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

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

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

1. Introductory Remarks

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

2. Personal Debt

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

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

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

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

3 Smyczyński and Andrzejewski, 2022.

3. The Professional Career of Prof. Smyczyński[4]

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

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

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

4 Andrzejewski *et al.* (eds.), 2008, pp. VII–X.
5 Radwański, 2006a.
6 Smyczyński, 1961, pp. 45–50.
7 Olejniczak and Panowicz-Lipska, 2013, pp. 311–317.

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

4. Legislative Work

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

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

8 Smyczyński, 2014a; Smyczyński, 2011.
9 Andrzejewski, 2017, pp. 21–35.
10 Smyczyński, 1997a, pp. 293–303; 1997b, pp. 239–254; 1995, pp. 98–115.
11 Ignatowicz and Nazar, 2016, pp. 63–68.

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

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

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

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

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

12 Radwański, 2006b.
13 Smyczyński, 2014, pp. 13–30.
14 Smyczyński, 1978.
15 Smyczyński, 1989. The title is a translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources were made by the author.
16 Brezhnev Doctrine. Soviet History (no date).

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

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

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

17 Roszkowski, 2003, pp. 328–344.
18 Id., pp. 227–228 and 265–267.
19 Friszke, 1994.

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

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

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

20 Smyczyński, 2012, p. 11.
21 Wikipedia, Adam Łopatka (no date).
22 Krawczak-Chmielecka, 2017, pp. 11–23.

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

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

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

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

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

23 Smolińska-Theiss, 2015, pp. 26–33.
24 Olczak-Ronikier, 2011.
25 Wiśniewski, 1999, p. 13.

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

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

6. Important and More Important Issues

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

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

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

26 Andrzejewski *et al.,* 2008, p. VIII.
27 Id., p. VIII.
28 Smyczyński, 2012, p. 11.

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

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

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

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

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

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

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

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

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

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

32 Dyczewski, 1988, pp. 99–128.

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

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

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

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

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

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

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

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

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

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

34 Smyczyński, 1996.

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

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

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

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

35 Smyczyński, 1999.

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

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

7. At the End

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

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

36 Ważyńska-Finck, pp. 71–73.
37 Smyczyński, 2012, p. 17.

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The Other Side of Childhood: Children in Street Situations

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Abstract. Although they exist in every nation and country on earth, not even their very prevalence has brought them the care they truly deserve, or enough attention in the media and public discourse. They are aged between 5 and 20 years (but some also say that they are strictly under 18 years) and live their lives in harsh street conditions, often not recognised or forgotten by their own families. They are children in street situations, sometimes called *gamines de la calle*, *meninos de rua*, *enfants de la rue*, and even *the thrown aways*. Their life means almost nothing to their environment, which either does not notice them at all, mistreats them most cruelly, or exploits them for some criminal activity. Their life is therefore more uncertain than the life of any other person in the world. Left to themselves, they pursue ways to survive that often border on crime, which can lead them to illness, addiction, and premature death. Their every living day is a fight for survival and recognition, which is aggravated by not only the fear and discomfort their presence causes to others but also the lack of will to solve their problem and lack of realisation that they are, in fact, just children. In this work, the authors deal with the definition of children in street situations in an international framework, and consider the approach taken towards children in street situations in the Republic of Serbia.

Keywords: children in street situations, international recognition of the problem, Serbian solution, violence, neglect and exploitation, child rights approach

1. Introductory Remarks

According to Article 1 of the United Nations Convention on the Rights of the Child (1989; or 'Convention' hereafter), every human being who is below the age of 18 years is considered a child unless majority is attained earlier under the law applicable to the child.[1] Childhood should be a period of endless joy and happiness due to the existence of a new being who is learning and growing together with parents; learning about the emotions and unconditional love parents can provide to this child; and discovering completely new abilities, which the parent also does. Unfortunately, some children come into the world where their arrival is not accepted; from the moment of their conception, they experience rejection and stigmatisation, and they are deprived of the love and care of their environment.

They often lack the capacity to establish relationships with other people based on trust and love, because they lacked this during their difficult upbringing. These children – especially those who live on the streets – are denied the opportunity to create a new life different from those who placed them in that narrative. The catchphrase 'every right for every child' promoted by UNICEF gained its full meaning only in 2011, when this international organisation began dealing with the status and rights of street children in a different, organised manner. The devastating fact that more than 150 million children globally live in such inhumane and extreme life-threatening circumstances today is reason enough for everyone – who emphasises that children are the best and most sacred thing in this world – to do everything they can to reduce the number of vulnerable children and enable them to have a happier, more carefree, and safer childhood.[2]

But who are the children living in street conditions, and how did they end up there?

The issue of street children first appeared as a major concern in the wake of the International Year of the Child (1979). In 1982, the Inter-NGO Programme on Street Children and Street Youth was formed, an organisation that was very important for defining children in a street situation and taking the first important steps in battling this phenomenon. A few years later, in 1983, a street child was defined as

> … any girl or boy who has not attained adulthood, who has made the street (in the broadest sense of the word, including vacant homes, wasteland, etc.) his or her habitual abode and/or source of livelihood, and who is inadequately protected, directed, and supervised by responsible adults.[3]

1 Convention on the Rights of the Child, General Assembly resolution 44/25, 20 November 1989.
2 Matthews, 2023.
3 Inter-NGO Programme on Street Children and Street Youth, Sub-regional Seminar for the Mediterranean, Marseilles, 24–27 October 1983: Summary of Proceedings.

Within this definition, UNICEF identified two categories of street children: children who spend the day on the street but have a place to go back to at night (although these places may be inadequate as accommodation) and street children who do not have anywhere to go.[4] In 1986, UNICEF's Executive Board approved priority measures on behalf of 'children in especially difficult circumstances', with special emphasis on street children. Further specifications on how children end up there and what should be done to minimise that risk were not explicitly mentioned.

We find the term "street children" in 1991 as well in documents from the Hearing Before the Selected Committee on Hunger in the United States,[5] where it was stated that 'one hundred million children between the ages of four to 15 live and work on the streets of the developing world. Twenty-five million of these children are completely homeless'. During the hearing, the poverty of parents was highlighted as a key reason for the emergence of the category of children on the street, and measures that can be used to reduce or eradicate poverty were discussed.

The Consortium for Street Children describes street children as those depending on the streets for living and working, alone or with other members of their families.[6] The connection with street life is so strong that it becomes part of their identity. They are surviving in the most dangerous conditions, without proper shelter, support, or understanding of their own situation.

This so-called 'streetism'[7] is the consequence of numerous difficult living conditions, such as economic poverty, parental death, parental neglect, violence, and abuse of children at home or within their communities.[8]

These children are often discriminated against, abused, or used in serious crimes as the direct perpetrators of those acts. They are suitable for participating in such criminal activities because they are without adequate protection or wider social support. They are left to themselves to use the means that are available to them, without any major knowledge or skills that can help them get out of the environment they have fallen into, which inevitably drags them into illness, addiction, and premature death. Nevertheless, they are invisible, with their sad life stories full of privation, violence, escape, and forced migration. Everything they do is inspired by a strong will to survive, although they are surrounded

4 Canuto, 2020.

5 Street Children: Global Disgrace. Hearing before the selected Committee on Hunger House of Representatives, one hundred and second Congress, first session, first hearing held in Washington D.C. November 7, 1991, 51–244, Serial No. 102-17.

6 Consortium for Street Children, no date a.

7 Asanbayev, Kutebayev, and Khamchiyev, 2016.

8 Report of the United Nations High Commissioner for Human Rights on the protection and promotion of the rights of children working and/or living on the street, A/HRC/19/35, 11 January 2012, United Nations General Assembly.

by lots of challenges and tempted to use drugs, alcohol, and violence to protect themselves.

It is not that unusual that they are sentenced to short prison sentences, and even when they want to reintegrate within their own families, the families do not want them back. So, it can be said that they are 'caught in a loop of trouble: problem, street, jail, more street, more difficulties'.[9] The children in street situations experience high levels of stigma and are often suspicious of anyone's attempt to help them and pull them out of the circumstances in which they find themselves. Mistrust towards others is really the only proven mechanism for their survival on the street.

The *Rights of Children in Street Situations: General Comment No. 21 (2017) on Children in Street Situations*[10] was the first international document that fully recognised these children's specific situation and need for the international community to act and do something more than it has done so far. We find here a new term – 'children in street situations' – which is used to mean (a) children who depend on the streets to live or work, whether alone, with peers, or with family, and (b) a wider population of children who have formed strong connections with public spaces and for whom the street plays a vital role in their everyday lives and identities.[11]

A child in a street situation indicates that almost every child's right from the Convention on the Rights of the Child (1989) has been violated, abolished, or ignored.[12] It means that even if there is a solid legal framework for the protection of children's human rights, these rights are not fully respected in several states who ratified the same convention.

Nevertheless, some important steps have been taken since 2011 on the international and national levels. That is why the judgement of the Inter-American Court of Human Rights in the case of "street children" (*Villagran-Morales et al. v. Guatemala*) is significant. It dealt with the murder of some boys who were street children. The investigation about their murder was not conducted properly because of their social status. The court found that the state of Guatemala violated the Inter-American Convention of Human Rights regarding the obligation to provide a real, effective investigation of the death of the murder victims. Although they were children in the street, they were still children and were murdered before they even got the chance to create a better life for themselves.[13]

9 Consortium for Street Children, no date.

10 In total, 327 children and young people from 32 countries were consulted in seven regional consultations.

11 United Nations Committee on the Rights of the Child, Consortium for Street Children, 2017a, p. 9.

12 Id., pp. 10–27.

13 Corte Interamericana de Derechos Humanos, 1999.

2. Dealing with the Issue of Children in Street Situations: The Case of the Republic of Serbia

The first relevant empirical data on children in street situations in Serbia was obtained from the report titled 'Children Begging in Vojvodina' based on research conducted in 2011 by the Provincial Protector of Citizens – Ombudsman. Although the report's main topic is begging, it indirectly provides valuable data about children who live and work on the street, because begging is still the main, dangerous activity these children engage in. Technically, begging by itself is a misdemeanour,[14] but the act may constitute a part of, or result from, much more serious crimes in which the child is victimised, such as neglect and abuse of a minor and even human trafficking.

Roma children are most often identified as begging children, followed by children forced to beg by organised crime groups, who enlist street children and children from poor families.[15] This finding indicates that not only was there no adequate definition of child begging at that time of the report, but certain categories of children such as Roma or the poor were also separated from the category of street children, even though every child who begged did so on the street and was in equally dangerous circumstances.

Based on the established facts and conclusions drawn – which mostly relate to the issues of prevalence, recording, causes, risk identification, implications, and consequences of child begging – appropriate recommendations from the Provincial Protector of Citizens – Ombudsman were sent, which primarily refer to measures to prevent begging and protect children. They refer to the necessity of (1) better legal regulation of issues concerning this phenomenon, especially through employment in competent institutions and establishments enabling professional development and specialisation in the field of protection of children (living) on the street or engaged in begging, and (2) establishment of a system for registering children (living) on the street and/or engaged in begging in social work centres in cooperation with the police, schools, health institutions, and other institutions and organisations dealing with the problem of child begging or coming into contact with children who beg.

An important recommendation is that all institutions with jurisdiction in combatting child begging should establish mutual cooperation, develop effective communication mechanisms, and provide support to begging children. At the same time, all institutions should take special care of the positive and negative jurisdictional conflicts between them –, that is, in situations when none of them are competent to act in the case of child begging, they should immediately

14 Article 12 Act on Public Order and Peace (*Zakon o javnom redu i miru*), Sl. glasnik RS, br. 6/2016 i 24/2018.

15 Muškinja-Hajndrih, Dragin, and Duškov, 2011, p. 43.

and jointly initiate relevant changes to define specific competences and their possible actions.[16]

In later years, as shown by the results of similar research,[17] the situation of children on the streets, which refers to both legislation and institutional protections and the actual situation on the ground, has not changed significantly. The system does not yet adequately recognise street children. No law, neither substantive nor procedural, adequately deals with this issue to ensure systematic protection of this highly vulnerable group of children.[18] To begin with, there is lack of a common working definition of 'street-involved children'. It is important to name a phenomenon, because once you name it, you accept its presence and have taken the first step in dealing with that phenomenon.

Public services have limited resources, and only a few specific services, such as shelters and drop-in centres, are available in major cities. Services of non-governmental organizations (NGOs) are donor-based and therefore short-term and non-sustainable, and social work centres lack an adequate number of social workers able to respond in a timely fashion to the high number of cases they handle. The system of services does not work through an intersectoral and multiagency approach. That is, various parts of the system work separately, and thus collaboration between public institutions themselves could be better.[19]

The same lack of collaboration is evident between the public sector and NGOs. Although there are cases of good cooperation, such as exchange of information on a child's situation and joint conferences on case management,[20] and other such solutions, there is always a possibility to create a better synergy between actors and interventions and to employ resources properly. There is recognition of the need to strengthen relations between various sectors of public services and between public and non-public ones, through a comprehensive mapping of services and development of intersectoral protocols, which aim to deal with the issue through a multidisciplinary and inter-sectoral approach. Moreover, these obligations need to be reflected in the job and position descriptions of all relevant actors.[21]

16 Id., pp. 45–46

17 Duci and Tahsini, 2016.

18 Id., p. 15.

19 There are some good examples on how that cooperation can look, such as in the area of prevention and protection against domestic violence, where multisectoral teams were formed at the level of many municipalities in the Republic of Serbia.

20 Joint conferences are held for exchanging information between competent authorities regarding a case of child rights protection; such meetings are attended by the representatives of at least the social work centre, police, competent court and/or prosecutor's office, a safe children's home, protector of citizens, a school, even NGOs, and other relevant institutions that can, with their view of the situation from different angles of their jurisdiction, help to reach the best and most optimal solution in the given situation.

21 Duci and Tahsini, pp. 123–124.

Recommendations that are based on established facts and conclusions derived from this research report by the Provincial Protector of Citizens – Ombudsman are grouped in the areas of child protection, social protection, education, health, coordination and procedures, information, and raising awareness. Besides the ones already mentioned, the following recommendations are the most important:

1. case management with the child's participation, and a family strengthening approach is crucial and must be taken into account every time it is possible, with special emphasis on the consideration of the best interest of the child – these should be employed in addressing both individual cases and the issue as a whole;
2. street-involved children should be mapped at a national level and an adequate database on cases should be created as an initial base for the developments of attitudes, opinions, possibilities, and potential solutions for children in such risky situations;
3. social inclusion and protection policies should address the needs of children at risk and street-involved children, by increasing cash assistance, by providing free access to healthcare, education, and other services and by widening the typology of benefits provided to the most vulnerable families. It could reduce poverty, which is the key reason for the emergence of the category of street children;
4. access to good quality and inclusive education should be provided to all children, because education provides them with more of a chance to break the spiral of violence, hopelessness, and other dangerous situations;
5. inter-sectorial efforts should be developed in order to make the registration of children without a legal status possible;
6. undertaking awareness-raising activities, which should be conducted for professionals and members of the public, in order to increase recognition that the issue of street-involved children cannot be viewed in isolation but rather seen as system-related and to reduce prejudice and stigma towards children and families and to promote inclusion.[22]

The stated findings, conclusions, and recommendations from the research report represent important guidelines for shaping and systematically solving the issue of children in street situations. Moreover, confirmation of their credibility soon came from the highest levels.

22 Id., pp. 139–141.

3. Committee on the Rights of the Child on Children in Street Situations

Based on Serbia's national report, submitted in accordance with the obligation it has as a State Party to the United Nations Convention on the Rights of the Child, on 7 March 2017, the Committee on the Rights of the Child (or 'Committee' hereafter) issued its concluding observations on the combined second and third periodic reports of Serbia.[23] The subject of children in street situations was brought within the title regarding special protection measures, which, among others, deals with issues of ethnic and other minority children, as well as the child's right to protection from economic exploitation, use of drugs, trafficking, other forms of exploitation, and deprivation of liberty. While the Committee noted the efforts made by Serbia to address the plight of children living in street situations as positive, it was concerned that these children are not legally recognised as victims but are rather treated, after turning 14 years of age, as offenders. The Committee was also concerned that the capacity of the competent authorities and institutions was insufficient. The Committee recommended that the State Party

1. assess the number of children living and/or working on the streets, and update studies on the root causes of their situations;
2. implement, monitor, and evaluate the implementation of the recommendations outlined in the Protector of Citizens' report, with the active involvement of children in street situations;
3. ensure that support, particularly reintegration with family or placement in alternative care, is provided with full respect for the child's best interests and giving due weight to their views in accordance with their age and maturity.[24]

Pursuant to the power to issue recommendations on any matter relating to children, which it considers should be given more attention by Member States, on 21 June 2017, the Committee published General Comment No. 21 (or 'Comment' hereafter) on children in street situations. This document aims to provide authoritative guidance to State Parties on developing comprehensive, long-term national strategies on children in street situations using a holistic, child rights approach and addressing both prevention and response in line with the Convention on the Rights of the Child. Although the Committee recognises the marked diversity of this group of children; lack of precise and consistent statistics about them; diversity in causes, prevalence, and experiences of children in street

23 CRC/C/SRB/CO/2-3, Adopted by the Committee at its seventy-fourth session (16 January – 3 February 2017). At the same time, General Comment No. 21 (2017) on Children in Street Situations was issued by the United Nations.

24 United Nations Committee on the Rights of the Child, 2017b, p. 16.

situations; and different approaches (foremost, the child rights approach and welfare, but also the repressive approach), it has managed to establish a unique definition and set clear objectives, which are

1. to clarify the obligations of States in applying a child rights approach to strategies and initiatives for children in street situations;
2. to provide comprehensive and authoritative guidance to States on using a holistic, child rights approach to prevent children experiencing rights violations and the lack of choices that results in them having to depend on the streets for their survival and development;
3. and to promote and protect the rights of children already in street situations, ensuring a continuum of care and helping them to develop to their fullest potential; to identify the implications of particular articles of the Convention for children in street situations to enhance respect for them as rights holders and full citizens, and to enhance understanding of children's connections to the street.[25]

The Comment clarifies the importance of an approach based on the rights of the child, which should be the backbone of every national strategy. This approach primarily ensures respect for the four basic principles (non-discrimination; right to life, survival, and development; best interest of the child; and engagement in and respect for children's views and participation) as well as other rights from the Convention. There is specific emphasis on the importance of respecting participatory rights, bearing in mind the harsh independence that children in street situations have acquired as a result of resistance to the world of adults who often neglected and abused them. Such independence, which comprises gained resistance and capability, represents a significant participatory force in the protection and improvement of these children's rights. As is well stated in the Comment, these children are 'experts on their own lives' and should participate in developing and implementing strategies.[26] It is necessary for such strategies to foresee the allocation of special budget funds for street children, as well as deal with several interdepartmental issues and processes, as an integral part of the holistic approach to develop the necessary connection between systems. The process requires changes and improvements to the law, and the Comment makes specific proposals, primarily the abolition of discriminatory provisions that put children at a disadvantage solely due to the personal nature of being in a street situation; decriminalisation of acts in which the decisive status of the child is that of a victim and not a perpetrator; and abolition of provisions that envisage

25 United Nations Committee on the Rights of the Child, 2017b, p. 5.
26 Id., p. 6.

the violent removal of children and their families from the streets, which is a form of direct discrimination.

The already mentioned diversity, which refers to not only the variety of children on the street but also the situations in which they are found, necessarily induces respect for the standard for the best interest of the child. This is especially true when ensuring individualisation of both preventive and interventional practical measures and of services such as health, education, justice, culture, sports, and information.

Further review by the Committee, based on elaboration and concretisation of the notion of children in street situations as well as key articles of the Convention, led to examples of bad practices, links between the children's real needs, ways to realise their protection, and improvement in their individual relevant children's rights. Therefore, besides the principles already mentioned, the Comment also pays special attention to topics such as the right to appropriate measures, right to direction and guidance consistent with evolving capacities, right to freedom of association and peaceful assembly and other related civil rights and freedoms, rights from the corpus of rights to a family environment and alternative care, right to an adequate standard of living, and rights related to disability and health as well as to education, leisure, and cultural activities; the last part is dedicated to violence against children and special protection measures. The standards established and elaborated in this way represent an invaluable source for not only creating and adopting national strategies but also assessing the fulfilment of the conditions foreseen in the existing normative solutions. For this reason, the next section discusses these individual rights in the context of children in street situations based on the latest normative solutions in this area in Serbia.

4. Regulation of the Protection of the Rights of Children in Street Situations in Serbia

To improve work and achieve a higher level of efficiency in organising protection, assistance, and support for children in street situations who are victims of violence, abuse, or neglect, the Ministry of Labour, Employment, Veterans and Social Affairs (or 'Ministry' hereafter) issued an order[27] in 2018 to all social work centres and guardianship authorities. The order requires them to take measures and begin activities in accordance with their competences to organise help and support for 'street children', that is, children who are victims of violence and abuse who 'live and work on the street' and are engaged in begging, washing windshields, collecting discarded raw materials from waste containers, selling flowers late at night, etc.

27 No. 560-00-334/2018-01 from 21 May 2018.

This act contains several, mostly procedural, measures and recommendations as well as instructions for their implementation. The order first established the formation of a special team in every municipality and city, which will include an expert from the guardianship authority, a police officer from the police department, and a representative from the regional health centre (paediatric service, preschool, or school dispensary). Thus, to implement the complete and continuous social and family legal protection of these children, the social work centre and guardianship authority are obliged – in all cases in which they have knowledge that children are being abused for exploitation or are caught performing the actions described above – to immediately take the children away from their parents, guardians, or the person with whom they are found and provide them healthcare, address their existential needs, and ensure their safety (custodial protection measures or placement in a social welfare institution or with a foster family).

As regards the parents, guardians, or persons with whom children are found, it is necessary to take measures for the protection of children from abuse and neglect through criminal law –, that is, by filing criminal charges for the possible criminal offense of 'neglect and abuse of a minor'. Similarly, against parents who abuse or neglect their child or grossly violate parental rights, civil law protection measures for abuse and neglect of a minor should be taken –, that is, proceedings for complete deprivation of parental rights should be initiated. Practically, this means the initiation of civil court proceedings for the deprivation of parental rights as well as a procedure for the protection of the child's rights, that is, for the prohibition of maintaining personal relations with the child. As an urgent procedure, measures are envisaged for acute protection of the child and for ensuring his or her safety, healthcare, existential conditions, psychosocial support, representation (through the appointment of a guardian), and other conditions for exercising the child's right to education and upbringing.

Almost two years after the order was passed, acting on his own initiative, the Protector of Citizens established that the Ministry had made an omission in its work by issuing this norm, as it obliged social work centres to take children away from their parents as soon as possible in every detected case; then, they were required to initiate proceedings before the court to deprive the children of their parental rights, prohibit the maintenance of personal relations with their parents, impose measures to protect them from violence, and file criminal charges against their parents. In this way, the Ministry acts in direct contravention of the Convention on the Rights of the Child, significantly lowers the level of realisation of children's rights in the Republic of Serbia, and directs social work centres to engage in illegal behaviour.[28] In a more detailed explanation, the Protector of Citizens stated that issuing an order to take children away from their parents in

28 No. 321-346/19 from 27 February 2020.

all cases, instead of when it is solely in the best interest of the child, lowered and disregarded the basic standards of respect for children's rights, multiplied the risks of illegal and improper separation of children from their families, and acted directly against the best interests of children. These solutions represent the most repressive measures towards children that can dramatically increase the institutionalisation of children as well as risks of separation from their family.

The contested provisions are also contrary to the generally accepted standard of international law, which prohibits the separation of children from their family due to poverty. This confirms that Serbia does not have measures to assess whether a child in a street situation with his or her family lives in conditions of extreme poverty and whether a child being in a street situation is precisely the result of extreme poverty; moreover, the country lacks prior planning and implementation of family support measures that eliminate or reduce extreme family poverty, or support the prevention of a child being in a street situation through educational and community services. Such measures, in accordance with the generally accepted standard of 'the least restrictive environment', also consider separation from the family as a measure of last resort only if a child being in a street situation is the result of a worrying relationship between the parents and not of extreme poverty or marginalisation. The harsh but fair findings of the Protector of Citizens also constitute a kind of outcry, calling out the hypocrisy of the state policy towards children. Thus, it is stated that the order to take children away from their parents in all cases is especially unfair to children in a street situation.[29]

Based on the established factual situation, the Protector made appropriate recommendations. First, it found it necessary for the Ministry to put the disputed order out of force, inform the social work centres about it, and create an order, instructions, or guidelines for social work centres on how to deal with children in street situations. These new instructions contain certain obligations of the centres: examine whether a child in a street situation and his family are in a state of poverty or extreme poverty, determine the cause of the child being in a street situation, and especially whether it is poverty, plan services to help parents achieve parenthood, provide services and measures to reduce poverty, detect families at risk of finding their children in a street situation; plan and take measures for these families to prevent the removal of children from the family, prohibit the exclusion from their family of children in a street situation who are in that situation exclusively because of poverty, and take measures for the urgent inclusion of children in a street situation in a regular compulsory education programme and in support services in the community. Besides the above, the main recommendations to the Ministry were the preparation of a draft strategy for combating the street situation among children as well as a proposal for a

29 Id., pp. 16–7.

protocol on the protection of these children, both based on the highest standards of realisation, protection, and promotion of children's rights.[30]

Although the Ministry officially refused to act on the Ombudsman's recommendations,[31] two years later, a new strategic act was adopted, this time with an intersectoral scope, calling for the application of valid international standards in this area. In the meantime, the adopted state Strategy for the Prevention and Protection of Children from Violence for the period of 2020–2023[32] started based on the claim that there is no systematic and complete record of children whose life and work is connected to the street. It also indirectly emphasises the importance of the children's participation, supported by the fact that over 50% of the children against whom measures – exclusively designed and applied by state bodies and institutions – are utilised return to the street and continue begging. No official field work or organised activities are carried out in the field aimed at providing immediate protection and reducing damage on the spot. Children who beg do not have, in regulations or in practice, the clearly recognised status of child victims of exploitation, violence, abuse, and neglect. The capacities of bodies and institutions responsible for the prevention and suppression of child begging are insufficient, in terms of both material resources and number of employees. No professional standards determine the actions of state bodies and institutions in cases of child begging. In cases where certain measures are taken, they are characterised by disorganisation, un-systematicity, and spontaneity. These factors created the conditions for the adoption of the Plan for the Protection of Children in Street Situations from Violence, Neglect, and Exploitation (or 'Plan' hereafter) in 2022, which is elaborated in the following.

30 Id., p. 2.

31 In its statement on the determination and recommendations of the Protector of Citizens, the Ministry, pursuant to Act no. 560-00-00307/2020-01 of 11 June 2020, argued that the disputed order does not contradict the Convention on the Rights of the Child, nor are social work centres directed to do illegal work. The Ministry explained that, a similar order in 2014 – wherein 115 local teams were formed to respond to the appearance of children in street situations and provide help and support to children and families and which included representatives of social protection, education, and healthcare – identified the lack of cooperation with the internal affairs authorities and communal police –, which can greatly contribute to the detection of these cases, given their competence and way of working in the field – as a shortcoming of this act and the main reason for passing the new order. The Ministry asserts that operational work does not exclude respect for the child's rights to live with his or her parents, to be cared for by his or her parents before all others or not being taken away from his or her parents without prior expert assessment but only because the child is 'in a street situation' and has worse material condition.

32 Official Gazette of the RS, No. 80/2020 of 3 January 2020.

5. Plan for the Protection of Children in Street Situations from Violence, Neglect, and Exploitation

On 25 May 2022, to apply General Comment No. 21 for children in street situations, the Ministry of Family Care and Demographics; Ministry of Labour, Employment and Social Issues; Ministry of Internal Affairs; Public Prosecutor's Office; and the City of Belgrade – as responsible authorities – passed the Plan for the Protection of Children in Street Situations from Violence, Neglect, and Exploitation.[33] This Plan was passed in accordance with the Family Act, Act on Criminal Procedure, Act on Offenses, Act on the Police, Act on Juvenile Offenders and Criminal Protection of Juveniles, Act on Preventing Domestic Violence, and the General Protocol for the Protection of Children from Violence, as relevant regulations.

This Plan has several main goals: to secure fast and efficient intersectoral cooperation in protecting children in street situations who might be at risk of becoming victims of violence, neglect, and abuse; to provide help and support; and to find alternatives for their dependence on the street.

For the first time in domestic regulations, relevant definitions were provided in accordance with international standards. Accordingly, children in street situations are defined as children aged up to 18 years whose life and/or work depends on the street where they reside alone or with peers or family; children who occasionally live and/or work on the street; and children who do not live and work on the street but spend most of their time there along with peers, siblings, and other members of their family.

Child labour in the street, depending on the type of work and circumstances under which the work takes place, can be useful or harmful and, in many cases, dangerous for children (e.g. through the abuse of child labour). Dangerous child labour in the streets is any kind of work in the streets that is harmful for a child's health, security, and morality, determined based on the child's age, type of activity, and circumstances around him or her.

When it comes to age, every type of work involving children aged 7 years or younger, work in the streets without appropriate supervision for children aged up to 14 years, and work during night for all children is prohibited. According to the circumstances, any work activity happening during extreme weather conditions (very cold, very hot, rain, snow, etc.), while wearing inappropriate clothes, or in unsafe surroundings (heavy traffic, high altitude, and similar) is also prohibited. Finally, according to the type of work, any activity that represents a danger to the child's security, health, wellbeing, morality, and education, such as working with dangerous materials (collection of discarded raw materials), begging, and any criminal activity involving children is prohibited. Social work centres (the guardianship authority), police departments, public prosecutors' offices, and

33 Council for the Rights of a Child, 2022.

every other authority that has this legal obligation or is interested in solving the problems of children in street situations (communal police, healthcare facilities, educational institutions, labour inspection, and NGOs) and could, within their regular activities, intensify activities for the prevention and protection of children in street situations have been designated as the bodies responsible for implementation.

In accordance with the child's best interest and with his or her active participation, the social work centres must provide, in partnership with the relevant subjects, continuous help and support to children in street situations by implementing measures and services from their jurisdiction; they must also provide such support to parents and guardians so that they can, within their capabilities and material possibilities, secure living conditions necessary for the optimal development of the child. For every child in a street situation who is without parental care or guardianship protection, alternative childcare must be secured, in accordance with the child's best interest and with his or her active participation. After timely and complete assessment of a child's condition, needs, family, and environmental factors, measures of criminal and civil liability must be taken against parents who have abused parental rights, gravely neglected their duties, or committed domestic violence (forcing children to do dangerous work in the streets, forcing children to beg, inciting children to commit crimes concerning street situations, being involved in the crime of human trafficking where a child is the victim, etc). During the assessment of parental capabilities, the sole fact that the children or family work or live in the streets cannot be the reason for deprivation of parental rights or provision of alternative care for the child.

Police departments must take measures and actions to identify the location, the approximate number and age of children who live and/or work in the streets, and the presence of adults or older peers in their close proximity to check if these persons are exploiting children to commit crimes or offences. If the determined facts and circumstances indicate that there are grounds for suspicion that a crime or offence has been committed, measures and actions must be undertaken to protect the victim; identify, find, and arrest the perpetrator of the crime or offence; discover and secure all the evidence and objects that can serve as evidence; and collect the needed information that could be useful for the procedure to file a criminal complaint. In each case, when there is suspicion that a child is a victim of some kind of human trafficking crime (exploitation of children for begging, committing crimes, prostitution, pornography, etc.), police indicators for preliminary identification of the human trafficking victims must be used; when that suspicion becomes reasonable, the Centre for the Protection of Human Trafficking Victims must be informed, and all necessary actions must be undertaken. In each case when there is a suspicion that a child is a victim of abandonment, abuse, or some other crime from the group of crimes titled Crimes

Against Marriage and Family, the Act on Preventing Domestic Violence must primarily be applied.

Public prosecutors' offices, acting based on criminal complaints and reports they received in cases of child abuse and exploitation, will take measures to check grounds for suspicion that a crime has been committed or has been committed by a specific person; then, they will initiate the criminal procedure, press charges, and file complaints. Groups for coordination and cooperation must consider cases formed based on applications or reports of abandonment or abuse of a minor. In these groups, members of the police, social care officials, healthcare and educational institutions, and NGOs are represented. Contact persons at higher prosecutors' offices in charge of human trafficking crimes must act on cases formed based on applications and reports of human trafficking; they will act and monitor the procedure in all cases where there are children present as victims of begging, crimes are committed by children, or children are abused for prostitution or pornography.

In the spirit of intersectoral cooperation, certain joint measures and activities are foreseen for all the authorities and institutions mentioned above. Directors of social work centres, together with managers of police departments and public prosecutors' offices, organise meetings with representatives of competent authorities, institutions, and NGOs in all cities and other municipalities in the Republic of Serbia. Herein, they analyse the current security situation to determine whether there are children in street situations in specific areas. In municipalities where their presence is established, a plan of activities aimed to protect children must be drafted, which will include the plan's goal, stakeholders, persons in charge of coordination, the timeframe, area in which it will be conducted, specific measures, actions, deadlines for implementation, and deadlines for report.

The importance of the network's existence is embodied in the obligation to connect all stakeholders. A list of contact persons from social work centres in charge of monitoring and reporting on the realisation of the plan must be delivered to the Ministry for Family Care and Demographics and the Ministry of Labour, Employment and Social Issues. A list of contact persons from police departments must also be delivered to the Ministry of Internal Affairs; finally, a list of contact persons from the higher public prosecutor's office for the crime of human trafficking and from lower public prosecutor's offices for the crime of domestic violence must be made available to the State Public Prosecutor's Office. Contact persons put in charge to monitor and report on the plan's implementation (from social work centres, police, and prosecutors) must draft joint reports, each for its own city or municipality, and deliver them every three months during the year as well as annually (not later than 31 January of the next year for the current year) to the addresses of the ministries mentioned earlier and the State Public Prosecutor's Office; representatives of the latter will monitor the activities'

implementation, perform analyses, provide professional assistance if needed, and prepare progress reports.

As the capital of Serbia, Belgrade, is by far the largest city in the country, it is home to the majority of children in street situations. Therefore, in addition to some of the aforementioned activities, the Plan foresees specific activities to be carried out by the city's Secretariat for Social Protection, in cooperation with Belgrade's Centre for Social Work, Shelter for the Children of Belgrade, and Belgrade's Police Department, and with the involvement of relevant partners (e.g. communal police, healthcare institutions, schools and other educational institutions, and NGOs). Such activities include media promotion of the Shelter for Children of Belgrade, especially their day-care services (through public information, social networks, and Internet sites of competent authorities and institutions), as well as distribution of promotional material (posters and flyers) so the children in street situations can get familiar with the ways of realisation and protection of their rights. Such material must be available at the premises of social work centres; other social care, healthcare, and educational institutions; catering and other sales facilities; police stations; and public prosecutors' offices.

Moreover, training is provided to the representatives of authorities and institutions that may come into contact or deal with children in street situations in the city of Belgrade, based on a training plan for the representatives in other municipalities. Workshops must be organised with children in street situations and other users of the day-care service in the Shelter for Children of Belgrade. Herein, children should be informed of the ways of realisation and protection of their rights; measures of protection from all kinds of violence, abuse, and neglect; and the services they can use in their local communities.

The basic starting point in protecting the rights of children in street situations is, as already stated, the development of a comprehensive, long-term national strategy by applying a holistic approach based on the rights of the child and dealing with both prevention and response to the problem, in accordance with the Convention on the Rights of the Child. After preparing such a document, an important task is to assess the fulfilment of the stated conditions and numerous other criteria and compliance with valid standards. Therefore, checking compliance of the presented Plan with the general criteria requires evaluating several elements.

Starting from the basic formal items, such as the terminology in use, the Plan provides complete, precise, and exhaustive definitions of key terms. It is of particular importance that the term 'child labour' is defined and especially divided into useful and dangerous labour; these labour types are also defined, as they can have a significant impact on the protection of children from this harmful

phenomenon. However, the inconsistent use of the term 'child' in criminal[34] and civil terminology – in a way similar to that found in the definition provided by the Convention on the Rights of the Child – represents a significant problem. This is because children, after turning 14 years old, can be treated as offenders (and children in street situations are often unfairly treated that way, such as for the misdemeanour of begging, when they are actually victims of criminal acts of neglect, abuse of a minor, or human trafficking).

A multi-sector approach and work on this problem satisfies the basic holistic concept at the level of both decision-makers (ministers and prosecutors) and operatives (social work centres, police, etc.). However, there is noticeable lack of some key actors, such as health and education authorities, whose involvement should ideally be mandatory as per the provision requiring the presence of all actors and authorities involved in assisting children in street situations. On the other hand, explicitly prescribing the existence of a list of contacts and their mutual connection and availability is a great solution that recognises the networking standard as a necessary condition of work.

The Plan envisages the collection of data on not only the number of children but also other elements important for a correct assessment of the street situation, the importance of which is pointed out by the Committee in several documents. The disadvantage of this is that the data are collected by only the police and exclusively for the purpose of identifying the existence of criminal acts and misdemeanours. Related to this, the clearly defined obligations to prepare joint reports and submit them within precisely specified dates and deadlines, as well as the obligation to provide feedback and help to competent authorities, are particularly important for both operational work and strategic action.

As regards the standards of accessing the child, there are elements pertinent to not only the rights of the child, but also child protection and repressive measures. In principle, the child's active participation in some key issues is considered (e.g. guardianship protection and alternative childcare), but the method of achieving it is not sufficiently elaborated and thus carries the risk of this obligation being neglected or misused. In complete contrast, treating children older than 14 years as criminals is, as already mentioned, a pressing problem. It seems that the Plan deals with the issues of prevention and intervention significantly, sufficiently, and, above all, evenly. Training is planned for specialised workers and other professionals who work with and for children, but it is insufficiently elaborated and is limited to the city of Belgrade. Because the strategic inclusion of systems that are of key importance for the realisation and protection of children's rights in general are not prescribed as mandatory, the possibility and method of children's

34 According to the Serbian Criminal Code, a person who has not reached the age of 14 years is considered a child; after that, until the age of 18 years, that person is considered a minor and is criminally liable.

access to basic services – such as health and education, but also justice, culture, sports, and information – are not shown adequately.

Considering that this Plan specifically deals with the protection of children in street situations from violence, neglect, and exploitation, it has certainly incorporated more protection mechanisms than this narrow area alone predicts. On the other hand, it does not meet the criteria of a special national strategy whose adoption is foreseen by the Comment. However, in view of the goal for which it was adopted and for all the above reasons, the Plan represents a significant step forward in protecting the rights of children in street situations in Serbia. Accordingly, this Plan brings the hope that the problem of street children will be approached more generally in the future, and we will be there to monitor the application process.

6. Concluding Remarks

Besides all the measures and mechanisms foreseen by the law for the recognition of children in risky situations and their protection by competent state authorities and other relevant social actors, such as NGOs, it is important to directly give those children the opportunity and information on how to fight independently to get out of the vicious cycle of poverty, deprivation, and violence that the street offers them. Distrust towards others, as a mechanism of self-preservation, successfully keeps them alive on the streets and gives them the feeling that they can manage their lives independently; it also makes street children often refuse help or not perceive help as such even when it is offered to them. Therefore, initiatives such as the creation of the Legal Atlas for Street Children[35] are important. The Legal Atlas is a visual, intuitive tool providing a comprehensive overview of laws affecting street children worldwide. It provides valuable information for anyone interested in the legal status of street children around the world, and it might be of great use for street children and homeless youth who have Internet access, individuals and organisations working directly with street children, and even law- and policymakers looking to make a difference for street children in their countries. These initiatives can help prevent the re-stigmatisation and re-traumatisation of these children, sending them a message that there is a way out. Every leaflet, booklet, and piece of information provided to the children on how they can cope with their situation, where the safehouses are located, and which people are ready to cherish them can help make a difference and save the children from the streets, one by one. The children are entitled to a good environment, and it is good for them to know and to realise that.

35 Consortium for Street Children, no date b.

All national and international activities regarding the recognition and protection of children in street conditions also send a message to those children that they are, and must be, sufficient and sufficiently valuable just because they exist; family cannot be always those connected by blood relations; connections of love and trust are not unusual, selfish, or conditional; and there is light at the end of the tunnel that is their life today.

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The Establishment of the Defender of Children's Rights in the Czech Republic

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Abstract. The article deals with the issue of the protection of children's rights in the Czech Republic. This protection is currently implemented by several authorities and institutions, hence being fragmented, lacking mutual coordination and uniformity of activities, and being almost exclusively conducted by state authorities that do not appear to be independent. This implies that the Czech Republic is failing to fulfil its international obligations, and not exclusively those under the United Nations Convention on the Rights of the Child. The establishment of the institution of a 'children's ombudsman' is therefore a necessary step that must be implemented as soon as possible. The author analyses both the current state of affairs and, in particular, the proposed legislation to establish an ombudsman for children in the Czech Republic, which would be called the Defender of Children's Rights. The benefits of this proposal, along with the problematic and controversial aspects that may hinder the proper functioning of a children's ombudsman in practice, are pointed out.

Keywords: child, protection of children's rights, Convention on the Rights of the Child, ombudsman, ombudsman for children

1. Introduction: The Current Legal Framework and Practice of Children's Rights Protection in the Czech Republic

Despite the fact that the independent Czech Republic ratified the United Nations (UN) Convention on the Rights of the Child (hereinafter referred to as the Convention) on 1 January 1993, the country has yet to establish an independent body responsible for monitoring its implementation. Although the obligation

to establish such a body is not explicitly enshrined in the Convention, the UN Committee on the Rights of the Child emphasises that this obligation is part of Art. 4 of the Convention. According to this article, the contracting states are obliged to take all necessary legislative, administrative, and other measures to implement the rights recognised in the Convention. In this context, the UN Committee on the Rights of the Child explicitly states that independent national bodies for the protection of human rights,[1] as established in accordance with the Paris Principles,[2] configure an important mechanism for promoting and ensuring the implementation of the Convention.

A similar approach is supported by the UN Committee on Economic, Social and Cultural Rights. The Committee points out that if Art. 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights enshrines the obligation of the state to take steps to gradually achieve the full realisation of the rights recognised in the Covenant by all appropriate means, one of these 'appropriate means' is precisely the activities of national bodies for the protection of human rights.[3] Furthermore, the UN Human Rights Committee highlighted, in general terms, that national human rights institutions have yet another important function, which is the power to remedy individual rights violations. In the context of the obligation under Art. 2 para. 3 of the International Covenant on Civil and Political Rights, which provides for the right to an accessible and effective remedy by which an individual may invoke the rights enshrined in the Covenant, the UN Human Rights Committee emphasised the role of national human rights institutions, endowed with appropriate powers. This same Committee has also pointed out that these remedies should consider the special vulnerability of certain groups, especially children.[4]

The establishment of a national authority for the rights of the child is also recommended by the European Convention on the Exercise of the Rights of the Child, which applies mainly to the procedural rights of the child in court proceedings.[5] According to Art. 12 para. 2 of this European Convention, these

1 UN Committee on the Rights of the Child. General Comment No. 2 (2002) – The role of independent national human rights institutions in the protection and promotion of the rights of the child. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2fGC%2f2002%2f2&Lang=en (Accessed: 18 February 2024).

2 UN General Assembly resolution of 20 December 1993, A/RES/48/134, on National Human Rights Institutions (Paris Principles). https://enoc.eu/wp-content/uploads/2015/01/Paris-Principle.pdf, accessed: 18.02.2024.

3 UN Committee on Economic, Social and Cultural Rights. General Comment No. 10 (1998) – The role of national human rights institutions in the protection of economic, social and cultural rights, para. 1. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f25&Lang=en (Accessed: 18 February 2024).

4 UN Human Rights Committee. General Comment No. 31 (2004) – Nature of the general legal obligations imposed on States parties under the Covenant, para. 15. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en (Accessed: 18 February 2024).

5 See Art. 1 para. 2.

national bodies should do the following: make proposals to strengthen legislation on the exercise of children's rights; comment on draft laws relating to the exercise of children's rights; provide general information on the exercise of children's rights to the mass media, the public, persons, and bodies dealing with children's issues; and seek the views of children and provide them with relevant information.[6] The establishment of mechanisms for the promotion and protection of human rights adapted to the specific characteristics of children and accessible to children in terms of their forms, powers, and responsibilities is recommended by a number of other international documents of the UN and the Council of Europe.[7]

In the Czech environment, various authorities and institutions deal with the issue of children's rights and their protection. Currently, the Ministry of Labour and Social Affairs, which is also the coordinator for the implementation of the Convention on the Rights of the Child, carries out the largest share of activities related to children's rights. It carries out decision-making and conceptual, methodological, and control activities in the field of social and legal protection of children. In practice, children's social and legal protection is performed mainly by municipal and regional authorities, even if within the framework of the exercise of delegated state administration. The implementation of the Convention is also partly dealt with by the Committee on the Rights of the Child, an expert body of the Government Council for Human Rights, which in turn is an advisory body to the Czech government. The agenda of social and legal protection of children in relation to foreign countries falls within the competence of the Office for International Child Protection, which has the role of representing the Czech Republic externally in the framework of international conventions on the protection of children's rights. The activities of the Ministry of Education, Youth and Sports,[8] the Ministry

6 The Explanatory Memorandum to the Convention even states that it may be appropriate to establish a separate body for this purpose, such as the Office of the Ombudsman. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5ee (Accessed: 18 February 2024).

7 These are, for example, the following: UN Directive on Substitute Care (UN General Assembly resolution of 24 February 2010, A/RES/64/142); the Directive for the Prevention of Youth Delinquency (Riyadh Directive; UN General Assembly resolution of 14 December 1990, A/RES/45/112); Rules for the Protection of Children and Juveniles Deprived of Personal Liberty (Havana Rules; UN General Assembly Resolution of 14 December 1990, A/RES/45/113); Recommendation 1286 (1996) of the Parliamentary Assembly of the Council of Europe on the European Strategy for Children; Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the rights of children living in residential facilities; Recommendation CM/Rec(2008)11 of the Committee of Ministers to Member States on European rules for juvenile offenders subject to sanctions and measures; Recommendation CM/Rec(2009)10 of the Committee of Ministers to Member States on integrated national strategies for the protection of children from violence; Recommendation CM/Rec(2011)12 of the Committee of Ministers to Member States on children's rights and child and family-friendly social services.

8 Schools of all grades, the Czech School Inspection, educational care centres, children's homes, children's homes with a school, diagnostic institutes, and educational institutions belong to the competence of the Ministry of Education, Youth and Sports of Poland.

of Health,[9] the Ministry of Justice,[10] and the Ministry of the Interior[11] are also partly concerned with children's rights. However, none of these bodies can be described as monitoring children's rights and ensuring their comprehensive protection, nor do they fulfil the criteria defined by the Paris Principles.[12]

An institution that to some extent fulfils the Paris Principles, particularly in having independence and being capable of action to protect human rights, in the Czech Republic is the current Public Defender of Rights. The Public Defender of Rights is the Czech version of the ombudsman[13] and has general and national competence. The ombudsman was introduced into the Czech legal system by Act No. 349/1999 Coll., on the Public Defender of Rights,[14] but is not enshrined at the constitutional level.[15] Sládeček defines the Public Defender of Rights as follows:

> [...] an independent and impartial person elected by the Parliament who, on the basis of complaints or on his/her own initiative and quite informally, investigates alleged illegality or other misconduct in the conduct (including possible inaction) of the public administration. The Ombudsman usually takes up the matter when no other effective (defensive) legal remedy is available and initiates remedies through his or her directly unenforceable recommendations.[16]

Moreover, Chamráthová points to the ombudsman's basic functions in society, namely:

9 It mainly deals with practical medicine for children and adolescents, the prevention of violence against children, support for families with children with disabilities, and the functioning of children's homes for children under 3 years (i.e. former infant institutions).

10 The Ministry of Justice deals with the agenda of family law and the activities of the courts, especially in the area of guardianship proceedings and justice in youth matters, and the legal regulation of the criminal law regarding the protection of children and youth.

11 Together with the Police of the Czech Republic, the Ministry of the Interior deals with the commercial and sexual abuse of children, the fight against human trafficking and domestic violence, the solution to risky behaviours of young people, the use of addictive substances by children and young people, and the prevention of crime by children and young people.

12 According to the Paris Principles, a national human rights institution must simultaneously not be under the direct control of the executive power, be independent of the judicial and legislative powers, and be separated from non-governmental organisations. In this regard, it represents a certain 'bridge' between civil society and the executive, and between the state and international institutions for the protection of human rights. Office of the United Nations High Commissioner for Human Rights: National Human Rights Institutions: History, Principles, Roles and Responsibilities. New York – Geneva, 2010. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/PTS-4Rev1-NHRI_en.pdf (Accessed: 18 February 2024).

13 Sládeček, 2011, p. IX.

14 For more details on its scope in the Czech Republic, see: Sládeček, 2017; Chamráthová and Svoboda, 2018, pp. 20–32.

15 See for more details: Šimíček, 2002, pp. 21–24.

16 Sládeček, 2019, p. 407. Translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources are conducted by the author.

> [...] informally, quickly and inexpensively helping citizens to seek protection against illegal or unfair acts of public administration or its inaction. The Ombudsman is to supervise the activities of the public administration [...] and to seek to remedy any misconduct or to improve its performance.[17]

Therefore, the Public Defender of Rights deals with the rights of the child in the context of his/her statutory activities but does not have the following: explicit competence to monitor the implementation of the Convention on the Rights of the Child; specific powers to protect children's rights (e.g. to make applications to the courts); is not entrusted with the dissemination of education in the field of children's rights, including the promotion of children's participation, although he or she may try to do so in practice.[18] Moreover, its competence does not fall within the area of local self-government, and this is even if decisions and other measures of municipalities and regions can significantly interfere with the rights of the child guaranteed by the Convention (e.g. in matters of the development of social services or social housing).

In the context of children placed in institutions where their personal liberty is restricted or deprived, the supervision by the public prosecutor's office of the observance of legal regulations in places where personal liberty is restricted can also be considered a general complaint mechanism –, and this in addition to the ombudsman. However, even this mechanism does not constitute a body for the protection of human rights and fundamental freedoms. Instead, these are state bodies that represent the state in protecting the public interest in specified procedures and areas. Importantly, the content of the public interest does not have to be the same as the protection of basic human rights and freedoms, even if these two concepts may sometimes overlap.[19] Moreover, considering that the Public Prosecutor's Office is always supposed to represent the state, it cannot be described as an independent national body in the sense of the Paris Principles.

To summarise the current situation, there are various authorities and institutions working in the field of children's rights protection in the Czech Republic, but they are all involved only in a specific area in accordance with their legal competences, and none fulfil all the conditions of a national human rights institution for the rights of the child. In addition, since these mentioned bodies also have executive power (except for the Public Defender of Rights), none fulfil the requirement of independence. Furthermore, none have the authority to systematically promote and protect children's rights, which includes the competence to investigate general or individual cases of violation or endangerment of children, to raise

17 Chamráthová, 2019, p. 3.

18 See, for example, the special website of the Defender, which is adapted for children. Available at: https://deti.ochrance.cz/ (Accessed: 18 February 2024).

19 See Záruba and Kocourek, 2004, pp. 392–400.

awareness of children's rights in society, and to evaluate the relevant national legal framework. Even the Public Defender of Rights does not fulfil this function to the required extent (see above).

2. Establishment of the Children's Ombudsman in the Czech Republic: Main Principles of the Proposed Legislation

Thus, the Czech Republic has not yet established an independent national body for the purposes of the national monitoring of the implementation of the Convention, which has been repeatedly and long-standingly criticised, in particular by the UN Committee on the Rights of the Child.[20] Several attempts have been made in the past to establish such an institution in the country, but so far without success. In 2022, a proposal was submitted to the Chamber of Deputies by several deputies to issue a 'Children's Ombudsman Act',[21] which was to be debated at the 94th session from 27 February 2024 of the Chamber of Deputies.[22] The latest effort to address this significant deficit and the unsatisfactory state of children's rights protection in the country is the government's proposed amendment to the existing Act on the Public Defender of Rights. The proposal is currently being discussed at the government level and should be subsequently submitted to the Chamber of Deputies, where it could have the support of the government majority.[23]

20 Final recommendations of the UN Committee on the Rights of the Child to the second periodic report on the Czech Republic on the fulfillment of obligations from the Convention on the Rights of the Child of 18 March 2003 (points 16 and 17). Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgnXZ0ChBsrwmcy8%2f%2bFNoDEya4pykM44cCwnDlrhj%2fks77k2KsymYiP1Bx8IIanx%2feVXPUcXHGK%2fkyjtBRxKYk%2bhp1uuBpVdyk4Ei2LwiNr6 (Accessed: 18 February 2024); Final recommendations of the UN Committee on the Rights of the Child to the consolidated third and fourth periodic report on the Czech Republic on the fulfillment of obligations from the Convention on the Rights of the Child of 08/04/2011 (points 16 and 17). Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrpiCE%2fy0jVxzg5%2bV8i7pht4H4a4pAWsJL3pa%2fvZCeSaVBbp1g77ZAaHTDQ9mJG8VIti46tzmjcvP%2fVoFNzfm%2f1WVG%2bKM%2fced2V99WuxIcPh (Accessed: 18 February 2024); Final recommendations of the UN Committee on the Rights of the Child to the consolidated fifth and sixth periodic report on the Czech Republic on the fulfillment of obligations from the Convention on the Rights of the Child of 22 October 2021 (point 12). Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrpiCE%2fy0jVxzg5%2bV8i7phvBpnkT8g83zMKrkCRWboaXpx2V7EmgulUUFgCh4LN3VhPNwxe71fWWHn9QAcL3JYB4wtsJ3PmO11JKIxUeLxd8 (Accessed: 18 February 2024).

21 Available at: https://www.psp.cz/sqw/text/historie.sqw?o=8&T=894 (Accessed: 18 February 2024).

22 Available at: https://www.psp.cz/sqw/historie.sqw?o=9&t=262 (Accessed: 18 February 2024).

23 Stehlíková, 2009.

At this point, a question may emerge: what are the main principles of the government's proposal for a 'Children's Ombudsman'? In addressing this situation, two solutions were basically offered; first, to modify the current mandate of the Ombudsman so that he/she could become a national body for the protection of children's rights; second, to establish a new institution that would meet all the necessary requirements.[24] The proposed regulation is based on the second variant, describing that the Defender of Children's Rights should work simultaneously as the Public Defender of Rights. The Public Defender of Rights and the Defender of Children's Rights would be independent of each other and have independent functions, competences, and tasks. Both institutions would share an office that will provide both ombudsmen with the conditions for the performance of their mandates. The government amendment therefore introduces the concept of a multi-ombudsman institution (i.e. 'several ombudsmen under one roof'), which also works in other European countries (e.g. Sweden and the Netherlands).[25] The Defender of Children's Rights will not, just like the current Public Defender of Rights, have any regulatory authority, his/her activities will not have an authoritative character, and his/her measures and outputs will have only an advisory character. Both defenders would cooperate, exchange information, and coordinate their activities.

Additionally, the Defender of Children's Rights would be elected by the Chamber of Deputies for a period of six years. A natural person can be elected as a Defender if he/she has the following attributes: the prerequisite knowledge, experience, and moral qualities to be able to fulfil the position properly; is a citizen of the Czech Republic; is fully autonomous and of good character; has reached the age of 40 years; has completed a university education in a master's degree program in the field of law; has been involved in the protection or promotion of children's rights for at least five years over the last 10 years. For the purpose of evaluating the proposed candidates, the Chamber of Deputies would establish an evaluation commission comprising scientific, academic, and spiritual experts, along with representatives of civil society, nationalities, and other social groups, all while considering the fair representation of men and women. A public hearing of the candidates would be part of the evaluation procedure, which would in turn assess the prerequisites for the performance of the function of the Defender, the candidate's intentions associated with the performance of the function, the goals he/she wants to achieve, and the

24 For solutions in EU countries, see Vaculová and Syllová, 2011, updated 2019.

25 Within the framework of the European Union, 17 Member States currently successfully use an independent institution of the children's ombudsman, and another six have appointed a special representative exclusively entrusted with the protection and enforcement of children's rights. Only the following four Member States lack a children's ombudsman or a special representative of the general ombudsman: the Czech Republic, Germany, Austria, and Portugal. See the website of the European Network of Children's Ombudsmen for more on this. Available at: https://enoc.eu/?page_id=2469 (Accessed: 18 February 2024).

specific measures he/she proposes to achieve them. The evaluation committee would then publish the evaluation of individual candidates.

The proposal also regulates the nomination and election process for the Children's Ombudsman to bring it closer to the requirements for national human rights institution (also known as NHRI) accreditation at Grade A. It seeks to strengthen transparency, openness, and the consideration of expertise in the nomination and election process. The consideration of expertise within the evaluation advisory body, or more generally a participatory process open to as many candidates as possible, is recommended by several bodies – first, the Global Alliance of National Human Rights Institutions (also known as GANHRI) Sub-Committee on Accreditation, which is responsible for the accreditation of national human rights institutions[26] in accordance with the Paris Principles. Second, the Venice Principles, which formulate the optimal functioning of ombudsman institutions.[27] Third, such a method of establishment is recommended by the EU Agency for Fundamental Rights (also known as FRA)[28] and the Committee of Ministers of the Council of Europe.[29]

The basic principles of the activities of the Defender of Children's Rights are based on the Convention and its general principles, especially the concept of the best interest of the child and child participation. The purpose of the institution is to balance children's vulnerability with the preservation of their autonomy, all while considering their gradual development and maturing. The Defender of Children's Rights would communicate with the child as much as possible, find out and consider his/her opinion, age, and intellectual and autonomous maturity, and strengthen his/her participation. Ongoing cooperation and communication with children must form the core of the activity of the Defender of Children's Rights, such that the opinion of the children is not just guessed by the Defender and that he/she does not promote something that the child does not really care for or wishes for something else. Similar to the Public Defender of Rights, the Defender of Children's Rights would establish an advisory body comprising children to carry out the agenda of protecting children's rights. This would appropriately strengthen children's participation in the protection and promotion of their rights, their awareness of their rights, and their ability to defend and

26 Available at: https://ganhri.org/wp-content/uploads/2019/11/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf (Accessed: 18 February 2024).

27 Principles of support and protection of ombudsman institutions (Venice Principles). Available at: https://www.ochrance.cz/o-nas/predpisy/Benatske-principy.pdf (Accessed: 18 February 2024).

28 Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-strong-effective-nhris-summary_cs.pdf (Accessed: 18 February 2024).

29 Recommendation CM/Rec(2021)1 of the Committee of Ministers to Member States on the development and strengthening of effective, pluralist and independent national human rights institutions. Available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a1f4da (Accessed: 18 February 2024).

enforce them. Children between the ages of 12 and 18 years can be appointed members of the advisory body, members can be at most 21 years old and would be appointed by the Defender of Children's Rights after consultation with non-governmental non-profit legal entities associating with or defending children and young people.

3. The Proposed Competences and Activities of the Defender of Children's Rights

As far as the competence of the Defender of Children's Rights is concerned, he/she would do the following: perform tasks in the area of the protection of children's rights resulting from the Convention and other international treaties part of the legal order of the Czech Republic; conduct investigations into the activities of public authorities listed in the law from the perspective of compliance with the law, from the perspective of the principles of the democratic rule of law and good administration, and from the perspective of protection against the inaction of these authorities in cases where a child's rights may be affected.

The Defender of Children's Rights would also perform the following tasks to protect and promote the rights of the child arising from the Convention and other international treaties:

a. systematically monitor and evaluate the fulfilment of the basic rights of the child;
b. carry out research and analysis;
c. issue reports, opinions, and recommendations on fulfilling the basic rights of the child;
d. support the fulfilment of the rights of the child and propose measures to improve their protection, including legislative measures;
e. support raising awareness of the rights of the child in society, including by supporting education in the field of human rights;
f. cooperate and ensure the exchange of information with relevant international bodies that monitor the Czech Republic's compliance with the obligations set forth in the Convention and other international treaties;
g. cooperate and ensure the exchange of information with national and foreign authorities and persons active in the field of the protection of the rights of the child, including civil society representatives.[30]

30 See more details on the scope and functions of children's ombudsman in the following: UNICEF, 2001, *Independent Institutions Protecting Children's Rights*. Available at: https://www.unicef-irc.org/publications/pdf/digest8e.pdf (Accessed: 18 February 2024).

An important proposed competence of the Defender of Children's Rights is to investigate individual complaints. Everyone would have the right to turn to the Defender of Children's Rights with an initiative in matters of his/her competence, and the proposal explicitly emphasises the child's right to submit an initiative even without the knowledge of his/her legal representatives. The proposal sees children as active beings who should be supported to actively protect and defend their rights, describing, 'Therefore, they have a sufficient degree of autonomy to formulate their opinion on the matter, express their dissatisfaction with a certain matter, and directly address the child rights defender with a complaint.'[31] The emphasis is hence also placed on easing the formal and content requirements of the initiative, the possibility of informal communication, and the adaptation of communication according to the age of the child and clarity of the child regarding the actions in relation to the child. Of course, it will also be important to understand how this informal procedure will be established in practice and how the effort to maximise the participation of children in the entire process will be taken into account.

The initiative must not be subject to any official control and is not subject to a fee. As aforementioned, not only children but also their legal representatives and other persons and authorities would be able to contact the Defender of Children's Rights. Furthermore, the notification by public authorities, persons entrusted with the performance of social and legal protection, schools and school facilities, providers of health and social services, and other facilities intended for children (or their employees) would not constitute a breach of confidentiality. The Defender of Children's Rights would be able to start the investigation both through the above initiatives and *ex officio*.

The range of subjects whose activities can be investigated by the Defender of Children's Rights would be quite wide and wider than those of the Public Defender of Rights – a characteristic desirable in the area of the protection of children's rights. In addition, the Defender of Children's Rights would be able to deal with complaints about the performance of state administration (i.e. referring to classical 'administrative authorities') and about the procedure of bodies that exercise their powers in the field of public administration (i.e. state administration or self-government), including territorial self-governing units and other bodies, legal entities, and natural persons. These refer mainly to self-governing bodies in the exercise of independent powers that affect, for example, the issues of housing or school districts of kindergartens and primary schools. However, some entities would be excluded from the scope of the Defender, such as the Parliament, the President, the Government, the Supreme Audit Office, the intelligence services, the public prosecutor's office, and courts.

31 Explanatory report on the proposal.

During the investigation, the Defender of Children's Rights would have, for example, the right to inspect a file and take copies or video recordings of it, to ask questions to the office staff (without the presence of other persons), and to suggest to the office that certain evidence or supervision actions be carried out. The authorities would be obliged to provide the Defender of Children's Rights with relevant cooperation and respond to his/her requests. The ombudsman would be entitled to speak with the child without the presence of other persons, including legal representatives. If the investigation does not reveal a violation of legal regulations or other misconducts, the ombudsman would then notify the complainant and the authority in writing. Unless this would be contrary to the interests of the child, the ombudsman would also inform the child's legal representatives. If the investigation does reveal a violation of the law or other misconducts, the ombudsman would invite the authority to comment on the findings within a reasonable period set by the ombudsman.

If, upon request, the office informs that it has taken or is taking remedial measures, and the ombudsman finds these measures sufficient, he/she would inform the complainant and the office about this. Otherwise, after receiving the statement or the time limit has expired, the ombudsman would communicate his/her final opinion in writing to the office and the complainant; a part of this opinion would be a proposal for remedial measures. In particular, the ombudsman would be entitled to propose the following remedial measures: initiation of proceedings to review the decision; act or procedure of the office; if they can be initiated *ex officio*, execution of actions to eliminate inactivity; initiation of disciplinary proceedings; initiation of prosecution for a crime, misdemeanour, or other administrative offence, providing compensation for damages and others. The office would then be obliged to inform the Defender of Children's Rights of the remedial measures it has taken within 30 days from the delivery of the final opinion. If the authority does not fulfil this obligation or if the measures are insufficient, the ombudsman would notify the superior authority and, if there is no such authority, the government. At the same time, he/she would inform the public about his/her findings, including the names and surnames of persons authorised to act on behalf of the office.

The proposal also foresees that the Defender of Children's Rights would be able to carry out visits to institutions where children are present. He/she would also help children who are discriminated against and children of European Union citizens, monitor the expulsion of minors, and monitor the situation of children with disabilities. In these and other areas, the Defender of Children's Rights would work closely with the Public Defender of Rights, also in view of the interdependence between the protection of children's fundamental rights and the protection of the rights of 'adults'. The Defender of Children's Rights would also have an increasingly important educational and awareness-raising function,

both for children themselves and for adults in contact with children, regarding children's rights among all.

The proposed regulation also provides for the participation of the Defender of Children's Rights in court proceedings. These should be essentially the same court proceedings in which the Public Defender of Rights may appear, extended by the possibility of intervening in selected proceedings, including the following: proceedings for the authorisation of the marriage of a minor; for protection against domestic violence; concerning the establishment or denial of paternity; concerning the court's care of minors; concerning the admissibility of taking or keeping a minor in a healthcare institution; concerning the inadmissibility of keeping a minor in a social services institution; concerning adoption. The possibility to intervene in court proceedings is perceived as a relatively strong power, which the ombudsman should use rather exceptionally, especially in cases where he/she is unable to obtain redress through the standard channels of action against children's social and legal protection authorities. It is expected that the ombudsman would use this possibility in 10 to 15 cases per year.[32]

4. Conclusions: Evaluation of the Proposed Model of the Defender of Children's Rights in the Czech Republic

First, the establishment of an ombudsman for children is a very important and, in my opinion, necessary legislative step. In view of the above, it is more than desirable for the Czech Republic to have a national human rights institution as soon as possible, as it would be comprehensively focused on the protection of children's rights and enforce and monitor the implementation of requirements arising from the Convention, as well as the implementation of other international obligations in this area.

The regulation of the selection and election processes of the Defender of Children's Rights, which seeks to reflect international legal requirements and standards in this area, is to be welcomed. However, I think that too many requirements are placed on the person of the Defender of Children's Rights, some of which may significantly limit the selection of a suitable candidate. I find the requirement of a university degree in a master's programme in law particularly questionable. I consider that this is not the only appropriate education for a Defender of Children's Rights, and that a person with a different educational background could also be a 'good' children's ombudsman. It is also debatable whether it is necessary for a children's ombudsman to be over 40 years of age, with a good question in this regard being "What are the advantages of this age limit for the performance of this function?" I consider the moral qualities of the

32 Ibid.

ombudsman and his/her experience in the field of the promotion and protection of children's rights to be key.

Another positive aspect of the proposal is the very broad scope of the Defender of Children's Rights powers, as it is supposed to include almost the entire public administration (i.e. not only the state administration but also the local government) and only a few exceptions. I consider the breadth of this scope to be desirable, as various acts and activities of local authorities may also interfere with the legal sphere and the rights of children. Furthermore, it is appreciated that the proposal respects the personality of the child and strengthens his/her participation in the protection of children's rights, as well as considers his/her age and maturity in the form of lower requirements for the elements of the complaint submitted by the child, for the clarity of communication with him/her, and the greatest possible assistance in solving his/her problems. The aim of making the child not only an object of protection but also an active co-creator is a well-chosen concept that is in line with modern trends in the field.

Regarding some controversial aspects of the proposed legislation on the Defender of Children's Rights, probably the most important is the question of whether it is appropriate to establish a separate, 'additional' institution alongside the current ombudsman (i.e. Public Defender of Rights). Indeed, a solution consisting in extending the competences of the current ombudsman to this agenda is also proposed. Meanwhile, critics of the establishment of a separate ombudsman for children point to the financial demands of the proposed solution, and to the substantive remit of the Defender of Children's Rights not being sufficiently and precisely separated from the substantive remit of the Public Defender of Rights (i.e. there is no clear division of competences).[33] In this respect, one can ask oneself a rhetorical question: how will one proceed, for example, in a case involving domestic violence and the unlawful reaction of the Police of the Czech Republic and the child social protection authority in a situation where a woman and her child are being abused? In such a situation, the Defender of Children's Rights would have to act on the case of the child, while the Public Defender of Rights would do so on the case of the mother. However, is it appropriate for two institutions, albeit cooperating, to deal with the same situation? Although the law emphasises their cooperation, how should they proceed in the event of a clash of opinions?

I therefore believe that careful consideration should be given to whether to establish two institutions working side by side (i.e. two ombudsmen), or whether to expand the competences of the current ombudsman to include the agenda of protecting children's rights and monitoring the fulfilment of obligations under the Convention. If the option of two separate ombudsmen is chosen, their competences, relations, and cooperation should be very carefully defined, including the resolution

33 See: Doubek, 2020; Richterová, 2023, pp. 184–185.

of possible conflict situations. If we proceed to expand the competences of the current ombudsman, we can draw on his/her already relatively long experience in the field of protection of the rights of persons, qualified professional background, and staff. Nonetheless, to achieve the quality required by international legal obligations and the nature of the institution, some changes would have to be made, such as in the selection and election of the ombudsman or by extending his/her powers to include the area of self-government.

Further suggestions and comments can also be made on the very general regulation of the child's status in the context of complaints and their investigation. How old must a child be to make such a complaint? Will he/she be able to defend his/her rights sufficiently and express his/her views? If it is not appropriate to inform the legal representatives, should not a guardian at least be appointed for the child? Moreover, should not a child psychologist also be present at the hearing? In these and other respects, it will still be necessary to complete, clarify, and eliminate the alleged shortcomings in the proposal, so that the Defender of Children's Rights can truly fulfil his/her tasks responsibly and provide real and accessible protection to children's rights. There can also be reservations about the children's ombudsman's power to initiate or intervene in court proceedings, with arguments that this is a very strong new power that is not sufficiently justified. In my opinion, it is true that this is quite a significant power, but I also believe that the Defender of Children's Rights would approach it responsibly, prudently, and apply it only in justified cases –, that is, it will not be overused.

In conclusion, the establishment of an ombudsman for children is necessary in the Czech Republic, and as soon as possible. Children are an extremely vulnerable group who require an independent institution to defend and promote their rights, notwithstanding the fact that this is required by a number of international legal obligations. Furthermore, the current practice in the Czech Republic is not sufficient in this respect. It is carried out by various different authorities, there is a lack of uniformity and coordination of procedures, it is mainly state bodies that are not independent that carry out tasks in the field of the protection of children's rights, and they do so only as one of their many activities.

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Safeguarding Futures: The Impact of the Best Interest Principle on Children in Alternative Care

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Abstract. Globally, the principle of the 'best interest of the child' has been recognised as a crucial standard for guiding decisions affecting children. It is considered integral to both policy-making and daily practice, ensuring that the rights and needs of children are prioritised in all care-related decisions. In Slovakia, this principle is firmly embedded within both national legislation and the nation's commitments under international law. Accordingly, this article delves into the issue of alternative care for children, particularly focusing on the application of best interest principle. By exhaustively examining historical contexts, legislative frameworks, and current practices, the research elucidates the evolution of the child welfare system and fundamental importance of prioritising children's well-being. From tracing the origins of institutional care to analysing the contemporary landscape of foster care and adoption, the study provides a comprehensive overview of the various care options available to children isolated from their familial environment. It explores the legal provisions and procedural mechanisms guiding decision-making processes, emphasising the central role of the best interest principle in safeguarding children's rights and ensuring their holistic development. Drawing on statistical data and case studies, the study offers insights into the current state of alternative care in Slovakia, highlighting trends, challenges, and areas for improvement. It underscores the need to reduce reliance on institutional care while promoting family-based alternatives. Consequently, the study advocates for a child-centred approach that prioritises the unique needs and circumstances of individual children. It calls for concerted efforts to embed the best interest principle into policymaking, service delivery, and societal attitudes, thereby fostering environments where children can thrive and reach their full potential.

Keywords: best interest of the child, children's rights, alternative care, foster care, institutional care

1. Introduction

In the complex and evolving field of child welfare, the 'best interest of the child' principle has been universally recognised as a crucial standard for guiding decisions affecting children. This principle, integral to both policy-making and daily practice, ensures that the rights and needs of children are at the forefront of all care-related decisions. Globally, this standard is not only a moral directive but also a legal obligation, reflecting a broader consensus on the importance of safeguarding children's welfare. The significance of this principle is particularly pronounced in the domain of alternative care, where children without the support of their biological families face increased risks and vulnerabilities. Here, the best interest standard is not just a guideline but a lifeline, shaping interventions that can dramatically alter the trajectories of young lives.

In Slovakia, the best interest principle is firmly embedded within both national legislation and the nation's commitments under international law. These legal frameworks are designed to ensure that children who are separated from their families – whether due to abandonment, abuse, or other distressing circumstances – are provided the care and protection they deserve. Despite these robust provisions, the real-world application of the best interest principle frequently encounters significant hurdles. The transition from legal theory to effective practice involves numerous challenges, including bureaucratic inertia, resource constraints, and varying interpretations of what constitutes 'best interest' in complex family situations.

This article aims to critically examine the application and operationalisation of the best interest principle within Slovakia's alternative care system. Through an in-depth exploration that includes reviewing policy documents, interviews with key stakeholders, and analysing relevant case studies, this study seeks to uncover the practical application of the principle and its shortcomings. The research investigates the discrepancies between the theoretical commitments enshrined in Slovak law and tangible experiences of children in alternative care settings.

By analysing how Slovakia navigates the delicate balance of rights, responsibilities, and realities in implementing child welfare policies, this article offers insights into both the accomplishments and areas that need improvement within the system. The objective is to identify and understand both systemic strengths and weaknesses, thereby providing a grounded basis for proposing concrete, actionable recommendations.

In contributing to the broader discourse on child welfare, this study not only highlights the specific context of Slovakia but also offers lessons and insights that are applicable internationally. By dissecting the intricacies of Slovak child welfare practices, the research contributes to a deeper, more nuanced understanding of how nations can protect and empower children placed in alternative care. For policymakers, practitioners, and academics, this article serves as a critical resource for re-evaluating and enhancing the strategies employed to safeguard the rights and welfare of children, ensuring that their best interests are not just a legal formality but a lived reality.

2. Brief History of Children in Alternative Care in Slovakia

Historically, the practice of raising children outside of parental care is far from contemporaneous, with its roots deeply embedded in ancient civilisations. The societal norms in ancient Greece and Rome particularly underscored the low value placed on children's lives. In these cultures, paternal rights extended to the grim authority of infanticide, where fathers could legally terminate the lives of their children. This brutal practice disproportionately affected girls, as historical demographics often show a higher proportion of males, suggesting that female infanticide was more prevalent.

In Roman culture, the value of a child's life began to be recognised through certain rituals and societal practices. A kind of social birth was conferred upon a child through the ritual of name-giving, symbolising societal acceptance and protection. Similarly, in Germanic traditions, the commencement of oral feeding marked the child's right to survival and integration into the community. Despite these cultural practices, it was not until the advent of formal legislative measures that significant strides were made towards protecting children. Emperor Trajan's 'alimentaria' laws, enacted in 103 CE, represented early efforts to support and nourish the young, while Constantine's laws, following his conversion to Christianity in 313 CE, further emphasised the sanctity of life.[1]

The turning point in the legal protection of children, however, came with the enactment of a law in 374 CE by Emperor Valentinian, which formally outlawed infanticide.[2] This law marked a pivotal shift in the legal framework, reflecting a growing societal recognition of children's intrinsic human rights. Malformed newborns, who were previously not considered humankind and typically killed immediately after birth, began to receive protection under these evolving legal standards.

1 Obladen, 2016, pp. 56–61.
2 Obladen, 2022, pp. 1–8.

Despite the rich historical context provided by these developments, the extent and focus of this article necessitate a more targeted examination. Subsequent sections will bypass the historical narrative to concentrate specifically on the evolution of the foster care system within our region and its relevance to the objectives of this study. This approach will allow for a more focused exploration of modern frameworks and practices that shape the current state of alternative care for children.

The history of institutional care for children in Slovakia dates back to the 18th century, with the earliest known orphanage being established in 1763 in Tomášikov. This institution laid the groundwork for the structured care of vulnerable children, setting a precedent that would be expanded upon in subsequent centuries. The inception of orphanages was largely spearheaded by religious institutions, with Catholic and Evangelical churches playing pivotal roles in their establishment.[3] Until the turn of the 20th century, these orphanages were predominantly managed by church authorities and, to a lesser extent, local municipalities.

By the dawn of the 20th century, the state recognised the necessity of a more formalised approach to child welfare, culminating in the adoption of the Act on Institutional Care in 1901. This legislation marked a significant turning point as it transferred the responsibility of caring for abandoned children from religious and municipal entities to the state.

This legislation was the cornerstone in the evolution of child welfare in Slovakia, demonstrating a paradigm shift towards state intervention in cases where familial structures failed to protect children. The legal framework established by the Act comprised critical statutes: Article VIII/1901, pertaining to 'state orphanages', and Article XXI/1901, relating to 'care for children'. These laws collectively signified a formal recognition of the state's duty to safeguard children's rights through institutional care when private familial support was inadequate. These articles dealt with the provision of state-maintained orphanages as well as the care of children above the age of seven in need of public aid.[4] The primary objective of this law was to safeguard children by providing them with institutional care, reflecting an evolving understanding of child welfare and state responsibility. According to the law, 'abandoned children' were defined as those aged below 15 who were destitute and lacked the support of their families or relatives. This definition aimed to identify and assist the most vulnerable segments of the population, ensuring that they received the care and protection necessary to uphold their rights and well-being.

Under this new legal framework, the state began to establish a more systematic network of orphanages and care facilities, modelled after institutions in Košice and Rimavská Sobota. These facilities were not just shelters but served as

3 Kušniráková, 2022, pp. 155—169.
4 Pettko-Szandtner, 1930, p. 26.

comprehensive care environments where children's basic needs were met, alongside the provision of educational and emotional support. The legislation thus not only facilitated a transfer of responsibility but also underscored the state's commitment to the holistic welfare of its youngest citizens, recognising their rights and needs in the absence of family care. This marked the beginning of a more proactive and protective approach to child welfare in Slovakia, driven by legislative action and state oversight.

Until 1945, both church-run and state-operated institutions in Slovakia played crucial roles in the care of orphaned and abandoned children. These two types of institutions coexisted, each contributing to the framework of child welfare in distinct ways. Alongside these institutional arrangements, the concept of foster family care also gained prominence, particularly during the inter-war period. During this time, experts began to recognise and emphasise the benefits of placing children in foster families rather than institutional settings.

Experts at the time noted significant differences in the outcomes and operational methods between institutional and family-based care. Although institutional settings could offer comprehensive healthcare services owing to their structured environment, they lacked the personal and emotional nurturing found in a family setting. 'There is a noticeable difference between institutional care and family care in terms of operation and results. […] the institution provides more health care […] but the lack of a home of their own is evident in their rudeness, garrulousness, distrustfulness […]'.[5]

These observations led to growing advocacy for foster care, which was seen as providing a more natural, family-like atmosphere that could better fulfil the emotional and developmental needs of children. The emphasis was on the importance of a loving and secure home environment that foster care could provide, which was believed to contribute positively to the psychological well-being and social development of children. This period marked an important shift in the perception of childcare, with an increasing acknowledgment of the value of family settings over institutional care for the holistic development of children.

In 1920, Slovakia saw significant legislative progress with the enactment of Act No. 256/1921, titled 'On the Protection of Children in the Care of Others and of Children Born Out of Wedlock'.[6] This law marked a pivotal advancement in the legal framework governing child welfare, specifically addressing the needs of vulnerable children who were either in the care of individuals other than their parents or were born out of wedlock. The legislation was amended in 1939, with Government Decree No. 29/1939 Coll. refining and expanding its provisions. The revised law outlined a more structured approach to institutional care through

5 Štampach, 1933, p. 138.

6 Act No. 256/1921 Coll. on the Protection of Children in the Care of Others and of Children Born Out of Wedlock.

the establishment of what was referred to as the foster care system. This system was designed to bridge the gap between institutional care and placement in a permanent foster family.

Under this system, children's homes served as interim environments for those requiring special care or undergoing the process of being placed with a foster family. These homes were not merely holding facilities but were integral to the foster care system, providing immediate and necessary support to children in transition. The focus of these homes was to ensure that children received the care and attention needed to prepare them for a more stable and permanent family environment. This legislative framework underscored a commitment to improving the care and protection of vulnerable children, ensuring that their needs were met promptly and appropriately while suitable long-term arrangements were made.

In 1947, Slovakia underwent a pivotal transformation in the field of child welfare with the passage of Act No. 48/1947 Coll.[7] This legislation led to a sweeping reform of institutional care, placing the care of children and youth entirely under state control. This period marked a significant shift as the state assumed full responsibility for all aspects of child welfare, aligning with broader socialist policies that prioritised collective education.

During the socialist era, the ideological focus on collective upbringing intensified. In line with this emphasis, traditional foster care systems were dismantled as of 1950, and the majority of children in need of care were placed in institutional settings. These institutions, often referred to as residential orphanages, operated under a collectivist principle, which prioritised the group over individual needs. It was not until 1973 that a reevaluation of this approach led to the reinstatement of foster care, acknowledging its benefits for the individual development of children.

By 1989, the childcare setting in Slovakia was heavily dominated by residential orphanages, with almost 95% of children in care living under this system. These facilities were large, with an average home accommodating 61 children, and the largest facility housing as many as 204 children.[8] Within these institutional settings, children often faced challenges that hindered their prospects for a successful career and personal development. They grew up in environments that, despite providing basic needs, lacked the personal attention and familial support crucial for holistic development. This era highlighted the limitations of a solely institution-based approach to childcare, eventually leading to calls for reform and the reintegration of foster care systems.

By 1997, the administration of the foster care system in Slovakia was segmented among three distinct government ministries, reflecting a specialised approach

7 Act No. 48/1947 Coll. on the Organisation of Youth Care.

8 Mikloško, 2008.

to different aspects of child welfare. The Ministry of Health was responsible for infant institutions, focusing on the youngest and most vulnerable children, while the Ministry of Education oversaw all institutions caring for children up to age 18, including their educational and developmental needs. Meanwhile, the Ministry of Labour, Social Affairs and Family was tasked with organising foster family care and specialised care for severely disabled children.

In the same year, a significant restructuring placed children's homes and orphanages under the jurisdiction of the Ministry of Labour, Social Affairs and Family. This change marked the beginning of a new philosophical approach to care provided in these institutions. There was a concerted effort to make life in orphanages more closely resemble family-like conditions. This shift aimed to improve the emotional and psychological well-being of children by creating environments that were less institutional and more akin to home settings.

This emerging philosophy was legislatively supported by the introduction of family-type children's homes, which were formally recognised in Slovak legislation through Act No. 195/1998 Coll. on Social Assistance. This act allowed children's homes to offer care either directly in family settings for the professional implementation of foster care or through a network of independent groups.[9] This legislative framework not only provided a structure for these new forms of care but also emphasised the state's commitment to creating more personalised and supportive environments for children in the foster care system, aligning more closely with the dynamics of family life.

In 2002, the Slovak government took a significant step towards improving child welfare by adopting the National Action Plan for Children. This strategic document underscored the government's commitment to fulfilling its obligations and protecting the rights of children. Among its various objectives, a key focus was the transformation of children's homes to elevate the standard of care provided.

This transformation encompassed more than just physical renovations; it also included substantial changes to the educational environment, staff composition, and economic management of these institutions. The aim was to transform children's homes from an institutional to a more family-oriented model of education, where an individualised approach to children's needs and development was prioritised.

In this model, children began to play an active role in daily life decisions that would typically occur within a family setting. They participated in tasks such as purchasing food and clothing, which not only involved them in routine life skills but also helped prepare them for independent living. Additionally, the children were encouraged to engage in activities that facilitated their integration into society and to learn self-care tasks. This approach represented a significant departure from

9 Act No. 195/1998 Coll. on Social Assistance.

the more impersonal, residential style of care, aiming to provide a more nurturing and empowering environment that reflected the dynamics of family life.

In 2009, the Ministry of Labour, Social Affairs and Family in Slovakia introduced the Concept of Residential Care for the period of 2009–2012, primarily aimed at enhancing the quality of institutional care to mimic the nurturing environment of a natural family setting more closely. The strategy was comprehensive, addressing multiple facets of care to ensure a supportive and enriching environment for children. Key to this concept was the prioritisation of placing children in professional foster families rather than traditional institutional settings. This approach was aimed at providing a more personalised and stable environment for each child. Additionally, the concept emphasised the importance of an individual approach to children's needs, ensuring that their unique circumstances and requirements were carefully considered and catered to.

Another critical aspect of the initiative was the respect for and support of sibling relationships. Recognising the emotional and psychological benefits of maintaining these bonds, the policy encouraged the placement of siblings together whenever possible to preserve family ties and provide mutual support within the foster care system. The concept also focused on enhancing the future prospects of young adults transitioning out of the care system. This involved preparing them for independence and adult responsibilities, ensuring they had the skills and support necessary to navigate life beyond institutional care. Furthermore, the policy underscored the importance of systematic training for staff in children's homes. This training was designed to equip caregivers with the skills to offer compassionate, effective care and to apply the latest best practices in child welfare.

Overall, the Concept of Residential Care marked a significant shift in the approach to child welfare in Slovakia, aiming to create a more family-like, supportive, and effective system for caring for children in need. According to the Commissioner for Children, it turns out that:

> the transformation of children's homes cannot be successful as an isolated process. Real change in the care of abandoned and at-risk children can only be achieved through a comprehensive change in the philosophy and system of care and education. The state, as the guarantor of social policy, should become the initiating agent of support and assistance to the biological or foster family in order to effectively promote its inner potential and exercise it in the interests of the successful functioning of the whole family.[10]

10 Mikloško, 2008.

Children's homes in Slovakia currently accommodate nearly 5,000 children[11] and have experienced significant transformational shifts aimed at improving the quality of care provided to these vulnerable groups. The reform process initiated with the restructuring of large, residential children's homes into smaller, more personalised settings. These settings are organised into separate groups housed in self-contained family homes or apartments, designed to emulate a typical family-living environment.

Further advancing these reforms, the institute of professional parenting was established, introducing a more structured and supported approach to foster care, where trained caregivers provide a stable and nurturing environment akin to biological parenting, but with professional oversight and resources.

Currently, efforts are ongoing to de-institutionalise foster care completely, so that placing children in institutional care becomes a truly exceptional measure, reserved only for situations where no other viable options exist. The intent is to ensure that every child has the opportunity to grow up in a family-like setting that provides stability, affection, and individual attention necessary for healthy development. This comprehensive approach not only redefines physical living arrangements but also entails a deep-seated change in the philosophical approach to childcare. It emphasises prevention and family support as primary strategies, aiming to maintain or reintegrate children into their biological families as far as possible, and resorting to institutional care only as a final option. This shift reflects a broader commitment to safeguarding children's rights and ensuring their well-being through the most family-oriented means available.

The passage of Act No. 61/2018 Coll., which amends Act No. 305/2005 Coll. on Social Protection of Children and Social Guardianship,[12] signifies a major shift in the landscape of childcare in Slovakia. This legislative update marks a significant step towards the phasing out of traditional children's homes as we currently know them, potentially leading to the disappearance of the term 'children's home' altogether. The transformation reflects a strategic move towards more integrated, family-centred care options that better address the individual needs of children requiring state intervention.

It is imperative for those studying this area to grasp the underlying philosophy of the legislative amendment. Accordingly, we can look to the provisions laid out in the explanatory memorandum of the Act.[13] According to this memorandum, Act No. 305/2005 Coll. is a public law regulation that outlines the framework for social protection measures and social guardianship. The law

11 According to the information provided by the Office of Labour, Social Affairs and Family, the number of children residing in children's homes in Slovakia in 2023 was 4,994.

12 Act No. 305/2005 Coll. on Social Protection of Children and Social Guardianship.

13 Explanatory memorandum to the government bill amending Act No 305/2005 Coll. on social protection of children and on social guardianship.

specifies the circumstances under which various social protection measures should be applied, advises when professional assistance should be offered or recommended, and delineates the conditions that necessitate immediate intervention. This framework aims to ensure that interventions in the lives of children are transparent, appropriate, and tailored to specific needs, promoting the welfare of children in a structured and legally sound manner. By moving away from a one-size-fits-all approach in institutional care, the amendment encourages a more nuanced and flexible approach to child welfare, where interventions are customised and oriented towards maintaining the child's connection with a family-like environment whenever possible. This approach not only aligns with international best practices but also supports the emotional and psychological development of children by providing care settings that more closely resemble a natural family structure.

Central to this approach is a strong emphasis on maintaining or reconstructing familial bonds wherever possible. The legislation firmly establishes that placing a child in a facility for the enforcement of a court order should only be considered as a last option, and should be seen strictly as a temporary measure. Additionally, whether in an alternative family environment or a facility, efforts must be made to preserve and support the child's relationships with their parents and extended family.

The underlying principles of the legislation include:

1. Primacy of the Natural Family Environment: This principle prioritises retaining children within their natural family setting. If a child is displaced, efforts to return the child to the same environment are considered critical. The goal is to maintain the child's familiar social and emotional bonds, recognising the importance of these connections for the child's development.
2. Priority of Non-Institutional Care Placements: For children who cannot be raised in their natural families, the legislation prioritises placement with relatives in foster care. If placement with relatives is not feasible, other foster care options are considered preferable to institutional settings. This aligns with the broader aim to provide a more personalised and nurturing environment.
3. Preference for Professional Family Settings in Legal Interventions: When court-ordered social protection or guardianship is necessary, placing a child in professional foster families is favoured over moving to larger, more impersonal institutional units. This preference supports the integration of the child into a family-like setting, even within the parameters of legal intervention.
4. Execution of Court Decisions in Family-like Settings: Whenever possible, court mandates concerning childcare should be executed in self-organised

groups that operate in separate houses or flats, rather than institutional environments. This structure aims to mimic a home setting, providing a more normal life experience and reducing the psychological impact of legal proceedings on the child.

5. Maintenance of Sibling Relationships: The legislation emphasises the importance of not separating siblings. Holding siblings together supports their emotional health and provides mutual psychological support, which is crucial during challenging times.
6. Proximity to the Natural Family Environment: For children who cannot remain with their parents, placements should ideally be as close as possible to their original home environment. This helps maintain a sense of continuity in the child's life and facilitates easier visits or interactions with their natural family.
7. Integration of Children Requiring Special Care: Children who need special or increased care owing to disabilities or other conditions should be integrated into settings that provide tailored support while still promoting inclusion and interaction with other children.

These principles represent a holistic and child-centric approach to child welfare, emphasising the importance of family, stability, and personalised care in fostering the well-being and development of children under state protection.

Experts acknowledge that both children and their families often require professional assistance to navigate challenging situations effectively. Insights from the Society of Friends of Children from Orphanages Smile as a Gift research indicate that the majority of parents with children in institutional care are not unwilling or inherently incapable of looking after their children.[14] Rather, they are individuals who lack the necessary skills or resources to provide adequate care. This group predominantly includes parents who are overwhelmed by the demands of childcare due to various factors, including economic hardship, limited education on child-rearing practices, or lack of familial support. Consequently, these parents should not face punitive measures but rather constructive support and education to develop the necessary skills to care for their children effectively. Addressing this need involves providing targeted interventions that offer skill development and ongoing support. This could include parenting classes that teach basic childcare, financial management, and coping strategies for stress, as well as access to services such as counselling and home visits from social workers. By equipping parents with these tools and supporting them through their challenges, it is possible to enhance their capacity to provide a stable and nurturing environment for their children, potentially reducing the need for institutional care placements.

14 Mikloško and Žarnay, 2007.

The proposed changes in child and family services were driven by the urgent need to provide professional assistance that is not only timely but also meets the required quality and scope. During expert discussions, there was consensus around the foundational idea that the social protection system for children and families should promote self-help and self-reliance in addressing their needs. It has been recognised that depending solely on the expansion of social services is not sufficient.

Accordingly, experts advocated for the creation of a new type of multifunctional facility that focuses on developing outpatient and field services, as well as providing opportunities for voluntary, temporary stays that facilitate intensive professional work with children and their families. These facilities aim to foster a more proactive and preventive approach in social care, enabling families to access support in their communities without the need for more drastic interventions like long-term institutional care. This approach aims to empower families, helping them build resilience and capabilities through accessible, high-quality support services tailored to their specific situations. By enhancing outpatient and field services, the system can deliver help where it is most needed, promoting the well-being of children and the stability of families directly in their own environments.

The proposed changes in the administration of services within facilities dedicated to child welfare are fundamentally aimed at enhancing the quality and effectiveness of the care provided. These changes include:

1. Clarification of Roles: A clear distinction is now being made between 'control' and 'assistance' within the bodies responsible for the social protection of children and social guardianship. This is crucial to ensure that while oversight remains a component of care, the primary focus shifts towards supportive interventions that genuinely aid children and families.
2. Transformation of Existing Institutions: Traditional facilities such as children's homes, crisis centres, and re-socialisation centres are being restructured into new, multifunctional institutions known as Centres for Children and Families. They are designed to maintain the core principles that govern the enforcement of court decisions in the realm of social protection and guardianship, yet provide a more holistic approach towards addressing the needs of children and families.
3. Flexibility in Service Provision: The new centres are not required to fulfil all legislated purposes but can instead tailor their services to meet various needs as outlined by law. This flexibility allows the centres to combine different forms of enforcement and purposes in a manner that is both appropriate and effective, adapting to the specific circumstances of the children and families they serve.
4. State Responsibility for Service Availability: There is an increased responsibility on state administration to ensure the availability of measures

carried out in both outpatient and field formats, as well as those conducted in residential forms based on agreements tailored to the needs of clients within the territorial districts of the child and social protection authorities.

5. Creation of a Supportive Network: The plan includes the development of a network of facilities that extends beyond state-run entities to include non-state accredited centres. This network aims to broaden the reach and accessibility of services, ensuring that more children and families can benefit from specialised support in a community-based setting.[15]

These changes are intended to create a more dynamic, responsive, and effective system that better supports the evolving needs of children and families, ensuring that interventions are not only comprehensive but also compassionately delivered.

The social protection of children encompasses a comprehensive suite of measures designed to safeguard the welfare and overall well-being of children, always prioritising their best interests. These measures not only aim to protect children but also actively promote their upbringing and holistic development within their natural family environment. This approach underscores the belief that a family setting is most beneficial for a child's growth and development.

However, when it is not feasible for children to be raised within their own family owing to various circumstances such as neglect, abuse, or parental incapacity, social protection measures step in to provide a suitable alternative environment. This representative setting seeks to replicate the nurturing aspects of a family to the greatest extent possible, ensuring that the child receives the necessary care, love, and support. The goal of these interventions is two-fold: to protect children from harm and ensure a conducive environment that supports their education, emotional health, and social skills. This dual focus helps prepare children for a successful transition into adult life, regardless of their early life circumstances. Such measures are a testament to the commitment of social protection systems to uphold the rights and dignity of every child, making sure that their fundamental needs are met in a manner that respects their individuality and potential.

The Act governing social protection establishes a clear hierarchy of preferences when selecting and implementing measures for the care of children. It prioritises measures that enable the upbringing and comprehensive development of the child within their own family by their parents. This approach underscores the fundamental belief that a child's development materialises within the familial structure, where parents are primarily responsible for nurturing and guiding their growth. However, if parental care is not feasible, the Act prioritises the child's relatives as the next best option for upbringing. This preference for familial care reflects a commitment

15 Explanatory memorandum to the government bill amending Act No 305/2005 Coll. on social protection of children and social guardianship.

to maintaining the child's connection to their biological roots and cultural heritage, which is seen as vital to their identity and emotional stability.

In situations where neither parental nor extended family care is possible, the authority for the social–legal protection of children and social guardianship intervenes to arrange alternative solutions such as foster care or adoption, collectively referred to as 'substitute family care'. This measure ensures that the child continues to benefit from a family-like environment, even when biological connections are not an option.

According to Act No. 36/2005 Coll., institutional care is considered the last resort in the spectrum of substitute care options for a child.[16] This stance is based on the principle that children thrive best in a more personalised, family-centric environment rather than institutional settings, which are considered only when all other closer-to-family options have been exhausted.

Since 2000, the number of children placed in foster care has decreased by 52%, while adoption rates have declined 35%. These statistics point to a broader systemic issue or change in societal, legal, or procedural frameworks that could be influencing these downward trends.

Conversely, one segment of alternative care – substitute personal care – has seen substantial growth, registering a 65% increase since the beginning of the millennium. This particular form of alternative care typically involves caregivers who provide personalised, one-on-one care, often for children with special needs or those requiring more intensive support. The rise in this specific care model suggests a growing recognition and need for specialised, individualised care environments that cater to the unique requirements of certain children within the foster system.

3. Overview of Existing Legal Frameworks and Practices Governing Children in Alternative Care

Data from the Ministry of Labour, Social Affairs and Family reveal a modest albeit steady increase in the number of children in alternative care in Slovakia over the past two decades. While the rise in numbers has been gradual, the implications of children living outside of their familial environment are profound and far-reaching. For example, recent statistics show that approximately 14,000 children, or about 1.38% of children in Slovakia, currently live away from their families. This figure represents a marginal increase of 0.052% from 2022.

Breaking down these figures further, about 60% of these children, accounting for over 8,000, are in foster care, guardianship, or substitute personal care, while the remaining 40%, or around 5,500 children, are in institutional settings. In 2023

16 Act No. 36/2005 Coll. on Family.

alone, 1,377 children were placed in children's homes, including 530 children transitioned from special boarding schools under institutional care orders. Among those living in children's homes last year, 321 returned to their family homes, 173 were adopted, 134 moved into foster care, and 61 transitioned to substitute personal care. Notably, the average duration spent in children's home was four years in 2023, down from four years and nine months the previous year, signalling a positive trend in reducing the time children spend in institutional care.[17]

These numbers, while reflecting the factual representation of the situation, often mask individual stories of the children affected. Behind each statistic, there is a child with unique strengths and vulnerabilities. It is crucial to move beyond considering these children merely as beneficiaries or subjects of bureaucratic processes and legal frameworks. Each child represents unique potential and resilience, embodying our collective responsibility. Accordingly, it becomes clear that these children are not just cases to be managed but young lives to be nurtured. They remind us of the importance of compassion and empathy, driving us to commit to their well-being and integration into society. Therefore, it is crucial to ensure a legal framework that protects the best interests of these children.

In Slovakia, the legal framework regulating family relations is encapsulated within Act No. 36/2005 Coll., commonly referred to as the Family Act. This legislation has undergone amendments to better address the dynamics of modern family needs. A key provision of this Act, found in Section 44, outlines the legal mechanisms available when the personal care of parents for a minor child is lacking because the parents are either unable or unwilling to provide such care. The legal remedies provided under the Family Act include:

1. Substitute Personal Care: This involves entrusting a minor child to the care of a natural person other than the parent. This option is considered when it is in the best interest of the child to remain in a non-parental but nevertheless personalised care setting that replicates the familial environment.
2. Foster Care: Foster care places a child in the home of a family that has been vetted and approved to provide a nurturing and supportive environment. This setting aims to provide the child with stability and a semblance of normal family life, where personal attention to the child's needs can be adequately provided.
3. Institutional Care: When other, more family-centric options are not feasible, a child may be placed in institutional care managed by local authorities. This option involves care in a more structured environment, such as residential homes, where children are looked after by professional staff.

17 According to the information provided by the Ministry of Labour, Social Affairs and Family.

Each of these solutions is designed to substitute for parental care that is lacking, with the overriding aim of ensuring the welfare and best interests of the child are maintained. These legal provisions reflect Slovakia's commitment to providing children with safe and supportive care environments when primary family care is not available.

3.1. Substitute Personal Care

In cases where the welfare of a minor child necessitates special consideration, Slovak courts have the authority to place the child under substitute personal care. This decision is made only if it aligns with the child's best interests. Eligibility to become a caregiver under this arrangement requires that the individual be a natural person with permanent residence in Slovakia, have full legal capacity, and possess suitable personal qualifications – including medical, personal, and moral suitability. Additionally, the lifestyle of the prospective caregiver and other individuals residing in the same household must collectively ensure a nurturing and safe environment conducive to the child's development.

This form of care is reserved for those who demonstrate a lifestyle that actively supports the child's welfare, thereby aligning with the overarching goal of promoting the minor's best interests. It is crucial to note that anyone who has been legally deprived of the right to care for their own minor child by a court cannot be considered for providing alternative personal care to another minor during the period of such deprivation. This safeguard ensures that only individuals capable of providing stable and competent care are entrusted with the responsibility of caring for a minor child under such circumstances.

When deciding to entrust a minor child to alternative personal care, the court typically prioritises relatives of the child, provided they meet the necessary preconditions. This preference for family members underscores the importance of maintaining familial bonds and ensuring continuity in the child's social and familial environment, which is deemed beneficial for their emotional and psychological well-being. In such cases, the court's decision clearly outlines the rights and responsibilities of the person entrusted with the care of the minor. This delineation ensures that the caregiver fully understands their obligations and the extent of their authority in matters concerning the child.

The individual who assumes the role of providing alternative personal care is expected to cater to the needs of the minor to the same extent as parents would. This includes day-to-day care and emotional support, ensuring the child's health, education, and overall well-being are maintained. While the caregiver has the authority to represent the minor child and manage the child's property in routine matters, they have limited power regarding significant decisions.

In instances where the caregiver believes that a decision made by the minor's legal guardian (typically the parent) in substantial matters does not serve the child's best interests, they have the right to challenge it. The caregiver can petition the court to review the guardian's decision, advocating for a course of action that better aligns with the child's needs and welfare. This mechanism provides an additional layer of protection for the child, ensuring that all significant decisions are scrutinised and in the best interests of the minor.

Parents of a minor child maintain their parental rights and responsibilities, but their scope is limited to areas that do not overlap with the duties of the individual to whom the child has been entrusted for substitute personal care. This arrangement ensures that while the substitute caregiver assumes day-to-day and critical responsibilities, the biological parents retain a meaningful role in their child's life.

The parents are also entitled to maintain contact with their child. This right is fundamental to preserving the parent–child relationship, even when the child is under substitute care. If disagreements arise about the terms of this contact between the parents and the substitute caregiver, either party can petition the court to resolve the issue. Such a legal provision ensures that any disputes regarding visitation rights are fairly adjudicated, prioritising the best interests of the child.

Furthermore, according to Section 45, para 7 of the Family Act, the financial responsibility of the parents towards the minor child remains unaffected by any court decision to place the child in substitute care. This means that parents remain obligated to contribute to the child's maintenance and meet any financial needs as prescribed by law, regardless of the child's living arrangements. This legal requirement reinforces the principle that parental responsibilities extend beyond physical custody and include providing financial support to ensure the child's well-being and development.

According to Section 45, para 9 of the Family Act, the Slovak court is mandated to conduct a review of the alternative personal care arrangement at least every six months. This review is carried out in collaboration with the authority for the social–legal protection of children or other individuals who are knowledgeable about the child's circumstances. The primary focus of these evaluations is to assess the quality of childcare being provided under alternative personal care and determine whether the biological parents are now in a position to resume personal care for their child. This periodic review ensures that the child continues to receive the highest standard of care and that any changes in the family's situation or the child's needs are promptly addressed.

In instances where it is deemed appropriate for a child to be cared for by a relative, the Slovak court has the authority to formalise the arrangement. The court's decision outlines specific rights and duties for the caregiver, ensuring they understand their

legal responsibilities and the expectations of their role. Additionally, the court may also stipulate the child support obligations of biological parents. This ensures that while the caregiver provides day-to-day care, the parents continue to fulfil their financial responsibilities towards the child. This comprehensive approach balances the need for stable care arrangements with ongoing parental involvement, supporting the child's overall development and well-being.

3.2. Foster Care

In situations where parents are unable or unwilling to provide personal care for their minor child, and it is deemed necessary for the child's welfare, the court has the authority to move the child to foster care. This decision is contingent on finding a suitable foster parent – a natural person who is not only interested in fostering the child but also meets specific criteria set forth by law.

To qualify as a foster parent in Slovakia, an individual must have permanent residence within the country, possess full legal capacity, and demonstrate personal qualifications such as good health, strong character, and moral integrity. Furthermore, the potential foster parent must be officially registered on the list of applicants for foster care according to a special regulation. It is essential that both the lifestyle of the foster parent and household environment guarantee that the foster care provided serves the best interests of the minor child.

Once appointed, a foster parent assumes responsibilities akin to those of the child's biological parents. This includes providing personal care to the child to the extent expected of a biological parent. The foster parent also gains the right to represent the minor in routine matters and manage the child's property.

However, for decisions deemed substantial or crucial to the child's welfare, the foster parent does not have automatic decision-making authority. Should the foster parent believe that a significant decision made by the child's legal representative (typically the biological parent) does not align with the best interests of the child, they have the right to request a judicial review. This process ensures that all critical decisions are scrutinised by the court to confirm they genuinely reflect what is best for the child, maintaining the child's welfare as the paramount concern in foster care arrangements.

A minor child residing in a household with a foster parent is expected to contribute to the family's common needs. This may involve personal assistance with household tasks and, if the child earns an income from their own work, a financial contribution from that income. This arrangement encourages a sense of responsibility and integration within the foster family, creating an environment of mutual support and cooperation.

During the period of foster care, the biological parents of the minor child retain their parental rights and obligations, but these are limited to areas that

do not overlap with the rights and responsibilities assigned to the foster parent. Importantly, biological parents maintain the right to have contact with their child. Should there be a disagreement between the biological and foster parent regarding visitation rights, the court is tasked with resolving the issue based on an application filed by either the biological or the foster parent. This judicial oversight ensures that the child's best interests remain paramount in arranging contact with the biological parents.

Furthermore, when a court decides to place a minor child in foster care, it also specifies the extent of the financial responsibilities of the parents or any other natural persons legally obligated to provide maintenance for the child. Additionally, the court mandates that these maintenance payments be directed to the child welfare authority responsible for the foster care arrangement. This procedure ensures that the financial support necessary for the child's upbringing is adequately managed and directed through appropriate legal channels, supporting the child's needs while in foster care.

3.3. Institutional Care

Substitute personal care and foster care are prioritised over institutional care in the legal framework governing child welfare. This prioritisation underscores a commitment to maintaining a more family-like environment for children wherever possible. Before a court can order institutional care, it must first thoroughly assess whether the child can be adequately supported through substitute personal care or foster care. This requirement ensures that institutional care is considered only as a last resort when other, more personalised care options are not viable.

Institutional care is considered by the court only under specific circumstances where the child's well-being is at significant risk. This may be the case if the child's upbringing is seriously endangered or impaired and other educational measures have failed to rectify the situation. Alternatively, institutional care may be deemed necessary if the parents are unable to provide personal care due to severe reasons, and no suitable substitute personal care or foster care options are available.

Importantly, inadequate housing or financial conditions of the parents are not sufficient grounds for deeming a child's upbringing as seriously threatened or impaired. This stipulation prevents children from being placed in institutional care solely because of economic disadvantages, thus avoiding unnecessary separation from their family environment.

Unless the court specifies otherwise, the parents retain their role as legal representatives of the minor child, including the responsibility to manage the child's property. This maintains some degree of parental involvement and rights, despite the child's placement in institutional care.

In exceptional cases, the court may order institutional care without previous educational measures having been attempted. In such situations, the necessity for bypassing these measures must be convincingly demonstrated, affirming that the unique circumstances of the case warrant immediate and direct intervention through institutional care.

This approach ensures that the decision to place a child in institutional care is made with careful consideration of all other, less disruptive alternatives, maintaining a focus on the child's best interests and the efficacy of potential interventions.

When a court directs institutional care for a child, it is mandatory to identify the specific institution where the child will be placed. This decision is not made informally; the court must consider what is in the best interests of the minor, with a particular focus on maintaining any existing emotional ties, especially with siblings, to help preserve these important familial relationships. Furthermore, the court possesses the authority to extend the duration of institutional care beyond the child's age of majority for significant reasons. This provision allows for continuity of care when it is deemed beneficial for the young adult's well-being, providing stability as they transition to adulthood.

Institutional care is specifically designed for minors who have yet to reach the age of eighteen. The process for ordering such care can be initiated either *ex officio* by the court itself or upon application. Importantly, the court is not restricted to strictly follow the applications or suggestions made by the parties involved in the proceedings. It retains autonomy to implement any educational measures it deems necessary and appropriate, prioritising the minor child's best interests above all.

Regarding legal representation and property management, the parents of a minor placed in institutional care typically retain their role as legal representatives and are responsible for managing the child's property. However, in certain cases, if the court finds it necessary for the child's welfare, it may appoint a guardian or a guardian *ad litem* to assume these duties. This ensures that the child's assets and legal rights are properly managed, protecting their interests while they are under institutional care. This approach reflects a comprehensive consideration of both the child's emotional and material needs during their time in institutional care.

4. Conclusions

This study underscores the critical importance of adhering to the best interest principle in the care and protection of children separated from their familial environments. Over the past two decades, although the number of children in alternative care in Slovakia has risen marginally, efforts to refine and improve the

conditions and duration of such care have shown positive trends. The gradual reduction in the average length of stay in children's homes testifies to the ongoing commitment to enhance the care system and better serve the needs of these vulnerable children.

The principle of the child's best interest must remain at the forefront of all policies and practices in child welfare. It compels us to continually assess and adjust the care options available, ensuring that each child receives the most familial and supportive environment possible, whether through foster care, guardianship, or institutional settings. This principle not only guides legal and procedural frameworks but also imbues the care system with a moral compass that prioritises the welfare, rights, and potential of every child.

Going forward, it is essential to maintain a holistic approach that integrates the best interest principle with practical measures. This includes improving support systems for foster and adoptive families, reducing reliance on institutional care, and fostering conditions that enable children to return safely to their biological families or transition smoothly into adulthood. Each step taken should aim to not only meet the immediate needs of children in alternative care but also equip them with the tools and opportunities necessary for a secure future.

By focusing on the best interests of these children, we not only adhere to our legal obligations but also fulfil a deeper societal commitment to nurturing the next generation. The children discussed in this study are not mere statistics; they are young individuals with potential and dreams. Our shared responsibility is to ensure that their journey through care systems leads them towards fulfilling and empowered lives. This commitment to their best interests is not just an investment in individual futures but in the health and integrity of our society as a whole.

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Rights of Children with Disabilities in International and Slovene Law

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Abstract. Children with disabilities are among the most marginalised people in every society. They face various barriers that limit their ability to function, participate, and enjoy their rights on an equal basis with other children. These barriers include physical, communication, attitudinal, and environmental obstacles, rooted in stigma and discrimination. The United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities are key international treaties safeguarding the human rights of all children, including those with disabilities. European legal instruments such as the European Social Charter (revised), European Convention on Human Rights, and Charter of Fundamental Rights of the European Union either explicitly protect or can be interpreted as safeguarding certain rights of persons with disabilities, including those of children with disabilities. Specific rights of children with disabilities are regulated by national legislation. Slovenia has implemented some of the principles of the main international instruments regarding children with disabilities. However, significant improvement in several domains is necessary to achieve genuine implementation of Slovenia's international legal obligations in this regard.

Keywords: children with disabilities, equal treatment, disability, human rights, Slovenia

1. Introduction

Fifteen percent of the world's population (at least one billion people) has some form of disability and nearly 240 million of them are children. According to the United Nations Children's Fund (UNICEF),[1] children with disabilities are among the most marginalised people in every society, facing various barriers limiting

1 UNICEF, Children with disabilities. https://www.unicef.org/disabilities (Accessed: 2 February 2024).

their ability to function, participate fully, and enjoy their rights on an equal basis with other children. These barriers include physical, communication, attitudinal, and environmental obstacles rooted in stigma and discrimination.

The United Nations Convention on the Rights of the Child (CRC) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD) are two international treaties that recognise and protect the human rights of all children, including those with disabilities. The CRC states that every child has the right to life, survival, development, education, health, protection, participation, and non-discrimination, regardless of their disability status.

2. The Convention on the Rights of the Child

The CRC is a comprehensive international treaty that outlines the rights of children. Article 2 of the CRC emphasises the principle of non-discrimination, stating that all children, irrespective of their disability, are entitled to the rights enshrined in the Convention. In addition, Article 23 of the CRC addresses the rights of children with disabilities specifically, calling for effective access to rehabilitation, health services, and social security.

The CRC expressly guarantees children with disabilities the right to freedom from disability-based discrimination and has specific provisions regarding the rights of children with disabilities. The Convention expressly recognises the right to freedom from disability-based discrimination by listing disability among the prohibited grounds for discrimination (Article 2, para. 1).[2] The CRC recognises the rights of a child with disabilities to special care and the obligation of the state within its resources to ensure assistance to the child and those responsible for his or her care (Article 23, para. 2). Such assistance should, if and when possible, be provided free of charge, with consideration given to the financial resources of the parents or others caring for the child (Article 23, para. 3).[3]

According to the CRC, children with disabilities have the right to survival and development. They have the right to life and to grow up in an environment that supports their physical, mental, social, and emotional development. Children also have the right to express their opinions, to be heard, and to participate in decisions that affect them, according to their age and maturity (the 'right to participation'). They also have the right to access quality and inclusive education that meets their needs and respects their dignity, potential, and abilities. The CRC requires states to adopt measures to ensure the full realisation of these rights by children with disabilities, such as by providing them with appropriate healthcare, rehabilitation, social services, accessibility, and support. The CRC

2 Chilemba, 2019, pp. 359–387.
3 Sandberg, 2019, pp. 193–194.

also urges states to cooperate with one another and with civil society to promote the rights of children with disabilities.

The Committee on the Rights of the Child (CRC Committee), established under Article 43 of the CRC to monitor the Convention's implementation, elaborated on the rights of children with disabilities in General Comment No. 9.[4] The CRC Committee stated that the leading principle relating to the rights of children with disabilities is found in the first paragraph of Article 23 because it guarantees the right to inclusion and active participation in society. The CRC Committee highlighted that states must take measures aimed at including children with disabilities in society. In its concluding observations, the CRC Committee bemoaned the exclusion of children with disabilities, especially through their placement in institutions.[5] The CRC Committee also emphasised the need for states parties to the CRC to provide care and assistance to children with disabilities and their families. The CRC Committee asserts that this assistance should be provided in forms such as social protection and poverty reduction programmes;[6] adequate support payments and services for children with disabilities, including those with severe or profound disabilities;[7] and 'services for children and parents and/or through financial support and assistance to parents who are unable to work and generate income because they provide constant care and assistance to a child with a disability'.[8]

3. The Convention on the Rights of Persons with Disabilities

In contrast to the CRC, which focuses on the rights of all children (including those with disabilities), the CRPD specifically focuses on the rights of persons with disabilities. The CRPD provides detailed guidance on how to ensure that persons with disabilities, including children with disabilities, attain the full and equal enjoyment of all human rights and fundamental freedoms. The CRPD also addresses specific issues relevant to children with disabilities, such as accessibility, reasonable accommodation, and support services. It recognises the importance of other rights for children with disabilities – such as the right to education, health, family life, participation, and protection from violence and

4 Committee on the Rights of the Child, General Comment No. 9 (2006), The rights of children with disabilities, CRC/C/GC/9, 27 February 2007.

5 Committee on the Rights of the Child, CRC/C/ROU/CO/5 Romania 2017j; CRC/C/SRB/CO/2–3 Serbia, 2017l.

6 Committee on the Rights of the Child, CRC/C/CAF/CO/2 Central African Republic, 2017e.

7 Committee on the Rights of the Child, CRC/C/EST/CO/2–4 Estonia, 2017f.

8 Chilemba, 2019, pp. 359–387. Translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources are by the author.

abuse – and aims to promote the dignity, autonomy, and inclusion of children with disabilities in all aspects of society.

Although the CRPD does not focus on children, it recognises the unique vulnerabilities and needs of children with disabilities and includes provisions relevant to their rights and well-being. It prohibits discrimination based on disability and asserts the equal rights of all individuals – including children with disabilities – to enjoy all human rights and fundamental freedoms (Article 5), while emphasising the best interests of the child as a primary consideration in all actions concerning children with disabilities (Article 7).

Article 7 of the CRPD focuses on the rights of children with disabilities. This article highlights that state parties are obliged to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on a basis equal to that of other children.[2] States parties are bound to ensure that children with disabilities have the right to express their views freely on all matters affecting them (with their views given due weight in accordance with their age and maturity) on a basis equal to that of other children and to be provided with disability and age-appropriate assistance to realise that right. State parties are also obliged to ensure that the best interests of the child are a primary consideration in all actions concerning children with disabilities and that children with disabilities have the right to preserve their identity – including nationality, name, and family relations – as recognised by law without unlawful interference.

Article 7 of the CRPD focuses on children with disabilities, requiring state parties to take all necessary measures to ensure their best interests, their right to express their views, and their full inclusion in society. A key distinction between Article 7 of the CRPD and Article 23 of the CRC is that the latter is subject to resource limitations. Article 7 of the CRPD sets out a new paradigm for child disability rights wherein resource constraints and progressive realisation are absent. States must commit 'all necessary resources' to realise the rights set out in Article 7. In fact, the resource limitation and progressive realisation components in Article 23 of the CRC must be deemed to have been eliminated through the adoption of Article 7 of the CRPD, as it constitutes a subsequent agreement or practice in accordance with Article 3, para. 3 (a) and (b) of the 1969 Vienna Convention on the Law of Treaties.[9] Early treatment is a crucial policy measure. It has at least two distinct dimensions. The first concerns the early identification of disabilities in children; this should be combined with appropriate registration at birth (in accordance with Article 18, para. 2 of the CRPD), which also eliminates the likelihood of abandonment. Early identification further ensures that parents in societies where disability is stigmatised are provided with the information and support they require to care for their disabled child.[10]

9 Bantekas, 2018, p. 198.
10 Id., p. 208.

To ensure that children with disabilities benefit equally from all Convention rights as required by Article 7, para. 1, state parties to the CRPD are required to explicitly prohibit all forms of disability-based discrimination against children in their laws and policies. State parties to the CRPD should guarantee that children with disabilities have equal and effective legal protections against discrimination on all grounds. To that end, domestic authorities should establish monitoring mechanisms and provide effective redress for children with disabilities in cases of discrimination. In addition, state parties to the CRPD must take all necessary measures to ensure that their mainstream non-discrimination and equal treatment initiatives cover children with disabilities specifically. Children with disabilities are also entitled to the provision of reasonable accommodations in accordance with Article 2 and Article 5, para. 3 of the CRPD, as an integral component of protection against discrimination.[11] Article 23 of the CRC was criticised for requiring that disabled children 'achieve the fullest possible social integration and individual development'. Article 7, para. 1 of the CRPD places the equality issue into proper perspective. Whereas other equality-based phraseology in the CRPD's provisions refer to 'an equal basis with others', the comparison with 'children' (rather than 'others') in Article 7, para. 1 suggests a functional test whereby the rights enjoyed by non-disabled children should also be enjoyed by their disabled counterparts. It is the responsibility of each state party to achieve this functional goal. This may require a state party to use extra financial resources or invest in infrastructure. Whatever action the state adopts, its effect must be to enable a disabled child to enjoy access to a particular right in a manner enjoyed by a child without disabilities.[12]

The CRPD recognises the right to education of persons with disabilities, including children. It emphasises the need for an inclusive education system that accommodates the diverse needs of learners, promoting the full participation of children with disabilities in mainstream education (Article 24). Furthermore, it recognises the evolving capacities of children with disabilities and emphasises their right to express their views on matters affecting them, while highlighting the importance of considering a child's age and maturity in decision-making processes (Article 7). The CRPD recognises the rights of persons with disabilities to family life and calls for appropriate support for the families of children with disabilities. This includes ensuring that such families have the resources and assistance they need to care for their children (Article 23) and addressing the right to healthcare of persons with disabilities, including children. It emphasises the need for accessible health services and information to ensure that children with disabilities have equal access to healthcare (Article 25). The Convention also underscores the rights of persons with disabilities, including children, to be

11 Broderick, 2018, pp. 201–202.
12 Bantekas, 2018, p. 208.

protected from exploitation, violence, and abuse, including measures to prevent and respond to all forms of abuse, neglect, and exploitation (Article 16).

Other provisions of the CRPD are also relevant in the context of implementation. For example, the obligation of state parties to raise awareness of the principles enshrined in the Convention (Article 8) is important. State parties are obliged to adopt immediate, effective, and appropriate measures for raising awareness throughout society, including at the family level, regarding persons with disabilities. These measures must foster respect for their rights and dignity; combat stereotypes, prejudices, and harmful practices relating to them; and promote awareness of their capabilities and contributions. Measures to this end include initiating and maintaining effective public awareness campaigns designed to nurture receptiveness to the rights of persons with disabilities, fostering at all levels of the education system – including among all children from an early age – an attitude of respect for the rights of persons with disabilities.[13] The required action is 'to raise awareness'. The CRPD indicates that the primary target is society as a whole ('throughout society'), including at the family level. In General Comment No. 2, concerning accessibility, the United Nations Committee on the Rights of Persons with Disabilities acknowledges that awareness-raising is one of the preconditions for the effective implementation of the CRPD. Therefore, state parties should strive systematically and continuously to raise awareness about accessibility among all relevant stakeholders. The Committee also recognises that a lack of accessibility is often the result of insufficient awareness and technical know-how and that introducing policies that improve accessibility for persons with disabilities requires changing attitudes towards them and fighting against stigma and discrimination through ongoing education efforts, cultural campaigns, and communication.[14] Article 8 calls for awareness raising at all levels of society and in all areas of life to bring about real change in the lives of people with disabilities. Tackling widespread ignorance, as well as debunking 'stereotypes and prejudices' associated with disability, is a necessary step towards the full recognition of people with disabilities as subjects with rights who are entitled to full participation in society. Awareness raising should promote positive perceptions of disability instead of focusing on a 'preventive' or 'deficit' model.[15]

Collecting relevant information on children with disabilities is an important aspect of Article 31, according to which state parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies that give effect to the Convention. The importance of the obligations under Article 31 to effect change lies in how well the obligation will,

13 Ibid.
14 Bariffi, 2018, p. 229.
15 Baranger, 2017, p. 214.

over time, push various actors to collect the robust, consistent, and comparable data required to ensure that violations of rights are properly addressed.[16]

Maintaining accurate statistical data consistent with Article 7 of the CRPD has several practical dimensions. The data can be used to assess whether a state has reduced the number of disabled children in long-term institutions or has succeeded in placing high numbers in foster care or reintegrating them with their families. Disaggregated data can also allow policymakers to fully appreciate the situation of and discrimination faced by children with disabilities and thus formulate targeted programmes designed to tackle the exclusions they face.[17]

4. European Legal Framework

4.1. European Union law

Equality and non-discrimination are founding values of the European Union (EU). As stated in Article 2 of the Treaty on the European Union (TEU),[18] the Union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law, and respect for human rights, including the rights of persons belonging to minorities. These principles are reflected in Article 10 of the Treaty on the Functioning of the European Union (TFEU).[19] Furthermore, Article 19 of the TFEU sets out the competence of EU authorities (the Council of the EU and the European Parliament) to take anti-discrimination measures.[20]

Article 21 of the Charter of Fundamental Rights of the European Union prohibits[21] discrimination based on disability. Additionally, the Charter expressly stipulates the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in community life (Article 26). However, the Charter does not extend the field of application of EU law beyond the competences of the Union or create any new competence or task for the Union, neither does it modify powers and tasks as defined in the EU Treaties. In cases where it does not apply, the protection of fundamental rights is guaranteed in the constitutions or constitutional traditions of EU countries and in the international conventions they have ratified.[22]

16 Pedersen, 2017, p. 557.
17 Bantekas, 2018, p. 207.
18 Consolidated version of the TEU, OJ C 326, 26.10.2012, p. 13–390.
19 Broderick and Ferri, 2019, p. 390.
20 Vernia, Discrimination on the grounds of disability: the UNCRPD of 13.12.2006 and EU law, http://www.era-comm.eu/oldoku/Adiskri/07_Disability/119DV65_Vernia_EN.pdf (11.4.2020).
21 Charter of Fundamental Rights of the EU, OJ C 326, 26.10.2012, p. 391–407.
22 Vernia, Discrimination on the grounds of disability: the UNCRPD of 13.12.2006 and EU law, http://www.era-comm.eu/oldoku/Adiskri/07_Disability/119DV65_Vernia_EN.pdf (Accessed: 11 January 2024).

The EU has been bound by the CRPD since 2011, as it participates in the Convention as a regional integration organisation[23] within the meaning of Article 44 of the CRPD. The CRPD is part of EU law and has a so-called 'sub-constitutive' status. It is subordinate to the TEU and TFEU, as well as to the EU Charter of Fundamental Rights, but is above secondary EU law (such as Directives) according to the hierarchy of rules. However, the EU has not yet acceded to the Optional Protocol to the CRPD.[24]

4.2. Council of Europe

The legal standards of the Council of Europe (CoE) apply to all persons equally, including those with disabilities. The most important instrument for the protection of human rights within the framework of the CoE is the European Convention on Human Rights (ECHR).[25] Other legally binding standards relevant to the rights of persons with disabilities are contained in the European Social Charter, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), and the Council of Europe Convention on Action against Trafficking in Human Beings.[26]

The ECHR and CRPD have different scopes *ratione materiae* and geographically. The CRPD is intended to protect the rights of persons with disabilities in all areas, whereas the ECHR is intended solely to protect civil and political rights (except for Protocol No. 1 on the right to property and the right to education).[27] The ECHR applies to states within the CoE, whereas the CRPD is not limited to European countries. The ECHR was the first international treaty aimed at protecting a wide range of civil and political rights, both in the form of a binding treaty for state parties and by establishing a system for monitoring the exercise of rights at the national level.[28] The ECHR does not explicitly relate to the rights of persons with disabilities, and disability is mentioned only in Article 5, para. 1(e); however, it is generally applicable to the human rights of all persons, including persons with disabilities.

23 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the UNCRPD, OJ L 23, 27.1.2010.

24 Broderick and Ferri, 2019, p. 311.

25 Act ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms, amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, and its Protocols No. 1, 4, 6, 7, 9, 10 and 11, Official Gazette of the Republic of Slovenia – MP, No. 7/94.

26 Council of Europe, Rights of Persons with Disabilities. https://www.coe.int/en/web/disability (Accessed: 7 January 2024).

27 Broderick and Ferri, 2019, p. 427.

28 Gomien, 2009, p. 16.

4.2.1. Case Law of the European Court of Human Rights

The European Court of Human Rights (ECtHR) has developed comprehensive case law on the rights of persons with disabilities, and many cases are related specifically to children with disabilities. In the *Case of Glor v. Switzerland*,[29] the ECtHR interpreted Article 14 of the ECHR for the first time to mean that disability was considered to constitute a personal circumstance based on which discrimination may occur.[30]

In recent years, the ECtHR has dealt with a significant number of cases related to children with disabilities and contributed to the development of international legal standards for the protection of their rights. The *Case of Guberina v. Croatia*[31] concerned a complaint by the father of a severely disabled child about tax authorities' failure to consider the needs of his child when determining his eligibility for a tax exemption for the purchase of property adapted to his child's needs. The Court held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 1 (protection of property) of Protocol No. 1, finding that the Croatian State had provided no objective and reasonable justification for its failure to consider the inequality pertinent to the applicant's situation.

The ECtHR has also decided on the rights of persons with disabilities in relation to their right to family and private life. In several cases, it has decided that Article 8 of the ECHR should be construed as obliging States to take special measures in the case of 'vulnerable' persons.[32] In the *Case of La Parola and others v. Italy*,[33] the Court considered the question of financial assistance to parents for the maintenance of a child with a disability. The applicants, who were unemployed, were the parents of the third applicant, a minor who had been disabled since birth, on whose behalf they acted. They alleged that the Italian State had violated his right to life and health by refusing him effective medical and financial assistance. The Court declared the application inadmissible, observing that the applicants were already in receipt of a benefit on a permanent basis intended to assist them in coping with their son's disabilities. The scale of this benefit showed that Italy was already discharging its positive obligations under Article 8 (right to respect for private and family life) of the Convention.

29 ECtHR, *Glor v. Switzerland*, Application No. 13444/04, Judgement of 30 April 2009.
30 Broderick and Ferri, 2019, p. 441.
31 ECtHR, *Guberina v. Croatia*, Application no. 23682/13, Judgement of 22 March 2016.
32 Broderick and Ferri, 2019, p. 435.
33 ECtHR, Persons with disabilities and the European Convention on Human Rights, Factsheet, March 2020. https://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf, p. 18 (Accessed: 5 February 2024).

The right to education (Article 2 of Protocol No. 1 to the ECHR) of children with disabilities was considered in the *Case of Dupin v. France*.[34] The Court held that the complaint alleging a violation of the of the applicant's child's right to education was inadmissible as manifestly ill-founded, on the basis that the refusal to admit the child to a regular school constituted neither a failure by the State to fulfil its obligations under Article 2 of Protocol No. 1 nor a systematic negation of his right to education on account of his disability, and that the national authorities had regarded the child's condition as an obstacle to his education in a mainstream setting; after weighing the child's level of disability and the benefit he could derive from access to inclusive education, the state opted for an education that was tailored to his needs in a specialised setting. The *Case of G.L. v. Italy*[35] concerned the inability of the applicant, a young girl with nonverbal autism, to receive specialised learning support during her first two years of primary education, even though the support was required by law. The Court held that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1, finding that the applicant had not been able to continue attending primary school in conditions equivalent to those available to other children and that this difference was due to her disability. The Court considered that the Italian authorities had not sought to determine the young girl's real needs and provide tailored support to allow her to continue her primary education in conditions that would, as far as possible, be equivalent to those in which other children attended the same school. In particular, the authorities had never considered the possibility that a lack of resources could be compensated for by reducing the overall educational provision so that it would be distributed equally between non-disabled and disabled pupils. In the *Case of T.H. v. Bulgaria*,[36] the applicant, an eight-year-old boy who had behavioural difficulties, had been diagnosed with a hyperkinetic disorder and a 'specific developmental disorder of scholastic skills'. He alleged that he had been discriminated against in his first two years of primary school by his teachers and the head teacher because of his disability. The Court held that there had been no violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 2 (right to education) of Protocol No. 1 to the Convention in respect of the applicant, noting that the available evidence did not suggest that the actions of the head teacher or the applicant's teachers had been unjustified, unreasonable, or disproportionate, or that the head teacher and other teachers had turned a blind eye to the applicant's disability and his resulting special needs; rather, it appeared that they had made a series of reasonable adjustments for him.

34 ECtHR, *Dupin v. France*, Application No. 2282/17, 18 December 2018.
35 ECtHR, *G.L. v. Italy*, Application No. 59751/15, Judgement of 10 September 2020.
36 ECtHR, *T.H. v. Bulgaria*, Application No. 46519/20, Judgement of 11 April 2023.

The *Case of Đorđević v. Croatia*[37] concerned a complaint by a mother and her mentally and physically disabled son that they had been harassed, both physically and verbally, for over four years by children living in their neighbourhood, and that the authorities had failed to protect them. The case concerned the State's positive obligations in a situation outside the sphere of criminal law, where the competent authorities were aware of serious harassment directed at a person with physical and mental disabilities. The Court found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention in respect of the child, finding that the Croatian authorities had done nothing to end the harassment despite knowing that the family had been systematically targeted and that future abuse was likely.

In one of the most recent judgments concerning children with disabilities, the *Case of N.M. and Others v. France*,[38] the ECtHR addressed the dismissal by the administrative courts of the arguments submitted by parents in their claim for compensation for the special costs arising from their child's disability, which had not been detected through prenatal diagnosis. The Court held that there had been a violation of Article 1 (protection of property) of Protocol No. 1 to the Convention with respect to the parent applicants.

4.2.2. European Committee of Social Rights

The revised European Social Charter (revised ESC) is another important international treaty in the CoE framework. The ESC's implementation was monitored by the European Committee of Social Rights (ECSR), among others. Complaints regarding this implementation can be submitted only by certain non-governmental organisations (NGO). A collective complaint may seek to address issues that may constitute an infringement of the ESC or the revised ESC.[39] In the *Case of International Association Autism-Europe (IAAE) v. France*,[40] the ECSR became concerned with inadequate regulation covering persons with autism and found that the proportion of children with autism, whether in full-time or special schools, was significantly lower than that of children without disabilities. It noted that the ESC requires countries not only to adopt regulations to ensure equal enjoyment of the right to education but also to take practical steps to ensure that these regulations are implemented effectively. In the *Case of Disability Advocacy*

37 ECtHR, *Đorđević v. Croatia*, Application No. 41526/10, Judgement of 24 July 2012.

38 ECtHR, *N.M. and Others v. France,* Application No., 66328/14, 3 February 2022.

39 CoE, ESC, Collective complaints procedure. https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure (Accessed: 13 February 2024).

40 ECSR, *International Association Autism-Europe (IAAE) v. France*, Complaint No. 13/2002. https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-13–2002-international-association-autism-europe-iaae-v-france?inheritRedirect=false (Accessed: 1 February 2024).

Center (MDAC) v. Bulgaria,[41] the ECSR concluded that the second paragraph of Article 7 had been violated independently or in conjunction with Article E of the revised ESC, as regular schools and their educational programmes were not accessible in practice, so children placed in institutions for mental disorders were denied the right to education based on their disability.

After the CRPD entered into force, the ECSR dealt with collective complaints concerning the right to education of persons with disabilities in the *Case of International Federation for Human Rights (FIDH) v. Belgium in 2011*[42] and found that Belgium had failed to set up sufficient day- and night-care facilities to prevent many of the most dependent persons with disabilities from being excluded from services corresponding to their specific needs. A violation of ESC provisions was found in the collective complaint *Case of European Action of the Disabled v. France*[43] regarding the right to education of children and adolescents with autism and the right to vocational training for young adults with autism and in the *Case of MDAC v. Belgium*[44] regarding the right of children with disabilities to have access to mainstream schools.

5. Rights of Children with Special Needs in Slovenian Legislation

The rights of children with disabilities in Slovenia is an important topic that concerns the human rights and well-being of millions of children in the country. Slovenia ratified the CRC[45] and CRPD[46] and is thus bound by the provisions of those conventions relating to children. There is no unified term for children with disabilities in the Slovenian legal system. Various terms are used in Slovenian legislation concerning children who are in any way hindered in normal

41 ECSR, *MDAC v. Bulgaria, Complaint No. 4/2007.* https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-41–2007-mental-disability-advocacy-center-mdac-v-bulgaria?inheritRedirect=false (Accessed: 1 February 2024).

42 ECSR, *FIDH v. Belgium*, Complaint No. 75/2011. https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-75–2011-international-federation-of-human-rights-fidh-v-belgium?inheritRedirect=false (Accessed: 4 February 2024).

43 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012. https://hudoc.esc.coe.int/eng/#{"ESCDcIdentifier":["cc-81–2012-dmerits-en"]} (Accessed: 12 February 2024).

44 ECSR, *Mental disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014. https://www.coe.int/en/web/european-social-charter/-/no-109–2014-mental-disability-advocacy-center-mdac-v-belgium (Accessed 01 February 2024).

45 Official Gazette of the SFRY, International Treaties, No. 15/90, Act on notification, Official Gazette of the Republic of Slovenia, International Treaties, No. 9/92.

46 Act Ratifying the Convention on the Rights of persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disabilities, Official Gazette of the Republic of Slovenia – International Treaties, No. 10/08.

development. The Constitution of the Republic of Slovenia mentions 'children with physical or mental disorders' (Article 52, para. 2). Regulations concerning healthcare use the same expression, whereas a slightly different expression – 'a child in need of special care and protection' – is used in regulations concerning social security. Since the adoption of the Placement of Children with Special Needs Act in 2003, the most accepted term has been 'children with special needs'.[47]

5.1. Early Treatment of Preschool Children with Special Needs

The Act Regulating the Integrated Early Treatment of Preschool Children with Special Needs (IET)[48] regulates the comprehensive early treatment of children with special needs and children with risk factors of preschool age. It involves the treatment of a child and his/her family in the child's preschool age range with the aim of ensuring and promoting the child's development, strengthening the capacity of the family, promoting the social inclusion of the family and child (Article 1), and defining the early intervention services provided for by law (Article 7).

The central pillar of the arrangements for the early treatment of children under the IET is the early treatment centre (Article 8), consisting of a multidisciplinary group of medical, social, and other professionals. For each child, the physician appoints a multidisciplinary team comprised of healthcare, education, and social care professionals who are important for assisting the child and family. The child's parents are also part of the team (Article 10). The multidisciplinary team prepares an individual family plan, in which the appropriate medical, social, and pedagogical assistance is defined for each child and his/her family. In cases where the physician decides not to draw up an individual family plan, the necessary treatments and assistance for the family are determined in collaboration with the parents (Article 12).[49]

An important role is played by the coordinator of the individual family plan, the multidisciplinary team member who monitors the implementation of early intervention services for the child and cooperates with the social work centre. The coordinator provides the family with information regarding social services and public powers in accordance with the sectoral legislation and other tasks assigned to social work centres by other regulations and also informs the family about other forms of assistance available to them under the applicable regulations.[50]

47 Murgel, 2020, pp. 257–259.
48 Official Gazette of the Republic of Slovenia, No. 41/17.
49 Murgel, 2019, pp. 59–70.
50 Ibid.

5.2. Education of Children with Special Needs

In addition to the regulations governing education in general,[51] the education of children with special needs is regulated specifically by the Placement of Children with Special Needs Act (PCSNA).[52] This law does not define who children with special needs are but lists groups of children according to their disability. Pursuant to Article 2 of the Act, children with special needs are children with intellectual disabilities, blind and visually impaired children or children with impaired visual function, deaf and hard-of-hearing children, children with speech and language disorders, physically impaired children, chronically ill children, children with disabilities in specific areas of learning, children with autistic disorders, and children with emotional and behavioural disorders who need an adapted implementation of education programmes with additional professional assistance or adapted education programmes or special education programmes (Article 2).

The PCSNA regulates procedures for the placement of learners with special needs in the appropriate educational programmes. Depending on the learners' psychological and physical status, the Act enables their inclusion in education at all levels, from pre-primary to secondary education, based on the assumption that additional help from experts and adapted programme implementation will help learners achieve a comparable standard of knowledge. Learners with severe disorders can still attend special forms of education in schools for learners with special needs and in institutions for the education and training of learners with severe developmental difficulties.[53]

Children with special needs who cannot be provided with education at their place of residence or with transport because of their distance from the place of education may join an institution for the education of children with special needs, a social care institution, or a pupils' home for children with special needs, or be placed in a foster family (Article 16, para. 1 of the PCSNA).

5.3. Parental and Family Benefits

The Parental Protection and Family Benefits Act (PPFB)[54] regulates certain rights of children in need of special care and their parents. According to Article 50 of the PPFB, parents have the right to work part-time in certain cases. One parent caring for and protecting a child up to the age of three years has the right to be a full-

51 Organisation and Financing of Education Act, Pre-Primary Institutions Act, Primary School Act, Vocational and Technical Education Act and Gymnasiums Act.

52 Official Gazette of the Republic of Slovenia, No. 58/11.

53 European Agency for Special Needs and Inclusive Education. https://www.european-agency.org/country-information/slovenia/legislation-and-policy (Accessed: 14 February 2024).

54 Official Gazette of the Republic of Slovenia, No. 26/14.

time or part-time employee. One parent caring for and protecting a moderately or severely impaired child or a child with moderate or severe intellectual disabilities is entitled to part-time employee status even after the child's third year of age but not after the child turns 18. In this case, the employer guarantees the employee the right to wages according to the employee's work obligations, and the state guarantees the full benefit of social security contributions from a proportion of the minimum wage. The state supports the contributions of the insured person and employer to the compulsory pension scheme, disability insurance, unemployment insurance, and parental care, as well as health insurance contributions in the event of illness and injuries sustained outside work to secure the right to health services and the reimbursement of travel expenses. The state pays these contributions at the rates set by law for social security contributions.

People with children in need of special care have a right to a cash allowance intended to cover the increased living costs incurred by the family for the maintenance and care of such children (Article 79 of the PPFB). A parent or other person is entitled to the childcare allowance if the child has a permanent or temporary residence in Slovenia and lives in the country (Article 80 of the PPFB).

The second benefit is a partial reimbursement for loss of earnings. This is received by a parent or another person when he or she leaves the labour market or starts working part-time instead of full-time to care for a child in need of special care. This right also rests with one parent or other person caring for and protecting two or more children with moderate or severe intellectual disabilities or moderate or severe motor impairment. A parent who works part-time instead of full-time is entitled to a proportionate part of the partial payment for the loss of earnings (Article 83). One parent or other person has the right to partial payment for the loss of income if the child and parent or other person has a permanent or temporary residence in the Republic of Slovenia and lives there (Article 84). One parent or other person has the right to partial payment for the loss of earnings if the conditions laid down in the Act are met or, at the latest, until the child turns 18 (Article 86 of the PPFB).

6. Challenges to Be Addressed

International conventions relating to the protection of the rights of children with special needs, especially the CRC and the CRPD, and international treaties at the European level represent only one step towards achieving the implementation of those rights in practice. Ensuring the rights of children with disabilities depends on the member states of the relevant international instruments. The international treaties are legally binding instruments that state parties must apply according to the *pacta sunt servanda* principle of international law.

Slovenia is an example of a CRPD member state that has implemented the obligations relating to children with disabilities only partially. In the Concluding Observations on the Initial Report on Slovenia from 2018, the CRPD Committee expressed concern about the lack of early assistance and placement of children with disabilities in residential treatment institutions, as well as the lack of mechanisms for ensuring the participation of children with disabilities in decision-making affecting their lives. The Committee recommended that Slovenia formulate a national strategy with benchmarks and human, technical, and financial resources aimed at ensuring the full inclusion of children with disabilities in society, paying attention to the development of inclusive settings in early assistance, education, housing, health, and community services.[55]

Regarding awareness raising (Article 8 of the CRPD), the Committee expressed concern about negative societal attitudes in Slovenia towards persons with disabilities, including a lack of awareness regarding their capabilities and rights – particularly for persons with psychosocial and/or intellectual disabilities – and the lack of strategies such as awareness-raising campaigns for combating stereotypes and prejudice against persons with disabilities. It recommended that the state implement measures for raising public awareness of the rights of persons with disabilities in families, schools, and society and adopt an awareness-raising strategy.[56]

According to the CRPD Committee, another concern regarding children with disabilities within the wider population of persons with disabilities is the lack of a systematic collection of disaggregated data on persons with disabilities and their social conditions, including the social barriers they face (Article 31 of the CRPD). The Committee recommended that Slovenia develop systematic data collection and reporting procedures and collect, analyse, and disseminate disaggregated data on the population of Slovenians with disabilities, including data disaggregated by sex, age, ethnicity, type of impairment, socioeconomic status, employment, and place of residence, as well as data on the social barriers faced by persons with disabilities and their poverty rates.[57]

None of these recommendations have been implemented to date. The prevailing approach to disability in Slovenia remains medical rather than human-rights-based. Negative social attitudes towards disabilities, especially psychosocial and intellectual disabilities, remain an issue. Slovenia has a parallel education system for children with disabilities. Slovenia faces most of its challenges in this area because it lacks a strategy for fully including children with disabilities, fails to collect sufficient data related to this sensitive social group, and collects little to no data on children with special needs.

55 Committee on the Rights of Persons with Disabilities, CRPD/C/SVN/CO/1, 16 April 2018, p. 4.
56 Id., p. 5.
57 Id., p. 13.

7. Conclusions

Standards of international law on the protection of the rights of children with disabilities are well-developed and based on the modern human rights model of the protection of the rights of persons with disabilities. However, including children with disabilities in legally binding instruments is merely the first rung of the ladder to be climbed. The example of Slovenia illustrates that, although some rights of children with disabilities have been regulated by national legislation, many challenges and gaps in the implementation of the rights of children with disabilities remain to be addressed.

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The Legal Situation of the Child in the European Union at the Stage of Qualification, Reception, and Procedure during the Granting of International Protection

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Abstract. Foreigners seeking international protection in the European Union constitute a broad group encompassing a diverse range of individuals with varied reasons for migrating. Their objective is not solely the pursuit but rather the attainment and reception of international protection within the European Union. Individual characteristics serve as the primary and fundamental distinguishing factor behind the reasons for migration, enabling the categorisation of foreigners seeking international protection within the European Union. The categories include persons with disabilities, older adults, pregnant women, single parents raising minor children, victims of human trafficking, individuals suffering from serious illnesses, those with mental disorders, torture survivors, rape survivors, and people who have endured other serious forms of psychological, physical, or sexual violence. Although mere examples, these categories have significant legal importance, as EU legal norms consider specific factual circumstances. EU law adjusts legal status during the stages of reception, qualification, and procedure to the factual situation justified by legally defined individual characteristics of the foreigner. However, the law does not explicitly mention the aforementioned categories of foreigners seeking international protection, which are prioritised and treated with exceptional attention to detail and legal significance in legal norms and literature. These categories include children and unaccompanied children. This study analyses the legal situation of children and unaccompanied children at each legally defined stage of seeking and granting international protection in the European Union, namely, reception, qualification, and procedure. In each stage, the legal situation of children and unaccompanied children differs from the classical or standard legal situation of foreigners belonging to other specially treated categories of foreigners or foreigners who do not belong to such categories. This study analyses this difference and the legal foundations taking into

account the special situation of children and unaccompanied children. Based on the findings, we offer observations and recommendations.

Keywords: children, asylum, refugee, subsidiary protection, international protection, European Union

1. Introduction

The European Union (EU) adopts normative and legislative actions concerning policies on border checks, asylum, and immigration as part of the legal norms of the Area of Freedom, Security and Justice (AFSJ). In accordance with Article 4(2)(j) of the Treaty on the Functioning of the European Union (TFEU), the AFSJ constitutes shared competences between the EU and its Member States. From the perspective of EU primary law, this holds significant legal importance, as in this case, regulations must comply not only with the standards arising from the principle of conferral and the principle of proportionality but also with those arising from the principle of subsidiarity. These principles are defined in Article 5 of the Treaty on European Union.[1]

In accordance with Article 78(1) of the TFEU, the EU should develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. Importantly, this policy must be in accordance with the Geneva Convention of 28 July 1951[2] and the Protocol of 31 January 1967 relating to the status of refugees[3] and other relevant treaties.[4] However, according to Article 78(2) of the TFEU, for the purposes of article 78(1), the EU should adopt measures for a common European asylum system comprising: a uniform status of asylum for nationals of third countries, valid throughout the EU; a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, would be in need of international protection; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

1 EUR-Lex (2012), 13–390. For example, 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.'

2 Convention Relating to the Status of Refugees Geneva, 1951, p. 137.

3 Protocol Relating to the Status of Refugees New York, 1967, p. 267.

4 An example is the Convention for the Protection of Human Rights and Fundamental Freedoms.

criteria and mechanisms for determining which EU Member State is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

Based on the aforementioned primary legal provisions contained in EU law, a so-called "triad of directives" concerning the broad process of granting international protection in the EU has been adopted. The literature emphasises that these directives mainly determine the legal situation of foreigners seeking international protection in the EU, including children and unaccompanied children. First, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 lays down standards for the reception of applicants for international protection (Reception Directive).[5] The purpose of this rule, according to its Article 1, is to lay down standards for the reception of applicants for international protection in Member States.[6] Second, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 concerns 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 (Qualification Directive).[7] The aim of this rule, based on its Article 1, is to lay down 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.[8] Third, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 concerns common procedures for granting and withdrawing international protection (Procedural Directive).[9] According to Article 1 of this directive, the aim is to establish common procedures for granting and withdrawing international protection pursuant to the Qualification Directive.[10] From these three directives, one can interpret the three stages experienced by a foreigner seeking international protection in the EU, including children and unaccompanied children. These stages are: reception, qualification, and procedure. In each stage, the so-called triad of directives contains special legal provisions taking into account the particular situation of children and unaccompanied children.

5 EUR-Lex, 2013a, pp. 96–116.
6 Peek and Tsourdi, 2016a, pp. 1382–1478, 2016b, pp. 1381–1477; Barry, 2021, pp. 223–242.
7 EUR-Lex, 2011, pp. 9–26.
8 Aldea, 2018, pp. 141–148; Eaton, 2012, pp. 765–792; Tsourdi, 2015, pp. 240–271.
9 EUR-Lex, 2013, pp. 60–95.
10 Vedsted-Hansen, 2016, pp. 1285–1381; Widdershoven, 2019, pp. 5–34; Costello and Hancox, 2016, pp. 375–445; Spalding, 2014, pp. 483–487.

At this point, we should note that in 2020 the European Commission submitted new legislative proposals in the field of issues regulated by the above directives.[11] However, by the time of writing, these proposals had not yet been adopted or entered into force, and thus had not become hard EU law. For this reason, this study does not consider them further.

2. Qualification Stage

The Qualification Directive contains a series of material legal provisions that concern not only the qualification criteria themselves (separately for refugees and persons eligible for subsidiary protection) but also relate to the assessment of facts and circumstances, refugee status, subsidiary protection status, the content of international protection, and administrative cooperation. As indicated in recital 13 of the Qualification Directive,

> The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks.

The essence of the qualification stage is to determine whether a foreigner seeking international protection in the EU meets the legal conditions enabling the granting of international protection to that foreigner. In accordance with Article 2(a) of the Qualification Directive, 'international protection means refugee status and subsidiary protection status as defined in points (e) and (g)'.

Therefore, first, in accordance with Article 2(e) of the Qualification Directive, 'refugee status means the recognition by a Member State of a third-country national or a stateless person as a refugee'. Additionally, complementing this is the definition contained in Article 2(d) of the Qualification Directive, according to which

> refugee means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

11 New Pact on Migration and Asylum.

In Article 12 of the Qualification Directive, reasons for exclusion from the possibility of obtaining refugee status are specified.

Second, according to Article 2(g) of the Qualification Directive, 'subsidiary protection status means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection'. In this case, complementing this definition is the concept of 'person eligible for subsidiary protection'. According to Article 2(f) of the Qualification Directive, a

> person eligible for subsidiary protection means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

In Article 17(1) and (2) of the Qualification Directive, the grounds for exclusion from the possibility of receiving subsidiary protection are specified.

This means that, initially, the eligibility of a foreigner seeking international protection in the EU for refugee status is checked first.[12] If found to be ineligible, the eligibility of a foreigner seeking international protection in the EU for subsidiary protection status is checked.[13] If the person is again found to be ineligible, a decision refusing to grant international protection is issued. The assessment at hand constitutes a single process, as the foreigner in this context submits a single application (the application for international protection).

The Qualification Directive contains legal provisions taking into account the particular situation of children and unaccompanied children. First, it is appropriate to mention the provisions of the Qualification Directive, which are more general in nature and concern the definitions of children and unaccompanied children, and second, constitute a directive to EU legislators to ensure the best interests of the child. Therefore, according to Article 2(k) of the Qualification Directive, 'minor means a third-country national or stateless person below the age of 18 years', and, according to Article 2(l) of the Qualification Directive,

> unaccompanied minor means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person;

12 Hathaway, 1991, pp. 113–131; Goodwin-Gill, 2013, pp. 651–666.

13 Battjes, 2014, pp. 541–561; Piotrowicz and Eck, 2004, pp. 107–138.

> it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.

The Qualification Directive, in this context, uses the term 'minor', which, considering the content of the presented definitions, semantically corresponds fully to the term 'child' understood according to linguistic rules but in a narrow sense. This is because in other parts of the Qualification Directive, the term 'child' or 'children' is used, and sometimes an appropriate annotation is made regarding the minority of these children. An argument in favour of using such terminology is that the word 'children' may be understood too broadly and could include adult children, thereby encompassing descendants in the first line without age limitations. Most likely for this reason, EU legislators decided to use the term 'minor' to emphasise that it refers exclusively to under-age children. An example here is the content of Article 2(j)(2) of the Qualification Directive, according to which

> family members means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection: the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law.

However, concerning the aforementioned directive from EU legislators to ensure the best interests of the child, it is necessary to refer to recitals 18 and 19 of the Qualification Directive. According to recital 18 of the Qualification Directive,

> The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

Additionally, according to recital 19 of the same directive, 'It is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child.'

The Qualification Directive also contains detailed provisions altering the procedural rules concerning children and unaccompanied children or safeguarding their best interests while considering their specific situation. A prime example of such regulation is Article 31 of the Qualification Directive, which is entirely dedicated to unaccompanied children. According to this, first,

> as soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

Second, 'Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.' Third, 'Member States shall ensure that unaccompanied minors are placed either: (a) with adult relatives; or (b) with a foster family; or (c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors.' In addition, 'In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.' Fourth,

> As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

Fifth,

> If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

Sixth, 'Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.' It seems that this is a solid legal basis, particularly attentive to the situation of unaccompanied children, who require such exceptional care and assistance. It is exceptionally rare for an unaccompanied child to seek international protection in a Member State.[14] The EU legislation aptly devotes considerable attention to this scenario by dedicating an entire separate article, Article 31 of the Qualification Directive, to unaccompanied children. In summary, the aim of this legal norm is to swiftly designate a person or entity to take care of the unaccompanied child. In this context, the EU legislation requires efforts to restore care primarily to parents and, if this is not possible, to other family members. Institutional care should be utilised only when no other option is available. Importantly, throughout the process of seeking care for the unaccompanied child, their best interests should be taken into account, as evidenced by directives not to separate siblings or to minimise changes in their place of residence. Another example of a legal norm concerning children is Article 9 of the Qualification Directive, which defines acts of persecution and provides examples of their forms, including acts of a gender- or child-specific nature.[15] This holds significant legal importance, as it provides a clear legal basis to qualify crimes targeting children as acts of persecution, which in turn is a crucial milestone in the process of qualifying for refugee status. Another example is Article 20 of the Qualification Directive, which opens an important legal chapter of the Qualification Directive concerning the scope of international protection. Essentially, it defines the rights of a foreigner granted international protection in the receiving country. In this context, Article 20 of the Qualification Directive stipulates that

> When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

It also states that 'The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.' This provides evidence that the EU legislation pays special attention not only to introducing regulations changing the rules for granting international protection to children and unaccompanied children but generally to securing the best interests of the child. However, importantly, this provision unequivocally

14 Natania, 2018, pp. 1–14; Hadzibulic, 2020, pp. 49–54; Chak, 2018, pp. 7–28.
15 Bhabha and Schmidt, 2008, pp. 126–138; Brumar, 2009, pp. 250–258.

shifts the responsibility for implementing this demand to the EU Member States. This seems appropriate, as it occurs within the framework of an EU directive. Undoubtedly, the EU Member States remain responsible for the correct, effective, and thoughtful implementation of EU directives to achieve their objectives.[16] In the context of the discussed issue, Article 27 of the Qualification Directive is also significant. On the one hand, it states that 'Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.' On the other hand, it stipulates that 'Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third-country nationals legally resident.' This example clearly demonstrates that EU legislators, by considering the particular situation of children and unaccompanied children, decided to introduce a legal provision guaranteeing them broader access to education. It is noteworthy that in the first case, the wording 'under the same conditions as nationals' is used as a model, while in the second case, it is 'under the same conditions as third-country nationals legally resident'.

The discussion in this section leads to a clear conclusion that, within the qualification stage, foreigners seeking international protection in the EU who are children or unaccompanied children can benefit from dedicated legal norms aimed at protecting their best interests. In other words, these legal norms take into account their exceptional situation and specific needs.

3. Reception Stage

The Reception Directive contains a set of legal provisions concerning the conditions for receiving foreigners seeking international protection in the EU. It is important to note that these provisions apply to foreigners who have requested such protection and have not yet received a decision on their application. In other words, the Reception Directive applies to foreigners who have arrived in an EU Member State and covers them until they receive refugee status, subsidiary protection status, or a negative decision. The reception phase involves all legal provisions governing the conditions for accommodating foreigners seeking international protection in the EU. Essentially, these legal norms carry an administrative nature, dictating the foreigner's (applicant for international protection) place of residence, eligibility for specific material benefits, and access to employment and education. More simply, the criteria for the reception stage significantly impact the quality of life for foreigners residing in EU Member States. Additionally, according to recital 12 of the Reception Directive, 'the harmonisation of conditions for the reception of applicants should help to limit

16 Versluis, 2004.

the secondary movements of applicants influenced by the variety of conditions for their reception'. This appears to be another important aspect of the Reception Directive, albeit less so than ensuring dignified reception conditions for foreigners seeking international protection in the EU.

The Reception Directive, like the Qualification Directive, includes legal provisions focused on the particular situation of children and unaccompanied children. In terms of general legal norms, the Reception Directive also contains definitions of the notions of 'minor' and 'unaccompanied minor'. Regardless of the call for proper legislation,[17] EU legislators decided to adopt definitions identical to those in the Qualification Directive. While it is commendable that these definitions are the same, this move could be unnecessary. In this regard, a simple reference to the relevant provisions of the Qualification Directive would have sufficed. Referring to definitions adopted in another EU rule arises from the specificity of EU legislation, wherein each secondary rule generally contains its own conceptual framework operating within that rule. By implicitly adopting the practice common in national law, where once a term is defined in one rule, there is no need to repeat it, arguments could ensue in EU law that if EU legislators wanted a term to be understood in the same way as in another secondary rule, they should have explicitly decided so, as indicated by EU legislative practice. Such arguments could lead to numerous and serious interpretational discrepancies. Therefore, including a reference to the definitions adopted in the Qualification Directive could be evaluated positively. Furthermore, it is worth referring to recitals 9 and 22 of the Reception Directive. According to recital 9 of the Reception Directive,

> In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, respectively.

According to recital 22 of the Reception Directive,

> When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

17 Zaleśny, 2009, pp. 11–47; Bułajewski, 2015, pp. 31–42; Drozdowski, 2021, pp. 40–46.

These provisions are similar to recitals 18 and 19 of the Qualification Directive. The goal appears to be identical, as in both cases the primary aim is to ensure compliance with the principle of the child's best interests.

The Reception Directive also includes detailed provisions concerning children and unaccompanied children. A prime example of such specific regulations addressing the situation of children and unaccompanied children is Article 21 of the Reception Directive, which opens an essential chapter of this legal act concerning persons in need of special care.[18] According to this provision,

> Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

The mechanism of this legal norm is very similar to the mechanism of Article 20 of the Qualification Directive. Here too, there is a shift of responsibility (consistent with the nature of EU directives) for the implementation of this directive. Additionally, key examples of legal norms dedicated to children and unaccompanied children are Articles 23 and 24 of the Reception Directive. The first of these provisions concerns minors, while the second concerns unaccompanied minors. According to Article 23 of the Reception Directive, first,

> The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

Second,

> In assessing the best interests of the child, Member States shall in particular take due account of the following factors: (a) family reunification possibilities; (b) the minor's well-being and social development, taking into particular consideration the minor's background; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; (d) the views of the minor in accordance with his or her age and maturity.

18 Morawa, 2003, pp. 139–155.

Third, 'Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centers referred to in Article 18(1)(a) and (b) and to open-air activities.' Fourth,

> Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counseling is provided when needed.

Fifth, 'Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.' Conversely, according to Article 24 of the Reception Directive, first,

> Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organizations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

Second,

> Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed: (a) with adult relatives; (b) with a foster family; (c) in accommodation centers with special provisions for minors; (d) in other accommodation

> suitable for minors. Member States may place unaccompanied minors aged 16 or over in accommodation centers for adult applicants, if it is in their best interests, as prescribed in Article 23(2). As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

Third,

> Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organizations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.

Fourth,

> Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Additionally, complementary to Articles 23 and 24 of the Reception Directive, Article 11(2) and (3) of the Reception Directive concerns the detention of vulnerable persons and of applicants with special reception needs. According to the cited provisions,

> Minors shall be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time, and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

Additionally,

> Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

It is easy to observe that Articles 23, 24, and 11 of the Reception Directive complement each other, operating to protect and implement the best interests of the child.[19] These regulations serve as a guarantee for children, including unaccompanied ones, that, on the one hand, their rights will be respected, and, on the other hand, their particular situation will be taken into account, and appropriate legal privileges will apply. These legal privileges aim, as far as possible, to counteract threats associated with harm to the best interests of the child by adjusting legal realities within the framework of EU law, which directly influences how the law operates in EU Member States. For instance, without Article 23 of the Reception Directive, theoretically, actions taken to safeguard the interests of the child could overlook whether the child is a victim of human trafficking.[20] Without Article 24 of the Reception Directive, theoretically, it would be possible not to immediately inform an unaccompanied child about the appointment of a representative for them, or to appoint a representative whose interests conflict or may conflict with those of the unaccompanied minor. Similarly, without Article 11 of the Reception Directive, theoretically, it would be possible to detain an unaccompanied child in prison. These are just some examples, but they illustrate how the aforementioned legal privileges work and what their differences relative to the standard provisions of the Reception Directive are.

These observations lead to the conclusion that EU legislators, within the reception phase, introduced legal provisions aimed at considering the special situation and needs of children, including unaccompanied children. The level and style of these legal norms, in principle, refer to and remain in line with the relevant standards contained in the Qualification Directive.

19 For the best child interest principle, see: Judgment of the Court of Justice of EU (Tenth Chamber) of 11 March 2021, M. A. v État belge (ECLI:EU:C:2021:197); Judgment of the Court of Justice of EU (Grand Chamber) of 10 May 2017, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others (ECLI:EU:C:2017:354).

20 Fong and Cardoso, 2010, pp. 311–316.

4. Procedural Stage

The procedural stage involves formal regulations that facilitate the application of the substantive legal principles laid out in the Qualification Directive. The relationship between the elements of this stage and those of the qualification stage can be illustrated as the traditional connection between substantive and procedural laws governing the same subject matter (e.g. civil matters). Thus, it can be compared to the relationship between the civil code and civil procedure code. The Procedural Directive, comprising formal regulations, sets out procedures for granting international protection in the EU and specifies the rights and duties of the parties engaged in such proceedings. Additionally, in the context of the procedural stage, the EU legislation aims to implement the concept of a unified procedure, as clearly emphasised in recital 11 of the Procedural Directive. Also important in this context is recital 12 of the Procedural Directive, which indicates that the main objective of this norm is expressly indicated, as follows: 'The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.' An argument in favour of introducing a unified asylum procedure[21] throughout the entire EU is indicated by recital 13 of the Procedural Directive. It emphasises that

> The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States.

This is exactly the same argument presented by the EU legislation in the context of the qualification stage (recital 13 of the Qualification Directive) and the reception stage (recital 12 of the Reception Directive).

The Procedural Directive, just like the Qualification Directive and the Reception Directive, contains legal provisions addressing – and sensitive to – the specific situation and needs of children and unaccompanied children. In terms of general regulations, it is worth emphasising, first, that the Procedural Directive also includes a definition of a minor and an unaccompanied minor. The definition of a minor is identical to that in the Qualification Directive and the Reception Directive. However, the definition of an unaccompanied minor refers to the provisions of the relevant article of the Qualification Directive ('unaccompanied minor means an unaccompanied minor as defined in Article

21 Bojenko-Izdebska, 2016, pp. 43–56; Schittenhelm, 2019, pp. 229–244.

2(l) of Directive 2011/95/EU'). On the side-lines and in the context of earlier considerations related to the duplication of identical definitions, as seen in this case, EU legislators opted to use the mechanism of referral. This could have been applied successfully in other instances of defining not only an unaccompanied minor but also a minor. Another example of general legal norm is found in recital 33 of the Procedural Directive, according to which

> The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background.

This is undoubtedly a reason similar to recitals 9 and 22 of the Reception Directive and recitals 18 and 19 of the Qualification Directive. The primary goal of these recitals is to instruct the best possible protection of the child's best interests and the fullest implementation of the principle of the child's best interests.

The procedural directive also contains specific provisions taking into account the particular situation of children and unaccompanied children. A prime example of such legal norm is Article 7(3) of the Procedural Directive, which pertains to applications made on behalf of dependants or minors. According to this provision,

> Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

This rule strongly emphasises that a child or unaccompanied child is not an object but a subject of the procedure for granting international protection in the EU, and, in some cases, this subject should be able to submit an application for such protection on their own behalf. The criterion here is generally the child's capacity to perform legal acts.[22] It is not specified here whether this capacity refers to full or limited legal capacity. It seems that EU legislators, respecting the diversity of EU Member States, intended to leave this decision up to them, as

22 Varney, 2017, pp. 493–519; Bhailís, 2018, pp. 45–49.

clearly emphasised in Article 7(5) of the Procedural Directive. According to this provision,

> Member States may determine in national legislation: (a) the cases in which a minor can make an application on his or her own behalf; (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a); (c) the cases in which the lodging of an application for international protection is deemed to constitute also the lodging of an application for international protection for any unmarried minor.

Article 7(4) of the Procedural Directive is also noteworthy; it states,

> Member States shall ensure that the appropriate bodies referred to in Article 10 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his or her personal situation, those bodies are of the opinion that the minor may have protection needs pursuant to Directive 2011/95/EU.

This provision reflects special concern for unaccompanied children who cannot rely on adult mentoring. If an unaccompanied child, for some reason, does not submit an application for international protection, the appropriate authorities have the right to do so on behalf of the unaccompanied child.[23] This seems to be the meaning of Article 7(4) of the Procedural Directive. However, a flagship example of a rule relating exclusively to unaccompanied minors as a more vulnerable category is Article 25 of the Procedural Directive. According to this provision, first and foremost

> With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall: (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting

23 Vannelli, 2022; Warren and York, 2014.

> as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU; (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

Furthermore, 'Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.' Second, 'Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken.' Third,

> Member States shall ensure that: (a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors; (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

Fourth, 'Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.' Fifth,

> Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor. Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable

> result. Where medical examinations are used, Member States shall ensure that: (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination; (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

Additionally, 'The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.' Sixth,

> The best interests of the child shall be a primary consideration for Member States when implementing this Directive. Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may: (a) apply or continue to apply Article 31(8) only if: (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or (ii) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; (b) apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if: (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or (ii) the applicant has introduced a subsequent application; or (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; or (iv) there are reasonable grounds to consider that a country which is not a Member State is a safe third country for the applicant, pursuant to Article 38; or (v) the applicant has misled the authorities by presenting false

> documents; or (vi) in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

Moreover,

> Member States may apply points (v) and (vi) only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative

and

> (c) consider the application to be inadmissible in accordance with Article 33(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38, provided that to do so is in the minor's best interests; (d) apply the procedure referred to in Article 20(3) where the minor's representative has legal qualifications in accordance with national law

and 'Without prejudice to Article 41, in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases.'

The scope of the rule contained in the entire Article 25 of the Procedural Directive is extremely broad and affects all provisions of the Procedural Directive. In this case, EU legislators chose to adapt the procedural rules for granting international protection in the EU, taking into account the particular situation of unaccompanied children.[24] Article 25 of the Procedural Directive is the provision within the norm wherein the concern for the best implementation and protection of the best interests of unaccompanied children is directly evident. Although all of this is contained within a single editorial unit of the Procedural Directive, it results in adjusting, on the one hand, by softening the rules, conditions, and requirements, and, on the other hand, by strengthening procedural guarantees for the entire procedure regarding international protection where the applicant is an unaccompanied child.[25] At this point, it is important to note the discrepancy regarding the lack of a similar regulation concerning children. Unaccompanied

24 Abbing, 2011, pp. 11–25; Mets, 2021, pp. 625–637.
25 Kalverboer *et al.*, 2011, pp. 2–18.

children constitute a particularly vulnerable category compared to children in general, but this does not mean that leaving standard procedural rules for children in principle will be deemed appropriate. Unfortunately, legal provisions, such as Article 15(3)(e) of the Qualification Directive, which stipulates the requirement for interviewing children in a manner that takes their needs into account, bring little change. The existence of such a legal gap and leaving this issue to the discretion of the Member States of the EU must be viewed negatively. A clear and specific legal norm dedicated to children is needed, modelled after Article 25 of the Procedural Directive, which is dedicated to unaccompanied children.

The procedural stage has been designed by EU legislators in such a way that unaccompanied children can seemingly expect a relatively thorough consideration of their best interests. Unfortunately, the same cannot be said for the situation of children who rely only on fragmented regulations (e.g. regarding interviews) and provisions of the directive's recitals. The latter may serve as a basis for legal interpretation in favour of children. First, however, it is not something that would necessarily occur; second, even if it were to happen, it would require time, meaning that, at least in some cases, the best interests of children might not have been adequately taken into account. It would be appropriate to introduce clear legal norms dedicated to children in the procedural stage to strengthen their position.

5. Conclusions

This section discusses some conclusions stemming from our findings in the previous section.

The Qualification Directive, Reception Directive, and Procedural Directive are clearly interconnected secondary EU rules. Their connection is mainly because each addresses the granting of international protection in the EU from a different perspective. Each of the three EU directives pertains to a different stage, but the stages do not follow one another sequentially. The beginning of each stage is marked by the submission of an application by an eligible person, and it concludes with a decision issued by the EU Member State. This means that the provisions of the Qualification Directive, Reception Directive, and Procedural Directive operate concurrently and intertwine with each other. Because of this and the fact that they are three separate rules, their provisions sometimes appear to be very similar. Sometimes, this similarity is due to the need to repeat the same subject matter (to ensure legal completeness); at other times, this resemblance is illusory and actually indicates that the so-called triad of directives forms a complementary organism.

The Qualification, Reception, and Procedural Directives each contain provisions focused on the particular situation of children and unaccompanied

children. However, there is a difference in the quality of these legal norms, with the Procedural Directive notably falling short owing to its lack of detailed legal provisions for children, similar to those for unaccompanied children. Nevertheless, from the perspective of safeguarding the best interests of children, and perhaps more broadly, a better solution would be to replace these three rules with a single legislative instrument containing sections relating to the qualification, reception, and procedural stages. This would eliminate unnecessary repetition of regulations on the same subject matter and facilitate intelligibility. Such a legal instrument should include a separate chapter dedicated to children and a separate chapter dedicated to unaccompanied children. These chapters should encompass all special legal norms dedicated to and taking into account the particular situation of children and unaccompanied children, including provisions for the qualification, reception, and procedural stages. The form of such a single legal instrument should be an EU directive, considering that immigration and refugee law is not within the exclusive competence of the EU but falls under shared competence. The principle of subsidiarity also applies here. This is not a definitive argument precluding the possibility of issuing an EU regulation, but at this stage of EU integration, taking into account the sensitivity of the matter and EU Member States' sovereignty, the Member States deserve to retain appropriate decision-making powers. Only when it becomes evident that EU Member States are unable to achieve a common goal would it be possible to attempt to justify the issuance of an EU regulation in terms of the principles of attribution, subsidiarity, and proportionality. However, the attempt alone does not guarantee a successful justification. Nevertheless, it seems that this moment has not yet arrived, and EU Member States should continue to carry out their tasks regarding the processing of applications.

In conclusion, it can be suggested that in the proposed legal instrument, the establishment of an ombudsman for children's rights in migration and refugee affairs could be considered. However, first, it would be necessary to establish an office for the ombudsman for children's rights in the EU.

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The Best Interest of the Child in the Education of Children with Disabilities in Croatia – A Case Study

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Abstract. This study aims to provide an overview of the inclusive educational practices for students with developmental disabilities in Croatia from the perspective of the best interest of the child. The case study method was used to analyse the education of students with developmental disabilities in regular elementary schools. This study provides an overview and explanation of the leading principle of the Convention on the Rights of the Child: the principle of the best interest of the child. The presentation of the best interest of the child as a right, principle, and procedural rule was provided. The best interest of the child must take precedence when undertaking all activities and making all decisions related to the child, both in the public and private spheres. The concept of the best interest of children with developmental disabilities will be applied to the Croatian context and connected to inclusive educational practices.

Keywords: Croatia, children's rights, inclusive education, best interest of the child, case study

1. Introduction

Education is a fundamental human right that builds foundations for 'a successful participation in social, economic, cultural and political life of the community'. It is a powerful tool for combating social exclusion, facilitates a person's full-fledged participation in society, and is a key factor in the economic development of a country.[1]

Inclusive education is based on the universal right to quality education and focuses on vulnerable groups. The aim of inclusive education is to overcome

1 Salaj, 2014, cited in Kiš-Glavaš *et al.*, 2012.

obstacles to all children's participation.[2] However, inclusion is not only a goal[3] but also a continuous process in which educational institutions attempt to respond to the needs of all pupils as individuals, each pupil feels welcome, and educational institutions facilitate research and communal problem-solving. Taking into account and accepting differences among children becomes an incentive rather than an obstacle to the teaching and learning process.[4] Inclusive education is the process of increasing the participation of all pupils to reduce their exclusion from the school environment, as well as from the cultural and broader social community.[5] Creating inclusive education not only enables the development of social competencies of all those included in the educational process but also results in a more active inclusion of children with disabilities in the educational system. This ensures the prerequisites for the development of social, emotional, and intellectual skills and behaviours, which are preconditions for the academic and social development of a person in line with their abilities.[6] Quality implementation of educational inclusion requires a change in attitudes, beliefs, knowledge, and skills based on which one understands and respects the different needs of children.[7]

Inclusive education is a process carried out by changing the approach to teaching and educational content as well as the educational system's structure and strategy. However, educational inclusion can only be realised following the implementation of certain changes in the overall educational practice.[8] Inclusive education requires that educational institutions adapt to all students. To ensure educational inclusion, it is important to have efficient support from institutional bodies and vocational guidance services, as well as a social welfare system, legal support from mobile teams and teaching assistants, and cooperation between parents and schools.[9] Therefore, the introduction and implementation of inclusion has become a demand within national educational policy and practice and not a specific intervention referring only to one marginalised group.

2. Inclusive Education in Croatia

Inclusive education gained importance within the Croatian educational policy in the 1990s. Through a series of legal norms and strategic documents, the Croatian regulatory and policy framework guarantees the right to inclusive education

2 Ainscow, 1999.
3 Mittler, 2006.
4 Booth and Ainscow, 2014.
5 Id., 1998.
6 Milašin *et al.*, 2009.
7 Ivančić, 2010.
8 Mittler, 2006.
9 Igrić, Cvitković and Wagner Jakab, 2009; Igrić *et al.*, 2010; Stančić, Horvatić and Nikolić, 2011.

for children with disabilities. The United Nations Convention on the Rights of Persons with Disabilities (2007) and the United Nations Convention on the Rights of the Child (1989) constitute a framework for establishing national policies. By perceiving a disability as a combination of a person's characteristics and their social environment, the conventions emphasise activities empowering children and persons with disabilities aimed at realising their rights and personal potential and stress the elimination of physical, social, and other obstacles for their equal participation in society. In Croatia, the education of pupils with disabilities in primary and secondary schools is regulated by the Primary and Secondary School Education Act,[10] Vocational Education and Training Act,[11] state pedagogical standards,[12] and the Rulebook on Primary and Secondary Education of Pupils with Disabilities.[13]

The Report of the European Parliament on the Condition of Children with Disabilities in Croatia (2014) regards the lack of a separate legal framework that would regulate the rights of children with disabilities and the lack of a unique definition of persons with disabilities as obstacles to the implementation of educational policy. Consequently, precise disaggregated data on the number of students with disabilities cannot be obtained.[14] According to data from the Report on the Work of the Ombudsman for Children for 2022, the Croatian register of persons with disabilities includes 59,241 children aged 0–17 years (approximately 10% of all persons with disabilities). In the 2022–2023 school year, 25,414 pupils with disabilities attended regular primary schools, and 5,400 regular secondary schools. So-called special schools, social welfare institutions, and other organisations provided primary school education to 2,743 pupils and secondary school education to 337 pupils.[15]

The analysis of the Croatian implementation practice indicates that there are certain implementation deficits,[16] that is, problems in implementing educational policy. In its analysis of the position of children with disabilities in Croatia in the context of primary and secondary school education, the European Parliament emphasised several key problems. There is a significant implementation gap in educational policy because there is no statutory norm ensuring the availability of teaching assistants for children with disabilities, which leads to dysfunctional educational processes at the start of each school year. The same challenge is

10 Official Gazette (OG) 87/08, 86/0, 92/10, 105/10, 90/11, 16/12, 86/12, 126/12, 94/13, 152/14, 7/17, 68/18, 98/19, 64/20, 151/22, 156/23.

11 OG 30/09, 24/1, 22/13, 25/18, 69/22.

12 National Pedagogical Standard for Primary Education System (OG, 63/08, 90/10) and National Pedagogical Standard for Secondary Education System (OG, 63/08 and 90/10).

13 OG 24/2015.

14 Ivanković Tamamović, 2014.

15 Report on the Work of the Ombudsman for Children, 2022.

16 Pressman and Wildavski, 1984.

recognised in the annual report on the work of the Ombudsman for Children.[17] Furthermore, the aforementioned European Parliament report states that sincere efforts to increase the inclusion of children with disabilities in regular education have not been made, there are no coordinated activities of various institutions acting in the field of education, and educational system employees do not know how to respond to the various needs of children with disabilities.[18]

Based on data from the Report on the Work of the Ombudsman for Children, the Ombudsman warns that support for children with disabilities in the form of teaching assistants has still not been legally regulated within the Croatian primary school education system. A significant number of schools still lack architectural adaptations; schools are inadequately equipped with up-to-date teaching materials as well as the adaptive and assistive technology needed to work with children with disabilities, while classrooms and practical training classrooms cannot always respond to their specific needs, especially those of students with multiple disabilities. Overcrowded facilities and a large number of pupils in classrooms negatively impact the quality of teaching practices. The Ombudsman also emphasised that the Croatian educational system cannot ensure the right to adequate education for each child, and that inclusive principles have still not taken root in Croatian educational practice. In secondary schools, it is necessary to enable students to assess the quality of a school's educational services. Gaining insight into pupils' satisfaction with the quality of school services can affect not only their educational status but also the level and quality of their participation in decision-making processes regarding issues of interest. If pupils are perceived as education stakeholders with various needs and expectations, then it is necessary for schools to have well-established strategies to ensure that the necessary resources (a choice of programs, methods, equipment, employees' attitudes, the support system, and similar) enable schools to react and meet the needs of their pupils. Admitting the importance of the influence of users on the quality of services, as well as considering users' perspectives,[19] would enable the introduction of an evaluation of educational service quality by children with disabilities, which can contribute to a better analysis of the prerequisites for the development of inclusive education.[20]

2.1. Child Participation

Children's participation rights are affected by the sociocultural context in which a child grows and the experience of the child in resolving problems with other persons, most commonly a parent or educator, that is, the teacher. In the context

17 Report on the Work of the Ombudsman for Children, 2015, 2016, 2022.
18 Ivanković Tamamović, 2014.
19 Urbanc, Kletečki Radović and Delale, 2009; Zaviršek and Videmšek, 2009.
20 Report on the Work of the Ombudsman for Children, 2016, 2022.

of educational practice, interactions between pupils and teachers build the foundation for children's participation and the common resolution of problems or obstacles they face. Educational workers are supposed to support and encourage children's participation in decisions that affect them, which requires meeting a number of preconditions: a) giving the child the voice to express their opinion on education and their own participation in the teaching process; b) listening to the child; c) taking into consideration the child's opinion in the decision-making process whenever possible and when it is in the best interest of the child; and d) creating preconditions for the child's active participation and contribution to the educational process as well as the evaluation of teaching quality.

The level of participation should depend on the child's developmental abilities in such a way that the child gradually takes more responsibility for resolving a certain problem or making a particular decision in line with their age, maturity, and developmental abilities. Bronfenbrenner describes[21] child development as the gradual acquisition of the power to act and take over responsibility for one's own behaviour.[22] Adult persons in the context of education are those class teachers and subject teachers who slowly transgress from the role of a leader to the role of a facilitator. As a facilitator, a class teacher (subject teacher) provides pupils with support, trusts in their active participation, motivates them, directs them, encourages them not to give up, and provides them with the necessary information to empower them within the process.[23] Class (subject) teachers who believe in and support pupils' participation in creating quality educational practices appreciate pupils' efforts, knowledge, and interest invested in resolving a problem, and provide feedback to pupils on their contributions to resolving specific problems.

The manner in which children with disabilities participate in the teaching process depends on their individual needs, and it is not necessary to insist on practising all forms of participation[24] as explained by Hart's participation model.[25] In addition to the first three models of non-genuine participation (manipulation, decoration, and tokenism), another five levels refer to situations of genuine inclusion of pupils in work, ranging from a willing decision to participate in a certain project or activities initiated by adults to the highest level of participation, which implies the independent creation of ideas, planning, and implementation of a certain activity by a pupil, with the option of including adults as support.[26] Unlike Hart, Treseder maintains[27] that all forms of participation are

21 Bronfenbrenner, 1979.
22 Bronfenbrenner, 1979, cited in Smith, 2007.
23 Smith, 2007.
24 Treseder, 1997, cited in Thomas, 2007.
25 Hart, 1992.
26 Ibid.
27 Treseder, 1997.

equally valuable and should not be presented hierarchically because different participation conditions (e.g. different environments and material circumstances) as well as differing pupils' and teachers' personalities require different modes of participation, ranging from the simplest to the most complex.[28] Shier modified Hart's scale[29] and structured a model in which the initial level of participation implies giving pupils an opportunity to express their opinions, whereas the final level means that pupils and teachers share power and responsibility in the decision-making process.[30]

Most levels of pupil participation can be realised by including pupils into 'school life' as well as by introducing participation in the teaching methods. Pupils can be included in various events in the school and other forms of cooperation with the local community (performances, festivals, school open days, etc.), work on projects with other schools or institutions, research at the school level, make decisions related to extracurricular activities in their school, make decisions concerning cooperatives with which pupils are involved, decorate the school's interior and exterior (especially in the context of accommodation services), make decisions concerning health (meals), produce the school's promotional materials, and they can even be included in certain management segments (through pupils' representatives in management bodies).

In the context of Croatian education policy, active participation of pupils in the educational process is guaranteed by the Primary and Secondary School Education Act,[31] which regulates the pupils' right to be informed of all issues affecting them, the right to respect pupils' opinions, the right to pupils' participation in the work of pupils' councils and drafting and implementation of schoolhouse rules, and pupils' right to propose improvement of the educational process and work.

However, in the context of Croatian educational practice, there are insufficient empirical data on the role of pupils and their participation in the implementation of educational policies. Pupils' dissatisfaction with the level of participation and its effectiveness is corroborated by the results of the study on child participation in schools in Croatia conducted by the Office of the Ombudsman for Children in 2017,[32] as well as by the study on pupils' participation in the Croatian school environment conducted by the abovenamed Office within the project 'Evaluation of Legislation, Policy and Practice on Child Participation in the European Union'.[33] The low level of child participation in the decision-making process in schools and local communities is also confirmed by the results of research on the

28 Treseder, 1997, cited in Thomas, 2007.
29 Hart, 1992.
30 Shier, 2001.
31 OG 87/08, 86/0, 92/10, 105/10, 90/11, 16/12, 86/12, 126/12, 94/13, 152/14, 7/17, 68/18, 98/19, 64/20, 151/22, 156/23.
32 Borić *et al.*, 2019.
33 Report on the Work of the Ombudsman for Children, 2014.

opinions and attitudes of children regarding their rights in Croatia conducted by the Office on the 20th anniversary of the Office of the Ombudsman for Children in the Republic of Croatia.[34] In addition, the results of a study on the participation of children with disabilities in education show that pupils do not see themselves as equal partners in the decision-making process and that they do not have many opportunities to express their opinions in school.[35] These results have been confirmed in other studies conducted in Croatia.[36]

2.2. Defining the Best Interest of the Child

The United Nations Convention on the Rights of the Child (hereinafter, the Convention) promotes an approach based on rights and requires a better understanding of children and their life experiences, as well as respect for the child's opinion and autonomy.[37] It introduces changes in the perception of the child because it does not perceive the child as an object but as a subject with rights; the child 'becomes an active and equal partner in making decisions affecting him or her'.[38] Therefore, Hart sees[39] the Convention as a strong indicator of increased social emphasis on participation, autonomy, and the right of the child to self-determination in balance with the protective and educational rights of children.

Parties to the Convention have committed to respect, protect, and enable the realisation of rights contained in the Convention in a way that all rights are ensured in line with the best interest of the child (Article 3); non-discrimination (Article 2); the child's right to life, survival, and development (Article 6); and the right of the child to participate in making decisions affecting him or her (Article 12). These four rights are crucial for the realisation of all other rights flowing from the Convention and because they are considered to be 'fundamental principles and rules of the Convention'.[40] These four principles are an inseparable part of the Convention and must be applied at the implementation and interpretation of all other articles.[41] A comprehensive understanding of the Convention requires the development of an approach based on the rights and participation of all stakeholders, with the aim of realising the physical, psychological, moral, and spiritual integrity of a child and promoting their dignity.[42]

34 Salaj *et al.*, 2023.
35 Report on the Work of the Ombudsman for Children, 2016.
36 Milić and Marojević, 2014; Jeđud Borić *et al.*, 2017.
37 Alderson and Montgomery, 1996.
38 Guran, 2015, p. 11. Translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources are by the author.
39 Hart, 1991.
40 Vučković Šahović, 2015, p. 15.
41 Guran, 2015.
42 Committee on the Rights of the Child, 2013.

There is a special connection between the principle of the best interest of the child and the principle of participation, as child participation is a 'method' used to realise the best interest of the child. It could be said that Article 3 in a certain way improves the functionality of Article 12, highlighting the key role of the child in all decisions affecting him or her.[43] According to Hassan Beshir,[44] the principle of the best interest of the child is an instrument that enables a connection between theory and practice; for that reason, some authors call it 'the Convention's servant'.[45]

The Committee on the Rights of the Child of the United Nations emphasises that 'all rights guaranteed in the Convention are established in line with the best interest of the child'[46] and none of the rights can be endangered by a negative interpretation of the best interest of the child. To ensure a better understanding of the concept of the best interest of the child, the Committee in 2013 adopted General Comment No. 14 (2013) on the child's right to have their best interest taken as a primary consideration,[47] which establishes the framework for assessment and determining the best interest of the child.

The Convention defines the best interest of the child as 'the right of the child to have their best interests assessed and taken into account as a primary consideration in all actions or decisions affecting him or her, both in the public and private sphere'.[48] Simply put, the application of the best interest of the child means that the child is focused on the process of making decisions affecting him or her, that is, that the child's interests have priority over other factors. The best interest of the child depends on the context and needs to be determined in each individual case, taking into consideration the personal situation and needs of the child.

The concept of the best interest of the child is 'a threefold concept encompassing a substantive right, a legal principle and a rule of procedure'.[49] According to the committee's interpretation, the substantive right of this concept refers to the obligation of a country to prioritise an assessment of the best interest of the child over other interests (those of other children, the public, parents, etc.) when making a decision on a certain question affecting a child. The legal principle stipulates that in situations in which one legal provision can be interpreted in more than one way, the interpretation to be chosen is the one that most effectively serves the child's best interest. The rule of procedures for making decisions states that the obligatory phases in the decision-making process comprise the assessment of

43 Committee on the Rights of the Child, 2009, 2013.
44 Hassan Beshir, 2012.
45 Vučković Šahović, Doek and Zermatten, 2012, cited in Vučković Šahović, 2015, p. 15.
46 Committee on the Rights of the Child, 2013, p. 3.
47 General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.
48 Committee on the Rights of the Child, 2013, p. 3.
49 Committee on the Rights of the Child, 2013, p. 4.

the best interest of the child and procedural guarantees. The assessment needs to include an evaluation of the possible impact of a certain decision on the child (positive or negative, short-term or long-term) and requires establishing procedural guarantees, that is, justification given by decision-makers of the way the best interests of the child have been explicitly taken into account.

3. Case Study from the Perspective of the Best Interest of the Child

This section analyses the implementation of the principle of the best interest of the child in a specific case from the Croatian school practice that the Office of the Ombudsman for Children has acted on. The example used for this purpose is described in detail below. It presents the case of a pupil with physical disabilities attending a primary school in the capital of Croatia, Zagreb. The child has a physical disability and uses a wheelchair for movement. Initially, the child was enrolled in school without the support of a teaching assistant; however, soon after the school year began, the child was appointed.

3.1. Case Presentation

In the primary school in question, which for the purposes of this paper shall be named Primary School X, education of pupils with physical disabilities is a common practice. The school's professional services include a pedagogist and a professional assistant (educational rehabilitator) employed part-time. Regarding accessibility, the school meets the criteria in two ways: an entrance ramp and a sanitary facility. However, its entrance ramp is extremely steep, making its use in wheelchairs difficult. The school has one adapted sanitary facility (toilet cubicle) on the ground floor, pursuant to the National Pedagogical Standards for the Primary Education System, which[50] stipulates that the school needs to provide one sanitary facility for pupils with physical disabilities and a changing room where incontinent pupils can wash and change. Facilities not accessible to pupils with physical disabilities include the school canteen, the gymnasium for physical education, and the school playground. The school canteen is not accessible because the door is too narrow for a wheelchair. The pupil can enter the gymnasium only at the external back entrance, which means that they must exit the school, go around the building, and then enter the gymnasium through the back entrance. To get to the outdoor school playground, the pupil has to exit the school building, move along the pedestrian path to reach the ramp located at the back of the school playground, and use the ramp to descend to the playground.

50 OG 63/08, 90/10.

According to the Decision on the Establishment of a Network of Primary and Secondary Schools, Dormitories, and Educational Programmes,[51] schools are listed among schools with spatial adjustments, although out of the six criteria for spatial adjustment (completely adjusted, an elevator, a ramp, a mobile platform, an entrance, and sanitary facilities), the school partially met only two criteria (a ramp and a sanitary facility) and fully only one criterion (an entrance). Therefore, schools do not meet most accessibility criteria according to the Rulebook on the Accessibility of Buildings for Persons with Disabilities and Reduced Mobility.[52]

Difficulties occur when a pupil with physical disabilities enters the upper grades, that is, at the beginning of subject teaching (from the fifth to the eighth grade). School practice is to place pupils attending subject teaching on the first floor and those taking part in class teaching (from first to fourth grade) on the ground floor. This practice places the pupil with physical disabilities in an unfavourable position based on his disability when his class moves to the first floor. According to the provisions of the Anti-Discrimination Act,[53] this seemingly neutral practice presents as indirect discrimination. To ensure accessibility, that is, the transition from the ground floor to the first floor (from fifth grade onwards), the pupil was provided with an electric wheelchair stair climber. The school borrowed aid from the association. However, problems arose when the stair climber broke because neither the school nor the association had funds allocated for maintenance. Consequently, the pupils used the stair climber for only one school year. The stair climber was unsuitable for the pupil in any case because of the pupil's kidney problems and because it did not meet the accessibility criteria of the abovementioned rulebook. To be precise, pursuant to Article 9 of the Rulebook on the Accessibility of Buildings for Persons with Disabilities and Reduced Mobility, a stair climber does not meet the accessibility criteria for overcoming height differences larger than 120 cm, that is from the ground floor to the first floor. Pursuant to the named article, appropriate accessibility elements include an elevator, a vertical lifting platform and an inclined folding platform. The school has failed to make sensible adjustments, as stipulated by the Anti-discrimination Act, since it has not moved the class of pupils with physical disabilities to the ground floor, thus providing them with an equal right to education, until the accessibility criteria stipulated by the named rulebook are met.

The school was of the opinion that it had provided all the preconditions for the education of students with physical disabilities, denying that it had failed to ensure sensible adjustments. It also denied indirect discrimination because, according to the school, all rooms and spaces were available to pupils with physical impairments.

51 OG 70/11, 62/17.
52 OG 15/05, 61/07, 78/13, 153/13.
53 OG 85/08, 112/12.

The pupils' parents complained about communication with the school's headmistress and the pressure they (including the child) faced because of their request to realise the right to equal educational opportunities for the child. Parents of pupils attending lower grades and parents of pupils with physical disabilities, as well as the Parents' Council, addressed an open letter to a number of institutions in which they complained about the discrimination of the non-impaired pupils of the lower and upper grades. Their opinion was that by moving classes (the upper grade attended by pupils with physical disabilities was moved to the ground floor, and one lower grade was moved to the first floor), the rights of their children to appropriate education guaranteed by the Constitution of the Republic of Croatia were breached. As a sign of protest against the relocation of the class, parents of lower-grade pupils decided not to send their children to school for two days.

3.2. Implementation of the Best Interest of the Child for Educational Inclusion of Pupils with Disabilities in Primary Schools

The committee proposes two phases – assessment and determination – for the implementation of the best interest of the child. According to the committee's recommendations, when evaluating a certain measure and determining the best interest of a child, it is necessary to determine the elements relevant to the assessment (1st phase – assessment) and conduct a procedure that ensures legal guarantees and corresponding applicable rights (2nd phase – determination). Strict adherence to these phases is not expected from persons who make decisions about children on a daily basis (e.g. parents, caregivers, professors, teachers, educators), while public authorities and organisations that make decisions affecting children are liable to fully respect them. A multidisciplinary team conducts an assessment of the best interest of the child with obligatory participation of the child, which consists of an evaluation and balancing of all the elements necessary to make a decision in a specific situation. The Committee recommends[54] paying special attention to the following elements: the child's opinion, the child's identity, preservation of the family environment and maintenance of relations, care, protection, and safety for the child, vulnerable situations, the child's right to health, and the child's right to education.

3.2.1. Conflicting Interests: The Child's Interest in Relation to the Interests of Others

In situations where, during the assessment and determination of the best interest of the child, different interests conflict (e.g. the parents' and the child's interests),

54 Committee on the Rights of the Child, 2013.

it is necessary to compare all factors and reach a solution in the best interest of the child. However, this comparison is often challenging. One should keep in mind that the best interest of a child must be prioritised. This means that the child's interests are not just one of the factors but also a priority, and thus, more weight should be given to what is best for the child. The Committee recommends that, in all situations in which there are conflicting interests, the child should be included in the assessment of their best interest, in line with their age and maturity. In General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence, the Committee pointed out that 'an adult's judgment of a child's best interest cannot override the obligation to respect all the child's rights under the Convention'[55] and that persons making decisions have to be aware of the best interest of the child and create conditions to hear his or her opinions.

According to Hammarberg (2008),[56] three types of conflicts of interest can occur: a) when the interests of a child or a group of children are in conflict with the interests of other children, b) when the interests of a child are in conflict with the desires of one or both parents/guardians, and c) when the interests of a child or a group of children are in conflict with social interests (e.g. economic situation in the country).

In the abovenamed example, there are conflicts of interests on four levels: 1) the pupil with disabilities and his class; 2) the pupil with disabilities and the class of pupils attending class teaching (a lower grade); 3) the pupil with disabilities and parents of other pupils; 4) the pupil with disabilities and the inclusive school practice.

The first two levels refer to the first type of conflict according to Hammarberg;[57] the third level belongs to the second type of conflict, in which the child's interests conflict with the parents' interests; and the fourth level belongs to the last type of conflict, in which the best interest of the child is in conflict with inclusive school practice. All the levels are mutually intertwined and should be observed as a whole. In situations in which different interests are in conflict during the assessment and determination of the best interest of the child, it is necessary to compare all factors and reach a solution in the best interest of the child.

The first two levels of conflict of interest present a threat to the best interest of the pupil with physical disabilities because his best interests (remaining on the ground floor) conflict with the interests of lower-grade pupils (relocation to the first floor alongside older pupils), as well as with the interests of his peers (quality of teaching because, for instance, they do not have lessons in practical training classrooms). In such situations, it is necessary to balance various factors and ensure that no children are in an unfavourable position, while paying particular attention

55 Committee on the Rights of the Child, 2011, p. 23.
56 Hammarberg, 2008.
57 Ibid.

to children belonging to vulnerable groups (e.g. children with disabilities, children belonging to national minorities, asylum-seeking children, etc.). Simultaneously, it is necessary to carefully consider the interests of all stakeholders and compare the levels of benefits and harm to reach an appropriate compromise.

Pupils with disabilities have the right to education just as all other pupils of the school, and the school – that is, the system as a whole – is responsible for enabling them to realise that right. In the Republic of Croatia, only a few schools have fully adjusted for children with physical disabilities. However, it would be incorrect to claim that a lack of complete adjustment prevents the realisation of the right to education for children with disabilities. An inclusive environment must be flexible enough to satisfy the needs of various groups of children. In addition to human resources, the successful implementation of inclusion[58] requires the school's material resources. Material resources included the removal of architectural barriers, didactic and methodological equipment, and teaching aids for children with disabilities. Positive examples from practice prove that even with limited material resources, but with appropriate awareness and significant human resources, it is possible to realise quality inclusion. However, this should not be used by the state and the school founders as a cry for not realising their obligations towards children with disabilities and for failing to provide them with the support they need: accessibility to school and all its facilities, adjustment of the teaching process, teaching assistants, and so on.

The headmistress, as the person in charge of managing the school, was faced with a series of dilemmas in the process of making a decision on the continuation of education of the pupil in question and his class at the transition to subject teaching: whose responsibilities are adjustments for the pupil, how to plan and implement those adjustments, who will provide assistance, is it in the best interest of all other pupils, what is to be changed in the school, should parents be included in the decision-making, and how to establish cooperation with dissatisfied parents? Because of the nature of their jobs, headmasters are responsible for a large number of stakeholders: pupils, their parents, the institution they work for, teachers and professors, and professional associates. They are also liable to their founders (cities or counties) and the Ministry of Science and Education. Considering multiple responsibilities can help headmasters find a solution and contemplate available options and possibilities for resolving conflicts.[59] An intentional or unintentional disregard for ethical and professional responsibilities and a breach of children's rights violates their integrity. Understanding the importance of integrity requires headmasters, as decision-makers in their schools, to focus on their own professional behaviour because their behaviour significantly affects the quality of pupils' education. Furthermore, it is not appropriate for them to place

58 Ainscow, 1999.
59 Drakulić, 2010.

their interests and protect their positions above those of schools and pupils. Self-deception and refusal to view the situation objectively, thereby generating the attitude that there is general responsibility for the case, is contrary to the application of standardised ethical and professional principles of headmasters and educational workers as a whole.

The inclusion of a child in a school, pursuant to the principle of the best interest of the child, has to be based not only on the child's well-being but also on the well-being of all other children at that school. Therefore, inclusion requires specific preconditions. It should not turn into a mere placement of a child with disabilities together with other children without adequate adjustments to their actual needs; the needs of the whole class must also be kept in view.

According to Galonja, the concept of the best interest of the child

> enables and directs towards considering the position of each child in a specific context in which the child finds himself or herself, and it imposes creating a clear procedural framework which is to ensure that key factors are taken into consideration during the assessment of age, gender, maturity and experience of the child, presence/lack of care provided by parents and/or guardians, circumstances under which the child develops, as well as circumstances under which protection programmes take place.[60]

The above definition indicates the dynamic nature and broadness of this concept, those being its advantages because 'the concept is adjustable, in relation to time and space, and cultural and socio-economic specifics of various legal systems'.[61] Owing to its flexibility, 'the concept can offer solutions for individual situations and improve knowledge on child development'.[62]

The third level of conflict is the clash between the interests of the pupil with physical disabilities and the parents of his peers from his class, as well as the parents of pupils of the lower grade who needed to move to the first floor. A practical example attests to the fact that the school did not include pupils or parents in its decision-making process. Parents of the peers were recalcitrant because they considered that the quality of teaching for their children would be decreased if they stayed on the ground floor, while the parents of the children of the lower grade considered that their children would not be safe on the first floor alongside 'big pupils'. Both groups of parents expressed reasonable doubts about the safety of their children and the quality of teaching, and the school did not inform them about what it would undertake to reduce their fears and doubts or to eventually dispel those doubts. A possible solution for increasing the safety

60 Galonja, 2015, p. 21.
61 Hassan Beshir, 2012, p. 11.
62 Committee on the Rights of the Child, 2013, p. 9.

of children on the first floor is the introduction of teacher patrols during breaks. The fear of decreased quality of teaching because pupils do not have access to practical training classrooms on the ground floor is entirely unjustified because there is the option of occasionally transporting the child to the first floor of practical training classrooms using a stair climber. In addition, teachers could sometimes, when practicable, bring the needed equipment to the classroom on the ground floor and hold lessons there.

A significant precondition for inclusion was the attitude of the headmaster[63] and teachers.[64] However, the creation of an inclusive environment is affected by the attitudes of the parents of children with disabilities and their peers.[65] Openness in communication when creating activities is important for all participants in the educational process (headmasters, professional assistants, educational workers, pupils, and parents). A collaborative rapport between the school environment and parents is extremely important for a child's development and learning, and it is reflected in the way educational workers include families in the learning process and development of their children, as well as in the life of the class and school. Promoting an effective interaction between families, the school, and the community facilitates the understanding of a common responsibility for education and the future of children.[66]

The fourth level of conflict is the conflict between the best interest of the child with physical disabilities and school practice, that is, the inclusive education of children with disabilities. At this level of conflict, the problem is often the unresolved issue of resources. Costs for ensuring the best interest of the child can often be significant, which is a hindering factor in less developed countries (e.g. expensive health treatments for the child and architectural adjustments in institutions). Although such decisions will be painful and extremely difficult, it is necessary to look for the best possible solution within the set framework and financial possibilities at a country's disposal, while still respecting the principle that the best interests of the child have priority.

The present case shows that the school, in the spirit of an inclusive ideology, enrolled students with physical disabilities. Taking into consideration the type of the pupil's disabilities (physical impairment) and the use of a wheelchair, complete and quality inclusion also requires meeting certain objective prerequisites for such inclusion, such as accessibility of the school. The school, which belongs to the network of primary and secondary schools, dormitories, and educational programs in the city of Zagreb, has met two accessibility criteria. The issue of

63 Larivee and Cook, 1979, cited in Kiš-Glavaš *et al.*, 2003.

64 Lewis and Doorlag, 1987, Mavrin, Cavor and Levandovski, 1991; Levin 1992; Villa and Thousand, 1992; Thousand *et al.*, 1994; Mustaü and Viciü, 1996; cited in Kiš-Glavaš *et al.*, 1997.

65 Oberman-Babić, 1996.

66 Livazović, Alispahić and Terović, 2010.

facilities which are not accessible, such as the canteen and the gymnasium, was resolved in the way that the pupil brought food into the classroom or had to exit the school in order to reach the gymnasium, which is not pleasant in rainy and cold weather. Initially, such difficulties were successfully resolved with the compromise between the pupil, his parents, and the school. However, the problem arose when the pupils started attending subject teaching because, in line with the existing practice of the school, the upper grades were located on the first floor. The child had been attending the school for four years, and the management of the school was aware of the upcoming problem, but the only thing they did was rent a stair climber from an association. The extent to which this school promotes an inclusive culture is questionable because, although it shows declarative acceptance of inclusive education, problems arise when it is time to take a particular action or initiative. Instead, the school invites competent institutions to resolve the problem, considering them liable to find solutions. Although the school enrolled pupils, it did not consider the adaptations that would enable quality education in a timely manner. According to the Convention on the Rights of Persons with Disabilities (2007), reasonable adaptation refers to necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden on an institution (Article 2). The provision of a stair climber shows that adaptation was considered; however, the solution was not well understood. The decision-making process did not take into consideration the opinions of the parents who had been emphasising the pupil's additional health problems with the kidneys, to which the pupil has to often use sanitary facilities. The school has one sanitary facility on the ground floor. Pupils' need to go to the bathroom results in their absence from lessons and missing certain teaching content on a daily basis. For the school, this was insufficient for making an exception and leaving the class on the ground floor. This solution was the least financially demanding for the school and its founder (the city), especially if it was taken into consideration that, owing to frequent use, the stair climber broke after a very short time and had to be serviced. However, the school did not allocate funds for this purpose in its budget, and the stair climber was soon put out of use.

According to Ivančić and Stančić[67] an inclusion-oriented headmaster cooperates with school professionals and parents in order to be able to comprehend various viewpoints and perspectives and ensure psychological, pedagogical, organisational, didactic and methodological as well as social preconditions for inclusive activities in the school. In finding appropriate modalities of work organisation, the headmaster also cooperates with the local community as well as professional and administrative institutions. Such a headmaster has a positive viewpoint on the involvement of non-governmental organisations, cultural institutions, and local companies in the work of the school and sees

67 Ivančić and Stančić, 2013.

them as facilitators in the process of removing various barriers.[68] In addition, an inclusion-oriented headmaster undertakes necessary activities for the evaluation of inclusive processes in the school to increase the quality of practice and recognise priorities in their activities.

3.2.2. The Best Interest of the Child and Child Participation

Article 12 of the Convention gives children the right to express their opinions regarding all decisions affecting them. Montgomery[69] describes child participation as the transfer of legal power from adults (most commonly, parents) to their children. To assess and determine the best interest of children, it is necessary to create conditions in which their voices can be heard. However, a child's right to participate in decision-making does not mean that the child can take full responsibility for decision-making. The Convention requires child participation, discussions with children, consultations in the decision-making process, and not authorising the child to make decisions. This responsibility lies with the adults, and children can choose to what extent and in what way they participate in the decision-making process.[70] Creating conditions for child participation consists in including the child in the decision-making process, providing him or her with information, answering all questions, hearing their wishes and needs in a particular situation, understanding their feelings, and providing them with all the necessary support. If the decision maker does not include the child in the process of determining the best interest of the child, a decision will be made that assesses the best interest of the child from the perspective of adults, that is, in line with adults' opinions on what is best for the child.

In the decision-making process in the school in the above case, child participation was completely absent. Unfortunately, this is not an exception because, in Croatia, adults tend to discuss what is best for the child in all areas of the child's life (family, education, health, free time, play, etc.). In the abovenamed case, the school should have included children in the decision-making process. Their opinions were important. Although sometimes their wishes are not considered, it is important to give pupils the opportunity to say what they think about a certain situation and discuss further activities with them. Thus, future problems can be predicted, and pupils' fears can be heard, which can help schools better plan their activities and initiatives. When a decision is made without informing or including children in a timely fashion, without risk assessment, and without the proposal of measures for risk reduction, opposition to the decision can occur. If we want to raise children as autonomous and active persons, as individuals who see themselves as active

68 Ivančić and Stančić, 2013.
69 Montgomery, 1992.
70 Alderson and Montgomery, 1996; Alderson, 2000.

participants in the change process and not as passive victims of changes happening around them, then we need to create such environments. Too often, adults create an environment in which a child is in the position of an object, in which the adult appears as a dominant subject or a subject who knows what is best for the child without consulting the child about it. The children from the school in question did not have the choice of expressing their opinions; instead, they became passive observers who were used by their parents to fight their battles. Moreover, the school did not have adequate mechanisms to conduct educational inclusion for pupils with disabilities. Although raising awareness and education of all stakeholders in this story is a long process, and changing deeply rooted viewpoints and prejudices is sometimes a very difficult mission, it does not mean that attempts to do so should be discarded.

4. Conclusions

All rights as defined by the Convention are equally important, interdependent, interrelated, universal, and inseparable. The best interest of the child is simultaneously included in the rights and principles of the Convention. Parties to the Convention are committed to providing full and efficient realisation of rights determined within the Convention to each child. In relation to the best interest of the child, this means that the countries which are parties to the Convention must always prioritise the best interest of the child in all activities related to children, regardless of whether they are conducted by state, public, private, or civil society organisations.

The presented case reveals inadequate school interventions and inconsistencies that occur within the process of inclusive education which are not in line with the best interest of the child: lack of understanding of adjustments for children with disabilities; inadequate capacities and expertise of school workers; poor communication with parents; insufficient provision of information on school's decisions to parents; lack of information flow between the headmaster and parents; discrimination of the pupil with disabilities; presenting the inclusion as an adjustment of the entire school to one child (distorted image of inclusion); the unsupportive attitude of the headmistress is mirrored in the school workers as well; requiring from 'someone else' (the founder) to resolve the inclusion difficulties; disregard and misinterpretation of the law and other regulations related to inclusive education and child rights; insufficient school initiative in making adjustments and finding a solution for technical difficulties; a lack of contact with other schools that have experience with inclusion, especially those that include children with physical disabilities; passive support to an intolerant attitude towards accepting children with disabilities; negative perception of

inclusion, inclusion as a 'forceful' placing of a child with disabilities in a class; unpreparedness of the school for inclusion; and the failure to include children in the decision-making process in the school.

The principle of the best interest of the child must be incorporated into the decision-making process in individual cases as well as in the process of shaping policies related to children. Facts and information on specific cases should be gathered by educated professionals with the support of a multidisciplinary team, and decisions regarding issues related to children should be resolved within the shortest possible time. The decisions need to be questioned at certain time intervals, and mechanisms for appeals and reviews of decisions relating to children should be established if they have not been conducted in line with the abovementioned principle of the best interest of the child. To realise the successful application of the principle of the best interest of the child in the process of inclusive education for children with disabilities, it is necessary to invest more effort into the education of adults. Such an education would result in the development of practical skills for listening and communicating with children. They would also master the methodology for assessment and determining the best interest of the child and learn about the process of systematic analysis of the consequences of recommended activities, that is, decisions made for a child or a group of children with disabilities.

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The Right of Children Belonging to a Minority to Be Educated in Their Language and Script in the Republic of Croatia

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Abstract. The right to education is indispensable to advancing human rights in a democratic society and is essential for enabling an individual to live a dignified life. Language is central to the identity of linguistic minorities and is a very important means of communication in society. Language issues are often the source of claims of discrimination in education. In the Republic of Croatia, children belonging to national minorities have a guaranteed right to be educated in their mother tongue. However, there are gaps between the standards set by the normative framework and practical reality. This study aims to analyse the approach of the Croatian legal order to the issue of education of children in the language and script of their national minority. Then, this study seeks to identify the obstacles that in practice hinder the full realisation of this right and ultimately to propose *de lege ferenda* measures that can contribute to the removal of existing barriers.

Keywords: Croatia, children, education, language, national minority

1. Introduction

The understanding of the right to education as being of essential importance for enabling an individual to live with dignity[1] and an effective antidote against discrimination, ignorance, and prejudice is universally accepted.[2] Similarly, the fundamental role of language in self-conception and building identity and personality is widely recognised. Linguistic identity is often the key to

1 Hodgkin and Newell, 2007, p. 411.

2 Committee on the Rights of the Child, General comment No. 1 (2001), Article 29 (1): The aims of education, CRC/GC/2001/1, 17 April 2001, para 6. All General comments of the Committee on the Rights of the Child cited as sources in this study are available at United Nations Human Rights, Office of the High Commissioner, no date.

cultural identity and preservation of communities,[3] and thus the efforts of the international community aiming at the protection of linguistic minorities are not surprising. The Republic of Croatia is a multinational country with a long history of multilingualism,[4] during which the Croatian language was sometimes a minority language. The process of the disintegration of Yugoslavia, the war and its consequences hindered for a long time more serious efforts towards the normalisation of relations between national minorities.

It was not until the beginning of the 2000s that more systematic efforts were made to build a comprehensive legal framework for the protection of national minorities. In this process, Croatia has been engaging all levels of the domestic legal order, starting with the Constitution of the Republic of Croatia[5] (Constitution), which established Croatia as the nation-state of the Croatian nation and the state of the members of its 22 national minority groups which are listed by name in the preamble: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians, and others who are its citizens.

Numerous studies have shown that the education of minority children in their own language results in better academic performance and lower dropout rates. In addition, pupils must always have the opportunity of learning the official language. Bilingualism has many advantages,[6] and it has been found that the combination of quality teaching in both minority and the official language is more cost-effective in the long term, improves levels of literacy and fluency in both languages, and leads to greater family and community involvement and support.[7]

This study aims to analyse the overall approach of the Croatian legal order towards the right of children belonging to minorities to be educated in their mother tongue as well as the practical reality of exercising that right. This research should reveal which issues represent the most serious barriers for children belonging to minorities in education and what measures can be implemented *de lege ferenda* to achieve the realisation of their right to be educated in their own language to the fullest extent possible.

3 Zhang, 2021, p. 341.

4 The topic of this study does not allow for further discussion on this matter. Succinct overviews can be found in, for example, Babić and Škiljan, 2019; Lewis *et al.*, 2020, pp. 288–292.

5 Ustav Republike Hrvatske (Constitution of the Republic of Croatia), Narodne novine (Official Gazette), no. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/2014.

6 Marinac *et al.*, 2021, p. 323.

7 United Nations Human Rights, Office of the High Commissioner, 2020, paras. 31, 47-48, 50, 53, 65.

2. Protection of Children Belonging to National Minorities in the Legal Order of the Republic of Croatia

2.1. Fundamental Principles Underlying the Protection of Minority Children and Their Right to Be Educated in Their Own Language

The Constitution[8] places equal rights and national equality among the fundamental values of the constitutional order of the Republic of Croatia (Article 3). Regardless of language and national origin, all persons are guaranteed fundamental rights and freedoms (Article 14). In addition, members of national minorities are explicitly guaranteed equal rights, freedom to express their national affiliation, to use their language and script, and to exercise cultural autonomy (Article 15). The Croatian language and the Latin script are in official use, but under conditions specified by law, in individual local administrative units (precincts) another language and script may be introduced in official use in addition to the Croatian (Article 12).

Basic principles upon which the Croatian education system is built are also established in the Constitution, most notably by Article 65, which proclaims that education is accessible to all Croatian citizens under the same conditions and in accordance with their abilities; it provides for free compulsory (primary) education. The education system in Croatia includes four stages: pre-school education, primary education, secondary education, and higher[9] education (university and professional studies).

The Constitutional Act on the Rights of National Minorities[10] established the obligation of the Republic of Croatia to provide education in the languages and scripts of its national minorities and ensure their cultural autonomy as well as access to the media and public information services in their language and script (articles 7 and 11).[11]

Furthermore, Croatia is a state party to many international instruments on human rights, including those that relate specifically to children as well as minorities,

8 Ustav Republike Hrvatske.

9 This study focuses on children belonging to national minorities, that is, persons up to the age of 18 years. Therefore, we do not deal with the rights of adult members of minorities in the context of higher education.

10 Ustavni zakon o pravima nacionalnih manjina (Constitutional Act on the Rights of National Minorities), Narodne novine, no. 155/2002, 47/2010, 80/2010, 93/2011.

11 The relevant provisions of the Constitutional Act on the Rights of National Minorities addressing the issue of education in the language and script of the minority are repeated and further elaborated in the Act on Education in the Language and Script of National Minorities and the national pedagogical standards, which are analysed *infra*.

and those documents form part of the Croatian legal order.[12] The most important binding international agreement on children's rights is the Convention on the Rights of the Child[13] (CRC), which obliges Croatia to respect and ensure the rights outlined in this document to each child within its jurisdiction (hence, regardless of the child's citizenship) without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's language, ethnic or national origin (Article 2). The right of non-discrimination is an absolute right,[14] and this element has to underlie all actions aiming at children's welfare in the broadest sense. Assessing the child's best interests, which has to be taken as a primary consideration in all actions concerning children (Article 3), is a complex activity that should be undertaken in the light of the child's characteristics, including belonging to a minority group as well as the cultural context in which the child lives. An important factor to consider is also the child's situation of vulnerability, and being a member of a minority group is considered a characteristic that puts the child in such a situation.[15]

The provisions of the CRC with explicit references to children belonging to minorities can be regarded as an elaboration of the non-discrimination principle in a way that resembles what is sometimes called positive discrimination or affirmative action. Namely, under Article 17, states should take actions with a view to encourage mass media to pay special attention to the linguistic needs of children who belong to minority groups.[16] Setting 'equal opportunities' as a basis for the realisation of the right to education as enshrined in Article 28 reflects that many children suffer discrimination in access to education, and one of the groups especially affected includes children belonging to minorities.[17] Complementary to the right to education are the aims of education elaborated in Article 29, including the development of respect for human rights and fundamental freedoms, for the child's cultural identity, language, and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.

For children belonging to ethnic or other minorities, Article 30 is the core CRC provision,[18] as it establishes their right not to be denied the enjoyment

12 By virtue of Article 141 of the Constitution, international treaties that have been concluded and ratified in accordance with the Constitution and published, and which are in force, form part of the internal legal order of the Republic of Croatia and have primacy over domestic law.

13 Konvencija o pravima djeteta (Convention on the Rights of the Child), Službeni list SFRJ, no. 15/1990, Narodne novine – Međunarodni ugovori, no. 12/1993, 20/1997, 4/1998, 13/1998.

14 Abramson, 2008, p. 40.

15 Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, paras. 48, 75.

16 Doek, 2009, pp. 282, 286–287.

17 Hodgkin and Newell, 2007, note 1, pp. 407, 416.

18 Doek, 2009, p. 288.

and practice of their own culture and the use of their language. In the course of drafting the CRC, proposals were made to include the explicit recognition of the right of the child to be educated in the language of his or her minority in Article 30, but they remained unsuccessful.[19] Nevertheless, Article 30 is important because significant frustration with the child's ability to use his or her minority language carries the inherent danger of preventing communication first with family members[20] but also with other members of the minority group who do not speak the majority language.

The CRC does not provide for the definition of 'minority', but the term is rather broadly interpreted as encompassing children of ethnic, linguistic, and national minorities.[21] Furthermore, children belonging to minorities are treated as 'children in vulnerable situations', that is, particularly susceptible to violations of their rights[22] and, consequently, requiring special attention. For example, states are expected to ensure that the right of the child to express his or her views freely in all matters affecting him or her (Article 12) is implemented for children experiencing difficulties in making their views heard, including minorities and other children who do not speak the majority language.[23]

Within the human rights protection system, as established by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms[24] (European Convention on Human Rights, ECHR), the right to education is guaranteed to everyone under Article 2 of Protocol no. 1 to the ECHR, which the European Court of Human Rights (the Court) interprets as the right to access an existing educational system, rather than a right to be taught in the language of one's choice.[25] However, if the state assumed responsibility for the provision of primary education in a certain language, the failure to make continuing provision for it at the secondary level could be considered as a denial of the substance of the right to education.[26] Deciding on the issue of segregation of

19 Some states expressed unwillingness regarding the duties such a provision would impose on them. For details on the process of drafting Article 30 of the CRC, see Office of the United Nations High Commissioner for Human Rights, 2007.

20 Zhang, 2021, p. 349.

21 Doek, 2009, p. 283.

22 See, for example, Committee on the Rights of the Child, General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4), CRC/C/GC/19, 20 July 2016, para. 3; Committee on the Rights of the Child, op. cit., note 15, para. 75; Committee on the Rights of the Child, General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, paras. 43, 72.

23 Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 21.

24 Konvencija za zaštitu ljudskih prava i temeljnih sloboda (Convention for the Protection of Human Rights and Fundamental Freedoms), Narodne novine – Međunarodni ugovori, no. 18/1997, 6/1999, 8/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13/2017.

25 White and Ovey, 2010, pp. 507–508.

26 Cyprus v. Turkey, Application no. 25781/94, 10 May 2001, paras. 273–280.

Roma children in education, the Court emphasised the state's obligation to protect the identity and lifestyle of children belonging to a minority group as their right to education was of paramount importance.[27] The Court's decisions in this area are welcome because they recognise the vulnerability of children belonging to ethnic minorities arising from their status as children and as members of a marginalised social group, as well as from their special educational needs.[28] However, some argue that the Court generally overlooks Roma children's status as rights-holders and focuses almost exclusively on their need for special protection.[29]

The Council of Europe's commitment to the protection of national minorities is most prominently expressed by two instruments addressing minorities' rights – the Framework Convention for the Protection of National Minorities[30] (the Framework Convention) and the European Charter for Regional or Minority Languages[31] (ECRML).

The Framework Convention stresses, inter alia, the need to preserve the essential elements of the minorities' identities, including their language (Article 5) and the states parties' duty to take measures in the fields of education[32] to foster knowledge of the culture, history, and language of their national minorities (Article 12). In areas inhabited by members of national minorities traditionally or in substantial numbers, as far as possible, state parties must endeavour to ensure that persons belonging to those minorities have adequate opportunities for being taught the minority language (Article 14).

The ECRML is the only legally binding international treaty dedicated specifically to the protection of the rights of linguistic minorities. It incorporates positive obligations of state parties in the field of education, including making available pre-school, primary, and secondary education in the relevant regional or minority languages, at least to pupils whose families so request, and whose number is considered sufficient; furthermore, the states should provide adequate training of teachers required to implement education in minority languages (Article 8).

27 D.H. v. the Czech Republic, Application no. 57325/00, 13 November 2007, paras. 181, 196–210.

28 Fenton-Glynn, 2021.

29 For details, see Peleg, 2018.

30 Zakon o potvrđivanju Okvirne konvencije za zaštitu nacionalnih manjina (Act on Ratification of the Framework Convention for the Protection of National Minorities), Narodne novine – Međunarodni ugovori, no. 14/1997.

31 Zakon o potvrđivanju Europske povelje o regionalnim ili manjinskim jezicima (Act on Ratification of the European Charter for Regional or Minority Languages), Narodne novine – Međunarodni ugovori, no. 18/1997.

32 A detailed overview of the opinions of the Advisory Committee, the supervisory body for the Framework Convention, concerning the rights of minority children in education is provided in Roter, 2015.

2.2. The Croatian Legislative Approach to the Education of Minority Children in Their Mother Tongue

Education in the language and script of national minorities is an integral part of the Croatian education system. The Act on Education in the Language and Script of National Minorities[33] guarantees education in the language and script of the given minority in pre-school institutions, primary and secondary schools, and other educational institutions, as well as through other forms of education (e.g. seminars, summer and winter schools) (Article 2). Upbringing and education in the language and script of the national minority can be carried out in an educational institution, in an educational group, or in a class department (in a school with classes in the language and script of the national minority or a school with classes in the Croatian language and script), which can be established for a smaller number of children/pupils than the number prescribed for those with instruction in the Croatian language (Article 3).[34] Educational work is to be carried out by teachers belonging to the national minority who have a complete command of the language of that minority or by teachers who are not members of the minority but have a complete command of its language and script (Article 10).

Besides the general part, education programmes for classes in the language and script of the national minority must also incorporate content related to the uniqueness of the minority (mother tongue, literature, history, geography, and cultural creativity) (Article 6). Pupils enrolled in classes taught in their minority's language also have to learn the Croatian language and the Latin script (Article 8). Publication of textbooks for education in national minority languages is co-financed utilizing the state budget, but schools can also use textbooks from the native countries (Articles 15 and 16).[35]

2.2.1. Pre-school Education of Children Belonging to National Minorities

Pre-school education, following the Pre-school Education Act,[36] is intended for children from the age of 6 months until they start primary school (Article 3). Kindergartens carry out a regular programme of upbringing and education as well as the programme in the language and script of the national minority (articles 3

33 Zakon o odgoju i obrazovanju na jeziku i pismu nacionalnih manjina (Act on Education in the Language and Script of National Minorities), Narodne novine, no. 51/2000, 56/2000.

34 The same rule is stated in the Primary Education Standard, see note 43, Articles 6 and 8, and Secondary Education Standard, see note 44, Articles 3 and 4.

35 The main purpose of this provision is to ensure that the price of textbooks is the same for the parents of children who are educated in national minority languages as the price of textbooks for the parents of children who are educated in Croatian. For details, see Government of the Republic of Croatia, 2023, pp. 100–101.

36 Zakon o predškolskom odgoju i obrazovanju (Pre-school Education Act), Narodne novine, no. 10/1997, 107/2007, 94/2013, 98/2019, 57/2022, 101/2023, 145/2023.

and 15.a). Under Article 15 of the National Pedagogical Standard for Pre-school Education[37] (Pre-school Education Standard), pre-school education programmes for children belonging to minorities can be carried out entirely in the language and script of a national minority or bilingually. These programmes are implemented in educational groups of a certain minority and pre-school institutions established for children belonging to national minorities. The programme in the minority language has to be partly conducted in the Croatian language (minimum 10 hours per week per educational group), while bilingual programmes are equally implemented in the Croatian language and the mother tongue of the national minority.

All children have to attend the pre-school programme, a mandatory and free-of-charge programme of educational work with children, in the year before starting primary school (Pre-school Education Act, Article 23.a). Its fundamental purpose is to develop skills, habits, and competencies to help children adapt to changed living conditions and development in the school environment. Competencies that every child should acquire and/or improve during the pre-school programme include communication in the mother tongue, basic communication in foreign languages, and cultural awareness and expression.[38] This is especially important for minority children who are not already attending kindergarten, which is often the case with Roma children.

Pre-school education currently caters for children from Serbian, Hungarian, Italian, and Czech national minorities.[39] Recently, it was recommended that Croatia[40] provide pre-school education in Ruthenian, Slovakian, Slovenian, and Ukrainian, which have not been used at that level of education before, as well as introduce pre-school education in German and Bayash Romani in additional municipalities or counties.[41]

2.2.2. Education in Minority Languages and Scripts in Primary and Secondary Schools

Primary and secondary education in Croatia is regulated by the Primary and Secondary School Education Act.[42] Primary education is compulsory, lasts for 8

37 Državni pedagoški standard predškolskog odgoja i naobrazbe (National Pedagogical Standard for Pre-school Education), Narodne novine, no. 63/2008, 90/2010, 57/2022.

38 For details on the aims, content, and duration of the pre-school programme, refer to: Pravilnik o sadržaju i trajanju programa predškole (Ordinance on the content and duration of pre-school programme), Narodne novine, no. 107/2014, 57/2022.

39 Government of the Republic of Croatia, 2019, p. 42.

40 Recommendations were issued in the context of the ECRML monitoring process. Under articles 15–17 of the ECRML, the Committee of Experts is the body in charge of monitoring the implementation of this instrument.

41 Council of Europe, 2022.

42 Zakon o odgoju i obrazovanju u osnovnoj i srednjoj školi (Primary and Secondary School Education Act), Narodne novine, no. 87/2008, 86/2009, 92/2010, 105/2010, 90/2011, 5/2012,

years, and is free for all children from 6 to 15 years of age (articles 4 and 12). Programmes implemented by primary schools can be regular and special, the latter including programmes in the languages and scripts of national minorities. Basic aims of education include developing pupils' awareness of national belonging, preservation of historical and cultural heritage and national identity, educating pupils following human rights and children's rights, training them for life in a multicultural world and for respect for diversity and tolerance (articles 4 and 11).

The National Pedagogical Standard for Primary Education[43] (Primary Education Standard) and the National Pedagogical Standard for Secondary Education[44] (Secondary Education Standard) regulate three basic models of organising and conducting classes for pupils belonging to national minorities in primary and secondary schools in Croatia as well as some special forms of teaching.

All classes in Model A are taught in the language and script of the national minority with the obligatory learning of the Croatian language in the same number of hours. Pupils also have the right and obligation to learn additional content important for their particular minority community. This model of teaching is mainly implemented in special schools in which all classes are taught in the minority language, but it can also be carried out in special departments or educational groups in institutions with classes in the Croatian language.[45]

Model B provides for bilingual teaching in such a way that the natural science group of subjects is taught in Croatian, while the social group of subjects is taught in the minority language. This model of teaching is conducted in separate departments in schools with classes in the Croatian language.[46]

For pupils attending Model C, classes are conducted in the Croatian language with an addition of 2 to 5 school hours per week taught in the minority language and dedicated to learning the language and literature of the national minority, geography, history, music, and visual arts. Instructions according to Model C in primary schools are organised in special educational groups.[47]

Currently, under Model A, primary and secondary education in Croatia is provided for Italian, Serbian, and Hungarian national minorities, and only primary education for the Czech minority group. Under Model B, Czech, Hungarian, and Serbian minorities are educated in primary schools and the Czech

16/2012, 86/2012, 94/2013, 152/2014, 7/2017, 68/2018, 98/2019, 64/2020, 133/2020, 151/2022, 155/2023, 156/2023.

43 Državni pedagoški standard osnovnoškolskog sustava odgoja i obrazovanja (Primary Education Standard), Narodne novine, no. 63/2008, 90/2010.

44 Državni pedagoški standard srednjoškolskog sustava odgoja i obrazovanja (Secondary Education Standard), Narodne novine, no. 63/2008, 90/2010.

45 Article 30 of the Primary Education Standard and Article 43 of the Secondary Education Standard.

46 Ibid.

47 Article 11 para. 3 and Article 30 of the Primary Education Standard and articles 4, 5, and 43 of the Secondary Education Standard.

minority in secondary schools. Under Model C, primary education is provided for Albanian, Czech, Serbian, Slovak, Slovenian, Hungarian, Macedonian, German and Austrian, Ukrainian, Rusyn, Russian, Jewish, and Polish minorities, while secondary education is provided for Czech, Macedonian, Hungarian, Russian, Slovak, Slovenian, Serbian, and Italian minorities.[48]

Moreover, special forms of education (e.g. summer schools) about national minority languages and cultures are implemented in collaboration with national minority associations with a view to the preservation of the ethnic, cultural, and linguistic identity of pupils and to enable them to acquire knowledge and skills outside of the standard educational system. Preference in participation in such programmes is given to those pupils who, owing to the objective reason of the location of their residence, are unable to participate in the otherwise established educational models (A, B, and C). Approximately 650 pupils belonging to national minorities participate in summer schools every year.[49]

It was recommended that Croatia make education in Italian (Model A) available in additional municipalities, to provide for Model C teaching of German, Bayash Romani, and Istro-Romanian at the primary level in additional municipalities, and to introduce the teaching of Ukrainian in secondary education. It was observed that the relevant authorities are in principle willing to comply, but the main obstacle is the lack of adequately trained teachers.[50]

In the 2021/2022 school year, education in primary and secondary schools in national minority languages and scripts under all models (A, B, and C) included a total of 8,349 pupils in 241 educational institutions,[51] in 1,001 classes/groups with 1,298 teachers.[52]

Model A included 3,570 pupils in primary schools and 1,074 pupils in secondary schools; Model B is the least represented, with only 51 pupils (45 in primary schools, and 6 in one secondary school); classes under Model C in primary education were attended by 3,368 pupils and 286 pupils in secondary education.[53] The literature shows that in the period between the school years 2003/2004 and 2019/2020, there is a trend of an increasing number of children belonging to national minorities included in the pre-school programme (by 34.7%), as well as of children included in primary school education (A, B, and C) by 6.2%. In the same period, the total number of pupils enrolled in the secondary

48 Government of the Republic of Croatia, 2023, p. 90.
49 Id., p. 100.
50 Council of Europe, 2022, note 41.
51 The list of schools teaching in the languages and scripts of national minorities in the 2021/2022 school year is available at: https://gov.hr/UserDocsImages/Dokumenti/Popis%20%C5%A1kola%20_modeli_%20ABC_2021_%202022.pdf (Accessed: 28 January 2024).
52 Government of the Republic of Croatia, 2023, pp. 90–94.
53 Ibid.

school education programme in the language and script of the national minority (A, B, and C) decreased by 24.9%.[54]

During 2019 and 2020, new curricula[55] were developed for instruction in the languages and scripts of national minorities: the Czech language (Models A and C), the Hungarian language (Models A and C), the Slovak language and culture (Model C), the Serbian language (Models A and Model C), and the Italian language (Model A). Moreover, in 2020, the Curriculum for the Course Subject Roma National Minority Language and Culture in primary and secondary schools (Model C) was adopted, whereby the Roma national minority has been integrated into the education system for the first time, and learning their mother tongue has been made possible, equally for both modules (Bayash and Romani ćhib).[56]

3. Disparities between Normative Expectations and Everyday Reality Experienced by Children Belonging to National Minorities in the Croatian Education System

3.1. General State of Affairs

An in-depth examination reveals that, with regard to providing children with education in the language and script of the national minority they belong to, the Croatian education system faces certain challenges making the practical state of affairs somewhat different from the picture one would imagine by looking solely at the relevant pieces of legislation.

Since the adoption of the Anti-Discrimination Act[57] in 2008, the majority of grievances submitted to the Ombudsman for Children about the discrimination of children referred to the area of education.[58] Additionally, the education system is continually the most pronounced area of violation of the rights of children

54 For details, refer to Bježančević, 2023.

55 Pursuant to Article 6 of the Act on the Education in National Minority Languages and Scripts, the curricula for instruction under Models A, B, and C are adopted by the Ministry of Science and Education after receiving opinions from minority associations.

56 Government of the Republic of Croatia, 2023, p. 86.

57 Zakon o suzbijanju diskriminacije (Anti-Discrimination Act), Narodne novine, no. 85/2008, 112/2012.

58 Pravobranitelj za djecu (Ombudsman for Children), Izvješće o radu pravobraniteljice za djecu 2022, Zagreb, 2023, p. 121; Pravobranitelj za djecu, Izvješće o radu pravobraniteljice za djecu 2020, Zagreb, 2021, p. 119; Pravobranitelj za djecu, Izvješće o radu pravobraniteljice za djecu 2018, Zagreb, 2019, p. 120. All annual reports of the Ombudsman for Children are available at Republika Hrvatska (n.d.).

belonging to national minorities,[59] and the majority of complaints in that category concern Roma children.[60] The tables below show the trend in the number of applications for the period between 2018 and 2022.[61]

Table 1. *Complaints concerning discrimination against children*

Complaints concerning discrimination against children[62]	**2022**	**2021**	**2020**	**2019**	**2018**
in total	31	49	35	42	38
in the education system	23	25	12	27	17
on the basis of national origin	1	4	2	6	1
on the basis of ethnicity	4	1	5	10	4

Table 2. *Complaints concerning the rights of children belonging to national minorities*

Complaints concerning the rights of children belonging to national minorities	**2022**	**2021**	**2020**	**2019**	**2018**
in total	23	43	26	47	30
Roma children	16	31	15	33	23

In 2022, research was conducted about the quantitative representation of national minorities, their portrayal, and the qualitative context in which they are presented in primary and secondary school textbooks in Croatia. Although there are positive examples, the analysis points to a generally insufficient representation and a tendency towards collective stereotypes.[63] For example, in some cases, the context is insufficiently explained, which contributes to the negative perception of the Serbian minority; mention is made exclusively of Roma who live outside Croatia. These findings correspond to the objections received by the Ombudsman for Children about books used as reading materials in schools that could be used as a platform for spreading negative stereotypes and intolerance towards ethnic and national minorities.[64] A more serious complaint in this regard concerned a school teacher's inappropriate and discriminatory treatment of pupils based

59 For example: Id., 2023, p. 134; Pravobranitelj za djecu, Izvješće o radu pravobraniteljice za djecu 2021, Zagreb, 2022, p. 134; Pravobranitelj za djecu, Izvješće o radu pravobraniteljice za djecu 2019, Zagreb, 2020, p. 149.

60 Ibid.

61 Sources of the data in the tables are the annual reports of the Ombudsman for Children.

62 Complaints in cases for which the Ombudsman for Children acted on the basis of the Anti-Discrimination Act.

63 Stjepanović, 2022, especially pp. 18–21. Roma, Serbian, Italian, and Hungarian minorities formed the sample population used for the analysis. Research results are intended to be incorporated in future curricular reforms.

64 Pravobranitelj za djecu, 2023, p. 124.

on their national origin, and his unacceptable intervention in the content of textbooks (personal interpretations and manipulations of the past).[65]

During the COVID-19 pandemic, especially during 2020, objections were expressed about the inadequacy of lessons broadcast on the Third Programme[66] of the Croatian Radiotelevision (HRT), which did not meet the needs of pupils of the Serbian national minority. After the Ombudsman for Children proposed some recommendations, the recording of video lessons and programmes for broadcast on television started in cooperation with the relevant representatives of the Serbian minority. Additionally, teachers and professional associates were involved in designing the content and the implementation of the educational programme in the Italian language. Distance learning for the Hungarian national minority was conducted in virtual classrooms.[67]

Another issue in this area concerns the duty of the HRT to produce and broadcast programmes intended to inform national minorities in the Republic of Croatia in the respective minority languages, including programmes for children.[68] The implementation of this obligation is elaborated in more detail in the contract between the HRT and the Croatian Government.[69] HRT broadcasts the weekly documentary programme *Manjinski mozaik* (e.g. 37 episodes in 2021) in minority languages with Croatian subtitles. Every 15th episode is devoted to a particular national minority in its language. Additionally, a weekly multicultural programme titled *Prizma* partly includes features in minority languages. Regardless of recommendations for immediate actions received in the context of the ECRML monitoring process, no new programmes in minority languages have been introduced, nor was any other change made to allocate sufficient time to each minority language in a programme which would be broadcast at regular intervals.[70] Furthermore, the HRT does not broadcast any children's programmes in the languages of national minorities.[71]

65 The inspection established that the teacher violated the school's Code of Ethics and put some of the students in an unequal position. Pravobranitelj za djecu, 2021, p. 125.

66 This was an educational programme organised cooperatively by the Ministry of Science and Education and the Education and Teacher Training Agency, broadcast by the HRT, in an attempt to compensate for the impossibility of teaching in classrooms during the restrictions related to the pandemic.

67 Pravobranitelj za djecu, 2021, p. 131. All the video lectures are available free of charge on the platform of the Ministry of Science and Education (n.d.).

68 Zakon o Hrvatskoj radioteleviziji (Croatian Radiotelevision Act), Narodne novine, no. 137/2010, 76/2012, 78/2016, 46/2017, 73/2017, 94/2018, 114/2022, 20/2023, Article 9, para. 2(6).

69 The most recent one was concluded for the 2023–2027 period. Ugovor između Hrvatske radiotelevizije i Vlade Republike Hrvatske za razdoblje, particularly Article 49.

70 Council of Europe, 2022, note 41.

71 Some children's programmes and animated films were broadcast in Romani languages in 2021, and only 300 minutes of audio-visual content for children were available in Romani languages in 2022. Pravobranitelj za djecu, 2023, p. 154; Pravobranitelj za djecu, 2022, p. 159; Pravobranitelj za djecu, 2020, p. 146.

Certain specific issues burden the practical implementation of instructions in minority languages and scripts. For example, sometimes different age groups of pupils have classes together, and not everyone can keep up in that situation; parents are motivated by the preservation of their national identity, but pupils are primarily motivated by improving their point grade average; teachers who teach under Model C often have to travel far to comply with the teaching hours assigned to them.[72] Unfortunately, there have also been reports of nationally motivated peer violence concerning children belonging to the Italian[73] and Albanian[74] national minorities.

Fortunately, there are also positive stories and experiences. For instance, summer schools had a very strong impact on the preservation of Ukrainian culture and national identity in Lipovljani or the fact that in a predominantly Ruthenian village of Petrovci, there were non-Ruthene pupils who attended classes in Ruthenian. There are also successful minority language and culture schools, so-called supplementary schools; for example, the Polish Consultation Centre, operating in Zagreb, provides instruction in Polish Language and Knowledge about Poland which are recognised as instructions under Model C.[75] The Serbian cultural society 'Prosvjeta' has been continuously and successfully implementing several activities for primary school pupils, who, among other things, are offered a correspondence course programme and free learning of the Cyrillic alphabet.[76]

The key challenges faced by children belonging to national minorities within the Croatian education system concern discrimination against children belonging to the Serbian national minority and discrimination against children belonging to the Roma minority. We take a closer look at these issues in the following subsection.

3.2. Barriers Faced by Serbian Minority Children

Although in Croatia, as previously mentioned, there is a trend of increasing the total number of children belonging to national minorities included in pre-school and primary school education, this does not apply to the Serbian minority. For example, in the 2002/2007 school year, 2,201 pupils attended Model A classes, and 10 years later there were 1,679.[77] Available data show that in the 2021/2022 school year, there were, in total, 3,201 pupils belonging to Serbian minority included in the educational system at all levels. On the pre-school level, 562 children attended six kindergartens. Model A teaching in the Serbian language

72 Lewis *et al.* 2020, pp. 299–305.
73 Pravobranitelj za djecu, 2023, p. 138.
74 Pravobranitelj za djecu, 2020, p. 153.
75 Lewis *et al.* 2020, pp. 304–305.
76 Matić, 2020.
77 Arbutina, 2018.

was implemented for 1,478 pupils in 27 primary schools. Model B teaching is generally the least represented, and in 2021/2022 it was implemented in only two primary schools and attended by 10 pupils. There were 612 pupils encompassed in instructions under Model C, in 38 primary schools. At the level of secondary education, 500 pupils were provided with teaching under Model A (6 secondary schools). Instructions under Model C were implemented for 39 pupils in 3 secondary schools.[78]

Members of the Serbian national minority highlight the following issues impeding the exercise of the right to education of children in their mother tongue, among others: lack of adequate textbooks in the Serbian language and Cyrillic script, lack of adequately trained teachers, and difficulties in the organisation of transportation for pupils to additional classes. Furthermore, in practice, parents often withdraw their children from classes under Model C in the upper grades of primary school because they believe that their children have learned enough. Classes under Model C are sometimes used by school principals to fill their teachers' time sheets. Consequently, instructions are given by teachers who do not know Cyrillic script and who have never studied Serbian literature and history. Moreover, some counties have ignored the request for transferring the founding rights over schools to local self-government; in other words, this would enable the registration of minority schools that would not be limited by the number of students.[79]

After repeated reports of peer violence between Croatian and Serbian pupils at a secondary school in Vukovar, where children belonging to the Croatian majority and children belonging to the Serbian minority are educated in their own languages and scripts in separate classes, the Ombudsman for Children visited the school. Conversations with pupils revealed that they feared provocations and physical attacks by other pupils because of their national affiliation. In this town, pre-school education and teaching in schools for pupils of the Serbian national minority is carried out in the Serbian language and the Cyrillic script and is practically separated from the teaching for Croatian pupils.

Unfortunately, this is a consequence of the still existing deep ethnic division in Vukovar. The destruction of the primary social networks between Serbian and Croatian people (neighbourhood, friendship, marriage ties) and the perpetuating intolerance have a negative effect on children's learning about coexistence, tolerance, and multiculturalism. The Ombudsman for Children recommended, among other measures, designing and implementing school programmes for the prevention of nationally motivated peer violence as well as enabling the active participation of the pupils themselves in the whole process.[80]

78 Government of the Republic of Croatia, 2023, p. 92.
79 Arbutina, 2018; Opačić, 2021.
80 Pravobranitelj za djecu, 2023, p. 138; Pravobranitelj za djecu, 2022, pp. 137, 178–179, 188–189.

3.3. Discrimination against Roma Minority Children

It is not a new[81] phenomenon by which Roma children throughout Europe face significant obstacles in exercising their right to equal access to education (including costs, residential segregation and isolation, and the language barrier), as well as impediments to receiving quality education (including an inappropriate learning environment, lower curricular standards, negative school–community relations, and discriminatory attitudes by teachers).[82] Croatia has been pursuing a public policy aiming for the inclusion of members of the Roma national minority since 2003.[83]

Since then, there has been a noticeable increase in the number of Roma children aged 3–6 years in pre-school education to 31.1%, but this is still a low rate compared to 82.8% of the general population.[84] Croatia is one of the European countries with the largest discrepancy between the Roma and the general population with regard to pre-school education.[85]

In the 7–14-year age group, 95.3% of Roma children are covered by primary education; however, for 85% of Roma in Croatia, the highest level of completed education is primary school or lower.[86] Only 31% of young Roma aged 15 to 18 years attend secondary school,[87] which corresponds to a disappointingly high 71% of young Roma leaving education before reaching secondary school at the European level.[88] Both in primary and secondary schools, Roma children achieve a lower grade average than that of the general population.[89]

The consequences of the COVID-19 pandemic had a particularly negative impact on Roma children. Educational programme broadcasts on television were inadequate to meet the educational needs of Roma pupils, and they lacked the content that would enable them to improve their knowledge of the Croatian language. Distance learning was a major issue because not only do many Roma children not have a personal computer, laptop, or tablet, but they also do not have access to the Internet, as the infrastructure in Roma settlements is poor or non-existent, and some do not even have electricity. Lack of parental support was additionally pronounced in such circumstances because, in most cases, Roma

81 Hodgkin and Newell, 2007, p. 462.
82 Van den Bogaert, 2019.
83 In 2003, the Croatian Government adopted the National Roma Programme. More details about the ensuing policies and programmes can be found in Office for Human Rights and the Rights of National Minorities of the Government of the Republic of Croatia, 2021, pp. 6–13.
84 Id., p. 25.
85 European Union Agency for Fundamental Rights, 2023, p. 36.
86 Office for Human Rights and the Rights of National Minorities of the Government of the Republic of Croatia, 2021, p. 28.
87 Id., p. 27.
88 European Union Agency for Fundamental Rights, 2023, pp. 37–38.
89 Office for Human Rights and the Rights of National Minorities of the Government of the Republic of Croatia, 2021, pp. 27–28.

parents do not have enough capacity or knowledge to help their children solve tasks within the curriculum or sufficient digital competencies.[90]

In general, the majority of complaints submitted to the Ombudsman for Children in connection with the discrimination of Roma children concern the unavailability of pre-school care and education, dropping out of school, segregated education, and peer violence[91] in schools. With regard to more specific individual applications, the Ombudsman acted upon the application regarding the enrolment of a Roma child in the first grade of secondary school. The child met the requirements for school enrolment, but as he was older than 17 years, he was removed from the system, and the school rejected the parents' request for subsequent enrolment.[92] It was reported that one kindergarten excluded 12 Roma children because the relevant Ministry failed to transfer the funds for co-financing the parents' share in the costs of the kindergarten.[93] There were even reports of insulting and belittling Roma children, calling them derogatory names, and pointing out their lack of knowledge by teachers.[94]

Regardless of the 2010 judgment of the Court in the *Case of Oršuš v. Croatia,*[95] which marked the segregation of Roma children in education as discriminatory, the problem of Roma-only classes persists to this day. This judgment was criticised as being a solution that prioritised the assimilation of Roma children[96] instead of protecting their diversity. Meanwhile, research shows that receiving education in more socially mixed or integrated schools results in better performance by disadvantaged children.[97] Segregation of Roma children in education is present across Europe; however, Croatia is one of the countries in which this issue is particularly pronounced, with 53% of Roma children attending a school where all or most of the other children are Roma.[98]

The main cause of segregation is still the insufficient command of the Croatian language, but schools point to other pertinent circumstances, including the lack of trained teachers and assistants,[99] absence of parental support by Roma parents, the lack of spatial capacity, and the lack of organised transportation for Roma children. The formation of Roma-only classes is partly a consequence of enrolling pupils in schools according to their place of residence, but also of the existing trend of an

90 Pravobranitelj za djecu, 2021, pp. 130–131, 146, 237.
91 Pravobranitelj za djecu, 2020, pp. 140, 152–153.
92 Following the Ombudsman's recommendation, the child was enrolled in school. Pravobranitelj za djecu, 2022, p. 125.
93 Pravobranitelj za djecu, 2020, p. 151.
94 Id., pp. 140, 152.
95 Oršuš and Others v. Croatia, Application no. 15766/03, 16 March 2010.
96 Zhang, 2021, pp. 353–354.
97 Howe and Covell, 2013, pp. 135, 139.
98 This is actually an increase in comparison to 40% in 2016. European Union Agency for Fundamental Rights, 2023, pp. 39–40.
99 See also Council of Europe, 2022.

unsupportive attitude by Croatian parents who do not want their children to attend classes and schools where the majority of pupils are Roma, and thus they transfer their children to other schools with a majority of Croatian pupils.[100]

Pre-school education is considered a key stage of the process of acquiring a good command of the official language and learning the mother tongue. Lack of such skills contributes to minority children's lower performance at school.[101] The problem of insufficient knowledge of the Croatian language persists even among Roma children who attended the mandatory 1-year pre-school programme. Increasing the inclusion of Roma children in pre-school education, at least for the duration of 2 years before starting school, is stated as an important goal in the National Plan for the Inclusion of Roma 2021–2027, but this measure is still insufficiently implemented.[102]

Taking all the above-mentioned data into account, it is highly unlikely that Croatia will achieve the 2030 targets of the EU Roma Framework,[103] which include at least 70% of Roma children participating in pre-school, at least 50% of Roma youth finishing secondary school, or at least halving the proportion of Roma children attending segregated primary schools.[104]

4. Conclusions

Croatia has built a fairly extensive legal framework for the protection of the right of children belonging to minorities to be educated in their own language and script, but it has yet to deliver and implement effective strategies and measures that will ensure its practical realisation in full. Unfortunately, it is not uncommon in Croatian public discourse for the very mention of multiculturalism issues to stir heated discussions or, at least, result in strong resistance. It is necessary to raise awareness that the education of minority children is not something extraordinary but their right. In the Croatian legal system, minority children are expressly recognised as having the right to education in their own language in addition to the general right to education and the right to preserve their minority identity and culture.

Having access to quality education, including early childhood education, is undoubtedly in the best interests of the child,[105] and therefore relevant legal

100 For details, see Pravobranitelj za djecu, 2023, pp. 124, 137; Pravobranitelj za djecu, 2022, p. 135; Pravobranitelj za djecu, 2020, p. 150; Pravobranitelj za djecu, 2019, p. 132.

101 Roter, 2015, pp. 218–219.

102 Pravobranitelj za djecu, 2022, p. 135; Pravobranitelj za djecu, 2020, p. 150. Pravobranitelj za djecu, 2019, p. 132. Since 2012, the Ombudsman for Children has repeatedly warned about the need to implement this measure.

103 European Commission, 2020.

104 European Union Agency for Fundamental Rights, 2023, pp. 36–39.

105 Committee on the Rights of the Child, 2001, para. 79.

provisions should be more intensively supported by strong action against aggravating factors impeding the realisation of the minority children's right to be educated in their mother tongue. Schools may be willing to abolish the segregation of Roma children or the complete separation of classes for Serbian and Croatian children, but they cannot resolve these extremely complex issues by themselves. Instead, coordination and cooperation of stakeholders on all levels is indispensable. Among many other measures, this includes providing for the necessary training of teachers, putting more effort into implementing the 2-year pre-school programme for Roma children, ensuring that the media fulfil their legal duties in this area, creating and implementing programmes for the prevention of nationally motivated peer violence in cooperation with experts as well as children and their parents, and implementing policies fighting discrimination and prejudice in education.

The organisation of the education system in a way that enables achieving the aims of education as listed in Article 29 of the CRC is a highly complex task. Moreover, at first sight, the aim of promoting understanding, tolerance, and friendship among all people may seem to be incompatible with developing respect for the child's own cultural identity and for the national values of the country in which the child is living. However, the importance of these aims partly lies in the need for a balanced approach which aims to reconcile diverse values through dialogue and respect for difference. Children are capable of playing a unique role in overcoming differences that have historically divided groups of people,[106] but only if they are allowed to do so. Achieving these aims would have multiple effects, both on the children belonging to minorities and the children belonging to the majority population as well as the wider community, thus, truly making national equality a fundamental value of Croatian society.

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106 Committee on the Rights of the Child, 2001, para 4.

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Legal Safeguards for Children without Parental Protection in Romania: A Study of Minors with Parents Serving Prison Sentences

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'There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.'

- Kofi Annan

Abstract. In the 30 years since the UN Convention on the Rights of the Child was ratified, despite ongoing improvement and change in perspective regarding these rights, we remain in the early stages. This is especially so for vulnerable groups such as children whose parents are serving a custodial sentence. In Romania, the rights of the child have evolved slowly since the communist era, when children were considered an asset to socialism – during this period, the Roman law designation of the 'pater familias' as the father was assumed by the state. Despite Romania's ratification of the Convention on the Rights of the Child as early as 1990, the road ahead was long, and significant steps were taken long after that point. We observe that it took 14 years from the ratification of the convention for the law on the protection of children's rights to be adopted, and another 19 years to admit that the legal instrument itself was insufficient for defending the rights of minors and even for preserving the family, the rights of parents, and their roles in society. This study analyses the situation of children whose parent or parents were incarcerated, with their parental contact limited, consequently affecting their fundamental rights as children. We demonstrate how children's rights have evolved in Romania and how the legislature has come to identify categories of risk, focusing on the situation of children with parents serving a custodial sentence and their protection methods. We consider it important to provide an overview of this category of children, especially with the enforcement of Act No. 156/2023 regarding processes for preventing separation of children from families, which is an integrated instrument in domestic legislation aimed at implementing the

protection that vulnerable children should receive in practice and providing the instruments for social workers to support these children.

Keywords: fundamental rights, children's rights, incarcerated parents, parental authority, Romanian law

1. Introduction

As an independent framework, the system for the protection of the rights of the child is a relatively recent institution in Romania. The first unitary legal regime on the matter came into force by the adoption of Act No. 272/2004 on the protection and promotion of children's rights. This act was partly adopted so that Romania could align with EU standards, as part of the requirements set forth for accession. Additionally, the legal regime recognised the pressing need to harmonise these rights, acknowledging that up to a point, children in general had not received sufficient protection from the legislature, which had focused solely on children in difficult circumstances.[1]

From a legislative perspective, Romania has faced notable deficiencies in comprehensively protecting children's rights. Until 2004, legislation primarily focused on protective measures for children in institutional care and lacked strategies aimed at preventing institutionalisation (placement of children in foster care or other unrelated home or facility) and preserving familial ties whenever feasible.[2] In this context, many children at risk have been legislatively marginalised, including the category of children with incarcerated parents. However, in 2004, the need to establish a robust, comprehensive legal framework encompassing children's rights was recognised. The rights that are of particular importance to this group, as outlined by international agreements, such as the United Nations Convention on the Rights of the Child (CRC), comprise the principle of the child's best interests (Art. 3 CRC),[3] prohibition of discrimination (Art. 2 CRC),[4] prohibition

1 The explanatory memorandum underlying Bill No. 224/2004, the draft Law on the protection and promotion of children's rights, 'Expenere de Motive'. The legislation prior to 2004 primarily focused on protective measures for children in placement and preventing placement by keeping the child within the family whenever possible. In 2004, the need to provide a legal framework that would regulate children's rights comprehensively was recognised, taking into account Romania's ratification of the United Nations Convention on the Rights of the Child (CRC) as early as 1990 through Act No. 18/1990 for the ratification of the CRC. Similarly, see Marin and Stănculescu, 2019, p. 72.

2 Principally, there were certain provisions in this regard but without alternative measures readily available to institutions in this matter.

3 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

4 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's

of separation from their family unless in their best interest (Art. 9 CRC),[5] and the right to participate in decisions that affect them (Art. 12 CRC).[6]

Empirical research suggests that the rights and requirements of children with incarcerated parents are frequently overlooked, with normative frameworks mainly focusing on the detainees and their rights.[7] A study[8] conducted in Denmark, Poland, Northern Ireland, and Italy revealed that police officers, despite possessing minimal training in this regard, endeavour to minimise collateral damage during arrests conducted in the presence of children. The study concluded that the absence of standardised procedures tailored to address the experiences of bystanders, particularly children, was evident. Consequently, the study underscored the need for detailed regulations governing arrests carried out in the presence of children. For instance, it advocated for the collection of pertinent information prior to arrest, including whether the accused or convicted individual has children, and for implementing procedural protocols aimed at diminishing the adverse effects on such children.[9] This imperative for comprehensive procedural frameworks aligns with jurisprudential considerations, as exemplified by the European Court of Human Rights (ECtHR) in the *Case of A v. Russia*. In this case, the court observed that the failure of state authorities to prevent psychological harm inflicted on individuals witnessing violent incidents, including children, amounted to inhuman and degrading treatment. Thus, the ECtHR's ruling underscores the state's obligation to safeguard the well-being of children and bystanders within the context of law enforcement actions, emphasising the need for robust procedural safeguards tailored to protect vulnerable individuals, particularly children, during arrests. In the aforementioned case, the ECtHR made the following findings:

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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.'

5 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (...) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

6 'States 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.'

7 Scharff-Smith and Gampell, 2011, p. 60.

8 Id., p. 226.

9 Ibid.

> That [the procedure of the arrest] had very severely affected her, as she had suffered in particular from a neurological disorder and post-traumatic stress disorder for several years afterwards. In the Court's view, the applicant witnessing such a violent incident had amounted to ill-treatment which the authorities had failed to prevent, in breach of their obligations under Article 3 (prohibition of inhuman or degrading treatment) of the Convention.[10]

Therefore, the case highlights an acute need for law enforcement authorities to exercise caution and pre-assess the conditions and potential collateral consequences of an arrest. To the best of our knowledge, the situation in Romania is no different, as there are no studies or concerns from institutions or private organisations in this regard.

With the entry into force of Act No. 272/2004, the child has become the focal point, regardless of whether they belong to a vulnerable category or not. However, in line with the CRC, certain categories considered vulnerable are identified. The largest category[11] is that of children who are temporarily or permanently deprived of parental care, which generically includes children whose parents are sentenced to custodial sentences, although they are not individually designated as a separate category. Unfortunately, these cases remained in the shadows until 2023,[12] when Act No. 156/2023 came into force. This norm was enacted owing to the requirements imposed by the European Commission on the Romanian state regarding the deinstitutionalisation process of children subject to special protection measures, a process that was previously characteristic of child protection as a whole.[13] With the entry into force of this law, children who have had or currently have at least one parent serving a custodial sentence[14] are recognised as a separate, vulnerable category. In our opinion, vulnerable children also include those whose parents are in pre-trial detention without a final court decision – and we do not treat these children as a standalone category in our study. We recommend that future legislation should reformulate this phrase to include children with parents in pre-trial detention.

10 *Case of A v. Russia*.

11 Primarily, the following are identified: children whose parents are deceased, children who cannot be left in the care of their parents for reasons beyond their control, abused or neglected children, abandoned children, children who have committed a criminal offence, unaccompanied children, and foreign or stateless citizens, including those seeking asylum or benefiting from international protection in Romania. This last category was included in 2022, following the outbreak of the war in Ukraine.

12 Several studies exist alongside compiled statistics and ongoing campaigns; however, they do not seem to garner special interest from the legislature or society.

13 The explanatory memorandum underlying Bill No. 145/2023 on the organization of activities for preventing the separation of the child from the family is rooted in several key considerations.

14 Article 5, paragraph (2), letter h) of Act No. 156/2023.

2. An Overview of Legislation

The entry into force of Act No. 156/2023 is based on the requirements formulated by the European Commission through Romania's Recovery and Resilience Plan, which mandates the Romanian state to establish a new legal framework for preventing the separation of children from their families.[15] Act No. 272/2004 did not establish broad alternatives for professionals within social welfare authorities to prevent the institutionalisation of a child deprived of parental care, or prevent the child's separation from the family. Hence, it became necessary to enact a legal framework that would enable the state to identify families in need of specialised assistance and provide social workers with alternative methods to maintain the child within the family environment, to avoid separation, in accordance with the child's fundamental right to grow up in a family setting. The enactment of Act No. 156/2023 is rooted in the fundamental right of the child to grow up in the care of their parents, except where such arrangement is deemed incompatible with the child's best interests.[16] From our perspective, this norm represents a significant step towards reinforcing initiatives that have not been under consideration since the adoption of Act No. 272/2004.

Specifically, the act underscores the imperative of deinstitutionalising the care of vulnerable children and introducing procedures designed to bolster family support networks, thereby ensuring that families are equipped with the necessary resources to nurture their children within the familial environment, rather than resorting to separation. Furthermore, the novelty of the law lies in the implementation of the 'child observer' system, which comprises a set of activities carried out using information technology for the registration by local public administration authorities of children at risk of separation from their families.[17] Indeed, the implementation of this system is intended to facilitate the identification of precarious situations by professionals, enabling the registration of vulnerable children into a centralised database for ongoing monitoring and the initiation of specialised support programmes. However, contentious debates have arisen surrounding this system, notably from certain non-governmental organisations contending that its true purpose is to streamline the monitoring of at-risk children, potentially paving the way for their subsequent separation from familial environments and placement into alternative care arrangements, or even adoption. A significant argument put forward by these critics concerns the expansive scope of the vulnerable categories delineated within the newly enacted legal framework. However, it is essential to note the nuanced circumstances

15 See explanatory memorandum underlying Bill No. 145/2023 on the organisation of activities for preventing the separation of the child from the family.

16 Article 9 of the CRC.

17 Article 16, paragraph (2) of Act No. 156/2023.

surrounding the implementation of the 'child observer' programme. Initially conceived as a pilot initiative under UNICEF's umbrella, named Aurora, the programme operated from 2014 to 2019. This duration allowed for thorough testing by professionals within the social welfare system. Consequently, in select counties, the system had been functional well before the drafting of the legislation. Statistical data suggest that during this operational phase, the programme brought tangible benefits to numerous families.[18]

Act No. 156/2023 individualises a larger spectrum of vulnerable categories than Act No. 272/2004, based on three main criteria:[19]

a. the economic circumstances and substandard living conditions within their familial and/or community environment, encompassing the risk of monetary poverty or extreme privation;
b. the compromised health status of one or more family members, including disability;
c. the presence of an abusive or violent familial atmosphere, alongside behaviours posing risks that may detrimentally impact relationships among adults and among children as well as between adults and children.

Subsequently, the legislature recognised the need to specifically delineate children within each category according to their particular state of vulnerability or risk. Consequently, children who had or currently have one or more family members serving a custodial sentence are identified as constituting a distinct vulnerable category.

3. Statistical Data

In accordance with Article 9 of the CRC, a child has the right to be raised within the family, with separation from parents or primary caregivers regarded as a measure of last resort, to be employed solely when deemed essential for the child's best interests. This identical right is mirrored in Article 8 of the European Convention on Human Rights (ECHR). The incarceration of one or both parents distinctly encroaches upon this right.[20]

Research in Romania that specifically targets children with incarcerated parents is limited, and that which exists is often characterised by short observation periods.

18 Evaluarea sumativă a componentei Pachetul Minim de Servicii a proiectului demonstrativ „Incluziune socială prin furnizarea de servicii sociale integrate la nivelul comunității", implementat în România, în perioada 2014–2018

19 Article 4 of Act No. 156/2023.

20 Minson and Flynn, 2021.

While this demographic has garnered increased international attention for being at risk, they remain relatively overlooked at the national level in Romania. One of the earliest studies in this domain was conducted by a non-governmental organisation between 2010 and 2013. As part of its campaign, various projects were implemented, including the creation and furnishing of dedicated rooms within penitentiaries aimed at facilitating more natural and meaningful parent–child interactions.[21] The subsequent extensive study on this topic approached the issue from the perspective of incarcerated mothers, examining the repercussions on maternal well-being and the dynamics of their relationships with their children during the period of detention.[22] Regrettably, even within statistical analyses, these children have not been prominently featured, often being subsumed under the category of children left without parental care. This classification typically occurs, especially when both parents are incarcerated, leaving the specifics of these children's situations largely undisclosed.

One of the most recent official datasets is embedded in the National Strategy for the Protection and Promotion of Children's Rights, termed 'Protected Children, Safe Romania' for the period of 2022–2027.[23] According to this report's statistical extrapolations, 42,920 children are separated from their incarcerated fathers, and 1,656 children are separated from their incarcerated mothers;[24] additionally, 39% of those incarcerated are parents to at least one child, with over two-thirds (68%) of them having two or more children.[25] Furthermore, the report underscores significant deficiencies in safeguarding the rights of these children, as they lack access to tailored support measures addressing their specific challenges. The report notes that children with incarcerated parents are three times more vulnerable to developing mental health issues and antisocial behaviours. They are also more susceptible to stigma and discrimination, including the risk of being perpetrators or victims of bullying in the school environment. Moreover, the likelihood of engaging in criminal behaviour increases among these children. They are at an elevated risk of poverty, as the income previously provided by the incarcerated parent is typically lost. Furthermore, additional expenses arise from supporting the incarcerated parent or maintaining a relationship with them during detention, along with other associated risks such as school dropout.[26] It should be noted that these data – and even minimal attention – now directed

21 Asociația Alternative Sociale, 2015.
22 Atena, 2012.
23 Government of Romania, 2022.
24 The report notes that these figures lack precision, as they are derived from the correlation of other statistical datasets and juxtaposed with the information collected by the Social Alternatives Association previously referenced. Consequently, it underscores the insufficient attention given to this particular group of children experiencing vulnerability.
25 Id., p. 37.
26 Ibid.

towards these children are because the EU Strategy on the Rights of the Child has been adopted,[27] according to which Member States are encouraged to implement the Council of Europe Recommendation on Children of Imprisoned Parents.[28]

According to studies conducted at the European Union level, Romania currently has 26,993 fathers and 1,313 mothers incarcerated, resulting in a total of 28,306 children separated from at least one parent in this situation.[29] Consequently, there is a substantial population of children who do not receive state assistance, as they were not officially recognised as a category requiring intervention until 2023. This delay has resulted in a lack of systematic measures to address their specific needs and vulnerabilities. Furthermore, the scarcity of court judgments addressing the situation indicates a gap in legal protection and support for these children, leaving them largely reliant on family members for care and support during their parents' incarceration.

4. Legal Perspectives for Children with One or Both Parents Incarcerated

As mentioned in Section 2, Act No. 156/2023 is in effect. This act marks the first formal recognition of the vulnerable category of children with one or both parents incarcerated. However, it offers only limited guidelines to assist professionals in social services in supporting the affected families. As the act is relatively recent and the regulations regarding its implementation are still to be adopted, it remains more an aspiration than an effective means of support for the time being. To identify particular measures that can be adopted currently, attention should be directed towards the general legal framework concerning children's rights, namely, Act No. 272/2004, the provisions of which need to be correlated with the Civil Code.

Article 5 of the CRC states as follows:

> Governments must respect the rights and responsibilities of parents and carers to provide guidance and direction to their child as they grow up, so that they fully enjoy their rights. This must be done in a way that recognises the child's increasing capacity to make their own choices.

In the same spirit, Article 14 states:

> 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

27 European Commission, 2021.
28 Council of Europe, 2018.
29 Statistics about Romania.

of his or her right in a manner consistent with the evolving capacities of the child.

Additionally, the fact that these rights and obligations fundamentally belong to the parents is further compounded by the principle that a child has the right to grow up within the family, and separation should be an exception only when in the best interests of the child. This right is provided for in Article 9 of the aforementioned convention: children must not be separated from their parents against their will unless it is in their best interests (e.g. if a parent is hurting or neglecting a child). Children whose parents have separated have the right to stay in contact with both parents, unless this could cause them harm.

When one or both parents are incarcerated, the child is left without parental care; in domestic legislation, this signals there is no individual to exercise the rights and obligations inherent in parental authority. In national jurisprudence, parental authority denotes the collective rights and responsibilities pertaining to both the welfare and property of the child and is uniformly vested in both parents. The standard entails the joint exercise of parental authority, with delimited exceptions as stipulated by law. In cases in which one parent is incarcerated, the execution of these correlated rights and obligations is impeded. Both domestic legal provisions and the practical circumstances at hand (e.g. restricted resources available to incarcerated individuals for maintaining communication with their children) are constrained by existing financial allocations.[30]

We consider it important to differentiate between situations in which both parents are incarcerated and cases in which only one parent is incarcerated. Our analysis regarding the measures that can be taken concerning these children focuses on the aforementioned scenarios, as the interventions that can be implemented vary accordingly.

4.1. Situation in Which One Parent Is Incarcerated

The situation becomes simpler to address in practice when one parent can still exercise the rights and obligations associated with parental authority, being physically present with the child. According to Article 36 of Act No. 272/2004,

30 Government of Romania, 2022. Similarly, the aforementioned strategy underscores substantial deficiencies in upholding children's rights when they become entangled in legal proceedings owing to actions perpetrated by their relatives. Consequently, the strategy delineates specific areas for scrutiny and regulation, as advised by the study conducted by the European Union Agency for Fundamental Rights. These areas encompass: the refinement of legal frameworks to educate children about their rights, the development of age-appropriate informational resources for children, the dissemination of information tailored to their understanding and maturity concerning the legal procedures they are involved in, the broadening of informational capacities in civil proceedings, and the adoption of a respectful stance towards children engaged in judicial processes by soliciting their viewpoints and affording due regard in accordance with their level of maturity.

the court is competent to decide on the exclusive exercise of parental authority by one parent when the other is convicted for such offences as human trafficking, drug trafficking, sexual offences, acts of violence, or any other reason. Given that there can be any other reason, the legislator has opened a Pandora's box, leaving it up to the discretion of a judge to determine whether the execution of a custodial sentence for a crime, other than those expressly provided for, may lead to the forfeiture of parental authority. We consider that this domestic regulation is welcome, and in line with international regulations on this matter.[31] Therefore, we contend that, in principle, the mere conviction to a custodial sentence should not automatically lead to the forfeiture of parental authority. This stance is supported by the fact that a criminal sanction, among other purposes, serves as a means of re-education, and the programmes available to those convicted are designed to reintegrate them into society.[32] These assertions are in line with the case law of the ECtHR. In the *Case of Gnahoré v. France*, decided by the ECtHR, it was established that courts must conduct a thorough analysis, on a case-by-case basis, when deciding on the withdrawal of parental rights, taking into account the best interests of the child. Thus, the Court concluded that there must be a compelling social need, and it must be proportional to the desired outcome. We believe that the mere conviction of a person to a custodial sentence is not evidence that they are unfit to exercise their parental prerogatives. Furthermore, through the interpretation of Article 8 of the ECHR, Member States are obliged to take positive action to make all efforts and provide sufficient procedures to maintain parent–child relationships in case of incarceration.

Additionally, in such circumstances, the legislation outlines specific measures aimed at preserving relationships with the incarcerated parent. Under Act No. 254/2013 concerning the enforcement of sentences and restrictive measures imposed by judicial authorities during criminal proceedings, provisions are made for the rights of children and incarcerated individuals to receive visits. Furthermore, it is stipulated that, to the extent feasible, specialised visiting areas may be established within penitentiaries to facilitate uninterrupted parent–child interactions under conditions as normal and natural as possible.[33]

31 The ECtHR holds that national courts must have a wide margin of appreciation regarding the need for state intervention in the parent–child relationship, as they are primarily the ones in direct contact with those involved. However, this discretion must remain within the boundaries of the principles set forth by Article 8 of the ECHR. *Case of Jansen v. Norway*.

32 In this regard, we find information indicating that there are programmes aimed at helping convicted individuals acquire skills in raising and educating children. https://anp.gov.ro/wp-content/uploads/2017/04/Oferta-de-programe-%C8%99i-activit%C4%83%C8%9Bi-educative-de-asisten%C8%9B%C4%83-psihologic%C4%83-%C8%99i-....pdf.

33 From the research conducted for the preparation of this study, no official data regarding the existence of such specially equipped rooms were found, apart from the acknowledgment of the existence of only three such rooms nationwide. Moreover, it is noteworthy that these rooms were established through the contribution of specialised non-governmental organisations.

Crucially, when the incarcerated parent is the mother, domestic legislation provides specific measures. Act No. 254/2013 stipulates that mothers or pregnant women serving a custodial sentence benefit from special measures. Accordingly, measures exist to enable pregnant women to give birth outside the penitentiary, in specialised medical facilities. Additionally, they are allowed to care for their newborn child within the penitentiary until the child is placed in a family environment outside the custodial setting – no later than the child's first birthday. When no suitable family members are available to assume the rights and responsibilities related to the child's care after the child turns one year old, placement in a specialised institution becomes necessary. Furthermore, according to Article 589 of the Criminal Procedure Code, an individual sentenced to imprisonment may ask a court to defer the execution of the sentence when they are responsible for a child under the age of 1 year. Until 2019, domestic case law indicated that this privilege was granted exclusively to the child's mother. The relevant case law was reinforced by the ECtHR ruling in the *Case of Alexandru Enache v. Romania* in 2017, in which the applicant sought the freedom to care for his 7-month-old child, but national courts outlined that this right primarily benefits the mother, considering the maternal relationship and its specificities, particularly in the child's first year of life. Through the aforementioned judgement, the court found that there had been no infringement on the applicant's rights, nor was there any basis for alleging discrimination under Article 14 in conjunction with Article 8 of the convention. Contrary to this ruling, the Constitutional Court of Romania, in Decision No. 535/2019 regarding the admission of the objection of unconstitutionality of the provisions of Article 589 para. (1) letter b) first sentence, second paragraph of the Criminal Procedure Code, acknowledged that the legal provision was unconstitutional, as it granted the right to care only to convicted women.[34] Additionally, the Implementation Regulation of Act No. 254/2013 stipulates that women in prison with their child be provided with special food, in accordance with the nutritional requirements of their condition, and visits, if permitted, should take place without separation devices.[35]

In conclusion, the particular provisions concerning incarcerated mothers align with the principles of the ECHR and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).[36] Both emphasise the need for a mother to remain with her child if the child is born during her imprisonment, as such separation is highly undesirable and contrary to the child's best interests.[37]

34 In this regard, the legal text was amended in 2023 to provide for this right for both women and men who are convicted.

35 United Nations, 2010.

36 United Nations, 2015.

37 European Court of Human Rights, 2021, p. 55.

4.2. Situation in Which Both Parents Are Incarcerated

Incarceration of both parents is an uncommon scenario that necessitates more complex and potentially more drastic interventions affecting a child's life. Pursuant to Article 44 and Article 54 of Act No. 272/2004, any child who is temporarily or permanently deprived of parental care is entitled to alternative protection. Such measures encompass special protection measures (placement, emergency placement) as well as guardianship or adoption, with adoption serving as a measure of last resort – when other options that do not entail separating the child from their extended family are unavailable. Principally, by aligning Act No. 272/2004 with the principles outlined by the ECtHR and the provisions of the CRC, it is imperative to prioritise the implementation of emergency placement measures within the extended family, resorting to guardianship or adoption only under exceptional circumstances. Moreover, this objective gains further prominence when juxtaposing the provisions of Act No. 272/2004 with those of Act 156/2023, which aims to provide families with supportive procedures to prevent the separation of a child from the family, even if it is an extended family.

As outlined in the study, the mere imposition of a custodial sentence on parents should not, and must not, *ipso facto* result in the forfeiture of their parental rights. When parents continue to maintain these prerogatives, it is incumbent on state institutions and judicial entities to legislatively establish mechanisms for sustaining communication with them. Concurrently, arrangements must be made regarding the delegation of these rights on behalf of the parents until their release.

4.2.1. Emergency Placement

Upon notification or self-notification by institutions regarding a child deprived of parental care owing to the imprisonment of the parents, prompt action is needed to remedy the situation. Authorities must implement the measure of emergency placement, as stipulated in Article 68 of Act No. 272/2004. Emergency placement is a temporary special protection measure expressly provided for by law and can be ordered for a minor whose parents have been arrested. It can be invoked by state authorities to promptly address situations endangering the child, correlating with the suspension of parental rights.[38] Given the urgency of the circumstance, the decision rests with the director of the local social assistance and child protection authority, who must promptly notify the court within a maximum of 5 days. Subsequently, the court determines the modalities for exercising parental rights. Although not explicitly stipulated, provisions concerning emergency placement should be complemented by those governing regular placement, as delineated in Articles 62 and subsequent provisions of Act No. 272/2004.

38 Domocoş, 2021.

Regarding the principles to be observed when determining emergency placement, the following considerations are paramount: prioritising placement with the extended family or a foster family,[39] avoiding separation of siblings, facilitating parental visitation, and ensuring ongoing connections with the child.[40] Additionally, children under the age of 7 years may be placed only with extended family, foster families, or a foster caregiver, with placement in residential care facilities prohibited, except in specific circumstances.[41] These principles are in line with the provisions of the CRC, ECHR, and established case law. It is important to note that in this case a suspension of parental authority occurs.[42] In our view, in cases in which parents are sentenced to incarceration, the court may delegate parental authority to the person caring for the child. However, applying these legal provisions to children whose parents are incarcerated presents challenges, as the only relevant legal text referring to them is found in Article 68 para. (2) of Act No. 272/2004 concerning emergency placement.

Therefore, the judicious question arises as to whether the court can order placement after being notified by the social assistance authority under Article 70 of Act No. 272/2004. The only situation to which this hypothesis may be circumscribed is that provided for by Article 60, letter b): when the child, for the protection of their interests, cannot be left in the care of the parents for reasons not attributable to them. However, is a custodial sentence a reason not attributable to the parents, especially when it should logically result from a

39 A foster family is defined as individuals, other than those belonging to the extended family, including relatives up to the third degree, with whom the child or their family has maintained personal relationships and direct contacts, as well as the person, family, or foster caregiver responsible for the upbringing and care of the child, in accordance with the law. Article 4, letter d) of Act No. 272/2004.

40 Article 64 of Act No. 272/2004.

41 Placement in a residential care facility may be ordered for a child between the ages of 3 and 7 years who cannot be accommodated for habilitation/rehabilitation in other types of services, if the child exhibits both complete functional impairment and complete activity limitations and participation restrictions, as confirmed by the comprehensive assessment service within the general department of social assistance and child protection (Article 64, paragraph (2) of Act No. 272/2004).

42 In the case of emergency placement, there is a legal suspension of parental rights pursuant to Article 68, paragraph (5) of Act No. 272/2004. Provisions regarding emergency placement, compared to those concerning regular placement and the child's reintegration into the family, do not entail the imminent forfeiture of parental authority. We believe that if this sanction is not expressly provided for by law, we cannot add it ourselves, with exceptions being strictly interpreted. Accordingly, in pursuant to Article 73, paragraph (4) and Article 74, parental rights and obligations are resumed by the parents, who will continue to be supervised by specialised workers from the General Directorate for Social Assistance and Child Protection. Furthermore, we relate these legal provisions to Article 508 of the Civil Code, which stipulates the situations in which parental authority may be forfeited, with emergency placement not being among them. Therefore, we consider that if the law has not expressly provided for this situation to lead to the loss of these rights and obligations, we cannot extend their interpretation ourselves. Domocoş, 2021, p. 128.

criminal conviction? From the analysis of the few court decisions in this matter, we conclude that the situation in which both parents are incarcerated can be circumscribed to the aforementioned hypothesis. In our view, this interpretation has arisen owing to the existing *lacuna* in the law on this matter. Considering that, as outlined at the outset of this study, the circumstances of these children seldom come before the competent courts, the legislator has not provided for this specific situation in Act No. 272/2004, leaving it to domestic courts to address this omission. Consequently, the situation of serving a custodial sentence has been construed as a reason not attributable to the parent, despite presenting at the very least a peculiar scenario, given that the commission of an offence leading to subsequent conviction cannot be deemed – in civil or family law contexts – as an unattributable consequence. Therefore, we contend that *de lege ferenda*, a revision of the circumstances to which placement measures apply is warranted, particularly in the light of the provisions outlined in Act 156/2023 addressing children in situations of risk.

During emergency placement, children are closely monitored, and every 4 months their placement is assessed by the general directorate for social assistance and child protection. The periodic verification of placement is necessary, considering its temporary nature, with the aim of keeping it as short as possible. This principle has also been enforced through ECtHR case law. In this regard, we mention the *Case of I.G.D. v. Bulgaria*, in which the Court considered that if the placement measure does not allow for periodic review, it is akin to deprivation of liberty (Article 5, paragraph 4 of the Convention) and, evidently, violates the right to private and family life (Article 8 of the Convention). Therefore, although there is no specified term for the application of this measure, we note that it can be changed at any time at the request of the parties concerned, including the child's parents or the child.

The procedure for implementing this measure is underpinned by various safeguards aimed at protecting the rights of the child and ensuring urgency in the ruling of the case. Specifically, it includes provisions for hearing from children aged 10 years and above and mandates swift resolution of such requests, with court deadlines not exceeding 10 days. Moreover, courts are obliged to deliver a verdict on the same day as the conclusion of the hearings, with a maximum extension of 2 days allowed in exceptional circumstances.

We believe that a legislative change is warranted in this regard, specifically to establish the requirement for hearing from children who have reached the age of 7 years. This recommendation stems from the fact that children aged 7 years and above are potentially subject to emergency placement in a residential care facility. In our opinion, it is unjustifiable for children between the ages of 7 and 10 years to be exposed to the possibility of such measures being ordered without their input. According to Article 12 of the CRC, children have the right

to be heard and for their views to be given due consideration. By the age of 7 years, children have reached a level of development at which they can coherently express their perspectives. It would then be the responsibility of the court or social workers to assess their opinions in relation to their level of maturity and exact age. Additionally, this approach aligns with the Guidelines on Alternative Care for Children.[43]

It is crucial to note that the emergency placement measure is initiated by the authorities. However, parents sentenced to a custodial sentence can also notify the competent authorities to arrange temporary placement until they are released. Pursuant to Article 111 of the Civil Code, individuals who are obligated to act upon learning of a child in need of parental care include, first and foremost, close relatives of the child, but we can see that anyone who knows a child deprived of parental authority has the obligation to notify the competent institutions. We believe this provision does not exclude notification by a parent after their incarceration.[44] In such a case, the basis for placement falls under Article 60 letter b) of Act No. 272/2004 concerning a child unable to be left in the care of the parents for reasons beyond their control.

Indeed, as previously indicated, this constitutes a provisional measure. In this regard, Article 72 of Act No. 272/2004 stipulates that during the quarterly evaluation, it is imperative for the court to be informed whether there have been any alterations in the circumstances prompting the enactment of the special protective measure. This entitlement to notification extends to both parents, legal guardians, and even the child.[45] The stipulations outlined in Article 73 para. (4) of Act No. 272/2004 mandate parental participation in counselling sessions aimed at fostering parental skills, thereby ensuring the effective reintegration of the family unit.[46] We consider that these provisions necessitate supplementation with those delineated in Act No. 156/2023, specifically under Article 5 para. (2) letter f), which designates a family as vulnerable if any of its children are subject to special protection measures.

43 Liniile directoare privind îngrijirea alternativă a copiilor. In the legal context, the principles enshrined in Article 24 of the Charter of Fundamental Rights of the European Union are pertinent. A study published by UNICEF (Analiza demersurilor pe care le poate întreprinde Uniunea Europeană pentru promovarea şi sprijinirea participării copiilor la luarea deciziilor) highlights the need for Member States, including Romania, to make concerted efforts to consider and respect the opinions of children in judicial procedures.

44 We believe this interpretation is supported by the fact that under Article 104 of Act No. 272/2004, a parent intending to work abroad is required to notify the authorities accordingly. Through a judicial procedure, the person who will ultimately exercise the full range of rights and obligations temporarily until their return to the country is established. This process entails a delegation of rights and obligations. We see no reason why the same course of action cannot be adopted by parents incarcerated as a result of a conviction.

45 This provision can be regarded as an application of the right for the minor to be heard.

46 In the case of convicted parents, such provisions are not only welcome but also essential.

Consequently, the aforementioned act dictates that upon identification of such vulnerability, a service plan must be devised, with its execution overseen by competent authorities. Concurrently, Article 74 of Act No. 272/2004 mandates that upon the cessation of the special protection measure, personnel specialised in the field, from state institutions, are obligated to periodically verify compliance with the requisite obligations.

4.2.2. Guardianship

Guardianship is a legal measure that can be implemented by the judiciary when a minor is bereft of parental care. The definition of guardianship is delineated in Article 110 of the Civil Code, stipulating the following circumstances: guardianship of a minor is established when both parents are, as applicable, deceased, unknown, deprived of parental rights, subject to a criminal penalty resulting in the prohibition of parental rights, receiving judicial counselling or special guardianship, missing, or judicially declared dead. Additionally, guardianship may be instituted in cases in which, following the termination of adoption, the court determines that it is in the minor's best interest to appoint a guardian. In our perspective, guardianship represents a subsidiary measure to placement, given that it entails the relinquishment of parental authority by the parents.[47] Essentially, for guardianship to be instituted, it is imperative for the court to have previously decreed the termination of parental rights. Although the Civil Code allows for the reinstatement of parental rights to parents upon demonstrating changes in circumstances since the termination of parental rights was mandated, this process entails a considerable amount of time until a final judgement is reached, time that is lost at the expense of the parent–child relationship.

4.3. The Right to Maintain Relationships between Children and Parents Serving a Custodial Sentence

In accordance with Act No. 254/2013, incarcerated parents have the right to visits from their own children, if possible, in specially designated spaces for this purpose. In support of this legal provision, the Implementation Regulation of Act No. 254/2013 regulates the conditions under which these visits can take place. Thus, where specially designated rooms exist, these visits take place without

47 In legal doctrine, an opposing view has been advocated (see Ghiță, 2021), suggesting that guardianship is imposed to the detriment of the special protection measures provided by law. We disagree with this perspective, considering that the state is obligated to keep the family together, and as we show, the mere incarceration of a parent does not lead to the loss of parental rights and obligations. Our thesis is further supported by the fact that legal provisions regarding guardianship are clear and limited, stipulating that this measure can be implemented only when parents are deprived of their rights and responsibilities associated with parental authority.

separation devices, considering that the very purpose of the space is to create an environment as close as possible to that of the family home.

For the situation of children who are in the child welfare system (i.e. they are subject to one of the special protection measures provided for by Act No. 272/2004) and whose parents are serving a custodial sentence, a collaboration protocol[48] was concluded in 2020. The purpose of this protocol, among other things, is to maintain personal relationships between children and incarcerated parents. Through this protocol, the National Administration of Penitentiaries and its subordinate units have undertaken several initiatives to respect the right to family life, including arranging child-friendly spaces; accompanying the child during visits to the penitentiary by a social worker; and facilitating the maintenance of family relationships, including through electronic and remote communication means. These measures are necessary for maintaining family relationships. In this regard, a study has shown the following:

> [r]esearch indicates that parent–child visits are most beneficial when they allow for physical contact, are offered in a child-friendly setting, are part of a family strengthening programme, and provide proper emotional preparation and debriefing before and after. Experts also find that physical contact and privacy during visits benefit both children and parents and help them cope emotionally and reconnect with each other.[49]

Similarly, the adverse effects[50] on the child resulting from the incarceration of a parent, such as anxiety, behavioural changes, and mental health issues, must be duly considered. The study referenced, conducted during the COVID-19 pandemic, concluded that the lack of direct contact between the child and the incarcerated parent had enduring negative consequences, which were likely to result in difficulties upon family reintegration, even though specific data are currently unavailable. To prevent these disruptions to family life, it is crucial for penitentiaries to facilitate both direct, in-person contact and indirect contact through video conferencing.[51]

To facilitate this direct contact and maintain closeness between children and parents, national legislation includes the principle that proximity to the place of residence at the time of deciding where a convicted individual will be incarcerated must be taken into account.[52] In this regard, case law from the ECtHR is relevant. For example, in the *Case of Voynov v. Russia*, the ECtHR condemned

48 Protocol de colaborare.

49 Cranmer *et al.*, cited in Minson and Flynn, 2021.

50 Ibid.

51 The same issues are also mandated by UNICEF through the Guidelines for the Alternative Care of Children.

52 Article 11 paragraph (5) of Act No. 254/2013.

Russia for sentencing the individual to a prison located 4,200 km away from his residence. It was concluded that proximity was necessary both to create a circle of safety and support for the detainee and to maintain family unity, and the court found that Article 8 of the convention had been violated. This issue was already addressed in the 1990s when, in the *Case of Marincola and Sestito v. Italy*, Italy was condemned for repeatedly transferring convicts to distant locations from their place of residence, thus violating Article 8 of the convention.[53]

5. Conclusions

Based on our analysis, we conclude that Romania has made significant progress on children's rights in the past 30 years, but there is still much room for improvement. While legislative frameworks have been established to protect families and prevent their separation, there remains a long road ahead to ensure that these laws are effectively implemented in practice.

Romanian legislation is capable of providing adequate protection for children with incarcerated parents, especially since the enactment of Act No. 156/2023, which clearly identifies these children as a vulnerable category. Although practical implementation of this law is currently lacking owing to the absence of implementing regulations, its provisions will be harmonised with those of Act No. 272/2004, as well as with the principles outlined in the CRC and ECHR, to ensure that institutions are equipped to defend and preserve the rights of these children. Romania has been consistently urged to focus on these children at the international level, and as such, the state will need to align with these expectations.

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Forms of Personalness and the Practice of Deinstitutionalisation in the Hungarian Child Protection System

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Abstract. The present study examines the problem of implementing 'personalness' (i.e. direct, interpersonal contact in a family-like environment) in the upbringing of children who are not raised or educated within their families in Hungary. The desired outcome of deinstitutionalisation and its implications in the field of children's rights are examined. The study presents the ways in which Hungarian regulations seek to address this desired outcome; it also discusses some shortcomings and proposes potential improvements to increase the likelihood that children in various forms of state care experience personalness.

Keywords: alternative care, personalness, interpersonal relationships, deinstitutionalisation, child protection, public management

1. Introduction

In the past few years, the number of children cared for by the Hungarian state yearly has been around 20,000.[1] Among these children, around 5,000 are in foster care, with around 5,000 foster parents.[2] Notably, there are around 2,000 children available for adoption, but only 1,000 children are approved for adoption each year, even though there are around 3,000 suitable adoptive parents.[3] International recommendations and trends increasingly prefer alternative care (as foster parents or adoptive parents) because of its cost-effectiveness and positive impact on children. This shift is also reflected in Hungarian legislation, but statistics

1 Based on the statistics of the Hungarian Central Statistical Office, 2024.
2 Hungarian Central Statistical Office, no date a.
3 Hungarian Central Statistical Office, no date, b.

show that the vast majority of children separated from their families end up in children's homes rather than alternative care.

Recent years have also seen the emergence of the concept of personalness; it has been described as a new function of public administration.[4] Child protection is primarily intended to help families, and in some cases to replace them; from this perspective, the institutional structure should seek to create experiences of personalness: 'the essence of child protection comprises informal interpersonal relationships within the formal professional system. And from the point of view of the individual, every personal action in child protection restructures the system.'[5]

The functioning of the child protection system determines whether young people growing up in state care will be able to cope successfully and live independent lives.[6] The main dysfunctions of the system include shortages of personnel, who receive insufficient recognition, and the incomplete development of a common conceptual framework.[7] Against this background, the aim of the present research is to review the forms of personalness and interpersonal relationships in the child protection system, and to examine the practice of deinstitutionalisation and related international recommendations.

2. Personalness in Child Protection

Personalness affects the terminology used to describe the forms of care: Act XXXI of 1997 on the Protection of Children and Guardianship Administration (hereinafter: the Child Protection Act, CPA) distinguishes between basic and specialised child welfare care (which includes family substitute care and the replacement of parental or other care) and between financial and in-kind care. Decree No. 15/1998 (IV.30.) NM on the professional duties and conditions of operating child welfare and child protection institutions and persons providing personal care uses the term 'care in the home'. In the literature, the term 'home substitute' or 'family substitute' is also often used.[8]

> The tasks of foster homes can be summarised as follows. First, they provide a home for children in need of state care. They ensure the physical, intellectual, moral and spiritual development of children and help settle the relationship between the child and his or her family. They prepare

4 Rixer, 2019.
5 Domszky, 2011. Translation by the author. Unless otherwise specified in the footnotes, all quotations from non-English sources are translated by the author.
6 Hungarian Central Statistical Office, 2012.
7 Bálint, 2014.
8 Mattenheim, 2017.

> young people in foster care for their careers, prepare them for independent living and provide aftercare.[9]

The experience of a loving home based on personal relationships is one of the most important experiences for socialisation. This was the foundation of the reform of child protection, launched in the 1980s, which grounded child protection in the role of families, on relationships that are based on personalness. This led to the transformation of children's homes into small-group accommodations, the emergence of residential care, and the strengthening of foster care networks. Personalness requires, among other things, a more professional approach and a strengthening of family care. In terms of preventive child protection, it requires the coexistence of several institutions and the spread of more personalised forms of family care, such as adoption, foster care, boarding schools and children's villages.[10] All this suggests the importance of the following personalness-related trends in the child protection system: first, interpersonal relationships between the professional and the person being cared for and second, measures aimed at disinstitutionalisation and deinstitutionalisation. These trends are examined in further detail in the following sections.

3. Interpersonal Relationships in Child Protection

The extent and quality of our personal relationships determine our place in society and our chances of thriving. The reproduction of existing relationships contributes to the social status of families as a kind of 'symbolic capital'; this form of capital is equally important as mobility opportunities stemming from labour and employment.[11] According to social capital theory, the so-called social capital index is composed of three main components: relationship capital, trust, and participation.

> Social capital is particularly low among the low-educated, i.e. those with no more than primary education and those with low status. Among these groups, it is also generally true that the sub-indices of social capital are similar, i.e. [...] not only are they poor in relationships, but their trust in institutions and other people is also below average, and several models show that their participation in political and civil organisations is below average.[12]

9 Rákó, 2014, p. 62. Translation by the author. Unless otherwise specified, all translations from non-English sources are by the author.
10 Veczkó, 2007, pp. 51–52.
11 Bourdieu, 2008.
12 Hajdu and Megyesi, 2017, p. 172.

These circumstances impact whether a family facing problems will be able to seek help; they also affect their willingness to cooperate with external intervention institutions and their representatives. Child protection professionals thus have a specific role because they must intervene in rather sensitive family situations and provide solutions to identified problems.

3.1. Personal Relationships in Primary Care

Generally, when a family has a child protection problem, the first support professional they meet is the family support worker (who does social work) linked to child welfare services (primary care). Hence, family support workers have a particularly important role in whether cooperation can develop at this initial stage; this relationship affects subsequent joint work and any procedures. (For example, a protection procedure is most often initiated on the recommendation of the family worker, but the child welfare service may also propose a foster placement.)

> Family visits can also help to build trust in people who are always suspicious of formal institutions. There is a greater chance of changing behaviour in the environment in which they live day after day, as it is easier to introduce and learn new things. It is also easier for the therapist to achieve an immediate effect through structural measures.[13]

In the case of support systems, there has been a recent shift towards family-centredness, where the primary aim is to establish a partnership with the family during the case intake period. Subsequently, the family is gradually empowered through cooperation, achieved with the development of family attachment and the creation of methodologies to access families. In supportive relationships, partnership and control are combined; counselling is constantly being professionalised, institutionalised, and methodologically standardised, while formalisation is accompanied by the need to preserve spontaneity.[14] Social workers' mindsets are both family-oriented and seek to promote change systemically. Their work requires the acquisition of various key skills, described in *Table 1*.[15]

13 Sherman and Fredman, 1989, pp. 189–190.
14 Temesváry, 2018, p. 86.
15 Minuchin, Colapinto and Minuchin, 2002.

Table 1. *Key skills for social workers (table content by the author)*

Skill Name	Main Related Activities
Conceptual skills	Mapping and placing the wider context and the way the family is organised in the system.
Preparing for change	Exploring possible solutions with the possibilities offered by the care system.
Exploring practical issues for family change	Gathering information, guiding them towards solutions while staying in the background; maintaining the autonomy of the family.
Redefining family assumptions and reinforcing new patterns	Improving families' self-image, empowerment, focusing on strengths.
Conflict management	Focusing on current problems based on family dynamics and their problems.

Child welfare providers may have bilateral relationships with several support professionals in addition to the family carer, and individual sessions may also take place (such as with a development teacher or psychologist). The caseload is generally high: in 2022, there were 6,373 employees for nearly 525,000 cases handled by family and child welfare services in 669 municipalities and 203 family and child welfare centres.[16] It is impossible to calculate the exact number of cases per person from the published data (as this varies substantially among different staff), but it is safe to estimate that there are at least 80–100 cases per family worker per year (this number may be influenced by geographical location). To increase efficiency and prevent staff turnover, in addition to raising wages, it may be important to develop other ways of promoting social work such as providing support professionals with supervision, recreational opportunities or the introduction of a recreation day.

From the point of view of personalness, one of the current theories that may be relevant is social-development-based social work, which takes community social work as an essential element. This, in addition to individualised sessions focusing on the problems faced by small communities, can promote the use of personal resources and thus change the situation of the whole community; at the same time, people who once needed help become helpers themselves.[17]

3.2. Personal Relationships in Specialised Care

Perhaps one of the most important issues when entering child protection specialist care is the provision of legal representation, which is provided by the child protection guardian affiliated with the regional child protection specialist

16 Hungarian Central Statistical Office, no date c.

17 Temesváry, 2018, p. 86.

services. The aim of this role is to consistently represent the best interests of the child; it is not subordinate to the care placement but is subject to the power of the guardianship authority. Representation includes, inter alia, promoting the exercise of the child's rights, communicating their views to the various institutions, and managing the child's assets. In fulfilling their roles, they are accountable to both the guardianship authority and the child.

> The above provisions taken as a whole ensure that all children have access to the protection guaranteed by the Fundamental Law and to the family substitute care due under the CPA (as an important element to ensure the legal representation of the child in addition to his or her care), and that, in accordance with the provisions of the Civil Code, there is always an adult person who, as guardian, is responsible for a child who for some reason does not have a parent exercising parental authority.[18]

As can be seen, these activities require intensive contact with the child, making workload a relevant factor.

Children placed in residential care or children's homes (together referred to as 'children's homes')[19] also come into contact with a range of other professionals such as childcare workers who care for them, teachers and development teachers who support their learning and development, and psychologists (hereafter referred to collectively as 'children's home workers'). The relationship with aftercare workers – who help young adults who have reached the age of majority but remain in children's homes – is particularly important.[20] Aftercare workers work with the young person to develop a plan to enable him or her to successfully lead an independent life as soon as possible.[21] During the period of aftercare, the young adult has the duty to cooperate.

Mike Stein classifies young people leaving care into three types based on their coping strategies. The first group is that of the victims; they have suffered the trauma of separation from their families and are typically unable to develop independent living. They are characterised by mistrust, are often exploited (for example, they become victims of prostitution), and have mental health problems.

18 Mattenheim, 2017, p. 565.

19 The term 'children in care' varies in both colloquial and official language in Hungarian, with several terms – such as 'child in special care', 'looked after by the state', 'fostered by the state', 'in state care', 'in child protection care' – being used interchangeably. For the sake of simplicity, these terms are used synonymously in the present study without adopting a critical perspective on their accuracy.

20 Aftercare may also be available for minor children; it may be available for up to one year after the termination of foster care (but up to the age of 18), when the relationship is mainly based on follow-ups and is carried out at the level of child welfare services.

21 For more information on the methodology governing aftercare, see the National Institute for Family and Social Policy, no date.

Young people in the second group – the survivors – are also characterised by instability; most continue to use social services after they reach adulthood, living from day to day and taking casual jobs. The third type are the successful ones, who face and overcome great struggles; they acquire a profession or higher education and have extensive social skills and contacts.[22] Hungarian follow-up analyses show that 70% of aftercare recipients complete their education, while 64% of persons receiving supplementary aftercare drop out of school; in general, aftercare recipients do better, even if the care leaves something to be desired (for example, it may fail to provide relationship capital).[23]

Children's homes try to create a sense of home, albeit in an institutionalised way; for this to be successful, several aspects need to be taken into account. For example, furnishings should be modern, children should have some degree of privacy (for example, space to store personal belongings), and there should be separate rooms (for example, a separate study room, playroom, and bedroom).[24] The issue of maintaining one's identity and culture also arises in special care, which can be particularly significant for Roma children or children of other nationalities. The CPA mandates that children's homes organise activities for this purpose, though this rarely happens in practice. Implementing relevant solutions (possibly involving civil organisations) would help children develop a healthy self-image and contribute to their development and the shaping of their future plans.[25]

Another important issue relates to instilling knowledge about family life within the framework of children's homes. Although children's homes usually stipulate house rules which cover household-related tasks, they tend to rely on school-based education for other forms of family-related knowledge. Internationally, there are several models of family life education:

1. The health model aims at sexual education.
2. The economic model aims at household and money management knowledge.
3. The social model aims at instilling family roles.
4. The socio-psychological model aims at improving social relationships and self-knowledge.
5. The career orientation model aims to improve future decisions.

There are various solutions in international practice regarding the age at which this type of education is provided. Generally, it occurs within the framework of separate subjects specifically designed for each purpose.

22 Stein, 2005.
23 Szikulai, 2006.
24 Molnár, 2002.
25 Aratóné, 2003.

In Hungary, Government Decree No. 110/2012. (VI. 4.) on the issuance, introduction, and application of the national core curriculum deals with the issue at three levels (general education, framework curriculum, textbooks) in twelve development areas, one segment of which is family life education. The rest are integrated within the framework of other subjects (for example, ethics, social studies, or biology), depending on age characteristics, from elementary school to high school. However, based on impact measurements, this solution is not effective; a coordinated strategy appears to be necessary.[26] Another question that arises for children in children's homes is the extent to which the care they receive can be considered sufficient without the constant and functional presence of a family environment.

Even for children raised in families, daytime care in educational institutions can pose difficulties and affect their development. Accordingly, workers in children's homes must respond to particular situations in a suitable form,[27] such as creating a sense of homeliness and educating children who have experienced multiple traumas (these traumas may relate to the period before being taken into care, the process of being taken into care, and the challenges of institutional or foster care placement).[28] Considering all these factors, professionals must possess appropriate professional skills. They serve as role models, and the bond they form with children is also vital, since the children's home essentially provides the primary setting for their socialisation.[29] 'A positive, consistent, and holistic approach to supporting children and young adults can greatly contribute to establishing their emotional stability and to the development of their motivation necessary for continuing their academic studies (e.g. in higher education institutions).'[30] In addition, workers in children's homes also establish contact with the parents and the child's family, with whom a special relationship develops.[31]

As is the case in residential institutions in general, during placement in a children's home, the evolution of the relationship between the child and the biological family (primarily the parents) is crucial. The responsibility for maintaining contact primarily lies with the parent; upon ordering the child's care, the guardianship authority regulates the extent and manner of this contact based on the recommendation of the care facility. Typically, this means one in-person visit per month and one or two telephone contacts per week, as well as the possibility of home visits during school holidays.[32] Over time – if the parent

26 Bodó, 2018.
27 Farkas, 2014.
28 Rácz, 2012; see also Kálmánchey, 2001.
29 Varga, 2012.
30 Rácz, Hodosán and Korintus, 2009.
31 Zsubrits, 2012.
32 Online tools are also provided and often replace formal means of contact between children and their parents; however, the online space is not yet subject to regulation. The dilemmas raised by this issue go beyond the scope of this study and should be examined in future research.

cooperates –, these visitations can become more frequent. However, it remains crucial to assess and reflect on the reduction of personal contact opportunities. This is especially the case when the child's removal from the family is not caused by a fault of the parent or the endangerment of the child. Moreover, parent–child meetings can lay the groundwork for future home care.

> However, institutions do not always support these visits. Often, they are used as rewards or punishments, without considering that they are part of the problem-solving process. The opportunity for visits is rarely withdrawn, mostly only if they pose a danger. The provision or withdrawal of the opportunity to return home should never be used to reward or punish behavior within the institution, nor should it depend on whether the biological parents meet other objectives set out in the treatment plan. There is little evidence that these controlling procedures modify behavior, but they certainly convey the message that compliance with institutional rules is more important than maintaining family relationships.[33]

Therefore, an important issue may be the expansion of contact opportunities and the development of new methods to ensure personal family relationships are maintained.

4. The Trend of Deinstitutionalisation

Child protection services that provide basic primary care are embodied in transitional care institutions, ensuring care for children (or the family in the case of a transitional family home) during periods of temporary difficulties faced by parents (such as unresolved housing issues). In these placement forms, as opposed to specialised care, there is more opportunity to maintain daily contact between children and parents, allowing parents to perform some of their caregiving duties in cooperation with the transitional care institution.

One criticism of transitional care is that the duration of the placement order (initially no more than six months, but which can be extended by two subsequent six-month periods) does not necessarily reflect the actual duration of the issues faced by the parent or parents. Moreover, it may become apparent in a shorter period whether there will be a need for temporary or permanent care; clearly, quicker solutions are in the best interests of the child. Professionals advocate for strengthening the substitute parent system and, based on the spirit of personalness, they recommend substituting institutional solutions with family integration.[34]

33 Minuchin, Colapinto and Minuchin, 2002.
34 Zámbó, 2010.

Conversely, the duration of transitional care might be too short to deal with the comprehensive existential and lifestyle changes needed in the parents' situation. As a result, there may be considerable pressure placed on professionals.[35]

> [Deinstitutionalisation] as a necessity is one of the most direct manifestations of personalness in legislation and public service practice. The institution of deinstitutionalisation is also a shift towards a more holistic vision, a more emphatic one, in the wider field of public administration and human (public) service provision.[36]

Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the Rights of Children Living in Residential Institutions[37] established the following fundamental principle: 'wherever possible, preventative support measures should be provided that are appropriate to the special needs of children and families.' Furthermore, 'the institutional placement of children should only occur in exceptional cases, during which the primary goal is to ensure the best interests of the children and their quickest, successful social integration or reintegration.' The use of resources is discussed in Directive 2004/18/EC on the coordination of procedures for public works contracts, public supply contracts, and public service contracts.[38]

The recommendation by the Committee of Ministers (2011) number CM/Rec(2011)12[39] addresses the rights of children and family-friendly social services, advocating not only for the availability of general, specialised, and intensive interventions for the protection of children but also for the training of professionals and the integration of supervisory opportunities, highlighting the importance of measures targeting children under three years of age and care that meets the needs of families. Article 7 of the CPA also establishes the principle of prioritising family care, adoption or foster care placement (which can include substitute parents or foster parents), with exceptions.[40]

Within the realm of institutional placements, smaller-sized institutions dominate. *Table 2* illustrates the different personal care services and their legal accommodation capacity.

35 Zombai, 2014.

36 Rixer, 2009. Translation by the author. Unless otherwise specified all translations from non-English language sources are by the author.

37 Council of Europe, Committee of Ministers, 2005.

38 eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32004L0018&from=EN (Accessed: 8 February 2024).

39 rm.coe.int/168046ccea (Accessed: 3 February 2024).

40 See CPA. 7. § (2) para.

Table 2. *Forms of personal care and their accommodation capacity (table content by the author)*

Type of Care	Form of Care	Institution Type	Accommodation Capacity
Transitional care – primary care	institutional	temporary home for families[41]	12–40 children and adults together
		children's temporary home	12–40 children
Admission – specialised care	substitute parental care protection (with network)	substitute parent	maximum 4 children
		foster parent	up to 6 children (including own biological children)
	institutional	dormitory	maximum 12 children
		children's home	12–48 children

Notably, there are even larger complexes of institutions where several children's homes are located in one large building (such as the Children's Protection Centre in Matészalka).[42] Another relevant form is the so-called 'boarding school', which nowadays operates in the form of a dormitory (such as the Hungária Elementary School and Dormitory in District XIX[43] or the Dankó Pista Unified Nursery School, Primary School, Vocational School, Secondary School, and College in Biri[44]); these provide day care during the week, mostly for disadvantaged children and children with special educational needs. They are considered to be educational rather than personal care institutions, even if their function is closer to the latter, since they have a structure closer to that of a children's home than to that of general boarding schools (e.g. grouped accommodation including teachers); this also affects their funding.

On the occasion of the twentieth anniversary of the adoption of the Convention on the Rights of the Child (2009), the UN published a guide on 'Alternative Care for Children', developed by the Committee on the Rights of the Child and the International Social Service.[45] The publication highlights that the removal of a child should be based on the principle of necessity (if there is no other solution), and that the main aim of the placement arrangement is to place the child as close

41 A family transition home can be a crisis centre, a shelter, or a single mother's home.
42 https://szszbmgyk.hu/elerhetoseg (Accessed: 5 February 2024).
43 Hungária Általános Iskola és Kollégium, no date.
44 Biri Község Önkormányzata, 2011.
45 Save the Children's Resource Centre, no date. (Accessed: 6 February 2024).

as possible to their birth family, bearing in mind the possibility of developing a personal bond with the caregivers in order to create stability and permanence (the principle of appropriateness). States should give priority to strengthening parental care and preventing family separation (informal care); where separation is unavoidable, every effort should be made to reunite families and encourage the development of foster parent networks; institutional care should be provided in small groups, in a family atmosphere, with as few staff as possible, and with aftercare support.

Eurochild,[46] a network of European child protection organisations, published a comprehensive study titled 'Deinstitutionalisation and quality alternative care of children in Europe'[47] in 2012, which notes that comparing the approaches to alternative care in different European countries is challenging due to the different definitions of residential care institutions used by Member States, which may include residential schools, special schools, infant homes, residential homes for children with intellectual disabilities or mobility impairments, residential homes for children with behavioural problems, juvenile detention centres and aftercare homes. In addition to highlighting good practices, the research points out that enabling children to grow up in a family setting is a cost-effective and long-term solution compared to public placement options. Citing findings from a 2008 UK survey,[48] the weekly cost of keeping a child in a public residential unit would be 4.5 times the cost of living independently, 8 times the cost of foster care, 9.5 times the cost of placement with family/friends, and more than 12.5 times the cost of staying with a family; the cost of placing a child in a public institution could pay for eight children to be placed in foster care.

The Guide concludes that deinstitutionalisation could be achieved through coordinated cooperation and division of labour between state authorities, local communities, and civil society, but that in most states the allocation of targeted resources and support does not follow this logic, which requires, *inter alia*, the following measures: developing national strategies; developing accountability and responsibility rules; incorporating deinstitutionalisation into national legislation; developing institutions for early intervention; targeting long-term investments in social action; framing deinstitutionalisation as a public interest at the level of state, official bodies, and society; mapping and incorporating best practices by experts into state social action mechanisms; and involving civil society in the processes by strengthening civil initiatives.

46 Eurochild, no date.
47 Eurochild and Hope and Homes for Children, 2014.
48 European Commission, no date.

The European Expert Group on the Transition from Institutional to Community-Based Care (EEG hereafter[49]) published *A Common European Guide on the Transition from Institutional to Community Care* in 2012. This guide identifies the main principles for implementing and facilitating the sustainable transition of children, people with disabilities, people with mental health problems, and older people from institutional care to family and community alternatives.[50] The guide presents research showing that children in institutional care have greater developmental difficulties compared to their peers in family or foster care, with symptoms in physical development and motor skills, brain development, emotional attachment, and mental, language, and psychosocial skills. This deficit is attributed to the fact that the relationship with caregivers is limited compared to more personal relationships in other forms of care. In addition to the economics of deinstitutionalisation, the guide also highlights the importance of prevention and the reintegration of institutionalised people into society; achieving these goals requires changes to the legal framework, building the capacity of the care system and strengthening communities. With regards to placements for children, it highlights the promotion of adoption, the extension of foster care, and the replacement of children's homes by residential care.

In Hungary, government efforts to replace residential institutions for people with disabilities started in 2009 and have subsequently been extended to other residential institutions, including child protection.[51] The process is currently being developed and implemented within the framework of the EFOP 1.9.1 TÁRS project.[52]

> [In] children's lives there is a whole range of environmental factors that, although not traumatic in the traditional sense of the word, have a detrimental effect on brain development. There is a growing body of evidence to suggest that the most serious threat to children's healthy development is neglect, i.e. when parents or carers are insensitive to the child's needs. Neglect in childhood, especially in infancy, is a serious threat to the nervous system. Research has shown that neglect can cause more long-term harm to children than physical abuse.[53]

49 The EEG is part of the Europe 2020 strategy; see more here: deinstitutionalisation.com/ (Accessed: 9 February 2024; see also: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en Accessed: 9 February 2024).

50 European Expert Group on the Transition from Institutional to Community-based Care, 2012.

51 Emberi Erőforrások Minisztériuma, 2019.

52 For more details on the structure of the programme, see: Fogyatékos Személyek Esélyegyenlőségéért Nonprofit Kft., no date.

53 Tough, 2018, pp. 32–33.

In the light of this, it can be concluded that the number of risk factors is very extensive; other forms of care, in addition to that provided by parents, play a major role in shaping a child's healthy development. In conclusion,

> the child protection system needs to be developed at different levels, as it can only work effectively if it is systemic. There is no hierarchical relationship between the different subsystems and services, no professional difference in prestige, they are not based on competing values, but have different systemic functions in ensuring the well-being and protection of children and the broad support of families.[54]

5. Concluding Reflections

The model of personalness in child protection is primarily expressed in supportive, personal relationships; it is also a key part of the terminology and process of deinstitutionalisation.

It is important to make a distinction between temporary and foster care. Considering the developmental difficulties of children in residential care, international recommendations – based on the spirit of deinstitutionalisation – increasingly emphasise solutions that replace institutional care. They recommend the promotion of family-friendly and child-friendly social services, prevention, and measures that ensure that children are brought up in families. The tools to reach these goals are coordinated programmes and strategies based on partnerships between the state, civil society, and wider society.

At the international level, deinstitutionalisation is a requirement for states, based on guidelines drawn up by the UN and the EU. It should be organised both by involving practitioners and by organising social cooperation based on a coordinated division of labour. However, staff in residential care institutions are not fully convinced: while they recognise that large institutional systems may not be the most effective means of providing personal care, they fail to see alternative solutions and fear for their roles and their jobs.[55]

Although Hungary's CPA is largely in line with international trends in terms of its deinstitutionalisation of specialised care (by prioritising foster care and starting to replace children's homes with residential homes), implementation differs in practice, partly due to the lack of professionals and institutional resources. Ombudsman's reports often mention shortages of equipment, absence of professional staff, lack of accommodation capacity, and the isolated locations

54 Rácz, 2018, p. 209.
55 Bugarszki *et al.*, 2010–2011.

of institutions which might hinder children's chances of social integration.[56] Children's homes and residential care homes must be located in municipalities that are welcoming, that see the job opportunities created by children's homes as a positive factor, and have infrastructure (such as public education institutions and specialised educational services).[57] It is equally important to increase the prestige of the child protection profession.[58]

In general, there are fewer measures in child protection legislation that seek to help families at risk of having their child taken into care; this should be improved. There is also a need to strengthen temporary or alternative care institutions and to regulate residential schools and their placement between services, which, as part of their function as temporary care institutions, could be a stepping stone between temporary and specialised care. In addition to smaller, more family-oriented institutions, it is just as important to improve the skills and qualifications of professionals working with children and to ensure continuity in their careers. To this end, targeted training and supervision, support for recreation, and competitive salaries are essential.

Regarding best practices, many NGOs lead the way, linking their initiatives with child protection services. Such cooperation could make the system more efficient, but there is no comprehensive legislative guidance on the forms it should take. The key to success seems to be that the local community accepts NGO volunteers and staff.[59] NGOs help disadvantaged children and their families mainly by building personal relationships through mentoring programmes; in this way, they contribute to fostering a family upbringing and overcoming family dysfunction, thereby strengthening local communities. In addition, there are initiatives to support, train, and supervise professionals and to exchange experience, which also fills a gap in the professional child protection workforce. It seems that projects based on various pedagogical (from traditional to alternative methods), professional, theoretical, and other approaches can be equally successful; the crucial factor comprises personal relationships combined with effective organisational functioning.

Overall, targeted initiatives with multi-level participants (public, civil, social), based on a partnership between the state, civil society and wider society, are clearly the most effective way of tackling the situation of disadvantaged and at-risk children. This requires not only a change in the legal framework but also the provision of public funding and grants. This research has shown that implementing the principle of personalness will shift the child protection system

56 See e.g. Report No. 6828-2020, Report No. 2875-2020, Report No. AJB-276/2019, Report No. AJB-2648/2015, Report No. AJB-746/2015.

57 Büki, 2015.

58 Rácz, 2014.

59 Darvas and Ferge, 2013.

in this direction, and that the success of this process can be assessed in the coming years. For this, developing and standardising child protection evaluation methods could be useful.[60] Programmes aimed at helping families and raising children in families are not only more cost-effective, but in the longer term they can solve the problems of vulnerable groups and prevent future generations from being affected by vulnerability. These initiatives need to take a multidimensional approach by developing complex professional programmes.[61] We hope that in the near future the child protection system can move in this direction and demonstrate practical results.

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60 Rácz, 2016.

61 Darvas, 2018.

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Children in Alternative Care

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Abstract. This article focuses on the alternative care of children. It emphasises several major points of alternative care from a children's rights perspective. The issue of alternative care as defined in the UN Convention on the Rights of the Child (CRC) and interpreted regarding the standards of children's rights is complex and affects essentially all rights of children, as enshrined in the CRC. This research contributes by envisaging some aspects of the Hungarian Child Protection Act that were enacted in 1997 and were meant as a milestone in the history of Hungarian child protection. This research explores children's rights in general, the main objectives of the Child Protection Act, reasons of child placement in alternative care, and main forms of this alternative care, including the foster care and children's homes. Furthermore, the issue of how Hungarian alternative care institutions meet the requirements of appropriate care for vulnerable children such as children with disabilities is examined. Consequently, the children's rights approach and Hungarian legal requirements are compared and form the basis for social assistance, alternative care as an *ultima ratio* solution, de-institutionalisation, and the caretakers of the vulnerable children. Of course, this series of issues is not an exhaustive list and does not include the practical realisation of the envisaged rights and institutions.

Keywords: alternative care, children's rights, children's home, foster parent, comparison

1. Children in Alternative Care – A Children's Rights Perspective

Children's rights, as enshrined in the UN Convention on the Rights of the Child (CRC) adopted in New York on 20 November 1989, have to be interpreted and applied in a complex way, as all children's rights are interconnected. Specifically, a particular right established for children by the CRC should not be construed

without considering the other rights included in the CRC. Moreover, all the listed rights are equal, although there exists the following 'pillars': the definition of the child in Article 1; prohibition of discrimination in Article 2; child's best interests, which are to be taken as the primary consideration in Article 3; right to life in Article 6; and the child's rights to be heard in Article 12.

According to Articles 20(1) and (2) of the CRC, a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State, and States Parties shall, in accordance with their national laws, ensure alternative care for such a child. Article 20(3) provides a wide interpretation of 'alternative care', as it states that such care could include, *inter alia*, foster placement, the *kafalah* of Islamic law, adoption, or, if necessary, placement in suitable institutions for the care of children. Additionally, this Article states that when considering solutions, due regard must be paid to the desiderate of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background.

It is important to emphasise that when mentioning the temporary or permanent deprivation, the CRC does not refer to parents but to the child's family. This stands in harmony with the CRC's approach towards the wider family of the child, as Article 5 provides, inter alia, that States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family.[1] These children are in need of special care, as they are vulnerable[2] and are 'at special risk of being denied' a 'nurturing environment'.[3] The wording and the interpretation of the CRC, which are unambiguous, suggest that the institutional placement of the child is the last resort, even if it can serve as the best solution in certain situations, for example, when siblings want to stay together.[4] Evidently, the first interpretations of the CRC indicate clearly that 'institutionalisation is particularly inappropriate for young children'.[5] The institutionalised alternative care of the child is the last resort and should only be temporary.[6]

The obligation to provide special protection and assistance for children being deprived of family environment is mandatory[7] and is the responsibility of the state, even if non-state entities may play a role in providing alternative care.[8] The provision of alternative care should meet several requirements, as simply providing alternative care is not sufficient; the state must offer various alternative

1 Hodgkin and Newell, 2007, p. 278.
2 Id., p. 280.
3 Tobin, 2019, p. 737.
4 Hodgkin and Newell, 2007, p. 282.
5 Ibid.
6 Schmal, 2021, p. 291.
7 Tobin, 2019, p. 734.
8 Id., p. 735.

care options that meet the requirements, as children are the holders of rights, and alternative care is not the subject of mere charity.[9] One option is children's foster care, which is maintained and operated based on a legally regulated 'foster care policy'.[10] Residential care as an alternative care option may play a role if it is 'necessary and suitable'.[11] Children being cared for in institutions or in foster families are certainly entitled to all children's rights.

Alternative care makes children vulnerable and results in stigmatisation,[12] although other factors, such as disability, make children more vulnerable. The Convention on the Rights of Persons with Disabilities (CRPD) adopted in New York on 13 December 2006 provides in Article 23(3) that State Parties shall ensure that children with disabilities have equal rights with respect to family life either when the child is disabled or when the parents are or both. If these children have to be placed in alternative care, according to Article 23(5), State Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, or within the community in a family setting, when the former fails. Evidently, this Article prioritises child placement in family surroundings rather than in institutional care.[13] It occurs that the number of children belonging to certain vulnerable groups, including disabled children, is extremely high in alternative care as a consequence of societal stigmatisation of children with disabilities and the fragmented system of social assistance.[14] The importance of avoiding institutionalisation, whenever possible, is underlined by the fact that children with disabilities who are institutionalised are at increased risk of experiencing abuse when we compare them with children who live with their own families.[15]

2. 1997 – A New Regime for the Protection of Children in Hungary

The child protection system in Hungary is regulated by Act No. XXXI of 1997 on the protection of children and guardianship administration (Child Protection Act).[16] The Act was adopted by the Hungarian Parliament in April 1997. The child protection system envisaged in the Act was influenced by the CRC, which was

9 Id., pp. 745–446.
10 Id., p. 748.
11 Schmal, 2021, p. 291.
12 Alternative care being one of the most stigmatising situations was mentioned in Hungarian context by the sociologist János Zolnay (Ferge Zsuzsa szakmai örökségének nyomában – Szabadegyetem). [In the Footsteps of Zsuzsa Ferge's Professional Heritage].
13 Fiala-Butora, 2018, p. 654.
14 Schmal, 2021, p. 287.
15 Sabatello and Layden, 2020, p. 605.
16 The Act was promulgated in May 1997.

ratified in Hungary in 1991 and promulgated by Act No. LXIV of 1991. An aim of the Child Protection Act was to eliminate the gap between the requirements of the international documents and the child protection regime in force in the Hungarian situation.[17] The Act was warmly welcomed by experts, and it is considered a milestone in the history of regulation of the child protection system is Hungary.

The actual protection of children's rights is emphasised as the objective and principle of the Child Protection Act. Several principles can be enumerated as the basis of the Child Protection Act and the child protection system as a whole, including: the prohibition of discrimination, protection of the child's best interests, the child's right to life, and the child's right to be heard. These rights echo the statements of the CRC. Most importantly, the functioning of the child protection system, requirements for cooperation, importance of volunteering, and primacy of children's rights and interests should be emphasised. Child protection is regarded simultaneously in a narrow and a wide sense. In the wide sense, all children fall under the 'umbrella' of child protection, the purpose of which is to provide assistance with specific services and measures to enforce the rights and interests of children enshrined in the law, fulfil parental duties, and ensure the prevention and elimination of children's endangerment and the replacement of missing parental care. The basic child welfare services target the upbringing of the child in his or her family and the prevention and elimination of danger to the child. This aim is realised through social assistance for the child and the family. Financial benefits and benefits relating to personal care are part of basic child welfare services. The narrow sense relates to authoritative measures with the aim of providing alternative care for the child. The Child Protection Act provides several instruments for the protection of children that are applied based upon the principle of graduality.

3. Children's Rights in the Child Protection Act

The connection between the Child Protection Act and the CRC is evident from Chapter II of the Act, which enumerates several rights of the children. As Hungary ratified the CRC, a huge gap emerged between the requirements of the CRC and the Hungarian practice, thereby elaborating the Child Protection Act.[18] Therefore, it has become the main legal source of the Hungarian law, containing a comprehensive list of children's rights.

While some children's rights apply to children who are brought up in their own families, other rights protect children belonging to a special or minority

17 Rózsás, 2004, p. 140.
18 Mattenheim, 2017, p. 21.

group. The Act establishes children's rights dealing with endangered children and general children's rights, several of which expressly repeat the children's rights enacted in the CRC. General children's rights refers to the child's right to receive help to develop his or her personality, to avoid a situation that threatens his or her development, to be integrated into society, and to create an independent way of life.[19] Children have the right to have their human dignity respected and to be protected against abuse (physical, sexual, or mental violence), neglect, and informational harm.[20] The child has the right to access to programs in the media that are suitable for his or her development, to help to expand his or her knowledge, to preserve the values of the Hungarian language and culture, and to be protected against such harmful effects as incitement to hatred, violence, and pornography.[21] The child has the right to be protected against environmental and social influences harmful to his or her development, as well as substances harmful to his or her health.[22] The child has the right to freely express his or her opinion, to receive information about his or her rights and the possibilities of enforcing his or her rights, to be heard directly or in another way in all matters concerning his or her person and property, and to have his or her opinion considered with regard to age, state of health, and level of development. The child has the right to file a complaint with the forums specified in the Act in matters of his or her concern. The child has the right to initiate proceedings before court and other bodies defined by law in case of violation of his or her fundamental rights.[23]

A special group of children is marked out for protection by the Child Protection Act, articulating that disadvantaged and cumulatively disadvantaged children have the right to receive increased assistance to overcome the conditions hindering their development and to increase their chances.[24] Such a disabled or chronically ill child has the right to special care that helps his or her development and the development of his or her personality.[25] Some articles aim to prevent abuse against children and manage situations when they seem to be the victims of abuse. Children, as aforementioned, have a right to be protected against abuse and may not be subjected to torture, physical punishment or other cruel, inhuman, or degrading punishment or treatment.[26] In 2014, a new regulation was introduced, such that now, the child has the right to benefit from the actions of professionals acting in the interest of his or her protection, especially to recognise and eliminate child abuse and apply uniform principles and methodology.

19 § 6(2) Child Protection Act.
20 § 6(5) Child Protection Act.
21 § 6(6) Child Protection Act.
22 § 6(4) Child Protection Act.
23 § 8(1)-(3) Child Protection Act.
24 § 4(2a) Child Protection Act.
25 § 6(3) Child Protection Act.
26 § 6(5) Child Protection Act.

4. The Characteristics of the Child Protection Act

The Act is the first complex legal rule in the field of child protection, which created an opportunity to establish regulations with a unified and wholistic approach.[27] Several objectives of child protection and the child protection system are enumerated in the Child Protection Act, providing a very wide spectrum. Child protection in the broadest sense applies to all children irrespective of whether they live in their own families or are endangered. It is closely connected to a professional dilemma of whether to intervene in the life of a family. The solution in the field of child protection was that social work and social assistance should be provided to the families.[28]

The general principle by which the state, local governments, persons, and bodies for the protection of the child have to support children such that their rights and interests may be realised and the parental obligations may be performed applies to all children. The principle that prescribes that the endangerment of the child has to be prevented and eliminated is also general, as it is fundamental and applicable to all children; theoretically, each child may be at risk of becoming endangered. The requirement of eliminating endangerment applies only to children who are endangered such as the principle that the absent parental care has to be substituted, and if the child has grown up in alternative care, his or her social integration has to be facilitated.[29] These principles create a clear system encompassing all children, based upon the idea that each child may get into a situation resulting in his or her endangerment.

The child protection system serves these objectives through different legal institutions, based upon detailed legal provisions. Three layers of care provided for families and children are defined. The first layer involves the different forms of supply belonging to the category of basic child welfare and care. It intends for families to use these supplies voluntarily and access them easily, close to their residence. The next layer of care is specialised and provided to children who already live in alternative care. The third layer includes the authoritative measures that can – and simultaneously have to – be applied if the care needed for the child's physical, mental, emotional, and moral development cannot be provided for the child with the consent of his or her parents, which endangers the child's development. The public guardianship authority then has to take one of the enumerated measures in such a case.

27 Herczog, 2001, p. 25.
28 Mattenheim, 2017, p. 21.
29 § 1(1) Child Protection Act.

5. Authoritative Measures as Interference in the Family's Life

One of the most important competences of the public guardianship authority is the exercise of its authoritative power.[30] The Child Protection Act regulates the measures that are to be ordered by the competent authority when needed, in the child's interest. Consistent with the main principles of the child protection system, such as the principle of graduality and differentiation between the supporting and authoritative competences, the public guardianship authority has to order one of the enumerated authoritative measures if the care that is needed for the child's physical, mental, emotional, and moral development cannot be provided with the agreement of the parents, which endangers the child's development. The authoritative measure has to fit the extent of the child's endangerment.[31]

The definition of being endangered is one of the most crucial issues in child protection, as it has a decisive importance. The Child Protection Act provides a definition according to the consequence of circumstances and behaviour or negligence displayed by the child or other person, obstructing or impeding the child's physical, mental, emotional, or moral development.[32] The Child Protection Act further adds two important provisions. The child can be separated from his or her parents or other relatives only in his or her own interests and in cases and way defined in law, and if the child is endangered purely by pecuniary reasons he or she cannot be separated from his or her family.

The mildest measure entails taking the child under protection.[33] If the public guardianship authority takes the child under protection, it does not separate the child from his or her parents and relatives, and parental custody is not affected. If the child is endangered and the parents or the legal representatives of the child cannot eliminate this endangerment by voluntary access to basic care services, or they do not use this opportunity, but the public guardianship authority can reasonably assume that the care may be provided for the child in his or her family with support, the child has to be taken under protection.[34] It has to be stated by the decision-maker whether taking under protection is a proper measure concerning the particular child's special circumstances. This is definitely an authoritative measure that can be ordered without the parents' or the child's legal representative's agreement, but as the child is left in his or her family and shall receive support together with the family, this measure borders on child welfare services and coercive measures.

30 § 67 Child Protection Act.
31 § 67(1) Child Protection Act.
32 § 5 *n)* Child Protection Act.
33 § 68 Child Protection Act.
34 § 68(1) Child Protection Act.

This measure is intended to grant continuous support in caring for the child and its organisation and the support of parental care to ensure eliminating the endangerment of the child. The public guardianship authority takes some special measures and calls the family and child welfare centre as a case manager to join all forces and services in connection with the child's protection. Noteworthy is the type of measures that may be taken by the public guardianship authority. For instance, it may oblige the parents to continuously avail the child of daytime care, to turn to a person or body dealing with family protection, or to access medical services for the child, and it may also oblige the parents that they and the child participate in conflict management. Moreover, it can determine certain behavioural rules for the child and also call the parents' attention to the consequences of his or her improper lifestyle and behaviour. The family and child welfare centre has to elaborate a unique plan for caring for and bringing up the child.

Another special authoritative measure is the child's provisional placement.[35] There are special circumstances when it is essential to act without any delay. If the child is without any supervision or the child's physical, mental, emotional, or moral development is seriously endangered by his or her family circumstances or himself or herself, he or she has to be placed immediately. If the child's circumstances require an immediate intervention in the child's life, it can only be interim. Several authorities, including the public guardianship authority, police, immigration authority, asylum authority, prosecutor's office, court, and penitentiary institutions, have the competence to interfere in the child's life and place the child either with the parent living separately from the child if he or she is eligible for caring for the child, with another relative or person, or at a foster parent or children's home, if such persons are unavailable. This measure affects the parents or the parents' parental custody, as the right attached to it, namely caring for the child, is suspended as long as the child is provisionally placed. This kind of placement is terminated by the public guardianship authority if the development of the child may be provided in his or her earlier circumstances, the child needs to be taken under protection if necessary, or if the child has to be taken into alternative care.

The most severe and crucial authoritative measure is taking the child into alternative care.[36] It is the *ultima ratio* solution among the coercive measures. This measure is intended to ensure care for the child by providing a home and a legal representative for him or her until his or her family will be able to accept the child back or a guardian who takes the child into his or her own household may be ordered for the child until the child is adopted or he or she reaches his or her majority. For the latter, the aim of alternative care is to prepare the child for an independent life. There are several situations that may result in the child

35 § 72 Child Protection Act.
36 § 77 Child Protection Act.

being taken into alternative care, such as when both parents have passed away and there is no relative or other person who can take the child in his or her own household as a guardian. In this case, it is a reasonable decision, as the state has to provide special protection and assistance for the child who is deprived of his or her family environment.

The public guardianship authority takes the child into alternative care if the child's development is endangered by his or her family surroundings and this endangerment cannot be eliminated either by child welfare services or by taking the child under protection, no result can be expected from the services or from having taken the child under protection, or the care for the child cannot be provided in his or her family.

The gradual character of the measures regulated in the Child Protection Act is mirrored in the presentation of the authoritative measures. While taking the child under protection does not separate the child from his or her family, alternative care results in separation in the child's interests. The provisional placement of the child is a reaction to an emergency situation, as the child has to be placed with another person who may be a separated parent of the child, a foster parent, or a children's home.

6. Alternative Care in the Mirror of the Child Protection Act

If the child is taken into alternative care, a home has to be provided for him or her. This provision consists of full care for the child, with the aim that he or she may be placed back into his or her own family or, in case of impossibility of the child's re-placement into his or her own family, support for the child's adoption may be ensured. Nonetheless, the child also needs support to start his or her own life path. The detailed rules on the institutions of alternative care are contained in Decree 15/1998 (IV. 30.) of the Ministry of Public Welfare on the tasks and operational conditions of child welfare and child protection services and professionals providing personal care.

6.1. Foster Families and Children's Homes

There are two main solutions for placement outside the family (also extended), which differ from each other. One is the child's placement in a foster family and the other is his or her placement in a children's home. From 1 January 2014, a change of paradigm occurred:[37] all children under the age of 12 have to be placed in a foster family instead of in a children's home, and the child may be

37 Filó and Katona-Pehr, 2022, p. 338.

placed in a children's home only if it is required by the child's health, the need for the joint placement of siblings, or is hindered by the definite request of the natural parents. According to this new regime, children under the age of three were re-placed with foster families in 2014, children under the age of six were re-placed with foster families in 2015, and children under the age of 12 were re-placed with foster families in 2016.[38] Since 2014, it has become a priority for a child in alternative care to be placed in a foster family, with child placement in a children's home becoming a secondary option.

Until the adoption of the Child Protection Act, children's homes were typically large institutions providing homes for several children, whereas the aim of the Child Protection Act was to reshape the system consisting of children's homes for a small number of children. Besides the children's homes, the so-called 'flat' children's homes were built.

A children's home provides for the care and upbringing of at least 12 and at most 48 children.[39] The 'flat' children's home is a children's home that is operated in an independent flat or family house having a maximum of 12 children who may live there.[40] The number of children who may live in a children's home is a crucial issue with regard to children with special needs or children with both special and particular needs who may live there.

6.2. Children with Special and Particular Needs

Children with special needs are children who are chronically ill or disabled and those who are under the age of three. Children with particular needs are children with severe psychological symptoms (severe personality development, emotional life and impulse control disorders, or severe psychotic or neurotic symptoms), those showing severe dissocial symptoms (severe behavioural and integration disorders or severe antisocial behaviour), those who abuse psychoactive substances (alcohol, drugs, etc.), or those suspected of being victims of human trafficking (including children who violate the prohibition of offering sexual services as defined specifically). Children with both special and particular needs belong to another group as they simultaneously need special and particular care.[41]

In a children's home, care for the children is provided in residential units according to the unique professional programme of each children's home. In one residential unit, a maximum of 12 children may be placed, and within the group of 12 children, at most one child with both special and particular needs, one child with special needs, or four children with particular needs may be placed.

38 Filó and Katona-Pehr, 2022, p. 339.
39 § 124(1) Decree.
40 § 125(1)-(2) Decree.
41 § 53(1) Decree.

Deviation from this requirement can only be allowed in the interest of the children concerned. The total number of children may be reduced to accommodate the placement of children with both special and particular needs, one child with special needs, or four children with particular needs. These requirements have to be applied to a 'flat' children's home where only a maximum of 12 children may be placed.[42] These rules were introduced in 2014.

In that year, special children's homes, special 'flat' children's homes, and special units of the children's home were introduced to increase care tailored to the individual needs of children.[43] These homes or units provide special or special and particular care for the concerned children over the age of 12 as an obligatory task. For a child showing severe dissocial symptoms, severe psychological symptoms, or using psychoactive substances, special care adapted to the child's condition has to be offered, while for children with both special and particular needs, special and particular care has to be provided. The number of children being placed in a special ('flat') children's home is reduced for the effective provision of the special (and particular) care. In a special care children's home, a maximum of 40 children, with a maximum of 8 children per residential unit, while in a special 'flat' children's home, a maximum of 8 children, and in a special unit of the children's home, a maximum of 8 children may be placed, in such a way that only children of the same sex can be placed within each group.[44]

In 2014, particular children's homes, particular 'flat' children's homes, and particular units of the children's home were introduced to increase care tailored to individual needs of children. These homes or units provide particular or special and particular care for the concerned children as an obligatory task. For a child who is under the age of three and has special needs owing to his or her young age, chronic illness, or disability, particular care adapted to the child's age and condition has to be offered, while for children with both special and particular needs, special and particular care has to be provided. All particular homes and units may take care of children under the age of six who are disabled and show developmental delay in some areas. In such a case, early development care is provided for the child. Moreover, the number of children is restricted in such institutions. In a particular children's home, a maximum of 40 children, while in a particular 'flat' children's home, a maximum of 10 children, whereas in a special unit of the children's home, a maximum of 10 children may be placed. At most 8 chronically ill, 8 moderately or severely disabled, or 10 mildly disabled children may be placed among the chronically ill or disabled children with particular needs in one group. In a group consisting of eight or ten children,

42 § 124 Decree.

43 These institutions were introduced by Decree 19/2014 (III. 13.) of the Ministry of Human Resources.

44 § 126 Decree.

a maximum one child with special and particular needs may be placed, and this can only be deviated from in the interests of the children concerned.[45]

In 2013, the rules on the central special children's home were modified.[46] The central special children's home provides care for children with a nationwide service area. It provides, in the frames of special care, therapy requiring special expertise for children who show severe psychotic or neurotic symptoms or are in need of the therapy because they have committed serious acts of violence, regularly abuse psychoactive substances, suffer from acquired immunodeficiency syndrome, or have become a presumed victim of human trafficking and in need of both particular and special care. The therapy is adapted to the child's condition and needs.[47]

6.3. Foster Family

Although child placement and care in foster families have a tradition in Hungary, the category of 'host parent' was introduced in 2014.[48] The host parent as an umbrella concept includes the deputy parent providing temporary care and the foster parent providing full care for children who are in alternative care. The temporary care by the deputy parent and the child's full care by a foster family through foster parents are different legal institutions belonging to different substructures of the child protection system. The child protection system involves two levels: basic child welfare care and specialised child protection care. The aim of the basic care is to support the child's mental, spiritual, and moral development and welfare, caring for the child by his or her own family, the prevention of the child's endangerment, termination of any endangered state, and prevention of the need for the child's placement in alternative care. Basic care is available upon a voluntary basis. Child protection (in a narrow sense) refers to the specialised care provided to children in alternative care.

6.4. Temporary Care as Part of the Basic Child Welfare Care

The key issue in temporary care[49] is its provisional character. Temporary care is provided at the child's parents' or his or her legal representative's request or upon the consent of these persons, if the parent is unable to raise the child in the family due to health conditions, lifestyle problems, justified absences, or other obstacles. Full care has to be provided to the child, and if the child is disabled, the care has to be adapted to the child's particular needs. Full care means the provision of

45 § 127 Decree.
46 The modifying legal source was Decree No 49/2013 (VII.10.) of the Ministry of Human Resources.
47 § 130–131 Decree.
48 Filó and Katona-Pehr, 2022, p. 343.
49 § 45 Child Protection Act

food, clothing, mental hygiene, and healthcare, education, housing that promotes the child's physical, intellectual, emotional, and moral development and is appropriate for its age, state of health, and other needs.

As the child has to be separated from the parent(s) not because of the parent's misconduct, the child's right to be taken care of in the company of his or her parents is crucial. The child under the age of 14 can only be separated from his or her parents in exceptionally justified cases, and the parent who has become homeless may be placed where the child is under temporary care. If the child is under the age of 12, his or her care has to be provided primarily by a deputy parent. In this case, the child's parent takes part in caring for the child according to his or her work schedule.[50] Temporary care may be provided in children's provisional homes where at least 12 and at most 40 children may be placed. There are 'flat' children's provisional homes that provide full and temporary care for a maximum of 12 children in an independent flat and in family-like circumstances.[51]

Upon the request of the parent who has become homeless, children and their parents may be placed together in the families' provisional home if, in lack of placement, their housing would not be provided, and the child would be separated from his or her family. The families' homes provide joint care of at least 12 and at most 40 adults and children.[52] There is a wide variety of tasks of such provisional homes providing care for families and children. These homes accommodate parents and children who have become homeless due to lifestyle problems or other social and family crises, those seeking protection, abused, or pregnant mothers in a crisis situation. They also provide temporary care for children in need of care and take in their homeless parents; assist the parents in the necessary care and upbringing of their child; provide the parent with co-housing with the child and care, as needed; provide parents with legal, psychological, and mental health assistance in addition to care; and participate in cooperation with the child welfare service in eliminating the reasons for the need for temporary care, sorting out the family's situation, and in reducing homelessness.[53]

Temporary care may be provided by a deputy parent who takes care of the child in his or her own household. The deputy parent can take care of up to four children at the same time, including their own children. The work of the deputy parent may be supported by a childcare worker, who is appointed by the maintainer of the network of host parents if the child placed with the deputy parent is under regular child psychiatric treatment or if there are more than two children under the age of three in the care of the deputy parent. The foster parent may also undertake the

50 § 45(3) Child Protection Act.
51 § 50 Child Protection Act.
52 § 51 Child Protection Act.
53 § 51 Child Protection Act.

tasks of the deputy parent; however, as a main rule, the children in the care of the host parent can only be those in alternative care or in temporary care.

6.5. Special and Particular Foster Parents

If the child is in alternative care, he or she may be placed with a foster family, to foster parents. This is not only an opportunity but is the objective of the system of alternative care to ensure family accommodation. A foster parent may be a special foster parent or a particular foster parent.[54] The special foster parent is the foster parent who is able to ensure the balanced upbringing of a child with severe psychological or severe dissocial symptoms or who abuses psychoactive substances and requires special care. The particular foster parent is the foster parent who can ensure the balanced upbringing of a chronically ill, disabled, or under three-year-old child in need of particular care. The foster parent can provide care for up to six children, including their own minor children. If the foster parent only takes care of foster children in his or her household, the foster parent can provide care for up to five children. If a child with special or particular needs is cared for in the foster parent's household, the number of children living there has to be reduced by one person in case of full care for each child with special needs or particular needs. There is a possibility of deviating from this rule on the request or with the consent of the foster parent and, especially, in case of the placement of siblings.[55]

7. Comparison between Some Aspects of the Child Protection Act and the Requirements of the CRC Concerning Children's Rights and Alternative Care

7.1. The Priority of Social Assistance and Family Care

The Hungarian child protection system in a broad sense is based upon care in the family, whereby the skills and tools of social work are utilised. Basic child welfare care makes it possible to opt for the most appropriate service and supply. This is provided close to the families both geographically and personally, as primarily social workers, carers, psychologists, and mediators provide these services. The child's temporary care serves as an example for the case when the parents cannot take care of their child but consent to the child's temporary care. In such a case, the child is not separated from his or her parents, if possible, which means that

54 § 54 Child Protection Act
55 § 54/A Child Protection Act.

the family as a unit is supplied with services. The holistic and complex provision of care for families, which is deeply rooted and is not discussed in the Child Protection Act, is in harmony with the children's rights approach.

7.2. Alternative Care as the Last Resort

The CRC requires that alternative care must be *ultima ratio*. The Hungarian Child Protection Act meets this requirement, as the basic child welfare care services precede the child protection measures and the child is placed in alternative care with foster parents or in children's homes only when there is no other opportunity to take care of the child. If the child is not endangered in his or her own family but is not under parental custody, the public guardianship authority has to be notified that a guardian needs to be appointed for the child. In such a case, if the parents exercising parental custody did not name anybody as the guardian, the guardianship authority shall primarily appoint a close relative who is suitable for the guardianship to act as guardian. If there is no such relative, the guardianship authority shall appoint another relative or another suitable person as guardian, primarily from among those who already take part in caring for and bringing up the child. Therefore, the child may remain in family circumstances or in his or her wider family and may be brought up in the guardian's own household. If the child is taken into alternative care, the child protection guardian – as part of the professional staff of the public guardianship authority – will represent him or her and administer the child's assets. The child in alternative care will be cared for personally by the foster parent or the staff of the children's home or 'flat' children's home.

7.3. Deinstitutionalisation

The child being separated from his or her parents or wider family and family members has to be placed in family-like circumstances. The process of de-institutionalisation has long been an objective, as there has been an obvious need for more foster families and foster parents. In 2014, the legislator introduced rules guaranteeing the gradual elimination of institutionalised children's homes. The effective rules require that children under the age of 12 have to be placed with foster families and cared for by foster parents. 'Flat' children's homes indicate a middle way solution, as a maximum number of 12 children may be placed in these homes, but these homes are operated in flats and family houses to create family-like circumstances. The same principle prevails in the residential units of the 'traditional' children's homes where the number of children is also limited. These children's homes are 'traditional', even though they are not the old, enormous children's homes anymore.

7.4. Appropriate Care for Vulnerable Children Such as Children with Disabilities

The Hungarian system of alternative care has several layers to provide special and particular care for children in need. Both the children's home (including the 'flat' children's home and the residential unit of the children's home) and the foster family (foster parent) may provide a surrogate home or parent who is prepared to care for children with special or particular needs or both these types of needs. These children are more vulnerable, and they need special attention from the staff of the children's home and the foster parent. The modification of the rules in 2014 made it possible to distinguish among these children, as being vulnerable is not a homogenous category.

8. Conclusions

The legal regime established by Act No. XXXI of 1997 in conjunction with the CRC provides for particular solutions in the case of children, particularly those with special needs. These solutions, in line with the desiderate of avoiding institutionalisation and even removal of the child from his or her family, strive to ensure assistance that is as close as possible to the child's original home and family. Only in extreme cases, and especially in the case of children suffering from disabilities, addiction or found in other specific circumstances, is the removal of a child from his family through placement allowed, and even in such extreme cases foster care is prioritised over institutionalisation.

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Poland as the Initiating Country of the Convention on the Rights of the Child

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Abstract. This study explores the role of Poland as the initiating country of the Convention on the Rights of the Child. It introduces prominent Polish legal scholars and emphasises the significance of children's rights as a human rights protection system. Subsequently, the most important milestones leading to the adoption of the Convention on the Rights of the Child are analysed, including key declarations, legal acts, guidelines, and findings. The thoughts of Janusz Korczak, a Polish educator and philosopher, which form the foundation of contemporary thinking on the welfare of children and children's rights, as well as the Convention on the Rights of the Child, are presented. Furthermore, the work on the Convention, such as the submission of the Polish draft, circumstances of adoption, and doubts about its functioning are examined. Importantly, this study discusses the major changes, introducing alterations in the children's rights protection system and presenting Polish legislative examples. The study concludes by summarising Poland's confirmed role in the context of the Convention's adoption and the demand for further observation of children's situations and responses to threats.

Keywords: children's rights, human rights, child, Convention on the Rights of the Child, Janusz Korczak

1. Introduction

Poland undoubtedly boasts numerous prominent legal scholars who have made significant contributions to the development of international law, which subsequently becomes part of the binding legal order in states that are parties to

international agreements or conventions. For instance, Paweł Włodkowic[1] and Stanisław from Skarbimierz[2] were immensely instrumental in the development of the laws of nations, while Juliusz Makarewicz[3] is noted as the creator of the Polish Penal Code of 1932.[4] Notably, a Pole, Rafał Lemkin,[5] coined the term 'genocide' and drafted the Convention on the Prevention and Punishment of the Crime of Genocide, signed on 9 December 1948, known as the 'Lemkin Convention'.[6]

In addition, the world owes Poland another incredibly significant legal act: the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989.[7] This convention holds profound importance in the development of children's rights and the legal status of children. Evidently, it is a source of pride for generations of Polish legal scholars and evidence that, as a country found at the 'Heart of Europe',[8] Poland can be at the forefront of envisioning the legal system of Europe and the world.

The aforementioned arguments reinforce that this convention relates to a delicate matter: children's rights – which must be emphasised as primary human rights, and their source lies in the inherent dignity of the individual and the uniqueness of the child as a human being. Consequently, every child is entitled to them, including the unborn, and their deprivation or renunciation is not possible.[9]

In this context, the words of the former Commissioner for Children's Rights, Marek Michalak, are noteworthy:[10]

1 Paweł Włodkowic was a Polish Catholic priest, scholar, lawyer, religious and legal-political writer, Rector of the Jagiellonian University, defender of Poland's interests in disputes with the Teutonic Order, precursor of religious tolerance and member of the Polish delegation at the Council of Constance in 1214–1218.

2 Stanisław from Skarbimierz was a Polish jurist and politician, the first rector of the reestablished Jagiellonian University in 1400, lawyer, and canon of the cathedral chapter at Wawel in Cracow.

3 Juliusz Makarewicz was a Polish jurist, long-time professor of criminal law at the University of Lviv, and a Senator of the Republic of Poland from 1925 to 1935, as well as the main author of the codification of Polish criminal law, the Penal Code of 1932, referred to in the literature as the 'Makarewicz Code'.

4 Presidential Decree of 11 July 1932 – Penal Code, *Journal of Laws* 1932, No. 60, item 571.

5 Rafał Lemkin was a Polish and American criminal lawyer of Jewish descent and the creator of the concept of 'genocide' and the draft convention on the prevention and punishment of genocide crimes, signed on 9 December 1948, known as the 'Lemkin Convention'.

6 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (ratified in accordance with the Act of 18 July 1950). *Journal of Laws* 1952, No. 2, item 9.

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

8 The term 'Heart of Europe', which is to be identified as Poland, was first used by Norman Davies in his book *Heart of Europe*.

9 Krawczak-Chmielecka, 2017, pp. 11–12.

10 Marek Michalak was a Polish special education teacher, social activist, and publicist, Doctor of Social Sciences, Chancellor of the International Chapter of the Order of the Smile, Chairman of

> The Convention on the Rights of the Child is a universal instrument, not only protecting these rights but also raising awareness of the value of childhood and thus humanity. The more effectively the provisions of the Convention on the Rights of the Child are observed, the fewer harms will be inflicted on people.[11]

The authors of the convention succeeded in developing a universal and consistent legal definition of the child. According to Article 1 of the Convention, a child is any human being under the age of 18, unless, under the law applicable to the child majority, is attained earlier. This forms the basis of the definition at the national level. For instance, according to Act of 6 January 2000 of Poland on the Commissioner for Children's Rights,[12] a child is any human being from conception until the age of majority. The national definition is based on international standards, although states have an autonomy that allows them to ensure broader protection of children's rights than the minimum convention standards.

Although this research focuses on the Polish legal thought in the field of children's rights and Poland's contribution to the adoption of the Convention on the Rights of the Child, this subject matter deserves broader discussion given the various achievements.

2. Milestones of the Children's Rights System – Progression towards the Convention on the Rights of the Child

Before analysing Poland's contribution as the initiator of the Convention, it is necessary to provide a retrospective of the international children's rights system. This involves presenting selected milestones that led to the adoption of the Convention on the Rights of the Child and made a significant contribution to the development of children's rights.

The initial steps towards children's rights were taken in the 19th century. In 1874, prompted by the events surrounding eight-year-old Mary Ellen Wilson, who was abused by her foster parents, the New York Society for the Prevention of Cruelty to Children was established in New York. The entire case shocked the local community, leading to legal proceedings and the foster mother being

the International Janusz Korczak Association, and the Commissioner for Children's Rights from 2008 to 2018.

11 Stadniczeńko, 2015, p. 9. Translation by the author. Unless otherwise specified in the footnotes, all translations quoted from non-English sources are by the author.

12 The Act of 6 January 2000 on the Commissioner for Children's Rights, *Journal of Laws* of 2023, item 292.

sentenced to one year of imprisonment. This was regarded as a cornerstone in the development of the global children's rights movement.[13]

Simultaneously, in Europe, international associations were formed, including criminologists and juvenile judges, whose focus revolved around caring for abandoned children. The aim of these entities was to influence state authorities to introduce penalties for crimes committed by minors and to establish centres for these children.[14]

I must highlight the year 1878, the birth year of Henryk Goldszmit, better known as Janusz Korczak, who, alongside his ideas, deserves a separate discussion. His scholarly work and actions would be recognised as foundational to children's rights, and he went on to become a pioneer in child protection efforts in Poland.

In 1892, the International Association for Child Welfare was established. Poland joined the organisation in 1928 owing to the efforts of President Ignacy Mościcki. However, the Polish government determined not to open a Polish branch of the Association.[15]

In 1908, the First International Congress on Moral Education took place in London. Here, the participation of a Polish representative from private educational associations, Stefania Sempłowska,[16] was significant. Over time, more organisations emerged to address the situation of children, particularly those who were homeless and abandoned. In 1913, the First International Congress on Child Welfare was organised. In 1919, Save the Children was founded in the United Kingdom. In the same year, the Swedish organisation Radda Barnen began its operations, followed by the International Union for Child Welfare in 1920.[17]

In 1924, significant events occurred from an institutional and legal perspective. The League of Nations General Assembly adopted the Declaration of the Rights of the Child, known as the Geneva Declaration, drafted by the founder of Save the Children. This short document contained five fundamental principles constituting the basis for the protection of children's rights.

In the light of the experiences of World War II, during which immense suffering, including that of children, occurred, efforts to develop a system for protecting children's rights began to accelerate. In 1946, the United Nations established two agencies focused on the broad protection of children's rights: the United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and

13 Krawczak-Chmielecka, 2017, pp. 11–12.

14 Czyż, 2002, p. 9.

15 Agreement on the Establishment of the International Association for Child Care, *Journal of Laws* of 1929, No. 49, item 403.

16 Stefania Sempłowska was a Polish teacher and educational activist, advocate for children's rights, journalist, and writer.

17 Krawczak-Chmielecka, 2017, p. 14.

Cultural Organisation (UNESCO). Noteworthy is that the idea of creating UNICEF originated from the Polish doctor Ludwik Rajchman.[18]

Subsequently, in 1948, the Universal Declaration of Human Rights was adopted, articulating the rights of mothers and children to 'special care and assistance' and 'social protection'. The United Nations General Assembly took another step in 1959 by adopting the Declaration of the Rights of the Child, an extension of the 1924 Declaration.

Going forward, the year 1966 marked the adoption of the International Covenants on Civil, Political, Economic, Social, and Cultural Rights.[19] Consequently, the United Nations and associated states committed to providing education and protection to all children. Two years later, the International Conference on Human Rights was organised. An assessment of the 20 years since the introduction of the Universal Declaration of Human Rights was conducted during this event, and plans for future work were formulated. Moreover, national commitments to uphold human rights were strengthened.

In 1973, the International Labour Organisation adopted the Convention concerning the Minimum Age for Admission to Employment.[20] It set the age of 18 as the minimum for hazardous or morally detrimental work for minors. The following year, the United Nations General Assembly appealed to member states to adhere to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict Situations. The Declaration prohibits attacks on or imprisonment of civilians – women and children – and protects the rights of women and children during armed conflicts.

In 1978, Poland submitted a draft Convention on the Rights of the Child to the United Nations Human Rights Commission. The project, authored by Polish lawyers, was submitted for consideration by a working group comprising representatives of member states, United Nations agencies (UNICEF, UNESCO), as well as intergovernmental and non-governmental organisations.

In 1979, the 20th anniversary of the adoption of the Declaration of the Rights of the Child was commemorated. In response, the United Nations General Assembly declared 1979 the International Year of the Child. Later in 1985, the United Nations General Assembly adopted the so-called Beijing Rules, which are the United Nations' model minimum rules for the administration of juvenile justice.

18 Ludwik Rajchman was a Polish bacteriologist and social activist of Jewish descent and one of the founders of UNICEF.

19 International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, *Journal of Laws* of 1977, No. 38, item 167; International Covenant on Economic, Social, and Cultural Rights opened for signature in New York on 19 December 1966, *Journal of Laws* of 1977, No. 38, item 169.

20 Convention No. 138 of the International Labour Organisation concerning the minimum age for admission to employment, adopted in Geneva on 26 June 1973, *Journal of Laws* of 1978, No. 12, item 53.

Four years later, eleven years after the submission of the draft, the United Nations General Assembly adopted the Convention on the Rights of the Child. It is widely regarded as a groundbreaking achievement in the field of human rights and children's rights. The Convention guarantees and establishes minimum standards for the protection of children's rights in all areas.

However, the adoption of the Convention does not mark the end of efforts to protect children's rights. It is a step in the right direction, but new threats emerge on the horizon with technological, civilizational, and globalisation developments.

3. Janusz Korczak's Ideas as the Moral Foundation of the Convention on the Rights of the Child

The figure and legacy of Janusz Korczak hold great significance in the context of Poland's role in the drafting of the Convention on the Rights of the Child, Polish legal thought, and its contribution to the development of a children's rights protection system.[21] Janusz Korczak was a Polish–Jewish physician, educator, writer, journalist, and social activist. He created a unique system of working with children based on partnership, autonomous procedures, institutions, and fostering self-governance.[22] He was a pioneer in educational diagnostics and advocated for children's rights. From 1912 to 1942, he ran an orphanage, and in 1942, along with the staff and about 2,000 children, he was transported to the German concentration camp in Treblinka during the so-called 'great action to liquidate the Warsaw Ghetto'. The exact date of his death is unknown, but he may have been killed on 7 January 1942.

With the passage of time, Janusz Korczak's ideas have been increasingly appreciated. He is recognised as a precursor to the children's rights movement in both Poland and worldwide. Therefore, presenting the principles of his thought as the philosophical, ethical, and pedagogical basis of the Convention on the Rights of the Child is worthwhile. As early as 1917, he called for the establishment of a *Magna Charta Libertatis* for children.[23]

Areas of his vast legacy, which require further discussion, include: 1) the right to the social participation of children; 2) children's citizenship; 3) sources of children's rights – natural law, the law of nature, and rules of life.[24]

Considerations regarding the child's right to social participation should begin with the thesis put forward by Korczak, namely that the child is a fully-fledged

21 Korczak, 1978.
22 Frydman, 1962, p. 109.
23 Korczak, 2012a, p. 55.
24 Michalak, 2015, pp. 15–18.

human being in the full sense of the word.[25] Today, we have no problem with this statement, although only a few years ago, it might have been considered an overinterpretation. The humanity of the child can be defined on various levels, including axiological, social, religious, pedagogical, and philosophical. Moreover, Korczak points out that it is up to us adults to raise awareness about the child's subjectivity, their self-determination, and participation in social life.[26]

Furthermore, Korczak indicates that the child is a creative subject who perceives the world in their own way. The child should be listened to, have a right to their own opinion, and, moreover, they should be provided with the means to realise their rights because they are a constant part of life. As Korczak stated, 'Children constitute a large proportion of humanity, the population, nation, inhabitants, fellow citizens – permanent companions. They were, are, and will be.'[27] This phrase represents what is known as Korczak's right to respect.

Notably, the issue of children's citizenship was not Korczak's original concept, as it had been discussed earlier by, among others, Helena Radlińska.[28] It comprises a bundle of social, economic, political, cultural, socialising-caring, and educational entitlements granted to children. However, it evolves with changing civilizational conditions. It expresses equality and community, as well as the diversity of children.[29]

An analysis of Korczak's sources of children's rights shows that his thought is strongly grounded in philosophical and social interpretations of human rights. This is the case with the concept of natural law, which assumes the existence and functioning of universal legal norms and indicates that 'individuals and human communities are capable—guided by the light of reason—of recognising the basic directions of moral action in accordance with the nature of the subject itself and expressing them normatively in the form of rules or commandments.'[30]

Based on this tenet, Korczak appeals to the world to recognise the child as a subject who has rights and value. He provides a broad definition of the child in terms of philosophical and biological perspectives. Korczak concludes his reflections by stating, 'There are no children—there are people.'[31]

25 Laska, 2013, pp. 27–34.

26 Michalak, 2015, pp. 15–18; Smolińska-Theiss 2015, pp. 15–18.

27 Michalak, no date.

28 Helena Radlińska was a Polish educator and the creator of social pedagogy in Poland.

29 Straczewska, 2012, pp. 146–160.

30 W poszukiwaniu etyki uniwersalnej. Nowe spojrzenie na prawo naturalne, Międzynarodowa Komisja Teologiczna, Rzym 2008, tłumaczenie – Kancelaria radców prawnych, Nowotnik, Lipski, Szafrański sp.p. [In Search of Universal Ethics: A New Perspective on Natural Law by the International Theological Commission, Rome 2008, translated by the Law Office of Nowotnik, Lipski, Szafrański and partners]. https://plockierodziny.pl/wp-content/uploads/2016/10/W-poszukiwaniu-etyki-uniwersalnej.pdf, accessed: 12.03.2024.

31 Smolińska-Theiss, 2015, pp. 15–18.

Korczak's contributions also include research on the natural rights of the child, in anthropological-biological terms. For Korczak, the child is primarily a huge developmental potential. However, their growth is a difficult and lengthy process. Children must explore and learn about the world. From the nature of children's rights, Korczak derives the rights to self-determination and respect. They have axiological, medical, and pedagogical foundations.[32]

Based on his experience, Korczak formulated pedagogical rules called 'rules of life': '1. Do not envy; 2. Do not sulk; 3. Do not get discouraged and persistently strive; 4. Be disciplined in relation to your duties.' Although a cursory analysis suggests they are not unique, analysing the context and logic of the argument reveals a certain pedagogical message directed at both children and adults, supported by experience, which should be implemented in the shared lives of children and adults.[33]

Janusz Korczak was not a lawyer and did not participate in the preparation of legal instruments concerning the protection of children's rights. However, he is now considered a pioneer in this area. His ideas are gaining importance and serve as a guiding theme in scholarly literature. It should be emphasised that he, a Pole, was the one who fully articulated the idea of children's rights. This is a kind of pedagogical legacy and a social command directed at adults and children. This legacy formed the basis of the Polish draft of the Convention on the Rights of the Child.

4. Work on the Convention on the Rights of the Child

As mentioned in Section 2, the human rights protection system underwent a long journey before being codified in the Convention. It was based on declarations between 1924 and 1959, prior to the Convention. This indicates that certain standards had already been established, albeit without binding force or international recognition, as indicated by legal scholars.[34]

Within the United Nations, not all member states held uniform positions on this matter. While the majority advocated for the adoption of a convention on children's rights, some argued that existing human rights instruments adequately addressed children's rights, thus obviating the need for a separate legal instrument.

Furthermore, concerns were raised about compliance with the Convention. While its adoption would be deemed a success, it would be incomplete without ratification, as this would not guarantee its enforcement by state parties. The ratification process by individual states was lengthy, with some Third World

32 Korczak, 2012b, p. 133.
33 Korczak, 2012c, pp. 9–10
34 Balcerek, 1986, pp. 142–143.

countries expressing doubts about their ability to ratify it. Disparities in cultural development and legal awareness worldwide were significant, as highlighted by Elżbieta Czyż: 'Differences in civilizational development, as well as the level and standard of children in various countries, are significant, and the convention would be an equally binding act to determine and implement children's rights in all countries.'[35]

Despite the differing opinions, work on the Convention proceeded, and its adoption was realised. This was a groundbreaking step in the development of the human rights protection system, transitioning from loose declarations to the realisation of Korczak's paradigm of the child as a unique rights-bearing subject equal to adults.[36]

Poland presented a draft convention on 7 February 1978. Furthermore, Polish delegation representatives proposed declaring 1979 the International Year of the Child to commemorate the 20th anniversary of the adoption of the Declaration of the Rights of the Child in 1959.

Poland's proposal met all the standards of an international agreement requiring ratification by state parties. Poland's main objective was to introduce a legally binding international instrument regulating children's rights, ensuring their enforcement both internationally and domestically. Polish representatives approached the drafting of the convention with fervour, as noted by academic circles. As J. Bińczycka recalls, 'The Convention is Poland's greatest, indeed its only contribution of this magnitude to the creation of universal standards in the field of human rights.'[37]

However, some voices in legal scholarship suggest that Poland's motivations for adopting this act were not unequivocal and were not solely based on concern for the welfare of children. It was also a political manoeuvre, as the Polish draft of the convention was presented a year after the People's Republic of Poland (the name of Poland during the period between 1945–1989) ratified the International Covenants on Human Rights under pressure from opposition movements such as Solidarity.[38] Additionally, Poland was grappling with an economic crisis. Therefore, it was perceived as an attempt to improve Poland's international image, as confirmed by Marek Andrzejewski, who indicates that

> Regardless of the intentions and merits of specific individuals involved in both the preparation of relevant documents and diplomatic efforts, this initiative aimed to give Poland—then ruled by a communist party

35 Balcerek, 1986, pp. 142–143.

36 Czyż, 1998, p. 137.

37 Bińczycka, 1999, p. 22.

38 Independent Self-Governing Trade Union 'Solidarity' was a nationwide trade union established in 1980 to defend workers' rights and, until 1989, also one of the main centres of opposition against the government of the Polish People's Republic and communism.

> propagating totalitarian ideas—the aura of a state respecting individual rights.[39]

The authors of the Convention decided to utilise the ten principles of the Declaration of the Rights of the Child from 1959 and enforce them. The following two provisions related to the reporting obligations of signatory states: Article XIII emphasised the universal and pervasive nature of the convention; and the final provisions defined issues regarding ratification and enforcing the document.[40]

Poland's draft was submitted to UN member states, who responded with their comments at the 35th session of the Human Rights Commission in 1979 and decided to work on the draft convention within the Human Rights Commission. Poland's draft was criticised for being overly propagandistic and for not addressing certain substantive issues.[41]

In 1981, with accelerated efforts, a working group was established, led by Professor Adam Lopatka. The original Convention draft was modified twice during the process. The work was concluded in 1989, having lasted for 11 years.

The Convention adopted on 20 November 1989 was based on Poland's 1978 draft. Some provisions remained unchanged. Following this, Jolanta Szymańczak directly confirms that 'The ideological basis of the project consisted of achievements of Polish pedagogical thought and, above all, the philosophical and educational concept of Janusz Korczak, who before World War II, embodied its principles in daily educational work.'[42] In summary, Poland's contribution to the work on the convention was indispensable. From beginning to end, the work on the convention was overseen by the Polish delegate. All decisions requiring agreement among states were made through consensus and lengthy discussions. This also constitutes a significant contribution to the development not only of the children's rights protection system but also of human rights in general. The final draft of the convention was not perfect. The clash of interests of individual countries and the weighing of values during the adoption of binding norms prevented the creation of a document that precisely regulated all aspects of children's rights protection.[43] However, the Convention prompted the world to perceive the child as a subject, not an object of rights. Children's rights were equated with human rights based on Janusz Korczak's ideas.

Ultimately, the Convention consists of a solemn preamble stating that every child in the world is protected, from as early as conception. The normative part is divided into 54 articles. The foundation of the convention's provisions was

39 Andrzejewski, 2000, p. 4.
40 Hanyś, 2015, p. 187.
41 Smyczyński, 2012, p. 11.
42 Szymańczak, 1999.
43 Wielec, 2017, pp. 147–217.

based on the following values: the welfare of the child, equality of children, respect for the rights and responsibilities of both parents, and state assistance in achieving the convention's goals. Simultaneously, the Convention defined a child in imprecise terms, stating that a child is an autonomous subject but requires special care due to their level of mental and physical maturity, as well as respect for their identity, dignity, and privacy. The primary environment for a child's upbringing is the family, and the state should support families and children in accordance with the principle of subsidiarity.[44]

Furthermore, the Convention explicitly expresses a bundle of rights belonging to children. Civil rights include: the right to life and development; right to identity, freedom, dignity, respect, personal integrity, freedom of thought, conscience, and religion; right to express their views and be heard in matters concerning them, in administrative and judicial proceedings; right to be raised in a family and maintain contact with parents in case of separation; and right to freedom from physical or mental violence. In the spectrum of social rights, there are rights to an adequate standard of living, health protection, social security, rest, and leisure. Cultural rights include the right to education, access to cultural goods, access to information, and knowledge of their rights. Additionally, the Convention established the rights to associate and assemble for peaceful purposes as political rights.[45]

After the adoption of the Convention on the Rights of the Child, ratification by individual states followed. This process varied depending on their approach to children's rights issues. In any case, the procedure was preceded by an analysis of the national system, identifying its shortcomings and the need to introduce selected norms.

Poland had to adjust its national regulations, particularly regarding children's participation in civil proceedings, adoption law, and the placement of children in care and educational institutions. The discussions on ratification determined the establishment of the Office of the Commissioner for Children's Rights, which became a constitutional body in 1997.[46]

Poland did not ratify the Convention in its entirety. Reservations were made regarding Article 7 (limitation of the right of an adopted child to know their biological parents) and Article 38 (age of recruitment into military service – this decision was to be reserved for Polish law). Additionally, Poland proposed two declarations aimed to have a significant impact on the interpretation of the convention's provisions. The first concerned respect for parental authority in accordance with tradition and customs when implementing the provisions of the

44 Jaros, 2015, pp. 63–84.
45 Stadniczeńko, 2015.
46 Blicharz and Zacharko, 2021.

Convention, and the second related to family planning education, which was to be in accordance with moral principles.[47]

During the 11 years of work on the convention, many innumerable prominent legal experts participated. Noteworthy are three individuals who contributed to the preparation of this document and influenced the development of the national and international child rights protection system and family law in general: professors Tadeusz Smyczynski,[48] Marek Andrzejewski,[49] and Adam Lopatka.[50]

5. Children's Rights Protection System Amidst Contemporary Challenges

Adoption of the Convention did not conclude the work on the children's rights protection system, but was a significant step that initiated an evolution in perceiving the role and subjectivity of children. This had an impact on further initiatives regarding children's rights protection. Here, the most important legal and extra-legal aspects influencing the situation of children are highlighted.

A year after the adoption of the Convention, the World Summit for Children took place in New York. The United Nations announced 'the Riyadh Guidelines', focusing on preventing juvenile delinquency. In 1991, a meeting of UNICEF experts took place to discuss reports on the implementation of the Convention's provisions. This contributed to the establishment of the Child Rights International Network (CRIN), tasked with monitoring children's rights compliance worldwide.

In 1999, the International Labour Organisation adopted a significant Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour.[51] Poland agreed to ratify the Convention in

47 Hanyś, 2015, p. 191.

48 Tadeusz Smyczyński was professor at the Institute of Legal Sciences of the Polish Academy of Sciences and at the Faculty of Law and Administration of the University of Szczecin, author of numerous publications in the field of civil law, especially family law, was the head of the Centre for Family Law and Child Law, an expert of the Sejm and the Senate, and member of the Problematic Team of the Codification Commission for Civil Law. The life and actions of Professor Smyczyński, and specifically his contribution to the drafting of the Convention on the Rights of the Child, are also presented in this issue of *Acta Universitatis Sapientiae – Legal Studies*, in a separate study by Marek Andrzejewski.

49 Marek Andrzejewski was Head of the Poznań Center for Family Law and Child Law at the Institute of Legal Studies of the Polish Academy of Sciences and a participant in the work of the Problematic Team of the Codification Commission for Civil Law.

50 Adam Łopatko was a Polish lawyer, professor of legal sciences, theorist of state and law. He was the first President of the Supreme Court from 1987 to 1990, *ex officio* chairman of the State Tribunal, Minister-Head of the Office for Religious Affairs, member of the Sejm of the People's Republic of Poland in the seventh and eighth terms.

51 Convention No. 182 of the International Labour Organisation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted in Geneva on 17 June 1999, published in the *Journal of Laws* of 2004, No. 139, item 1474.

2001, an important document regarding the control of child labour, somewhat complementary to the Convention's provisions.

The year 2000 saw the adoption of two optional protocols to the Convention on the Rights of the Child: the first concerned the involvement of children in armed conflicts,[52] while the second addressed child trafficking, child prostitution, and child pornography.[53] Signatory states determined whether to implement the protocols' provisions, and Poland opted to ratify both protocols in 2007.

In 2002, for the first time at the United Nations forum, children were given a voice. The 'Child-Friendly World' programme was announced, outlining the goals the UN for achieving children's rights protection in the next decade. Four years later, UNICEF, in collaboration with the United Nations Office on Drugs and Crime, prepared a special handbook on assessing juvenile justice dimensions. Its goal was to introduce child-friendly justice institutions.

In 2010, the UN Secretary-General presented the Convention on the Rights of the Child Status to the General Assembly, and a year later another optional protocol was established concerning the procedure for recognising complaints. Under the protocol's provisions, the Committee on the Rights of the Child can accept and consider complaints about individual violations of children's rights by state parties to the Convention. Poland did not ratify this protocol – having formally signed it in 2013 – but this may change soon.[54]

In 2015, Somalia and South Sudan decided to ratify the Convention. This is of significance in the context of the fight for children's rights in African countries, given the exploitation of children as soldiers in armed conflicts. Consequently, the Convention is the most widely ratified international document, with only the United States absent among the ratifying states.[55]

However, the fight for children's rights does not end here, as new threats emerge due to globalisation, technological, and social changes. Therefore, despite compliance with the Convention, states must respond to threats to which children are exposed at the national level.

For instance, in Poland, changes to national legislation have been guided by Janusz Korczak's idea to treat children as autonomous subjects fully entitled to

52 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted in New York on 25 May 2000, published in the *Journal of Laws* of 2007, No. 91, item 608.

53 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000, published in the *Journal of Laws* of 2007, No. 76, item 494.

54 The Convention on the Rights of the Child. Poland has not ratified an important document for nine years. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8498724,konwencja-o-prawach-dziecka-polska-od-dziewieciu-lat-nie-ratyfikowala-waznego-dokumentu.html (Accessed: 12.03.2024).

55 United Nations Treaty Collection. Chapter IV Human Rights. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (Accessed: 12.03.2024).

exercise their rights and having broad powers to influence their situation. In particular, the evolution of criminal procedure provisions concerning the hearing of minor witnesses or victims should be highlighted.[56]

Initially, the Polish Code of Criminal Procedure[57] did not provide for a special procedure for hearing children. However, over time, four special procedures were introduced: 1) for minor victims; 2) for minor witnesses; 3) for minor victims who have reached the age of 15 in cases of rape, sexual abuse of incapacity or helplessness, or sexual abuse of a relationship of dependency or critical position; and 4) for the hearing of individuals with mental disorders, developmental disorders, impairments of perception, or reproduction of perceptions. The latter of the discussed changes came into force in 2024.[58]

Moreover, in Poland, recent reforms with an anti-violence character have been introduced, creating institutions aimed at preventing violence at a very early stage. The reforms were implemented gradually and in stages.

Furthermore, in connection with the case of eight-year-old Kamil from Czestochowa, who was abused by his stepfather and later died from his injuries, and his father was accused of attempted murder, the so-called 'Kamil Act'[59] was passed in 2023. Among its provisions is the implementation of the 'Serious Case Review' procedure, obliging authorities to analyse the most serious cases of violence against minors. It is now the responsibility of the authorities to examine why appropriate actions were not taken before harm was done to the child and what measures can be taken to prevent such incidents.[60]

There are many challenges and threats to children and the child protection system.[61] However, since 1989, we have had an international legal instrument that is universally binding and widely recognised. This is the basis for further actions aimed at protecting children and ensuring their well-being. In crisis situations, we can always refer to the Convention and Korczak's thoughts, which will help us find legal solutions to contemporary problems.

56 Michalak, 2015, pp. 15–18.

57 Act of 6 June 1997: Code of Criminal Procedure, consolidated text *Journal of Laws* of 2024, item 37.

58 Wielec and Bojanowski, 2024.

59 Act of 9 March 2023 amending the Act on Counteracting Domestic Violence and Certain Other Acts, *Journal of Laws* of 2023, item 535.

60 The 'Kamil Act: Standards of Protection for Minors'. https://www.gov.pl/web/sprawiedliwosc/ustawa-kamilka--standardy-ochrony-maloletnich2 (Accessed: 08.03.2024).

61 Some of them result from the noticeable progress of new technologies; in this respect, see scientific works in terms of the impact of new technologies on many levels of practical application: Oręziak, 2019c, pp. 61–63; Oręziak, 2019d, pp. 102–109; Oręziak, 2018a, pp. 199–219; Oręziak, 2020, pp. 187–196; Oręziak, 2019a, pp. 181–192; Oręziak, 2018b, pp. 117–141; Oręziak and Wielec, 2018, pp. 50–65; Karski and Oręziak, 2021, pp. 242–261; Oręziak, 2021, pp. 47–78; Oręziak, 2019b, pp. 432–448; Oręziak, 2022, pp. 125–140; Oręziak and Łuniewska, 2021, pp. 223–232; Oręziak and Świerczyński, 2019, pp. 257–275.

6. Conclusions

The aforementioned considerations confirm that Poland was not only the initiator of the Convention on the Rights of the Child but also made a significant contribution to the idea of treating children's rights as an integral part of the human rights protection system.

It is not coincidental that the idea of children's rights is deeply rooted in Polish culture, heritage, and worldview. Children have always been present in our history. Notably, Saint Jadwiga,[62] Queen of Poland, dedicated her childhood to God and the Fatherland. We cannot forget about the youth who fought and died for Poland's independence in the November Uprising of 1831 and the January Uprising of 1863. Following World War I, the unwavering patriotic stance was demonstrated by the 'Eaglets of Lviv' and the 'Eaglets of Płock', the youngest defenders of Polish cities during the period of national liberation struggles and the Polish–Bolshevik war. Subsequently, the 'Warsaw children' actively participated in the Warsaw Uprising of 1944.

Throughout ancient times, Poland has been endowed with outstanding experts, including lawyers, educators, philosophers, and psychologists. This is evidenced by the contributions of individuals to Polish thought on children's rights protection, culminating in two elements: the ideas expressed by Janusz Korczak and the adoption of the Convention on the Rights of the Child. Nevertheless, considering the significant and indisputable role of children in Polish history, acknowledging the hardships and suffering endured by Polish children in defence of the nation and the Polish state, these elements can be regarded as a tribute to them. However, this tribute is paid not only to Polish children but to all children worldwide, ensuring that the dignity and rights of all children are respected and upheld.

Besides, it should be emphasised that the work on the children's rights protection system is not over. The situation of children worldwide and the observance of their rights require continuous monitoring. Considering the various threats inherent in today's world – emanating from both the West and the East, of a civilizational, military, and technological nature –, we must remain vigilant, sensitive, and attuned to the well-being of children. Moreover, we must remember the role they play in relation to adults, echoing the words of Janusz Korczak: 'Children are born with wings. Teachers help them spread their wings.'

62 Jadwiga of Anjou was Queen of Poland from the House of Anjou, daughter of Louis the Great of Hungary and Elizabeth of Bosnia. In 1384, she was crowned Queen of Poland, the first wife of King Władysław II Jagiełło, Apostle of Lithuania, and a saint of the Catholic Church. She is the only Polish monarch to be canonised. Although she did not officially receive this title, she is venerated by some Catholics as the patroness of Poland.

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