but also physical and other abuses, including neglect) is significantly different

[28] John Jay College, 2004, p. 170.
[29] Németh, 2019, pp. 5–6.
[30] Ibid.

from that of other countries. The root cause of the Irish problem, the report finds, was the various abuses committed in poorly functioning residential institutions combined with the Church's failure to properly investigate and deal with the ever-expanding scandal in its bosom.[31]

3.1. Typology of abuses, chapters of the research

The Commission defined as abuse: (1) physical abuse and the lack of its prevention (listed first); (2) use of a child as a sexual object for one's own or a third party's pleasure; (3) neglect that leads to an abnormality in the child's physical or mental development or seriously damages the child's well-being or behavioral skills; and (4) any other act or omission that has or could have similar negative effects on children, such as emotional abuse.[32]

The research is divided into five chapters and has a completely different system from any other independent country report, with the first and second chapters following a summary report style discussing the abuses that occurred in the examined institutions individually, in an institution-by-institution overview. Chapter 3 is most similar to the other reports; the authors summarize more than 1,000 testimonies, focusing on the place and form of abuse, typology of the victims, and so on. In chapter 4, the responsibility of the Ministry of Education and the relevant features of institutional financing, which also falls under the Ministry's responsibility, are examined, as well as the relationship between schools and society and the characteristics of the operation of residential schools in relation to child welfare. Specific conclusions and proposals are formulated for these topics. Chapter 5 consists of expert reports along with description of the composition of the Commission and the legal background.

In the following, we will describe the most important details of the summary report, focusing on the first three chapters and the conclusions formulated in the 4th chapter; however, we will first describe the task, composition, and research methodology of the Committee.

3.2. The Commission's task, composition and research methodology

The task of the Commission was to investigate child abuse cases in institutions maintained by religious orders, mostly state-funded, in light of the following themes.[33] Whether abuse occurred in the given institution.

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[31] Keenan, 2017, pp. 257–270.
[32] CICA, 2009, pp. 6–7.
[33] Keenan, 2017, p. 264.

What kind of abuse occurred and how many people (abusers and victims) were affected. The role and responsibility of the Church, the state, and various supporting organizations and suggestions in response to the above.[34]

The Commission examined schools run by 18 religious orders.More than 100 people participated in the committee; the president was surrounded by a 7-member council of commissioners, numerous lawyers, legal advocates, and a large number of administrators. In addition, two subcommittees were established: one was called the Investigative Committee and the other the Trust Committee.

The duties of the Trust Committee were as follows. To provide an opportunity for those who were abused in institutions as children but who did not wish to report to the Investigative Committee but instead requested that their reports and experiences be treated confidentially. To collect evidence of abuse. To make general proposals regarding what detailed recommendations the Commission would make and to compile relevant reports.[35]

The Commission of Inquiry’s activities were as follows. It heard witnesses who wanted to have their allegations of abuse investigated. Consequently, the commission heard witnesses — private individuals, members of religious orders, and others — at both public and (mostly) private hearings. The Commission had the right to oblige parties to participate in hearings and present the documents required by the Commission. All parties were entitled to legal representation. The task of the committee was to investigate abuses that occurred in the institutions during the relevant period and to determine their nature, causes, circumstances, and extent, as well as how the management, administration, supervision, and regulatory functions of the institutions were carried out in relation to abuses by the relevant persons. It reported its findings to the Upper Committee in writing.[36]

The hearings took place in person, alone, or with a companion brought by the victim, who was bound by confidentiality in the same way as the members of the Committee themselves. From the hearings, the Committee collected three types of evidence. (1) Audio recordings of testimonies. (2) Following the testimonies, answers to the questions asked by the members

[34] CICA, 2009, vol. 1, ch. 1.
[35] CICA, 2009, vol. 3, p. 4.
[36] CICA, 2009.

of the Board of Commissioners. (3) Documents, statements, letters and photographs.

The report is a summary compiled from the testimonies after they were collected and organized.

3.3. Statistics and nature of occurrences

3.3.1. Prevalence of sexual abuse of young people in Ireland

The data below are not from the Ryan Report. Because social data were included in both the American and French studies, I thought it would be good to display similar data from Ireland (and Germany; see below) from sources other than the reports:

"One in five women, or 20.4%, reported experiencing contact sexual abuse in childhood, while a further 7.6% of all women stated they had experienced attempted or actual penetrative sex in childhood, that is, rape or attempted rape… one in six men, or 16.2%, reported experiencing contact sexual abuse in childhood, of whom approximately one quarter reported experiencing attempted or actual penetrative sex in childhood. Overall, almost one third of women and one quarter of men reported some level of sexual abuse in childhood, that is, contact and non-contact sexual abuse.".[37]

3.3.2. Sexual abuse by priests and religious personnel

The Trust Committee listened to the testimonies of 1,090 victims from 1914 to 2000. Most of the cases occurred between 1930 and 1990. The cases affected 216 institutions.[38]

The Examination Committee notes I and II. related to the individual institutions. These cases occurred between 1936 and 2009. The Commission investigated only institutions with 20 or more complainants.

According to the Ryan Report, 170,000 children attended the institutions investigated during the period under review; Ryan later called

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[37]Departmental Investigations. Available at: https://www.oireachtas.ie/en/debates/debate/dail/2012-10-25/11/?highlight%5B0%5D=animal&highlight%5B1%5D=animal&highlight%5B2%5D=welfare#s15 (Accessed: 24 June 2022).

[38] CICA, 2009, p. 12.

this figure incorrect, and it was corrected to 42,000.[39] The number of victims exceeded 2,000, which is almost 5% of students. A total of 800 priests and religious personnel committed crimes.[40]

More than 90% of victims reported physical abuse, and more than half (mostly boys) reported sexual abuse.[41] Emotional abuse and neglect were also present, the latter caused by insufficient government funding. According to the report's testimony, the schools applied oppressive strictness not only to the children but also to the adults working there. The Ministry of Education exercised its control rights either negligently or not at all.[42]

3.4. Case management and Church and state responses to abuse

According to the report, the supervisors, although most of them knew about the cases, considered "avoiding scandal" more important than protecting the children, and refused to do anything about the perpetrators.[43] The Ministry of Education colluded with religious leaders[44] when they learned of the incidents.

Based on the above, the reporters formulated the conclusion that Church leaders, although they knew about the crimes committed, did nothing; at most, they placed the abusers in other institutions, where they found more victims. The cases were investigated in isolation and secretly, and no systemic conclusions were drawn; consequently, no attempt was made to reform the system. Cases where older boys sexually abused younger boys were ignored, and if there was a consequence, the victims were punished with the same severity as the perpetrators, with the direct consequence of remaining silent .[45]

3.5. The financial consequences of the cases

After the publication of the Ryan Report, the government and religious orders began negotiations on responsibility, as there were many serious claims for compensation. In 2002, an agreement was reached for 128

[39] McGarry, 2019.
[40] Keenan, 2017, p. 11; CICA, 2009, Executive Summary, p. 12; Méténier, 2020.
[41] CICA, 2009, vol. 3, ch. 19, p. 2.
[42] CICA, 2009, vol. 3, ch. 19, p. 21.
[43] CICA, 2009, vol. 3, ch. 19, p. 21.
[44] CICA, 2009, vol. 3, ch. 19, p. 23.
[45] Keenan, 2017, p. 266.

million euros paid by the orders, then in 2010, religious orders paid a voluntary donation of another 338.5 million euros. According to estimates, the final cost of reparations for sexual abuse committed in residential institutions was more than 1.3 billion euros, and the Irish government is demanding more contributions from religious orders, which bear some responsibility.[46]

3.6. The social profile of the victims

75% of the 1,090 testimonies from the Trust Committee were from children living in two-parent households; the remaining 25% either lived with a single mother or did not know anything about their biological parents. Most families were extended families, with grandparents and an average of six children. In the vast majority of cases, testimonies reported simple, uneducated parents. In all, 77% of the victims were over 50 years old and less than 3% were under 30 years old at time of reporting. The majority of the victims had stayed in a residential institution between the ages of 5 and 15, for an average length of stay of 9 years.[47]

3.7. Typology of abuses

One of the peculiarities of the Ryan Report is that it considered not only sexual abuse but also other forms of abuse: physical, sexual, and emotional abuse, as well as neglect.

3.7.1. Physical abuse

Physical abuse occurred in all institutions in all decades examined and in almost all victims. The witnesses described this as a reality that was constantly present in their boarding school life and that completely permeated their everyday lives. They reported regular beatings, and unfortunately, not a small number of cases where they were injured or even lived in fear of death due to the frequency and severity of abuse. They also suffered especially brutal punishments, such as beatings with whips until they started to bleed, kicking, burning, or having their heads pressed underwater. These brutal acts often took place in public and front of other

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[46] Keenan, 2017, p. 270.

[47] CICA, 2009, vol. 3, ch. 19, p. 23.

students, staff, and teachers. Victorians also reported serious injuries, bleeding wounds, or broken bones.[48]

3.7.2. Sexual abuse

On average, 50% of the men and women who testified were affected by sexual abuse (boys in a much larger number), including rape, various forms of molestation, and voyeurism. As in cases of physical abuse, there were one-off cases as well as long-lasting, often repeated abuse. Unfortunately, the secrecy surrounding these crimes helped keep a large number of cases hidden. If the victim spoke up, in most cases, they were punished by the people whose job was to protect, develop, and educate them—not only priests and religious personnel, but also foster parents, secular employees, visitors, and other people who would be left alone with the children without supervision. In the case of female victims, both the perpetrator and those for whom complaints were made often blamed the female victims themselves for what happened.[49]

3.7.3. Neglect

This was perhaps the most common type of abuse suffered. Little food, lack of heating, bad clothes, and lack of personal care from those whose job was to love, develop, raise, and help the children were ubiquitous. Victims reported that they did not care about their safety, education, or development, and that their experiences had serious consequences in their later lives, as their physical and mental health often suffered damage, they were unable to find jobs, and they had low social and economic status. Neglect was also present at the levels of individual educators and institutions. In many cases, injuries and illnesses were not treated, which, in some cases, had lifelong consequences.[50]

3.7.4. Emotional abuse

[48] CICA, 2009, vol. 3, ch. 19, p. 13.
[49] CICA, 2009, vol. 3, ch. 19.
[50] Ibid.

In this round, victims mentioned a lack of attachment and poor emotional connections. Humiliation, constant criticism, prohibition of family contact, trampling on honor, threats, and intimidation were the most common methods. Most patients had to be separated from their parents and siblings. In some cases, they were told that their parents were dead or told other lies about their family. More than once, they had to watch their peers being abused, which caused serious emotional trauma. Almost without exception, the victims reported that, as a result of emotional abuse, they had to deal with serious health, psychological, and integration problems in their adult lives.[51]

3.8. Recommendations

In the last chapter of the report (Part 4), the Commission formulated 20 proposals.

First, a monument was to be erected in recognition of victims' suffering and as a sign of apology. To date, this has not been done; although the plans were accepted in 2013, authorization was ultimately not granted.[52]

The first group of proposals included initiatives aimed at alleviating victims'suffering and the negative effects of abuse. In the second group, experts gave preventive suggestions and initiatives related to the protection of children.

4. Germany - the MHG study

The so-called Mannheim, Heidelberg, and Gießen (MHG) study was completed by a research consortium from these three scientific institutes the Central Institute of Mental Health (Mannheim), the Institute of Criminology and the Institute of Gerontology of the University of Heidelberg; and the professor responsible for Criminology, Juvenile Law and Prison Research at the University of Gießen.[53]

The report was entitled "Sexual harassment of minors by Catholic priests, deacons and male religious in the area of the German Bishops' Conference"[54], and examined cases of harassment committed by priests, deacons, and members of religious orders operating in the area of the

[51] Ibid.
[52] Casey, 2021.
[53] MHG, 2018a.
[54] MHG, 2018a.

German Bishops' Conference (exercising authority over all of Germany). It was presented on September 5, 2018, at the autumn plenary assembly of the German Bishops' Conference in nearby Fulda.[55]

4.1. The questions—areas of research

The project provided detailed information on the following topics. Frequency of sexual abuse committed by priests and deacons under the jurisdiction of the German Bishops' Conference and religious personnel under the responsibility of the Conference in a contractual relationship with the Conference (i.e., "with a stipendium" by the Conference). Forms of sexual abuse committed and structural and operational characteristics of the Church that facilitated the occurrence of abuses.[56]

4.2. Research team and methodology

The research team consisted of two main groups. First was the so-called research consortium to which all participating institutes delegated researchers. Second was a group of their scientific colleagues.

To initiate the investigation, a contract was signed with all 27 dioceses in Germany. Thus, bishops fully participated in the research.

The research was divided into seven subprojects, each of which examined the issue of sexual abuse from a different aspect. Their methodology was also designed according to the specifics of the topics (see next page), so each subproject used a different methodology.

The investigation covered the period from 1946 to 2014, although there were also perpetrators (a small number) who had committed abuse earlier. These abuses were included in the report if the perpetrator was still alive in 1946 but had committed the act before 1946.

The researchers did not have direct access to the diocese archives. They were always handled by relevant diocesan employees or a commissioned legal firm, and the data and cases were forwarded to the research consortium in anonymized form, using a pre-specified form prepared by the consortium.

The seven sub-projects produced extensive and detailed research results. The diversity and thoroughness of the independent use of existing information sources and the use of research methodologies combining criminological, psychological, sociological, and forensic psychiatry

[55] MHG, 2018b.
[56] MHG, 2018a, p. 1.

knowledge is of such depth that, according to the researchers, it has never been seen in national or international research.[57]

Although the methodological differences made it difficult to standardize the data, and the time needed to evaluate the data was rather extended, the experts who performed the analysis were of the opinion that an institution as complex as the Catholic Church could achieve the goals of its research as efficiently as possible with this type of methodology. in this topic.[58]

The sub-projects were. (1) Analysis of diocesan data. (2) Interviews with victims, accused and unaccused clerics. (3) Analysis of criminal archives. (4) Concepts regarding prevention and their various aspects. (5) Research and analysis of relevant literature. (6) Analysis of the personnel files of the dioceses. (7) Completion of an online, anonymous questionnaire by the persons concerned.[59]

4.3. Prevalence of sexual abuse of minors

4.3.1. General prevalence of sexual abuse of minors in Germany

According to data from the German Federal Criminal Police, the number of reported sexual crimes committed against children under the age of 14 increased significantly by in year 2021 compared to the previous year 2020. While 16,900 children were sexually abused in 2020, 17,704 were abused in 2021, including 2,281 children under the age of six. The report also pointed out that the number of reported cases in which there are images or video content containing child abuse that can be found online has doubled over the course of a year; in 2020, there were 18,700 such cases, which will increased39,171 in 2021.[60]

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[57] MHG 2018b, p. 3.
[58] MHG 2018b, p. 3.
[59] MHG 2018b, p. 4.
[60] *Germany records rise in child sexual abuse in 2021.* DW. Available at: https://www.dw.com/en/germany-records-rise-in-child-sexual-abuse-in-2021/a-61974823 (Accessed: 27 June 2022).

In the case of adult men and women, 9% of men and 19% of women have been sexually abused as children in Germany—every seventh adult, according to data from the World Health Organization.[61]

According to investigations launched in 2020, the number of sex offenders is in the tens of thousands: in 2019, in the city of Bergisch, near Cologne, a huge manhunt was launched due to materials containing child pornography found in the home of a sex offender discovered as a result of a routine investigation (followed by a massive police action with the involvement of more than 300 police officers); thus ultimately revealed a network of 30,000 potential child abusers.

4.3.2. Sexual abuse by priests, deacons, and religious personnel

A) Statistics of occurrences
As part of subproject no. 6, more than 38,000 personal documents and other reference data were examined between 1946 and 2017.

B) Number of offenders
The number of clerics accused of sexually abusing minors in this period was 1,670, or 4.4% of clerics who served during the examined period.[62] In all, 5.1% of the diocesan clergy (1429 accused persons) and 2.1% of religious personnel (159 accused persons) were offenders.

C) Number of victims
The report noted that the methodology processed the data using a conservative approach; therefore, the absolute numbers and proportions could conceivably be higher.[63]
The 1,670 perpetrators sexually abused 3,677 minors. This implies an average of 2.5 cases per offender. As for cases in which criminal proceedings were initiated against the perpetrator, this ratio was much higher, with almost four children (3.9) per perpetrator. In 54% of the cases, the abuser had one victim, 42.3% abused more than one victim, while for

[61] *Figures on Child Sexual Abuse in Germany.* Independent Commissioner for Child Sexual Abuse Issues. Available at: https://beauftragte-missbrauch.de/en/themen/definition/figures-on-child-sexual-abuse-in-germany (Accessed: 27 June 2022).
[62] MHG, 2018b, p. 4.
[63] *Figures on Child Sexual Abuse in Germany.* Independent Commissioner for Child Sexual Abuse Issues. Available at: https://beauftragte-missbrauch.de/en/themen/definition/figures-on-child-sexual-abuse-in-germany (Accessed: 27 June 2022).

the remaining 3.7%, there were no data. Those who abused multiple people abused an average of 4.7 victims. The most depraved sexual predator found during the investigation was responsible for the abuse of 44 children.

D) Locations of the crimes

Nearly 50% of the cases took place during private meetings between the perpetrator and the victim, mostly in the parish (where the priest lived). Most of the other cases took place at school or during an organized holiday camp.

E) Time distribution of cases

The distribution of cases from the 1950s to the 2000s (counting multiple cases of abuse of the same victim by the same perpetrator over time from when the first case occurred) was relatively even: the plurality of cases, 17.4%, occurred in the 1990s, and the smallest group, 12.1%, in the 1980s; in the other mentioned decades, the rate of occurrence ranged from 13.3% to 15%. Rates were much lower in the 1940s (8.1%) and in the 2010s (1.9%).[64]

F) The costs

The dioceses created a procedure called "Compensation provided following recognition of the harm suffered by victims of sexual harassment" for the injured parties, within the framework of which compensation could be requested following a defined system. In some dioceses, applications were approved almost automatically, whereas there were also dioceses which as few as 7% of applications were given a positive response. As of 2014, nearly 5 million euros have been paid within the framework of this procedure.[65]

Twenty dioceses reported payments in addition to those made in the framework of the above procedure. In most cases, this was related to legal or expert opinions, as well as the costs of psychotherapy; the total amount was nearly 1 million euros. The criteria for the approval or evaluation of these procedures remain unclear.[66]

G) Profile of offenders

[64] MHG, 2018a, p. 129.
[65] MHG, 2018b, p. 8.
[66] MHG, 2018a, p. 43.

Three subprojects also include analyses of the common features of perpetrators, based on which a triple typology[67] is established.

The first type of offender is one who has committed sexual abuse against several victims under the age of 13; in some cases, the abuse lasted for a period longer than six months, and he often abused his first victim shortly after ordination. This offender is called the "fixed type" in the report.[68] This term implies that this type of offender has a pedophilic tendency. Often, this type of person chooses the profession of a priest (or even coach) precisely because it creates an environment in which he has easy access to potential victims.

The second type comprises narcissistic–sociopathic offenders. This type tends to abuse their power not only to gain access to sexual pleasure but also to force any other situation to their advantage.

The researchers labeled the third type "regressive-immature." They mainly discuss the stagnation of sexual development in this group and note that while there are heterosexual and homosexual people among them, this type of offender is much more homosexual in orientation in the Catholic Church than in other areas of society. For these people, their first abuse occurred long after ordination. These offenders usually suffer from isolation and feel that they have not received sufficient support from the Church.[69]

The age of the offenders was between 30 and 50 years at the time of the first offense, while the date of the first abuse was on average 14.3 years after ordination[70], which shows that most offenders belonged to the third (or to a lesser extent, the second) type.

E) Reaction of the Church following the announcements

E1) Sanctions against accused clerics

Canon law proceedings were documented for 33.9% of the defendants, while for 53% this did not happen. Only a quarter of canon law proceedings ended with sanctions, most of which were mild. As for criminal proceedings, criminal charges were filed in 37.7% of the cases, while in the remaining more than 60%, no charges were filed during the period under review.

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[67] MHG, 2018b, p. 10.
[68] MHG, 2018b, p. 10.
[69] Ibid.
[70] MHG, 2018b, p. 5.

Reports to the Church were mainly submitted by family members of the victims (27.5%), whereas criminal reports were mostly filed by the Church (20%). It is interesting to find that 10.7% of accused priests self-reported, while in the control group (lay people) there was not a single offender who self-reported.[71]

E2) The relocations

Both absolute numbers and ratios show that clerics who committed sexual abuse were transferred significantly more often than those who did not. Overall, 86.8% of diocesan priests were transferred at least once during their careers, compared to 91.8% of offenders. The latter moved to another parish an average of 4.4 times during their priestly service, whereas priests who did not commit sexual abuse had to move only 3.6 times. There were similar rates for movement between dioceses and transfers abroad, and all of this shows that transfer was regularly used to "remedy" abuses.[72]

F) Typology of victims

F1) Distribution of victims by gender

As in other reports, male victims were the majority (in contrast to other segments of society, in which girls fall victim to significantly more abuse than boys do). Here, the boy–girl ratio is 2:1.[73]

F2) Type and severity of offences

More than 80% of the victims reported abuse involving physical contact, which ranged from biting to penetrative rape. The rate of the latter (oral, anal, vaginal violence) was 15.8%–18% of all cases.[74]

F3) Age of victims

The abused children were on average 10.6 (as measured by subproject 2, which included the confessions of the perpetrators) and 12 years old (as measured by subprojects 6 and 3, which included diocesan and police documentation). The proportion of those who were abused for the first time

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[71] MHG, 2018b, p. 7.
[72] Ibid.
[73] MHG, 2018b, p. 4.
[74] MHG, 2018b, p. 6.

before the age of 13 was 51.6%. Overall, 25.8% of the victims were 14 years of age or older, and 22.6% were of unknown age.[75]

G) Sexual orientation of the perpetrators; psycho-social predisposing factors
G1) Pedophilia
According to the research (three sub-projects also dealt with this issue), approximately 28% of the perpetrators were attracted to boys under the age of 13, so it can be assumed that they have pedophile tendencies.

G2) Homosexuality
Different sub-projects reported significantly different rates. According to the testimony of the criminal files and diocesan documents, approximately 14%–19% of the perpetrators had homosexual tendencies on average, which is significantly higher than the 6.4% result in the control group, especially if we add that thoseabusing priests interviewed in the second sub-project, 72% declared themselves homosexual.

G3) Psychosocial predisposing factors
Among the perpetrators, the largest proportion that had been abused during childhood was identified in the 2nd subproject interviews: 36% confessed that they were also victims as children. Although ecclesiastical and criminal files contain only a small amount of source material on this, abuse during childhood can be indirectly inferred from behavioral disorders other than sexual violence among the abovementioned proportion: these (isolation, alcohol problems, social behavior disorders, etc.) might also be signs that the person himself was a victim in childhood.

4.4. Recommendations

The report makes use of eleven proposals rooted in victim-centeredness (including financial compensation), transparency, reform of the clerical power structures present in the Church, and the importance of training, among others.[76]

[75] MHG, 2018b, p. 5.
[76] MHG, 2018b, pp. 12–15.

5. France – the CIASE report

Similar to the American and the Irish report, the French report, published on October 5, 2021, was prompted by a prominent abuser. A priest from Lyon, Bernard Preynat, sexually abused at least 80 boys between the ages of 7 and 15 years between 1971 and 1991. The court sentenced the priest to five years in prison in 2020. During his four-day trial, ten of his victims testified against him.[77] The Archbishop of Lyon, who had not reported Preynat's actions to the authorities, was also prosecuted and received six months in the first instance but was acquitted in the second instance on the basis that he had never tried to obstruct the work of justice. One of the victims also testified saying that the cardinal specifically advised him to go to the authorities with the crimes committed against him.[78]

In the wake of the case, and thanks to the activities of the "La parole liberée" (Freedom of speech) organization, it became obvious that abuses and related events (silence and procrastination of Church leaders in relation to the cases) showed a systemic problem.[79] No one could believe anymore that the "French exception" existed - that is, that unlike the American and Irish Churches, there were only isolated cases.[80]

Similar to other countries, in France, in November 2018, the Bishops' Conference and the Conference of Religious Sisters and Brothers established an independent commission (Commission independante sur les abus sexuels dans l'Église; CIASE) to investigate sexual abuse by members of the clergy and religious orders.

5.1. Questions—four areas of research

Similar to the John Jay investigators, CIASE was required to act on four issues. (1) Find out about sexual abuse cases in Church institutions from 1950 to the present day. (2) Check what measures have been taken in relation to these by the relevant Church bodies and superiors, or if no measures have been taken. (3) What steps has the Church taken and is it taking to deal with this "plague". (4) Make any recommendations you deem necessary.[81]

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[77] BBC, 2020a.
[78] BBC, 2020b.
[79] CIASE, 2021, p. 11.
[80] CIASE, 2021, p. 10.
[81] CIASE, 2021, p. 2.

5.2. Research team and methodology

The Bishops' Conference and the Religious Conference did not entrust an organization or a higher education institution, but one individual person, Jean-Marc Sauvé, an economist and former president of the French State Council, with the organization of the research, including the formation of the research team. In all actions during the procedure, he was given a completely free hand.

During the selection of the research team, Sauvé tried to ensure that its composition would serve the achievement of the set goals in all respects, as well as professional excellence, coverage of various relevant disciplines, diversity of worldview and religious beliefs (from different denominations faiths, as well as agnostics and atheists), and gender ratio. The committee comprises experienced professionals in the fields of law (criminal, church, and child protection law), psychiatry and psychoanalysis, medicine and healthcare, education and social work, history and sociology, and theology. Sauvé selected specialists with outstanding knowledge who were recognized for results in their own fields, thus creating the basic conditions for in-depth interdisciplinary work. The committee comprised 12 men and 10 women from different generations, with an average age of 57. In addition, two office employees and three employees responsible for contact with the victims helped with the commission's work.[82]

The team devoted the first three months to methodological foundations—processes, parameters, data collection and analysis—as follows.

They first gathered data from witnesses through an online questionnaire and in-person or online interviews. Over almost a year and a half (June 2019 to October 2020), 6,471 contacts were obtained, and an additional questionnaire gathered another 1,628 samples. In addition, a national-scale public opinion survey was conducted with a list of 28,000 people, between November 2020 and January 2021.

The second research block involved the collection and analysis of existing documentation and data. First, the questionnaires requested by the Bishops' Conference and the Religious Conference were prepared and sent to the individual bishops and provincial superiors of the orders. They requested archival documents (including previously classified documents)

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[82] *Compositon.* CIASE. Available at: https://www.ciase.fr/composition-de-la-commission/ (Accessed: 10 June 2022).

from 31 dioceses and 15 church institutes. All but two of the requested materials were received, so the organization's willingness to cooperate was evident. They gained full access to relevant state (interior ministry, judicial, and police) files. A questionnaire survey was conducted in which clerics and members of various religious orders were asked about a range of topics, including questions about their training and chastity vows. All available testimonies were collected, including those sent to CIASE and those that could be found already in publication or online. Finally, all available statistical and data analyses were taken into account, including those published by the French press.

The third element was a socio-anthropological investigation, which consisted of two parts: one was the analysis of the testimonies received, the final results of which were also recorded in a separate book[83], while the other analyzed media coverage related to the abuse of children in the church from 1950 (but essentially from 1990) to the present day.

The perpetrators were also analyzed in two separate groups: one group conducted interviews with 11 clerics who responded to CIASE's call to be interviewed; the other examined documents containing personality analysis and other psychological or psychiatric reports of the perpetrators in 35 court judgments of conviction for church abuse.

Finally, 20 interviews were conducted with priests and seminarians from all over France and with interviewees of all ages and profiles.

In addition, the researchers also used non-programmed, not previously planned interviews: 73 conversations with various expert groups and individuals, with one or maximum two interviewees at a time; conversations with 174 victims, which took between 2 to 3 hours each, as well as interviews with 67 people at the plenary sessions of CIASE who had expertise in ecclesiastical or secular fields or had requested a plenary hearing as witnesses.[84]

The organization and analysis of thousands of pages of material, establishment of diagnoses, and formulation of proposals were carried out by four working groups. (1) Working group responsible for theological, ecclesiastical, and church government issues. (2) Working group responsible for studying canon law and civil law and making proposals for canon law reform. (3) Working group responsible for the situation of victims, responsibility, and reparations. (4) Working group investigating

[83] CIASE, 2021, Annexe.
[84] CIASE, 2021, pp. 5–6.

church responses (or the lack thereof) and countermeasures taken by the church after 2000, implemented based on the victims' reports.

The researchers divided the results of the research work into 3 large chapters. (1) "Casting light": analysis of data and information collected on the quantity and quality of the abuses committed. (2) "Revealing the shadows": to diagnose the revealed phenomena and (3) "Dispelling the darkness": to find the right ways and ways to process the phenomena of the past, to deal with abuse in the present, and to prevent future events.[85]

5.3. "Casting light": The prevalence of child sexual abuse in France

5.3.1. General prevalence of sexual abuse in France

In a study commissioned by CIASE, 14.5% of women and 6.4% of men had suffered sexual abuse as children in France. Expressed in figures, this means that a total of approx. 5.46 million French residents were sexually abused during childhood, including 3.9 million women and 1.56 million men.[86] In the words of the president of CIASE, "these numbers are depressing, they call into question our entire society".[87]

It is no coincidence that on January 23, 2021, the President of France set up an independent commission, the Commission Independent sur Incest et les Violences Sexual faites aux Enfants (CIIVISE; Independent Committee on Incest and Sexual Violence Against Children), to deal with sexual abuse of children inside and outside the family. Based on the testimony of victims and analysis of other data, this commission must form a position on the extent of the problem and make suggestions to the state leadership for steps related to the treatment and prevention of this traumatic situation.[88] The commission's results show that 160,000 children in France go through the horrors of sexual abuse every year. As in the Church, there is also a serious systemic problem related to the abuse of the state system. According to the research, "doctors are the weakest link," but they add that

[85] CIASE, 2021, pp. 6–7.
[86] CIASE, 2021, pp. 6–7.
[87] CIASE, 2021, p. 10.
[88] Commission Independent sur Incest et les Violences Sexual faites aux Enfants - CIIVISE (Independent Committee on Incest and Sexual Violence Against Children), made its first report by 31 March 2022. https://www.lemonde.fr/societe/article/2021/11/17/la-ciivise-a-deja-recu-6-200-temoignages_6102386_3224.html (Accessed: 22 June 2022).

the entire child protection system needs to be strengthened, since in 4 out of 10 cases reported by victims, nothing happens.[89]

5.3.2. Sexual abuse by priests, deacons, and religious personnel

A) Temporal and geographical distribution of cases

The report divided the examined timeframe into three periods. The period from 1950 to 1970 experienced the most abuse. From 1970 to 1990, cases showed a downward trend, whereas at the beginning of the third period, from 1990 to 2020, they rose again.

Examination of the geographical distribution showed that although in terms of absolute numbers, the regions where religious activity was higher produced a higher number of cases, if we look at the relative numbers examined in light of the number of priests, less religiously active places showed much higher rates. This may be because clerics living in such settlements have received less attention from the leadership.[90]

B) Statistics of occurrences

During the study period, members of the clergy and religious orders sexually abused 216,000 minors. If we add this number, sexual abuse committed by laypeople employed by the church increases to 330,000.[91] Across all social spheres (family, friends, acquaintances, school, etc.), we find that 4% of sexual abuse is committed by priests, deacons, or religious personnel, while another 2% is committed by laypeople employed by the Catholic Church. Thus, the Church was implicated in approximately 6% of all such crimes committed in society during the examined period.

In general, it can be said that the highest number of victims of sexual abuse by Church personnel were boys aged 10–12, while similar acts within the family are more often committed against girls, and in other social spheres (school, sports, camps, etc.) equally against boys and girls.

The researchers concluded that the main reason for this difference was probably that priests interacted with boys in much greater numbers than with girls. This was especially true for the first period examined, when a large number of residential institutions were still maintained for boys in this age group, including those in which the residents studied to become priests

[89] Elzas, 2022.
[90] CIASE, 2021, p. 8.
[91] CIASE, 2021, p. 9.

(minor seminaries). According to psychiatrist Bernard Cordier[92], there may have been a possible “recruitment bias” in the selection of priests:

> the majority of those who are preparing for the priesthood are deeply convinced that the conscious renunciation of women belongs to their vocation. However, it is conceivable that such renunciations are easier for those without heterosexual attractions or who are asexual.

This might in turn mean that men without heterosexual attraction are drawn to a Church career.

Regarding the number and proportion of abusers, according to the report, at least 3,000 clerics and religious personnel committed sexual crimes against minors during the period under review. This is 2.5–2.8% of those on active duty. To calculate the ratios, the numbers of priests and religious personnel serving were obtained from the statistical data of the episcopal and religious conferences, which deemed[93] reliable and “very accurate.” More than 93% of the perpetrators were men; numbers overlap to a degree because one perpetrator often abused several children; there were many victims (more than 30%) who were abused by perpetrators who abused two (10.5%), or even more (19.7%) victims.

C) The costs

Considering the legal and compensation costs incurred in connection with the abuse was not part of the task of CIASE. However, CIASE’s own costs were quantified, totaling €3.8 million, including fees for 26,000 working hours and all costs incurred.[94]

Regarding compensation, the report notes that many did not demand financial compensation; they felt uncomfortable doing so, and some saw compensation as the “price of silence,” which they were not willing to accept. At the same time, many people considered it fair to be paid for their suffering. The committee’s proposal included attention to compensating the victims.[95]

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[92] Cited in CIASE, 2021, p. 105.
[93] CIASE, 2021, p. 158.
[94] CIASE, 2021, p. 5.
[95] CIASE, 2021, p. 299.

D) Profile of offenders

Most of the perpetrators (30%) were employed in parishes, closely followed by clerics engaged in teaching (25%); 15% of the perpetrators were chaplains or leaders of youth movements, while 7.7% were religious, and 22.3% belonged to other categories. The average age of the perpetrators changed significantly over the decades, from 38 in the 1950s to 46 in the 1970s, 48 in the 1990s, and 58 in 2020, at the beginning of the study. This does not mean that the age of the perpetrators when they (first) committed violence increased, but rather that acts committed many years ago are coming to light. Among the priests convicted after 1990, many were convicted relatively quickly after a sexual assault in the 1990s and were found to have been guilty in past cases. This is called the "catch-up effect" in the literature.[96]

E) Typology of victims

Regarding the relationship between victims and perpetrators, the report states that there were almost no cases where the cleric (or monk) and his victim did not know each other (the rate of such situations was 1 in 750). Most of the abusers (47%) met their victims in the world of education; the second largest group was connected to places of spiritual connection (parish, rectory, etc.) (36%), while the members of the third group were those who knew each other as close family members (17%). The crime sites vary: the parish appears most often (39%), while the school accounts for 30% and the home for 15%.

The social profile of victims was relatively uniform. Although all social strata and professional qualifications were represented, the victim most often lived in modest circumstances. The family breadwinner was a worker in 33.7% of cases, another employee in 23%, and casual worker or unemployed in 9.9%, so approximately 2/3 of the families came from a middle-class social environment or below. Victims usually grew up in religious families, where the priest was venerated.

The victim's profile often showed psychological instability caused by emotionally neglectful parental behavior. Most victims were boys between the ages of 10 and 13. The physical superiority and authority given by the age difference itself created an imbalance between the victim and the

[96] CIASE, 2021, p. 90.

aggressor, to which was added the particular status of the cleric—partly as a substitute for the parents.[97]

F) Causes of sexual abuse in perpetrators

The report included a series of interviews with the perpetrators. The researchers contacted all bishops and religious superiors and asked them to connect with all offenders who had either been convicted o or confessed to committing a sex crime. In the end, they found 11 (10 priests and one deacon) perpetrators with whom they could sit down and talk about the crimes committed and their motives.

In the interviews, no perpetrator complained that they received little love or attention in their family; they came from average families, mostly with parents from a working-class background. No family tragedy interfered with their development. It is an interesting and important point that there was no single one among them who said that a transcendent or supernatural motive was the reason for their profession.

Regarding sexual orientation, more than half of the respondents declared themselves homosexual, and some had sexual relationships with adults of the same sex.[98] In relation to sexuality, they said that having sex with women outside of marriage was considered a sin, and some considered any sexual relationship to be a sin.

Several had been sexually abused; others testified—although no violence was mentioned—that there had been "physical closeness" with fellow seminarians and with the teachers in the seminary on more than one occasion. These phenomena are consistent with those reported in several studies. The results of a survey showed that there were strong mechanisms for the reproduction of sexual violence in the Church, especially in minor seminary centers (where underage boys studied and prepared for priesthood). According to another study, 27% of priest abusers were themselves victims of sexual abuse in childhood.[99]

In relation to the crimes committed, perpetrators' attitudes generally fluctuated between minimizing the significance of the cases, denying responsibility, and sincere acknowledgment. However, in most cases, their actions were relativized, and their significance was downplayed.

[97] CIASE, 2021, p. 91.
[98] CIASE, 2021, p. 145.
[99] CIASE, 2021, p. 146.

5.4. "Revealing the shadows": diagnosing the revealed phenomena

For a long time — according to the CIASE report, until 2015 — the Church prioritized the protection of itself as an institution and the avoidance of scandal over the interests of the victims. The problem was systematic. The Church had neither the conceptual basis nor the intention to deal with the cases, not because it accepted or supported the perpetrators and their behavior, but because it did not know how to deal with them.

According to the analyses, distortions of Catholic teaching also contributed to the spread of sexual violence against minors: clericalism, a false interpretation of obedience and respect for the priestly person that cannot be derived from the Gospels, and the overvaluation of the celibacy and sanctity of the priestly profession are among the reasons.[100]

5.5. "Dispelling the darkness": finding the right ways and means to process the actions of the past, to deal with abuses in the present, and to prevent them in the future

CIASE formulated recommendations for the French Catholic Church in the third and final chapter of its report. The recommendations are based on taking responsibility, which the authors assert must be done both individually, as regards individual perpetrators (and those who enable them), and systematically, with reference to the Church as a whole.

Regarding practical implementation, the report recommends that the Church develop specific procedures for dealing with abuse and mitigating damage. It recommends reforming the church organization in such a way that it leaves less room for the abuse of power.

According to the proposals, the most important supporting element is anti–sexual abuse training for all those who can potentially become perpetrators or victims (priests, religious people, deacons, laypeople working with juveniles, and juveniles themselves and their parents). Training is identified as a key element of prevention, and churches are invited to implement it on a wide scale[101], as is continuing education.[102]

The report asserts that the Church must enter the "path of truth and reconciliation" by acknowledging its responsibility, which it has tried to avoid for so long. This is true not only in terms of criminal law, but also in terms of social and civil law. The Church must do everything it can to serve

[100] CIASE, 2021, p. 11.
[101] CIASE, 2021, p. 12.
[102] CIASE, 2021, p. 15.

justice and attempt to address the damage caused financially, regardless of the duration of the incident.[103]

Therefore, CIASE recommends that a compensation system be developed to assess the size and method of the amounts to be paid and other considerations for each individual. It is important that they do not recommend the use of categories or payment frames, but instead think about finding a way of compensation in each case separately, completely independent of each other. The report also recommends that an independent body control this process[104] and that resources be managed by a special committee created for this purpose.

Moreover, the report suggests continuous monitoring of personnel's psychological suitability.[105]

Finally, CIASE state that they are aware of the consequences of the excessively bureaucratic measures (like the obligation to copy emails between priests and minors to parents, or forbidding even an insignificant touch like caressing a child's face, etc.) of the procedures and the exaggeration of transparency. The Church's evangelising mission, based on human relations, can be made impossible, as over-bureaucratized systems suffocate those relations. Therefore, it is necessary to find a healthy balance that ensures the freedom necessary to form and nurture relationships, but at the same time leaves no room for exaggeration or abuse of power.[106]

The Bishops' Conference took these recommendations extremely seriously. At their conference held in Lourdes in November 2021, they developed a completely victim-centered procedural protocol in accordance with the proposals, created a fund to compensate the victims, jointly apologized, and held a prayer of atonement for the crimes committed.[107]

6. Summary

The examined reports are similar in many ways, but there are also significant differences that deserve more serious analysis. Below, I

[103] CIASE, 2021, p. 13.
[104] This committee was also established, in June 2022 (the Instance Nationale Indépendante de Reconnaissance et de Réparation (INIRR)). Chambraud, 2022.
[105] CIASE, 2021, p. 15.
[106] CIASE, 2021, p. 16.
[107] Zengarini, 2021.

summarize the main figures of the data presented above by juxtaposing the situation in each country.

Sexual abuse of minors showed certain differences across countries. A total of 10.5% of adults surveyed in France admit that they were sexually abused in childhood; this percentage was 22% in the USA, 27% in Ireland, and 18% in Germany. As for current abuse, the number of sexual abuse cases among minors is increasing every year in Germany. In 2021, there were 17,704 police cases on file, while more than 30,000 cases related to child pornography were registered (the latter number has doubled since 2020). However, the number of current cases is even more terrifying in France, where 160,000 cases have been registered annually in recent years, which is why the state has created a commission similar to the one the Catholic Church created. It is therefore not an exaggeration to talk about a kind of "child abuse pandemic" in our developed world—certainly in the countries examined, and especially in France.

The age and sex of church victims fall into roughly the same patterns as in society as a whole, except that boys are the overwhelming majority everywhere, in contrast to the rest of society, where there are many more female victims. The age of those affected everywhere starts above 10 years; in the American report, the majority are 13-to-17-year-old boys, at the age of puberty, while the French and German reports found the majority of victims were between 10 and 13 years of age, at the pre-pubertal age. The Irish report did not examine the ages of the victims, only stating that children between the ages of 5 and 15 lived in the investigated institutions.

The profile of church abusers showed a high degree of similarity among the countries examined. In Ireland, the Ryan Report did not include data on the absolute number of priests and religious involved. According to one study,[108] the number of priests and religious was 8,000–9,000 from the 1930s to the 1970s, but fell continuously from the 1980s onward, to 2,700 by 2016. Of these, the proportion of religious was, on average, a quarter. The Ryan Report discusses about 800 offenders over nearly 70 years, and it is difficult to calculate how many priests and religious passed through in the institutions that the report investigated, including deaths and new entrants. At a rough estimate, I would place numbers at 10,000–15,000 at most. I did not include the nuns, whose proportion among the abusers was a maximum of 10%. Thus, according to my estimation, the rate of offenders is higher

[108] McSweeney, 2022, pp. 12-13.

than in other countries, at least between 5.3% and 8% (whereas in the other examined countries, the rates was between 2.8 and 4.5%).

There were no significant differences in the absolute numbers of offenders. In the USA, 4,392 offenders were found, in Ireland 800 (remember, these are only cases occurring in schools maintained by religious; the results of diocesan investigations are missing here), in Germany, 1,670; and in France, 3,000 of the investigated 50-to-70-year-olds in periods.

The number of victims in the examined countries and periods was as follows: in the USA, 10,667; in Ireland, 2,000; in Germany, 3,677; given population differences, these numbers show no difference in magnitude. In France, however, approximately 3,000 clerical perpetrators were responsible for the abuse of 220,000 victims, which is unusual compared to previous cases, as if we were moving into another universe. These data raise many questions, but they are far beyond the scope of this study.

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IVAN ŠIMOVIĆ*

The right of the child to be heard in the Croatian family law system

ABSTRACT: Croatian family law system positions children as legal subjects who can actively participate and make autonomous decisions in proceedings in which their rights and interests are decided. This is because children are holders of many substantive rights which are of little or no value if they cannot be realized in practice. Therefore, the Croatian legislator tried to ensure a system of procedural rights of the child authorizing them to protect their rights in all judicial and administrative proceedings either directly or, usually, through a legal representative. Pivotal procedural right of the child recognized by national and international sources of law is the right to be informed and heard in all matters affecting him/her. Hence, adequate understanding and implementation of this procedural right in the Croatian legislative and judicial system is essential. The goal of this article is to present a comprehensive analysis of relevant Croatian legislation, judicial practice, academic literature, and research studies in the context of the realization of the child's right to be informed and heard, as well as to point out the deficiencies which show that the Croatian family law system is yet to function perfectly in practice.

KEYWORDS: right of the child to be informed and heard, best interests of the child, Croatian Family Act, Convention on the rights of the child, special guardian ad litem.

1. Introduction

In the Croatian family law system, children are no longer just formal subjects (and *de facto* objects) of judicial and administrative proceedings. They can lawfully participate in these proceedings, and thus exercise the rights prescribed by national and international legal sources.[471] The need to

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* Associate professor Ivan Šimović, Chair of Family Law, University of Zagreb Faculty of Law, Trg Republike Hrvatske 3, Zagreb, Croatia, isimovic@pravo.unizg.hr.
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[471] Hrabar, 2012, p. 104; Majstorović, 2017a, p. 57; Šimović, 2021a, pp. 192–195.

position children as legal subjects who should actively participate and make autonomous decisions in proceedings in which their rights and interests are decided has long been established in the theory of substantive and procedural family law.[472]

Although children hold many substantive rights, especially in the field of family law, these rights are of little value if they cannot be realized in practice. Therefore, it is important to ensure a system of procedural rights of the child by prescribing them on the legislative level, authorizing the child to protect his/her substantive rights in judicial and administrative proceedings if those rights are threatened or violated by third parties.[473]

This is precisely why children's capacity to stand as parties to a suit (*ius standi in iudicio*) and litigation capacity (*locus standi in iudicio*) are important categories. They define the legal position of the child, which is realized in his/her right to participate as a party in all judicial proceedings in which their rights and interests are decided,[474] while undertaking procedural actions generally through a legal representative (parents, one parent with whom the child lives, adopters, individual guardians, social welfare centers, special guardians – Article 346 of the Family Act (hereinafter referred to as: FA) in connection with Article 80 of the Civil Procedure Act (hereinafter referred to as: CPA),[475] because of a lack of litigation capacity.[476] This means that, generally, a child cannot independently initiate judicial proceedings and undertake procedural actions in proceedings with a valid legal effect.[477] For this reason, the Croatian family law system has

[472] Hrabar, 2002, pp. 46–53; Korać, 2003, pp. 32–43; Hrabar, 2003, pp. 38–39; Uzelac and Rešetar, 2009, pp. 163–179.

[473] Aras, 2014, p. 35.

[474] Family Act, Official Gazette, No. 103/2015, 98/2019, 47/2020, Art. 358: The child is a party in all judicial proceedings in which his/her rights and interests are decided.

[475] Art. 346 of the FA: The provisions of the Civil Procedure Act and the Seizure Act shall apply accordingly to proceedings in family and status matters unless this Act stipulates differently; Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 148/2011 – official consolidated text, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, Art. 80: Parties who do not have the litigation capacity shall be represented by their legal representatives. The parties' legal representatives shall be designated by the law or by an act of the competent state body issued in accordance with the law.

[476] Šimović, 2021a, p. 195; Šimović, 2011, pp. 1626; 1629–1630.

[477] There are several exceptions to this rule. A) Art. 359 of the FA prescribes that in matters relating to personal rights and interests of the child, the court may permit the child to perform certain procedural actions if certain preconditions are met – the child that filed the

incorporated a legal principle that guarantees the child's right to objective and impartial representation as one of their basic procedural rights.[478]

The right of the child to be heard is part of the previously presented system of procedural rights of the child and is recognized by national and international law. Hence, although the child generally lacks litigation capacity, he/she is a party in all judicial proceedings in which his/her rights and interests are decided,[479] and has the right to be informed and express his/her opinion[480] always following the principle of primary protection of his/her best interests.[481] If the court did not give the child the opportunity to be heard in these proceedings, and there were no particularly justified reasons for this, this would represent a substantial violation of civil procedure rules,[482] as well as a violation of the constitutional right to a fair

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request has turned fourteen and is capable of understanding the meaning and legal consequences of those procedural actions (as confirmed by the opinion of the social welfare centre); B) Art. 117(2) of the FA prescribes preconditions for the acquisition of legal capacity by the child – when reaching the age of majority or by entering marriage before majority. In those situations, a child can undertake procedural actions by himself or herself (full litigation capacity – Art. 79(1) of the CPA in connection with Art. 346 of the FA); C) Arts. 85, 88 of the FA prescribe preconditions for the acquisition of limited legal capacity by the child – when reaching the age of fifteen or sixteen, a child can partially represent his/her property or personal rights. In those situations, a child has not acquired full litigation capacity and shall have litigation capacity only within the limits in which his or her legal capacity is recognised (Art. 79(3) of the CPA in connection with Art. 346 of the FA); See: Šimović, 2021a, pp. 192–195; Aras Kramar, 2022, pp. 108–117.

[478] Art. 348 of the FA; Art. 346 of the FA in connection with Arts. 82, 83 of the CPA. Art. 348(1), (2) of the FA: A court shall pay particular attention during the proceeding to protect the rights and interests of children.

Art. 82 of the CPA in connection with Art. 346 of the FA: During the whole proceeding the court shall, *sua sponte*, pay attention to whether the person appearing as a party … has litigation capacity, whether the party who lacks litigation capacity is represented by his/her legal representative. Art. 83(2) of the CPA in connection with Art. 346 of the FA: When the court establishes that a party has no legal representative … it shall request the competent social welfare centre to appoint a guardian for the party lacking litigation capacity … or it shall take other measures necessary for proper representation of the party lacking litigation capacity.

[479] Art. 358 of the FA.

[480] Arts. 86360 of the FA.

[481] Art. 5(1) of the FA: Courts and all public authorities conducting proceedings in which it is directly or indirectly decided on the rights of the child must above all protect the rights and the welfare of the child.

[482] Art. 346 of the FA, in connection with Art. 354(2) subpar. 6 of the CPA – violation of the principle of hearing the parties. Art. 354(2) subpar. 6 of the CPA: A substantial violation of civil procedure rules always exists if, because of unlawful actions, and

trial.[483] This confirms that compliance with the procedural rights of the child, especially the right to be informed and express his/her opinion, is of essential importance within the Croatian family law system.

2. Protection of the right of the child to be heard in national and international legal sources

2.1. The Constitution of the Republic of Croatia and the Family Act

The child's right to be heard has an important position within the FA and is prescribed by both, substantive and procedural provisions.[484] In part of the FA, which contains substantive provisions, this child's rights are regulated by Article 86 which reads:

> Parents and other persons who take care of the child are obliged to respect the child's views in accordance with his/her age.
> In all proceedings involving decisions on the child's right or interest, the child is entitled to be informed in an appropriate way of the relevant circumstances of the case, obtain advice and express his/her views and to be informed of the possible consequences of those views. The child's views shall be given due weight in accordance with his/her age and maturity.[485]

Paragraph 1 of Article 86 prescribed how this right of the child should be realized in everyday life, referring to family, school, health, diet, sports, and cultural issues.[486] This provision also prescribes who is, first and foremost, obliged to respect the child's right to be heard and help him/her realize this right in practice – the parents. Therefore, this provision is connected to

especially because failure to make service, any of the parties was not given opportunity to be heard by the court. See Aras, 2014, p. 63; Aras Kramar, 2022, p. 122; Šimović, 2011, p. 1642.

[483] Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014., Art. 29(1): Everyone shall be entitled to have his/her rights and obligations ... decided upon fairly and within a reasonable time by an independent and impartial court established by law.

[484] Another Croatian legal source that is of relevance is the Bylaw on the Methods of Communication with the Child (Official Gazette, No. 123/2015), which prescribes in more detail methods of obtaining the opinion of the child in judicial proceedings. Provisions of this national legal source will be analyzed later in the text.

[485] A very similar procedural provision is contained in Art. 360(5) of the FA.

[486] Similar opinion in Hrabar, 2020, p. 664; Rešetar, 2022, p. 352.

Article 91 Paragraph 3 of the FA, where it is prescribed that parents have an obligation to talk to their children and try to reach an agreement regarding the exercise of their parental obligations, duties, and rights derived from parental care (in accordance with the age and maturity of children).[487]
Paragraph 2 of Article 86 prescribes how this right of the child should be realized in all judicial and administrative proceedings in which his/her rights or interests are decided, emphasizing the child's right to be informed and obtain advice, before eventually deciding to exercise the right to express his/her opinion. This provision is a confirmation that Croatian legislators have implemented and they have further elaborated the constitutional requirement thus: 'Everyone's duty is to protect children and infirm persons.'[488] We align with the authors' interpretation of the provision as

> the legal basis of all considerations regarding children in general, including the area of participation of children in court proceedings. It is the duty of the society, represented by judicial and administrative bodies, to protect the children, also by making them "visible."[489]

The logic behind this standpoint of Croatian family law theory is that if the child's opinion is not established because he/she was not given the opportunity to express his/her considerations, thoughts, wishes etc., then the child cannot be protected as it will be impossible to determine what is in the child's best interest and how to protect it![490]

Paragraph 2 of Article 86 confirms that the Croatian legislature has implemented requirements prescribed by international global and regional legal sources that represent a component of the domestic legal order of the Republic of Croatia[491] – for example, Article 12 of the Convention on the

[487] Age and maturity of the child are factors that should be considered, because the older and more mature the child is, the greater the influence his/her opinion has on the decision-making process. See Korać Graovac, 2012, p. 121; Majstorović, 2017a, p. 57; Šimović, 2021a, pp. 194–195; Knol Radoja, 2021, p. 171.
[488] Art. 64(1) of the Constitution; Alinčić et al., 2013, p. 108.
[489] Majstorović, 2017a, p. 59.
[490] Hrabar, 2007, pp. 274–276; Hrabar, 2020, p. 664; Šeparović, 2014, pp. 52, 75–76, 205–206, 216; Rešetar and Rupić, 2016, pp. 1179–1180; Rešetar, 2022, p. 349.
[491] Art. 134 of the Constitution: International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have

rights of the child: CRC,[492] Article 3 of the European Convention on the Exercise of Children's Rights: ECECR,[493] Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms: ECHR,[494] Article 24 of the Charter of fundamental rights of the European Union: Charter[495].

2.2. Convention on the Rights of the Child and the Family Act

The Convention on the rights of the child (hereinafter referred to as: CRC) is the most important global legal document for the protection of children's rights. It rests on four principles that form the basis for all actions regarding children: prohibition of discrimination,[496] protection of the best interests of the child as the primary consideration,[497] the right of the child to full and harmonious development,[498] and the right of the child to be informed and heard in any judicial and administrative proceedings affecting him or her.[499] Some studies that have been conducted with the goal of ascertaining the influence of the CRC on national legal systems imply that Article 12 of the CRC was the most incorporated provision after Article 3.[500] The full text of Article 12 of the CRC reads:

> State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law.

[492] Convention on the rights of the child (1989), Official journal of the SFRY, No. 15/1990., Official Gazette – International treaties, No. 12/1993, 20/1997, 4/1998, 13/1998.

[493] European Convention on the exercise of Children's Rights, Official Gazette – International treaties, No. 1/2010, 3/2010.

[494] Convention on the protection of human rights and fundamental freedoms, Official Gazette – International Treaties, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

[495] Charter of fundamental rights of the European Union (2012), Official Journal of the European Union, C 326, 26.10.2012.

[496] Art. 2 of the CRC.

[497] Art. 3 of the CRC.

[498] Arts. 6, 18 of the CRC.

[499] Art. 12 of the CRC.

[500] Daly and Rap, 2019, p. 300.

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the Child has long emphasized that a strong link exists between the right of the child to be informed and to be heard[501] and the principle of primary protection of the best interests of the child.[502] In this regard, General Comment No. 12[503] prescribes (par. 74.):

> There is no tension between Articles 3 and 12, only a complementary role of the two general principles … In fact, there can be no correct application of Article 3 if the components of Article 12 are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives.

Relying on this standpoint of the Committee on the Rights of the Child, Croatian family law theory concluded that the same link exists between Articles 86 and 5 of the FA and thus formed a standpoint that proper exercise of the child's right to be informed and heard is somewhat of a precondition for the correct assessment and protection of the best interest of the child.[504] This standpoint of Croatian family law theory has also been accepted and implemented in Croatian judicial practice. In this regard, the standpoint of the County Court in Zagreb is as follows:

> In the proceedings of the first-instance court, the relevant provision of Article 86 Paragraph 2 was properly applied in accordance with the principle of primary protection of the best interests of the child from Article 5 of the FA, thus primarily

[501] Art. 12 of the CRC.
[502] Art. 3 of the CRC.
[503] Committee on the rights of the child (2009). General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009.
[504] Hrabar, 2007, pp. 274–276; Hrabar, 2020, p. 664; Majstorović, 2017a, p. 56; Šeparović, 2014, pp. 52, 75–76, 205–206, 216; Rešetar and Rupić, 2016, pp. 1179–1180; Seršić–Gržetić, 2011, pp. 726, 732; Šimović, 2011, p. 1639; Lucić, 2021, p. 112; Rešetar, 2022, p. 349; Knol Radoja, 2021, p. 179.

protecting the rights and interests of the child – in accordance with the provision of Article 3 of the CRC.[505]

3. Expressing an opinion – the right of the child, not an obligation

Another legal standpoint that has been emphasized in international legal sources is that expressing an opinion is the right of the child, not his/her obligation. This standpoint was implemented in General Comment No. 12 (par. 16), Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (further: Guidelines on Child-Friendly Justice – par. 46)[506] and most recently in the Brussels II *ter* Regulation, where it is prescribed that '…while remaining a right of the child, hearing the child cannot constitute an absolute obligation but must be assessed taking into account the best interests of the child...' (recital 39).[507]

To improve the family law system, the Croatian legislature implemented the following legal standpoint into the procedural provisions of the FA and prescribed: 'In proceedings concerning the personal or proprietary rights and interests of the child, the court will enable the child to express his or her opinion, unless the child declines.'[508]

This provision confirms that the right to be heard is solely a right and never the obligation of the child, but at the same time, it imposes an obligation to inform the child that he/she can decide not to participate at any point in the proceeding.[509] In connection with this, the FA prescribes that the competent court is not obligated to obtain a child's opinion in cases where there are particularly important reasons that need to be explained in the decision.[510] For example, if the child is exposed to a conflict of loyalty

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[505] County Court in Zagreb, Gž Ob 436/2017, 25 April 2017; See also Constitutional Court of the Republic of Croatia, U-III/1008/2015, 1 July 2015, para. 8.1. and 11.2; Constitutional Court of the Republic of Croatia, U-III/4069/2013, 10 September 2014, para. 2. and 4.2.

[506] Committee of ministers of the Council of Europe, 2010. It can rightly be said that the General Comment or the Guidelines on child-friendly justice are not direct legal sources of the Croatian legal order, but they have a strong impact on both Croatian family law, theory, and judicial practice. Thus, it was necessary to accentuate their relevance in this field of law.

[507] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Official Journal of the European Union, L 178/1.

[508] Art. 360(1) of the FA.

[509] Majstorović, 2017a, p. 58; Hrabar, 2020, p. 663.

[510] Art. 360(4) of the FA.

or a high amount of stress or manipulation (by parents, household members, third persons, etc.), the competent court's duty is to assess whether these are justified reasons not to obtain the child's opinion.[511] Analyzed judgments confirm that the stated duty has been accepted and implemented in Croatian judicial practice; that is, the courts generally provide an adequate explanation of justified reasons for not obtaining the child's opinion.[512] A few examples are considered below.
Constitutional Court of the Republic of Croatia, U-III/1525/2015, judgment from July 17, 2015, par. 12.

> It is true that the CRC stipulates that the child has the right to freely express his/her views, but during the proceeding it was unequivocally established that in this particular case the child cannot freely express his opinion because the mother constantly exerts a negative influence on the child.[513]

County Court in Dubrovnik, Gž 319/2014, Judgment of 2 April 2014.

> Although the CRC in Article 12 stipulates that children shall be provided the opportunity to express their views on all important issues that may affect their lives, as is referred to in the FA as well, appreciating all the circumstances of the case, this court considers that it would not be in the best interest of a minor child to be heard before the court. Namely, a direct question about whether she would be against moving to Austria brings the child into a conflict of loyalty because she is in a situation where she must choose between her parents.[514]

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[511] Majstorović, 2017a, p. 66; Parać Garma, 2012, p. 147; Rešetar, 2022, p. 351; Knol Radoja, 2021, p. 170; Lucić, 2017, p. 414.
[512] If the court would not provide an adequate explanation of the particularly justified reasons for not obtaining the child's opinion, this would represent a substantial violation of civil procedure rules (Art. 346 of the FA in connection with Art. 354(2) subpar. 11 of the CPA – the judgment has defects because of which it cannot be examined). It would also represent a violation of the procedural requirements set forth in the Grand Chamber judgment of the ECtHR in *X v. Latvia* App. No. 27853/09, 26 November 2013, para. 107.
[513] The Constitutional Court of the Republic of Croatia confirmed that the negative influence from one of the parents towards the child was the reason why the competent court was not under an obligation to obtain a child's opinion in this proceeding.
[514] The County Court in Dubrovnik concluded that the conflict of loyalty was the reason why it was not under an obligation to obtain a child's opinion.

These examples also confirm that Croatian judicial practice is in line with the standpoint of Croatian family law theory – not to expose the child to additional stress, inconveniences, and conflicts of loyalty[515] – as well as with the standpoint of the Court of Justice of the European Union expressed in Case C-491/10 PPU:

> ... the conflicts which make necessary a judgment awarding custody of a child … and the associated tensions, create situations in which the hearing of the child ... may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.[516]

4. Expressing an (authentic) opinion in an appropriate place

In the Croatian family law system, not only does a child have the right to express his/her own opinion in all judicial and administrative proceedings in which their rights or interests are decided, but the child also has the right to express his/her opinion in an appropriate place. The rights of the child are prescribed in Article 360 Paragraph 2 of the FA which reads: ‘The court shall enable the child to express his or her opinion in an appropriate place and in the presence of a professional if it considers that necessary in the circumstances of the case.’

Hearing a child in an appropriate place is a precondition that must be met for the court to obtain an authentic opinion of the child (deprived of any external influences).[517] Therefore, the question remains: What is considered

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[515] Majstorović, 2017a, p. 66; Parać Garma, 2012, p. 145–148; Knol Radoja, 2021, pp. 171–172, 179–180.

[516] Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, para. 64.

[517] The problem of authenticity of the child's opinion, i.e., possible manipulation of the child, is often accentuated in relevant Croatian family law theory. See Hrabar, 2019, pp. 29–34, 46–54; Hrabar, 2012, p. 107; Hrabar, 2020, p. 665; Majstorović, 2017a, pp. 57; Parać Garma, 2012, p. 147; Knol Radoja, 2021, p. 179.

an appropriate place in the Croatian family law system? The answer to this question cannot be found within the provisions of the FA, but within provisions of the Bylaw on the Methods of Communication with the Child (further: Bylaw).

The Bylaw defines that an appropriate place is '…a premises other than a courtroom that is equipped and adapted for working with the child, where the child is ensured privacy and safety.'[518] This may be the child's home (also the home of the parents, foster parents, or an institution where the child is living) or special premises in the building of the court,[519] competent social welfare center, special guardianship center, or any other place determined by the court, as long as it meets the preconditions prescribed in Article 5 of the Bylaw. In addition, a child's opinion can be heard through a video link in his/her parents' home, foster home, or an institution where he/she is living. Notwithstanding the (appropriate) place where the child is being heard, he/she should always express his/her opinion in the absence of his/her parents or other people who care for him/her.[520]

The relevance of hearing a child in an appropriate place was also emphasized in Croatian judicial practice: County Court in Pula, Gž Ob 257/2020, judgment of 1. September 2020. In that case, the parties debated whether the child was heard in an appropriate place and, consequently, whether the opinion obtained from the child was authentic. The Court concluded that the child was unlawfully detained in the father's household for two months, where he was heard by a special guardian. The court correctly determined that the child's opinion was not authentic but was the result of the father's inappropriate and harmful pressure on the child.

[518] Art. 5 of the Bylaw on the Methods of Communication with the Child.

[519] The problem is that most Municipal courts in Croatia do not have financial resources to implement this provision in their daily work. This is an important criticism as regards the Bylaw, since it oversees the fact that insufficient budgetary resources are secured for these matters, making the normative solutions only a list of good wishes. See Majstorović, 2017a, p. 65; Parać Garma, 2012, p. 146.

[520] Art. 4 of the Bylaw on the Methods of Communication with the Child. For a detailed analysis of the provisions of the Bylaw regarding the appropriate place, see Majstorović, 2017a, pp. 6567; Rešetar and Lucić, 2021, pp. 150–151; Aras Kramar, 2021, pp. 119–122.

5. Deficiencies in Croatian family law regulation of the right of the child to be heard

After a detailed analysis, it is possible to determine two deficiencies in the provisions of the FA that regulate the right of the child to be informed and heard in all proceedings in which their rights or interests are decided. The first deficiency that needs to be addressed is presented in Article 360 Paragraph 3 of the FA. This provision is as follows:

> In an exception to Paragraph 2 of this Article, in the case of a child younger than fourteen, the court shall enable his or her opinion to be expressed by way of a special guardian ad litem or another professional person.

According to General Comment No. 12. (par. 35 and 41) and Guidelines for Child–Friendly Justice (par. 44), not only does the child have the right to express his/her opinion in an appropriate place, but the child also has the right to choose how to express his/her opinion, either directly or through a representative.[521] The problem is that according to the provisions of Article 360 Paragraph 3 of the FA, a child younger than 14[522] years cannot express his/her opinion directly, but only through a representative. As a result, this category of children is denied the right to choose how they would be heard in proceedings in which their rights or interests are decided. This is in direct contradiction to the fundamental principles laid down in ECECR, one of which is that the child decides how he/she will be heard – directly or through a representative.[523]

The second deficiency that needs to be presented refers to the realization of rights of the child to express his/her views in the mandatory counselling[524] and family mediation[525] proceedings. Both are extra-judicial

[521] Lucić, 2017, pp. 396, 417; Lucić, 2021, p. 99.

[522] It is unclear why the element of maturity was omitted? Hence, the principle of cumulating of age and maturity, as legacy of the CRC is not respected. See Majstorović, 2017a, p. 66; Hrabar, 2020, p. 663.

[523] Rešetar, 2022, p. 350.

[524] Art. 321(1), (2) of the FA: Mandatory counselling is a form of aid provided to family members to reach an agreement on family matters, within the framework of which the counsellors show great concern for the protection of family relations affecting the child and present the legal consequences of a failure to reach such an agreement and initiation of judicial proceedings regulating children's rights. Mandatory counselling is conducted by an

proceedings in which decisions are made concerning the child's rights and interests, which are important if not crucial for the child's future. Article 325 Paragraph 3 of the FA prescribes that during the mandatory counselling proceeding, a child can be allowed to express his/her opinion if the parents consent to it.[526] Also, Article 339 Paragraph 2 of the FA prescribes that a child can be allowed to express his/her opinion in the family mediation proceeding, again if the parents consent to it. Notwithstanding the faith that the legal system has in parents, who are first in line to protect their children, the fact that children's participation depends upon the decision of the parents cannot be considered as a proper solution, which is in line with Article 12 of the CRC or the recommendations prescribed in General Comment No. 12. (par. 32 and 52).[527]

6. The role of a child's special guardian *ad litem*

The child's special guardian *ad litem* plays an important role in the realization of the child's right to be heard. As already mentioned, the FA prescribes that in case a child is younger than 14, the court shall enable his or her opinion to be expressed through a special guardian *ad litem* or another professional person (for example, psychologist, social worker, or another qualified professional, Article 360 Paragraph 3). The position and duties of the child's special guardian *ad litem* come to the fore in proceedings in which the interests of the child conflict with those of the parents as their most common legal representatives, or in cases where there is the risk of such a conflict.[528]

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expert team at the social welfare centre situated in the place of the child's residence or in the place of the parents' last common residence.

[525] Art. 331(1) of the FA: Family mediation is a procedure in which the parties, assisted by one or more family mediators, try to amicably resolve family matters.

[526] An identical provision is contained in Art. 329(2) of the FA.

[527] Majstorović, 2017a, pp. 60, 66; Čulo Margaletić, 2017, pp. 155–157; Aras Kramar, 2015, pp. 246–247; For a different standpoint on this issue see Lucić, 2017, pp. 411–413.

[528] Art. 240(1) of the FA: In order to protect certain personal and proprietary rights and interests of the child, the social welfare centre or the court shall appoint a special guardian: 1. to a child in matrimonial disputes and in proceedings for contesting maternity or paternity, 2. to a child in other proceedings in which it is decided on parental care, certain contents of parental care and personal relations with the child when there is a dispute between the parties, 3. to a child in the proceedings of imposing measures for the protection of personal rights and welfare of the child within the jurisdiction of the court when it is prescribed by the provisions of FA, 4. to a child in the process of making a decision that

The special guardian *ad litem* represents the child in proceedings for which he/she was appointed, informs the child about the subject, evolution, and possible outcome of the proceeding in an appropriate way, and assures that the child's right to express his/her opinion is realized.[529] This means that, in matters of representation, the special guardian *ad litem* is obliged to consider the child's views in accordance with his/her age, maturity, and best interest and is obliged to accept the views and wishes of the child, unless it is contrary to his/her best interest.[530] Other duties of a child's special guardian *ad litem* are to contact the parent or other persons close to the child[531] as well as to inform the child of the content of the decision and the right to appeal.[532]

The aforementioned provisions of the FA demonstrate that the Croatian family law system has specified the position and duties of a child's special guardian *ad litem* in accordance with the requirements prescribed by international global and regional legal sources that represent a component of the domestic legal order.[533] However, as pointed out in Croatian family law theory, the challenges are often not related to legislation but to its effective implementation in practice.[534] This thesis was confirmed by the judgment of the European Court of Human Rights in *C v. Croatia*[535] in which the Court concluded that proceedings carried out in front of Croatian courts did not meet the procedural requirements derived from Article 8 of the ECHR because the special guardian was not appointed to the child (a party to the

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replaces the consent to adoption, 5. to a child when there is a conflict of interest between him or her and his or her legal representatives in property proceedings or disputes, or when concluding certain legal transactions, 6. to children in case of a dispute or a legal transaction between them *when the same person has parental care over them, 7. to a child of foreign citizenship or a stateless child found on the territory of the Republic of Croatia unaccompanied by a legal representative, 8. in other cases as prescribed by the provisions of FA, i.e. special regulations or if it is necessary for the protection of the rights and interests of the child.

[529] Art. 240(2) in connection with Art. 360(3), (5)–(6) of the FA.

[530] Art. 243(1) in connection with Art. 230, Art. 252(2), (3), Art. 257(2) of the FA.

[531] Art. 240(2) of the FA.

[532] Art. 361(2) of the FA. About the role of a child's special guardian *ad litem* see also Šimović, 2021b, p. 176; Lucić, 2021, pp. 100–101, 104–106, 109; Lucić, 2017, pp. 415–417; Rešetar and Lucić, 2021, pp. 149–150; Aras, 2014, pp. 58–59.

[533] Art. 12(2) of the CRC; Arts. 4, 9, 10 of the ECECR, procedural obligations derived from Art. 8 of the ECHR.

[534] Majstorović, 2017b, p. 103, 117; Korać Graovac, 2016, pp. 130, 142.

[535] *C v. Croatia* Appl. No. 80117/17, 8 October 2020, para. 76–78, 81.

proceeding), nor was the child given the opportunity to be heard.[536] As a result: '…the combination of flawed representation and the failure to duly present and hear the applicant's (minor child's) views in the proceedings irremediably undermined the decision-making process in the instant case.'

A similar conclusion was reached in the judgment of the Constitutional Court of the Republic of Croatia[537] in which the Court concluded that there was a violation of the procedural rights of children as parties to the proceedings (including their right to be informed and heard) because their special guardian *ad litem* was completely passive in representing their rights and interests during the proceedings.[538] However, in another judgment, the Constitutional Court of the Republic of Croatia[539] concluded that there was no violation of the procedural rights of the child because her special guardian *ad litem* was active in representing the child's rights and interests during the proceedings. This shows the importance of the role of the special guardian *ad litem* in the context of the realization of the child's right to be heard and the protection of the child's right to objective and impartial representation in judicial and administrative proceedings.

7. Concluding remarks

There is no doubt that Croatia has created solid legal foundations for enabling the active participation of the child in judicial and administrative proceedings in which their rights or interests are decided. The FA and the Bylaw clearly and unequivocally prescribe the child's right to be informed and heard, as well as his/her right to professional and impartial representation by a special guardian *ad litem* in proceedings in which his/her interests conflict with those of the parents. These provisions of the FA and the Bylaw are, for the most part[540], in line with the requirements derived

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[536] The question of inadequate representation of children and violation of their right to be heard was also addressed in other cases in front of the ECtHR. See: *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 129, 181, 184–187; *Case of N. Ts. and others v. Georgia*, App. No. 71776/12, 2 February 2016, para. 75, 77.

[537] U-III/1674/201, 13 July 2017, para. 9.4, 12.

[538] See also: Judgment of the Constitutional Court of the Republic of Croatia, U-III/249/2022, 12 July 2022, para. 10.7–10.9.

[539] U-III/3665/2020, 12 September 2021, para. 6.1.

[540] Two deficiencies of the FA provisions that regulate the right of the child to be informed and to be heard have been elaborated in Chapter 5.

from international global and regional legal sources that represent a component of the domestic legal order of the Republic of Croatia: CRC, ECECR, ECHR, and Charter.

However, as pointed out in the previous chapter, the problem is not legislation, but the exercise and effective implementation of legislation and the prescribed standards relating to children's procedural rights in practice.[541] The question is, why is that so? Let us consider the main structural problems and their possible solutions.

- Croatian family law theory has often accentuated that there are no specialized family courts that would enjoy adequate logistical support from auxiliary professions such as social workers, psychologists, and social pedagogues.[542] We believe that this should change and that the path towards the recognition of children's procedural rights, as well as their more efficient legal protection, demands the reorganization of the judicial system in that direction. Unfortunately, it appears that there are not enough financial resources to cover the cost of such an organization.[543]
- Most Municipal Courts in Croatia lack the financial resources to implement the provisions of Article 5 of the Bylaw in their daily work. This means that most courts do not have an appropriate place for working with the child, which is a precondition that must be met to obtain an authentic opinion of the child.[544] We hope that insufficient budgetary resources will not be an obstacle to the effective implementation of children's procedural rights in the future.
- Competent Municipal Courts often use social welfare centers as auxiliary bodies for hearing the child, which is a party to the proceeding. This is because their expert teams, apart from lawyers, also include social workers and psychologists with more experience and specific competencies for communicating with children that are not acquired during legal education. This is, of course, a good solution

[541] Majstorović, 2017b, p. 103, 117; Korać Graovac, 2016, pp. 130, 142; Rešetar and Lucić, 2021, p. 155.
[542] Jakovac-Lozić, 2001, pp. 26–40; Majstorović, 2017a, p. 68; Korać Garovac, 2013, pp. 50–51; Šimović, 2022, p. 75; Aras, 2014, p. 64.
[543] However, some reform activities are under way. In every city that represents the centre of a county (Croatia is divided into 21 counties), a family law department has been formed within the Municipal Court.
[544] Majstorović, 2017a, p. 65; Rešetar and Lucić, 2021, p. 154; Parać Garma, 2012, p. 146.

"on paper" but in practice, it needs additional support from the competent Ministry. The problem is that social welfare centers are often overburdened and under capacitated and are therefore exposed to the risk of making poor assessments.[545]

- The special guardianship center employs an insufficient number of special guardians' *ad litem* that can adequately fulfil all duties required by law. A recent study has shown that '...the biggest problem of the successful work of special guardians has been the excessive number of cases of representation in relation to the number of employed special guardians.'[546] The total number of child representation cases in 2021 was 5274 and the number of special guardians was 18, which means that each special guardian had an average of 293 cases that year.[547] When the number of child representation cases is added to 195 adult representation cases that year, it is clear that such a heavy caseload must have an impact on the quality of representation provided by the special guardians.[548] Another research study has shown that it is not possible for special guardians to adequately fulfil all duties requested by law with such a large number of representations and wide territorial jurisdiction.[549] Due to all the above-mentioned insufficiencies, the representation of children by special guardians *ad litem* is often reduced to the mere fulfillment of a form prescribed by the law. Such a system of child representation does not enable quality representation of the child's best interest in judicial proceedings nor does it establish a quality relationship with the child and is ripe for reform.[550]

The deficiencies listed above show that the Croatian family law system is yet to function perfectly in practice, despite all the legal standards for the protection of children's procedural rights that have been incorporated into legislation. If we do not rectify the deficiencies that occur in the

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[545] Korać Garovac, 2013, pp. 50–51; Lakić, 2016, p. 57.

[546] Lucić, 2021, p. 108.

[547] Annual Report of the Croatian Ombudsman for children, 2021, p. 104.

[548] Research conducted in 2021 by the Croatian Ombudsman for children shows that the special guardians were present at only 15% of the court hearings in which they were representing minor children. See Annual Report of the Croatian Ombudsman for children, 2021, p. 105.

[549] Lucić, 2021, pp. 108–109.

[550] Annual Report of the Croatian Ombudsman for children, 2021, p. 105; Lucić, 2021, pp. 110–112.

implementation of legislation in practice, we can expect that new violations of children's procedural rights will continue to occur.[551] To conclude, the analysis of relevant legislation, judicial practice, academic literature, and research studies show that the Croatian family law system, at the moment, is not fully capable of fulfilling the ultimate goal – giving every child the opportunity to participate in every judicial and administrative proceeding that is crucial for his/her future, i.e., making every child and his/her opinion visible.

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[551] This thesis is confirmed by recent judgments of the ECtHR (Case *C v. Croatia*, Appl. No. 80117/17, 8 October 2020, para. 76–78, 81; Case *M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 129, 181, 184–187), as well as the Constitutional court of the Republic of Croatia (U-III/1674/201, 13 July 2017, para. 9.4, 12; U-III/249/2022, 12 July 2022, para. 10.7–10.9).

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BALÁZS SCHANDA[*]

The freedom of religion of children

ABSTRACT: The Convention on the Rights of the Child recognises the right of the child to freedom of thought, conscience and religion. In the wording of the Convention, parents provide direction in exercising this right. Other human rights instruments lay more emphasis on parental rights. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. There are good reasons for the neutral state to keep out from religious disputes as well as from the religious life of families. State involvement should be reserved for extreme cases, but it may be inevitable when family relations break down. Prudence is needed to promote peace in the family and society instead of raising internal and religious tensions.

KEYWORDS: religious freedom, parental rights, religious education, custody, rights of children, freedom of conscience.

1. Freedom of religion in UN documents

The most important human rights conventions prioritise protection of the freedom of religion. However, these are naturally regulatory frameworks given meaning by the national contexts in which they are applied. Although it is not binding, the Universal Declaration of Human Rights is the first "law" that enshrines human rights in a charter according to the principle of universality and which is considered to have the greatest impact. According to Article 18:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

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[*] Professor, Pázmány Péter Catholic University, Hungary, schanda.balazs@jak.ppke.hu.
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The Universal Declaration states that “the family is the natural and fundamental group unit”[552] and acknowledges that “Parents have a prior right to choose the kind of education that shall be given to their children.”[553] According to Article 18 of the International Covenant on Civil and Political Rights, promulgated in Hungary with Law-Decree No. 8 of 1976:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Of the international laws enacted under the aegis of the UN, the “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief”, passed with resolution No 36/55 by the UN General Assembly on 25 November 1981, should also be mentioned, which, although it is not binding, still serves as a beacon. This Declaration affirms the previously declared norms that guarantee freedom of religion and urges states to take effective action to prevent and eliminate negative discrimination based on religion or belief. The Declaration affords special protection to the rights of parents in raising their children according to their beliefs.

The Convention on the Rights of the Child adopted in New York on 20 November 1989, promulgated in Hungary with Act No. LXIV of 1991,

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[552] Art. 16(3) of the Universal Declaration of Human Rights.
[553] Art. 26(3) of the Universal Declaration of Human Rights.

declares the right of the child to freedom of thought and religion and also acknowledges that parents have the right to provide direction in a manner consistent with the evolving capacities of the child in Article 14[554]:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

International human rights conventions contain fundamentally similar provisions on the freedom of religion, although the Convention on the Rights of the Child and the other documents lay differing degrees of emphasis on protecting the integrity of the beliefs of families. The different wording mirrors a different perspective that can be seen as a contradiction. The Convention on the Rights of the Child would provide children with the right to make independent decisions regarding religion, depending on age. A number of people have pointed out the contradiction between these two approaches.[555]

Both the Covenant and the Convention make a fundamental distinction between the freedom of religion and the freedom of religious observance: while the former is considered an absolute right, the latter may be restricted for certain reasons.

2. The freedom of religion in the European Convention on Human Rights

Under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated in Hungary with Act No. XXXI of 1993, which is especially important for the binding adjudication of individual complaints:

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[554] Lux, 2018.
[555] Schweitzer 1994.

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 of the Convention provides for the prohibition of discrimination:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

For the freedom of religion, it is important to note that Article 2 of Protocol 1 expressly acknowledges the right of parents to provide education in conformity with their religious convictions:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In addition to the historical role of the freedom of religion, the freedom of thought, conscience, and religion form an inseparable and prominent fundamental right that, according to the Convention, is one of the pillars of a "democratic society". Moreover, religion is a fundamental element of the cultural identities of nations. As Giovanni Bonello, a former Maltese member of the Court, expressed in his concurring opinion to the judgment in Lausti v. Italy:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. (…) A European court should not be called upon to bankrupt centuries of European tradition.[556]

Until the 1990s, the Court did not formulate any substantive jurisprudence regarding freedom of religion, possibly because democratic states generally tend to respect this right and because the relationship between the State and religious communities has developed in accordance with the widely differing historical traditions in various nations, requiring international fora to apply a wide range of considerations in both regulation and practice. In certain States Parties, the Court determined it legitimate to uphold the position of the state religion,[557] while in others it protected the secular nature of the constitutional order[558]. Case-law has increased in quantity drastically in recent decades. The cases shed light on certain well-defined, controversial topics: how far can the State go in protecting any particular (majority) religion or the secular nature of the State if such results in a disadvantage to minority needs? How can the peaceful coexistence between the faithful of different religions with culturally different traditions be guaranteed, and how must the state respect the independence of religious communities?[559]

As regards the freedom of religion of children/minors/school-age children, the controversial issues are around the protection of specific clothing required by religious doctrine for both teachers and students in the educational institutions of various countries. In the case of a teacher fired from a state-run school in Geneva, with reference to the fact that the school is secular, the Swiss court accepted the reasoning that for the children, especially younger children, the teacher is a representative of the State, and the measure was necessary to protect the rights and freedoms of the children

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[556] *Lautsi v. Italy* App. No. 30814/06, 18 March 2011.
[557] *Darby v. Sweden* App. No. 11581/85, 23 October 1990, see.: commission report 45.
[558] *Leyla Sahin v. Turkey* App. No. 44774/98, 10 November 2005.
[559] Schanda, 2021; Grabenwarter, 2014, Art. 9, 224-250.; Koltay, 2015; Martínez-Torrón - Navarro-Vals, 2004; Szajbély 2018; Temperman – Gunn – Evans 2019; Vermulen 2018; Ventura, 2019.

in light of their impressionability.[560] The Court also rejected the complaint filed by a teacher at Istanbul University.[561] The question arises as to whether emphasising the young age – and thus the impressionability – of the students in one case weakens the reasoning regarding the headscarf of the university professor: in the case of the Turkish teacher, the court accepted the protection of the peculiar secular nature of the Turkish state instead of the grounds of religious pluralism. The Court accepted the application of the restrictive rules by referring to the protection of the "the rights and freedoms of others" in the case of both the university students[562] and the students participating in compulsory education: the protection of students' bodily integrity in physical education classes was found to be a suitable reason for the restriction,[563] while in a broader sense the secular nature of the State and public education may also give rise to the imposition of restrictions.[564] The State may also rightfully protect children from peer pressure by restricting the wearing of headscarves.[565] It should be noted that the practice of the court in accepting existent restrictions in all cases is based on the broad power of discretion of the states; it does not in any way follow from the judgments that the absence of the restriction would be worrisome.

States are given a wide power of discretion in connection with the organisation of public education, as the objective of public education is to transfer knowledge in an objective, critical, and pluralist way; however, an exemption may not be requested from compulsory public education even for religious reasons.[566] Schools may not have the objective or purpose of indoctrinating children or undermining family education. Although the basis is respect for parental rights, these rights may also be restricted, i.e., although it is not permitted to turn children against their parents, parents may not require that the children not be subjected to any impacts contrary to their beliefs. Granting exemption to children from sexual education has not

[560] *Dahlab v. Switzerland* App. No. 42393/98, 15 February 2001.
[561] *Kurtumulus v. Turkey* App. No. 65500/01, 24 January 2006.
[562] *Leyla Şahin v. Turkey App. No. 44774/98, 10 November* 2005.
[563] *Dogru v. France* App. No. 27058/05, 4 December 2008.; *Kervanci v. France* App. No. 31645/04, 4 December 2008.
[564] *Aktas v. France* App. No. 43563/08, 30 June 2009; *Bayrak v. France* App. No. 14308/08, 30 June 2009.; *Gamaleddyn v. France* App. No. 18527/08, 30 June 2009; *Ghazal v. France* App. No. 29134/08, 30 June 2009; *Jasvir Singh v. France* App. No. 25483/08, 30 June 2009; *Ranjit Singh v. France* App. No. 27561/08, 30 June 2009.
[565] *Köse and Others v. Turkey* App. No. 37616/02, 7 December 2010.
[566] *Folgerø and Others v. Norway* App. No. 15472/02, 14 February 2006.

received protection.[567] Exemption may also not be requested for compulsory co-educational swimming classes, as this would lead to the exclusion of immigrant children by the State. Moreover, participation also promotes integration in addition to teaching the child to swim.[568]
Freedom of religion is not affected by generally compulsory, neutral requirements. Just as no-one is exempt from the rules of the road for religious reasons, citizens also do not have the right to refuse the use of a tax number on religious grounds.[569] Religious norms do not grant exemption from the obligation to observe state law. Accordingly, a sexual act with a girl younger than 16 is a crime even if the perpetrator and the victim are married under Islamic law.[570] The application of Seventh-day Adventist parents to obtain an exemption for their children from having to attend school on Saturday was also not approved.[571]

Refusing a blood transfusion may be a free expression of a person's autonomy (Article 8) and freedom of religion. The principle, though it may seem unreasonable to others and the medical community, may not be an impediment to dissolving or banning the operations of a religious community. Adult persons obviously have to be provided with the opportunity of making truly free decisions, and courts must be able to overrule the decisions made by parents in respect of the minor members of the group in the interest of the children.[572]

3. The rights of the child vs. parental rights?

As an independent right, the freedom of thought, religion, and conscience is due to all natural persons regardless of citizenship and any restrictions to personal freedom. In respect of children, certain approaches, such as the Convention on the Rights of the Child, imply that the fundamental rights of a child's freedom of religion and parental rights may compete: according to the Convention, instead of selecting the education to be given to the child, the parent provides "direction to the child in the exercise of his or her right

[567] *A.R. et L.R. v. Switzerland* App. No. 22338/15, 19 January 2018. Art. 40, 49.
[568] *Osmanoğlu et Kocabaş v. Switzerland* App. No. 29086/12, 10 January 2017.
[569] *Skugar and Others v. Russia*, App. No. 40010/04, 3 December 2009.
[570] *Khan v. the United Kingdom* App. No. 35394/97, 4 October 2000.
[571] *Martins Casimiro and Cerveira Ferreira v. Luxembourg* App. No. 44888/98, 27 April 1999.
[572] *Jehovah's Witnesses of Moscow and Others v. Russia* App. No. 302/02, 18 August 2010. Art. 131-144.

in a manner consistent with the evolving capacities of the child." The Holy See underlines in its reservation to the Convention the "primary and inalienable rights of parents" i.a. with regard to religious rights.[573]

The Fundamental Law (the Constitution) provides special protection to parents in determining the religious education their children receive. However, a parent's religious conviction may not be a primary reason for keeping their child out of public education: Article XVI paragraph 3 of the Fundamental Law specifically states that the obligation of taking care of minor children extends to providing schooling. Exemption from specific subjects (biology, co-educated physical education, swimming lessons) raises special questions. Although Hungarian case law has not yet been faced with these issues, the Educational Authority has allowed the application of special schedules (previously, notaries had allowed home-schooling), which is debatable insofar as it is based only on the parents' religious needs.

Children and students have the right to participate in religious education (religion and ethics, or optional religious studies).[574] The parent decides on participation.[575] There are no legislative provisions regarding any possible disputes between the parents or between a parent and a child. General principles can be used to settle either of these potential conflicts. The parents have to come to an agreement between themselves regarding issues resulting from their worldview. In no situation does the State take a position on religious issues: the legal regulation of the denomination of a child to a couple of different Christian denominations is now history even if the practice remains in many families. Like other, sensitive issues regarding education, the parental decision governs any possible disputes between the parent and the child. Hungarian law does not apply "Religionsmündigkeit", whereby a young person over 14 is considered "mature" and may, in most Austrian and German states, freely opt out from compulsory denominational religious education or convert to another faith. (Parents may make all decisions regarding religious affairs until the child is 10 years old; between the ages of 10 and 12, the parents must take their child's opinion into account, but the child may only leave the given religion with the consent of both parents. When the child is between 12 and 14, the parents may decide to leave a religious community against the child's will, and after reaching

[573] United Nations, 2023; Benyusz, 2021.
[574] Art. 46(3) of the Act No. CXC of 2011.
[575] Art. 182 of the Ministerial (EMMI) Decree No. 20 of 2012.

the age of 14, the child may make independent decisions, including leaving school-based religious education.[576])

4. Religious issues in child custody disputes

Although membership in a church may not be taken into consideration in child custody disputes, the court may assess its consequences. Custody may be impacted if one parent "resolutely and forcefully" involves the child in practicing religion despite the objections of the other parent and this, along with other circumstances, has a negative impact on the child's mental state.[577]

> Differences in worldviews may not be evaluated to the advantage or detriment of either parent when determining custody. In principle, a distinction based on religious differences between parents is, therefore, not acceptable. […] Of course, the issue is entirely different if the parent's educational principles and behaviour are anti-communal or are contrary to the child's fundamental interests, in which case this has to be evaluated for the purposes of custody concerning its suitability for educating and the care of the child and ensuring healthy moral development.[578] The worldviews of the parents and the doctrines and principles of their religion are not part of the custody lawsuit and may not be subjected to judicial discretion.[579]

Neither the guardian authority nor the court may make decisions in absence of an agreement between parents exercising joint custody in issues of conscience and freedom of religion.

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[576] *Gesetz über die religiöse Kindererziehung; 15. Juli 1921 (RGBI S. 939)* Available at: https://www.oesterreich.gv.at/themen/leben_in_oesterreich/kirchenein___austritt_und_religionen/Seite.820012.html (Accessed: 15 December 2022).

[577] Curia decision No. BH1994.543.

[578] Curia decision No. BH 1998.132. It has to be noted, that the Supreme Court also referred to the *Hoffmann v. Austria* (June 23, 1993) case in its reasoning.

[579] Curia decision No. BH 2001.479.

5. Issues of religion in child subsidiary protection

By law, the subsidiary protection of the child shall take into consideration the child's freedom of conscience and religion as well as their national, cultural, and ethnic origins.[580] Children taken into temporary or permanent foster care are especially entitled to freely select, express, and practice their convictions regarding religion and conscience in line with their age, state of health, development, and other needs, and to participate in religious education accordingly.[581] When determining the custody of the child, the guardian authority shall take into consideration the child's "religious and cultural identity". The law decrees that the child's religious identity and not religious convictions have to be considered, as a kindergarten child, for example, does not yet have convictions. However, even a young child may have an identity. In this respect, the parents' decision is governing, for example to have the child christened in a certain denomination. However, identity may not be considered only a formal membership in a church, in the absence of which the religions of forebears may also prove governing. Children taken into foster care decide to participate in religious education independently,[582] where the foster parent merely supports the child's participation.[583]

6. Conclusions

The instruments of law are only of limited use for settling the internal relations of families. The strength of religious convictions and religious traditions also forces the law to back down. Although the State may take action against the decisions of the parents (for example, against the threat of female genital mutilation on religious grounds) to protect the rights of the child, the general rule is to protect the religious integrity of the family. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. There is no single regulation or measure regarding how and when older children must be provided a say, or the right to make independent decisions, in these issues. In this respect, the internal relations and the millennia-old religious norms of the family as the "natural

[580] Art. 7(1) of the Act No. XXXI of 1997.
[581] Art. 9(1) point (d) of the Act No. XXXI of 1997.
[582] Art. 9(1) point (d) of the Act No. XXXI of 1997.
[583] Art. 55(1) point (c) of the Act No. XXXI of 1997.

community" enjoy primacy. It is recommended that today's legal system of rules for governing state and man proceed with prudence: it must promote peace in the family and society, not internal tension.

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SZABOLCS ANZELM SZUROMI, O.PRAEM.*

Canon law aspects of children's rights[584]

ABSTRACT: The canonical system of the Catholic Church considers the human being as a person who, according to the revelation, is created in the image and likeness of God and therefore deserves equal human dignity (regardless of age, gender; biological-, physical-, spiritual-, social conditions). This explains the fact that canon law sources already before a separate "children's rights system" (i.e., 20th century) protected children's rights from the time of the Early Church. Naturally, there is the painful phenomenon of sexual abuse of minors, which has been the most highlighted issue in the Church's relationship with children in the last decades. It might seem that the protection of the rights of minors (i.e., children) is limited to the prevention and sanctioning of this gravest delict and the special care of the victims. However, the protection of children's rights within the Church is much broader. Therefore, the right of parents to educate their children freely following their faith is also an essential right according the Church's documents, since 1929.

KEYWORDS: children's rights, gravest delicts, protection of rights of minors, protection of victims, educational rights of parents, religious freedom, integrated education.

1. Introduction

The protection of "children's rights"[585] as a legal category can be considered a recent development compared to the long history of the development of

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* Full professor of Pázmány Péter Catholic University, Budapest (PPCU), Hungary; Director of the International Canon Law History Research Center at PPCU; Rector Emeritus of PPCU; Full member of Academia Europeae (London), szuromi.szabolcs@ppke.hu.
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individual state legal systems. Scholarly literature considers children's rights as third-generation human rights.[586] Despite the adoption of the Geneva Declaration by the League of Nations in 1924, children's rights appeared as an explicit and specific form from the legal developments after the Second World War in 1946.[587] We see this in the more precise definitions of fundamental rights by the United Nations and the parallel gradual incorporation of these fundamental rights into the constitutions of countries around the world.[588] Keeping this in mind, when we consider children's rights under canon law, two important aspects should be noted. The first is that the canonical system of the Catholic Church considers the human being – regardless of age and gender, biological, physical, spiritual, social, etc., conditions – as a person who, according to the revelation, is created in the image and likeness of God and therefore deserves equal human dignity. This explains the fact that canon law sources – although not in a separate "children's rights system" before the 20th century– protected children's rights even from the time of the Early Church. The second aspect is the painful phenomenon of sexual abuse of minors, which has been the most highlighted issue in the Church's relationship with children in the last decades. It might seem that the protection of the rights of minors (i.e., children) is limited to the prevention and sanctioning of this gravest delict and the special care of the victims. However, the protection of children's rights within the Church is much broader. In this overview, I would briefly discuss these two aspects. At this juncture, it is appropriate to refer to Pope Pius XI (1922-1939) who already emphasized in 1929 the right of parents to educate their children freely following their faith; this is also recognized by the state:

> (…) We see the supreme importance of education, not merely for each individual, but for families (…) Moreover, every Christian child or youth has a strict right to instruction in harmony with the teaching of the Church, the pillar and ground of truth. And whoever disturbs the pupil's faith in any way, does him grave wrong, since he abuses the trust that children place in their teachers, and takes unfair advantage of their inexperience

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585 Lux, 2018.
586 Halmai and Tóth, 2008, p. 88.
587 UNICEF, no date.
588 In detail, cf. Sedletzki, 2012, pp. 13-24.

> and of their natural craving for unrestrained liberty, at once illusory and false (…).[589]

2. Children's rights in canon law history

2.1. The protection of children against violence under criminal law

One of the most debated issues today – and one of the main concerns of society, particularly for parents and families – is sexual abuse against minors. This serious problem is connected to all areas that relate to minors. Religious communities, particularly the Catholic Church, have introduced increasingly significant child protection policies regarding the conditions and standards for dealing with minors. The seriousness of the issue means that even a single incident cannot be tolerated within any kind or composition of the community. For this reason, over the last two decades, particularly in the second half of that period, the principle of zero tolerance for sexual abuse against children has been repeatedly expressed by the authorities of the Catholic Church. While the emphasis on the principle and its practical implementation is of crucial importance, it should not be forgotten that this is not a 21st-century development provision that responds to the legitimate expectations of society. If we consider canon law sources on this issue, it is clear that sexual abuse against children has been considered by canon law from the very beginning, and the most serious canonical sanctions have been established for offenders.[590] This is based on the biblical principles[591] mentioned in the introduction, which, on the one hand, derive from the strict observance of the sixth commandment[592], and on the other, from the fact that the victim is created in the image and likeness of God.[593] We are therefore confronting undoubtedly, on the one hand, the commission of the gravest delicts against children as vulnerable persons; on the other hand, the most severe sanctioning of these acts, which has existed from the very beginning, within the canonical legislation. The tension between these two statements is caused by the consistent existence or irresponsible attitude of those who are competent to act in accordance

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[589] Pius XI, Litt. Enc. *Divini illius magistri* (31 dec. 1929): *Acta Apostolicae Sedis* 22 (1930) 49-86, Art. 57.

[590] In detail, cf. Szuromi, 2016a, especially pp. 388-394.

[591] Cf. *Sacred Scriptures in the Life of the Church*, in *The Holy Bible. Revised Standard Version. Catholic Edition*, Oxford (UK) – New York 2008, xxiii-xxv.

[592] Ex 20:1-18; Dt 5:1-21.

[593] Gen 1:26.

with the law. These gravest delicts cause lasting personal damage in children's lives, forcing the ecclesiastical legislator to issue the strongest preventive and sanctioning decisions, and at the same time to give support to the victims. This moral responsibility has motivated those canonical sources that, already from the middle of the 2nd century (i.e., Didache), strongly condemned the mentioned acts as contrary to the Christian way of life and the teaching of the Church. The cited early canonical sources took place in the later composed collections of canon law, which were finally incorporated in the Decretum Gratiani[594], compiled around 1140[595], and in the subsequent papal legislation, of which the Liber Extra (1234)[596] is one of the most important collections of the High Middle Ages.[597] These two canon law works, together with four other canonical collections, constituted the Corpus iuris canonici, which was the current law of the Church's disciplinary system until 1917. With the promulgation of the first Codex iuris canonici, the same corpus of law was unified and codified[598] (that is CIC [1917] Cann. 2357 §§1-2; 2359 §2) and was replaced by the new Code of Canon Law (promulgated on January 25, 1983). This latter Code was revised several times, including the amendment on May 21, 2021, concerning canonical penal law[599], particularly concerning the sanctions for child abuse (that is, CIC Can. 1398).

2.2. Children's right to know the truth – an integrated education based on their skills

It is necessary to emphasize that knowing and transmitting the truth have always been considered a duty and right in the disciplinary arms of the Church. The "right to know and to teach the truth" was and still is the responsibility of the family, particularly, of parents. Nevertheless, the community (municipal, religious, ecclesiastical) has always assisted in fulfilling this responsibility in an institutionalized form from the Early

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[594] C. 3 q. 4 c. 4 (Friedberg, Aemilius (ed.), *Corpus iuris canonici*, I-II. Lipsiae, 1879-1881. [repr. Graz 1955; hereinafter, Friedberg I-II.] I. 512); C. 3 q. 5 c. 9 (Friedberg I. 516); C. 6 q. 1 c. 17 (Friedberg I. 558); D. 1 de poenit. c. 15 (Friedberg I. 1161).
[595] Landau, 2008, pp. 22-54.
[596] X 3.1.13 (Friedberg II. 452); X 5.16.5 (Friedberg II. 806-807); X 5.31.4 (Friedberg II. 836); X 5.31.9 (Friedberg II. 837); X 5.34.15 (Friedberg II. 875-877).
[597] Bertram, 2012, pp. 916-923.
[598] Cf. Sedano, 2015.
[599] Franciscus, Const. Ap. *Pascite gregem Dei* (23 mai. 2021): *Communicationes* 53 (2021) 9-12.

Middle Ages. The structured form of public education in Europe began with Catholic schools, which dominated this area until the 16th century when this system was transformed into Christian education in Europe.[600] Therefore, it is not accidental that the right to "know the truth" – which guaranteed that the children would be educated according to families' beliefs, in other words, to know the truth that their parents had chosen – has become an important part of the Church's teaching and discipline. The authors of the earliest canonical sources on this subject are Origen (†253) [*Against Celsius*, I, 11][601], St. Cyprian (†258) [*On Mortality*][602], St. Chrysostom (†407) [especially his Homily LXXXII and his Homilies to the Gospel of Matthew][603], and St. Ambrose (†397) [*On Abraham*, I, 3][604]. Naturally, the catechetical formation within the family, but already in the parish community from the 6th century, then in the cathedral and parish schools from the end of the 8th century, was supplemented by other elements of knowledge related to the individual abilities and social situation of each child, which helped them in their daily lives. These early sources, supplemented by Medieval canonical decisions, were included in the same important collections, and after the codification, their principles were incorporated into the *Codex iuris canonici* (1917), which were already listed in the previous point on violations against children.

Turning to the recognition of children's rights in the 20th century, which was incorporated into a system of separate duties and rights, the establishment of this institutional form is also clearly visible within the legislation and directives of the Catholic Church. In chronological order, after the papal encyclical letter of 1929, already quoted in the introduction, the Second Vatican Council's declaration on Christian education – *Gravissimum Educationis* should be mentioned[605], which on October 28, 1965, among other things, stated that 'Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools.'[606] The detailed directive of the Congregation for Catholic Education on April 7th, 1988, which comprehensively explained the

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[600] In detail, cf. Szuromi, 2021.
[601] Cf. Willis, 2002, p. 8.
[602] Ibid.
[603] Ibid. pp. 8-9.
[604] Ibid. p. 9.
[605] Conc. Vaticanum II (1962−1965), Sessio VII: *Declaratio de educatione christiana* (Oct. 28, 1965): Conciliorum oecumenicorum decretal, Bologna [3]1973, 959-968.
[606] Ibid. Art. 1.

training and education of the whole person – independently of their religious convictions – as manifested in Catholic education, should also be considered of fundamental importance.[607] This document explained that 'The religious freedom and the personal conscience of individual students and their families must be respected, and this freedom is explicitly recognized by the Church.' The same Congregation, preparing for the third millennium, elaborated and published on December 28th, 1997 a complete educational framework, taking into consideration the individual circumstances, abilities, religious, and cultural traditions of children.[608] This document emphasized that 'Those initiatives which are ignoring the principle of religious freedom of the citizens to educate their children according to their own traditional belief can destroy many unchangeable values.' Finally, after a long preparatory process, on April 7, 2014, the Catholic Church presented its long-term educational plan for children's rights, their protection, the unique role of the family, and changes in society in the 21st century.[609] In it, the legislator pointed out that 'Psychological, social, cultural, religious diversity of the children should not be hidden, denied, but considered as an opportunity and gift. Those who are most in difficulty, poorest, most fragile, most in need, should be at the focus of the school's attention.' This list clearly shows the legislative concern about guaranteeing and protecting children's rights, which has been increasingly defined in the 20th and 21st centuries.[610]

3. Hierarchical structure of the protection of children's rights in canon law

As has been discussed, various instruments on the protection of children's rights were inspired by the teaching of the Church, from different epochs, which aimed to protect children who are considered vulnerable human persons, to fulfill their objectives considering the challenges of the contemporary era, and to respect children's specific characteristics as well as their religious, family, and cultural traditions. Since the Church is a

[607] C. pro Institutione Catholica, Lineamenta, *Dimensione religiosa dell'educazione nella scuola cattolica* (7 apr. 1988): *Introduzione*, Art. 6.
[608] C. pro Institutione Catholica, *The Catholic school on the threshold of the third millennium* (Dec. 28th 1997), *Itroduction*, Art. 1.
[609] C. pro Institutione Catholica, Instrumentum laboris, *Educare oggi e domani. Una passione che si rinnova* (7 apr. 2014), III, 1.
[610] In detail, cf. Szuromi, 2016b.

hierarchical community, it is obvious that the protection of children's rights is also based on the norms of different hierarchical levels. So far, we have only touched on the highest level. Undoubtedly, the most important guarantees and frameworks are conciliar decisions, the canons of the current Code of Canon Law (especially concerning penal sanctions), and other papal and dicasterial norms.[611] However, beyond these, the general prescriptions of national bishops' conferences and the activity of institutions they have set up at the national level play an important role.[612] Likewise, each diocese operates its own offices and professional organizations to guarantee and protect children's rights, prevent abuse, and provide care for those who have suffered abuse.[613] Nevertheless, perhaps even more important than anything else, within the hierarchical system is the system of rules and policies of those institutions that deal directly with children.

Regarding the latter, it is useful to review the regulations on the protection of children's rights in parochial schools, which are the oldest institutional forms of the Catholic Church's childcare. For this overview, I use the policies of St. Peter and St. Paul Catholic Elementary School (Wilmington, CA, USA)[614] as guides.[615] The updated rules for the 2022/2023 school year cover twenty-two main themes, of which I focus on ten issues. The first, setting out the school's spirituality, is the so-called "Mission Statement", which highlights:

> The mission of Saints Peter and Paul Catholic School is rooted in upholding the dignity, worth, and call to holiness of each member of the school community (…). Each student is formed using the cardinal virtues of prudence, justice, fortitude, and temperance (…). We intend to develop our students physically,

[611] D. pro Doctrina Fidei, *Vademecum su alcuni punti di procedura nel trattamento dei casi di abuso sessuale di minori commessi da chierici (5 iun. 2022).* Available at: https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_it.html (Accessed: 29 January 2023).

[612] Hungarian Catholic Bishops' Conference, *Charter for the Protection of Children and Young People*, Budapest 2011.

[613] In 2019, every diocese of Hungary erected a new office, i.e., *Services for Protection of Children and Youths*.

[614] St. Peter and St. Paul Catholic Elementary School, 706 Bay View Avenue Wilmington, CA 90744.

[615] *Statutes of Saint Peter and Saint Paul Catholic Elementary School, 2022/2023*, Wilmington, CA. 2022.

> mentally, and spiritually; and invite their families to partake in the experience of learning, living, and worshipping in an authentic Catholic school environment.[616]

The wording is especially noteworthy because it not only includes the aforementioned directives of the Church but also a list of all the values mentioned among children's rights in international declarations (e.g., UNICEF).[617] The Statutes explicitly mention parents as primary educators according to the school's conviction. This follows what is described in the *Dimensione religiosa dell'educazione nella scuola cattolica* (1988) and *The Catholic school on the threshold of the third millennium* (1997).[618] Parents are involved in their children's religious formation, moral formation, educational instruction, and school programs.[619] The Statutes specifically refer to the importance of the family environment in promoting the education of children (to avoid the problem of "double education"). As a parochial school, the statutes naturally provide a separate section on religious education.[620] Noteworthy is the so-called "controversial issues policy", which deals with situations and issues of a religious, moral, socio-political, or scientific nature, wherein different positions are definite but differing opinions among recognized theologians, moralists, and social scientists are considered controversial. In dealing with these issues, great care is taken to consider them in an atmosphere of freedom and mutual respect and to ensure that the issues are dealt with at the maturity and understanding level of the students.[621] I should mention the non-discrimination and non-Catholic policies (non-Catholics cannot participate in the full sacramental life of the Catholic Church. The purpose of this policy is to show the appropriate reverence for sacraments by not partaking in them without believing in them) and the acceptance of a variety of family backgrounds.[622] The school provides regular discipline reports, cumulative pupil records, and health records to parents, guardians, and church and state authorities that supervise the school. Access to these records is subject to

[616] Statutes, 5.
[617] Cf. UNICEF, no date.
[618] Statutes, 7.
[619] Statutes, 7-9.
[620] Statutes, 9-10.
[621] Statutes, 10.
[622] Statutes, 10-11.

strict rules for the protection of personal data.[623] There is a separate chapter in the statutes that deal with specific student health crises, including child abuse.[624]

4. Conclusion

This brief overview demonstrates that the protection of children's rights is not limited to the prevention and sanctioning of the gravest delicts. Different children's rights have been interpreted by Canon law based on the Holy Scriptures and the Great Mission Commandment of Jesus Christ, in accordance with divine law. This has generated various specific canonical rules and institutional frameworks in different epochs and at different hierarchical levels of the Church. Ensuring the observance of the law also requires the protection of children's rights through penal law. This system was further reinforced in the 20th and 21st centuries which led to the establishment of the *Pontifical Commission for the Protection of Minors* on March 22nd, 2014[625] and the establishment of similar organizations at the diocesan level. In parallel with this disciplinary development, the Catholic Church's directives for the integrated education of children have been elaborated in detail, taking into consideration the individual circumstances, abilities, and religious and cultural traditions of children.

[623] Statutes, pp. 18-19.
[624] Statutes, pp. 19-20.
[625] Hompage. Available at: https://www.bostoncatholic.org/news/march-22-2014-holy-father-francis-institutes-the-pontifical-commission-for-the-protection-of-minor (Accessed: 31 August 2023).

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[5] Sedano, J. (2015) ’Dal Corpus Iuris Canonici al primo Codex Iuris Canonici: Continuità e discontinuità nella tradizione giuridica della Chiesa latina’, *Folia Theologica et Canonica,* 4 (26/18) pp. 215-238.

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[8] Szuromi, Sz. A. (2016b) ’The religious dimension of education as one of the primary principles of religious freedom based on human dignity’, *Folia Theologica et Canonica,* 5 (27/19) pp. 137-144.

[9] Szuromi, Sz. A. (2021) ’Religious Education of the Catholic Church, since the 18th century from canonical and ecclesiastical law aspects’,

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ANDJELIJA TASIC[*]

Deprivation of parental rights: a safety net for children or parents?

ABSTRACT: The family, the primary and most suitable place for growth and well-being, can be jeopardized by the misbehavior of its members. In accordance with its duties, the State should take appropriate measures to protect family members, especially the children. This paper focuses on the deprivation of parental rights and its normative and theoretical framework as a court measure for children's protection. Presenting the results of research that considers cases in front of the Basic Court of Niš, this study aims to determine the reasons for the deprivation of parental rights, difficulties that occurred in the proceedings, and ways to overcome them.

KEYWORDS: deprivation of parental rights, the concept of parental rights, children's rights, child abuse, parental neglect, Serbian family law.

1. Introduction

International conventions and contemporary family law doctrines unanimously state that the family is the most natural and ideal environment for child development. The Convention on the Rights of the Child, the most important international document defining the rights of children, confirms this viewpoint.[626] In the Convention's preamble, it is stressed that State Parties are convinced that 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.' Accordingly, it is recognized that a child should grow up in a family environment in an atmosphere of happiness, love, and

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[*] Associate Professor, Faculty of Law, University of Nis, Serbia, andjelija@prafak.ni.ac.rs; ORCID: 0000-0002-9146-2088. The paper was written as a result of financing by the Ministry of Science, Technological Development and Innovation of the RS, according to the contract registration number 451-03-47/2023-1/200120 dated 02/03/2023.
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[626] Convention on the Rights of the Child, signed on 20th November 1989 (hereinafter: Convention and CRC).

understanding for the full and harmonious development of his or her personality. These attitudes reflect that State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child, where the State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing duties and shall ensure the development of institutions, facilities, and services for the care of children.[627] Similar obligations are prescribed in two important regional documents: the American Convention on Human Rights and the African Charter on the Rights and Welfare of Children.[628]

In a Serbian family law doctrine, the authors share the opinion of “preasumptiones iuris tantum” that it is the best interest of the child to live with his/her parents and the child’s right to be primarily fostered by its parents;[629] that the family is a common and the most natural environment for children to live and achieve one’s rights;[630] and, finally, that family, more than any other social group, connects an individual with society.[631]

However, family relationships, such as providing an ideal environment for a child’s development or creating a healthy personality, are not always ideal. Research has shown that violence against children is widespread in families and require punishment. A 2017 UNICEF report indicated that, globally, hundreds of millions of young children experience physical punishment and/or psychological aggression from their caregivers on a regular basis. Sexual and emotional violence against girls is more frequent than against boys, and the COVID-19 pandemic has worsened the rate of all forms of domestic violence.[632]

More than 70% of children in Serbia have been exposed to some form of violence at least once and over one-quarter have been neglected at least

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[627] Art. 18 of the CRC.
[628] Art. 17 of the American Convention on Human Rights, adopted on 22nd November 1969; Article 20 of the African Charter on the Rights and Welfare of the Child, entered into force on 29th November 1999. European Convention on Human Rights, came into force on 3rd September 1953; it does not provide similar obligations, but prescribes the right to respect for private and family life.
[629] Ponjavić and Vlašković, 2022, p. 245.
[630] Vučković Šahović and Petrušić, 2015, p. 149.
[631] Draškić, 2009, p. 56.
[632] UNICEF, Global Status Report on preventing violence against children 2020, p. 12.

once. Eight percent of children were victims of sexual abuse, and 38% witnessed domestic violence.[633]

The task of the state is to provide a model of parental behavior and appropriate sanctions for deviating from this model of behavior to protect children from all forms of abuse and misuse.[634] More significant state intervention in personal relationships between parents and children has provided a new concept of parental rights.[635] Due to popularization of human rights and separation of children's rights as a new category, there was a change in understanding the essence and content of parental rights.[636] The provisions of the Serbian Family Act[637] (FA) emphasize that parental rights are derived from parental duty and exist only to the extent necessary for the protection of the child's personality, rights, and interests. The term "parental rights" is replaced with the term "parental responsibilities," because it suggests a new way of perception of the child as a legal entity and the primary responsibility of parents for children's proper growth and development.

To protect the child, the state has prescribed certain measures with the aim of preventing or repressing parents' harmful behavior.

State Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who cares for the child (Art. 19. CRC). These measures should include the appropriate judicial involvement.

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[633] UNICEF – Violence against children - National Report for Serbia, 2017, p. 36.

[634] Under international law, the state has reserved the right to intervene where the state believes it's the child's best interest. International law provides the criteria and regulates when the state can separate a child from his or her family, and it also establishes conditions under which the state acts "in loco parentis". (Van Bueren G, 1995, pp. 86–87).

[635] At the beginning, roman "patria potestas" meant lifetime and strong authority of "pater familias" over all children and their descendants. A grown son, with his new family, remained under his "pater familias'" authority. The relationship between parents and children, however, developed, so that in the Middle Ages, "mundium", the father's authority, also contained parental duties. The new concept of parental rights was established in 20th century. (Draškić, 2009, pp. 175–177).

[636] Draškić, 2009, p. 277; Vučković Šahović and Petrušić, 2015, p. 160; Janjić Komar and Obretković, 1996, p. 14.

[637] Family Act (hereinafter FA), Official gazette Republic of Serbia, No. 18/2005, 72/2011 – other law and 6/2015, Art. 67.

The Committee on the Rights of the Child specified the scope of the term “violence against children” to include neglect, mental violence, physical violence, sexual violence, and other harmful practices. In General Comment No. 13,[638] the crucial terms are defined.

Neglect refers to the ‘failure to meet children’s physical and psychological needs, protect them from danger, or obtain medical, birth registration, or other services when those responsible for children’s care have the means, knowledge, and access to services to do so.’[639] General Comment No. 13 considers physical, psychological, or emotional neglect, neglect of children’s physical or mental health, educational neglect, and abandonment.

“Mental violence” as mentioned in the Convention, is often described as psychological maltreatment, mental abuse, verbal abuse, and emotional abuse or neglect, including all forms of persistent harmful interactions with the child, scarring, terrorizing and threatening, exploiting, denying emotional responsiveness, insulting, name-calling, humiliation, belittling, ridiculing and hurting a child’s feelings, placement in solitary confinement, isolation or humiliating or degrading conditions of detention, as well as cyber bullying. Examples of physical violence are corporal punishment and all other forms of torture; cruel, inhuman, or degrading treatment or punishment; and physical bullying and hazing by adults and other children. Children with disabilities are especially exposed to certain forms of violence, such as forced sterilization, violence in the guise of treatment, and deliberate infliction of disabilities on children to exploit them for begging on the streets or elsewhere. Under the scope of sexual harassment, the inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; sexual exploitation, including pictures and videos; child prostitution; sexual slavery; sexual exploitation in travel and tourism; trafficking (within and between countries); and the sale of children for sexual purposes and forced marriage. Additional harmful practices should be mentioned, such as female genital mutilation, amputations, binding, scarring, burning and branding, violent and degrading initiation rites; force-feeding of girls; fattening; virginity testing (inspecting girls’ genitalia); forced and early marriages; “honour” crimes; “retribution” acts of violence (where disputes between different groups are taken out on

[638] General Comment No. 13 (2011), the right of the child to freedom from all forms of violence.
[639] Para. 20 of General Comment No. 13.

children of the parties involved); dowry-related death and violence; accusations of "witchcraft" and related harmful practices such as "exorcisms;" uvulectomy and teeth extraction. Although there are more examples of violence against children, the above-mentioned examples show how broad this term is.

2. Theoretical Framework

2.1. Causes and substantive grounds for deprivation of parental rights

2.1.1. Full deprivation of parental rights

The Republic of Serbia submitted combined second and third periodic reports (CRC/C/SRB 2-3) and the Committee on the Rights of the Child adopted the concluding observations of the combined second and third periodic reports. Part E was devoted to Violence against Children.[640] As stated, the Committee is seriously concerned about the high number of reported cases of violence against children; the inhuman or degrading treatment experienced by children, particularly children with disabilities, living in institutional care homes; the fact that children with disabilities are more likely to be victims of physical and sexual violence; the widespread instances of violence in schools, particularly at the primary school level, often perpetrated against children with disabilities and lesbian, gay, bisexual, and transgender children; instances of cyberbullying; and inadequate implementation of the general protocol, regulations, and relevant special protocols. The Committee on the Rights of the Child proposed adequate measures to improve the position of children in the Republic of Serbia.

Supervision of the exercise of parental rights is a measure that helps parents exercise their parental rights or affect their behavior.[641] It occurs as a preventive control when the social service makes decisions that help parents exercise parental rights and as a corrective control when social services correct the parents in exercising parental rights and initiate legal proceedings in accordance with the law.

A stricter measure that the state imposes on parents owing to the abuse or neglect of parental rights is the deprivation of parental rights. This

[640] Art. 19, 24(3), 28(2), 34, 37 point (a) and 39.
[641] FA Art. 79–80.

measure is explained by the “Parens patriae” doctrine, under which the state alleges an interest in the care and custody of children (and others who are not competent in representing their own interests).[642] According to one interpretation of this theory, the right to take care of the needs and proper raising of children first belongs to the state and not to the parents. The state only delegates to parents a set of rights that fall within the scope of parental rights and determines targets to be achieved. Parents are authorized to revoke their parental rights if they act contrary to the aims of the state. According to another interpretation, this theory confirms only the state’s interest in protecting and raising children. Parents’ rights do not arise from the state, but they have the authority to protect their children from parents who misuse their rights.

The Institute of Deprivation of Parental Rights has undergone significant changes since the FA was adopted in 2005. According to earlier legislation, the procedure for deprivation of parental rights was conducted under the rules of non-contentious proceedings. The change in this practice probably occurred because it was believed that civil litigation provided a greater guarantee of the adoption of a lawful and proper decision.

The subject of this paper is the normative and theoretical analysis of substantive and procedural provisions for the deprivation of parental rights, as well as the presentation and analysis of the results of empirical research. The study’s timeframe ranged from 2005 to 2010, and the research was conducted in the Basic Court of Niš.

Parental rights deprivation is a universal measure for sanctioning parents’ behavior, which occurs in domestic Serbian law in the form of full and partial deprivation. Rules of substantive law prescribe the grounds for deprivation of parental rights, while procedural law prescribes a special procedure for deprivation of parental rights. In the regulation of the procedure for the deprivation of parental rights, as a special method for providing legal protection in a specific legal matter, the legislator has tried to adapt the procedure to a sensitive parent-child relationship.

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[642] Hubin, 1999, pp. 123–150. This doctrine, literally asserting that the king is the parent of the state, was formulated in England in the thirteenth century to assert the state’s role as guardian of those who were mentally incompetent. The notion that the king (or the government) is the parent of the entire state is quaint; the assertion that the state has a compelling interest in the care, nurturing, and rearing of children is not.

According to the FA, the full deprivation of parental rights may occur if a parent abuses or grossly neglects the duties of parental rights.[643] The legislator, exempli causa, listed the ways in which duties can be abused: if a parent physically, sexually, or emotionally abuses a child; exploits a child by forcing it to excessive labor, or labor that endangers the morals, health, or education of the child, or the work that is prohibited by law; encourages a child to commit an offense; allows the child to have a bad habit; or otherwise abuses their parental rights. While the abuse of parental rights is often achieved through commission, gross neglect of duties comes from the parents' failure to perform some of their duties. For example, the following reasons for deprivation are stated: if the parent abandons a child; if he/she does not take care of a child he/she lives with; avoids supporting the child financially or maintaining personal contact with the child he/she does not live with, or if he/she does not allow contact between a child and a parent with whom the child does not live; if on purpose and unjustifiably avoids creating conditions for living together with a child who is in an institution for social protection or otherwise grossly neglects the duties of his/her parental rights.

Abuse and gross neglect of duties related to parental rights are legal standards that are concretized through examples. In this way, a list of possible ways to misuse parental rights is not specified but is left to the court to decide whether one situation can qualify as abuse or gross neglect. To concretize these standards, it could be of great help for the court to use the definitions of relevant terms established under the General Protocol for the Prevention of Child Abuse and Neglect, which was adopted in 2005.[644] In this way, the reasons for the deprivation of parental rights are similar to those in other family legislatures in the Balkan region.[645] However, the FA

[643] FA Art. 81.

[644] According to this Protocol, abuse and gross neglect of parental rights includes all forms of physical or emotional abuse, sexual abuse, neglect or negligence, commercial or any other exploitation, which lead to actual or potential health problems, threats to child's development or dignity, in a relationship based on responsibility, trust or power.

[645] Family Act of Republic of Croatia, Art. 170 (Official gazette No. 103/15, 98/19, 47/20); Family Act of Serbian Republic Art. 106 (Official gazette No. 54/2002, 41/2008 and 63/2014); Family Act of Republic of Montenegro, Art. 87 (Official gazette No. 1/2007, 53/2016 and 76/2020).

does not provide reasons related to parents' health, which are prescribed in certain foreign jurisdictions.[646]

In particular, the court deprives, in full, the parental rights from parents who allow the maintenance of personal contact between the child and the parent with whom the child does not live. Emphasizing this reason in the FA is welcomed, considering the current negative practice of domestic courts, which is not to sanction parents who do not allow contact between the child and another parent. Such court actions led to the adoption of one of the first judgments of the European Court of Human Rights against Serbia in the case of V. A. M. against Serbia.[647] It was decided that the state would violate Article 6 of the European Convention on Human Rights (Right to a Fair Trial), Article 8 (Right to personal and family life), and Article 13 (Right to effective remedy).

The sanction for the full deprivation of parental rights is the deprivation of all parental rights and duties, except for the duty to financially support the child. The contents of parental rights include custody, care and upbringing, education of the child, child's advocacy, financial support, and managing and disposing of property.[648]

2.1.2. Partial deprivation of parental rights

The general clause was used to create reasons for partial deprivation of parental rights. According to Article 82 of the FA, one shall be partially deprived of parental rights if one performs parental rights or duties with negligence.

Unlike the descriptive manner used for reasons for full deprivation of parental rights, an example has not been provided to judges to recognize whether one's behavior is negligent or a less usual but legally permissible

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[646] As of August 2005, 37. American states included disabilities for terminating parental rights, while 14 states did not. Of those 37 states, 36 have specific grounds for mental illness, 32 have grounds for intellectual or developmental disability, 18 have grounds for emotional disability, and 8 have grounds for physical disability. (Kundra and Alexander, 2009, pp. 142–149).

[647] Application No. 39177/05. The applicant was a HIV-positive female who was disallowed contact with a child, because the court did not use all the available measures to enable her that right from her ex-husband. For that reason, she hasn't seen the child in nearly eight years. Serbia paid approximately 20,000 euros for the procedural costs and non-pecuniary damage.

[648] FA Art. 68–74.

model of childcare and education. It seems that this could lead to an uneven application of the law and inequality before the law, depending on the judge's personal sense of "normal" or "usual" child rising. For this reason, it might be more useful to regulate this form of deprivation more accurately, citing examples of negligence and leaving the possibility for the judge to bring other similar examples under this legal standard.

The sanction for the partial deprivation of parental rights is depriving a parent of one or more rights and duties of their parental rights, but not the duty to financially support the child.

2.2. Procedure in cases of deprivation of parental rights

On litigations for deprivation of parental rights special rules of civil procedure are applied, which is indicated in the FA as 'Procedure for the protection of rights of the child and for the disputes about exercise or deprivation of parental rights.' The Civil Procedure Act[649] is a subsidy applicable to this procedure.

Litigation in cases of parental rights deprivation may also be considered an adhesion process to litigation in matrimonial matters, maternity and paternity cases, litigation for protecting children's rights, and civil actions for the exercise of parental rights. Before the adoption of the FA in 2005, the legal protection method was not contentious. Bearing in mind the complexity of the legal issue in question, the ratio of the legislator to transform it to litigation is justified, since it is considered that the civil action, as a general, basic, and regular method of legal protection, provides greater assurance that lawful decisions will be brought.

2.2.1. Principles of the procedure

Bearing in mind all specifications of parental rights deprivation, the general rules of civil procedures have been modified and special working methods for this procedure have been prescribed.

The leading principle in cases of the deprivation of parental rights is to protect the best interests of the child. The Convention on the Rights of the Child provides that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies, the best interests of the child shall be a

[649] Official gazette No. 72/2011.

primary consideration.[650] There is no unique definition of this term, but it broadly describes the well-being of a child, determined by a variety of individual circumstances, such as the age, level of maturity of the child, presence or absence of parents, the child's environment, and experience.[651]

The deprivation of parental rights is particularly urgent. The first hearing is scheduled to be held within eight days of the date the court receives the lawsuit. The Appellate Court shall render a decision within 15 days of receiving the appeal. When these norms are observed together with the common provisions of the FA relating to the proceedings regarding all family relations, according to which the lawsuit is not submitted in response to the defendant, and the proceedings should usually last a maximum of two sessions. The attention shown by the legislator at the creation of this principle of the procedure is obvious.

This proceeding is dominantly inquisitorial,[652] as the court may determine the facts that have not been disputed between the parties and can independently research the facts that no party has put forward.[653]

The principle of disposition is also limited because, in these cases, judgment because of failure to act and judgments on the basis of a confession or denial cannot be reached.

According to the common provisions that apply to all proceedings regarding family relations, the public is excluded in cases of parental rights deprivation. Data from court files are official secrets and shall be kept by all participants in the proceedings to whom such data are available.[654]

2.2.2. Participants in the civil procedure: the court, parties, and participants

For litigation that deals with the deprivation of parental rights, the court of the first instance is in charge. For the territorial jurisdiction of the court, the rules of general territorial jurisdiction are set, but rules of electoral

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[650] Art. 3 Para 1 of the Convention.

[651] UNHCR Guidelines on Determining the Best Interest of the Child, May 2008, Available at: https://www.unhcr.org/fr-fr/en/media/unhcr-guidelines-determining-best-interests-child, (Accessed: 10 February 2023).

[652] One of the main characteristics for general civil litigation is the principle of disposition, and its parallel, when collecting the proofs is in question, adversarial procedure. The court does not collect the information and facts ex officio, but it is received from parties (Iudex iudicare debet secundum allegata et probate a partibus).

[653] Art. 205 FA.

[654] Art. 206. FA.

jurisdiction are also applicable so that legal action may be initiated in front of the court in which the child has a permanent or temporary residence.[655] Owing to the sensitivity of parent-child relationships and relationships within the family in general, the proceedings for this legal matter are handled by a specialized panel.

The following subjects have an active capacity to sue: children, parents, prosecutors, and social services.[656] This legal solution is a novel because, until 2005, non-contentious proceedings for the deprivation of parental rights could initiate social services, prosecutors, and other parents.

The procedure was initiated through a lawsuit. All children, health and educational institutions, social welfare institutions, courts and other state bodies, associations, and citizens have the right and duty to inform prosecutors or social services of the reasons for the deprivation of parental rights.[657] One or both parents can be sued in this process. A legal guardian represents the child as a party to this procedure. If the child and its legal guardian have conflicting interests, the child is represented by a collision guardian. If the child is 10 years old and capable of reasoning, the child can ask on their own or through another person or social service to obtain a collision guardian.

If the court determines that a child, as a party in these proceedings, is capable of having the opinion, it is obliged to ensure that the child has all the information that it requires, to allow the child to express its opinion, and to pay adequate attention to the opinion in accordance with the child's age and maturity unless it is obviously contrary to the best interest of the child. However, the doctrine points to several problems related to a child's right to express opinions. First, this right is limited in that it is recognized only for children older than 10 years.[658] These provisions are inconsistent with the Convention on the Rights of the Child; the child's right to free expression is not associated with the age of the child but with the child's ability to form an opinion, which depends on a number of individual characteristics. Further, the legislature tied the exercise of this right to the child's best interest, starting from the premise that the right to free expression and the best interest of the child may be mutually contradictory and that in this case,

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[655] Art. 261. FA.

[656] Art. 264. FA.

[657] Though it is not only right but also a duty to disclose the reason, no sanction is specified for not acting in the prescribed way.

[658] Petrušić, 2006a; Petrušić, 2007.

the best interests of the child prevail, which is now considered to be an outdated theoretical position. Finally, attention is drawn to the fact that only the right to express an opinion, not the right to respect that opinion, coupled with the best interests of the child, may cause the child to be denied the right to express their opinion.

The next question relates to situations in which the child is not a party to litigation in cases where other entitled subjects initiate proceedings. All of the above duties of the court and collision guardian regarding the child's right to express an opinion are applicable, by letter of law, only to situations in which the child is the party. Unlike other procedures for resolving family disputes, the necessary anticipation of the child and both parents is not prescribed.[659] If a child in this proceedings does not have a position of a party, it is, as the doctrine states, "invisible," "hidden" party, regardless of the fact that litigation is initiated to protect its rights. Children can have their own personal interests, which may be contrary to the interests of the party that initiated the proceedings. However, even if the court recognizes a conflict of interest between the child and the party that initiates the proceedings, it is unable to respond and set up a collision guardian for the child because the child, formally, is not a party to the proceedings.

This question is connected to the problem of opposing interests of the child and its legal representative when they are in the same party role. Establishing the existence of conflicts of interest in this case is doubly tricky because the representative interest can be covert, and it is not easy to determine the best interest of the child. Therefore, the doctrine suggests a German model that stipulates that a child in certain proceedings must be given a special guardian.[660]

Social services, apart from prosecutors, can also play other roles. Before making a decision to protect the rights of the child or a decision to exercise or deprive parents of rights, the court shall request a report and expert opinion of the social services, family counseling, or other institutions

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[659] For example, for maternity and paternity litigations the litis consortium of both child and parents is necessary (Art. 256. FA).

[660] The court is entitled to assign a special guardian to the child when it concludes that the child's interests are in contrast with their parent's interests, when the welfare of a child is endangered, and is connected with the child's separation from their family or a parent's loss of all parental rights, as well as when the child should be separated from a married couple, life partners, foster parents, or persons entitled to have personal contact with the child. (Petrušić, 2006b, pp. 169–191).

specialized in the mediation of family relations.[661] Social services also help the court determine a child's opinion in certain situations.

The same subjects are entitled to initiate proceedings for the restoration of parental rights with the addition of a parent who has terminated the right. However, it is not clear who would be the sued person (defendant) in this case, because this issue is not regulated. One can only assume that this omission resulted from the fact that this procedure until 2005 was non-contentious and that those proceedings could be one-party. Litigation to restore parental rights does not necessarily anticipate the participation of parents and children. In addition, it would not make sense if a child, the parent who exercises parental rights, the prosecutor, or social services put a claim against the parent whose parental rights have been terminated. The assumption is that the parent will bring an action if the conditions are fulfilled, and in cases where he/she disputes the claim for the restoration of parental rights, it would be against the best interest of the child for the court to adopt such a claim.

2.2.3. A petition

The complainant requests the court to deprive the respondent of some or all rights from the content of parental rights. This petition is constitutional because it seeks to impose a legal change. The general rules of civil procedures are applicable in terms of content. The lawsuit must contain all the elements prescribed by the Civil Procedure Act, in part related to the formal regularity of the submitted act.[662]

The rules of procedural law do not allow the court to award something else or anything more than that sought by the plaintiff in a petition (Ne eat iudex ultra et extra petita partium). However, the court may award less than that in the complaint. Based on this rule, the question is whether only a petition for the full deprivation of parental rights can be fully adopted. More precisely, the request for full deprivation of parental rights implicitly includes a request for partial deprivation of parental rights. Reasons for the full deprivation of parental rights are listed in the FA but can be divided into two large groups: abuse of parental rights and duties or gross negligence of parental rights. The reasons for the partial deprivation of parental rights are not as thoroughly regulated, listed only as negligence in the exercise of

[661] Art. 65. para 6 FA.
[662] Art. 98. and 192. of Civil Procedure Act.

rights and duties of parental rights. The question is whether the court, if during the procedure, based on established facts, determines that there has been no abuse or serious neglect of parental rights, but "only" negligence in exercise of the rights and duties, may, if the claim is directed to the full deprivation of parental rights, deprive parents only partially of their parental rights? More specifically, is there an identity between the partial deprivation of parental rights and the partial adoption of a petition for the full deprivation of parental rights? If not, what should the court do if it determines that only elements of partial deprivation of parental rights exist? This is one of the proceedings in which the court must be guided by the best interests of the child, and the real question is how to perform this effectively. The court may initiate this procedure as an adhesion proceeding, but what should be done in a situation where the central procedure is the deprivation of parental rights? The right and duty of the judicial authority is to notify social services as well as actively legitimate persons in this proceeding, and there are grounds for the deprivation of parental rights. In addition, the social service may itself note that there are grounds for initiating the proceedings. However, urgency does not allow all actions to be retaken if they have already been undertaken during the process of full deprivation of parental rights. Therefore, the statutory regulation of this issue should be considered to clarify whether there is an overlap in the content of full and partial deprivation of parental rights.

2.2.4. Decision making and verdicts

In this process, the Court reaches a verdict. By nature, this decision is constitutional. In comparative law, a high degree of credibility of evidence and clear and convincing evidence is required (75% certitude).[663] With this degree of certainty, the following elements must be proven: 1) the child's safety, health, or development has been or will continue to be endangered by the parental relationship; 2) the parent is unwilling or unable to eliminate the harm facing the child, or is unable or unwilling to provide a safe and stable home for the child, and the delay of permanent placement will add to

[663] Historically, the legal standard of proof for terminating parental rights was relatively low, a preponderance of the evidence (or "more likely than not"). However, the United States Supreme Court, in *Santosky v. Kramer* (1982) overturned this relatively lenient standard of proof in favor of higher standard, clear, and convincing evidence. (Barone, Weitz and Witt P, 2005, p. 405).

the harm; 3) the division (the Division of Youth and Family Services) has made reasonable efforts to provide services to help the parent correct the circumstances that led to the child's placement outside the home, and the court has considered alternatives to deprivation of parental rights; and 4) deprivation of parental rights will not do more harm than good.

The FA does not prescribe any exception to the general rules of civil procedures in terms of proof, and from the records of processed cases, it could not be observed that the court established particular criteria on this issue.

This decision must be recorded in the birth registry, and if a child has the right to real estate, it must also be recorded in a corresponding public registry of property rights. In proceedings involving the deprivation of parental rights, the parties cannot conclude a judicial settlement. The decision was approved for revision.

The Court decides on discretion regarding the reimbursement of the costs of the proceedings, bearing in mind the grounds for fairness.

3. Empirical Research

3.1. The circumstances of the disputed cases and proceedings before the Basic Court

The study included 12 subjects, who were validated in front of the Basic Court in Niš during 2005–2010. Thus, according to the available documents, all proceedings conducted in front of the court during this period were handled.[664] However, further studies on this topic are warranted.

All disputed cases can be classified into several groups based on the reasons parents have been deprived of their parental rights.

The first group of cases, five of them, concern circumstances in which the child has an innate disability because of which the parents are unable or unwilling to take care of the child.665 The proceedings are brought by the Center for Social Work, usually at the initiative of the defendants and the

[664] While collecting data, two problems were confronted. First, the electronic registar for browsing the data is only available from 2010. Also, there are no unified records in the social service. For that reason, the data are received by the intern records of the employed or by memory. Further, it is especially hard to prove abuse, and establishing an informative network for wider indications is recommended. The main evidence are clinical records and social records. (Janjić and Obretković, 1996, pp. 113–114).

[665] The following anomalies occurred: down syndrome, anomaly multiplex (exact type of anomaly was not noted), heart anomaly, apert syndrome.

parents of a minor. Children are typically placed in social care institutions.[666] In most cases, parents do not show interest in caring for their children or helping them adapt and socialize.[667]

In three out of five cases, both parents were completely deprived of parental rights; in one case, both parents were partially deprived of parental rights, and in one case, one parent was partially deprived of parental rights.

The disposition of the judgment in which the defendant (a father) is partially deprived of parental rights is incomprehensible and vague, since it is judged that he partly decides on issues that significantly affect the lives of minor claimants. It follows that the defendant can decide on some issues and not others. If the judge misunderstood a clear legal norm that does not leave such a possibility, he did not list issues on which the defendant could or would not decide in the future. Regardless, what has been decided in the verdict may be assumed; however, this is a judge's failure or misunderstanding of the regulations of such a crucial and delicate legal matter.

Explanations for judgments are also questionable because almost none of them state the exact reason for the deprivation of parental rights. It remains in the domain of speculation whether the explanations relate to the abandonment of a child or to the intentional and unjustified failure to create conditions for living together with a child who is in an institution for social protection. Considering that there is always an essential violation of civil

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[666] Conditions in institutions for social care are described in the report, Torment not treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities, MDRI, 2007. Different forms of violation of human rights such as unsanitary conditions, infectious diseases, lack of medical help and rehabilitation, make life in institutions dangerous. Many children from this research are institutionalized in Kulina, one of institutions described in this MDRI report [Online]. Available at: https://www.mdri-s.org/wp-content/uploads/2015/02/Mucenje-kao-lecenje.pdf www.mdri-s.org (Accessed: 14 February 2023).

[667] The latest research shows that it is in the best interest of children with disabilities to grow up in a family and be involved as much as possible in different activities with other children. Radical turnover is made in an opinion concerning raising a child with a disability. In the past, parents were encouraged to place the child in a social institution, but today they are advised to raise the child in a family environment. (Llewellyn et al, 1999, p. 219) This kind of behavior is against the latest tendencies in inclusive education, which encourage involving children in everyday activities. This kind of treatment is not only good for children with disabilities, but also for other children, because they would develop understanding of the differences.

procedures if a judgment has defects that cannot be examined, judges are expected to have serious and fundamental approaches to adjudication.[668]

These proceedings are characterized by efficiency, a small number of hearings, and renunciations of the right to submit a remedy because it is also in the interest of the respondents to end the proceedings as soon as possible by adopting the claim. In only one case was a temporary representative appointed as the respondent, the mother of a minor child.

The second group consists of cases in which parents are deprived of parental rights because of severe neglect of parental rights. Two cases arose from the same situation, in which parents allowed girls aged 11 and a half years and 13 years to "marry." The girls had been exposed to mental and physical abuse. There is no clear reason why passive multiparty litigation is yet to be established. The cases are based on the same factual and legal situation. There is jurisdiction of the same court, so to achieve a procedural economy, it was more appropriate to lead one proceeding instead of two.

One case relates to parents who did not want to take their child from the hospital, and two cases relate to parents who neglected a child who lived with them.[669] In all the proceedings, the parents were fully deprived of their rights.

Only one case was brought about because of child abuse, and the parents were partially deprived. The father beat the child, threw him on the bed, put cigarettes on his cheek, and burned his heel with hot bricks. Based on the judgment of the criminal court, the father was sentenced to prison for two years for the abuse, and the mother was sentenced to prison for one year due to neglecting the child. It is unclear why the social services claimed partial instead of full deprivation of parental rights when such conduct does not fall under simple negligence in the exercise of parental rights. The

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[668] Art. 374. para 12 of Civil procedure: The crucial violence of civil procedure exists if the judgment has defects that cannot be examined, and especially if the decision is unclear, contradictory to itself or to reasons in explanation, or if there is no explanation at all, or those reasons are unclear or contradictory, or there is a contradiction because the explanation cites documents or records.

[669] In one of these two cases, a child was assigned to a mother, who was emotionally unstable, immature, possessed a higher sexual urge, exhibited impulsive behaviour, did not understand development needs, felt maternity was a burden and was emotionally cold to the child. This attitude is against the opinion that women with severe mental illness (SMI) derive great meaning and pride from being mothers. Because motherhood for women with SMI appears to be part of their positive identity, we recommend that this status be fully explored and considered in working with these mothers. (Sands, Koppelman and Solomon, 2004, p. 322).

parents were deprived of the following rights and duties: care, raising, upbringing, education, and child advocacy. The claim for parental support was denied because they were recipients of social care. The Court's decisions and claims are questionable. The legal norm is clear: parents may be partially deprived of all parental rights, but of the duty to support a child.[670] It follows that the claimant does not need to request that the parents support the child because they are not deprived of their duties. The claimant could eventually determine the amount that parents would be required to provide for the child's support.

The last proceedings were initiated by the father of a minor child against the mother and the ex-wife. She also asked for the full deprivation of the claimant's parental rights. Since it was clear that the central problem was an unhealthy relationship between parents and did not concern the child's best interests, the Court rejected both petitions.

3.2. Analysis of the data

According to the collected data, 12 procedures for partial or full deprivation of parental rights were terminated in front of the Basic Court in Niš from 2005 to 2010. In Nis, approximately 3,400 children are born each year.[671] As there are no statistics on the number of juveniles in Niš, a rough estimate is that there will be 51,000 in 2021.[672] This means that only one parent out 25,000 children is deprived of parental rights. It follows that this is a marginal social phenomenon, and its frequency deserves more attention. However, it is doubtful that this is a realistic picture, but it seems that the abuse or serious neglect of parental duties exists. Public perception, obtained by reading newspaper articles, suggests it is a far more widespread phenomenon.[673] This is supported by data from the Annual Report of the Center for Social Work in Niš, according to which, during 2021, 45 children were victims of domestic abuse, and in 2020, 31 children were victims,

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[670] Art. 82. Par. 2. FA.

[671] U niškom porodilištu 2022. najviše rođenih beba u poslednje 3 godine. Available at: www. https://www.juznevesti.com/Drushtvo/U-niskom-porodilistu-2022-najvise-rodjenih-beba-u-poslednje-3-godine.sr.html (Accessed: 16 January 2023).

[672] The population between 0 and 19 years. (Available at: https://publikacije.stat.gov.rs/G2022/Pdf/G202213049.pdf, Accessed: 26 January 2023). According to the last population census, Niš is home to approximately 260,237 citizens.

[673] 'Baby fell in a manhole,' 'Mother killed a baby and then tried to commit a suicide,' 'Father killed a child for revenge,' are examples of newspaper headings (different medias in Serbia).

which raises the question of why there are not more proceedings in this matter. The reasons remain only in the domain of speculation, but the prevailing impression is that the relationship between parents and children and family relations in general continue to be considered as something that stays in the family, and the relevant institutions seldom and unwillingly interfere. The number of decisions in this area speaks more about society's unwillingness to react than about the judiciary's unwillingness to deal with this problem because the claim was adopted in 11 out of 12 cases.

The evidence used was the hearing of parties and the reading of documents. In one case, a child whose parents have been deprived of their parental rights is questioned.

On average, 4.5 hearings were held before a decision was made. The hearings were often delayed because the defendant was not properly summonsed or summonsed but did not come. In both cases, a temporary representative was set.

The average duration of proceedings is seven months, which conflicts with the principle of urgency. The only procedure against the state of Serbia led by the European Court of Human Rights, referring to the deprivation of parental rights, is the duration of proceedings in front of domestic courts.[674] Due to violation of Article 6 (Right to a fair trial), Serbia is obliged to pay 2,600 EUR for non-pecuniary damages and 1,300 EUR for the costs of the proceedings.

The only appeal to the court was to the Center for Social Work due to the decision to reimburse the costs.

4. Conclusion

The deprivation of parental rights is the most severe measure by which the state interferes with the relationship between parents and children. Thus, the state punishes parents who unconsciously exercise their parental rights, abuse them, or neglect the rights and duties of their parental rights, but, broadly and more significantly, protects the rights of a child. Therefore, it is essential to clearly and precisely prescribe the substantive reasons for the deprivation of parental rights and procedures. While full attention was paid to the prescription of the reasons for the full deprivation of parental rights, it seems that the same attention was missing when it came to the partial deprivation of parental rights. Therefore, the grounds are too broad and

[674] *Veljkov v. Serbia* App. No. 23087/07, 19 April 2011.

vague, which can lead to a distortion of the principle of legal certainty due to different interpretations by the judge. The method of legal protection for which the current solution has opted is litigation, which differs from the longstanding practice in which this matter is decided in non-contentious proceedings. When creating the procedural rules, the child's best interest was taken as the supreme principle, but some questions remained sketchy, such as the right of the child to express opinions (and be appreciated) and the role of the child when it is not a party in these proceedings.

Research conducted by the Basic Court in Niš concluded that proceedings for the deprivation of parental rights are extremely rare in practice. The most significant number of proceedings were initiated because parents themselves could not or did not want to take care of their children, who were, in almost all cases, born with some form of inborn disease or disability. Other proceedings were initiated mainly due to neglect of parental duties, while only one process was initiated because of the physical abuse of a minor.

The average duration of the proceedings is seven and a half months, which is inconsistent with the principle of urgency by which judges should be guided to carry out the proceedings. The most significant problem in achieving efficiency is the submission of letters to respondents. In making the explanation, the court did not always give a precise reason for the deprivation of parental rights, and in one case, partial deprivation did not list the rights a parent was deprived of.

In conclusion, the existence of abuse and neglect and parents not prosecuted and appropriately punished for misbehavior remains. In this way, this phenomenon can expand because unpunished cases encourage others to behave in the same way and, conversely, children exposed to violence have a greater predisposition to become bullies.

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KATALIN VISONTAI-SZABÓ*

Safe in the family

ABSTRACT: Corporal punishment of children has been a part of everyday life for centuries, as it has long been seen as a means of education. However, in the last century many social scientists, psychologists and doctors warned parents about the dangers of punitive discipline. The concept of child abuse has long been recognised in the paediatric literature, with the term "Battered Child Syndrome" being coined by Henry Kemp.

Many parents see corporal punishment of their children as an effective, socially acceptable method of child-rearing. Parents hit their children not because they want to do so or because they want to hurt them, but rather because they believe that corporal punishment teaches their children positive patterns of behaviour and protects them from various threats. Parents often know of no other way to express their dissatisfaction with their child or their own helplessness. They seldom think about how their child might feel when he or she gets a beating or is waiting for the inevitable slap.

The public opinion is that corporal punishment is a necessary part of discipline and education. It is from spanking and slapping that children learn to respect their parents. To improve the situation of physically abused children, it is necessary to change social attitudes towards such behaviours and to teach parents the negative effects of these behaviours. Another key task is to educate parents about alternative child-rearing methods. Corporal punishment as a means of disciplining children will not immediately disappear from parents' child-rearing repertoires. In fact, as research and expert opinion confirms, constant and consistent educational work will only lead to a gradual change in parents' attitudes and behaviour.

KEYWORDS*:* child maltreatment, physical, psychical and sexual abuse, child abuse, domestic violence, child psychology.

* Senior lecturer, PhD., Faculty of Law, University of Szeged, Hungary, visontaikata@gmail.com, visontai@juris.u-szeged.hu, https://orcid.org/0000-0002-3295-5675.

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1. Introduction

If we ask where the child is safest, we instinctively answer: in their family. In a perfect world, this would be true, but unfortunately, the reality is far from it. According to UNICEF's Hidden in Plain Sight report[675] collected from 190 countries, children were most at risk at school and at home. Child abuse and neglect within the family, typically committed by parents, lead to adverse childhood experiences. Anyone who was exposed to maltreatment as a child or was only an eyewitness to domestic violence bears the consequences as an adult. The root of countless somatic and psychological problems in adulthood is the trauma suffered in childhood. Unfortunately, the topic is surrounded by many misconceptions and in 2023 it is still considered taboo even though every tenth child in Hungary is at risk[676] and approximately 15-30 children die every year from abuse by their parents.[677] For some reason, society only considers extremely serious abuses, which end in death or result in severe disability, even though emotional abuse can have serious consequences, even to the society as a whole.

Adults who have been maltreated as children report a lower quality of life than those without any abusive past. These findings may indicate that multiple maltreatment is associated with an even lower quality of life relative to single maltreatment.[678]

The other problem is that many people still think that what happens within the family is a private matter and should not be shared with outsiders, even though publicity is the only escape for the victim. As long as the abuser has reason to believe that there will be no consequences for his actions - despite the fact that the Criminal Code strictly punishes these actions - the victims have little hope.

As for statistical data related to child abuse, the number of offenses has been steadily increasing since 2016. The reason for this is not that parents abuse their children at an increasing rate, but that society has become much more sensitive, pays more attention to the signs, and fewer cases are kept secret, but at the same time, the latency is still extremely high. According to data from the Central Statistical Office, 6,300 cases of

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[675] UNICEF, 2014.
[676] UNICEF, 2023.
[677] Herczog and Kovács, 2004.
[678] Hoefnagels et al., 2020.

child abuse occurred in 2020, which is 500 more cases than in 2019.[679] This significant increase may also be due to the COVID pandemic, as the incidence of domestic violence increased due to lockdowns and confinement.[680]

Child maltreatment, according to the World Health Organization, is a type of physical and/or emotional ill-treatment, sexual abuse, neglect, negligence, and commercial or other exploitation, which results in actual or potential harm to the child's health, survival, development, or dignity in the context of a relationship of responsibility, trust, or power. Exposure to intimate partner violence is sometimes included as a form of child maltreatment.[681]

Domestic violence is a complex phenomenon that can occur in several forms. Violent behavior (which causes physical, mental, or sexual injury) and the fact that the victim and perpetrator know each other well (usually relatives) can be considered the cornerstones. The purpose of violent behavior is for the perpetrator to keep the other party under his power and to exercise control and dominance over them. The offense is cyclically repeated and becomes increasingly severe over time.

According to the definition of the National Institute of Criminology, domestic violence is violence and abuse between people who live together and are physically, emotionally, materially, or legally dependent on each other, which includes all forms of physical, sexual, and emotional abuse or neglect.

2. The typical forms of domestic violence and child maltreatment

According to the relationship between the perpetrator and the victim, we can distinguish between intimate partner violence, violence against children, and violence against the elderly and sick family members. Each type rarely occurs in isolation. Someone who is violent is usually violent toward all members of the family.

The American model[682] distinguishes between three basic types of domestic abuse. In the case of "reciprocal family violence", the father and mother mutually abuse each other, and both beat the child. If they do not

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[679] Gyurkó, 2022.
[680] Wong et al., 2021.
[681] WHO, 2022.
[682] Browne and Hamilton, 1999.

hurt the child, they cause him enough trauma when he sees them fighting. In "hierarchical family violence", everyone has a place in the cycle of abuse. The father hits the mother and the mother hits the child. We speak of paternalistic family violence when the father and the child (mostly boys) act together against the mother and the female members of the family, who are considered inferior.[683]

The expression of violence can be physical, psychological, or sexual, and it can also manifest itself in the form of neglect.

2.1. Physical abuse

Physical violence includes all kinds of intentional physical abuse: beating, punching, kicking, biting, wounding with a weapon, burning, scalding, shaking, grabbing, pushing against a wall, and pushing on the floor or bed. All the above-mentioned behaviors fall under the concept of abuse, even if there is no visible evidence of injury, and the injury does not require medical attention. Concussions are especially dangerous for babies since the brain and skull of young children are still underdeveloped, and even moderate shaking can cause serious brain damage or even death (i.e., Shaken-Baby Syndrome).

One may ask, "why do people beat their family members?" This is usually because they are unable to manage their tempers, and they cannot channel the accumulated stress and frustration in any other way than through an aggressive act against a weaker person. In most cases, aggression is not due to provocation by a family member, it is only directed at them. A typical case is when the head of the family is regularly humiliated at work by his boss and colleagues. They obviously cannot turn the anger and tension accumulated due to negative criticism towards the person they want to, but they will take out their anger on their child or spouse, which they cannot express to their boss.

In 1962, an American doctor, Henry Kempe, first described battered child syndrome. Subsequently, it soon became clear that the perpetrators were parents in 90% of the cases.[684] Intracranial injuries and femoral fractures occur almost exclusively as a result of abuse. In Hungary, approximately 30 children die each year because of provable abuse and negligent endangerment.[685]

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[683] Szöllősi, 2005, p. 83.
[684] Révész, 1999.
[685] Pászthy, 2007, p. 15.

Head injuries caused by human hands can cause immediate death in children, and brain damage caused by continuous, regular abuse can lead to mental retardation and epilepsy.[686] The younger the age at which abuse occurs, the more serious the consequences. Neglect and abuse affect all areas of a child's development, endangering their physical, emotional, social, psychological, moral, learning, and cognitive abilities.

It is typical that not only parents but also abused children try to hide the abuse. During the examination, the children report almost verbatim the made-up story told by the parents about the origin of the injury. The doctor may detect that the child is denying previous abuse, is alarmed, looks to establish eye contact with the parent, and expects confirmation from them. The parent is often irritable and hostile towards the doctors and the child, criticizes them, shows little concern, and refuses further examination. [687]

According to Kaiser, 7-9-year-old boys are most at the highest risk of physical abuse. Kaiser states that this is because children start school at this age, increasing the likelihood of discovering abuse and the number of cases in which parents feel the need to discipline their children.[688] According to Gelles' research, the most vulnerable group of children is the age group between three months and three years old. He believes that it is a source of great frustration for parents who are not able to communicate with their children since they cannot speak yet, so they do not understand why they are crying. This tension can only be relieved by aggression against the children. Furthermore, the birth of a child results in a tense atmosphere, as everything is transformed as a result, which may also cause financial difficulties. The escalating tension from several directions is difficult to manage. [689]

Parental stress is a factor found to be positively associated with harsh parenting practices. The perpetrator's intent to punish a child's crying behavior was the main precipitator of abusive head trauma – shaken baby syndrome. Harsh physical punishment to the point of death was used to correct child disobedience or to punish child misbehavior. According to American studies, 70% of children were being cared for by a male caregiver at the time of the fatal event. The study found that mothers' male companions (boyfriend, stepfather) had 2.4 times the odds of perpetrating fatal physical punishment compared to fathers. The elevated risk associated

[686] Ibid, p. 16.
[687] Pászthy, 2007.
[688] Kerezsi, 1995, p. 61.
[689] Ibid.

with mothers' male companions may be influenced by attachment or connectedness, which might be absent in this nonbiological relationship.[690]

According to another American research, boys under the age of 3 are most likely to be exposed to physical abuse. In all cases, boys were abused more often and more severely than girls. At the same time, the research also showed that children under the age of three were abused by their mothers in 68% of cases, given that they spend most of their time with them at this age.[691] However, in the case of sexual abuse, the proportion of male perpetrators was already close to 90% .[692]

According to Ranschburg, the physical abuse of a child develops gradually.

> At first, the parent just gets frustrated, feels powerless, unable to establish a relationship with his child, and unable to influence him. When his patience finally runs out, he hits the child in utter desperation. First, this is not a real beating; it may just be a slap or a small blow on the diaper, but in any case, it is effective, as the child is very shocked by the unexpected consequence. The parent then feels that he has found the solution, but in order to always achieve the desired effect with beating, he has to use increasingly harsh methods. This is how the first weak slap turns into regular beating with the waist belt. However, after a while the child will become immune to abuse and violence will no longer be suitable for achieving the desired effect, only aggressiveness, irritability, hatred, and the enjoyment of breaking the rules will slowly become integrated into the child's temperament and personality.[693]

Although all forms of corporal punishment against children are prohibited by law (the Act No. XXXI of 1997), corporal punishment remains accepted in many places.

> Many people think that a "father's slap" or a little "mother's spanking" is not yet domestic violence, it fits into education. However, the science of pedagogy and psychology has long

[690] Wilson et al., 2023.
[691] Tamási, 2005.
[692] Szöllősi, 2005.
[693] Popper et al., 2005. pp. 19-20.

> stated that physical abuse is serious and unforgivable, a crime that cannot be justified; moreover, it even has a personality-destroying effect as it affects the child's personality development. Overall, there is no boundary between paternal slap and violence, and any form of physical punishment against a child is impermissible, even if it is done with the best intentions. The purpose of education is not to make the child obey out of fear of physical pain, but to understand and experience the rightness or wrongness of his actions, to learn what is allowed and what is not.[694]

Beatings, therefore, only serve as temporary deterrents, and they only provoke intense anger, a desire for revenge, a feeling of helplessness, and self-loathing in the child, which will have far-reaching consequences.

Parents beat their children either because they believe that it will be useful and they do not know any other, more effective way of raising them, or because they cannot handle their dissatisfaction, frustration, or helplessness in any other way.

There are cases in which both parents abuse the child, but mostly only one passively lets it happen. The children were not usually angry with the passively watching parent; they always found some reasonable explanation as to why they are unable to help them. Rationalizing the situation is much easier to bear than admitting that both parents actually betrayed him. (Forward, 2000, p. 134).

> Anger boils in the souls of children exposed to violence. No one can be beaten, humiliated, terrorized, belittled, or blamed for their own problems without feeling resentment. However, a child who has experienced violence has no way to vent his anger. Temperament therefore. necessarily finds the way to get rid of it in adulthood.[695]

Despite this, thousands of families in Hungary still use corporal punishment as an educational tool to discipline their children.

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[694] Ranschburg, 2006, p. 29.
[695] Forward, 2000. p. 142.

Studies have revealed that physically abused children show selective attention to anger cues, have difficulty disengaging from them, and are more likely to misinterpret facial cues as anger or fear.[696]

The occurrence of physical violence does not depend on economic or social status or even education, it occurs at all levels. This is a sure sign that the aggressor is also abused as a child. Because someone who grew up in a loving atmosphere as a child and whose parents never laid a hand on him will certainly not beat his family members as an adult. Conversely, if he grew up in an environment where he learned that physical violence is the only appropriate way to deal with conflict and relieve stress, then he would stick to this tried-and-true method as an adult, even if he promised it a thousand times as a child that he would never be like his parents. Since these young people enter adulthood with huge emotional deficits and unsatisfactory needs, no matter how late they have children, they will not be mature enough to raise them properly.

There is an extreme case of child abuse, Münchausen syndrome, by proxy, but in this case, the parent damages the child's physical and mental health due to a serious mental illness. Their purpose is to attract the attention of others, primarily doctors. Mothers typically do this to their children (e.g., they poison them or expose them to pneumonia).

Hungarian criminal lawyers, whose interests do not extend to the field of children's rights, still believe that there is a so-called domestic disciplinary right, which means that the parent has the right to punish the child physically and mentally within the framework of education, such that it does not cause serious injuries. However, Article 6 paragraph 5 of the Act No. XXXI of 1997 on child protection, which entered into force on January 1, 2005, after the amendment, clearly states that the child's human dignity must be respected; the child must be protected against assault – physical, sexual, and mental mistreatment – neglect; the child must be protected against harmful effects caused by different sources of information; and that children are never allowed to undergo torture, corporal punishment, and any other cruel, inhuman, or humiliating punishment or treatment.

The Act No. LXIV of 1991, which promulgated the UN Convention on the Rights of the Child adopted in New York in 1989, sets similar expectations. The Convention is linked to comprehensive commentary No. 8 entitled 'The right of the child to be protected from corporal punishment and other cruel or degrading forms of punishment' and No. 13 'The right of the

[696] Strathearn et al., 2020.

child to be protected from all forms of violence' issued by the UN Committee on the Rights of the Child. Children have an inalienable right to respect their human dignity and physical integrity, as well as equal protection from violence. The child is not the property of the parent but an individual with his own rights, a person entitled to human rights.

In general, the abuse or humiliation of a child is prohibited, harmful, and condemnable. It is not possible to hit, slap, pull the child's ears, pull the hair, push him, kneel him in a corner, or use violence against him in any other way, as all of these can cause physical or mental pain. The pain caused to the child violates his right to protect against violence. Zero tolerance is important because it is not possible to draw a limit to the extent to which it is acceptable to abuse a child, since adults - especially if they hit the child out of sudden excitement or anger - often do not even assess how much force they use and how much pain they cause to the child. Even if beating does not cause physical pain, it still violates the child's dignity and causes humiliation and emotional damage.

2.2. The psychical violence

The appearance of psychological violence varies. This includes repeated teasing, insults, threats, belittling, humiliation, shaming, mocking, criticizing, and emotional blackmail. During the insult, the aggressor was continuously criticized by a superior. Whether he does it with or without reason, his goal is to destroy, humiliate, and make the other person feel small. The aggressor is as unfair and mean as possible to make the other person believe that he is in no way worthy of being loved. Rejection can cause serious damage, especially in children, but can also destroy the self-confidence of adult women and men. In many cases, it precedes or is accompanied by physical violence, but it can also occur on its own. Its main goal is to destroy the victim's self-esteem and it usually succeeds.

There are two problems with examining psychological terror. First, it is difficult to define and extremely difficult to prove; second, it causes a much more serious and profound effect than physical violence. As the victims usually say, the physical wound heals, but the mental wounds persist for a lifetime.

It belongs to the scope of psychological violence and has very serious consequences: making the child feel worthless, unloved, unwanted, and useless; setting expectations that do not correspond to age or development; creating a constant feeling of fear or anxiety; violent and cruel upbringing;

using bizarre methods of punishment; emotionally unpredictable behavior; social isolation; moral corruption; teaching deviant behavior; and coercion.[697] However, it can also appear in the form that the perpetrator deliberately abuses someone or something that is important to the child (e.g., damages, throws away his favorite toy, or abuses his dog).

Humiliation with intentional and long-term psychological torture are especially shocking in the case of children because it seriously affects their personality development. The most serious consequences are punishment with deprivation of love and continuous doubting of the child's skills, aptitude, and intellectual ability.

Disparaging criticisms and degrading comments carry negative messages for children and dramatically affect their mental health. Cruel words have more power in a child's development than we think. It is especially harmful if a child's appearance, intelligence, abilities, or even human values are insulted on a regular basis. Parents defend themselves by saying that they were only joking. A small child cannot distinguish between truth and a joke, threats, or good humor. If he was hurt a lot when he was younger, he would never understand the joke even as an adult; he will interpret every funny comment literally and consider it an attack on his person.[698]

Furthermore, when "toxic parents" react to behavior they do not like with punishment and withdrawal of love, it has a very negative effect on the child's emotional development.[699] This destroys children's self-confidence and self-esteem. Even in adulthood, children will not be able to believe in themselves, they will become timid when it comes to initiating relationships because they are afraid of disappointment and rejection.

Emotional abuse in early childhood may lead to psychopathology via insecure attachment, which has been associated with externalizing behavioral problems and impaired social competence.[700]

2.3. Sexual abuse

The driving force of sexual violence is usually not the insurmountable desire for sex but the breaking of the victim's will, humiliation, and making them feel inferior. Victims of sexual violence are mostly women or children;

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[697] Pászthy, 2007, p. 18.
[698] Forward, 2000.
[699] Ibid.
[700] Strathearn et al., 2020.

however, it can also be directed against a man, although significantly less often.

In terms of the degree of violence, we must distinguish between sexual violence committed against adults and children. If it is committed against an adult, a much greater degree of violence is required, since the adult is aware of what she wants and what she does not want, so it is usually only possible to induce unwanted sexual behavior through coercion or threats. It is not necessary to use physical violence against a child as a small child is already frightened by verbal aggression. Furthermore, seduction also works in many cases through nice words, promises, and gifts to persuade the child to play sexual games since they do not know what is happening to them.

The majority of sexual crimes against children are not committed by strangers, but by relatives and acquaintances, persons whom the child trusts, and whom the child loves. Therefore, such an event causes a particularly great mental turn. The perpetrator of sexual abuse is most often (75%) a family member or an unrelated acquaintance (20%); only in the rarest cases is a stranger (5%).[701]

The age groups most at risk for violence against children are 10-15 years old for girls, 6-8, and 14-16 years old for boys.[702] The seriousness of the situation is further aggravated by the fact that, according to the 2020 data from the Central Statistical Office, sexual violence is the crime most often committed against children aged 0-13.[703] Violence against a child can often remain secret, as it is much easier to intimidate and keep a child in fear than an adult. Her fear is further enhanced by the fact that she is mostly completely vulnerable to the perpetrator. When a child is molested, the child has an irrational sense of guilt, which prevents things from coming to light.

Children blame themselves for what happened and feel guilty, dirty, disgusting, and ashamed that this could have happened to them. In addition to fear, shame prevents them from reporting the crime to someone. Unfortunately, in many cases, society and the authorities believe, and the perpetrators also defend themselves with the notion that the child behaved too defiantly, irritating the adult with this overheated sexual behavior. This attitude is absolutely reprehensible and extremely destructive since even if it was the case (which is almost impossible, but possible in some cases), the

[701] Pászthy, 2007, p. 18.
[702] Hegedűs and Pintyi, 2012.
[703] Central Statistical Office, 2022.

adult should control the events and not expect the child to behave like an adult.

Sexually abused children are psychologically damaged to such an extent that they are almost certainly unable to lead a normal sexual life as adults. Either they completely reject sexuality and become asexual or become sick people who satisfy their aberrant desires in a perverse way. Girls who are molested by their fathers almost invariably feel unfit to be mothers,[704] thus perpetuating their suffering. In addition, they hate themselves for the rest of their lives, regardless of whether they reveal the secret.

The family burdened with the secret of sexual abuse usually lives in seclusion in its own closed world, having little contact with the outside world. Since the secret must be kept, it is very important that the environment notices clear signs in the child's behavior, such as physical and psychological exhaustion, refusal to eat, sadness, indifference, fear of adults or intensely provocative behavior, and repetition of erotic movements.[705]

2.4 Neglect

Neglect is complex and multidimensional in nature. It can consist of neglectful caregiving; insufficient provision of food, clothing, hygiene, healthcare, and shelter; inadequate or general lack of supervision; unsafe environment; failure to protect from violence; emotional neglect; abandonment; failure to provide required medical care; exposure to illegal or other activities that promote delinquency or antisocial behavior; and failure to ensure school attendance.[706]

A child needs love, care, emotional security, and close attachment for healthy development; if they do not receive this, it will have serious consequences both in the short and long term. An emotionally neglected baby is single-minded, indifferent, trying to entertain himself, rocking, stroking, or shaking his head. His gaze is blank and apathetic. Older children experience low self-esteem, underdeveloped empathy skills, speech development disorders, retarded cognitive development, regressive behavior, concentration difficulties, and declining school performance. A neglected child is difficult to motivate and communicate. Adolescence is

[704] Mérai, 2006, p. 53.
[705] Ibid, p. 45.
[706] Ogle et al., 2022.

characterized by self-destructive behaviors, such as alcohol, smoking, drug use, and uncritical sexual relations.[707]

As a result of childhood neglect, the risk of developing personality disorders increases dramatically, and the tendency toward depression, anxiety, aggression, and diseases, as well as self-esteem and self-image, is severely damaged.[708]

Emotional neglect, in particular, may lead to deficits in emotion recognition and regulation as well as insensitivity to rewards, potentially influencing social and emotional development.[709]

3. In what kind of families can domestic violence occur?

It is a widespread misconception that domestic violence occurs only in families with low education and low economic and social status. In fact, it can appear at any level of education in families, of any status and its occurrence is roughly uniform at all levels.

The most reliable predictors of occurrence were the personality of family members and family history. Most of all, those struggling with narcissistic personality disorder become aggressors within the family, and if someone is a victim of domestic violence in their childhood, the probability that they will end up in a similar situation in adulthood increases dramatically. If the victim is male, it is quite possible that he will be the aggressor in adulthood. If the victim is a woman, she will either be very neglectful and rude to her children or she will choose a partner with whom she will have to repeat the injuries she suffered in her childhood.

The head of the family who keeps his family in constant terror and regularly abuses and humiliates them almost always has a pathological personality, so punishing him alone will not bring about the expected results.

The likelihood of the occurrence of violence is increased by the following: certain socio-cultural traditions ("a child only learns if he is beaten," "a woman is good if she is beaten"), alcohol and drug addiction, the occurrence of violence in the previous life of a family member, regular viewing of rough action films, authoritarian personality.

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[707] Pászthy, 2007, p. 20.
[708] Ranschburg, 2006, p. 25.
[709] Strathearn et al., 2020, p. 399.

According to American research, the basis for the appearance of domestic violence is always a protracted or recurring conflict that usually arises because of the child. Money is the second source of dispute, followed by the division of housework, spending free time, and finally, sex. A poor financial situation and unemployment can be an increased risk factors.

> For those families where there are no children, wife beating either does not occur at all or occurs in very small numbers, the frequency of the crime increases with the number of children. At the same time, in the case of six or more children, physical violence between couples ceased.[710]

The following factors may increase the risk of neglect: childbirth difficulties, child development or behavioral problems, age of parents who engaged in neglectful caregiving, parental history of childhood abuse, poor parental coping skills, limited knowledge of child rearing practices, parental isolation, parental history of substance abuse, criminal behavior, lack of access to childcare, family stress, and family mental health challenges.[711]

According to Hungarian public opinion polls, the size of the family is decisive for the appearance of aggression, so the larger the family, the more children there are, and the more certain the occurrence of violence. The Children's ages matter; small children and young parents further increase the likelihood of disputes, which, according to Hungarian experience, arise in the vast majority of cases over money (or the lack thereof).[712]

According to Hungarian research, domestic violence is more likely to occur in cases where pregnancy is unplanned (the child is born outside or before marriage), unwanted, or when parents are very young. The researchers identified the following factors that predict or are closely related to the possibility of later child abuse: low birth weight, premature birth, and neonatal separation in the first six months of life (prolonged hospital stay due to illness of the mother or the child, or if one of the parents was in prison during the critical period), because of which the bond between mother and child will be weaker from the start. A lack or weakness of attachment has been shown to be closely related to child abuse. They also researched the characteristics of children that also easily lead to abuse:

[710] Tamási, 2005, pp. 32-36.
[711] Ogle et al., 2022.
[712] Tamási, 2005, p. 49.

hyperactive behavior, children who cry a lot, eat poorly, refuse physical contact, and hugs. Children born in bad marriages or broken relationships, or if the father leaves the mother during pregnancy, are at an increased risk.[713]

According to Ranschburg, the extent to which a child meets the expectations of their parents is also of great importance. If a child's temperament and developing personality do not fit the family's lifestyle, this will certainly be a source of countless conflicts and predict the appearance of violence with great certainty. 'If there is something different in the child's backpack than what the parent expected, then there is always a problem, and the signs of this can be observed and detected already in the second year.'[714]

In the case of domestic violence, the treatment of the entire family is necessary. The victims should be helped to overcome the trauma, and the perpetrator should be freed from his aggressive urges and supported in learning alternative methods of stress management and child-rearing. Multigenerational cycles of violence in which parents regularly abuse their children, who then grow up to do the same as their own children, must be broken.

According to the experts dealing with domestic violence[715] the appearance of aggression depends on the family heritage - the conditions in which the parents grew up, what experiences they brought from home - and the personality traits of the aggressor, so it can occur in families of any economic and social status.

However, according to Kerezsi, numerous studies indicate that among the causes of the appearance of domestic violence, we can primarily highlight financial problems, the parents' integration disorders, and deviant lifestyle, as well as the inadequacy of living conditions. According to her point of view, at-risk families are usually characterized by larger-than-average family size and an atypical family structure.[716] Her claims are also supported by the data of Fehér's empirical research, according to which low education is a risk factor, as is an unfavorable labor market position and low

[713] Kerezsi, 1995. pp. 59-60.
[714] Popper et al., 2005, p. 21.
[715] Morvai, 1998; Ranschburg, 2006.
[716] Kerezsi, 1995, p. 43.

income.[717] All these risk factors can be summarized and grouped according to increased stress.

Frivaldszky emphasizes parents’ marital status; in his opinion, if the parents are married, domestic violence cannot occur only in cases where the parents are in a cohabitation relationship, since the essence of such coexistence is missing: respect.[718] Empirical research and statistical data also contradict the above statements, as the perpetrator and victim were married in 41% of cases, cohabiting in 28% of cases, and divorced in 19% of cases.[719]

In poorly functioning family subsystems, the heads of the family tools are inherently incomplete. There are countless advanced means of influencing family members, including verbal persuasion, argumentation, and exemplary behavior. However, the aggressor’s problem-solving and conflict-handling tools are exhausted by the use of milder or more serious forms of violence, so violence becomes a means of family communication. Because there is a lack of external control in such cases, there is a great danger that the problem will escalate and aggression will increase.[720]

It is worth mentioning the signs can be used to recognize an abused child. A physically or sexually abused child typically avoids eye contact and flinches in the event of sudden unexpected contact. They are timid, shy, alarmed, oversensitive, and mistrustful. They are characterized by sleep disorders (they cannot sleep due to constant stress and fear; they are unable to relax) and eating disorders (due to complete rejection of food; they become conspicuously thin or seek comfort in constant eating, which leads to extreme obesity at a very young age). Abused children have a harder time establishing relationships with their peers than others and are typically lonely or excluded from the community. A neglected child is conspicuously dirty, unkempt, and smelly. Since their parents do not care about them, their school results are also very poor. Adolescents are much more likely to show signs of depression, and their repressed negative emotions are expressed in aggression or auto-aggression (self-harm and suicide attempts). Sexually abused children may also exhibit over sexualized behavior and frequent mentions of sexuality.

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[717] Fehér, 2005, p. 176.
[718] Frivaldszky, 2012, p. 2.
[719] Fehér, 2005, p. 175.
[720] Kerezsi, 1995, p. 53.

3.1. Vertical families

In the case of vertical families, relationships are based on a clear hierarchy of subordinates and superiors, where subordinates are unconditionally obedient to their superiors, even if they do not agree with their superiors' wishes. In the vertical family, coercion, violence, and fear ensure the dominance of the family head. The main rule is that the dominant family member commands and punishes and the subordinate obeys and suffers. The punishment is not proportionate and is mostly unrelated to the offense; it is mostly just an excuse for aggression. This is known as the sandbag effect. Especially in the case of the head of the family with an authoritarian personality, it is common for him to be frustrated and tense because of something, but he cannot direct this frustration-induced aggression against the person who triggered it–for example, against the boss who criticizes his work–so he transfers the tension to the weaker members of his family.[721]

3.2. Horizontal families

In democratically organized families, everyone is equal; they can decide on important issues together, and they love and respect each other. Violence has almost never occurred in these families. Of course, there can be conflicts here as well, but their resolutions and outcomes are very different from those of vertical families. Among other things, anger and dislike are sincere and directed against the other person. It is quite natural that even in a well-functioning relationship, there can be arguments and conflicts, but they are triggered by the behavior of the partner rather than an outsider.[722]

Even in otherwise completely "normal" families, i.e., where neither party was a victim as a child and neither suffers from some kind of personality disorder, there may be some hostility, however, this must be clearly distinguished from manifestations of domestic violence. In dysfunctional but non-pathological relationships, "games" often appear, which can easily and quickly poison the relationship of the parties, but in some cases, these games keep the dying relationship alive for a long time. During the games, the roles of the "victim" and the 'perpetrator' are constantly changed, and the parties mutually abuse each other.

[721] Ranschburg, 2006, pp. 35–39.
[722] Ranschburg, 2006.

4. The consequences of maltreatment on children

Developmental psychologists have long known that the quality of the early mother-child relationship and the family environment can have lifelong consequences on a person's personality, so it is crucial to understand how a person's childhood develops. 'In adult character traits, we find the quality of the parent-child bond that once existed.'[723]

Child maltreatment can cause severe damage to their mental and psychological development. Some of the adverse outcomes associated with maltreatment include cognitive disability, anxiety, depression, PTSD, substance abuse and addiction, psychosis, behavioral problems, having multiple sexual partners, teenage pregnancy, obesity, cardiovascular disease, and overall decreased quality of life. Cognition and education outcomes including reading ability and perceptual reasoning, verbal intelligence, failure to complete high school or employment, and attention problems were measured in studies and showed significant associations with maltreatment. Physical abuse is also associated with high dietary fat intake, as maltreated children often turn to food for comfort, a risk factor for obesity and poor sleep quality in men.[724]

For small children, sanctions are typically independent of what happens.

> For example, if a three- or four-year-old child sees another child doing something right (e.g., washing dishes), but his parents still punish him for it, he concludes that he must have been punished because he was bad, so the punishment qualifies the action. Five- or six-year-olds are confused in this situation, so, to resolve the contradiction between action and sanction, they assume that they must have been punished because they did something wrong previously. Until the age of seven, children are incapable of classifying parental sanctions as unjust. They also think that if they are punished, they must have been bad, and on the basis of this, irrational guilt develops, which later becomes fixed and leads to serious personality distortion. They will have

[723] Popper et al., 2005, p. 26.
[724] Strathearn et al., 2020.pp. 389–390.

> constant self-esteem issues that they will be anxious and withdrawn.[725]

A family saturated with violence consumes puts a lot of effort into giving the impression of a normal family. For a long time, outsiders will not detect a problem. Maintaining this appearance is particularly destructive to the child. It is impossible for them to develop strong self-confidence because they have a constant feeling of guilt due to lying. Because of this, they will later doubt whether people believe them, and after a while, they will avoid making friends and become lonely.[726] Alternatively, they will lie to their friends all the time or exaggerate the incidents that have happened.

It often happens, especially in alcoholic families, that children are neglected and they almost grow up by themselves.

> Such children have an extremely high tolerance and accept being neglected. For them, love and rudeness are forever intertwined, and this guides them throughout their lives, even during the choice of a partner. Adult children of alcoholic parents inherit anger, depression, joylessness, suspicion, damaged relationships, and an excessive sense of responsibility. They also resort to drinking like their parents. It is a terrible experience for the child that the person who should love him the most disregards him, is terribly unpredictable, and hurts him. This experience will accompany him throughout his life and will be there in all his relationships.[727]

Children's self-image is shaped by the adults close to them–primarily their parents and kindergarten teachers–by rating criticizing or praising their abilities and actions. Unfortunately, many times, they are unaware of the effect of the personality traits they helped their children develop. The child makes every qualification part of his developing self, and if he constantly hears that you are worthless, he will become so.[728] The child can only love himself or herself with that love and can only return to his/her environment what he receives. A child who is not loved will struggle with self-esteem

[725] Ranschburg, 2003, pp. 20-21.
[726] Forward, 2000, p. 81.
[727] Ibid, pp. 88-89.
[728] Ranschburg, 2003, p. 34.

disorders throughout life; if he does not learn to love himself, he will not develop self-esteem. Once self-esteem is formed, it resists any attempt to change it.[729]

It is difficult to regain a sense of trust and security once parents have trampled it. A person's personality is formed based on the basis of her relationship with his parents.[730] During the loving relationship, the so-called "primordial trust" develops and solidifies, which then accompanies a person throughout his life. If this primordial trust does not develop in the child because of the fault of the parents, no one will be able to develop it in adulthood.

Since the child is constantly afraid and anxious even when the period of calm before the storm is taking place, constantly waiting for the volcano of aggression to erupt, anxiety becomes constant. It remains even into adulthood; he will always be nervous and restless, anxious, and distrustful of everyone because he is used to having nowhere to hide from the rapist, no one to run to, and having to go home to the same hell every day.

Feelings of insecurity and lack of support had the worst effect on a child's developing personality. It is impossible to meet vague and undefined behavioral expectations. Parents adapt the tools of discipline based on their emotions at the time and not based on pre-established principles. Bullied children who grow up in such circumstances quickly learn not to expect support or love. They try to become invisible and do everything to avoid conflicts, which usually leads to abuse.[731]

Verbal insults do not go away without a trace and are even more difficult to heal than physical wounds. Insensitive parents may not even realize that the many insults, humiliating comments, and disparaging comments that they treat their children every day are like burning the child's sense of self with a hot iron and inflicting a never-ending wound on his soul. Parents are at the center of the child's world, and if they claim that the child is not worthy of love, the child will believe that it is so.[732]

Those who are victims of physical and verbal abuse blame themselves for what has happened and carry this guilt with them for the rest of their lives. In addition to anxiety, they have a constant sense of guilt and inadequacy, even if they have no reason for it. Abused children, due to their

[729] Ibid, p. 33.
[730] Forward, 2000, p. 129.
[731] Kerezsi, 1995, p. 152.
[732] Forward, 2000, p. 112.

lack of self-confidence and self-esteem disorders, can only become successful people through incredible willpower and effort, since they must also overcome their limitations and believe that they can achieve the set goal because they are capable of it and deserve it. This is a difficult task.

Raising children is a huge responsibility and a very hard task if taken seriously. It is not an impossible task. There are only two things to keep in mind. One is to love the child unconditionally and sincerely. The other is to remain consistent in all aspects. Aggressive parents cannot meet these two conditions, and by constantly sending conflicting messages to their children, they completely confuse themselves because they never know what to expect. Unpredictability on the part of parents presents the greatest risk for the child. The constant conflicting reactions and expectations (getting praise for the same action on one occasion and being put down on another occasion) can trigger personality disorders, and in severe cases, can lead to schizophrenia.

Abused children are often exposed to a bizarre mixture of joy and pain, so they will constantly search for a source of parental love, they will do everything just to be loved. This pursuit of love continues into adulthood. As they are unable to distinguish between sincere love and exploitation, girls often become prostitutes or engage in inappropriate sexual relations as adults. In their case, it is common for them to run away from home at a young age, get married very soon, or have children to be able to break away from their toxic family as soon as possible. However, in most cases, this is an apparent solution. Starting a family thoughtlessly usually worsens their situation.

The most serious problem in the case of these children is that, just like in "well-functioning families," in pathological families, the advantages and disadvantages are passed down from generation to generation. Thus, boys who see aggression as the only possible way to relieve stress and resolve conflicts will grow up to be just like their fathers, passing on the family's pathology to their new family. After all, children learn the basic norms of social coexistence in the family at an early stage in their lives.

5. Summary

In general, it can be said that the long-term consequences of domestic violence appear throughout the development of the victim, from the family to relationships with partners, and similar patterns are exhibited when the

victim raises their own child. Adults who are victims of violence in their childhood are not able to forget their childhood. Unless they receive expert help, they cannot overcome the past, so they enter the world of adults without a transition from childhood. According to the experience of the research conducted by Kerezsi, children who grow up in this way not only pass on violence to their own children and partners, but their aggressive parents also get back what they gave them.[733] Adults who were abused as children returned to their aging parents the insecurity, lack of support, and lack of love that they suffered as children.[734] However, this does not solve the problem; it worsens it.

Child maltreatment is associated with a broad array of adverse outcomes during adolescence and young adulthood, including deficits in cognitive development, attention, educational attainment, and employment; serious mental health problems, including anxiety, depression, PTSD, and psychosis and experience of intimate partner violence, substance use and addiction problems, sexual health problems, physical health limitations, and risk.[735]

Domestic violence is also passed on to grandchildren; grandparents expect them to fix what they messed up and continue terrorizing them. There is no escape from the vicious circle without help.[736] Experience proves that if they receive help to process what happened, the likelihood of abuse and passing on bad family patterns is reduced.[737] However, if someone does not have the opportunity to experience nonviolent communication and unconditional love based on true acceptance, neither in childhood nor later, they will have a very difficult time in life. The cycle of violence means that parents who report experiencing physical abuse or witnessing violence at home during childhood are at an increased risk of reporting that they engage in abusive or neglectful parenting.[738] Thus, it is important that everything must be done to protect children and break intergenerational patterns of abuse.

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[733] Kerezsi, 1995, p. 105.
[734] Kerezsi, 1995, p. 148.
[735] Strathearn et al., 2020, p. 398.
[736] Mérai, 2006, p. 38.
[737] Révész, 1999, p. 392.
[738] Greene et al., 2020.

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AGNIESZKA WEDEL DOMARADZKA*

Children's rights with disabilities and alternative care between universal and regional (Council of Europe) standards of protection

ABSTRACT: The study deals with issues relating to alternative institutional care to which children, particularly children with disabilities, are subjected. In the case of these children, there is often a multiple 'sensitisation' situation - not only are they minors, but they are deprived of parental care and have intellectual or physical disabilities. The legal regulations for children in such situations will be presented. Soft-law guidelines representing demands for adoption and implementation at the national level will also be identified and discussed. A separate analysis will be made of the jurisprudence of the European Court of Human Rights on children in institutional care and how and to what extent this jurisprudence effectively influences the level of protection. In this aspect, particular attention will be paid to the issue of the vindication of violations of law violations by victims and the possible possibilities of making legal standing more flexible.

KEYWORDS: child, children's rights, disabilities, alternative care, human rights, institutional care

1. Introduction

The human rights protection system, including the protection of children's rights as a specific system, has two dimensions in the international sphere: a universal one, usually strongly linked to the United Nations (UN), and a regional one characterized by the applicability of regulations protecting children's rights in a selected geographical area. Both systems are designed to support the child's situation at the national level in a complementary way. In the event of a failure of the national system, they also provide for solutions that allow for the filing of notices or complaints aimed not only at

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* Vice-dean, Faculty of Law and Economics, Kazimierz Wielki University, Bydgoszcz, Poland, awedel@ukw.edu.pl, ORCID: 0000-0001-8128-9536.
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obtaining appropriate compensation or redress but also at a broader impact on the entire child rights protection system in order to make it more effective. The need for effectiveness is determined primarily by the vulnerability of children, resulting from the fact that they are identified as members of a vulnerable group. The particular vulnerability of children is due to their immaturity and consequent unawareness of the rights violations to which they might become victims. These violations are particularly problematic for children placed in alternative care. The focus of this study is more specifically primarily on those children placed in alternative institutional care. Institutional care, in most cases carried out by the state, must meet the highest standards, for states are, after all, aware of their own legislation protecting the situation and rights of children and the human rights contractual obligations by which they are bound. States have the capacity to safeguard children's rights effectively, and should violations occur, they also have mechanisms to hold violators accountable at the national level. Moreover, states are also aware of the international child rights safeguards system in the universal and regional spheres.

Unfortunately, despite such extensive regulations, which are expected not only to prevent the violation of children's rights but, in the event it occurs, to react quickly to eliminate it, practice shows that the system works imperfectly in many cases. Consequently, it is necessary to analyze the standards related to the legal regulations, assess whether they are optimal, examine practice, and draw attention to those elements that should be improved and made more effective in the future. These improvements should reduce situations in which children, as subjects who often cannot claim their own rights, had these rights not only been guaranteed in legislation but realized.

1.1. The legal foundations of a universal child protection system and their relevance to alternative custody

Any consideration of children's rights must begin with the fundamental universal document, the Convention on the Rights of the Child (CRC).[739] This document is considered one of the most widely accepted international agreements. Its content addresses the child's situation in various contexts and draws attention to the need to meet the child's needs comprehensively.

[739] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3., Available at: https://www.refworld.org/docid/3ae6b38f0.html (Accessed: 31 January 2023).

Concerning the issue of foster care, it is first necessary to draw attention to Article 3 of the CRC, which contains one of the interpretative and guiding principles of the Convention[740], namely, the principle of the protection of the best interests of the child. According to Article 3 of CRC, any action 'undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' towards children must meet the standard of considering their best interests. Although it does not specify that actions are to be taken concerning children placed in foster care, this guideline is to be applied by all organizational entities, including those running foster care or deciding that a child will be placed in such care. A dedicated solution relating to foster care can be found in Article 20 of the CRC, which implies the need to take measures to provide children deprived of their family environment with alternative care. These measures should be conceived in such a way as to provide the child with an environment that is as close as possible to a family environment.[741] Furthermore, in the case of sick children, care should be provided at a level appropriate to their situation.[742] In particular, sick children, as well as children with disabilities, are particularly vulnerable to discrimination in access to education, health care and other social services.[743]

In addition to the Convention standards at the universal level, the UN document on guidelines on alternative care is particularly important.[744] These guidelines point to the need to preserve the family environment and view the family as the fundamental social group where opportunities for growth and development are most significant. The guidelines indicate that any decisions concerning children should be made with attention to the individual situation and taking into account the mechanisms for the best interests and rights of the child. There should also be no discrimination of any kind. Regarding alternative care standards, the need to place the child in an institution as close as possible to his or her current residence is emphasized. Attention is also drawn to the fact that the possible removal of a child from the natural family environment should be treated as a last resort. In particular, poverty and the financial conditions of a family should

[740] Glenn, 1997, p. 23.
[741] UN Committee on the Rights of the Child (CRC), General comment No. 17.
[742] Ibid, General comment No. 7.
[743] Cantwell and Holzscheiter, 2008, p. 6.
[744] Resolution adopted by the General Assembly [on the report of the Third Committee (A/64/434)] 64/142 – Guidelines for the Alternative Care of Children, Available at: https://digitallibrary.un.org/record/673583 (Accessed: 31 January 2023).

not be the only determinant of whether a child should be removed from that family. It is also considered essential to take direct measures to support the family in its possible social and legal difficulties, including ensuring its reintegration. Placing children in alternative institutional care requires far-reaching care, professionalism, sensitivity, and measures to ensure contact with the family.

This requires high standards in the performance of the staff involved in institutional care that should be implemented from the very beginning, which emphasizes the need to ensure that the transfer of a child into foster care is carried out with the utmost sensitivity and in a child-friendly manner. Those involved in this procedure should be adequately trained. Guardians of children in institutional care are also required to provide children with wholesome food following the children's dietary habits, norms, and religious beliefs and to secure any supplementation. It is also the responsibility of caregivers to ensure that children's health conditions are adequate, including ensuring that they have access to appropriate medical care and support should the need arise. Particular attention is required to respecting the child's rights for children with disabilities, HIV/AIDS, or any other special needs. The guideline also calls for the provision of fundamental rights to children in institutional care, such as the satisfaction of religious and spiritual needs and the right to privacy, safety, and hygiene. Importance should also be attached to adequate accommodation in institutions, and the housing provided in an institution should take into account factors such as the child's age, maturity, and degree of vulnerability. This last element is essential when considering infrastructural barriers that may present difficulties for children with mobility disabilities.

Care facilities should also ensure that children are protected from all forms of abuse and that children in alternative care are not stigmatized. The treatment of children in institutions shall not be cruel, inhuman, or degrading. Any form of discipline involving confinement, seclusion, or any form of physical or psychological violence shall be prohibited. The use of force or coercion may only be justified by an absolute necessity to protect the child's or others' physical or mental integrity in accordance with the law and must be reasonable and proportionate. Any calming or sedative medication may only be used based on therapeutic need and after appropriate diagnosis and selection of medication by a specialist. The need for children to have access to an effective and impartial mechanism through which they can raise complaints or concerns about their treatment or

placement conditions is also indicated. This aspect will be applied when children are at a level of development that enables them to identify the conditions and treatment for themselves.

Although this document is in the form of a guideline, given the extensive experience of the UN system in respecting children's rights and the knowledge base derived from periodic reviews or cooperation with non-governmental actors, its content should be considered particularly important.

1.2. The legal basis of the regional system for the protection of children's rights and its relevance to alternative custody

The regional system in Europe concerning children's rights is based on diverse sources. First, attention should be drawn to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), inspired by the Universal Declaration of Human Rights.[745] This document has an autonomous character in relation to those obligations under international law that directly guarantee the rights and freedoms provided for therein.[746] The Convention is not a document dedicated to children's rights, and it contains only a few provisions dedicated to children. However, it assumes that all the rights and freedoms it contains are rights and freedoms for everyone, including children. Of course, their perception and interpretation depend on the particular context of being a child and the specific needs of children. With that said, this interpretation has already been left to the bodies of the Council of Europe (CoE), originally the Commission on Human Rights and now the European Court of Human Rights (ECtHR). In the context of cases concerning children and their treatment related to institutional care or family relationships, Article 2 (right to life), Article 3 (freedom from torture and inhuman or degrading treatment), and Article 8 (right to respect for private and family life) of the ECHR have been cited most frequently in case law.

One of the first documents to deal with alternative custody, which originated at the Council of Europe regional level, is the resolution on the placement of children.[747] This resolution stipulated that, as far as possible,

[745] Schabas, 2015, p. 1.

[746] Loucaides, 2007, p. 9.

[747] Resolution No. R (77) 33 on the placement of children. Available at: https://rm.coe.int/res-77-33e-on-placement-of-children/1680a3b3f0 (Accessed 31 January 2023).

institutional care should be avoided in favor of leaving the child in a family environment while intensifying measures to support the family. Decisions regarding the placement of children in foster care should be made to guide the child's developing emotional needs and his or her physical well-being and welfare to the highest degree possible. Great importance is also attached to the professionalism of the staff in children's centers. The eventual care should take the form of foster care in the family environment, and placement in institutions should only be temporary.

The issue of alternative care for children was addressed for the second time by adopting a resolution in 2005.[748]

According to this resolution, the placement of children in institutions should be an exceptional case, but if it is to take place, it is necessary to ensure that children are able to exercise their full rights. The time spent in care should be as short as possible and should aim at reintegration with parents. Emphasis is also placed on the need to ensure non-discrimination, particularly regarding sex, race, color, social, ethnic or national origin, opinion expressed, language, property, religion, disability, birth, or any other status of the child and/or their parents. Individualizing the child's care plan is essential to ensuring that the child is allowed to express their opinion and pour in, depending on their stage of development. The resolution also stresses the need to take measures to prevent the excessive use of control and discipline unless this is determined by the need to protect the child himself or herself or other persons present with the child. The text of the resolution also points out the specific rights of children placed in foster care, which include: the right to placement for the sole purpose of meeting the needs of the child, the right to contact with the family, the right to contact with siblings, the right to identity, the right to respect for ethnic, religious, cultural, social, and linguistic background, the right to privacy, and the right to health care. In the context of health care, the need for it to be provided at a good quality level and in such a way that it is adapted to the needs of the child was emphasized. Other necessary rights included the right to respect for the child's dignity and physical integrity, the right to equal opportunities, the right to access to education, the right to be prepared for active and responsible citizenship, the right to participate in decisions concerning oneself, the right to information about one's rights, and the possibility to

[748] Recommendation Rec(2005)5 of the Committee of Ministers to member states on of children living in residential institutions, 16 March 2005, Rec(2005)5, Available at: https://www.refworld.org/docid/43f5c53d4.html (Accessed: 31 January 2023).

react to violations of those rights. Ensuring the realization of these rights entails a high degree of professionalization of the staff running and working in children's centers and proper control and accreditation of these facilities. It is also necessary to ensure that any violations identified are punished. The recommendation also emphasizes the significant role that non-governmental organizations, including religious organizations, have to play in addition to public institutions.

The document adopted by the Committee of Ministers of the Council of Europe in 2011,[749] which dealt with child- and family-friendly social services, first included the basic principles that should be respected when providing social services.

These principles include (referring to the CRC), first, the principle of the best interests of the child, which should be implemented, among other things, by respecting the dignity of the child as well as treating the child with care, sensitivity, fairness, and respect and ensuring that the child is protected from discrimination based on gender, age, disability, economic or ethnic origin, race, color, birth, property, language, religion, political or another opinion, sexual orientation, or other status. Overcoming the stigmatization of certain groups of children should also help to realize this principle. The principle of the child's participation was identified as the second principle. The child should be listened to by social services staff and should be involved in the planning and adaptation of the measures that will be taken toward them. Of course, this should be done taking into account the child's age and individual characteristics. The right to participation must be correlated with the obligation to provide children with information on the available social services, their situation, and the decisions that have been taken with regard to them, and to be listened to concerning the assessment of these actions. The third principle to be taken into account is the principle of protection. This assumes that the child should be protected from neglect, abuse, violence and exploitation. Any services provided to the child, especially vulnerable children, should provide appropriate prevention, take individual needs into account, and ensure prevention of re-victimization.

The wording of the recommendation itself implies a strong emphasis on the situation of children with special needs. It points out the need to

[749] Recommendation CM/Rec(2011)12 of the Committee of Ministers to member states on children's rights and social services friendly to children and families. Available at: https://www.coe.int/t/dg3/children/keyLegalTexts/SocialServicesSept2012_en.pdf (Accessed: 31 January 2023).

provide a support system for children with mental health problems, as well as to take into account the needs of children with disabilities in such a way that they can live independently and participate fully in everyday life. It also emphasizes the importance of special social services allowing rapid intervention in crisis situations. Great importance is also attached in the body of the recommendation to the use of deinstitutionalization mechanisms, and these should be carried out in such a way as to increase the chances of family and community-based care, mainly dedicated to children under three and children with disabilities. The final part of the recommendation refers to the definition of standards to which social services should conform, mainly in terms of their organisation and wide availability. The quality of social services is also determined by the quality of the staff running them. Attention is drawn here to the need for training and continuous improvement of the competencies of persons providing these services to children, especially in respecting children's rights, including the rights arising from the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

According to the documents analyzed, a great deal of attention is paid to the empowerment of the child in foster care, and the existence of their rights and freedoms is extensively legislated. The documents' content shows an awareness of the uniqueness and risks of the alternative care environment. At the same time, there is an awareness of situations in which the use of alternative care is unavoidable.

1.3. Selected ECHR case law on foster care

Despite the existence of detailed solutions both at the level of legislation and at the level of guidelines and instructions addressed to States, the situation of children in institutional care remains a problematic issue, resulting in several violations. As can be seen from a selection of cases referred to the ECtHR, children with disabilities tend to be permanent residents of institutional care and sometimes suffer violations of their rights and freedoms while in such care.

One of the most well-known and at the same time appalling cases on institutional child custody is considered the case of Nencheva and others v. Bulgaria.[750] This case concerned children placed in institutional foster care in a children's home in Bulgaria for children with physical and mental disabilities. The facts of the case concerned the period 1996–97 when

[750] *Nencheva and Others v. Bulgaria*, App. No. 48609/06, 13. June 2013.

Bulgaria was in the midst of an economic crisis. Consequently, the state authorities could not provide the children in the institution with food, warmth, and medical care meeting an adequate standard. The institution had a food shortage, so the children were fed only a small amount of putrid and non-diversified products. Due to the lack of fuel, the rooms in which they were housed were underheated, with temperatures of around 15 degrees Celsius. Hygienic conditions also left much to be desired. Due to the lack of disposable materials, it was necessary to wash current items, which took a long time to dry due to the low temperatures. In the convalescent home, children lying in bed were in difficult hygienic conditions. Despite numerous requests and appeals from those in charge of the facility, the state authorities did not provide such assistance.

As a consequence, 15 children died. In the Court's view, Article 2 of the ECHR must be regarded in certain circumstances as imposing a positive obligation on the State to protect the individual from others, and in certain specific circumstances, even from himself. This obligation cannot be excessive, nor does the existence of any alleged threat to life oblige the authorities to take specific measures to eliminate that threat. However, a positive obligation exists where it can be established that the authorities knew or ought to have known at the time that a real and imminent danger threatened the person's life. On the other hand, the authorities' liability will involve their failure to take measures within the scope of their powers that, from a reasonable point of view, would undoubtedly have reduced that risk. In examining this ECHR case under Article 2 ECHR, the Court found fault with the governmental authorities who were regularly informed of the situation and needs of the children's center.

Moreover, they were aware of the situation of crisis that prevailed in Bulgaria at the time. It was not a sudden, one-off, and unforeseen situation, but probably a state of affairs lasting for a more extended period and requiring decision-makers to take such decisions that would minimize the harmful effects of the crisis. The fact that all persons placed in institutional care were children and young adults (under 22 years of age) and had severe mental and physical disorders is also not irrelevant to the analyses made. Placing them in state institutions consequently subjected them to the exclusive care of the State, which, given their vulnerability, was obliged to take special care.

In deciding on the alleged violation of Article 2 ECHR, the Court found that the Bulgarian Government had not only failed to take measures

to prevent the risk of loss of life and the loss of life itself for children in institutional care but had also failed to fulfill its obligation to provide an adequate investigation into the circumstances of the deaths that had occurred. Meeting the standards of Article 2 ECHR requires that the Bulgarian authorities fulfill their obligation to conduct an ex officio investigation into the circumstances of the deaths. The circumstances should also include an examination of what involvement the state authorities had in the whole procedure, what actions to protect life they were obliged to take, and the identification and possible holding accountable of those whose acts or omissions might have influenced the whole situation.

As has been established, the proceedings were not initiated until two years after the events that led to these 15 deaths. The criminal proceedings took eight years, which clearly violates the standards of conduct concerning such weighty issues as the question of death. In this regard, as the Court emphasized, the Bulgarian Government has not provided any explanation to justify either the delay or the long course of the proceedings. The standard of the procedure itself in terms of the evidence collected was also unsatisfactory. Questions concerning the determination of the causes of the deaths and the factors that influenced these deaths were unclear. In particular, there was no clear answer as to whether and to what extent the deaths were due to natural causes and whether they occurred earlier than the assumed life expectancy of the children. Due to the length of the proceedings, it was also not possible to establish conclusively who could have influenced the deaths of the children and in what way. The government party's allegations concerning the events at the care center concerned only three persons. Moreover, these were only the people who managed the home and took measures, often desperate, to ensure a minimum existence for the residents. The entity responsible for the events that should be held liable was the public authorities, who failed to make the budgetary adjustments necessary to purchase sufficient food and fuel or to provide adequate and timely medical care.

The Court added that it was insufficient to recognize that the parties to the proceedings had a civil remedy to claim liability and obtain compensation in connection with the death of the children. For procedural reasons relating to the fact that the six-month time limit for bringing an action had been exceeded, the allegations raised under Articles 3 and 6 ECHR were not examined.

The ECHR clearly recognized the importance of being able to seek justice on behalf of children in the case of Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania.[751] The Center mentioned above of Legal Resources (CRL) brought an action against Romania on behalf of the late Valentin Câmpeanu. He was HIV-positive from childhood and severely mentally disabled. Valentin Câmpeanu had been a resident of various institutional care facilities throughout his childhood and into adulthood. Although in the present case we are dealing with an adult, the reasons for his condition at the adult stage and his death must be sought from the early years of childhood. After all, Câmpeanu, who had been abandoned at birth, had spent the entire period in institutional care. He was therefore in the power of the state authorities, and it was these authorities that had a far-reaching duty not only to preserve his life but also to ensure the quality of that life and to ensure that he lived as long as possible in the comfort that was possible because of his disability and his illness. He was housed in a medical and social care center not adapted to deal with people with mental problems and eventually ended up in a psychiatric hospital. As determined by CRL, who noticed his problem during a visit to the hospital, he never received appropriate treatment, receiving antiretroviral medication only incidentally and suffering from malnutrition. CRL representatives found that Câmpeanu was housed alone in an isolated, unheated, and locked room with only a bed without any bedding, could not use the bathroom by himself, and was only partially clothed. Due to fears of infection, the staff at the psychiatric hospital where he was staying only administered glucose through a drip. An attempt by CRL representatives to transfer Câmpeanu was unsuccessful. The patient died in the evening of the same day. Unaware of his death, CRL continued with the transfer requests and organized an investigation into the violations of his rights as a human being concerning transfers to different facilities and the lack of appropriate diagnostics. After his death, CRL continued the proceedings by submitting a request for a criminal investigation concerning the death and circumstances of Mr. Câmpeanu's death. Initially, an autopsy was waived, indicating "it was not believed to be a suspicious death, taking into consideration the two serious conditions displayed by the patient" (namely intellectual disability and HIV infection).

[751] *Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]* App. No. 47848/08, 17. July 2014. [GC].

However, due to CRL's intensified efforts, an exhumation was carried out. It was concluded that the cause of death was not sudden and was due to cardiopulmonary failure caused by pneumonia, a complication occurring during the progression of HIV infection. The national proceedings in which CRL actively participated did not clarify the circumstances of the case. The various instances tended to rely on Mr. Câmpeanu's incomplete medical records. They considered that there was no basis for claims that presumed the existence of negligence on the part of the care providers, in particular such negligence that could have led directly to Mr. Câmpeanu's death.

In examining this case, the ECHR first had to answer questions regarding the legitimacy of the CLR. The government side contested this legitimacy. Significantly, this challenge took place at a different level. In the Court's view, however, the situation regarding CRL's ability to step in on behalf of Mr. Câmpeanu is particular. According to the ECHR's well-established jurisprudence, actions may only be brought before the Court by or on behalf of living persons. Although in this case we are not dealing with an express power of attorney for the CRL, in the case of the most severe violations of the ECHR, applications can be made without express power of attorney. In its deliberations, the ECtHR emphasized that the Convention must be interpreted as guaranteeing practical and effective rights, rather than theoretical and illusory ones.[752] Moreover, the ECtHR pointed out that jurisprudential activity is not only aimed at resolving specific cases, but also at clarifying, safeguarding, and developing the principles established by the Convention to increase its scope of application. Although Câmpeanu was not an incapacitated person, nor did he have an appointed guardian, this was not due to his capacity, but rather was the result of negligence by the state authorities. He also had no relatives. Consequently, it must be considered that these exceptional circumstances justified the possibility for CRL to act on behalf of Mr. Câmpeanu through the ECtHR, even without an extraordinary power of attorney. A contrary conclusion would have led to a situation in which the State would have avoided responsibility, which must be considered contrary to the spirit of the Convention.

With regard to the consideration of the violation of Article 2 of the ECHR, it was stated that the State's obligations under it concern both the protection of the right to life and the provision of effective measures to establish the facts surrounding the death and possibly to bring those responsible for the death to justice. Mr. Câmpeanu had spent his entire life

[752] McBride, 2021, pp. 35–36.

in public institutions. However, the transfers between facilities that he experienced were determined by their willingness to accommodate him rather than by his actual needs and the appropriate level of medical care. The result of such carelessness was, for example, that he was deprived of access to antiretroviral medication and was only given minimal treatment consisting of vitamins and sedatives. Consequently, at the investigation stage of the causes of death, it was impossible to ascertain the scale and timing of the negligence. Furthermore, there was neither accurate documentation of Mr. Câmpeanu's treatment, nor did the Government provide reliable documents on the circumstances of his death.

Furthermore, the Government was also unable to point out that the state authorities were not responsible for decision-making errors related to providing adequate medication and care. The latter aspect has a broader background and also refers to the systemic negligence toward residents in institutional care that took place in Romania at the time (food shortages, underheating, difficult living conditions) and the fact that, despite being aware of them, the public authorities did not take corrective action. Thus, Romania was considered to have breached its positive obligations under Article 2 ECHR.

From the perspective of the above case, the possibility of conducting proceedings before the ECtHR on behalf of the deceased Mr. Câmpeanu should be considered most relevant. The Court's decision to recognize the legitimacy and to take into account the evidence collected by the CRL in the case not only made it possible to establish the State's responsibility but also showed that procedural possibilities exist to protect vulnerable groups effectively. In the case indicated, we not only have the long-standing neglect of a child and later an adult, but also the lack of a practical possibility to assert one's rights due to the lack of awareness of their existence and the failure to appoint a guardian. The fact of the death of the person affected by these negligent acts should not only not stand in the way of establishing responsibility, it should indeed be supported procedurally at the level of the opening up of the ECtHR to the possibility of victims' entities acting on behalf of injured individuals.

Unfortunately, this positive trend of extending legal standing has not been sustained by the ECtHR. Even worse, it was not upheld in a similar case also concerning foster care and the negligence that took place in foster care. In 2016, a case was brought before the Court against Bulgaria. The complainant in the case was the Bulgarian Helsinki Committee (BHE),

specializing in the protection of human rights. The association became interested in the case of the care home in Mogilina after a program was broadcast on Bulgarian television about children abandoned by their parents and housed there ("Les enfants abandonnés de la Bulgarie"). The information contained in the program inspired the BHE to prepare and submit a letter to the Prosecutor General regarding the possibility that crimes related to the life and health of the children residing there had been committed in disabled children's homes. The informed authorities initiated investigations, which ended with a finding of no violations and no need to continue the proceedings. As a consequence of this decision, the BHE took civil action claiming that the prosecution's failure to take action constituted a case of age discrimination based on disability and health status. However, despite further national proceedings involving the BHE, no charges were brought against any individual.

Two cases of girls' deaths in foster care became the canvass for the ECtHR investigation.[753] The first of these, Aneta Yordanova, was abandoned by her mother after birth. Due to her intellectual disability, she was placed in an institution for children with profound mental disabilities. While in the institution, she underwent surgery for an inguinal hernia. She also complained of vomiting and stomach pains. The doctor diagnosed gastritis and duodenitis and recommended hospitalization. As her condition worsened, an operation was carried out, clearing the gastric contents.[754]

Despite surgery, the condition did not improve. Aneta Yordanova died and, as the post-mortem showed, the cause of death was peritonitis due to perforation of the stomach, duodenum, pneumonia, and pleurisy. Despite the ongoing investigations, the prosecutor ultimately did not charge anyone. The second girl, Nikolina Kutsarova, also abandoned shortly after birth, placed with a foster family, and then placed in a home for mentally disabled children. While in foster care, she began to avoid eating. Despite being hospitalized, her condition did not improve and she consequently died, with several pathologies cited as the cause of death established after autopsy: dry coagulopathy, sepsis, anemia and thrombocytopenia, failure of several organs, cachexia, and, as a direct cause, cardiac arrest. The prosecution's

[753] *Bulgarian Helsinki Committee v. Bulgaria (dec.),* App. No. 35653/12 and 66172/12, 28. June 2016. [Section V].

[754] According to medical records, the girl's stomach contained: 25 shoe inserts, 8 rags, 6 socks, 3 sponges, 3 pieces of paper, and 3 pebbles, with a total weight of approximately four kilograms.

investigation, as in the case of the first girl, also failed to result in any charges.

In referring the complaint to the Court, the BHE alleged violations of Articles 2, 3, 8, 13, and 14 of the Convention concerning the two girls. At the same time, it identified itself as its representative. This representation was based on the fact of its activities as an association for the protection of human rights. It also stressed the recognition of the capacity of its activity at the national level by the Bulgarian Prosecutor's Office. The allegations formulated by the association concerned, in the case of Aneta Yordanova, the lack of adequate supervision of the girl, resulting in the absorption of numerous objects, as well as the lack of timely assistance and care adequate to her condition. These actions constituted discrimination based on her degree of disability, her status as an abandoned child, and the fact that she had been placed in foster care. An element of the violations also concerned the failure to conduct an effective investigation. In the case of the second girl, the allegations included a lack of adequate care and feeding and a failure to provide prompt and appropriate treatment, resulting in the girl's death. In this case, there was also a failure to conduct an effective investigation.

Concerning the admissibility of the proceedings initiated by the Bulgarian Helsinki Committee, the ECtHR focused primarily on the aspect of the association's standing. It pointed out that the association was not a direct victim of the alleged violations, nor was it an indirect victim, nor was there a sufficiently close connection between the association and indirect victims. Accordingly, the aspect on which the ECtHR chose to focus its deliberations was whether there were "exceptional circumstances" justifying the granting of standing to the BHE as an entity acting on behalf of the deceased girls. The admissibility of an organization to act on behalf of a deceased person had already been allowed by the ECtHR in the earlier Valentin Câmpeanu case. At that time, the Court allowed the possibility of standing by pointing to the vulnerability of the immediate victim preventing her from bringing an action during her lifetime, the relevance of the allegations brought before the Court, the lack of heirs or legal representatives capable of bringing an action before the Court, the contact of the applicant associated with the victim, and its participation in the national proceedings after death, as well as the recognition of the association's capacity to act by the national authorities. Referring to these recognized grounds and examining their application in the case against Bulgaria, the

ECtHR found the girls' lack of capacity to stand alone in Court during their lifetime due to their mental handicap, their status as abandoned children, and their high vulnerability. The Court also found that the victims had heirs, living mothers, and siblings. However, the ECtHR's recognition that their situation differed from that of Valentin Câmpeanu (whose mother had died) cannot be considered appropriate. Neither mother maintained nor sought to maintain contact with the deceased girls. The same applied to the siblings.

Consequently, the Court was correct (despite its initial reservations) in pointing out that these persons could hardly be regarded as capable of bringing an action. In analyzing the admissibility of the ECtHR, however, it noted that in the Romanian case, the association had taken an interest in the deceased Mr. Câmpeanu while he was still alive, had contact with him, and had initiated domestic proceedings immediately after his death. In the Bulgarian case, no such events took place, and, in the Court's view, this lack of immediacy is the basis for the difference in status of the two associations. However, the question must be asked whether this is indeed the correct approach. BHE indeed had no contact with the girls, but it raised the issue of abuse in institutional care homes as soon as it became aware of it, i.e., after the television program was broadcast. It then pursued active measures at the national level to clarify the circumstances of the deaths and bring those responsible to justice. The fact that action on behalf of specific individuals Aneta Yordanova and Nikolina Kutsarova was taken a long time after their deaths does not detract from the legitimacy of the action and the need to pursue it. Even more surprising is the ECtHR's argumentation indicating that the Bulgarian association had no standing in the domestic proceedings and did not enjoy a party's rights, which distinguished it from its status as an association in the Romanian case. Consequently, it was held that the lack of contact before the death, the lack of procedural status, and the late time of the intervention were grounds for refusing to recognize the association as having standing to appear before the Court. In rejecting the possibility of proceeding with the application, the Court stressed that it appreciated the activities of civil society in the field of the rights of people with extreme sensitivity and pointed out (somewhat paradoxically to the earlier argumentation) that the national authorities had taken into account the reports prepared by BHE.

The fact that the association in question was not in contact with the persons affected by the infringements must be regarded as unconvincing. In this case, being in contact should not affect legitimacy significantly since a

situation of far-reaching mental disability eliminates the freedom of the association in question to authorize it to act on behalf of someone. The lack of legitimacy leads to a situation of impossibility in conducting proceedings that thus makes it impossible to establish possible infringements and a lack of consequences for the guilty parties, including state authorities.

Concerning the action taken by the Court, it should be pointed out that it declared the application inadmissible based on only one formal, and not even fully substantiated, element. The other criteria from the Câmpeanu case, considered relevant, examined, and indicated as fulfilled, were also applicable in this case.

2. Conclusions

The analysis presented herein of universal and regional legislation as well as the references to proceedings before the ECtHR indicate that the situation of children in institutional care still needs improvement. A number of guidelines and recommendations related to institutional custody emerge from the UN and CoE's analysis of documents from individual countries, reports, and the facts of cases pending before the ECtHR. This analysis warrants several conclusions.

First, the family environment, or one as close as possible to the family environment, should continue to be considered the leading and best environment for the child. As Article 16(3) of the Universal Declaration of Human Rights indicates, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' In a similar manner, the regulations contained in Article 23(1) of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights were adopted. Also, the predecessor documents to the CRC, the 1924 and 1959 Declarations on the Rights of the Child, recognized the need to protect children without parents or whose parents could not care for them. In its preamble, the Convention itself provides that the child, "for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

Second (albeit closely related to the first proposal), the need for the de-institutionalization of childcare should be stressed.[755] De-institutionalization processes should be implemented systematically and consistently across countries. There should be de-institutionalization policies and activities to promote and support family-like environments for children. Particular support should be provided to those de-institutionalization activities that involve children with disabilities. According to statistics, they often find themselves in institutional care, and a barrier to their transfer to family-like environments is the relatively low support that families caring for such children receive.

Third, it should be remembered that the importance of NGOs and their role in ensuring respect for children's rights was already recognized at the level of the CoE recommendations. Although there was no mention of legitimacy at the time, the fact that they should be involved in this protection was stated. This involvement should lead to adequate respect for children's rights and possible assistance in ensuring redress in case of violations. Such an outcome would be possible if the legitimacy of NGOs in the ECtHR was allowed. Such organizations should be able to initiate proceedings before the ECtHR regardless of their de facto recognition as representatives of victims at the national level. As Judge Pinto de Albuquerque rightly pointed out in his dissenting opinion, recognition or not as a representative at the national level is irrelevant, as "otherwise it would make liability for human rights violations conditional on the actual recognition of the complainant by the same institutions that may be responsible for the violation." Moreover, as Pinto de Albuquerque argues, standing should seek to ensure equality of rights in the enjoyment of the Convention. In cases where national authorities ignore the fate of alleged victims of human rights violations and where these persons are neither themselves nor through relatives in a position to bring complaints to the ECtHR themselves, the Court must interpret their rights of access to the European protection system as broadly as possible, as only such an approach guarantees the effective protection of their rights.

Fourth, we must not forget the new challenges that, unfortunately, are emerging for states in the context of child welfare. For example, the recent

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[755] Council of Europe Strategy for the Rights of the Child (2016–2021) Children's human rights. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8 (Accessed: 31 January 2023).

events related to the COVID-19 pandemic have resulted in the periodic closure of institutional care facilities in many cases. Not only has this resulted in restrictions on contact with the children there, but it could also be an opening for abuse due to the limited capacity to control and supervise such facilities. Also, the new challenges posed by the armed conflict in Ukraine may constitute an institutionalized danger due to the massive influx of children from Ukraine to neighboring countries and the need to provide these children with care, including institutional care, as these are in many cases children who have been in such care in Ukraine.

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[7] UN Committee on the Rights of the Child (CRC), General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), 17 April 2013, CRC/C/GC/17, Available at: https://www.refworld.org/docid/51ef9bcc4.html (Accessed: 31 January 2023).

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ZSUZSA WOPERA*

Strengthening The Right of Children to Express Their Views in Family Law Procedures

ABSTRACT: In recent years, significant progress has been made in Hungary in strengthening the right of children to express their views. The study analyzes what amendments have been made in Hungarian civil law and civil procedure law in this field. The study analyzes how to interpret the right of a child who is capable of forming views in the light of the findings of the general comments issued by the UN Committee on the Rights of the Child. In addition, the article analyzes in detail Article 21 of the Brussels IIb regulation on the expression of the child's views and the related rules for refusal of recognition and refusal of enforcement of decisions in matters of parental responsibility. The study provides a detailed 'practice guide' for Hungarian legal practice on how to apply the provisions that entered into force in August 2022 consistently with EU law and international legal interpretations. The article provides answers to the procedural questions that arose after the entry into force of the amendment of Hungarian Civil Code in 2022. The author takes a stand on the question of which stage of the civil procedure and with what content it is worth issuing the notice for the child.

KEYWORDS: right of the child to express views, capability of forming views, matters of parental responsiblity, best interest of the child, hearing the child.

1. Introduction

Act CXXX of 2016 on the Code of Civil Procedure, which entered into force on January 1, 2018 (hereinafter referred to as: Civil Procedure Code), codified the protection of the best interests of the child as a primary consideration when defining family law procedures and developing its

* Professor, University of Miskolc, Faculty of Law, Institute of European and International Law, zsuzsa.wopera@uni-miskolc.hu.
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special regulations.[756] The Civil Procedure Code significantly expanded the range of family law court procedures for which special rules were established compared to Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as: Civil Procedure Code of 1952).

Act CXIX of 2020, amending the Civil Procedure Code from January 1, 2021, introduced additional special rules based on judicial practice to speed up these procedures on the one hand and to protect the interests of children on the other. Furthermore, the amendment to Act V of 2013 on the Civil Code (hereinafter referred to as: Civil Code), which entered into force on January 1, 2022, broadened the joint exercise of parental custody and shared physical custody, while ensuring the best interests of the child.[757]

When the Civil Procedure Code was codified and when the Civil Code and the Civil Procedure Code were amended, an important legislative goal was to ensure that the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, were implemented in the new regulations.[758] These special provisions were already included in the Civil Procedure Code of 1952, with the enactment of Act LXII in 2012 to implement child-friendly justice.

As the main element of child-centered justice, the Civil Procedure Code allows the court to *ex officio* exclude the public from the hearing by the protection of minors and establishes special rules of territorial jurisdiction in family law procedures, which enable the above-mentioned lawsuits to be initiated at the domicile or place of residence of the minor. One of the most important innovations of the Civil Procedure Code for strengthening child-friendly justice is that it defines the rules for interviewing a minor child as an interested person[759] (see later for details). These are important progressive changes.

On August 1, 2022, the outstanding innovation of strengthening children's rights came into force, which supplemented Article 4:171 paragraph 4 of the Civil Code, according to which the court is obliged to

[756] The Civil Procedure Code contains special regulations for the following family law actions: matrimonial actions, actions for the establishment of parentage, actions related to parental custody, actions related to contact with the child, actions related to the termination of adoption and actions brought for the maintenance of a minor child (Arts. 453–492 of the Civil Procedure Code).

[757] See Szeibert, 2022, pp. 10–15; Simon, 2022, pp. 1–10.

[758] Council of Europe, 2010.

[759] Art. 473 of the Civil Procedure Code.

inform the child who is of sound mind the opportunity to express his or her views in actions for settling the exercise of parental custody and for the child's placement with a third party.

In this study, we analyze Hungarian regulations that strengthen the right of the child to express his or her views and international legal and EU legal backgrounds.

2. A brief commentary on the civil substantial and procedural rules regarding the hearing and expression of the child's views

Unusually, in Hungarian private law, provisions regarding participation, hearing, and giving a child an opportunity to express his or her views in judicial proceedings affecting them are found in both the Civil Code and the Civil Procedure Code. Since its entry into force on March 15, 2014, the Civil Code has placed great emphasis on understanding the views of the child, who is of a sound mind. The Civil Code 'Involving the child in the decision-making' provision is of fundamental importance.[760]

It has been a rule for several decades that, in the procedures for settling the exercise of parental custody and for the child's placement with a third party, the court should hear from both parents, except for irremovable obstacles. In justified cases or if requested by the child, either directly or involving an expert, the child should be heard as well. For a child older than 14 years, the consent of the child shall be required for any decision on parental custody and placement unless the child's choice endangers his development.[761]

An important change was made to this regulation: an amendment on August 1, 2022, which clearly strengthened and made the child's right to express his or her views more effectively in family law lawsuits. Act LXII of 2021 on international judicial cooperation concerning parental responsibility (hereinafter referred to as: Parental Responsibility Act) added that the court must inform the child who is of sound mind about the opportunity to express his or her view.

[760] According to Art. 4:148 of Act V of 2013 on Civil Code 'The parents are obliged to inform the child of any decisions affecting him; they shall ensure that their child who is of sound mind may express his views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity.'

[761] Art. 4:171(4) effective before 1st of August 2022. Act IV of 1952 on Family Law also contained similar provisions.

It is important to emphasize that the supplement, which entered into force on August 1, 2022, did not change the previous regulation of the hearing of the child; to make the channeling of the child's views more effective, it requires the court to inform the child who is of sound mind, so that the child knows at all that he or she can express his or her views during the procedure if his or her parents are not informed about this possibility.

Therefore, we must clearly distinguish between the provisions on hearing the child and the court's obligation to inform the child of the sound mind and the opportunity to express his or her views. The court's obligation to notify does not mean that it orders the child to be heard but that the court informs the child who is of a sound mind that if he or she wishes, he can express his or her views in some form during the procedure.[762] The regulation is otherwise flexible because it is up to the court at which stage of the first-instance procedure to inform the child of the possibility of expressing his or her views.

The procedural rules for interviewing a minor child as an interested person can be found in the Civil Procedure Code. If the court decides in the course of the action to interview the minor child as an interested person, in justified cases it shall simultaneously appoint *ex officio guardian ad litem* for the minor.[763] The court may interview a minor child in the absence of the parties (their parents) or their representatives. The interview with the minor shall be conducted in a suitable atmosphere and in a manner that is understandable, taking into account his age and level of maturity. At the beginning of the interview, the minor shall be informed that all statements made during the interview must be in accordance with the truth and that he may refuse to make a statement or answer individual questions. If a minor is interviewed in the absence of a party, the chair will present the minutes of the interview to the party.[764]

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[762] In the notification sent to the child, the court informs the child that he or she can express his/her opinion in different ways. They can do this in writing, in the form of any electronic message, video message or drawing, which they can send to the court electronically with the help of their parents or even independently, i.e., the child does not have to appear in court. The use of electronic communication channels is already natural for children belonging to generation Z. Based on experience so far, children are particularly active, many use the opportunity to express their views electronically, but many of them want to appear in person before the court.

[763] Cf. Gyurkó, 2022, pp. 1–9.

[764] Art. 473 of the Civil Procedure Code.

The new regulation in the Civil Code, which strengthened the right of the child to express his or her views, was implemented by the Parental Responsibility Act, which reflected the legal developments that took place at the international level in the last decade in the fields of taking children's rights seriously, child-centered justice, and the regulation of cases involving parental responsibility.

Many questions arise in connection with the new Hungarian regulations, which include the following: When is a child said to be of sound mind? At which stage of the procedure must the child be notified t? What should be the content of the notification? To whom should the notification be sent: directly to the child or his parents? etc. These questions will be answered at the end of the study, however, an analysis of the international legal and European Union legal background and legal practice of the right of the child to express his or her views will be undertaken as the answers to these questions can be found in both international law and EU law.

3. The interpretation of a child's right to be heard in the UN Convention on the Rights of the Child

The amendment of the cited section of the Civil Code is, therefore, fully harmonized with Article 12 of the UN Convention on the Rights of the Child (hereinafter referred to as: Child Convention), which has been part of the Hungarian legal system since 1991.[765]

According to Article 12 of the Child Convention (1) State Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight, in accordance with the age and maturity of the child. (2) For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[765] Act LXIV of 1991 on the promulgation of the Convention on the Rights of the Child, dated 20 November 1989 in New York.

The Committee on the Rights of the Child[766] (Committee) monitors the implementation of the Child Convention and has issued recommendations, implementation handbooks, and general commentaries over the last 30 years for the effective application of the Convention.

In the following section, we summarize the most important statements regarding the child's expression of his or her views on court procedures affecting the child.

The Committee has consistently emphasized that the child must be regarded as an active subject of rights (active participants) and that a key purpose of the Convention is to emphasize that human rights extend to children. The rights of the child set out in the two paragraphs of Article 12 do not provide the right to self-determination but concern involvement in decision-making. The significance of Article 12 of the Child Convention is that it not only requires that children be assured of the right to express their views freely but also that they should be heard and that their views be given "due weight." The Committee has rejected what it termed 'the charity mentality and paternalistic approaches' to children's issues ('the parent knows what is good for the child'). [767]

The Committee emphasizes that it is not enough that legislation should establish children's rights to be heard and have their views given due weight; children must be made aware of their rights. The right to information is a prerequisite for participation.[768]

It is important to highlight that Article 12 of Child Convention provides the right to express freely the views for a child who is 'capable of forming his or her own views.'

Article 12 does not set any lower age limit on children's right to express views freely. Some countries reported that they had set a minimum age for the right of the child to be heard, for example, in custody proceedings following the separation or divorce of parents, but the Convention provides no support for this, and states cannot quote the best interests principle to prevent children from having an opportunity to express their views.[769]

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[766] See Online. United Nations Human Rights. Available at: https://www.ohchr.org/en/treaty-bodies/crc (Accessed: 10 January 2023).
[767] United Nations Children's Fund, 2007, pp. 149–150.
[768] Ibid, pp. 152, 159.
[769] Ibid, p. 153.

According to General Comment No. 12 (2009), the States parties shall assure the right to be heard to every child 'capable of forming his or her own views.' This phrase should not be seen as a limitation but rather as an obligation for state parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that State parties cannot begin with the assumption that a child is incapable of expressing their own views. On the contrary, State parties should presume that a child has the capacity to form his or her own views and recognize that he or she has the right to express them; it is not up to the child to first prove his or her capacity. The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views and discourages State parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting her or him.[770]

Article 12 paragraph 2, specifies that opportunities to be heard have to be provided in particular 'in any judicial and administrative proceedings affecting the child.' The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption (…).[771]

The link between the paragraphs of Article 12 indicates that the second paragraph of Article 12 applies to children 'capable of forming views,' again emphasizing that very young children should have the formal right to be heard. As previously noted, the Convention provides no support for a set minimum age. For the child to be 'provided the opportunity' implies an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasize that there is no requirement that the child express views.

The Committee on the Rights of the Child in the 'Concluding observations on the sixth periodic report of Hungary' recommends among the main areas of concern and recommendations, that Hungary (a) further develop the practice of hearing the views of children under the age of 14 years and ensure that their views are duly taken into account in family law proceedings concerning them, including in custody and guardianship decisions (…).[772]

[770] UN Committee on the Rights of the Child (CRC), 2009, p. 9.
[771] Ibid, p. 11.
[772] UN Committee on the Rights of the Child (CRC), 2020, p. 5.

Even before the amendment of Article 4:171 paragraph 4 of the Civil Code, the Committee considered developing the practice of hearing the views of children under the age of 14 years.

4. Strengthening the children's right to express their views in the field of judicial cooperation in family matters in EU law

The direct reason for the amendment of the Civil Code cited above was the entry into force of Council Regulation (EU) 2019/1111 of June 25, 2019, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and international child abduction (hereinafter referred to as: Brussels IIb regulation).

It is clearly visible that major progress has been made in the Brussels IIb regulation compared to the Brussels IIa regulation,[773] precisely in the area of much stronger consideration of the rights and best interests of children.[774] In the Brussels IIa Regulation, there was no harmonized obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express his or her own views. Children's hearing is regulated only in child abduction cases.[775]

According to Recital 39 of the Brussels IIb regulation, the proceedings in matters of parental responsibility under the regulation as well as return proceedings under the 1980 Hague Convention should, as a basic principle,

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[773] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

[774] Art. 56(4), (6) of the Brussels IIb regulation are good examples. According to Art. 56(4), (6) in exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child, suspend the enforcement proceedings if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances. Where the grave risk referred to in para. 4 is of a lasting nature, the authority competent for enforcement or the court, upon application, may refuse the enforcement of the decision.

[775] See Art. 11(2) of the Brussels IIa Regulation. If hearing the child is an explicit requirement only in child abduction procedures, it is nevertheless an important and general ground for non-recognition of decisions established in Art. 23(b) of Brussels IIa regulation. See Pataut, 2012, pp. 131–133.

provide the child who is subject to those proceedings and who is capable of forming his or her own views, in accordance with the case law of the Court of Justice, with a genuine and effective opportunity to express his or her views. When assessing the best interests of the child, due weight should be given to those views. The opportunity for the child to freely express his or her views in accordance with Article 24 paragraph 1 of the Charter of Fundamental Rights of the European Union and in light of Article 12 of the UN Convention on the Rights of the Child plays an important role in the application of this regulation.

Articles 21 and 26 of the Brussels IIb regulations determine uniform standards for the hearing of the child. According to the Article 21 of Brussels IIb regulation

> When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. Where the court, in accordance with the national law and procedure, gives a child an opportunity to express his or her views in accordance with this article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.

According to Article 26, Article 21 of the regulation also applies to return proceedings under the 1980 Hague Convention.[776]

It can be seen that the Article 21 of Brussels IIb regulation uses exactly the same wording to define the range of children capable of forming their views. Nevertheless, the regulation supplements Article 12 of the Child Convention with two important indicators: The child must be given a genuine and effective opportunity to express his or her own views. This regulation does not explain when the opportunity to hear about a child is genuine or effective.[777] The leading case[778] of the EU's Court of Justice of

[776] See Wopera, 2023, pp. 163–172.

[777] According to Recital 39 of Brussels IIb regulation whilst, according to the case-law of the Court of Justice, it is not a requirement of Art. 24 of the Charter of Fundamental Rights if European Union and of Regulation (EC) No. 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that

the European Union[779] does not provide much guidance as to when the opportunity can be considered genuine and effective, but it confirms that the court must be given the opportunity to express a child's views.[780] According to the Practice Guide, all appropriate legal tools must be made available to children to freely express their views.[781]

However, the Brussels IIb regulation should leave the question of who will hear the child and how the child is heard to be determined by the national laws and procedures of the Member States. Thus, the Brussels IIb regulation should not determine whether the child should be heard by the judge in person, by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom, in another place, or through other means. In addition, while retaining the rights of the child, hearing the child should not constitute an absolute obligation, but must be assessed considering the best interests of the child, for example, in cases involving agreements between the parties.[782]

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that court thus retains a degree of discretion, the case-law also provides that, where that court decides to provide the opportunity for the child to be heard, the court is required to take all measures which are appropriate to the arrangement of such a hearing, having regard to the best interests of the child and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views. The court of the Member State of origin should, in so far as possible and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No. 1206/2001.

[778] In Case C-491/10 PPU in Joseba Andoni Aguirre Zarraga v Simone Pelz the CJEU stated, that 'In other words, whilst it is not a requirement of Art. 24 of the Charter of Fundamental Rights and Art. 42(2) point (a) of Regulation No. 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.' (Recital 66).

[779] See Raffai, 2016, pp. 76–86.

[780] Case C-491/10 PPU in Joseba Andoni Aguirre Zarraga v Simone Pelz, 22 December 2010.

[781] Practice guide for the Application of the Brussels IIb regulation, European Commission, Luxembourg 2022, p. 192.

[782] Recital 39 of Brussels IIb regulation.

The right of a child to express his or her own views plays a role in the recognition and enforcement of decisions, authentic instruments, and agreements. The recognition and enforcement of a decision related to parental responsibility may be refused if it is given without the child, who is capable of forming his or her own views, having been given an opportunity to express those views in accordance with Article 21 (see Article 39 paragraph 2).[783]

5. Conclusions and a "practice guide" for the Hungarian judiciary to strengthen the right of children to express their views

Based on international and EU judicial practices, recommendations, and commentaries, it is clear that children's abilities to form views cannot be linked to age. It must also be ensured that the youngest child can express his or her views on the procedures that affect them.

It is worth paying attention that the 'child's capability of forming his or her views' according to the Child Convention and EU law, in my opinion is not the same as the concept 'child who is of sound mind' according to the Hungarian law. It should be noted that Hungarian civil law does not define the concept of 'child who is of sound mind.'[784] According to Hungarian judicial practice, 'the court must examine the child who has a sound mind individually in each case, in which age is not a determining factor.'[785]

It should be emphasized that determining the capability of forming views is not a matter of expertise; it must be decided by the court.

In my opinion, it is reasonable to send a notice to the child at the beginning of the preparatory stage of the civil procedure; and if the child requests to be heard, the opportunity must be created as soon as possible within the framework of the preliminary taking of evidence.

It is important to use notices with different content and languages in court proceedings according to age group. It may be necessary to

[783] Practice guide for the Application of the Brussels IIb regulation, European Commission, Luxembourg 2022, p. 187.

[784] Unlike the 49/1997. (IX. 10.) Government decree on guardianship authorities and the child protection and guardianship procedure, which defines the concept of a child who is of sound mind. According to section 2a) of this Decree, a 'child who is of sound mind' is a minor who, in accordance with his age and intellectual and emotional condition, is able – during his hearing – to understand the essential content of the facts and decisions affecting him or her, and to foresee the expected consequences.

[785] Curia Court Decision No.298.2019.

standardize the wording of court notices with the involvement of psychological experts so that they are sufficiently “child-friendly.”

We agree with court practice, where children under 14 years old are informed by their parents, but the notification is addressed to the child. If a child is above the age of 14, the court sends a notification to the child.

What constitutes a child’s interview from a procedural law perspective must be clarified. It is worth considering that the child’s interview is similar to a procedural perspective as a personal interview at the party,[786] even if the child is neither a party nor a witness in the proceeding. It is also important to emphasize that the notification of the child cannot be ignored, even if the parents reach an agreement on the exercise of parental custody. It clearly follows from international and EU legal regulations that there is no difference between whether the court decides with a judgment or a settlement in parental custody disputes.[787]

In summary, it can be said that important changes have occurred regarding the strengthening of children’s expression of their views and their participation in family law procedures, which were given a new push by the regulation that entered into force on August 1, 2022. It is clear that to accept and understand this new concept, a change of attitude is needed, so that it is clear that the child is not the subject of the procedure, but an interested person in the procedure, who has rights and whose opinion matters.

[786] According to Art. 231(1) of the Civil Procedure Code if doing so is necessary for adjudicating the action or establishing the facts of the case, the court may order ex officio and at any stage of the proceedings the personal interview of a natural person party, his statutory representative and the statutory representative of a party other than a natural person.

[787] This opinion is confirmed by the Art. 39(2) of Brussels IIb regulation according to which ‘The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Art. 21, except where a) the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or b) here were serious grounds taking into account, in particular, the urgency of the case.’ Consequently, there is no third exception to constitute the settlement.

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