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CHILD-CENTERED JUSTICE IN HUNGARY*

A gyermekközpontú igazságszolgáltatás Magyarországon

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Abstract: This article aims to introduce the development of Hungarian child-centered justice, what were the most important changes occured during the last few years thanks to international standards, Governmental programmes and new procedural codes. In this article I would like to give a brief summary about the types of cases and procedural position a child could appear in a civil case. Moreover, in order to examine the efficiency of Hungarian system, we shall compare it with the solutions used in other European legal systems, and with the provisions of currently applicable Regulation (EC) 2201/2003, and the Regulation (EU) 2019/1111 replacing it from 2022.

Keywords: *child-centered justice, civil justice, minor, hearing of the child, Brussels IIa. Regulation*

Absztrakt: A tanulmány fő célja annak bemutatása, hogy hogyan fejlődött a magyar gyermekközpontú igazságszolgáltatás, milyen jelentős változások következtek be az elmúlt pár évben a különböző nemzetközi előírásoknak, kormányzati programoknak, valamint az új eljárásjogi kódexeknek köszönhetően. A tanulmány igyekszik röviden bemutatni, hogy a gyermek milyen ügyekben, és milyen perbeli pozícióban kerülhet kapcsolatba a polgári igazságszolgáltatással. Emellett a magyar rendszer hatékonyságának vizsgálatához össze kell vetnünk más európai jogrendszerekben alkalmazott megoldásokkal, továbbá a jelenleg hatályos 2201/2003/EK rendelet és az ezt 2022-től felváltó 2019/1111/EU rendelet előírásaival.

Kulcsszavak: *gyermekközpontú igazságszolgáltatás, polgári perek, kiskorú gyermek, a gyermek meghallgatása, Brüsszel IIa. rendelet*

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Introduction

The nature of children's rights is twofold. They have the same human rights as adults, but their vulnerability justifies the establishment of a special guarantee system.[1] In the same context, the ECHR gives 'everyone' whose human rights are violated, the right to 'an effective remedy before a national authority'.[2] This wording clearly includes children. The result is that children can bring their cases to the court, although they are often not entitled to bring legal proceedings under their domestic law.[3]

The United Nations Convention on the Rights of the Child adopted on 20th november, 1989,[4] *a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*

Child-friendly justice refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.[5]

At international level the above mentioned New York Convention[6] (hereinafter: Convention) was the first source of law which declared the child's right to be heared. The guidelines on child-friendly justice, and their explanatory memorandum, were adopted by the Council of Europe in 2010. Based on existing international and European standards, in particular the United Nations Convention on the Rights of the Child and the European Convention on Human Rights, the guidelines are designed to guarantee children's effective access to and adequate treatment in justice. They apply to all the circumstances in which children are likely, on any ground and in any capacity, to be in contact with the criminal, civil or administra-

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1 FAIX Nikoletta: A gyermeki jogok kialakulása a nemzetközi jogban és az igazságszolgáltatásra gyakorolt hatásuk. *Eljárásjogi Szemle* 2016/4., 10.

2 Article 13.

3 *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* (Adopted by the Committee of Ministers on 17, November 2010 at the 1098th meeting of the Ministers' Deputies), (hereinafter Guidelines of CMCE), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168042cf3, 1st February 2021, 74.

4 UN Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, in Hungary announced by the Act LXIV. of 1991.

5 Guidelines of CMCE, 17.

6 United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th November 1989, entry into force 2 September 1990, in accordance with article 49.

tive justice system. They recall and promote the principles of the best interests of the child, care and respect, participation, equal treatment and the rule of law. The guidelines address issues such as information, representation and participation rights, protection of privacy, safety, a multidisciplinary approach and training, safeguards at all stages of proceedings and deprivation of liberty. In this article, I would like to sum up the main point of the Convention and connecting explanations, connecting to the child's right to heared. I try to go around topics like e.g. the importance of the child's age and maturity, the role of judges and representatives of the child, training of professionals. Then I turn on the topic of international child abduction cases. After in the light of international rules and guidelines I briefly summarize the Hungarian rules applicable, and lastly I bring some foreign institutions and solutions, which could solve the shortcomings in Hungarian law.

1. Protection of children at internetional level

According to Article 3 of the UN Convention *[i]n all actions concerning children, […] undertaken by […] courts of law, […] the best interests of the child shall be a primary consideration,* and *States, as Parties of the Convention shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

The Committee on the Rights of the Child has highlighted, that *the best interests of the child shall be a primary consideration in all actions concerning children, as one of the general principles of the Convention on the Rights of the Child, alongside articles 2, 6 and 12.*[7] The provisions of the Charter of Fundamental Rights of the European Union have the same content.[8]

1.1. Best interest of the child

In order to resolve the dilemmas related to maturity and to solve the problems related to the child's participation, it is essential to acquire a child protection approach that examines the child's best interests and focuses on their enforcement. The importance of EU guidelines also lies in considering the judiciary as part of the child protection system. How can child-friendly or child-focus be defined, or how French terminology illustrates the task (une justice mieux adaptée aux enfants) – justice that is more "child-tailored"? The answer to the question can therefore best

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[7] Rachel HODGKIN – Peter NEWELL: *Implementation Handbook for the Convention on the Rights of the Child* (hereinafter: Handbook). United Nations Children's Fund, 2007, https://www.unicef.org/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, 3rd February 2021, 35.

[8] Art. 24 (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

be approached from the point of view of enforcing the best interests of the child, as a principle formulated in both international and domestic documents.[9]

But what is the best for the child? It is a very different question, and of course we cannot give an overall definition or list to answer it. But we can state that we could describe it as the application of three P: Provision-Protection-Participation.[10] Provision means the State has the obligation to protect fundamental rihgts, social welfare, education, etc. Protection means a strong and safe social network and child protection system. And participation of children in procedures and decisions concerning them. The first and the second ones are given, parents and judges cannot influence them, but the participation mostly depends on parents and judges, because States Parties of the Convention have to guarantee this right, but the content and applicable procedure differs from state to state. The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.[11]

In 2013, the UN Committee on the Rights of the Child adopted a new commentary on the consideration of the best interests of the child. In its Comprehensive Comment No. 14, the Commission emphasizes that the best interests of the child consist of three elements. On the one hand, the individual right, the right of the child to have his/her best interests to be taken into account and taken into account as a primary consideration in a decision on a matter, and the guarantee that this right, the child or group of children or children in general will also be enforced when a decision is made. This right therefore contains an obligation on States Parties which is directly applicable and subject to judicial review. Secondly, it is a fundamental, interpretive legal principle, because if a legal provision can be interpreted in several ways, the interpretation that mostly serves the best interests of the child must be chosen. Thirdly, a procedural rule. When a decision has to be made that affects a particular child, the potential impact (positive or negative) of the decision on the child concerned must be assessed during the decision-making process. Procedural guarantees are needed to assess and determine the best interests of the child. In addition, the reasons for a particular decision must include that the rights of the child have been clearly taken into account.[12]

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[9] GYENGÉNÉ NAGY Márta: A gyermek mint érintett részvétele a közvetítői eljárásban. *Családi Jog* XVI/4., 2020, 3.

[10] GYENGÉNÉ NAGY Márta: A családi jogi mediáció helye az EU gyermekbarát igazságszolgáltatásról szóló tematikájában. *Családi Jog* XVII/3., 2019, 34. and GYENGÉNÉ NAGY Márta: A gyermek mint érintett részvétele a közvetítői eljárásban. *Családi Jog* XVI/4., 2020, 3.

[11] Guidelines of CMCE, 17.

[12] KATONÁNÉ PEHR Erika: Minden gyermek egyenlő, de nem egyforma – néhány gondolat a 30 éves Gyermekjogi Egyezményről. *Családi Jog* XVII/3., 2019, 14.

In assessing the best interests of the involved or affected children:
- their views and opinions should be given due weight;
- all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;
- a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.[13]

In other words: they shall be having the opportunity to express their point of view; shall be treated as a 'normal' party, like an adult in some manners in the procedure; and shall have the oppurtunity to exercise their procedural rights conducted by suitably qualified professionals.

While the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.

1.2. Some practical instructions for hearing of the child

1.2.1. Age and maturity

States Parties (to the Convention) *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.*[14]

Child's right to be heard having regard to the child's age and maturity, the child should have the right to be informed, consulted and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him/her.[15] Civil cases involving children include those concerned with custody and the upbringing of children, including separation from parents, adoption and so forth. It is very important to emphasize, that the Convention requires only that the child is provided with an opportunity to be heard in any judicial and administrative proceedings affecting him/her.[16] But it does not mean the child must be heared in every case. The right to be heard is a right, not a duty of the child. The child's autonomy should be respected in accordance with the developing ability and need of the child to act independently, his/her human dignity shall be respected in every case.

In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have. But a child should not be precluded

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13 Guidelines of CMCE, 18.
14 UN Convention Art. 12.
15 CEFL Principles on Parental Responsibilities 3:6.
16 Rachel HODGKIN – Peter NEWELL: op. cit. 11.

from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him/her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his/her views and opinion on matters concerning him/her.

Participation in court proccedings can be based on a set age limit or on the notion of a certain discernment, maturity or level of understanding. Both systems have advantages and disadvantages. A clear age limit has the advantage of objectivity for all children and guarantees legal certainty. However, granting children access based on their own individual discernment gives the opportunity for adaptation to every single child, according to their levels of maturity. This system can pose risks due to the wide margin of appreciation left to the judge. A third possibility is a combination of both: a set legal age limit with a possibility for a child under this age to challenge this. This may, however, raise the additional problem that the burden of proof of capacity or discernment lies on the child.

The Convention sets no age limit on this right directly, as it tends to be too rigid and arbitrary and can have truly unjust consequences. Strict age categories also cannot fully take into account the diversity in capacities and levels of understanding between children. These can vary greatly depending on the child's individual development capacities, life experiences, cognitive and other skills. A very young child may be intelligent enough to assess and understand their own specific situation. The capability, maturity and level of understanding are more representative of the child's real capacities than his/her age.[17] Moreover, setting any age limit may necessarily become exclusionary, because if protection is guaranteed by setting an age limit, children who do not fall in that age but would otherwise stand in need of protection, are excluded from the scope of protection.[18]

In the guidelines, reference is made to concepts such as "age and maturity" and "sufficient understanding", which implies a certain level of comprehension, but does not go as far as to demand from the child a full comprehensive knowledge of all aspects of the matter at hand.[19]

Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.[20]

1.2.2. Direct or indirect hearing

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

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[17] Guidelines of CMCE, 75.

[18] SZEIBERT Orsolya: A gyermek meghallgatása/véleménye, a gyermektartás, az élettárs szülők helyzete és az ötéves Ptk. – vitatható gyakorlatok. *Családi Jog* XVII/3., 2019, 3.

[19] For more information, see CRIN Review: "Measuring maturity. Understanding children's 'evolving capacities'", 2009.

[20] Guidelines of CMCE 51.

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[21]

Depending on the wishes and the interests of the child, serious consideration should be given to who will listen to him/her, presumably either the judge or an appointed expert. Some children may prefer to be heard by a 'specialist' who would then convey his/her point of view to the judge. Others, however, make it clear that they prefer to talk to the judge him/herself, since he/she is the one who will make the decision.[22] In my opinion it is not so fortunate. To give an appropriate information to the child is necessary, but I think the jugde shall decide which manner is the most expedient solution with regard to the child's age, maturity and personality.

Children should be consulted on the manner in which they wish to be heard,[23] orallyor in writing. In cases of a very shy child, communicate in writing could have more results, but it assumes adequate maturity and communication skills of course. The opinion of psychologist experts is that if any mental problem can be perceived on the child on the basis of the files – tense, anxious, producing symptoms – it is better to heared by an expert. Such a serious emotional crisis situation cannot be properly handled by the judge; it does not have the expertise to cause as little harm as possible to the hearing. Nevertheless, there are good experiences with direct listening, children are open, smart, down-to-earth; the hearings are basically very useful, the outcome of the hearing is often confronted by the parent, who in a good case thinks about whether he/she is on the right way in the procedure.[24]

1.2.3. Place and time of the hearing

Cases involving children should be dealt with in non-intimidating and child-sensitive settings, e.g. out of the courtroom, in a child-friendly hearing-room. Equally, child-friendly court settings may mean that no wigs or gowns or other official uniforms and clothing should be worn.[25] It is important that the child can speak freely and that there should be no disruption. This may in practice mean that no other people should be allowed in the room (e.g. the parents or the alleged perpetrator), and that the atmosphere is not disturbed by unwarranted interruption, unruly behaviour or transit of people in and out of the room.[26]

Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court ses-

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[21] UN Convention Art. 12.

[22] Guidelines of CMCE, 81.

[23] Guidelines of CMC, 28.

[24] DARNÓT Sára: A gyermek meghallgatása családjogi perekben – interjúk alapján, különös tekintettel a jogalkalmazási eltérésekre. *Családi Jog* XV/4., 2017, 23.

[25] Guidelines of CMCE, 85.

[26] Guidelines of CMCE, 81.

sions should be kept to a minimum. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.[27]

The time element is also a very important question, especially in cases of parent–child relationships. There is a duty to exercise exceptional diligence in view of the fact that the risk of passage of time may result in a de facto determination of the matter and that the relation of a child with one of his or her parents might be curtailed.

After the decision is made, national authorities should take all necessary steps to facilitate the execution of judicial decisions involving and affecting children without delay. The Committee of Ministers suggests that after judgments in highly conflictual proceedings, guidance and support should be offered, ideally free of charge, to children and their families by specialised services.[28]

1.3. Giving adequate information of the child

Article 3 of the European Convention on the Exercise of Children's Rights[29] combines the right to be heard with the right to be informed: in judicial proceedings, children should receive all relevant information, be consulted and express their views and be informed of the possible consequences of compliance with these views and the possible consequences of any decision.[30]

In every individual case, from the very first contact with the justice system (or at least as soon as possible) and on each and every step of the procedure, all relevant and necessary information should be given to the child.[31]

Information on the procedural system includes the need for detailed information on how the procedure will take place, what the standing and role of the child will be, how the questioning will be carried out, what the expected timing will be, the importance and impact of any given testimony, the consequences of a certain act, etc. Children need to understand what is happening, how things could or would move forward, what options they have and what the consequences of these options are.[32]

The information may have to be translated in a language the child understands (a foreign language, Braille or other) as is the case for adults, and the formal legal terminology will have to be explained so that the child can fully understand its meaning.

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27 Guidelines of CMCE, 31.
28 Guidelines of CMCE, 32.
29 ETS No. 160.
30 Guidelines of CMCE, 79.
31 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3, 22nd March, 2022, 58.
32 Guidelines of CMCE, 59.

Children should be provided with all necessary information on how to use the right to be heard effectively. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed. [33] It is also of paramount importance that during the judicial hearing judge shall not create such an illusion in the child that he/she will decide the future fate of the family and the purpose of this procedural act is for him/her to choose and make a statement about his/her parents. The purpose of the hearing should not be to pass on the decision to the child by the parents or judges. With this procedural act the judge can get a comprehensive, direct picture of the family, which can greatly help in judgment-making. Before doing so, however, it is worth obtaining as much evidence as possible and considering whether a direct judicial hearing or the secondment of a psychologist expert is more appropriate in the case.[34]

In the case of cross-border civil law and family disputes, depending on maturity and understanding, the child should be provided with professional information relating to access to justice in the various jurisdictions and the implications of the proceedings on his/her life.[35]

Children may experience a lack of objective and complete information. Parents may not always share all pertinent information, and what they give may be biased. In this context, the role of children's lawyers, ombudspersons and legal services for children is very important.[36] The child's lawyer, guardian ad litem or legal representative should communicate and explain the given decision or judgment to the child in a language adapted to the child's level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.[37] This kind of act absolutely missing in Hungary, because child usually does not have an own representative. If he/she had guardian ad litem in the procedure, this guardian does not keep in contact with the child after hearing the case. In better cases his/her parents would inform the child about the content of judgement.

It would be worthwhile also to inform the parents in advance about how the hearing will take place, as it is also against the child's best interests if the child receives incorrect answers from them about his/her questions about what is waiting for him/her in the courtroom. In order to avoid 'educating' the child, parents shall be noticed that this is also a form of abuse against the child and is a burden on the

[33] Guidelines of CMCE, 28.
[34] KOZÁK Henriett: 16.
[35] Guidelines of CMCE, 60.
[36] Guidelines of CMCE, 58.
[37] Guidelines of CMCE, 32.

parent when considering a substantive decision. Furthermore, they may be informed that neither parent may decide unilaterally, without the consent of the other, to obtain a psychologist's private expert opinion on the child after a direct judicial hearing.[38]

Investing in children's rights education and the dissemination of children's rights information is not only an obligation under the United Nations Convention on the Rights of the Child, but is also a preventive measure against violations of children's rights. Knowing one's rights is the first prerequisite of 'living' one's rights and being able to recognise their violation or potential violation.[39]

2. Legal representation of the child

If children are to have access to justice which is genuinely child friendly, Member States should facilitate access to a lawyer or other institution or entity which according to national law is responsible for defending children's rights, and be represented in their own name where there is, or could be, a conflict of interest between the child and the parents or other involved parties. This is one the main messages of the Guidelines.[40] The European Convention on the Exercise of Children's Rights[41] states: *'Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular […] a separate representative […] a lawyer.'* [42]

It is also important that the legal fees of the child's lawyer shall not be charged to his/her parents, either directly or indirectly. If a lawyer is paid by the parents, in particular in cases with conflicting interests, there would be no guarantee that he/she would be able to independently defend the child's views.[43]

A system of specialised youth lawyers is recommended, while respecting the child's free choice of a lawyer. It is important to clarify the exact role of the child's lawyer. The lawyer does not have to bring forward what he/she considers to be in the best interests of the child (as does a guardian ad litem), but should determine and defend the child's views and opinions, as in the case of an adult client. The lawyer should seek the child's informed consent on the best strategy to use. If the lawyer disagrees with the child's opinion, he/she should try to convince the child, as he/she would with any other client.[44]

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38 KOZÁK Henriett: op. cit. 16–17.
39 Guidelines of CMCE, 93.
40 See ChildONEurope, Survey on the national systems of children's legal representation, March 2008 (www.childoneurope.org). Several models are illustrated in this survey.
41 ETS No. 160.
42 ETS No. 160.
43 Guidelines of CMCE, 78.
44 Guidelines of CMCE, 78.

3. Importance of training of judges and other professionals

The Committee emphasizes States' obligation to develop training and capacity-building for all those involved in the implementation process – government officials, parliamentarians and members of the judiciary – and for all those working with and for children.[45]

For children, there are many legal, social, cultural and economic obstacles to their access to court, the lack of legal capacity probably being the most important one. In most of the cases, they are represented by their parents or guardians. But when the legal representative does not want to act on their behalf, or is unable to do so, and when competent public authorities do not instigate a procedure, children often have no way to defend their rights or act against violations. In those cases, and if a special representative has not been appointed by the competent authority, they cannot enjoy the basic right to bring a matter to court. Guidelines are meant to stimulate discussion on children's rights in practice and encourage member states to take further steps in turning them into reality and filling in existing lacunae. They are not intended to affect issues of substantive law or substantive rights of children nor are they of a legally binding nature. Most of the guidelines will only necessitate a change in approach in addressing the views and needs of children. [46]

However, it is not enough for Memeber States of the convention to make their institutional systems suitable for ensuring the child's participation in procedures affect him/her by creating structural changes in the child's hearing. It is even more important that a kind of professional shall hear the the child whose professional skills and knowledge are a guarantee that the child's opinion would be duly taken into account. Defining the criteria of 'properly' is not an easy task. This is what the European Commission draws attention to in its general explanation No 5, which states: *'It is not particularly difficult to pretend to listen to a child; to give due weight to your opinion – this already requires a real change.'*

According to the Guidelines on child friendly justice *all professionals working with and for children should receive necessary interdisciplinary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them*. Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability. Close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his/her legal, psychological, social, emotional, physical and cognitive situation.[47] Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. In cases involving children,

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[45] *GENERAL COMMENT No. 5 on General measures of implementation of the Convention on the Rights of the Child* (CRC/GC/2003/5). https://www.unicef-irc.org/publications/pdf/crcgencommen.pdf, 39.

[46] Guidelines of CMCE, 45–46.

[47] Guidelines of CMCE, 23.

judges and other legal professionals should benefit from support and advice from other professionals of different disciplines when taking decisions which will impact directly or indirectly on the present or future well-being of the child, for example, assessment of the best interests of the child, possible harmful effects of the procedure on the child, etc.[48]

Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties. Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and indepth training and be capable of communicating with children at their level of understanding. Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian ad litem or another independent representative to represent the views and interests of the child. [49]

For several years now, the Flemish Bar Association and its Youth Lawyer Commission has been offering its members a two-year course on children's rights. The legal information is complemented with basic training in child psychology and development and practical training such as communicating with children. Attendance of all modules is obligatory in order to obtain a certificate as a 'youth lawyer'.[50] I think the introduction of such a training would be very useful in Hungary also, and not just for representative, but judges too.

4. Mediation

An important area of child-centered justice in the future may be the involvement of the child in the mediation process, which provides an opportunity for the child to be heard directly by the mediator. Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice. Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account. [51]

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[48] Guidelines of CMCE, 66.
[49] Guidelines of CMCE, 27.
[50] Guidelines of CMCE, 65.
[51] Guidelines of CMCE, 25.

Involving the child in dispute resolution can serve different purposes in international and domestic disputes involving children. First, listening to the child's views sheds light on the child's feelings and wishes, which could serve important information in determining whether a particular solution is in the child's best interests. Second, it could make parents aware of the child's wishes and help them move away from their own position to an acceptable common solution. Third, the involvement of the child respects the child's right to be heard, while giving him/her the opportunity to learn about what is happening around him/her. [52]

5. Hearing the child in cross border family and international child abduction cases

Regulation No. 1347/2000 layed down rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses was the first Union instrument adopted in the area of judicial cooperation in family law matters. This Regulation was repealed by *Regulation No. 2201/2003 (commonly known as the Brussels IIa Regulation). The Brussels IIa Regulation is the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental responsibility.* It provides for uniform rules to settle conflicts of jurisdiction between Member States and facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in another Member State.

Under EU law, the most important instrument regulating child abduction between EU Member States is the Brussels IIa Regulation, largely based on the provisions of the Hague Convention. This regulation complements and takes precedence over the Hague Convention in intra-EU abduction cases. Child abduction refers to a situation in which a child is removed or retained across national borders in breach of existing custody arrangements.[53] Under the Hague Convention, wrongfully removed or retained children are to be returned speedily to their country of habitual residence.[54] The courts of the country of habitual residence determine the merits of the custody dispute. The courts of the country from which the child has been removed should order the return within six weeks from the date that the return application is made. The Hague Convention is underpinned by the principle of the child's best interests. In the context of this convention, the presumption is that the unlawful removal of a child is in itself harmful and that the status quo ante should be restored as soon as possible to avoid the legal consolidation of wrongful situations. Issues of custody and access should be determined by the courts that have jurisdiction in the place of the child's habitual residence rather than those of the

[52] GYENGÉNÉ NAGY Márta: A gyermek mint érintett részvétele a közvetítői eljárásban. *Családi Jog* XVI/4., 2018, 2.

[53] Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980 (Hague Convention).

[54] Article 11 (1).

country to which the child has been wrongfully removed. Article 13 includes the provisions that have generated most of the litigation, both at a domestic and at an international level. It establishes that the country the child has been removed to may refuse to return a child, where the return would expose him/her to a grave risk of harm or otherwise place him/her in an intolerable situation. A return may equally be refused if the child objects to the return if he or she has attained the level of maturity to express his/her views.

Similar to the Hague Convention, the courts of the state where the child was habitually resident immediately prior to improper removal/retention retain the jurisdiction in cases of child abduction under the Brussels IIa Regulation. The regulation maintains the same exceptions to the return as those included in the Child Abduction Convention.[55]

However, under Brussels IIa, as opposed to the Hague Convention, the state of habitual residence retains jurisdiction to adjudicate the merits of the custody dispute, even after a non-return order is issued in application of Article 13 (b) of the Hague Convention.[56] The change of jurisdiction to the state the child has been removed to may only occur in two situations. The first situation stipulates that the courts of the state of refuge shall have jurisdiction if the child has acquired habitual residence in that state and each person having right of custody has acquiesced in the removal or retention. The second situation arises where the child: has acquired habitual residence in the state he/she has been removed to; a period of one year has elapsed since the parent left behind had or should have had knowledge of the whereabouts of the child; the child is settled into his new environment; and at least one of the four further conditions listed in Article 10 (b) of the Brussels II bis Regulation are met.

As with all other EU legal instruments, Brussels IIa must be interpreted in accordance with the provisions of the EU Charter of Fundamental Rights, in particular Article 24. The CJEU has had the opportunity to clarify the interpretation of Article 24 in the context of child abductions. In the Aguirre Zarraga Case,[57] the CJEU ruled that the right of the child to be heard, enshrined in Article 24 of the Charter, requires that the legal procedures and conditions which enable children to express their views freely be made available to them, and that those views be obtained by the court.[58] The base of the case was the Article 23 of the Regulation,

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[55] *Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights and Council of Europe.* 2015, https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf, 1st February 2021, 87.

[56] Article 11 (6)–(8) of the Brussels II bis Regulation.

[57] CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 2 December 2010, see the details of the case in WOPERA Zsuzsa: *Az európai családjog gyakorlata*. Wolters Kluwer, Budapest, 2017, 97–102.

[58] *Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights and Council of Europe.* 2015, https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf, 1st February 2021, 88.

which defines grounds for non-recognititon for judgements relating to parental responsibility cases, and according to this Article: *A judgment relating to parental responsibility shall not be recognised: […]*

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; […]

According to the Charter of Fundamental Rights [children] *may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity*.[59]

This approach was strenhtened in the preamble of Brussels IIa Regulation that the hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

According to the CJEU however, it is only for the courts of the child's habitual residence to examine the lawfulness of their own judgments in the light of the EU Charter of Fundamental Rights and the Brussels II bis Regulation. Thanks to the principle of mutual trust, the court of the Member State to which the child had been wrongfully removed could not oppose the enforcement of a certified judgement, ordering the return of the child, since the assessment of whether there was an infringement of these provisions fell exclusively within the jurisdiction of the state from which the child had been removed.[60]

For the best interes of the child hearing in another Member State may take place under the arrangements laid down in the Regulation[61] on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

In child abduction cases it should also be taken into account that a child is often not met the 'left behind' requesting parent for weeks or even months, and the external image of that parent due to the new environment, situation, external forces had unfavorably transformed. This is because children often emotionally identifying with the parent they are currently living with.[62]

Ten years after the entry into force of the Brussels IIa Regulation, the Commission has assessed the operation of it in practice and considered necessary amendments to the instrument in its application report adopted in April 2014. This is an initiative within the Regulatory Fitness Programme (REFIT). In addition, the European Court of Justice (CJEU) has so far rendered 24 judgments concerning the interpretation of the Regulation which were taken into account. The objective of the

[59] Art. 24. (1)
[60] Uo.
[61] Council Regulation (EC) No 1206/2001 of 28 May 2001.
[62] KOZÁK Henriett: op. cit. 16.

recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interests of the child by simplifying the procedures and enhancing their efficiency.

Thanks to the revision procedure, after five years of work the Council adopted the 2019/1111 Council Regulation[63] on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction on the 25 July 2019, which is a recast of the Brussels IIa Regulation. While the Brussels IIa Regulation is overall considered to work well, the consultation of stakeholders and a number of studies have revealed several deficiencies in the Brussels IIa Regulation, the matrimonial and parental responsibility matters, the latter were identified to have caused acute problems which need to be addressed urgently.[64]

Essentially, six main shortcomings concerning parental responsibility matters could be identified and have been modified correspondently in the new Regulation. One of these problematic points was the hearing of the child. Regarding the recognition of judgments in both matrimonial and parental responsibility matters, the use of the 'public policy' ground of non-recognition has been rare. However, in matters of parental responsibility, significant divergences have arisen in practice with regard to a broader or narrower application of this ground.[65] In addition, in matters of parental responsibility, a frequently raised ground of opposition has been the fact that the judgment was given without the child having been given an opportunity to be heard.[66] The Regulation is based on the principle that children's views must be taken into account in cases concerning them as long as this is appropriate in light of their age and maturity and in line with their best interests. Difficulties arise due to the fact that Member States have diverging rules governing the hearing of the child. In particular, Member States with stricter standards regarding the hearing of the child than the Member State of origin of the decision are

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63 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, L 178, 2. 7. 2019, 1–115.

64 Proposal for a COUNCIL REGULATION on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM/2016/0411 final – 2016/0190 (CNS).

65 Study on the Interpretation of the Public Policy Exception referred to in the Annex to this report.

66 Other frequently raised grounds for the non-recognition of judgments have been the service of documents where the judgment was given in default of appearance, the failure to comply with the procedure laid down in the Regulation for the placement of a child in another Member State and the fact that the judgement was given without the parent concerned having been given an opportunity to be heard. These are important considerations referring to the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter.

encouraged by the current rules to refuse recognition and exeqution if the hearing of the child does not meet their own standards. In addition, the importance of hearing children is not highlighted in the Brussels IIa Regulation in general terms for all cases on matters of parental responsibility, but only in relation to return proceedings.[67]

The new Regulation leaves Member States' rules and practices on how to hear a child untouched, but requires mutual recognition between the legal systems. This means that an obligation to give the child who is capable of forming his or her own views an opportunity to express these views would be made explicit in the Regulation, bearing in mind that all Member States have ratified the UN Convention on the Rights of the Child which already obliges them to hear the children meeting the condition mentioned above in any domestic and cross-border proceedings concerning them. Notably a distinction is made, as it is the case in the respective Article of the Charter of Fundamental Rights, between the question when the child needs to be given the opportunity to be heard on the one hand (i.e. when he/she is capable of forming/expressing his or her own views) and the question what weight the judge shall give to the child's views on the other hand (which depends on the age and maturity of the child). This distinction has to be recorded in the decision and in a certificate annexed to it. For a parent seeking recognition of a decision on another Member State, this means that a court in that country will not refuse to recognise it on the mere fact that a hearing of the child in another country was done differently comparing to the standards applied by that court.[68]

6. Hungarian legislation

6.1. The development of Child-Centered Justice

In Hungary, professionals prefer to define our system as child-centered justice instead of child-friendly justice. Child-centered justice is a kind of judicial system which ensures the children's respected rights and effective vindication of that rights, gives priority the best interest of childrens in all matters involving them as high leve las possible.[69] But the judge shall not be considered as a friend of the child involved.

For the purpose of examining the progress achieving the realization of the obligations undertaken in the Convention in each member State shall be established a Committee on the Rights of the Child, which shall carry out the provided functions.[70]

The handbook on the Application of the Convention contains an implementation checklist, which could serveas a kind of example about the legal issues to be regulated upon the Convention. Connecting to Art. 12, the following questions shall be taken into account by the national legislators: Is any general principle established

[67] COM (2016) 411 final, 4.
[68] COM (2016) 411 final, 15.
[69] https://birosag.hu/gyermekkozpontu-igazsagszolgaltatas, 21st February 2021.
[70] UN Convention Art, 43.

in legislation that once a child has acquired 'sufficient understanding', he/she acquires certain rights of decision-making? Are there mechanisms for assessing the capacity/competence of a child? Can a child appeal against such assessments? Are there other ways in which legislation respects the concept of the child's 'evolving capacities'? Do children acquire rights, either at prescribed ages, or in defined circumstances, for giving testimony in court in civil cases or participating in administrative and judicial proceedings affecting the child?[71]

The key goals of the national programme of the National Office for the Judiciary titled 'Child-centred Justice' are to protect the interests of children in court procedures and to continuously educate the judges hearing cases involving minors.

In 2006, the Hungarian Committee expressed its concern that the child's opinion is not being sufficiently taken into account in child custody proceedings.[72] Minors under the age of 14 are interviewed as witnesses only in exceptional cases, and the court asks for an expert opinion in most of the divorce and child placement cases. In Hungary, experts do not get any special coaching, professional support, supervision, there are no professional standards, protocols, which leads to serius anomalies and more years long procedures. At that time, the use of mediation has not been extended despite the existence of legal conditions, which greatly hampers the handling of family conflicts and the prevention of later contact problems. Child hearing rooms are used for hearing the child only in a small number of cases, it is not always assured that girls are be heard by women, the child does not receive adequate information, help to understand what is happening, etc. [73]

There was a positive change, when the Minister of Justice declared 2012 the year of child friendly justice, according to the European Commission's roadmap of 2011 for the Rights of the Child[74], and to the guidelines of the committee of Ministers of the Council of Europe on child-friendly Justice.[75]

6.2. Hearing of the child in the Hungarian procedure

In Hungary, before the new Civil Code entrered into force, the Csjt.[76] was applicable to family law questions, and as a result of the New York Convention on the Rights of the Child, it has made it obligatory for parents to ensure that their child

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[71] Rachel HODGKIN – Peter NEWELL: op. cit. 14.

[72] See: http://www.csagyi.hu/images/stories/kutatas/civiljelentes/civil_magyar.pdf, 21st February 2021, 17.

[73] http://www.csagyi.hu/images/stories/kutatas/civiljelentes/civil_magyar.pdf, 1st February 2021, 17.

[74] A bizottság közleménye az Európai Parlamentnek, a Tanácsnak, az Európai Gazdasági és Szociális Bizottságnak és a Régiók Bizottságának. *Az EU gyermekjogi ütemterve*. http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0060:hu:NOT, 1st February 2021.

[75] *Az Európa Tanács iránymutatása a gyermekbarát igazságszolgáltatásról.* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM, 1st February 2021.

[76] A házasságról, családról és a gyámságról szóló 1952. évi IV. törvény.

has the right to be heard and to take this into account where possible. In proceedings relating to parental responsibility and the placement of a child, as well as changes in placement, the Csjt.[77] required the court and the guardianship authority to hear the child in justified cases. The hearing also indicated the child's request as a sufficient basis for the hearing, and the hearing itself can be held directly or through an expert, at the choice of the judge. But courts usually did not use this opportunity, or only seldom. It was the common stand that hearing of a child, if it is necessary at all, was the task of psychological expert.[78]

Ágnes Bucsi – in connection with family law lawsuits examined by her, concluded in her article[79] written in 2011 that the direct hearing of the child in Hungary is still a procedural act that the persons concerned try to avoid. And although in custody proceedings, the child is more often heard directly than in court, and even as a general rule, this is only formal, at least from the transcripts.[80]

In 2012, in the spirit of "child-friendly justice", great procedural progress was made in the regulation of the direct hearing of a child in court. The child's conceivable procedural legal position has been clarified, and the (old)[81] Code of Civil Procedure (hereinafter Pp.) has finally set out in relative detail the procedural rules applicable to the hearing of a minor child as an interested party. With this, the rules of hearing of the child as a procedural act has become predictable and transparent for everyone, which necessarily has a positive effect on the parties' sense of law. Prior to that modification, if a judge decided to involve a child in the proceedings, he/she essentially determined the order of the hearing. Although there has been a legal possibility to do so so far, it has included in the general rules of civil procedure that a guardian ad litem for the minor shall be appointed at for the hearing, and has included in these rules the norm used by the courts in almost all such cases a minor may be heard in the absence of the parties and the representatives of the parties.[82] The child is also approached to the party's procedural position as an interested party in the sense that he should not be warned about his duty to tell the truth, but that he/she should make realistic presentations during the hearing.

Before the "child-centered" novellar modification in civil litigation, it has always been a question whether, in the case of a direct hearing of a child, the parties may raise questions to the minor and, if so, when and in what form. Pp. since its amendment in 2012, it has become clear that the parties may ask questions before the hearing, even if the child is heard in the absence of the parties. The law also allows the guardian ad litem assigned to the child to ask questions directly, but the

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77 74. §.

78 KOZÁK Henriett: op. cit. 12.

79 BUCSI Ágnes: a gyermek meghallgatása az őt érintő eljárásokban – egy alapelv érvényesülése a magyar joggyakorlatban. I. és II. rész, *Családi jog* 2011/2., 17–26. and 2011/3., 10–16.

80 BUCSI: op. cit. II 11–12.

81 Act III of 1952., which was beeig in force until 1st January, 2018.

82 KOZÁK Henriett: op. cit. 14.

chairman of the council may refuse certain questions, even those proposed by the parties and legal representatives – e.g. in the best interests of the minor or because it does not affect the subject matter of the lawsuit.

In 2013, the President of the Curia ordered an investigation to analyze the case law on the return of children illegally brought to Hungary.[83] This examination included an analysis of the child's direct hearing of the child at first instance. In this case group, the figures suggested that the courts chose to hear the child directly to find out the facts much more often than before. In 7 of the 28 cases actually examined, the court of first instance heard the child directly. In a case involving the return of an abducted child, the child is heard relatively often by the court and a psychologist is rarely involved in very justified cases, as the case has to be substantially closed within a relatively short period of 6 weeks. Furthermore, the reason is that the relevant EU Regulation makes the hearing of children the main rule, and this principle has become accepted in Hungarian case law in recent years.[84] In 5 of the 7 cases, the court of first instance also appointed a guardian to hear the child, and heard each child in the absence of the parents or legal representatives, but in the presence of the guardian. It could be concluded from the recorded records that the minors were heard in an appropriate atmosphere, in a way that was understandable to the children, and that the children were informed in advance about their role, the right to refuse to answer and the nature of the proceedings. From what was said at the children's hearing and other evidence, it could be concluded that these procedural acts helped the judge's decision with substantive information both in terms of fact-finding and in mapping the child's true emotional attachments.

The new Civil Code came into effect on the 1st of March, 2014. According to the Civil Code *the parents shall inform their child concerning the decisions that pertain to the child as well, and they shall permit the child of sound mind to express his/her views before the decision is made, and to partake in making the decision itself together with his/her parents in cases defined by law. The parents shall take the child's opinion into account, giving due weight consistent with the child's age and degree of maturity.* The Commentary as the Convention also uses the terms of judgement and discretion ability, and and defines the concept of it: a minor has the ability of judgemnt if he/she is able to understand the substance and consequences of a legal transaction, to form an opinion and to express this opinion.[85]

In actions brought in disputes in connection with the exercise of certain rights of custody and with the third-party placement of a child the court shall hear both

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[83] 2013.El.II.G.1/14. A jogellenesen Magyarországra hozott gyermekek visszavitelével kapcsolatos eljárások vizsgálatára létrehozott joggyakorlat-elemző csoport összefoglaló véleménye. http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2013_el_ii_g_1_14.pdf .

[84] KOZÁK Henriett: op. cit. 13.

[85] DARNÓT Sára: A gyermek meghallgatása családjogi perekben – interjúk alapján, különös tekintettel a jogalkalmazási eltérésekre. *Családi Jog* XV/4., 2017, 22.

parents, except if any insurmountable obstacles exist. In justified cases, or if requested by the child him/herself, the court shall hear the child as well either personally or through an expert. If the child is over the age of fourteen years, the decision relating to custody and his/her placement can be made upon the child's agreement, except when the child's choice is considered to jeopardize his/her development.[86] In practice, that if 'there is no doubt in the parents' concurring statement that their decision was made in the best interests of the child', respect for the peaceful consensus and the best interests of the child to be spared will overshadow the arguments for hearing.[87]

In 2017, the National Office for the Judiciary continued to treat the high-level protection of the interests and rights of children in court proceedings as a priority, and put a strong emphasis on the training of family law judges and judges hearing the criminal cases of young persons. Mandatory training was held in this year for family law judges based on the experiences of the family law pilot training conducted at the Budapest-Capital Regional Court in 2015. At the training, all judges hearing family law cases (ca. 520 persons) received the same four-day training. The training took place at the regional level, and the team of presenters consisted of experienced judges, psychologist experts and children's rights experts in all locations.

On 11th October 2017, we organised the first meeting of the coordinators of Child-centred Justice at the Hungarian Academy of Justice. The main goal of this meeting was to activate the network. The Child-centred Justice national conference was also held at the Hungarian Academy of Justice on 6th November 2017. The conference focused on the rights of children in family law litigations and online crimes committed by and against children. More than 100 judges and invitees attended the conference.

Similarly to the previous years, the Child-centred Justice Working Group worked actively nowadays too. Among others, its members prepared an informational material for children and parents regarding the interviewing of children in criminal cases, which has been uploaded to the court websites. In 2017, the children's interview rooms were used on 109 occasions in civil cases and on 823 occasions in criminal cases. It remains one of the objectives of the National Office for the Judiciary to ensure that children are interviewed by the judges in a calming and safe atmosphere in children's interview rooms at the courts.[88]

In the new Code of Civil Procedure the rules practically have not changed.[89] A person having limited capacity to act, e.g. a minor child, whose personal status is affected by the action, shall have full procedural capacity to act during the action. The rules of hearing the child are in Chapter XXV of the Code of Civil Procedure,

[86] Act V of 2013 on the Civil Code of Hungary, 4:171. § (4).
[87] DARNÓT Sára: op. cit. 23.
[88] https://birosag.hu/en/child-centred-justice, 21st February 2021.
[89] Act CXXXof 2016 on Civil Procedure 473. §.

between the common rules on actions related to parental custody and connect with the child. If the court decides to interview the minor child as an interested person, in justified cases it shall simultaneously appoint ex officio a guardian ad litem for the minor. If a party does not have procedural capacity to act and there is conflict between him and his statutory representative, the court shall appoint a guardian ad litem to represent the party, subject to the exception specified in connection with actions for the establishment of parentage. The court may hear the child in the absence of the parties or their representatives as well. If the child is below the age of fourteen he/she shall be summoned through his statutory representative, by way of a call to ensure that the child appears in court. If he/she is above this age shall be summoned directly, and the court shall notify his statutory representative, even if the representative is also summoned to the hearing.

The interview of the minor shall be conducted in a suitable atmosphere and in a manner that is understandable for him/her, taking into account his/her age and level of maturity. At the beginning of the interview, the minor shall be asked his/her name, place and date of birth, mother's name and domicile, and shall be informed that all statements made during the hearing must be in accordance with the truth, and that he may refuse to make a statement or answer individual questions. If the court appointed a guardian ad litem for the minor, the provided information shall also cover the procedural role, rights and obligations of the guardian.

The child shall be heared by the chairman. The parties may propose questions before the interview, even if the minor is interviewed in the absence of the parties. The guardian ad litem may propose questions during the interview of the minor. The chairman may allow the guardian ad litem to question the minor directly, and decides whether the minor may be asked a proposed or direct question. At the end of the interview, while the minor is still present, the testimony recorded in the written minutes shall be read out, and if the minutes are recorded by making a sound recording of the contents of the minutes, it shall be recorded in the presence of the minor. The minor may correct or supplement his testimony while it is being read out or recorded. With the permission of the chair, the minutes may be supplemented or modified according to any remarks made by the guardian ad litem or the parties, if the interview is conducted in the presence of the parties. If it is dismissed, the respective request of the guardian ad litem or the parties shall be recorded in the minutes. If the minor is interviewed in the absence of the parties, the chair shall present the minutes of the interview to the parties.

Viktória Ádámkó aptly defined the competence in making decisions affecting the child. A child shall be considered as competent in custody cases concerning him/her who has a stable self-initiative mindset and personality – or at least an emerging one, and able to express a firm opinion on his/her placement wish, considering the personality of his/her parents, independently and without negative influence, thereby able to make a well-founded request for the court, recognizing and assuming the consequences of the court's decision on the placement of

him/her.[90] Hungarian family law does not specify the age at which a child can be heared. According to psychology, a court hearing is permissible from the group of school-age, second-grade, six- to eight-year-old children, since by then the minor's logical abilities, perception of reality, and moral compass make it suitable for forming an opinion that cannot be ignored. Hungarian judicial practice considers twelve years to be the age at which a child is expected to have a meaningful opinion. Other data from the lawsuit, however, may show that the minor is extremely mature and advanced, judgmental for up to twelve years, but it may also be the case that, due to certain factors, a sixteen-year-old teenager is unable to make a substantive statement. The minor's personality is crucial to how he or she handles the court hearing. It is therefore advisable for the judge to find out before the hearing about the child's personality, characteristics, tendencies to anxiety, for example on the basis of a pedagogical opinion, a guardianship document or a similar statement from the parents.[91]

It is procedurally unmanageable if a child is making a statement during a hearing of a judicial or psychological expert, even on the relevant facts of the case, but then he/she asks the person conducting the hearing not to record all or part of what he/she has said as part of a lawsuit. This is a particular problem, both ethical and procedural, if what the child has said could fundamentally influence the judgment of the case, or if their disregard is clearly against the best interests of the child.[92]

So we can say, the Hungarian rules are in accordance with the main international standards, but of course we also have backlogs in this field. I personally missing that after the child has been interwiewed, he/she gets no information from the court about the decision and its reasoning. In my opinion it could reduce the child's confidence and trust in the justice system. And it would also be considerable to introduce the institution of own lawyer for the child. Guardian ad litem is appointed only in justified cases, i. e. when there is a conflict of interest between the child and the parent. I think it does not serve the best interest of the child.

7. Some foreign examples

After the brief introduction of the Hungarian procedure to hear the child, I would like to introduce some other foreign institution I found effective.

In some European Member States, private or subsidised services are available for children and young people where they can get information on children's rights in general or basic information on the legal issues of their own case or situation. In certain member states, such as Belgium and the Netherlands, there are 'children's

[90] ÁDÁMKÓ Viktória: Az ítélőképessége birtokában levő gyermek véleményének meghallgatása – különös tekintettel a gyermekelhelyezésre. *Családi Jog* XIII/3., 2015, 10–11.

[91] Uo. 11.

[92] KOZÁK Henriett: op. cit. 14.

rights shops'[93], which can refer them to a lawyer, provide them with assistance in exercising their rights (for example, writing to a judge to be heard in a case), etc.[94]

In the Netherlands parents at the end of their relationship, whether they are spouses or live in a registered or de facto partnership shall conclude a parenting plan on settling the exercise of parental responsibility. The child should also be involved in the preparation of the parenting plan, his/her opinion shall be taken into account. This plan aims to think about the impact of their separation on the child, and minimalize the possible conflicts. It shall be submitted before the application for divorce is filed. Parties may prepare it themselves, but may also seek the assistance of a mediator, lawyer or notary.[95] The plan shall cover the questons of child's habitual residence, practice of right to access, how to inform each other, and child support. Failure to submit the plan will, in most of the cases, result in the rejection of the action. As we can see, these contents are also required in the Hungarian mutual agreement of the spouses, but here it is not a reason for refusal if the child was not involved in the decision. If communication between the parents does not work at all or one of them has left for an unknown residence, the court will usually not sanctioning the failure of submission. In the claim parents shall describe how they had their child involved, independendently of his/her age, so the court can decide whether the agreement is in the best interests of the child or not. Courts also made guidelines to the examination of involving of the child into the decision making process. Above six years the child shall be involved to the plan. But if the claim does not contain informations about the opinion of the child, the court shall hear the parents separately. In family law cases concerning the child the court shall provide opportunity to the twelve years old or older child to be heared, but he/she does not have to make a statement. In child support cases children above sixteen shall be involved. However, the court may also offer a hearing to a younger child, if he/she is unable to make a decision based on a conflicting statement of parents.

The court shall determine the method the child should be heared. There are no procedural rules for this question, but there are some guidelines. According to these guidelines the child could be heared orally or in writing, in child support cases only in writting. But in all cases the child shall be given the opportunity to give an oral statement, in the absence of his/her parents. If the child's opinion shall be treated confidentially, the court does not make a record, but the court shall briefly inform the parents about the standpoint of the child. But the court does not have to inform the child how was his/her opinion taken into account.

An other state I also would like to introduce is Germany, which has the oldest traditions of hearing the child in Europe, and often criticised for hearing too often and

[93] The "Kinderrechtswinkel" in Ghent and Bruges and the "Service droit des jeunes" in most major cities in the French-speaking community in Belgium.

[94] Guidelines of CMCE, 60.

[95] SZEIBERT Orsolya: A gyermek meghallgatása… 35.

relatively young children in court procedures.[96] There is a law in force since 1980, which obliges courts to hear the child in person before making certain decisions concerning the child's person or property, in particular questions of parental responsibility and contact. Family law judges can only derogate from this legal obligation if there are very justified reasons, so we can say German judges have the greatest professional experience in this field in Europe – and probably in the world. German judges are also regularly given several days of training specifically on hearing the child. And the German Federal Ministry of Justice periodically orders the examination of the practice of hearing a child in the light of legal facts, last time between 2006 and 2010.[97]

There was a survey showed that the average age of the lowest age children heard by German local and appellate courts is 4.1 years, but 3 years is not uncommon either. However, those going to school are already heard by 95.3% of judges, so in Germany, the age of 14 is no longer relevant to the hearing. A child hearing takes an average of 25 minutes in both the local and appellate courts. Nearly half of the judges set a separate deadline for the child to be heard, which usually takes place in the judge's office, clearly less frequently in the courtroom or in a playroom equipped for this purpose. In nearly a third of the cases, the child is heard by the acting judges alone, and in a further third with the assistance of a guardian ad litem. Two-thirds of all judges said that a simple conversational situation should actually be created at the hearing. However, based on all the responses, it can be concluded that some kind of aid is used in half of the children's hearings, most often, toys or colored pencils were used, writing instruments were offered. German judges refrain from hearing the child in 5–20% of cases, 80.3% justified it with the age of the child, 26.3% on the grounds that it would presumably burden the child. Judges who had previously attended child hearing education indicated this reason much less frequently, in contrast to those who had not yet received such a training. Even with the age of the child, those who have less professional experience were more likely to miss a direct child hearing.[98]

The question of the burden of the child at the hearing was the subject of a very detailed subject of the German study cited above. In doing so, data on children were collected one week before the hearing, then immediately before and after the hearing, and finally four weeks later. At these times, interviews with both parents and affected children revealed their feelings about the hearing and what they experienced about themselves and their child. Based on the results obtained, it was concluded that children feel more unwell, excited, afraid and insecure a week before the hearing. Immediately before the hearing, the children reported a clear increase in these mental burdens, internal tensions, followed by a very significant relief in the vast majority after the hearing. Only the children of anxious parents were exceptions to this.

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96 KOZÁK Henriett: op. cit. 9–10.
97 Ibid. 10.
98 Ibid. 11.

Four weeks after the hearing, the feeling of relief in the children's self-esteem continued to show and even intensified. As a further result of the research, it was found that the mental strain of boys was greater than that of girls at all four time points. There is no difference in the burden or response of children under 14 years of age. Older children were more likely to feel less well 4 weeks after the hearing and, in the parents 'view, had almost the same stress reactions as before, while children under 14 had a clear reduction in internal tension. The hearing itself was definitely positively assessed by the parents, they felt that their own interests as well as those of the child were taken into account in doing so. From all these data, the research team came to the very important conclusion that direct judicial hearing of a child, in the narrower sense, is not a burden. Rather, a kind of restlessness is observed in three areas (interaction of mood swings, shyness, and insecurity), similar like in an exam situations.[99]

Conclusions

None of the international documents granting the child's right to be heared determine the minimum age of the child. It shall be judged individually from case by case. Intentionally, so we have to put more emphasize on regular trainings of judges (and other professionals).

Mediation can undoubtedly open new perspectives for development, however it is neccessary to ensure the child is heared by competent and practiced professionals. The framework and procedural rules of this out of court dispute resolution mechanism exists, but parties to the dispute not know about the positive features of it, and that is why they do not trust in meadiaton. However, I think, it could cause the least harm for the child and family affected.

We can say, that Hungarian legal rules and Child-centered justice meets the requirements of the Convention, but as long as the practical trainign of professionals is achived and there are no common minimum standards for cooperation, we cannot talk about a real and effective process. The Guidelines of the EU consider judicial bodies as a part of the child protection system. If a system designed to protect the best interests of a child is dysfunctional, the child's rights to information and freedom of expression are exist on paper but in fact they are ignored.[100] The Convention binds not only authorities and courts, but also everyone, state bodies, society, teachers, parents, families and people in contact with the child. The child does not really have to face the situation of what it means to be an active legal entity when his/her parents are divorcing his or her parents. The child is (also) entitled to active legal personality from the moment of birth (this protection – as a minimum requirement – begins with the birth of the child under the Convention). If the child

[99] Ibid. 11.

[100] GYENGÉNÉ NAGY Márta: A családi jogi mediáció helye az EU gyermekbarát igazságszolgáltatásáról szóló tematikájában. *Családi Jog* XVII/3., 2019, 37.

grows up in a society where his/her participation is self-evident (participation in the family, school, health care, etc.), it is also self-evident that he/she may be heard by a court / official / child rights professional. So we should start the trainings already at school and within the family, to teach our children standards of cultured debate, that he/she has the right to express his opinion, feelings, afraids, to ask questions if he/she have doubts. That judges and other officers are not enemies, they are working for us, and we may trust them.

The responsibility for this belongs to everyone, to all of us.[101]

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