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Not My Fault, But Still My Punishment

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'On this earthly journey', that certain ash-baked scone: the Good Word of the family, its Spirit are the patron saint of the fabled hero.
He who departs without it: will find himself in greater perils, more vulnerable in every way.[1]

Abstract. The aim of this study is to draw attention to the repercussions of parental detention on other family members, particularly children – whose development is a shared responsibility of both their parents and the state. Such impulses, whether arising from within the family or from the external world, exert both direct and indirect influences on the path to adulthood of children left to fend for themselves, imposing burdens they may carry throughout their lives. The family constitutes the primary arena for socialisation, and it is within this most intimate setting – intended to provide emotional security – that such minors often endure the greatest trauma. For many years, research has shown that depression, anxiety disorders in children, unrealistic fears of losing their parents, self-deprecation, stigmatisation, total isolation, or aggressive behaviour are closely correlated with parental imprisonment. Moreover, the mere experience of a parent's arrest can itself cause emotional shock, profound confusion, fear, and distress. Although the Convention on the Rights of the Child provides broad and complex guarantees for safeguarding the best interests of the child – among which a healthy, harmonious, and supportive family environment is paramount –, there remains a lack of effective solutions and institutionalised forms of intervention that address the specific circumstances and needs of this vulnerable group. This shortfall persists despite the explicit prioritisation of the child's best interests in several international instruments, such as the European Prison Rules. Even where personal contact is maintained, the processes of entering prison, as well as the prevailing conditions and control mechanisms, remain daunting. Consequently, in practice, many innocent minors suffer the negative consequences associated with the execution of a

1 Földes, 1978, pp. 48–52. Unless otherwise specified in the footnotes, all translations quoted from non-English sources were made by the author.

criminal sentence, although their only 'sin' is to have been born the children of such parents.

Keywords: children rights, Convention on the Rights of the Child, family relations, parental imprisonment, negative consequences, child socialization, trauma, mental health, resilience, human ecological system, aggression, ACE

1. Introduction

A happy childhood, a healthy, harmonious, and supportive family environment is an important prerequisite for entering adulthood with inner balance, self-esteem, and empathy for others and for facing the challenges and struggles of adulthood. The central concept of the Convention on the Rights of the Child[2] (CRC) is the *best interest of the child*. Ensuring this is not only the responsibility of the state or other authorities but especially of parents: Article 18(1) states that both parents have primary responsibility for the upbringing of their children and that they 'shall be guided in their actions by the best interests of the child'. Of course, in addition to the parents, the State, the various public authorities and adult society as a whole have a major responsibility. 'Public and private social protection institutions, the courts, administrative authorities and the legislature shall, in all decisions concerning children, have the best interests of the child as a primary consideration' (Article 3(1) CRC).

The State Parties to the Convention also undertake a number of obligations to safeguard the best interests of the child. Among other things, they

> shall ensure to the child, having regard to the rights and duties of his or her parents, guardians and other persons legally responsible for him or her, the protection and care necessary for his or her well-being, and to this end shall take the necessary legislative and administrative measures (Article 3(2) CRC).

2. Trapped by Doubts and Questions

What this means in practice is that adult society around the child, whether professionals or other actors, must be guided in their actions by the best interests of the child in their activities. However, in everyday life, there are many situations which impose obligations on public bodies and authorities, acting in the interests of society as a whole – and whose fulfilment can have serious

2 United Nations, 1989.

negative consequences, both directly and indirectly, for the lives of children who are related to the adults involved.

The criminal lifestyle of the parents, or even the fact that they have committed a single offence, may have legal consequences which negatively affect the children in the family. The fact that the parent has to provide for the maintenance of his or her child may be taken into account as a mitigating circumstance when imposing the sentence, in accordance with the Criminal Chamber Opinion No. 56: 'a mitigating circumstance is when the offender has relatives who need to be maintained or educated.'[3]

This is therefore an option for the court seized of the case, so the actual impact of this fact in a particular case depends on the individual discretion of the judge concerned. The best interests of the child are a peripheral issue in the process; the focus, in our view, is on the importance of ensuring the exercise of parental responsibility and the ability to fulfil it. This is referred to in the Criminal Chamber Opinion when it excludes the application of a mitigating circumstance in cases where a person has not previously fulfilled his or her duty of care.

The loss, through the incarceration of a parent, can be a traumatic experience for the child and can raise a number of serious questions for the parent, relative, or the person who will care for the child in this situation.

Many fears and doubts may arise in the mind of the adult who is faced with this situation – and he or she has to make a decision. What should you say to the child if he or she is looking for his or her mother or father? Do you dare tell them that the parent the child loves and adores has committed a crime and is currently in prison? How will he or she understand this without being ashamed of his or her parents or emotionally breaking his or her trust in the imprisoned parent? Name the parent as a good or as a bad person? After all, what that parent has done is morally reprehensible; it is his or her job and aim in bringing up the child to ensure that such things do not happen. Should the caregiver take the child with him or her to prison so that the child may see his or her father or mother? How will the child experience the conditions (queuing, waiting, being searched, strict guards) that he or she will face? Will it do him or her any good to see his or her mother or father in prison clothes, behind bars or behind a plexiglas screen? Or how much does it help if you tell the child about the situation, that they are actually going to visit the parent's place of work and that the prisoner's uniform is part of the work attire?

Many people choose either to justify the parent's absence with this workplace story or to give some other explanation such as a job abroad. However, this solution presents several risks. Although the parent or the adult raising the child is primarily motivated by the need to maintain the child's psychological well-being, to protect him or her from the stigma of the community, and to take his or her interests into

3 Kúria, 2023.

account, as questions steadily arise, a false world is built, where one lie is followed by many more. But it can also be traumatic for a child to realize that the place where he or she has been visiting his or her parents for years was not their workplace but a prison. Thus, trust in the adult who raised such a child is also shaken, triggering emotional reactions ranging from disappointment to anger.

Families receive little or no help in working through these dilemmas. Although well-intentioned bad choices can run counter to the child's interests and needs.

3. Changes in Contact as a Possible Risk Factor

In itself, a dysfunctional or conflictual family or a parent who is 'just' stressed out about everyday tasks or emotionally neglectful of their child can also have a negative impact on the child for life. However, the imprisonment of a parent creates a number of specific risk factors that can multiply the potential for emotional and psychological harm to children. There are direct and indirect, internal and external characteristics that emerge in these situations, which are often not successfully managed or resolved without external support.

The direct impact on the child is the loss of the possibility of daily contact with the parent. This is not only a serious problem when there is a balanced, loving, and caring relationship between parent and child. Ágnes Solt's research[4] on juvenile offenders' typical life histories has shown, among other things, that even the loss of an authoritarian, strict father who does not refrain from physical punishments can create a serious emotional vacuum in the child and ultimately lead to deviant or delinquent behaviour. This is true even though research shows that these children typically have strong negative feelings towards their strict, rule-abiding, educationally attentive, and often violent fathers.

In the context of adolescence and childhood socialization in general, the role of parents is of paramount importance – although research shows that the negative impact of the absence of a parent on a child also depends on whether the mother or father is in prison.[5] (Restricted contact with the child is also a more traumatic experience for mothers.)

Even when limited contact with the incarcerated parent is possible,[6] the child may experience severe emotional loss, and the strength of the emotional bond may be significantly weakened, especially in the case of prolonged incarceration. Although telephone conversations are important for a new generation used to

4 For more details, see: Solt, 2018.

5 For more details, see, for example: Juhász, 2011, pp. 281–300.

6 'In the beginning, yes [they came to talk], but then it cost too much to drive to pick them up, or I don't want to put them through the few kilometres of walking between the bus stop and the prison. Because I would call the two little girls and my partner, because I don't want them to suffer. And that little bit of time can be taken.' Prison interview, excerpt in: Biró, 2015, p. 86.

information and communication technologies (ICTs), these cannot replace the experience of meeting in person. Thus, even if a child can establish regular video contact with the inmate, he or she is forced to forego the parent's touch and the experience of the parent's non-verbal messages – these are channels of parents' emotions to which children are very receptive.

There may be many other – objective[7] – reasons for the breakdown or loosening of contact with the detained parent – for example, the deteriorating social situation of the family, which is negatively affected by the loss of a father's income, which provides the family's financial base. However, it is not only financial obstacles that can lead to fewer or not face-to-face meetings. For a parent living further away from the place of detention – for example, if he or she is raising young children alone or a parent who has to work multiple jobs –, the mere organization of travel can be a burden. In these cases, the difficulties caused by the absence of the parent are based on factors and circumstances over which the child has no meaningful control. These obstacles can lead to a loosening or a breakdown in the emotional relationship, even if the adult who remains with the child speaks only in positive terms about the detainee.

It is a fact that contact is also extremely important for the imprisoned parent, and it has a major reintegration effect.[8] It is precisely the weakening – especially the breaking – of family ties that is the most difficult for prisoners[9] to bear, but which often occurs, especially in the case of longer prison sentences.[10] (It is parents, especially prisoners' mothers, who remain with their children during many years of absence.)

A change in the emotional and psychological state of the parent who is the sole caregiver of the child, or the consequences of a poorly chosen coping strategy, may be an indirect risk factor for the child's immediate environment. Coping with the new life situation and the increasing burden can be a serious psychological challenge even for an adult. How the adult who stays at home with the child – typically the mother – can find appropriate solutions to the family's changed daily life management can be a major challenge.

7 'Well, if I look at it from the point of view of the children, it's psychologically calming for them, so even today, if we can talk on the phone, that's great, but we can't really use this option because the minute charges are very expensive. So, it's bad. We haven't had a speaker for over a year. I could get [a package], but it would be silly for me to take the money out of my children's mouths to make my life better here. I have what I need within the prison, and because I work, sometimes I send money home.' Interview in prison, excerpt in: Biró, 2015, p. 87.

8 For more details, see Biró, 2015.

9 'Well, when I broke up with my partner, we broke up... so we put aside the relationship a little bit, so a lot of things were broken. I was a bit confused, then I got two disciplinary cards, then I moved here, then I found out about my son, that was my low point, which led to another disciplinary card.' Prison interview, excerpt in Biró, 2015, p. 90.

10 'So, exactly here we also talked to other prisoners, and it's true to say that – and this is not my fiction – it's a statistic in prison that a lot of relationships and marriages end. So, it's precisely because of the lack of a home, in all areas.' Prison interview, excerpt in Biró, 2015, p. 90.

In the majority of cases, the other party is not aware that his or her partner had committed a crime, and it is a shock for them when this fact comes to light. To find out that the person you know and love is a convicted criminal is a huge disappointment.

The shame brought on the family – and personally on the partner – can trigger anger, and the sudden change in the family's financial situation, the burden of running the family can cause frustration and despair.

The two main groups of coping strategies[11] in such situations are emotion-focused and problem-focused. In the latter, the person takes a hard look at the situation, the challenges and problems that arise, taking stock of their own capabilities, weaknesses, and burdens. He or she then takes the decisions that are best suited to deal with the situation in the best possible way – and seeks help if necessary. However, in the event of a particularly bad or broken emotional state, it is difficult to see things clearly, to face them honestly, to confront problems, to acknowledge shortcomings and limitations. Therefore, a significant proportion of people are more prone to choose emotion-focused coping strategies. These may include, for example, the use of alcohol, drugs, or other substances that can temporarily lift a person out of a stressful emotional state that seems unmanageable.

4. The Consequences of Detention: A Systems-Based Approach

If we want to describe a family as a human ecological system, we can use, among others, Urie Bronfenbrenner's[12] systems theory. According to this theory, a person's socialization background, the groups that influence him or her, are decisive because cultural patterns and roles are being acquired through them – especially in the case of children. The quality of social relations, however, may not only be a socialization factor but also a risk factor for the child's physical, mental, and intellectual development.

The model[13] breaks down the broader and narrower environment surrounding a person into micro-, meso-, exo-, and macrosystems, thus making it possible to describe the complex interaction with the child and with each other.

11 For more details, see Csemáné Váradi and Gilányi, 2011.
12 Glauber, 2011, p. 82.
13 Id., p. 83.

Figure 1. *Bronfenbrenner's human ecological system (own ed.)*

The microsystem, in the case of a child, is primarily the living space defined by the actors in the immediate environment. It is the adults (e.g. parents, foster parents, grandparents) and, of course, children (e.g. siblings) who provide the most immediate human contact in their daily lives, including the human environment they create. Their behaviour, personality, habits, the cohesiveness of the family, the relationships between the people living together, etc. affect the child even when he or she is not involved in the interaction directly.

But it also includes the more immediate physical environment; the physical environment in which the child spends a significant part of his or her time. In other words, a neglected or well-kept home, books, toys, plants, or even the availability of information and communication technologies also have an impact on the minors living there – although the quality of these is not or is only partially influenced by him or her.

The mesosystem assumes a looser (relational) relationship structure, with human actors that expand as the child ages. In early childhood, the role of childcare and education institutions – and the adults who work there – is dominant, but this role is increasingly taken over by the peer group and the home environment. The circle of people with whom the child interacts is becoming wider and wider as he or she ages. The new circle of persons that emerges depends to a large extent on the characteristics of the previous one. Thus, depending on the nature of the leisure activities, the mesoscale may be extended to include the human environment of sports clubs, entertainment venues, or various playful communities. The relationship between the actors in the micro- and mesosystem also has an impact on the development of the child's human environment. For example, if a parent prohibits certain activities (e.g. dance club) or social relationships (e.g. peer-groups or schoolmates), this will also affect the child's interactions circle at the meso-level.

The connection to the exosystem is the most distant and indirect for children. It is the social structure that influences the nature of the mesosystems; the smaller the child, the less the child perceives its supportive or even discouraging nature.

For example, the accessibility of local schools is important at several points. How much time is spent travelling? How can the family arrange transport to school? Should an adult accompany the child to the educational establishment, or can he or she go alone? Does this mean moving away from the familiar environment where friends live? Or does the parent have to change jobs because he or she is only able to start work later? Will the children he or she knew from nursery school be the child's classmates, or will they be strangers from another municipality? How will he or she (in a typically larger city) fit in with his or her differently socialized pupils? How difficult is it for him or her to adapt to the different school subculture and teacher expectations?

At this level, in addition to personal interaction experiences, there are also indirect (referral) mechanisms of action. For example, the social network surrounding the family, the parents' workplace, or their social relationships may affect children.

The most transversal relationship is at the broadest (last) level – although its role may be particularly important, for example, in the case of the children studied. The macrosystem is not only the economic, social, and societal environment in which the actors at the previous levels operate. It also includes the culture, customs, beliefs, as well as generally accepted and adhered-to norms of the country concerned. Of particular importance is the set of expected value – what is positively judged, rejected, or stigmatized by public perception.

The human ecology model provides an opportunity to set the main features of the situation of the child of a detained parent within a specific research framework. It can be concluded that practically all elements of this human ecological system are characterized by risk factors, some of which are specific, but at the same time by a small number of protective factors as well.

Although the impact of the different levels is increasingly distant in relation to the microsystem, the macrosystem characteristics and their consequences may be amplified in the case of children in this particular situation. The fact that a society is culturally attuned to a child with a criminal family background (e.g. the belief in the genetic roots of criminality), the strength of negative value judgements or the acceptance of relevant stereotypes in society can be a determining factor. Particular attention should be paid to the equally high number of negative elements at other levels and to the heightened vulnerability of children (and this target group in particular) per se.

With regard to the exosystem, the attitude of the spouse or partner of the detained parent or person who is responsible for the child's upbringing towards the workplace and the local living environment, and the extent to which he or she can obtain meaningful support, either because of social difficulties in the new living situation or because of other problems, also plays an important role. The stigmatization of the parent by his or her own staff, the assumption by neighbours

that he or she has a similar criminal attitude to that of his or her detained partner, is a huge psychological burden on the person. This can have a greater power to break down his or her self-esteem, increase his or her shame, his or her sense of abandonment and hopelessness. This often leads to isolation and introspection, which further increases the power of negative psychological processes that are already more easily generated.

These specific features of the macro- and exosystem can in themselves have a negative impact on the child's microlevel family interaction if their mechanism of action is mediated. The effects of this, i.e. changes in parental behaviour, cannot be overridden by those directly experienced by the child in the mesosystem – for example, the fact that he himself or she herself never directly encounters the stigmatizing, condemning opinions of the people in his or her living environment. Increased tension is a major drain on the energy and coping skills of a parent who is already struggling to cope with problems without support. This means that the quality of the work with the child, the patience towards the child, and the deterioration of the atmosphere in the home are perceived as being more severe.

The child can also be directly confronted with the negative effects of the micro- and mesosystem. For example, when his or her classmates are distanced from him or her, or when classmates' parents forbid them to be friends with him or her for that reason, because his or her parent has been imprisoned. Professionals working in education or childcare settings may also have negative value judgements or misconceptions about the heritability of criminal tendencies. Thus, a child's behaviour in breach of school rules and possible maladjustment may be seen as a sign of future criminal tendencies, even if it does not differ from the typical behaviour of his or her peers.

Of course, the strongest negative experience may be triggered by a change in the most intimate family relationships, as has already been mentioned in several points. A serious crisis may also arise if the parent's detention leads to a change in the family composition (e.g. the child moves away to live with grandparents or relatives) or the child is institutionalized in the absence of other solutions.

As couple relationships may be disrupted, especially in the case of a long sentence, the emergence of a new actor (e.g. surrogate father) in the microsystem can create new problems. The loss of the beloved but now abandoned father, the sight of the mother's happiness versus the father's suffering, the experience of being left alone in longing for the father triggers complex, multi-layered disturbances in the emotional life of the child, leading, among other things, to a breakdown in his or her microsystemic interactions (e.g. disappointment at the loss of the shared destiny experience with the mother; changes in the relationship of trust with the mother; deteriorating behaviour at school due to increased internal stress; increasingly conflictual peer relationships, etc.).

These drastic changes and negative trends have a much stronger and longer-lasting impact on the target group of this study than on children with a well-functioning family background and strong emotional ties.

5. Lifetime Burdens

The impulses that can affect a child under the ecological model have or can have a myriad of short- and long-term effects, even on the child's adult life.

In particular, parental imprisonment is a traumatic experience that can trigger anxiety, stress, fear, isolation from the environment, or auto- or hetero-aggression in general.

Recent research suggests that trauma alone is a non-specific vulnerability factor. In other words, as a transdiagnostic factor,[14] it may play a role in the development of multiple pathologies rather than a single specific one. In cases where the trauma is caused by prolonged emotional abuse from a person close to the child, it can have long-lasting consequences over many years. It can also affect the child's personality development, cognitive abilities, neurodevelopment, relationship patterns, and emotion regulation. The ability to trust others is reduced, and this underlying fear makes it difficult to form secure attachments to others based on mutual emotions.

Other research has highlighted that relationship trauma as a child is associated with a number of serious psychopathologies, self-harm behaviours (e.g. anorexia), dissociative or post-traumatic stress disorder. The sudden and prolonged disappearance of a significant person from the child's life may be one main form of the relationship trauma. This can trigger psychological processes that correspond to the content of relational traumatization. It is important to underline that the power of the effects is further enhanced, and the range of risk factors is extended by self-blame, which typically appears at a younger age. The child believes that his or her misbehaviour and disobedience was the reason for the important parent's withdrawal from his or her life.

The ability to cope with problems[15] depends on a number of circumstances. In cases where a) the child is either dependent on the object of the negative emotions he or she is experiencing, or b) the object is out of reach for him or her, the aggressive impulse often shifts towards the self.[16]

When he or she loses a father or mother who is important to him or her, for reasons unknown or only partly known to him or her, or when he or she feels anger or rage against the parent because of his or her irresponsible behaviour leading to

14 Lénárd, 2020, p. 421.
15 Kamneva *et al.*, 2020, pp. 1398–1403.
16 Skegg, 2005, pp. 1471–1483.

conviction are all specific life situations in which the object of aggression becomes inaccessible to him or her. A change in the parent's behaviour (e.g. tightening discipline, impatience), an increase of the parent's stress, or a negative change in the emotional relationship with the child cover the second situation, where the child is dependent on the object of aggression. The aggressive urge towards the self is a typical reaction because the child still experiences less psychological suffering from having to put up with self-harm than from having to confront openly the behaviour of the father or mother. But a similar auto-aggressive urge may be triggered by the sense of shame that a child feels, for example, at the image of a parent in detention as a criminal.

These traumatic experiences are typically left untreated and can eventually trigger the child's impairment or even loss of the ability to adapt positively.[17] If the deteriorating social situation associated with the already indicated feelings of shame is accompanied by a lack of self-confidence or a sense of insecurity, the desire to self-harm is further heightened.

Self-harm behaviours are a solution for the child because they localize the pain, make it clearly identifiable, and, whether they are used to relieve self-hatred or to overcome anxiety, they do so under the false impression that the child is in control.[18] Auto-aggressive urges often manifest themselves with a combination of mood swings, sleep disturbances, learning or adjustment problems, or loss of impulse control.

If parental incarceration occurs during the child's adolescence,[19] the range of negative consequences can be extended to a lifetime. Adolescence is a particularly sensitive period of life,[20] with many functions. It can also be a challenging time for young people with a healthy personality structure living in a safe environment.

One important task is the development of full self-awareness. This includes not only emotional awareness but also accurate self-assessment, self-confidence, and a correct awareness of weaknesses and strengths. In any case, children are characterized by

> [P]oor self-awareness, incomplete self-communication, low self-esteem, lack of self-confidence, lack of objectivity in self-awareness judgements, lack of nuance in the self-image (social image) attributed to others, conflicting self-states, etc.[21]

17 Yates, 2004, p. 35.
18 See, for example, Csemáné Váradi, 2021, pp. 95–112.
19 For more details, see Bernáth and Solymosi, 1997.
20 Tókos, 2005, pp. 10, 59.
21 Id., p. 59.

The role of micro-contextual interactions, especially of the peer group, is greatly enhanced. As the principle of the 'Looking Glass Self Hypothesis (LGSH)'[22] suggests, the young person's self-image is shaped by the reactions of others.

This ultimately leads to the prominence of negative value judgements at the other three levels: meso-, exo-, and macrolevel – for example, if the child is stigmatized by his or her human ecological environment, merely on the basis of his or her identification with a father or mother as a criminal. This, based on LGSH's mechanism of action, can significantly break down his or her self-esteem, sometimes triggering self-loathing and self-deprecation.

Mental health problems are already more likely to occur at this stage of life[23] due to a range of circumstances. To solve the child's psychological pain and anxiety, the young person may turn to the use of various stimulants, drugs, or other risk-seeking behaviours, partly as a result of poor peer patterns or peer pressure.

When negative impulses are cumulative, the child's behaviour changes for the worse. If those in the institutional environment (e.g. school) around the child lack (or have insufficient) expertise or information about what is happening in the family, the problematic behaviour is treated symptomatically – typically by sanctioning. The actual identification of the underlying problems is not addressed.

At home, the child's problems can also be left unresolved for other reasons. The burden of one parent's absence from family life falls on the parent who remains at home, who may already be in a serious emotional crisis as a result of what is happening, often unable to pay sufficient attention to the child's changing behaviour or to identify it as an alarm signal. (It is also generally agreed that a lack of a sensitive – and consistent – parental response, especially when attachment to the parent is also insecure, can more easily lead to the development of a child's emotion regulation disorder.)[24]

Whatever the cause, the fact is that often the child is left alone, and his or her psychological symptoms can accompany that young person for the rest of his or her life, if not diagnosed or treated, and may even develop into severe disorders and illnesses. Among the numerous negative consequences, there are several which, because of their long-term mechanism of action, can affect the development of the child's personality structure, causing damage to certain regions. For example, an important criterion for a successful adult life is the development or strengthening of one's resistance to stress. The resilience of an individual can be defined along three parallel processes.[25] It encompasses the ability of a person – in our case the child – to function competently despite negative life situations, negative life

22 For more details, see Silva *et al.*, 2022.
23 See, for example, Csemáné Váradi, 2013, pp. 5–42.
24 Lakatos, 2011, p. 163.
25 Danis and Kalmár, 2020, p. 117.

experiences, or traumas, which are accompanied by stress and anxiety. It refers to the capacity to adapt successfully and resist stress.

Examples of such traumatic triggers include adverse childhood experiences (ACE),[26] poverty, a family with conflict or dysfunction, neglect, or inappropriate community responses.

All of these are events that the child of a detained parent may face in their daily life. For resilience to develop, it is important that supportive or protective factors[27] be put in place. These may include a good family background, a strong emotional connection to a person, a safe environment, successful school performance, or, for example, the child's mental health. However, for children with special family situations, these promotive or protective factors are often not present.

Adverse childhood experiences are important not only because they identify living with a person with a prison history or the loss/death of a parent as specific instances of adverse factors but also because our mental state, well-being, and psychological status, in addition to the quality of our attachment relationships, are determined by our experiences of ACE.

Research has shown that these risk factors have the potential to negatively affect health and psychosocial well-being in general.[28] The more cumulative these risk factors are, and the more intense or persistent, the more severe their consequences.

The sensitivity of the child's neurobiological development to these impulses during the phases of neurobiological development is also important. During the so-called 'sensitive periods', the functioning of specific brain regions is more intense and sensitive. But they also become more receptive to negative experiences, the effects of which can amplified.[29] Thus, during these phases of life – typically in early childhood –, the person becomes more vulnerable, more fragile mentally and psychologically. (Adolescence is a similarly important sensitive period, but for different reasons.) Police intrusion into the home at night, handcuffing, and removal of the parent can be a particular risk factor in this respect, as can be the inability to maintain contact over a long period of time.

The degree of shock of these experiences may vary considerably depending on the specific stage of neurobiological and neuropsychological development.

However, differences in individual developmental pathways constitute a natural phenomenon. It is also influenced by the specific form that the negative effects listed take. Experiencing the same trauma within the same family can

26 The literature identifies 'living with someone who has gone to prison' and 'losing a parent through divorce, death or abandonment' as priority cases. MU, 2024.

27 Danis and Kalmár, 2020, p. 118.

28 Id., p. 121.

29 Danis *et al.*, 2011, pp. 54–55.

also trigger different degrees and types of negative effects, simply because of the different psychological characteristics of the individuals.

It is important to note that the negative early childhood experiences discussed do not necessarily have a direct impact on later life course periods such as adolescence or adulthood. Such a spillover mechanism of action may be present where the ACE experience influences the functional efficacy of risk or protective factors that emerge later in life. Their importance is indicated by the fact that they can also lead to the development of psychopathological pathologies in the presence of adverse interactions.

Yet these are not predetermined fates! The choices and decisions that take place at different times and in different contexts are the (relatively) free choices and decisions of the individual and, as such, mark out different developmental paths. Whether the traumatic experience will have lifelong effects, and whether or not it leads to the development of post-traumatic stress disorder (PTSD), depends to a large extent on the child's ability to mobilize his or her internal and external resources, i.e. those found in his or her own human ecological environment.[30] In this respect, the target group is characterized by more disadvantaged conditions (features). For example, external resources are often only available to a limited extent, or completely unavailable due to the changed life situation of the family, as the other parent may also be in a serious emotional crisis.

The ability to cope with the problems experienced, and thus to prevent, for example, the development of post-traumatic stress disorder, depends on three major factors:[31]

1. the dose effect: exposure to the number and degree of risk factors, i.e. the length of time, the degree and number of risk factors present in a person's life;
2. the presence and comprehensiveness of promotive and protective factors:[32] whereas according to the previous point children are typically characterized by a high dose effect due to the fact and consequences of detention, this group of factors is characterized by the absence or limited nature of the factors that the child will face;
3. the age and stage of psychological development: the age at which the traumatic experiences and the supporting factors occur is very important. Negative experiences in early childhood have a greater impact precisely because they occur during a sensitive period of neurodevelopment, as already mentioned. Similarly, adolescence and early adulthood are more vulnerable periods.

30 Danis and Kalmár, 2020, p. 126.

31 Id., 2020, p. 129.

32 'The promotive factor is a positive effect that supports the achievement of successful and competent functioning in all life situations, while the protective factor acts in the presence of harmful and damaging factors.' Kóródi *et al.*, 2022, p. 484.

In the absence of supportive factors, when the traumatic period falls within this sensitive period, the spectacle of the arrest (retention) of a parent, a prolonged heightened stress during the criminal justice process, the experience of imprisonment or when later contact with the parent is interrupted or limited can cause severe and permanent psychosocial and health damage.

6. Final Thoughts

The family, as the most crucial human ecological system for the child, is a complex, sensitive, constantly changing, living, pulsating organism, a web of interdependent personal relationships influenced by many factors.

According to the so-called triadic family approach,[33] family relationships are interdependent and influence each other. In other words, a breakdown or damage to the functioning of one diadic subsystem (e.g. father–mother relationship) in itself affects the functioning of the other two diads (mother–child; father–child).

Crime statistics show that men typically are significantly over-represented in crime. It is precisely because of the difference in criminal activity that incarceration generally connects to the father. The initiation of criminal proceedings, the arrest and subsequent conviction of the father is in a significant number of cases unexpected – and shocking – for the mother, who was previously unaware of her partner's lifestyle. Because of the negative emotions and feelings (such as anger, frustration, blaming the other party, bitterness, etc.) that can arise, the breakdown in the relationship between the parents can in itself have a significant impact on the relationship between the mother and the child who remains at home.

As a result of transactional processes, all three of the groups of possible protective factors – individual characteristics, family composition, processes in the wider social environment – can be identified as having negative attitudes that ultimately interact in a circular way to amplify their destructive effects on all diads. Due to the crisis situation of the family – one parent caring for the child –, there is a lack (or limited presence) of a caring family environment, emotional and spiritual attention; school environment or peer groups (especially social media and the Internet) stigmatize and prejudice; but there are also very few real supportive (legal) institutions in the social security system.

The third protective factor relates to the characteristics of the individual. Examples include self-esteem, self-respect, a positive vision of the future, or even a belief in the meaning of life. However, it is precisely in this respect that these children may be poorer. The lack of self-confidence and feelings of insecurity associated with a deteriorating social situation and a sense of shame can lead to a loss of the ability to adapt positively, or even to a loss of this

33 Danis, 2020, p. 167.

ability.[34] Despair, isolation, and frustration can lead to a desire to self-harm as a means of problem-solving.

It is also important to point out that changes in the child's human ecological system associated with parental detention or with limited or interrupted contact with parents always[35] trigger negative processes. This is true even if the child appears to be coping well with the absence of the parent and changes in his or her family. It is an important fact that the consequences of trauma, its timing, and the way in which it manifests itself can vary widely.[36] The psychological symptomatology of the so-called delayed reaction describes precisely the situation where negative psychological effects manifest themselves only slowly (even after a considerable time has passed), and sometimes gradually. Because of the distance in time from the underlying event, it is thus more difficult for the external environment to link them to the previous trauma suffered by the child. Left untreated, signs of distress deepen, the dysfunction may become permanent, and recovery is typically very slow and prolonged. In other cases, recovery may not occur at all. Indeed, if the child has no external support and no internal resources to mobilize, the unprocessed trauma will be permanent, and personality functioning will become permanently impaired.

These children did not get 'ash-baked scones' as a roadmap, but (they got) health and mental health problems, traumatic experiences, post-traumatic stress syndrome, and a lack of skills (e.g. resilience, ability to happiness) without which adulthood is likely to be difficult. Yet their only 'sin' is that they were born as children of such parents.

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34 Yates, 2004, p. 35.

35 Of course, certain psychiatric pathologies and psychological disorders may influence this.

36 Danis and Kalmár, 2020, p. 128.

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International Legal Framework of Disabled Children's Right to Benefit from Social Security

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Abstract. This article explores the international legal framework governing the social security rights of disabled children, emphasising its foundation in various international treaties and conventions. Social security, often defined as a comprehensive system that addresses risks such as illness, disability, unemployment, and old age, is critical to ensuring equitable living standards. This study highlights key instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and International Labour Organization conventions, which collectively establish minimum standards for social protection. The Convention on the Rights of Persons with Disabilities (CRPD) marks a paradigm shift by advancing the human rights model of disability and moving beyond traditional welfare approaches to promote empowerment, inclusion, and active citizenship. This article underscores the intersection of disability, children's rights, and social protection by focusing on the Convention on the Rights of the Child (CRC). It examines how these frameworks advocate for social security systems that respect children's dignity, ensure their inclusion in society, and address specific challenges such as accessibility, non-discrimination, and support services. Notably, the CRPD calls for policies that account for disability-related costs, facilitate independent living, and encourage community participation, thus bridging the gaps in traditional approaches that often perpetuate dependence. The recommendations include the adoption of inclusive social protection systems that integrate disability-related needs, ensure equity, and contribute to Sustainable Development Goals (SDGs). By highlighting best practices, such as tailored cash transfers, in-kind support, and accessible health services, this article emphasises the need for legislative reform, data-driven policymaking, and international cooperation to foster a human-rights-based approach to social security for disabled children.

Keywords: social security, disability rights, Convention on the Rights of Persons with Disabilities (CRPD), children's social protection, inclusive policy frameworks

1. Introduction. The International Legal Framework of the Right to Social Security

Social security is rarely defined in international legal sources, whereas the social security system itself is most often defined in professional literature as a set of all measures that should, in certain cases (illness, accident at work, old age, death, birth of a child, and unemployment), reestablish a disturbed balance. In most cases, it is assumed that social security represents an umbrella concept, that is, the basic goal of the science of social law, which is achieved through various subsystems such as social insurance and social protection systems. Consequently, social security can be a goal that society strives for to ensure decent living conditions and an existential minimum for as many residents as possible; this goal will be achieved by the developed social insurance and social protection systems, which will enable individuals to exercise their basic rights and receive appropriate protection in cases of occurrence of a certain social risk.

Social security is the subject of several international documents and treaties. Among the most relevant are ILO Convention No. 102 concerning Minimum Standards of Social Security, 1952; ILO Convention No. 128 concerning Invalidity, Old-Age, and Survivors' Benefits, 1967; and the International Covenant on Economic, Social and Cultural Rights (UN), 1966. Among the regional international treaties, the most important are the European Social Charter of 1961, the Additional Protocol to the European Social Charter, and the most recent document, the European Social Charter of 1996 (Revised).

The Universal Declaration on Human Rights recognises the right of everyone to social security (Article 22) and affirms that everyone has the 'right to a standard of living adequate for the health and well-being of himself and of his family' and the 'right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control' (Article 25).

The UN legal framework on human rights contains several provisions specifying the various rights of children that form part of their right to social protection. These comprise the right to social security, considering the resources and circumstances of the child and persons responsible for their maintenance; the right to a standard of living adequate for their health and well-being; and the right to special care and assistance. The UN Convention on the Rights of the Child (CRC) states that 'The States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law […]' (Article 26).

The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states to provide the widest possible protection and assistance to families, particularly for the care and education of dependent children. ILO social security

standards complement this framework and provide guidance to countries on how to affect the various rights that form part of children's right to social protection.[1]

The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), Part VII, sets minimum standards for the provision of family (or child) benefits in the form of either a periodic cash benefit or benefits in kind (food, clothing, housing, holidays, or domestic help), or a combination of both, allocated for the maintenance of children. Thus, the fundamental objective of family benefits should be to ensure the welfare of children and economic stability of their families.[2]

As specified by the ILO's Committee of Experts on the Application of Conventions and Recommendations, these standards require that family benefits be granted with respect to each child in the family and to all children as long as the child is receiving education or vocational training on a full-time basis and is not receiving an adequate income determined by national legislation. They should be set at a level which relates directly to the actual cost of providing for a child, and should represent a substantial contribution to this cost. Family

1 United Nations General Assembly, 1966. Article 9 provides a brief and general reference on the right to social security, thereby leaving it to the UN specialised agencies (in particular the ILO) to identify the details of this clause, Article 10(2) awards special protection to mothers during a reasonable period before and after childbirth. To working mothers, it offers, during such a period, paid leave or leave with adequate social security benefits.

2 While Convention No. 102 covers all branches, it requires that only three of these branches be ratified by Member states, which allows for the step-by-step extension of social security coverage by ratifying countries. Among ILO Security Standards, the following are worth mentioning:
– The Medical Care Recommendation, 1944 (No. 69), which envisages comprehensive social security systems and the extension of coverage to all and laid the foundations for Convention No. 102 (1952).
– The Medical Care and Sickness Benefits Convention, 1969 (No. 130) and the Medical Care and Sickness Benefits Recommendation, 1969 (No. 134), which make provisions for medical care and sickness benefits.
– The Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) and the Employment Promotion and Protection against Unemployment Recommendation, 1988 (No. 176), relating to unemployment benefits.
– The Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), and the Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131), covering the old-age benefit, invalidity benefit, and survivor's benefit.
– The Employment Injury Benefits Convention, 1964 (No. 121) and the Employment Injury Benefits Recommendation, 1964 (No. 121), which make provisions for employment injury benefits.
– The Maternity Protection Convention, 2000, (No. 183) and the Maternity Protection Recommendation, 2000 (No. 191), covering maternity benefits.
– The Equality of Treatment (Social Security) Convention, 1962 (No. 118), the Maintenance of Social Security Rights Convention, 1982 (No. 157), and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167), which provide reinforced protection to migrant workers.
– The Social Protection Floors Recommendation (No. 202), which provides guidance for the establishment and maintenance of social protection floors and their implementation within strategies for the extension of social security aiming at achieving a comprehensive social security system.

allowances at a minimum rate should be granted regardless of the means. The benefits above the minimum rate may be subjected to a mean test. Furthermore, all benefits should be adjusted to consider changes in the cost of providing for children, or in the general cost of living.[3]

The ILO Recommendation No. 102 further refines and extends the normative framework, aiming at universal protection. Income security for children is one of the basic social security guarantees constituting a national social protection 'floor', and it should ensure 'access to nutrition, education, care and any other necessary goods and services' (Para. 5(b)). Although the guarantee should be nationally defined, the Recommendation provides clear guidance on its appropriate level: the minimum level of income security should allow for life in dignity and be sufficient to provide effective access to a set of necessary goods and services, such as may be set out through national poverty lines and other comparable thresholds (Para. 8(b)). Providing universality of protection, the Recommendation sets out that the basic social security guarantee should apply to at least all residents and all children, as defined in national laws and regulations, and subject to existing international obligations (Para. 6), that is, to the respective provisions of the CRC, ICESCR, and other relevant instruments. Representing an approach that strongly focuses on outcomes, Recommendation No. 202 allows for a broad range of policy instruments to achieve income security for children, including child and family benefits.[4]

Article 12 of the European Social Charter 1996 (Revised) guarantees the right to social security and identifies the four principles with which the system should comply. Article 12 refers to the European Code of Social Security of the Council of Europe (1964). The latter is similar to ILO Convention 102, but the minimum requirements for acceptance for ratification are twice as high for the Code.

Article 16 of the American Declaration of Rights and Duties (1948) includes the right to social security in specific areas. Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights 'Protocol of San Salvador' (1988) refers to provisions related to old age and disability and to social security benefits for employees in the field of healthcare, work-related injuries, diseases and maternity.

3 c), paras. 184–186.

4 International Labour Organization, 2012. See also United Nations, 2015, p. 5. The Recommendation reflects the ILO's two-dimensional extension strategy, which provides clear guidance on the future development of social security in its 187 member States by: achieving universal protection of the population by ensuring at least basic levels of income security and access to essential healthcare (national social protection floors: horizontal dimension); and progressively ensuring wider scope and higher levels of protection, guided by ILO social security standards (vertical dimension). See International Labour Organization, 2017, pp. 6–8. 13. This report was adopted virtually unanimously (one abstention) by the Governments, as well as workers' and employers' organizations, of the ILO's 187 Member States.

2. The Convention on the Rights of Persons with Disabilities

The drafting of a new human rights convention on the rights of persons with disabilities had to meet two basic requirements. On the one hand, it had to reflect the paradigm shift from the medical model to the human rights model thanks to the disability rights movement. On the other hand, it had to set minimum standards that would protect people with disabilities in the most vulnerable situations in their lives.[5]

For more than 20 years, organisations have called for a convention to protect nearly 600 million people with disabilities. The first Italian proposal was made in 1987 as part of the Decade of People with Disabilities (1983–992), followed by a Swedish proposal in 1989; however, these remained mere proposals. The time was ripe for a catalogue of rights.[6] This is supported by two exceptional reports that placed disabilities in the context of international human rights policies for the first time.[7] Within the UN framework, disability was previously treated as a medical or social issue. During this period, the focus was on prevention, rehabilitation, and social security.[8] In 1982, the idea of equal opportunities was introduced; however, disability was still viewed as a medical and social problem. Leandro Despouy drew attention to human rights violations that led to disabilities, raising the issue to an international level within the UN. Among these violations, Despouy highlighted the use of inhumane treatment in wartime (e.g. amputations), female mutilation, medical experiments on human beings, forced sterilisation in institutions for people with disabilities, psychological violence, and sexual harassment.[9] Finally, the United Nations Standard Rules were established within the Decade of People with Disabilities. However, they did not bind to each other.[10]

Following a proposal by Mexico on 19 December 2001, on 26 February 2002 the UN General Assembly, by resolution A/RES/56/168, established an Ad Hoc Committee to finalise the Convention.[11] The January draft followed a holistic approach based on the principle of non-discrimination and sought to declare existing human rights in a catalogue. Therefore, the Convention can be considered specific, even though its wording itself is unfortunate, as it suggests that it is a declaration of specific rights. Rather, it is specific because some articles of the Convention have been drafted through the lens of autonomy, equal

5 Degener, 2006, p. 104; Lachwitz, 2008, p. 143.
6 Ibid.; Dhanda, 2008, p. 44.
7 Daes, 1986, p. 9; Despouy, 1993.
8 Degener, 2006, p. 104; Lachwitz, 2008, p. 143.
9 Degener, 2006, p. 104.
10 Degener, 2009, p. 34.
11 United Nations General Assembly, 2002.

opportunities, and the need for participation, and the civil, political, economic, social, and cultural rights it contains have been given a disability-specific interpretation. However, Aichele and Bernstoff stress that the Convention, thanks to the disability rights movement, is new compared to previous human rights conventions and represents the next stage in the development of human rights protection, particularly with regard to the definition of disability and the concept of non-discrimination. This new perspective and context sets the Convention apart from other human rights conventions.[12]

Article 1 sets out the purpose of the Convention, which is '[...] to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.'

In addition to the social (societal) model of disability, which holds that disability is the responsibility of society, and goes beyond it, the Convention is the most prominent representative of the human rights model of disability.[13] The human rights model is an active participation (fourth-generation) model, whereas the social security model is a third-generation model. According to the human rights model, people with disabilities are subject to human rights, which the state has a duty to respect, protect, and ensure; that is, they require both active and passive behaviour.

The definition of the Convention's purpose has greatly contributed to the empowerment of people with disabilities.[14] Empowerment is a developmental process whereby people are empowered to live better lives through their own means over time. This concept can also be viewed as an open normative form filled with beliefs, values, and moral judgements. Various approaches exist: political, everyday, reflexive, and transitive. [15]

In the political approach, the concept describes a process by which people and groups are empowered to engage in political decision-making. Many see civil rights and emancipation movements as originating from this concept.[16]

The everyday approach to the concept focuses on the microenvironment of everyday life, in which individuals autonomously determine their lifestyle, personal and property relations. This approach is relevant in social work, as it focuses on the recognition of people's strengths and resources, which are used in the provision of social assistance.[17]

The reflexive understanding approach refers to the process of gaining vitality; it refers to some change in the life process, usually a release from dependency,

12 Lachwitz, 2008, p. 144; Aichele and Bernstorff, 2010, pp. 199–204.
13 Dhanda, 2008, pp. 43–61.
14 Aichele, 2008, p. 4; Bielefeldt, 2009, p. 4; Dhanda, 2008, p. 44.
15 Herriger, 2010, pp. 13–19.
16 Id., pp. 14–15.
17 Id., pp. 15–16.

such as being placed under guardianship. This can also be understood at the level of everyday life and politics.[18]

The transitive approach is also relevant in social work as an aid to self-determination and refers to all the reserved resources needed to lead a successful life.[19]

In summary, empowerment is self-actualisation, the empowerment of oneself, and the strengthening of qualities and autonomy. At the same time, it is a process in which people take control, move out of disadvantage, and use their own and collective skills and resources to determine their own lives according to their choices, needs, interests, and desires.[20] This concept relates to the findings on the measurement of capability and the concept of decision-making capability, which will be discussed later. Thus, similar to mental health law and therapeutic justice, empowerment has emerged from the Independent Living Movement over the decades.

To achieve this goal, the Convention draws a precise distinction between the different domains of life and the state's obligations in relation to them.[21]

Respect for human dignity is a central concept of the Convention; it is repeatedly mentioned in it and has become a tool for shaping awareness. However, it is necessary to shape the awareness not only of society but also of persons with disabilities. This is the purpose of awareness-raising programmes and training.[22]

The Preamble to the Convention, articles 3(i) and (m), 3(d) (General Principles), 24(1)(a) (Education), contain the construction that disability is part of human diversity and humanity. This is known as the principle of diversity[23] and is important for the development of genetic engineering. However, it can often give the reader the impression that it is a document for the protection of minorities since each disability group has its own culture that requires support from the state and society.[24] Also new in Preamble (m) is the notion that ensuring the full participation of people with disabilities helps them feel a sense of belonging to society (*Zugehörigkeit*).[25]

Often, human rights conventions, precisely by providing protection, inadvertently delimit protected subjects to society. Thus, the Convention has a negative protective function, but it simultaneously creates a strong demand for

18 Ibid.
19 Id., p. 17.
20 Id., p. 20.
21 Aichele, 2008, p. 4.
22 Bielefeldt, 2009, pp. 4–5.
23 Id., pp. 6–8; Dhanda, 2008, p. 46.
24 Bielefeldt, 2009, p. 9.
25 Id., p. 10.

development in the community. According to Bielfeldt, this is not the case under any other human rights convention. [26]

The Convention covers eight thematic areas of disability policy, reflecting the achievements of the disability rights movement: general disability policy; women with disabilities; children with disabilities; protection and safety of persons with disabilities; self-determination; freedom and participation rights / freedom from barriers; solidarity; and international cooperation.[27]

Disability policy should consider the fact that international developments and disability rights movements have made disability a human rights issue, as well as a medical and social one. Articles 1 (Purpose of the Convention), 3 (General principles), 4 (General obligations), 5 (Equality and nondiscrimination), and 8 (Raising awareness) lay the basis for a state's disability policy.[28]

We consider it important to emphasise all these points because if the right to social security is to be established, the enjoyment of rights requires respect for human dignity, personal autonomy, and access in general, without prejudice to equal treatment.[29]

3. Social Protection and Children in the Convention

Historically, social protection policies have been constructed from the perspective of the loss of capacity to earn income and the need for rehabilitation and care. This approach guided the adoption of ILO Conventions 102, 121, and 128 and national disability contributory income security schemes. While providing essential protection for workers, it has cemented a dichotomy between persons with disabilities deemed able or unable to work and participate in society contributing to schemes fostering 'dependency, exclusion from society, and institutionalisation'.[30]

The human-rights-based approach to disability, which contributed to the adoption of anti-discrimination legislation in the 1990s and the United Nations

26 Id., 12–13.

27 Degener, 2009, pp. 36–51.

28 Id., p. 36.

29 The joint report lists the following: non-discrimination and accessibility, respect for dignity, personal autonomy, choice, control over one's life and privacy, full and effective participation and inclusion, consultation and involvement of persons with disabilities, attitudes and awareness, adequacy of benefits and support, eligibility criteria and disability assessments, and monitoring and evaluation. The importance of disability assessment is also highlighted by Côte: Disability assessments can produce a better understanding of individual support requirements. Until recently, most countries used medical assessments focused on health conditions and impairments (medical model). While valued for their apparent objectivity, they leave out significant parts of what constitutes disability and provide little information about the actual support required. Côte, 2021, p. 358.

30 Committee on the Rights of Persons with Disabilities, 2017.

CRPD in 2006, challenged this entrenched perspective. It re-conceptualised disability as a result of the interaction between persons with impairments and diverse barriers that may restrict their participation. This implies policies across sectors that combine the removal of barriers (awareness raising, non-discrimination, and accessibility) with the provision of required support (assistive devices, rehabilitation, support services, and social protection).[31]

Article 28 refers, for the first time in an international instrument, to the right to social protection and links it to the right to an adequate standard of living with reference to adequate food, clothing, and housing and the continuous improvement of living conditions. It also tailors the right to social protection for persons with disabilities, recognising that they must enjoy this right without discrimination on the basis of disability, and establishes a pathway for their inclusion in all efforts related to the realisation of this right.[32]

More specifically, Article 28 creates an obligation for State Parties to take appropriate measures to ensure that persons with disabilities receive equal access to mainstream social protection programmes and services, including basic services, poverty reduction programmes, housing programmes, retirement benefits, as well as access to specific programmes and services for disability-related needs and expenses.[33] These obligations emphasise that social protection should always contribute to the empowerment, participation, and inclusion of all persons with disabilities.

Social protection also resonates with other provisions of the Convention, including the right to live independently and be included in the community (Article 19), respect for home and family (Article 23), education (Article 24), health (Article 25), enablement and rehabilitation (Article 26), and work and employment (Article 27). Importantly, social protection interventions should be measured against the Convention's principles of non-discrimination, participation and inclusion, equal opportunities, accessibility, and equality between men and women (Article 3).[34]

In addition to Article 7 on children with disabilities, age-specific statements are made in points (d) and (r) of the preamble,[35] Article 3(h), Article 4(3) (inclusion of children with disabilities in legislation), Article 8(2)(b) (raising awareness, including for children up to the age of majority), Article 16(5) (child-centred legislation), Article 18(2) (children's right to acquire citizenship), Article 23(3), (4) and (5) (family rights), Article 24(2)(a) and (3)(c) (integrated education),

31 Côte, 2021, p. 358.
32 United Nations, 2015, p. 8.
33 Ibid.
34 Ibid. International Labour Organization and International Disability Alliance, 2019, p. 5.
35 '[...] Recognizing that children with disabilities must be guaranteed the enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling further the obligations of States Parties to the Convention on the Rights of the Child to this end […].'

Article 25(b) (access to health services), and Article 30(5)(d) (participation in cultural and leisure activities).

Social protection is central to the implementation of the CRPD and ensures that persons with disabilities are not left behind in their efforts to achieve the SDGs. The report of the Special Rapporteur concludes the following:

> Securing the right of persons with disabilities to social protection must be a priority for States and the international community. Inclusive social protection systems, including social protection floors, can contribute significantly to supporting the social participation and inclusion of persons with disabilities by ensuring income security and access to social services. They can also play an important role in fostering the realization of the Sustainable Development Goals for persons with disabilities. For that purpose, States must move away from traditional disability-welfare approaches and turn towards rights-based ones, and must develop comprehensive social protection systems that guarantee benefits and access to services for all persons with disabilities across the life cycle. The inclusion of persons with disabilities in social protection systems is not only a human rights issue, but also a crucial investment for development that States cannot afford to miss.[36]

Historically, social protection has viewed disability through the lens of loss of capacity or incapacity to earn income. Consequently, persons with disabilities were considered one of the groups which required protection rather than support. This approach reflects a societal perspective on disability as an individual problem that ignores the negative impact of social barriers and attitudes and is based on very low, if any, expectations of persons with disabilities to be able to contribute actively to society. Consequently, many social protection policies focus solely on providing a basic level of subsistence or maintaining income after a loss of earning capacity in ways that may not promote participation and inclusion. The shift of paradigm initiated by the CRPD implies a change of perspective in the design of social protection policies mostly focussing on three interrelated issues: moving away from an 'incapacity to work' approach,[37] from institutionalised

36 United Nations, 2015.

37 A new enabling approach is needed that recognizes the capacities of all persons with disabilities and addresses the barriers that they face in the labour market. Such approach should promote an adequate and flexible combination of income security and disability-related support to promote economic empowerment. International Labour Organization and International Disability Alliance, 2019, p. 6.

care to support for living in the community,[38] beyond one-size-fits-all eligibility thresholds and benefit levels.[39]

4. The Convention on the Rights of the Child

The Preamble of the Convention acknowledges that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members, particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding; be fully prepared to live an individual life in society; and be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, particularly in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity.

Particular care shall be extended to the child, as stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognised in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular, in articles 23 and 24), the International Covenant on Economic, Social and Cultural Rights (in particular, in Article 10), and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children.

As indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. The provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the Declaration on the Protection of Women and Children in Emergency and

38 In combination with other policies, social protection plays a key role in preventing institutionalisation. It can help tackle poverty and support coverage of disability-related costs, as well as facilitate or incentivize the development of community support services that foster the full and effective participation, choice and control of persons with disabilities. Ibid. In order to make social protection more inclusive for persons with disabilities and more supportive of their social and economic participation, eligibility thresholds should consider disability-related costs, and benefits should adequately cover these costs through appropriate mechanisms in cash or in kind. Where an income threshold for disability-related support is needed, this threshold should be significantly higher than that for accessing basic income support. Ibid., p. 7.

39 Joint statement, 2019, pp. 5–6.

Armed Conflict recognise that, in all countries in the world, there are children living in exceptionally difficult conditions and that such children need special consideration.

Article 26 deals with a child's right to benefit from social security and insurance. As underlined by the Committee, this right is important in itself and plays a key instrumental role in the realisation of other Convention rights.[40] It guarantees financial and other support for the child provided by the state in all cases where the adult(s) responsible for the child is/are not in a position to provide for the child because they are unemployed or for other reasons, such as illness, disability, childbearing, old age, widowhood, being a single parent, and in total absence of both parents (orphanhood). These circumstances may prevent adults(s) from securing work or income.

Contrary to other international legal provisions dealing with the issue of social security, Article 26 does not guarantee the right to social security but the right to 'benefit from' social security. The use of this expression is due to a proposal of the International Labour Organization (ILO) delegation during the drafting of the Convention, which underlined that recognising children's 'right to social security' would not mirror their real position regarding entitlement to social security benefits. Parents and/or legal guardians hold the rights to receive benefits 'by the reason of their responsibility for the maintenance of the child' [41] based on Article 18. Therefore, the position of dependency of the child towards their parents or legal guardians and their entitlement to social security would have been more adequately reflected by recognising the child's right to 'benefit from' social security and not the right to social security. Nevertheless, Article 26(2) ensures that applications for benefits cannot be made on behalf of the child. Furthermore, in the general guidelines for periodic reports, the Committee asks State Parties to describe in their reports the circumstances and conditions under which children are authorised to apply for social security benefits, either directly or through a legal representative.[42]

With reference to the implementation of Article 26, it is worth underlining that it is subject to the provision of Article 4, which sets forth that State Parties are obliged to 'undertake all appropriate, legislative, administrative, and other measures to the maximum of the available resources and where applicable within the framework of the international cooperation'.[43] Therefore, the right of the child to benefit from 'social security is not an immediate States Parties' obligation,

40 United Nations Committee on the Rights of the Child, 2003, para. 6; United Nations Committee on the Rights of the Child, 2006, paras. 10, 26; United Nations Committee on the Rights of the Child, 2007, para. 20; Vandenhole, 2007.

41 Detrick, 1999, p. 447.

42 Ruggiero, 2022, p. 218.

43 Hodgkin, Newell, and UNICEF, 2007, p. 385.

but one of progressive achievement'.[44] So far, the Committee has not provided a comprehensive clarification of Article 26 by way of General Comments, nor through the Concluding Observations on reports of States Parties.[45] Therefore, the specific and technical meaning of 'social security' needs to be identified in many universal and regional treaties dedicated to the right to social security. In these treaties, 'social security' is composed of the nine traditional branches identified by ILO Convention 102 on Minimum Standards, namely healthcare, sickness, unemployment, employment injury, family, maternity, invalidity and survivor's benefits; and a social security system should comply with the following four principles identified by the 1996 European Social Charter (Revised):

1. The social security system should be set up or maintained.
2. A minimum level should be defined for each social security system.
3. The principle of progressive improvement of the system should apply.
4. Equality of treatment should be ensured for nationals of other contracting states, along with 'granting, maintenance and resumption of social security rights'.[46]

5. A Social Protection System for Persons (Children) with Disabilities

Social protection should be aimed at achieving universality and thus contribute to the objective of enjoyment of an adequate standard of living by all persons. Universal social protection involves comprehensive systems that guarantee income security and support services for all people across their lifecycle, paying particular attention to those experiencing poverty, exclusion, or marginalisation. Simultaneously, universal social protection should entail inclusiveness, that is, consider the particular circumstances of all persons, including those with disabilities.[47]

What does the CRPD tell us about the proper social protection system for people with disabilities? The CRPD moves beyond traditional disability-welfare considerations towards a complex equality model that highlights the interdependence and indivisibility of all human rights, stressing that persons with disabilities must enjoy these rights on an equal basis with others. Traditional disability welfare approaches have been instrumental in building and spreading the medical model of disability worldwide, as they are part of a societal structure

44 S. L. de Detrick, 1999, p. 447; Vandenhole, 2007, pp. 24–30
45 Vandenhole, 2007, p. 1, 15.
46 Ruggiero, 2022, p. 219.
47 United Nations, 2015, p. 7.

that considers disability as a medical condition, and persons with disabilities as unable to work, cope independently, or participate in society. Unsurprisingly, these approaches triggered further segregation and the loss of self-determination. Children with disabilities were sent to special schools, and persons with disabilities received medical attention and rehabilitation in segregated settings, along the lines of 'fixing' or 'curing' them while disregarding their own will. When persons with disabilities were granted disability benefits, this was often based on the premise that they were unable to work. Therefore, social protection for persons with disabilities needs to move towards intervention systems that promote active citizenship, social inclusion, and community participation, while avoiding paternalism, dependence, and segregation. The ultimate aim is to achieve the right to live independently and be included in the community, in line with Article 19 of the Convention. This creates an obligation for States to ensure that persons with disabilities enjoy: choice on an equal basis with others about life-shaping decisions (e.g. where and with whom they wish to live), and thus have control over their own lives; access to necessary support services as a condition for free choice on an equal basis with others (including the provision of personal assistance); and access to all community services available to others, including in the context of the labour market, housing, transportation, health care, and education.[48]

The Special Rapporteur made the following recommendations to States with the aim of assisting them in developing and implementing disability-inclusive social protection systems:[49]

a) Ensure that the rights of persons with disabilities to social protection are recognised in domestic legislation and considered in national social protection strategies and plans, including nationally defined social protection floors.
b) Implement comprehensive and inclusive social protection systems that mainstream disability in all programmes and interventions and ensure access to specific programmes and services for disability-related needs.
c) Design disability benefits in a way that promotes the independence and social inclusion of persons with disabilities and does not limit their full and equal enjoyment of other human rights or fundamental freedom.
d) Ensure that eligibility criteria and targeting mechanisms do not discriminate directly or indirectly against persons with disabilities. Disability determination, when established, must respect the rights and dignity of persons with disabilities.

48 Id., p. 8.
49 Id., pp. 14–25.

e) Guarantee that the benefits and services offered by social protection programmes are relevant for persons with disabilities and consistent with the right to an adequate standard of living.
f) Refrain from adopting any retrogressive austerity measures that directly or indirectly affect the rights of persons with disabilities to social protection.
g) Develop disability-related indicators, undertake research on social protection, and collect data disaggregated based on disability and gender to adequately assess the impact of social protection programmes on persons with disabilities.
h) Establish formal consultative mechanisms to ensure the active involvement and participation of persons with disabilities and their representative organisations in decision-making processes related to social protection, including budget cuts.
i) Encourage international cooperation to support inclusive social protection systems, facilitate cooperation to make mainstream social protection programs inclusive of persons with disabilities, and develop and improve disability-specific programmes and services.

Not accounting for the extra costs for people with disabilities in social protection policies undermines their effectiveness of social protection policies in diverse ways. In the following section, we refer to some of these.

1. Persons with disabilities may be excluded from social protection programmes because the standard means that the tested benefits understate the extent of poverty among persons with disabilities. Because poverty measurements rarely account for direct disability-related costs, they underestimate the socioeconomic vulnerabilities of persons with disabilities. Consequently, poverty-targeted and means-tested programmes that do not factor disability-related costs into their eligibility thresholds exclude many persons with disabilities and their families with a standard of living below the set thresholds.
2. The regular benefits of social protection programmes may provide a lower standard of living for people with disabilities because of the extra costs they face. Social transfer programmes that provide equal benefits to persons with and without disabilities do not allow them to maintain equal standards of living. To do so, the benefits must be increased or complemented by other benefits to cover disability-related costs. Additionally, because disability-related costs vary depending on the type and degree of disability, social protection mechanisms must be adjusted to fit the support costs for a particular disability category.

> 3. Social protection may fail to support the economic empowerment of people with disabilities. By not recognising that seeking and retaining work can raise disability-related expenses, social protection payments may be insufficient to support persons with disabilities in obtaining employment. This failure can be magnified if the receipt of social protection benefits is contingent on the perceived inability to work or if disability benefits can be lost if the person starts working or earns above a defined threshold, which is the case in many countries.[50]

While the extra cost of disability varies greatly depending on the availability and financial accessibility of goods and services, researchers have calculated that it amounts to almost 50 per cent of an individual's income. A recent study on older persons with disabilities estimated that, on average, disability costs are approximately 65 per cent higher than the net weekly pre-disability household income.[51]

The ILO Joint Statement titled *Towards Inclusive Social Protection Systems Supporting the Full and Effective Participation of Persons with Disabilities* presented a comprehensive and inclusive social protection system that should ensure that persons with disabilities have access to programmes that adequately: ensure income security that enables access to necessary goods and services; ensure coverage of disability-related costs and facilitate access to the required support, including services and assistive devices; ensure effective access to healthcare, including disability-related medical care and rehabilitation, as well as HIV services; improve access to services across the life-cycle, such as child care, education, vocational training, support with employment and livelihood generation, including return to work programmes; and take into account the diversity of this population group, both in terms of type of disability and other factors such as age, gender, and ethnicity.[52] Côte summarizes these desiderata as follows: making social protection systems inclusive first requires understanding the diversity of persons with disabilities, the inequalities and barriers they face, and the support they require. Second, delivery mechanisms must be fully accessible. Finally, it requires investments in a blend of cash transfers, in-kind support, including services. According to Côte, inclusive social protection combines a diversity of schemes to provide basic income security, cover disability-related costs, including support services, and grant access to healthcare and other essential services. He outlined the system according to the following:[53]

50 Mont, Cote, Hanass-Hancock *et al.*, 2022. United Nations, 2015, p. 10.

51 United Nations, p. 11. See: Cullinan, Gannon, and Lyons, 2011, pp. 582–599; Saunders, 2014; Loyalka *et al.*, 2014, pp. 97–118.

52 International Labour Organization and International Disability Alliance, 2019, p. 7.

53 See this system in Côte, 2021, pp. 363–364.

1. Countries have adopted different tax-financed cash transfers that can be broadly divided into three categories depending on their purpose: basic income security; coverage of disability-related costs; and hybrids, whose purpose depends on individuals' circumstances.
2. In-kind support and concessions can respond directly to disability-related needs such as healthcare, assistive devices, or support services, which are quite costly and cannot be covered by a basic disability allowance. Other concessions, such as free public transportation or tax exemptions for disability card holders, can offset disability-related costs. The concessions that appear to be the most valued are free or heavily subsidised healthcare, assistive devices, transport and housing, and utility bill subsidies. Income tax exemptions are valued in countries with a wide formal sector because they provide relief to many parents of children with disabilities and increase the benefits of entering the formal economy.
3. Access to health care, including rehabilitation and assistive technology.
4. Support services such as personal assistance, sign language interpreters, circles of support for persons with intellectual disabilities, and respite services are critical for the survival and basic socioeconomic participation of many persons with significant disabilities.
5. Inclusive combinations of scheme.
6. There are some general design choices to be considered that can have significant impact on effective support for the inclusion of a given scheme.

Unfortunately, in many countries, cash transfers are mutually exclusive, which undermines their effectiveness.

6. Closing Remarks

In the case of social protection systems that include disabilities, it is necessary to ensure that the right to social protection for persons with disabilities is recognised in national legislation. There is a need to implement comprehensive and inclusive social protection systems that mainstream disability into all programmes and interventions, and design disability benefits to promote the independence and social inclusion of persons with disabilities. It is also essential to: ensure that eligibility criteria do not discriminate directly or indirectly against persons with disabilities; develop disability-related indicators; conduct research; establish formal consultation mechanisms; and encourage international cooperation to promote inclusive social protection systems.

Inclusive social protection combines a diversity of systems to ensure basic income security, cover disability-related costs, including support services, and provide access to healthcare and other essential services.

The referenced provisions of the CRPD and CRC call for the development of inclusive social protection for all State Parties. This is an important part of the human rights model for disabilities.

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The Rights of the Child and Alternative Care

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Abstract. This study is devoted to the right of a child to know his or her origin, parents, to be in their care, or at least to have contact with them if he or she is placed in alternative care. Moreover, it also analyses the best interests of the child as a primary consideration in all actions, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, as well as the child's participation rights. Finally, attention is paid to the new family policy and recent developments in the field of alternative care and the rights of the child removed from his or her family of origin.

Keywords: child, parents, family life, alternative family care, foster care, alternative non-family care, institutions, case-law, pro-family policy

1. Introduction

The United Nations Convention on the Rights of the Child is the most widely ratified human rights treaty in history and has helped transform children's lives worldwide. Its motto, purpose, and goal, according to the website of the United Nations International Children's Emergency Fund (UNICEF), is *'For every child, every right'*. It also enshrines that:

> children are not just objects who belong to their parents and for whom decisions are made, or adults in training. Rather, they are human beings and individuals with their own rights. The Convention says childhood is separate from adulthood, and lasts until 18; it is a special, protected time, in which children must be allowed to grow, learn, play, develop and flourish with dignity.

However, it also states that 'Still not every child gets to enjoy a full childhood. Still, too many childhoods are cut short'.[1]

The Czech Republic, or former Czechoslovakia, has acceded to the Convention on the Rights of the Child soon after its adoption.[2] This was of considerable significance for the entire legal order at the time. Many provisions of the Convention on the Rights of the Child were paraphrased into domestic black letter law, although the Convention on the Rights of the Child was directly applicable. We focus here on the best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, as well as the child's participation rights, the child's rights to fair trial in all court proceedings related to him or her, and the proceedings related to alternative care. As the child has the right to know his or her origin and parents, and be in their care, entrusting children to alternative care must be seen as exceptional, subsidiary, an *ultima ratio* measure. In general, a child's rights must be considered and protected as fundamental rights, values, or principles of the legal order.

Subsequently, the professional sphere and the public slowly became familiar with the concept of the Convention on the Rights of the Child and its individual provisions. Although it might seem that the Convention on the Rights of the Child could not cause interpretation and application problems, this was not the case at first. Specifically many problems were posed by, and still relate to, the right of a child to know his or her origin and parents, to be in their care, or at least to have contact with them if he or she is placed in the alternative care of third parties. In the past, alternative care was not always understood as subsidiary, less severe means were not made use of, and family life was not protected. Other problems were the violation of the child's right to a fair trial or the negation of the child's participation rights.

It was primarily the Constitutional Court of the Czech Republic that, through its case-law and negative standard-setting, contributed to the fulfilment of children's rights and to the proper interpretation and application of the Convention on the Rights of the Child in the Czech Republic. Moreover, the case law of the European Court of Human Rights contributed to strengthening the awareness of the right of the child to family life, a right that applies to everyone.

The following section is thus devoted to the most pressing aspects of children's rights in this area.

1 UNICEF, 1989.

2 Published under No 104/1991 Sb.

2. The Child as an Integral Part of the Family of Origin

According to the Convention on the Rights of the Child, a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.

While the Czech Republic seems to fully respect this fundamental right of the child in terms of the child's rights, the opposite is true in practice. The Czech Republic has been criticised many times by the United Nations Committee on the Rights of the Child for the *de facto* existence of the so-called baby boxes,[3] which, on the one hand, give a chance to an unwanted child to survive after birth, but, on the other hand, allow the child to be recklessly abandoned by his or her mother. Statistics from February 2024 show that there were 87 of them located throughout the country and there have already been 261 abandoned babies recovered from them since the start of the project.[4] The largest number of abandoned babies was recorded in the capital of the Czech Republic, Prague, where there are three such places for leaving new-born children.[5] No relevant information is available on the mothers of these children. By giving birth outside medical facilities, which is not permitted in the Czech Republic, they risk their lives and those of their children. Unfortunately, the state is currently turning a blind eye to this problem. Moreover, even some experts and the public have been tolerating the abandonment of unwanted babies in these places, referring to the idealistic concept of preventing the murder of newborns.[6] However, police statistics show that infanticide still occurs. It is to the credit of the private founder of the so-called baby boxes that, in the last few years, he has also set up shelters for mothers of young children in distress.[7]

In addition to the issue of anonymous births (i.e. outside medical facilities), in private, the so-called hidden births are also possible in the Czech Republic, being regulated by law (see Section 37, Act No 372/2011 Sb., Act on Health Services, as amended). According to the Act, the child whose mother wants her personal data not to be revealed has a 'legal' mother;[8] however, her identity will not be known to the child. The child may demand that 'an envelope with his or her mother's personal data' be opened, for example, in court proceedings for determining parenthood.[9] Much criticism has been levelled at the above-

3 See OHCHR, 2011.
4 See Babybox.cz, 2024.
5 For more, see Babybox.cz, 2024.
6 For the criticism, see Zuklínová, 2005, pp. 250 et seq.
7 See Babybox.cz, 2024.
8 For the concept of status law according to the Czech legal order, see Králíčková, 2021a, pp. 77 et seq.
9 For more critics, see Hrušáková and Králíčková, 2005, pp. 53 et seq.

mentioned rule, including in law journals.[10] However, there are no official statistics available on this matter.

It is the above-mentioned pathological behaviour leading to the abandonment of new-born children by their mothers that prevents these children from living with their fathers, in the family of origin. However, such children can be placed in substitute families, but the unfortunate entry into life of these unwanted children is typically followed by further adversity. Not every child is fortunate enough to be adopted, which under Czech law is primarily a status change accompanied by family care.[11] A life in foster care, or even in alternative non-family care, thus represents fate for many children, unfortunately. *De lege ferenda*, it is up to the State to better protect 'unwanted' children. This positive obligation to protect family life applies not only to the Czech Republic but also to many other (European) countries.

Recent data from the Ministry of Education, Youth and Sports show that, in the 2022/2023 school year, out of a total of 6,355 children ordered to be institutionalised, only 57 were fully orphaned.[12] The Ministry uses this term to refer to children whose sole parent (holder of parental responsibility) or both parents are deceased or to 'found' children whose parents are unknown, often from baby boxes. Data reveals that less than 1% of orphans living in alternative non-family care or institutions in the Czech Republic are fully orphaned. There is the myth of the large number of orphans in such institutions, but most children in institutions have someone to live with: their own parents, grandparents, adult siblings, or other family members. Hence, these children are not legally adoptable. Therefore, the possibility of their return to their parents, to the families of close relatives (e.g. in the form of foster care), or at least the possibility of more extensive contact, is rather the rule nowadays, as evidenced by the data. This is good news for improving social work or the pro-family policy.

3. On the Bad Practice and Case Law of the Constitutional Court and the European Court of Human Rights

The practice of state authorities in removing children from their families and social work with the families of origin has not always been optimal. First, let us

10 See Králíčková, 2022b, pp. 83 et seq.
11 On the reform of the concept of adoption of minors, see Králíčková, 2003, pp. 125 et seq.
12 Ministerstvo školství, mládeže a tělovýchovy, no date.

mention the key decision of the Constitutional Court of the Czech Republic[13] that cancelled the following provision:

> If there is an urgent need for it, the National Committee is obliged to take a preliminary measure on which only the court has the right to decide otherwise, to which it immediately notifies it; the court will decide subsequently (Section 46, Act No 94/1963 Sb., On the Family, as amended; the whole act was repealed and replaced in 2012).

In this case, the petitioner filed a constitutional complaint with the Constitutional Court against the decision of the Regional Court in Brno, which dismissed his appeal against the judgment of the Municipal Court in Brno. To substantiate the application, he stated that the decision on the interim measure issued by the administrative authority (the former National Committee) had decided to place his son in institutional care. He thus appealed against the preliminary injunction, but the superior administrative authority did not grant it. He stated that the decisions of the administrative authorities violated his rights and those his child, as the Charter of Fundamental Rights and Freedoms provides that the rights of parents may be restricted and children separated from their parents against their will only by a court decision based on the law (Article 32, para. 4, Constitutional Act No 2/1993 Sb., as amended, Charter of Fundamental Rights and Freedoms). A similar provision is included in the Convention on the Rights of the Child. Because of the submitted petition, the Constitutional Court had to concentrate primarily on comparing the content of the contested provisions proposed for repeal with the content of the provisions of the Charter of Fundamental Rights and Freedoms and the Convention on the Rights of the Child. The Constitutional Court agreed with the complainant that the restriction of parental rights and the separation of children from their parents must be interpreted in accordance with the express wording of the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic, and the Convention on the Rights of the Child; in the event of parental disagreement, it can only be implemented by a court decision. The Constitutional Court concluded that the relevant section conflicted with the constitutional order and had to abolish it.

Second, let us refer to the case law of the European Court of Human Rights, in particular, case *Wallová and Walla v. the Czech Republic*.[14] In this case, the European Court of Human Rights held unanimously that there had been a violation of the European Convention for the Protection of Human Rights and

13 Constitutional Court of the Czech Republic, case No Pl. ÚS 20/94 from 28 March 1995.

14 European Court of Human Rights, case *Wallová and Walla v. the Czech Republic*, Application No 23848/04 from 26 October 2006.

Fundamental Freedoms[15] on account that the applicants' five children had been taken into institutional care (see Article 8, right to respect for private and family life). In the cited case, on an application by the authority for the social and legal protection of children, the District Court made an order for the supervision of the applicants' children to ensure that their parents would quickly find suitable housing. Then, the authority applied for a temporary care order for the children on the grounds that the family did not have a suitable and stable home. Hence, the District Court ordered the temporary placement of the three oldest children in a children's home and of the two youngest in another. Subsequently, the District Court ordered the institutional care of the applicants' five children, noting that Mr Walla did not have stable employment and that his wife, who was unemployed, had not yet complied with the formalities which would have enabled her to obtain social benefits. The applicants had thus not made sufficient efforts to overcome their material difficulties and find a home for their family. The District Court ruled that they were not able to bring up the children properly. It also noted that they had not shown any interest in the children, with whom they had not been in contact. This decision was later upheld. Then, the Constitutional Court of the Czech Republic dismissed an appeal by the applicants regarding the fact that the children had been taken into institutional care on the ground that this had been the only possible solution and that it had been in accordance with the law and in the children's best interest. Subsequently, the oldest child ceased to be affected by the care order when he reached the age of majority; custody of the two youngest children was given to a foster care family, a married couple. The orders concerning the second and third child were cancelled later and they were able to return to living with their parents, but under supervision. As grounds for lifting the orders, the Czech courts noted that the applicants had started renting a flat, that Mr. Walla had been working for some months, and that his wife was receiving a disability pension. However, the two youngest children remained in foster care at a substitute family.

4. The Subsequent Legal Changes: New Standards of the Social and Legal Protection of Children

Regarding the above analysed bad practice of both the authority for social and legal protection of children and the courts, the Czech legislator subsequently established several rules aimed at providing children from socially disadvantaged backgrounds with dignified treatment in the spirit of the Convention on the Rights of the Child. In this context, both the substantive and procedural legislation was amended. As inadequate financial and housing conditions must not lead to the

15 Published under No 209/1992 Sb.

conclusion that the parents of the children are incompetent to raise and care for them, it was stipulated that the removal of children from their families must be seen as *ultima ratio*, as an exceptional solution for an exceptional situation and realised only by the court. As a rule, this must always be preceded by less intrusive and invasive interventions in the family situation. Any alternative care must be conceived as subsidiary to the care of the parents for the children in the family of origin. The rights of the children have to be respected, including participation rights. Finally, any state action must always pursue the best interests of the child.[16]

The so-called Children Act has also been amended many times in this respect (Act No 359/1999 Sb., on Socio-Legal Protection of Children, as amended, further 'ChildA').[17] In the current version, the social-legal protection focuses on children

> a) whose parents have died, fail to fulfil the obligations arising from parental responsibility, or do not exercise or abuse the rights arising from parental responsibility;
> b) who have been entrusted to the care of another person responsible for the upbringing of the child, if that person fails to fulfil the obligations arising from the entrustment of the child to his or her care;
> c) who lead an idle or immoral life consisting in particular of neglecting school attendance, not working, even if they do not have a sufficient source of livelihood, using alcohol or addictive substances, being at risk of addiction, living in prostitution, have committed a criminal offence or, in the case of children under the age of 15, have committed an act which would otherwise be a criminal offence, repeatedly or persistently commit offences under the law governing offences, or otherwise endanger civil coexistence;
> d) who repeatedly abscond from their parents or other natural or legal persons responsible for the upbringing of the child;
> e) on whom an offence endangering life, health, liberty, their human dignity, moral development, or property has been committed or is suspected of having been committed;
> f) who, at the request of their parents or other persons responsible for the child's upbringing, are repeatedly placed in institutions providing continuous care for children or whose placement in such institutions lasts longer than 6 months;
> g) who are threatened by violence between parents or other persons responsible for the upbringing of the child or violence between other natural persons;

16 Previously, Králíčková, 2022b, pp. 83 et seq.
17 Krausová, Novotná, 2006, pp. 1 et seq.

h) who are applicants for international protection, asylum seekers or persons enjoying subsidiary protection and who are in the territory of the Czech Republic unaccompanied by their parents or other persons responsible for their upbringing.

If these facts persist for such a period or are of such intensity that they adversely affect the development of the children or are or may be the cause of the adverse development of the children, measures must be taken. One of the key previous amendments to the so-called Children Act also introduced new terms and measures such as an individual plan for the child's upbringing, providing counselling, or organising case conferences. The rights of the child, including participatory rights, were also emphasised.

Following long-standing criticism of bad practice, especially by the United Nations Committee of the Rights of the Child, the Czech legislator has attempted further remedies, by trying to reduce the number of children in institutional care in favour of foster care (e.g. through financial support for foster care provided by the child's grandparents). However, the main goal of the state's pro-family policy is to gradually eliminate care for children under the age of 3 years in nurseries and similar institutions.[18]

However, substantial changes in this field took place in connection with the new Civil Code of 2012 (hereafter, CC; Act No 89/2012 Sb., effective since the 1 of January 2014). Further, the incorporation of family law matters into this main source of private law, Book II – Family Law, was significant.[19] Specifically, the new concept of parental responsibility[20] conceived according to international conventions and in harmony with the Principles of European Family Law regarding Parental Responsibilities[21] enacted by the Commission on European Family Law[22] must be highlighted.[23] In the light of this perception, the child is no longer conceived as a passive object of his or her parents' activities but as an active subject with legally guaranteed rights. In relation to the above legislative changes in connection with case *Wallová and Walla v. the Czech Republic*, the current Civil Code also provides that unfavourable financial circumstances or the inadequate housing conditions of the child's parents may not be the reason for removing a child from his or her family, namely the parents (Section 971, para. 3, CC). The Civil Code also states that 'any radical solution' must be preceded by milder measures, such as a warning to the parents, or by supervision of the family, including active social work.

18 Ministerstvo práce a sociálních věcí, 2020.
19 Králíčková, 2014, pp. 71 et seq.; 2021a, pp. 81 et seq.
20 Králíčková, 2022a, pp. 85 et seq.
21 For more, see Boele-Woelki *et al.*, 2007.
22 Commission on European Family Law, no date.
23 See Králíčková, 2021b, pp. 85. et seq.

Finally, the Ministry of Labor and Social Affairs presented 'The New Family Policy Strategy 2023–2030' (hereinafter Strategy)[24] based on the finding that the Czech society has been undergoing constant social, demographic, and economic development and that the family remains a highly preferred value today. The situation of families was characterised by declining fertility rates, aging population, changing family structure, women achieving higher education, differential employment by gender and age, and relative and absolute poverty of families with children.[25] The Strategy was transposed into the following five main objectives:

> a) support the importance of family values, increase social prestige and appreciation of the family, and strengthen the institutional anchor of the family policy in the Czech Republic;
> b) develop an environment supportive of stable family relationships and strengthen risk phenomena prevention in the family;
> c) promote balance between family life and work;
> d) create a favourable environment for material and financial stability of families; and
> e) support families at all stages of life and in specific situations.[26]

5. On Alternative Family Care

5.1. General

According to the Convention on the Rights of the Child, a child has the right to grow up primarily with his or her parents. Parents have not only the right but also the obligation to have the child with them and exercise the rights and duties arising from parental responsibility.

Removing a child from the care of the parents or other relatives is always a subsidiary solution to the care of the child in the natural family, which enjoys special protection. At the same time, it is an *ultima ratio* solution in situations where other instruments, such as educational measures, cannot be used to protect the best interests of the child. It must be stressed that any alternative solutions in relation to parental care are temporary and are admissible only for the period during which the parents themselves are unable to provide for the child. Moreover, they can only be used if the aim cannot be achieved by less severe means, as stressed in the case law of the European Court of Human Rights, especially in *Kutzner v.*

24 See Ministerstvo práce a sociálních věcí, no date, p. 1.
25 See Ministerstvo práce a sociálních věcí, 2017, pp. 10–19.
26 For more Ministerstvo práce a sociálních věcí, 2017, pp. 3–4.

Germany.[27] Such interference must be proportionate to the aim pursued, namely the protection of the minor child, and must also respect the rights of the child and pursue his or her best interests or welfare. Alternative family care, which includes foster care, care by a person other than the child's parents, and guardianship with personal care, is a special form of care for a child at risk in a family or family-like environment. These measures have many things in common, such as their temporary nature and the fact that the parent–child family status relationship is maintained, but the mutual obligations and rights change in practice. They also have priority in relation to alternative non-family care or institutional care.

The child's interest in being placed in one of the forms of alternative family care is the primary consideration. For any procedure, it is also necessary to ensure the child's participation rights and the right to a fair trial. Placing a child outside the family, in another alternative suitable environment, is by no means the end of the state's intervention. Such intervention may later even be significantly intensified. Thus, the authority for the social and legal protection of children is obliged to provide assistance to the parents after the child has been placed in alternative care, in particular helping to arrange family circumstances that would enable the child to return to the family; dealing with the child's living and social situation, including the family's material needs; or enabling cooperation with social security authorities and other authorities; for this purpose it should also provide the parents with professional advisory assistance.

The Civil Code regulates all forms of alternative family care. They differ from each other both in their prerequisites, their purpose, and their consequences for the child and his or her parents. In practice, they always depend on the needs and wishes of the individual child, the situation in his or her family of origin, and a range of circumstances. Ultimately, the best interests of the child must always be pursued, and the child's participatory rights must be fully respected.

5.2. Foster Care

The legal regulation of foster care has undergone many changes over time. It was widely used in the former Czechoslovakia before the communist coup of 1948, which resulted in many legal changes, especially 'the collectivisation of childcare' according to the Soviet model.[28]

The Civil Code now defines it as alternative care for a child at risk in a family or a family-like environment (Section 958 ff, CC).[29] Foster care has an irreplaceable

27 European Court of Human Rights, case *Kutzner v. Germany*, Application No 46544/99 from 26 February 2002.

28 For the new concept, see Hrušáková, 1993, pp. 101 et seq.

29 For the family-like environment, see, for example, the concept of so-called SOS Children's Villages, SOS dětské vesničky, z.s., no date.

place in the system of forms of care for children in an alternative environment, but it must always be understood as subsidiary to the child's natural family, or family of origin, which enjoys special protection, and simultaneously as a priority in relation to alternative non-family care (i.e. institutional care) or upbringing. It must be stressed that any alternative solutions to parental care are temporary. They may be used only for the period during which the child's parents are unable to provide the necessary care for the child and only if the objective cannot be achieved by less severe means.

The purpose of foster care is to provide personal care to the child in a supportive, subsidiary way to the care of the parents. However persistent the barriers to family care may seem at first, everyone, including the State, has a duty to encourage the development of the family bond between the parents and the child. The purpose and goal of foster care is not a permanent but a temporary solution, which is paralleled by intensive social work with the family of the child in crisis. Hence, foster care can be short-, medium-, or long-term, always in relation to the obstacles in the personal care of the child's parents and in relation to the needs, interests, wishes of the child.[30]

Maintaining and developing the child's attachment to his or her family refers to relationships not only in the nuclear family (parents and child) but also in the extended family. It is thus about preserving the child's natural attachment to those close to him or her. Foster care also has an important role to play in this respect, as it enables the child's *de facto* situation to be confirmed by persons close to the child, particularly grandparents, if the child cannot be cared for by his or her parents. In practice, in approximately 60% of cases, foster care is exercised between family relatives as unmediated foster care.

However, foster care can also be mediated only by the State, which, based on the law and through the competent authorities, searches for suitable foster parents for a child at risk. A child may thus be entrusted to the foster care of strangers. In this case, the role of the State becomes more important. In addition to the mediation of foster care, the State provides this alternative form of care for the child not only by providing material security (i.e. foster care benefits) and controlling it, but in the form of support in the form of training and accompanying foster parents.[31]

The private-law relationship between the foster parent and the child is manifested in the provision of personal care for the child. A foster parent shall be entrusted the foster care of a minor child if the child's interests require such entrustment, and the future foster parent, or future foster (married) parents, should provide a guarantee of the child's proper upbringing. A relative or close

30 For the new concept, see Králíčková, 2010, pp. 106 et seq.
31 See Králíčková *et al.*, 2020, pp. 1127 et seq.

persons take precedence unless this is not in accordance with the best interests of the child. Residence in the Czech Republic is another condition.

The duties and rights of a foster parent include:

a. to take personal care of the child;
b. to bring up the child and exercise the rights and duties of parents in daily matters;
c. to decide on the child's ordinary affairs in the representation of the child and the administration of the child's property;
d. to inform the parents about the child's essential matters;
e. to maintain, develop, and deepen the child's relationship with his or her parents, relatives, and close persons, and in principle to allow the parents to have contact with the child.

It should be emphasised that the child's parents remain the holders of parental responsibility, continue to be the child's legal representatives, have the right to administer the child's property and make decisions in the child's essential matters (e.g. healthcare or education), and have the right to meet the child in person, unless otherwise stipulated.[32] A child also has the right to regular personal contact with his or her parents. If there is a disagreement between the parents and the foster parents on an essential matter concerning the child (e.g. the choice of school or profession), not only the foster parent but also the child or the parents may petition the court for a change of rights or obligations, termination of foster care, or another decision.

As mentioned above, foster care is relatively generously funded by the state. Foster care benefits are regulated in a special act (Section 47e ff, ChildA) as:

a. contribution to cover the child's needs differentiated according to the age of the child and the degree of disability (reimbursement);
b. foster parent remuneration for foster parents providing mediated foster care based on the minimum wage (recurrent);
c. foster care allowance for foster carers providing unmediated foster care (for instance, for grandparents) set with regard to the subsistence level (reimbursement);
d. child takeover allowance (one-off);
e. contribution to the purchase of a personal motor vehicle (one-off).

In this context, it is necessary to add an additional benefit, which is a maintenance allowance to which an adult or fully competent person who is

32 For details, see Králíčková, 2022a, pp. 88 et seq.

dependent and was in foster care before his or her majority is entitled (Section 50b ff, ChildA).

However, the above-mentioned funding of foster care by the state does not relieve the parents of the child of their maintenance obligations. Parents are obliged to pay maintenance for their child according to their, often, very limited possibilities, abilities, and property situation to the state, which may require enforcing it.

Finally, foster care is terminated or revoked by the court when the child reaches the age of majority or full legal capacity, in case of the death of a child or foster child, or in case of the divorce of the foster parents for joint foster care. Here, too, it must be emphasised that a child has always the right to request to be returned to his or her family of origin. This is linked to the child's right to live with his or her parents or close relatives. The child's parents have the same rights. Then, a court decides to terminate foster care and returns the child to his or her parents. However, if it is not possible for the child to return to his or her parents, a court may decide on the termination of foster care and on a new alternative environment for the child.

5.3. Professional Foster Care

'Foster care for a temporary period' is a special form of foster care. This statutory terminology is used for so-called professional foster care, introduced into the legal order recently (Section 958, para. 3, CC and Section 27a, ChildA). It can only be performed by foster parents registered in the register of persons suitable for temporary foster care maintained by the regional authority for the social and legal protection of children. The selection of these persons is carried out very carefully. Applicants for temporary foster care must be professionally prepared based on the facts that their care will be short-term and they will usually need to care for the child soon after his or her birth. The court decides on the temporary placement of a child in this form of foster care by way of an interim measure, which lasts for three months from its enforceability or until the decision on the merits is enforceable. Professional foster care is legally limited in time: it may last no longer than one year (except for the custody of siblings). After the end of professional foster care, the child is returned to his or her family of origin if the reasons for the removal of the child have ceased. If the court finds that the return of the child to the family of origin is not realistic in the short term, it decides on a more stable form of foster family care in the interest of the child. Moreover, financing by the state is regulated in a similar way as in the case of foster care.

5.4. Care by Persons Other than the Child's Parents

This form of alternative family care for a child is intended especially when the caregiver is a relative or a person close to the child or his or her parents, and when it is possible to determine the parents' or other direct relatives' (e.g. grandparents) maintenance obligations to the child to the extent that it corresponds to the child's justified needs (Section 957, CC). An indisputable advantage of this type of care is the fact that the caregiver and the child know each other, they usually share a family bond, and the transition of the child to this care is not as emotionally demanding. The rights and obligations of a caregiver are similar to those of foster parents. However, this form of childcare is not funded by the State and the child's parents fulfil their maintenance obligation to the child directly to the caregiver, or caregivers if they are married.

5.5. Guardianship with Personal Care

A guardian must be appointed to the child, for instance, in the event of the death of the child's parents. Hence, in principle, all obligations and rights of a child's parents belonging to the concept of parental responsibility are exercised by a guardian. However, the guardian is not the holder of parental responsibility. Even if a guardian is a natural person (e.g. a grandmother or an adult sister), he or she *ex lege* does not have to take personal care of the child – unlike a foster parent. Even if the child has a guardian, he or she may be placed in foster care or alternative non-family care, as the personal care of the child is not the primary purpose of guardianship (Section 928, CC). That is, guardianship is not in principle a form of alternative family or personal care, as its aim and purpose are much more complex.

In practice, it always depends on the specific situation in the family of origin of the child, on his or her needs, and on his or her wishes and best interests. However, if the guardian has personal custody of the child by virtue of a court order, he or she is entitled to all foster care benefits, similar to a foster parent (Section 939, CC in connection with Section 47e ff, ChildA).[33]

6. Alternative Non-family Care

6.1. General

International treaties, particularly the Convention on the Rights of the Child, provide for the right of a child who is permanently or temporarily deprived of his or her family environment or who cannot be left in that environment in his or

33 For more details, see Králíčková *et al.*, 2022, pp. 324 et seq.

her own best interest to special protection and assistance guaranteed by the State. Such a child must be provided with alternative care, preferably family care.

According to civil law, institutional care must be distinguished from institutional protective care according to criminal law, the purpose of which is completely different. Both forms of alternative non-family care are temporary measures which must be evaluated on an ongoing basis. Unless otherwise provided, the child's parents remain the holders of parental responsibility and have the right to exercise its various components.[34] However, in the best interest of the child, they must endure certain factual or legal restrictions; otherwise, the purpose of institutional care and institutional protective care would be completely defeated. They may have personal and regular contact with the child unless expressly prohibited.

Institutional care or institutional protective care should not, as a matter of principle, be seen as a punitive measure but as helping the child and his or her family of origin bridge a period of crisis.[35] After all, the system of care for a child at risk is currently focused on preventing the child from being at risk and on supporting the development of that child in a family environment. Only a court can decide to remove a child from his or her family of origin and place him or her in a substitute family or in alternative care of family or non-family form. This radical intervention is usually preceded by educational measures.

6.2. Institutional Care, or Upbringing

Collective education, or upbringing, is not organised with the purpose of sanctioning, but to help the child and his or her family in the situations regulated by law (Section 971 ff, CC). It can perform various functions in relation to the reasons listed below.

Institutional care may be ordered by the court if previous measures did not provide a remedy (Section 971, CC). This must be understood in the broader context of any interference by the state authority in the relationship between the parents and child. These may be educational measures, which are admonitions, supervision, restrictions, and social work imposed according to the Civil Code (Section 925, CC) or pursuant to a special act (Sections 13 and 13a, ChildA); or other measures of social and legal protection consisting in particular of preventive and advisory activities or any of the judicial interventions in parental responsibility (suspension of exercise, restriction of parental responsibility or its

34 See Šínová *et al.*, 2016, pp. 63 et seq.

35 For the critics of bad practice by the Public Defender of Rights (Ombudsman), see Kancelář veřejného ochránce práv, 2017.

exercise, or deprivation of parental responsibility); or decisions on the restriction or prohibition of personal contact between parents and a child.[36]

The prerequisites for ordering institutional care are set out by law as follows. If the child's upbringing or physical, intellectual, or mental condition, or proper development are seriously endangered or disrupted contrary to the child's interests, or if there are serious reasons why the child's parents cannot ensure the child's upbringing, the court may order institutional care as a necessary measure. The court would do so if the measures taken previously have not provided a remedy. At the same time, the court always considers whether it is appropriate to give priority to entrusting the child to natural persons, or alternative family care. As mentioned above, insufficient housing or property conditions of the child's parents or persons who have been entrusted with the child's care cannot in themselves be a reason for a court decision on institutional care if the parents are otherwise capable of ensuring the proper upbringing of the child and the fulfilment of other obligations arising from their parental responsibility. Finally, in its decision ordering institutional care, the court shall indicate the facility in which the child is to be placed. In doing so, it shall consider the interests of the child and the statement of the authority for the social and legal protection of children.

Institutional care can be ordered for a maximum of three years, with the proviso that it may be extended in exceptional cases (Section 972, CC). It is newly stipulated that the court is always obliged to review at least once every six months whether the reasons for ordering institutional care persist, regardless of the facility in which it is performed (Section 973, CC).

6.3. Institutional Protective Care, or Upbringing

Institutional protective care, or upbringing, is a measure of criminal law (Section 22, Section 93, Act No 218/2003 Sb., Juvenile Justice Act, as amended, which replaced the inadequate original regulation in the Criminal Code). It is imposed as a protective measure on juveniles (criminally responsible persons) and children under the age of 15 years who have committed a criminal act (criminally irresponsible persons). The law distinguishes two variants of institutional protective care, or upbringing, as follows:

a. optional protective care, or upbringing, can be used for a child under the age of 15 years, when he or she commits an otherwise criminal offence; the juvenile court may impose, as a rule based on the results of a previous educational-psychological examination, protective education in addition to other measures if this is strictly necessary to ensure his or her proper upbringing;

36 Krausová and Novotná, 2006.

b. compulsory protective care, or upbringing, must be imposed by the juvenile court on a child who has committed an offence for which the Criminal Code provides for the imposition of an exceptional penalty and who, at the time of the offence, had reached 12 years of age but was under 15 years of age.[37]

7. Special Provisions on the Rights of the Child

As already mentioned in relation to the Convention on the Rights of the Child, the child has participation rights guaranteed by law, be it the Civil Code, the so-called Children Act, or civil procedure codes, that is, both the Civil Procedure Code (hereafter CPC; Act No 99/1963 Sb., as amended,) and the Act on Special Court Proceedings (hereafter, SPC; Act No 292/2013 Sb., as amended).[38]

In accordance with the Convention on the Rights of the Child, it is possible to say that the child has the following rights:

a. to be informed;
b. to express his or her views and wishes;
c. to influence, by his or her opinion, the decisions; and
d. to completely determine, by his or her opinion, the decisions.[39]

In this spirit, the Civil Code provides that, before making a decision that affects the interests of the child, parents shall inform the child of everything that is necessary for the child to form his or her own opinion on a given matter and communicate it to the parents; this does not apply if the child is unable to properly receive the information, form his or her own opinion, or communicate it to his or her parents; the parents shall pay due attention to the child's opinion and take the child's opinion into account when making a decision (Section 875, para. 2, CC).

The court has a similar information obligation towards a child if it decides the child's case (Section 867, CC). Further, the child must receive information about the possible consequences of compliance with his or her view or the possible consequences of any decision in the case or matter that concerns him or her. To strengthen the participatory rights of the child, the Civil Code establishes a rebuttable presumption, according to which a child over 12 years of age is presumed to be able to receive the information, make his or her own opinion, and communicate it (Section 867, para. 2, the second sentence, CC). Finally, the court must pay due attention to the opinion of the child. However, the court must

37 For the history and current regulations, see Šámal *et al.*, 2011.
38 For details, see Radvanová, 2015, pp. 36 et seq.
39 On the family procedural rights of the child, see Martiny, 2017, pp. 737 et seq.

always pursue the best interests of the child or his or her welfare. In this context, the Civil Code provides that, if the court finds that a child is unable to properly receive the information or form his or her own opinion or communicate it, the court shall inform and hear a person who is able to protect the interests of the child; this person's interests must not be in conflict with the interests of the child (Section 867, para. 2, the first sentence, CC). The child's parents usually defend the best interests of the child. However, if there is a potential conflict of interest, the court shall appoint guardian *ad litem* to the child (Section 948 ff, CC).

Moreover according to the so-called Children Act, the child who can form his or her own opinions has the right, for the purposes of social and legal protection, to express those opinions freely when all matters affecting him or her are discussed, even without the presence of his or her parents or other persons responsible for his or her upbringing. The child's views shall be given due weight, appropriate to his or her age and mental maturity, in consideration of all matters affecting him or her. In its action, the state social authority shall consider the wishes and feelings of the child, in line with his or her age and development, so as not to endanger or impair his or her emotional and psychological development. Finally, the child who is able, in view of his or her age and intellectual maturity, to assess the impact and significance of decisions arising from judicial or administrative proceedings to which he or she is a party, or other decisions relating to his or her person, shall receive information from the authority for the social and legal protection of children on all relevant matters concerning his or her person; a child over the age of twelve years of age shall be deemed to be able to accept the information, form his or her own opinion, and communicate it (Section 8, para. 2, 3, ChildA).

Regarding civil procedural law, the child is the subject of the court proceedings, not their object. This also applies to alternative care proceedings. In general, the child's capacity to be a party to the proceedings arises at birth. His or her procedural capacity (i.e. his or her ability to act independently before the court) depends on his or her capacity to act or on the degree of his or her intellectual and voluntary maturity in relation to his or her age. A minor who is not fully capable of acting independently is also usually not able to act independently in court and needs a representative.[40] In principle, the child's parents as holders of parental responsibility are allowed to represent him or her by operation of law. The child's parents usually defend the best interests of the child; however, if there is a potential conflict of interest, the court shall appoint a guardian *ad litem* to the child (Section

40 For some proceedings, the law grants standing to a minor child who is not fully competent, usually over 16 years of age. This is the case in proceedings for the permission to marry (Section 368, SPC), for protection against domestic violence (Section 403, SPC), for adoption (Section 431, SPC), for the granting of legal capacity to a minor child, to obtain the consent and withdrawal of the consent of the legal representative to the independent operation of a commercial establishment or other similar gainful activity (Section 469, SPC), and for the return of a minor child in cases of international child abduction (Section 481, SPC).

948 ff, CC). Finally, to ensure the effective protection of a minor child who is not fully capable of exercising his or her legal capacity in the often demanding court proceedings, the law provides support representation by a legal representative based on a decision of the president of the chamber (§ 23, CPC). Even if such a child is capable of exercising his or her legal capacity in terms of substantive law, that is, is sufficiently intelligent and mature to engage in the legal actions which gave rise to the claim that forms the subject matter of the proceedings and is thus procedurally competent in the proceedings for this reason, the president of the chamber may decide that he or she shall be represented.

8. On the New Case Law of the Constitutional Court

Although the law in books (black letter law) provides significant scope for children to exercise their participation and procedural rights, they do not always find application in practice, as evidenced by a recent decision of the Constitutional Court of the Czech Republic,[41] in which the court stated:

> In proceedings for interim measures concerning the placement of a minor (close to the age of majority) in an institution providing institutional education, the courts are obliged to give the minor the opportunity to be heard. To do otherwise is contrary to the best interests of the child, a denial of the possibility of exercising participation rights, and an expression of arbitrariness in the application of the law.

It appears from the cited decision that the parents of the minor complainant requested the District Court to issue an interim order and subsequently a judgment on the merits that the minor complainant be placed under institutional care. According to the District Court, the 16-year-old complainant's behaviour at that time continued to deteriorate, and his development was in danger. The minor had been ignoring all his obligations for a long time, living an idle life, and not receiving any education. He commits 'defective' behaviour and meets inappropriate people who endanger his development. The Regional Court subsequently dismissed the complainant's appeal, as it had already ruled on the merits. Thus, the applicant's guardian *ad litem* lodged a constitutional complaint against both decisions.

The Constitutional Court found several errors in the civil courts' procedure. The complainant was neither heard nor represented by a guardian in the proceedings before the District Court for the interim measure; nor was he heard in the proceedings before the Regional Court. The Regional Court sought the applicant's

41 Constitutional Court of the Czech Republic, case No II ÚS 2225/23 from 1 November 2023.

views through the guardian and was satisfied with one affirmation, namely that the minor had asked for the interim measure to be annulled. However, according to the Constitutional Court, such a procedure cannot be approved. If the courts considered that the minor had not chosen the right path in life and that there were reasonable doubts as to whether his normal development was impaired, it was their duty to ascertain his opinion on the case. This means listening to him and considering his other ideas about the future. From the complainant's statement, it could have become clear whether in the absence of his parents' personal care there were other possibilities of alternative care or provision of housing. In the case of minors close to the age of majority, it is possible to include both the extended family and families of close friends, a partner, a boarding school, and, in extreme cases, a shelter. Placing a minor in institutional care is always a last resort, or *ultima ratio* option. The Constitutional Court also commented on institutional care as a form of alternative care. However, this should only be chosen when the family is unable to provide care, and no other (less invasive) alternative can be found. Finally, the Constitutional Court found that the contested decisions violated the applicant's fundamental right to communicate his viewpoint and his right to be heard in judicial proceedings guaranteed by the Convention on the Rights of the Child, as well as the right to judicial protection, the right to have the case heard in his presence guaranteed by the Charter of Fundamental Rights and Freedoms, and, finally, the right to a fair trial guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms.

9. Conclusions

As analysed above, the Czech Republic is still facing several issues, just like any other country. However, several amendments to national law and the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic have contributed to the fulfilment of children's rights, their comprehensive protection, and the strengthening of their right to family life, especially the family of origin. The new pro-family policy, which focuses on preventing and strengthening the key functions of the child's family of origin, including financial support and affordable housing, contributes to the fulfilment of the Czech Republic's obligations and to the implementation of the Convention on the Rights of the Child. However, some aspects remain unnoticed by the legislator such as the reality of the so-called baby boxes.

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Alternative (Child)care – General Remarks and Observations Regarding Placement in Institutional Care

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Abstract. Alternative care is a protective measure for children unable to live with their parents due to various reasons such as neglect, abuse, or family instability. In Slovenia, alternative care is implemented when a child's safety and well-being are compromised within their family environment. The preferred option is family-based care over institutional placement, in line with international trends towards deinstitutionalization. However, Slovenia faces challenges such as the decline in foster care availability, potentially leading to increased reliance on institutional care. Despite the efforts to promote family-based care, the need for institutional care may persist, emphasizing the importance of prioritizing a child's best interests in either setting. Ensuring suitable conditions, including proper staffing, funding, and access to essential services such as education and healthcare, is crucial in both family-based and institutional alternative care. Regardless of the form of alternative care, the primary aim remains to offer children a supportive environment conducive to their growth and to protect their rights.

Keywords: family relations, temporary protective measure, best interest of the child, gatekeeping

1. Introduction

Parents have the primary and equal responsibility for the care and upbringing of a child and their development (Article 135 of the Family Code[1] (hereafter FamC)). Following the principle of priority, they also have the right and obligation to protect the rights and interests of their child before all others. Parents are bound

1 Family Code (Slovene *Družinski zakonik)* (FamC): Uradni list RS (official gazette), no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.

by parental responsibility, which includes their obligations and rights related to the child's life and health, upbringing, protection and care, supervision, and education. Similarly, parents also have the obligations and rights to represent their child, provide for them, and manage their property (Article 136(1) of the FamC in connection with Article 137(1) of the FamC). Furthermore, parents must enable their child's healthy growth, harmonious personal development, and preparation for independent life and work (Article 137(2) of the FamC).

When parents fail to exercise these rights and obligations or to do so in the best interest of the child, the state must ensure appropriate protection of the child and their rights. Article 56(3) of the Constitution of the Republic of Slovenia[2] (CRS) provides a constitutional basis for children and minors for whom parents do not care adequately, have no parents, or lack adequate family care to enjoy special protection from the state. The court and the social work centre (hereafter SWC) may intervene in parental responsibility if it is necessary to safeguard a child's rights and interests (Article 153 of the FamC). In doing so, they must act and take measures required for the child's upbringing and care or for protecting their property, as well as other rights and interests. These measures aim solely to protect the child and not punish the parents for their actions (inactions).[3] The FamC for the protection of the child's interests specifies:

1. temporary orders (Articles 161 to 166 of the FamC);
2. emergency removal of the child (Articles 167 to 168 of the FamC);
3. measures of a more lasting nature (Articles 169 to 176 of the FamC).

For children who do not have parents or whose parents, for various reasons, cannot care for them, the state provides special protection by ensuring their placement in alternative care, where they can gain family experience to the greatest extent possible.[4] Institutional care for the child or, according to the FamC, the measure of placing the child in an institution (regulated in Article 175 of the FamC) falls among the measures of alternative (child)care.

2 Constitution of the Republic of Slovenia (Slovene *Ustava Republike Slovenije*) (CRS): Uradni list RS, no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a, 92/21 – UZ62a.

3 Republika Slovenija, 2022.

4 Republika Slovenija, 2022.

2. The Convention on the Rights of the Child as the Foundation of Children's Rights

The Preamble of the United Nations Convention on the Rights of the Child[5] (UNCRC) states 'that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding'. It is also evident from the Preamble that the 'family is the fundamental group of society and the natural environment[6] for the growth and well-being of all its members and particularly children [...]'. Therefore, the family deserves the necessary protection and assistance to fully assume its responsibilities within the community. In doing so, the UNCRC recognizes the importance of the family as a social unit that plays a crucial role in a child's life.

While the UNCRC presents the family as the natural environment for the growth and well-being of a child and the realization of their rights, the FamC in Article 2(1), unlike the UNCRC, provides a specific definition of family:

> The family is the life community of the child, regardless of the child's age, with both or one of the parents or with another adult person who cares for the child and has certain obligations and rights to the child under this code.

However, the concept of family is subject to constant change, just like the society. In specific provisions of the FamC, the legislator has departed from this definition of the family and used a broader, sociological concept of the notion.[7]

The fundamental premise of the UNCRC is that parents have rights and responsibilities towards their children. In doing so, they exercise their autonomy, and the state will not intervene in the relationship between a child and their parents. Unfortunately, it is not always possible for a child to live in a family environment, as circumstances may prevent them from living with their parents for various reasons. This is also evident in Article 9(1) of the UNCRC, which states:

5 Convention on the Rights of the Child (Slovene *Konvencija o otrokovih pravicah*) (UNCRC): Uradni list SFRJ – MP, no. 15/90, Uradni list RS – MP, no. 9/92.

6 See also Universal Declaration on Human Rights (hereafter: UDHR): Uradni list RS, no. 24/2018), whose Article 16(3) states: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Comp. also International Covenant on Economic, Social and Cultural Rights (ICESCR): (Uradni list RS, no. 35/92 – MP, no. 9/92), which in Article 17(a) emphasizes that the family is the natural and fundamental unit of society. Additionally, the European Social Charter (ESC; Uradni list RS, no. 24/1999 - MP, no. 7/99) states in Article 16, 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society …'.

7 VSL sodba II Cp 1916/2022, 16 January 2023.

> 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.

As the UNCRC imposes obligations on State Parties to provide families with the necessary institutions, services, support, and facilities to care for their children adequately, parents have primacy regarding their children. State Parties must thus provide parents with adequate support to ensure the realization of their children's rights.[8] In Article 20 of the UNCRC, we can find a reference to alternative care for children, as protection for children who, for any reason, are deprived of their original family environment. Consequently, a child temporarily or permanently deprived of their family environment or whose interests do not allow them to continue living in that environment has the right to special protection and assistance provided by the state (Article 20(1) of the UNCRC).

State parties must, following their domestic legislation, provide alternative care for such children (Article 20(2) of the UNCRC). The UNCRC provides examples of what constitute alternative care measures, which may include foster care, *kafalah* under Islamic law (a form of guardianship), adoption, or, if necessary, placement in suitable facilities intended for childcare (Article 20(3) of the UNCRC).

When seeking and implementing measures to ensure adequate alternative care for a child in need, State Parties should pay special attention to the continuity of the child's upbringing and their ethnic, religious, cultural, and linguistic backgrounds (Article 20(3) of the UNCRC).[9] For instance, the continuity of a child's ethnic, religious, and linguistic backgrounds was discussed in the case of *Abdi Ibrahim v. Norway*,[10] decided by the European Court of Human Rights (ECtHR). The ECtHR found that, in deciding on the adoption of the child, the Norwegian authorities did not sufficiently consider the applicant's (a Somali Muslim) interests in enabling the child to maintain at least some ties with their cultural and religious background. The ECtHR emphasized that the reasons underlying Norwegian authorities' decision were not sufficiently compelling to demonstrate that the case circumstances were so exceptional to justify the complete and final severance of the ties between the applicant and her son. By

8 Vaghri, Zermatten, Lansdown and Ruggiero, 2022, p. 114.

9 Cranmer, 2022.

10 Case ECtHR *Abdi Ibrahim v. Norway,* app. no. 15379/16, 10 December 2021.

contrast, the ECtHR took a different view in the case *Kilic v. Austria*,[11] where the applicants (Turkish Muslims) complained that the authorities refused to return the children to their care and that the children were placed with foster families that did not match their religious or ethnic backgrounds. The ECtHR confirmed that the Austrian authorities sought to place the children with families that would match the applicants' cultural, linguistic, and religious origins. Still, at that time, such families were not available.

We can thus conclude that other articles of the UNCRC (e.g. articles 7, 8, 18) require State Parties to provide necessary support to families to enable them to care for their children. However, Article 20 of the UNCRC demands that if, despite these measures, children cannot be adequately cared for by their own families, they have the rights to special protection and assistance from the state.[12]

3. Alternative Care for Children – General Overview and in the Light of the Slovenian Family Code

3.1. Foundation

When parents are absent or, for various reasons (culpable or not),[13] they cannot or even must not care for the child, the state must provide appropriate care for such children. In this case, the state must ensure alternative childcare.

The FamC regulates the following forms of alternative childcare: foster care, institutional care, and adoption. Additionally, a new institution introduced by the FamC in 2017 is considered an alternative childcare measure, namely granting parental responsibility to a relative (Article 231 of the FamC), which is to be applied when the child's parents are no longer alive. This represents a critical element of alternative care arising from the child's separation from their parents. Due to the death of a parent, there is a permanent reason why a child can no longer live with the parent, thus necessitating appropriate care. The court may grant parental responsibility to a close relative willing to assume full care for the child and who meets the conditions for adopting the child but cannot adopt the child due to other legal restrictions or chooses not to. The person granted parental responsibility for the child has the same rights and obligations as the child's parents would have. The court may grant joint parental responsibility to relatives who are married or live in a civil partnership. Under this arrangement,

11 Case ECtHR *Kilic v. Austria,* app. no. *27700/15,* 12 April 2023.
12 Arkadas-Thibert and Lansdown, 2022, p. 164.
13 See Kraljić, 2019, p. 841.

if it is in the child's best interest, the child is allowed to stay within a circle of close relatives.[14]

The FamC also legally regulates the possibility for parents to express their will in advance regarding the person to whom the child should be entrusted for care and upbringing in the event of their death or prolonged incapacity to exercise parental responsibility. This person could be:

1. a person to whom the child should be entrusted for care and upbringing;
2. a relative to whom parental responsibility should be granted;
3. an adoptive parent; or
4. a guardian (Article 144(1) of the FamC).

The validity of the parents' advanced expressed will is assessed in the same manner as the validity of a last will under the Inheritance Act[15] (Article 144(2) of the FamC). However, considering the child's best interest, which must guide all proceedings concerning the child, the court is not obliged to consider the advanced expressed will of the parents if it contradicts the child's best interest (Article 144(4) of the FamC).[16]

3.2. Definition of Alternative (Child)care

Although the UNCRC serves as the fundamental international legal document for protecting children's rights, it does not provide a specific definition of alternative care. The FamC does not define alternative care either.

The definitions of the various stakeholders or authors range from very concise to extensive. According to Kaur *et al.*, 'alternative care is a form of care provided to children by caregivers other than their birth parents.'[17] Alternative Care Thailand provides the following definition: 'Alternative care is any arrangement, formal or informal, temporary or permanent, where a child is living away from his or her parents and the parents are not actively involved in their lives.'[18] Similarly, but expanded and adapted to Article 20 of the UNCRC, Arkadas-Thibert and Lansdown refer to alternative care as follows:

> Although the placement decision must be made by a competent authority in accordance with national laws, it may be formal or informal, temporary

14 Kraljić, 2019, pp. 815–823; Novak, 2019, pp. 759–762.
15 Inheritance Act (Slovene *Zakon o dedovanju*): Uradni list SRS, no. 15/76, 23/78, Uradni list RS, no. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, 63/16.
16 For more, see Kraljić, 2019, pp. 489–493.
17 Kaur *et al.*, 2023, p. 141.
18 Alternative Care Thailand, no date.

> or permanent, and public or private with the extended family, with community members previously known to the child, with foster placement, with family style or other forms of residential care, with kafalah of Islamic law, or adoption.[19]

Regardless of whether a definition is short or extensive, what they all have in common is that they associate alternative care with the separation of the child from their parents. Therefore, when a child cannot live with their parents, whether due to culpable (e.g. domestic violence, alcohol abuse, neglect) or non-culpable reasons (e.g. the death or illness of parents), the state has the obligation and responsibility to ensure appropriate care for these children.

Although the UNCRC has set a clear direction of protecting children who cannot live with their parents or remain in a stable family environment, it does not establish which measures should be taken.[20] As a result, in 2009, Resolution A/HRC/RES/11/7 was adopted, along with the 'Guidelines for the Alternative Care of Children' (hereafter Guidelines 2009),[21] which outline the approaches for policymakers, decision-makers, and professionals to provide appropriate alternative care for children. Guidelines 2009 represent a non-binding international instrument and do not impose any obligations on states. This is evident from their wording, as they use the term 'should' instead of 'shall' or 'must', except when referring to existing rights under the UNCRC.[22] Despite their non-binding nature, the Guidelines 2009 significantly impact the field of alternative (child)care.

In 2020, Resolution A/RES/74/133 – Right of the Child[23] (hereafter Resolution 2020) was adopted, complementing Guidelines 2009. Resolution 2020 and Guidelines 2009 provide guidance to assist states in shaping policies and practices to protect and promote the well-being of children whose parents are unable to care for them or threaten their well-being.[24]

Both CRS[25] and the FamC (e.g. Article 8 of the FamC) ensure special protection for children by the state, but they do not provide a definition of alternative care. Special protection by the state should be understood as a concept broader than

19 Arkadas-Thibert and Lansdown, 2022, p. 169.
20 Cantwell *et al.*, 2012, p. 19.
21 United Nations Human Rights Council, 2009.
22 Cantwell *et al.*, 2012, p. 20.
23 United Nations General Assembly, 2019.
24 United Nations Human Rights Council, 2009, p. 5.
25 Comp. Article 56 of the CRS: 'Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law. Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.'

alternative care. It encompasses all measures aimed at protecting a child, their rights, and interests, as well as assisting the family, including when there is no separation of the child from their parents or removal from their biological family. Alternative care, however, refers to the measures to be taken when there is a separation of the child from their parents.

3.3. Interventions in Family Relationships

Although measures for alternative care are intended to protect the child, their rights and interests, they significantly interfere in the relationship between parents and the child, and thus also in family life. For example, the measure of placing a child in an institution, which results in separation from the parents, undoubtedly and irreversibly affects family relationships and usually has lasting effects, although the family unit may only be separated just for a short time.[26] However, a judge must not hesitate to order alternative care for a child if it is determined (with an appropriate standard of proof) or suspected that the child or their best interest is in any way endangered. The child's best interest is a fundamental principle established in Article 3 of the UNCRC, as well as in Article 7 of the FamC. The best interest of the child is a postulate of family law, and, as such, it must always be prioritized, even to the detriment of the child's parents; the child must be protected, if circumstances require, by removal from their own parents and placement in an institution.[27]

Additionally, from Article 8 of the European Convention on Human Rights[28] (ECHR), it emerges that every child has the right to respect for family life, which is also recognized in Article 7 of the Charter of Fundamental Rights of the European Union[29] (CFR-EU).[30] Therefore, a child should not be deprived of contact with their parents unless it is contrary to the child's best interests. This leads to a confrontation between two of the child's rights: on the one hand, the right to respect for family life and, on the other hand, ensuring that the child is protected from harm that may occur in cases of abuse or neglect. If possible, the

26 Čujovič, 2019, p. 79; see also *VSL sklep IV Cp 212/2020*, 26 February 2020.

27 Čujovič, 2019, p. 79.

28 European Convention on Human Rights (Slovene *Evropska konvencija o človekovih pravicah*) (ECHR): Uradni list RS – MP, no. 7/94.

29 CFR-EU: Uradni list Evropske unije, no. C 83/391.

30 See also Article 12 of the UDHR, stating, 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.' A similar provision is also contained in Article 17(1) of the International Covenant on Civil and Political Rights (Uradni list RS, no. 35/92 – MP, no. 9/92): 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

unnecessary separation of children from their families and family environments should be prevented.

3.4. Establish a Gatekeeping Mechanism

Alternative care should provide protection for children and their rights and interests if they cannot live with their parents. Given the particularly sensitive nature of the measures that entail the separation of children from their parents, it is necessary to establish strict and systematic judicial and administrative 'gatekeeping' procedures to ensure that quality alternative care is recommended only after considering the child's best interests as the primary principle. Children must be guaranteed to receive the care that best suits their needs.[31]

The ECtHR has also stated that decision-making processes (administrative or judicial) leading to interventions in family life must observe certain procedural safeguards. These procedures must be fair and respect the interests protected by Article 8 of the ECHR. In other words, they must respect family life. The placement of a child in alternative care must, thus, be lawful, pursue a legitimate aim (e.g. protecting the child's best interests), and be considered necessary in a democratic society. Only then will the placement of a child in alternative care also be consistent with Article 8 of the ECHR.[32] Every decision regarding the placement of a child in alternative care must adhere to strict criteria and procedural guarantees, and a competent authority must adopt the measure; in Slovenia, this is either the SWC or the court. Trained professionals should support the competent authority.

3.5. Reasons for Placement of a Child in Alternative Care

Millions of children worldwide grow up deprived of parental care. They may be separated from their parents and families for numerous reasons – both culpable and non-culpable. Reasons leading to the separation of children from parents can include poverty, discrimination, violence, abuse, neglect, human trafficking, humanitarian emergencies, armed conflicts, natural disasters, climate change, migration, death or illness of the parents, or lack of access to education, healthcare, and other services that could jeopardize the family.[33]

Following the case law of the ECtHR, placing a child in alternative care is only permissible if it is prescribed by law, serves a legitimate aim, and is necessary in a democratic society. The competent authority must also present adequate

31 United Nations General Assembly, 2019, p. 11.
32 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 117.
33 United Nations General Assembly, 2019, p. 5.

and sufficient reasons for placing the child in alternative care.[34] The court must justify its decision to remove the child (according to Article 174 of the FamC), which may lead to the placement of the child in alternative care, and explain why it has opted for this measure. Moreover, it must specify any errors and deficiencies identified in exercising parental responsibility and how the child is endangered.[35] It is unnecessary for the reasons stemming from the parents' side to involve culpable conduct or omissions. The child can be removed if their development risks being impaired, but it is not necessary for harm to the child's development to have already occurred.[36]

Reasons for placing a child in institutional (residential) care may vary by country. In Indonesia, for example, poverty and the hope for better education are the main reasons for placing children in residential care. Families living in remote villages send their children to residential care facilities to ensure that they receive education.[37] Birth outside of marriage increases the risk of parental separation, and unwanted children born out of affairs or rape are often placed in residential care as well. These children are subject to social stigma.[38]

Based on Article 175(1) (placement in an institution) of the Slovenian FamC, the court can decide on the placement of a child in an institution due to psychosocial problems manifested as behavioural, emotional, learning, or other difficulties in their upbringing' if the child themselves or other children in the family are endangered; and if it is only possible to adequately safeguard their interests or the interests of other children in the family by placing them in an institution. The court justified its decision to place a child in an institution as follows:

> The child is verbally and physically very aggressive towards classmates, and also exhibited verbal and physical aggression towards teachers. He intimidated classmates and physically confronted them (he even brought a stun gun to school), constantly disrupted classes, to the point where teaching could not proceed smoothly, and even attempted to attack physically a teacher, prompting police intervention physically. Outside of school, the child was involved in criminal activity (actions against public order and peace, theft, violent behavior, grand theft, robbery, grievous bodily harm), which the police investigated and concluded with reports due to the child's age and associated criminal responsibility. The mentioned behaviors alone demonstrate at least severe behavioral, psychosocial problems in the child. The child [...] also has emotional and learning difficulties [...]. [39]

34 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 117.
35 Novak, 2019, p. 576.
36 UPRS sodba I U 1084/2017-9, 11 July 2007.
37 O'Kane and Lubis, 2016, p. 18.
38 Id., p. 20.
39 VSM sklep III Cp 765/2020, 27 October 2020.

In this case, both the court and the SWC recognized and identified some circumstances indicating that the parents could no longer provide the child with an appropriate upbringing environment and that the child's interests could only be adequately safeguarded by placing them in institutional care.

Therefore, priority is given to safeguarding the interests of the child rather than those of the parents. The child's interests are protected not only by the court but also by the SWC. Therefore, the court explicitly emphasized in its decision that, in Slovenia, the SWC is:

> obligated to take action to protect the child's interests if there is a suspicion that the child is endangered in the domestic environment [...] It is indeed obligated to protect the constitutional rights of parents in relation to their children, as stated by the plaintiff. However, in these cases, protecting the child's interests always takes precedence over protecting parental rights [...] It is about safeguarding the interests of the child.[40]

In this regard, two fundamental differences between articles 167 and 174 of the Slovenian FamC should be highlighted. Both articles provide for the possibility of placing a child in an institution. On the one hand, Article 167 of the FamC pertains to the emergency removal of a child, which is carried out by the SWC if there is a high likelihood of such severe endangerment to the child that their interests can only be safeguarded by immediate removal from the parents. In such cases, the SWC will remove the child and may place them in institutional care (or alternatively in foster care, a crisis centre, or with another person) even before the court decides on the request for an interim order (Article 167(1) of the FamC). The SWC must propose to the court the issuance of an interim order within 12 hours of removing the child. The court must then decide on the request for an interim order immediately but no later than 24 hours (Article 168(1) of the FamC). If the SWC does not propose the issuance of an interim order or if the court does not decide on the SWC request within the prescribed period or rejects the issuance of an interim order, the child must be immediately returned to the parents (Article 168(2) of the FamC).

On the other hand, Article 174 of the FamC concerns a more lasting measure of removing the child from the parents that falls within the court's jurisdiction. The court may remove the child from the parents and place them with another person, in foster care, or an institution if the child is endangered, and if only through removal can their interests be adequately safeguarded and if the circumstances of the case suggest that the parents will be able to resume care for the child after a certain period. In such cases, the court also appoints the other person, foster parent, or institution (Article 174(1) of the FamC).

40 UPRS sodba I U 1084/2017-9, 11 July 2007.

Another significant difference regarding placement in an institution exists between articles 174 and 175 of the FamC. Placement in an institution under Article 174 of the FamC represents a more enduring measure that can be implemented even without parental consent. By contrast, for the placement in an institution under Article 175 of the FamC, parental consent is required.

Additionally, the distinction between the two articles is that under Article 174 of the FamC a child is placed in an institution if their endangerment is established. However, under Article 175 of the FamC, placement in institutional care is also envisaged in case of psychosocial problems such as behavioural, emotional, learning, or other developmental issues of the child. The purpose of placing a child in an institution is to adequately safeguard their interests or those of other children in the family.

3.6. Child's Right to Information

In line with Art. 12 of the ECHR, the child must also be involved when making decisions regarding their placement in alternative care.[41] Specifically, a child has the right to information and express their views regarding their placement in alternative care.[42] Moreover, the child has the right 'to be consulted and to have their views taken into account in accordance with their evolving capacities'.[43]

When assessing whether the procedures interfering with family life comply with Article 8 of the ECHR, the ECtHR considers whether parents are sufficiently involved in the decision-making process.[44] Therefore, their inclusion in this process should ensure the protection of their interests. Decisions regarding alternative care should thus be made with the involvement of the child, parents, and extended family, as a last resort, and for the shortest possible period. Even a child already placed in alternative care still has the right to be informed about their rights and options. On the one hand, alternative care represents a protective measure that ensures the temporary safety for a child separated from parents or the nuclear family. On the other hand, alternative care can facilitate the child's return to the family, if feasible.[45] This includes being informed about any developments, providing opportunities to participate in decisions, and, in certain circumstances, listening to the affected child.[46]

41 Sandberg, 2019.
42 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 113.
43 Id., p. 114.
44 Arkadas-Thibert and Lansdown, 2022, p. 168.
45 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 114.
46 See, for example, *B. v. Romania (No. 2)*, app. no. 1285/03, 19 February 2013; *B.B. and F.B. v. Germany*, app. nos. 18734/09 and 9424/11, 14 March 2013; *B. v. Romania (No. 2)*, no. 1285/03, 19 February 2013; *B.B. and F.B. v. Germany*, nos. 18734/09 and 9424/11, 14 March 2013.

In Article 158(1), the Slovenian FamC explicitly emphasizes that the court, when deciding on measures for the protection of the child's interests (including placement of the child in an institution), considers the child's opinion expressed by the child themselves or through a person they trust and have chosen if the child is capable of understanding the significance and consequences. However, the court may issue an interim order without previously obtaining the child's opinion (Article 158(2) of the FamC).[47]

3.7. Temporary (Interim) Nature of the Measure

The fundamental premise is that alternative care measures should primarily be temporary protective measures, including placing a child in institutional care. Despite a child's placement in alternative care, efforts should be made towards family reunification and the child's reintegration into their family or familial environment. An exception to this is adoption. According to Slovenian legislation, adoption establishes the same legal relationship between the child and the adoptive parent as between biological parents and children. Through adoption, the adoptive parent acquires parental responsibility and all the rights, obligations, and responsibilities derived from it (Article 9 of the FamC).

Unlike adoption, the measure of placing a child in institutional care constitutes a reversible measure. When a court orders placement in an institution, it sets a duration for this measure, as the placement of a child in institutional care should not last longer than necessary. Despite being classified as a more enduring measure, the duration of the placement in an institution is limited to a maximum of three years (Article 175(3) of the FamC). However, to ensure the protection of the child's interests to facilitate their potential return and reintegration into their biological family, the imposed measure must be regularly reviewed. During the child's institutional placement, both the child and the parents should receive all necessary assistance. During this time, the state (through the SWC overseeing the implementation of the measure) should strive to address the underlying causes that led to the imposition of the measure and facilitate family reunification as soon as possible. The purpose of removing the child and subsequently placing them in an institution is not to break up families but to temporarily separate them, thus allowing each member to strengthen individually so that the family can ultimately live more harmoniously after the reunification and the child can reintegrate into the family and society more effectively.[48] During this period, the

47 See more about the children's right to express their views in Kraljić, 2019, pp. 537–539; Kraljić, Kežmah, and Čujovič, 2022, pp. 401–409; Kraljić and Drnovšek, 2022, pp. 101–116; Novak, 2019, pp. 488–496.

48 Tako tudi Recommendation Rec(2005)5 of the Committee of Ministers to member states on the rights of children living in residential institutions, a*dopted by the Committee of Ministers on 16*

parents should address the reasons that led to the child's endangerment (e.g. seeking treatment for drug addiction).

The period of placing a child in an institution can be extended, but only exceptionally, when it is expected that the child will be able to return to the family soon. The child will only return to the family if the parents demonstrate that they can take care of the child. Otherwise, after the measure expires, the court must protect the child's interests and ensure permanent alternative care for the child, which may involve depriving the parents of parental responsibility or opening up the possibility of adoption.

However, if a child who has been placed in an institution gains full legal capacity (at the age of eighteen, upon marriage, or by a court decision if they become a parent), they may remain in the institution only if they provide written consent to do so (Article 175(4) of the FamC).

3.8. Preferential Treatment of Family Care over Institutional Care

International law confirms that family care for a child must take precedence over institutional care. As such, the decisions regarding alternative care should be temporary, made with the involvement of the child, parents, and extended family, as a last resort and for the shortest possible period. The Convention on the Rights of Persons with Disabilities[49] (CRPD) explicitly mentions alternative care for children. Article 25(4–5) of the CRPD states:

> 4. 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. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. 5. States 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, and failing that, within the community in a family setting.

This is particularly important because disabled children are even more vulnerable due to their disabilities, and ensuring appropriate alternative care for them in practice is even more challenging. Therefore, efforts are first made to provide alternative care within the extended family (e.g. fostering by relatives), as these are usually individuals and environments that the child knows. If this is not

March 2005 at the 919th meeting of the Ministers' Deputies (v nadaljevanju: Recommendation 2005).

49 CRPD: Uradni list RS, no. 37/2008.

possible, efforts are made to place the child, if possible, in a family setting within the community (e.g. fostering by other individuals). If this is not possible, the most suitable institutional placement should be sought for the child. Alternative care for a child outside the family (i.e. institutional care) should be limited to cases where such placement can be identified as particularly appropriate, necessary, or constructive for the individual child and is in the child's best interest.[50]

However, it cannot be assumed that family care is always more suitable. If the circumstances of a case dictate that institutional care for the child is more appropriate and meets an individual child's needs and best interests, it must be considered. Institutional care will also be more suitable if the child, when capable and old enough, expresses the desire for placement in institutional care.

3.9. The Necessity Principle

Guidelines 2009 are based on ensuring two fundamental principles that must be followed regardless of the measure taken to provide and implement alternative care for children: the principle of necessity and the principle of suitability.

Alternative care for a child should only be implemented if such care is genuinely needed. In this context, the principle of necessity focuses on preventing situations and conditions that may lead to alternative care. The reasons that may lead to alternative care for children are diverse and may include material poverty, stigma, discrimination, parental or child education, domestic violence, and neglect.[51]

The principle of necessity also dictates establishing the aforementioned gatekeeping mechanism, ensuring that children are admitted into the alternative care system only after all options for remaining with their parents, or at least with the extended family, have been considered. If there is a need for a child to be placed in alternative care, measures must be taken to ensure that the placement undergoes regular review.[52] Regardless of the type of alternative care, the child's best interests should be the primary consideration, and all activities should aim to provide the child with the most appropriate care according to their needs.

3.10. The Suitability Principle

If the competent authority (i.e. judicial or administrative body) determines that a child genuinely needs alternative care, it must be provided in an appropriate manner. All care environments must, thus, meet general minimum standards in terms of conditions, staffing, regimen, financing, protection, and access to essential

50 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 114.
51 Cantwell *et al.*, 2012, p. 22.
52 Ibid.

services (especially education and healthcare). To ensure these conditions, mechanisms and procedures for alternative care providers must exist.[53]

Although Guidelines 2009 do not clearly define the terms of alternative care and are non-binding, they provide clear indications regarding the quality of care and the quality of minimum standards for alternative care. The Slovenian legislator has also followed this approach and prescribed the conditions that must be met by foster or adoptive parents who care for a foreign child in the FamC.[54] Additionally, the Provision of Foster Care Act[55] specifies mandatory training for foster parents, participation in interdisciplinary teams, and the requirements for institutions where children who cannot live with their parents are placed (e.g. spatial equipment). The suitability and appropriateness of individuals and spaces must be ensured both before placement and throughout its entire duration.

Another aspect of 'suitability' relates to aligning the caregiving environment with the individual child. This means selecting the best option to meet the child's needs at any given time. It also means that there are various family-based and other caregiving environments available, genuine choice, as well as a recognized and systematic process for determining which is the most suitable (gatekeeping). However, although family care for the child (e.g. foster care) is given priority, it may not be suitable in every case. For example, a child who is taken into care due to negative family experiences (e.g. domestic violence) may not be open to family placement because of their own negative experiences. Instead, they may prefer to distance themselves from the family environment and prefer institutional care (e.g. a facility) or a residential unit.

Therefore, dual suitability must be established. That is, the court will first need to determine, for example, that placing the child in foster care or an institution is the most appropriate form of alternative care for the child. Then, based on the child's individual needs (e.g. health, education), the most suitable foster parent willing and able to take on the foster care of the child will need to be selected. This is particularly important for kinship foster care. Even in case of placement in a facility, the child's individual needs and characteristics must be considered.

When deciding on the placement of a child in an institution, the court also determines the facility the child will be placed in and obtain an opinion from the SWC. During the implementation of the measure, the court may also transfer the child to another facility if it decides that such a transfer benefits the child.

Additionally, it is important to consider the provision of the Article 20(3) of the UNCRC, which requires State Parties to pay special attention to maintaining

53 Phillips, 2008, p. 23; Cantwell *et al.*, 2012, p. 22.

54 See more Kraljić, 2019, pp. 849–858.

55 Provision of Foster Care Act (Slovene *Zakon o izvajanju rejniške dejavnosti):* Uradni list RS, no. 110/02, 56/06 – odl. US, 114/06 – ZUTPG, 96/12 – ZPIZ-2, 109/12, 22/19.

the continuity of a child's upbringing and to their ethnic, religious, cultural, and linguistic backgrounds when ensuring appropriate alternative care.

3.11. The Impact of the Child's Placement in Institutional Care on Parents' Rights and Obligations

When the court decides to remove a child from their parents, it may also simultaneously decide to place the child in an institution as one of the possible alternative forms of child protection. This measure is only possible with parental consent. By the court's decision, an institution is appointed where the child will be placed. However, with placement in an institution, other obligations (e.g. child maintenance payments, representation) and rights (e.g. visitation rights) of the parents towards the child do not cease unless the court also restricts parental responsibility (Article 174(2) of the FamC). When issuing the measure of placing a child in institutional care, the court must assess whether it is necessary to restrict parental responsibility to protect the child's interests. To exercise these rights, the child must be assigned a guardian by the SWC.

The measure of removing a child from their family's care should be treated as a last possible and, whenever possible, temporary resort. Before a child is placed in institutional care, the court must first decide on the removal of the child, which entails separating the child from their parents. The placement of a child in a facility represents an intervention in parental responsibility aimed at safeguarding the child's interests, given their vulnerability. Before the court decides on a more permanent measure (including placement in an institution), the SWC prepares a plan of assistance for the family and the child (e.g. family therapy, treatment for addiction). The court may also decide not to inform one or both parents about the child's placement to protect the child's interests, that is, the court delivers the decision to the parents without disclosing where the child is placed. The decisions regarding the removal of a child should be regularly reviewed. Once the reasons for removal are addressed or eliminated, the child's return to parental care must be in the child's best interest.[56]

In all decisions regarding alternative care for children, it is important to consider that the child should remain as close as possible to their usual place of residence. This facilitates contact with the parents and potential reintegration into the family. Additionally, this approach can minimize any disruptions to the child's educational, cultural, and social life.[57]

When deciding to place the child in institutional care, the court also decides on the child's contact with their parents. The right to contact with the child can be restricted or revoked for one or both parents (Article 175(4) of the FamC in

56 United Nations General Assembly, 2019, para. k.
57 SOS Children's Villages International, 2010, p. 7.

connection with Article 173 of the FamC) if there is a risk to the child due to the visits and only by restricting them (e.g. time, place, supervised visits) or by completely revoking them can the child's interests be sufficiently safeguarded. Therefore, children placed in alternative care must retain the right to establish contact with their parents. The ECtHR has emphasized that mutual contact between parents and children is a fundamental part of family life under Article 8 of the ECHR. As placement in alternative care is usually a temporary measure, maintaining family relationships is crucial for ensuring the child's successful return to their family.[58]

When the court decides on the measure of placing the child in institutional care, it also decides on the maintenance of the obligations of each parent (Article 175(5) of the FamC). That is, parents subject to the measure of placing the child in a facility are not exempt from paying maintenance. They will have to pay a certain amount of maintenance into a special account opened by the child's guardian for this purpose (Article 184(3) of the FamC).

When placing a child in institutional care, the court may also restrict parental responsibility for the parents (Article 171 of the FamC). The court may prohibit parents from managing the child's maintenance, other property, or only prohibit the disposal or encumbrance of the child's property (Article 171(2) of the FamC). If parental responsibility is restricted for the parents, a guardian is appointed for the child, but only to the extent that the parental responsibility is restricted. The measure of restricting parental responsibility lasts for a maximum of one year. However, if the court decides on the measure of restricting parental responsibility together with the measure of placing the child in institutional care, the duration of the measure restricting parental responsibility is aligned with the duration of the measure of placing the child in institutional care. In this case, both measures can last for up to three years (Article 174(3) in connection with of Article 171(5) of the FamC).

4. Final Thoughts

Alternative (child)care protects children who cannot live with their parents, the reasons for which vary. In Slovenia, alternative childcare is used when a child's rights and interests are endangered in their own family, primarily due to neglect or abandonment, the child's psychosocial problems, family violence, etc. Placement in institutional care as an alternative care measure is used only when it makes it possible to protect the child's rights and interests adequately. Efforts are made to provide primary family placement for every child in need of alternative care. In other words, family placement typically takes precedence over placement in a

58 European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 121.

facility as an institutional form of childcare. Development guidelines in the field of alternative childcare have been moving towards from institutional childcare to family- or community-based care for children.[59] In short, the trend is towards deinstitutionalization. However, deinstitutionalization is already proving to be a problem in Slovenia, as there is a noticeable decrease in individuals opting to provide foster care and, consequently, a reduction in foster care capacity. If this trend continues, the vulnerability of foster care as family-based alternative childcare can be expected. Such a decline in foster care reopens the need for institutional care. This means that children will continue to be placed in facilities when family-based care is not guaranteed. Therefore, in addition to the trend towards deinstitutionalization in alternative childcare, it is necessary to consider that institutional care may be necessary for a longer time than anticipated and may even be the only option for some individual cases. However, regardless of whether it is institutional or deinstitutionalized alternative childcare, the focus must always be on the best interests and well-being of the child.

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59 Anghel, Herczog and Dima, 2013, p. 240.

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Rights of Children with Disabilities

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Abstract. The rights of children with disabilities represent a critical dimension of human rights, emphasising equality, dignity, and inclusion. This paper examines the legal and social frameworks for protecting these rights, with a focus on Poland's legislative, constitutional, and international obligations. It discusses evolving definitions of disability, emphasizing the role of societal attitudes and systemic barriers in perpetuating inequality. Analysis of international conventions, such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, underscores global commitment to safeguarding the dignity and opportunities of children with disabilities. The paper highlights Poland's extensive legal guarantees, including healthcare access, education, and financial benefits, while critiquing challenges such as fragmented regulations, insufficient funding, and societal stigmas. It advocates inclusive education, comprehensive family support, and improved teacher training to foster empathy and effective integration. Recommendations stress the need for stable, accessible legal frameworks and proactive measures to ensure that children with disabilities achieve parity in opportunities and societal participation. Despite progress, achieving substantive equality requires sustained efforts to dismantle discriminatory barriers and foster inclusive environments.

Keywords: children with disabilities, human rights, disability inclusion, legal protections, inclusive education

1. Introduction

Modern societies have many people living with various disabilities, among whom children represent a large proportion. According to the 2021 National Population and Housing Census, out of a population of more than 38 million, the number of

people with disabilities in Poland as of 31 March 2021 was about 5.5 million,[1] of which approximately 300,000 were children.

Undoubtedly, disability restricts people; however, it does not deprive them of their humanity or their rights, which derive from the dignity inherent in everyone, which is innate, not dependent on anything, not subject to gradation, and is the same for everyone. People with disabilities have the same rights as others. This means that a child, like an adult, is entitled to the full range of human rights. However, due to the particular physical and psychological vulnerability of children, the specific protection of their rights, which is appropriately strengthened compared to the standards adopted for adults, is necessary. Therefore, the rights of the child are specific to the general system of human rights; nevertheless, they form an integral part of the human rights to which everyone is entitled, which emphasises the subjectivity of the child as a subject of the law.

Against the background of the general standard of children's rights, a catalogue of the rights of children with disabilities, which aims to equalise their life chances and ensure the enjoyment of the rights to which all children are entitled, stands out. Due to the limitations caused by disability, the realisation of these rights may be difficult. Therefore, it is necessary to create appropriate conditions for everyone to fully enjoy their rights.

2. The Concept of Disability

Disability refers to the impaired functioning of a person in biological, individual, and social terms, resulting from an impairment of the ability to perform a certain activity in a way that is generally regarded as normal and typical of members of modern societies. People with disabilities are hindered from functioning normally not only by their own limitations but also, if not primarily, by unfavourable social attitudes. It is accepted that disability is an evolving concept and that it results from the interaction between persons with dysfunctions and the barriers resulting from human and environmental attitudes that hinder their full and effective participation in society on an equal basis with others.[2]

It is important to stress that disability is a phenomenon inherent in human nature. The causes of disability vary due to various factors (either congenital or acquired during a person's life) such as age, gender, inherited genes, injuries and accidents, complications from illnesses, addictions, poverty, social exclusion, life situations that activate various forms of mental disorders, and environmental

1 Statistics Poland, National Population and Housing Census 2021. Population ageing in Poland in the light of the results of the 2021 Census, Warsaw 2021, p. 49.

2 Preamble to the Convention on the Rights of Persons with Disabilities, created in New York on 13 December 2006, Dz. U. 2012, item 1169.

pollution. It follows that anyone can develop a disability at any time in their life. Therefore, disability should be regarded as completely normal and inherent in human life. It is particularly important to prepare children to accept their own and others' disabilities and to treat them as part of life – present or future, personal, or that of loved ones.

The concept of a person with disabilities has been introduced into legal language relatively recently, replacing earlier terms, such as disabled person, handicapped person, invalid, cripple, which had acquired a pejorative meaning. In Polish law, the term 'disabled person' was first used in the resolution of the Sejm of 16 September 1982 on invalids and disabled persons.[3] However, the concept was not defined. The Act on Employment and Vocational Rehabilitation of Disabled Persons of 9 May 1991[4] defined a disabled person as 'an unemployed or disabled person seeking work within the meaning of the provisions on employment and counteracting unemployment' (Article 2(2)). As this definition referred to the ability to perform gainful employment and not to a health impairment, it did not satisfy many circles. In 1997, two further definitions of a disabled person were developed. The first was in the Charter of the Rights of Persons with Disabilities of 1 August 1997,[5] according to which persons with disabilities are those whose physical, mental, or psychological impairments permanently or periodically hinder, limit, or prevent them from living, learning, working, and performing their social roles in accordance with legal and customary norms (§ 1). The second is included in the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities,[6] in which persons with disabilities are defined as persons whose physical, mental, or psychological condition permanently or periodically hinders, restricts, or prevents them from fulfilling their social roles due to a permanent or long-term impairment of the organism's efficiency, in particular resulting in inability to work (Article 2(10)). Pursuant to Article 4a(1), a child with a disability is one who is under 16 years of age, if they have a physical or mental impairment of an expected duration of more than 12 months, due to a congenital defect, long-term illness, or bodily injury, resulting in the need for total care or assistance in meeting the basic needs of

3 Resolution of the Sejm of the People's Republic of Poland of 16 September 1982 on invalids and persons with disabilities, *Monitor Polski* 1982, No. 22, item 188.

4 Act of 9 May 1991 on employment and vocational rehabilitation of disabled persons, Dz. U. 1997, No. 123, item 776.

5 Resolution of the Sejm of the Republic of Poland of 1 August 1997, The Charter of Rights of Persons with Disabilities, *Monitor Polski* 1997, No. 50. item 474 and 475. The Charter was introduced to bring together all the fundamental rights of persons with disabilities in one document, which was to constitute an element of pressure on institutions obliged to protect their interests. However, the document did not fulfil the expectations that were attached to its enactment.

6 Act of 27 August 1997 on professional and social rehabilitation and employment of persons with disabilities, Dz. U. 1997, No. 123, item 776, as amended.

life in a manner that exceeds the support needed by a person of their age. In the assessment system, disability is decided in proceedings establishing disability for persons up to and from the age of 16. When legally confirming the disability of younger children (up to the age of 16), a certificate of established disability is issued (without differentiating degrees of disability). A child's disability is declared for a limited period, but not exceeding the child's 16th birthday; an assessment of the child's capacity to improve his or her functioning is decisive. However, for persons over the age of 16, disability is assessed according to three levels: severe, moderate, or mild. The degree of disability is either temporary or permanent. Detailed principles of assessing disability in children up to the age of 16 are regulated by the provisions of the Regulation of the Minister of Labour and Social Policy of 1 February 2002 on the criteria for assessing disability in persons up to the age of 16,[7] and those of assessing disability in older children are regulated by the provisions of the Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on assessing disability and the degree of disability.[8] This means that the notion of a person with a disability is linked to obtaining a formal confirmation of such status by a district or municipal team for assessing disability, without which a person who is actually disabled cannot be recognised as such. Thus, it is possible to speak of legal disability (documented by a decision of the relevant authority) and biological disability, where a person does not apply for such a decision. Nevertheless, only parents and guardians of children who have a disability certificate can apply for various forms of state support and assistance.

3. International Guarantees for the Protection of the Rights of Children with Disabilities

Of particular importance in the system for the protection of the rights of children with disabilities was the world's first declaration defining the rights of the child: the Declaration of the Rights of the Child, commonly referred to as the Geneva Declaration, adopted by the General Council of the International Children's Aid Union on 13 February 1923, then adopted by the General Assembly of the League of Nations on 16 November 1924. The Geneva Declaration set out the rights of the child to normal physical and spiritual development, to care, to assistance and education, and to social security regardless of the child's race, nationality, and religion. The significance of the Geneva Declaration was to replace the

7 Regulation of the Minister of Labour and Social Policy of 1 February 2002 on the criteria for assessing disability in persons aged up to 16 years, Dz. U. 2002, No. 17, item. 162.

8 Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on disability assessment and the degree of disability, Dz. U. 2003, No. 139, item. 1328.

mercy and philanthropy factor with an explicit emphasis on the obligations of adults towards children[9] and to regard the child as an autonomous being with a catalogue of his or her own rights.

On 20 November 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child, addressed to all children, including children with disabilities,[10] an extension of the Geneva Declaration. The Declaration provided a benchmark for the basic needs of the child and, at the same time, was an act of international law that recommended that states establish children's rights in their national laws and obliged nations and states to respect and uphold these rights. At the heart of the Declaration was the conviction that mankind should give the child the best it has, since the child, due to its physical and mental immaturity, requires special care and attention and adequate legal protection, both before and after birth. The basis of all actions should be the welfare of the child. The Declaration contained detailed rules on the protection of the rights of the child, including the physically or mentally handicapped child, who should be given special care. Meanwhile, it placed an obligation on states to introduce laws into their national legal systems, which should take the principle of the best interests of the child as their basis. The Declaration consists of an introduction and 10 detailed principles on the rights of the child:

1. The first principle contains the fundamental rule that rights apply to all children, without exception or distinction on the grounds of race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or any other reason.
2. The second principle emphasises the role of legislation, which should provide the child with the necessary and indispensable conditions for health and normal physical, mental, moral, spiritual, and social development, under conditions of freedom and dignity.
3. The third principle confers on all children the right to a name and citizenship.
4. The fourth principle ensures that children have the opportunity to benefit from social welfare.
5. The fifth principle concerns children with developmental deviations and disorders; it implies the need for special care for these children.
6. The sixth principle states that, for the harmonious development of personality, the child needs love and understanding, as well as care, especially of the parents, to whom the state should provide the appropriate conditions and assistance necessary for the upbringing and preparation of the child for life in society.

9 Balcerek, 1990, pp. 190–191.

10 Declaration on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1959.

7. The seventh principle refers to the right of every child to education – free and compulsory, at least as far as primary school is concerned.
8. The eighth principle prescribes the priority of protection and assistance for all children.
9. The ninth principle obliges adults to protect the child from neglect, cruelty, and exploitation.
10. The tenth principle contains the injunction to educate the child in the understanding of others, tolerance, friendship among nations, peace, and universal brotherhood.

Among these, the fifth principle, which applies to children with disabilities, holds a special place, according to which 'The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition'.

However, it was not until the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, that real actions for the subjective treatment of the child were initiated.[11] The convention was ratified by Poland in 1991. It is generally acknowledged that the Convention is the greatest achievement of the international community in terms of the protection of children's rights, as it constitutes the axiological and normative basis for actions for the benefit of the child at the global, regional, national, and local levels. Incidentally, it should be added that the draft Convention was prepared by Poland and presented to the international community in 1978, providing a basis for further work. According to the adopted definition, a child is any human being below the age of 18 years, unless he or she attains the age of majority earlier in accordance with the law relating to the child (Article 1).[12] By virtue of the Convention, the states that have ratified it have assumed not only certain legal and international obligations but also obligations towards the children themselves. These obligations are incumbent on the state, its authorities, and the adult population as a whole. Parents, who are to be supported by the state, are responsible for fulfilling their obligations towards children. The Convention obliges all institutions, bodies, and organisations to safeguard the interests of the child in all activities concerning the child. It places an obligation on states to develop institutions, facilities, and services aimed at ensuring the well-being of children and to establish social programmes to support children, young people, and those who care for them. The special protection of the child related to his or

11 The Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989.

12 In Poland, this definition is detailed in Article 2(1) of the Act of 6 January 2000 on the Ombudsman for Children, consolidated text Dz. U. 2023, item 292, according to which a child is every human being from conception to adulthood.

her state of health is further manifested in the inclusion of the category of disability in the catalogue of grounds constituting the prohibition of discrimination. State Parties must respect and guarantee rights with regard to every child, without discrimination of any kind, regardless of, inter alia, race, colour, sex, language, religion, political opinion, property status, or disability (Article 2(1)).

The Convention defines the status of the child based on four assumptions:

1. The child is an autonomous subject, but due to his or her physical and mental immaturity, he or she requires special care and legal protection.
2. The child as a human being requires respect for his or her identity, dignity, and privacy.
3. The family is the best environment for the upbringing of the child.
4. The state is to support the family and not replace it in its functions.

The Convention also contains a catalogue of the fundamental rights of the child.[13] Each corresponds to a duty of the state to ensure its realisation to the maximum extent possible. Against the background of the general standard of protection of children's rights, specific standards to which children with disabilities are entitled can be identified. The situation of these children is specific, and the rights to which they are entitled require special protection, consisting not only in the prevention of discrimination but, above all, in the application of the principle of equalisation of life chances. The equalisation of opportunities is a prerequisite for equality. From an individual perspective, attention is paid to supporting the activity, independence, and autonomy of children with disabilities and the assistance and support of the environment working on their behalf. The systemic approach emphasises state action in the sphere of legislation, social policy, and organisation of social life.[14] Comprehensive assistance provided by the state is intended to help a child with disabilities integrate into society and, on a personal level, develop fully.

The most important tasks of the state in favour of the child with disabilities are included in the rather elaborate Article 23 of the Convention on the Rights of the Child. The guarantees contained therein are comprehensive, addressing various aspects of life and functioning. According to its wording,

> 1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in

13 The catalogue of children's rights was formulated based on the following principles: the child's welfare, equality, respect for the rights and responsibilities of both parents, and state support. The catalogue includes the following rights: civil, social, cultural, political, and economic.

14 Nowicka-Chachaj and Rdzanek-Piwowar, 2005, p. 22.

> the community. 2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. 4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

It is complemented by Article 25, according to which

> States Parties shall recognise the right of a child placed by a competent authority in an establishment for the care, protection or treatment of physical or mental health to a periodic review of the child's treatment and any other circumstances relating to the placement […]

– a bulwark against discriminatory treatment and segregation of children with disabilities. It follows that the provisions of Article 23 of the Convention extend their protection to all the rights of a child with a disability and his or her family.

A mechanism has been introduced to monitor the status of the State Party's implementation of the Convention through the obligation to submit periodic reports on the means it uses to realise the rights contained in the Convention and its progress in the enjoyment of those rights (Article 44). Submitted reports are considered by the Committee on the Rights of the Child (Article 43), a panel of experts 'for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention'. The Committee on the Rights of the Child, after considering government reports

on the implementation of the Convention, may offer suggestions and general recommendations based on the information received. These suggestions and general recommendations of the Committee are forwarded to the concerned State Party and brought to the attention of the United Nations General Assembly, together with any comments made by States Parties to the Convention. Unfortunately, however, the Committee has limited ability to enforce the rights under the Convention, as it can only issue non-binding opinions and recommendations. Their importance is based on the Committee's international authority and on factors of a diplomatic nature.

In the system of protecting the rights of persons with disabilities, the Convention on the Rights of Persons with Disabilities of 13 December 2006, which was ratified by Poland in 2012, plays a special role. It applies to persons with disabilities, which include persons with long-term physical, mental, intellectual, or sensory impairments that, in interaction with various barriers, may hinder their full and effective participation in society, on an equal basis with others. The primary purpose of the Convention is to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity (Article 1). Children with disabilities require special protection due to their vulnerability and risk of social exclusion, as reflected in Article 7 of the Convention, according to which

> 1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

The Convention reminds the international community that persons with disabilities are subjects of law, endowed with human rights just as persons without disabilities. Thus, they are not objects to be managed but veritable subjects deserving of the respect owed to every human being. The Convention placed an obligation on everyone, particularly state authorities, to create conditions for the fullest possible enjoyment of all human rights and obliged states to take effective measures to improve the living conditions of persons with disabilities. To help states fulfil their obligations, a Committee on the Rights of Persons with Disabilities was established (Article 34), with functions analogous to those of the Committee monitoring the Convention on the Rights of the Child. Along with the

Convention, an optional protocol, which introduced an additional mechanism to control the application of its provisions of a quasi-judicial nature in the form of the possibility for the Committee to examine individual complaints, was enacted. Poland did not accede to this protocol and, thus, did not recognise the competence of the Committee to receive and examine notifications made directly or on behalf of persons or groups of persons under Polish jurisdiction who claim to be victims of a violation of any of the rights enumerated in the Convention.

4. Constitutional Guarantees for the Protection of the Rights of Children with Disabilities

In what concerns the protection of a child with disabilities, the Constitution of the Republic of Poland of 2 April 1997,[15] the supreme law of the Republic of Poland, is of utmost significance. Among the provisions relating to the protection of the rights of a child with disabilities, of fundamental importance is Article 30 of the Constitution of the Republic of Poland, according to which 'The inherent and inalienable dignity of the human being is a source of human and civil freedoms and rights. It is inviolable and its respect and protection is the duty of public authorities.' The concept of dignity is understood as a fundamental characteristic of every human being, determining the respect due to him or her, regardless of his or her objectively or subjectively perceived other characteristics. It follows that dignity does not depend on a person's degree of fitness. Human rights based on it are therefore innate, inalienable, universal, and indivisible. A consequence of this is the prohibition of discrimination against anyone for any reason. According to Article 32 of the Polish Constitution, everyone is equal before the law and has the right to equal treatment by public authorities. No one may be discriminated against politically, socially, or economically for any reason. Disability cannot determine the legal inequality of a person or justify discrimination. The indicated provision introduced the principle of equality, the essence of which is that all subjects of the law characterised by a given essential (relevant) characteristic to an equal degree are to be treated equally, i.e. according to an equal measure, without discriminatory as well as favourable differentiations.[16] However, this does not mean that this principle should be equated with a prohibition of differentiation. Indeed, the principle of equality should be interpreted considering the principle of social justice (Article 2 of the Constitution of the Republic of Poland). Thus, it is permissible to differentiate the situation of similar entities, characterised by the same feature, if this remains in direct relation to the purpose of the regulations,

15 The Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 78, item 483 as amended.

16 Judgment of the Constitutional Tribunal of 9 March 1988, U 7/87, OTK 1988, No. 1, item 1.

while the differentiation must be proportional, which means that the importance of the interest that is to be served by such differentiation must remain in appropriate proportion to the infringed interests; meanwhile, the differentiation must not be fundamentally detrimental to other values.[17] Therefore, it is permissible to prefer certain groups (positive discrimination, compensatory preference, affirmative action) when this is necessary to bring about de facto equality.[18] Due to their impairments, persons with disabilities are at a higher risk of encountering barriers to the full realisation of their rights than those without disabilities. This means that it is constitutionally permissible to discriminate positively to reduce the social inequalities between persons without disabilities and those with disabilities. In certain situations, the legislator is even obliged to introduce positive discrimination against persons with disabilities.

The legislator imposes an obligation on public authorities to provide special healthcare to children, pregnant women, persons with disabilities, and the elderly (Article 68(3) of the Constitution of the Republic of Poland). This means that Poland has assumed the obligation to secure a higher standard of rights for the above-mentioned categories of persons. These categories include children with disabilities. Article 67 of the Constitution of the Republic of Poland confers on every citizen, inter alia, in the event of inability to work due to illness or disability, the right to social security and imposes specific obligations on state authorities to assist in securing the existential needs of persons with disabilities. The provision of Article 69 of the Constitution of the Republic of Poland explicitly guarantees public authorities' assistance for persons with disabilities, referring to specific statutory regulations concerning assistance in securing their daily existence, adaptation for work/learning, and social communication.

The protection of children's rights, without any differentiation, is provided for by Article 72(1) of the Polish Constitution, according to which

> The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.

This constitutional rule, meant to ensure the protection of the interests of a minor, who, in practice, can claim it himself to a very limited extent, constitutes the basic, overriding principle of the Polish family law system, to which all regulations in the sphere of relationships between parents and children are

17 Judgment of the Constitutional Tribunal of 16 December 1997, K 8/97, OTK 1997, Nos. 5–6, item 70.

18 Judgment of the Constitutional Tribunal of 29 September 1997, K 15/97, OTK 1997, Nos. 3–4, item 37.

subordinated.[19] The primacy of the principle of the child's welfare means that in all actions concerning the child, whether taken by public authorities or private institutions, the child's best interests must be prioritised. To this end, a specialised body – the Children's Rights Ombudsman – whose role is to protect the rights of children, including children with disabilities (Article 72(4) of the Polish Constitution), has been established. Its competences and method of appointment are set out in the Act of 6 January 2000 on the Ombudsman for Children's Rights. The subjectivity of the child is emphasised in Article 48(1) of the Constitution of the Republic of Poland, according to which 'Parents shall have the right to raise their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.' These provisions are reinforced in Article 53(3) of the Polish Constitution, according to which 'Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate […]', and in Article 72(3) of the Polish Constitution, which obliges public authorities and persons responsible for the child to listen to and, as far as possible, consider the child's opinion when determining the child's rights. This is because the child, like everyone else, has the right to his or her own views and his or her own opinion, which require at least being heard.

5. Statutory Guarantees for the Protection of the Rights of Children with Disabilities

International and constitutional guarantees for the protection of the rights of a child with disabilities are reflected in statutory provisions that relate to various aspects of human life. They regulate the forms of support and assistance provided by the state for children with disabilities and their families. Particular importance is attached to health protection, mainly the use of health services.

The basic normative act regulating the availability of these benefits is the Act of 27 August 2004 on healthcare services financed from public funds.[20] The Act provides for the right to health services aimed at the preservation of health, prevention of disease and injury, early detection of disease, treatment, care, and the prevention and reduction of disability (Article 15(1)). However, children with disabilities require much more extensive diagnostics, ongoing rehabilitation, costly treatment, and specialised equipment. The state has an obligation to inform and identify funding opportunities for medicines and treatment, purchase

19 Judgment of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK-A 2003, No. 4, item 32.

20 Act of 27 August 2004 on healthcare services financed from public funds, unified text Dz. U. 2024, item 146.

of rehabilitation equipment, booking of rehabilitation holidays, and access to orthopaedic items and aids necessary for the rehabilitation of children with disabilities. Adequate, functioning rehabilitation equipment or orthopaedic objects and aids necessary for rehabilitation are the basis of not only improvement but also ensuring that children with disabilities enjoy their rights. The duty to inform is very important here, as parents of children with disabilities are often helpless or lost in the face of the amount of paperwork they must deal with when seeking to obtain the necessary support from the state.

5.1. Rehabilitation and Schooling

The Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities provides for support aimed at enabling persons with disabilities to participate in social life and vocational rehabilitation based on instruments aimed at professional activation and promotion. For a child with a disability, support instruments in terms of social rehabilitation are important. Pursuant to Article 10c, under the system of social rehabilitation benefits, a subsidy may be granted for participation in a rehabilitation turnout as an organised form of active rehabilitation combined with elements of leisure, the purpose of which is the general improvement of psychophysical fitness and development of social skills of participants, inter alia, through establishing and developing social contacts, realisation and development of interests, and participation in other activities provided for in the programme of the turnout. The duration of rehabilitation holidays is at least 14 days. These stays are organised exclusively in the country in stationary and non-stationary forms (e.g.: sailing camp, canoeing, hiking camp, etc.). In addition, rehabilitation holidays are organised for persons with disabilities with similar needs, particularly resulting from their age or type of disability or type of illness or dysfunction.

Rehabilitation holidays are subsidised by county family assistance centres or municipal social assistance centres operating in cities with county rights, funded by the State Fund for Rehabilitation of Disabled Persons. Pursuant to Art. 10e, a disabled person may apply for a subsidy for participation in a turnout if the average monthly income, within the meaning of the provisions on family benefits, divided by the number of persons in a joint household, calculated for the quarter preceding the month in which the application is submitted, does not exceed 50% of the average remuneration per person in a joint household or 65% of the average remuneration in the case of a single person. In cases justified by a difficult material situation of a disabled person, the subsidy for the participation in the turnout of this person or the subsidy for the participation of his or her carer may be granted without reducing the amount of the subsidy despite exceeding the amount of the average monthly income. A child with disabilities and his or her guardian can

apply for the subsidy. In accordance with the provisions applying the norms of the Act, contained in the Regulation of the Minister of Labour and Social Policy of 15 November 2007 on rehabilitation sessions,[21] the amount of co-financing is 27% of the average monthly remuneration for a disabled person up to the age of 16 and a disabled person aged 16–24 who is studying and not working, regardless of the degree of disability, and 18% of the average monthly remuneration for the guardian of the child. In cases justified by the particularly difficult life situation of a person with disabilities, this subsidy may be increased to 35% of the average monthly salary. Children with disabilities up to the age of 16 and persons with disabilities up to the age of 24 who are studying and not working, regardless of the degree of disability, have priority in obtaining the subsidy.

In addition to the co-financing of participation in rehabilitation holidays, the catalogue of support in the field of social rehabilitation of a child with disabilities includes the co-financing of the provision of rehabilitation equipment and orthopaedic articles and aids and elimination of architectural, urban planning, transport, communication, and technical barriers. Detailed regulations related to the granting of these benefits are contained in the Regulation of the Minister of Labour and Social Policy of 25 June 2002 on determining the types of county tasks that can be financed from the State Fund for Rehabilitation of Persons with Disabilities.[22] A carer of a child with disabilities may apply for the co-financing of the provision of rehabilitation equipment – up to 60% of the cost of the equipment – according to the needs resulting from the child's disability. In addition, a child with a disability may be granted a subsidy for the purchase of orthopaedic items and aids. Such assistance is granted in an amount of up to 100% of the disabled person's own contribution within the limit of the price of the item/measure if such a contribution (co-payment) is required and up to 150% of the sum of the limit amount and the disabled person's own required contribution (co-payment) to the purchase of these items and measures if the price is lower than the set limit. The elimination of architectural, urban planning, transport, communication, and technical barriers for persons with disabilities is provided for up to 80% of the costs of the project, but no more than fifteen times the average wage. The aim of eliminating these barriers is to enable or facilitate a child with disabilities to perform everyday basic activities and maintain contact with the environment.

As a rule, a child with disabilities is not exempt from compulsory schooling and therefore not only has the right to attend school but also has such an obligation from the age of 7 to 18. This is confirmed by the Act of 7 September 1991 on the educational

21 Regulation of the Minister of Labour and Social Policy of 15 November 2007 on rehabilitation holidays, Dz. U. 2007, No. 230, item 1694.

22 Regulation of the Minister of Labour and Social Policy of 25 June 2002 on determining the types of county tasks that can be financed from the funds of the State Fund for Rehabilitation of Disabled Persons, Dz. U. 2002, No. 96, item. 861.

system[23] and the Act of 14 December 2016. The Education Act[24] states that a child with disabilities has a full right to education and to be provided with educational opportunities in all types of schools, according to individual developmental and educational needs and predispositions. The Act also addresses the need to adapt the content, methods, and organisation of teaching to the psychophysical capabilities of students and to ensure the use of psychological care and special forms of didactic work. The implementation of these goals and tasks includes the idea of inclusive education (inclusion) for children with special developmental needs, which may determine the need to secure specific educational needs. It should be emphasised that inclusive schools are the most effective means of equalising opportunities and integrating students with disabilities into society. It is also an important element in building social solidarity between the non-disabled and the disabled and in eliminating discriminatory attitudes. Segregated education in special education institutions should only be an exception complementary to the general education system. Exercising the right to education and fulfilling compulsory schooling prepares one for an independent, adult life. It enables one to acquire the knowledge and education needed to function as an informed and responsible individual, able to work and meet one's life needs as independently as possible. It is a right that guarantees personal development, active participation in public life, and independence in decision-making. It is in the interest of the community that children with disabilities, once they reach adulthood, do not live on social assistance benefits but are able to function independently to the best of their ability. This is because exclusion due to disabilities in childhood undoubtedly results in the perpetuation of this disadvantage into the adult life of the person with disabilities.

The legislator ensures that all students with special educational needs have the opportunity to attend all types of schools: mainstream, inclusive, and special schools. Attendance at mainstream schools in standard classes, with the possibility of benefiting from special individual educational support, is the preferred form of teaching, most conducive to full integration. The school may provide special educational conditions if the pupil obtains a certificate of need for special education. This document is issued by the assessment team of the psychological-educational counselling centre.[25] The certificate is a valuable source of information for the teacher about the student, his or her developmental potential, needs, strengths of the student, ways of working, necessary conditions for the organisation of the educational process, etc. Every child with a disability

23 Act of 7 September 1991 on the educational system, unified text Dz. U. 2022, item 2230 as amended.

24 Act of 14 December 2016 Education Law, unified text Dz. U. 2023, item 900 as amended.

25 Regulation of the Minister of National Education of 7 September 2017 on judgements and opinions issued by adjudicatory teams acting in public psychological and pedagogical counselling centres, Dz. U. 2017, item 1743.

has the right to receive psychological-educational care and assistance and special forms of didactic support, as well as to receive an opinion or a certificate on the adjustment of educational requirements to his or her individual psychophysical needs, to receive a diagnosis, and to receive therapy depending on the identified needs. When the psychological-educational counselling centre or other specialised counselling establishes specific learning difficulties, which make it impossible for the child to fulfil his or her school duties, the parents have the right to demand that the school adapts the educational requirements to their child's individual needs, and the school is obliged to adapt the requirements to enable the child to equalise his or her chances in the future and to achieve independence and active participation in social life. The obligation to adapt the content, methods, and organisation of teaching to the psychophysical capabilities of the pupil rests with the school management and the teachers. A pupil with disabilities may be postponed from compulsory schooling or have their period of education extended by at least one year at each educational stage. Given the pupil's educational difficulties, it may be important to provide appropriate teaching aids and resources. The size of any aids used, their weight, the possibility to manipulate them or limit their mobility, the appropriate adaptation of the textbooks, etc. are also significant. Teachers are obliged to individualise their work with the pupil and adapt the way in which the curriculum content and the rules for assessing achievements are implemented to the pupil's needs and abilities. Due to the limitations resulting from the disability, the educational process should be organised in such a way as to adapt to the pupil's slower pace, enabling him or her to complete a task in a longer time, extending the time for tests, or dividing tasks into stages. It is also important to adapt the educational requirements and assessment rules to the individual pupil's psycho-physical abilities daily. The degree of implementation of the appropriately modified curriculum in relation to the core curriculum should be taken into account. When assessing a pupil, it is necessary to consider not only the learning outcomes but also the effort and progress made by the pupil.

5.2. Various Benefits

Municipalities are obliged to provide free transport and care for students with disabilities when travelling to the nearest institution or to reimburse the student's transport costs and that of his or her parent/guardian if the latter provides transport and care for the student. Pupils with motor disabilities (including aphasia) or moderate or severe intellectual disabilities are also provided with transport to the nearest post-primary school until the end of the school year in the calendar year in which the pupil turns 21. Children and youths with profound intellectual disabilities who participate in remedial classes are provided with free transport

and care by the municipality when travelling to a remedial-educational centre until the end of the school year in the calendar year in which they turn 24 or 25.

Various types of benefits for children with disabilities are a tangible form of assistance, among which monetary benefits should be prioritised. Children with disabilities are entitled to a nursing allowance, while parents/guardians of children with disabilities can apply for one. This type of support is guaranteed by the Act of 28 November 2003 on Family Benefits.[26] Pursuant to Article 16, the attendance allowance is a benefit granted irrespective of income criterion, the purpose of which is to partially cover expenses resulting from the need to provide a disabled person with the care and assistance of another person in connection with an inability to lead an independent life. The attendance allowance is granted to a child with disabilities, a person with disabilities over the age of 16 if he or she has a significant degree of disability certificate, and a person with disabilities over the age of 16 with a moderate degree of disability certificate if the disability developed by the age of 21. The amount of the attendance allowance is PLN 215.84 (€50) per month. This allowance is not due to a person placed in an institution providing 24-hour care, a person entitled to a nursing allowance, and when family members are entitled to benefits abroad to cover expenses related to their care unless the provisions on the coordination of social security systems or bilateral social security agreements provide otherwise. A person entitled to the attendance benefit is not entitled to the attendance allowance. In turn, pursuant to Article 17, the carer's allowance is due to parents/guardians caring for a person up to the age of 18 who have a certificate of a significant degree of disability or a certificate of disability together with the following indications: the need for permanent or long-term care or assistance from another person in connection with significantly limited ability to lead an independent life and the need for permanent co-participation of the child's guardian in the child's daily life in the process of treatment, rehabilitation, and education. However, the carer's allowance is not due in a situation where a child with disabilities has been placed at or is staying in a social care home, a care and treatment facility, a nursing and care institution, an institution providing 24-hour care; when the person is chronically ill; and when the person is housed in a correctional institution, detention centre, or shelter for minors. The allowance is also not due if the person in need of care has an established entitlement to a special attendance benefit, attendance allowance, or a carer's allowance; the person in need of care or another person related to the person in need of care is entitled abroad to a benefit to cover expenses related to care unless the provisions on the coordination of social security systems or bilateral social security agreements provide otherwise and the person in need of care has an established entitlement to a special attendance benefit, an entitlement to an attendance allowance, or an entitlement to a carer's

26 Act of 28 November 2003 on family benefits, unified text Dz. U. 2024, item 323.

allowance. The amount of the carer's benefit is PLN 2,988 (€700) per month. This amount is subject to annual valorisation. The carer's allowance is increased by 100% for the second and each subsequent person over whom care is exercised. The head of the municipality, mayor, or town mayor disburses the pension and disability insurance contribution and health insurance for the person collecting the carer's allowance. The awarding of the carer's allowance is not dependent on the family income criterion, meaning that it is possible to combine professional activity, without any restrictions, with the collection of this benefit, thus ensuring the possibility to obtain funds thanks to which they will be able to fulfil their parental duties better. All the more so as caring for a disabled child is expensive.

The family benefit is used to partially cover the child's living expenses. The right to this allowance is vested in the child's parents/guardians (Article 4(1–2)). Family benefit is not granted, inter alia, if the child has been placed in an institution providing 24-hour maintenance or in foster care; a family member is entitled to family benefit for a child abroad, unless the provisions on the coordination of social security systems or bilateral social security agreements provide otherwise. An institution providing round-the-clock subsistence is a social welfare home, a youth education centre, a juvenile hostel, a reformatory, a remand prison, a prison, as well as a military school or other school providing full subsistence free of charge (Article 3(7)). Family benefit is granted until the child: reaches 18 years of age; completes schooling, but no longer than reaching the 21st year of age, or 24 years of age if he or she continues schooling or higher education and has a moderate or significant degree of disability (Article 6(1)). The granting of the right to the family benefit depends, inter alia, on meeting an income criterion. The family benefit is granted if the average monthly per capita family income or the income of a learner does not exceed the net amount of PLN 674.00 (€156). For families with a child with disabilities, this criterion is PLN 764 (€178) net per family member. Family benefit is paid monthly in the amount of: PLN 95.00 (€22) per child up to the age of 5; PLN 124.00 (€29) per child over the age of 5 up to the age of 18; and PLN 135.00 (€31) per child over the age of 18 up to the age of 24. There are additions to the family benefit for, inter alia: education and rehabilitation of a disabled child; commencement of the school year; a child commencing education at a school outside the place of residence; single parenthood; and parenting a child in a large family (Article 8).

Financial support is also provided for by the Act of 12 March 2004 on social assistance.[27] Benefits granted under this Act may take the form of a cash benefit, granted to the family primarily in the form of a purpose-specific benefit and a special purpose-specific benefit. The purpose-specific benefit may be granted to meet an essential living need, in particular, to cover part or all of the costs of food, medicines, foodstuffs for special nutritional purposes, medical devices and

27 Act of 12 March 2004 on social assistance, unified text Dz. U. 2023, item 901 as amended.

treatment, heating, including fuel, clothing, necessary household items, minor repairs and renovations in the dwelling, and funerals (Article 39). In particularly justified cases, a family with an income exceeding the income criterion may be granted a special purpose allowance (Article 41). A formal and legal condition for receiving benefits from the social assistance system is meeting the income criterion established by the Regulation of the Council of Ministers of 14 July 2021 on verified income criteria and amounts of cash benefits from social assistance,[28] which is PLN 776 (€180) for a person running a household alone and PLN 600 (€140) for a person in a family. For a person who resigns from employment in order to provide direct personal care to a chronically or seriously ill family member, a social assistance centre/social services centre pays a contribution to the pension and disability insurance funds from the amount of income criterion per person in a family if the income per person in the family of the caregiver does not exceed 150% of the amount of the income criterion per person in a family and the caring person is not subject to compulsory pension and disability insurance from other titles or does not receive a pension or disability allowance. The need for direct personal care must be certified by a health insurance doctor. The contribution for pension and disability insurance in the amount specified in the provisions of the social insurance system is paid for the period of care, but no longer than for the period necessary to obtain the insured status (contributory and non-contributory) compulsory period of 20 years for women and 25 years for men (Article 42). A disabled child who requires partial care and assistance in meeting the necessities of life may be granted care services, specialised care services, or a meal, provided at a support centre (Article 51(1)). Under institutional care, a person requiring round-the-clock care due to disabilities, who cannot be provided with the necessary assistance in the form of care services, is entitled to be placed in a social welfare home (Article 54). Among the types of social welfare homes, provision is made for social welfare homes for children and adolescents with intellectual disabilities and for persons with physical disabilities (Article 56, points 5 and 6).

5.3. Foster Care

Special forms of support for a child with disabilities and their foster carer are provided for in the Act of 9 June 2011 on Family Support and the Foster Care System.[29] With the special needs of a disabled child in mind, in terms of individual, specialised care and rehabilitation and revalidation, special types of foster care institutions are provided for in the form of unrelated professional foster

28 Regulation of the Council of Ministers of 14 July 2021 on verified income criteria and amounts of cash benefits from social assistance, Dz. U. 2021, item 1296.

29 Act of 9 June 2011 on family support and the foster care system, unified text Dz. U. 2024, item 177.

families and specialised-therapeutic-type foster care institutions. The legislator has also extended the period in which a disabled foster child can stay in foster care until the age of 25 (Article 37(2)). A foster family and a person running a family-type children's home are entitled to an allowance of no less than 227 PLN (€52) a month to cover increased costs of the maintenance of that child (Article 81 sec. 1). An allowance of not less than PLN 860 (€200) per month is granted for the maintenance of a child in a family-type care institution who has a certificate of disability or a certificate with a considerable or moderate degree of disability. This amount can be increased by expenses for: subsidising holidays outside the place of residence of a child aged 6 to 18 – once a year; covering necessary expenses related to the needs of the admitted child – once and expenses related to the occurrence of random events or other events affecting the quality of care – once or periodically (Article 115).

6. Conclusions

The provisions of Polish law meet the requirements for the protection of the rights of a child with disabilities and his or her family, although their realisation in practice varies, and they do not eliminate all exclusionary mechanisms. However, the situation of a child with disabilities is not shaped by legal regulations only. Regulations alone, even in their most perfectly shaped form, will not fully secure the realisation of the rights to which they are entitled. At the level of statutory regulations, the range of legal guarantees dedicated to children with disabilities are broad. However, there are still some social barriers to interpersonal relationships with persons without disabilities, which hinder their social activity. These barriers often result from prejudices and stereotypical perceptions of disability, leading to exclusion and marginalisation. Meanwhile, people with disabilities have the same rights as others and should therefore be given the opportunity to participate in society. Levelling the playing field is possible by breaking down stereotypes and prejudices against people with disabilities. This is a fundamental step towards providing them with a welcoming environment, respect, and understanding. In view of this, intensive efforts are needed to change perceptions regarding disability and to become familiar with it as a normal part of life, inter alia, and to a greater extent than hitherto, by conducting awareness-raising campaigns among the non-disabled community on the coexistence of non-disabled and disabled people in joint activities. The perceived slow change in social mentality gives hope for gradual improvement in the situation of people with disabilities.

Most importantly, regarding the rights of a child with disabilities, the whole system should strive to ensure that the child can develop as close as possible to his or her non-disabled peers and that disability is not a barrier to development.

However, this requires increased state involvement, including financially. State policy in this area should consider the specific problems that children with disabilities face daily, bearing in mind that their upbringing and the satisfaction of specific needs due to disability always entail the involvement of above-standard material resources. The possibility of prompt treatment and rehabilitation and their consistent continuation is often determined by the amount of families' material resources, meaning that their lack automatically limits the developmental possibilities of a child with disabilities and reduces their chances of achieving independence in the future.

The law provides for many types of benefits and services for children with disabilities; however, the level of funding is inadequate to meet their actual needs. It should be borne in mind that children with disabilities require a commitment of greater financial resources if only because of the increased cost of medical treatment, the need to provide them with constant rehabilitation, and the maintenance and repair of assistive equipment. Clearly, due to the child's disability, these needs are much higher than in the average family. The rights guaranteed to children with disabilities and their families will only be on paper as long as the financial support falls short of real needs.

The lack of a support system for children with disabilities points to the lack of a support system for their families, including, inter alia, the lack of comprehensive information and support for parents from the doctor and medical staff immediately after a child is diagnosed with a disability, the lack of procedures for ensuring the earliest possible specialised treatment and rehabilitation, and the lack of an effective support system for parents with a child with disabilities to enable them to work freely. The problems associated with the early diagnosis of disabilities are worth noting. Parents of children with disabilities need to know that they will not be left to fend for themselves. However, they are sometimes unable to cope with the responsibilities of providing appropriate care for a child with disabilities, and they end up abandoning them. This is why, despite the progress made in deinstitutionalisation, many children with disabilities live in various types of institutions. The lack of an effective welfare system and real support does not encourage families to keep children with disabilities at home. It is necessary to develop a comprehensive family support programme with an extensive system of volunteers, caregivers, physiotherapists, and nurses to assist parents with a child with disabilities.

Undoubtedly, progress is visible in the development of legal guarantees for the protection of the rights of persons with disabilities. However, more legal measures should be taken to assist them better in solving their problems, rather than bailing them out.

Nevertheless, the quality of existing legal regulations is insufficient. Laws should be precise and understandable, as well as stable and orderly. Meanwhile,

the provisions containing standards affecting children with disabilities often require at least basic legal knowledge and are scattered across many normative acts, which are subject to frequent changes. Often, shortly after a normative act has been issued, a new one must be issued due to amendments. The large number of provisions scattered across many normative acts and the specificity of legal language require high legal awareness among parents of children with disabilities in order to interpret these provisions appropriately and go to the appropriate body to exercise their rights. It seems desirable to reinforce the stability of law and to create a single authority to provide information on the rights of children with disabilities and their parents, as well as the support that should be sought and from whom it can be obtained. Prompt, reliable information enables parents to start treatment immediately, which not only improves the child's current state of health but also prevents it from deteriorating and increasing disorders.

It is necessary to implement measures to integrate children without disabilities with those with disabilities so that both groups can 'get to know' each other, understand each other, and help each other. Isolating children with disabilities from those without disabilities negatively influences the perception of those with disabilities as inferior. Not separating children with and without disabilities allows both groups to be in a diverse environment while fostering self-esteem, empathy, tolerance, and acceptance. It also influences the development of independence and builds self-confidence while fostering positive attitudes, helping to build lasting relationships with peers. Therefore, the benefits of this type of coexistence accrue to both parties. The process of inclusion of children with disabilities is only partly realised, as it involves relationships within the school, whereas outside-school children with disabilities do not participate in the lives of their non-disabled peers. Only by understanding inclusion in this way is it possible to effectively build a community based on solidarity between children with disabilities and their non-disabled peers in their natural living environment.

For the rights of children with disabilities to be fully realised, school teachers should be prepared adequately. Unfortunately, most teachers are not prepared to work with children with disabilities; they have inappropriate attitudes towards them, use discriminatory language, lack the skills to integrate children with disabilities with their non-disabled peers, and show reluctance to accept children with disabilities into their classrooms. This calls for decisive action in terms of mobilising them to improve their interpersonal skills and teaching methods, as well as being more open and allaying their fears of interacting with children with disabilities. This seems to be the best way to put into practice international and national guarantees to protect the rights of children with disabilities.

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Vulnerability and Children's Right to a Healthy Environment, with a Special Focus on the Hungarian Ombudsman's Practice

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'In every crisis, children are the most vulnerable. Climate change is no exception'.[1]

Abstract. The impact of climate change on the rights and well-being of children is an undisputed fact among human rights researchers. It poses significant challenges to the effective enjoyment of various human rights, including the rights of children as set out in the United Nations Convention on the Rights of the Child (UN CRC). As a result, children's rights scholars also deal with this complex issue. Due to their incomplete maturity, evolving capacities, and special developmental needs, children are disproportionately affected by changes in their environment, making them highly vulnerable. Factors such as poverty, minority backgrounds, and disabilities exacerbate their vulnerability. Independent children's rights institutions (ICRIs) also play a critical role in monitoring and advancing children's rights as human rights in the context of the environment, often in the form of an ombudsman institution. The main monitoring body of the UN CRC, the CRC Committee, in its recently adopted General Comment No. 26 on children and the environment, also highlighted the importance in this field of environmental rights. Despite such calls, the ICRIs do not emphasise children's environmental rights. This study examines the Hungarian ombudsman as a case study. This is a unique situation, as Hungary has a specialised deputy ombudsman for future generations, along with a general ombudsman with the special task of protecting children's rights; nevertheless, evidence shows that neither of them feels any ownership of this issue.

Keywords: children's rights, vulnerability, independent children's rights institutions (ICRIs), ombudsman, climate change, environmental rights, Hungary, UN CRC.

1 UNICEF, 2015, p. 6.

1. Introduction

Many scholars and researchers highlight the significant impact of climate change on children's rights and well-being,[2] as climate change poses significant challenges to the effective enjoyment of various human rights, including those outlined in the United Nations Convention on the Rights of the Child (UN CRC). The UN CRC is a legally binding international agreement that sets out the basic civil, political, economic, social, and cultural rights of children. As climate change worsens, it directly and indirectly affects children's rights in numerous ways. These rights include the rights to life, survival, and development, access to health and education, protection from violence and exploitation, and enjoyment of one's culture. International bodies, including the UN Committee on the Rights of the Child (UN CRC Committee), have identified climate change as one of the biggest threats to children's health and urged states to prioritise children's health concerns in climate change adaptation and mitigation strategies. The latest General Comment (GC) No. 26 to the CRC[3] on children's rights and the environment states that

> The extent and magnitude of the triple planetary crisis, comprising the climate emergency, the collapse of biodiversity and pervasive pollution, is an urgent and systemic threat to children's rights globally. The efforts of children to draw attention to environmental crises created the motivation and were the momentum behind this general comment.[4]

The UN CRC Committee highlighted the benefits from the contributions of children and young people at its 2016 Day of General Discussion on children's rights and the environment.[5] Moreover, a children's advisory team supported the consultation process undertaken for GC 26, the first of its kind, with 16,331 contributions from children from 121 countries, through online surveys, focus groups, and in-person national and regional consultations.[6] The UN CRC Committee also received inputs from states, experts, and other stakeholders through two rounds of consultations on the concept note and first draft of the GC.

UNICEF also communicates clearly that children are disproportionately affected by changes in their environments due to their incomplete maturity, evolving capacities, and special developmental needs.[7] However, they bear the

2 McInerney-Lankford *et al.*, 2011; Sinden, 2008; Knox, 2009; Bakker, 2020; Nolan, 2022.
3 UN Committee on the Rights of the Child, 2023.
4 Ibid.
5 During its 69th session, the CRC Committee decided to devote its 2016 General Discussion Day to the issue of children's rights and the environment. It took place on Friday, 23 September 2016, during the 73rd session of the Committee at the UN Office in Geneva. OHCHR, 2016.
6 Child Rights Environment, no date.
7 UNICEF, 2021a, 2021b; Save the Children, 2021.

least responsibility for the climate crisis but are among the most vulnerable to its impacts. The so-called 'vulnerable' children, in global terms, such as those from low- and middle-income countries, indigenous children, children with minority or migrant backgrounds, and children living with disabilities, are particularly susceptible to the negative impacts of climate change. Extreme weather events, water and food shortages, displacement, and health risks exacerbate their vulnerabilities. Universal access to safe drinking water is a fundamental need but also a human right. Shortages of safe water and proper available food already have disproportionate impacts on children, particularly the most vulnerable ones. Child mortality rate in 2020 stood at 5.0 million, which means 13,800 children under the age of five years died every day in 2020.[8] Globally, infectious diseases, including pneumonia and diarrhoea, remain a leading cause of deaths in children aged under five years, along with preterm birth and intrapartum-related complications. Globally, malnutrition and undernutrition are responsible for about half of all under-five-year-olds' deaths and are a major factor exacerbating the frequency and severity of other diseases and infections.[9]

Children are more vulnerable to vector-borne and infectious diseases due to factors such as their developing immune systems, limited access to healthcare, and higher likelihood of living in areas with poor sanitation and hygiene conditions. Climate change exacerbates these vulnerabilities by altering environmental conditions that affect disease transmission dynamics.

Climate change is projected to increase the displacement of people. In other words, it can be seen as a risk factor for migration and can indirectly increase the risk of violent conflict. There is no legal definition for 'climate refugees' (yet); however, the climate crisis is seen clearly as a human crisis by migration-related international organisations, such as the International Organization for Migration and the UN Refugee Agency. It is driving displacement and making life harder for those already forced to flee. It may trigger displacement and worsen living conditions or hamper return for those who have already been displaced.[10]

According to the Intergovernmental Panel on Climate Change (IPCC), persons who are socially, economically, culturally, politically, institutionally, or otherwise marginalised are especially vulnerable to climate change as well as some adaptation and mitigation responses. The negative impacts of climate change disproportionately affect vulnerable children. The IPCC states that

> Children aged ten or younger in the year 2020 are projected to experience a nearly four-fold increase in extreme events under 1.5°C of global warming by 2100, and a five-fold increase under 3°C warming. Such increases in

8 UNICEF Data, no date.
9 Ibid. See also UNICEF, 2022.
10 UNHCR, no date.

> exposure would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario.[11]

OECD also reported that

> Climate change is a serious risk to poverty reduction and threatens to undo decades of development efforts. As the Johannesburg Declaration on Sustainable Development states, 'the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable.' While climate change is a global phenomenon, its negative impacts are more severely felt by poor people and poor countries. They are more vulnerable because of their high dependence on natural resources, and their limited capacity to cope with climate variability and extremes. Experience suggests that the best way to address climate change impacts on the poor is by integrating adaptation responses into development planning. This is fundamental to achieve the Millennium Development Goals, including the over-arching goal of halving extreme poverty by 2015, and sustaining progress beyond 2015.[12]

The impacts of climate change and the vulnerability of poor communities to climate change vary greatly; however generally, climate change is superimposed on existing vulnerabilities. It seems to be obvious that eradicating (extreme) poverty and stopping global warming can only be tackled together: Reducing poverty without considering carbon emissions is a self-defeating strategy, as climate change impacts will threaten hardly won development gains. However, despite rapid progress to decarbonise the world economy, reducing poverty by increasing people's consumption today requires increasing carbon emissions, since economic systems in most developing countries still rely on fossil fuel energy.[13] The evidence is mounting: An International Monetary Fund report estimated that an additional 68 to 135 million people could be pushed into poverty by 2030 because of climate change.[14] Taconet, Méjean, and Guivarch[15] also showed that if the most dire projections of future economic damages in the current scientific literature hold true, climate change would reverse the gains of the past few decades and cause inequality between countries to rise again. Within countries, the impacts of climate change also risk worsening inequality.

11 IPCC, 2022.
12 OECD, 2003.
13 World Bank, 2023.
14 International Monetary Fund, 2021.
15 Taconet, Méjean and Guivarch, 2020.

The principle of intergenerational equity[16] underlying these frameworks places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations[17] to meet their developmental and environmental needs. This study highlights the critical role that independent children's rights institutions (ICRIs), working usually in the form of an ombudsman's institution can, and should, play in monitoring and advancing children's rights as human rights, particularly in the context of the environmental impacts of climate change. By nature, ICRIs should ensure that children have access to remedies and justice, including through extra-judicial means and in the field of children's environmental rights. This competence and responsibility should be even more significant in the case of vulnerable children.

As a kind of case study, the study analyses the Hungarian hybrid-type human rights institution of the Office of the Commissioner for Fundamental Rights (CFR). In this system, while the CFR (ombudsman or ombudsperson) typically oversees the protection and promotion of human rights in general, including those of children, the specific focus on children's environmental rights may not receive adequate attention or priority within their mandate. This could be due to various factors such as limited resources, competing priorities, or lack of specialised expertise in environmental issues. However, there is another actor, namely the general ombudsman's specialised Deputy Commissioner for Future Generations who may primarily focus on sustainable development issues, aiming to safeguard environmental rights. These officials do not deal with the rights of future generations as part of children's rights, and the specific intersection between children's rights and environmental rights is not explicitly addressed within their mandate.

My hypothesis highlights a gap in the protection of children's environmental rights within the framework of the institution, as neither the Commissioner nor his Deputy addresses this complex and multifaceted issue. The reasons behind this could be various, out of which institutional limitations are only one factor, and there may indeed be lack of ownership or clear responsibility for addressing children's environmental rights within the existing human rights framework. In the end, this gap potentially undermines efforts to effectively protect and promote the rights of children as well as of future generations, leaving children vulnerable to environmental hazards now as well as to climate change impacts in the future.

16 Brown Weiss, 2008.

17 The present study does not dive into the contemporary academic debates in the field of international human rights law about the definition and scope of future generations, nor does it take a stand in this discussion (see more: Cho, 2013; Boston and Stuart, 2015; Tattay, 2016; Könczöl, 2016; Brännmark, 2016; Lewis, 2018; Unruh, 2016; Arts, 2019; Jakab, 2021; Nolan, 2022; Skogly, 2021; Daly, 2022).

2. Vulnerability of Children

The concept of 'childhood vulnerability' and its legal implications are well-known to legal science;[18] however, vulnerability is often seen as part of the complex child/childhood definition. Being a child in and of itself makes children vulnerable and in need of protection.[19] Children are physically weaker and with developing cognitive, emotional, and social skills compared to adults. Children are perceived as in a relatively powerless position compared to adults.[20] This vulnerability is usually categorised into three forms: physical, social, and structural. Children are physically weaker and smaller than adults, making them more susceptible to harm. They have limited ability to protect themselves from physical dangers and risks. Children lack proper social skills, experiences, and relational contexts to protect themselves from harm. They may not have the knowledge or ability to navigate social situations safely. Thus, children need to be equipped with the tools to 'escape' vulnerability and achieve autonomy and self-sufficiency in adulthood. This includes access to rights such as education, which are seen as necessary for children to become responsible adult citizens. However, access to proper services, such as healthcare, can be listed here too.

Indeed, the concept of childhood vulnerability has been subject to criticism for several reasons. By framing children primarily as a vulnerable category, there is a risk of overlooking their agency and capabilities. This perspective may lead to paternalistic interventions that restrict children's autonomy and decision-making, disregarding their capacity to participate in decisions affecting their lives. Emphasising childhood vulnerability may lead to an exaggeration of the risks children face. While it is essential to acknowledge and address risks to children's well-being, an overly cautious approach can result in limiting children's experiences and opportunities for growth and development. Focusing solely on vulnerability can downplay children's abilities and resilience. Children are often more capable and resourceful than they are given credit for, and excessively stressing their vulnerability may overshadow their strengths and competencies.

Overall, while recognising and addressing vulnerabilities is essential for protecting children's rights and well-being, it is crucial to maintain a balanced perspective that acknowledges children's agency, strengths, and capacities. This approach promotes empowerment and autonomy while ensuring that children are supported and protected appropriately.[21] The idea of children's vulnerability

18 See also the vulnerability theory. Fineman, 2010, pp. 251–275.
19 Herring, 2022.
20 Norozi and Moen, 2016, p. 81.
21 Fineman, 2012; Kitzinger, 1988.

played a crucial role in motivating the adoption of the UN CRC,[22] as universal vulnerability applies to all children as human beings.

However, attention should also be paid to children as rights holders, which did not happen before the UN CRC. The CRC Committee formulated children's vulnerability as follows: 'At a universal level all children aged 0–18 years are considered vulnerable until the completion of their neural, psychological, social, and physical growth and development'.[23]

In sum, in terms of children's rights, primarily based on the UN CRC itself, everyone is a child below the age of 18 years, and as such the ratifying state parties shall respect and ensure the rights outlined in the UN CRC to each child within their jurisdiction without any discrimination.

3. Independent Children's Rights Institutions

The main monitoring treaty body of the UN CRC, the UN Committee on the Rights of the Child, in its General Comments No. 2 (2002) and No. 5. (2003) calls on the state parties to establish ICRIs. Moreover, it highlights the responsibilities of these institutions under Article 4 of the UN CRC, asserting that they are core parts of the state commitment to the application of the UN CRC.

Indeed, the quasi-judicial features of these institutions that handle complaints and address human/children's rights issues play a crucial role in ensuring accessibility, transparency, and effectiveness in promoting and protecting human rights. Moreover, as with most constitutional bodies, they have the legitimacy and wide acceptance to achieve compliance with their recommendations by the addressed organs, despite their soft law nature.[24]

Ombudsperson institutions with a general mandate, but also in some cases ICRIs, function as the given country's national human rights institutions (NHRIs) according to the UN Paris Principles[25] and Venice Principles,[26] which offer a precondition system (and checklist) to monitor their functioning, independence, credibility, and effectiveness. Nowadays, ombudsperson institutions exist in more than 140 states, at various levels of the government, with different competencies. Therefore, ombudspersons have become a feature of most countries' institutional frameworks around the world.

The CRC Committee, in its recently adopted General Comment No. 26 on children's rights and the environment,[27] also called upon state parties to provide

22 Tobin, 2015.
23 UN Committee on the Rights of the Child (CRC), 2003, para 72 f).
24 Reif, 2015, 2017; Kucsko-Stadlmayer 2012; UNICEF, 2012.
25 UN, 1993.
26 Council of Europe, 2019.
27 UN Committee on the Rights of the Child (CRC), 2023.

access to justice pathways for children, including complaint mechanisms that are inclusive and child friendly. This ensures children's engagement with effective judicial, quasi-judicial, and non-judicial mechanisms, including child-centred NHRIs. Moreover, the European Network of Ombudspersons for Children (ENOC) issued a Position Statement in 2022, which arose from their members' concern about children's environmental rights and particularly concerns about the extent to which the climate crisis is an imminent threat to children's rights and interests.[28]

Despite these steps and calls, evidence indicates that many (in fact, most) ICRIs do not adequately address issues related to environmental and climate change concerning children's rights. Conversations around climate change are often lacking, leading to lack of awareness among young people about the dangers arising from environmental/climate change and the relevance of their rights to these issues.

4. About the Hungarian Ombudsman

The establishment of the ombudsman's institution in Hungary marked a significant milestone in the country's transition to democracy and the protection of human rights. This move came as part of broader political reforms initiated during the transition from communism to democracy. Act 59 of 1993 on the Parliamentary Commissioner for Citizens' Rights was adopted, and two years later, the first commissioners were elected, and their joint office was established. The Commissioner for Civil Rights was responsible for fundamental rights in general (including the rights of children), while the Commissioner for Data Protection and the Commissioner for Minority Rights acted as specialised ombudspersons. The Establishment of the Parliamentary Commissioner for Future Generations in Hungary in 2008 marked a significant development in the protection of environmental rights and intergenerational equity. This 'green ombudsman'[29] was created to safeguard the rights and interests of future generations, including the fundamental right to a healthy environment and the right to physical and mental health. The constitutional mandate of the ombudsman's office encompasses the protection, maintenance, and preservation of natural resources as the common heritage of the nation for the benefit of future generations. In practice, the concept of future generations within the scope of the Commissioner for Future Generations includes both children and generations yet to be born. This broader interpretation acknowledges the interconnectedness between children's rights and the rights of future generations. However, as mentioned before, there is ongoing debate and divergence in international human rights law regarding the relationship, overlap, or distinction between the rights of future generations and children's rights.

28 ENOC, 2022.
29 Lukács, 2012.

Children's rights, as outlined in international instruments such as the UN CRC, encompass a wide range of civil, political, economic, social, and cultural rights that are specifically tailored to the needs and vulnerabilities of children. On the other hand, the rights of future generations focus on ensuring sustainable development and preserving resources for the benefit of future inhabitants of the planet. These rights often centre around environmental protection, sustainable resource management, and intergenerational equity. While there is overlap between the two concepts, they also have distinct features and objectives. Children's rights address the immediate needs and well-being of present-day children, while the rights of future generations have a longer-term perspective and aim to secure the well-being of future inhabitants of the Earth.

Later, the transition from a system of specialised commissioners to a unified CFR in Hungary, as established by Act 111 of 2011 (the new Ombudsman Act) and Article 30 of the Fundamental Law, represents a significant shift in the country's approach to human rights protection and oversight of government activities. This move towards centralisation reflects broader political dynamics and government priorities, including efforts to streamline governance, increase efficiency, and reduce costs; many European states had already opted for similar solutions.

The CFR now has two deputies: one working to protect the interests of minorities and one defending the rights of future generations (the Deputy for Future Generations [DFG]). They act with somewhat more limited powers than their predecessors, the former specialised commissioners. Since 2011, the ombudsman has constituted a National Human Rights Institution (NHRI). The CFR has been classified as an NHRI with 'A' status, following the UN Paris Principles; however, in 2021, the Sub-Committee on Accreditation of Global Alliance of National Human Rights Institutions (SCA GANHRI) recommended that the office be downgraded to a 'B' status – that is, as only partially compliant with the UN Paris Principles.[30] This decision invokes some concerning challenges and trends in the activities of the institution in the last couple of years, which require us to consider the decreasing level of efficacy towards defending fundamental rights.

When the new Ombudsman Act entered into force, the defence of children's rights became one of the main legal obligations of the general ombudsman (however, a deputy was not delegated for this task). This constitutional background does not provide for children's rights in general but for the rights of the child to protection, which is also the basis of the ombudsman's investigation reports. The Commissioner builds all investigations on the fact that, in addition to the general international human rights instruments applicable to children's rights – as Hungary ratified the UN CRC quite early, in 1991 –, it clarifies the state's constitutional obligation to protect the fundamental rights of children. Considering Article Q of the Fundamental Law, the legal system of the Republic of

30 UN, 1993.

Hungary accepts the generally recognised rules of international law and ensures the consistency of international legal obligations with domestic law.

Based on the law, the Commissioner's main task is to investigate issues relating to constitutional rights and initiate general or specific measures to remedy them. Anyone, including children, may initiate proceedings, but the ombudsman may also act on his own motion to investigate suspected constitutional irregularities.

Already during the very first term of office, the experience was that children's rights were not reflected in the complaints (which is not an unusual or Hungary-specific phenomenon),[31] so the commissioners started comprehensive inquiries *ex officio* in areas where there were conspicuously few complaints (e.g. children with disabilities, living in state care, facing the justice system, etc.). Proactivity was prompted by the empirical experience that violations of children's rights were less likely to reach the office than that of other vulnerable groups.

According to case statistics, the CFR has received around 7,300–8,000 complaints per year,[32] a significant number of which are rejected because of jurisdictional limits, with the complainant being informed at the time of submission.

Since 2011, the CFR had acted as an NHRI classified with 'A' status, but recently, based on the recommendation made in 2021 by the SCA GANHRI, it was downgraded to 'B' status, as being only partially compliant with the Paris Principles. The reasons invoked were that 'the SCA is of the view that the CFR has not effectively engaged on and publicly addressed all human rights issues'.[33] The CFR's reserved, or even silent attitude, especially since 2013 (and even more so since 2019), was the reason for downgrading it and also a point to be criticised from a human rights defender's perspective.[34] The CFR tried to act as a quasi-ombudsman for children, becoming an associate member of the ENOC; within the framework of annual projects on children's rights between 2018 and 2013, it initiated many *ex officio* investigations and turned to the Constitutional Court. From Hungary, the CFR is still an associate – an ever less active – member of ENOC, while the DFG is not involved in the network.

With the new Ombudsman Act, the defence of children's rights has become written into the law (Article 1. 2a. of the CFR Act) as one of the main legal obligations of the ombudsman. However, unfortunately, no deputy was set up for this task, and a department was dedicated to deal with children's rights (along with other social-rights-related cases).

The work in the unified institution also has consequences for case management, as it also means that in the case of violation of the rights of children to a healthy

31 Lux, 2022.
32 Office of the Hungarian Commissioner for Fundamental Rights, no date.
33 GANHRI SCA, 2021, pp. 12–13.
34 valaszoltekozmaakos.hu (Accessed: 15 march 2024).

environment/climate change, the competence is divided between the CFR and his DFG.

In recent years, there has been an inflation of extra tasks for which the office has a mandate, such as constituting the National Preventive Mechanism of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 2015. The Equal Treatment Authority merged into the CFR in 2021. Since 1 January 2023, the ombudsman has been performing the tasks of the independent mechanism of the UN Convention on the Rights of Persons with Disabilities as well, such as setting up a Disability Directorate with a seat in the city of Debrecen.

While the topic of children's rights falls within the mandate of the CFR, his DFG deals with the right to a healthy environment. The DFG's work is geared towards a general environment and nature protection agenda (including climate change) and does not specifically target children's rights, 'although the beneficiaries of the work would indeed be today's children and generations not born yet'.[35] Despite this understanding, there is no sign that more focus will be given to child-related issues.

The DFG has worked on several environment-related topics (e.g. nature conservation, noise and air pollution) not only as investigations but also in an advisory capacity or to prepare legislative proposals (e.g. on topics such as environmental liability, nature conservation, ecosystem services, and indoor air pollution).

Based on its special responsibility to promote the needs of future generations as outlined in the Report of the UN Secretary-General, the DFG organised a conference in 2014 to bring together national institutions, titled Model Institutions for a Sustainable Future, with the aim to contribute to closer cooperation in the implementation of sustainable development and intergenerational solidarity at the national level. As a consequence, the Network of Institutions for Future Generations had been established.[36]

Neither the CFR nor the DFG has received any complaints related to children's healthy environment in the last seven years. However, the importance of the issue was clear to the general commissioner at one point, so he decided to dedicate the year 2013 to issues related to the child's fundamental right to a healthy environment. The basic legal starting point of the 2013 project were articles 20 and 21 of the Fundamental Law, which state that everyone has the right to physical and mental health. Hungary promotes the enforcement of this right with genetically modified organism-free agriculture, by ensuring access to healthy food and drinking water, organising occupational safety and healthcare, supporting sports and regular exercise, and ensuring the protection of the environment. Article of the Fundamental Law also stipulates that natural resources, especially

35 Interview 1.

36 Network of Institutions for Future Generations, no date.

agricultural land; forests and water resources; biological diversity, especially native plant and animal species; and cultural values constitute the common heritage of the nation, while protecting, maintaining, and preserving it for future generations is the duty of the state and everyone.

Moreover, Article 24 of the UN CRC recognises the child's right to the best possible state of health. It provides that state parties should make efforts to ensure that no child is deprived of the right to access these services.

During the ombudsman's research, it became clear that all children suffer the consequences of a polluted and unsafe environment, but the most vulnerable are children living in the poorest countries and belonging to the most disadvantaged population groups. Most often, children living in particularly unfavourable conditions become victims of physical and psychological trauma, injuries, acute and chronic infectious and non-infectious diseases, growth and development disorders, disability, and, in the worst case, death. Special attention must therefore be paid to the prevention of such circumstances and the elimination of their underlying causes. According to a study on the environmental burden of disease in children, nearly a third of the total burden of disease from birth to 18 years of age in the European region can be traced back to an unsafe and unhealthy environment in the child's home and the wider community, causing significant social and economic costs. These findings were also highlighted in the Fourth Ministerial Conference on Environment and Health organised in Budapest in 2004, where the ministers adopted the European Action Plan for the Environment and Children's Health programme (CEHAPE), which deals with the environmental risk factors that have the greatest impact on children's health. Therefore, these were the cornerstones of the ombudsman's project year.

At the end of the year, two comprehensive reports were drafted regarding the enforcement of the rights of the child pertinent to environmental rights: one on environmental education (report no. AJB-676/2013) and the other (report no. AJB-677/2013) on certain issues related to providing access to healthy drinking water, in connection with the EU's CEHAPE programme. In the first report, according to the ombudsman, one foundation of intergenerational justice is the creation of a knowledge-based society because, without adequate knowledge and information, neither the society nor decision-makers can enforce the protection of natural resources. In state and local government decisions affecting finite natural resources, when making legislation, not only the common needs of the present generation but also how today's decisions affect the living conditions of future generations must be considered.

When it comes to children's rights through a healthy environment, the field covered by the Office of Future Generations overlaps with the mandate of the CFR, whose priority includes the protection of the rights of the child. Therefore, in this case, the Commissioner and his Deputy can and shall work together. As

mentioned above, a second joint *ex officio* investigation was documented (report no. AJB-677/2013), bearing the working title 'Can Children Drink Tap Water When Thirsty?' It reviewed certain issues of providing access to healthy drinking water, with special emphasis on exposure to naturally occurring arsenic content. The investigation confirmed that not every child has access to healthy drinking water even in Hungary, and until the drinking water system is renovated and any pollution eliminated, the official service provider should provide adequate information to the public about any potential health-related effects and offer laboratory services for confirming the quality of water. The investigation also concluded that it could constitute a violation of the child's right to protection and care if access to clean water is not ensured.

There is also a clear correlation between air pollution, environmental degradation, the right to a healthy environment, and the right to physical and mental health. For example, household heating practices, including the burning of inadequate material (lignite, waste, and wet wood), play a significant role among the causes of air pollution both indoors and outdoors. In this regard, it is also clear how strong is the link between equality issues, children's rights, and the right to a healthy environment.

Bearing this in mind, the general ombudsman comprehensively examined the conditions for children's healthy start in life in report no. AJB-1356/2013. It has become an accepted position that the environment has both positive and negative impacts on human rights, since it has a fundamental role and importance in ensuring human life. The quality of the environment of the expectant mother and unborn child and toddler is decisive for the later health of the adult. This appears as an increased challenge in households where all this is associated with poverty and deprivation.

The ombudsman also asserted the rights to a healthy environment of vulnerable children (mainly children belonging to Roma minorities) living in segregated places in report no. AJB-2050/2013, which tried to assess the issue in the framework of on-site investigations.

Unfortunately, since this special dedicated year of 2013 elapsed, neither the CFR nor his DFG retained any special focus on children and the environment when it comes to investigations.

5. Conclusions

Summing up, the transition to a unified system of the CFR, while aimed at increasing efficiency and reducing costs, has raised concerns about potential challenges and trends in the institution's activities, particularly regarding its efficacy in defending the fundamental rights of all, especially children and

other vulnerable groups. Some of these challenges and trends may include the following.

Centralisation of power. The consolidation of oversight functions under a single institution may concentrate power and decision-making authority, potentially limiting the independence and autonomy of the CFR. This centralisation could undermine the institution's ability to effectively hold government authorities accountable and address human rights violations.

Political interference. Looking at the very 'reserved attitude' of the current commissioner during his mandate, there may be concerns about political influence in the activities of the CFR, particularly if the institution is perceived to be aligned with or influenced by the ruling government. Political pressure could compromise the institution's impartiality and effectiveness in defending fundamental rights.

Reduced specialisation. The transition from specialised commissioners to a unified ombudsman institution may result in reduced specialisation and expertise in addressing specific human rights issues. This could limit the institution's capacity to effectively investigate and address complex or specialised cases, particularly those requiring in-depth knowledge and understanding of specific rights violations.

Resource constraints. Centralising oversight functions may lead to resource constraints and capacity limitations within the CFR's office. A lack of adequate resources, including funding, staff, and infrastructure, could hinder the institution's ability to respond promptly and effectively to citizens' complaints and grievances, thereby compromising its efficacy in defending fundamental rights.

Diminished public trust. Concerns about political interference, reduced specialisation, and resource constraints may contribute to diminished public trust and confidence in the CFR. If citizens, especially those who have less capacity and ability to enhance their voice, such as children and other vulnerable groups, perceive the institution as ineffective or compromised, they may be less inclined to seek assistance or report human rights violations, further undermining the institution's efficacy in defending fundamental rights.

Upholding the independence, impartiality, and effectiveness of the institution is crucial for safeguarding the fundamental rights of children in Hungary.

In this particular situation of defending children's environmental rights, it could be seen that the DFG does not deal with children's rights cases. It deals with the right to a healthy environment as a fundamental human right, not as a particular children's right. The CFR has a dedicated competence to pay particular attention to the protection of children's rights and to the rights of the societal groups most at risk, that is, vulnerable groups (Article 1, point d. of the CFR Act). However, he does not deal with environment-related rights (of children or people at risk in the society).

The DFG, with his limited powers, is in a weaker legal position than the ombudsman himself; invoking his lack of competence in this issue, he does not use any non-formal, non-legal tools or possibility of communication to raise his voice on this issue. The current CFR is often criticised because of his 'reserved' or even negligent, silent attitude in general. Neither official highlights the issues related to children and climate in a reactive (based on lack of complaints) or proactive way. In this unified system, the CFR is not obliged to speak out on issues of children's rights any more than other issues within the ambit of his general mandate.

The issues of the right to a healthy environment and children's rights aspects of climate change 'fall between the two seats' of the two offices because of this structure and interference of competences. The passivity and lack of proactivity of the CFR and his specialised Deputy are especially surprising. However, there is space and also legal possibilities to present, advocate, and highlight many more questions related to climate issues in connection with children's rights. Moreover, the attitude and chosen role of the head of the institution, the CFR as a single head body, determine the proactivity of the entire office (and deputies). Still, I firmly believe that the legislator has missed an important opportunity, as neither a separate specialised ombudsperson nor even a deputy for children's rights has been established in Hungary.

To address the gap of the lack of ownership of children's rights to a healthy environment, which can be seen in the lack of investigations, public speeches, and activities performed by both actors, it may be necessary to advocate for dealing with children's environmental rights within the current mandates of the office, as well as provide them with the necessary resources, expertise, and support to effectively address these issues. Additionally, raising awareness among stakeholders and the public about the importance of children's environmental rights could help generate momentum for action and accountability in this area.

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International Legal Framework for Adoption of Children

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Abstract. This article forms part of a doctoral research in progress on adoption and child's right to identity. Its aim is, however, to introduce the general international law context of the institution of adoption, including the combined effects of various international norms. Conventions and international documents provide numerous requirements, protecting the rights of the child and the rights of adults involved. One should remember that the purpose of adoption is to provide a child with a safe and stable family environment. Noting the special position of the case law of the ECHR, the text presents the most important specialized international instruments, primarily: the UN Convention on the Rights of the Child, the HCCH 1993 Adoption Convention, and the European Adoption Conventions. Information about each convention will be provided to systematise the sources of law. In addition, individual institutions within child adoption will be examined with a view to how the analysed instruments include them. As part of the study, critical issues for adoption will be identified from the point of view of human rights and children's rights standards. Consequently, the chapters of the paper deal with individual safeguards within child adoption: forming the basis of each decision about a child – the best interest principle, the subsidiary character of adoption and intercountry adoption, required consents for adoption, requirements for adoption procedure and adoptive parents, and the aspects of the child's right to identity.

Keywords: adoption, rights of the child, human rights, best interests of the child, family life

1. Introduction

The modern concept of adoption (in the case of children; adoption of adults is also known as a concept, albeit mostly in the field of the history of law) consists in making 'a legal decision to transfer definitive and absolute parental responsibility

for a child, creating a new parent–child relationship as a result of which the child becomes a fully-fledged member of the adoptive family'.[1] The legal institution of adoption in the form known today is based on the desire for seeking the best possible solutions for the child and both its biological and adoptive parents. The situation of these persons is described in scholarly thought as an adoption triad, or even as a triple-win concept.[2] Of course, as stated in the above-mentioned definition, a legal decision is the necessary element of an adoption proceeding. Therefore, a state and its organs are involved in the proceedings. Their role is to safeguard the interests of the individuals who represent the triad in a given case. State authorities are in charge of protecting and assisting a child whose best interest cannot be guaranteed in their family environment, ensuring alternative care for such a child. Conventions and international documents provide various requirements, protecting the rights of the child and the rights of adults involved. In Europe, the most effective instrument to protect human and child rights during adoption is the European Convention on Human Rights (ECHR).[3]

Noting the special position of the ECHR, and the case law of the European Court of Human Rights (ECtHR) which interprets the convention, the following remarks will also introduce the international legal context of the institution of adoption, including the combined effects of the various international provisions. Of course, these international instruments do not provide a complete conceptualisation and regulation of the issue, which remains in the regulatory domain of particular countries. However, multiple sources refer to the requirements for adoption. They constitute human rights and children's rights standards. The international legal basis for alternative care for children and adoption is provided for in arts. 20 and 21 of the Convention on the Rights of the Child (CRC).[4] Moreover, the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention; the Hague Convention)[5] is undoubtedly of importance to adoption in its cross-border version. Moreover, the European Convention on the Adoption of Children[6] and its revised version[7] (together: the European Adoption Conventions) include regional standards in adoption.

In the scope of their application, the conventions are binding on the domestic level after having been ratified.[8] Even if non-binding, they would constitute a reference point for national legislation and research or set directions for potential

1 Council of Europe, Commissioner for Human Rights, 2011, p. 7.
2 Smith Rotabi and Bromfield, 2016, p. 3 and the quoted sources therein.
3 Council of Europe, 1950, ETS 5.
4 United Nations, 1989, p. 3.
5 Hague Conference on Private International Law, 1993, p. 167.
6 Council of Europe, 1967, ETS 58.
7 Council of Europe, 2008b, CETS 202.
8 Regardless of the way of incorporation of the international standards on the domestic level, see e.g. Luhamaa and O'Mahony, 2021, p. 179 and the quoted sources.

international co-operation in the field of adoption. Therefore, I will present the institution of adoption in the light of international law. Information about each convention will be provided in order to systematise the sources of law – to determine their scope of application. In addition, individual institutions within child adoption will be examined regarding how the analysed instruments include them. As part of this study, critical issues for adoption will be identified from the point of view of human rights and children's rights standards.

2. The European Convention on Human Rights and Other Sources of International Law

The ECHR does not explicitly address the rights of the individual in adoption, but Art. 8 (the right to respect for private and family life) includes adoption cases in its scope of application.[9]

It is clear that the ECHR does not exist independently of other instruments of international law and that its application must conform to international law, notwithstanding its particular status and the interpretation methods and tools. The ECtHR has emphasised this numerous times.[10]

The most relevant topic for the present analysis is, however, the juxtaposition of international children's rights law and the ECHR. Children's rights are enshrined in the CRC. The relationship between the ECHR and the CRC is complex.[11] As Trond Helland and Ragnild Hollekim noted:

> Similarities are apparent between the Contracting States' positive obligations to protect children under the ECHR and CRC. However, while the ECHR focuses on *all* individuals (adults and children alike), the CRC revolves around only children's rights and thus has a more comprehensive approach to these rights. The ECtHR seems to acknowledge that the CRC is more comprehensive concerning children's rights (...).[12]

Particularly, concerning children, 'the Court considers that the positive obligations that Article 8 lays on the Contracting States (…) must be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989'.[13]

9 On the scope of application of ECHR in connection with adoption, see e.g. Draghici, 2011 or Fenton-Glynn, 2021.

10 E.g.: ECtHR, *Al-Adsani v. the United Kingdom* judgment (Grand Chamber) of 21 November 2001, Application no. 35763/97, para. 55.

11 See e.g. Helland and Hollekim, 2023 and the quoted sources, Kilkelly, 2015.

12 Helland and Hollekim, 2023, p. 214.

13 ECtHR, *Wagner and J.M.W.L v. Luxembourg*, judgment (Chamber) of 28 June 2007, Application No. 76240/01, para. 120.

The CRC is undoubtedly a point of reference in ECtHR cases concerning children and, as such, contributes to the development of children's rights in the law of the ECHR. Yet, the mentioning of CRC provisions is sometimes considered inconsistent and their following insufficient.[14]

The significance of substantive international instruments in the field of adoption was recognized by the ECtHR in the case of *Pini and others v. Romania*. The case concerned the adoption of Romanian girls by Italian citizens, which was opposed by the children themselves. The Court stated explicitly 'the Convention must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights' and that 'with regard in particular to the obligations imposed by Article 8 of the Convention on the Contracting States in the field of adoption, and to the effects of adoption on the relationship between adopters and those being adopted, they must be interpreted in the light of' specialized international agreements.[15]

Therefore, it remains necessary to present the international sources of law governing the adoption.

3. The Most Important Specialized International Instruments

3.1. The UN Convention on the Rights of the Child

As far as the adoption of a child is concerned, the CRC should be mentioned first. With 196 State Parties, it remains the most widely ratified international human rights treaty. The Convention entered into force more than 30 years ago. One should remember the role of Poland, particularly Prof. Tadeusz Smyczyński, in its preparation.[16] However, the initial draft from Poland contained no reference to adoption; the early proposals on domestic and intercountry adoption were submitted from Barbados and Columbia.[17] In the final version of the text, these provisions became arts. 20 and 21. In view of their decisive character for international adoption standards, it is worth recalling them:

14 Fenton-Glynn, 2021, p. 394.

15 ECtHR, *Pini and others v. Romania*, judgment (Chamber) of 22 June 2004, Application No. 780028/01 and 780030/01, paras. 138–139.

16 E.g. the study by Dr. hab. Marek Andrzejewski, prof. INP PAN titled *The Role of Prof. Tadeusz Smyczyński as a Drafter of the UN Convention on the Rights of the Child* in Issue 1/2024 of *Acta Universitatis Sapientiae, Legal Studies* (under publication).

17 See e.g. Lansdown, 2022, p. 172 and the quoted sources.

> Art. 20
> 1. 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.
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
> 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption, or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Requirements for the system of adoption are provided in the subsequent Art. 21 of UNCRC:

> Art. 21
> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration, and they shall:
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
> (b) Recognize that inter-country adoption may be considered as an alternative means of child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
> (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
> (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
> (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Due to the holistic approach of the CRC, it remains necessary to consider other rights of the child related to adoption: the prohibition of discrimination, the right to know and preserve their identity, the right to live with their parents and to an upbringing in the family, the right to express their opinion, to an adequate standard of living and to protection from violence, mistreatment, abuse, or exploitation. Obviously, addressed in the CRC from the perspective of children, they also reflect the rights of adults, particularly biological parents. However, the holistic approach to different aspects of the situation of a child reflects the child-centricity of the institution of adoption, as well as the children's rights-based approach.[18]

The provisions of the Convention are supplemented by three optional protocols: on the involvement of children in armed conflict,[19] on the sale of children, child prostitution and child pornography,[20] and on a communications procedure.[21] They bind 173, 178, and 50 countries respectively.[22]

One may note that the final provision of Art. 21 of the CRC encourages the development of bilateral and multilateral arrangements for child protection in adoption. Consequently, the other conventions, concluded after the CRC constitute its implementation instruments.

3.2. The HCCH 1993 Adoption Convention

Unquestionably, the Hague Convention is a highly relevant international instrument in the field of adoption in its inter-country version. It was concluded under the auspices of the Hague Conference on Private International Law, the leading international organization in the field of private international law. Family matters in a wider sense (including forms of the protection of adults lacking capacity) are a vital area of the HCCH's activities. The organization created a number of conventions during the last few decades with the express purpose of addressing the dangers and cross-border concerns that families and children experience when operating under civil law.[23]

One may name the 1993 Convention a continuation of Art. 21 of the CRC (provisions on inter-country adoption). Also, I should draw particular attention to Art. 21 (c) of the CRC: '[State Parties shall] ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.' However, due to the popularity and detailed character of the Hague Convention, from an international law perspective,

18 See Tobin, 2023.
19 United Nations, 2000a, p. 222.
20 United Nations, 2000b, p. 227.
21 United Nations, 2011, p. 135.
22 According to status as of 3 April 2024.
23 See e.g. Loon, 2017, p. 32.

the substantive obligations enshrined therein can serve as an interpretation of a child's rights in an adoption situation as such.

The number of Contracting Parties to this Convention reached 106 after the accession of Angola in March 2024. The Convention was created in response to the increasing number of international adoptions in the second half of the 20th century and the risks resulting from them. The crucial objectives were to prevent abuse by establishing minimal standards for inter-country adoption and a system of co-operation between State Parties. The Convention emphasizes a role of central authorities of the State of Origin and Receiving State and of accredited bodies and other competent – judicial and administrative – authorities. Moreover, the Convention secures the automatic recognition of adoptions made following its requirements. The 1993 Convention respectively refers to post-adoption matters, noting that what happens during the adoption procedure will be relevant to the adopted child at a later stage in life.

Since its signature, the United Nations Fund for Children and the Committee on the Rights of the Child have given the HCCH Adoption Convention particular consideration and support, seeing it as a crucial implementation tool of the CRC.[24] The 1993 Convention has encouraged the enactment of laws and rules, stronger protocols, more stringent controls, and the processing of inter-country adoptions by authorized authorities. These have all aided in generating the political will to step up measures to stop and deal with unethical inter-country adoption operations. Being a Party to the Convention, however, has no bearing if the Contracting States fail to carry it out properly, and illegal activities may continue. Therefore, the HCCH itself promotes the evaluation of good practices and challenges, addressing particular risks and illicit practices.[25]

It is necessary to clarify that the Hague Convention

> [D]oes not cover all international adoption cases, but only one class of them: those expressly indicated in Article 2, i.e. the adoption of a child habitually resident in one State (the 'State of origin') by spouses or a person habitually resident in another State (the 'receiving State').[26]

One may note that all adoptions are potentially international, e.g. in the case of a family moving abroad, when the need to recognize adoption in a different country appears.[27]

24 Id., p. 41.
25 See e.g. Hague Conference on Private International Law, 2023.
26 Parra-Aranguren, 1993, para. 34.
27 See e.g. Commission Internationale de l'État Civil, 2015.

3.3. The European Adoption Conventions

Additionally, the Council of Europe had an impact on setting regional standards in adoption because of the European Convention on the Adoption of Children from 1967 and its revised version from 2008 concluded under its auspices. The aim of these conventions was to harmonize domestic regulations on adoption. The Convention from 1967 was the first international document referring in detail to the substantive aspects of adoption. Among others, the European Adoption Conventions address the issue of the effects of adoption and restrictions on revoking or annulling an adoption, which, in principle, should create parent–child relationships, which are permanent.

One of the general recommendations of the Council of Europe's Commissioner for Human Rights published in 2011 was to 'adapt national legislation and practices to the 1993 Hague Convention and the European Convention on the Adoption of Children (Revised), and ratify these conventions immediately where this has not yet been done'.[28] It is worth noting that the European Adoption Conventions are still binding upon a limited number of states.[29] One of the reasons that may prevent States from adhering to international agreements on family matters is a different understanding of the fundamental institutions in domestic legal orders combined with different approaches to sensitive matters such as availability of adoption to homosexual persons and joint adoption to unmarried or same-sex couples.[30] Following this, one may note that the revision of the European Convention provides for adoption either by a couple or by one person (Art. 7). This may include registered partners, unmarried couples; different and same-sex couples, to which the states are free to extend the scope of the Convention. Nevertheless, they are not obligated to introduce institutions which are not known to their domestic law, such as registered partnerships of any kind.

The 2008 Convention provides for the possibility of stating reservations. These may relate to provisions on the consent of the child to adoption (mainly the aspect of age limits; Art. 5), on the status of a person or couple capable of adopting a child (the above-mentioned Art. 7), and on the access of the adopted child to information concerning their origin (Art. 22(3)).

Shortly after the Convention came into being, from a Polish perspective, Anna Natalia Schulz positively assessed the possibility of stating reservations as a realistic

28 Council of Europe, Commissioner for Human Rights, 2011, p. 5.

29 As of 1 February 2024: the European Convention of 1967 is binding upon 16 states, among them the Czech Republic, Poland, and Romania; the revised version of 2008 is binding upon 10 states, Romania being among them.

30 E.g. Denunciation by Sweden or Norway of the 1967 European Convention, within the scope of which there is no adoption by same-sex registered partners; very cautious position of Poland with regard to any international instrument related to marriage in any way.

solution.[31] As it turned out, however, this flexibility did not increase the popularity of the Convention among states. The above-mentioned questions – the child's consent to adoption, their possible access to information on their origin, and the issue of access to adoption for registered partners – are ones that the 2008 Convention addresses differently from its predecessor from 1967. A different approach is also remarkable with regard to the position of the biological father, which is linked to the disappearance of the distinction between 'legitimate' and 'illegitimate' children. The latter also entails the 'modernized' language of the 2008 Convention.

4. Other Relevant Documents

Among documents that cover children's rights more generally, the European Convention on the Exercise of Children's Rights[32] requires mentioning. It is another instrument of the Council of Europe (apart from the ECHR or European Adoption Conventions). In the context of adoption, it is particularly important to refer to this Convention as the one focused on empowering the child's participation in the decision-making process. It is devoted particularly to the procedural measures of promoting the exercise of children's rights. The Convention was ratified by 20 states, including Croatia, the Czech Republic, Poland, and Slovenia.[33]

One should remember that in a given adoption case, it may be necessary to consider the special needs of a child (or parents) resulting, e.g., from their disability.[34]

Some auxiliary, non-binding instruments are relevant for interpreting the rights of the child and state obligations during or in relation to adoption. The first of them is UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.[35] This document influenced the drafting of Art. 21 of the CRC.[36] Additionally, the Committee on the Rights of the Child makes recommendations on issues relating to children to which it believes the State Parties to the CRC should devote more attention. These are, inter alia, essential to adoption issues such as the best interest of the child and the right of the child to be heard.[37]

31 Schulz, 2008, p. 118.
32 Council of Europe, 1996, ETS 160.
33 As of 12 May 2024. Among Central European countries, the Convention was respectively signed by Hungary, Serbia, and Slovak Republic.
34 See United Nations, 2006, p. 3.
35 UN General Assembly Resolution, A/RES/41/85, 3 December 1986.
36 See e.g. Lansdown, 2022, p. 172 and the quoted sources.
37 United Nations Committee on the Rights of the Child, 2009, Art. 3(1) and United Nations Committee on the Rights of the Child, 2013.

5. The Main Principles of Adoption According to International Instruments

5.1. The Best Interest of the Child

The best interest of the child as a principle serves as the foundation for the requirements for protecting the child's rights. This includes adoption contexts. The CRC and the other multilateral treaties mentioned above expressly support this principle. Determining the best interest and means of protection in a particular case can certainly be difficult. Beyond adoption, one could argue that the child's best interest is rarely served in a variety of circumstances (such as protracted, contentious disputes between parents). However, at least as to its purpose, the best interest of the child should be considered in adoption.

The term remains widely used in the debate on children's rights as well as in specific cases. Not without a reason, as it is a general principle of the CRC. According to its Art. 3, in all actions of public or private social welfare institutions, courts, administrative or legislative bodies, the best interest of the child must be a primary consideration. This should be viewed from multiple dimensions. The concept of the best interest of the child has implications for both the making and application of the law, substantive as well as procedural law. It can be seen as an interpretative as well as a corrective clause. Consequently, one may call it a general principle of the rights of the child. The principle requires a comprehensive analysis and is interpreted on a case-by-case basis due to cultural differences and the unique circumstances of each child. It is out of the scope of the present text to refer to the history of the best interest of the child as a concept, its understanding and questions arising in various contexts.[38] Here, the aim is to analyse the above-mentioned instruments in terms of their references to the best interests of the child.

In the most general way, one may note that all the conventions mentioned are optimised to guarantee that adoption takes place in the best interest of the child. In each case, the best interest of the child should be examined, and it should be decisive regarding the means used. This applies both to the decision on adoption as such and to all decisions made at the various stages of the adoption process. The best interests of the child must be the 'paramount consideration' in adoption situations, according to Art. 21 of the CRC. Art. 21's standards surpass Art. 3(1)'s general requirement that it be 'a primary consideration'. Additionally, as Katre Luhamaa and Conor O'Mahony put it, analysing General Comment No. 14 of CRC Committee (Art. 36) and the ECtHR judgment in the case of *Strand Lobben v. Norway*:[39]

38 See e.g. Freeman, 2007; Kilkelly, 2016 and the quoted sources.

39 ECtHR, *Strand Lobben and others v. Norway*, judgment (Grand Chamber) of 10 September 2019, Application no 37283/13.

> The legal requirements deriving from [Art. 21] are specified in General Comment no 14, where the CRC Committee (2013: para 36) stressed that the word 'shall' places a strong legal obligation on states and means that states do not have discretion as to whether children's best interests are to be assessed. Thus, the best interests cannot be one among several considerations; rather, it should guide the whole adoption process and be the primary driver of the adoption (*Strand Lobben v Norway*).[40]

The CRC Committee mandated that the best interest of the child is the determining factor when making decisions on adoption. The European Adoption Convention from 2008 follows the same approach, stating in its Art. 4(1), 'The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.'

In the Hague Convention, consideration for the best interest of the child is relevant in connection to procedural public policy exceptions. Art. 24 provides that the recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interest of the child. The Hague Convention is crucial in ensuring safeguards for the best interest of the child in inter-country adoption. Although this instrument of private international law is in itself an attempt to protect the best interest of the child, it leaves a significant flexibility to the applicable law. By focusing punctiliously on the most essential issues, procedural aspects or international cooperation in this regard and recognition of the adoption decision, it enforces an approach to implementation of the children's rights standards.

5.2. Subsidiarity

5.2.1. Alternative Care: Protection of the Family of Origin (and Family Life)

It is worth remembering that all mentioned instruments recognize the central role of the family in taking care of a child, providing for him or her a stable and harmonious home. Therefore, adoption remains a form of care subsidiary to that of a family of origin and provides alternative care to children who are unable to enjoy family life within their biological families. Such conventions provide safeguards for the family of origin; however, the aim of adoption is to secure 'alternative' family life for a child.

The term 'alternative care' encompasses the situation of children who do not live with their parents. Of course, this is not a homogeneous group. It includes children who are looked after by relatives or other adults (not family

40 Luhamaa and O'Mahony, 2021, pp. 183–184.

members) or stay in an institutional care establishment. From a different angle, alternative care is a set of activities of a state designed to provide temporary care and upbringing for children deprived of parental care.[41] Adoption is one of the forms of alternative care, mentioned by Art. 20 of the CRC, albeit a very special one, terminating the rights and responsibilities of the biological parents.[42] Undoubtedly, implementing the obligation to provide adequate care for a child deprived of parental care remains a challenge for the state and its specialized bodies. It is worth remembering that they are in charge of providing the enjoyment of the fullness of the child's rights, which are, for the ones in alternative care, the same as for any other child. Under the CRC, particular attention should be paid to the role of the family in the upbringing of the child (inter alia, Art. 9). The best interest of the child is referred to in the aforementioned Art. 20. Only this can help decide on separating a child from the family of origin on or placing them in alternative care, possibly temporarily. It is the child's fundamental right to live with the biological family, and only as a last resort, in their best interest, should the child be placed in alternative care. This right extends to providing care and upbringing in the form of alternative care and to guaranteeing a return to the natural family when it can provide appropriate conditions. Adoption is possible when there is no longer any chance of family reunification. Subsidiarity in adoption is a principle that aims to ensure that a child's right to a family environment is respected in the most appropriate manner.

5.2.2. Subsidiarity of Inter-country Adoption to Care in the Child's Country of Origin

The principle of subsidiarity dictates that the primary responsibility for the care and upbringing of a child lies with the child's biological family and, failing that, within the child's country of origin. Only when these options are not in the best interest of the child should inter-country adoption be considered by competent authorities. Domestic adoption is seen as preferable because it allows the child to remain within their own cultural, social, and linguistic environment. However, the care by a family (even abroad) should be prioritized over the institutionalized forms of care. Also, as stated in para. 123 of the explanatory report to the Hague Convention:

> [N]otwithstanding the express acceptance of the subsidiarity principle, there was consensus that, in certain circumstances, the best interests of

41 Maj, 2015, p. 264.

42 Noting also that adoption is not known to legal systems of all of the countries, e.g. Islamic countries. Art. 20 refers respectively to *kafalah*. However, it is not covered by the Hague Convention, despite Egypt's initial suggestion.

> the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance, in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of.[43]

The subsidiarity principle requires balancing the child's best interests with respect for the sovereignty and capabilities of the child's country of origin. This can be a delicate and complex process, particularly in cases involving differing cultural norms and legal standards. These challenges are reflected also from the perspective of an individual child and respect for their original identity.

The idea of subsidiarity of inter-country adoption is upheld by both the CRC and the HCCH 1993 Adoption Convention, guaranteeing that inter-country adoption is a last resort. While the Hague Convention offers a precise procedural framework expressly for inter-country adoption, guaranteeing ethical procedures and careful examination of domestic alternatives, the CRC provides a generic framework emphasising the best interests of the child and giving priority to domestic options. When used in tandem, these tools support and safeguard children's rights throughout the adoption process.

5.3. Consent for Adoption

The realization of the subsidiarity of adoption is the requirement of consent concerning parents, relatives, and legal guardians, as mentioned by Art. 21(a) of the CRC.[44] This provision emphasizes the necessity of informed consent, ensuring full understanding of the implications of adoption. Also, the Hague Convention mandates in Art. 4 that the biological parents' consent must be counselled, informed, free from coercion, and given in the proper legal form. One should also remember the requirements of Art. 29 of the Hague Convention, which prohibit, as a rule, personal contact between prospective adoptive parents and the child's parents or guardians until the consent requirements are met. This ensures the integrity of the adoption process and the protection of all parties involved. Special protection is offered to mothers after giving birth to a child.

The European Adoption Conventions refers respectively to the consent to adoption of the spouses (partners, see above) of the prospective adoptive parents. Although provisions on consent and enquiries concerning the views of the child were also included in the 1967 European Convention, the empowerment of the biological father and the child themselves in consenting to the adoption, as provided for in Art. 5 of the revision of the European Convention, can serve as

43 Parra-Aranguren, 1993, para. 123.

44 This may also refer to the consent of the competent authorities when required; see e.g. Art. 4(c)(1) of the Hague Convention.

an example of a preferable direction of development in adoption standards.[45] The father's consent has been equated in importance with the mother's, regardless of the parents' relationship status.

Similarly, the consent of the child is required for granting adoption according to the revised version of the European Convention. Concerning the child, this is the realization of his or her right to be heard (Art. 12(2) of CRC), which, together with the child's best interest, should be at the centre of the adoption proceedings. This is reflected in the Hague Convention (Art. 4 (d) or Art. 21(2)) as well. Considering the child's views is a procedural obligation and a substantive requirement for the State. The consent of the child shall be given not to adoption in general but for the specific adoption by the specific adoptive parents. The child's degree of maturity must, however, be taken into account. One of the factors that requires attention is the age of the child considered by law as having sufficient understanding. Setting age limits in this regard is left to the decision of the domestic legislature. However, the 2008 Adoption Convention states in Art. 5(1)(b) *in fine* that: 'a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by law and shall not be more than 14 years'.[46] Younger children[47] shall be consulted, unless it is manifestly contrary to the child's best interests. Providing a child's views an opportunity to be included in the decision-making process is one of the most challenging aspects of adoption, requiring an interdisciplinary approach.

The provisions on consent ensure that adoptions are conducted ethically, respecting the rights of the biological parents while prioritizing the best interests of the child.

5.4. Requirements for Adoption Procedure and Adoptive Parents – Selected Aspects

Carefully examining the situation of the child and deciding on adoption constitute the role of the competent authorities.[48] The European Adoption Conventions refer directly to qualifications and training of social workers, who typically deal with adoption matters. Substantive and procedural requirements in accordance with applicable law should assure the protection of biological parents, intended

45 See Council of Europe, 2008a, paras. 29–30.

46 Save on exceptional grounds determined by law; see Art. 5(3).

47 Or those who suffer from disability preventing the expression of a valid consent; see Art. 5(3) *in fine*.

48 See more on the professional requirements towards them according to the Committee on the Rights of the Child in Vité and Boéchat, 2008, paras. 62–64. The Hague Convention refers in detail to the necessary attributes of the accredited 'central authorities', which have numerous obligations under the Convention.

adoptive parents and – first and foremost – the child. The conventions refer to certain matters in particular.

The mechanisms of the CRC, starting with Art. 35, aim to prevent the sale of children. Achieving improper financial benefits from adoption could lead to such situations. For inter-country adoption, this is explicitly addressed by Art. 21(d) and continued by the Hague Convention. Its Art. 4(c)(3) states that the consent of parents and children, mentioned above, cannot be induced by payment or compensation of any kind. Art. 32(1) adds that: 'no one shall derive improper financial or other gain from an activity related to an intercountry adoption.' The European Adoption Conventions contain similar safeguards for domestic adoptions.

Furthermore, to ensure that adoption is indeed the best way to protect a child and prospective adoptive parents are suitable (see below), the Hague and European instruments relate to the 'all pertinent and reliable'[49] information circulation process. For instance, as stated in Art. 9(1) of the 1967 European Adoption Convention: 'the competent authority shall not grant an adoption until appropriate enquiries have been made concerning the adopter, the child and his family', therefore all relevant actors in adoption. These enquiries concern in particular the appropriateness of the child's placement, the situation of the persons involved, and the prospective adopter's eligibility, suitability, and motivations. Circumstances on the part of the child are in particular those that affect their identity.

The European Adoption Conventions address the issue of the age of prospective adoptive parents. This relates to two questions: the minimum age of the adoptive parents that should be prescribed by law and the age difference between them and the child. As a rule, the 1967 Convention set the minimum age of parents as being between 21 and 35 years (Art. 7). Furthermore, it required the difference in age between the adopter and the child to be no less than the normal difference in age between parents and their children (Art. 8). The revision from 2008 determines these limits differently. As a matter of principle, the minimum age should be neither less than 18 nor more than 30 years. Also, there should be an appropriate age difference between the adopter and the child, preferably a difference of at least 16 years (Art. 9(1)). The Conventions do not allow restrictions on the number of children adopted or a prohibition of adoption by those who may have children. The conventions of 1967 and 2008 treat the issue of contact between prospective adoptive parents and the child differently. This 'probationary period' is respectively required and optional. The Hague Convention refers to the probationary period as well (Art. 20). Also, it provides for the mechanisms which ensure the care for the child if the continued placement of the child with the prospective adoptive parents is not in the child's best interests (Art. 21).

49 Art. 21(a) of the CRC.

The Hague Convention, and likewise the 2008 European Adoption Convention, draws attention to the need for the State to provide pre-adoption counselling and post-adoption support to adoptive families.

5.5. The Child's Right to Identity

Unquestionably, a child's identity is interfered with by adoption. The consequences of adoption may create a new legal parent–child relationship or change the child's name. Thus, adoption influences the fundaments of an origin of a person. Hence, there is a need to study this interaction.

One has to agree with the remarks of Philip Alston, Nigel Cantwell, and John Tobin that:

> [N]ational adoption presents challenges in preserving a child's identity. These problems are likely to be magnified in inter-country adoptions which generally sever not only the physical ties with a child's biological parents or previous carers, but the social, racial, cultural, linguistic, and religious ties between an adopted child and his or her country of origin.[50]

Therefore, international instruments specialized in the area of adoption invoke the issues relevant for the protection of child's identity.

As the starting point, one may refer to Art. 20(3) *in fine* of the CRC. It is worth recalling that according to this text: 'when considering solutions [for ensuring alternative care for a child], due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. The provision is a response to bad past practices. These consisted of enforcing the compulsory removal of children from indigenous or minority populations and giving them to wealthy childless parents in violation of these rights. Even with the best of intentions, these acts demonstrate overt racism and have harmed a significant number of children and adults alike.[51] Nowadays, the tenets of placement continuity and identity preservation remain crucial components of assessments of the situation of the child, although they are not exclusively decisive. Of course, the best interests of the child are decisive, combined, however, with the importance of availability and feasibility of different solutions.

These issues are also mentioned in the Hague Convention (Art. 16). Information about a child's background, social environment, and medical or family history have a role in the process of deciding on the (inter-country) adoptability of a

50 Alston, Cantwell and Tobin, 2019, p. 792.
51 Tobin, 2019, p. 754 and the quoted sources.

child.[52] Also, in this respect, due consideration shall be given to the ethnic, religious, and cultural background of the child.

On the topic at hand, it is worth noting the differences between the 1967 European Convention and its 2008 revised version. The first change concerns the catalogue of factors to be taken into account in adoption enquiries. In the 2008 version, it is longer and includes circumstances reminiscent of those in the Hague Convention. Either way, however, it is exemplary in nature. Furthermore, the newer version approaches differently the question of the child's surname after adoption. According to the Convention of 1967, the adopted person should generally be able to acquire the adopter's surname, either replacing or adding to their original surname. The Convention of 2008 allows states to make exceptions regarding the child's surname's change. One may note that the revised version is characterized by a greater openness to forms of adoption with limited effects, those preserving some elements of the child's contact with their roots in terms of name or family ties. However, for the integration and protection of a child from statelessness, both Conventions provide that the adopted child should acquire the nationality of the adoptive parents.

Access to and disclosure of information is another essential issue to which attitudes have changed in recent decades. It reveals the tension between 'open' and 'secret' adoption. Thr Conventions both of 1967 (Art. 20(2)) and 2008 (Art. 22(2)) agree that 'provision shall be made to require or permit adoption proceedings to take place *in camera*'. However, recurrence ends on this procedural aspect. As to making provisions to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin, it is obligatory in the Convention of 1967 (Art. 20(1)) and optional in its 2008 revised version (Art. 22(1)). Both versions of the European Adoption Convention allow the adopter and the adopted person to obtain a document that attests to the date and place of birth without revealing the fact of adoption or the identity of the biological parents. Also, they both require public records to be kept and reproduced in a manner that prevents individuals without a legitimate interest from learning about the adoption or the identity of the biological parents. Nevertheless, provisions of the older Convention do not address the adopted child's access to information about their origins. In contrast the revised one explicitly grants the adopted child access to information about their origins held by the competent authorities. Furthermore, it provides a mechanism for potentially overriding the biological parents' right to anonymity, considering the circumstances and rights involved. Also, the analysed Convention of 2008 specifies that information regarding an

52 At the start of the same process, from the point of view of the decision on parents' suitability, information is collected about their background, family and medical history, social environment, reasons for adoption, ability to undertake an inter-country adoption, as well as the characteristics of the children for whom they would be qualified to care (Art. 15).

adoption must be collected and retained for at least 50 years after the adoption becomes final. The Convention takes a broad perspective on a challenging and complex matter. It is worth recalling that reservations to the provision on access to information concerning the child's origin are allowed (Art. 22(3)). As of 14 May 2024, a reservation in relation to the child's access to information about their origin was made only by Finland, which will not apply the given provision to granting access to information for a child under 15 years of age.

The regulation of the Hague Convention is not so broad. It refers to the preservation of the information concerning the child's origin and access to them by the child and its representative (in so far as it is permitted by the law of the State), as well as data protection.

Issues of the child's identity must be considered as important ones, elements of which are addressed by all the conventions discussed.

6. Conclusions

In conclusion, it is worth noting that the individual's protection standards in adoption are included in instruments of (almost) universal significance as well as regional, European ones. Yet, the latter have not been successful in terms of the number of adhering states. The international legal framework for adoption includes various elements of the situation of the child, the biological and adoptive parents, which are relevant in the context of adoption. Of course, the most important instrument concerning the child's situation is the CRC. It refers explicitly to alternative care and adoption, as well as to factors that may be relevant in the context of adoption. It also sets out general directives to protect the situation of each child. The Hague Convention develops the UN Convention's requirements for inter-country adoption. For purposes of the present research, the aspect of child protection was much more important than co-operation in cases of inter-country adoption, as per the title of the 1993 Convention. In principle, for obvious reasons, the phenomenon of inter-country adoption poses more challenges for the protection of children than domestic adoption. Therefore, and given the wide geographical scope of the Convention, its provisions may serve as a guide in interpreting the various questions of adoption, including domestic ones.

The international legal framework for adoption forms an essentially coherent landscape. Therefore, one may claim that other instruments, when referring to the situation of the child, uphold the rights provided by the CRC.

Broadly speaking, it can be observed that all of the main specialized instruments are designed to ensure that adoption occurs in the child's best interest. It should always dictate the methods applied to each situation. Secondly, every analysed convention acknowledges that a family is a child's primary carer. Thus,

adoption continues to be a subsidiary form of care, one of the possible types of alternative care for a child unable to experience family life in their original homes. Additionally, possibly with a preference for domestic adoption before an inter-country one. Another relevant issue is consent for adoption, including consideration for the voice of the child. Also, the requirements for the adoption process and prospective parents are crucial, which should assure the suitability of adoptive parents for a child.

The 1967 Adoption Convention and its 2008 revised version differ in their approach to certain issues, such as the means of protection of the child's right to identity. Controversial and challenging issues can and indeed are encountered by the ECtHR in the context of specific cases. The ECHR law gains even greater significance when considering the relatively limited applicability of the specialized European treaty arrangements with regard to adoption.

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A Children's Rights Approach to Surrogacy

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Abstract. Today, surrogacy procedures offer medical solutions to intended parents who otherwise cannot have a child naturally. Various legal and ethical issues arise from both traditional and gestational surrogacy from the child's point of view. To balance the rights of children and parents, international legal documents and case law of the European Court on Human Rights, which deliver approaches to ensure the best interest of the child and the child's right to identity as highlighted in the United Nations Convention on Children's Rights, are considered in surrogacy procedures where the legal situation is complex due to the different national regulations.

Keywords: cross-border surrogacy, best interest of the child, legal parent–child relationship

1. Introduction

Surrogacy arrangements have challenged traditional family structures. Originally, founding a family with a child occurred in the very private sphere of a man and woman, with no interference from third persons. However, involvement of a reproductive clinic, a surrogate mother, and sometimes a gamete donor exposed the intimate family relationship to a broader perspective. As more subjects are present in surrogacy arrangements, legal ties become more complex, thus finding a fair balance between the rights of all is demanding. Especially, the child's position is really sensitive, as the child is in the primal care of his or her legal parents, and when legal parenthood is not that obvious (which is usually the case in surrogacy), the parental responsibility is split. Thus, due to the controversy of this phenomenon, states tend to choose one of three legislative approaches (complete prohibition, permissive legislation or non-regulation, and silence on the issue) to manage surrogacy legally. Moreover, cross-border surrogacy agreements make the family structure even more complex. Here, the intended parents' main reason to travel abroad to engage in such procedures are the legal obstacles their

home country creates. To avoid the consequences of prohibitive legislation, they choose a state where surrogacy is legal and accessible to foreigners. However, upon returning home, grave issues surface when the intended parents wish to register the child before a competent civil registry based on the foreign birth certificate. This likely leaves the child in exceptional factual and legal uncertainty concerning the parents' ties to him or her and the child's nationality. Sometimes, even placement into alternative care may be ordered.

The child's right to identity must therefore be the object of prominent focus, including the right to know his or her genetic origins. The best interests of the child and the right to a private and family life must be considered paramount. These values are very broad in the context of surrogate-born children, and states that are parties to any international children's rights document must assume positive and negative obligations to create a legal environment in which these rights can be exercised. However, the right to self-determination of the surrogate mother and the intended parents might not be fully respected, as usually the intended parents are the putative holders of parental status, including all rights and responsibilities; however, the majority of the states in Europe declare the birth mother as the legal parent of the child.

The clash of rights and legal values is definite; which one prevails often lies in the hands of courts, mainly the European Court of Human Rights (ECtHR), which offers numerous interpretative approaches to deal with international surrogacy arrangements to avoid human rights violations. As of today, it is evident that children's rights are human rights, and thus the international community must take steps towards improving the situation of every child, including surrogate-born-children, to benefit from the rights enshrined in several international conventions. In particular, it must be examined how the child's best interests and right to identity are configured in cases of surrogacy in such a delicate familial structure. This is notwithstanding the legal implications and issues stemming mainly from international surrogacy arrangements.

2. History of International Legal Protection of Children

The recognition of specific legal protections to children emerged hand in hand with the anti-child labour movements in the 19th century. The consequences of the Industrial Revolution implied a bigger workload, which was imposed on children. Parental authority remained in focus and stayed decisive in family power dynamics, and thus the formal equality introduced with the bourgeois-influenced transformation of civil law and the Industrial Revolution remained non-inclusive to children.[1] The idea of children being valuable members of the society was

1 Hrabar, 2016, p. 21.

starting to prevail, which started to highlight the importance of their right to education. As exercising the right to education was not compatible with child labour, it resulted in a significant reduction in the child labour force. Moreover, social awareness about children's well-being started to gain recognition.[2] A great breakthrough was achieved by the International Labour Organization in 1919, namely Convention No. 5 on the minimum age of children for employment in industry and Convention No. 6 on the night work of young persons in industry, which started a wave in recognition of the exclusive link between compulsory education and minimum age of employment.[3]

The authentic blossoming of children's rights in a normative sense started in the 20th century. First, many national laws were passed, focusing on the protection of children, which contributed to the recognition of the need for an extensive legal document protecting children's rights. The devastating consequences of the First World War highlighted the losses of the most vulnerable groups of society, and thus public opinion turned to ways of assisting their recovery. Noteworthy examples are the Save the Children Fund established by Eglantyne Jebb in 1919, International Save the Children Union launched by Rädda Barnen, and International Committee of the Red Cross in 1920. These efforts culminated in the adoption of the Declaration of the Rights of the Child by the League of Nations in Geneva in 1924. The declaration, in just five articles,[4] aimed to direct member states' attention to the universal international legal protection of children, which had to be a general requirement to ensure the healthy upbringing of children, as their weak position makes them more likely to be subjected to abuse and exploitation. The motivation behind drafting the Geneva Declaration was to create a special group of legal subjects for children, recognise their interests and need, and make visible for adults the duties they owe to children who depend on them. Regardless of the goodwilled efforts, the Geneva Declaration remained non-binding on the member states; nevertheless, it was a great initiative and the first step towards recognition and implementation of the comprehensive international legal protection for children.

Under the scope of the United Nations (UN), the field of children's rights gained special recognition and had the opportunity to ensure the ongoing development of the legal protection of children. The second step in this process was embodied

2 Although child labour itself was not considered as exploitative and harmful, with time, legal safeguards regulating the minimum and maximum age to work, improving working conditions, and shortening the working hours were introduced as of the second half of the 19th century in some countries such as Prussia, Denmark, Germany, Italy, the Netherlands, and Belgium.

3 Grgurev, 206, p. 103.

4 These articles, if paraphrased in today's legal terms, encompassed the right to development; right to survival, health, resocialisation, rehabilitation, and substitute care; right to protection from economic exploitation and restricted work conditions; and right to upbringing and all-round development and to nurture and educate the child in a way that later he or she can be beneficial to the society.

by the adoption of the Declaration on the Rights of the Child proclaimed by UN General Assembly Resolution No. 1386 (XIV), which revised, extended, and updated the wording of the Geneva Declaration, as well as reframed the overall message towards the international community. It specifically asserted the freedoms and rights of children and emphasised the pursuit of the well-being of both children and the society.[5]

These noteworthy efforts culminated in the adoption of the Convention on the Rights of the Child[6] (CRC), intended to oblige member states to actively contribute to the well-being of children and shape their national legislation to achieve a universal children's rights-based approach. Their progress is monitored by a special committee that delivers expert reports to the state parties on whether they managed to fulfil the requirements for proper implementation. From the other side, member states who ratified the CRC have to submit a report regarding the progress they made in implementing the advice of the committee on national child protection policies.[7] This is the fundamental method by which the UN puts certain pressure on state parties to respect the CRC regulations, as it is not 'strictly' binding on states that had ratified it. Overall, in international law, state parties are bound to abide by its provisions.

In the sphere of the UN child protection initiatives, we ought to mention the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, as it is one of the most extensively ratified global agreements advocating for the criminalisation of subjects involved in instances of sexual exploitation and other forms of exploitation of minors. The Optional Protocol was adopted in 2000 and entered into force in 2002, which was proceeded by a long debate and call for action initiated by the international community, the UN General Assembly, and the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography. They asked to extend the jurisdiction of national laws of member states to effectively tackle the criminality related to exploitation and other offences against children, as well as enhance cross-border cooperation. The Optional Protocol is of high importance regarding the protection of children in cases of international commercial surrogacy.

Furthermore, international protection of children's rights is present in the work of the Council of Europe, especially in the case law of the ECtHR. Since the European Convention on Human Rights (ECHR) has been drafted, member states have incorporated its human rights regulations into their national legislation. Although the ECHR does not specifically deal with children, some of its provisions remain applicable to them. Moreover, case law of the ECtHR provides

5 Veerman, 1992, p. 159.

6 CRC was adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989.

7 Id., Articles 43–45.

a guideline for the 'preferred' and quite comprehensive interpretations in cross-border surrogacy cases and for issues that arise from them (legal parenthood, discrimination, adoption, genetics, distinction of commercial and altruistic surrogacy procedures, etc.), including for the protection of the rights of the child if born from a surrogacy agreement. It is essential to mention that the court always examines whether the state's legislation was proportionate, pursued a legitimate aim, and was necessary in a democratic society to protect certain values when there was an interference to the applicant's certain rights. Referring to the fact that there is no consensus on whether surrogacy arrangements that were drafted abroad would gain legal recognition, member states enjoy a substantial margin of appreciation, depending on the interests and issues at stake.

Moreover, the court promulgates the CRC by using it as a source of law in the decision-making process.

In the circumstances of European Union (EU) membership, the Lisbon Treaty[8] brought a considerable improvement in children's rights protection at the supranational level. It has made the value of protection of children's right a general objective of the EU, which shall be enforced with regard to all EU policies, in both internal and international relations.[9] Accordingly, the member states have the obligation to promote children's rights. In connection with parental responsibility, the procedural law was enhanced by the revision of the Brussels IIa Regulation,[10] requiring procedures involving children to be accelerated and made more efficient and the promotion of stronger enforcement of children's rights.

Besides, the EU Charter of Fundamental Rights[11] is considered as binding and one of the fundamental, primary sources of EU law. It contains specific provisions on children's rights, thus obliging EU institutions and Member States to comply with these provisions. It is worth mentioning in connection with the ECHR that the charter's legal protection cannot be of a lower level than that of the ECHR.

As outlined above, children's rights have been at the centre of attention in the 20th century. Many different international organisations have dealt with emphasising the relevance of children's rights by approaching them from the basic human rights perspective. The outcome of interpretational development from both social and legal points of view led to the acknowledgement of the concept that children's rights are human rights. The message behind these regulations is in sync with the original motivations behind the CRC's initiators and drafters. They aimed to consider children as fully fledged rights holders with rights equal to adults, highlighting the 'contractual' nature of the CRC between adults and children, which is based upon the three hard 'Ps': provision, protection, and participation.

8 Treaty of Lisbon, 2007.
9 Treaty of Lisbon, 2007, articles 2 and 3.
10 Council Regulation (EC) No 2201/2003.
11 European Union, 2012.

In the context of all abovementioned international instruments, the core principles are none other than non-discrimination, best interest of the child, rights to life, survival and development, and lastly consideration of the viewpoint of the child.[12] When examining these principles to be ensured in family structures, assisted reproductive techniques, especially commercial surrogacy, add great complexity to the equation, particularly in the fields of the child's best interest, right to identity (and including access to origins and family environment for the child), parental filiation, right to birth registration, and the problem of commodification and sale of children.

3. Clash between Children's Rights and Surrogacy Arrangements

Utilisation of assisted reproductive technology, which encompasses surrogacy, is on the rise for establishing families. Children born through these medical procedures are entitled to the same rights as all children under the UN CRC. However, surrogacy arrangements, mainly for monetary compensation – specifically gestational[13] and cross-border ones – could expose the child to potential violations of his or her human rights in various ways. The use of assisted reproductive techniques is not new, and it is getting more and more popular among couples who are affected by infertility on the grounds of medical or social conditions.[14] Nevertheless, it brings a great complexity not only to family interrelations but also from the conceived child's point of view.

First, it is essential to provide a definition of surrogacy arrangements, as well as discuss the medical practice and address the issues they raise for children

12 These four are the underlying principles of the UN CRC: non-discrimination in Article 2, best interests of the child in Article 3, right to survive and develop in Article 6, and right to have their views heard and taken seriously in Article 12. Notwithstanding, these principles are not exclusive to the CRC but rather are encompassed or in line with other international legal instruments, optional protocols, and conventions, which are tangentially related to children.

13 In this surrogacy agreement, the surrogate mother's eggs are not used, and someone else is the genetic mother of the child, usually the intended mother. In gestational surrogacy arrangements, the surrogate mother is the birth mother of the child, but with no genetic filiation to him or her. This type of surrogacy seems to be ideal for prospective parents because if the medical condition causing infertility is connected to the incapability of the women to carry the child (uterine conditions, lack of a uterus, etc.) or if the pregnancy would be high-risk (heart disease, eye disease, etc.), it will result in the genetic offspring of the prospective parents to whom a surrogate gives birth.

14 Infertility is a medical condition, specifically recognised as a disease by the World Health Organization, which can impact the reproductive systems of both men and women, defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse. Social infertility is connected to social and legal obstacles that aggravate family foundation with a child for single individuals and gay and lesbian couples.

born from these procedures. Basically, surrogacy is the practice of a woman getting pregnant on behalf of another, who for medical or other reasons is not able to get pregnant and bear a child on her own. We can distinguish altruistic or commercial surrogacy, based on whether the surrogate mother receives monetary compensation above the necessary reimbursement of the medical expenses. From the biological and medical points of view, the combinations of genetic connections between the conceived child, surrogate mother, and intended parents can vary (in case a donor gamete is involved), but for the sake of simplicity, we distinguish between traditional and gestational surrogacy. In the latter case, gametes of the intended father and mother are used and fertilised in a laboratory environment, outside the body *in vitro*. Then, the embryo is implanted into the surrogate mother's uterus. Thus, the surrogate has no genetic filiation to the child although she bears and gives birth to him or her. In traditional surrogacy, the surrogate mother's eggs are used, and thus the most preferred form of surrogacy from the intended parent's perspective is the former.

Second, it is evident from the abovementioned practice that this procedure is truly contentious from the legal, ethical, and bioethical perspectives for all subjects involved. Despite all the challenging implications, this phenomenon is on the rise. We must emphasise the future children's interests and consider their basic and essential needs before, during, and after the use of this particular assisted reproductive method. The most pressing questions concern the human rights dimensions of surrogacy in relation to the child, specifically the child's right to identity, in the light of the child's best interest principle.

3.1. The Child's Right to Identity in Cases of Surrogacy

The right to identity can entail many elements considering one's origins; thus, it is a fundamental determinant of one's personality. Although it has extensive components for conceptualising what identity is and how one's self is created or constructed from philosophical and sociological points of view, it is certain that knowing one's cultural, biological, national, and ethnic origins is essential in the healthy development of the child, as it has a lifelong impact on future generations.[15]

In legal terms, the child's right to identity is specified first in the UN CRC, namely in Article 7, which affirms that every child has the right to acquire a nationality, register his or her birth at the competent civil registry immediately after birth, have a name, and know and be cared for by his or her parents as far as possible. Article 7 renders a positive obligation towards member states to prevent children from becoming stateless or unregistered. Moreover, Article 8 stipulates that state parties respect the right of the child to preserve his or her identity, including nationality,

15 O'Callaghan, 2021, p. 2.

name, and family relations as recognised by law without unlawful interference. Moreover, the child's right to identity is closely linked to the exercise of other rights mentioned in the CRC. In particular, these include the rights to development in Article 6, keep families together in Article 9, facilitate contact with families across country borders in Article 10; and maintain continuity in a child's ethnic, religious, cultural, and linguistic backgrounds in Article 20.[16]

In addition, the UN Children's Fund notably highlighted the importance of preserving the child's right to identity in 2019 as the 'Society first acknowledges a child's existence and identity through birth registration. The right to be recognised as a person before the law is a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights.'[17] Apparently, identity rights, although very complex, shall be considered to comply with the abovementioned standards, even in cases of pre- and post-effects of surrogacy arrangements. With surrogacy in the picture, the identity protection of the child has numerous shortcomings, stemming from two main dimensions of the phenomenon.

First, complications result from the nature of the so-called 'split parenthood'[18] caused by the unique combination of biological and genetic links between the child, surrogate mother, and intended parents. Overall, parenthood of the child can be established through gestational, genetic, and social means; which pathway the law recognises varies from country to country.[19] However, there might be cases where the child born through surrogacy potentially has as many as five parents (the surrogate mother who gave birth to him or her; intended mother who contributed the genetic material; intended father who contributed the genetic material; and, if not, male and female donors who contributed the genetic material). As the dominant trend of anonymous donations of genetic material and the nature of surrogacy is that the surrogate mother does not wish to become a legal parent to the child to whom she gave birth, ultimately, the child has little chance and transparency to get to know his or her genetic origins, especially the

16 Dambach and Cantwell, 2023, p. 2.

17 United Nations Children's Fund, 2019.

18 Navratyil, 2012, p. 178.

19 In surrogacy cases, the most problematic aspect regarding establishment of parenthood is the legal status of the mother. Predominantly, countries with continental legal systems carry the long-established Roman law principle, namely the *Mater semper certa est* (the mother is always certain), which considers that the fact of childbirth is connected to legal maternity; in other words, the mother of the child is who gave birth to it. However, in some legal systems, usually where surrogacy is permitted, the biological and gestational facts can be overwritten, and maternity is established based on intent via the surrogacy contract. As the biological fact was not present for the intended mother, her maternity can be easily challenged when she returns to the home country where the Roman law principle is valid. Thus, acknowledgement of her legal maternal status can be easily contested, or even rejected, because the surrogacy contract is either illegal or null and void.

identity of the genetic parents and gestational mother. This leaves the child in an 'identity vacuum, lacking knowledge of their personal narrative'.[20]

On the other hand, generally, disputable surrogacy arrangement cases possess an international element (being concluded across borders), causing the child born from the agreement to grow up in the home country of the intended parents, which is geographically distinct from the place of birth and the domicile of the surrogate mother. In other words, he or she is raised at a distance from his or her ethnic and cultural origins. Knowing and being raised in alignment with one's ethnic and cultural identity and heritage and actively providing the children transparent information to link them with their ethnic and cultural backgrounds have long-term effects and contribute to their physical, psychological, cultural, and spiritual development, as evoked in Article 6 of the CRC. These elements are of paramount consideration for the child to form a cohesive identity, not to mention the relevance of accessing medical and health determinants.[21]

Furthermore, there are other important elements connected to the child's right to identity, as enshrined in articles 8 and 7 of the CRC, which stipulate immediate birth registration, as well as the right to have a nationality. Looking closer at the nationality aspect of identity, it is intertwined with human dignity, which can be compromised in international surrogacy arrangements by the high probability of these children becoming stateless. The core problem here also lies in the reluctance of the home country of the intended parents to recognise the effects of the surrogacy arrangements and the foreign birth certificate on their territory to maintain their ban or non-recognition of such procedures. Moreover, the practical challenges in obtaining a valid travel document or the requirement for a valid temporary visa are difficult given the conflicting legislation on legal parental filiation and nationality. There have been many infamous unfortunate

20 Achmad, 2018, p. 60.

21 Access to medical data and medical history of the child is a crucial element of preserving his or her right to health and medical treatment in cases where a health risk occurs or there is risk of developing a hereditary disease. A clash between data protection and perseverance of anonymity of the surrogate mother (in traditional surrogacy) or gamete donors and the child's right to identity is inevitable. Nevertheless, the legal nature of these data usually fall into the scope of health data of a sensitive nature, which have high guarantees with regard to preserving confidentiality (these data may contain information about genetic data, health status, and predisposition to diseases). With the different regulations regarding the ownership of these data (usually only the owner has access rights, although they could be extended to genetic descendants), there is debate regarding whether the access should be unlimited or the disclosure should be restricted only to critical genetic data. Regulations on anonymity in sperm, oocyte, and embryo donation vary between states, and some have not ventured into the territory of surrogacy. Thus, even if the intended parents are keen on actively tracing the donor's medical and personal identity in cross-border situations, it can be extremely difficult or even impossible. For more about the child's access to genetic identity, see Panagopoulou-Koutnatzi, 2016.

cases with dramatic outcomes[22] where the child has been left stateless due to complications arising from cross-border surrogacy arrangements.

Lastly, the term 'family relations' mentioned in Article 8 also contributes to preserving the child's right to identity by knowing and maintaining a relationship with family members. The family history includes the genetic, gestational, social, and legal forms of the child's identity. Moreover, it encompasses a wide range of relationships, including historical ties, continuity, or separation, involving birth parents, gamete donors, siblings, grandparents, and additional relatives. Unlike the abovementioned components of the right to identity, family relations capture a much broader space for interpretation than what they practically refer to. Family relations in Article 8 intend to go beyond nuclear ties, and thus it does not focus solely on legal parenthood but parenthood in general (including genetic, gestational, and social links). These links, as discussed earlier, are multiplied in surrogacy cases. The meaning and intention of Article 8 and the reasoning for its inclusion in the CRC were to establish a basis for interpreting the provision as being relevant to aspects of a child's identity rooted in both biological and genetic connections between children and adults. Although the biological, genetic, and gestational filiations were not mentioned explicitly in the article (as it was unforeseen at the time of codification), its drafters lightly touched on issues that may compromise the identity of a child born through assisted reproductive technologies.

In conclusion, the pressing problem is the elevated tension between the adult's interest to preserve anonymity and confidentiality and the child's interest to know and preserve their origins. By all accounts, it can be said that an approach to surrogacy focused on children's rights might require the operation and maintenance of an accurate database that records the circumstances of their birth, including surrogacy arrangements, and details about the surrogate mother. Active preservation of the child's right to identity lies especially in the hand of the legal

22 The Yamadas, a Japanese couple, entered into a gestational surrogacy arrangement in India in 2007, where the intended father and an anonymous Indian woman provided the genetic material. After the couple developed some serious marital problems, they were divorced by the time baby Manji was born to the surrogate mother. Although the intended father insisted on caring for the baby, the now ex-wife did not, as she had no biological or legal relationship to the child. So, suddenly, there were multiple candidates who could legally become the child's mother (the surrogate mother based on the surrogacy arrangement, the egg donor on genetic basis, and the surrogate mother who gave birth to him). Neither the previously drafted surrogacy arrangement nor any legislation could give any direction to determine baby Manji's nationality and legal family relations, which eventually exposed him to statelessness. The case was heard and quickly resolved by the Indian Supreme Court, who instructed the competent state departments to deal with the case, ultimately issuing travel documents and allowing baby Manji and his grandmother to travel to Japan, where the Japanese authorities highlighted that he could acquire Japanese citizenship once the parent–child relationship was resolved. See more in Points, 2009.

parents; moreover, the legal environment is an external factor, as the child cannot be expected to maintain his or her identity independently and actively.[23]

Despite the great efforts of UN organisations focused on children's rights,[24] shifting the member states' attitudes towards acceptance remains a challenge. The reasons for the states' reluctance in this matter are discussed later.

3.2. The Child's Best Interest Principle in Surrogacy

The concept of the best interest of the child is enshrined in Article 3 of the CRC and is of primary consideration in every substantive and procedural legislative step, legal practices of the member states, and public and private decision-making that involves or affects children. This principle intends to ensure that the rights most conducive to the child's interest are realised. It also imposes a ranking in the corresponding rights of other subjects, based on which the best interests of the child are served. It basically represents a kind of positive discrimination for the child in legal relations. As one of the fundamental holistic overreaching principles of the CRC, it is the embodiment of the prioritisation of children's aspects of any case.[25]

The exact definition of the child's best interest is absent in the CRC. Thus, its content must be determined on a case-by-case basis, by paying special attention to the given circumstances of the case and closely analysing the situation of the child, their needs, and effects of the decision on them. Most importantly, the best interest of the child must be a primary consideration, but this interest is not of an absolute nature.[26]

To connect this principle to the discussion of the child's identity, the CRC Commission undoubtedly recognises that it is usual that, because surrogacy

23 Dambach and Cantwell, 2023, p. 2

24 It is worth mentioning the steps taken by the CRC Committee, which has prepared numerous recommendations connected to safeguards and guarantees to child identity preservation in cases of assisted reproduction. The UN Special Rapporteur on Sale and Sexual Exploitation of Children notably turned towards states to strengthen and pay special attention to the access to origins, for the purposes of identity preservation if the child is born through surrogacy. Moreover, in her report for the 2019 UN General Assembly, she urged states to
'(d) Preserve, in all cases, all pertinent information, and establish and maintain registers and national records containing information about the genetic and gestational origins of surrogate-born children, through which children can seek to access (…) there should be comprehensive safeguards to ensure that records of the surrogate arrangement are kept in order to enable the surrogate-born children to have access to information about their origins;
(e) Ensure the right of surrogate-born children to access information about their identity and origin, including their cultural, ethnic, religious and linguistic background, in line with their evolving capacity and in accordance with the legal regulations of the given country.'
See more: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 2018.

25 UN Committee on the Rights of the Child (CRC), 2013.

26 Kaime, 2011, p. 106.

arrangements 'modify' the identity of the child (when the legal parental filiation and responsibility is transferred from the surrogate mother to the intended parents), it is in their best interest to protect and preserve their genetic and biological origins as well as family relations (even in the analogous case of natural conception leading to adoption, i.e. anonymous births).[27] In cases where modification of the child's identity is present, this decision shall be preceded by a best interest assessment and determination conducted by qualified and competent professionals, with 'paramount consideration'[28] of the best interest of the child in identity matters.[29] Best interest determinations are self-explanatory challenges to states prohibiting or not regulating surrogacy, as they have to recognise the parental filiation without having any original proof of the circumstances of birth, pregnancy, etc., being presented mostly with only a foreign birth certificate. Thus, UNICEF Child Identity Protection briefing notes acknowledge these challenges by expressing that

> Although it is in the best interests of children to have legal parentage established as soon as possible after birth, the integrity of a child's legal parentage in surrogacy needs to be protected through minimum standards. These include, for example, pre-surrogacy safeguards, best interest determinations (BID), consents of all parties to the arrangement, and protecting the child's right to access their origins.[30]

We can conclude that the best interest of the child notion is placed among the priority principles for consideration when cross-border surrogacy takes place between member states of the UN CRC. The primary targets of these recommendations are state parties where commercial and altruistic surrogacy is illegal or not regulated at all. This is because they face a controversial situation and need to strike a balance between maintaining their public order and respecting the child's right listed in the UN CRC, as well as other regional human rights frameworks at the level of the EU and the Council of Europe, even when there is a lack of unified European legal instruments addressing surrogacy.[31]

27 The CRC Committee was not satisfied with the possibility of the so-called 'baby boxes' practice in the Republic of Korea, an initiative operated by some religious organisations, which is considered to be a safe and anonymous way for mothers in desperate situations to leave their unwanted babies. The CRC Committee urged to prohibit the practice and 'to consider introducing, as a last resort, the possibility of confidential hospital births' (UN Committee on the Rights of the Child, 2019). These initiatives are also operating in other member states; in Central Europe, the Czech Republic is a notable example in this field.

28 UN Committee on the Rights of the Child (CRC), 2013.

29 Dambach and Cantwell, 2023, p. 10.

30 Unicef and Child Identity Protection, 2022, p. 2.

31 Garay, 2020, p. 74.

4. ECtHR's Children's Rights-Based Approach to Surrogacy

Undoubtedly, the ECtHR case law contributes to navigating the human rights aspects of surrogacy, which generally affect the member states' legislation. In its decision-making process, the ECtHR turns many times to children's rights protection documents. Generally, the majority of the Council of Europe member states prohibit and condemn surrogacy, especially its non-altruistic version. Several conflicts brought before the court are connected to the non-recognition and refusal of issuing of a foreign birth certificate establishing legal parenthood based on surrogacy arrangements contracted abroad, upon return of the intended parents with a child to their home country. Given the lack of European consensus regarding surrogacy arrangements, member states enjoy a wide margin of appreciation in this area. However, the ECtHR has many times incorporated both the best interest of the child principle and the child's right to identity under the umbrella of Article 8 of the CRC (right to respect for private and family life).

The ECtHR's approach recognising parent–child relationships in cross-border surrogacy cases has been established on many occasions, especially in the following cases: *Labassée v. France* and *Mennesson v. France*,[32] *Foulon v. France*,[33] *Bouvet v. France*,[34] and *Laborie v. France*.[35]

By analysing the *Mennesson v. France* case, we may demonstrate how the best interest of the child principle and the child's right to identity played a key role in cross-border surrogacy cases.

In the factual background of the case, Mr and Mrs Menesson, both French citizens, concluded an international surrogacy agreement in California. The twins born out of this agreement had a genetic link to one of the intended parents. However, the French authorities refused to issue a French birth certificate, and thus the twins could not gain French citizenship. The ECtHR in its ruling and reasoning focused on the link between legal parentage and genetics and the difference between altruistic and commercial surrogacy. In these cases, significant emphasis was placed on preserving the child's right to identity through the recognition of parenthood with the genetic parent.[36] In other words, a person's identity encompasses the establishment of a legal parent–child relationship, and when this fails, an essential aspect of a persons' identity is lost.[37] Furthermore, the court emphasised how the best interest of the child principle was not considered by the French authorities, while it should have been a basis in public decision-

32 *Mennesson v. France*, App. No 65192/11; *Labassée v. France*, App. No 65941/11.
33 *Foulon v. France*, App. No 9063/14.
34 *Bouvet v. France*, App. No 10410/14.
35 *Laborie v. France*, App. No 44024/1.
36 Trimmings, 2020, p. 198.
37 Mennesson, para. 96.

making concerning the child. The French authorities violated the child's right to respect for private life because their right to identity in French society was not ensured due to the refusal of their French nationality.

By relying on the children's rights-based approach, the court gave precedence to the biological connection in surrogacy cases while suggesting that the best interest of the child should precede public policy concerns over surrogacy.[38] This guidance of the ECtHR was further affirmed in the cases of *Paradiso and Campanelli v. Italy*[39] and *Valdís Fjölnisdóttir and Others v. Iceland*,[40] where the steps taken by the public authorities of states where surrogacy is against the law – involving formal non-recognition of the family relations between the child and the non-genetic intended parents – constituted a lawful and necessary interference with the applicants' right to respect for private and family life.

Although the court clearly focused on the genetic/biological link as having decisive importance in establishing parenthood, it also acknowledged that adoption[41] is a valid option for the genetically non-related intended parent.[42] Nevertheless, the court still left some relevant and pressing questions open in this regard.[43]

Additionally, the ECtHR gave the green light to recognising the effects of surrogate motherhood in a cross-border context in an Advisory Opinion[44] following up the Mennesson case, as in a

> situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent–child relationship with the intended father has been recognized in domestic law:
> 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent–child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother';

38 Trimmings, 2020, pp. 199, 200.

39 *Paradiso and Campanelli v. Italy*, App. No 25358/12.

40 *Valdís Fjölnisdóttir and Others v. Iceland*, App. no 71552/17.

41 Nevertheless, it is important to highlight that the Hague Conference of Private International Law has explicitly emphasised that the structure outlined in the 1993 Hague Adoption Convention is not applicable to surrogacy agreements. Consequently, the conference established a working group on parentage/surrogacy to assess the viability of a private international law instrument in this regard.

42 *C and E v. France*, App. nos 1462/18 and 17348/18 and *D v. France*, App. no 11288/18.

43 Further issues arise from other situations when the surrogate mother is genetically related to the child. Whether this approach of the court applies also to genetic motherhood, not only fatherhood, and whether this reasoning in the Mennesson case could be applied to same-sex couples is further discussed here: Trimmings, 2019.

44 European Court of Human Rights (Grand Chamber), 2019.

> 2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used.[45]

As the case law presented above points out, the attitude of the ECtHR towards cross-border surrogacy arrangements is underpinned by a child-protection-centred approach, focusing on the best interest of the child principle and the child's right to identity. Although all international hard and soft law instruments protecting children's rights represent important and valid guidelines for member states, this also raises concerns that such a child-focused approach suggests the existence of a loophole in the law of the prohibiting states. Putting it simply, measures incorporated in the member states' law to prevent and discourage cross-border surrogacy practice (prohibitive regulation) usually hinder the safeguards of the best interest of the child. This means that the ECtHR, in its endeavour to prioritise the child's best interests, effectively legitimises surrogacy by granting legal parentage to commissioning parents.[46]

5. Conclusions

The evolution of surrogacy arrangements has challenged conventional notions of family structures, necessitating careful consideration of the legal and ethical dimensions. As surrogacy involves multiple parties and intricate legal ties, finding an equitable balance among the rights of all stakeholders remains a significant challenge. It is crucial to pay particular attention to the welfare of the child, who often becomes the key point of contention in surrogacy cases.

Throughout history, the society's perception of children has gradually changed from being assets to the family and society to becoming fully independent individuals with the potential of becoming contributors to the society, with their own rights and responsibilities, especially the right to be involved and participate in any decision-making process concerning them by expressing their standpoints on the issue. The UN CRC, being the most important legally binding document as well as the most widely ratified among UN member states, managed to shift the adult-centrism approach to children in general.

However, cross-border surrogacy initiated complex discussions in both the law and society about the 'debiologisation' of family structures, overemphasising the role of individual freedom and desires and the emergence of technocracy in

45 Korać Graovac, 2021, p. 44.
46 Čulo *et al.*, 2019, p. 797.

family creation. These have definitely dismantled the traditional views on family and influenced the legal environment and solutions to filiation.

In the middle of the conflicting ethical and legal ideals, the intended child is stuck between the competing interests of the state and wishes of the intended parents. Moreover, the non-universal regulation on international surrogacy arrangements elevates the risk of a breach in the children's rights.

Articles 7 and 8 of the UN CRC, the best interest of the child principle, and the follow-up guidance and recommendations carried out by professionals from interdisciplinary fields intend to help navigate situations wherein the children's right to identity and their best interest in identity modification are challenged. The UN CRC and the identity regulations help the ECtHR in its decision-making and interpretation of the child's right in the context of cross-border surrogacy arrangements; herein, the competing interests are usually related to parental filiation and the legality of surrogacy arrangements.

The child's identity is encompassed in Article 8 of the CRC, and it seems that case law suggests that the ECtHR highlights the genetic parentage and the child's right to identity, underscoring the importance of legal recognition of parent–child relationships in surrogacy contexts. However, while prioritising the child's welfare, the ECtHR's approach may inadvertently undermine prohibitive regulations enacted by member states, effectively legitimising surrogacy in certain instances. That is why member states express reluctancy towards accepting the child's rights approach if they expressly prohibit surrogacy in their legislation.

Moving forward, it is essential for policymakers and legal authorities to appease the complexities of surrogacy with the fundamental rights of children, ensuring that legislative frameworks uphold the principles of the child's best interests and right to identity. Collaborative efforts at the international level are crucial to address the multifaceted challenges posed by surrogacy arrangements, safeguarding the rights and well-being of surrogate-born children in an evolving legal landscape.

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Augmentative and Alternative Communication (AAC) in a Child's Relationship with the Justice System

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Abstract. This article explores the incorporation of Augmentative and Alternative Communication (AAC) into the Polish justice system, focusing on its relevance for children, including those with disabilities. In 2023, Article 185e(4) of the Code of Criminal Procedure was amended to mandate the use of AAC methods during the interrogation of witnesses who face verbal communication challenges. These provisions align with international frameworks such as the Convention on the Rights of Persons with Disabilities (CRPD) and the European Parliament Directive 2012/29/EU, ensuring access to justice for vulnerable populations. The article examines the legal basis for AAC implementation, highlighting the principle of single-time questioning to protect witnesses and ensure substantive truth. It examines the unique needs of witnesses requiring AAC, including those with developmental disorders, sensory impairments, and intellectual disabilities, emphasising the role of experts in facilitating communication. Central to the analysis are three groundbreaking materials developed by the Institute of Justice and the Ministry of Justice: the 'Vademecum AAC', 'Boards Supporting Conversation', and 'Materials for Children and People with Speech Comprehension Problems'. These resources use systems such as Picture Communication Symbols (PCS) to bridge communication gaps and prepare children for interactions with the judiciary. The study underscores AAC's transformative potential in the justice system, enhancing child protection, ensuring equitable communication, and promoting rights awareness. It concludes that AAC is a crucial tool for preventing crime, empowering witnesses, and fostering inclusivity in judicial processes.

Keywords: augmentative and alternative communication (AAC), child witnesses, justice system accessibility, communication disabilities, Polish legal reforms

1. Introduction

A special procedure of questioning for witnesses – who have mental and developmental disorders, disturbances in the ability to perceive or reproduce perceptions, and where there is a justified fear that questioning under normal conditions could have a negative impact on their mental state or would be significantly difficult – was introduced in Poland based on Article 185e(4) of the Act of the Code of Criminal Procedure.[1] This article was added to the Code of Criminal Procedure pursuant to the Act of 13 January 2023 amending the Code of Civil Procedure and certain other acts.[2] Prepared by the Ministry of Justice, the amendment to the regulations aimed to:

> strengthen the protection of persons experiencing domestic violence through comprehensive regulation of not only civil law, but also criminal law, which is to supplement the solutions introduced by the Act of 30 April 2020 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws, Item 956).[3]

1 The Act of 6 June 1997, the Code of Criminal Procedure, that is, *Journal of Laws* of 2024, Item 37, as amended. Owing to the *novelty of the analysed* provision in the Polish legal system and the international nature of the publication, it is worth recalling at this point the content of the entire Article 185e of the Code of Criminal Procedure: 'Par. 1. If a witness has mental or developmental disorders, disturbances in his ability to perceive or reproduce perceptions, and there is a justified fear that questioning in conditions other than those indicated in this provision could adversely affect his mental state or would be significantly difficult, the witness is questioned only if his testimony may be of significant importance for the resolution of the case, and only once, unless important circumstances come to light, the explanation of which requires a new hearing, or if the motion for evidence of the defendant who did not have a lawyer at the time of the first hearing of the witness is granted.
Par. 2. The hearing is conducted by the court at a session with the participation of an expert psychologist, no later than within 14 days from the date of receipt of the application. The prosecutor, the defence counsel and the attorney have the right to take part in the hearing. A person referred to in Article 51 paragraphs 1 or 3 or an adult indicated by a witness has the right to be present at the hearing, if this does not limit the freedom of speech of the person being examined. At the main hearing, the video and audio recording of the hearing is played and the report of the hearing is read.
Par. 3. The expert psychologist participating in the hearing should be of the gender indicated by the witness, unless this will hinder the proceedings.
Par. 4. If the witness has problems with verbal communication, the questioning is carried out using the augmentative and alternative communication used by the witness. The hearing is attended by an expert with appropriate knowledge in the field of augmentative and alternative communication.
Par. 5. With regard to the witnesses referred to in paragraph 1, the provisions of Articles 185a to 185c shall not apply.'

2 *Journal of Laws* of 2023, Item 289.

3 See. Government of Poland, 2022.

Regarding the hearing in the manner specified, inter alia, in Article 185e(1), the legislator decided that it is to be conducted in appropriately adapted rooms at the court's seat or outside its seat and 'in another place, if justified by the individual needs of the witness and there is a possibility of recording the act with the use of an image and sound recording device'.[4]

Moreover, pursuant to Article 186f(2), a person questioned in accordance with the procedure specified in Article 185e 'shall receive information about the course, manner and conditions of the interrogation. The information shall contain a descriptive or graphic representation of the course, manner and conditions of the interrogation.'[5]

The amended provisions of the Code of Criminal Procedure also include a delegation to issue regulations by the Minister of Justice, in which, first, he will determine the template of information on the course, manner, and conditions of interrogation of persons referred to in Article 185f(2) of the Code of Criminal Procedure, considering the need for the persons questioned to understand this information.[6] Second, he will determine the manner in which such hearings are prepared and conducted and the conditions to be fulfilled by the rooms intended for the hearings, including their technical equipment, having regard to the need to ensure freedom of expression and a sense of security of the persons being interrogated, considering the individual needs of those persons.[7]

Thus, the Polish legislator considered the obligations under, inter alia, the Convention on the Rights of Persons with Disabilities (CRPD) signed in New York on 13 December 2006.[8] With respect to guaranteeing access to justice for persons with disabilities, a special mode of questioning them and, if necessary, the use of assistive or alternative communication was introduced into criminal procedure. Moreover, the adopted amendment considered Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.[9] The changes introduced in the Polish law were significant in its adaptation to the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence, completed in Istanbul on 11 May 2011.[10]

4 Article 185f, paragraph 1. K.p.k.

5 Moreover, as follows from the further part of this provision, 'At least 3 days should elapse between the service of the information and the date of the hearing, unless the interests of the proceedings prevent it. The provision of Article 171, paragraph 8 shall not apply'.

6 Article 186f(3) of the Code of Criminal Procedure.

7 Article 186f(4) of the Code of Criminal Procedure.

8 *Journal of Laws* of 2012, Item 1169 and of 2018, Item 1217.

9 *Journal of Laws* of the Republic of Poland. EU L 315, 14.11.2012, p. 57.

10 *Journal of Laws* of 2015, Item 961 and of 2021, Item 844.

Further, the solutions proposed in the Act referred to at the beginning seek to strengthen the position and increase the standard of securing the interests of minors who are victims and witnesses of crimes, as well as adults who are victims of crimes against sexual freedom and decency.

The aforementioned legislative changes in the Polish legal system justify the use of 'augmentative and alternative communication' (AAC).

This study aims to disseminate and internationalise the changes introduced into the Polish legal system, introducing new standards and a new quality in communication between the justice system and children, including children with disabilities. Therefore, the subject of the study is the analysis of the legal basis enabling the use of augmentative and alternative communication in the Polish justice system and the presentation of materials for augmentative and alternative communication prepared by the Institute of Justice in Warsaw and the Polish Ministry of Justice,[11] which are significantly novel in the field of protection of children's rights on an international scale.

2. Legal Basis

According to the explanatory memorandum to the Bill of 13 January 2023 amending the Code of Civil Procedure and certain other acts, the new solutions are for the hearing of witnesses who have mental and developmental disorders, disturbances in the ability to perceive or reconstruct observations, and there is a justified concern that questioning under normal conditions could adversely affect their mental state or would be significantly difficult.

> They are to make criminal procedure more accessible to people who take part in it. In particular, they aim to ensure that minors and persons with disabilities feel safe, and that the regulations concerning information about rights and obligations and instructing them are friendly and understandable and adapted to their needs resulting from their age, personal characteristics, as well as the nature of the crime committed against them. On the other hand, they also do not omit, in terms of the right to information, suspects up to 18 years of age, who should be obliged to receive all instructions in such a way that they understand them. Awareness of rights is inextricably linked with the right to defense.[12]

The legislator rightly assumed that the creation of friendly conditions for interrogation, adapted to the needs and methods of communication with

11 Pilch and Duda, 2024a.

12 Government of Poland, 2022.

the environment, of people with disabilities who have problems with verbal communication, will increase the detection of crimes committed to the detriment of these people, and thus eliminate the impunity of perpetrators who take advantage of, for example, the reduced means of informing law enforcement[13] authorities by these aggrieved parties. Considering the above, the Polish legislator, based on Article 185e § 4 of the Code of Criminal Procedure, imposed on the court the obligation to conduct the interrogation using the assistive and alternative communication used by the person being interrogated, if he or she communicates with the environment in this manner.[14]

An important issue that has not been resolved at the statutory level (because it did not have to) is the definition of the subjective scope of 'witness with special communication needs'. This term can be understood as people with severe developmental dysfunctions, with complex, multi-range disabilities, but also suffering from impaired hearing, deaf, deaf-blind, autistic, suffering from cerebral palsy, impaired motor functions, intellectual disabilities, strokes or head injuries. Although some people with special communication needs do not need the participation of a third party to be understood, in a group of people who are dependent in terms of communication, it is necessary to have a specialist in the communication process who can, for example, prepare the witness's statement and convey it verbally (e.g. formulate a sentence from graphic signs indicated by the patient) or, for example, translate content from the language (e.g. sign language) used by the witness.

The study conducted by Communication Matters in the UK reveals that adults who have not spoken since birth or became disabled during the age of majority predominate among people requiring ACC support, with this group including people who cannot communicate temporarily, for example, owing to medical treatment.[15]

Before a witness (including a minor) is questioned using the methods of augmentative and alternative communication indicated in Article 185e(4), certain conditions must be fulfilled. In Article 185e(1) of the Code of Criminal Procedure, the Polish legislator established the principle of necessity and single-time questioning, from which it follows that a witness with disabilities is questioned only if his or her testimony may be significant for the resolution of the case, and only once, unless significant circumstances come to light, the explanation of which requires a new hearing, or if the defendant's evidentiary motion is granted, who did not have a lawyer at the time of the first hearing of the witness. The

13 Government of Poland, 2022

14 For more on this topic, see: Wielec and Bojanowski, 2024, pp. 147–163.

15 Most often, ACC support is required by people with Alzheimer's/dementia 23.2%, Parkinson's 22.1%, and autism spectrum 18.9%. Communication Matters, 2013.

adoption of such assumptions by the legislator indicates that the regulation in question aims to protect the witness and the principle of substantive truth.[16]

As C. Kulesza notes, in relation to the previously applicable provisions of articles 185a–185c of the Code of Criminal Procedure, 'the commented provision is enriched with a regulation providing that if a witness has problems with verbal communication, the interrogation is carried out with the use of supportive and alternative communication used by the witness'.[17]

The Polish legislator, as part of persons with disabilities, has provided for the participation in the hearing of such persons by an expert with appropriate knowledge in the field of assistive or alternative communication.

3. Augmentative and Alternative Communication in the Polish Justice System

The concept of 'augmentative and alternative communication' (AAC) has not been defined in the Polish legal system. As Aleksandra Buchholz highlights, this term refers to all forms of supportive and alternative communication that allow non-verbal communication. Alternative communication aims to enable people to communicate in ways other than speech, whereas supportive communication is complementary to minimally present verbal speech.[18]

Augmentative and alternative communication includes various communication channels, comprising the use or co-application of different systems. Jerzy Skorupka suggests examples of the following systems: manual (e.g. sign language, dactylography, phonogestures), graphic (e.g. pictograms), tactile (e.g. Braille, point alphabet for the hand, Tadom's method, dactylography for the hand), and their various combined forms. During the interrogation, the witness may, for example, use aids in the form of pictures, paper and a pen, or communicate, such as through facial expressions or gestures.

Legal literature, under the term augmentative and alternative communication understands 'the functional use of tools and ways of communication (for understanding and broadcasting spoken and written messages) that supports, complements or replaces speech'.[19] In Poland, three basic systems of augmentative and alternative communication are used: graphic, gesture-based (i.e. manual), and spatial-tactile.[20]

16 Świecki, 2023.
17 Kulesza, 2023.
18 Buchholz, 2015.
19 Pilch and Duda, 2024a, p. 2.
20 See: *Alternatywne i wspomagające metody komunikacji,* Błeszyński, 2006.

The most popular systems used in assistive and alternative communication are systems based on graphic signs, which can be indicated using a finger, hand, pointer, or even sight. Ready-made sets of graphic symbols are Picture Communication Symbols (PCS), Pictograms, Makaton, MÓWik, WSL by Widgit, ARASAAC symbols, and extremely abstract Bliss symbols.[21] By way of example, Picture Communication Symbols is a database of over twenty thousand black and white (black outlines on a white background) and colour pictures organised into categories such as people, verbs, descriptive symbols, food, leisure time, and nouns. MÓWik is a database of over 12,000 symbols developed in Poland: black and white and their coloured equivalents, which can be found in the communication software of the same name.[22] It should be considered that communication with younger children and people with reduced intellectual potential can also be facilitated by photographs depicting people, objects, places, or activities of everyday use.

Gesture-based systems are a natural method of communication for children that accompany language development. Children shake their heads, which means a 'no', or they nod, which means a 'yes'. Similarly, adult gestures increase the quality and clarity of the message. One of the methods supporting communication of people with speech and language disorders is Makaton based on Polish Sign Language.[23]

The third system of communication by means of augmentative and alternative communication is the system of spatial-tactile signs, which aims to help in the transition from the pre-symbolic communication stage to communication by means of symbols that are as abstract as possible and in the acquisition of a formal language system. As A. Pilch and I. Duda highlight,

> [t]he actual objects can be both real objects and their fragments or miniatures. These can be artificially created symbols, or signs that have, for example, one or two features in common with the referent. They can be used in creating a system of communication with people with vision problems and in some cases with people with intellectual deficits.[24]

As part of the project of the Institute of Justice conducted in cooperation with the Ministry of Justice, the following materials for supportive and alternative communication in the justice system have been prepared: 'Vademecum AAC – Communication with people with complex communication needs', 'Boards supporting conversation during the hearing of a witness using AAC', and

21 Pilch and Duda, 2024a, p. 5 et seq.
22 Id., p. 7.
23 Kaczmarek, 2014.
24 Pilch and Duda, 2024a, p. 9.

'Materials for children and people with speech comprehension problems with AAC symbols preparing for meeting with the judiciary'. The authors of these three studies are Agnieszka Plich and Iwona Duda, whereas the consultants of 'Materials' and 'Boards' are sexologists Dr Izabela Fornalik, Joanna Płuska, and Justice Agnieszka Matysek. The draft by the Institute of Justice in Warsaw and the Polish Ministry of Justice are part of the activities aimed at implementing the provisions of two acts: the Act of 13 January 2023 amending the Code of Civil Procedure and certain other acts[25] and the Act of 28 July 2023 Amending the Family and Guardianship Code and Certain Other Acts.[26]

It is pertinent to enquire regarding a need for a system to support children's communication with the wider justice system – apart from the evident statutory indication cited in this academic article. Preschool and school-age children who have various speech problems should be provided with aids to communicate with others. Such aids could be communication books or high-tech devices with specialized software supporting communication. However, owing to the specific nature of activities conducted before the judiciary, books and devices of this type may lack the symbols required during a conversation with representatives of the judiciary, which will contribute to significant limitations in communication. 'Boards' and 'Materials' are to complement the communication aids that people appearing before the judiciary have so far used.

As the authors emphasize,

> each Individual Communication System of a person with complex needs in communication is unique and tailored to their needs. There are no two identical systems, so the aids we have prepared are not complete and sufficient. If necessary, they should be modified, supplemented, changed or expanded by the vocabulary they contain.[27]

In the 'Boards', prepared by the Institute of Justice in cooperation with the Ministry of Justice, the communication system was based on the Picture Communication Symbols (PCS) system. The symbols are black and white to not hinder reliable information. However, a page in colours is also available as a separate table.[28] This set of aids comprises 34 tables covering, among others, such issues as family, people, professions, activities, the body of a woman and a man, places, days of the week, sexual activities, the alphabet, and numbers. In addition, 32 tables prepared in the PCS system have been supplemented with two tables in the Mówik system, which concern the court and special issues.

25 *Journal of Laws* of 2023, Item 289.
26 *Journal of Laws* of 2023, Item 1606.
27 Pilch and Duda, 2024b, p. 3.
28 Ibid.

In turn, 'Materials' is intended to bring the complex justice system closer to children with complex communication needs. In these, the authors used the colourful PCS symbols used in communication aids to explain the intricate world of interrogation or hearing procedures in an attractive and simple manner.[29] These materials comprise 11 boards, covering issues such as interrogation, judge, witness, psychologist, hearing, as well as the rights of the child and the rights of the abused child.

4. Conclusions

The presented materials on the use of augmentative and alternative communication in relation to children are not only part of the implementation of the provisions of the Code of Criminal Procedure amended in 2023 but also an important element of respect for children's rights.

Despite the lack of a legal definition of the term 'augmentative and alternative communication', at the initial stage of application of the provisions concerning this form of questioning a witness (i.e. about a year after their entry into force) who has difficulties with verbal communication, it appears that such a definition is unnecessary. The long-standing use of this type of communication with children and people with disabilities confirms the effectiveness of the methods and the necessity of their use for an ever better and more complete protection of, among others, children who experience or witness violence.

The need and use of augmentative and alternative communication should not raise any doubts. Moreover, the view expressed by A. Plich and I. Duda that the boards they have prepared are only an introduction to the database of aids related to the prevention of crime and that this database will constantly grow.[30]

The materials prepared by the Institute of Justice in Warsaw and the Polish Ministry of Justice were provided to all courts in Poland as support for children in contact with the justice system.

29 Pilch and Duda (Ibid.) write about *Materiałach dla dzieci i osób...*: 'In addition, we have developed boards that synthetically talk about the rights of all children, especially abused children. We also wanted to show in an accessible and understandable form the dangers that children may face and how they can seek help.'

30 Pilch and Duda, 2024b, p. 4.

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From Social Innovation Project to Regular Service: The First Three Years. The Sure Start Children's House Service in Hungary

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Abstract. This study examines the development of the Sure Start Children's House service funded by the European Social Fund in Hungary. The topic has become relevant, especially as the Sure Start Children's House service has become part of the Hungarian social care and services system after almost 10 years of being a pilot and multi-cycle EU-funded project-based operation. The analysis in this article is based the strategic documents, project content, and legislative changes relevant to the service. Over the past two decades, several strategy documents have identified the challenges and development tasks for Roma children with social disadvantages, especially during preschool years. The sustainability of projects for alleviating child poverty has been brought to the fore under several aspects as projects have progressed and terminated, which is why it is significant that the Sure Start Children's House has become part of the child protection system since 2013, building on previous project experiences. The integration of this service into the national care system took place at the same time as increased support from the central budget provided the opportunity for a social innovation project to become a sustainable service, thus maintaining the initial results.

Keywords: social innovation, disadvantaged children, child protection and care system, social service design, social service system

1. Introduction

The importance of early childhood programmes in alleviating the reproduction of social inequalities is indisputable. Early childhood, defined as the first years of life, has a profound impact on a children's subsequent evolution. The quality of these early years has an impact not only on the life of individuals but also on the functioning, capacity, and cohesiveness of the local and wider community.

Information on child development and the experience of various early childhood programmes, both international and national, shows that arrested development is easier to reverse in the early years than later in life. In Hungary's disadvantaged regions, the combination of the out-migration of better-off families and the higher numbers of children in the remaining families, along with their low-income situation, long-term unemployment, precarious housing conditions, as well as the lack of efficient, quality services and other socio-economic factors, increase the proportion of children at risk of poverty. A significant body of research shows that children living in deprivation are at a much higher risk of poverty than children from average economic backgrounds. Hungary's accession to the European Union has provided significant resources for social regeneration programmes. One of these is the Sure Start Programme, which provides regular support for children living in deprivation and their families. The aim of the programme is to improve the development chances of children living in poverty from birth, especially in disadvantaged regions and municipalities.

2. The Process of Social Innovation According to the Regulations of the European Social Fund

The Sure Start Children's House service has become part of the Hungarian service and care system after nearly 10 years of being a pilot and multi-cycle European Social Fund project-based operation. This service-type social innovation has addressed and reached families and children aged 0–5 years old in the most disadvantaged settlements.[1] One basic principle of social innovation is that it provides innovative responses to social needs. Social innovation can be viewed as a process, so its nature can be examined.[2] Interpreting it as a process also implies that the social need to which social innovation can respond needs to be identified as part of social innovation. According to Regulation (EU) 1304/2013/EU[3] and Regulation (EU) 2021/1057,[4] the concept of social innovation is also reflected in the concept of social policy experimentation and its relation to social needs. The broad scope of social needs can be narrowed down by the fact that social policy experiments can be linked to policy interventions, that is, they can only respond to those social needs that are identified by the policy. The following

1 Balás, Baranyai, Herczeg and Jakab, 2016.
2 Veresné Somosi and Balaton, 2021.
3 Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006, OJ L 347, 20.12.2013, pp. 470–486.
4 Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013, OJ L 231, 30/06/2021, pp. 21–59.

question may thus arise: how are social needs identified by policy? Strategic planning documents can provide the framework and direction for multiannual policy interventions. A strategy is a pre-planned, long-term series of actions that enables the achievement of one or more objectives by providing the resources necessary for their implementation.[5] The adoption of national strategic planning documents is decided by Parliament or the Government. The need to prepare strategic planning documents may also arise from being a European Union Member State, from an international treaty or other international commitment, or from the decision of an autonomous regulatory body or the head of an autonomous public administration. A common feature of strategic planning documents is that they set out the situation and challenges relevant to their content and identify the objectives and lines of action based on these. The adoption of strategic planning documents by the National Assembly and the Government identifies societal needs which can form the basis for a social policy experiment. However, the following dilemma may arise: what happens if there is no adopted strategic planning document for a sector or area of intervention? The social need may still exist, but the main difference is that this need has not been set out by such a document. The need to create and adopt a strategy may not only come from within but also from the outside. An example is the Framework for national Roma integration strategies up to 2020[6] adopted in 2011, which calls on Member States to develop their national Roma integration strategies in line with EU objectives,[7] as well as make use of the EU initiative on social innovation, launched by the Commission in 2011 under the name European Platform against Poverty and Social Exclusion.[8] Regulation (EU) No 2021/1060[9] lays down eligibility criteria for the efficient and effective use of EU funding. Eligibility criteria are horizontal and thematic for the European Regional Development Fund, European Social Fund Plus, and Cohesion Fund. The regulation identifies the policy objective, specific objective, designation of the eligibility condition, and criteria for fulfilling the eligibility condition. For the European Social Fund Plus, such eligibility criteria are identified in existing policy strategy papers covering the active labour market, gender equality, all levels of the education and training system, social inclusion and poverty reduction, Roma inclusion, health, and long-term care.

5 Torma *et al.*, 2022.
6 European Commission, 2011.
7 Ibid.
8 European Union, 2011.
9 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down the common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, pp. 159–706.

The strategies to be adopted as a condition for eligibility should include a situation analysis, as well as setting out the social needs in the concerned area. Overall, strategy documents, regardless of the origin of the need to draw them up and adopt them, provide a strong framework for identifying social needs on the basis of which a social policy experiment can be launched. The definition of a social policy experiment was first set out in Regulation (EU) 2021/1057, but the concept was also included in Regulation (EU) 1296/2013. The socio-political experiment was one of the specific objectives of the Progress, as a way of developing and implementing methods for testing and evaluating innovative solutions as to improve them. According to Regulation (EU) 2021/1057, recital (34):

> Social experimentation is a small-scale project testing which allows gathering of evidence on the feasibility of social innovations. It should be possible and encouraged for ideas to be tested at local level and for those ideas that are feasible to be pursued on a wider scale, where appropriate, or transferred to other contexts in different regions or Member States with financial support from the ESF+ or in combination with other sources.

The policy rationale for social policy experiments has been explained above. In addition to soundness, two elements of the definition need to be highlighted: (1) the social policy experiment is small-scale and (2) social policy experiments must be designed in advance so that their effects can be later measured.

The evaluation of social policy experiments can aim to identify the causal effects of interventions and answer a simple question: what works? Evaluation can gather evidence on whether European Social Fund interventions actually change the circumstances of participants and the outcomes that result from these interventions.[10] Subsequent extensions are only justified for social policy pilots that really work, that is, are more efficient and effective than the traditional approach. The European Commission's publication, based on the National Endowment for Science, Technology and the Arts, provides an approach that balances the need for evidence with innovation, identifying five different levels of evidence for social policy pilots.[11]

At the first level of evidence, project implementers articulate why social innovation is important (i.e. why it is needed), but they cannot yet systematically describe how it works. Further evidence gathering (e.g. control group studies, subsequent external evaluation) shows not only that positive change has taken place but also that change has been brought about by the intervention. At the fifth level of evidence gathering, documents, procedures, and operational systems are in place to allow social policy experiments to be run and extended by other

10 European Commission, 2013.
11 Puttick, Ludlow, 2013; Barnett, 2020.

implementers elsewhere while continuing to have a positive and direct impact on the outcome and remaining financially viable.

The aim of implementing and expanding social innovation is to enable policies to respond more effectively to social change. The European Social Fund Plus regulation provides the possibility for innovations based on social policy experimentation to be pursued on a wider scale (including other locations, regions, Member States), with financial support from the European Social Fund and other sources. The process of social innovation under the European Social Fund Regulations is illustrated in *Figure 1*. However, it is necessary to add a capacity building element to the figure to help illustrate the process. Capacity building for testing social policy experiments, social and labour market policy innovations is included in the specific objectives of the Progress strand.

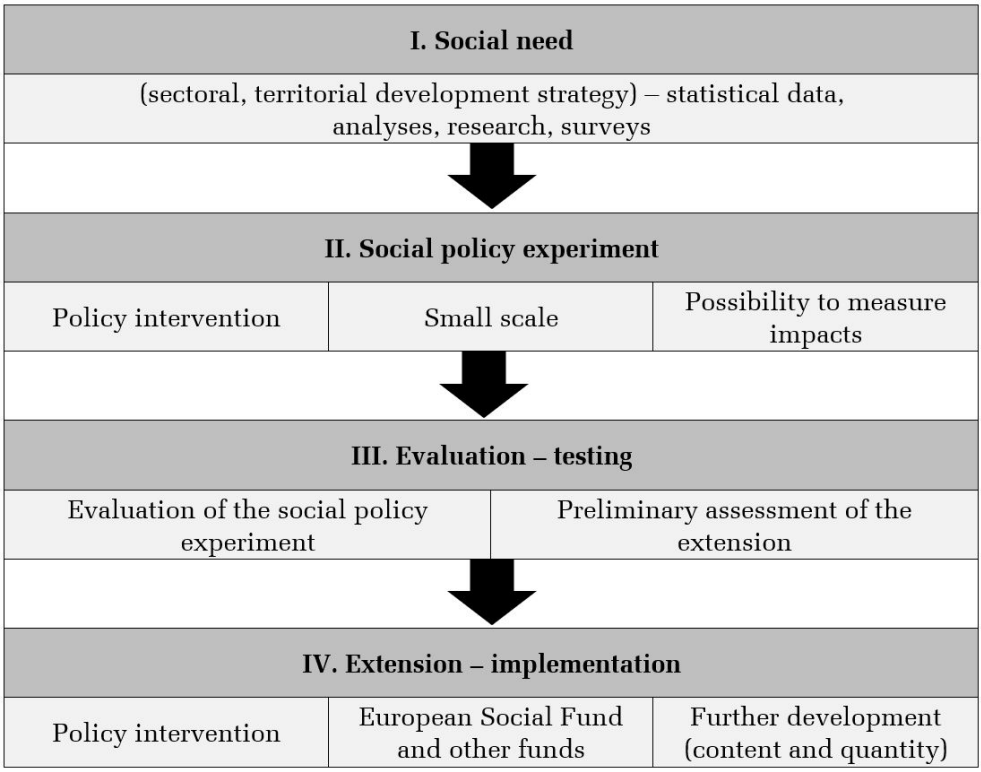

Figure 1. *The process of social innovation according to European Social Fund Regulations Note* (table elaborated by the author)

The social innovation policy process described above can be traced back to recent European Social Fund regulations. The description of the social innovation

process in the legislation appeared more than 10 years after the launch of the Sure Start Programme, so it may provide an interesting basis for examining the extent to which the Sure Start Programme as a social innovation has followed a similar or different path to the process described above.

3. The Sure Start Children's House in Hungarian Strategy Documents

In this section, the strategies formulated in Hungary over the past 20 years and the challenges they have identified, as well as proposals for the development of Roma children from socially disadvantaged backgrounds, will be introduced, with a focus on the pre-primary school period. I first present what these documents and strategies specifically refer to regarding the Sure Start Children's House concept. As previously indicated, strategies provide a framework and direction for policy interventions over a number of years in the form of strategic planning documents. Sectoral, horizontal strategies play a key role in shaping policy processes and planning multi-year actions.[12] Four relevant strategies were identified in the analysis of this topic: the Decade of Roma Inclusion adopted in 2007, the 25-year 'Better for Children' National Strategy, and the Hungarian National Strategies for Social Inclusion adopted in 2011 and 2021.

3.1. The Decade of Roma Inclusion

The Decade of Roma Inclusion is an international initiative to strengthen the socio-economic situation and social inclusion of Roma people in European countries with a significant Roma population that brings together governments, NGOs, and intergovernmental organisations. This programme focuses on the priorities of education, employment, health, and housing, and draws attention to the need to combat poverty and discrimination. The Programme was launched at a conference in Budapest in 2003, which resulted in the signing of the Decade of Roma Inclusion Declaration by the first eight participating Prime Ministers in February 2005. Twelve countries participated in the programme: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Montenegro, Romania, Serbia, Slovakia, and Spain. The Decree on the Strategic Plan for the Decade of Roma Inclusion (hereinafter the Plan) was adopted by the National Assembly of Hungary in 2007. The aim of the Plan was to create conditions for the social and economic integration of the Roma, improve their living conditions, improve Roma access to public services, and reduce and, in the long term, close the gap between the living conditions of the Roma and

12 Kocziszky, 2021.

the non-Roma populations. The Plan sets further sub-objectives in the areas of expanding integrated education and raising the level of Roma education in general, promoting Roma integration into the labour market and increasing their employment level, improving housing conditions, improving the health status of the Roma, and reducing discrimination against the Roma. The tasks set out in the Plan identify the most important and complex long-term measures to ensure the real social and economic integration of the poorest, including a high proportion of Roma, based primarily on the territorial concepts of disadvantaged areas, municipalities, and social aspects (e.g. deprivation, long-term unemployment, low educational attainment), or their intersection. However, only those objectives and measures that focus specifically on the development of children in need, including Roma children aged 0–6 years old (including pre-primary education), are relevant for this study.

The Plan identifies the challenges in the pre-primary education for children in need and Roma children, in particular their low participation in pre-primary education. According to the Plan, 88% of children aged 3–5 attend kindergarten nationally, but only 42% of Roma children. Data for the 2007–2008 school year show that 323,000 children were attending kindergarten in the year the Plan was adopted. Under the 1993 Public Education Act in force in 2007, although kindergartens are educational institutions from the age of three until the start of compulsory schooling, their attendance is not compulsory from the age of three. Compulsory pre-school education starts from the age of five as follows: in the year in which the child reaches the age of five, he or she must attend pre-school education for four hours a day from the beginning of the school year. One of the aims of the Plan is thus to ensure that Roma and severely disadvantaged children are included in pre-school education from an early age.

One o the identified challenges is a lack of places. The Plan identifies the need to provide access to pre-school services and to increase the number of places in settlements where the number of pre-school children is expected to increase, especially in the most disadvantaged settlements (with a higher density of Roma).

According to the Hungarian National Social Inclusion Strategy, more than 60% of Roma live in rural areas, mostly segregated areas, in very poor housing conditions. In settlements of between 1,001 and 3,000 inhabitants, 41% of Roma kindergarten-age children are found in rural areas, while the proportion is 66% in settlements with less than 3,000 inhabitants.[13] The Plan does not mention the pre-primary period, nor does it consider the importance of this period for children's development, the related institutions, professionals, regulatory and funding areas, and the overall challenges of the functioning of this institutional system specifically affecting Roma and disadvantaged children. Following the

13 Babusik, 2003.

adoption of the Plan, the Government adopted a Decision on the Government Action Plan for the Decade of Roma Inclusion Strategic Plan for 2008–2009.

Government Decision No 1105/2007 (27.12.2007) on the Government Action Plan for the Decade of Roma Inclusion Strategic Plan for 2008–2009 I. Point 1 of the tasks in the field of education specifically refers to the Sure Start Programme. According to the decision, at least five programmes should be launched under the Sure Start Programme to support pre-school children aged 0–5 years old and their families in the most disadvantaged localities and municipalities, break the cycle of deprivation, and implement early skills development. The results of the programme should be taken into consideration and the programme extended nationwide.

3.2. The 'Better for Children' National Strategy

The 'Better for Children' National Strategy is a 25-year programme adopted by Parliament in 2007. Its immediate antecedent is the work of the Research Centre for Social Sciences against Child Poverty of the Hungarian Academy of Sciences, prompted by the increase in poverty after the regime change, especially the growing poverty and inequality of children. Set up in 2005 at the initiative of the Prime Minister, the Child Poverty Programme Office was mandated to develop a strategic programme to reduce the number of children living in poverty. The basic principle of the programme is that child poverty reduction became a priority in the government's efforts to reduce poverty and social exclusion. One of the core objectives of the 'Better for Children' National Strategy is to gradually but significantly improve the situation of Roma people, in particular the opportunities for Roma children.[14] This National Strategy is based on three main reasons: (1) all poverty causes suffering, but child poverty is intolerable; (2) the need to break the cycle of poverty; and (3) the interest of all in the sustainable economic and social development of the country. While the 'Strategy recognises that Hungary has a well-established institutional system with a network of child protection services, nurseries, kindergartens, and public education, which could provide opportunities to counteract the disadvantages of children living in poverty, it is precisely the most disadvantaged families and children who are excluded from care and forced into the least comprehensive and least effective care. Moreover, the lack of daycare services in many places and the fact that the most disadvantaged are the least well provided for makes it difficult for parents with young children to work. This is why the 'Better for Children' National Strategy specifically addresses socially vulnerable children aged 0–5 years, their parents, and the related institutional system. The lack of daycare for children undermines both parents' but especially women's chances in the labour market and children's integration in school and subsequent social

14 Ferge, 2006; Darvas and Ferge, 2012; Albert, 2014.

integration. The National Strategy notes that there are significant capacity gaps in the provision of care for young children under the age of 3 in Hungary, especially in smaller settlements. The most common institutional form is the *crèche*, but it does not operate in smaller settlements, and the institutional integration which provides both nursery and *crèche* care in a more cost-effective way has not spread. Children from families with multiple disadvantages are more likely not to start kindergarten at all or start it much later (at the age of 5–6). The 'Better for Children' National Strategy identifies several key priorities for reducing child poverty, such as ensuring that all families with children have access to healthcare and information on care systems and services. Reducing the spatial disparities in care would significantly improve access to services, thus reducing health inequalities. The 0–3 years old age group should be a priority target group, as the quality of life and early development provided at this age have a fundamental impact on the child's further development, health, mental health, and life chances. The 'Better for Children' National Strategy mentions the Sure Start Children's House programme, which was launched in the 2000s in one place only and not as a regular service, referring to early childhood development.

3.3. Hungarian National Social Inclusion Strategy

The Hungarian National Social Inclusion Strategy for the period of 2011–2020 (HNSIS) was adopted by the government in 2011 to comply with an EU obligation. The HNSIS and the policy of inclusion aim to reduce the proportion of people living in poverty or social exclusion, lower the social disadvantages of children, weaken the tendencies of poverty transmission, reduce the social differences between Roma and non-Roma populations, and improve the situation of Roma women. By adopting the HNSIS, the government also aimed to integrate into the catching-up policy the strategies concerning children living in poor families, Roma issues, and disadvantaged areas, such as the Decade of Roma Inclusion, the 'Better for Children' National Strategy, and strategies and concepts for specific problem areas relevant to poverty. The HNSIS has been prepared in the light of the Commission Communication on the EU Framework for National Roma Integration Strategies adopted in 2011 (mentioned above). The HNSIS comprises three major units: situation analysis, objective, and measures. The three-year action plans for the measures related to the HNSIS are adopted by government decision, indicating the government body responsible for the measure and the budgetary resources that can be allocated to it. The HNSIS has a separate chapter on child wellbeing and emphasises the need for the early identification of differences in physical and mental development, early intervention, and early childhood care and education (under 3 years), especially in service-poor settlements. On the one hand, the HNSIS 2011–2020 already refers to the Sure

Start Children's Houses as innovative early childhood services that, following EU development, have become an integral part of the care system by being integrated into the Hungarian child protection system. On the other hand, a further objective is to expand the network and range of services of the Sure Start Children's Houses in disadvantaged municipalities and districts, also with EU funding. According to the Central Statistical Office, there were 58 Sure Start Children's Houses in 2013 at the end of the first EU development cycle, and EU development has increased the number to more than 110 in 2014.

The HNSIS 2030 strategic plan was adopted by the Government in 2021 and sets the direction for the catching-up policy until 2030. The strategy adopted in 2021 is essentially unchanged from the one adopted in 2011. Its areas of intervention cover the same areas as the previous strategy, but with greater emphasis on certain areas. HNSIS 2030 underlines that the basic aim of child welfare services, child development services, daycare, and many other child welfare measures in Hungary is to ensure that children of nursery and of kindergarten age receive quality early childhood education, development, social, health, psycho-social, and mental health support that creates the conditions for healthy development. It also stresses that the development of children from families living in poverty can be seriously delayed since the early years, even during the mother's pregnancy. The lifestyle of expectant mothers, physical and psychological stress, and harmful addictions can all affect the development of the foetus. In addition, premature birth and low birth weight are in no small part due to social factors (lack of income and poor housing conditions). One of the main risk factors for a low birth weight is the young age of the mother. In the context of the Sure Start Children's Houses, the HNSIS 2030 also recognises the importance of increasing the number of services and sets the objective of expanding these on a territorial basis. It assigns a specific number and a deadline to this objective: according to the Central Statistical Office, 185 services were operational in 2022.

In summary, all strategies and related action plans reflect the importance of pre-school development and of support for socially disadvantaged, including Roma, children, as well as the need to improve the institutions and service systems that deliver it. The existing strategies identify the Sure Start Children's Houses as a pilot project to be developed and as a service to be expanded based on legislation.

4. The Sure Start Children's House Service in Hungarian Legislation

If you search the Hungarian legal directory for the term '*Biztos Kezdet Gyerekház*' (Sure Start Children's House), you will find numerous (27 as of February 2024) pieces of legislation, including laws, government and ministerial decrees, and

government and ministerial decisions. The search does not include legislation repealed since 2012. The legislation thus provides for the purpose, definition, basic operating and funding rules of the Sure Start Children's House, as well as the responsibilities of certain government institutions in relation to the service, resource content, links to strategic plan documents, status of staff working in the service, and the awarding of professionals who have been recognised for their outstanding work in relation to the service. This list alone shows the wide-ranging legislative work that has been carried out since the first Safe Start for Children Act.

This section is not intended to provide a detailed description of the legal environment of this service but rather to set out the main stage in this respect. In particular, it examines the professional and financial regulatory environment of the service and its changes.

In Hungary, the Sure Start Children's House as a service was not legally established for almost 10 years after the programme was launched in 2003. The Sure Start Children's House programme was initially launched on a pilot basis in seven municipalities, initiated and funded by the then Ministry of Youth, Family, Social Affairs and Equal Opportunities. The continuation and development of the programme was made possible by the EEA and the Norwegian Financial Mechanism 2004–2009. The continuation and dissemination of the programme has also been enshrined in government strategy documents such as the Decade of Roma Inclusion Programme or the Better for Children National Strategy. The EEA and Norwegian funded project aimed at developing services for children and families with children in 13 municipalities of the Szécsényi microregion having a population of 20,000 people in 2005, of which more than 4,000 minors.[15] The Szécsényi microregion is located in the disadvantaged north-eastern part of the country, characterised by high unemployment, a high proportion of Roma settlements, and socially disadvantaged people. In 2009, the first two European Social Fund calls for proposals were launched to roll out Safer Start programmes focusing on early intervention. The aim of the two calls was to establish and run Safe Start Children's Houses that provide regular care for children aged 0–5 living in poverty, monitor children's development and detect possible developmental disorders, encourage healthy eating, and help parents prepare for having and welcoming children, including childcare and education. The two calls for proposals differed not in content but in territorial focus, ensuring that part of the resources available for this purpose were specifically targeted at the most disadvantaged localities.

The application guidelines defined the Safer Start activities, which focused on the children, parents, professionals working with them, community of the municipality, as well as the creation of the material environment and purchase of equipment related to the related professional tasks. The tender specifications also

15 Fresno, 2010.

included requirements regarding the regularity of services, the number of children who could be involved in the project, the professional skills of the implementers, and the infrastructure and the material conditions of the Sure Start Children's House. From an infrastructural viewpoint, the programme was expected to be implemented in a dry, well illuminated space of at least 70 m^2, with outdoor access and a room of at least 30 m^2 for the children's activities, a small room, a bathroom, a warming kitchen, and a hall. The projects would take 2–3 years to complete. An important feature of the programme is the voluntary involvement of the target group and the voluntary commitment of the service provider.

The sustainability of projects against child poverty has been highlighted under several aspects during the progress and closure of the projects. Sustainability is not only related to the long-term availability of resources but also to the ability of projects to integrate into existing institutional and service structures once they have proven to work well and contribute to improving the situation of the Roma.[16]

The application documents referred to in this section, despite the fact that they are not legislation but application principles, provided the basis for the development of the content of the Sure Start Children's House that can be enshrined in legislation. With the closure of the tenders for the development of the Sure Start Children's Houses, the need to develop the regulation of the Sure Start programme, which has been tested and developed over several project cycles, has been strengthened.

The concept of a Sure Start Children's House was introduced in 2012 by Act XXXI of 1997 on the Protection of Children and Guardianship Administration. At that time, the Act did not contain a definition of the service but an enabling provision allowing the Minister to regulate its professional tasks and operating conditions by a decree. According to the Act, the purpose of the Sure Start Children's House is to provide preventive services to support the healthy development of children with socio-cultural disadvantages, especially disadvantaged or multiply disadvantaged children, to compensate for their developmental delays, strengthen parental competences, and ensure social inclusion for parents and children under kindergarten age. In addition to defining the purpose of the service, the law also provides that the Sure Start Children's House would cooperate with child welfare services, child protection services, nurseries, other children's institutions, and, if necessary, other members of the social protection signalling system to ensure the successful social integration of the child and the family.

The detailed technical rules for the service are laid down in a ministerial decree from 2013. The provisions of NM Decree No 15/1998 (IV. 30.) on the professional tasks and conditions of operation of child welfare and child protection institutions and persons providing personal care for children, which also apply to Sure Start Children's House, entered into force on 8 March 2013.

16 Fresno, 2010.

NM Decree No 15/1998 (IV. 30.) regulates the mandatory and non-mandatory tasks of the Sure Start Children's House, its opening hours, the scope of service users, the number and qualifications of its staff and its relationship with the child welfare service and the public health nurse. It also provides for the regulations on the location of the services and the equipment to be used by the children. The Decree has been in force for 5 years; although certain sections have been amended, its content remained essentially unchanged.

Regarding professional regulation, the major change occurred on 1 January 2019, when the Sure Start Children's House was regulated together with the Kindergarten Service in Act XXXI of 1997 in a new subchapter, the Children's Opportunity Services. The reason for the amendment is as follows:

> The Sure Start Children's House is a service that has been the result of a development process across government cycles and is gradually becoming an integral part of the child welfare system. The Children's Houses, which have completed EU development, have received central budget support since 2012 and the service has been included in the Act XXXI of 1997 since 2013. As a new form of care, the Sure Start Children's House needs to be specifically named among the basic child welfare services. However, unlike other child welfare services, the operation of the Sure Start Children's House is not a compulsory municipal task. The specific functioning of the Sure Start Children's House reflects the fact that it does not fall under all the general rules applicable to basic child welfare services (e.g. voluntary use, no fee expected from the target group, no need to operate an advocacy forum, etc.). It is also necessary to change the purpose of the Sure Start Children's House service, as the compulsory kindergarten education has made the target group children and their parents who are not yet in kindergarten. In order to define the target group more precisely, it should also be specified that it includes primarily children in receipt of regular child protection benefits and their parents. The inclusion of children and their parents eligible for regular child protection benefits as a target group instead of disadvantaged and multiply disadvantaged children is appropriate because disadvantaged and multiply disadvantaged children under the age of 3 are rarely identified as such, but the eligibility for regular child protection benefits is.[17]

Following the amendment of Act XXXI of 1997 in 2018, the detailed professional content of the Sure Start Children's House and Study Hall services was issued in a new ministerial decree. Namely, EMMI Decree No 40/2018 (XII. 4.) on the professional tasks and operating conditions of children's services to improve

17 Translation by the author.

opportunities regulates the professional tasks and operating conditions of the Sure Start Children's House. The professional rules have been amended several times over 10 years, but the original purpose and professional content of the service has not changed. It remains a service of prevention and social inclusion for socially deprived children of pre-school age and their parents.

The first national budget funding for Sure Start Children's Houses became available in 2012, under which 41 services received support. In 2024, the number of supported services was set to be 173. In 2012, the central budget allocated HUF 183 million to support the operation of 41 services. As the number of services has grown, the amount of funding allocated has steadily increased. The central budget for the Sure Start Children's Houses stands at HUF 1,829.4 million under Act LV of 2023 on the Central Budget of Hungary for 2024. This document does not allow for a description of the legislative changes concerning the financing of the service. However, it is necessary to state that the funding of the service has changed over the last more than 10 years so that it has created a stable basis for the predictable operation of the service, including the continuous increase of the subsidy, support of the annual salary compensation of the staff, and continued operation of the new EU-funded Sure Start Children's Houses from the national budget.

5. Conclusions

On 13 December 2023, the Deputy State Secretariat for Social Inclusion of the Ministry of the Interior organised an event titled '10 Years of the Child Protection Act – National Meeting of Sure Start Children's Houses'. The aim of the event was to celebrate the fact that the Sure Start Children's House service became part of the child protection system under Act XXXI of 1997 since 2013. After 20 years, the social innovation pilot programme became a legally established service. A key role in launching this process was played by the reinforcing social science work that grounded and strengthened the local work and its wider context.

The importance of early childhood programmes was already articulated at the strategic level by the government in its early years, which provided the basis for allocating resources to the task. The development of the Sure Start Children's House service has been supported by EU funding over several cycles, namely 2007–2013 and 2014–2020. The sustainability of the results of project-based developments is key, which is why it is essential that an initiative that starts as a pilot programme continues to operate as a service in a stable legal and funding environment based on several years of policy development.

According to data from the Central Statistical Office for 2022, more than 24,673 children under the age of 3 are in receipt of regular child protection benefits, of whom 9,028 face multiple disadvantages; of the latter, only 1,883 are in daycare.

The number of children receiving regular care in Sure Start Children's Houses was 2,407 in 2022 according to the Central Statistical Office. The question is: What can be done to ensure that children aged 0–3 who are not reached by services can also receive help that strengthens their chances of adequate development?

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Humanitarian Corridors: Solidarity, Security, and Legality in Handling the Refugee Crisis[1]

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> *'Meet the thirsty, bring them water; […] greet the fugitives with bread. They flee from the sword, from the whetted sword; From the taut bow, from the fury of battle.'*
>
> Isaiah 21:14–15[2]

Abstract. Our contemporary world is marked by global disorder, similar to a 'Third World War fought piecemeal'. The number of armed conflicts is on the rise and so is the number of refugees. Fleeing violence and misery, they are abused by human traffickers and tens of thousands lose their lives in the Mediterranean or the Sahara. The EU, UN, and governments have been struggling to find an institutional answer. There is room for innovative ideas. This study presents the 'humanitarian corridors', designed by the Community of Sant'Egidio and implemented by flexible coalitions of public and private subjects, including religious communities, NGOs, and families. The purpose of the corridors is to save lives and establish a 'best practice' combining solidarity, legality, and security for migrants and host country alike. The corridors operate in a clear division of labour between state authorities and civil society. Sant'Egidio and other proposing organizations receive quotas from governments, which they fill with asylum seekers, selected from the most vulnerable among them in refugee camps in Lebanon, Libya, Ethiopia, etc. The consular authorities issue the necessary entry visas, after appropriate security checks. Once in the host country, the authorities decide on their asylum claims. Their travel costs and essential needs during an initial period in the host country are covered by the sponsoring entities. Ghettoization is avoided. The state budget is not involved. Nor do humanitarian corridors require new legislation: they

1 The present study owes a great deal to Roberto Morozzo della Rocca's book 'Corridoi umanitari', Edizioni San Paolo, Milano, 2023. I would like to express my gratitude also to Daniela Pompeji, Maria Quinto, Jan De Volder, and other friends in the Community of Sant'Egidio, whose generous and tireless work for the humanitarian corridors inspired me to write this.

2 The New American Bible.

make use of existing national and EU laws. At present, Italy, France, and Belgium have humanitarian corridors in place, based on memoranda of understanding signed by the respective governments, Sant'Egidio, and other partner organizations. This study presents some of the MoUs.

Keywords: humanitarian corridor, asylum, refugee, Sant'Egidio, social integration, migration

1. A World in Disarray

'Nothing but peace can stop refugees': I read this slogan on social media sometime during the refugee crisis in the summer of 2015. Then, nearly half a million refugees had passed through Hungary in a matter of a couple of days. Most of them had arrived from war-torn Syria via Turkey. As we know, civil unrest broke out in Syria during the 'Arab Spring' in March 2011. By mid-2012, it had degenerated into a chaotic civil war, a *bellum omnium contra omnes* in which each warring faction had its own foreign sponsor on which to rely for arms and money. Yet it was not until a few years later that a large segment of the population began to lose faith in the future of their once flourishing country and chose to leave. They were looking for a future, a new start for their children – like three-year old Alan Kurdi, whose lifeless body washed ashore near Bodrum, Turkey in September 2015. The photo of the little boy, lying face down on the sandy beach, as if only asleep, made the front page of leading newspapers around the world and led to a wave of solidarity from the public and governments alike. The most notable example was the decision of the German government to receive up to 1 million refugees from Syria. Although the wave hit high, the wavelength proved short: the tide of the humanitarian enthusiasm soon receded, giving way to 'refugee fatigue' and the by now customary security concerns.[3]

With the proliferation of wars throughout the 2010s and 2020s, the global situation went from bad to worse. The number of refugees kept rising. According to statistics published by the UNHCR, by the end of 2022, 108.4 million people had been forcibly displaced as a result of persecution, conflict, violence, human rights violations, and events seriously disturbing public order – 1 in every 74 habitants of our planet. In the decade between 2012 and 2022, the figures more than doubled.[4] 'Forcibly displaced' is a heterogeneous category: only a minority of those who are forcibly displaced have access to a regular asylum procedure, whereas the majority consists of internally displaced persons, many of whom populate vast, open-air refugee camps, especially in countries like the Democratic Republic of the Congo and Ethiopia. Migratory pressure is mounting in Europe,

3 Decety, 2024, 52.

4 United Nations High Commissioner for Refugees, 2023.

but the overwhelming majority of refugees and displaced persons still struggle to survive in places near their homes. At the same time, the number of more or less open armed conflicts has surpassed 100.[5] This made Pope Francis claim that the Third World War is already ongoing, albeit in a piecemeal fashion.[6]

Entire regions are turning into theatres of war. From the Sahel Belt, a series of military takeovers have spread towards the Horn of Africa, giving rise to a new geopolitical term, the 'Coup Belt', which stretches from Ivory Coast to Sudan. The regional chaos intensified after a popular uprising, and Western military intervention put an end to Colonel Gaddafi's regime (and life) in Libya in 2011. Since then, the country has virtually split into its two ancient provinces, Tripolitania and Cyrenaica, with two competing 'governments', warlords, and militias. In Libya, enormous detention centres host migrants, *en route* to Europe, trapped between the Sahara Desert and the Mediterranean Sea. These facilities are often run by armed militias or criminal gangs that thrive on trafficking in human beings and extortion. Many describe these facilities as concentration camps where torture, rape, and murder are commonplace.[7] A fact-finding mission of the UN reported widespread 'terrible violations and abuse'.[8] The migrants, most of them sub-Saharan Africans, including families with children as well as unaccompanied minors, have to choose between a perilous voyage across the Mediterranean or staying in Libya.

Since 2011, the Mediterranean route has seen a dramatic increase in crossings. The number of landings on Italian shores was 4,406 in 2010. In 2011, the figure rose abruptly to 62,261 only to stabilize at a lower rate until 2014, 2015, and 2016, which saw record numbers: 170,100, 153,842, and 181,436 respectively. The wave of migrants then ebbed significantly, to 11,471 by 2019[9] only to rise again in the 2020s. Statistics of the Ministry of Interior show 105,131 and 157,651 landings for the years 2022 and 2023 respectively.

Another crisis broke out in Afghanistan when the Taliban retook control over most of the country, reconquering Kabul on 15 August 2021, taking advantage of the clumsy evacuation of American, British, and other Western troops. In a matter of 2 weeks, as many as 100,000 people had to be airlifted to Europe and the US: Afghani whose lives were in danger because they were regarded as collaborators of Western powers. In the following months, many more would try to escape via Pakistan and Iran. The pressure has not subsided much since but the willingness on the part of Europe to take them in has. The Taliban are apparently not willing to guarantee even the most basic human rights. Those who had believed that the

5 Armstrong, 2023.
6 Pope Francis, 2023.
7 Mannocchi, 2019; Latza Nadeau, 2021.
8 UN News, 2022,
9 Morozzo della Rocca, 2023, p. 19; Openpolis, 2023.

20 years of massive Western intervention would lead to a new, democratic and free Afghanistan were bitterly disappointed.[10]

In a world already in disarray, Russia invaded Ukraine on 24 February 2022, triggering a new refugee crisis on an enormous scale. This time, Europe's attitude has been welcoming towards the millions of Ukrainians fleeing the war.

2. The Genesis of a Response

We face a paradox. Europe has the world's most developed legal system, with a highly elaborate *acquis* in the field of asylum. At the same time, the high level of protection is of use only for those who manage to arrive in the EU. However, it is difficult for a refugee to arrive in the EU alive and next to impossible to arrive legally. This is because the EU has been raising a sophisticated material and immaterial fence to keep them out. It includes a *quid pro quo* approach to development cooperation towards third countries. Aid, visa facilitation, and other benefits are often conditioned on the willingness to check emigration and to take back their own nationals if expelled from one of the Member States. This is well illustrated by the replacement of operation 'Mare Nostrum' with 'Tritone'. After the first tragedy off Lampedusa in 2013, in which 313 migrants lost their lives,[11] the Italian government launched and funded 'Mare Nostrum' with the mission to intercept ships carrying migrants and to rescue them if in danger. By cautious estimates, Mare Nostrum, by means of the Italian Navy, might have saved as many as 100,000 lives. Some Member States, however, were not impressed: they were afraid that the reduced mortality of the Mediterranean route might be perceived as a pull factor. After 12 months, Mare Nostrum was abandoned and replaced by 'Triton', an operation funded and carried out by the EU, with the focus shifting from saving lives to protecting the external maritime borders.[12]

The humanitarian corridors in their present form originate from the initiative of the Community of Sant'Egidio. This community was founded in 1968 by a then 18-year old Catholic student, Andrea Riccardi in Rome. Riccardi asked a simple question: how does one live the Gospel in a post-modern urban society which has produced progress and wealth but preserved, and occasionally even enhanced, injustice and solitude? He invited his friends to read the Bible together and make friends with the poor. The movement, whose membership is composed almost exclusively of lay people, started to spread across four continents in the late 1980s and distinguished itself in humanitarian missions, ecumenical and interfaith dialogue, as well peace initiatives, like the one that in 1992 put an end to the

10 Morozzo della Rocca, 2023, pp. 176–177.
11 UN News, 2013.
12 Morozzo della Rocca, 2023, p. 36.

civil war in Mozambique. Pope Francis summed up the work and spirituality of Sant'Egidio in three 'p' letters: *prayer*, friendship with the *poor*, and *peace*.[13]

The presence of numerous communities of Sant'Egidio on the African continent implies a close contact with social strata that are the main sources of emigration. The typical African migrant is a child or young adult person and belongs to the middle or lower-middle classes. In fact, the poorest cannot save thousands of dollars for the journey, which may take as long as 2 years. Sant'Egidio does not promote emigration. On the contrary, the members of the community in Africa are encouraged not to abandon their countries but to rediscover a new kind of patriotism, a new faith in the future of Africa.

Sant'Egidio is a witness to the tragedy of forced migration, especially in Italy. Italy is at the receiving end of the deadly Mediterranean route. According to international agencies, the number of dead and missing between 2014 and March 2024 was close to 30,000.[14] Credible estimates put the combined death toll at circa 41,000 during the 30-year period from 1991 to 2021.[15]

As early as 1984, a humanitarian corridor *ante litteram* was established to bring 33 Christian refugees from Lebanon – elderly people, unable to move on their own, who had lost their homes in the civil war. The mission seemed impossible. By virtue of a geographic reservation to the 1951 Geneva Convention, Italy was not obliged to grant asylum to refugees if they were not from Eastern Europe, but the government made an exception in the end. A similar but even more dramatic scenario emerged in 1986 in the context of the war between Iran and Iraq. A group of 150 Chaldean Christians, most of them families with small children, had fled the war and conscription for men. They were roaming helplessly about the mountainous region between Iraq and Turkey, pushed back several times by the Turkish authorities. Intensive and complex negotiations between Sant'Egidio, the UNHCR, and the Turkish and Italian governments at first led nowhere. The deadlock was caused by the non-conformity of the names and identities of the refugees with the data Ankara had. The activists of Sant'Egidio searched for the refugees in the mountains of Iraqi Kurdistan and managed to compile a new, updated list. An important lesson for future humanitarian corridors was learned: in times of war and humanitarian crises, every list, if kept with precision, can prove to be Schindler's list, saving lives. The 150 refugees were granted asylum in Italy. Eventually almost all of them resettled in Canada, welcomed by relatives and members of the Chaldean diaspora there. Sant'Egidio prepared and accompanied the process and thus became familiar with the Canadian sponsorship system, emphasising the engagement of civil society in receiving and integrating migrants and refugees. The Canadian model provides for board and lodging, clothing,

13 Sant'Egidio, 2014.
14 International Organization for Migration (IOM), 2024.
15 Morozzo della Rocca, 2023, p. 31.

and healthcare for a year. Elements of the Canadian know-how were adopted as building blocks for the humanitarian corridors 30 years later.[16] Perhaps the most important gain was the partnership with governments, international organizations, NGOs, churches, religious leaders, communities, and civil society. In fact, the humanitarian corridors require a complex, multidisciplinary approach.

3. The Resurrection of Article 25

By the mid-2010s, it had become clear that the paradigm in Europe was unlikely to change any time soon; the main policy thrust would continue to be the tightening of border controls and the lack of meaningful opportunities for legal immigration. The Community of Sant'Egidio began to understand that the only way to respond to the immense humanitarian need was to explore avenues or at least niches in the existing European and national legal frameworks.

The first legal norm that looked promising was Council Directive 2001/55/EC.[17] This directive offers temporary protection to displaced persons in the event of a sudden, mass influx of refugees and aims to balance the efforts between Member States in tackling the emergency. The directive was originally adopted in response to the Kosovo crisis. Not all Albanian Kosovar refugees were eligible for asylum under the Geneva Convention, but through EU legislation it became possible for them to obtain short-term, renewable visas on humanitarian grounds.

Directive 2001/55/EC lay dormant for about 20 years, even though emergencies on the external borders of the EU proliferated. Only in 2022, with Russian aggression against Ukraine, was it dusted off and applied. Nonetheless, for the purposes of the establishment of humanitarian corridors, this directive proved, after all, unworkable.[18]

At this juncture, the attention of Sant'Egidio turned to another EU norm, namely Article 25 of the Schengen Visa Code.[19] This provision makes it possible for member states 'exceptionally' to issue visas with limited territorial validity (LTV) on humanitarian grounds, for reasons of national interest or because of international obligations. LTV visas do not entitle their holders to travel freely in the Schengen area until they are granted asylum. Article 25 hinges on the interpretation of the term 'exceptionally'. Hitherto, member states rarely availed themselves of Article 25. When they did, it was for the medical treatment of patients in serious health conditions from third countries, deemed incurable

16 The Global Compact on Migration, adopted by the General Assembly of the UN, cites 'private and community sponsorship programmes' among the possible durable solutions. Global Refugee Sponsorship Initiative, no date.

17 Council of the European Union, 2001.

18 Morozzo della Rocca, 2023, p. 78.

19 Visa Code, 2009.

there. However, a more generous interpretation of the provision seemed quite possible.[20] Article 25 was to become the cornerstone of the humanitarian corridors.

The first memorandum of understanding (MoU) on a humanitarian corridor between the Italian government and a 'coalition' of Christian entities, including Sant'Egidio, was signed on 15 December 2015. This MoU allowed for the reception of up to 1,000 refugees from refugee camps in Lebanon.

Other agreements between the Italian and other governments were to follow the same pattern. For Italy, the MoU on Lebanon was renewed in 2017 and in 2021, and further MoUs were added: two on Ethiopia (2017, 2019); one on Greece, concerning the refugee camp on Lesvos (2020); one on Libya (2021); and one on Afghanistan (2021), after the rash evacuation of Western military and civil personnel. Thereafter, four other European governments joined this 'coalition of the willing': France, Belgium, Andorra, and San Marino.

It is worth highlighting the continuity in how well-founded the humanitarian corridors are. Although they are inspired by an ideal that one may call Christian humanism, its creators have always kept it off the ideological battleground. They rather took a pragmatic approach, which eventually resulted in multi-partisan support by successive Italian governments of different political affiliations. The project has managed so far to navigate with impressive safety through the rough waters of Italian politics from the centre-left cabinet of Matteo Renzi in 2015 all the way up to Georgia Meloni's right-wing government.[21]

4. Synergies

From the very beginning, it was clear that the realization of the humanitarian corridors would be possible only through collaboration among a wide range of stakeholders: countries of origin and host countries, international organizations, municipalities, NGOs, and churches and religious communities.

Among the partners, the UNHCR stands out for obvious, operational reasons. With respect to the EU, the UNHCR is not a partner for the time being in the realization of the project, although a more active role in the future cannot be excluded either. EU law, however, provides a vast legislative background, including soft law, which lends legal security to the initiative. Speaking of these two major players leads me to clarify the relationship between humanitarian corridors and two related instruments: resettlement and relocation.

Recommendation 2015/914 of the European Commission, released in the wake of the 2015 European Agenda on Migration, laid out resettlement as a means by which persons, in need of international protection, upon request of the UNHCR,

20 Morozzo della Rocca, 2023, pp. 78–79.

21 Government of Italy, no date.

can be granted entry into a member state which has committed itself voluntarily to a resettlement programme and a refugee quota. The overall quota was set at 20,000 at the EU level for all Member States.[22] Resettlement is one of the few legal channels for migration currently.

If resettlement is an expression of solidarity with refugees, relocation programmes are meant to express solidarity among Member States. The first such programme was to benefit Italy and Greece in 2015. Relocation means the transfer of persons in need of international protection from the Member State of first arrival or of first application to another Member State with a view to distributing the responsibility. Unlike the resettlement scheme, the first relocation programme was adopted not through soft but through binding EU law, which foresaw the relocation of 120,000 third-country nationals.[23] Both the resettlement and the relocation programmes were aimed at persons in need of international protection under Article 2 of the Qualification Directive, that is, refugee status or subsidiary protection.[24]

The humanitarian corridor, as we have seen, overlaps with resettlement to some extent – yet with notable differences, as we shall see.

The basic idea of the humanitarian corridors is that while they could not provide a global solution to the refugee and migration crisis, they would save a selected number of vulnerable subjects. However, who would choose the beneficiaries, and what would be the criteria? In the gestational phase, it was almost taken for granted that it should be the UNHCR, the agency already present in the regions concerned, in possession of expertise and lists of refugees who might qualify for resettlement to the EU. However, the initiators of the humanitarian corridors took a different approach. Their aim was to create a new scheme in addition to the existing ones. In fact, those eligible for resettlement are already under international protection and have the prospect of resettlement, even if not immediately. The humanitarian corridors were to address the most desperate cases in the shortest possible time. Furthermore, unlike the refugees selected for resettlement by the UNHCR, the beneficiaries of the humanitarian corridors would be identified among those not yet recognized as refugees under the Geneva Convention. Their application for asylum would be decided on by the authorities of the host country after, and not before, their arrival. Again, the chief criterion was vulnerability.[25] There was another argument against the automatic use of the registers of the UNHCR: the fact that they were often outdated. The most evident example is Lebanon, which, overwhelmed with refugees after the outbreak of the war in Syria, suspended the registration of asylum seekers by the UNHCR in 2015.[26]

22 European Commission, 2015.
23 European Council, 2015.
24 Id. Article 2.
25 Morozzo della Rocca, 2023, pp. 90–91.
26 United Nations High Commissioner for Refugees, no date.

The humanitarian corridor, as we shall see, is a complex process that starts with the selection of beneficiaries but does not end with their arrival or the decision on their legal status in the host country. The ultimate end is social integration. It takes a constant dialogue with all the stakeholders, a precise mapping of the itinerary of the refugees all the way through this process. For this reason, looking at the process from the end, the initiators could not let the choice of candidates out of their hands.

The role of schools cannot be overstated. Experience shows that young children from all cultural backgrounds find it easy to learn the language and the basics of the host country's culture. In 2015, the Italian House of Representatives, the lower chamber of Parliament, passed an amendment to the law on citizenship. The Italian citizenship law is based on the *ius sanguinis* as opposed to the *ius soli* principle. The draft amendment would complement this with the *ius culturae,* a new way of acquiring citizenship, unprecedented for the Italian legal system. The envisaged beneficiaries are foreign minors who were born in Italy or entered Italy by the age of 12 years if they had attended school regularly and successfully for at least 5 years in the country.[27]

Civil society is the protagonist of the humanitarian corridors, but the authorities of the host country play an essential part. The consular network of the host country issues the entry visa after a thorough screening of the applicant: security and safety are the hallmark of the humanitarian corridors not only for the refugees but also for the host country, whose elementary right remains to decide to whom it should grant entry. Once in the country, the competent authorities – typically under the supervision of the Ministry of Interior – decide on the asylum application.

In Italy, the proponent of the humanitarian corridor was, as mentioned earlier, a 'consortium' of Christian entities: besides the Community of Sant'Egidio, it included the Tavola Valdese[28] and the Federation of the Lutheran Churches in Italy. Thus, an important feature of the initiative emerged: ecumenism.

5. Memoranda of Understanding with Italy

I now turn to some of the texts implementing the idea of the humanitarian corridors in three Member States of the EU: Italy, France, and Belgium. I possess only a limited selection of the MoUs in copy. Thus, the scope of my analysis is limited and does not consider the humanitarian corridors from Greece or the

27 Servizio Studi del Senato, 2015, p. 11.

28 Tavola Valdese (Waldensian Table) is the governing body of the Waldensian Evangelical Church. Its foundation as a proto-Protestant community by Peter Waldo dates back to 12th-century France. The Waldensians later joined the Calvinist branch of the Reformation. Chiesa Evangelica Valdese, no date.

arrangements involving Andorra, Luxemburg, and San Marino. However, I hope that the following discussion sufficiently highlights the main features of the initiative.

Italy takes credit for the most successful and extensive realization of the project. The best way to understand the legal concept is to read the MoUs with which the successive Italian governments committed themselves to the cause of the humanitarian corridors. The MoU signed in 2019 (MoU-2019) is a good example. It is an eight-page document, signed by the Ministry of Foreign Affairs and the Ministry of the Interior for the government, and the Italian Bishops' Conference and the Community of Sant'Egidio as proponents of the corridor.[29]

The Preamble (*Premesse*) recognizes the 'need to find alternative legal channels for people in need of protection, experimenting with innovative forms of reception'.[30] It also evaluates the experiences of the previous MoU, signed on 12 January 2017 (MoU-2017) recalling that in the time frame from November 2017 to January 2019, 500 people arrived in Italy under the MoU-2017 whose social integration on the whole could be regarded as well achieved. This was because of the willingness of the beneficiaries to learn Italian and seek employment. The document underlines a particular indicator of success: the low number of 'secondary movements'. This technical term refers to refugees or migrants who are granted legal status in one Member State but eventually travel on to another third Member State of their own choice, hoping for a better opportunity or attracted by relatives living there. One of the objectives of the common European asylum policy is, in fact, the prevention of secondary movements. The MoU-2019 acknowledges the positive role of church organizations (Caritas, Sant'Egidio, and Fondazione Migrantes) that have offered assistance free of charge to the beneficiaries.[31] Article 2 defines the purpose of the project, which 'is to facilitate the arrival in Italy legally and under conditions of safety of potential beneficiaries of international protection, especially the most vulnerable'. What is meant by 'vulnerability' can be understood from the following provisions.

Article 3 sets forth the criteria for identifying the beneficiaries:

> Beneficiaries shall be identified from among potential recipients of international protection, in accordance with relevant national and European Union legislation. The personal and family conditions of applicants shall be screened with reference to a plurality of preferential criteria. The text lists the criteria further in a non-exhaustive manner.

Eligible should be

29 MoU-2019. All MoUs quoted or referred to in this study are, in copy, on file with the author.
30 Id. 1.
31 Id. 6.

> persons recognized by the UNHCR as qualifying, at least *prima facie,* for refugee status under the 1951 Geneva Convention and its 1967 Protocol or those who are forced to leave their country in well-founded fear of suffering serious personal harm.

So far, there is nothing. However, the next sub-paragraph goes further and gives a rather strong mandate to entities that are neither state authorities nor international institutions to ascertain a condition of vulnerability in an applicant. The MoU-2019 gives this power to the Italian Bishops' Conference (*Conferenza episcopale italiana*, CEI) through Caritas Italiana and Migrantes Foundation as well as to the Community of Sant'Egidio. The text expressly provides for the possibility of choosing candidates from outside the 'pool' of those previously registered by the UNHCR. Thus, the aforementioned Catholic organizations assume a decisive role in the screening process. CEI and Sant'Egidio can ascertain vulnerability after hearing the opinion of the

> UNHCR for the purpose of acquiring any further cognitive elements that should be received in a term compatible with the conduct of the planned operations, based on the personal situation, age and health conditions, and in any case in accordance with the criteria expressed in Article 17 of Legislative Decree No. 142 of August 18, 2015, adopted in implementation of Directive 2013/33/EU on laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures for granting and withdrawing international protection.[32]

The provision that the MoU-2019 refers to is about persons with special needs:

> minors, especially if unaccompanied; the disabled; the elderly; pregnant women; single parents with minor children; victims of human trafficking; persons with serious illnesses or mental disorders; persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence or violence related to sexual orientation or gender identity, and victims of genital mutilation.

The next passage in Article 3 of the MoU-2019 adds what one may call a 'teleological consideration'. Vulnerability usually stems from the past, from the personal history of the applicant. The refugee has suffered: this should give him or her the right to protection, therapy and a chance for a new life. These people deserve a new start. Therefore, the project of the humanitarian corridors tries

32 D.Lgs. 142/2015.

to foresee the future and sets up certain 'factors that shall be taken into account in admission to the project, which are useful in facilitating the identification of integration paths'. Heart-breaking as it may sound, the supply does not match the demand. The number of refugees and their suffering are all but limitless, whereas the capacity of the humanitarian corridor is not. The operators have the ongoing task of choosing from among the many who meet the criteria. Here, the complementary factor comes into play. Persons who may count on support in Italy because of the declared willingness of individuals, churches, or associations to initially provide for their hospitality and sustenance have a better chance of being admitted to the programme. The same applies to refugees with stable family or social connections in Italy.

It bears repeating that a distinctive feature of the humanitarian corridor is that it does not require public funding. It puts zero burden on the state budget. Whose money is involved then? The answer lies in the sponsorship system – the private donors, associations, municipalities, and church groups, among others, who help concentrate the necessary funds.

The MoU-2019 clearly states that

> CEI and Sant'Egidio shall engage with their own professional and economic resources, in the activities of identification and in-depth assessment of potential recipients of the project, up to the preparation of individual and family dossiers […] carried out in the countries of transit by the proposing organizations, in collaboration with the UNHCR with regard to the persons under its jurisdiction.

The objective of the assessment is to identify potential beneficiaries. This means nothing less than the personal contribution of volunteers, the operators of the proponent organizations on the ground: in refugee camps in Lebanon, Ethiopia, Libya, Pakistan… It takes a lot of personal engagement, interviewing, paperwork, the touching of wounds with one's own hands in both the figurative and the physical sense.

In addition, these organizations 'shall take charge of the transfer to the national territory of those who hold entry visas issued by the competent consular authorities pursuant' to Article 25 of the Visa Code, referred to above. We can safely say that the bulk of the burden is shouldered by the organizations, together with a heavy responsibility. However, the role of the consular authorities remains essential: issuing visas is an act of sovereignty. Every state has the right to know who is entering its territory and to ensure that they are doing so legally. Personal safety of the refugees is ensured by the airline ticket, provided by the organizers and sponsors, as an alternative to the rubber boats of the human traffickers.

The proposing associations 'shall also ensure the reception, for an appropriate period of time, and support in the process of socio-cultural integration of the beneficiaries, with legal assistance in the phase of the application for international protection to the competent national authorities'. The acquisition of language skills is nominated together with social skills.

The humanitarian corridor does not end with the arrival at Fiumicino Airport. There is a long way yet to go until a win-win situation is reached.[33] The idea is that the host societies should benefit, too. Ghettoization can and must be avoided. The best way to achieve this is if the institutionalization of migrants is avoided. Experience shows that willingness to receive and integrate refugees can be found across the country. Communities rather than institutions can successfully integrate people.

The Ministry of the Interior performs a coordinating function throughout the project. The Department of Public Security (*Dipartimento della Pubblica Sicurezza*) of the same ministry, upon the outcome of verifications in the relevant databases, including against fingerprint samples, 'shall authorize the issuance of visas against the list of beneficiaries drawn up by the Proposing Associations'. The ultimate decision lies with state authorities. Only if and when any risk to public security has been eliminated and the proposed list approved 'shall the Ministry of Foreign Affairs and International Cooperation […] issue entry visas through its diplomatic-consular Representations, in accordance with art. 25' of the Visa Code, and therefore 'with Limited Territorial Validity, with the exclusive purpose of allowing one entry into Italy in a legal manner and under conditions of personal safety' (Article 4).

The MoU-2019 was signed for corridors connecting Ethiopia, Niger, Jordan, and possibly other transit countries, to be agreed upon by the parties, for a period of 24 months from the first entry, extendable upon authorization of the relevant ministries for another 12 months. One of the core issues that the MoUs deal with is the number of beneficiaries. The MoU-2019 set the quota at 600.

The final Article 6 provides for a monitoring mechanism, albeit without going into organizational detail: 'The parties shall establish a nucleus for coordinating, monitoring and evaluating the project to examine the results achieved, the effectiveness of the operational methods adopted, and the critical issues encountered, in order to make any necessary additions or changes [….]'. The main purpose is 'to evaluate and define individual situations for which the compliance with the criteria […] is in doubt'. The intention is clear: the entire

33 There is a vast body of literature, often sponsored by international organizations, such as the UN, OSCE, and the IOM, about how to turn migration from an emergency into a mutual opportunity. These works typically conclude that the skills and ambitions of the migrants, if properly developed and integrated into the labour market, can contribute significantly to the economy and help restore the balance sheet of social security, among other benefits. See e.g.: OECD, 2023; Frattini, 2017, pp. 105–134; Agunias, 2006.

process depends on how and to whom the operators apply the category of 'vulnerable'. Furthermore, 'The project shall be assessed with an initial report after the first semester and a final evaluation report, also in order to consider the possibility of any further development of the project'.

A much awaited MoU on Libya was signed on 27 April 2021 by the Ministry of Foreign Affairs and International Cooperation, the Ministry of the Interior, the Community of Sant'Egidio, the Federation of Evangelical Churches (*Federazione delle Chiese evangeliche)*,[34] and the Waldensian Table as well as the UNHCR (MoU-Libya).[35] Unlike the MoU-2019, this document starts from a premise that is less technical. Instead of emphasizing the need to establish more channels of legal immigration, it cites the 'well established commitment' of the European Union to prevent the loss of life in the Mediterranean, quoting in particular the statement adopted during the Special Meeting of the European Council on 23 April 2015.[36] The preamble cites a number of relevant documents adopted recently by the UN (the Global Contact in particular), the UNHCR, and the European Commission. Commission Recommendation 2020/1364 of September 2020 stands out: in fact, that document explicitly mentions the humanitarian corridor among

> Other forms of community sponsorship beyond resettlement, which can serve as a model, include what some Member States and private organisations refer to as 'humanitarian corridors', namely the community sponsorship model currently implemented by faith-based organisations in Italy, France and Belgium in cooperation with the respective national governments. […] (Recital (28).[37]

MoU-Libya acknowledged the 'expertise' developed by the three non-governmental signatories through the implementation of previous accords, such as in opening and managing the corridor from Lebanon. The ambition of the initiators of the humanitarian corridors is reflected in the text: it is to 'consolidate an Italian best practice with a view to its extension to the European level' (Article 2). A new element in the MoU-Libya is the obligation of the proposing organizations to provide, prior to departure, extensive information to the selected beneficiaries not only about the operation of the corridor and their rights and duties in the host country but also about the 'cultural differences between the

34 The term 'evangelical' is misleading. The majority of the membership consists of historic Protestant churches of the Lutheran or Calvinist confession. Federazione delle Chiese Evangeliche in Italia, no date.

35 MoU-Lybia, 2021.

36 'The situation in the Mediterranean is a tragedy. The European Union will mobilise all efforts at its disposal to prevent further loss of life at sea…' Statement of the Special meeting of the Council of the European Union, 2015; MoU-Lebanon-2021, 1.

37 Commission Recommendation (EU) 2020/1364.

country of origin/first asylum and Italy' (Article 4). The MoU-Libya is more complex than the previous MoUs, partly because of the role of the UNHCR as party to the agreement. The other reason is the situation on the ground, which is even more volatile than that in Lebanon.

The Libya

> project shares with the previous humanitarian corridors […] the purpose of allowing regular entry to potential beneficiaries of international protection, but differs from them in a more accelerated activation procedure made necessary both by the urgency of intervening in a situation of extreme suffering […] and by the difficulties of operating in a context torn by the protracted armed conflict[38] (Recital 15).

The idea that the humanitarian corridors are a means by which to contrast human trafficking is also featured (Recital 16).

In laying down the criteria for admission, the MoU-Libya by and large follows the previous pattern, although more elaborately. Beneficiaries have to meet certain cumulative conditions. They have to be recognized under the UNHCR mandate or at least registered with UNHCR Libya, and in clear need of international protection; the proposing organizations themselves may signal potential beneficiaries to the UNHCR. Stay predating 1 January 2021 on Libyan territory is also a requirement. Current or previously suffered detention in Libya can be taken into account (Article 3). The decision also has to consider whether a woman has suffered violence that falls within the scope of the Istanbul Convention (Article 3).[39]

The commitments of the proposing associations are mostly the same as in the MoU-2019. The difference is the inclusion of the UNHCR as a signatory. The selection process should be carried out in constant dialogue and exchange of information between the proposing associations and the UNHCR. The latter will share with the former names from its own list, which may also include cases the organizations themselves had signalled to the UNHCR in the first place. The role of the UNHCR is indispensable in the risky environment of the country, where the movement of the volunteers of the proposing associations is strongly limited. Personal interviews with the refugees are essential to the programme and the UNHCR is committed by the MoU-Libya to facilitate these encounters online or, to the extent possible, offline. If beneficiaries are detained in one of the detention centres, the UNHCR will negotiate for their release, liaise with Italian and Libyan

38 Unfortunately, this writer is not in possession of any MoU on the Horn of Africa. Nonetheless, the methodology applied should be very similar. The point of departure of the corridor is in Ethiopia, where the proposing associations perform the selection process in refugee camps.

39 Council of Europe, 2011.

authorities to prepare and acquire the necessary travel documentation and authorizations, and conduct the necessary pre-departure medical examinations. The MoU-Libya covers up to 500 beneficiaries divided into two quotas: the proposing associations are in charge of 200, while the national (public) reception system are in charge of 300. For the latter group, the selection process and the entire pre-departure phase will be entrusted to the UNHCR, except for the editing of the lists, where the proposing associations will have an input (Article 4).

An MoU on Lebanon was signed on 29 July 2021 (MoU-Lebanon).[40] It elaborates further on the criteria of vulnerability, making a specific reference to a 'proven situation of personal vulnerability, which cannot be adequately addressed in the country of first asylum […] and which […] can be properly addressed in Italy'. In fact, there are illnesses easily curable except in times of war. However, this need has to be matched with the financial and organizational capacity of the proposing associations to arrange for the treatment in Italy (Article 3.b).

Remarkably, the humanitarian corridors were not suspended even during the COVID-19 pandemic. However, the MoU-Lebanon committed the proposing associations to equip the beneficiaries with certificates on the absence of infectious diseases. The geographic scope of the document is Lebanon, as its title suggests. The main, but not exclusive, target group is constituted of 'people fleeing regional conflicts, mainly Syrian households and vulnerable individuals'. The limit is set at 1,000 persons over a period of 24 months, renewable by a maximum of another 12 months if approved by the competent (interior and foreign) ministries. MoU-Lebanon allows for some flexibility with regard to the target group, authorizing the proposing associations to select a reduced number of beneficiaries 'in transit countries other than Lebanon, if affected by humanitarian emergency situations, subject to preliminary investigation by the competent authorities' (Article 5).

On our list, the last Italian MoU, signed on 11 November 2021, is about Afghanistan (MoU-Afghanistan).[41] It provides for a somewhat more complex arrangement. The method remained the same albeit with some organizational changes. The number of signatories grew further still. The CEI re-joined the project. The new signatories are ACRI[42] and the INMP.[43] Besides the UNHCR, the IOM was a signatory for the first time. The preamble of the document cites the 'worsening humanitarian crisis […] that followed the withdrawal of NATO troops

40 MoU-Lebanon, 2021.

41 MoU-Afghanistan, 2021.

42 Associazione Culturale e Ricreativa Italiana is the biggest Italian non-profit organization not linked to the Catholic Church. It has links to some trade unions of anti-fascist traditions. Associazione Ricreativa Culturale Italiana – ARCI APS, no date.

43 Istituto Nazionale per la promozione della salute delle popolazioni Migranti e per il contrasto delle malattie della Povertà is a public entity for social and healthcare issues related to migrant populations and poverty, as well as a national centre for cross-cultural mediation in healthcare. Istituto Nazionale per la promozione della salute delle popolazioni Migranti e per il contrasto delle malattie della Povertà – INMP, no date.

and the Taliban's seizure of power', which 'saw Italy immediately committed to the evacuation of thousands of Afghan citizens and to a solution […] that protects human rights, in particular those of women and children' (Recital 1).

The MoU-Afghanistan is backed by a variety of international commitments like the Statement on the Situation in Afghanistan agreed upon by the Justice and Home Affairs Council on 31 August 2021,[44] which

> calls for a determined and concerted response […], including the need to continue evacuations of […] people at risk and the need to provide support to neighboring third countries in the form of resettlement on a voluntary basis, giving priority to vulnerable people such as women and children (Recital 2).

Among the additional criteria, concerning the chances of their integration into Italian society, existing family ties are mentioned with a wording that goes beyond the scope of family members eligible for reunification under European legislation. (In the Orient, the immediate family includes uncles, aunts, and cousins.) For specific reasons, certain categories are explicitly mentioned as potential beneficiaries: 'individuals who, because of their activities in Afghanistan, their professional role, or their past public positions, are particularly exposed to risk to life, […] personal safety, or personal freedom' as well as 'people who have worked with the Italian contingent or with organizations related to Italian international cooperation in Afghanistan'. A special category of potential beneficiaries is constituted by those who should have been airlifted after the Taliban took over but were left behind (Article 3. a, b, c, d). The proposing associations may identify up to 800 candidates for the humanitarian corridor over the period of 2 years, extendable for 1 more year.

> If it is not possible for them to independently identify profiles […] in order to reach the planned quota of 800 […], they may also identify potential beneficiaries […] by drawing on the lists provided by UNCHR. Under this MoU, the total number of 800 is broken down among the associations.[45]

The MoU-Afghanistan attaches a distinct role to the UNHCR with regard to those refugees who are already under its jurisdiction and as such already enjoy some degree of international protection (Article 2(2)(a)). They make up the remaining 400 beneficiaries, not dealt with by the proposing associations. The MoU-Afghanistan commits the UNHCR to identify and select an appropriate

44 Statement on the situation in Afghanistan, 2021.

45 CEI: 300, Sant'Egidio: 200, Federation of Evangelical Churches and Waldensians combined: 200, ARCI: 100.

number of persons among those registered with the UNHCR field office, according to the criteria adopted in its own resettlement procedures. The IOM, meanwhile, was entrusted with performing pre-departure medical examinations and swabs for SARS-CoV-2 infection and with the organization of transportation 'in dignity and safety' of beneficiaries. The MoU-Afghanistan mandates the IOM to facilitate on-line meetings with the beneficiaries, to liaise with the local authorities to issue the necessary permits and with the Italian embassies for entry visas, and to provide information – practical, legal, cultural, etc. – to this group of beneficiaries. In this context, the IOM has similar responsibilities to the proposing associations *vis-à-vis* the beneficiaries they have chosen.

In summary, under the MoU-Afghanistan, like in the Libyan case, the total quota is divided between the proposing organizations and the UNHCR. Both can select beneficiaries. However, after the selection phase, both quotas are integrated into the same framework: they receive the same visa in the same procedure and received in a similar manner by their sponsor communities in the host country. There is, however, a difference regarding the costs. Under the MoU-Afghanistan, the Ministry of Interior covers the travel costs between the transit country and Italy for both groups. After arrival, the reception and the integration path will be funded by the same ministry for the 400-unit strong UNHCR quota, whereas the other 800 beneficiaries will fall under the already 'classical' civil sponsorship schemes of the humanitarian corridors (Article 5. b, c).

The geographic scope of this MoU poses a serious challenge. It is clearly not feasible to rescue people out of Afghanistan under Taliban rule. The project can only be addressed to those who have already fled the country and now reside in Pakistan, Iran, or any other country of first asylum/transit, with the aim of involving 1,200 beneficiaries over 2 years, with the possibility of extending the term to a total of 36 months. Running the projects in countries like Iran and Pakistan is far from easy. Their governments often barely tolerate the presence of refugees.

6. Outside Italy: MoUs in France and Belgium

An MoU was signed with the French government on 14 March 2017 (MoU-FR).[46] It follows the same pattern as the MoU-2019, which, in turn, was a renewed version of the first and simplest formula proposed by Sant'Egidio in 2015 for Syrian refugees in Lebanon. It institutes the same division of labour between the promoter organizations, the government, and the UNHCR, the latter not being a signatory in the French case. There is a minor but significant difference from the equivalent Italian MoUs. The French Ministry of the Interior commits itself to issue not an LTV visa under Article 25 but a 'D' visa in Annex VII para. 7

46 MoU-FR, 2017.

of the Visa Code, within 2 months of the application at the consulate. The 'D' visa is a long-stay visa, issued for those who are entitled to take up residence in a particular Member State. There is also a self-imposed deadline of 3 months from application within which the Ministry of Interior grants the refugee status to those eligible. (Recall that the beneficiaries are selected among those whom the UNHCR have found, *prima facie*, to be eligible for asylum or subsidiary protection.) The MoU-FR opened a humanitarian corridor for 500 beneficiaries from Lebanon to France within 18 months of signature, a period which, after evaluation, may be extended (Article 5).

Belgium has also set up a humanitarian corridor with Sant'Egidio. The first agreement with the Belgian government was signed in November 2017. It was renewed on 23 December 2021 in the form of a Letter of Intent (LoI) with only two signatures: the Secretary of State for Asylum and Migration, representing the federal government without the Ministry of Foreign Affairs, and the president of the local Sant'Egidio organization as 'executor', 'in partnership with Belgium's recognized worship services'.[47] The latter grouping is an umbrella organization encompassing the Anglican, Muslim, Jewish, Orthodox, Protestant Evangelical, and Roman Catholic denominations and communities. The structure and language of the Belgian LoI is less statutory than that of the Italian MoUs. It simply describes the commitments of the parties and the procedures they have to follow. As to its content, however, it implements the idea of the humanitarian corridor just as the other documents do. The quota allowed by the LoI is 250. The distribution of the beneficiaries should be as follows: between 50 and 150 Syrians from Lebanon who could not be registered by the UNHCR because of their arrival after 2015 and have special vulnerability or belong to a minority; between 1 and 25 Syrians directly from Syria; between 20 and 100 refugees from Libya; and the same quota of Afghans with special risk profiles from Afghanistan. The text then elaborates on vulnerability: families with children, single women, advanced age, medical condition, and belonging to an endangered ethnic, cultural, or religious minority. The existence of 'ties with Belgium' is also listed among the criteria. On-site identification is also foreseen in this case, although it is not clear how it can be achieved in Libya or with regard to the Afghans. As to the former, the text says that a separate agreement with the UNHCR will be made. The geographic scope of this document is less clear-cut, as the inclusion of Afghans and refugees via Libya shows. Each individual file is submitted to the Office of the Commissioner General for Refugees and Stateless Persons (CGRS). The CGRS may schedule an additional interview if necessary and possible. This can be done by videoconference or in person (again, how this may be achieved is unclear). The application for the humanitarian visa and travel should also be organized by the executor in the same way as under the Italian and French MoUs.

47 LoI-BE, 2021.

Like in the other cases, the executor provides quality care, guidance, and initial integration of beneficiaries. Upon arrival in Belgium, the executor is responsible for the rapid referral of the persons concerned to the asylum procedure. Public funds are not involved, but the medical expenses during the asylum process are borne by Fedasil (*Agence fédérale pour l'accueil des demandeurs d'asile*). The assistance from the sponsoring communities should run for a minimum of 1 year.

However, there is a clause which is unique to the Belgian case. In the unlikely event of international protection being denied, the executor guarantees accompaniment to voluntary return, possibly with Fedasil assistance.

7. Conclusions

From February 2016 and up to the date of the submission of the manuscript of this study (2024), 6,470 people have arrived in Europe through the humanitarian corridors.[48] Is this a significant number? If compared to the tens of millions of displaced persons across Africa and the Middle East, we may be tempted to answer 'no'. However, as the great Hungarian-born American historian, the late John Lukacs, would repeat: 'History is not written in numbers.' Why? Because, according to ancient Talmudic wisdom, also taken up in the Quran: 'Whoever saves a life, it is as if he saved an entire world.'[49] Words and gestures – and why not numbers, too? – may give rise to a new culture, in which solidarity and security are no longer regarded as antithetical but rather as mutually reinforcing. As Pope Francis said: the humanitarian corridors 'combine solidarity and security'[50] – and legality, I should add, presuming that Francis would not mind.

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48 Comunità di Sant'Egidio, no date.

49 Mishnah Sanhedrin 4:9; Babylonian Talmud Tractate Sanhedrin 37a; Al-Ma'idah (5:32).

50 Pope Francis, 2016.

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Efforts to Improve the Educational Prospects and Living Conditions of Roma Children – How the European Union Is Supporting Member States' Action for the Socio-economic Integration of the Roma

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Abstract. The European Union and international organisations adopted several isolated programmes and actions from the mid-1990s to support the social inclusion and socio-economic integration of the Roma, who make up the largest ethnic minority of the European Union and are most exposed to risks of poverty, material deprivation, and discrimination based on ethnic origin. However, the will to accelerate integration efforts and opt for more concerted action at the level of the European Union was articulated only in 2011 with the adoption of the European Framework for National Roma Integration Strategies. This framework identified four main policy fields of action beyond the horizontal priority of fighting non-discrimination: education, employment, health, and housing. However, as the European Union has only limited competences in these policy areas, the main responsibility to bring about tangible change in the situation of the Roma remains with the Member States. Based on the European Framework for National Roma Integration Strategies, Member States adopted their national strategies, whereas the European Commission monitored and evaluated the implementation of the national measures on a regular basis. Progress in the four policy fields in the period of 2011–2019 remained limited. Encouraging results were achieved regarding access to early childhood education and care of Roma children, but the situation did not change or even worsened in other subcategories of action (i.e. segregated schooling persisted). The European Commission, which had declared that its highest priority was 'equality for all', adopted a new approach to Roma integration in 2020 that broadened the scope of intervention to Roma equality, inclusion, and participation. The Commission proposed a new EU Roma Strategic Framework to Member States, surpassing the previous socio-economic approach and inclusive growth aspects. The paradigm shift was obvious not

only by the introduction of the equality element but also by the proposal of common European headline targets and EU-level indicators. Nonetheless, Member States' ambition to commit to common achievable targets was moderate. While Member States agreed to adopt national Roma strategic frameworks, many of them opted for national targets and indicators instead of the common European ones. The European Commission has already evaluated the national strategies and found that Member States' action until 2030 will primarily focus on education and the improvement of the situation of Roma children and pupils.

Keywords: non-discrimination, Roma, education, integration, European Union, Member States' action

1. Introduction

The European Union (EU) committed itself to eliminating inequalities and combating discrimination based on different grounds, including discrimination based on ethnic origin. Hence, EU institutions use their legal, financial, and political instruments to protect and promote the rights of the most vulnerable. The European Commission made 'The Union of equality' one of its major priorities for the period of 2019–2024 and adopted five comprehensive equality strategies,[1] of which one focuses on Roma equality, inclusion, and participation. However, the EU cannot act alone in certain fields which are relevant for the inclusion and integration of the Roma, as Member States hold the primary responsibility for adopting and implementing targeted or mainstreamed measures aimed at improving their socio-economic, educational, health, and housing conditions. The present study seeks to provide a brief overview of what action has been taken by the EU during the past decade in this field and how well Member States have been able to contribute to achieving the common European objective of tackling the socio-economic exclusion of the Roma.

1 The Gender Equality Strategy 2020–2025; the EU Anti-racism Action Plan 2020–2025; The EU Roma Strategic Framework for Equality, Inclusion, and Participation 2020–2030; the LGBTIQ Equality Strategy 2020–2025; Strategy for the Rights of Persons with Disabilities 2021–2030. See: European Commission, no date.

2. Multiple Discrimination[2] Faced by Roma Children and Their Educational Situation in Europe

Roma[3] make up the largest ethnic minority of the EU and are present in each Member State with the exception of Malta.[4] In four EU Member States, namely Bulgaria, Romania, Slovakia, and Hungary, Roma make up a significant proportion of the population, well above the 1%[5] that is a rough 'average' in other Member States. According to the average estimates of the Council of Europe, around 11 million Roma live in Europe,[6] mainly in 'extreme marginalisation in both rural and urban areas and in very poor socio-economic conditions'.[7] These assumptions are corroborated by the EU's Agency for Fundamental Rights (FRA), which regularly surveys[8] the situation of the Roma in EU Member States. Some core questions of these surveys and the aspects examined include whether Roma experience discrimination or hate crime owing to their ethnic origin, their employment situation, their housing conditions, whether they have equal access to health services, their life expectancy, and with regard to children, their educational indicators, such as participation in early childhood education and care (ECEC), the share of school drop-out rates, whether Roma children experience school segregation, and their overall educational attainments.

Special attention to the difficulties faced by Roma children and their precarious situation is all the more justified because they may suffer multiple forms of deprivation – caught by the transmission of intergenerational poverty and social exclusion[9] and compounded by the burden of discrimination and

2 Multiple discrimination means all instances of discrimination on several grounds, which can manifest in the form of *additive discrimination* or *intersectional discrimination*. The latter covers situations in which 'two or more discrimination grounds operate and interact with each other in such a way that they are inseparable or inextricable'. Council Recommendation on Roma equality, inclusion and participation (2021/C 93/01), 12. 3. 2021, recital 15.

3 According to the Council of Europe's definition, 'Roma' is an umbrella term encompassing Roma, Sinti, Kale, Romanichals, Boyash/Rudari, Balkan Egyptians, and Eastern groups (Dom, Lom, and Abdal), such groups as Travellers, Yenish, and the populations designated under the administrative term Gens du voyage, and people who identify themselves as Gypsies. See: Council of Europe, 2012. The institutions and official documents of the EU adopt and apply a very similar definition but add to the abovementioned groups the Ashkali, ethnic Travellers, Tsiganes, or Tziganes, without denying the specific characteristics of those groups. See, for example, 2021/C 93/01, recital 16.

4 European Commission, 2020, p. 1.

5 Bulgaria: 9.94%, Romania: 9.02%, Slovakia: 8.63%, Hungary: 7.49%; see: Organisation for Economic Co-operation and Development, 2022.

6 Council of Europe, 2012.

7 European Commission, 2012, p. 2.

8 See the following FRA reports: EU-MIDIS Data in Focus Report 1: The Roma, 4.4.2009; The situation of Roma in 11 EU Member States, 23.5.2012; EU-MIDIS II: Roma, 29.11.2016; Roma and Travellers in six countries, 23.9.2020.

9 On the causes of the vicious circle of passing on marginalisation, see, for example, Fundación Secretariado Gitano, no date.

spatial and/or educational segregation.[10] The FRA's latest Roma survey[11] reveals and confirms general and also child-specific facets of anti-Gypsyism and grounds of discrimination, which may manifest in harassment and violence, higher risk of poverty, severe material deprivation, segregation and discrimination in education, insufficient access to health services and health insurance, housing deprivation or overcrowded housing, lack of access to tap water, etc. A particular Central-European regional phenomenon seen especially in Romania, Czechia, Slovakia, and previously in Hungary aggravates the educational prospects of Roma children; this is related to the misclassification of a very high percentage of Roma pupils as having special educational needs. Hence, Roma children are disproportionately more often enrolled in remedial schools for children with mental health disabilities without actually having mental health problems.[12] Both the European Parliament and the Council of the European Union have deplored[13] this practice and called for 'measures to prevent and eliminate misdiagnosis leading to inappropriate placement of Roma pupils in special needs education'.[14]

Although it is undeniable that granting equal access to Roma children to inclusive, non-segregated quality education would benefit the whole of society, statistics show a regrettably different reality. The FRA's findings[15] purport that on average in the EU, only 44% of Roma children aged from 3 years to the age of starting compulsory primary education attend ECEC, whereas this number is 93% for the general population in the EU. The lowest level of participation in the ECEC of Roma children is in Croatia (24%) and Romania (27%), whereas the divide is largest in Italy, where only one-third (30%) of Roma children attend ECEC compared to the general population's rate of 94%.

School segregation, which impacts negatively on children's life chances and 'reduces their chances of acquiring essential life skills through contact with others […] and clearly undermines the future job and salary opportunities'[16] of those concerned, also hits Roma children hard. According to the same FRA survey, on average, every second Roma pupil (54% of those aged 6–15 years) learns in a segregated educational environment. This rate is highest in Slovakia and Bulgaria (65% and 64%, respectively), whereas Portugal (2%) and Italy (7%) show the best results. We could provide inestimable further examples of the multiple forms of deprivation faced by Roma children, because on average, 83% of Roma children in

10 The Feasibility Study for a Child Guarantee provides an in-depth analysis of the situation of Roma children regarding poverty, social exclusion, adequate nutrition, access to early childhood education and care, education, healthcare, and housing, and it assesses the main policies and programmes in place in the EU Member States. See: Fresno, Meyer and Bain, 2019.

11 European Union Agency for Fundamental Rights, 2022 (hereafter: FRA Roma Survey 2021).

12 Kirilova and Repaire, 2003.

13 European Parliament, 2023, points E, K, L, and 2.

14 2021/C 93/01 points 6. b-c.

15 FRA Roma Survey 2021.

16 Council of Europe Commissioner for Human Rights, 2017.

the EU lived in households at risk of poverty in 2021 in contrast to the 20% average of the EU's general population. Furthermore, 54% of Roma children lived in a household of severe material deprivation[17] in 2021 compared to 7% of the children in the general population. One in five Roma children experienced hate-motivated bullying or harassment, and because of early school abandonment and the lack of real career perspectives, in the age group of 16–24 years, every second (56%) Roma youngster was unemployed or did not pursue studies. (With the EU terminology, these youngsters are 'NEET', i.e. not in employment, education, or training.)

3. The EU's Competence to Promote Social Justice and Protection, as Well as Dispositions Pertaining to the Rights of the Child

The situation described above necessitates action at the levels of the Member States and the EU although the scope and nature of national and community actions will differ owing to the division of competences. The nature of the EU's competence in question depends on which aspect of the multi-faceted challenges faced by the Roma we are examining. Traditionally, the sectoral objectives of Roma integration cover four main areas of intervention (as shown below), namely, education, employment, healthcare, and housing, to which the horizontal requirement of fighting non-discrimination is added.

The EU has committed to taking into account requirements linked to guaranteeing 'the fight against social exclusion, and a high level of education, training, and protection of human health' (Article 9 of the Treaty on the Functioning of the European Union, TFEU[18]), as the EU itself is founded on the values of non-discrimination, justice, and solidarity, among others. Hence, combating discrimination and social exclusion are also among the general objectives of the EU.[19] As recognised by the Charter of Fundamental Rights of the European Union[20] (hereafter Charter), '[i]n order to combat social exclusion and poverty, the Union recognises and respects the right to *social and housing assistance* so as to ensure a decent existence for all those who lack sufficient resources' (Article 34.3, emphasis added). Despite this general objective, the EU

17 Elements of severe material deprivation according to the FRA Roma Survey 2021 (p. 27.) are the inability to pay for at least four of the following nine items: 1. unexpected expenses; 2. a 1-week annual holiday away from home; 3. a meal with meat, chicken, or fish every second day; 4. adequate heating of a dwelling; 5. durable goods such as a washing machine; 6. a colour television; 7. a telephone; 8. a car; or 9. confronted with payment arrears.

18 Consolidated version, OJ C 326/47, 26.10.2012.

19 European Union, 2012.

20 Ibid.

does not have an exclusive competence in the field of social policy; thus, Member States and the EU share the regulatory role of combating social exclusion and helping to reintegrate persons excluded from the labour market (Articles 2.2 and 4.2 TFEU). This relatively confined margin of manoeuvre is also illustrated by Article 153.1 point j) of the TFEU, which allows EU support and supplementary action in the form of policy coordination to combat social exclusion.

Protection and improvement of human health, education, vocational training, youth, and sport are fields of action where the Union can carry out actions only to support, coordinate, or supplement the actions of Member States (Article 6 TFEU). In these fields, the Union does not supersede the respective competences of its Member States according to Article 2.5 of the TFEU. It follows from the previous description of the division of powers that the EU cannot act in the field of Roma integration without the Member States in the first place or in the absence of their active involvement. Hence, the engagement of the EU in the field of Roma integration is more of a catalyst than a set of fully-fledged, independent actions.

Turning from the overarching topic of the fight against different forms of marginalisation to the protection of the rights of Roma children, we see, on the one hand, that the Treaty on the European Union (TEU) lists the protection of the rights of the child among its general objectives, but, on the other hand, the EU does not have special powers to regulate children's rights as such – although it has developed a number of non-binding instruments[21] and a handbook[22] on children's rights under EU law. In its relations with the wider world, the EU upholds and promotes its values, and in the framework of the protection of human rights, it also protects the rights of the child (Article 3.3 and 3.5 TEU).[23]

21 The legally non-binding EU instruments relevant for realising the rights of children, combating child poverty, and social exclusion are: Europe 2020: A strategy for smart, sustainable and inclusive growth (COM(2010) 2020), the Agenda for the rights of the child (COM(2011)60), the EU Recommendation on 'Investing in children: Breaking the cycle of disadvantage' (2013/112/EU: Commission Recommendation of 20 February 2013), principle 11 on childcare and support to children of the European Commission Recommendation on Establishing the European Pillar of Social Rights (C(2017)2600), the Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee, and the Communication from the Commission on the EU Strategy on the Rights of the Child COM(2021) 142 final 24. 3. 2021. The aforementioned principle 11 of the Pillar of Social Rights declares that 'Children have the right to affordable ECEC of good quality. Children have the right to protection from poverty. Children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities.'

22 European Union Agency for Fundamental Rights and Council of Europe, 2022.

23 This commitment manifests, for example, in the yearly adopted EU Priorities in UN Human Rights Fora, in which the protection and promotion of the rights of the child is a recurring obligatory element. In point 31 of the priorities set for 2024, the Council concludes that '[t]he EU will continue to champion the rights of the child, prioritizing the protection of children from all forms of violence, universal access to quality and inclusive education, with a particular attention to girls' right to education and those in disadvantaged, vulnerable and marginalised situations including indigenous children and children belonging to minorities, including national and ethnic minorities, as well as children with disabilities.' 5311/24, 22.01.2024.

The Charter consecrates a separate article to the rights of the child, which – in line with Article 3 of the UN Convention on the Rights of the Child[24] – prescribes, among others, to public authorities to take primary consideration of the best interest of the child in all actions related to children (Article 24.2).[25] Obviously, the EU has a youth policy (Article 165 TFEU), but in this field its powers are only supportive and supplementary; thus, for instance, the development of quality education (e.g. combating school segregation) and the organisation of the education system remain the sole responsibilities of the Member States, to which the EU can contribute only by encouraging cooperation between them.

The EU recognises that the rights of persons belonging to minorities (Article 2 TUE – without distinction of it being ethnic, racial, linguistic, or other) form part of its core values, but because of the lack of the recognition of the collective rights of persons belonging to national minorities and the sensitivity of this question in interstate relations or because of the impossibility of collecting data on ethnic origin in certain Member States, the EU addresses minority issues solely on an individual basis and in the context of defining it as a ground of discrimination that should be prohibited. (Article 10 TFEU, inter alia, covers racial and ethnic origin, while Article 2 of the Charter adds to it social origin and language as well.)

4. The EU's Support to Member States' Action for the Social Inclusion of the Roma: An EU Framework for National Roma Integration Strategies (2011–2020)

The need for more effective policy responses to help the socio-economic integration of the Roma arose in 2010 with the communication[26] of the European Commission which, besides identifying the challenges ahead and the already available policy tools at the EU level, also called for an integrated approach alongside mainstreaming and policy coherence. Although this communication could be considered as a milestone for the later elaboration of the four intervention policy areas, both the EU and international organisations (OSCE, Council of Europe) previously held dialogue on Roma integration, identified problems and good practices, and foresaw some institutional framework or adopted action plans.[27] The European Platform for Roma inclusion adopted in 2009 the Ten

24 United Nations General Assembly, 1989.

25 The Charter makes specific reference to child-related rights, among them education, prohibition of child labour, family, social security, and healthcare in articles 14, 32, 33, 34, and 35 respectively.

26 European Commission, 2010.

27 In COM(2010)133 the Commission enumerates the previous initiatives in the field of Roma integration and reviews the major relevant EU documents. European Commission, 2010a.

Common Basic Principles for Roma inclusion,[28] which called on the Member States to make better use of existing legal, political, and financial EU instruments, the potential of the open method of coordination, peer reviews, and sharing of best practices.

Although the Communication of the Commission in 2010 embraced the approach of inclusivity and non-discrimination, its primary focus remained market-based. It stated that '[t]he full integration of Roma will have important economic benefits for our societies, especially for those countries with a shrinking population which cannot afford to exclude a large part of their potential labour force';[29] therefore, the Commission linked the socio-economic integration of the Roma to the Inclusive Growth priority of the Europe 2020 Strategy.[30] The Europe 2020 Strategy underlined Member States' individual and collective responsibility to combat poverty and social exclusion and envisaged, among other things, that Member States should define and implement measures addressing the specific circumstances of groups at particular risk, including Roma. With a positive outlook until 2020, the Commission foresaw multiple actions to achieve high employment delivering economic, social, and territorial cohesion and initiated several flagship projects, one of which was called the 'European Platform against Poverty'. As part of the strategy, the Commission set concrete headline targets on which Member States had to report annually in the framework of a process called the 'European semester'. Three headline targets were of relevance for Roma integration: raising the employment rate of the population aged 20–64 years from the current 69% to at least 75%, reducing the share of early school abandonment to 10% from the current 15%, and reducing the number of Europeans living below national poverty lines by 25% in order to lift 20 million people out of poverty. Based on the national reports of the 'European semester', the Council of the European Union has issued country-specific recommendations to each Member State since 2012, which contained recommendations on Roma integration to EU countries with a sizeable Roma population.

These previously scattered EU-level initiatives received a real impetus in 2011 both from the Hungarian presidency of the Council of the European Union being engaged in the subject and by the communication of the Commission on a proposal for an EU Framework for National Roma Integration Strategies.[31] Hungary, which has one of the highest shares of Roma population in the EU, took the topic of the integration of the Roma onto the highest level of the political

28 The Principles were adopted by the Platform on 24.4.2009 and have been annexed to the Council Conclusions on the Integration of the Roma (10394/09), 9.06.2009.

29 European Commission, 2010a, p. 2.

30 European Commission, 2010b.

31 European Commission, 2011.

agenda during its presidency in 2011 and formulated the ambitious objective of striving for tangible measures at the EU level in fighting child poverty.[32]

In this regard, the promotion of national commitments and acceptance of the need for a more coordinated European response were facilitated by the communication of the Commission about the new European Framework for National Roma Integration Strategies (NRIS), which set concrete goals for the integration of the Roma in four areas of policy intervention, namely, education, employment, healthcare, and housing. In education, the goal was to ensure that all Roma children complete at least primary school, have access to quality education, and are not subject to discrimination or segregation. Member States were also encouraged by the Commission to widen access to quality ECEC, reduce the number of early school leavers from secondary education, and increase the participation of Roma youngsters in secondary and tertiary education.[33] Regarding access to employment, healthcare, housing, and essential services, the goal was to reduce the gap (employment, health status, and access to housing and public utilities) between Roma and the rest of the population. As the socio-economic integration goals set forth in these four fields of action were linked and seen as directly contributing to the achievement of Member States' overall targets laid down by the Europe 2020 Strategy, the Commission could instrumentalise the process by foreseeing the development of national Roma integration strategies, an annual reporting mechanism, and could call for common, comparable, and reliable indicators to assess the progress of each Member State.

Based on the above communication of the Commission, the Council of the European Union under the Hungarian presidency adopted conclusions[34] on an EU Framework for NRIS up to 2020, by which Member States agreed to

> prepare, update or develop their national Roma inclusion strategies, or integrated sets of policy measures within their broader social inclusion policies, for improving the situation of Roma, by the end of 2011 [and] appropriately monitor and evaluate the impact of the Roma inclusion strategies or integrated sets of measures.[35]

32 European Parliament, Committee on Foreign Affairs, 2011, p. 1 (Priorities and programme of the Hungarian Presidency). With regard to Roma integration, the priorities read as follows: 'In the framework of the initiative to decrease poverty, the Presidency wishes to pay increased attention to the struggle against child poverty and will strive for tangible, European-level measures in the field of the integration of the Roma-people'.

33 European Commission, 2011, p. 5.

34 Council of the European Union, 2011.

35 Council of the European Union, 2011, points 22–23. The adoption of the EU Framework for NRIS was considered to be among the most important achievements of the Hungarian Presidency. Government of Hungary, Prime Minister's Office, 2011.

The European Council noted the major importance of this consensus of the Member States in committing themselves to develop NRIS and accept the oversight of their progress at the EU level in a formal reporting procedure. Thus, the European Council called for rapid implementation of the commitments and set a deadline[36] for preparation of the Member States' national strategies or integrated sets of measures tailored to the needs of the Roma population in each country.

4.1. Assessing Member States' Progress in the Field of Roma Integration: The Process and Its Deficiencies (2011–2020)

Once the national strategies were prepared, the European Commission was in position, first, to assess these strategies[37] and, second, to continuously monitor the progress achieved by the Member States. Besides the annual reporting that ran from 2013 until 2019,[38] the European Commission also assisted the Member States with a mid-term review in 2017[39] and – based on these results – an in-depth evaluation[40] of the relevance, effectiveness, coherence, efficiency, and EU added value of the EU Framework for NRIS. Besides the annual reporting, the Commission established the National Roma Contact Points' network and an internal Roma Task Force to assist Member States in their efforts; the Commission also gave guidance to Member States on the targeted use of available EU funds. The initial setting of the follow-up procedure was reinforced by the Council of the EU in 2013,[41] which – intending to accelerate socio-economic integration – recommended that Member States adopt specific and more targeted actions to strengthen Roma integration in the fields of education, employment, health, and housing, and called on them to communicate their progress – based on the new recommendations – annually to the Commission from 2016 onwards.[42] This comprehensive reporting had to focus on integration measures rather than on outcome and 'use […] any relevant core indicators or methods of empirical social research or data collection for monitoring and evaluating progress on a regular

36 European Council, 2011, p. 13. 4th indent.

37 Communication from the Commission – National Roma integration strategies: A first step in the implementation of the EU Framework and the accompanying staff working document. See: European Commission, 2012.

38 Commission reports on the implementation of the national strategies are available at the following references: COM(2013) 454 final 26.6.2013; COM(2014) 209 final 2.4.2014; COM(2015) 299 final 17.6.2015; COM(2017) 458 final 30.8.2017; COM(2018) 785 final 4.12.2018; COM(2019) 406 final 5.9.2019.

39 European Commission, 2017.

40 European Commission, 2018.

41 Council of the European Union, 2013.

42 Id., points 4.1.–4.2.

basis, particularly at the local level'.[43] Thus, result indicators would enable the overall effectiveness of the interventions to be measured.

The unavoidable question of indicators arose in 2011 too, when the Commission anticipated that if Member States set targets in their national integration strategies, these 'minimum standards should be based on common, comparable, and reliable indicators'.[44]

However, as at this time there was no intention on the part of the Member States to agree on common denominators in this regard (and probably there would have been no consensus in the Council either), indicators were to be defined at the national level. However, the Commission did not abandon facilitating the comparability of the Member States' results or promoting a clearer picture of the progress achieved in Roma integration on EU average. Hence, in 2012, a Working Party on Roma Integration Indicators was set up under the coordination of the FRA, which worked towards 'consolidating both national and European monitoring and reporting mechanism [and which] has developed a reporting and indicator framework to measure progress on the implementation of measures under the [2013] Council Recommendation'.[45] A major shift towards a possibly more decisive EU implication in putting in place common indicators was brought about by the multiannual financial framework for 2014–2020, within which the use of EU funds required output and result indicators for Roma inclusion as well.

The Commission noted that there was increased 'pressure for progress in identifying indicators and building monitoring mechanisms that can be used in the context of both the NRIS implementation and EU funds'.[46] While indicators are key to the comparability and better understanding of overall progress, EU Member States were reluctant to engage in this regard. In 2013, the Council recommendation still linked the monitoring of the progress on Roma integration to the full respect of the principle of subsidiarity and stressed Member States' primary responsibility in choosing 'their own monitoring methods, including appropriate methods for any data collection, and possible indicators'.[47]

As seen above, the (relative) effectiveness of the reporting mechanism between 2011 and 2020 was forged step by step, not only by means of the national exercise of annual reporting but also by the Member States' willingness to step up their integration efforts and to be inclined to work on possible common indicators. This process reached its optimum in 2020–2021 by the adoption of a new approach manifesting in the EU Roma Strategic Framework (see below). The Commission proposed in this new strategic framework the use of different types of common

43 Id., point 3.5.
44 European Commission, 2011, p. 4.
45 European Commission, 2015, p. 12.
46 Ibid.
47 Council of the European Union, 2013, 19th indent.

EU indicators. The Council of the EU recommended to Member States the use – as appropriate – of a portfolio of indicators developed by the Working Party on Roma Indicators (see below) from then on. In this regard, it is important that Roma integration targets could directly contribute to the attainment of the UN's Agenda 2030 and the Sustainable Development Goals too.

4.2. Assessing Member States' Progress in the Field of Roma Integration: Tangible Results (2011–2020)

In its mid-term review (2017), the Commission evaluated Member States' efforts as 'overall limited with significant differences across areas and countries. Education is the area with most progress (improvements in early school-leaving, early childhood education, and compulsory schooling, albeit deterioration in segregation).'[48]

Until 2016, Member States reported a total of 592 measures in the four key intervention areas (education, employment, health, and housing) and 138 for combating discrimination. Almost half of the 592 policy measures (278 measures) were dedicated to education, indicating that Member States acknowledge the incomparable benefits of investing in the care and education of Roma children. According to the logic of the national strategies (or, in their absence, of the integrated set of national measures), Roma integration measures could be either targeted (community-specific) or mainstreamed (Roma inclusion goals are mainstreamed in public policies). Hence, the Commission examined how many of the national integration measures foreseen were directly designed to reach Roma. In this regard, education policy stood out, as there were 163 targeted measures (out of 278), many of which concerned ECEC (e.g. increased investment, legislative changes, and introduction of compulsory kindergarten years), which resulted in growing numbers of Roma children participating in ECEC. The Commission noted that some progress was made in the fight against early school leaving, but Roma youngsters are still 'strongly over-represented among early school-leavers, with rates up to 24 times higher than in the population as a whole',[49] whereas evidence of segregation in education and trends of inappropriate placement of Roma in special needs schools persisted or even grew.

The in-depth evaluation report of the Commission (2018) also concluded that while the NRIS had the undeniably positive impact of mainstreaming Roma integration in public discourse, EU funding, and policy-making, and that the targets set forth in the four-policy field were and remain relevant, they had their shortcomings because the NRIS system had inherent limitations. The Commission found that the goal of all Roma children completing at least primary education

48 European Commission, 2018, p. 4.
49 European Commission, 2017, p. 14.

was not ambitious enough and national measures could not reach their full effectiveness, while the efficiency of the monitoring and reporting system remained limited. Overall, 'the ambition of "putting an end to the exclusion of Roma" has not been achieved'.[50] Besides these structural weaknesses, the Commission expressed concern over the lack of a child-sensitive approach in the NRIS and the failure to take into account the specific vulnerabilities of women. In the Commission's view, Member States should have adopted more comprehensive strategies that simultaneously covered children's different needs, such as quality education, health condition, access to adequate housing, and protection of their rights.

The last implementation report (2019) in the NRIS series resonates with this critique and proves that 73% of the measures implemented by the Member States were relevant for only one thematic area; thus, the Member States followed a 'more integrated approach' only in less than one-third of the cases. However, education stood out from the policy areas regarding the number of implemented actions, and the Commission found that the overall educational situation of the Roma improved in countries with large Roma populations (also because of the predominance of targeted actions). Despite the increasing level of Roma children in ECEC, the situation of school segregation did not improve: Almost every second (46%) Roma child was still learning in segregated schools.[51] When planning and implementing integration measures in the sub-areas of education, Member States most often chose action to reduce the incidence of early school leaving and incentives to encourage Roma participation in and the completion of secondary and tertiary education. Besides increasing efforts enabling Roma children to access ECEC, Member States also adopted several measures allowing schools to consider the needs of individual pupils in close cooperation with their families.[52] National Roma Contact Points reported that according to their evaluation, the most widespread educational achievement was the use of Roma mediators in schools, whereas the biggest challenges were still linked to absenteeism, early school leaving, and the transition from primary to secondary education.[53] A common conclusion drawn from Member States' intervention and targeted measures is that early intervention and prevention, as well as the active involvement of Roma parents supporting their children in each stage of education, is of paramount importance. Extracurricular activities could contribute to strengthening the identity and social networks of Roma children, while complex support measures (tutoring, scholarships) could help pupils stay in education and successfully enter the labour market in the future.

50 European Commission, 2018, p. 7.
51 European Commission, 2019b, p. 11.
52 Id. p. 13.
53 European Commission, 2019a, p. 4.

5. A Renewed Approach to Roma Integration in a European Strategic Framework: Equality, Inclusion, and Participation (from 2020 to 2030)

The EU Framework for NRIS was foreseen for a decade and ceased to be applicable in 2020. When taking on the office, President of the European Commission Ursula von der Leyen made 'equality for all and equality in all of its senses' one of the major priorities of the new Commission,[54] in response to which the European Commission adopted in 2020 an EU Roma Strategic Framework designed to last until 2030. Besides the formerly targeted four policy areas, the framework also encompassed the horizontal objectives of equality, inclusion, and participation. The formerly applied four sectoral intervention areas remain an integral part of the new strategic framework, but by adding to them the three horizontal goals, EU action was deliberately aiming to overcome the previous socio-economic standpoint and to focus on equal opportunities for the Roma. Besides this paradigm shift, the other novelty of the strategic framework is that it set ambitious common, EU-level quantitative headline targets and proposed the use of common indicators (as developed by the responsible working party with the coordination of the FRA – see above).

The education targets to be reached collectively by 2030 are the reduction of the gap in participation in ECEC by at least half and the reduction of the proportion of Roma children who attend segregated primary schools by at least half in Member States with a significant Roma population. Other targets include cutting the poverty gap, the employment gap, the gap in the NEET rate, and the gap in life expectancy by at least half between Roma and the general population, reducing the gap in housing deprivation by at least one-third, and ensuring that at least 95% of Roma have access to tap water.[55] The Commission also proposed reinforced reporting and monitoring, invited Member States in general to include a bulk of minimum quantitative and qualitative targets and commitments in their National Roma Strategic Frameworks (NRSFs), and encouraged Member States with significant Roma populations to adopt more ambitious commitments. Moreover, a specific recommendation to focus on children in order to fight multigenerational poverty was formulated.[56]

The Council mainly upheld the proposal of the Commission and called on the Member States to adopt their NRSFs by September 2021. The Council confirmed the will to reduce the structural inequalities faced by Roma and acknowledged the importance of indicators and monitoring methods; however, it did not prescribe the achievement of the Roma integration targets set by the Commission as a common EU-level objective of the Member States (Member States should include quantitative

54 von der Leyen, 2019, p. 11.
55 European Commission, 2020, pp. 4–5.
56 Annex 1 to COM(2020) 620 final (European Commission, 2020), p. 2.

and/or qualitative national targets in their NRSFs),[57] nor did it describe the use of the EU-level indicators, allowing Member States to use them only 'as appropriate' and to use their national indicators instead.[58] The Council encouraged Member States only 'to be guided by voluntary minimum commitments and, depending on the national context, by possible additional efforts'.[59]

Thus, for each policy area (horizontal and sectoral), the Council recommends to the Member States only a number of measures to be included in the NRSF, which, in order to ensure effective equal access to all forms and stages of education, could be, for example, the prevention and elimination of school segregation and of misclassification of Roma pupils, leading to their inappropriate placement in special needs education, the promotion of mentoring, peer learning, effective parental involvement (or employment of Roma mediators and teaching assistants), and support for the acquisition of skills in line with future labour market needs.[60] The Council also recommends a set of measures to overcome discrimination, inequality, and disadvantage in terms of education opportunities, featured among which are individual support and mediation, access to quality ECEC, prevention of school abandonment with a specific focus on Roma girls, dedicated scholarships, after-school programmes, support for participation in non-formal learning, and acquisition of digital skills.[61]

As the Council recommended that Member States were to report on the implementation of the NRSF measures on a biennial basis starting from 2023 onwards, the European Commission was not yet in a position to evaluate Member States' progress in this regard; however, it has already presented the first assessment[62] of the NRSFs. Overall, the Commission found that NRSFs lack clear targets and a clearly earmarked budget for implementation and monitoring, but several Member States (including those with larger Roma populations) have set national targets corresponding to the EU-level targets, and most Member States have put in place a monitoring and reporting mechanism. Regarding national measures proposed in the field of education, the Commission notes that

> [t]he sectoral objective dedicated to education stands out as the area where Member States plan to take the most extensive measures. On desegregation in education and housing, however, the plans do not appear to be sufficient to successfully address the full extent of the problem.[63]

57 See the use of the words 'in the light of' and 'as relevant' and the allowing of 'and/or' when pointing at *national* targets in point 39 of 2021/C 93/01 (Council of the European Union, 2021).
58 Id., point 38.
59 Id., point 1.
60 Id., points 5–6.
61 Id., point 7.
62 European Commission, 2023.
63 Id. p. 4.

6. Positive Examples of National Measures in the Field of Education Contributing to a Better Educational Outlook of Roma Children

As stated by the Commission in the assessment report of the NRSFs, measures planned by the Member States in the field of education seem to cover the widest range of national actions and – pending their implementation – appear promising at first sight. The Commission also assessed whether the national measures proposed reflect the particular challenges of the respective Member State and identified in each policy areas those forward-looking national proposals that would seem ambitious enough to help meet the EU's common targets.

In this regard, the Commission points to various educational projects and new policy approaches that could be considered innovative and appropriate.[64] For instance, Austria, France, Poland, and Slovenia encourage the employment of Roma assistants and the adoption of Roma school mediation projects (especially with Roma women as mediators in Poland), which should include actions to raise awareness about Roma culture and history, facilitate dialogue and communication between teachers, pupils, and parents, and assist parents in educational matters. Poland completes this initiative by giving incentives to local governments to increase the number of Roma school mediators where the number of pupils is relatively high. Latvia supports the employment of Roma mediators who could help increasing the motivation and interest of young people to return to education or the labour market based on their individual needs. In Denmark, all municipalities must establish a coherent, coordinated youth strategy for young people under 25 years who have not completed upper secondary education. These strategies should cover the sectors of education, employment, and social policy. Regarding dedicated financing, Luxemburg has introduced a special scheme for primary education school boards, which allows boards to apply for State subsidies if their school is attended by at least four pupils of a Roma or Sinti background.

In Finland, the National Advisory Board for Romani Affairs reviews the content of educational materials concerning Roma and provides textbook publishers with guidance and development proposals regarding these contents. Croatia plans to introduce a Roma curriculum in schools to help preserve Roma language and culture. In this framework, Roma children could attend 2–5 hours of extra classes per week taught in their native tongue. Similarly, Slovenia and Austria provide bilingual or native-language educational activities for Roma pupils, whereas these programmes are to be implemented regionally.

Given the high school dropout rates of Roma pupils, it is essential to fight absenteeism and early school leaving. France, for instance, targets mobile

64 The following examples are extracted from SWD(2023) 3 final (European Commission, 2023).

Roma communities living in slums and camps, by mediation, school assistance programmes, awareness raising, outreach, and support by mobile teams composed of State and regional actors. These mobile teams meet families with children not currently enrolled at school and provide them with tailored support. Another example of outreach activity targets the families of the youngest Roma children to raise awareness about the importance and availability of ECEC in Finland. Latvia also launched a specific project to reduce early school leaving, targeting the parents of Roma pupils.

7. Conclusions

Roma integration has long been on the EU's and other international institutions' agendas; However, only in 2011 did political recognition of the importance of helping to improve their socio-economic situation by coordinated action and the will to increase concerted effort in combating their discrimination manifest, when the Council agreed to establish a European Framework for NRIS. Despite the predominance of Member States' competences in this regard, the framework's inherent insufficiencies which were linked to the lack of EU-level indicators and targets, and its limited results, the EU through its involvement still managed to channel Roma integration into mainstream policy action and brought about notable changes in the educational situation of Roma children (although school segregation persisted). The framework identified four fields of policy actions (education, employment, health, and housing) for which Member States had to step up their integration efforts – although the rationale for these interventions was linked primarily to economic considerations and the idea of mobilising Member States' own latent workforce, thus maximising their own human and growth potential.

This approach has been overcome by 2020, when sectoral policy areas have been complemented by horizontal areas of focus, namely, equality, inclusion, and participation. It is still too early to judge the efficiency of the national Roma strategic frameworks, but, certainly, an indisputable achievement is that besides the national strategies, which are ambitious to varying degrees, the EU's National Roma Strategic Framework sets EU-level targets and proposes to Member States the application of a portfolio of indicators developed at the EU level. From the first policy documents, it seems clear that Member States are willing to invest in policy fields from which they can expect the biggest return and that they unanimously recognise the importance of targeted and mainstream measures, especially in the field of education. The four countries where Roma make up a significant proportion of the population (Bulgaria, Romania, Slovakia, and Hungary) need to amplify their efforts to contribute to the achievement of the

common European goals of Roma integration, but first and foremost to bring about tangible results in the living conditions of the Roma, Roma children, and women and to fight their marginalisation and discrimination. The fact that education stands out as the area in which Member States plan to take the most extensive measures seems promising, but real change in the situation of Roma children cannot be achieved without the active involvement of parents and Roma mediators, and addressing the complex causes and adverse consequences of the multiple forms of discrimination from which they suffer.

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The Complexities of Protecting Children's Rights During Hybrid Warfare

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Abstract. Modern armed conflicts have intensified humanitarian crises, with hybrid warfare tactics amplifying the vulnerabilities of children. By blurring the lines between peace and war, hybrid warfare combines conventional military operations with cyberattacks, disinformation, and economic coercion. This creates unprecedented legal and humanitarian challenges, particularly in safeguarding children's rights. As of 2024, data from UNICEF reveals alarming increases in displacement, casualties, and educational disruptions among children in conflict zones, with over 473 million children – one in six globally – residing in affected areas. This paper examines the international legal framework for the protection of children, focusing on gaps in implementation during hybrid warfare. It emphasizes the urgent need for robust accountability mechanisms, stronger international cooperation, and child-centred policy innovations that address systemic inequalities. Protecting children in conflict requires immediate action to preserve their rights and foster a resilient future, even in volatile environments.

Keywords: hybrid warfare, protections of children, armed conflicts, children's rights, humanitarian law

1. Introduction

The year 2024 marks a devastating period for children affected by armed conflict, as global data highlights severe violations of children's rights in war zones. Conflicts now account for 80% of humanitarian crises,[1] depriving children of essential resources such as education, healthcare, and clean water. Over 473 million children currently live in conflict-affected areas, a figure that has doubled since the 1990s, with millions displaced due to violence.

1 See Hewitt, 2009; Majerčáková Albertová, 2024.

Children represent a disproportionate share of refugees and internally displaced persons, facing heightened risks of malnutrition, exploitation, and limited access to education. In regions such as Ukraine, Gaza, and Sudan, school closures and healthcare system collapses have further deepened their vulnerability. The humanitarian implications of such wars are sadly well known. However, the relevant literature has seemingly awarded less significance to hybrid conflicts, when the rights of children suffer less visible, but perhaps no less harmful infringements. This paper explores the critical intersection between hybrid warfare and children's rights, analysing the international legal frameworks designed to protect children during armed conflict. It highlights the ongoing challenges posed by hybrid warfare's ambiguity and decentralized tactics, which complicate accountability and exacerbate children's suffering. The findings underscore the need for strengthened legal protection, improved monitoring systems, and collaborative international responses to uphold children's rights amid these complex conflicts.

2. War-Affected Children

This section will explore the roles that children, including boys and girls, play in armed conflicts and the impact of these roles on both their individual development and their collective identity. A thorough understanding of the realities children face during wartime is crucial for humanitarian and human rights practitioners. Such an understanding enables the development of comprehensive protection programmes, including advocacy campaigns and legal interventions, and supports efforts to engage children actively in their own defence.

Throughout history, children have been profoundly affected by warfare, whether through direct involvement in combat, suffering injury from stray bullets, or experiencing the socioeconomic consequences of a disabled soldier-parent's absence.[2] Armed conflicts not only define children's formative years but also shape their future trajectories. History reveals the recurrent presence of children in war, serving varied roles. For instance, children have historically been enslaved for sexual and economic exploitation, trained to defend territory, or assigned as aides to warriors. In European military tradition, for example, boys could become pages to knights as early as the age of seven, receiving combat training and advancing to junior battlefield positions.[3]

Ancient texts and iconography illustrate the prevalence of boys as combatants or entire units composed of youths. In the Roman Empire, young recruits formed an integral part of the military structure. However, debates regarding

2 Fonseka, 2001.
3 Baranovsky, 1997.

the appropriate age for military participation have persisted. The philosopher Plutarch referenced age thresholds for involvement, though historical armies commonly employed younger boys as support staff, including as drummers in the Napoleonic Wars and buglers in the American Civil War. By the 20th century, children's military roles evolved further, as illustrated by the Boy Scouts' origins in the Boer War and the militarization of youth organizations like the Hitler Youth during World War II.

During the 20th century, humanitarian responses increasingly framed children as innocent victims of war, necessitating protection and relief. This perspective catalysed the formation of organizations such as Save the Children (in response to the economic sanctions on World War I Germany), Plan International (responding to the plight of Spanish Civil War children), Oxfam (addressing the famine affecting Greek children), and UNICEF (established to provide post-World War II emergency aid). Family reunification efforts led by the International Committee of the Red Cross further underscored the recognition of children as wartime casualties deserving specialized care.

The release of the report titled *Impact of Armed Conflict on Children*[4] by rapporteur Graça Machel marked a pivotal moment in increasing global attention on children in conflict zones. Policymakers, academics, and media alike have since dedicated greater focus to normative protective frameworks for children. Yet, despite normative progress, the enforcement of these protections remains inconsistent, particularly during active conflicts. Recent UNICEF data indicates that over one billion children live in conflict-affected regions, with many of them being under the age of five.

Reports from the United Nations Secretary-General highlight serious violations against children in conflict zones, including murder, abduction, recruitment as soldiers, sexual violence, and attacks on schools and hospitals. Evidence also indicates that children are often deliberately targeted to demoralize or terrorize adversaries. The use of landmines, cluster munitions, and child human shields exemplifies this disregard for child safety. The Beslan school hostage crisis in Russia vividly demonstrated this grim reality.[5]

The proliferation of lightweight, inexpensive weaponry in recent decades has exacerbated child recruitment, as noted in global reports documenting child soldiers in numerous conflict zones. The data shows that in any active conflict, child soldiers are almost inevitably involved.[6]

The correlation between heightened sexual violence and the presence of armed actors is a long-standing issue that has become more strategically utilized

4 United Nations General Assembly, 1996.
5 United Nations, 2009.
6 Spielmann, 2019.

in recent conflicts. In Darfur,[7] for example, rape has been used as a deliberate tactic to humiliate and displace communities, while in the eastern Democratic Republic of Congo, all parties to the conflict have been implicated in widespread sexual violence against children.[8]

3. The Impact of Conflict on Children

The repercussions of armed conflict on children are vast, affecting their physical health, emotional resilience, and psychological development. In some regions, cycles of conflict persist for so long that children reach adulthood having never experienced peace.

Humanitarian access to children in conflict zones is often obstructed, as evidenced in recent crises in Sri Lanka and Sudan. Denial of such access deprives children of essential resources, including food, water, and medical care, violating their right to survival and development. The disruption of daily life during warfare can lead to violations of children's fundamental rights, including education. Conflict-related attacks on schools have surged in recent years, resulting in school closures and systemic educational collapse.

Children's inability to attend school due to curfews, sieges, or school destruction increases their vulnerability to recruitment and exploitation. Schools often serve as stabilizing forces during crises, providing a semblance of normalcy and helping mitigate trauma. Therefore, establishing educational and recreational programmes post-crisis is critical for children's psychosocial recovery.

Armed conflict also impacts children's sense of identity[9] and belonging, as familial and social bonds are severed. Displacement uproots children from familiar environments, forcing them to relinquish symbolic personal items that serve as cultural touchstones. The breakdown of protective social structures increases the risk of exploitation and violence. Alcohol and substance abuse, often used by adults to cope, further destabilizes households, leading to an uptick in domestic violence and neglect.

Conflict can force children into exploitative labour or survival-based transactions, including artisanal mining or transactional sex. Family separations amplify these risks, particularly for children with pre-existing vulnerabilities, such as orphans and those with disabilities. Child soldiers, in particular, endure extreme physical and psychological trauma from exposure to violence, torture, and sexual exploitation. The reintegration of former child combatants poses significant challenges due to community stigma and the lingering impacts of trauma.

7 UNICEF, 2023.
8 Terry, 2012.
9 Nemeth, 2002.

Sexual violence remains a devastating weapon of war with profound consequences for children. Cultural stigmas often prevent open discussions about these assaults, compounding victims' isolation and emotional distress. Girls who bear children as a result of rape face further marginalization. Counselling services, whether formal or informal, play a crucial role in their recovery, though access remains limited in many conflict zones.[10]

4. Legal Protection of Children in Armed Conflict

The alarming statistics and situational analyses presented in the previous section highlighted the severe impact of armed conflicts on children. These figures not only call for urgent humanitarian action but also underscore the critical importance of legal protection in ensuring the safety and rights of children. International Humanitarian Law (IHL) establishes a clear framework for shielding children from the consequences of war, even under the most challenging circumstances.[11]

International humanitarian law provides comprehensive protection for children during armed conflicts, whether international or non-international in nature. Children, as part of the civilian population not engaged in hostilities, are entitled to humane treatment and safeguarded under legal provisions regulating the conduct of war. Recognizing their inherent vulnerability, the Geneva Conventions of 1949[12] (GC III. and GC IV.) and their Additional Protocols of 1977[13] (AP I. and AP II.) have established specific measures for their protection. Even when children directly participate in hostilities, these protections remain applicable. Notably, the Additional Protocols and the 1989 Convention on the Rights of the Child, along with its Optional Protocol, impose stringent limitations on children's involvement in hostilities.

Children who are not combatants are afforded *general protection* under GC IV. and AP I. during international armed conflicts. These include guarantees to life and prohibitions against coercion, corporal punishment, torture, and reprisals. In non-international conflicts, similar protections are outlined under common Article 3 of the Geneva Conventions and Article 4 of AP II., which emphasize the principle that civilians, including children, must not be the object of attack. Acknowledging children's unique needs, IHL mandates their *special care and protection* against abuse. This includes provisions for evacuation, access to medical care, family reunification, education, and humane treatment if detained or interned. Key provisions also prohibit the death penalty for offences committed

10 Tóth, 2017.
11 International Committee of the Red Cross, 2011.
12 Geneva Conventions I–IV, 1949.
13 Additional Protocols of 1977.

while under the age of 18. These measures collectively affirm children's right to an environment that mitigates the adverse impacts of armed conflict.

Despite extensive protection,[14] children are often involved in armed conflicts. The 1977 Additional Protocols were pioneering in addressing this issue, restricting direct involvement in hostilities for those under 15 years and encouraging recruitment prioritization among older adolescents. AP II. goes further, explicitly banning both recruitment and participation of children under 15, whether direct or indirect. In the unfortunate case of their involvement, children under 15 remain entitled to special protections even as combatants.

The 1989 Convention[15] broadens the scope of child protection in armed conflicts, urging states to ensure children under 15 are not directly involved in hostilities and prioritizing older youth in recruitment. However, these provisions are less stringent than AP II's outright prohibition. Adopted in 2000, the Optional Protocol[16] to the 1989 Convention strengthens these protections, raising the minimum recruitment age for voluntary service and prohibiting compulsory recruitment under 18. The International Criminal Court Statute of 1998[17] further criminalizes the recruitment or use of children under 15 in hostilities, ensuring accountability under international law.

Thus, through sustained international and national efforts, the protections afforded by IHL aim to shield children from the ravages of armed conflict and ensure their rights are preserved.

5. The Changing Nature of Warfare

The nature of armed conflict has evolved significantly, moving away from the traditional concept of wars fought between nation-states with clear military objectives and battlefield engagement. Historically, conflicts such as the Crimean War and the First World War were characterized by formal declarations of war, structured combat, and adherence – albeit imperfectly – to agreed conventions regarding the protection of non-combatants. However, modern armed conflict has become increasingly complex, diffuse, and less regulated by traditional norms.

The term 'war' has largely been replaced by 'armed conflict' in international discourse, reflecting the diversity and complexity of contemporary violence. According to IHL principles, armed conflicts are classified as either international – those involving hostilities between two or more states – or non-international, where violence occurs between governmental forces and non-state actors, or

14 United Nations, 1966a; 1966b.
15 United Nations, 1989.
16 United Nations, 2000.
17 International Criminal Court, 2021.

between such groups. The International Committee of the Red Cross (ICRC) specifies that non-international conflicts must exhibit a minimum level of sustained violence and organizational structure to meet this classification.

Modern conflicts exhibit several defining features:[18]

1. *Targeting of Civilians:* Unlike traditional warfare, where combatants and military infrastructure were primary targets, contemporary conflicts often see civilians as direct targets of violence. This may involve the strategic use of civilian populations as human shields or retributive violence against communities accused of supporting opposing factions.
2. *Multiplicity of Armed Actors:* The proliferation of non-state actors, including insurgent groups, paramilitaries, and criminal organizations, has blurred the distinction between combatants and civilians. These groups may engage in political or criminal activities interchangeably, complicating their legal classification under IHL.
3. *Prolonged Conflicts and Resource Exploitation:* Conflicts in resource-rich areas often endure due to the financial incentives associated with control over natural resources. Warring factions may prioritize securing economic gains over achieving political objectives, as seen in regions like eastern Congo and Nigeria.
4. *Fragmentation of Command Structures:* Non-state armed groups often lack formal hierarchies and may shift allegiances frequently, making it difficult for external actors, such as peacekeepers, to engage or negotiate effectively. The absence of clear leadership exacerbates lawlessness and impedes accountability.

In addition to the above trends, contemporary armed conflicts are influenced by the following developments:[19]

1. *Urban Violence and Insurgency:* Conflicts have increasingly moved from rural battlefields to urban settings, resulting in more civilian casualties and the destruction of infrastructure. Insurgency tactics, such as bombings and guerrilla warfare, thrive in densely populated areas.
2. *Terrorism and Counterterrorism:* The rise of terrorism has introduced a new dimension to warfare, where non-state actors often target civilian spaces and critical infrastructure. In response, counterterrorism measures can also negatively impact civilian populations, particularly when they involve mass detentions or indiscriminate use of force.

18 Reperger, 2013.
19 Stepanova, 2009.

3. *Use of Proxy Forces and Private Militias:* States increasingly outsource military operations to private security firms or paramilitary groups, thereby reducing direct accountability for human rights violations. These groups, often less disciplined and regulated, contribute to heightened brutality in conflict zones.

Peace negotiations are – as a result of the changing landscape of conflict – becoming increasingly complex, involving multiple factions with competing interests.[20] Partial peace agreements that exclude key actors often fail to achieve lasting stability, as seen in conflicts in Sudan and Colombia. Additionally, humanitarian operations face credibility crises due to incidents of misconduct by peacekeeping forces, including allegations of sexual exploitation. Efforts to build sustainable peace are further undermined by the economic motivations of some conflict actors.

The evolving nature of armed conflict necessitates a reevaluation of traditional frameworks for war and peace. While the underlying use of violence to achieve political or economic objectives remains a constant, the actors, methods, and consequences of contemporary conflicts have changed dramatically. Effective responses require an adaptable approach that addresses the root causes of violence, strengthens accountability mechanisms, and prioritizes the protection of civilian populations, particularly children. International actors must also ensure that peace processes are inclusive and address the needs of all stakeholders, including marginalized groups and non-combatants.

6. Hybrid Warfare: Characteristics and Differences from Conventional Warfare

Hybrid warfare has emerged as a prominent and complex form of conflict in the modern era, blurring the lines between war and peace and challenging traditional military doctrines. By merging conventional and unconventional tactics, hybrid warfare seeks to exploit an adversary's vulnerabilities across military, political, economic, and informational domains. Hybrid warfare encompasses a wide spectrum of tactics, from traditional military engagements to irregular and asymmetric approaches, including cyber operations, disinformation, economic coercion, and the use of proxy actors. Unlike conventional warfare – typically characterized by open, large-scale confrontations between state militaries – hybrid warfare aims to operate in a 'gray zone', remaining below the threshold that would trigger formal declarations of war or military retaliation.[21]

20 Baranovsky, 1997.
21 Hoffman, 2009.

Frank G. Hoffman describes hybrid warfare as a deliberate combination of conventional military forces and unconventional means, such as political subversion, guerrilla tactics, cyberattacks, and economic sabotage, employed to confuse, weaken, and destabilize adversaries. In contrast to the distinct separation of civilian and military spheres in conventional warfare, hybrid warfare deliberately targets civil institutions, public trust, and social cohesion.

Key characteristics of hybrid warfare include the following:

1. It occurs in a multiplicity of domains. Hybrid warfare extends conflict beyond traditional battlefields, targeting digital, economic, and societal systems. While conventional warfare is often confined to land, sea, and air domains, hybrid warfare leverages cyberattacks, media manipulation, and economic sanctions to create a multidimensional offensive. Modern hybrid actors recognize that disrupting financial systems, information networks, and political processes can be as effective as military force in undermining an opponent's stability. Conventional warfare traditionally involved controlling physical territory, whereas hybrid warfare focuses on dominating information spaces, influencing public opinion, and destabilizing governance.
2. The separation between civilian and combatant is blurred: In conventional warfare, combatants are typically identifiable by their uniforms, ranks, and adherence to rules of engagement. In hybrid warfare, non-state actors, paramilitary groups, and disguised operatives are often used to achieve plausible deniability. Civilians may also be co-opted or inadvertently drawn into conflict, either as pawns in disinformation campaigns or as casualties in false-flag operations designed to obscure the aggressor's identity. Conventional military engagements sought to minimize civilian involvement, at least in principle, whereas hybrid warfare often weaponizes civilian populations, making them central to the conflict dynamic.
3. Information operations and disinformation campaigns are significant. The strategic use of disinformation and propaganda is a hallmark of hybrid warfare. Information operations aim to sow confusion, erode public trust, and manipulate narratives to weaken political cohesion. Hybrid actors often use social media, false news reports, and cyber influence campaigns to distort reality and undermine institutional credibility. While propaganda has long been a part of warfare, hybrid warfare places unprecedented emphasis on digital platforms and instantaneous information dissemination. In contrast, conventional warfare relied more heavily on formal communication channels and long-term psychological operations.
4. Use of proxy forces and unconventional actors is prevalent. States engaged in hybrid warfare frequently rely on non-state actors, including private military

companies, insurgent groups, and local militias, to conduct operations on their behalf. These proxies provide a layer of deniability and complicate international responses, as their activities can be framed as internal conflicts or rogue actions rather than state-sponsored aggression.[22] Traditional wars were generally fought by state-sanctioned military forces with clear lines of command and accountability. Hybrid warfare, however, relies on dispersed networks of actors with ambiguous affiliations and fluid alliances.

5. Economic pressure and resource weaponization are used. Hybrid warfare often involves economic coercion, such as sanctions, trade restrictions, and the manipulation of resource access, to destabilize adversary economies. By targeting critical supply chains and energy resources, hybrid actors can inflict significant damage without resorting to military action.[23] Economic blockades and resource control were historically used in conventional warfare, but hybrid warfare incorporates these measures as standalone or preliminary tactics within broader conflict strategies, rather than accompanying direct military engagements.
6. Technological integration and cyberwarfare are pursued. Hybrid warfare heavily integrates cyberattacks and digital surveillance as offensive tools. Cyber operations may target government databases, power grids, and communication systems to disrupt critical infrastructure. These attacks are often anonymous and difficult to attribute, complicating legal and military responses. Conventional warfare relied primarily on physical confrontation and conventional weaponry. In contrast, hybrid warfare leverages technological advancements to engage in 'invisible' battles that can cripple national systems without firing a single shot.
7. Ambiguity and plausible deniability are paramount. One of the defining features of hybrid warfare is the use of tactics that obscure the aggressor's identity and intentions. Through tactics such as false-flag operations, staged protests, and covert cyberattacks, hybrid actors can delay or prevent attribution, making it difficult for affected states to mount a coordinated defence or seek international recourse. In conventional warfare, the identities of belligerents were typically clear, even in cases of subterfuge or deception. Hybrid warfare, however, thrives on ambiguity, making traditional deterrence strategies less effective.

Hybrid warfare presents significant challenges to international law and the principles of just war. The existing legal frameworks governing warfare, including the Geneva Conventions, struggle to address conflicts that fall outside traditional categories of interstate war. For example, cyberattacks and disinformation

22 Porkoláb, 2016.
23 Berzins, 2015.

campaigns often do not fit the legal definitions of armed aggression, raising questions about how and when states can lawfully respond.[24]

The use of proxy forces and private military companies further complicates accountability, as it becomes difficult to trace responsibility for human rights violations and war crimes. Hybrid actors exploit legal gray areas to conduct operations that are both highly effective and difficult to prosecute. This ambiguity necessitates a reevaluation of international legal norms to ensure that states can respond to hybrid threats without undermining human rights or escalating conflicts.

In conclusion, hybrid warfare represents a significant departure from conventional warfare, characterized by its multidimensionality, the use of unconventional actors, and its emphasis on disinformation and cyber operations. By operating in the 'gray zone' between peace and war, hybrid actors challenge traditional notions of conflict and evade conventional deterrence mechanisms. Understanding the defining features of hybrid warfare is essential for developing effective counter-strategies that address not only military vulnerabilities but also political, economic, and informational weaknesses.

7. The Challenges of Protecting Children's Rights in Hybrid Warfare

Children's rights have evolved significantly over the past century, moving from the margins of legal and political discourse to the forefront of international law. The adoption of the United Nations Convention on the Rights of the Child (UNCRC)[25] represents a landmark achievement, establishing that children have distinct and non-negotiable rights, including the right to education, health, protection, and participation. However, the practical application of these rights remains inconsistent, particularly in conflict zones where state structures collapse and international laws are violated. The document outlines key international legal instruments, such as the Geneva Conventions and regional human rights charters, as foundational to protecting children. It further addresses the responsibilities of state and non-state actors in preventing violations and ensuring access to justice for child victims. The document emphasizes that, despite the legal recognition of children's rights, conflicts often exacerbate vulnerabilities due to displacement, separation from families, and direct violence. Among the primary obstacles to the protection of children are:

24 Dinstein, 2001.
25 Convention on the Rights of the Child, 1989.

1. Weak governance and accountability mechanisms: In fragile states, government institutions often lack the capacity or political will to enforce children's rights, allowing violations to occur unchecked.
2. Non-state armed groups: The rise of non-state actors in modern conflicts complicates the enforcement of international legal norms, as these groups often reject or are not bound by international agreements on children's protection.
3. Resource constraints: Humanitarian organizations tasked with ensuring children's welfare frequently face funding shortfalls and logistical challenges, limiting their ability to deliver essential services such as education and healthcare.

The document highlights the importance of legal and institutional mechanisms in addressing violations of children's rights. International courts and tribunals, such as the International Criminal Court (ICC), play a critical role in holding perpetrators accountable for crimes against children, including recruitment as child soldiers, sexual exploitation, and forced displacement.[26]

Furthermore, the document outlines the significance of national legal systems in enforcing children's rights. However, it points to disparities in legal frameworks across states, with some nations lacking adequate laws to protect children or failing to implement existing protections. This disparity is particularly evident in cases involving displaced children and refugees, where host nations may not fully extend legal protections due to political, economic, or social pressures.

The right to education and participation are emphasized as central to empowering children and mitigating the long-term impacts of conflict. The document notes that education not only provides knowledge but also restores a sense of normalcy and safety for children in post-crisis environments. Yet, educational institutions are often targeted in conflicts, either as symbols of state authority or as strategic sites of control.[27]

Participation, as articulated in the CRC, ensures that children have a voice in matters affecting their lives. The document argues that involving children in decision-making processes can foster resilience and enhance the effectiveness of humanitarian and legal interventions. However, meaningful participation requires culturally sensitive approaches that recognize children's diverse experiences and developmental stages.

International organizations, such as UNICEF and the UN High Commissioner for Refugees (UNHCR), play pivotal roles in advocating for and protecting children's rights. The document underscores their efforts in monitoring violations, providing emergency assistance, and supporting policy development at the national and

26 Lattmann, 2018.
27 Ibid.

international levels. Additionally, non-governmental organizations (NGOs) are highlighted as critical partners in implementing grassroots programmes that directly support affected children.

Emerging threats to children's rights include cyber exploitation, climate-induced displacement, and the weaponization of misinformation,[28] itself a tool of hybrid warfare. These challenges necessitate adaptive legal frameworks and innovative policy responses. For example, the increasing prevalence of online exploitation demands enhanced cybersecurity measures and international cooperation to track and prosecute offenders. Several recommendations can be made for strengthening the protection of children's rights, such as strengthening legal frameworks (harmonizing national laws with international standards and ensure robust enforcement mechanisms to hold perpetrators accountable), enhanced monitoring, as well as long-term investments in education, psychosocial support, and community development are crucial for rebuilding children's lives after conflict.

Ultimately, the protection of children's rights in the context of conflict and displacement remains a critical and complex challenge. While significant progress has been made through international legal instruments and humanitarian interventions, gaps in implementation and enforcement persist. Addressing these challenges requires a multifaceted approach that prioritizes accountability, resource allocation, and the active involvement of children themselves. By fostering international solidarity and adopting child-centered policies, the global community can better safeguard the rights and well-being of children affected by crises. All these measures are applicable to hybrid conflict and increase societal resilience to such aggression.

8. Conclusions

The protection of children's rights during armed conflicts has always been fraught with challenges, but hybrid warfare amplifies these difficulties through its complex and multifaceted nature. Hybrid conflicts often blur the distinctions between combatants and civilians, between war and peace, and between state and non-state actors, creating legal, moral, and operational dilemmas for international institutions, governments, and humanitarian actors. As the analysis of recent conflicts demonstrates, children are disproportionately impacted, facing increased risks of death, injury, displacement, and exploitation. Despite the robust international legal frameworks established by instruments such as the Geneva Conventions and the UN Convention on the Rights of the Child (CRC), the realities of hybrid warfare highlight critical gaps in enforcement and accountability.

28 Gerasimov, 2013.

One of the defining features of hybrid warfare is its reliance on indirect, covert, and decentralized methods, including cyber operations, disinformation campaigns, and the strategic use of proxy forces. These tactics exacerbate the vulnerability of children in conflict zones. Unlike conventional warfare, where clear lines of engagement and accountability are maintained, hybrid warfare thrives on ambiguity, making it difficult to identify perpetrators of rights violations. For example, in many hybrid conflicts, schools and hospitals become targets – not necessarily because of their military value but to destabilize communities, disrupt social cohesion, and spread terror. The resulting destruction not only deprives children of essential services such as education and healthcare but also exacerbates their psychological trauma and long-term social dislocation.

Another critical issue is the use of information warfare in hybrid conflicts, which has far-reaching implications for children's rights. Disinformation campaigns can distort the narrative around conflict, hinder humanitarian access, and foster mistrust between local populations and international organizations. This undermines efforts to protect children, as it becomes increasingly difficult to provide accurate information and secure cooperation from affected communities. Additionally, children themselves become targets in the digital realm, with social media platforms used to propagate harmful content or recruit vulnerable youths into armed groups. International legal frameworks have yet to fully address the complexities of these digital threats, leaving significant gaps in the protection of children in hybrid conflicts.[29]

Furthermore, hybrid warfare often operates in the 'gray zone,' where actions do not meet the formal threshold of war but still result in severe violations of children's rights. In such scenarios, traditional mechanisms of legal accountability and international intervention are often insufficient. Non-state actors and proxy militias, commonly employed in hybrid warfare, may not be signatories to international treaties and, therefore, do not consider themselves bound by conventions protecting civilians. This complicates the application of humanitarian law and necessitates new approaches to ensure that all actors involved in conflict are held accountable for crimes against children.

The humanitarian response to children's needs in hybrid conflicts is also hindered by logistical and political constraints. Humanitarian agencies often struggle to navigate the complexities of hybrid warfare, where access to conflict zones is restricted not only by violence but also by political manipulation and misinformation. Hybrid warfare's ability to disrupt supply chains and block aid flows leaves children particularly vulnerable to starvation, disease, and exploitation. In many cases, children are forced into survival strategies, including labour exploitation and recruitment by armed groups, further perpetuating cycles of poverty and violence.

29 Caliskan, 2019.

Monitoring and reporting mechanisms must be enhanced to ensure that violations against children's rights are systematically documented and that perpetrators are held accountable.[30] Additionally, national governments and international bodies must work together to bridge the gap between legal norms and practical enforcement. This requires not only the ratification of international treaties but also the development of national legislation that incorporates child protection measures into broader security strategies.

Moreover, the protection of children's rights in hybrid warfare necessitates a paradigm shift towards resilience-building and child-centred approaches. Efforts must be made to ensure that children's voices are included in peace-building processes and post-conflict reconstruction. Their perspectives provide valuable insights into the long-term impacts of conflict and can help shape policies that prioritize their rehabilitation and reintegration into society. Investing in education, mental health support, and community programmes is crucial to fostering a sense of stability and normalcy for children affected by hybrid warfare.

After all, the protection of children's rights in the context of hybrid warfare represents one of the most pressing challenges in contemporary international law and humanitarian efforts. While significant progress has been made in recognizing children as independent rights-holders, the realities of hybrid conflicts demand more adaptive and integrated responses. The international community must move beyond reactive measures and adopt proactive strategies that address the root causes of conflict, strengthen accountability mechanisms, and empower children and their communities. Ultimately, safeguarding children's rights in hybrid warfare requires a collective commitment to uphold the principles of justice, dignity, and resilience in the face of an increasingly complex and unpredictable global security landscape.

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