Jean Monnet Chair on Cross-border Movement of a Child in EU

EU CHILD

Doctoral Conference Osijek

PROCEEDINGS

Osijek, 15 and 16 March 2018

Co-funded by the Erasmus+ Programme of the European Union

Jean Monnet Chair in Cross-border Movement of a Child

EU CHILD

Doctoral Conference Osijek

Editor:
Mirela Župan

PROCEEDINGS

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PROGRAMEE

15 March 2018

Faculty of Law Osijek, Faculty Council Aula

14:00 – 15:00 Registration

15:00 – 15:15
Conference opening / EU child project presentation
Prof. Sonja Vila, vice rector /
Prof. Renata Perić, dean
Ass.prof. Mirela Župan, Jean Monnet Chiar holder

15:15 - 18:00 I. SESSION - CHILD ABDUCTION
Moderators: Ass.prof. Mirela Župan, Ass.prof. Ines Medić, Ass.prof. Sanja Marjanović

Plenary lectures
International Child Abductions
Prof. Thalia Kruger, University of Antwerp

Good Practice on Article 13(1)(b) of the Hague Child Abduction Convention
Ass.prof. Sanja Marjanović, University of Niš

16:00 -16:15 Coffee break

Provisional measures and child abduction procedures
Ass.prof. Mirela Župan, mr.sc. Senija Ledić, PhD candidate, Martina Drventić

Role of the Ministry of Foreign and European Affairs in international cases of child abduction
Mario Oreški, PhD candidate

Un/lawful relocation of a child and parental responsibility – Croatian challenges
Daniel Rupić, PhD candidate

Mediation in cross-border parental child abduction
Ass.prof. Branka Rešetar, Marijana Šego, PhD candidate

Child abduction – violation of the "right to a family life"
Suzana Šop, PhD candidate

17:15 – 18:00 Discussion

19: 00– Dinner

16 March 2018

Faculty of Law Osijek, Faculty Council Aula

9:00 – 11:00 II. SESSION – GENERAL TOPICS
Moderators: Ass.prof. Branka Rešetar, Ass.prof. Paula Poretti, Ass.prof. Igor Vuletić

Plenary lecture
Children's rights in family law procedures
Prof Szeibert Orsolya, Eötvös Loránd University Budapest

Protection of fundamental rights of migrant children-Are we up to it?
Ass.prof. Ines Medić, Mia Grgić, PhD candidate

Can a diplomatic status of a parent be considered as a stumbling-block in ensuring the rights of the child?
Maja Čarni Pretnar, PhD candidate

Children's capacity to give informed consent
Ass.prof. Ivana Tucak, Tomislav Nedić, PhD candidate; Dorian Sabo, PhD candidate

The child in a child: child marriage and lost identity
Jane Diala, PhD candidate

Access to justice for children with disabilities
Ass.prof. Paula Poretti, Marija Živković, PhD candidate

Juvenile criminal procedure in Bosnia and Herzegovina: between general and separate criminal legislation
Nedžad Smailagić, PhD candidate

11:00-11:15 Discussion

11:15 -11:45 Coffee break

11:45 - 14:00 III. SESSION– EU TOPICS

Moderators / Moderatori: Prof.dr.sc. Mario Vinković, Doc.dr.sc. Dunja Duić, Doc.dr.sc. Tunjica Petrašević

Plenary lecture
The child's best interest as a primary consideration in EU family reunification law
Prof. dr. sc. Iris Goldner Lang, University of Zagreb

New issues of the right on family reunification within the EU law - Analysis of the Case C-
165/14 Alfredo Rendón Marín v. Administración Del Estado
Ass.prof. Dunja Duić, Ass.prof. Tunjica Petrašević, Ena Buljan, PhD candidate

Trafficking of children in the European Union
Ksenja Pertinač, PhD candidate
Violence against children and integrated child protection systems in the European Union
Ivana Rešetar Čulo, PhD candidate

Child's position in a cross-border successions procedure
Ass.prof. Mirela Župan, Marina Čepo, PhD candidate

Child's right to property – child as a shareholder
Zlatan Omerspahić PhD candidate

13:30 – 14:00 – Discussion

14:00 – Lunch

EU Child

Doctoral Conference Osijek

15-16 March 2018

The international Doctoral Conference Osijek entitled 'EU Child" is organized by the J.J. Strossmayer University of Osijek and held in Osijek on the 15-16 March 2018. The Conference is one of the events of the **EU Child project „Jean Monnet Chair on Cross-Border Movement of a Child**" reg.br. 575451-EPP-1-2016-1-HR-EPPJMO-CHAIR. EU Child is a three-year long project (1/9/2016-31/8/2019) performed at the J.J. Strossmayer University of Osijek. The project is co-financed and supported by the European Union through the ERASMUS + Program of the Education, Audiovisual and Culture Agency, and by the participating Law faculty. EU Child project is operated as an intensive curricula activity in various interrelated legal areas and through various additional activities with legal aspects of corss-border child movement in its focus. Among the activities one can find enhancing existing teaching activity and intoduction of the new curricula, round table, webinars and workshops for wide range of affected audience (from elementary school children andteachers to law students, practitioners and interested public in general), research activities and a Moot Court in the closing year of the project.

Organizing the Doctoral conference 'EU Child' targets one of the project goals. EUChild Chair aims to encourage, advice and mentor young generation in EU studies to cross-border child movement. PhD candidates are encouraged to take part in conference, to conduct / present a research / prepare a quality scientific paper, either alone or together with their supervisors.

To attract the widest possible audience who can benefit from the research results, the conference papers are collected and published here. Conference papers are previously published in the journals Pravni vjesnik (2019)35(1) and SEE Law Journal (2018)1(4), (2019).(5) and (2019)1(6). The Faculty of Law, University of Osijek is much priviledged to host the conference and hopes that the cooperation will be continued.

Mirela Župan

CONTENTS

CHILD ABDUCTIONS

Mirela Župan[*]
Senija Ledić[**]
Martina Drventić[***]

PROVISIONAL MEASURES AND CHILD ABDUCTION PROCEEDINGS[****]

Summary
The purpose of the established system of the proceedings in cases of international child abduction, as set out in the Hague Convention on Child Abduction, which has been strengthened, in relation to the EU Member States, by the provisions of the Brussels II bis Regulation, is to secure a prompt return of the child that has been wrongfully removed or retained to his/her Member State of origin. The return of the child must provide full protection of the child both in the state where the child was unlawfully resident and in the state where the child has to return. In these respect, the competent authorities have at their disposal legal mechanisms for provisional and protective measures provided for by the Brussels II bis Regulation and the Hague Convention on Measures for the Protection of Children. The possibility of taking these measures will depend on the national law of the state in question and on the specific circumstances of the case. In this paper, a legal framework will be presented for the imposition of provisional measures in cases of cross-border child abduction, which will be supported by the case law of the Court of Justice of the European Union. Case examples gathered under the project "Cross-border removal and retention of a child – Croatian practice and European expectations" will illustrate the difficulties encountered by the courts in the Republic of Croatia when it comes to applying the relevant provisions.

Keywords: cross-border child abduction, Hague Convention on Child Abduction, Brussels II bis Regulation, Hague Convention on Measures for the Protection of Children, provisional and protective measures, Court of Justice of the European Union.

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1. INTRODUCTION

Provisional and protective measures, besides in civil and commercial matters, may be of particular importance in cross-border family disputes, if applied properly.[1] Despite the fact that international treaties and regulations governing procedural issues in civil and commercial matters have been applied for decades, there are many outstanding issues in relation to proper application of provisional measures. They are also reflected in provisional measures in family matters concerning the definition of provisional measures, a proper structure of criteria pertaining to connecting factors, an *ex parte* system of provisional measures and the relationship and coordination with the substantive procedure.[2] The aim of research carried out within the framework of the project "Cross-border removal and retention of a child - Croatian practice and European expectations" (hereinafter: Project) was to provide an overall scientific analysis of the practice of four Croatian municipal courts (Municipal Civil Court of Zagreb, Municipal Court of Split, Municipal Court of Rijeka, Municipal Court of Osijek) in the period from 1 July 2013 to 1 July 2017.[3] The objective of this research is to determine the number and manner of solving the cases and to analyse them statistically and scientifically, aiming at contributing to adaptation of the Croatian legislation to the international obligations assumed. The research showed that in the relevant period of time, 16 cases were conducted before those four courts on the basis of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: Hague Convention on Child Abduction).[4] In five cases, the court recorded the existence of provisional measures. Two were taken during the child abduction proceedings in the state where the child was habitually resident prior to removal. Three were taken in the state to which the child was unlawfully removed, two of which were taken before a request for the return of the child was lodged and one was taken during the child abduction proceedings. It was also documented that in two cases, during the decision-making process about the return of the child, the Croatian court had received a request for a provisional measure, which was rejected in both cases. The paper analyses court decision collected by the Project to determine which controversial issues regarding the application of the rules on provisional measures have been confirmed in relation to Croatian practice. This paper will also deal with the relationship of legal sources regulating provisional measures and their scope (2, 3), applicable law (4), procedural issues (5, 6) and protective measures in international child

[1] Pertegás Sender, M., *Article 20 Provisional, including protective measures*, in: Magnus, U., Mankowski, P. (eds.), Brussels II bis – Commentary, Sellier European Law Publishers, München, 2012, p. 248.
[2] See: Honorati, C., *Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling*, Rivista di diritto internazionale privato e processuale, Vol. 48, No. 3, 2012, pp. 525-544.
[3] The project was funded through the internal call for proposals of J. J. Strossmayer University of Osijek for the application of scientific research and artistic projects for the program IZIP 2016. The principal investigator is Mirela Župan, PhD, Associate Professor, and the guest researcher, Professor Thalia Kruger, comes from the University of Antwerpen. Other Project associates are Martina Mikrut, PhD, Assistant Professor, Martina Drventić, Senija Ledić, MS, Marijana Šego, Mario Oreški and Danijel Rupić.
[4] HCCH, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24. Haška konvencija o građanskopravnim aspektima međunarodne otmice djece od 25.10.1980, Official Gazette of SFRJ, International Treaties, No. 7/91.

abduction proceedings (7). The content will be corroborated by the relevant practice of the Court of Justice of the European Union (hereinafter: CJEU).

2. LEGAL SOURCES OF PROVISIONAL MEASURES IN INTERNATIONAL CHILD ABDUCTION CASES

The basis for dealing with cross-border child abduction cases is the Hague Convention on Child Abduction. It does not regulate any legal aspect of provisional measures, but merely provides for them in the chapter on central authorities, citing, as one of the special functions of central authorities, that they shall take all appropriate measures, either directly or through any intermediary, to prevent further harm to the child or prejudice to any of the interested parties by taking or initiating a provisional measure.[5] The Republic of Croatia became a contracting party thereto on 8 October 1991.[6]

Legal sources supplementing international child abduction cases, including provisional measures, are the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: Hague Convention on Measures for the Protection of Children)[7] and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels II *bis* Regulation).[8]

In relation to the Hague Convention on Child Abduction, the Hague Convention on Measures for the Protection of Children is a comprehensive instrument for the protection of children.[9] While the Hague Convention on Child Abduction only provides for the possibility of initiating provisional measures, the Hague Convention on Measures for the Protection of Children contains rules on applicable law, rules on international jurisdiction and rules on recognition and enforcement. With regard to their mutual relationship, the provisions of the Hague Convention on Measures for the Protection of Children do not replace mechanisms established by the Hague Convention on Child Abduction, but supplement and strengthen them in some

[5] *Ibid.*, Article 7(2)(b).

[6] The Republic of Croatia became a contracting party pursuant to the Notification of Succession of 8 October 1991 – Official Gazette, International Treaties, No. 4/94

[7] HCCH, Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, https://www.hcch.net/en/instruments/conventions/full-text/?cid=70. Zakon o potvrđivanju Konvencije o nadležnosti, mjerodavnom pravu, priznanju, ovrsi i suradnji u odnosu na roditeljsku odgovornost i o mjerama za zaštitu djece, Official Gazette, International Treaties, No. 5/2009.

[8] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338.

[9] Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb, Pravni fakultet Osijek, Osijek, 2012, pp. 199-222, p. 201.

aspects.[10] The Republic of Croatia became a contracting party to the Hague Convention on Measures for the Protection of Children on 1 January 2010.
Within the framework of common provisions, the Brussels II *bis* Regulation, which lays down jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, contains a provision regulating provisional and protective measures.[11] The provisions of the Brussels II *bis* Regulation are also not used to change the provisions of the Convention on Child Abduction, but to supplement them.[12] In relations between the EU Member States, the Brussels II *bis* Regulation takes precedence over the Child Abduction Convention to the extent to which it relates to the cases governed by the Brussels II *bis* Regulation.[13] It has been in force in the Republic of Croatia since 1 July 2013.
A somewhat more complex mutual relationship exists between the Convention on Measures for the Protection of Children and the Brussels II *bis* Regulation. The Convention on Measures for the Protection of Children stipulates that it does not affect any international instrument which contracting parties are parties to and which contains provisions on matters governed by the Convention on Measures for the Protection of Children, unless the parties to that international agreement otherwise agree.[14] The Brussels II *bis* Regulation regulates in more detail the relationship between these two instruments, prescribing that in legal relations involving the EU Member States, the Brussels II *bis* Regulation will take precedence in cases where a child is habitually resident in the territory of an EU Member State or in cases where the recognition and enforcement of a judgment given in one Member State are requested in another Member State, irrespective of the child's habitual residence.[15] In matters not regulated by the Brussels II *bis* Regulation itself, the Hague Convention on Child Abduction and the Hague Convention on Measures for the Protection of Children shall apply.[16]

3. THE SCOPE OF THE RELEVANT PROVISIONS ON PROVISIONAL MEASURES

Given the lack of arrangements for provisional measures under the Hague Convention on Child Abduction, additional clarifications can be found in its accompanying documents. The Explanatory Report to the Child Abduction Convention explains that the ability of the central authorities to act varies from one Contracting State to another and that provisional measures are designed in particular to avoid another removal of the child.[17] Thematically linked only to central authorities, the Guide to Good Practice elaborates this particular task in more detail. It states that depending on the limits of the powers vested in them, the central authorities should, at the very least, be able to alert other welfare or child protection agencies when a child is at

[10] *Practical Handbook on the Operation of the 1996 Child Protection Convention, HCCH Publications*, 2014, para. 13.1., https://www.hcch.net/en/publications-and-studies/details4/?pid=6096&dtid=3, Accessed 19 September 2017.
[11] Brussels II *bis* Regulation, *op. cit.*, note 8, Article 20.
[12] Pataut, E., *Article 11 Return of the child*, in: Magnus, U., Mankowski, P. (eds.), Brussels IIbis – Commentary, Sellier European Law Publishers, München, 2012, p. 128.
[13] Brussels II *bis* Regulation, *op. cit.* note 8), Article 60(1)(e).
[14] Convention on Measures for the Protection of Children, *op. cit.* note 7), Article 52(1).
[15] Brussels II *bis* Regulation, *op. cit.* note 8), Article 61.
[16] *Ibid.*, Article 62(1).
[17] Pérez-Vera, E., *Explanatory Report on the 1980 Hague Child Abduction Convention*, HCCH Publications, 1982, para. 91, https://assets.hcch.net/upload/expl28.pdf. Accessed 17 September 2017.

risk, so that those agencies can take necessary protective measures.[18] The conclusion of the Special Commission to Review the Operation of the Hague Convention is that Contracting States should ensure the availability of effective methods to prevent either party from removing the child prior to the decision on return.[19]

The Hague Convention on Measures for the Protection of Children distinguishes between two types of measures that can be imposed in international child abduction proceedings with respect to jurisdiction in relation to their imposition.[20] These are measures for which the authority of the state where the child is habitually resident has jurisdiction (Article 5) and urgent protective measures that are imposed by the authority of the state where the child is unlawfully resident (Article 11). A comprehensive rule stipulates what measures directed to the protection of the person or assets of the child may in particular deal with: (a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; (b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence; (c) guardianship, curatorship and similar institutions; (d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; (e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution; (f) the supervision by a public authority of the care of a child by any person having charge of the child; and (g) the administration, conservation or disposal of the child's property. This list contained in Article 3 of the Convention on Measures for the Protection of Children is not complete, therefore it is difficult to find a measure that will not fall under the scope of this Convention, with the exception of those expressly excluded in Article 4.[21] Provisional measures resulting from the general rule of jurisdiction based on the child's habitual residence are not limited by the rules of temporal or territorial validity. Pursuant to Article 14, they remain in force, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

Urgent protective measures referred to in Article 11 may be taken by the authorities of any Contracting State in whose territory the child or assets belonging to the child are present, but only in cases of urgency. The Convention itself does not define the concept of urgency. It can be said that an emergency situation is a circumstance in which regular treatment pursuant to Articles 5 to 10 can cause irreparable damage to the child. The state of urgency therefore

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[18] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice Part I*, HCCH Publications, 2003, p. 52, URL: https://assets.hcch.net/upload/abdguide_e.pdf. Accessed 17 September 2017.

[19] *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), Conclusion 1.12., URL: https://assets.hcch.net/upload/concl28sc4_e.pdf. Accessed 18 September 2017.

[20] See generally: Lortie, P., *An overview of the aims and central features of the 1996 Hague Convention on International Child Protection*, in: Rešetar, B., Aras, S. (eds.), Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta Interdisciplinarni, komparativni i međunarodni osvrti, Pravni fakultet Osijek, Osijek, 2014, pp. 221-227.

[21] Župan, M., *op. cit.* note 9, p. 204.

justifies the deviation from the usual rules and for this reason it should be interpreted quite strictly.[22] The timeliness of these measures is limited to the period until the authorities competent under other rules of jurisdiction, i.e. the competent authorities of a non-Contracting State, take measures to remedy the situation.

In Article 20, the Brussels II *bis* Regulation recognises provisional and protective measures that the courts of a Member State may take in urgent cases in respect of persons or assets in that state.[23] These measures shall cease to apply at the moment when the court of the Member State having jurisdiction under the Brussels II *bis* Regulation takes the measures it considers to be appropriate. In accordance with the interpretation of the CJEU in Case *A.*, provisional measures within the meaning of Article 20 of the Brussels II *bis* Regulation are only those measures where three cumulative conditions are satisfied, i.e. the measures concerned must be urgent, must relate to persons and assets located in the forum state and must be provisional.[24] The substantive scope of this provision is doubtful in legal literature.[25] It is an open question whether Article 20 refers only to provisional and protective measures relating to the substantive scope of the Brussels II *bis* Regulation, or whether such measures may also relate to matters beyond its substantive scope. From the Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (hereinafter: Brussels II Convention) it follows that, since provisional measures may be imposed in relation to persons and assets, they also concern matters not included in the scope of the Brussels II Convention.[26] This claim is not confirmed by the interpretations of the Court of Justice of the European Union in cases *De Cavel*[27] and *W. v H.*[28] in relation to provisional measures pertaining to the protection of matrimonial property. Today it is easier to offer an answer to the question of the substantive scope of the provision of Article 20, since provisional measures in matters most frequently associated with marital disputes and disputes over parental responsibility, such as the exercise of the maintenance right and matters of marital property regimes, are legally regulated by the separate regulations.[29]

[22] Lagarde, P., *Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications*, 1998, para. 68, https://www.hcch.net/en/publications-and-studies/details4/?pid=2943. Accessed 21 September 2017.

[23] The Convention on Measures for the Protection of Children provides for the possibility of imposing measures in relation to the child and assets, the Brussels II *bis* Regulation provides for the imposition of provisional measures in relation to persons and assets. In the Proposal for a recast of the Brussels II *bis* Regulation of June 2016, the word "person" is replaced by the word "child", harmonising in this way its content with the Convention on Measures for the Protection of Children. See also: Drventić, M., *New Trends in European Family Procedural Law*, in: Duić, D., Petrašević, T. (eds.), Procedural Aspects of EU Law, Pravni fakultet Osijek, Osijek, 2017, pp. 424-447, p. 433.

[24] Case C-523/07, *A*, [2009], ECLI:EU:C:2009:225, para. 47.

[25] Pertegás Sender, M., *op. cit.* note 1, p. 250.

[26] *Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás*, [1998] OJ C 221/27, para. 59.

[27] Case 143/78*, Jacques de Cavel v Louise de Cavel*, [1979], ECLI:EU:C:1979:83.

[28] Case 25/81, *C.H.W. v G.J.H.*, [1982], ECLI:EU:C:1982:116.

[29] Pertegás Sender, M., *op. cit.* note 1, p. 251.

4. APPLICABLE LAW

The question of the law applicable to taking provisional measures can be found only in the provisions of the Hague Convention on Measures for the Protection of Children. Pursuant to Article 15, the law applicable to protective measures is law of the forum (*lex fori*). This rule applies irrespective of the grounds on which jurisdiction is based and is justified by the fact that the application of law of the forum makes it easier for the authorities to operate since they apply the law they know best, and since ultimately protective measures will primarily be taken in the state imposing them.[30] Exceptionally, in so far as the protection of the person or the property of the child requires, the court may exceptionally apply or take into consideration the law of another state with which the situation has a substantial connection.[31] Similarly, if the child's habitual residence changes to another Contracting State, the law of that other state governs, from the time of the change, the conditions of application of the measures taken by the former authority.[32]

5. INTERNATIONAL JURISDICTION

5.1. RULES ON JURISDICTION

In provisions on jurisdiction, the Hague Convention on Measures for the Protection of Children favours the courts and authorities of the child's habitual residence.[33] The basic rule of jurisdiction contained in Article 5 stipulates that the judicial or administrative authorities of the Contracting State of the child's habitual residence have jurisdiction to take measures directed to the protection of the child's person or property. The same article contains an exception according to which, in case of a change of the child's habitual residence to another Contracting State, the authorities of the state of the new habitual residence shall have jurisdiction. However, a change of the child's habitual residence will not lead to a change of international jurisdiction if child relocation is unlawful. In accordance with Article 7, in case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction. Exceptionally, the authorities of another State would have jurisdiction if a person, institution or other authority having rights of custody has acquiesced in the removal or retention, or if the child has resided in that other state for a period of at least one year after the person or institution having rights of custody has or should have had knowledge of the whereabouts of the child, no request for the return lodged within that period is still pending, and the child is settled in its new environment.[34] By this solution, the Hague Convention on Measures for the Protection of Children reinforces the effects of the Hague Convention on Child Abduction, stating that the removal of a child to another state does not provide for jurisdiction of the authorities in that

[30] Župan, M., *op. cit.* note 9, p. 212.
[31] Convention on Measures for the Protection of Children, *op. cit.* note 7), Article (15)(2).
[32] *Ibid.*, Article (15)(3).
[33] Župan, M., *op. cit.* note 9, p. 205.
[34] Convention on Measures for the Protection of Children, *op. cit.* note 7, Article 7(1).

state on parental responsibility or contacts.[35] The same solution applies in relation to the EU Member States in accordance with Article 10 of the Brussels II *bis* Reglation.[36]

Despite the above-mentioned rules, the authorities of the state of a new unlawful habitual residence of the child have the ability to adopt urgent protective measures. Their jurisdiction is based on Article 11 of the Hague Convention on Measures for the Protection of Children, which stipulates that the authorities of any Contracting State in whose territory the child or property belonging to the child is present shall have jurisdiction to take any necessary measures of protection, provided that it is a case of urgency and with a time limit set for such measures that shall cease to apply at the moment when the authorities of the state of the child's habitual residence take the measures they consider to be appropriate.

In its Article 20, the Brussels II *bis* Regulation also enables deviation from the rules of jurisdiction, prescribing that in urgent cases, the courts of a Member State may take provisional, including protective, measures in respect of persons or assets in that state even if the court of another Member State has jurisdiction as to the substance of the dispute.[37] It is suggested that, in order to make the grounds of jurisdiction clearly evident, whenever a court takes such measure it should state *in limine* of the judgment whereby the measure is taken whether it has jurisdictional competence under the Regulation on the substance of the process or whether it has not.[38]

The fact that the Croatian authorities are not aware of the possibility of imposing provisional and protective measures under Article 20 of the Brussels II *bis* Regulation is confirmed by a recent case from the Municipal Court of Split,[39] which ruled on the request of the father to return the unlawfully removed child to Slovenia. The father claims that he did not give the child's mother permission to remove the child to Croatia. The mother stated in the court that she was a victim of domestic violence and hence stayed for a while at a safe house in Slovenia. The Croatian court found out in the return proceedings that, based on the request the father lodged before the competent court in Slovenia to award custody of the child to him, a provisional measure was adopted by which the child was entrusted in the mother's care and the father was granted with the contact rights. Likewise, the court also stated that a court settlement on a visitation schedule between the father and the mother regulating the time the father spends with the child was concluded before the competent Slovenian court shortly thereafter. Since father continued to harass the mother and the child during the proceedings in Croatia, the mother requested the adoption of a provisional measure before the court in Croatia as to who the child would live with and how the contacts with the other parent would be arranged. The court declared that it has no jurisdiction as to the adoption of a provisional measure, explaining that by the fact that the child was habitually resident in Slovenia before abduction, that the

[35] Župan, M., *op. cit.* note 9, p. 208.

[36] See: Lazić, V., *Legal Framework for International Child Abduction in the European Union – the Need for Changes in the Light of Povse v. Austria*, in: Župan, M. (ed), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osijek, Osijek, 2015, pp. 295-316.

[37] See: McEleavi, P., *The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?*, Journal of Private International Law, Vol. 1, No. 1, 2005, pp. 5-34, p. 11.

[38] *Practice Guide for the Application of the Brussels IIa Regulation*, p. 23, http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_hr.pdf. Accessed 20 September 2017.

[39] Municipal Court of Split (Općinski sud u Splitu), No. R1 Ob-637/2016 from 26 June 2017.

parental responsibility proceedings were conducted before the Slovenian court, and that there already exists a provisional measure regulating visitation and contacts. The Appeal Court confirmed the contested decision. A provisional measure and the settlement made before the Slovenian authorities do not produce any legal effect in Croatia without the recognition procedure carried out, so it is wrong to refer to them in the explanation as one of the reasons for not imposing a provisional measure in Croatia. The court could have found the grounds for action at the request of the mother for the adoption of a provisional measure in Article 20 of the Brussels II *bis* Regulation or explained its reasons for not adopting the measure by other facts.

In the proceedings for the return of the child brought from France to Croatia by its mother, when deciding on the father's request for the adoption of a provisional measure to regulate his contact with the child in Croatia, the Municipal Civil Court of Zagreb has decided not to impose a provisional measure, arguing that the petitioner has no legal interest in the imposition thereof.[40] The Appeal Court accepted the appeal filed by the appellant and revoked the decision in which the court refused to issue a provisional measure and remanded the case to the Municipal Civil Court instructing it to state the reasons for rejecting the proposal.[41] The two instances were without prejudice to their jurisdiction, although in the explanatory statement, authorisation to issue a provisional measure was not based on Article 20 of the Brussels II *bis* Regulation. In fact, the courts did not make any referral to the grounds of jurisdiction for issuing such a provisional measure. It is to be assumed that they were not considering the cross-border element and by this had been guided by the national rules.[42]

5.2. RELATIONSHIP BETWEEN THE GENERAL JURISDICTION PROVISIONS AND THE PROVISION OF ARTICLE 20 OF THE BRUSSELS II *BIS* REGULATION. CASE *DETIČEK V SGUEGLIA*.

The relationship between a general jurisdiction rules based on the child's habitual residence and special authorisation to take provisional measures referred to in Article 20 of the Brussels II *bis* Regulation, which has repeatedly been problematic in national practice, has been further regulated by the Court of Justice of the European Union with its interpretation in the Detiček v Sgueglia case, following the request for a preliminary ruling from the High Court of Maribor.[43] The judgement is related to the dispute between Ms Detiček and Mr Sgueglia concerning custody of their daughter Antonella. In June 2007, the competent court in Tivoli (Italy), before which divorce proceedings were pending between Ms Detiček and Mr Sgueglia, provisionally granted custody of the child to Mr Sgueglia and ordered temporarily placement of the daughter in the children's home in Rome. On the same date the mother left Italy with the child and went to Slovenia. Shortly afterwards, Mr Sguiglia requested the Slovenian authorities to recognise and declare enforceable the order by the Italian court, which was done by the

[40] Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), No. 144-R1 Ob-830/16-43 from 31 January 2017.
[41] County Court of Zagreb (Županijski sud u Zagrebu), No. 68 Gž Ob-400/17-2 from 10 April 2017.
[42] See: Župan, M., Drventić, M., *Kindesentführung vor kroatischen Gerichten mit besonderer Rücksicht auf die aus Deutschland kommenden Anträge*, Revija za evropsko pravo, Vol. 20, No. 1., 2018, pp. 63-83.
[43] Case C-403/09 PPU *Jasna Detiček v. Maurizio Sgueglia*, [2009], ECLI:EU:C:2009:810.

competent court in Slovenia, in accordance with the Brussels II *bis* Regulation. By judgment of November 2007 of the Regional Court of Maribor, the order of the court in Tivoli was declared enforceable in the territory of the Republic of Slovenia, which was also confirmed by the judgment of the Supreme Court of the Republic of Slovenia in October 2008. Meanwhile, Ms Detiček made an application to the court in Maribor for a provisional and protective measure giving her custody of the child. By order of December 2008, the Regional Court of Maribor allowed Ms Detiček's application and granted her provisional custody of the child. The Court based its decision on Article 20 of the Brussels II *bis* Regulation in conjunction with Article 13 of the 1980 Hague Convention on Child Abduction, on the grounds of change of circumstances and the best interests of the child. Mr Sgueglia appealed to the same court against that order, which dismissed his action in June 2009. After that, he appealed to the High Court. The High Court decided to stay the proceedings and refer the question to the Court of Justice of the European Union for a preliminary ruling as to whether a court of the Republic of Slovenia, has jurisdiction under Article 20 of the Brussels II *bis* Regulation to take provisional and protective measures in a situation in which a court of another Member State, having jurisdiction as to the substance, has already taken a protective measure declared enforceable in the Republic of Slovenia. The Court explains that Article 20 is an exception to the rule of general jurisdiction laid down in Article 8 of the Brussels II *bis* Regulation, which should be interpreted restrictively and which can only be applied on condition that three cumulative conditions are satisfied, i.e. the measures concerned must be urgent, must relate to persons and assets located in the forum state and must be provisional. The Court considers that none of the conditions were met in the Detiček case. The Court finds that the circumstances mentioned by the Regional Court of Maribor when it ordered a provisional measure are not grounds for finding that the case is urgent. If such circumstances were treated as an urgency situation, one would run counter to the principle of mutual recognition of judgments given in the Member States, given that a provisional measure adopted in Italy is recognised before the competent Slovenian authorities.[44] The Court explains that a provisional measure granting custody of a child is taken not only in respect of the child, but also in respect of the parent to whom custody of the child is granted and of the other parent who is deprived of that custody. In this case, the father, as one of the parties in respect of whom such a measure is taken, resides in a Member State other than the forum state.[45] Finally, the court also considers the issue of a child maintaining direct contact with both parents in the light of Article 24 of the Charter of Fundamental Rights of the European Union, [46] and concludes that Article 20 of the Brussels II *bis* Regulation cannot be interpreted in such a way that it can be used by the parent who has wrongfully removed the child as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.[47] In the light of all the above considerations, the Court decided that Article 20 must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State

[44] *Ibid.*, para. 45-49.
[45] *Ibid.*, para. 50-52.
[46] "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests." *Charter of Fundamental Rights of the European Union*, [2007], OJ C 303/1.
[47] Case C-403/09 PPU, *op. cit.* note 43, para. 57.

to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction as to the substance of the dispute, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.
By its strict interpretation of the requirements that needs to be met in order to apply the Article 20 of the Brussels II*bis* Regulation, the CJEU had manifestly advocated the rules of the Hague Convention on Child Abduction and Brussels II *bis* Regulation that are fighting against the child abduction. Still, it is considered that the condition on geographical scope suggesting that all the parties must be in the State in which the provisional measure is request, is to restrictive. It leads toward the situation where no provisional measure could be issued if one parent is in another country.

6. THE RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES

Pursuant to Article 23 of the Convention on Measures for the Protection of Children, measures for the protection of children taken in one Contracting State will be recognised by operation of law in other Contracting States. It is not necessary to commence proceedings in the Contracting State requiring the recognition of measures for them to produce their effects there.[48] However, in order for a measure to be recognised, its existence may need to established in the requested Contracting State. To avoid placing bureaucratic hurdles in the way of the protection of children, the Convention does not have any formal requirements in this regard.[49] Article 23(2) contains an exhaustive list of reasons for which recognition may be refused: (i) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II; (ii) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of the procedure of the requested State; (iii) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard; (iv) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child; (v) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State; and (vi) if the procedure provided in Article 33 has not been complied with. When it comes to enforcement, measures taken and enforceable in one Contracting State shall, upon request by one of the interested parties, be declared enforceable or registered for the purpose of enforcement in that other state. The declaration of enforceability or registration may be refused only for the same the reasons recognition may be refused for. In such procedures, the Convention prohibits any review of the merits of the measure taken.[50]

[48] Practical Handbook on the Operation of the 1996 Child Protection Convention, *op. cit.* note 10, para. 10.1.
[49] *Ibid.*, para. 10.2.
[50] Convention on Measures for the Protection of Children, *op. cit.* note 7, Article 27.

Recognition and enforcement rules apply to all jurisdictional regimes, including urgent protective measures referred to in Article 11. Article 11 gives the judge rendering a decision on a request for the return the possibility of taking urgent protective measures when there is a possibility that the child's return is expected to encounter a serious risk of harm. The advantage of these measures is that they give assurance to a judge that they will be recognised and enforceable in the state the child is to return to, in the period immediately following the child's return.[51] For example, a judge may impose a measure that would enable a parent from whom the child was removed due to allegations of domestic violence, following the return to its state of habitual residence, to visit the child only under the supervision of a Social Welfare Center officer.

The rule on provisional and protective measures referred to in Article 20 of the Brussels II *bis* Regulation is limited in terms of recognition and enforcement.[52] Unlike Article 11 of the Convention on Measures for the Protection of Children, it does not constitute the rule of jurisdiction but is contained in the chapter containing common provisions, meaning that the rules on the recognition and enforcement of decisions under Brussels II *bis* Regulation do not apply thereto

A more detailed interpretation of this question was given by the court in the Purrucker case[53], following the request for a preliminary ruling from the German Federal Court. The judgment concerned Mr Purrucker and Mr Vallés Pérez. In mid-2005, Ms Purrucker went to Spain to live with Mr Vallés Pérez. In May 2006, she gave birth to twins who were born prematurely. The boy, Merlín, was able to leave hospital in September 2006. The girl, Samira, could do so only in March 2007, after intervening complications. By that time, the relationship between Ms Purrucker and Mr Vallés Pérez had deteriorated. Ms Purrucker wanted to return to Germany with the children, while Mr Vallés Pérez was opposed to this. In January 2007, the parties signed an agreement before a notary according to which the children will live in Germany with the mother but the parents will both have joint custody, and the father can freely exercise his right of access to his children. The agreement had to be approved by a competent court in order to be enforceable. Ms Purrucker intended to return to Germany with her son D., the child of a previous relationship, and her children Merlín and Samira. However, due to complications and the need for surgery, the child Samira could not leave hospital. In February 2007, Ms Purrucker left for Germany with her son Merlín and according to her statements in the proceedings, her daughter was also to be brought to Germany after she left hospital. Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, in June 2007 he brought proceedings before the court of first instance in San Lorenzo de El Escorial to obtain the granting of the provisional measure and rights of custody of the children Samira and Merlín. By the judgment delivered in November 2007, the Spanish Court adopted the provisional measure granting the father custody of both children, while the mother was ordered to return Merlín to Spain and

[51] Beaumont, P., Walker, L., Holliday, J., *Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU*, Journal of Private International Law, Vol. 12, No. 2, 2016, pp. 211-260.

[52] Beaumont, P., Walker, L., Holliday, J., *Parental responsibility and international child abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, International Family Law Journal, Vol. 4, 2016, pp. 307-318.

[53] Case C-256/09 *Bianka Purrucker v Guillermo Vallés Pérez*, [2009], ECLI:EU:C:2010:437.

was allowed to visit her children at any time whenever she wishes to do so. In January 2008, the Spanish court issued a certificate pursuant to Article 39 of the Brussels II *bis* Regulation. In addition to requesting the return of Merlín to Spain, Mr Vallés Pérez also brought proceedings in Germany concerning the enforcement of the judgment of the Court in San Lorenzo de El Escorial granting a provisional measure. On 3 July 2008, the District Court in Stuttgart ordered the execution of the judgment of the Spanish court, which was confirmed by the Appeal Court in Stuttgart by a decision on appeal of 22 September 2008, and warned the mother that she could be fined if she did not comply with the order. Ms Purrucker brought the appeal before the Federal Court challenging the judgment of the Appeal Court in Stuttgart of 22 September 2008. The Federal Court decided to stay the proceedings and refer the question to the Court of Justice of the European Union for a preliminary ruling whether the provisions of Article 21 et seq. of the Brussels II *bis* Regulation concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, apply to enforceable provisional measures taken within the meaning of Article 20 of the Brussels II *bis* Regulation, concerning the right to child custody.[54] At the very beginning, the relevance of the question is challenged by the Court of Justice of EU. The provisional measure concerned in the Purrucker case does not fall within the scope of Article 20 of the Brussels II *bis* Regulation since it was taken by a court which had jurisdiction as to the substance of the matter. Moreover, even if this measure had been taken by a court which did not have jurisdiction as to the substance of the matter, it could not in any event fall within the scope of Article 20 in so far as it related to Merlín, since he was not in Spain when the Court in San Lorenzo de El Escorial delivered its judgment.[55] Furthermore, the Court explains that, as is evident from the position of Article 20 in the structure of the Regulation itself, it cannot be regarded as a provision which determines substantive jurisdiction.[56] The Court explains that the position of the provision of Article 20, its content and the content of Recital 16 show that provisional, including protective, measures within the scope of Article 20 do not fall into the category of judgments adopted in accordance with the rules of jurisdiction laid down by the Regulation and hence neither under the recognition and enforcement system established by the Regulation.[57] The fact that the provisional measures referred to in Article 20 of the Regulation do not fall under the recognition and enforcement rules prescribed by the Regulation, will not affect the possibility of their recognition and enforcement in the Member States in accordance with other international instruments, as long as they comply with the Regulation.[58]

The question arises as to whether Article 11 of the Convention on Measures for the Protection of Children shall apply when the child is habitually resident in an EU Member State? More specifically, in relation to the mutual legal relationship between two instruments, does Article

[54] The Court did not agree with the opinion of Advocate General Sharpstone, according to which provisional measures imposed by the competent court under the provisions of the Brussels II *bis* Regulation may be recognised and enforced in other Member States in the same way as any other decision rendered on the basis of the same facts, in accordance with Article 21 of the Brussels II *bis* Regulation. See: Case C-256/09 Opinion of Advocate General Sharpston delivered on 20 May 2010. ECLI:EU:C:2010:296.
[55] Case C-256/09, *op. cit.* note 41, para. 58.
[56] *Ibid.*, para. 60-61.
[57] *Ibid.*, para. 87.
[58] *Ibid.*, para. 92.

11(1) of the Convention on Measures for the Protection of Children fall under the heading "matters not regulated by the Brussels II *bis* Regulation"?[59] In its interpretation in the Purruker case, the Court did not give a completely clear answer to this question, although its positive attitude to the possibility of applying the provisions of the Hague Convention on Measures for the Protection of Children can be implied in its reasoning.

The aforementioned situations could eventually be resolved by the Commission Proposal to recast the Brussels II *bis* Regulation of 2016,[60] which favours the solution offered by the Convention on Measures for the Protection of Children. The Proposal moves the provision referring to provisional measures to the chapter on jurisdiction, and in a special provision contained in Article 48 it unambiguously states that the provisions of Chapter IV on the recognition and enforcement apply to provisional, including protective, measures determined by the competent authority under the jurisdiction rule.[61]

The practice of national courts has confirmed lack of understanding of the legal effects of provisional measures taken in another Member State. In one of the examples, the Municipal Court of Osijek acted upon the request of the petitioner for the return to Germany of a minor daughter unlawfully taken to Croatia by her mother for reasons of domestic violence against her and the child. In the course of the return proceedings, the father obtained a provisional measure in Germany entitling him to decide on the place of residence of the child. After having conducted the proceedings, the Croatian court decided to order the mother to return the child to the father to the place of her habitual residence in Germany, explaining that the conditions for the application of Article 13(1)(b) of the Convention have not been met, referring also to the provisional measure adopted in Germany as an additional reason for rendering a decision ordering the return of the child.[62] The provisional measure in matter was issued in the state of child's habitual residence and it was not recognised in the Republic of Croatia. In order to gain the legal force in the Republic of Croatia the measure needed to be recognised upon the Article 23 of the Hague Convention of on Measures for the Protection of Children. Otherwise, the measure was not effective in the Republic of Croatia. The Court of Appeal stressed in its reasoning that German provisional measure lacked the legal force in Croatia.[63]

[59] Beaumont, P., Walker, L., Holliday, J., *op. cit.* note 51, p. 13.

[60] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Bruxelles, 30.6.2016. COM(2016) 411 final 2016/0190 (CNS).

[61] See: Kruger, T., *Enhancing Cross-Border Cooperation,* Recasting the Brussels IIa Regulation, Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 36-45, p. 38, URL: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf. Accessed 25 September 2017 and Kruger, T., Samyn, L., *Brussels IIbis: successes and suggested improve*ments, Journal of Private International Law, Vol. 12, No. 1, 2016, pp. 132-168.

[62] Municipal Court of Osijek (Općinski sud u Osijeku), No. 12 R1 Ob-566/2016-26 from 3 October 2016 (INCADAT cite: HC/E/HR 1394).

[63] County Court of Zagreb (Županijski sud u Zagrebu), No. 1 Gž Ob-1456/2016-2 from 2 December 2016 (INCADAT cite: HC/E/HR 1395).

7. PROTECTIVE MEASURES

7.1. MEASURES SECURING THE RETURN OF A CHILD

During the return proceedings, it is necessary for the court and other competent authorities to ensure the safety and well-being of the child to the maximum extent possible. In these proceedings, we should distinguish between the measures taken in the requested State in order to protect the child during the return proceedings, and the measures taken in the requesting State in order to protect the child upon his or her return to the requesting State.[64]

Article 11(4) of the Brussels II *bis* Regulation stipulates that a court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention on Child Abduction if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. The provision, consistent with the principle of mutual trust between Member States, promotes the dialogue between judges and officials of the EU Member States to ensure that appropriate provisional measures are taken when necessary.[65] Research conducted showed that, out of eight decisions made in the EU Member States[66] which were decided upon in the relevant period by the courts included in research, in six cases the court rejected the petitioner's request for the returning of the child pursuant to Article 13(1)(b), in one case the court ordered the return of the child and in one case the judge rejected the request as inadmissible. It has been noted that only in one case, out of six, the court has verified that the adequate arrangements have not been made by the applicant in order to secure the protection of the child after his or her return. In another case, the court requested the data referred to in Article 11(4) of the Brussels II *bis* Regulation, but has not received any from the central authority of the requesting State by the judgment delivery date, and hence could not use them in the proceedings prior to judgment delivery.

In order to secure the prompt and safe return of the child, the courts ruling on requests for the return of children have at their disposal options such as mirror orders, the so-called *safe harbour* orders and undertakings, where the possibility of enforcement in the state the child is returned to is always uncertain. In the states that are contracting parties to the Hague Convention on Measures for the Protection of Children, the issue relating to enforcement in the other Contracting State is not questionable when adopting the measures referred to in Article 11.[67] The question as to whether and what kind of measure shall be taken depends on the particular circumstances of the case and the national law of the state in question.

Although the Child Abduction Convention does not mention them, a positive aspect of these measures is found in common law systems in the form of undertakings. They can be voluntarily

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[64] *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (10-17 October 2017), p. 34. https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf, Accessed 27 September 2017.

[65] Beaumont, P., Walker, L., Holliday, J., *op. cit.* note 51, p. 221.

[66] Judgements at first instance were taken into consideration, regardless of the outcome of the appeal procedure in some of the cases.

[67] Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *op. cit.* note 64, p. 35.

taken by the left-behind parent or their adoption may be requested by the court that decides on the return request.[68] Schuz lists five types of measures, arising from court practice, which can be brought in these situations: (i) financial and material measures, e.g. travel expenses for return purposes; (ii) measures aimed at preventing the initiation or continuation of criminal proceedings against a parent who abducted the child after his or her return, e.g. the obligation of the parent from whom the child was removed not to institute criminal proceedings, or to withdraw a lawsuit against the parent who removed the child; (iii) measures relating to parental care proceedings under way in the state where the child is to be returned, e.g. if the parent from whom the child was removed before or during the return proceedings obtains a decision granting parental care to him, (s)he may be obliged not to enforce that decision until the proceedings relating to the substance of the matter are concluded; (iv) measures aimed at preventing the violence of the parent from whom a child was removed against the returning child and parent, e.g. prohibition of access to the returning parent, and sometimes to the returning child without permission issued by the court of the returning state, and finally, (v) the measure by which the parent from whom the child was removed may commit to initiate the proceedings for making a decision on parental care and the state where the child returns immediately upon the child's return.

The aforementioned case of the Municipal Court of Osijek[69] was the only of eight EU cases in which the court ordered the return of the child to the father habitually resident in Germany. According to the circumstances of the case, the mother was a victim of domestic violence in Germany. She reported violence to the German police and stayed at a safe house in Germany for some time before coming to Croatia. It is unknown whether the mother has proven the existence of domestic violence before the court in Croatia, but it is clear that the court did not request any delivery of reports by the German authorities about the circumstances, which it was authorised to do on the basis of Article 13 of the Child Abduction Convention. A special guardian appointed to represent a child in court proceedings emphasised in the course of the proceedings that, if the child were to return to the Germany, the court should seek guarantees from the competent German authority aimed at securing the conditions for the return of the mother and the child to Germany. The court did not accept the opinion of a special guardian, and despite the existence of legitimate reasons for more careful handling of the case, it ruled that the child should be returned to the father, together with her travel document. Indiscriminate treatment of the court was confirmed later in the case. The appeal court annulled the first-instance judgment and returned the case for a retrial, and before the judgment was delivered in the repeated trial, the father, when he came into direct contact with his child during his visitation time in Croatia, took the child to Germany without the mother's permission. The above circumstances indicated that the court had the grounds for seeking a guarantee, but also for the adoption of a provisional measure under Article 20 of the Brussels II *bis* Regulation which would protect the child during the child return proceedings, such as measure of exercising the contact of a child and a father in a presence of a expert workers from the Social Welfare Centre.

[68] Schuz, R., *The Hague Child Abduction Convention. A Critical Analysis*, Hart Publishing, 2013, p. 291.
[69] Municipal Court of Osijek, *op. cit.* note 62.

7.2. PROTECTIVE MEASURES IN THE CHILD RETURN PROCEEDINGS IN THE LEGAL SYSTEM OF THE REPUBLIC OF CROATIA

In the legal system of the Republic of Croatia, in the proceedings in which it decides on family and status related matters,[70] the court is obliged to pay special attention to the protection of the rights and interests of children under the provisions of Article 348(1) of the Family Act.[71] In matters of status, decisions relating to parental care, personal relationships and measures to protect the rights and well-being of a child it is also authorised to determine the facts the parties have not presented (Article 350). Moreover, the proceedings relating to delivering judgments on the rights of the child are urgent,[72] in certain cases when deciding on the rights and welfare of the child, the court is empowered to act *ex officio*[73] and without oral hearing,[74] e.g. in special security proceedings when deciding on:

1. a provisional measure relating to the parent the child shall live with, the child's habitual residence and personal relations with the child,
2. a provisional measure for maintenance; these provisional measures can be imposed before the initiation of and during the court proceedings in which the relationship ensured by the provisional measure is determined.[75]

When it comes to the process of establishing the child's personal relationship with a parent or the procedures preventing the unlawful removal of a child by a parent entitled to the right to maintain a personal relationship and direct contact with a child, the Family Act also provides for measures to ensure the return of the child, and these are:

1. to impose an obligation to turn in a passport to a court that imposed the measure in the course of maintaining a personal relationship and direct contact with a child;
2. to impose an obligation of a security deposit to a parent entitled to the right of maintaining a personal relationship and direct contact with a child;
3. to impose a ban on alienation or burden of property rights by the annotation and entry of a ban in public registers;
4. to impose an obligation to a parent maintaining a personal relationship and direct contact with a child to report regularly with the child to the competent authority, such as a social welfare center or a police station in the place where personal relationships are maintained;
5. to determine the place where personal relationships are to be maintained;
6. to prohibit the departure of a child from the state in which personal relationships are to be maintained and to enter the ban into a national or cross-border information system.[76]

[70] Special litigation proceedings, non-litigation proceedings, special enforcement and assurance proceedings.
[71] Family Act (Obiteljski zakon), Official Gazette, No. 103/15.
[72] *Ibid.*, Article 347(1) - the principle of urgency, one of the fundamental principles of court proceedings under the Family Act.
[73] *Ibid.*, Article 530(4).
[74] *Ibid.*, Article 531.
[75] *Ibid.*, Article 529.
[76] *Ibid.*, Article 419(1).

The protection of the child upon the return is the mail task of the judicial and other authorities of the Member States in the cross-border proceedings concerning the child's rights. By the detailed measures listed above by which the Family Act provides for the safe return of a child, the protection of a child is guaranteed at the national level, but as well it is guaranteed in the cases conducted upon the Hague Child Abduction Convention. These measures by its content and legal scope, are contributing to the principles of mutual trust between the national legal system and national judicial authorities and the judicial systems and judicial authorities of other Member States in cross-border proceedings concerning the rights of the children.

For the same reasons, it is acceptable to conclude that in the Republic of Croatia, the Enforcement Act[77] as a general regulation regulating the assurance proceedings, in particular the assurance by a provisional measure, is in force as a legal source for taking the necessary measures for the protection of the child upon his or her return. Namely, the task of provisional measures in modern conditions has been substantially altered. Its classical function is to create the conditions for the future realisation of creditor claims based on a decision that will be or has already been made in the main proceedings. In addition a different, new function has been accomplished. This function has its roots in the European and Croatian legislation and judiciary and has been gaining importance. It is a function of a fast and temporary arrangement of the relations between the parties involved in the dispute in order to establish legal peace, defined as a regulatory function. Its essence is in the court's authority to arrange certain legal relationships temporarily, more or less, according to their free judgment.[78] In so doing, the freedom of assessment in relation to protective measures in child return proceedings would depend on the need to protect children and the need for mutual trust in the legal systems of the EU Member States.

Assurance by a provisional measure as a protective measure in child return proceedings can be particularly efficient in cases when it is necessary to prevent violence. Likelihood that a provisional measure will be needed to prevent violence is one of the alternative prerequisites needed to impose a provisional measure to ensure non-cash claims.[79] The other likelihood is the existence of a claim, which would be a return decision in child return proceedings.

While the provisions of the Family Act on provisional measures in the national legal system have traditionally been present in a more or less unchanged form, the measures referred to in Article 419(1) of the Family Act are relatively new.[80] However, we believe that, in addition to general provisions on handling family and status related matters, the courts will recognise them in their practice as available and efficient instruments in the exercise of the right to the protection of the child upon his or her return after the unlawful removal or retention and as ways to facilitate the treatment of competent authorities in cross-border proceedings concerning parental responsibility disputes.

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[77] Enforcement Act (Ovršni zakon), Official Gazette, No. 112/12, 25/13, 93/14, 55/16, 73/17.

[78] Dika, M.,*Građansko ovršno pravo, I. knjiga, Opće građansko ovršno pravo*, Narodne novine, Zagreb 2007, pp. 847-848.

[79] Enforcement Act, *op. cit.* note 77, Article 346(1) and (2).

[80] Entered for the first time into the Family Act (Narodne novine, No. 75/14) whose application was suspended by the Decision of the Constitutional Court of the Republic of Croatia No. U-I-3101/2014 of 12 January 2015 such that the execution of all individual acts undertaken pursuant to this Family Act is temporarily suspended. However, they were entered in the unchanged form into the Family Act of 2015, which is now in force.

8. CONCLUSION

The competent authorities are required to take into account the best interests of the child during the entire return procedure conducted under the Hague Convention on Child Abduction. Taking care of the best interests of the child is also manifested through provisional and protective measures for the protection of the child and its assets, but other persons as well, usually the parent who removed the child, when necessary. Research within the Project, carried out on a sample of 16 judgments, showed that the courts in a total of 7 cases were expected to decide on a request for a provisional or protective measure and/or legal effect of an already existing measure.

Competent authorities which have no jurisdiction as to the substance of the matter are also authorised to undertake appropriate provisional measures. The basis for this treatment are Article 20 of the Brussels II *bis* Regulation and Article 11 of the Hague Convention on Measures for the Protection of Children. These measures differ currently in relation to the regime of their recognition and enforcement. In that sense, the competent authorities need an unambiguous answer to the question whether, when the child is habitually resident in an EU Member State, Article 11 of the Hague Convention on Measures for the Protection of Children shall apply, in order that the measures taken may have a cross-border effect. The question will no longer be relevant if the Proposal to recast the Brussels II *bi*s Regulation of 2016 is adopted, causing the provision relating to provisional, including protective, measures to become one of the jurisdiction chapters.

The protection of a child upon the return to the state of his or her habitual residence is based on Article 11(4) of the Brussels II *bis* Regulation, which stipulates that a court cannot refuse to return a child on the basis of Article 13(b) of the Hague Convention on Child Abduction if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. The possibility of taking such measures depends on the national law of the state and on the particular circumstances of the case. The basis for the proceedings in Croatian national law is set by Article 419 of the Family Act, which prescribes measures to ensure the return of a child or to impede the unlawful removal of a child by a parent. Practice has not yet proved how this provision functions in cross-border cases.

Research conducted within the Project confirmed that the existing global issues regarding the application of regulations on provisional measures in civil and commercial matters are also problematic in the practice of Croatian courts, when dealing cross-border abduction cases. Despite a small sample of court judgments, application difficulties are clearly present. These relate to defining the jurisdiction of the national court to impose provisional, including protective, measures under Article 20 of the Brussels II *bis* Regulation and to the attitude the court towards provisional measures taken in another Member State with regard to their legal effects in the Republic of Croatia. In addition, it was found that in only two cases the court did take into account Article 11(4) of the Brussels II *bis* Regulation. This oversight can be only partially justified by the fact that in some cases the Croatian courts used the mechanism referred to in Article 13(3) of the Hague Convention on Child Abduction, but it did not prove efficient in terms of the speed of delivery of the requested data. The solution to the difficulties

encountered by the competent authorities lies in the introduction of mandatory concentration of jurisdiction for dealing with cross-border child abduction cases, which is contained in the Proposal to recast the Brussels II *bis* Regulation, and in conducting continuous and appropriate training of practitioners dealing with cross-border abduction cases.

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11. Enforcement Act, Official Gazette, No. 112/12, 25/13, 93/14, 55/16 73/17.
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THE ROLE OF THE MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS IN INTERNATIONAL CASES OF CHILD ABDUCTION[***]

Abstract:
This paper examines how the Ministry of Foreign and European Affairs (hereinafter: MFEA) has clarified its competence in cases involving a wrongful removal or retention of a child. The Directorate for Consular Affairs of the MFEA and a network of diplomatic missions and consular offices overseas deal with nine new cases of child abduction for the period between 2013-2017. The MFEA works in accordance with the Vienna Convention on Consular Relations and with the Foreign Service Act. However, such regulations which would define the MFEA's handling in child abduction cases have not been issued in Croatia yet. On the basis of research and a comparison of child abduction cases in Croatia and in some EU Member States, the authors suggest that Croatian legislature de lege ferenda takes into account provisions of a legal system of some EU countries when amending the Foreign Service Act or enacting the Consular Service Act.

Keywords: Brussels IIbis Regulation, child abduction, Child Abduction Convention, Foreign Service Act, Ministry of Foreign and European Affairs, Vienna Convention on Consular Relations

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1. INTRODUCTION

Intensive migration, especially the one driven by economic motives and family reunification, interrelates with the situations where the divorce or dissolution of cohabitation often results in a situation of international child abduction. International child abduction is defined as the unlawful removal or retention of a child to a jurisdiction different than its habitual residence. It is unilaterally decided by one parent, without the other parent's consent or subsequent approval.[1] International child abduction appears to be a complex problem;[2] it is regulated on the international and European level, together with national laws. Foundations for the proceedings are grounded by the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: the Child Abduction Convention)[3] and by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: the Brussels II*bis* Regulation).[4]
The Child Abduction Convention applies within ninety-nine signatory states.[5] The Convention led to the significant changes within the rules on the private international law of the contracting states. There is ~~a~~ value in the fact that the child abduction cases can be resolved much efficiently between two states which are signatories to the Convention. Though, the Convention~~s~~ does not address the problem of dealing the child abduction cases with non-contracting states.[6] Between the contacting states the Convention had established the international mechanism for the prompt return of the child to its state of habitual residence prior to the move, thus restoring the *status quo ante* unilaterally altered by the abductor.[7] The provisions of the Brussels II*bis* Regulation supplement the provisions of the Child Abduction Convention.[8] In relations

[1] González Beilfuss, Cristina. "Chapter C.8: Child abduction" In Encyclopaedia of Private International Law, edited by Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio, 298-300. Cheltenham: Edward Elgar Publishing, 2017.
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[4] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIbis Regulation) [2003] OJ L 338.
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between the EU Member States[9], the Brussels I I*bis* Regulation takes precedence over the Child Abduction Convention to the extent to which it relates to the cases governed by the Brussels I I*bis* Regulation.[10]

Situations of international child abduction imply the involvement of numerous authorities in both the state of former habitual residence and the state of refuge.[11] Those bodies are primarily judicial and administrative, but also from the civil sector. The ministries of foreign affairs are often included in child abduction cases, which was also confirmed in the Republic of Croatia.[12] The network of diplomatic missions and consular offices are often first addressed by the Croatian citizens in terms of offering support abroad, when international child abduction occurs.[13]

The role of ministries of foreign affairs differs with regard to whether the countries involved in the matter are contracting states to the Child Abduction Convention, and whether the countries or one of these countries involved in the matter are not contracting states to the Child Abduction Convention. As a general rule, the Central Authorities will assist parents left behind if the child has been taken to a contracting state; and the ministries of foreign affairs if the child has been taken to a non-signatory state. Hence, this division cannot be considered strict since the ministries of foreign affairs have their role in the Hague cases as well.

This paper provides for a brief analysis of a legal framework for the actions of ministries of foreign affairs in child abduction cases. Two researches were conducted within this paper, the first included a short questionnaire sent to the ministries of foreign affairs of all EU Member States, while the second included analyses of facts referring to the cases conducted in the Croatian MFEA in a four-year period from 2013 to 2017.

The primary goal of the latter research was to inspect the benefits and shortcomings, as well as the overall adequacy of the current legal framework. A sample of cases handled in the relevant research period would be used as a testing ground. Consequently, a possible amendment to the Foreign Service Act[14] or the enactment of a new Consular Service Act,[15] which would meet practical needs, may be proposed. If a hypothesis that the current legal framework is not sufficient for handling specific international child abduction cases is confirmed, the added value of this research comes to a forefront. Accordingly, the final goal of this research would be a proposal for improving legal tools providing a framework for actions and measures taken

[9] Its scope is limited to the European Union, except for Denmark, which is is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application. See Preamble 31 Brussels IIbis Regulation.

[10] Brussels II *bis* Regulation, *op. cit.* (note 4), Article 60(1)(e).

[11] See: Schuz, Rona. The Hague Child Abduction Convention. A Critical Analysis. London: Hart Publishing, 2013, 38-42.

[12] For more information about international private rights, see: Mills, Alex. The Confluence of Public and Private International Law, Cambridge University Press, 2009, 264-269.

[13] According to cases analysed, foreigners have also asked for information from and inquired about procedures at diplomatic missions and consular offices.

[14] Foreign Service Act, Official Gazette Nos. 48/1996, 72/2013, 127/2013, 39/2018.

[15] Consular Service Act (the EU) was already foreseen by the Annual Plan of Normative Activities for 2014 with a deadline set for the 4th quarter. However, the idea has been abandoned.

by the MFEA, Croatian diplomatic missions, and consular offices abroad in cases of international child abduction.

2. LEGAL FRAMEWORK FOR THE TREATMENT OF THE MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS

2.1. THE HAGUE FRAMEWORK

Private international law–child abduction are principally the rules of cooperation between authorities; hence they are contained in international instruments.[16] The rules of cooperation aim to ensure the application of private international law and their effect abroad.[17]

The Child Abduction Convention does not regulate the treatment of the ministries of foreign affairs in child abduction cases; still their role can be derived right through the rules of cooperation regulating the functions of Central Authorities.

Every contracting state to the Child Abduction Convention is obliged to designate a Central Authority[18] to discharge the duties imposed by the Convention.[19] This cooperation has to develop on two levels: the Central Authorities must firstly cooperate with each other. In addition, they must promote cooperation among the authorities competent for the matters dealt with within their respective States.[20] Whether this cooperation is promoted effectively will depend to a large extent on the freedom of action which each national law confers upon the Central Authorities.[21]

The documents accompanying the Convention, issued by the Hague Conference on Private International Law (hereinafter: the HCCH) included the specific role of ministries of foreign affairs in child abduction cases, with a view to (i) removing the obstacles for the application of the Convention, (ii) providing assistance when addressing the return request, and (iii) preventing abduction.

Thematically linked only to Central Authorities, the Guide to Good Practice elaborates the tasks of ministries of foreign affairs in more detail. The first task refers to the obligation of Central Authorities to take all appropriate measures to eliminate any obstacles to the application of the Convention.[22] One of the measures recommended by the Guide is a direct discussion between two Central Authorities of the two affected countries on the obstacles that have occurred, saying that, if necessary, this discussion may be carried out through the diplomatic channel.[23]

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[16] González Beilfuss, C., *op. cit.* (note 1).
[17] For more information, see: Župan, Mirela. "Cooperation of Central Authorities." In Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts, edited by Constanza Honorati, 247-273. Torino: Giappichelli, 2017.
[18] The Central Authority in Croatia is the Ministry for Demography, Family, Youth and Social Policy.
[19] Hague Child Abduction Convention, *op. cit*. (note 3), Art. 6.
[20] Pérez-Vera, E., op. cit. (note 7), p. 453.
[21] See: Trimmings, Katarina. Child Abduction within the European Union. London: Hart Publishing, 2013, p. 140.
[22] Hague Child Abduction Convention, *op. cit*. (note 3), Art. 7(i).
[23] Pérez-Vera, E., *op. cit.* (note 7), 14.

The second task refers to the assistance provided for the Central Authorities. The Convention contains a list of functions of Central Authorities, which in not exhaustive.[24] By performing them, the Central Authorities are encouraged to cooperate with other authorities, including ministries of foreign affairs. In the instructions for the requesting Central Authority, the Guide recommends that, if there are communication problems with the requested Central Authority, it may be possible to send applications via diplomatic channel, or by diplomatic bag with the agreement of the relevant embassies.[25]

The Guide to Good Practice on Preventive Measures stresses the role of consular offices in the part on proactive measures. The Guide provides that every state should promote a legal environment which reduces the risk of abduction. This includes the measures considering travel documents, travel consent, border control and open borders as well as commercial and sea carriers.[26] The role of consular offices is also included in the part on reactive measures in relation to a response to a credible risk of abduction. The Guide promotes that national legal provisions and administrative practices should enable state authorities to respond rapidly and effectively when there is a credible risk of abduction. This considers the issues of travel documents and border control. For the category of the children with more than one nationality the Guide promotes cooperation between consular offices in relation to issuing, withdrawing and/or revoking passports and visas for children with more than one nationality is a useful preventive measure.[27]

2.2. VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS

The role of diplomatic and consular representation becomes even more significant when a child abduction situation includes the country which is not a contracting state to the Child Abduction Convention. When a child is abducted and taken to a non-contracting state, the parent attempting to secure the return of the child is faced with the harsh reality that his or her government has very few options to secure the child's safe return. These options include only protection by the diplomatic or consular authorities.[28] In international law, there are two types of protection a state can use on behalf of their nationals abroad, i.e. diplomatic protection and consular assistance.[29] They are regulated by different treaties. The rules of diplomatic protection are codified in the Vienna Convention on Diplomatic Relations.[30] The main treaty

[24] See: Hague Child Abduction Convention, *op. cit*. (note 3), Art. 7(2) and Župan, M., *op. cit.* (note 16), 274-278.
[25] Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice Part I, HCCH Publications, 2003. Accessed September 27, 2018. https://assets.hcch.net/upload/abdguide_e.pdf, 52.
[26] Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III - Preventive Measures, HCCH Publications, 2005. Accessed September 27, 2018. https://assets.hcch.net/upload/abdguideiii_e.pdf, 8-13.
[27] *Ibid.,* 16.
[28] See: Melissen, Jan. "The Consular Dimension Of Diplomacy." In Consular Affairs and Diplomacy, edited by Jan Melissen and Ana Mar Fernández, 1-17, Brill | Nijhoff, 2011.
[29] See: Okano-Heijmans, Maaiko. "Changes in Consular Assistance and the Emergence of Consular Diplomacy." In Consular Affairs and Diplomacy, edited by Jan Melissen and Ana Mar Fernández, 19-41, Brill | Nijhoff, 2011.
[30] Vienna Convention on Diplomatic Relations, United Nations, Treaty Series, vol. 500, 95.

under international law on consular assistance is the Vienna Convention on Consular Relations, which defines a framework for consular relations between states.[31]

The Vienna Convention on Consular Relations states that consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of same Convention.[32] It provides as well that the provisions of the Convention also apply, so far as the context permits, to the exercise of consular functions by a diplomatic mission.[33] For the purpose of this article, it can be stated that consular officers are persons of a country who exercise certain functions for their country in another country and protect interests of their citizens within their jurisdiction.[34]

Article 5 of the Vienna Convention on Consular Relations specifies consular functions. Consular functions related to the consular officials duties when citizens of their country face difficulties in a foreign State are as follows: (i) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and corporate bodies,[35] and (ii) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State.[36] For the purpose of this article, the paragraph which constrains the lists of representation or the arrangement of representation for nationals before tribunals and other authorities of the receiving State as a consular function is equally relevant.[37]

2.3. THE NATIONAL FRAMEWORK

The provisions of the Vienna Convention on Consular Relations are incorporated in the Foreign Service Act. The Act specifies that a consular office shall exercise functions specified in the Vienna Convention on Consular Relations. Actions of a consular office in child abduction cases ~~is~~ are not specifically regulated by the Act yet still can be derived from the functions to: (i) safeguard the interests of the Republic of Croatia, its nationals and establishments resident in the receiving State within its consular district; and (ii) perform administrative duties, notary public jobs, duties in the area of home affairs, defence, registrar's office and social welfare as defined by law, and provide legal assistance to Croatian nationals in exercising their employment, social security and other rights and interests in the receiving State within its consular district, perform other duties for which it is authorised by law and other regulations

[31] Vienna Convention on Consular Relations, United Nations, Treaty Series, vol. 596, 261. It was adopted on 22 April 1963 by the United Nations Conference on Consular Relations held in Vienna, Austria, from 4 March to 22 April 1963. It entered into force on 19 March 1967, in accordance with Article 77. The former Yugoslavia signed and ratified the Convention on 24 April 1963 and 8 February 1965, respectively. The text of the Convention published in the Official Gazette SFRY, International Contracts and Other Agreements, No. 5/1966. The Republic of Croatia has been a party to the Convention since 8 October 1991 based on the notification of Succession, Official Gazette: International Treaties No. 12/1993.
[32] *Ibid.*, Art. 3.
[33] See: Denza, Eileen. Commentary on the Vienna Convention on Diplomatic Relations. London: Oxford, 2016.
[34] Kristin Haugevik. "Parental Child Abduction and the State: Identity, Diplomacy and the Duty of Care." The Hague Journal of Diplomacy 13 (2018): 1-21.
[35] Vienna Convention on Consular Relations, *op. cit.* (note 32), Art. 5(a).
[36] *Ibid.*, Art. 5(d).
[37] *Ibid.*, Art. 5(j).

and which are not prohibited under the laws and other regulations of the receiving State, to which the receiving State is not opposed or which have been defined in international treaties.[38] Regarding international child abduction and the procedure of diplomatic missions and consular offices, the Act on Travel Documents of Croatian Citizens[39] is of significance. The Act determines more precisely who can apply for a travel document.[40] Diplomatic missions and consular offices are authorised to issue a passport or *laissez-passer* to citizens who live or found themselves in their area of jurisdiction abroad.[41]

The same Act contains a provision on the issuance of a travel document for a child. These provisions prescribe in more detail conditions under which application forms for child travel documents can be submitted. As such, they prevent abuse by only one parent. The role of the consular office is evident in some aspect of this rule. The application for the issuance of a travel document for a child must be submitted by the child's legal representative to the competent body of public administration. An application for a child travel document can be submitted by one of the parents with a declaration that the document will be collected by another parent in person. If another parent is prevented from collecting the document in person, the document could be collected by the parent who submitted the application with the other parent's permission in writing with the signature validated by a notary or a competent authority or in a Croatian consular office if they are not on the territory of the Republic of Croatia. An application form for the issue of a travel document can be submitted by one of the parents independently if another parent has died or is declared dead, if he or she is deprived of legal capacity in relation to obtaining a travel document, if he or she by a judicial decision independently exercises parental custody in full or if parental custody of another parent stagnates based on a judicial decision. In urgent cases, when there is a danger for the child or when the issue of a travel document is in the best interest of the child, the application for the issue of a child travel document can be submitted and the issued document can be collected by the same parent with written permission of the Centre for Social Care which is in charge according to the place of residence.[42]

3. COMPARATIVE ANALYSES OF THE ACTING OF MINISTRIES OF FOREIGN AFFAIRS IN CHILD ABDUCTION CASES

The scope of this research was extended beyond the functioning of Croatian diplomacy. Namely, the appropriateness and quality of diplomatic service provided by Croatian authorities should be elaborated by comparison with the treatment provided by other EU Members State diplomatic channels in similar cases. There is no available statistical record on the number of child abduction cases, except for Italy that has published the Statistical Yearbook and ~~for~~ the UK that has available information on their web page. To accomplish the obtaining the data on

[38] Foreign Service Act, *op. cit.* (note 14), Art. 14.
[39] Act on Travel Documents of Croatian Citizens, Official Gazette Nos. 77/1999, 133/2002, 48/2005, 74/09, 154/201414, 82/2015.
[40] Travel documents are as follows: a passport, a diplomatic passport, a service passport, *a laissez-passer* as well as travel documents issued based on an international agreement. Art. 4 of the Act on Travel Documents of Croatian Citizens, *ibid.*
[41] *Ibid*., Art. 24.
[42] *Ibid.*, Art. 34.

procedures conducted, a questionnaire was been sent to the ministries of foreign affairs of EU Member States.[43] The questionnaire contained questions relevant for this research, or more precisely, the questions on how many international child abduction cases the respective ministry of foreign affairs handled in the period 2013-2017, and if the ministry assisted in the clarification of abduction in accordance with special law (e.g., the Consular Service Act) or just with the Vienna Convention on Consular Relations. Out of 27 questionnaires that were sent out, responses of eight Ministries of Foreign Affairs of Member States were received.

State	***Cases in period 2013-2017***
United Kingdom	1,299
Sweden	384
Italy	375
Finland	18
Malta	1
Austria	No data
Germany	No data
Hungary	No data

3.1. GENERAL CONSULAR ASSISTANCE

The research showed that most of the countries provide only general consular assistance in child abduction cases and the treatment in child abduction situations is not particularly regulated by law.

3.1.1. Ministry for Foreign Affairs of Sweden. The Ministry for Foreign Affairs of Sweden provides general consular assistance. The substance of assistance varies from country to country, depending on the conditions in the country concerned. In some countries, where Sweden does not have any diplomatic representation and/or where it advises against travel, the possibility of giving assistance is very limited. In other countries, Sweden can sometimes assist in the attempts to locate the child and contact the abductor to see if voluntary return is possible. Swedish embassies can assist, in accordance with the legislation, by issuing temporary

[43] The Ministries of Foreign Affairs of 13 Member States have not returned the questionnaire, while the Czech Republic, Denmark, Latvia, the Netherlands, Slovakia and Slovenia forwarded the questionnaire to their Central Authorities.

passports and give advice regarding the return of a child, and can also help the applicant to find a lawyer.[44]

3.1.2. Ministry of Foreign Affairs and International Cooperation of Italy. The Italian Ministry of Foreign Affairs and International Cooperation provides consular assistance in accordance with the Vienna Convention on Consular Relations and the Italian Legislative Decree No. 71/2011 on Consular Functions.[45] The Ministry dealt with 67 new cases in 2013,[46] 71 new cases in 2014,[47] 77 new cases in 2015,[48] 84 new cases in 2016[49] and 76 new cases in 2017.[50]

3.1.3. Ministerial Department for Foreign & Commonwealth Office of the United Kingdom. The Consular Directorate of Foreign & Commonwealth Office (FCO) provides consular assistance to British nationals affected by international child abduction. The FCO can provide a list of overseas lawyers, in certain circumstances arrange to meet the child, contact the relevant authorities overseas to check what progress has been made in finding the child, offer travel information and help with finding accommodation locally, help to contact the relevant local authorities and organisations, where appropriate contact the courts overseas to express the interest in a case and ask about progress, go to court hearings overseas, provide information about translation services and where is appropriate, issue travel documents.[51] The FCO does not offer legal advice, "rescue" a child or get involved in any illegal attempts to bring a child back to the UK, guarantee the return of a child, even if the UK orders this, find a child, pay the bills (including legal fees, translation services, travel or accommodation costs) and remove a child from a country without UK travel documents.[52] The FCO dealt with 553 international parental abduction and child custody cases in 2013/14,[53] in 2015/2016 with 445 new cases[54] and in 2017 the FCO provided assistance in 301 new child custody and international parental child abduction cases (data covers period to November 2017).[55]

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[44] Email from the Ministry for Foreign Affairs of Sweden, Department for Consular Affairs and Civil Law, Central Authority for the Civil Aspects of International Child Abduction, 10 August 2017.
[45] Email from the Ministry of Foreign Affairs and International Cooperation of Italy, 11 September 2017.
[46] „L' Annuario Statistico 2013", https://www.esteri.it/mae/pubblicazioni/annuariostatistico/2013_annuario_statistico.pdf.
[47] „L' Annuario Statistico 2013", https://www.esteri.it/mae/resource/doc/2015/06/annuario_statistico_2014_-_rev5_4_giugno_2015_web.pdf.
[48] „L' Annuario Statistico 2014", ,https://www.esteri.it/mae/resource/doc/2016/04/annuario_statistico_2015_interattivo_aprile2016.pdf.
[49] „L' Annuario Statistico 2015", https://www.esteri.it/mae/resource/doc/2016/07/annuario_statistico2016_r_070716.pdf.
[50] „L' Annuario Statistico 2016", https://www.esteri.it/mae/resource/pubblicazioni/2017/07/annuario_statistico_2017_web3.pdf
[51] Email from the Consular Directorate of Foreign & Commonwealth/Child Protection Unit of 11 August 2017.
[52] „Guidance International Parental Child Abduction", https://www.gov.uk/government/publications/international-parental-child-abduction/international-parental-child-abduction
[53] „Statistics of child abduction cases 2013/2014", https://www.gov.uk/government/news/parents-urged-to-consider-devastating-consequences-of-child-abduction
[54] „Statistics of child abduction cases 2015/2016", h ttps://www.gov.uk/government/news/foreign-office-and-reunite-highlight-impact-of-child-abduction
[55] „Statistisc of child abduction cases 2017", https://www.gov.uk/government/news/international-child-abduction-free-sources-of-advice-and-support

3.1.4. Ministry for Foreign Affairs and Trade Promotion of Malta. The Consular Directorate of this Ministry had one case of child abduction in the period 2013-2017. The Ministry abides by the Vienna Convention on Consular Relations, and works closely with the Ministry for Home Affairs and National Security to determine what course of action would be required in such particular stance. Hence, the role of the Ministry in any abduction of (a) Maltese national/s is dictated by the Vienna Convention, and the nature of the case, which could vary in both nature and degree.[56]

3.1.5. Federal Ministry for Europe, Integration and Foreign Affairs of Austria. The Austrian Foreign Ministry does not compile statistics specifically on cases of international child abduction. The cases mainly handled by the Ministry are those that concern states that are not parties to the Hague Convention. The cases concerning member countries are handled directly by the Ministry of Justice. With regard to cases concerning non-member states, the Ministry acts in accordance with the Vienna Convention on Consular Relations and international conventions applicable to child abduction. So far, there has been no specific law on consular services.[57]

3.1.6. Federal Foreign Office of Germany. The Federal Foreign Office and the German missions abroad (embassies and consulates-general) are often asked for assistance when children are abducted across borders. However, in cases of international child abduction, the Federal Foreign Office and the German missions abroad have no legal means and practically only very limited real means of helping secure the abducted child's return to Germany. The Federal Foreign Office does not keep statistics on child abduction cases.[58]

3.1.7. Ministry of Foreign Affairs and Trade of Hungary. Regarding the period between 2013 and 2017, the Hungarian Consular Service faced a couple of cases connected to international child abduction. However, the Act on Consular Protection (Act XLVI of 2001) does not refer to child abduction, except for a short remark on the special treatment of minors when performing consular assistance. Consequently, only a very small percentage of abduction cases emerge in the scope of the Consular Service.[59]

3.2. ASSISTANCE BASED ON THE SPECIFIC LAW

Finland has a specific law, i.e. the Consular Services Act,[60] which regulates the measures of the Ministry of Foreign Affairs and the Finnish missions abroad in cases of child abduction. Crucial for the intervention of the Ministry of Foreign Affairs and the missions is that the removal and retention of a child is unlawful according to the Child Custody and Right of Access Act and that the matter does not fall under the competence of some other authority. When a child has been removed to a contracting state to the Child Abduction Convention, the matter is

[56] Email from the Ministry for Foreign Affairs and Trade Promotion of Malta, 13 October 2017.
[57] Email from the Federal Ministry for Europe, Integration and Foreign Affairs, 3 November 2017.
[58] Email from the Federal Foreign Office, 11 August 2017.
[59] Email from the Ministry of Foreign Affairs and Trade of Hungary, 15 August 2017.
[60] Consular Services Act (498/1999; amendments up to 896/2015 included). Translation to English available at: http://www.finlex.fi/fi/laki/kaannokset/1999/en19990498.pdf.

dealt with by the Ministry of Justice.[61] In cases where the child is abducted from one non-contracting state to another non-contracting state the Ministry of Foreign Affairs will provide assistance in accordance with the Consular Services Act, provided that the child is under 16 years of age, residing permanently in the consular district of the mission, has been removed to the consular district of another mission or has not been returned from such a consular district. The mission shall assist in the return of the child:

> 1) if the child or his or her custodian, requesting the return of the child, is a Finnish citizen;
>
> 2) if the removal or non-return of the child is considered unauthorised under the legal order of the State from which the child has been removed or to which the child has not been returned; and
>
> 3) if the measures concerning the return of the child do not fall within the competence of another authority.[62]

The missions can assist in the voluntary return of the child and in the achievement of an amicable agreement for the return of the child. At the request of the custodian of the child or other person having the right of custody, the mission shall in the first place provide help by submitting a request for assistance to the competent authority of its consular district, for the purpose of:

> 1) investigating the whereabouts and conditions of the child, and for the purpose of returning the child;
>
> 2) obtaining counsel or other legal assistance based on the local law, for the person who has requested the return of the child; and
>
> 3) seeking general information on the necessary parts of the laws of the state in question.

The mission shall assist in contacts between the parties, transmit information and documents concerning the return of the child to authorities and to the person who has requested the return of the child and assist in the arrangements for the repatriation of the child.

The missions cannot assist in re-abducting the child, act as a lawyer, influence the trial and the final decision of the court and violate the laws and regulations of the country in question. The number of international child abduction cases from data operating system of the Ministry for Foreign Affairs are as follows: 13 new cases in 2013, 7 new cases in 2014, 12 new cases in 2015, 16 new cases in 2016, and 10 new cases in 2017.[63]

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[61] „International child abduction“ https://oikeus.fi/en/index/esitteet/kansainvalinenlapsikaappaus/lapsionkaapattuei-sopimusvaltioon.html.
[62] Consular Services Act, *op. cit.* (note 61) Art. 31.
[63] Email from the Ministry for Foreign Affairs of Finland, Unit for Consular Assistance, 11 August 2017.

4. DIPLOMATIC PROCEDURES FOR INTERNATIONAL CHILD ABDUCTION CASES IN THE REPUBLIC OF CROATIA

4.1. STATISTICAL RECORDS

The MFEA of the Republic of Croatia has registered nine child abduction cases which were conducted in the period of four years, i.e. from 1 July 2013 to 1 July 2017, regardless of their commencement date. Two cases originated from 2011, one case was received in 2013, three cases in 2015 and three cases in 2016. The two cases from 2011 are still ongoing.[64]

Cases in the period from 1 July 2013 to 1 July 2017	
Year of addressing the MFEA	Number of cases
2011	2
2013	1
2015	3
2016	3
Total cases	9

Most cases are simultaneously conducted in the Croatian Central Authority, i.e. the Ministry for Demography, Family, Youth and Social Policy, while others have been registered only in the MFEA. Two of them were incoming cases and five were outgoing cases. The remaining two cases were connected only to Croatian citizenship.

[64] The general research of the Croatian judicial practice were conducted for the same period by the prof Mirela Župan within the project „Cross-border removal and retention of a child – Croatian practice and European expectations". The scientific analysis of the practice of four Croatian municipal courts (Municipal Civil Court of Zagreb, Municipal Court of Split, Municipal Court of Rijeka, Municipal Court of Osijek) in the period from 1 July 2013 to 1 July 2017, had determined that 16 cases were conducted before those four courts on the basis of the Child Abduction Convention. The research is in the publishing procedure. For the Croatian judicial practise analyses see: Župan, Mirela and Ledić, Senija. "Cross-border family matters - Croatian experience prior to EU accession and future expectations." *Pravni vjesnik* 49 (2014): 49-77; Župan, Mirela and Hoško, Tena. "Application of the Hague Child Abduction Convention in SEE region: Croatian national report" in Private International Law in the Jurisprudence of European Courts – family at focus, edited by Mirela Župan, 227-243. Osijek: Faculty of Law Osijek, 2015, Župan, Mirela and Drventić, Martina. Kindesentführung vor kroatischen Gerichten mit besonderer Rücksicht auf die aus Deutschland kommenden Anträge. Revija za evropsko pravo 1 (2018): 63-83.

Type of request	Number of cases
Incoming	2
Outgoing	5
Only connected to Croatian citizenship	2
Total cases	9

4.2. CASE ANALYSIS

The analysis of case facts and case resolution pointed toward four categories of child abduction cases which included the acting of the MFEA. In terms of those four groups, the facts of the nine cases will be presented according to the information available.

4.2.1. In most of the cases, the request made to the MFEA considered only consular assistance:

(1) The father, a citizen of Germany, has reported child abduction by the mother, from Germany to the United Kingdom. Both the mother and the child have only Croatian citizenship. The child was born in the United Kingdom. The mother moved to Germany (first to Heidelberg, then to Ulm) for work, then again to the UK (after she had previously announced her departure to the court in Ulm and declared her new residence). After she had asked for higher alimony, she was reported for child abduction. In 2013, the mother turned to the Croatian Embassy in London with a request for protection because the police had entered her flat and taken her driving licence, passport and her child's passport (born in 2009) as ordered by the High Court of Justice, Family Division.

(2) The child who was a Croatian citizen was taken to Russia in 2015 by the mother, a solely Russian citizen. Previously they were living together with the child's father, a Croatian citizen, in Croatia. The child's documents were issued in Russia. Since the mother died in the meantime, the child lived with the grandmother in Russia. The Croatian Embassy in Moscow requested a death certificate from Russian authorities and sent a diplomatic note with a request to enable the father to be in contact with the child.

(3) In 2016, the Croatian Embassy in Moscow received notification from the Federal Migration Service that a father, a Croatian citizen, applied for political asylum in Russia, for him and for his four minor children. By subsequent verification it was confirmed that a protective measure was imposed on both the mother and the father in Croatia. The measure implied professional help and support for parents in exercising their parental authority in respect of four minors. In the meantime, the mother was hospitalised in a psychiatric hospital in Croatia. After her return from the hospital, the Croatian Ministry of the Interior submitted a proposal for an offence committed pursuant to Article 4 of the Croatian Act on Protection against Domestic Violence. A

special obligation to outpatient psychiatric treatment and observation was imposed to the parents. As the children did not attend kindergarten and school, during field investigation (after the report of the Centre for Social Care) only the mother was found and she did not know where her children were. Through efforts of Croatian diplomats in Moscow the father and children returned to Croatia.

4.2.2. In some of the cases, assistance of the MFEA only referred to the instruction to the party to address the other, i.e. competent authority:

(4) Case facts speak of a father, an Australian citizen, who turned to the Directorate for Consular Affairs in Zagreb in 2015. His wife is a Croatian national who lived in Australia for 15 years, with Australian residency throughout the entire period. She abducted their two children, solely Australian citizens, who were both under 10 years of age. Children originally travelled to Vienna for a short family visit, using the Australian passport. The father claimed that she had applied for dual Croatian citizenship for children since he had found her emails on requesting the original birth certificates for the children as well as emails she had sent to attorneys in Vienna requesting information regarding Croatian citizenship. The Directorate for Consular Affairs referred the father to the competent authority in Australia or to the Australian Embassy in Croatia.

(5) The Consulate General of the Republic of Croatia in Los Angeles received an E-mail from the father claiming that the mother had abducted their child (born in 2009) from France to Croatia. Both the mother and the child are citizens of Croatia. The father is a citizen of Israel currently living in the USA, with previous France residence for seven years. The Sector for Consular Affairs referred the father to the competent authority in the USA or to the Diplomatic Mission of Israel in the USA.

(6) The mother who is a Croatian citizen took her eight-year-old son to Ireland in 2016. Social Welfare Centre wrote directly to the Croatian Embassy in Dublin to take all necessary measures and actions within the limits of competence of Diplomatic Mission to return the child back to Croatia. The Social Welfare Centre was referred to a competent authority in Croatia.

4.2.3. In one case the MFEA was only informed by the applicant that the request trough the Central Authority was made.

(7) The facts of the case indicate that the mother took a three-year-old child from Croatia to Serbia in 2016. All three parties are citizens of Croatia. The father asked for help the Ministry for Demography, Family, Youth and Social Policy and notified the MFEA.

4.2.4. Two following cases consider the role of MFEA in the stage of enforcement of a return order, in one incoming and one outgoing case.

(8) The father was a citizen of Italy and the mother was a citizen of Croatia. The minor child was a dual citizen, also having a residence in Italy. By the decision of 2011, the Court in Turin entrusted the care of the child to both parents. The mother collected a *laissez-passer* in the Consulate General of the Republic of Croatia in Milan and had arrived in Croatia. Upon a father's return claim, the Croatian Court accepted the request for the return of the minor child to Italy. The mother and the son were not found by the police at her parents' address during a police check.

The activity of the Italian diplomacy was at a very high level in this case. The Italian Foreign Minister tackled the issue in a bilateral meeting with the Croatian Foreign Minister in 2013. A month later Croatian Ambassador in Rome was invited to a meeting with Directorate General for Italian Citizens Abroad and Migration Policies. Italian Embassy in Zagreb sent several verbal notes to the Croatian MFEA with requests: to identify the child's status and to check if the child is registered in the Croatian Institute for Health Insurance, to identify a possible enrolment of the child into Croatian education system in the school year 2016/2017. The issue was afterward once again discussed between the Croatia Foreign Minister and Italian minister.

In addition, the role of Italian diplomacy in this case is evident in a way that Italian Consulate presented the content of Italian law to the Municipal Court. Namely, the Municipal Court in Split has by the first instance judgement ascertained the law of the Republic of Italy on the basis of insight into a public document on the content of foreign law. The public document was contained in written Statement of the Italian Consulate in Split, which was translated and sealed by court interpreter for the Italian language. The Municipal Court supposes that the Italian Consulate being a diplomatic representative body of Italian Republic in Croatia has power to present the content of the law of the Republic of Italy to the Municipal Court on behalf of the Republic of Italy.

(9) The mother of the child issued divorce proceedings to the Municipal Court in Zagreb. In the process of provisional measure, the Court entrusted a minor (six months old) to the mother until the final judgement in divorce proceedings. The mother was settled to the Women's shelter by the responsible Social Welfare Centre. In 2011 the mother left Croatia without the knowledge and agreement of the father, taking the child to Serbia. Before leaving Croatia, the mother managed to get the passport in the Embassy of the Republic of Serbia. Among other authorities the father turned to the Croatian MFEA to review the conditions under which the Serbian passport had been issued. The MFEA sent a note to the Serbian Embassy to inquire circumstances and conditions under which the Serbian passport had been issued.

In the meantime, competent judicial authorities of the Republic of Serbia issued a decision to return the child to Croatia. Directorate for Consular Affairs of the Republic of Croatia forwarded a father's request to the Embassy of the Republic of Serbia by which the enforcement of the decision of the Serbian Court was urged. The Embassy of

the Republic of Serbia has not replied to the request. In addition, by diplomatic means the Croatian Embassy in Belgrade requested from the competent Serbian authorities to submit observations on the case. Also, a series of diplomatic notes in which the other side was informed about the course of procedures and conclusions connected with the case were delivered.

As regards the issue of passport to the child, the suspected official person in the Ministry of Foreign Affairs of the Republic of Serbia was summoned for committing an offence of abuse of authority (Art. 359(1) of the Criminal Code of the Republic of Serbia). The employees of the Croatian Embassy attended court hearings. It should be noted that the mother was found guilty of abduction a minor (Art. 191(2) of the Criminal Code of the Republic of Serbia) and was given a suspended sentence. The litigation continues and the child was still in Serbia in December 2017.

5. CONCLUSION

The role of the foreign affairs ministries in child abduction cases differs considering whether or not the countries involved in the matter are contracting states to the Child Abduction Convention. When the states involved in the matter are contracting states, the role of the ministries of foreign affairs is auxiliary. It derives from the provisions on the general aim of the Convention and also from the rules of cooperation, which determine the functions of the Central Authority. The document accompanying the Convention devoted attention to a certain extent to the tasks of the ministries of foreign affairs. This role can be additionally specified, or in most cases derived from general rules, in other international conventions determining the diplomatic and consular relations, bilateral agreements and national law. In cases where both or one of the countries involved in the matter are not contracting states to the Child Abduction Convention, assistance to the parties involved in a child abduction case can be provided only in accordance with the latter, and it varies from state to state.

Research into the established practice of acting of ministries of foreign affairs in child abduction cases in EU Member States showed that most of the countries provide only for consular assistance regulated by the Vienna Convention on Consular Assistance and general rules on consular assistance contained in the national law. The example of Finland stands out from the research by its specific law, i.e. Consular Services Act, which regulates the measures of the Ministry of Foreign Affairs and the Finnish missions abroad in child abduction cases where the child is abducted from one non-contracting state to another non-contracting state.

The second research into the existing practice of the Croatian MFEA in child abduction cases showed that nine cases were conducted within the period of four years, i.e. from 2013 to 2017. All cases considered the relations between the contracting states to the Child Abduction Convention. In three cases, the request made to the MFEA considered only consular assistance; in three cases, the role of the MFEA considered only the instruction to the party to address the competent authority; in one case, the MFEA only informed the applicant that the request through the Central Authority was made, and in two cases, the role of the MFEA was considered in the stage of enforcement of a return order.

In none of the cases was the MFEA asked for assistance by the Central Authority, when sending the return request, pursuant to the recommendations contained in the HCCH Guides. The reason for this can be found in the fact that there is a developed judicial cooperation system within the contracting states, whose operation is facilitated by today's modern means of communication between Central Authorities. Also, the research did not point towards cases in which the MFEA prevented child abduction, still it can be stated that the Croatian Act on Travel Documents of Croatian Citizens goes in accordance with the proactive and reactive measures recommended by the HCCH by placing the specific rules on the issue of travel documents for the child.

The existing legal framework in the Republic of Croatia does not define and reflect the various aspects of inclusion of the MFEA, including diplomatic missions and consular offices, in international child abduction cases. Despite the lack of non-Hague cases in the observed research period, in order to overcome legal uncertainty, it is necessary for the legislator to identify the need of special regulation of the acting of the MFEA in a situation where abduction occurs with the non-contracting state involved. The recommendations can go even further by suggesting the regulation of the MFEA acting in Hague cases as well. This would strengthen the implementation of the Child Abduction Convention and be of great benefit to the exercise of the prescribed expeditious six-week deadline for issuing an order upon the return request.

Due to the complexity of the problem of international child abduction, there is a need for greater interaction between various government authorities as well as better education of officials involved in international child abduction cases.

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Daniel Rupić[*]

UNLAWFUL RELOCATION OF A CHILD AND PARENTAL RESPONSIBILITY – CROATIAN CHALLENGES[**]

Abstract:
Due to global recession, Croatian accession to the European Union, the domestic labour market and very high unemployment rate Croatian citizens are forced to search for job opportunities outside Croatian borders. As a result, we face more situations where the parents have joint custody, but one of them wants to move to another state with their child, or worse, they have already moved without the consent of the other custodial parent. All these circumstances can be a trigger new family disputes or open old wounds. Due to such situations, Croatians face the new challenge of balancing the right to a family life, freedom of movement, rights regarding the parental responsibility and custody rights of the parents, and the child's right to maintain relationship with their parents and other family members.
The reform of the Croatian Family Act system in 2014 made considerable improvements and created new instruments for solving custody proceedings and parental responsibility matters by establishing a new arbitrary system in order to promote a peaceful resolution of family disputes, before initiating a judicial procedure, with a substantial consideration of joint custody.
How is the current system dealing with cases of custody and parental responsibility matters regarding the cases of unlawful removal or retention of the child? What are the tasks and jurisdiction of the Social Welfare Centre in Croatia in those cases? How hard is it to determine the child's best interest in custody proceedings, cases of legal relocation of a child or in child abduction cases? We are going to point out some actual problems we are facing in such an arduous decision making process regarding children.

Keywords: Child's best interest, migration, parental responsibility, parental child abduction

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INTRODUCTION

Migration has become one of the key components of population change in Europe. Migration flows over past decades among EU Member States and in and outside of the EU have had a significant impact on the current population range in most Member States. Croatian accession to the European Union in 2013 and the European citizenship granted to Croatian citizens, considering the economic situation in the country, high unemployment rate and the general dissatisfaction of citizens, has led to a considerable outflow of young people with a work capacity abroad in search of a better future.[1]

Hence, according to the official data, the number of emigrated Croatian citizens in 2014 amounted to 20,858, and in 2015 the number increased to 29,651 citizens[2], whereas the unofficial data and the warnings of demographers predict that since 2013, i.e. since the accession of the Republic of Croatia to the EU, more than 200,000 people left Croatia, assumed that the majority of them are between 20 and 39 years old.

How does the increased mobility of Croatian citizens reflect on incomplete families with joint underage children, especially if we consider the increasing divorce rate, the issue of single-parent families, and the current trends of relocating abroad, then finally the hitherto issue of resolving family disputes and problems-gains a whole new international dimension.

This paper does not focus on the demographic changes in Croatia's population, but it explores how current changes affect the family relationships. In the first part of this paper, we will describe the new manner of regulating family disputes in the Croatian family law system, and the role of social welfare centres in the process of resolving the family law issues. In the light of modern trends and migrations, there are often situations where a parent wants or needs to move to a different country with a child, which is why the second part of the paper points out the scope of parental responsibility and the children`s rights with respect to the parents; these rights are often conflicted, especially in the situations of family separation and legal relocation. The third part of the paper explores the issue of lawful relocation of a child and the issue of unlawful child abduction, and, finally, the concept of the best interest of a child and how to determine and protect the best interest of a child and protect it in the case of unlawful child abduction.

[1] Data available at URL: http://ec.europa.eu/eurostat/web/population-demography-migration-projections/migration-and-citizenship-data

[2] Croatian Bureau of Statistics (URL: https://www.dzs.hr/default_e.htm)

1. CROATIAN EXAMPLE OF DEALING WITH FAMILY DISPUTES

The Croatian Family Act reform, which started in 2013 resulted in a new Family Act[3] in 2015 (hereinafter: FA), made considerable improvements in the field of parental responsibility, resolution of parental disputes and family proceedings, divorce proceeding etc. The FA implemented the ideas and goals from the international treaties that Croatia signed in order to respect the obligations from the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)[4], European Convention on the Exercise of Children's Rights (1996)[5], Convention on Contact Concerning Children (2003)[6], also implementing the requests from ECtHR judgements from the cases against Croatia, and harmonisation of national legislation with a procedural requirement in relation to a child according to the Council Regulation Brussels II bis No. 2201/2003[7]. The aim was to create a higher level of child and family protection, and a goal to improve divorce proceedings, child adoption, parental responsibility matters and custody proceedings, child protection measures etc., with the respect of joint parental responsibility, child's procedural rights and trying to reduce the rate of high-conflict family disputes.

The new FA led to a greater autonomy of parties and responsibilities of spouses or parents for the purpose of reaching an agreement on the scope of parental responsibility. The novelties are reflected in the enhancement of extrajudicial mechanisms for resolving family law disputes by prescribing mandatory counselling and family mediation as procedures conducted before the bodies outside of the judiciary. The parents are best acquainted to the needs of their own child, hence an agreement between the parents is in the best interest of the child.[8] The primary responsibility for regulating parental responsibility rests on the parents who are obligated to draw up an agreement in line with the best interest of the child, which could become applicable after court verification. If the parents are unable or do not want to draw up such an agreement, then the relevant decision is made by the court within the court proceedings in which the child is a party represented by a special guardian as an independent representative.

The scope of parental responsibility now contains a new unconventional terminology, hence the term "child`s address of residence" is used instead of "custodial parent", and the term "the time which the child will spend with each parent" is used instead of "visitation with the non-

[3] Family Act, The Official Gazette no. 103/2015

[4] Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 at the United Nations Headquarters in New York, and prepared for signature on 30 March 2007

[5] European Convention on the Exercise of Children's Rights, Council of Europe, Strasbourg, 25 January 1996, entry into force 1 July 2000

[6] Convention on Contact Concerning Children, Council of Europe, Strasbourg, 15 May 2003, entry into force 1 September 2005

[7] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility repealing Regulation (EC) 1347/2000

[8] Vodič za ostvarivanje prava djeteta na informacije, izražavanje mišljenja, zastupnika i prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi, izrađen u sklopu Projekta „Zaštita djece u sudskim postupcima razvoda braka i o roditeljskoj skrbi", Hrvatski pravni centar, Zagreb, 30 September 2015, ISBN 978-953-6635-06-1, p. 62

custodial parent". This change in terminology has proved to be motivating and less discouraging for parents in practice when it comes to regulating the issue of parental responsibility in extrajudicial proceedings.

In the following paragraph, we will present two new ways to resolve family disputes before initiating court proceedings in the Croatian legal system - mandatory counselling and family mediation.

A) MANDATORY COUNSELLING PROCEDURE

In order to promote an amicable resolution of family disputes, the FA established a new mediation procedure - the mandatory counselling procedure, which must be attended by the parents or ex-spouses planning to divorce before taking court action, where the parties are encouraged to arrange a parenting plan. It takes place at the Social Welfare Centre, where a team of experts (a social worker, psychologist and a lawyer) advise the parties on how to arrange a plan, which will be later verified by the court and has the legal effect of a court order. If the parties fail to agree on a parenting plan, they are obligated to attend mandatory family mediation, and if the mediation fails or is not feasible for some reason (i.e. if there is suspected or confirmed domestic violence between the parties or current living address of one of the parties is unknown), the last and the final resort is a judicial procedure. Even though arranging a plan or parental agreement is not a novelty in the Croatian legal system, because the parents or spouses were able to reach an agreement even before the reform, a significant difference is that now the parties are encouraged in a specific manner to reach such an agreement.

Mandatory counselling is a form of assistance provided to family members in reaching an agreement on their family matters which protects a family relationship involving a child; it informs them about the legal consequences of failing to reach an agreement by notifying them about initiating a judicial proceeding in which a decision is made on the personal rights of a child involving them personally, excluding their representatives or attorneys. The parents are advised to take the child`s well-being into consideration in the process of regulating the contentious family relationships; they are acquainted with the negative consequences of family conflicts with respect to the child and the benefits of amicable arrangement of family relationships, informed about the obligations of the family members to talk to the child and take the child`s wishes into consideration; they are also acquainted with a possible resolution of the dispute through family mediation.[9]

The main goal of mandatory counselling is to draw up a plan on joint parental custody as a written agreement between the child`s parents on the further execution of joint parental responsibility. Agreeing on such a plan implies several important issues that should be regulated within such agreement: child's place and address of residence; time which the child will spend with each parent; the manner of exchanging information on deciding matters of fundamental importance to the child, and the exchange of other important information regarding the child; the amount of support provided by the non-custodial parent and the manner

[9] Family Act, Art. 321

of resolving future disputes. They can also regulate other matters of parental responsibility they deem important.

Mandatory counselling needs to be performed before initiating divorce proceedings involving a joint child or before initiating a judicial procedure on parental responsibility.[10] If they fail to agree on joint parental custody, they are advised to reach an agreement in the process of family mediation, except when the law prescribes that the participation is not mandatory[11]; they will be acquainted with the fact that the court is obligated to decide on the custodial parent ex officio in the divorce proceedings initiated by either spouse and on the scope of parental responsibility and child support, and that the court will enable the child to express his/her opinion in the proceedings, and that a special guardian, whose costs are borne by the parents, will be appointed to the child to represent him/her in the divorce proceedings. [12]

Parents or other family members are obligated to initiate the process of mandatory counselling before initiating court proceedings for deciding on medical treatments of the child, child`s education, on approving the joint parental custody plan or the agreement on achieving personal relationship with the child, on achieving parental responsibility, representation of the child regarding his/her fundamental personal rights, on exercising the right to information on essential circumstances concerning the child or on the achieving, restricting or prohibiting personal contacts with the child. [13]

In the process of mandatory counselling, the child may be granted to express his/her opinion, with the parents` consent. [14] A section where the parents indicate whether they allowed the child to be heard is part of the joint parental custody plan, and in case they have not, they should state the reasons thereof; they should also indicate if they accepted the child`s opinion regarding the content of the plan, and the reasons for not accepting the child`s opinion in case they rejected it. [15] Thus, the obligation to inform the child and the need to hear the child`s opinion rests exclusively on the parents now; they are obligated to notify the child about the agreement together, if the child is capable of understanding its meaning. [16]

In order for the joint parental custody agreement to become an enforcement instrument, it should go through the court verification process. The plan is subject to modifications in line with the child`s age and maturity or in the event of fundamentally changed circumstances which require certain changes. Every modification of the plan should be submitted to the court for verification. [17]

[10] Family Act, Art. 322
[11] Ibid, Art. 332
[12] Ibid, Art. 327
[13] Ibid, Art. 329
[14] Ibid, Art. 329 (2)
[15] Ordinance on the mandatory contents of the joint parental custody plan form, The Official Gazzette no. 123/2015
[16] Family Act, Art. 106
[17] Ibid, Art. 107

Mandatory counselling is not performed for people without legal capacity who are unable to understand the meaning and consequences of the procedure even with professional assistance; people with clouded judgement or people with unknown residence or domicile, or people under enforcement procedures. [18] [19]

Upon the completion of mandatory counselling, the Social Welfare Centre is obligated to prepare a report stating the following: the participants in the procedure, readiness of each party to amicably resolve the dispute, their readiness to participate in family mediation, the party intending to initiate court proceedings, allegations on domestic violence, and the assessment on potential equal participation of parties in family mediation. If mandatory counselling is performed before initiating the divorce proceedings, the report should also state whether the spouses have been informed about the legal consequences of failing to reach an agreement or the joint parental custody plan, and about the fact that the court will decide ex officio on the issues of parental responsibility, the possibility to hear the child`s opinion and to appoint a special guardian for the child in the court proceedings. [20] The report is delivered to the parties within sixty days from receiving the request within the mandatory counselling procedure before initiating the divorce proceedings, and no later than thirty days within the mandatory counselling procedure before initiating child-related court proceedings, and is valid six months from the completion of mandatory counselling.[21]

Even though there are still no official data, case law shows that mandatory counselling has contributed to the reduction of court proceedings deciding on parental responsibility; success rate of resolving issues on parental responsibility exceeds 85%, whereas only a minor number of cases are referred to family mediation and/or court proceedings because they fail to reach an agreement.

The legislator`s intent to encourage an amicable resolution of family disputes by reducing the number of disputes and court proceedings has resulted in a considerable disburdening of courts, because often the child-related court proceedings resembled a battle between the conflicted interests of parents where no one ever wins, and the child loses the most.

B) FAMILY MEDIATION

New Family Act introduced the institute of family mediation where the parties attempt to amicably resolve a family dispute with one or more family mediators, i.e. impartial and specially trained person entered in the registry of family mediators. The main purpose of family mediation is to reach a joint parental custody plan and other child-related plans, where the parties may agree on other contentious material and non-material issues.[22] Even though family mediation is a procedure in which family members participate voluntarily, there is an

[18] Ibid, Art. 326 and Art. 329 (2)
[19] Ibid, Art. 321
[20] Ibid, Art. 324 (1)
[21] Ibid, Art. 324 (2) and (3)
[22] Family Act, Art. 331

exception: mandatory participation in family mediation before initiating the divorce proceedings.[23]

Family mediation can be carried out independently of the court proceedings before the court proceeding, during or after the court proceeding has been completed. Family mediation is not conducted before initiating the custody and insurance proceedings, but the court may, during the proceedings about the enforcement of the personal relationships with the child, eventually propose to the parties to enter into family mediation.[24] If the parties in the court proceedings agree to resolve the dispute in family mediation procedure, the court may suspend the proceedings and order a three-month period in which the parties may try to solve the dispute in family mediation procedure. If the court during the court proceedings evaluates that there may be an amicable resolution of contentious family relationships, it may propose to the parties to attend family mediation. The court will continue with the proceedings if the parties fail to resolve the dispute within the given deadline or if they propose the continuation of the proceedings before such deadline expires. However, before making a decision on the suspension of the court proceedings, the court is obligated to evaluate whether the suspension is suitable considering the requirement for emergency resolution of cases involving child`s rights and interests.[25]

In family mediation procedure, the family mediator may allow the child to be heard with the consent of his/her parents.[26]

When the parties reach an agreement during the mediation procedure or arrange a joint parental custody plan or an agreement, it will become applicable after court verification.[27] If the parties fail to draw up a joint parental custody plan, the family mediator will state in the report on the suspension of the family mediation procedure if both parties actively participated. This report can be used for initiating the court proceedings.[28]

Family mediation is not performed when the expert team or family mediator conclude that the spouses cannot equally participate due to domestic violence; if one or both of them have no legal capacity and cannot understand the meaning and legal consequences of the procedure even with the legal assistance; if one or both spouses have clouded judgement and if residence or domicile of any of the spouses is unknown.

C) THE ROLE OF SOCIAL WELFARE CENTRES IN FAMILY DISPUTE RESOLUTION WITHIN THE CROATIAN LEGAL SYSTEM

The actual and local competence of social welfare centres is prescribed by the Social Welfare Act[29] and Family Act, hence the Social Welfare Centre resolves issues at the first instance in

[23] Ibid, Art. 320
[24] Ibid, Art. 334
[25] Ibid, Art. 338
[26] Ibid, Art. 339
[27] Family Act, Art. 336
[28] Ibid, Art. 337
[29] Social Welfare Act, The Official Gazette no. 157/2013, 152/2014, 99/2015, 52/2016, 16/2017, 130/2017

the administrative domain of social welfare, family law and criminal law protection and other rights in line with the positive regulations. It participates as a party or intervener before the court and other state authorities when it comes to the protection of the personal interests of children and other family members who are unable to protect themselves or their own rights and interests.[30] Social welfare centres are established for the territory of one or more municipalities or cities within the same county.[31]

Social Welfare Centre may be a party in the court proceedings, a representative of a child when it initiates the court proceedings on behalf and for the account of the child, and an auxiliary body of the court.[32] When the Social Welfare Centre initiates the court proceedings or is obligated by law to partake in the court proceedings, it acts then as a party, i.e. proceedings for establishing existence, non-existence or annulment of matrimony, proceedings for establishing maternity or paternity, proceedings for the suspension of parental responsibility for valid reasons, proceedings for restricting or prohibiting the achievement of personal relationship of the child with the parent, proceedings for determining measures for protecting the rights and well-being of the child, and child handover proceedings.[33]

Social Welfare Centre has the capacity of a legal guardian of the child when it initiates paternity or child support proceedings on behalf and for the account of the child[34], whereas it has the capacity of an auxiliary body when it prepares findings and opinions at the court`s request, determines and delivers data on family, property and social circumstances of the parties and when it assists the court in the proceedings for delivering interim measures and enforcement for the purpose of handover of the child and achieving a personal relationship with the child.[35]

Social Welfare Centre has the local competence according to the domicile or residence of the parties involved in the proceedings. If the party does not have residence in the Republic of Croatia, the institution in the place of the party`s last known residence or domicile in the Republic of Croatia has territorial competence. If territorial competence cannot be in any way determined, the institution where the cause for proceedings occurred has territorial competence.[36]

Territorial competence in matters regarding children is determined by the place of residence of parents, and if they do not have permanent residence in Croatia, by their habitual residence. Furthermore, for a child whose parents are separated, territorial competence shall be determined by the place of residence of the custodial parent according to the court's decision, and if they do not have permanent residence in Croatia, by their habitual residence. Until the decision of the court is made, the Social Welfare Centre shall be competent by the place of

[30] Ibid, Art. 127
[31] Ibid, Art. 126
[32] Family Act, Art. 353.
[33] Family Act, Art. 354.
[34] Ibid, Art. 355 related to Art. 383 (establishing paternity) and Art. 424 (child support proceedings)
[35] Ibid, Art. 356
[36] Social Welfare Act, Art. 100.

residence or habitual residence of the parent where the child mostly resides.[37] Mandatory counselling before initiating the child-related court proceedings is performed by Social Welfare Centre which is competent according to the child`s residence or domicile, or according to the place of the last known common residence or domicile of spouses or extramarital partners, depending on the conducted mandatory counselling procedure.[38]

1.1. PARENTAL RESPONSIBILITY AND CHILD'S RIGHTS

Parental responsibility is composed of a catalogue of rights and duties, particularly concerning child's health, care, upbringing, protection, education, attaining family relationship and specifying the child's place of residence, but also the rights and duties about managing child's assets, such as representing the child's personal and ownership rights, including the responsibilities, the duties and the rights of the parent for the purpose of protecting and promoting child's personal rights and ownership rights and well-being. A parent is not able to waive his/her parental responsibility. The parents are obligated to communicate and should agree on the scope of their parental responsibility with their child. [39] [40]

The FA guarantees every child their fundamental rights and upbringing in a family appropriate to their physical, psychological and other developmental needs. The child has the right to live with his/her parents, and if the parents live separately, the child has the right to parental care from both parents. The child has the right to keep family relationship with his/her parents and other family members, with whom they do not live, and the right to be informed about important circumstances related to his/her parents or family members. The parents are obligated to exchange information about the child's health and information about his/her education, which has to be clear, fast and focussed exclusively on the child, but such cooperation shall not be used for the control of the other parent.[41]

The parents and other persons who are obligated to care for the child must respect the child's opinion in terms of his/her age and maturity, and in procedures concerning the child's right or interest, the child has the right to be properly informed about the circumstances of the case, to express his/her opinion, and to be informed about the possibilities of respecting his/her opinion. The child's is entitled to have his/her opinion taken into account in line with his/her age and maturity.[42] For that purpose, legislators have modified and enhanced the institute of special guardianship (*guardian ad litem*), which is currently performed by specially trained lawyers with a bar exam who possess required professional skills and competencies in the field of communication with children and children`s rights for the purpose of representing children in court proceedings. The child is a party in the court proceedings which decide on the exercise of parental responsibility, personal relationship of the child and the parent and child support;

[37] Ibid, Art. 101.
[38] Family Act, Art. 329
[39] Family Act, Art. 92
[40] Ibid, Art. 104
[41] Ibid, Art. 84
[42] Ibid, Art. 86

in these cases, the child is represented by a special guardian, regardless of who the initiating party is.[43]

The term "parental responsibility" is widely defined in Article 1(2) Brussels II bis and covers all rights and duties of a holder of parental responsibility, where the list of matters within the meaning of "parental responsibility" is not exhaustive, but merely illustrative, and includes rights of custody and rights of access, guardianship and curatorship, designation and functions of a person in charge of the person or property of a child or who represents or assists the child, measures for protection of a child in relation to the administration, conservation or disposal of the property of a child, the placement of a child in a foster family or in institutional care. These may arise by judgement, by operation of law or by agreement.[44]

In terms of rights and duties arising from parental responsibility, the term "custody" is not precise within the sense of the Croatian legalese and is used in other context, however the right to jointly exercise parental responsibility is synonymous to the term "joint custody".

A) CHILD'S RIGHTS RELATED TO SEPARATED PARENTS

Child's rights related to parental responsibility concern joint custody, right to ensure family relationship between the child and his family, decision-making and legal representation of the child by his legal guardians and child support. The FA defines joint parental responsibility as the right and duty to equally, jointly and consensually exercise parental responsibility, and in situations of the separated life of the parents, they are obligated to arrange the parental responsibility with a parenting plan or a court decision. During the exercise of joint parental responsibility, the parents should resolve their issues consensually.[45] Joint custody should always be a rule, with few exceptions (in case of death of one of the parents or where one parent is pronounced dead by a judicial decision). One parent can exercise sole parental responsibility partially or in its entirety only by restricting the other parent's right on his/her parental responsibility by a judicial decision which has to be in compliance with the child's welfare. When the parents do not agree on the parenting plan agreement during the mandatory counselling procedure, family mediation or in judicial proceeding, the court can also award sole custody to only one parent, where the court has to reconsider the fact which parent is cooperative and ready for an agreement. If a parent insists on arguing for sole parental responsibility, he/she must prove that joint parental responsibility is not in compliance with the child's best interest, otherwise the court can confide the sole parental responsibility to the other parent. Even in cases of such a decision by the court, it is necessary to define if the parent representing the child in cases concerning the child's personal rights needs consent or agreement from the other parent or not.[46]

The right to respect family life includes a number of composite rights, such as: the child's right to be cared for by his parents, the right to maintain contact with both parents, the right not to

[43] Ibid, Art. 414
[44] Practice Guide for the application of the Brussels IIa Regulation, available online at: http://e-justice.europa.eu
[45] Family Act, Art. 104
[46] Ibid., Art. 105

be separated from parents (except where it is in the child's best interests) and the right to family reunification.[47] Everything must be done to preserve personal relationships and, when appropriate, to 'rebuild' the family.[48]

If we consider the right to exercise parental responsibility and the lawful cross-border relocation of the child, we are not only referring to the decision on whether it is possible or not to relocate the child, but the concern is focussed on the child`s right to achieve a personal relationship between the parent who is staying and the child who is leaving. Parental responsibility comprises the right and obligation of the parent to maintain personal contacts with the child, as well as the child`s right to maintain personal contacts with the parents. A parent, or any other person with whom the child resides or who has been entrusted with the child`s care, is obligated to encourage the child to maintain relationship or contacts with family members or other non-blood relatives with whom the child lived in a family union during which time they developed an emotional bond with said persons, and the obligation to refrain from any kind of behaviour which would prevent or obstruct such relationships. Personal relationships and contacts may be restricted or prohibited only by a court decision.[49] [50]

Personal relationships should be maintained for a longer or shorter period of time in the form of direct socialisation in different places, or indirectly by using all sorts of communication channels, mailing letters, gifts and similar. In the event of dispute concerning personal relationships or exchange of information, the court may, at the proposal of the child, parent or person entitled to such information, issue an order aimed at protecting the child`s well-being.[51]

The EU Charter of Fundamental Rights expressly recognises every child's right to maintain contact with both parents, which must occur on a regular basis, allow the development of a personal relationship and be in the form of direct contact.[52] The right to maintain contact with both parents is expressly cited within the Convention on Contact Concerning Children[53], where it states that "*a child and his or her parents shall have the right to obtain and maintain regular contact with each other*"[54]. The general principles to be applied in jurisprudence about contact emphasise the right of a child to be informed, consulted and to express his or her views, and for these views to be given due weight.

In one of its decisions regarding a constitutional lawsuit filed by a parent, the Constitutional Court of the Republic of Croatia emphasised that the state is obligated to help maintain contacts between the child and the parents and undertake all reasonably expected measures within specific circumstances of each case; the Court based its decision on the conclusions from the

[47] Handbook on European law relating to the rights of the child, Luxembourg: Publications Office of the European Union, Council of Europe, 2015, page 77
[48] Handbook on European law relating to the rights of the child, p. 77
[49] Family Act, Art. 95 and 119
[50] Ibid, Art. 120
[51] Ibid, Art. 121
[52] Charter of Fundamental Rights of the European Union, 2000/C, 364/01, Art. 24 (3)
[53] Convention on Contact Concerning Children, Council of Europe, CETS No. 192, 2003.
[54] Ibid., Art. 4 (1)

case *Olsson v. Sweden*[55]. The Constitutional Court particularly emphasised that, at determining such contacts, the state should establish a fair balance between the interests of the child and parents, with special focus on the best interest of the child which may supersede the parents` interest depending on its nature and gravity (attitude of the ECtHR in the case *Sahin v. Germany*[56]).[57]

B) CHILD'S DOMICILE

One of the scopes of parental responsibility is the representation of the child's substantial personal rights, such as the change of child's domicile. Such representation is only valid if the parent representing the child has a written consent from the other parent. If the change of domicile does not affect the contacts of the child and the non-custodial parent, his/her written consent is not required, but said parent should request the consent from the Social Welfare Centre. [58] If we consider the change of residence or domicile through the prism of current trends of emigration, in order to avoid the unlawful relocation of the child, it is not sufficient to demand that both parents consent to the relocation, but it is important for the parents to regulate the issue by setting up a joint parental custody plan instead of merely acquiring written consent, or to replace such consent with a court decision.

According to the Croatian Domicile Act 2012[59], domicile is a place and address in the Republic Croatia where a person has set up permanent residence in order to exercise his/her rights and obligations related to life interests such as family, professional, economic, social, cultural and other interests, and residence is a place and address where the person temporarily resides, but not permanently. Croatian nationals who live or reside outside of Croatia can get residence in the Republic of Croatia. Residence has to be registered when the person stays at the same place over 3 months or is conditioned only by the exercise of certain rights and obligations related to life interests (employment, education, long-term treatment or other interests). [60]

A child's address of residence is the address of his/her parents.[61] The parents are obligated to agree on the child's place of residence, and if the parents are separated, the child can stay with only one of them. The parents` right to determine the child`s place of residence can be limited by a court decision or the need to acquire consent of the Social Welfare Centre. The child cannot live with the parent who does not exercise parental responsibility on personal rights of the child or if the parent has been deprived of the parental responsibility right. [62]

The legal system of the Republic of Croatia only defines the terms "domicile" (*prebivalište*) and "residence" (*boravište*), without considering the definition used in the international private law and relevant regulations. Brussels II bis Regulation uses the term "habitual residence"

[55] Olsson v. Sweden (No. 2), request No. 13441/87, judgement of 27 November 1992, §90
[56] Sahin v. Germany, request No. 30943/96, judgement of 8 July 2003. §65, §66
[57] Decision of the Constitutional Court of Croatia, No.: U-III-2047/2006, 8 May 2008
[58] Family Act, Art. 100.
[59] Domicile Act (Official Gazette 144/2012, 158/2013), effective from 29/12/2013
[60] Ibid, Art. 2.
[61] Family Act, Art. 96.
[62] Family Act, Art. 96

which is translated into Croatian as "*uobičajeno boravište*" and the term "domicile", used in the legal system of the UK and Ireland. The same term "habitual residence" is used in the Hague Convention on International Child Abduction and is not easily adaptable into the Croatian legal system according to the applicable regulations, since this term is used only as a translation, but without the interpretation of its implementation.

The term "habitual residence" was only introduced with the adoption of the International Private Law Act[63], which regulates the applicable law for international private law relationships, competence of the courts and other bodies of the Republic of Croatia in legal matters involving such relationships and procedural rules, and the recognition and enforcement of foreign court decisions in private law matters. It is defined as a place where a natural person usually resides regardless of the fact if the person`s stay there is registered or allowed; when determining habitual residence, we should also consider personal or business circumstances which indicate the person`s legal ties with that place or his/her intention to establish such ties. It took a really long time to acknowledge the importance of regulating the term by accepting international enactments and their implementation into the Croatian legal system, and to define it within national legislation. However, it should be noted that the International Private Law Act enters into force no sooner than 29 January 2019.

C) CHANGE OF THE CHILD'S ADDRESS

The Family Act specifically regulates consensual decision-making which is essential for the child. When exercising joint custody, the parents are obligated to make consensual decisions about the child, which not only includes decisions about changing the child's name, address or religion, but many others relevant to the child which may have a significant effect on the child's life such as having personal relationships with other family members or persons, exceptional medical procedures or treatment and choosing a school which requires the other parent`s consent.[64] In the event of dispute in such matters, the court proceedings will establish which parent is allowed to represent the child; the court proceedings may be initiated at the child`s or parent`s proposal. If disputes or disagreements often occur between the parents, and such proceedings are frequently initiated, the court may award sole custody to one parent.

When the parents are cooperative, the procedure is simple, considering that the parents can initiate the procedure of mandatory counselling, and after they reach an agreement and devise a joint parental custody plan in line with the new circumstances, they will submit it for court verification. This is a more suitable way to prevent the creation of gaps in the future exercise of parental responsibility than the written consent of the parents required in the event of child relocation.

When there are conflicted wishes and opinions of the parents, such situations are much more challenging for the parents and involved experts, therefore we witness many conflicted rights of children and parents in the child relocation dispute. The final decision always results in the

[63] International Private Law Act, The Official Gazette no. 101/2017
[64] Family Act, Art. 108

separation of the child from one of his/her parents, regardless of whether the child relocation will be granted or the child will remain with the staying parent.

1.2. CHILD'S RIGHT TO RELOCATE

One of four freedoms enjoyed by EU citizens is the free movement of workers, including the rights of movement and residence for workers, the right of entry and residence for family members, and the right to work in another Member State and be treated on an equal footing with nationals of that Member State.[65] The Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[66], grants all Union citizens and their family members, irrespective of nationality, to move and reside freely within the territory of the Member State, and in order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality. [67]

The parent`s right to relocate together with the child is almost always conflicted with the right of the other parent to maintain personal contacts with the child, as well as personal contacts with other family members. Naturally, there is also the conflict of two rights between the parents - the right of the staying parent to maintain personal direct contacts on regular basis and family ties with the child and the right of the leaving parent to freely move and relocate as a family. Parental responsibility in Croatian legal system is nominally joint and indivisible, which entails that the parents should mutually agree on all important matters concerning the child, and to co-decide on fundamental child-related issues such as the child`s domicile. The child`s relocation limits or completely prevents the non-custodial parent to decide on the child-related issues, to participate in child`s life, and poses the risk of affecting emotional and other existing bonds between them.

Even the experts are not unanimous on the issue of child`s relocation; some argue that the child`s well-being is best protected if we ensure the child`s good relationship with the primary custodian, hence the child should be granted to relocate. Others advocate the institution of consent to relocate, because they believe that the preservation of family union and frequent contacts with both parents guarantee the child`s well-being, and are therefore against relocation.[68]

By considering the right to relocate, four legal approaches can be applied: the first one is the presumption in favour of the right to relocate, where the relocation is generally granted except when the other parent contests said presumption with evidence that the relocation may harm the child (e.g. law of English and Wales, Israel, France and Spain). The second approach is the

[65] Treaty on European Union, article 3(2); Treaty on the Functioning of the European Union, articles 4(2)(a), 20, 26 and 45-48

[66] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

[67] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, preamble, item 4-6

[68] Medić Ines and Mioč Petra. *Preseljenje djeteta*, Suvremeno obiteljsko pravo i postupak, Osijek, 2016, p. 112

presumption against the right to relocate, where the parent who wants to relocate is requested to prove that he/she has a valid reason for relocation, and that relocation is in the child`s best interest. The third approach combines two variants; one where the burden of proof shifts from one side to the other, i.e. the parent who requests relocation has to prove that there is no ill intention or that he/does not plan to eliminate the other parent from the child`s life, whereas the decision in the second one is based on the best interest of the child, which means that whoever provides better arguments in favour of the best interest of the child, wins the case.[69]

Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) states that "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*". The term "concerning" has a vast potential range, and the Committee on the Rights of the Child sought to make this manageable in its General Comment No. 14 (2013)[70], which states that the term 'concerning' refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure.[71] Relocation cases provide an interesting example of the contrast between decisions directly affecting children and decisions that affect children indirectly. A relocation case can be treated as a decision about the parent (whether to allow or restrain him or her from leaving the jurisdiction) and whether, and, if so, how this eventually impacts the child, nonetheless that is a false characterisation, because the decision is in fact about where the child should live and how the child is to maintain contact with both parents.[72]

Therefore, it is difficult to adopt a general, universal stand on the child`s right to relocate or its prohibition, because justification of such claim should be considered for every case individually, whereby the court should also consider all the factors concerning the child and his parents. The child`s relocation undoubtedly creates a new situation and changes in family dynamics, whether it is a leaving or a staying parent or the child himself/herself, in which case there is a conflict of several acknowledged rights that need to be balanced. It should also be pointed out that relocation-related issues can be overcome if the parents agree on the decisions concerning the child, if they are cooperative and on good terms, because in such cases it is obvious that the parents put their child`s best interest above their personal interests.

However, in situations where these relationships are gravely and irreparable damaged, parents often resort to various methods and put their own interests above the interest of the other parent

[69] Schuz, R.: The Hague Child Abduction Convention, A Critical Analysis, Hart Publishing, 2013., p. 75; see more in Medić I., Mioč P., Preseljenje djeteta, p. 113-115

[70] General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as primary consideration (Art. 3, para. 1), adopted by the Committee on the Rights of the Children at the 62nd meeting (14 January – 1 February 2013)

[71] General Comment 14 (2013), item 19

[72] Eekelaar J., The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children, 23 Int'l J. Child. Rts. 3 (2015), page 9; In the paper, John Eekelaar discusses "direct" and "indirect" measures, referring to Art. 3 (1) of the UNCRC and the observations of the Committee in it's General Comment No. 14 (2013)

and, consequently, the child as well. The real underlying motive for unlawful relocation is often to limit the other parent`s right to exercise parental responsibility, or to sever all ties of the child with that parent.

The Family Act now prescribes a special judicial procedure regarding child`s domicile, therefore when one of the parents contradicts the relocation of the child, at the proposal of the child or the parents the court will decide on which parent represents the child in that matter for the protection of the child`s well-being. The court will consider the child`s age and opinion, the child`s right to exercise personal contacts with the other parent, readiness and willingness of the parents to cooperate for the purpose of exercising parental responsibility, personal circumstances of parents, distance between a parent`s place of residence and the place to which the child should relocate, traffic connections between these two places, and the right of parents to free movement.[73]

1.3. UNLAWFUL RELOCATION OF THE CHILD - CHILD ABDUCTION

According to the official data of the Ministry of Demographics, Family, Youth and Social Policy, the number of interventions of the Social Welfare Centre according to the Hague Convention on Civil Law Aspects of International Child Abduction amounted to 39 in 2016, 28 of which concerned the children relocated from Croatia[74], and 21 in 2015, 14 of which concerned the children relocated from Croatia[75]. The Central Authority to discharge the duties which are imposed by the Convention in Croatia is the Ministry for Demography, Family, Youth and Social Policy

Child abduction refers to a situation in which a child is removed or retained across national borders in breach of existing custody arrangements, where the courts of the country of habitual residence determine the merits of the custody dispute. The courts of the country from which the child has been removed should order the return within six weeks from the date that the return application is made.[76]

Under EU law, the most important instrument regulating child abduction between EU Member States is the Brussels II bis Regulation, largely based on the provisions of the Hague Convention. The Brussels II bis shall take precedence over the Hague Convention if the child concerned has his/her habitual residence on the territory of a Member State or as concerns the recognition and enforcement of a judgement rendered in a court of a Member State on the territory of another Member State, even if the child concerned has his/her habitual residence

[73] Family Act, Art. 484

[74] Source: http://www.mdomsp.hr/UserDocsImages/dtomasic/Statisticka%20izvjesca/2016/Godi%C5%A1nje%20statisticko%20%20izvjesce%20o%20korisnicima%20i%20primijenjenim%20pravima%20socijalne%20skrbi%20%20u%20Republici%20Hrvatskoj%20u%202016%20godini.xlsx

[75] Source: http://www.mdomsp.hr/UserDocsImages/dtomasic/Statisticka%20izvjesca/2015/Godi%C5%A1nje%20statisticko%20%20izvjesce%20o%20primijenjenim%20pravima%20socijalne%20skrbi%20%20u%20RH%20u%202015.%20godini-2.xlsx

[76] The Hague Convention on the Civil Aspects of International Child Abduction, Art. 11.

on the territory of a third state which is a contracting Party to the Hague Convention.[77] Therefore, a key issue under the Brussels II bis Regulation is only the determination of habitual residence of the child.[78]

The Hague Convention is underpinned by the principle of the child's best interests. In the context of this convention, the presumption is that the unlawful removal of a child is in itself harmful and that the status *quo ante* should be restored as soon as possible to avoid the legal consolidation of wrongful situations. Issues of custody and access should be determined by the courts that have jurisdiction in the place of the child's habitual residence rather than those of the country to which the child has been wrongfully removed. [79]

At the time the Hague Convention was drafted, the perception was that most people who abducted their children were fathers who were not the primary caretakers of the child and who only fled with the child to retain custody when a separation dispute would likely take away their custody rights.[80] The drafters considered the typical abducting parent to be a male who absconds with the child because he is dissatisfied with the actual or predicted outcome of losing custody rights in a separation, however, since then, it has been determined that most abductors are women alleging domestic violence, which was not as prominent of a public issue as it is today.[81]

A) CUSTODY RIGHTS

The removal or the retention of a child is considered wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[82] The Convention's main objectives are to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.[83] To establish whether a child can be returned to his home country, the petitioning parent must also have a "right of custody" over the child,[84] where the "right of custody" means the right to care for the child and to determine the child's place of residence, and „the right of access" includes the right to take a child for a limited period of time to a place other than the child's habitual residence. Those rights of custody may arise in particular by operation of law or by reason of

[77] Brussels II bis, Art. 61
[78] Handbook on European law relating to the rights of the child, p. 83
[79] Ibid, page 89
[80] Simpson K. What Constitutes a Grave Risk of Harm: Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims, 24 Geo. Mason L. Rev. 841 (2017), p. 846.
[81] Ibid, page 608-09
[82] The Hague Convention on the Civil Aspects of International Child Abduction, Art. 3
[83] Ibid, Art. 1
[84] Ibid., Art. 3

a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.[85]

In a child abduction case, a court has to consider the child's habitual residence, a breach of custody rights under the law of the country in which the child was habitually resident immediately before the removal or retention, *exercise of custody rights* and the age of the child.[86]

In the procedure of returning the unlawfully relocated child, the court should first consider and determine the child`s habitual residence, the violation of the right of custody in the context of the law of the state where the child had habitual residence before removal or retention, the exercise of these rights and the child`s age. [87]

B) NON-RETURN EXCEPTIONS

The Convention lays out several defences that an abductor may use to prevent the return of the child. If the child has been out of his home country for over a year, a judge is allowed to use his discretion to decide if "the child is now settled in [his or her] new environment, known as the "well-settled exception" found in Article 12."[88] Second, a court does not have to order a return if the petitioning parent was not exercising custody rights at the time of abduction, or the parent consented to or subsequently acquiesced to the abduction.[89] The third defence is the "grave risk of harm". The Court may also refuse to order a return if the child is at an age and maturity the court deems appropriate, and he or she objects to the return. [90] Lastly, a court may refuse to return a child if its home country violates "human rights and fundamental freedoms".[91] [92]

These exceptions can be considered as exceptions established for the cases where the return would be the opposite of what constitutes the child's best interest.

C) CHILD ABDUCTION PREVENTION MECHANISMS

The legal framework that currently governs the countries of the European Union addresses the problem of international child abduction from a reactive stance, seeking the return of an abducted child once he or she has already been removed from a country, instead of proactively preventing the abduction from occurring in the first place.[93] In 2005, the Permanent Bureau of

[85] Ibid, Art. 5
[86] Loo H., In the Child's Best Interest, p. 616
[87] Loo H., In the Child's Best Interest, p. 616
[88] The Hague Convention on the Civil Aspects of International Child Abduction, Art. 12.
[89] Ibid., Art. 13 a)
[90] Ibid., Art. 13 b)
[91] Ibid., Art. 20
[92] Simpson K. What Constitutes a Grave Risk of Harm: Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims, page 850
[93] Galdos Alexandra, When a Stranger Isn't the Danger: International Child Abduction and the Necessity of Mandatory Preventative Measures in the European Union, 49 Geo. Wash. Int'l L. Rev. 983 (2017), p. 990

the Hague Conference[94], suggested a creation of a legal environment which reduces the risk of abduction as a proactive measure, not only by promoting a legal environment which reduces the risk of abduction, encouraging the implementation of the Convention and strengthening the Central authorities of the contracting States by providing them with the human and material resources necessary for the effective implementation, monitoring and review of appropriate preventive measures, but also by implementing the measures such as requiring children to have separate travel documentation, requiring the consent of both parents before issuing travel documentation for children, by requiring a proof that a consent has been given, where necessary, prior to permitting a child to leave a jurisdiction.[95]

In cases of perceived increased risk of child abduction, the suggestion is to implement a system of voluntary agreements and mediation by promoting voluntary agreements, and facilitating mediation in relation to issues of custody or contact/access, or to implement legislative provisions and court orders by implementing provisions seeking to prevent or discourage abduction. A highly restrictive approach to relocation issues may have an adverse effect on the operation of the Convention and may encourage abduction. As an effective response to a credible risk of abduction, the proposals of reactive measures include the implementation of a passport alert system to notify a named person if a passport application is made for a child, or refusal of issuing a passport to a named child, ensuring orders for preventing removal from a jurisdiction to Passport Authorities or by empowering Passport Authorities and the implementation of a procedure for the withdrawal or revocation of a child's passport where there is a credible risk of abduction.[96]

However, these suggestions are in no way legally binding upon signatory states, and the remaining legal mandates are limited supplements to the Abduction Convention.[97]

Considering the proposals regarding the issuance of travel documents to underage children, the Act on Travel Documents of Croatian Nationals[98] defines that when the parents of a child exercise joint custody, the request for the issuance of the travel document should be submitted by both parents, whereas it can, exceptionally, be submitted by one parent who signs a statement that the document will be personally collected by the other parent. If the other parent is, for some reason, unable to personally collect the document, the applying parent can collect it with a notarised written consent of the other parent, competent authority, or the embassy of the Republic of Croatia in the foreign country, if the other parent is outside of Croatia. Exceptionally, if there is a risk for the child or the issuance of the travel document is in the best

[94] The Permanent Bureau is the secretariat of the Hague Conference. Its main task consists in the preparation and organisation of the Plenary Sessions and the Special Commissions. The Permanent Bureau carries out the basic research required for any subject that the Conference takes up. More about the Hague Conference FAQ online, URL: https://www.hcch.net/en/faq

[95] Guide To Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, p. 11

[96] Ibid., p. 21

[97] Ibid., p. 19

[98] Act on Travel Documents of Croatian Nationals, OG 77/99, 133/02, 48/05, 74/09, 154/14, 82/15

interest of the child, the same parent can submit the request and collect the document with the written consent of the Social Welfare Centre.[99]

The Croatian legal system does not have other mechanisms of notifying the competent authorities on the possible risks of child abduction by alarming the competent authorities, a possibly delivering interim orders for the issuance or annulment of the child`s travel documents, or depositing existing travel documents, however any future amendments to the Family Act should take these into account.

1.4. CHILD'S BEST INTEREST

The court will grant the child`s relocation if it evaluates that it is in the best interest of the child. On the other hand, the court will dismiss the return request in the procedure of returning the unlawfully relocated child if it determines that it is not in the best interest of the child. The following question arises: how will the court determine what is in the best interest of the child? In all procedures deciding on a child`s right, the Croatian courts summon the Social Welfare Centre which provides its own opinion on the best interest and the well-being of the child in a specific case. How will the authorities determine the best interest of the child? Will the principle of the best interest of the child be put in focus in the procedure of deciding on the return of the unlawfully relocated child?

In the United Nations Convention on the Rights of the Child[100] (hereinafter: UNCRC), "best interests" appears eight times in the fifty-four articles of the UNCRC, making it one of the most widely recognised and important international standards regulating decisions regarding children. Despite these commitments to the child's best interests' principle, there is no clear definition for the "child's best interests" or what makes up the child's best interests.[101]

The Court of Justice of the European Union (hereinafter: CJEU) jurisprudence in cases of wrongful removal of a child following a decision taken unilaterally by one of the parents has primarily aimed to uphold the fundamental right of the child to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24 (3) of the Charter), as the Court asserts that this right undeniably merges into the best interests of any child. In the CJEU's view, a measure that prevents the child to maintain, on a regular basis, a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that takes priority over the interest underlying that fundamental right. It can be limited only by the best interests of the child. This right is at the centre of judicial decision - making about custody of and contact with children. In a series of cases, the ECtHR has either expressly or implicitly referred to the best interests of the child within the context of custody and contact.

[99] Ibid, Art. 34.

[100] United Nations Convention on the Rights of the Child, adopted and prepared for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990

[101] Hannah Loo, In the Child's Best Interests: Examining International Child Abduction, Adoption and Asylum, Chicago Journal of International Law, 609 (2016), p. 614

The establishment of the best interest of the child is performed on individual basis, considering the context and the circumstances surrounding each child and parent. We should not strive towards uniformity, because it would have more disadvantages than advantages from the child`s perspective, and it would be contrary to the desired objectives of implementing this standard. Generally, it is easier to negatively determine the standard of the best interest of a child than positively, which means that it is often easier to determine what harms the child, rather than what benefits him/her.[102] The best interest of the child is certainly not considered as a separate concept by observing the child alone, but it also includes his/her parents. In line with the modern conceptualisation of indicators of the child`s well-being which states that the direct well-being of a child should be considered, e.g. physical and mental health, safety and protection against violence, child`s living conditions, e.g. family structure and income, family`s relations with the local community, and any relations significant for the child, such as closeness, manner of communication, support and other resources gained from interacting with people that matter to the child.[103]

In fact, the Committee on the Rights of a Child states that there are no preliminary solutions for each situation in it is established what is in the child`s best interest, but we can only set up principles for determining that.[104] Therefore, the Committee states that the concept of the child's best interests is flexible and adaptable.[105] It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child.[106]

In order to ensure that the decision in every specific case is really based on the fair evaluation and assessment of the best interest of a child, the competent authorities have to consider, determine and elaborate on the consequences of this decision on the child. From several possible alternatives, it is essential to choose the one with the most favourable effects on the child.[107]

Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence

[102] Bubić Suzana: Standard „Najbolji interes djeteta" i njegova primjena u kontekstu ostvarivanja roditeljskog staranja. dani porodičnog prava, 2 (2). issn 2303-6052, 2014., p. 12
[103] Unicef, Hajduković, 2015, p. 32.
[104] Šahović Vučković N.; *Najbolji interesi deteta: pravo, principi i procesno pravilo - Međunarodni standard i alatke za sprovođenje* u Zaštita najboljeg interesa djeteta, Zbornik priopćenja s Godišnje konferencije i Tematskog sastanka Mreže pravobranitelja za djecu Jugoistočne Europe, Zagreb, 2015., str. 14.
[105] General Comment No. 14 (2013), item 30
[106] Ibid., item 32.
[107] Bubić S., page 12.

of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.[108]

The experts from the Social Welfare Centre may resort to "Triangle chart for the assessment of children in need and their families", as a guideline in the procedures concerning the protection of child`s rights and well-being by determining what would be the best interest of a child. The child and his/her safety, stability and well-being are at the centre of the triangle, and the sides of the triangle represent the child`s developmental needs, parental competencies and family and environmental factors.[109] The child`s developmental needs include health, education, emotional development and behaviour, identity, family and social relations. Parental competencies include basic care, ensuring safety, emotional tenderness, encouragement, leadership, stability and setting of boundaries. The third category of family and environmental factors includes family history, accommodation, employment, income, family and social integration and communal resources.[110]

The Convention on the Exercise of Children's Rights[111] further identifies requisites of judicial decision-making, including the legal obligations to consider whether the judicial authority has sufficient information to determine the best interests of the child, ensure the right of the child to information about the process and outcomes and open a safe space for affected children to freely express their views in an age/maturity appropriate manner.[112]

The Committee on the Rights of a Child proposes the consideration of the following elements during the assessment and determining of the best interest of a child, depending on a specific situation: child`s views, child`s identity, preservation of the family environment and maintaining relations, care, protection and safety of a child, vulnerable situations, the child's right to health and education.[113] Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases.[114]

The flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused by parents to defend their own interests in custody disputes or by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.[115] The best interest of the child may be abused by a parent in the event of child relocation, by justifying it with better living conditions abroad for the child and presenting such

[108] General Comment No. 14, item 48.
[109] Unicef, Ajduković, Radočaj, 2008, p. 88.
[110] Ibid., p. 89.
[111] European Convention on the Exercise of Children's Rights, Council of Europe, CETS No. 160, 1996.
[112] Handbook on European law relating to the rights of the child, Luxembourg: Publications Office of the European Union, Council of Europe, 2015,: ISBN 978-92-871-9917-1, page 87
[113] General Comment No. 14, item 52.
[114] Ibid., item 80.
[115] General Comment No. 14, item 34.

circumstances as more important for the child` development than maintaining quality contacts with the staying parent and other family members.

The legal standard of the best interests of the child is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. Such a decision by internal authorities involves the risk of expressing their particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgements upon the national community from which the child has recently been snatched. For these reasons, inter alia, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained.[116]

Right from the start, the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody', 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'. These two paragraphs reflect quite clearly the philosophy of the Convention. The struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. It is legitimate to assert that the two objects of the Convention - the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment - both correspond to a specific idea of what constitutes the 'best interests of the child'. However, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected.[117] The interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.[118]

The principle of emergency procedure has a dual role - it is one of the foundations to ensure the best interest of a child which reduces the risk of inflicting the child with a psychological trauma on returning. The Convention prescribes a strict non-binding six-week deadline within which the courts should decide on the request for the purpose of ensuring faster and easier adaptation of the child to his/her new environment. Every overstepping of that deadline envisaged for the return of the child provides for the possibility to use of *the well-settlement* exception. In its judgements, the European Court of Human Rights criticises the role of the

[116] Explanatory Report on the 1980 Hague Child Abduction Convention , by Elisa Pérez-Ver a Pérez- Vera, 1982, page 431, para. 21.
[117] Ibid., para. 23-24
[118] Pérez- Vera Report, page 433, para 29

states in deciding on the return; they first enable the child to properly adapt to the environment, and then create a whole new situation where the return of the child is no longer in his/her best interest. In the case Monory v. Romania and Hungary[119], the Court established infringement due to prolonged proceedings as a result of actions made by state authorities, and the erroneous implementation of substantive law; i.e. the competent court did not apply the Hungarian law according to the child`s residence, but rather interpreted the provisions of the Conventions according to the Romanian law, i.e. country to which the child was relocated. In the case Adžić v. Croatia[120], the Court established infringement of the claimant`s right from Art. 8 of ECHR because the court issued a final decision after more than three years, even though the six-week deadline prescribed by Art. 11, par. 2 of the Convention is non-binding, the overstepping of that deadline for more than 151 weeks cannot be considered a positive obligation for emergency procedure in the process of child return, i.e. the time required for the issuance of the final decision does not meet the emergency procedure requirement.

According to the Croatian legal system, the unlawful child abduction, in terms of the Hague Convention, is classified as a criminal offence committed by a parent as a grave violation of the child`s rights and the rights of the parent from whom the child was removed.[121]

The restoration of previous conditions from which the child has been removed prevents the occurrence of the legal consolidation of *de facto* conditions resulted from a criminal offence.[122] Legitimate question arises here: to what extent can the competent authorities make a fair decision and protect the best interest of a child in the matters of unlawful removal or retention of the child, if their negligence caused that once the best interest of the child turned into the least favourable situation for the child?

CONCLUSION

Cases involving the exercise of parental responsibility or any issue concerning a child`s rights have always been sensitive, especially because they impact a person`s fate and have direct and/or indirect consequences on all participants in that process, which is why this issue should be approached with utmost caution. Even though the best interest of a child is at the focus of these proceedings, it is a flexible concept subject to different interpretations, and there is no universal formula for determining it, hence it should be determined in light of the specific circumstances of the particular child and available facts and resources.

When a decision is made about the child`s right to relocate, the best interest of the child should be at the focus of decision-making – whether it results in leaving the child within a familiar environment or potentially changing the primary guardian with whom the child will continue to live in the same country, or granting the parent to relocate with the child and risking the deterioration of the child`s emotional ties with the other parent.

[119] Monory V. Hungary and Romania, No. 71099/01, ECtHR (Second Section), Decision of 17.02.2004
[120] Adžić v. Croatia No. 22643/14, judgement of 12 March 2015
[121] Croatian Criminal Code Act, Art. Official Gazette 125/2011, 144/2012, 56/2015, 52/2016, 61/2015, 101/2017, Section XVIII, Art. 174
[122] Šeparović M., Dobrobit djeteta i najbolji interes djeteta u sudskoj praksi, Zagreb, 2014, p. 144

Real-life situations of unlawful removal or retention of a child should be attended to with utmost caution and emphasis on emergency proceedings in order to prevent the consolidation of unlawful conditions caused by one parent`s autocracy into those conditions where the return of the child would be harmful. The Hague Convention has created a system which prevents the unlawful and intentional change of the family arrangements in its early stages, and restores the conditions which existed before the unlawful act. It is, therefore, inadmissible to justify such intentional and unlawful conduct with a protection of another recognised right of a child or parent, especially since in these modern times almost every legal system enables suitable and effective protection and legal protections and instruments to enable the parent`s relocation with a child, despite the other parent`s objection.

The issue of exercising parental responsibility should be resolved with an agreement between the parents, or by providing the possibility to regulate these issues with an administrative or court decision. Unlawful removal of a child should be avoided at all costs, regardless of the motives which led to it. Emergency proceedings of public and judicial authorities in the event of child abduction prevent the parent`s unlawful conduct to reinforce and become normalised. This is why we need to work on raising awareness and promoting amicable resolution of family disputes, and also simplifying procedures where the parents have reached an agreement. This is the general direction that Croatia has taken with its most recent reform of the family law legislation.

Despite the fact that the cases of enforcement of court decisions concerning a child, i.e. coercive removal of the child from a parent, from the common-sense perspective of a child`s life with the parent and maintaining family relationships may seem harsh, inhumane and contrary to the child`s interest, we should, unfortunately, consider the importance of complying with the legal system and the rule of law in a democratic society. In one of its decisions, the Constitutional Court has justly stated that the objective legal system in a democratic society based on the rule of law cannot be built, and the protection of constitutional and conventional rights of individuals cannot rely on reasons which are not based on the common sense argument. Deriving from unsuccessful experiences of trying to execute enforcement and the media impact of cases, they emphasized the unconditional duty of all entities to comply with final and enforcing court decisions, including the legal enforcement decisions (court decisions), and absolute inadmissibility to have any individual (or group of individuals) take the law into their own hands and thus contradict these decisions, because in that way they threaten the public order and violates the values of a democratic society based on the rule of law, where freedom in a democratic society based on the rule of law primarily implies the readiness of an induvial to assume responsibility for his/her own fate within the constitutional framework of protected rights.[123] Even though this specific quote was taken from the decision of the Constitutional Court from a case concerning real property enforcement where the media and the public tried to influence the judicial bodies, we should remember the importance of complying with the court decisions and the execution thereof as a guarantee of the rule of law and preservation of the legal system, regardless of how the public perceives it.

[123] Decision of the Constitutional Court of Croatia, No.: U-III-2551/2015, 7 July 2015

Fighting against unlawful relocation of children is an effort we must undertake in order to protect both children and their parents, placing their rights and interests in a proper balance.

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GENERAL TOPICS

Maja Čarni Pretnar[*]

INVOKING IMMUNITY IN FAMILY DISPUTES: CAN THE DIPLOMATIC STATUS OF A PARENT BE CONSIDERED AS A STUMBLING-BLOCK IN ENSURING THE RIGHTS OF THE CHILD?[**]

Abstract

The specific situation was chosen to show that, in principle, invoking diplomatic immunity denies the other parent the right to judicial protection at any court other than that of the sending state. As a consequence, it is a child whose rights are being denied as well. A (small) child has no means to defend or act on him- or herself and is therefore trapped in a situation where he or she cannot acquire judicial protection of his or her rights. The obligation to consider the child's best interest is enshrined in national legislation mainly as a consideration on the substance. With the Committee on Rights of the Child expressly elevating the principle to international procedural law, consideration of the child's best interests should already be made at the stage when the court balances concurrent international provisions, as early as in seizing jurisdiction. The importance of the Vienna Convention on Diplomatic Relations as indispensable for the maintenance of interstate relations has been constantly confirmed by courts. As human rights gained importance in international law, specifically regarding the question of access to court, invoking diplomatic immunity does not automatically lead to declining jurisdiction, but to conducting an assessment of concurrent considerations. In cases affecting children, one of them should be the consideration of the best interest of the child. The outcome of these assessments is to be seen in forthcoming case law.

Key words: rights of the child, child's best interest, diplomatic immunity, access to court, international procedural law

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1. INTRODUCTION

This paper focuses on the issues that a (national) court of the European Union Member State examines when presented with a case of family dispute with an international element as a consequence of a parent invoking diplomatic immunity. In the European Union and wider, due to progressing globalization and a constantly increasing number of multinational families and families living abroad, the problem of approaching the legal resolution of family splits is being recognized. This question has been the subject of various international and regional documents, some traditional, such as the Vienna Conventions, and some more recent, trying to encompass the dynamics of political reality the components and privileges of being a diplomat are laid down in the Vienna Convention on Diplomatic Relations (hereinafter: VCDR).[1] Its preamble recalls that the status of diplomatic agents has been recognized by peoples of all nations from ancient times; respecting the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations; believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems; and realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.[2] What these immunities entail is laid down in Article 31,[3] namely an absolute immunity in criminal proceedings, for the official and private actions, while in case of immunity from civil (and administrative) proceedings for the official and private actions, the Convention provides three definitive restrictions.[4] They are to be interpreted narrowly and none of them apply to family disputes. However, several states participating in the codification conference expressed an interest in enacting a special resolution to encourage sending countries to waive immunity of diplomatic mission members in civil proceedings brought in the receiving country, as long as it does not impede the functions of the mission.[5] This indicates that the awareness of possible immunity abuse[6] has always been present.

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[1] Vienna Convention on Diplomatic Relations, 18 April 1961, Official Gazette SFRY, International Treaties No. 2/64, Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA, Official Gazette of Republic of Slovenia, International Treaties, No. 9/92.

[2] Summarized from Preamble of VCDR.

[3] Article 31: "1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

[4] *Ibid.*

[5] Bohte, B., Sancin, V., *Diplomatsko in konzularno pravo*, Ljubljana, Cankarjeva založba, 2006, p. 147.

[6] There has been a number of scholars touching upon the problem of abusing immunity, especially when the protection of human rights is strengthening, and international criminal law is increasingly gaining importance. See A.M. Castro, *Abuse of Diplomatic Immunity in Family Courts: There's Nothing Diplomatic About Domestic Immunity*, Suffolk university law review, URL=http://suffolklawreview.org/wp-content/uploads/2014/05/Castro_Note.pdf. Accessed on 12 August 2018.

Nevertheless, diplomatic agents or persons enjoying immunity from jurisdiction under Article 37 can initiate legal proceedings. However, this would preclude them from invoking immunity from jurisdiction with respect to any counter-claim directly connected with the principal claim.[7] By entering a proceeding, it is assumed that they are submitting themselves to the possibility of a full and thorough scrutiny of the case.[8] The notion of "entering" proceedings does not mean waiving immunity when an agent subsequently submits a counterclaim in substance in the event that the court does not accept the immunity objection.[9] The number of cases considering diplomatic immunity is rather small, primarily because diplomatic immunity builds on the traditional theory of international relations, which is mainly enforced through diplomatic channels. The reason behind this still stems from the principles of sovereignty of the states and equal powers between them, which consequently results in the court's waiver of jurisdiction. Nevertheless, the abuse of immunity has been identified[10] and that has contributed to the more attentive approach by national courts.

With human rights and rights of the child gaining importance in international law, which is reflected in numerous international and regional documents in last decades, the collision of rules between protecting the principles of sovereignty of the states and equal powers between them, and the rights of the child, is inevitable.

To present the challenges the national courts of the European Union Member States are confronted with when resolving multinational cross-border family disputes, that by their nature entail the collision of different rules, the international legal basis for guaranteeing protection of the rights of the child will be discussed firstly, followed by the introduction of the impact on access to (national) courts by the interplay of international instruments, highlighting the issues of immunity to proceedings. Finally, to give some conclusions to the posed question, the national case law will be observed.

2. RIGHTS AND BEST INTEREST OF THE CHILD

Children are holders of rights, rather than just objects of protection. They are beneficiaries of all human/fundamental rights and subjects of special regulations, given their specific characteristics.[11] These rights are proclaimed on the international as well as the European/regional level and are to be respected by the courts of law.

[7]VCDR Article 32, para. 2.

[8]Singh, R., *Use or Abuse of Diplomatic immunity? A critical analysis of International law on Diplomatic and consular Asylum*, Virtual Centre of International Law, 2015, URL=http://www.publicinternationallaw.in/node/118. Accessed on 12 August 2018.

[9]Cour d'appel – Arret du fevrier 28, 2008 (Bruxelles), point 2. Para 15, URL= https://lex.be/fr/doc/be/jurisprudence-bruxelles/cour-d-appel-arret-28-fevrier-2008-bejc_2008022824_fr. Accessed on 12 August 2018.

[10]More on this Castro, A.M., *op. cit.* note 6.

[11]Končina Peternel, M., *Pravice otroka in njihovo pravno varstvo,* Zbornik znanstvenih razprav / Univerza v Ljubljani, Pravna fakulteta, Letnik 52, 1992, pp. 145-158; Article 24 of the Charter of Fundamental Rights of EU recognises that children are independent and autonomous holders of rights.

On the international level, the Convention on the Rights of the Child[12] (hereinafter: CRC) has already introduced in its Article 3, the notion that the child's best interests be taken 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. In the General Comment No. 14, the Committee on the Rights of the Child (hereinafter: Committee)[13] further describes the child's best interest as a threefold concept.[14] It underlines, as a rule of procedure, that whenever a decision is to be made which will affect a specific child, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child concerned. As a holder of rights in civil cases, a child may defend his or her interests directly or through a representative, depending on national rules regarding the procedural capacity of the child.[15] The courts must place primary consideration on the best interests of the child in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so. This means that the consideration of the child's best interests may not be taken into account on the same level as all the others and is elevated above other considerations, justified by the special situation of the child.[16]

Even though the European Convention on Human Rights (hereinafter: ECHR)[17] does not refer expressly to the rights of the child, these were already established,[18] considering that the states have the obligation to guarantee these rights to "everyone" (Article 1) and that by means of the prohibition of any kind of discrimination (Article 14), the rights set down in the ECHR are conferred to the children as well. Consequently, the ECHR it is to be taken into account when resolving multinational cross-border family dispute cases.

In the European Union (hereinafter: EU), children's rights have only recently been addressed as part of a more holistic and coordinated EU agenda, with the introduction of the Charter of Fundamental Rights of the European Union[19] (hereinafter: Charter) laying down "the rights of

[12]Convention on the Rights of the Child, 20 November 1989, Official Gazette SFRY, International Treaties No. 15/90, Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA, Official Gazette of Republic of Slovenia, International Treaties, No. 9/92.

[13]General Comment No. 14 (2013), adopted by the Committee at its sixty-second session (14 January – 1 February 2013). URL= http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. Accessed on 12 August 2018.

[14]*Ibid*, "…the child's best interest is a threefold concept: a substantive right, a fundamental interpretative legal principle and a rule of procedure", p. 4, para. 6.

[15]This varies from country to country. For example, in Slovenia, for a child to act on his or her own behalf conditions of having turned 15 years of age and a certain degree of maturity must be met.

[16]Summarized from General Comment No. 14, *op. cit.* note 13, see par 37: The special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

[17]Convention on Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950, Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11, Official Gazette of Republic of Slovenia, International Treaties No. 7/94.

[18]ECtHR - *Güveç v. Turkey*, No. 70337/01, 20 January 2009, URL=http://hudoc.echr.coe.int/eng?i=001-90700. Accessed on 12 August 2018.

[19]Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326**,** pp. 391–407.

the child" in Article 24.[20] A closer insight of Article 24 reveals that the EU endorsed the "basic"[21] text referring to child's rights. As children's rights have only recently been introduced into EU legislation, the courts of the EU predominantly dealt with these issues on the preliminary ruling level and adjudicated only a few, most of them in the context of free movement and EU citizenship. The right to respect for family life is set out in the Charter Article 7.[22] However, the EU's competence in matters of family life relates to cross-border disputes, including the recognition and enforcement of judgments across Member States. Therefore, the Court of Justice of the European Union (hereinafter: CJEU) deals with matters such as the child's best interests and the right to family life as laid down in the Charter, when applying the Brussels II bis Regulation.[23] The Regulation reflects the best interest of the child as the overriding principle and confirms that as a general rule, the court that is most competent for making decisions about children in cross-border cases is the Member State of the child's habitual residence, with some reasonable exceptions.[24] The Regulation, however, does not apply in cases when diplomatic immunity is invoked, as it is laid down in paragraph 14 of the preamble.[25] In specific situations, such as mentioned in this paper's title, it is not uncommon that a parent takes a child to a different country. If a parent invokes diplomatic immunity in an intra-EU case, it is only The Hague Convention on international child abduction[26] that could be applied, since invoking diplomatic immunity excludes the application of the Brussels II bis Regulation.

Regarding the requirement that the principle of the child's best interest be applied,, the Charter expressly incorporates an obligation to consider the best interests of the child (Article 24 (2)), *a contrario* ECHR does not regulate it expressly; however, the ECtHR endorsed that obligation in its case law (see, for example, ECtHR, *Ignaccolo-Zenide v. Romania*[27]; *Neulinger and*

[20]Until the introduction of the Charter and the entry into force of the Lisbon Treaty, the rights of the child were being addressed partially as specific child-related aspects of broader economic and politically driven initiatives.
[21]Article is based on CRC, particularly Articles 3, 9, 12 and 13 thereof.

[22]Article 7 of the Charter: "Everyone has the right to respect for his or her private and family life, home and communications.".
[23]Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000**,** Official Journal L 338, pp. 1 – 29.
[24] Župan, M., *The Best Interest of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?*, in Liefaard, T., Sloth-Nielsen, J., (ed.) The United Nations Convention on the Rights of the Child: taking stock after 25 years and looking ahead, Brill/Nijhoff, Leiden, Boston, 2017, pp. 213-229.
[25]Council Regulation (EC) No 2201/2003 of 27 November 2003, *op. cit*. note 23, para. 14: "Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.".
[26]The Hague Convention on the Civil Aspects of International Child Abduction, 25 of October 1980, Official Gazzete of Republic of Slovenia, International Treaties, No 6/93. A specific relationship between Brussels II bis Regulation and Hague Convention is highlighted in paragraph 17 of the preamble to Brussels II bis Regulation.
[27]ECtHR - *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, para. 94, URL= http://hudoc.echr.coe.int/eng?i=001-58448. Accessed on 12 August 2018.

Shuruk v. Switzerland[28]). The ECtHR also made a reference that to not have the child's status determined by a court is not in that child's best interest. (*Frisancho Perea v. Slovakia*[29]).

3. ENFORCEMENT OF RIGHTS

3.1 ACCESS TO COURT

To be able to protect and enforce the rights of the child, access to court must be guaranteed. In the case of international agreements and conventions, national courts are the first called upon to provide the protection of the rights laid down in these instruments.[30]

At the European level, the (general) definition of access to court was provided by the ECtHR in the Golder case, where it held that the procedural guarantees laid down in Article 6 of ECHR concerning fairness, publicity and expeditiousness would be meaningless if there was no protection of the precondition for enjoyment of those guarantees, namely, access to court.[31] However, the right is not absolute, and may be subject to legitimate restrictions. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right, and whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[32] If the restriction is compatible with these principles, no violation of Article 6 will arise. For EU member states who are all also parties of ECHR, the EU law implies more extensive protection since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its *Johnston*[33] judgment as a general principle of Union law and embodied it in Article 47[34] of the Charter.

When dealing with family dispute cases where children are involved, it is especially the court that needs to take into consideration the best interest of the child. The role of the court should also be the same in situations when the proceedings have not reached the stage of deliberation on merits, and the court is yet to establish jurisdiction. It is in this respect that a child could

[28]ECtHR - *Neulinger And Shuruk v Switzerland,* No. 41615/07 6 July 2010, paras. 134 and 146 – 151, URL= http://hudoc.echr.coe.int/eng?i=001-99817. Accessed on 12 August 2018.
[29]ECtHR*: Frisancho Perea v Slovakia,* No. 383/13, 21 October 2015, para. 77, URL= http://hudoc.echr.coe.int/eng?i=001-156271. Accessed on 12 August 2018.
[30]Or as it is referred in K. Lenaerts, I. Maselis and K. Gutman*, EU Procedural Law*, Oxford University Press, 2014, p.3 para. 1.04. "In the case of the EU, the national courts, and not the courts on EU level, are considered the "normal EU courts" in the sense that it is generally before such courts that the litigants may bring cases involving issues of EU law.".
[31]ECtHR - Golder v. the United Kingdom, No. 4451/70, 21 February 1975, paras. 28-36, URL=http://hudoc.echr.coe.int/eng?i=001-57496. Accessed on 12 August 2018.
[32]ECtHR - Ashingdane v. the United Kingdom, No. 8225/78, 28 May 1985, para. 57, URL= http://hudoc.echr.coe.int/eng?i=001-57425. Accessed on 12 August 2018.
[33]CJEU - Case 222/84 / Judgment *Johnston v. Chief Constable of the Royal Ulster Constabulary,* URL = http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dd6427f80b567c44628b75c709e26ebd5d.e34KaxiLc3qMb40Rch0SaxyNbxn0?text=&docid=93487&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=531368. Accessed on 12 August 2018.
[34]Article 47 Right to an effective remedy and a fair trial. The Charter, *op. cit.* note 19.

stay trapped in the lawless situation if there is a barrier to even start the proceedings. And invoking diplomatic immunity could constitute such a barrier.[35]

3.2. CASE LAW

3.2.1. Invoking diplomatic immunity in civil and administrative proceedings in general

The case law of invoking diplomatic immunity in civil and administrative proceedings is relatively scarce and even more so when it comes to family disputes. However, it can be quickly concluded that even in the cases where interests of the state's parties to VCDR are not (that) evident, such as divorce or employment cases, the courts faithfully apply VCDR provisions.

For example, in the United Kingdom (UK), the Court of Appeal (civil division) upheld the judgement rendered in the divorce case of *Estrada v. Al-Jufali,*[36] and explained that even though VCDR codifies the rules for the exchange of embassies among sovereign States and it does not therefore govern the immunities and privileges of the Permanent Representatives to the IMO (or of IMO officials), reference may be made to the VCDR in the determination of the nature and extent of the immunities and privileges conferred, as a matter of law, on Permanent Representatives. Hence the court broadened the scope of application of VCDR provisions.

In another UK case, an employment case, *Reyes and Suryadi v Al-Malki*[37] the appellate court dismissed the appeal, on the basis that employing persons to provide domestic services to an agent on a diplomatic mission in the receiving state is conducive to the performance of diplomatic functions. The court endorsed the ECtHR arguments[38] that measures taken by a State which reflect generally recognised rules of public international law on State immunity, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 (1). The Supreme court in its 2017[39] judgement overturned the decision and allowed an appeal on the grounds of Article 39(2) VCDR considering that Mr Al-Malki's posting came to an end.

In Germany, in an employment case,[40] the court of the first instance proclaimed the claim inadmissible ascertaining the importance of diplomatic immunity for the international

[35]Guide on Article 6 of the European Convention on Human Rights,
URL= https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, p. 10, para. 1. Accessed 12 August 2018.

[36]Court of Appeal, Royal Courts of Justice, *Estrada v Al-Jufali,* 22 of March 2016, [2016] EWCA Civ 176 Case No: B6/2016/0548, paras. 5, 10, 12 and 92, URL=https://www.judiciary.gov.uk/judgments/estrada-v-juffali/. Accessed on 12 August 2018.

[37]Court of Appeal, Civil division, *Reyes and Suryadi v. Al-Malki*, 5 of February 2015 [2015] EWCA Civ 32, Case No: A2/2013/3061, URL=https://www.judiciary.gov.uk/judgments/ms-c-reyes-and-ms-t-suryadi-v-mr-j-al-malki-and-mrs-al-malki-and-others/. Accessed on 12 August 2018.

[38]ECtHR - *Al-Adsani v. United Kingdom*, No.35763/97, 21 November 2001, para. 19URL= http://hudoc.echr.coe.int/eng?i=001-59885. Accessed on 12 August 2018.

[39]Supreme Court, *Reyes and Suryadi v. Al-Malki*, 18 October 2017, [2017] UKSC 61, para. 4, URL=https://www.supremecourt.uk/cases/docs/uksc-2016-0023-judgment.pdf. Accessed on 12 August 2018. The Supreme court held that the employment and maltreatment of Ms Reyes were not acts performed by Mr Al-Malki in the exercise of his diplomatic functions and allowed an appeal.

[40]Landesarbeitsgericht Berlin-Brandenburg Berlin, Urteil vom 9. November 2011 · Az. 17 Sa 1468/11,

relations,[41] and the court of appeal upheld it on the same grounds. The importance of diplomatic immunity for the international relations was reiterated also in a divorce case.[42]

As already pointed out, there is almost no case law on cases containing issues of diplomatic immunities in civil or administrative proceedings, specifically family disputes, on the international level, and that is despite the increasing number of countries as well as international alliances and organizations that are a working environment for diplomats. The reasons are related to the nature of diplomatic immunity and the fact that the VCDR contains its own remedies, which are effective e.[43] Nevertheless, these cases undoubtedly exist and it can be concluded, also from the proceedings presented above, that VCDR is still very much respected, that courts rely on the wording of its provisions,[44] and that they are even broadening the scope of its application to other types of immunity.[45] In *Reyes and Suryadi v Al-Malki* and both German cases, the court explicitly and straightforwardly revealed the underlying considerations that diplomatic immunity is indispensable for the maintenance of interstate relations. The importance of respecting VCDR provisions was further reiterated by the fact that in the UK cases, even those on plain divorce issues, the State Department intervened,[46] although no UK diplomatic agents were involved, arguing the principle of reciprocity.

3.2.2. Invoking diplomatic immunity in family dispute cases regarding the parental responsibility

Notwithstanding the jurisprudence presented above, there are some cases where it can be perceived in the deliberations of the courts that access to the court in family matters is not being automatically dismissed when a parent who is a diplomatic agent invokes diplomatic immunity.

In a case adjudicated in Belgian court in 2008,[47] the parties, both Danish nationals, were established in Belgium since 2004 following the appointment of Mrs. M. as a diplomatic agent. The parties had been *de facto* separated since March 2006 and acquired a decision on separation from Danish administrative authorities at the beginning of 2007. In October 2007, Mr. C lodged an application for divorce before the Brussels Court of First Instance and a request for interim measures. Regarding the children, Mr. C asked the Court of First Instance *inter alia* to confirm the joint exercise of parental authority and to award him the main accommodation of the two children for schooling reasons. By the first order, the court dismissed the objections raised by

URL=https://openjur.de/u/625515.html. Accessed on 12 August 2018.

[41]*Ibid*., para. 21. The diplomatic immunity is indispensable for the maintenance of interstate relations, which allows states, independent of their different constitutional and social systems, to develop a mutual understanding and settle their differences of opinion by peaceful means. Any impairment of immunity for diplomats, recognized for a long time in international law, is, on the other hand, capable of disturbing the communication and cooperation of the states to which the international community is compelled to depend, in the interests of the orderly progress of the relationship between its members.

[42]Kammersgericht Berlin, Beschluss Az. 1 VA 8/10, URL=https://openjur.de/u/282647.html. Accessed on 12 August 2018.

[43]Castro, *op. cit.* note 6.

[44]See the German case, *op. cit*. note 40.

[45] See *Estrada v. Al-Jufali, op. cit.* note 36.

[46]*Ibid.,* para. 24-25.

[47]Cour d'appel – Arrêt du février 28, 2008 (Bruxelles), point 2. para 15, see *op. cit.* note 9.

Mrs. M., declaring that it did have jurisdiction to hear the application and declared it admissible.

The appeal was brought by Mrs. M., who was a diplomatic agent at the time of the court issued its decision on jurisdiction on the first instance.[48]. She appealed the decision that denied her immunity on the basis that in collision of CRC and VCDR, the CRC that prevails. In the appeal, she reiterated that the national court of the receiving country cannot have jurisdiction in this case, since she was a diplomatic agent, thus basing her objection on the provisions of VCDR.

The appellate court held that it was indisputable that Mrs. M was a diplomatic agent at the referred time and enjoyed all the privileges, including absolute immunity from civil proceedings and added that it is not for the national court to create new restrictions on invoking immunity. The appellate court also held that the ECtHR had already had an occasion to clarify that the right of access to a court enshrined in Article 6 of ECHR is not absolute and that States may impose limitations provided that they pursue a legitimate aim and are not disproportionate; it had already been held by the ECtHR that the recognition of diplomatic immunity has a legitimate aim and that the resulting limitations are not disproportionate if the applicants have other reasonable means to effectively protect their guaranteed rights. The court further held that reasonable means, namely, affording Mr. C access to a court in accordance with both Article 6 and Article 8 of the ECHR, exist in the present case before the Danish courts. The court concluded that the fact that the Belgian judge declined jurisdiction by virtue of the diplomatic immunity invoked by Mrs. M does not infringe on either of the the provisions of CRC nor Article 6 or 8 of ECHR.

A case with a lot of similarities to the one presented above was being adjudicated by the Belgian first instance court in 2017.[49] The background of the case is that the parties lived in Brussels with two children, all Slovenian nationals and with registered permanent residence in Slovenia, though children never lived outside Belgium. The parties were never married. However, when they split in 2015, they convened an agreement (joint parental authority) which was to expire in August 2017, since Mrs. M was leaving the post in Brussels and returning to Slovenia. In his claim of November 2016, Mr. F asked the court for a decision on parental responsibility over the two children and an interim measure that would prevent changing the habitual residence of the children without his consent. Mrs. M, who was a diplomatic agent, invoked diplomatic immunity. Mr. F filed a motion to stay proceedings in order to attempt to ask the authorities of the sending state for the waiver of Mrs. M's immunity.

The court first established the jurisdiction, based on the Brussels II bis Regulation in the part of parental responsibility and on the Regulation on maintenance[50] in the part of the request for

[48]Bruxelles Tribunal Civil (ref.), 21 décembre 2007, in Kluwer, W., ed., *Actualités du droit de la famille* No 6, 2008, pp. 122-123.
[49]Tribunal de première instance francophone de Bruxelles, Tribunal de la Famille, No. 16/7811/A, 12 July 2017, (unpublished).
[50]Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, pp. 1–79.

maintenance. It also established that Belgian law was applicable. It continued that it was indisputable that Mrs. M was a diplomatic agent. The court held that to decline the jurisdiction, which would lead to unreasonable delay of the rendering of a decision, would constitute an infringement of the fundamental international law principle, namely the right to a trial in a reasonable time. It considered that taking into account the whole process of unsuccessful mediation, that the proceedings started in November 2016, and that diplomatic status of Mrs. M expires in August 2017 as does the agreement on parental responsibilities, it would be impossible to acquire a judicial decision in due time. It raised doubt as to whether Slovenian court would be able to seize jurisdiction, and stated that it is not in the best interest of the children that when the agreement expires there would be no other judicial decision.

Following these considerations, the court concluded that the balance of interests between the rights, and the principle of concurring international law leads to the predominance of the right of access to courts and the considering of the interest of the child against the diplomatic immunity. In court's view, respecting diplomatic immunity would inevitably lead to an unreasonable situation where no court would be able to issue measures deemed urgent within a reasonable period of time.

The last two cases presented are important because of the argumentation of the decisions, and also interesting in terms of similar circumstances and the fact that they were both adjudicated in Belgian courts. There is also no difference in terms of the decision of the court of first instance, while the decision of the court of appeal in adjudicating the second case remains to be seen. The court needed first to assess whether it holds jurisdiction. Since it was indisputable in both cases that the defendants were enjoying diplomatic immunity entailing protection in official and private actions, the only assessment the court needed to conduct was that of proportionality, in particular on the possibility for the applicant to have other reasonable means to effectively protect their rights guaranteed by the ECHR. It is this assessment that lead to different, opposite court decisions. In the first case, the court of first instance concluded that provisions of CRC prevailed over provisions of VCDR, after which the court of appeal annulled the first instance decision on the grounds that because there is a possibility of seizing jurisdiction in Denmark, the declination of Belgian jurisdiction does not constitute unreasonable limitation of the right to access to court. In the second case, the similarity extends to the fact that Slovenia is also a party of the mentioned conventions, but in this case the court pointed out as the main argument the importance of time in which a decision should be made and subsequently raised some doubt on Slovenian court seizing the jurisdiction. Considering the urgency of the rendering of the urgent measures due to the expiry of the agreement regulating parental responsibilities and the time needed for the proceedings to finish, the court concluded that declining the jurisdiction would inevitably lead to the unreasonable situation where no court would be able to regulate measures deemed urgent within a reasonable period of time. Therefore, it was the element of "time" that brought about the conclusion that there is no other reasonable possibility to render the decision on time, stressing the consideration of the

child's best interest. Whether this decision will be upheld by court of appeal remains to be seen.[51]

Comparing the presented cases, the assessment of the application of a proportionality test is needed to further highlight the barrier that invoking diplomatic immunity represents when ensuring children's rights. In both cases, EU nationals seek legal remedy at Belgian court. When an applicant files a claim, a court assesses whether it fulfils the criteria of material and procedural conditions. In these relevant cases, the claim was custody of the children at the competent (by substance) civil court. The court established jurisdiction based on Brussels II bis Regulation under its Art. 8 on habitual residence of children. When a claim was sent to the defendant to respond, they invoked diplomatic immunity. At that moment, the court was required to set aside the use of Brussels II bis Regulation, based on paragraph 14 of the Preamble to Brussels II bis Regulation, which mandates that national law should be applied when diplomatic immunity is invoked. At the first instance, the Belgian court needed to decide between concurrent (public) international provisions of CRC, ECHR and VCDR. In both cases, the court opted for the principle of best interest of the child and the international principle of access to court to prevail over VCDR. Therefore, the proportionality test that is induced through ECtHR, namely, whether the applicant has other reasonable means to effectively protect their rights guaranteed by the ECHR, resulted in the conclusion that there was no other reasonable means and seized the jurisdiction.

In the case of Danish nationals, however, the appellate court decided differently, stating that there is a possibility of Danish court to seize jurisdiction, since the parties already gained the administrative decision on the dissolution of their marriage, and adding that they will all be moving to Denmark in a year and a half. An important matter, which is also distinct to the Slovenian case, is that a valid agreement existed on parental rights, while in the 2017 case (Slovenian nationals) it was to expire in a short period of time. The other question that the court could raise in the first case, which was submitted by the parties, is a possibility of "lis pendens" since the parties gained the decisions of administrative body on separation. However, in this particular case the court did not elaborate further on this issue,[52] but actually gave enough indication of the possibility of seizing jurisdiction in Denmark.

In the 2017 case, an interesting question relates to the assessment of whether a Slovenian court has the ability to seize jurisdiction. The Belgian court, when establishing its jurisdiction, stressed the importance of the fact that the children's habitual residence was in Belgium and for that reason was in doubt whether the Slovenian court would seize jurisdiction. The case law[53] of Slovenian courts indeed reveals the application of the Brussels II bis Regulation in similar cases based on Art. 8, thus habitual residence criteria. Furthermore, it is probable to

[51]Considering the decision was rendered only in July 12, 2017, it is yet unknown whether an appeal was submitted.
[52]Nevertheless, even if the case was indeed pending before the administrative body there is still a question whether it constitutes "a court", under the ECHR.
[53]For example, the court of appeal held that it was wrong to decline seizing jurisdiction, since the standard of habitual residence was not met and therefore the Slovenian court had the right to accept the case in proceeding. Višje sodišče v Ljubljani, *VSL sklep IV Cp 793/2017*, 6 April 2017, URL= http://www.sodisce.si/vislj/odlocitve/2015081111408099/. Accessed on 12 August 2018.

believe that if the case had been filed in Slovenia first, the court would have declined jurisdiction. However, it would have been a different situation if in fact the Belgian court had declined jurisdiction based on paragraph 14 of the Brussels II bis Regulation when the defendant invoked diplomatic immunity. The Slovenian court would have to seize jurisdiction based on VCDR derogating Brussels II bis Regulation (paragraph 14 of the Preamble) and thus referring to national law, in this case to Private International Law and Procedure Act.[54] Establishing jurisdiction would be required on international principles of guaranteeing access to court, as well as based on Slovenian national law, where Art. 73/2 stipulates nothing less than exclusive jurisdiction of Slovenian court in cases of custody issues when the defendant and child have Slovenian citizenship and registered permanent residence in Slovenia. It remains to be seen in future cases whether or not this will really be the reasoning the courts will apply.

Furthermore, the Belgian court's doubt regarding the seizing of jurisdiction by another national court highlights the issue of mutual trust principle,[55] which the EU--in the Area of Freedom, Security and Justice, or even broader--relies on in creating genuine judicial area. By contrast, parties to VCDR are strongly upholding the Convention's provisions and constantly working on upholding the trust between them, which is evident from the case law presented above. This is one of the reasons the VCDR is considered the traditional cornerstone of international relations.

Nevertheless, the Belgian court has, in the 2017 case, proclaimed the time issue as the fundamental argument for seizing jurisdiction. Of course, to some extent the Belgian court had the power to act in a faster manner, however, the parties' actions, especially applicant's filing for an immunity waiver, prolonged the process to such an extent that the court decided not to risk the expiry of the custody agreement without a new one in place and seized jurisdiction.

4. CONCLUSION

The aim of the article was to present the challenges of protecting the rights of the child in courts through the perspective of a specific problem, namely, the invoking of diplomatic immunity in family disputes. This specific situation reveals the consideration of the best interest of the child introduced in the procedural aspect. In the decisions on merits, the legal standard of the best interest of the child has ascertained its role, considering that it is enshrined in national family rules and it even found its way to the ECtHR case law, even though the ECHR does not stipulate the definition of the child. Declaring the consideration of a child's best interest a primary consideration in all (even procedural) matters is a relatively new concept introduced by General Comment No. 14.[56] To assess the impact of raising the consideration of the child's best interest to the level of international procedural law, the scrutiny of case law needs to be conducted. A relatively scarce amount of case law in the EU nevertheless contains two relevant cases. Both

[54]Private International Law and Procedure Act, Official Gazzete of Republic of Slovenia, No. 56/99 and 45/08.
[55]More on this see Prechal, S.*: Mutual Trust Before the Court of Justice of the European Union,* European Papers, Vol. 2, 2017, No 1, pp. 75-92.
URL=http://www.europeanpapers.eu/it/system/files/pdf_version/EP_EJ_2017_1_7_Article_Sacha_Prechal_2.pdf. Accessed on 12 August 2018.
[56]General Comment No.14, *op. cit.* note 13.

cases were adjudicated in Belgium between the parties that were EU nationals, but not Belgian. In each case one of the parents was a diplomatic agent. Since the specific situation presupposes a diplomatic agent invoking immunity, it is therefore logical that it is not the diplomatic agent who initiated the proceedings and is thus the defendant in the case.[57] Therefore, the court, when receiving the claim, was not familiar with this fact and seized jurisdiction on the basis of the Brussels II bis Regulation, since they were all habitually residing in Brussels. The moment the defendants invoked immunity from jurisdiction of the receiving state's courts, the Brussels II bis Regulation did not apply anymore due to paragraph 14 of its preamble. From that point on, the court needed to assess the existence of other reasonable possibilities of access to court. In the case of 2008, the court of first instance decided that the consideration of child's best interest prevails over VCDR and accepted jurisdiction. The court of appeal, on the other hand, stated that according to Article 31(4) of VCDR, only the sending state holds the jurisdiction and thus the reasonable possibility of the applicant to acquire judicial decision exists in a Danish court. The 2017 case contained very similar facts, with the difference being that a valid agreement on parental responsibilities was going to expire in a relatively short time. The court held that it was on the merit of time that declining jurisdiction would lead to a situation where no other court would be able to render a decision on time. Even if the decision is not upheld by an appellate court in the case of an appeal, the attempts to make the consideration of the child's best interest a principle in international procedural law are being acknowledged. On the other hand, at the regional level, in the EU, the Brussels II bis Regulation already embraced the best interest of the child as an overriding principle.[58] Hopefully, there will be other court decisions on this matter to see whether the trend will continue, making it possible to make firmer conclusions. On the other hand, the fact that an EU regulation could in fact affect the protection of diplomatic agents provided by VCDR would raise questions about the traditional value of VCDR for the international community and possibly even legal certainty in the future.

The title already presumes that the court has to elaborate on the right of access to court in "two stages" that can unreasonably prolong the proceedings due to the resolving of the questions regarding the waiver of immunity. Regardless of the decision, whether it being the declination of jurisdiction and therefore either the start of proceedings in the sending country or waiting until the diplomatic status is withdrawn, or accepting jurisdiction after consideration, it is time that is of paramount importance. Since the court decision regarding the child will necessarily be issued after extra time spent on deliberations regarding the immunity, the impact of invoking immunity can be also named "a stumbling block."

[57]When a diplomatic agent initiates the proceeding, he is precluded from invoking immunity. (VCDR Article 32 (3)).
[58]Župan, M., *op. cit*. note 24.

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THE CHILD IN A CHILD: CHILD MARRIAGE AND LOST IDENTITY IN SOUTHERN AFRICA[**]

Summary:
In most communities in sub-Saharan Africa, the definition of a child is culturally, politically, and socially unspecific and varied. The variance in meanings ascribed to a child is evident in legislative definitions, especially on the issue of child marriage. Child marriage, a human rights violation is a legal or customary union in which one or both spouses are below the age of 18. This practice is prevalent in most communities in sub-Saharan Africa. Arguably, it robs children of the opportunity to enjoy childhood and experience dependence, protection, and care. Rather, it turns them into protectors, nurturers, and providers. Children are shoved with the responsibility of being parents through child marriage. Thus, creating no demarcation between the role and responsibility of an adult and a child. Given that children are ill-prepared for marriage and its concomitant elements such as sex, psychological, emotional and physical maturity to be spouses and possibly parents, this paper argues that the journey to self-discovery and identity is at the intersection of culture, law, and religion. The clash between religious and cultural autonomy is a pervasive problem for national and international laws, one that arises because of claims of immunity from child protection and marriage provisions on the grounds of cultural or religious autonomy. Informed by observation during fieldwork in Southern African countries and literature on cultural relativism, this paper suggests that the clash between cultural autonomy and child marriage prohibition is best addressed through a legal pluralist perspective. This perspective seeks to bridge the gap between customary law, national laws, and international treaties, and requires sensitivity to the economic and socio-cultural factors behind the persistence of child marriage.

Keywords: Identity, self-discovery, child marriage, human rights, marriage age

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1. INTRODUCTION

In what ways can the clash between cultural autonomy and child marriage prohibition be addressed? Ordinarily, a child should be a person who, in some fundamental way, is not yet developed, but is in the process of developing.[1] However, the definition of a child remains inconsistent, ambiguous, and varying according to countries, circumstances, regions and communities. It also varies based on the applicable nature of law. For example, there are varying definitions of a child, age of marriage, and age of consent under marriage laws, criminal laws, juvenile justice, child protection, and contract laws. Over time, the definition of a child has undergone and is undergoing review by governments through constitutional amendments, since the constitution is the supreme law in most states. For example, the Malawian constitution, with regards to age of marriage, was amended to bring uniformity in the definition of a child and to close loopholes that allow children between the ages of 15 and 18 years to get married with parental consent. The amendment was also to align the Constitution with other statutory laws such as the Marriage, Divorce and Family Relations Act, a law that sets 18 as the age of marriage.[2] On 20 January 2016, the Zimbabwean constitutional court struck off section 22(1) of the Marriage Act, which allowed children under the age of 18 to marry. The Justices of the court ruled that the provision is inconsistent with the Zimbabwean Constitution. The court ordered that ''No person, male or female, in Zimbabwe may enter into any marriage, including an unregistered customary law union or any other union, including one arising out of religion or a religious rite, before attaining the age of eighteen (18)''.[3] The Zimbabwean Parliament is also set to pass a new law that would see parents arrested for accepting lobola (brides-price) for children younger than 18.[4] The Zimbabwean Customary Marriage Act, which is silent on the age of marriage, shall have an insertion stating that no person under the age of 18 shall be capable of contracting marriage.[5] On February 2015, the Malawian parliament passed the Marriage, Divorce and Family Relations Act (Bill No. 5 of 2015).[6] The Act increases the legal age of marriage to 18 and punishes the perpetrators of child marriage. Recently, legal drafters from the Southern African Development Community (SADC) approved and adopted a regional Model Law on Eradicating Child Marriage.[7] The Model Law aims to eradicate child marriage and protect children already in marriage. Countries in the SADC region such as Zambia and Mozambique are working towards aligning their

[1] Schapiro, T., *What Is a Child*? Ethics, Vol. 109, No. 4, 1999, pp. 715-738, p. 716.
[2] Masina, L., *Malawi Outlaws Child Marriage*, 2017, https://www.voanews.com/a/malawi-outlaws-child-marriage/3824898.html. Accessed 10 October 2017.
[3] UNICEF, *The Constitutional Court Ruling on ending Child Marriages: An Important First Step*, https://www.unicef.org/zimbabwe/media_17754.html. Accessed 29 September 2017.
[4] *Ibid.*
[5] *Ibid* .
[6] Human Rights Watch, Malawi: New Marriage Law Can Change Lives, https://www.hrw.org/news/2015/04/17/malawi-new-marriage-law-can-change-lives. Accessed 30 September 2017.
[7] SADC Parliamentary Forum, https://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf. Accessed 30 September 2017.

Marriage laws as well as their constitution to the Model law.[8] Nonetheless, these changes have not eliminated existing disparity on the definitions of a child. For example, despite the passing of the Marriage, Divorce and Family Relations Act in 2015 in Malawi, there is still an outcry that section 14 of the Act conflicts with the Constitution with regards to the age of marriage.[9] This unclear definition of a child especially on the issue of marriage and the total disregard for the consequences attached to it contributes to violations of human rights.

2. UNDERSTANDING THE PROBLEM

Child marriage, a global menace and violation of human rights, cuts across all countries, cultures, regions, religions and ethnicities.[10] The term 'child marriage' here means a formal marriage or informal union before the age of 18.[11] The formal marriage is a marriage allowed by the law, such as Constitution and other statutory laws while informal marriage means marriage without the backings of the law such as customary law marriage which is largely uncodified.[12] Child marriage robs children of the opportunity to enjoy childhood and experience dependence, protection, and care from their respective families.[13] It also affects their health, sexual, social and psychological development.[14] It turns them into protectors, nurturers, and providers. Children are shoved with the responsibility of being parents through child marriage, thus removing demarcation between the role and responsibility of an adult and a child. As a prevalent practice, child marriage has defied legislation in most Southern Africa. Given that children are ill-prepared for marriage and its concomitant elements such as sex, psychological, emotional and physical maturity to be spouses and possibly parents, this paper argues that the journey to self-discovery and identity is at the intersection of culture, law, and religion. The clash between religious and cultural autonomy is a pervasive problem for national and international laws, one that arises because of claims of immunity from child protection and marriage provisions on the grounds of cultural or religious autonomy. Using literatures and examples from few countries in Southern Africa, this article addresses this problem using a legal pluralist perspective. This perspective seeks to bridge the gap between customary law,

[8] National strategies are being adopted in line with this model law. Zimbabwe is set to align its marriage laws and constitution in line with the SADC Model Law. See https://www.newsday.co.zw/2017/03/bill-align-marriage-laws-constitution/. Accessed 7 October 2017.

[9] On 14th February 2017, the parliament passed a landmark bill to amend the Constitution and harmonise the age of a child with other relevant laws.

[10] Wadesango, N., Rembe, S and Chabaya, O., *Violation of Women's Rights by Harmful Traditional Practices* Anthropologist, Vol. 13, No 2, 2011, pp. 121-129 at 124-125; Warner, E., *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls,* American University Journal of Gender, Social Policy and the Law, Vol. 12, No. 2, 2004, pp. 233 – 272, p. 239.

[11] Raj, A., *When the mother is a child: the impact of child marriage on the health and human rights of girls,* Archives of Disease in Childhood, Vol. 95, No. 11, 2010, pp. 931-935, p. 931.

[12] Wanda, BP., *Customary family law in Malawi: Adherence to tradition and adaptability to change,* The Journal of Legal Pluralism and Unofficial Law, Vol. 20, No. 27, 1988, pp. 117-134, p. 119.

[13] Rutter, M., *Parent-Child Separation: Psychological Effects on the Children*, Journal of Child Psychology and Psychiatry Vol. 12, No. 4, 1971, pp. 233–260, p. 233.

[14] Nour, NM., *Health Consequences of Child Marriage in Africa*, Perspective, Vol. 12, No. 11, 2006, pp. 1644-1649, p. 1644.

national laws, and international treaties, and requires sensitivity to the economic and socio-cultural factors behind the persistence of child marriage.

This article is divided into four parts. Following introduction and problem background, third part reviews the concept of child, identity and child marriage. It looks at the importance of family support versus the lack of it on a child. It situates this loss of identity to lack of family support. Part four identifies state efforts to combat and harmonise laws on child rights and prevent child marriages. It will further highlight the challenges faced in combating this menace. Fifth part conceptualises cultural relativism. This part situates the challenges faced in combating the widespread of child marriage practice and problem of loss of identity to the clash between cultural autonomy and law. It then argues that the journey to self-discovery and identity is at the intersection of culture, law, and religion. Final part draws a causal link between the prevalence of child marriage and normative interaction.

3. CONCEPTUALISING CHILD, CHILD MARRIAGE AND IDENTITY

Childhood is a natural and universal period of transition to adulthood.[15] However, what or who is a child is an important question that is rarely asked because it seems to be irrelevant.[16] The term child which in Latin means *infans*, is defined as a person who is inarticulate, immature and needs protection.[17] African Charter on the Rights and Welfare of the Child (ACRWC) defines a child as every human being below the age of 18 years.[18] Article 1 of the Convention on the Rights of the Child (CRC) of 1989 defines a child as any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier. Most national constitution and statutes have their definition and set legal age of who is a child.[19]

The inconsistency surrounding the meaning of a child both legally and culturally is the most striking and problematic aspect of the concept. This is because the conception of the child is wide and the age of the majority varies from time to time, space to space and from one culture to another.[20] Age of majority here means the legally fixed threshold of adulthood. At this point, a child ceases to be considered a child and assumes the legal control over their persons, actions, decisions thus terminating parental control and legal responsibilities over them. For time conception of a child, Ariès in his child development theory argued that in the medieval period, childhood did not exist but was rather closely linked to adulthood, adolescence and seen as a

[15] James, A., C Jenks, C., Prout, A., *Theorizing Childhood*, 1998, pp. 5-10; Jenks, C., *Childhood*, 1996, pp. 7

[16] This is because it means different things to different people. See C Jenks*, op. cit.* note 15, p. 6 -7; James, A., Prout, A., *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, 2015, p. 2

[17] Piaget, J., *The Language and Thought of the Child*, 1959, 3rd ed, pp. 1-14; Cunningham, H., *Children and Childhood in Western Society since 1500*, 1995, p. 1

[18] Article 2 of ACRWC 1990.

[19] For example, see The Children's Act of 2005 (Act No. 38 of 2005) Interpretation; Sec 28 (3) South African Constitution 1996; Sec 266 Constitution of Zambia (Amendment) Act 2016.

[20] James, A., *From the child's point of view: Issues in the construction of childhood* in: Panter-Brick, C. (ed.), *Biosocial perspectives on children*, 1998, pp. 47, 62.

period of independence. [21] Scholars such as Luker have argued that the concept of adolescence was introduced in the twentieth century by the move of global economy and society.[22] For instance, the puberty emergence signals the termination of childhood.[23]

Consequently, it can be argued that the conception of a child is no longer perceived as a natural/universal group but is subject to legal and socio-cultural context.[24] This is because the experiences of children are different across the globe.[25] Sociocultural construction and perception of who is a child occurs when there is transformation or alteration (socio-economic conditions) that directly or indirectly affects a large segment of that population or community. These socio-economic changes such as cash economy, cost of migration, global warming and a shift from subsistence form of agriculture to commercial form, brought about a shift from communalism to individualism thus influencing behaviour and decisions.[26] Furthermore, structural adjustments programmes, western education and religion brought about distortion in practices such as marriage systems such as bridewealth payment.[27] The result is high demand of bridewealth payment and high incidence of child marriage.

Child marriage as violation of human rights has been a subject of global concern.[28] Literature on child marriage has grown significantly over the past decade. Studies have shown that child marriage exists to a great significant as a traditional practice in rural areas and amongst people living in poverty.[29] The main driver of high rates of child marriage is the level of socio-

[21] Ariès, P., *Centuries of Childhood* in Beck, J., Jenks, C., Keddie, N., and Young, MFD. (eds.), *Toward a New Sociology of Education*, 1976, pp. 37-47; see also Veerman, PE., *The Rights of the Child and the Changing Image of Childhood*, 1992, pp. 3-4.
[22] Luker, K., *Dubious Conception: The Politics of Teenage Pregnancy*, 1996, pp. 25, 28-29; Caldwell, JC., Caldwell, P., Caldwell, BK., Pieris, I., *The Construction of Adolescents: Implications for Sexuality, Reproduction, and Marriage*, Studies in Family Planning, Vol. 29, No. 2, 1998, pp. 137-153; James *et al*., *op. cit*. note 15, p. 2.
[23] Macleod, C., *Teenage Pregnancy and the Construction of Adolescence: Scientific Literature in South Africa*, Childhood*,* Vol. 10, No. 4, 2003, pp. 419-437, pp. 421.
[24] Bridgeman, J., Monk, D., *Introduction: reflections on the relationship between feminism and child law*, in Bridgeman, J., Monk, D. (eds.), *Feminist Perspectives on Child Law*, 2000, p. 3; Beck, J., et al., *op. cit*. note 21, pp. 5-7; Jenks, C., *Editorial: Many Childhoods,* Childhood Vol. 11, No. 1, 2004, 5-8 pp. 6; Leshan, EJ., *The conspiracy against childhood*, 1968, pp. 6 -8; Bain, WE., *With life so long, why shorten childhood*, Childhood Education, Vol. 38, No. 1, 1961, pp.15-18; Jenks, C., *Constructing Childhood Sociologically* in Kehily, MJ., (ed.) *An Introduction to Childhood Studies*, 2009, pp. 93-95.
[25] Jenks, C., *op. cit*. note 15, pp. 6 -7; Stephens, S., *Children and the Politics of Culture*, 1995, p. 5
[26] Berry, S., *Cocoa, custom, and socio-economic change in rural Western Nigeria*, 1975, pp. iv – xiii; PE Kigho, PE., *Global warming and its implication on the economy: the Nigerian perspective*, Journal of Research in Peace, Gender and Development, Vol. 3, No. 4, 2013, pp. 54-57, p.55; Jegede, AE., Idowu, AE., *Youth at Crossroads: The Challenges of Social Change in Nigeria*, Journal of Cultural Studies Vol. 2, 2009, pp. 184 – 196 at 184. This is not peculiar to Nigeria see Wolpe, H., *Capitalism and cheap labour-power in South Africa: From segregation to apartheid*, Economy and society Vol. 1, No. 4, 1972, pp. 425-456, pp. 425-427.
[27] Ferraro, G., Andreatta, S., *Cultural Anthropology: An Applied Perspective*, 2014, pp. 224-225.
[28] Child marriage affects both girls and boys but most children married under 18 years of age are girls. See Rembe, S., Chabaya, O., Wadesango, N., and Muhuro, P., *Child and Forced Marriage as Violation of Women's Rights, and Responses by Member States in Southern African Development Community*, Agenda Vol. 87, No. 25/1, pp. 65-74, p.65; Birechi, J., *Child Marriage: A Cultural Health Phenomenon*, International Journal of Humanities and Social Science Vol. 3, No. 17, pp. 97-103, p. 98.
[29] Bunting, A., *Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue*, Social and Legal Studies, Vol. 14, No. 1, 2005, pp. 17-38, p. 25; Walker, JA., *Early marriage in Africa-trends, harmful effects and interventions*, African Journal of Reproductive Health Vol. 16, No. 2, 2012, pp. 231-240, p. 231; Singh, S.,, Samara, R., *Early Marriage among Women in Developing Countries*, International Family

economic development in many countries.[30] As such the need for survival pushes most poor households to give their girl-child out in marriage.[31] This practice is an economic surviving approach which reduces the number of persons to feed in the household, and also reduces the cost of raising daughters or sending them to school.[32]

Secondly, child marriage is deeply rooted in cultural values and practices.[33] Culture shapes peoples' behaviour and commands their respect.[34] Most times, the need to preserve age long tradition/ perceptions also encourages high rates of early marriage.[35] Most families are under pressure to conform to some certain customary requirements; failure of which can lead to ridicule or family shame.[36] An example of some tradition that promotes child marriage can be seen in the practice of *ukuthwala* (forced marriage or marriage by abduction) notable amongst the Eastern Cape of South Africa.[37] Also the rites of passage ceremonies in which girls as young as eight are compelled to attend customary rites that "teach" them what it means to be a woman and what it entails to be a woman promotes child marriage.[38]

Thirdly, patriarchal ordering contributes to child marriage.[39] This point also contributes to gender inequality.[40] Studies have shown that the institution of patriarchy lies in the

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Planning Perspectives Vol. 22, No. 4, 1996, pp. 148-175 at 148; Jensen, R., and Thornton, R., *Early Female Marriage in the Developing World*, Gender & Development Vol. 11, No. 2, 2003, pp. 1-19, pp. 1 -11.

[30] Ibhawoh, B., *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, Human Rights Quarterly, Vol. 22, No. 3, 2000, pp. 838-860, p. 841; Ndulo, M., *African Customary Law, Customs, and Women's Rights*, Indiana Journal of Global Legal Studies Vol. 18, No. 1, 2011, pp. 87-120, p. 117.

[31] *Ending child marriage in Africa a brief by Girls Not Brides*, available online at http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf (accessed on 22 June 2015).

[32] Otoo-Oyortey, N., Pobi, S., *Early Marriage and Poverty: Exploring Links for Policy and Programme Development*, Gender and Development, Vol. 11, No. 2, 2003, pp. 45-51, p. 44.

[33] Mikhail, SL., *Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation*, Gender and Development, Vol. 10, No. 1, 2002, pp. 43 – 49, p. 43.

[34] Landes, D., *Culture makes almost all the difference* in: Harrison, LE., SP Huntington, SP. (eds.), Culture matters: How values shape human progress, 2000, pp. 2-3, 14-15, 80, 282.

[35] UNICEF, *Early Marriage a Harmful Traditional Practice: A statistical exploration*, 2005, pp. 4.

[36] Kanyangu, RM., *Factors which contribute to early marriage among teenagers in rural areas in Kasulu District Council* (LLM Diss. Submitted to The Open University of Tanzania, 2014) 14.

[37] Mwambene, L., Sloth-Nielsen, J., *Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act*, African Human Rights Law Journal Vol. 11, No. 1, 2011, pp. 1-22, p. 3; Rice, K., *Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority among the Xhosa*, Journal of Southern African Studies Vol. 40, No. 2, 2014, pp. 381-399; Bekker, JC., Rautenbach, C., Goolam, N., *Introduction to legal pluralism in South Africa*, 2006, p. 31. Many scholars have shown that this practice does not amount to forced marriage because of the meaning attached to it. See Koyana, DS., Bekker, JC., *The Indomitable Ukuthwala Custom*, De Jure Vol. 40, No. 1, 2007, pp. 139-144, p. 140; Bennett, TW., *Customary Law in South Africa*, 2004, p. 201.

[38] Linton, R., *Age and Sex Categories*, American Sociological Review, Vol. 7, No. 5, 1942, pp. 589-603, p. 598; Zabin, LS., Kiragu, K., *The Health Consequences of Adolescent Sexual and Fertility Behavior in Sub-Saharan Africa*, Studies in Family Planning, Vol. 29, No. 2, 1998, pp. 210-232, pp. 214-215.

[39] Mfono, Z., *The custom of bride abduction holds its own against time*, Agenda Vol. 16, No. 45, 2000, pp. 76-80; Maluleke, TS., Nadar, S., *Breaking the Covenant of Violence against Women*, Journal of theology for Southern Africa Vol. 114, 2002, pp. 5-17, p. 14; Mathur, SM., Malhotra, GA., *Too Young to Wed: The Lives, Rights, and Health of Young Married Girls*, 2003.

[40] Raj, A., *When the mother is a child: The Impact of Child Marriage on the Health and Human Rights of Girls* Archives of *Disease* in Childhood Vol. 95, No. 11, 2010, pp. 931-935, p. 931.

socialization of the child practice whereby the boy child is taught how to be in control and the girl-child how to be submissive, making them (girl-child) 'traditional underdogs'.[41] Studies have also shown that child marriage still persists because of the low value given to women and girls.[42] The families who engage in this practice consider it a way to secure their child's future without paying attention to the effects it has on the child.[43] In what follows, this article will situate lost identity as an effect of child marriage.

3.1. LOST IDENTITY IN THE CONTEXT OF CHILD MARRIAGE

Before looking at the effects of child marriage on the child it is worthy to note that child marriage varies depending on society's view of the role, structure, pattern, individual and collective responsibilities of every member of the family. Family is the foundation of social life in human societies. It is a major institution tasked with the responsibility of social and economic empowerment, reproduction of society both socially and otherwise, protection and guidance. As such its influence on child's personality development cannot be over emphasised. The foundation of family in most traditional societies is marriage whether monogamous or polygamous.[44] Marriage and family are key structures in most societies. Consequently, when families engage or force their girl child to early marriage it causes psychological breakdown/distress.[45] It also impedes on the health, sexual, social, emotional and psychological development of the victim.[46] Since most of child marriages are without the free and full consent of the girl who most times lack the decision-making powers and skills to be mothers and wives, they are forced to become adults.[47] These children grow up as a child without childhood. The result is that after marriage these children become isolated from society, develop low self-esteem, lose their self-worth and identity.[48] The reason is that most of these girls who marry before the age of 18 have low educational level, lack access to information on sex and use of contraceptives, they are also forced into sexual activity despite the fact they are ill prepared for it.[49] Efforts have therefore been put in place by government to put to an end to the incessant

[41] Mfono., *op. cit.* note 39, p. 76; Richter, L., Dawes, A., C Higson-Smith., (eds.) *Sexual Abuse of Young Children in Southern Africa*, 2004, p. 102-103.
[42] Singh, K., and Kapur, D., *Law, Violence, and the Girl Child*, Health and Human Rights Vol. 5, No. 2, 2001, pp. 8-29, p. 10, p. 24.
[43] Scheper-Hughes, N., *Child Survival: Anthropological Perspectives on the Treatment and Maltreatment of Children*, 1987, pp. 254-255.
[44] Dobson, JC., *Marriage is the Foundation of the Family*, Notre Dame Journal of Law, Ethics & Public Policy Vol. 18, No. 1, 2004, pp. 1-6, p. 1; Armstrong, A., Beyani, C., Himonga, C., Kabeberi-Macharia, J., Molokomme, A., Ncube, W., Nhlapo, T., Rwezaura, B., Stewart, J., *Uncovering reality: excavating women's rights in African family*, International Journal of Law, Policy and the Family Vol. 7, No. 3, 1993, pp. 314–369, p. 318, pp. 328-329.
[45] Veerman., *op. cit*. note 21, p. 361.
[46] Ashworth, G., *Of Violence and Violation: Women and Human Rights*, 1986, Change International Reports; B Charlotte, B., *The Intolerable status quo: Violence against Women and Girls*, The Progress of Nations Vol. 1, 1997, pp. 40-49 p. 41- 45.
[47] Ouattara, M., Sen, P., Thomson, M., *Forced Marriage, Forced sex: The Perils of Childhood for Girls*, Gender and Development Vol. 6, No. 3, 1998, pp. 27-33, p. 28; Nkosi, M., Wassermann, J., *A history of the practice of ukuthwala in the Natal/KwaZulu-Natal region up* to 1994, New Contree Vol. 70, 2014, pp. 131-146, p. 142.
[48] Identity has been defined as a search for the authentic self. See Taylor, C., *The Ethics of Authenticity*, 1992, p. 44.
[49] Clark, S., Bruce, J., Dude, A., *Protecting Young Women from HIV/AIDS: The Case against Child and Adolescent Marriage,* International Family Planning Perspectives, Vol. 32, No. 2, 2006, pp. 79-88, p. 79

increase of child marriage. In what follows this article will examine the efforts of government to end child marriage and challenges encountered in the intervention.

4. INTERVENTIONS TO END CHILD MARRIAGE

Efforts, strategies, policies, programs, laws by both international and national government have been put in place to stop this social anomaly.[50] These international treaties and conventions include but not limited to article 21 (1) and (2) of the African Charter on the Rights and Welfare of the Child 1990,[51] article 19(1) and (2) of the Convention on the Rights of the Child 1989, article 8(1) and (2) of the SADC Protocol on Gender and Development 2008,[52] article 16(1) and (2) of the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979,[53] article 10 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, [54] article 23 (2), (3) and (4) of the International Covenant on Civil and Political Rights (ICCPR) 1966,[55] article 16 (a) and (b) of the Universal Declaration of Human rights (UDHR) 1948. Country interventions include but not limited to South African Law Reform Commission (SALRC) Revised Discussion Paper on Project 138: The Practice of *Ukuthwala*. Studies have shown that the success of this intervention and many other programs geared toward ending child marriage can and have been hampered by so many factors/ challenges.

The first is the issue of imposing foreign culture on non-western societies. According to Bunting, most programs, strategies are bound to fail if it is perceived by the recipients as a means to import foreign values/culture or an attempt to regulate population growth.[56] Explaining further she said that if communities do not see early marriage as a human rights violation, many programmes aimed at stopping it may be seen as imposition of western/foreign values regarding marriage on non-western societies.[57] It is worthy to note that culture gives people a sense of belongings, as such it is difficult to let go of most of its belief.[58]

The second challenge is patriarchy. The issue of patriarchy also poses a barrier to the success of child marriage programs. When people believe that the programs will empower women or girls to challenge their husbands, then it becomes very difficult to implement the programs. This empowerment can come in the form of education for the girls, the result is that women

[50] See for example Marriage, Divorce and Family Relations Act (Bill No. 5 of 2015).
[51] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
[52] SADC Protocol on Gender and Development, 2008, entered into Force February 22, 2013.
[53] The UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) adopted in 1979 and came into force on 3 September 1981.
[54] International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted on 16 December 1966, and entered into force from 3 January 1976.
[55] International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, and entered into force from 23 March 1976.
[56] Bunting, *op. cit*. *note* 29, p. 27.
[57] Bunting, *op. cit*. note 29, p. 33. See also by Fenrich, J., Galizzi, P., Higgins, TE., *The Future of African Customary Law*, 2011, p. 213.
[58] Wadesango, *et al*, *op. cit*. note 10, p. 121; see also AE Iyanuolu, AE., *The challenges of culture for the rights of women in Africa: A critical analysis of the protocol to the African charter on human and people's rights on the rights of women in* Africa, 2008, LLM thesis UCT.

can become self-reliant and aware of their rights. Consequently, they are denied the privilege of going to school.

The third challenge relates to the suitability of the program to address the condition of the girls in question. According to Bridgeman and Monk, most programmes and policies are not culturally suitable to address the socio-economic conditions in which girls and young women live.[59] According to them, the consequences and reason for child marriage might differ from place to place and time due to cultural factors.[60] Burr in agreement to this suggests that real changes will only take place if close attention and respect is shown for cultural beliefs and practices of local people, including children.[61] Kabeberi-Macharia argues in line with Bridgeman *et al* that most programmes are not culturally appropriate to address the socio-economic conditions of the girl-child because they fail to show an understanding of the status of the girl-child, the cultural norms, attitudes and economic activities of the community she comes from and how these have been shaped by social and economic factors.[62] Freeman also suggests that child's rights be expressed in a universal term but applied in a way that is responsive to the local context.[63] This issue was also raised by Lowe and Douglas when they suggested that regional approach rather than a global approach should be adopted towards and if success to child marriage programs is to be achieved.[64] Arango *et al* also argues that careful understanding of the cultural context within which these practices take place must be looked into for successful child marriage programs. [65]

The fourth challenge is legal pluralism. The term is defined as the existence of multiple legal systems within one legal field, human population and/or geographic area.[66] Gaffney-Rhys notes that legal pluralism which is prevalent in most African countries hampers the success of child marriage programs.[67] This issue of legal pluralism according to her is of two types; the first one involves the co-existence of international treaties and national laws. An example is the article 16(2) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) which states that '[t]he betrothal and the marriage of a child shall have no legal effect…' but failed to define who a child is. It merely provides that States fix the age without any suggestion. Also, article (1) of the Convention on the Rights of the Child (1989)

[59] Bridgeman, *op. cit*. note 24, p. 3
[60] Bridgeman, *op. cit*. note 24, p. 3. See also James *et al*, *op. cit*. note 15, p. 58; Bunting, A., *Particularity of rights, Diversity of contexts: Women, International Human Rights and the Case of Early Marriage*, 1999, PhD diss., National Library of Canada, p. 11.
[61] Burr, R., *Global and Local Approaches to Children's Rights in Vietnam*, Childhood Vol. 9, No. 1, 2002, pp. 49-61, p. 49, p. 60.
[62] Kabeberi-Macharia, J., *Reconstructing the Image of the Girl-Child* in Ncube, W. (ed.), Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa, 1998, p. 47.
[63] Freeman, M., *Culture, Childhood and Rights*, Family in Law Review Vol. 5, 2011, pp. 15-33, p. 22.
[64] Lowe, N., Douglas, G., *Bromley's Family Law*, 2015, p. 24.
[65] Arango, DJ., Morton, M., Gennari, F., Kiplesund, S., and Ellsberg, M., *Interventions to prevent or reduce violence against women and girls: A systematic review of reviews*, Women's Voice and Agency Research Series Vol. 10, 2014, pp. 1-60, p. 27.
[66] Griffiths, J., *What is legal pluralism?* The Journal of Legal Pluralism and Unofficial Law Vol. 18, No. 24, 1986, pp. 1-55, p. 38.
[67] Gaffney-Rhys, R., *International Law as an Instrument to combat Child Marriage*, The International Journal of Human Rights Vol. 15, No. 3, 2011, pp. 359-373, pp. 364-365.

clearly defines a child as a person below the age of eighteen (18). Also, the UN General Assembly adopted the resolution that minimum age for marriage should not be less than fifteen (15) during its twentieth session in 1965.[68] The African Charter on the Rights and Welfare of the Child (ACRWC) 1990 also stipulates that minimum age for marriage is 18, countries like Mozambique permits that girls be married at the age of 14. The implication of this is that some countries find it problematic to ascertain age at marriage, partly because they either ratified the UN recommendation or CEDAW or the ACRWC. Secondly is the issue of recognition/acceptance of national laws and personal laws by many countries. Most national laws exist in conjunction with personal laws which allows marriage at a far earlier age. An example is the Muslims, who are subject to the sharia law which does not stipulate any specific age.[69] Kuenyehia in agreement with Gaffney-Rhys said that the interaction of these laws often result in conflict, abuse and denial of rights.[70] Himonga also argues that the application of customary law together with the state laws lead to conflict as such, it can affect the implementation of conventions.[71]

The fifth challenge is culture and complexity of government procedures. People's dependence on their tradition slows down the implementation of convention and international treaties. According to the surveys taken by the World Bank's Institutional Reform and Capacity Building Project (IRCBP), rural people see the customary legal system as the main source of authority because it is more accessible and the most influential in their lives; they trust their traditional leaders more than they trust the formal government because they are more familiar to them; they are more likely turn to traditional chiefs and local courts to settle their disputes than they are to turn to formal government bodies like police units and courts.[72] While most victims of early child marriage prefer to settle the problem amongst their local communities or NGOs, the formal system like the court doesn't help matters as most of their procedures are lengthy, complicated, expensive, and foreign, it also takes time to achieve desired result.[73]

The sixth challenge is lack of skill/ expertise and awareness. Most of the traditional authorities, law enforcement officials are not well trained or aware of child marriage, its ills and legal

[68] United Nations General Assembly Resolution 2018 XX.

[69] de Alwis, RS., *Child Marriage and the law- legislative Reform Initiative Paper series*, 2008, p. 30; Nkoyo, T., *Revising equality as a right: The minimum age of marriage clause in the Nigerian child rights 2003*, Third World Quarterly Vol. 27, No. 7, 2006, pp. 1299- 1312, p. 1299; see also Himonga, C., *The Right of the Child to Participate in Decision Making: A Perspective from Zambia* in Ncube, W., (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, 1998, p. 96. See a similar situation in India; MacKinnon, CA., *Sex equality under the Constitution of India: Problems, prospects, and personal laws*, International Journal of Constitutional Law Vol. 4, No. 2, 2006, pp. 181-202, p. 181.

[70] Kuenyehia, A., *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, University of California Davis Law Review Vol. 40, No. 2, 2006, pp. 385-405, pp. 385-388.

[71] Himonga, C., *The Application of African Customary Law under the Constitution of South Africa: Problems Solved or just Beginning?*' South African Law Journal Vol. 117, No. 2, 2000, pp. 306-341, p. 306.

[72] (IRCBP) Institutional Reform and Capacity Building Project Evaluations Unit, 'Report on the IRCBP 2007 National Public Services Survey: Public Services, Governance, Dispute Resolution and Social Dynamics' (2008) 35; see also V Maru, V., *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, Yale Journal of International Law¸, Vol. 31, No. 2, 2006, pp. 476 – 427, pp. 448-449.

[73] Plan International United Kingdom, 'Before their time: Challenges to Implementing the Prohibition against Child Marriage in Sierra Leone' (2013) 27-30.

prohibition making most of the cases of early child marriage unreported.[74] Lack of skills and capacity has been noted to be a barrier to the effective functioning of child marriage programs. According to a report on Stamping out and Preventing Gender-Based Violence and Child Marriage, the Ministry of Chiefs and Traditional Affairs (MCTA) in Zambia has taken a strong lead on tackling child marriage, launching a campaign to end child marriage (ECM) in April 2013 which has, to date, increased media coverage, and conducted provincial sensitisation workshops with traditional chiefs but it (MCTA) has limited technical capacity.[75] The empowerment of Chiefs/traditional leaders will go a long way in mitigating child marriage. Recently, a chief in Malawi annulled 330 customary marriages – of which 175 were girl wives and 155 were boy fathers.[76] Bunting also notes that the available laws and policies are not being complied with because people are not aware of their existence.[77]

The seventh challenge is the domestication of international treaties and inaccessibility of most child marriage centres. Jonas highlights that the issue of ratification of international treaties can mitigate the success of child marriage programs.[78] According to him, international treaties are not self-executing and will only be a noble declaration if not domesticated. He suggested the need for them to be domesticated locally either through making of a new law or adjusting existing laws to conform to the requirements of the instrument. Jonas also raised the issue of inaccessibility of most NGO's, and other institutions that work to eradicate child marriage.[79] According to him, most of the NGO's are located in the urban areas making it difficult for children in the rural areas to access the available facilities.

The eighth challenge to the success of child marriage programs is the issue of funding. Most programs depend on international communities, government and other donors for its success.[80] Financial assistance and basic supplies like vehicles and writing supplies seems to be inadequate, making plans for eradication of early child marriage unrealisable.

From its findings in Sierra Leone, Plan International reported that the lack of funding is mostly because the government lack the political will to end child marriage.[81] Government has not made child marriage its priority, as such allocating resources to end it may be more than a mirage.[82]

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[74] Lowenstein clinic interview with William Bangura, Principal Social Development Officer, Ministry of Social Welfare, Gender and Children's Affairs, National Government of Sierra Leone, Makeni 2012.

[75] *Business Case: Stamping out and Preventing Gender-Based Violence and Child Marriage* available online at iati.dfid.gov.uk/iati documents/4317633.doc accessed on the 19 July 2015.

[76] UN Women, *Malawi Chief annuls 330 child marriages*, 2015, http://www.unwomen.org/en/news/stories/2015/9/malawi-chief-annuls-330-child-marriages. Accessed 14 October 2017.

[77] Bunting *op. cit*. note 29, p. 27; Gaffney-Rhys *op. cit*. note 67, p. 369.

[78] Jonas, B., *Towards Effective Implementation of Children's Rights in Tanzania: Lessons and opportunities from Ghana and South Africa*, Master's thesis, university of Pretoria, 2006, p. 16; see also Rhezaura, B., *Domestic Application of International Human Rights Norms: Protecting the Rights of the Girl Child in Eastern and Southern Africa* in Ncube, W., (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, 1998, p. 29.

[79] Jonas, *op. cit*. note 78, p. 27.

[80] Jonas, *op. cit*. note 78, p. 27; see also Gaffney-Rhys, *op. cit*. note 67, p. 369.

[81] Plan International UK, *op. cit.* note 73, p. 30.

[82] Nour, op. cit. note 14, pp. 1647.

The ninth challenge faced in effective programming and policy regarding child marriage is the fact that most marriages are unregistered and unofficial as such very little data exist about child marriage.[83]

The tenth challenge relates to the fact that most human right programs deal with the individual rather than the group. As Bennet put it, human rights emphasize the individual while customary law emphasizes the group or community; customary law stresses duties, human rights regimes naturally stress rights; and customary law is imbued with the principle of patriarchy, which means that any freedoms of thought, speech, movement or association are qualified by the respect due to all senior men.[84]

The eleventh challenge is the issue of the meaning of a child and variations in the age for marriage. Chinyangara *et al* note that variations in the minimum age for marriage and also the definition and understanding of who a child is can pose a challenge to the success of programs.[85] Ariès accepts that there are different variations in understanding and meaning of who a child is, making it difficult to adhere to the provisions of international conventions.[86] Ncube argues that there exist diverse cultural and traditional ideas of childhood, its role, its rights and obligations that must be put into consideration in the interpretation of children's rights.[87] Rhezaura argues that the world community is so diverse socially, economically and culturally, as such cannot understand children's rights the same way.[88] According to him, regional studies/survey should be conducted in order to ascertain how communities understand and apply children's rights, how it defines the relationship of parent and child and what it considers to be appropriate conduct between them and other members of the family.[89] Affirming the argument of Rhezaura, Himonga notes that proper assessment should be done to ascertain what meaning and understanding the Convention and various treaties means to children and their various families using Zambia as an example.[90] This challenge relates also to the issue of cultural relativism. The next section will review the concept of cultural relativism. It situates the challenges faced in combating the widespread of child marriage practice and problem of loss of identity to the clash between cultural autonomy by arguing that the journey to self-discovery and identity is at the intersection of culture, law, and religion.

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[83] Warner, op. cit. note 10, pp. 237.
[84] Bennett, TW., *The Compatibility of African Customary Law and Human Rights*, Acta Juridica, 1991, pp. 18-35, p. 23.
[85] Chinyangara, I., Chokuwenga, I., Dete, RG., Dube, L., Kembo, J., Moyo, P., Nkomo, R., *Indicators for Children's Rights: Zimbabwe country case study, Zimbabwe*, 1997.
[86] Ariès, *op. cit*. note 21, pp. 37-40.
[87] Ncube, W., *Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture* in: W Ncube, W. (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, 1998, p. 1.
[88] Rhezaura, B., *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa: Contemporary challenges and present-day dilemmas in Ncube*, W., (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, 1998, p. 289-290; see also An-Naim, AA., Towards a Cross Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, Degrading Treatment or Punishment' in An-Naim, AA., (ed.) *Human Rights in Cross Cultural Perspectives*, 1992, p. 19-20.
[89] Rhezaura, *op. cit*. note 88; see also Rhezaura, B., *The Duty to Hear the Child: A View from Tanzania* in Ncube, W. (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, 1998, p. 59.
[90] Himonga, *op. cit*. note 69, p. 97.

5. CULTURAL RELATIVISM AND LOSS OF IDENTITY

The practice of child marriage has developed differently in diverse communities based on different meaning and social context of specific community.[91] In other words, practice such as child marriage, are sanctioned by the relevant social understandings of the cultures within which they are practiced. In most societies, child marriage persists because of the belief that young girls will engage in premarital sex or get unwanted pregnancy either by choice or by force which might render them (girls) unmarriageable.[92] This is mostly the case in communities where virginity is valued.[93] As such they are married early to ensure their virginity.[94] Other communities, believe that early marriage will derail young girls from engaging in any promiscuous act either for financial purposes or otherwise.[95] Yet, others engage in child marriage because of the incentives of bridewealth payment.[96] These examples show that child marriage is relative to the individual community. In other words, the success and failure of child marriage programmes is based on the interest of the community it serves. The term cultural relativism is a principle that holds that some cultural and historical variations are exempt from legitimate criticism by outsiders.[97] This term is strongly supported by notions of communal autonomy and self-determination. The challenges faced in combating the widespread of child marriage practice and problem of loss of identity relates to the clash between cultural, religious autonomy and state laws. Therefore, restoring the lost identity of children who are engaged in child marriage rests on resolving the tension between law, religion and culture.

5.1. THE TENSION BETWEEN CULTURE, LAW AND RELIGION: A CASE OF LEGAL PLURALISM

Legal pluralism is the consequence of colonial rule in Africa.[98] The concept of legal pluralism recognises religious, customary and other state laws.[99] Customary law as well as religious law

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[91] Mill, JS., *On Liberty*, 1869, pp. 126-127; Landes, *op. cit*. note 34, p. 2-3

[92] Warner, *op. cit*. note 10, p. 239; Nour, *op. cit*. note 14, p. 1644.

[93] Hampton, T., *Child marriage threatens girls' health*, Jama Vol. 304, No. 5, 2010, pp. 509-510 at 510; Lee-Rife, S., Malhotra, A., Warner, A., Glinski, AM., *What works to prevent child marriage: a review of the evidence*, Studies in family planning Vol. 43, No. 4, 2012, pp. 287-303 at 288; Askari, L., *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, ILSA Journal of International and Comparative Law Vol. 5, No. 1, 1998, pp. 123-138 at 126; Sohoni, N., *The Burden of Girlhood: A Global Inquiry into the Status of Girls*, 1995, p. 32-33; O'Connell, H., *Women and the Family*, 1994, p. 15.

[94] Jensen, et al., *op. cit*. note 29, p. 9, 12,18; Gaffney-Rhys, *op. cit*. note 67, p. 360.

[95] Warner, *op. cit*. note 10, p. 241.

[96] Askari, L., *op. cit*. note 93, p. 126; Saranga, J., Kurz, K., *New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs*, 2007, p. 9.

[97] Donnelly, J. '*Cultural Relativism and Universal Human Rights'* Human Rights Quarterly*, Vol.* 6. No. 4, 1984, pp. 400- 419 at 400-401; Teson, FR, '*International Human Rights and Cultural Relativism'* Virginia Journal of International Law, Vol. 25, No. 4, 1984, pp. 869- 900 at 873; Pollis, A., 'Liberal, Socialist and Third World Perspectives of Human Rights' in: Schwab, P. (ed.), *Toward a Human Rights Framework*, 1982, pp. 22-23;

[98] Merry, SE., '*Legal Pluralism'* Law and Society Review, Vol. 22, No. 5, 1988, 869 -896 at 869; Himonga, C., Bosch, C., '*The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning' South African Law Journal,*Vol. 117, 2000, pp. 306- 341, p. 307.

[99] Higgins, TE., Fenrich, J., Tanzer, Z., *Gender Equity and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, Fordham International Law Journal, Vol. 30, No. 6, 2007, pp. 1653- 1708 at 1664

such as Islamic law is entrenched in the community. The application of these laws to practices such as marriage leads to conflict of laws. For instance, family laws which are regulated by customary laws conflicts with provisions of state laws and other international laws. These laws (state laws and international conventions and treaties) create loop hole that allows the application of customary law. In South Africa, section 24 (1) of the Marriage Act states that 'No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for contracting the marriage has been granted and furnished to him in writing'. Subsection 2 states that 'For the purposes of sub-section (1) a minor does not include a person who is under the age of twenty - one years and previously contracted a valid marriage which has been dissolved by death or divorce'.[100] While Sec 3 (3) (a) of the Recognition of Customary Marriages Act 120 of 1998 states that 'If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage. In Zimbabwe Sec 20 (2) of the Marriage Act states that 'the marriage of a minor shall not be solemnized without the consent in writing of the persons who are, at the time of the proposed marriage, the legal guardians of such minor or, where a minor has only one legal guardian without the consent in writing of such legal guardian'.[101] Sec 16 (3) of the Zimbabweans' Constitution provides that state and government agencies at all level must ensure due respect of the dignity of traditional institutions.[102] Article 17 of the Covenant on Civil and Political Rights (CCPR) provides that no one shall be subjected to unlawful or arbitrary interference with his privacy or family.[103] What is arbitrary and unlawful is not defined. Article 17 (2) went further to state that everyone has the right to the protection of the law against such interference. In most communities and under customary law, age of marriage does not determine capacity to marry. In these communities, puberty signifies the ability of a girl-child her ability to procreate, become a wife and mother.[104] In the context of child marriage therefore, the implication of this provision (Article 17(2) of CCPR) is that no one should interfere with family issues. In the light of this plural legal settings presented above, these legislations and other human rights provisions contain opportunities, contradictions and loopholes that allows child marriage to strive. It seems therefore, that the success of child marriage programs and laws rest in acknowledging that autonomy revolves around the values and interests of a community. It rests on respecting the meanings attached to the idea of equality, recognising the right of indigenous nations to define and protect their cultural traditions and customs.

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[100] Marriage Act 25 of 1961
[101] Marriage Act [Chapter 5:11].
[102] Constitution of Zimbabwe Amendment (Act No.20) Act 2013
[103] International Covenant on Civil and Political Rights 1976
[104] Rwezaura, B., *Competing Images of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa*, International Journal of Law, Policy and Family Vol. 12, No. 3, pp. 253- 278 at 260; Armstrong, *et al, op. cit*. note 44, p. 329

6. CONCLUSION

Child marriage, a global menace and violation of human rights, cuts across all countries, cultures, regions, religions and ethnicities. It affects both boys and girls. As shown, culture and religion play significant role in shaping the definition, influencing and structuring behaviour around marriage more than law. From the above, it is clear that a number of external and internal factors (socio-economic factors) encourages the prevalence of child marriage, which leads to loss of identity in children. This is despite the efforts made by government and other reformers to end the widespread practice. The practice of child marriage is being challenged and renegotiated by different communities whose interests it serves. So far as these interests and socio-economic conditions continue to persist, child marriage will continue to be championed by its believers.[105]

It is also clear that child marriage has devastating effects ranging from physical, emotional, health, sexual and social on the girl child. Its persistence is heightened by various socio-economic conditions such as poverty. Consequently, the journey to self-discovery and identity which is at the intersection of culture, law, and religion needs an approach to cultural practice that takes autonomy rather than universalisation as a central guiding principle. The journey to self-recovery also entails a policy dialogue with stakeholders in the community such as the religious and community leaders who have enormous influence in the community. Hence, a bottom-up approach is required to understand and solve the problem of child marriage. This approach requires understanding and being sensitive to people's lived realities that drive child marriage and other societal menace.

[105] Ansell, N., *Because it's Our Culture!' (Re)negotiating the Meaning of Lobola in Southern African Secondary Schools*, Journal of Southern African Studies Vol. 27, No. 4, pp. 697-716, p. 715.

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ACCESS TO JUSTICE FOR CHILDREN WITH DISABILITIES*

"There can be no keener revelation of a society's soul than the way in which it treats its children."
— Nelson Mandela, Former President of South Africa

Abstract

Ensuring standards of access to justice for children addressed by various international, European and national instruments entails both creating conditions for active participation of children in proceedings and adjusting proceedings to their participation. In this sense, equitable access to justice for children means that children are efficiently informed of their rights and obligations, adequately represented by parents or other legal representatives, but in some cases, persons other than their legal representatives and that judges, lawyers and other participants are aware of children's needs and equipped with relevant knowledge and skills in order to address them. Also, measures which ensure adequacy of courtrooms or other child-friendly spaces in which children are interviewed, appropriate equipment and services and participation of persons (psychologists, social workers, experts, interpreters etc.), which provide necessary assistance to children in acquiring legal protection, are of relevance. The paper aims to examine the level in which Croatian legal system is able to respond to the imposed requirements in proceedings involving children with disabilities. Along with the review of relevant legal framework at international, European and national level, analysis of the results of a research into court practice, work of the office of the Ombudsman for children, special guardians for children and other persons and bodies included in proceedings involving children with disabilities will be conducted. Based on the results of the research, guidelines for possible interventions which would improve the system in the future will be provided.

Keywords: children with disabilities, access to justice, reasonable accommodations, court practice, individual assessment

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1. INTRODUCTION

Children belong to a group of vulnerable persons and their vulnerability originates from their age and immaturity which puts them in a position of dependency towards their parents or other persons. This vulnerability is especially obvious in situations when a child should access court or other authorities in proceedings regarding his/her rights and interests. Hence, the relevant legal framework at international and EU level provides for child-sensitive justice which protects the specific, vulnerable position of a child. Themechanisms which provide it have also been gradually translated into national legal systems, including those of EU Member States.

In order for the rights guaranteed to children to be effectively protected and promoted it is essential to ensure adequate *access to justice* for children.The concept should strengthen the capacity of all children toaccess relevant information and effective remedies to claim their rights, including through legal and other services, child rights education, counseling or advice, and support from knowledgeable adults.[3] Moreover, *access to justice* for children requires taking into account children's evolving maturity and understanding when exercising their rights.[4]There is a comprehensive legal framework ensuring *access to justice* for children, among which we will focus on relevant European developments.[5] Inensuring standards of*access to justice*the European Convention for the Protection of Human Rights and Fundamental Freedoms[6](hereinafter: ECHR) is the first successful attempt to ensure a legally binding effect to the rights contained in the Universal Declaration of Human Rights[7]. Article 6 ECHR guarantees a fair and public hearing within a reasonable time by an independent and impartial

[3]See UN Common Approach to Justice for Children, 2008, p. 4. URL=https://www1.essex.ac.uk/armedcon/story_id/UNCOMMON.pdf Accessed 3 April 2018.Access to justice for children: Report of the United Nations High Commissioner for Human Rights, A/HRC/25/35, 2013, p. 4. URL=http://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj27qmA-Z7aAhUmsKQKHUDhD2cQFggmMAA&url=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession25%2FDocuments%2FA-HRC-25-35_en.doc&usg=AOvVaw1GrdB3mkHd-mVlQ0W_3P1z Accessed 2 October 2017.

[4]Ibid.

[5]All core international human rights treaties are relevant in this context. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which also places obligations on States to follow the principles of child-sensitive justice, should be particularly highlighted. Regional human rights treaties – such as the American Convention on Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms; Charter of Fundamental Rights of the European Union; Arab Charter on Human Rights; African Charter on Human and Peoples' Rights; and African Charter on the Rights and Welfare of the Child – also guarantee relevant human rights to ensure access to justice for children. Relevant international and regional non-binding standards include, *inter alia*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime; Standard Minimum Rules for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;United Nations Rules for the Treatment of Prisoners and Non-custodial Measures for Women Offenders;United Nations Standard Minimum Rules for Non-custodial Measures; Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters; Guidelines for the Alternative Care of Children; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice; Guidelines on Action for Children in the Justice System in Africa; Child Friendly Legal Aid in Africa. Ibid., p. 5.

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

[7] Universal Declaration of Human Rights, Official Gazette, International treaties, No. 12/2009.

tribunal established by law. At the same time the right to access to court (*access to justice*) was defined in the jurisprudence of the European Court for Human Rights (*Golder v the United Kingdom*[8]). Hence, *access to justice*pertains to a group of implied rights which stem from the European Court for Human Rights' interpretation of the rights contained in Article 6 ECHR. Although the ECHR does not contain a definition of a child, Article 1 ECHR prescribes an obligation of the states to secure ECHR rights to "everyone" within their jurisdiction. Article 14 guarantees the enjoyment of the rights set out in the ECHR "without discrimination on any ground", including grounds of age. The European Court of Human Rights has accepted applications by and on behalf of children irrespective of their age. In its jurisprudence, it has accepted the Convention on the Rights of the Child[9] (hereinafter: CRC) definition of a child, endorsingthe "below the age of 18 years" notion.[10]

At EU level fundamental rights are guaranteed in the Charter of Fundamental Rights of the European Union[11] (hereinafter: Charter) from 2000. Since the Charter is a part of the Treaty of the European Union (hereinafter: Treaty of the EU) its main aim was to provide a more accessible and visible framework which ensures fundamental rights to EU citizens. Article 47 Charter is among rights contained in the Charter and its content corresponds (to a large extent) to that of Article 6 ECHR. The Charter ensures standards of child protection relevant for access to justice for children such as human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), right to liberty and security(Article 6), respect for private and family life (Article 7), protection of personal data (Article 8), non-discrimination (Article 21) and the rights of the child (Article 24). Further, it confirms the status of a child as an independent and autonomous subject as already implied in the CRC. The Charter implemented the rights guaranteed to children from the ECHR and a more restricted number of rights from the CRC, including the 'best interest of the child'. Hence, children are guaranteed the right to protection and care and a right to express their views in proceedings concerning their rights, in accordance with their age and maturity (arg *ex* Article 12/1 CRC).

The significance of the CRC for ensuring *accessto justice* for children is in the requirement that effective legislative and administrative procedures and measures should be adopted in the national legislation.[12] CRC does not contain an explicit provision on the right to an effective remedy. Nevertheless, the Committee on the Rights of the Child held that the right to an effective remedy is an implicit requirement of the CRC. According to the Committee the "States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-

[8] Case Golder v. United Kingdom, Judgment, Merits and Just Satisfaction, App No 4451/70, A/18, [1975] ECHR 1, (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), 21 February 1975 (Official Case No): A/18.
[9]Convention on the Rights of the Child, Official Gazette, International treaties, No. 12/1993.
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[11]Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), 26 October 2012, 2012/C 326/02, URL=http://www.refworld.org/docid/3ae6b3b70.html Accessed 4 February 2018.
[12] Report of the United Nations High Commissioner for Human Rights, *op. cit.* note 3, p.5.

sensitive information, adviceand advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance."[13] The Committee emphasized that in case of violations of rights, "there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [of the CRC]".[14]The CRC additionally provides a list of fundamental safeguards to ensure fair treatment of children.[15]

Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice[16] are a document created on the basis of existing standards enshrined in the international and European instruments (referred to in the preamble of the Guidelines) and the case law of the European Court of Human Rights. Since the Guidelines are aimed at enhancing access to justice for children,they provide rules which the national legal systems should follow in order to ensure that, in any such proceedings, allrights of children, among which the right to information, torepresentation, to participation and to protection are fullyrespected with due consideration to the child's level of maturityand understanding and to the circumstances of the case.At the same time, respecting children's rights should not jeopardise the rights ofother parties involved.[17]Nevertheless, the empirical research shows that there are significant differences in the level of information provided to children, the moment the information are provided as well as who provides them to children. In comparison to the criminal proceedings, civil proceedings provide less regulation but offer more discretion to legal practitioners in regard to the estimation of the level of information which should be available to children. It is expected that parents should be the first to inform children on proceedings involving or affecting them. However, the practitioners stress the importance of safeguarding that in the process of receiving information children are not influenced by their parents. Also, throughout the process of providing

[13]UN Committee on the Rights of the Child (CRC),General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, URL= http://www.refworld.org/docid/4538834f11.html Accessed 1 April 2018.
[14]Ibid.
[15]These include including the rights to information (Article 17), expeditious decisions (Article 10) and prompt access to legal assistance and to prompt decisions by the court (Article 37d). Article 12 of the CRC, which establishes the child's right to be heard and taken seriously, is of particular importance. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child. It requires that the views of the child be given due weight in accordance with their age and maturity. In addition, paragraph 2 establishes that children shall be provided the right to be heard in any judicial or administrative proceedings affecting them, either directly, or through a representative or an appropriate body. The Committee on the Rights of the Child recognized article 12 as one of the four fundamental principles of the CRC, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which frame children's access to justice and should be considered in the interpretation and implementation of all other rights.UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, URL= http://www.refworld.org/docid/4ae562c52.html Accessed 1 April 2018.
[16]Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice: The Council of Europe programme "Building a Europe for and with chidren", Council of Europe Publishing, 2010. URL=https://rm.coe.int Accessed 4 October 2017.
[17]Ibid, p. 17.

information to children, their maturity and any communication difficulties should be born in mind.[18]

But, are all the procedural mechanisms mentioned above a sufficient guarantee of equitable access to justice to children with disabilities as especially vulnerable group of children? Namely, it is common to addressthe matter of access to justice for children, while the specifics of proceedings concerning children with disabilities caused by barriers which this group of children faces when accessing justice are seldom discussed. However, in the total population of 4.190.669 Croatian citizens, in the period between 2015 and 2016 there were 39.055 children with disabilities.According to the information from the Croatian registry on persons with disabilities on the date 26.01.2017 there were 511.910 persons with disabilities in Croatia, among who 32.101 children (born in the period from 26.01.1999 until 26.01.2017), 6.2% from the total number of persons with disabilities. Out of the total number of children with disabilities, there are 62 % boys and 38 % girls. The largest number of registered children with disabilities (the 14.969 (46.6%) among them)are at the age between 10 and 14.[19]

According to the information provided by the Office of the Ombudsman for children (hereinafter: Office), on 31.12.2016 there were 118 children placed in institutional care (children homes as well as centres for organized and assisted living). [20]

Hence, the paper aims to explore thelevel in which Croatian legal system is able to respond to specific requirements of proceedings involving children with disabilities, while taking into account the results of a research conducted for EC in 2014, which analyzed access to justice for children with mental disabilities in 10 Member States.[21]

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[18] Child-friendly justice – perspectives and experiences of children and professionals, European Union Agency for Fundamental Rights, 2015.,URL=http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals-summary_en_0.pdf Accessed 01 March 2018.

[19] According to the statistics of the Croatian Bureau of Statistics and the Croatian Institute of Public Health for 2015, 2016 and 2017. More information available at: URL=https://www.dzs.hr/default_e.htm.
Disorders in the vocal and speech communication, damages to the central nerve system and intellectual disorders are the most common causes of disability among children (87 %) in Croatia.The most common diagnosis are dystonia (syndrome), present in 2161 children, infantile cerebral palsy, present in 1627 children and epilepsy present in 1510 children.16,3% of children with disabilities have intellectual disorders (49 % of children with mild intellectual disorders). There are 813 children with deep (heavy) intellectual disorders. Congenital anomalies cause disabilities in 14.6% children. Among congenital anomalies there are malformations of the bone and marrow present in 1323 children, malformations of the cardiovascular system present in 1235 children and Down syndrome present in 675 children. Psychological disorders and behavioral problems cause disabilities in 10% of children. The most common diagnosis causing disabilities due to the disorders in the social functioning of a child are hyperkinetic disorder and behavioral problems in childhood (F90-F98) present in 2933 children. Five children with disabilities and grave difficulties have attempted suicide and 36 children were victims of violence (Y00-Y07, Z61, Z62). Damages of other organs are causes of disabilities in 8.9% children. Also, there are 3.9 % children with pervasive disorders (autism). Around 43.1% has multiple disorders which further endanger their development and functional capabilities. It is necessary to emphasize that all varieties of disability and difficulties are more present in male population, especially autism, behavioral problems and vocal and speech disorders.

[20]More information available in the Reports on the work of the Ombudsman for Children. URL=http://www.dijete.hr/www/?page_id=6243Accessed 2 October 2017.

[21]Mental Disability Advocacy Center, Access to Justice for Children with Mental Disabilities: International Standards and Findings from Ten EU Member States, 2015.URL=http://www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws2_standards_and_findings_english.pdfAccessed 2 October 2017.

A starting point is the question of particularity of the position of a child with disabilities in proceedings concerning his/her rights and interests. An analysis of treatment which is considered as 'disability discrimination'[22] is provided as well as measures which should eliminate it. Although divorce proceedings in which decisions on parental responsibility are brought are the focus of the paper, also other proceedings in which children with disabilityparticipate are considered.

For the purposes of this paper, according to Article 1 CRC a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

With regard to Article 1 of the Convention on the Rights of Persons with Disabilities[23] (hereinafter: CRPD), children with disabilities arethose children who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Along with the general obligation of a Member State to facilitate access to justice for children deriving from the international and European instruments, additional obligation for Member States, concerning children with disabilities, originates from recital (r) of the CRPD preamble according to whichchildren with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the CRC.

Thereby, account should be made to the fact that children with disabilities are not distinguished from other children by the mere fact of disability. Instead, the disability should be comprehended as an evolving concept and it should be kept in mind that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others (arg. *ex* recital (e) CRPD preamble).This perception is a necessary foundation for raisingawareness and understanding of the position and the role of all participants to the process of providing legal protection for children with disabilities. Namely, when it comes to proceedings concerning rights and interests of children with disabilities, so far the established practice in Croatian legal system was to determine circumstances of the child's disability, which usually resulted in determination of child's inability to actively participate in proceedings already in the initial stage of the proceedings. This meant that the child was not able to actively take part in proceedings. Such conduct was conditioned by the fact that disability, especially if it does not involve merelyphysical disability was considered to be linked to the lack of capacity of the child

[22] Article 2 of the CRPD, defines 'disability discrimination' as "any distinction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."
[23] Convention of the Right of Persons with Disabilities, Official Gazette, International treaties, No. 6/2007, 3/2008, 5/2008.

to participate adequately, regardless of the assistance of the parents or guardians in the proceedings.[24]

This might be true in a number of cases, especially due to the age and maturity of children (which can also cause inability of children without disabilities to actively participate in proceedings), physical or mental disability, disorders or similar conditions which prevent verbal communication with children. However, there are cases in which disability should not be viewed as an obstacle. With adequate accommodationschildren with disabilities could be provided with a possibility to participate in proceedings. Interpretation of relevant instruments which regulate access to justice for children supports this view.

Namely, along with an obligation to inform a child as set out in the CRC (arg *ex* Article 13), the Guidelines additionally provide that „all professionals working with and for children should receive necessary interdisciplinary training on their rights and needs of children of different age groups, and on proceedings that are adapted to them" (arg *ex* point 14 Guidelines) and that „professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability"(arg. *ex* point 15 Guidelines).

2. CURRENT STATE OF PLAY –EXAMPLES OF COURT PRACTICE IN CROATIAN LEGAL SYSTEM

In order to determine how proceedings concerning rights and interests of children with disabilities are conducted and detect approaches which can be considered as barriers to efficient access to justice, research into court practice at the Municipal civil court in Zagreb as well as interviews with judges were conducted, results of which will be presented and analyzed next.[25]Along with views and understanding of judges on certain matters, special guardians for children from Centre for Special Guardianship[26] and the office of Ombudsman for children also contributed with their insight on open issues regarding proceedings concerning rights and interests of children with disabilities during interviews which were conducted with them.Information gathered in the process of conducting these interviews were a basis for a discussion on necessary accommodations in proceedings concerning rights and interests of children with disabilities provided further in the paper.

A divorce proceedings between the parents of a child with disability (age 14)[27], was initiated on January, 7th 2015. The proceedings for divorce in Croatian legal system should result in decisions concerning parental responsibility, contacts and maintenance of the child. Upon

[24]A view expressed in the interviews conducted with special guardians from the Dislocated Unit Osijek of the Centre for Special Guardianship.

[25] The research offers an insight to the court practice of the Municipal civil court in Zagreb regarding proceedings on divorce and parental responsibility over children with disabilities. Although these cases do not necessarily reflect the court practice of other courts in Croatia, the examples which weregathered and analyzed in the research may be useful for detecting potential open issues and doubts connected to proceeding in such cases.

[26]The interview was conducted with guardians from the Dislocated Unit Osijek of the Centre for Special Guardianship.

[27] Municipal (civil) court in Zagreb (*Općinskigrađanskisud u Zagrebu*), P2-14/2015 from 1 June 2015.

initiating divorce proceedings, the mother also requested provisional measure according to which the child should live with the mother and the father is deprived of the right to live with the child until a final and binding judgment is delivered.The request wasbased on the fact that there was family violence during which the father threatened to commit suicide in the child's presence. Since the father was in psychological treatment but was regularly allowed to spend weekends at home, the provisional measure was supposed to disable the father to live in the same apartment with the child, in order to protect the child from similar events in the future. The parents were referred to obligatory consultation proceedings but they were not able to agree on the matters of parental responsibility. Mediation was not possible due to the fact that there was family violence. Although the child was 14 years old at the time of the proceedings and the child is notnon-verbal, meaning that it is able to communicate in ways which people can understand,itdid not actively participate in the proceedings. Along with the report on mandatory counselling, the court was provided with an opinion of a psychologist (from December, 29th 2014) according to which the child has reduced intelligence and attention difficulties. From the interview conducted in order to evaluate family circumstances, the psychologist concluded that the child accepts the separation of his parents. Also, the psychologist confirmed that the child witnessed his father's treats of suicide, although it is not possible to reveal if the child understood the meaning of the treats, because he refers to the situations as "those in which his father lost himself", as his mother previously explained to him.Since the parties to the proceedings concluded an agreement on divorce, parental responsibility, contacts and maintenance of the child, the court rendered a judgment on July, 1st 2015 according to which the child will live with the mother and contact his father regularly. The father will pay for the maintenance of the child.

On April, 4th 2015 proceedings were initiated by a request of a mother of two children (one of who is a child (15) with disabilities diagnosed with severe intellectual disability and maturity at a level of a 4 year-old) that the amount paid for maintenance be increased because it has become insufficient.[28] The father contested the request. The court assessed that a child with disabilities is not capable of expressing her view, so the mother was interviewed on circumstances of the child's disabilities, welfare and material needs. The court rendered a judgment on increase of the amount for maintenance for children on December, 10th 2015.

First two presented cases were recent, hence Family Act from 2015[29](hereinafter: Family Act 2015) applied, which brought some significant novelties in regard to the position and procedural rights of children in divorce, parental responsibility and maintenance proceedings. In comparison, in the third case Family Act from 2003[30](hereinafter: Family Act 2003) applied, which was drafted before the European Convention on the Exercise of Children's Rights[31] (hereinafter: ECECR) and Guidelines, hence the application of Family Act 2003 requires

[28]Municipal (civil) court (*Općinski građanski sud u Zagrebu*) 144-POb-400/15 from 10 December 2015.
[29] Family Act, Official Gazette, No. 103/2015.
[30]Family Act, Official Gazette, No. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 05/2015.
[31]European Convention on the Exercise of the Children's Rights, Official Gazette, International treaties, No. 1/2010.

interpretation of its provisions along with provisions on providing information to a child from the ECECR.[32]

Mother of two children (one of who is a child with disabilities diagnosed with autism) initiated divorce proceedings[33] in which also decisions concerning parental responsibility, contacts and maintenance of the children should be brought on February, 20th 2011. The father did not contest the claim for divorce, but he insisted that decisions concerning parental responsibility matters regarding the child with disabilities should be brought jointly by both parents. Given that parents participated in intervention procedure before divorce proceedings was initiated, the Social Care Centre was obligated to give its opinion and recommendation to the court on family circumstances. When issuing its opinion, the Social Care Centre among other, consulted the findings of the Centre for autism which conducted assessment of child's disabilities. According to the Centre for autism, the child has mild intellectual disability. The child was not interviewed before Social Care Centre or the court so he was not able to express his views on matters whichconcerned him in divorce, parental responsibility and maintenance proceedings. During the proceedings the parents agreed that children will live with their mother and contact their father regularly. The father will pay for the maintenance of the children. The court rendered a judgment on May, 23rd 2011.

Unlike the first three cases in which the parents eventually were able to agree on divorce and/or parental responsibility and maintenance, the following cases reflect difficulties in approaching justice for children with disabilities, occurring in situations where there is a dispute among parents which causes inability to reach an agreement on matters related to the parental responsibility.

In a divorce proceedings initiated by a mother of two children (one of who is a child with disabilities, diagnosed with profound level of impairment) on October, 26th 2015, the mother requested divorce, parental responsibility and maintenance for the children.[34] The father contested the request of the mother based on the fact that the mother wished to institutionalize the child with disabilities. The parents were referred to obligatory consultation proceedings and according to the report of the Social care centre on family circumstances from February, 9th 2016,the child was not interviewed because he is diagnosed with cerebral palsy and he is non-verbal.His medical documentation and reports on previously conducted examination and expertise provided by psychologists and doctors were consulted instead. Due to the inappropriate communication among parents, theywere referred to the consultation, on which the Social care centre drafted a report on April, 22nd 2016. The court rendered a judgment on divorce, parental responsibility and maintenance based on the agreement concluded by the

[32]Korać Graovac, A.; Rajhvan Bulat, L., Pravo djeteta na informacije, in: Aras Kramar, S., Korać Graovac, A., Rajhvan Bulat, L., Eterović, I., *Vodič za ostvarivanje prava djeteta na: - informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi*, Hrvatski pravni centar, Zagreb, 2015, pp. 16-28, at p. 22.
[33] Municipal (civil) court in Zagreb (*Općinskigrađanskisud u Zagrebu*) P2-2206/11 from 20 February 2011.
[34]Municipal (civil) court in zagreb (Općinski građanski sud u Zagrebu), POb-1866/2015 from 1 June 2017.

parents. The son (a child with disabilities) will live with the father and the daughter will live with the mother.

In the last case, divorce proceedings were initiated by the mother of a child with disabilities (who was 3 years old at the time, and at that point was only diagnosed with developmental speech problems) on April 30th 2008.[35]The request of the mother regarding parental responsibility and maintenance was contested by the father. According to the first report of the Social care centre from July, 25th 2008 on intervention procedure which the parents participated in before initiating divorce proceedings, the parents are not able to agree on parental responsibility. The subsequent report of the Social care centre from March, 4th 2009, to the court on family circumstances was given in accordance with its findings which included a psychological expertise for the child. In its opinion and recommendation, the Social care centre supported the suggestion of the parents that the child should live half of the time with the mother and the other half with the father. Although, in the opinion of the Social care centre the mother is more fit to live with the child due to his age and profound connection with the mother. However, in the opinion of a speech therapist from January, 29th 2009 and podiatrist from November, 25th 2008 the father is more accurate in keeping appointments and generally more included in child's therapy. Although the father requested preliminary measure in March, 22nd 2010 according to which the child should live with him, the request was denied. In December, 16th 2009 one of the therapist expressed his concern that the child is included in too many therapies and has no quality time with his parents. According to the expertise of the Child and Youth Protection Centre of Zagreb from November, 18th 2010 the child's disabilities are in the range of mild mental retardation. They recommended that the child should continue with the same organisation of life, regardless of which parent the child will live with. First instance judgment was rendered in May, 14th 2012, according to which the child will live with the mother and have regular contacts with the father. The father will pay maintenance for the child. Although the judgment was appealed, the second instance court dismissed both appeals - the appeal of the father and the appeal of the Social care centre. In rendering its judgment, the second instance court took into account the provisions of CRC on the best interest of the child.

The conducted research into the court practice in Croatian legal system confirms the views expressed in the interviews with Croatian judges that the approach towards children with disabilities does not differ from the general approach to children in divorce and parental responsibility proceedings. However, according to the recommendations stemming from Mental Disability Advocacy Centerresearch on access to justice for children with disabilities, the approach should be adjusted. First it will be necessary to examine if the child has sufficient understanding and if the information which should be made available to him/her are adapted to his/her age and maturity and cognitive capacity. This would ensure that instead of using the assessment of cognitive capacities in order to establish if the child with disabilities is capable of participating in proceedings and if it is able to give testimony in accordance with the rules

[35]Municipal (civil) court in Zagreb (Općinski građanski sud u Zagrebu), P2-765/08-63 from 14 May 2012. County court in Zagreb (Županijski sud u Zagrebu), 15Gž2-416/12-2.

on evidence, the emphasize would be on establishing which measures or acts would provide for adequate accommodations, since their absence results in the denial of the right to be heard.[36]

In Croatia, judicial professional are not used to adapting proceedings to participation of children with disabilities. However, the reasons of a lack of readiness of judicial professionals to enable active participation of children with disabilities cannot be simply attributed to their tendency to treat children with mental disabilities as passive recipients of services who are incapable of forming and expressing their own will and preferences[37]. Instead, often the fear is present among judges as well as legal representatives and guardians that including a child with disability in court proceedings, especially if it will require long or repeated questioning of a child, will traumatize and harm the child, his/her wellbeing and health.[38]

The recent views of legal theorists oppose these views as well as such practice. According to them, whenever the circumstances are such that with adequate accommodations the child with disabilities could be included in proceedings regarding his rights and interests, such practice would be desirable and welcome, because it is empowering for the child. Otherwise, the child with disability might feel excluded, discriminated and helpless.[39]Hence, in order to ensure participation of children with disabilities in divorce and parental responsibility proceedings, more attention should be given to "reasonable accommodations", as forms of individualised supports and adjustments necessary to ensure that people with disabilities, including children, can enjoy and exercise their fundamental rights, without imposing an undue burden on the organisation providing the adjustments in accordance with Article 2 CRPD. The place and the role which reasonable accommodations should take in Croatian legal system will be analyzed next.

3. REASONABLE ACCOMMODATIONS - A GUARANTEE OF PROCEDURAL RIGHTS FOR CHILDREN WITH DISABILITIES IN CROATIAN LEGAL SYSTEM

If undertaken, which measures would be able to provide reasonable accommodation to children with disabilities in proceedings before Croatian courts and other qualified entities? General accommodations suggested in the legal literature which include undertaking accessibility audits of courts and judicial rules and implementing national accessibility plans; providing information to the public about justice systems and processes in accessible formats (including easy-read and pictorial formats); using modern information communication technology systems and assistive devices; introducing mandatory provisions to establish procedural accommodations to judicial processes for persons with disabilities; and rolling out general and targeted public awareness campaigns to strengthen awareness are systematic changes.[40]Although during the last reform of the Croatian family legislation[41] some changes

[36]Mental Disability Advocacy Center, op.cit. note 21, p. 5.
[37]Ibid.
[38]Croatian judges who participated in the research also confirmed this view. However, according to some judges the fear and reluctance is equally present in all proceedings involving children because judges in Croatia still lack the relevant knowledge on how to conduct interviews with children.
[39]Mental Disability Advocacy Center, op.cit. note 19, p.22.
[40]Ibid., p. 27.
[41]Ibid., p. 19.

were introduced to the legal framework, to the greatest extent they refer to the regulation of procedural rights of children, while only subsidiarily taking into account the specific position of children with disabilities.[42]

In regard to participation of a child, parents and other persons in family proceedings(arg. *ex* Article 358-363), Family Act 2015 provides the child with standing in all proceedings concerning his/her rights and interests (arg. *ex* Article 358). Hence, the child is a party in divorce or separate proceedings concerning the plan on joint parental responsibility, decisions on which parent the child will live with, exercise of parental responsibility, child's personal relationships with the other parent and maintenance. In proceedings in which a court examines the plan on joint parental responsibility, both parents represent the child (Article 461/2). If a claim in parental responsibility proceedings is brought by one parent against the other, regardless whether it is connected to the divorce, the child is represented by a special guardian from the Centre for special guardianship (arg. ex Article 414).[43]In proceedings, information which is provided to a child is adapted to his/her age and maturity. Providing information to young children should be entrusted to persons with adequate knowledge on child psychology in order to ensure that child's best interest is considered. Information should be provided in a language that a child understands (foreign language, Brail or other) while the formal legal terminology should be explained so the child understands its meaning.[44] The child should be informed on the subject matter, the course and the outcome of proceedings in a manner appropriate to the age and maturity of the child, providing that it does not endanger the development, upbringing and health of the child (arg ex Article 360/5). Special guardians of the child, the court or other competent persons from the Social care centre are obligated to inform the child (arg ex Article 360/6).[45]

Obviously, the presented national legal framework is harmonized with the international and European standards for protection of procedural rights of children. Hence, setting the Croatian legal system to become appropriate for administration of justice for children with disabilities will not require too many adjustments of the legal framework. However, in regard to the methods of application of provisions of Family Act 2015 it is merely suggested in the legal literature that there should be no discrimination of children on the basis of their cognitive capacities, if the case concerns children with disabilities, or obstacles which could impair the understanding of information (for vulnerable group of children who do not understand the official language).[46]Given that such an obligation is not provided in the relevant legal framework, its introduction should be advocated for. At the same time, systematic measures

[42]Eterović, I., Predgovor, in: Aras Kramar, S.; Korać Graovac, A.; Rajhvan Bulat, L.; Eterović, I., *Vodič za ostvarivanje prava djeteta na: - informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi*, Hrvatski pravni centar, Zagreb, 2015, pp. 5-7, at p. 5.
[43]Aras Kramar, S., Glavna obilježja obiteljskopravne reforme u Hrvatskoj: postupci radi razvoda braka i o roditeljskoj skrbi te postupovna prava djece, in: Aras Kramar, S.; Korać Graovac, A.; Rajhvan Bulat, L.; Eterović, I., *Vodič za ostvarivanje prava djeteta na: - informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi*, Hrvatski pravni centar, Zagreb, 2015, pp. 11-15, at p. 14.
[44]Mental Disability Advocacy Center, *op.cit.* note 21, p. 18.
[45]Ibid.,p. 23.
[46]Korać Graovac, A.; Rajhvan Bulat, L.,*op. cit.* note 32, p. 19.

which should act as a safeguard of general accommodations, which are suggested by the Mental Disability AdvocacyCenterresearch, are also not provided under Croatian law.[47]In order to examine the validity of opting for its introduction, the experience of legal practitioners in administrating justice for children with disabilities in Croatia are presented and analyzed next. Thereby, the question whether legal practitioners have adequate means to accommodate proceedings in Croatia to participation of children with disabilities was in the focus of the research.

As to whether they can accommodate proceedings to participation of a child with disabilities, Croatian judges feel that this matter is connected to the technical capacities of each court. For example, one judge said that her court is accessible to children with disabilities, but it is not adequately equipped. There are no child-friendly interview rooms and there is a lack of use of modern information communication technology systems and assistive devices in order to enable interviews with children with disabilities in an environment familiar to them. For now, there was no specific training of judges on how to conduct proceedings involving children with disabilities. However, judges can request assistance of psychologists from the Social Care Centres in assessment of child's capacities and/or in conducting interviews with children. Judges find this possibility as crucial for enabling children to be heard because it provides them with an opportunity to rely on the specific knowledge and approach of psychologists towards children. According to judges, lawyers and special guardians for children (who act as legal representatives of children in certain proceedings) also lack such specific knowledge and skill set. Namely, it should be kept in mind that special guardians are also lawyers and they were not educated on how to deal with children with disabilities.

Apart from judges, there is a significant role of special guardians for children in providing access to justice for children with disabilities. As Article 240 Family Act 2015 sets out, special guardians participate and represent children in divorce, parental responsibility, contacts and maintenance proceedings in which there is a dispute among parents; proceedings in which maternity or paternity is disputed; proceedings concerning provisional measures for the protection of personal rights and best interest of the child; proceedings which substitute the consent for adoption; in proceedings concerning property matters in dispute among children and their legal representatives and for proceedings concerning unaccompanied children who are foreign citizens (they are usually represented by the Social Care Centres).According to Article 240(2) Family Act 2015, in these proceedings special guardians are legal representatives of children and they are obligated to inform children on the subject matter of the dispute and the decision in a way that is appropriate to their age and if necessary, contact parents or other close relatives or persons close to children.

From the interviews conducted with special guardians it seems that in proceedings concerning children with disabilities they are represented in the manner equal to all children. Special guardians make efforts in order to communicate with children with disabilities and inform them in appropriate manner. In most proceedings special guardians ascertain that a child with

[47]Mental Disability Advocacy Center, *op.cit.* note 21, p. 27.

disabilities is not capable of understanding the meaning of the proceedings. In order to be able to represent a child with disabilities, special guardian usually interviews parents, legal guardians or foster parents in order to establish child's views on matters affecting him/her. Special guardian then communicates the lack of capacity of a child with disabilities to form his/her views and to express those views independently to the court.

In the interview conducted with special guardians, absence of special knowledge and training on dealing with children with disabilities was emphasized as one of the main obstacles to providing access to justice to children with disabilities. Also, Centres for special guardianship are not equipped with interview rooms adapted to children with disabilities. Special guardians do not seek assistance from psychologists or other experts in providing accommodations to children with disabilities.

According to the Office there were no complaints concerning the treatment of children with disabilities in the court proceedings in Croatia. However, this should not be automatically attributed to the inexistence of barriers for children with disabilities in accessing justice in Croatian legal system. Also, as to the procedural position of children with disabilities in court proceedings, the Office considers it to be equal to the position of all children. In regard to the possibility of accommodating proceedings to participation of children with disabilities, the Office presented information concerning criminal proceedings. Although criminal proceedings are not the focus of the paper, provided information may be used as a relevant basis for the comparison with the information gathered in regard to civil proceedings. According to the Office, in criminal proceedings the judge has discretion in rendering all decisions aimed at providing assistance to the child with disabilities. These include decisions on assistance of an expert for the child with disabilities during the main hearing as well as decisions regarding availability of courtrooms. Along with the possibility of judges to request advice and input from the expert (usually a social pedagogue), the judge can also request participation and advice of experts from other relevant institutions. In the opinion of the Office, one of the main obstacles for children with disabilities in accessing justice is the fact that only a small number of advocates have the relevant knowledge for adequate representation of children with disabilities. In criminal proceedings, children as perpetrators of a criminal offence are appointed an advocate *ex officio*. Nevertheless, in order to be able to safeguard their children's rights, parents are also participants to the criminal proceedings. As to the sensitivity of judicial institutions towards children with disabilities, the Office considers almost all available facilities as not child-friendly and inadequate for interviewing children, including children with disabilities. Also, whether child-friendly information and advice will be available to children with disabilities depends on the sensibility of a particular judge conducting proceedings in question. Hence, as the necessary adjustment to the participation of children with disabilities in court proceedings the Office suggests education of judges, advocates and guardians as well as introduction of accessibility measures such as conduct of proceedings without delay and providing child-friendly rooms and assistance.

Given the delicate situation of providing a possibility for children with disability to participate in proceedings, along with general accommodations, certain specific adaptations in terms of

legal processes which should allow for a degree of flexibility which are responsive to the needs of individual children and the provision of individualised supports are suggested by Croatian legal experts and practitioners. Also, in the legal literature, measures such as sign language, augmentative and alternative communication (including interpreters trained in communicating with children with mental disabilities) and other accessible means, modes and formats of communication of their choice are advised.[48]Hence, building on the results of research into the court practice and experience of legal experts, in the concluding remarks we will try to indicate certain operational guidelines which could be useful for resolving observed problems and obstacles in enabling children with disabilities to obtain justice before Croatian courts.

4. CONCLUDING REMARKS

The first difficulty encountered in the research of the topic was gathering of relevant information. However, the lack of relevant information has to be considered in the light of the transformation which the Croatian family legislation has undergone recently. Namely, the recent reform was aimed at harmonization of proceedings involving children with the procedural standards prescribed in international and EU instruments. Although the imposed requirements of the new legal framework seek adjustments and intense efforts of legal practitioners in conducting proceedings which affect children with disabilities, in the most part they have been implemented successfully. Still, there is insufficient coordination among authorities which participate in the proceedings and a lack of an integral infrastructural support for judges. For now, only a small number of courts started to establish child-friendly interview rooms. Also, Croatian courts are not equipped with modern technology tools and communication devices which ensure that the child is interviewed only once and his responses recorded for further use in the proceedings. Having in mind all the systemic deficiencies, it comes as no surprise that similar to the EU Member States included in the EC research, there is no monitoring on how many children with disabilities come into contact with the judiciary or participate in court proceedings or on the outcome of the proceedings in Croatian legal system.[49]Therefore, the first recommendation would concern establishment of mechanisms for monitoring proceedings involving children with disabilities. This would provide for a possibility of a regular assessment if measures to ensure reasonable accommodations and adjustments to the needs of the individual child are taken in the course of the judicial proceedings. Although the conducted research did not ensure a comprehensive overview of the court practice, still the included cases can be considered as representative of proceedings involving children with disabilities. The analysis of the cases before the Municipal civil court in Zagreb revealed a consistency in the conduct of proceedings involving children with disabilities. Namely, in most cases proceedings were conducted in the manner in which proceedings involving children are regularly conducted. Usually, at the initial stage the court established that the case involves a child with disabilities due to which the child is not able to actively participate in proceedings. Even though this is true in a large number of cases, more

[48]Children's Rights for All! Implementation of the United Nations Convention on the Rights of the Child for children with intellectual disabilities (2009-2011), p. 33. URL= http://www.childrights4all.eu/wp-content/uploads/2015/01/CRC_EU_report.pdf Accessed 4 April 2018.
[49]Mental Disability Advocacy Center, *op.cit.* note 21, p. 5.

efforts should be undertaken to assess whether with certain accommodations a child with disabilities could be heard and his opinion acknowledged (even if it is non-verbal). Hence, in order to set up Croatian justice system to grant immediate access to courts to children with disabilities, there are three categories of obstacles which should be removed:

- No regulatory framework for access to justice for children with disabilities
- Inadequate administration of justice (exclusionary attitudes)
- Insufficient accessibility measures

In this sense, there is a range of interventions which should be considered:

- There are no provisions on proceedings involving children with disabilities in Croatian national legislation. Attention should be paid to providing a framework on proceedings involving children with disabilities in which reasonable accommodations would be ensured along with definition of methods to facilitate it.
- A more clear division of competence between the Office of the Ombudsman for children and the Ombudsman for persons with disabilities should be envisaged in order to ensure a mandate of one of them for representing a child with disabilities in proceedings before national and international courts.
- Education and training on conducting proceedings involving children with disabilities should be available to legal practitioners. Emphasis should be on the measures which they need to take in order to uphold the rights of children with disabilities in court proceedings. A distinction between an assessment of the evolving capacities of a child with disabilities in order to provide individual adjustments for his participation in proceedings and the established practice of the mere determination that due to the child's disabilities he/she is unable to participate in the proceedings should be made.
- Technical adjustments such as establishing child-friendly interview rooms and communication technologies should be accelerated.
- Special guardians from the Centre for special guardianship who act as representatives in proceedings involving children should be provided with additional training in order to be able to assist children with disabilities in accessing justice.

To conclude, reaching the objective of increasing access to justice for children with disabilities definitely calls for changes in regulatory framework and national plans in Croatian legal system. But more importantly, it makes it imperative to adopt changes in the approach, work towards better inclusion and overall raising of awareness of all participants in the process of providing equitable justice on the capacities, the needs andthe abilities of children with disabilities.

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Alice Bitutu Mongare[*]

COHABITEE: A THORN IN THE FLESH?, A KENYAN PERSPECTIVE.[**]

Abstract

For a long time, African men, from a patriarchal standpoint, have buried their heads in the sand when it comes to their mistresses and cohabitees, notwithstanding numerous legal provisions on cohabitation. In most cases, not many people knew about the other life of men until their demise, when the cohabitee - given the opportunity- could meddle in the deceased's property. Additionally, she could engage the bereaved family in endless legal battles, wanting a share of the deceased person's property. The matter has been a thorn in the flesh of the bereaved families as well as Kenyan courts. This holistic lacuna prompted the lawmakers to come up with a lasting solution to the problem. This resulted in a new Marriage Act that recognizes only five categories of marriage. The cohabitee seemed to have lost it, however they have not given up and have taken their fights to court. There has been a mixed reaction to cohabitation, as some courts take different standpoints. This paper attempts to establish whether things are any better for the cohabitee, the bereaved family, and the court generally with the new laws in place. The discussion utilizez a philosophical approach in the pursuit of conceivable remedies to the facets of interest. As a consequence, to the foregoing, the finding(s) of this paper comprises the hypothesis: that a cohabitee is not a wife for purposes of succession where a man had contracted a monogamous marriage prior to cohabitation: her children, whether legitimate or born out of a valid marriage relationship, are well provided for under the law: cohabitation is a reality that calls for a paradigm shift by possibly moving the court for a declaration on cohabitation as a brand of marriage for the purposes of inheritance.

Key words:

Cohabitee, intestate/testate succession, wife for the purposes of succession, thorn in the flesh, net intestate residue, minor.

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INTRODUCTION

A cohabitee is a common law wife who is recognised as the result of a long relationship with a man that resembles marriage.[1] Cohabitation finds anchorage in Section 3 of the Judicature Act[2] where common Law is recognized as one of the sources of Law in Kenya. The position on international law (common law position) forming part of the laws of Kenya, is further buttressed under the 2010 Kenyan constitution.[3] The doctrine of presumption of marriage is a common Law doctrine,[4] as already seen in Kenya it is sanctioned by the law. Cohabitation as already stated, though an English doctrine, has been adopted by Africans and has become an embedded perennial African *legal* practice even where the law forbids it.[5] The result of long cohabitation of male and female adults, without any celebrated known marriage, is significant for the females as it gives them identity.[6] It is a fact that subsists among the youths especially, due to varied rationales, namely: peer pressure; cost sharing; social need; immorality dimension, in some instances which eventually transform into a marriage.[7] The intricacy to these raised issues is that the parties involved do not adhere to their respective cultural or civil marriage formalization procedures of the relationships before one of the party's demise.[8]

Presently, there has been more confusion around cohabitation relationships, through the surfacing economic concept of *slay-queen,*[9] which is serving as a conduit for cohabitation and targets financially stable, married men.[10] Cohabitation, thus, for the youths due to social and economic reasons, begins in college life and matures to some form of a *relationship.* In some cases where a man had contracted a monogamous marriage, such a man could cohabitate secretly so as not to cause pain to the man's other marriage and family members, and because of the legal consequences.[11] It is also not a legally recognised form of marriage where a man

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[1] *The Marriage Act: Laws of Kenya* Nairobi, Government press No. 4 of 2014, Section 6, p. 8.
[2] *Judicature Act Cap 8 Laws of Kenya* Nairobi, Government press section 3, p. 5.
[3] The Constitution 2010, Article 2(5&6) also see Karen Njeri Kandievs Alssane &another, Ouko, Kiage & M'Inoti ,while commenting on international law on ownership of proper that kenya is monist State by dint of embracing it without domesticating statute.
[4] N. Hiekel & C. A. Liefbroer, A. Poortman, "Understanding the Diversity in the Meaning of Cohabitation Across Europe" *European Journal of Population* Vol. 30 Issue 4(2014):391-410.
[5] M. A. Angawa, *Procedure in the Law of Succession* Nairobi: Law Africa, 2011, p. 2. Also see Winnie Kamau's customary law and women's Rights in Kenya. <http://theequalityeffect.org/wpcontent/uploads/2014/12/customaryLawAndWomensRightsInKenya.pdf accessed on 28 October 2018.
[6] ibid.
[7] S. Mzangila, "Here are some Facts about Cohabitation", *Standard Digital*, 16 July 2017. <https://www.standardmedia.co.ke /article/2001247755/here-are-some-facts-about-cohabitation > (accessed 16 July 2018). Also see *Constitution of Kenya 2010* (Nairobi: Government Printing Press), Article 45(2)
[8] W. Kamau, *Judicial Approaches to Applicability of Customary Law to Succession disputes in Kenya,* East African Law Journal (l2015) p.140.
[9] Keloduma, Slay queen, November 06, 2017<www.urbandictionary.com/define.php?term=Slay%20queen> accessed on 30/9/18.
[10] J. Chigiti, "Cohabitation and the Law" *The Star newspaper* 22nd August 2012 > (Accessed 15 July 2018).
[11] S. Mzangila, "Here are some Facts about Cohabitation" *Loc. Cit*, see also C. Kipkurui, Family *Law- Cohabiting and its legal implication in kenya also see* Patricia Kameri Mbote *'Gender dimensions of law, Colonialism and inheritance in eastern Africa: Kenyan women's experiences' IELRC Working paper 2001<http://www.ielrc.org/content/w0101.pdf>* accessed on 20 sept 2018.

had first contracted a monogamous marriage.[12] However, if the said married man, having celebrated a marriage under a monogamous system, involves himself in a cohabitation relationship, while the monogamous marriage is still subsisting,[13] a criminal offence is committed with a prescribed penalty under Kenyan laws.[14] Things get more complicated when such a man dies intestate, that is, without writing a will on how his property is to be distributed among his beneficiaries.[15] Cohabitation, even though an adopted western doctrine, has become a perennial African *legal* problem. Besides the above demonstrated confusion, the men financially supported the cohabitees fully without thinking of their official wives and/or children.[16]

Notably, in the event that the cohabiting man dies in the hands of the cohabitee, intestate,[17] the cohabitee holds on to the death certificate and colludes with urban local administrators also known as chiefs. They issue a certificate in the form of a letter confirming that the cohabitee and her children are the sole beneficiaries of the deceased's estate.[18] It is important to note that the local administrator (chief), being on the ground and familiar with the deceased's survivors, informs the court under intestate succession the beneficiaries of the deceased person.[19] The local administrator's letter is an important document that assists the court in checking cases of disinheritance against the rightful heirs as provided for under section 29 of the Law of Succession Act (LSA). The official deceased's family could also ask for another death certificate and the local administrator's (the chief's) letter from their rural village.[20] This pull and push derails the succession process in court, and the painful part is when the court finds that the cohabitee is not a recognised wife for purposes of succession. As has been decided in several cases, for instance, Justice Mwera, while faced with similar circumstances, revoked a grant for being irregularly obtained.[21] Justice Hayanga[22] also decided that: Protective powers have to be exercised against wrongful disposal and intermeddling of property of the deceased person. To add insult to injury, the *mainstream or official wife is* never in the picture concerning

[12] *Case v Ruguru Nairobi,* [1970] EA 55, where the plaintiff alleged that the defendant used to assault him and sought the court's declaration that the defendant was a trespasser. Since he had contracted a monogamous marriage that was still subsisting.

[13] Kamau W. Op.Cit (n.7) p. 151

[14] *The Penal Code: chapter 63 Laws of Kenya* section 171. Also see Chigiti on intermeddling of property of a deceased person Daily Star News https://www.the-star.co.ke/news/2013/08/28/meddling-with-a-deceaseds-property-is-a-crime_c821754 >accessed on 9 November 2018.

[15] Ang'awa, *Procedure in the Law of Succession*, *Loc.Cit*.

[16] Men ignore their families for mistresses and cohabitees

[17] *Ibid. also see see* Patricia Kameri Mbote *'Gender dimensions of law, Colonialism and inheritance in eastern Africa: Kenyan women's experiences' IELRC Working paper 2001<http://www.ielrc.org/content/w0101.pdf>* accessed on
20 sept 2018.

[18] Chigiti on intermedaling with property of a deceased person daily Star Newspaper Nairobi< https://www.the-star.co.ke/news/2013/08/28/meddling-with-a-deceaseds-property-is-a-crime_c821754> accessed on 9 November 2018.

[19] Ang'awa, *Procedure in the Law of Succession*, *Op. Cit*., p. 6.

[20] ibid

[21] Richard Katiwa Muli vs John Kisalu Nguli Machakos HCCC No.21 of 1998 (OS) Mzangila Snr on facts on cohabitation.

[22] In the matter of the estate of Mohammed Saleh Said Sherman (deceased) Mombasa High Court Succession Cause No. 145 of 1998.

the existence of any other *marriage in the form of cohabitation* involving their deceased husband.[23] The reason for the shock is because she is married under a system that does not allow the husband to contract any other marriage as was determined by Justice Bosire.[24] The widow is slapped with the news about the husband's cohabitation relationship at the time of her late husband's burial arrangements.[25] That is, when the cohabitee seeks recognition in the burial programmes and or arrangements for the *deceased husband.*[26] The above background was the genesis of the problem at hand.

1. COHABITATION LEGALITY VS ILLEGALITY IN KENYA

In certain circumstances, cohabitation may be recognised as a form of marriage, but only under the fulfilment of certain conditions.[27] Justice Mustafa determined the key points to note if a relationship is to be recognised or presumed as a marriage in Kenya.[28] To wit: the parties seeking to be recognised as husband and wife or the cohabitants must have cohabited for a long time without being married under any form of system; they must have held out to the public as being husband and wife; the cohabitee and the children in the said relationship must have financially depended on the deceased man. Additionally, the children in the cohabitation relation must have identified with the man by naming him their father. The cohabitants may have bought property together which would move the relationship from the realm of concubinage to marriage. In some cases, in the course of cohabitation, a token dowry may have been paid.

Cohabitation is clearly an English common law creation,[29] that is sharply contrasted with the purported presumption of marriage by African married men, and is also contrary to the Kenyan marriage laws. This also is the position in circumstances where a man was in a monogamous marriage which is still subsisting.[30] According to the English, from where the doctrine originated, the parties had to be single and no other relationship or any form of relationship was entertained, other than the two unmarried persons cohabitating.[31] Conversely, cohabitation for the African men in most cases is practiced contrary to the real meaning and spirit behind it.[32] The said African men would have mistresses and cohabitees, while at the same time actively

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[23] Mzangila l*oc. cit* see also Kangahe on where becoming a widow is the worst thing https://www.nation.co.ke/lifestyle/dn2/957860-4176078-1bv60c/index.html> accessed on 9 Nov 2018.
[24] Mary Wanjiku Githatu V. Esther Wanjiru Kiarie [2010] eKLR.
[25] Mazingira, "Here are some Facts about Cohabitation" *Loc. Cit*.
[26] Anastacia Mutheu Benjamin vs. Lakeli Benjamin and another Nairobi CACA No. 6 of 1979.
[27] Evidence Act Cap 60 laws of Kenya, Rebuttable presumptions of law section 4
[28] Hortensiah Wanjiku Yawe vs Public Trustee Civil Appeal No. 13 of 1976, Court of Appeal Nairobi.
[29]Patricia Kameri Mbote *'Gender dimensions of law, Colonialism and inheritance in eastern Africa: Kenyan women's experiences' IELRC Working paper 2001<http://www.ielrc.org/content/w0101.pdf>* accessed on 20 sept 2018.
[30] Kamau W. loc. cit n 7
[31]N. Hiekel & C. A. Liefbroer, A. Poortman, "Understanding the Diversity in the Meaning of Cohabitation Across Europe" *European Journal of Population* Vol. 30 Issue 4(2014):391-410.
[32] N. F. Dodoo, & K. Megan "Cohabitation, Marriage and 'Sexual Monogamy in Nairobi", *Social Science Method Vol. 64 Issue 5*(2007):1067-1078.

living with their wives whom they had married in systems of marriages that did not allow them to contract any other marriage.[33]

There are very minimal cases were the official marriages, that is if the first marriages were polygamous in nature, due to cultural practices, gave men the ability to legalize the cohabitation relationship into customary marriage, if they so desired.[34] On the other hand, the majority of these men cohabited while in a monogamous marriage, leading to it being regarded as an adulterous relationship.[35] Within the Kenyan laws, some of the marriages that do not allow one to contract any other marriage include: civil marriages, Christian marriages, and Hindu marriages, all which strictly advocate for one man one wife. Hence, the question this paper seeks to answer is whether cohabitation is a thorn in the flesh of the bereaved family, Kenyan society, and by extension the courts that have to decide cases on cohabitation brought before them.[36]

The study focuses on scenarios where there is a subsisting monogamous marriage in the life of the man. In most cases, the official wife never knows about the cohabitee until the husband dies intestate. The cohabitee shows up seeking to be recognised as one of the deceased's dependants and demands to participate in burial arrangements of the deceased. Further, the cohabitee engages the bereaved family in endless court battles seeking to have a stake in the deceased man's estate. Justice Mabeya, while faced with a burial dispute of this kind between a spouse and the cohabitee, decided that the spouse had a leading role in the deceased husband's burial arrangements.[37]

2. THE TYPES OF MARRIAGES RECOGNISED UNDER THE MARRIAGE ACT AND THE POSITION OF THE COHABITEE IN KENYA.

To end the unwarranted war over cohabitees the law makers amalgamated all the marriage laws into a *one stop shop hereinafter* known as the Marriage Act 2014. The existing marriage laws prior to the Marriage Act were the African Christian Marriage Act, the Civil Marriage Act, the Hindu Marriage Act, the Islamic Marriage Act, and Customary Marriages.[38] The guiding question is: *whether the new marriage Act 2014 will resolve the problem at hand.*

This section of the paper critically examines the position of a cohabitee under the Marriage Act and The Law of Succession. As already stated, The Marriage Act recognises several types of marriages:[39] The *Christian marriage, the civil marriage, the Hindu Marriage,* which are monogamous by nature and provide for one man one wife. The Christian marriage is celebrated in churches and temples and it is officiated by priests or pastors.[40] The civil marriage is

[33] The repealed Marriage Act and the African Christian Marriage Act Cap 150 &151.
[34] E. Cotran, *Restatement of African Law: 2 Kenya 11 The Law of Succession* (London: Sweet &Maxwell, 1969), p. 133.
[35] Dodoo & Klein, "Cohabitation, Marriage and 'Sexual Monogamy in Nairobi", *Loc. Cit.*
[36] Mzangila l*oc. cit*
[37] John Omondi Oleng & another vs Sueflan Radal [2012] eKLR.
[38] W. Kamau loc. Cit 7.

[39] *Ibid,* also see marriage Act 2014 at p 8.
[40] Cotran, *Restatement of African Law*, *Loc. Cit*., p. 133.

celebrated before the registrar of marriages at the Attorney General's office or before the district commissioners. The Hindu marriage is celebrated in the Hindu shrines and officiated by the Hindu ministers. Legally, in these scenarios, there ought to be no room for any other type of marriage while the statutory marriage subsists. In circumstances where the man cohabits, while his other monogamous marriage subsists, that other relationship with the cohabitee is considered *as an adulterous relationship.*[41] Cohabitation in this scenario is a crime known as *bigamy* if proved that the man cohabited while the monogamous marriage subsisted, and is punishable both under English and Kenyan Law.[42].[43]Additionally, in circumstances where the monogamous marriage relationship had gone sour, before the spouses officially divorced, there was no room for celebrating any other form of marriage.[44]

The customary marriage and the Muslim marriage are potentially polygamous by nature. Under Islamic law, a man may marry four wives at any time, with special ceremonies carried out to seal each marriage. The African customary law marriages were and still are potentially polygamous and the men are allowed to marry as many wives as they can accommodate. There were, however, special ceremonies that were conducted for these marriages to be deemed authentic. They included, for instance, introduction, meaning ceremonies carried out to enable the in-laws to be to know each other.[45] This was followed by dowry payment, that is the payment of the bride price, and finally a wedding was conducted.[46] The legal status on inheritance for the cohabitee in Kenya is clear, that is, cohabitees are not recognized as wives for the purposes of succession.[47] The foregoing Kenyan legal viewpoint creates room for a flood gate of dilemmas. This paper looks at the applicable law and the courts' construction or interpretation of the existing laws in relation to the cohabitee's fate regarding succession.

3. LEGAL REGIME GOVERNING SUCCESSION IN KENYA AND THE POSITION OF THE COHABITEE.

It is important to note that in Kenya, whether a person dies testate (where one dies leaving a will behind) or intestate, distribution of his/her property must be in line with the Law of Succession Act Cap 160 (herein referred to as the "Act" or LSA).[48] The Act is the seminal legislation with universal application in regard to both testate and intestate succession as provided for under the preamble to the Act, and Section 2(1) of Cap 160.[49] Further, the laws

[41] Kizito Charles v Mary Rose Vermour alias Rose Moraa Civil Appeal No 61 of 1984: also see Also see Phyllis Njoki and 2 Others Vs Rosemary Mueni Karanja &Another
[42] The Bigamy Act of 1604
[43] Section 171, Penal code Laws of Kenya
[44] Kizito, case
[45] E. Cotran, *Casebook on Kenyan Customary Law* (New York: McGraw-Hill Professional Publishing, 1987), p. 18.
[46] *Ibid*.
[47] *The Law of Succession Act: Laws of Kenya* Nairobi Chap. 160.
[48] *Ibid.*
[49]Section 2(1) of cap 160 provides that the Act *has universal application*, in regard to both intestate and testamentary succession except as otherwise provided by the provisions of the Act.

applicable to succession matters for anyone who died after 1981 and domiciled in Kenya is the Law of Succession Act (LSA) Cap 160 laws of Kenya.

Mistresses under the law of succession have the same fate as cohabitees, that is, they are not wives for the purpose of succession, and the position is also true under both Cap 160 and Marriage Act as wives for purposes of inheritance. Under Section 2 of the Marriage Act 2014 Laws of Kenya, 'cohabit' is defined as: a living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.[50] Further than engendered connotation, cohabitation is neither recognized as a form of marriage under the marriage Act, nor discussed anywhere, in the Act other than giving the meaning of cohabit. To say the least, the definition given under section two is hanging as *an island*, in absence of any explanation and/or recognition of cohabitation as a form of marriage in the Act, it is a *shell* that was forgotten by lawmakers after *the occupant was killed*. The cohabitees hence are not married but have embraced a relationship that resembles a marriage. They have to demonstrate that they are husband and wife even though not formally recognized.[51] They must also show that there are no inhibiting factors that bar their cohabitation relationship being recognized as a marriage.

The Law of Evidence Act Cap 80 laws of Kenya provides for presumption of marriage and imports the common law meaning of presumption of marriage.[52] Under both the Marriage Act and Law of Succession Act Cap 160, cohabitees are not wives for purposes of succession. The law provides that for any marriage to be recognized as a marriage under the said laws in Kenya, it has to be registered.[53] Registration, however, is only available in the five forms of marriages as stated above. The question is whether if the cohabitee relationships were to find anchorage in law, how many cohabitees would be ready to have their relationship with married men publicly known. This probably explains why these relationships remain secretive until the demise of the man.[54] However, there are pending cases before court, after the Kenyan Attorney General's legal notice no. 46/17 on registration of all marriages Kenya. The courts still determine each case on its own merit, as the said legal notice cannot apply retroactively.[55] For instance, Justice Majanja, in a burial dispute brought before him, held that there was a presumption of marriage in the circumstances. The parties in this case were not married under any form of system but Cohabited and had issues out of the said cohabitation. He ordered that the cohabitee spouse should dispose of the remains of the deceased.[56]

[50] The Marriage Act Laws of Kenya, 2014. Section 2.
[51] Civil Appeal No. 13: *Loc. Cit.*
[52] *The Evidence Act: Laws of Kenya*, Nairobi The National Council for Law Reporting, 2012/2014, Chap. 80.
[53] The legal notice no 46/17 , also see Wairimu Mercy, unregistered customary marriage illegal < https://www.the-star.co.ke/news/2017/08/03/unregistered-customary-marriages-illegal-as-ag-order-takes-effect_c1609722>Accessed on 9 November 2018.
[54] Kirui C illegal marriages in kenya < https://www.academia.edu/18580788/FAMILY_LAW-_COHABITING_AND_ITS_LEGAL_IMPLICATION_IN_KENYA>accessed on 15th August 2018.
[55] Beatrice Chelangat Cheluget: Kisii HCA 10 of 2018
[56] ibid

4. DISTRIBUTION OF THE DECEASED'S PROPERTY, DOES A COHABITEE HAVE A REPRIEVE?

The other question is distribution of the deceased person's property, where the deceased is survived by more than one spouse. The question is how the law advocates distribution of the deceased's property among the surviving spouses and dependants, with a view of establishing the cohabitee's position if any. A surviving spouse includes a separated wife, however, a divorced wife's benefits is qualified. A cohabitee is not mentioned anywhere in the law as a surviving spouse. A divorced wife can only claim under section 26 of the law of succession Act for reasonable provision if what was provided in form of alimony was not sufficient on the basis of section 28 of the law of succession Act. The courts consider the guidelines under section 28 of the Act when distributing the deceased man's estate. Of importance is the nature and amount of the deceased's property and the future needs of the dependants.[57] Under section 35 and 37 of the Law of Succession Act, the surviving spouse is entitled to deceased's personal household effects absolutely. She is also entitled to a life interest on the residue of the net intestate estate.[58] Section 3(1) of the Act defines personal effects to mean clothing, articles of personal use, furniture, utensils, pictures, and decorations associated to a matrimonial home. The residue net intestate estate means property that remains after all the beneficiaries have their shares. The residue net intestate estate is to be enjoyed by the surviving spouse in her lifetime and on her demise the property passes to the intestates' children.

In instances where the surviving spouse has no children, section 36 of the Act provides that she is entitled to personal effects and 10,000 Kenya shillings of the residue net intestates or 20% thereof, whichever is greater. She loses this share upon re-marriage. Where the deceased was polygamous section 39 and 40 provides how the property is distributed. That is, the property shall be distributed according to the number of children for each wife, and the wife is considered an extra unit. The customary marriages also included a special type of marriage arrangement known as *woman to woman marriage*. From the African standpoint, a boy child is very important in the family and prior to this Act and the 2010 constitution, a girl child was not entitled to inherit.[59]

Women who did not have a boy child were allowed *to marry a woman* to give birth to sons on their behalf. This kind of marriage was known as woman to woman marriage.[60] If the woman was barren she could also marry a woman who would sire children for her. Arrangements were made, she- *wife* lived with a man appointed by her *woman-husband* and the children she gave

[57] In the Matter of Humphrey Edward Githuru Kamuyu deceased Nairobi HCSC No. 2322 of 1995 where justice vishram held that only free estate is available for this purpose. Not property that has already passed to other beneficiaries.

[58] This was determined by Justice Waki in the matter of the Estate of Aggrey Makanga Wamira in Mombasa HCSC No. 89of 1996.

[59] Cotran, Restatement *of African Law, Loc. Cit.*

[60] Estate of Tabutanyi Cherono Kiget (Deceased)Kericho HCP&A157 of 2001 Kimaru J ordered that the deceased *woman husbands'* estate to be distributed like any other customary marriage. The decease's daughters had wanted to disinherit the woman in the circumstances the court said this was a customary marriage. A grant of letters of administration issued to deceased daughters was revoke to pave way for the special customary wife to inherit her woman husband.

birth to were considered the barren woman's or *Woman- husband's*. The same rules of intestacy distribution applied to her on the deceased *woman husband* personal effects absolutely, and life interest in the net residue. The cohabitee is not mentioned anywhere in this intestate distribution of the deceased's property.

4.1. THE CURRENT POSITION OF COHABITEES AND OR MISTRESSES AFTER THE PASSING OF THE MARRIAGE ACT 2014

As already seen, a cohabitee and/or mistress is not legally recognized as a spouse under the current marriage laws in Kenya.[61] The positions are aggravated where the deceased man contracts a monogamous form of marriage which continues to subsist. The law is silent on marriages by cohabitation and as such, a cohabitee and or mistress is not entitled to inherit the deceased's property. In regards to intestate succession, mistresses and cohabitees do not fall among the list of dependants provided under section 29 of the Law of Succession Act, and hence they bear no rightful claim over the deceased's estate (in case the deceased dies intestate) section 29 gives the list of dependants in the following manner:

''Meaning of dependant for the purposes of this part, "dependant" means:

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and CAP. 160 Law of Succession [Rev. 2015] [Issue 1] L13-16,

c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.''

The law of succession in Kenya which is premised on Cap 160 as seen above recognizes only a wife or wives in polygamous marriages and former wife for purposes of succession.[62] Section 3 of the law of succession provides that a former wife is a separated wife. Cohabitees and mistresses neither fall under section 3(2) of Cap 160[63] which defines a wife, nor under Section 3(5) of the Act, which provides for wives married in a polygamous marriage to a husband who had previously or subsequently contracted a monogamous marriage.[64]

To intervene between the customary law and English law stance on marriage, **Section 3(5) of Cap 160** was passed to cover for the customary law wife who was married under customary

[61] R L A vs F O & another [2015[] eKLR, Civil Suit 205 of 2015.
[62] Winnie Kamau op. cit (n 7)
[63] Law of Succession Act cap 160, Section 3(2) of Cap 160 states: "wife" includes a wife who is separated from her husband and the terms "husband" and "spouse", "widow" and "widower" shall have a corresponding meaning.
[64] Law of Succession Act cap 160, Section 3(5) states: Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act

marriage, and subsequently the husband married under statute which advocated for one wife and one man. Thus, the abandoned woman married under African customary marriage was protected under section 3(5) and could inherit the husband's property in case of intestate succession. Notably, section 3(5) of the law of succession *does not aid a cohabitee and or mistres*s. This was so stated: *In the Matter of the Estate of Stephen Ng'ang'a Gathiru (deceased)*[65] before Justice Waweru J, the court adjudged that the applicant was not a wife or former wife of the deceased, as she did not fall within the definition of dependent in section 29 of the Act (Cap 160) and therefore she could not bring an application under section 26 of the Law of Succession Act for inheritance. Thus, section 3(5) of LSA does not aid a cohabitee, she is also not represented under the list of dependants under section 29 of the LSA.

4.2. ARE THERE CIRCUMSTANCES WHEN A COHABITEE AND OR MISTRESS WOULD INHERIT FROM THE ESTATE OF A DECEASED?

Succession in a nutshell is two pronged: Testate, where a deceased person dies leaving a will, and intestate, where he/she dies without a will. The analysis above espouses the position of mistresses and or cohabitees with regard to intestate succession under Part V of the Law of Succession Act chapter 160 laws of Kenya. Under testate succession (Part II of Cap 160), a will captures the intentions of the deceased on whom he/she wants to benefit from his/her estate. In other words, a will is a manifestation of the testamentary freedom expressed by a testator, this freedom being provided for under section 5 of the Act. Section 5 provides in the following terms: Persons capable of making wills and freedom of testation,

'' *(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses. (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person. (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges….''*

It is important to note that this freedom is not *a blank cheque* and has to be in accordance with section 26 of the Act. The states provides that the testator must first sufficiently provide for his dependants as stated under section 29 of the Act before giving gifts to non- beneficiaries. According to Sir J.P. Wilde in the case of: *Lepage vs. Goodban:*[66] *the will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute.* In this case the statute governing succession issues is cap 160 (LSA). In order to be considered as valid,[67] a testator must have testamentary intention (*or animus*

[65] Nairobi HCSC No. 500 of 1992.
[66] (1865) LR 1 P&D 57.
[67]Section 3 of Cap 160 offers a statutory definition stating that it is the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil. Cap 160 Laws of Kenya.

testandi) that is he must intend the wishes to which he gives deliberate expression to *take effect only at his death*.[68]

Section 5 of Cap 160 regards persons who are capable of making wills and freedom of testation, (Testamentary freedom). In explaining this doctrine of testamentary freedom in the case of*: Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR,*[69] the judges in court of appeal in this case stated authoritatively that:

"*…. This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. Nevertheless, like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime."*

The concept of testamentary freedom vests the freedom to distribute his property as he wishes upon a person/testator.[70] This means if a testator names a mistress or cohabitee in his will and the will is not challenged in court or/and if challenged in court the court in its wisdom upholds the bequests under the will, then the mistress or cohabitee stands to inherit from the estate of a deceased. The only is that he must exercise this freedom responsibly and his wishes must not be repugnant to law and morality.[71] Further, he must endeavor to provide for all his dependants.[72] The concept is premised on the ideology that man wishes to have some control over his property even upon his demise by leaving a will.[73] Based on the above, it is possible for a cohabitee or mistress to inherit under a valid will as long as the testator sufficiently provides for his dependants.

4.3. POSSIBLE REPRIEVE FOR MISTRESSES AND OR COHABITEES

The arguments expressed below did not consider Legal notice No 46 of 2017 as issued by Attorney General of the Republic of Kenya. The effect of the legal notice being that all marriages as discussed above ought to have been registered with the Registrar of marriages. The registrar's office is a department in charge of Marriages within the Attorney General. The job of the registration of marriages was to curb the many property cases taken to court on claims that one was a wife. However, a cohabitee or a mistress can also bring an application under section 26 of Cap 160 as a seminal law on succession which states in the following terms:

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[68] Parry & Kerridge, *The Law of Succession*, 13th Edition (New York: Palgrave, 1998), p. 35.
[69] Kenya Law Reports, Civil Appeal 128 of 1995.
[70] Law of Succession: *op. cit.* Section 5(1), Chapter 160.
[71] Per Justice **Maina. J*, James Maina Anyanga v. Lorna Yimbiha Ottaro 2014 eKLR.***
[72] The Marriage Act: *Loc. Cit.* 8.
[73] Musyoka, W. *Law of Succession* (Nairobi: Law Africa, 2006), p. 2.

''Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate affected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant,..... order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate. [Act No. 8 of 1976''

This will be on the basis that she was a dependant and or a cohabitee of the deceased by way of long cohabitation and mainly receiving financial support provided that the estate is capable of sustaining this support going forward. However, the provision is subjective because it depends on the court hearing the case. Some cohabitees have moved to court for provisions on dependency and cohabitation only to be slapped with a ten shillings reward, for instance in a case that was decided by Justice Joyce Aluoch.[74] Provided that the man had not contracted another marriage under a system that does not allow him to contract another marriage, the provision will be on the basis of the general rule that long periods of cohabitation give rise to the presumption of marriage.

The above doctrine is described in Section 119 of the Evidence Act,[75] which states that, "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Courts presume that a marriage existed if the parties acted and intended to live together as husband and wife. The courts deciding the current position and giving property to cohabitees seem to base their argument on the above provisions of law. It is worth noting that regardless of all these laws, all matters of succession taking place after 1981 are governed by the law of succession cap 160. The said statute is silent on the fate of cohabitees except *by construction* (interpretation) by the courts.[76] Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted individually by strong and weighty evidence to the contrary."[77]

This has however changed in Kenya in that if anyone is to be recognized as a wife, the relationship has to fall within the five types of marriages provided under the marriage Act. Further, it has to be registered with the Registrar of marriages as at 1st August 2017. Additionally, in a similar scenario when a Jewish man cohabited with a Christian woman for 28 years, there was the general reputation that they were married and their children were baptized as Christians of both "husband" and "wife," the husband's relatives declined to

[74] Justice Joyce Aluoch, currently one of the ICC Judges, on several occasions discouraged cohabitation by giving a valueless reward to the cohabitee applicants such as kenya shillings ten it cannot buy even one piece of onion.
[75] The Law of Evidence: *op. cit*. 25, CAP 80.
[76] *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi HCSC No. 1903 of 1994 (Kamau J)).
[77] In *Re Estate George Robinson Wangome Thiga (Deceased) succession cause 127/2011*

recognize the marriage. The Court held that there was a presumption of marriage and the onus was on the person denying it to rebut the position.[78]

The principles for determining a marriage out of cohabitation were clearly set out in a series of past decisions, prime among them as stated being the case of *Hortensia Wanjiku Yawe* v *Public Trustee Civil Appeal 13/76,* Mustafa J stated,
'*I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor, long cohabitation as man and wife gives rise to a presumption of a marriage in favour of the Appellant. Only cogent evidence to the contrary can rebut such a presumption. '*In *Re: Laplin-Watse* v *Tate,1973(3 ALL, ER 105)*

Wambuzi J stated therein*, "The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted*." In the absence of evidence of such cohabitation there can be no basis for making the presumption of marriage.

While contrasting the above two decisions, In *Re Estate George Robinson Wangome Thiga (Deceased) succession cause 127/2011* the matter before the court was succession, in which the court held that the petitioner (cohabitee) having established cohabitation, was further required to establish that she was a dependant of the deceased or at least qualified to be considered as a dependant of the deceased. Failure to prove dependency meant that the cohabitant could not benefit from the estate of the deceased.

In the case of *Moses Nderitu & Dorcas Njoki Nderitu* v *Peter Irungu Gathuita & Abigael Njoki Mwangi Succession cause 630/2012*, the court, while determining the existence of cohabitation between the parties herein, stated that "in sum, there was no sufficient evidence placed before this court that established a Kikuyu customary marriage or marriage by cohabitation and repute between the deceased and Peter Irungu Gathuita. The two could have been having a relationship but no marriage…" The court thus revoked the grant of letters of administration that had been issued to Peter Irungu Gathuita.

In the case of Mary Njoki v John Kalyanji Mother and others, Mary Njoki was a girlfriend of the deceased since her university days in school of law. They were to be seen together during the holidays, and he would save some money from his allowance and send to her at campus. After their graduation they lived together at different places, and after the deceased died, Njoki sought a share of the deceased estate. This move was opposed by the deceased's brothers who argued that she was not a wife. The court held that the presumption of marriage could not be upheld here, and the judges stressed the need for quantitative and qualitative cohabitation, meaning of substance and for a long duration. They gave such examples as: having children together and/or buying property together, which would move a relationship from the realm of concubinage to marriage.

[78] Goodman v Goodman (1859) 28 LJ CH. 742.

Under Misc364/198, Kizito Charles v Rosemary Moraa Vermour the case sets out the principles for determining a marriage out of cohabitation. In this case, the Appellant sued for trespass and various acts of nuisance and a declaration that the Respondent was never his wife. The Respondent had been married to Mr. Vermour who had fathered one of her children and they had gotten married in a marriage of convenience.

She had been a headmistress of a high school and a pregnancy would have embarrassed her before the staff and students. Mr. Vermour left for England whereupon she moved to stay with the Appellant for four years and had three children. Trouble started when they had a mentally disabled child. It was argued in court on her behalf that a presumption of marriage be held. The court held that no marriage could be held and the marriage between her and Mr. Vernour had not been over, she had no capacity to marry and her cohabitation was adulterous which had unfortunately brought forth children.

5. THE FATE OF CHILDREN OF THE COHABITEE

As already discussed above, Section 29 of the Law of Succession Act gives meaning to the word "dependant". Section 66 of the Act gives the order of priority of persons to inherit the deceased's estate. It includes, *inter alia,* the wife, wives and former wife or wives. They are followed by children of the deceased whether or not maintained by the deceased immediately prior to his death. They include any child of the deceased, whether by his lawful wife or not, as long as there is sound evidence giving effect to the fact. Toward this end, the law appears to be fairly clear and children sired as a result of what would otherwise be referred to as an "unfortunate union" retain the right to adequate provision[79] in the estate of the deceased. The court would interfere with the freedom of a testator in a testate succession who, for whatever reason, fails to make adequate provision for his step children. Step children are children of the cohabitee, sired by a different person other than the deceased. The courts can, pursuant to section 27 of the LSA, make adequate provision for the disinherited dependant.

In case of the children of the deceased, Section 35(5) deals with what should happen in the event of the death of the surviving spouse or the re-marriage of the widow. The whole net intestate estate, that is the portion subject to the life interest, is split between the surviving children. The cohabitee does not enjoy this right, however, in an instance where there are children from the cohabitee, the property should be divided equally among all of the deceased's children. Due regard should be taken where any property is held in a trust for a child, any previous benefits, any power of appointment, or any award of the court made under section 35(3) and (4). Instances where the power of appointment is unreasonably done and one of the children or his representative challenges it in court, the court will be guided by section 26, 27, 28 of LSA.

[79] Adequate provision is not equity or equality in distribution. The dependants cannot complain that the distribution was unfair or unequal, he can only say that he has not been provided for at all or that the provision is not adequate for her needs considering the extent of the Estate and the circumstances. The issue of equity in distribution was settled in the case of John Gitata Mwangi & Others v Jonathan Njuguna Mwangi & Others.

5.1. CHILDREN BORN BEFORE COHABITATION

This segment delineates that children born before cohabitation are deemed to be those who could be children of the cohabitee sired by another man other than the deceased. In *the Matter of the Estate of Jonathan Mutua Misi (deceased) P&A95/ 1995,* it was held that a child of *an adulterous union and/or* cohabitation is entitled to inherit from his father. This is because he is his offspring and cannot be expected to prove his mother's marriage to his father. Furthermore, the Court of Appeal in *John Ndung'u Mubea v Milka Nyambura Mubea civil appeal no.76/1990* held that the children of an adulterous union are children for the purposes of succession. Children that are sired by another man other than the deceased but the deceased acknowledged as his are to inherit. This construction resonates well with the 2010 constitution of Kenya.[80]

5.2. MINOR CHILDREN AND THEIR SHARES

The share of the estate that is to devolve upon minor children below 18 years old[81] is to be held in a statutory trust, set out in section 41 of the Act. The section provides that the share for the children is to be divided equally between the children of the intestate living or *en ventre sa mere* (infants). However, this is subject to such children reaching the age of eighteen years. To strengthen this position, in *the Matter of the Estate of Joseph Kimemia Gichuhi succession cause no. 1072 of 2002*, it was held that section 41 of the Act requires that the property being given to the children should be held in a trust until they turn eighteen.

Additionally, in *the Matter of the Estate of Loice Njeri Ngige succession cause no.113 of 1994,* the court directed the administrators of the deceased's estate to open bank accounts on account of the minor survivor. It was further directed that the administrators' trusteeship was to terminate upon the minor survivor coming of age: when all the property held in trust for the minor should revert to her. Where the cohabitee's children are minors, she holds the property in trust with another adult member of the deceased's family as trustees.[82] This position is reached by the court, as the deceased's family does not willingly hand over the property freely to the cohabitee in trust for her minor children.

6. CONCLUSION.

Legal notice no. 46/17 issued by the attorney general of Kenya is a caveat,[83] requiring that even traditional marriages should be registered by 1st August 2017. The effect of this is that the presumption of marriage may come into question, thus limiting the possibility of a cohabitee or mistress getting a reprieve, as argued above. However, if she had complied with all requirements for cohabitation to be presumed as a marriage, she can register the marriage under

[80] Constitution of Kenya (2010) Article 27, see also Children's Act, No. 8 of 2001.
[81] F.J Heather Francis, what age do you need to inherit a trust from a will< https://info.legalzoom.com/age-need-inherit-trust-will-25855.html>accessed on 12 November 2018.
[82] ibid
[83] Legal notice no. 46/17 by the *Attorney General of Kenya on Registration of Marriages* (Nairobi Government Press).

customary marriage and may enjoy the above reprieve. However, if the deceased had celebrated a marriage under a system that does not allow him to contract another marriage, then the above reprieve is unavailable to the cohabitee.

The role of women in matters of intestate succession, even where a valid marriage exists, is significantly limited. For example, a surviving spouse with no children is, pursuant to section 36 of the LSA, only entitled to the personal and household effects of the deceased husband absolutely and either the first 10,000 KShs. or twenty percent of the residue of the net intestate estate and a life interest in the whole remainder as long as she does not remarry. Residue in the net intestate means the remaining intestate's property after distribution and payment of debts owed by the deceased's estate. It is apparent that a surviving spouse is restricted by law in her dealings in a significant portion of the estate of a deceased spouse by about 80%, yet she is a valid spouse. Should this, then, be treated as a forecast of the unfortunate, yet inevitable fate of a cohabitee, one that the law is deliberately blind to?

Cohabitation as discussed above has little or no chance of assuring succession under intestate succession. But under testate succession the cohabitee or mistress if provided for in a valid will, has the opportunity to inherit from the estate of a deceased person. The provision is in protection of the testamentary freedom of a deceased person under Section 5 of the law of succession Act. The question is, since there *is a window* for providing for cohabitees in the law whether intentionally, by design, or inadvertently by the legislators, that is provision for the cohabitee through will, why is it that the African men do not utilize the same by providing for the family sufficiently and the cohabitee, now that cohabitation has been infused into these monogamous married men? There are several instances whereby the man abandons the family and cohabitees when he is old and/or about to die, packs all his belongings, and proceeds to his lawful family. So, then, are cohabitees meant to be convenience entertainers of African men, thus enlarging this adopted western culture as a perennial African -legal phenomenon?

A cohabitee, for the purposes of the perspective taken by this paper, that is, cohabitation while a man is married under a system of marriage that does not allow contracting of another marriage, is not a wife. Where the man is allowed to marry more wives, for instance in customary or Islamic marriage, the cohabitee will be recognized as a wife upon registration of the relationship so presumed as a marriage. Where a cohabitee is provided for under will as long as the family is sufficiently provided for, and no repugnance clause is invoked by the testator, the bequest to her passes. The cohabitee's children are entitled to inherit the deceased estate where the children are minors, the cohabitee will hold the property in trust on behalf of the minor child together with an adult member of the deceased man's family.

As a way forward to cohabitation and as a holistic challenge especially when it touches on the distribution of the matrimonial property, the law only provides for a wife or a former wife while the cohabitee does not feature anywhere, regardless of her contribution to the deceased estate. The Marriage Act, as already discussed, recognizes five forms of marriage, it gives at section two thereof, the meaning of cohabitee, and does not mention anything more than the definition. In the researcher's views, this *is a shell that was inadvertently left behind, after the occupant*

was killed. The construction necessitates an eccentric litigation in the pursuit of a declaration of cohabitation as a form of marriage as was envisioned under common law. As a caution, too, as long as it does not entangle a man that is already under a recognized system of marriage which prohibits such clandestine affairs between a man and woman.

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EU TOPICS

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RECENT ISSUES OF THE RIGHT TO FAMILY REUNIFICATION WITHIN EU LAW - ANALYSIS OF THE CASE C-165/14 ALFREDO RENDÓN MARÍN V. ADMINISTRACIÓN DEL ESTADO[****]

Abstract:
This paper is concerned with the right to family reunification and its limitations. Freedom of movement of workers is one of the fundamental freedoms enjoyed by EU citizens. It encompasses the right of EU citizens' family members to move and reside freely within the territory of the Member States regardless of their EU citizenship. The right to family reunification and family members (spouse, partner with whom the Union citizen has contracted a registered partnership which has been equalized with marriage, his/her and his/her partner's direct descendants who are under the age of 21 and their dependent direct relatives in the ascending line) are defined under Directive 2004/38/EC of the European Parliament and of the Council.
This paper outlines the development of the right to family reunification and reviews CJEU jurisprudence regarding family reunification, especially landmark cases (C-109/01 Akrich, C-127/08 Metock and Others v Minister for Justice, and C-34/09 Ruiz Zambrano). It also offers an analysis of the most recent judgment of the CJEU in this regard: Case C-165/14 Alfredo Rendón Marín v. Administración del Estado. In its request for a preliminary ruling, the national court requested interpretation of Article 20 TFEU concerning the dispute between A. R. Marín – a third-country national and father having sole custody of two minor children who are EU citizens and who have resided in Spain since their birth – and the Director-General of Immigration in Spain who refused to grant the former a residence permit on grounds of Mr. Rendón Marín's criminal record in Spain. The purpose of this paper is to analyse this recent CJEU judgment to determine the scope of the right to family reunification with regard to protection of minor children.

Keywords: free movement of workers, citizenship, minor children, right to family reunification, Directive 2004/38/EC

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INTRODUCTION

The Court of Justice of the European Union (CJEU) has on many occasions addressed the issues of family reunification right that is undoubtedly an essential part of European law today. This right derives from the Treaties, namely the right to free movement of persons (Article 45 TFEU) and citizenship rights (Article 20 TFEU), as well as from secondary legislation. The principal focus of the paper is the CJEU jurisprudence concerning the above-mentioned Treaty provisions and Directive 2004/38/EC of the European Parliament and of the Council. The latter Directive defines family member as spouse, partner with whom the Union citizen has contracted a registered partnership which has been equalized with marriage, his/her and his/her partner's direct descendants who are under the age of 21, or their dependent direct relatives in the ascending line.

After outlining the right to family reunification, the paper will analyse landmark cases involving the right to family reunification in their order of appearance before the CJEU (C-109/01 *Akrich*, C-127/08 *Metock and Others v. Minister for Justice*, Case C - 200/02 *Zhu and Chen* and C-34/09 *Ruiz Zambrano*). The central point of the paper is the analysis of the most recent judgment of the CJEU in this matter: Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*. The ruling in the *Marín* judgment concerns fundamental issues of the right to family reunification with regard to protection of minor children. In its request for preliminary ruling, the national court requested interpretation of Article 20 TFEU within the context of the dispute between A. R. Marín – a third-country national and a father having sole custody of two minor children who are EU citizens and who have resided in Spain since their birth – and the Director-General of Immigration in Spain who refused to grant him a residence permit on grounds of Mr Rendón Marín's criminal record in Spain. The analysis will examine the questions arising out of this recent judgment to determine the scope of the right to family reunification with regard to protection of minor children.

1. FREEDOM OF MOVEMENT AND EU CITIZENSHIP AS BASIS FOR THE RIGHT TO FAMILY REUNIFICATION IN THE EU

Mobility is a political, economic and social issue in the EU.[1] The largely positive effects of the opening of borders between Member States (such as increasing productivity, reducing unemployment and improving attitudes towards the EU) are evident in the fact that most EU citizens nowadays associate the Union with freedom of movement for the purpose of labour, study and travel.[2] To increase labour mobility, Member States are obligated to take measures and guarantee effective legal protection of workers and members of their families who exercise their right to freedom of movement from nationality-based discrimination and unjustified

[1] Euroguidance Hrvatska, *Savjetovanje o mobilnosti - intervju*, Agencija za mobilnost i programe EU, p. 14, available at: http://www.euroguidance-vlaanderen.be/file/view/euroguidance_web%20publ_v5%20croatia.pdf; Accessed 27 September 2017.

[2] Goldner Lang, I., *Transitional arrangements in the enlarged European Union: How free is the free movement of workers?*, Croatian yearbook of European law & policy, Vol. 3. No. 3., 2007, pp. 241-271.

restrictions and obstacles.[3] Labour mobility is indispensable for employment and economic growth and the resulting successful and efficient functioning of the EU internal market. Free movement of workers is thus a particularly important and sensitive issue for the EU.[4]

1.1. FREEDOM OF MOVEMENT

The first measures concerning the freedom of movement of persons were adopted over 40 years ago.[5] They included the right of workers who were EU citizens to be accompanied not only by the spouse and children under 21, but also by dependent adults, parents and grandparents, irrespective of the family members' nationality.[6] During the first stage of the European integration development (from 1957 to the mid-1980s), the free movement of persons was an exclusively economic and legal principle. It was aimed at removing obstacles to the movement of people as a factor in the production process and the creation of a common market of labour, goods, services and capital of EEC member countries.[7] The concept of freedom of movement gradually evolved to include self-employed persons, students, and today all EU citizens.[8]
Freedom of movement of persons (workers) is one of the four fundamental freedoms underlying the EU and its unique market. It implies the right of EU citizens to cross EU internal borders exempt from the formalities envisaged for third country nationals, and to reside, work and receive education in Member States other than their native, exempt from nationality-based discrimination.[9] Pursuant to Article 45 of the Treaty on the Functioning of the European Union (TFEU), freedom of movement for workers[10] must be secured within the EU. The provisions of Article 45 prescribes the scope of the free movement of works and exceptions to that scope (public service exception and limitation of the free movement required by public order, public safety and health protection),[11]Nevertheless, the existence of a cross-border element is a prerequisite without which freedom of movement would not have achieved its purpose. A second prerequisite is the citizenship of a Member State, i.e. citizenship of the EU.[12]

[3] Marković, T., *Prava državljana članica EGP-a i članova njihovih obitelji u okviru slobode kretanja vs. mobilnost*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, Vol.30 No.2, 2014, pp. 285-305, p. 302.
[4] Kapural, M., *Sloboda kretanja radnika u proširenoj Europskoj uniji i njezin utjecaj na Hrvatsku*, Pridruživanje Hrvatske Europskoj uniji: Ususret izazovima pregovara; treći svezak; Institut za javne financije, Zaklada Friedrich Ebert, Zagreb, 2005., p. 90.
[5] Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on the freedom of movement of workers within the Community
[6]Condinanzi, M.; Lang, A.; Nascimbene, B., *Citizenship of the Union and Freedom of Movement of Persons*, Martinus Nijhoff Publishing, Leiden Boston, 2008: pp. 65-102.
[7] Novičić, Ž., *Sloboda kretanja ljudi u pravu Evropske Unije*, Biblid, Vol. LV, No. 1, 2003, p. 58.
[8] Goldner Lang, I., *Sloboda kretanja ljudi u EU*; Školska knjiga, Zagreb, 2007.
[9] Novičić, *op. cit.* note 7, p. 57.
[10] Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment - Article 45(2) TFEU, available at: http://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A12016ME%2FTXT
[11] Article 45 TFEU.
[12] Goldner Lang, *op. cit.* note 8.

1.2. EU CITIZENSHIP

EU Citizenship was introduced by the Maastricht Treaty with the aim of bringing the EU closer to its citizens and strengthening the bond between the citizens and the EU.[13] The term "citizenship" here is used as a complementary term to the citizenship held by the EU citizens in their native Member States.[14] The introduction of the EU citizenship extended the scope of family reunification rights to Member State nationals who are not involved in economic activities.[15]

Per Article 20(1) TFEU: *'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'* EU citizenship is thus held by Member State nationals (dual nationality individuals included) in accordance with the national law.[16] *'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.' 'They shall have,* inter alia*, the right to move and reside freely within the territory of the Member States.' 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'*[17] Owing to a number of important interventions by the CJEU in the last ten years as well as the legislative initiatives, EU citizenship has matured as an institute. One such intervention is the so-called Citizenship Directive (Directive 2004/38/EC).[18]

1.3. FAMILY REUNIFICATION

Family reunification is a necessary way of making family life possible.[19] As one of the fundamental pillars of our cultures and societies, it largely affects the protection and wellbeing of its individual members.[20] Family life is even more important when it comes to children, who, because of their age and development, are more in the need of care, support and protection by their parents and other family members. In all cases, family separation increases distress and

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[13] Đerđa, D., *O državljanstvu Europske unije*, Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu, god. 11, 2002, No. 12, p. 84.

[14] Grubiša, D., *Lisabonski ugovor i europsko građanstvo,* Politička misao: Časopis za politologiju, Vol. 47. No. 4, 2010, pp. 185-209.

[15] Joint cases C-64/96 and C-65/96, *Kari Uecker and Vera Jacquet v. Land Nordrhein Westfalen*, 1997, ECR I-3171, par 23.

[16] Ryland, D., *European Union citizenship: freedom of movement and family reunification. Reconciling competences and restricting abuse?*, 2010, In: 10th Jubilee International Academic Conference, 'State, Society and Economy' - Globalisation in a Contemporary World, June 2010, Modrzewski, A.F., Krakow University, Poland, available at: http://eprints.lincoln.ac.uk/3054/1/AFMKrakow_10IACEuropean_Union_Citizenship.pdf; Accessed 28 September 2017.

[17] Article 20(2) and Article 21(1) TFEU.

[18] Kostakopoulou, D., *European Union citizenship: Writing the future*, European Law Journal, Vol. 13, No. 5, September 2007, pp. 623-646; Condinanzi, *et al., op. cit.* note 6, pp. 1-65.

[19] Töttős, Á., *Family reunification rules in the European Union and Hungary,* 2014, available at: http://migrationonline.cz/en/e-library/family-reunification-rules-in-the-european-union-and-hungary; Accessed 28 September 2017.

[20] Article 16, Universal Declaration of Human Rights, available at: http://www.un.org/en/universal-declaration-human-rights/, Article 8, European Convention of Human Right (ECHR)

instability in children, and negatively affects their capacities to cope and integrate into the host society.[21]

Since the establishment of the freedom of movement regime, efforts have been invested in establishing another principle – family reunification, thus extending the right to freedom of movement to family members of the original holder.[22] The Charter of Fundamental Rights of the European Union addresses family life in a number of articles that set out the principles of respect for private and family life, the right to marry and the right to found a family, as well as lay down provisions on family and professional life. The right to family life is thus a fundamental right, but the question is: does EU rules *enhance* family reunification?[23] As a document of great legal significance that establishes human and fundamental rights as the foundation of EU citizenship[24], the Charter recognises that 'the family' in the EU has to be protected in its own right, and not only in the process of achieving other goals, whether economic or not.[25]

The right to free movement of EU nationals encompasses their right to be joined by family members and the right of these family members to be integrated into the host Member State by being granted certain rights, such as the right to obtain employment. As such, it is obvious that an EU worker's right to family reunification is based on the perception of a worker as a human being exercising his/her social rights when moving to another Member State and taking up employment there. Thus, the right to family reunification departs from the image of an EU worker as a solely economic unit of production, instead of being founded on the free movement of persons as a realisation of one's personal rights and on the promotion of European integration.[26]

Recent trends promulgated by CJEU case law indicate a changing approach towards family reunification, with free movement no longer being cited as the only legal basis for granting family reunification rights.[27] It is of importance to note that at the current stage of the European integration process the right to family reunification is not an autonomous right under EU citizenship law. In the eyes of the CJEU, its importance is reduced to a functional instrument in order to guarantee, on one hand, the right to free movement of persons, as well as, on the other hand, the genuine enjoyment of EU citizens' other rights stemming from EU law.[28]

EU citizens can rely on their EU citizenship rights (including the right of residence of their third-country family members) only when they fall within the scope of application of the EU law. If not, they are subject to the often more restrictive national rules of the Member States.

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[21] CRISIS, Unicef, *The Right of the Child to Family Reunification*, 2016, available at: https://www.unicef.org/eca/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf; Accessed 28 September 2017.

[22] Krūm, K; *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge;* Martinus Nijhoff Publishing, Leiden Boston, 2014, p. 210.

[23] Töttős, *op. cit.* note 19.

[24] Militaru, I.N., *Citizenship of the European Union under the Treaty of Lisbon,* Juridical Tribune, Vol. 1, 2011, p. 81.

[25] Ryland, *op. cit.* note 16.

[26] Goldner, I., *Family reunification of European Community nationals*, Croatian yearbook of European law & policy, Vol. 1. No. 1. 2005, pp. 163-202.

[27] *Ibid*.

[28] Van Elsuwege, P.; Kochenov, D., *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, European Journal of Migration and Law, No. 13, 2011, p. 465.

This leads to the well-known phenomenon of reverse discrimination,[29] which is usually regarded as an inevitable consequence of the division of competences between the EU and the Member States.[30] Static EU citizens occasionally not only face stricter family reunification conditions than their migrant compatriots and nationals of other Member States, but they may also find themselves in a less advantageous position in comparison to third country nationals residing lawfully in the territory of a Member State. The latter can benefit from the conditions laid down in Directive 2003/86/EC on the right to family reunification within the EU.[31]

However, nothing seems to prevent the Member States from regulating the right to family reunification for all EU citizens. Ultimately, Article 79 TFEU provides an explicit legal basis for the regulation of conditions of entry and residence of third country nationals, 'including those for the purpose of family reunification'. This provision seems not necessarily limited to matters of family reunification with third-country nationals but may also include family reunification of (static) EU citizens and their third-country family members.[32]

Nevertheless, family life is a key part of the day-to-day lives of all residents of the EU, be they EU citizens or not.[33] To that end, the EU has adopted two Directives to create common standards for family reunification within EU territory: Council Directive 2003/86/EC on the Right to Family Reunification[34] (Family Reunification Directive) and Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States[35] (Free Movement Directive),[36] as outlined below.

The Family Reunification Directive 2003/86/EC governs the conditions under which third-country nationals living legally in the EU (sponsors) are permitted to bring in their families to a Member State to preserve family unity.[37] This includes primarily the spouse and minor

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[29] Hanf, D., *"Reverse Discrimination" in EU Law: Constitutional Aberation, Constitutional Necessity, or Judicial Choice'*, Maastricht Journal of European and Comparative Law Vol. 18; No. 1-2, 2011 ; pp. 26-61; Van Elsuwege, P.; Adam, S., *'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande'*, 2008, Cahiers de droit européen, pp. 655-711; Tryfonidou, A., *'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe'*, Legal Issues of Economic Integration Vol. 35; No. 1, 2008; pp. 43-67.

[30] Geelhoed, L.A., *'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels'*, Manunza, E.; Senden, L. (Ed.), De EU: *De interstatelijkheid voorbij? Nijmegen: Wolf Legal Publishers*, 2006, pp. 31-49; Lord, S., *Introducing a European Legal Order*, London: Stevens and Sons, 1992, p. 99.

[31] Van Elsuwege, *et al., op. cit.* note 28, p. 456.

[32] Proposal for a Council Directive on Family Reunification, COM (1999) 638 final, p. 14.

[33] EU Law Analysis, Expert insight into EU law developments, *Family Reunion for Third-Country Nationals: Comments on the Commission's new guidance,* 2014, available at: http://eulawanalysis.blogspot.hr/2014/04/family-reunion-for-third-country.html; Accessed 28 September 2017

[34] Directive 2003/86/EC of 22 September 2003 on the right to family reunification

[35] Directive 2004/38/EC of 29 April 2004 is about the right of citizens of the Union and their family members to move and reside freely within the territory of the EU and EEA member states.

[36] Van den Broucke, S.; Vanduynslager, L.; De Cuyper, P., *The EU Family Reunification Directive Revisited, An analysis of admission policies for family reunification of Third Country Nationals in EU Member States*, 2016, p.1.

[37] The Directive applies to third-country national sponsors who (1) have a residence permit, valid for at least one year or more, issued by a Member State and "reasonable prospects" of obtaining the right of permanent residence; (2) have stayed lawfully in the Member State for a period not exceeding two or three years before applying for their family members to join them, depending on the capacity of the given EU Member State to receive the migrants; and (3) comply with the Member State's procedural requirements, such as filing an application and providing documentary evidence of the family relationship; Library of congress, *Family*

(adopted) children. However, Member States may also allow entrance and residence by law or regulation to first-degree relatives in the direct ascending line, to any spouse in case they are dependent of them and they are not provided sufficient family support in the origin state, or to the adult unmarried children that are not objectively able to take care of their needs because of their health condition.[38]

Once admitted in a Member State, family members receive a residence permit and obtain access to education, employment and vocational training on the same basis as the sponsor. After a maximum of five years of residence, family members may apply for an autonomous permit. Member States may impose some conditions before allowing family reunification. They may require the sponsor to have adequate accommodation, sufficient resources and health insurance, and impose a maximum waiting period of two years. Family reunification may be refused to spouses who have not reached a required age (21 years at the highest). Lastly, threat to public order, public security or public health can be grounds for rejecting the application. The CJEU has underlined that Member States must apply the Directive in a manner consistent with the protection of fundamental rights, notably regarding the respect for family life and the principle of the best interests of the child.[39] Per Article 5 of the Directive, the child's best interests should be of primary consideration in all actions. Additionally, the CJEU has recognised that children should grow up in a family environment and that Member States should ensure that a child is not separated from his/her parents against his/her will. It has stated that applications by a child or his/her family member to enter or leave a Member State for the purpose of family reunification are to be dealt with by Member States in a positive, humane, and expeditious manner.[40]

The Free Movement Directive 2004/38/EC governs the right of EU citizens and their family members to move and reside freely within the territory of the Member States. It compiles into a single legal act many existing pieces of legislation, lays down the conditions for the right of free movement and residence (both temporary and permanent) for EU citizens and their family members, and sets out the limits to those rights on grounds of public policy, public security[41] or public health.[42] The Free Movement Directive extends the right of entry and residence

Reunification Laws, 2014, available at: https://www.loc.gov/law/help/family-reunification/eu.php; Accessed 27 September 2017.

[38] *Cf. ibid.,* Article 4.

[39] Guild, E.; Gortázar, C., *The Reconceptualization of European Union Citizenship*, Brill Nijhoff Publishing, Leiden Boston, 2014, p. 169-189.

[40] CRISIS, Unicef, *The Right of the Child to Family Reunification*, note 21.

[41] According to Article 27 of Directive 2004/38/EC, measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

[42] *EU freedom of movement and residence*, EUR-Lex, 2015, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33152; Accessed 28 September 2017.

accorded to the EU citizen[43] to third-country family members[44] who are accompanying or joining the EU citizen in the host Member State.[45] The full extent of this provision became apparent as a result of the controversial ruling of the CJEU in the *Metock* case.[46] One of the postulates of the Free Movement Directive is the extension of the right of all EU citizens to move and reside freely within the territory of the Member States to their family members, irrespective of nationality. The Directive also allows Member States to extend the definition of family members to registered partners or even grant entry and residence as family members to persons not belonging to the narrow concept of family members, taking into consideration their relationship with the EU citizen or any other circumstances (such as their financial or physical dependence on the EU citizen).[47]

In view of EU rules, national legislation of Member States observes family reunification in three regimes: that between third-country nationals (based on the Family Reunification Directive 2003/86); that of EU citizens residing in another Member State and their family members, (based on the Free Movement Directive 2004/38); and that of Member State nationals and their third-country national family members.[48] In the next chapter, we will illustrate landmark cases of the CJEU regarding this situations.

2. LANDMARK CJEU JURISPRUDENCE CONCERNING THE RIGHT TO FAMILY REUNIFICATION

This chapter analyses landmark cases involving the right to family reunification in the order of their appearance before the Court of Justice of the European Union (CJEU). It will briefly outline the reasoning of the Court in the respective judgments to determine the scope of the right to family reunification defined in CJEU jurisprudence.

2.1. CASE C-109/01 *SECRETARY OF STATE FOR THE HOME DEPARTMENT V. HACENE AKRICH*

Moroccan citizen Hacene Akrich entered the United Kingdom on a one month tourist visa. His application for leave to remain as a student was refused in July 1989 and his subsequent appeal dismissed in August 1990. Moreover, he was found guilty of felony and was deported to

[43] EU citizens with a valid identity card or passport may enter another EU country, as may their family members, whether EU citizens or not, without requiring an exit or entry visa, they may live in another EU country for up to 3 months without any conditions or formalities. EU citizen can live in another EU country for longer than 3 months if the citizen is subject to certain conditions, depending on their status in the host country (registration to relevant authorities). EU citizen is entitled to permanent residence if they have lived legally in another EU country for a continuous period of 5 years. This also applies to family members;
available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33152. Accessed 28 September 2017.

[44] Defined in Article 2(2) (a)-(d) of Directive 2004/38/EC.

[45] *Ibid*. Article 7(2).

[46] Ryland, *op. cit.* note 16.

[47] Directive 2004/38/EC, para. (5) and (6).

[48] Töttős, *op. cit.* note 19; This third stipulation is not covered by EU law, therefore Member States have the discretion to regulate it according to their own interests, although the recent case-law of the CJEU to some extent interfered with this field of rules limiting the freedom of Member States.

Algiers. He returned illegally to the United Kingdom in 1996, married a British citizen and applied for leave to remain as her spouse. Mr Akrich was detained under the Immigration Act and afterwards deported to Dublin (Ireland) where his wife had meanwhile taken up employment.[49] Mrs Akrich had moved to Ireland with the intention of triggering the Treaty and consequently the right to family reunification that guarantees EU citizens the right to return with their spouses to their origin Member State after having exercised free movement rights.[50] The CJEU ruled that a third-country national married to an EU citizen must be lawfully resident in one Member State upon migrating to the host Member State to which the EU citizen is migrating or has migrated. Furthermore, the Court stated that Article 10 of Regulation 1612/68[51] applies to genuine marriages exclusively, and that the intention of the spouses migrating to another Member State is not relevant for the assessment of their legal situation.[52] In other words, the Court took the position that once a third-country national has resided illegally in one Member State, cross-border movement cannot change his/her residence status from illegal to legal. Consequently, illegal residence status precludes the application of free movement rights provision and the right to family reunification.[53] It emerges from the *Akrich* judgment that a Member State can refuse third-country national family members the right of residence if they had not previously resided lawfully within the territory of another Member State insofar as this refusal does not infringe the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[54] However, the reasoning in *Metock & Others v. Minister for Justice* marks an evident shift in the position of the Court.

2.2. CASE C-127/08, *BLAISE BAHETEN METOCK & OTHERS V. MINISTER FOR JUSTICE*

The reference for a preliminary ruling in *Metock* concerns the interpretation of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States. The reference was brought by the Irish High Court and merged four cases concerning third-country nationals who arrived in Ireland, applied for asylum and were refused. While residing in Ireland they all married EU citizens who were not Irish nationals but were lawful residents in Ireland. Per Court ruling in *Akrich,* the right of residence in another Member State extends to spouses of EU citizens insofar as they have been

[49] Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* ECLI:EU:C:2003:491.
[50] Spaventa, E., *Case C-109/01 Secretary of State for the Home Department v. Hacene Akrich, judgment of the Full Court of 23 September 2003, [2003] ECR I-9607,* Common Market Law Review, Vol. 42 ; No 1, 2005, pp. 225-239, p. 226.
[51] Article 10: „The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse", Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257, 19/10/1968.
[52] Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* ECLI:EU:C:2003:491, par. 61.
[53] Goldner, *op. cit.* note 26, p. 181.
[54] Article 8 ECHR: Right to respect for private and family life; Cambien, N., *Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice*, Equality and Law Reform, Columbia Journal of European Law, Vol. 15, No. 2, 2009, pp. 321- 341, p. 332.

lawfully resident in one Member State and were either seeking to join their lawfully resident spouses in another Member State or seeking to enter the Member State in the company of their spouses. These conditions were not met in three of the four cases.[55]
The Court ruled that Directive 2004/38/EC precludes Member State legislation that requires a third-country national, spouse of an EU citizen lawfully resident in but not national of the host Member State, to have previously been lawfully resident in another Member State prior to entering the host Member State, to benefit from the said Directive.[56] Furthermore, the Court stated that Article 3(1) of Directive 2004/38/EC[57] implies that the above third-country national accompanying or joining his/her EU citizen spouse, benefits from the provisions of the said Directive irrespective of when and where their marriage took place and of how the third-country national entered the host Member State.[58]
The case was decided in an accelerated preliminary ruling procedure provided for in Article 104a of the Rules of Procedure[59] as there was legal uncertainty affecting the applicant's circumstances and danger of infringement of their fundamental rights (in particular, the right to family life under Article 8 ECHR). Given the fundamental impact of this judgment on the right to family reunification and free movement of EU citizens, the Court took the position that it is within the competence of the EC (today EU) to regulate entry and residence of family members of EU citizens irrespective of their prior lawful residence in the Member States. Moreover, in a significant shift from *Akrich*, the Court stated clearly that Member States are not permitted to impose the condition of prior lawful residence, thus strengthening the protection of fundamental rights.[60]

2.3. CASE C - 200/02 *ZHU AND CHEN*

The reference for a preliminary ruling was brought by the Immigration Appellate Authority (United Kingdom) in the course of proceedings instituted by Kunqian Catherine Zhu (Irish national) and her mother Man Lavette Chen (Chinese national) against the Secretary of State for the Home Department. The case concerned the rejection of applications of Mrs Zhu and Mrs Chen for a long-term permit to reside in the United Kingdom. Mrs Chen and her husband were Chinese nationals. Mr Chen frequently travelled for work to various Member States, in particular the United Kingdom. Their second child was born in Northern Ireland and was granted Irish nationality. She was in sole custody of her mother and unable to obtain Chinese

[55] Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 21-35.
[56] Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 80.; See more in: Guild, E.; Peers, S.; Tomkin; J.; *The EU Citizenship Directive: A Commentary,* Oxford University Press; Oxford, 2014, pp. 82-85.
[57] Article 3(1) Directive 2004/38: „This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."
[58] Case C-127/08, *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449, par 99.
[59] See more on accelerated and urgent preliminary ruling procedure in: Petrašević, Tunjica. *Accelerated and urgent preliminary ruling procedure,* Pre procedure in European Union law - cooperation of national courts with the European Court (Capeta, T., Goldner Lang, I., Perišin, T., Rodin, S., *Reforma Europske unije, Lisabonski ugovor* Narodne novine, Zagreb, 2011, pp. 103-124; Lenaerts, K.; Maselis, I.; Kathleen, G., *EU Procedural Law*, Oxford University Press, Oxford, 2006, pp. 613-614.
[60] Cambien, *op. cit.* note 54, pp. 321- 341, p. 334.

nationality. The Secretary of State for the Home Department refused to grant the long-term residence permit to the two applicants in the main proceedings. It stated the grounds of Zhu, a child of eight months of age, not having exercised any of the rights arising from the EC Treaty and Mrs Chen not being entitled to reside in the United Kingdom under those regulations.[61]
On the facts of the case, and in response to the questions of the national court, the Court ruled that Article 18 EC and Council Directive 90/364/EEC do confer the right to reside indefinitely in a Member State on a young minor provided that the minor holds nationality of the respective State, is covered by appropriate health insurance and is in the care of a third-country national parent, with resources sufficient for the minor not to fall financial burden on the host Member State. In such circumstances, the said provisions do allow the minor's primary carer to reside with the child in the host Member State.[62] The case marks the first instance of the Court extending the right of residence of parents from the free movement right of their minor children to achieve protection of family life.

2.4. C - 34/09 *RUIZ ZAMBRANO*

This landmark ruling was delivered by the Grand Chamber of the CJEU in 2011. Colombian nationals Mr and Ms Zambrano entered Belgium in 1999 with their first child on a tourist visa from Columbia. Belgian authorities refused their applications for asylum, but did not deport them to Colombia on account of the country's civil war. As of 2001, Mr and Ms Zambrano were registered residents in Belgium, and Mr Zambrano was employed for a certain time despite of him not holding a work permit. Their two children (born in 2003 and 2005) acquired Belgian nationality. Mr and Ms Zambrano's residence permit application was rejected on the grounds of having disregarded the laws of their origin country by not registering their children with the diplomatic or consular authorities, and yet correctly following the available procedures for acquiring Belgian nationality for their children, plausibly to attempt legalising their own residence by extension. Mr Zambrano was also refused the right to unemployment benefit on the grounds that the periods of work he had carried out without a work permit could not validly be taken into account.[63]
The national court referred to the Court *inter alia* the question of whether the TFEU provisions on citizenship imply that the right of residence of a dependent minor child who is an EU citizen and national of the Member State in which he or she resides is conferrable on a third-country national relative in the ascending line (parents), as well as exempt the latter from the obligation to obtain a work permit in that Member State.[64]
The scope of the Court's decision in Ruiz Zambrano is defined by circumstances where minor children are deprived of 'genuine enjoyment of the substance of the rights attaching to the status of European Union citizen', thereby falling within EU law.[65] The Court reminded that Article

[61] Case C-200/02 *Zhu and Chen* EU:C:2004:639, par 7-14.
[62] *Ibid*. par 47.
[63] C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 14-24.
[64] *Ibid*. par 36.
[65] "Genuine enjoyment test". See more in: Lansbergen, A., Miller, N.; *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz, Zambrano v. Office national de l'emploi* (ONEM). European Constitutional Law Review, Vol. 7; No. 02, 2011, pp. 287-307, p. 291.

20 TFEU confers EU citizen status on all Member State nationals, and as Belgian nationals, so onto Mr Zambrano's children.[66] Furthermore, the Court ruled that Article 20 TFEU implies precluding of national measures that effect deprivation of EU citizens of the *genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens*, irrespective of the citizens' previous exercise of their right of free movement.[67]

In the judgment, instead of the cross-border element (free movement rights), the Court observed EU citizenship rights as the criteria for bringing a situation within the scope of EU law. The Court reasoned that deportation of Mr Zambrano by national authorities would have effected deprivation of his Belgian children of their EU citizen rights as established directly and exclusively under Article 20 TFEU.[68] In what had previously been considered 'internal situations'[69] and outside EU law scope, the significance of this judgement lies in using citizenship rights as grounds for granting the right of residence under EU law to third-country national parent of children who are EU citizens but had not yet exercised their right to free movement.

3. CASE C-165/14 *ALFREDO RENDÓN MARÍN V. ADMINISTRACIÓN DEL ESTADO*

This request for a preliminary ruling concerns the interpretation of Article 20 TFEU in the proceedings between Alfredo Rendón Marín and the Spanish State Administration. Rendón Marín was a third-country national (Colombia) and father of minor children who were EU citizens in his sole care and resident in Spain since their birth. In the national procedure, the Director-General of Immigration of the Ministry of Labour and Immigration refused Mr Rendón Marín's application for residence permit under exceptional circumstances on grounds of his criminal record.[70]

Rendón Marín's two children in his sole care and custody have been Spanish residents since their birth. His son was a Spanish national and his daughter Polish. Rendón Marín's criminal record involved a nine-month imprisonment that was sentenced in Spain. He was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. The decision on his application to remove mention of his criminal record from the register was due on the date of the order for reference, namely 20 March 2014. On 18 February 2010, Mr Rendón Marín applied with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit under exceptional circumstances.[71] The application was rejected on grounds of criminal record by decision on 13 July 2010.[72] Mr Rendón Marín's appeal against said decision was dismissed by the National High Court on 21

[66] C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 40; Case C-224/98 *D'Hoop*, ECLI:EU:C:2002:432, par. 27, Case C 148/02 *Garcia Avello*, ECLI:EU:C:2003:539, par 21.
[67] C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, par 42-44.
[68] Van Elsuwege, *op. cit.* note 28, pp. 443-466, p. 448.
[69] EU citizens and their family members can only rely on their EU citizenship rights, when they fall within the scope of application of EU law i.e. if there is no link with EU law, they are subject to national rules of the Member States that can be more restrictive. See more in: Tryfonidou, *op. cit.* note 29, pp. 43-67.
[70] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado* ECLI:EU:C:2016:675, par 2.
[71] Pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.
[72] Pursuant to Article 31(5) of Law 4/2000.

March 2012, whereupon he brought an appeal against that judgment before the Supreme Court, basing it on the judgments in *Zhu and Chen* and *Zambrano*.

National law thus prohibited without any possibility of derogation the grant of a residence permit to applicants with criminal records in the country where the permit is applied for. Given that this inevitably effected depriving a minor EU citizen who is a dependant of the applicant for a residence permit of his right to reside in the European Union, the referring Supreme Court was uncertain whether said national law provisions were consistent with the Court's case law relied on in the case, with regard to Article 20 TFEU.[73] The Supreme Court thus referred to the Court the following question:

"*Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004,* Zhu and Chen *(C-200/02, EU:C:2004:639), and of 8 March 2011,* Ruiz Zambrano *(C-34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?"*[74]

The Court examined whether a third-country national such as Mr Marín may enjoy a derived right of residence either under Article 21 TFEU and Directive 2004/38[75] or Article 20 TFEU[76], and if so, whether his criminal record could justify a limitation of that right (even though the referring court has limited its question to the interpretation of Article 20 TFEU). In particular, the Court examined the circumstances of case in light of the fact that rights granted to third-country nationals under provisions of EU law on EU citizenship are not autonomous rights of third-country nationals, but rather derived from the exercise of freedom of movement and residence of an EU citizen[77]. As previously seen in its practice, even though exceeding the question of the national court, the Court took the liberty to extend the scope of EU law by referring to Article 21 TFEU and Directive 2004/38 in this context.

Article 21 TFEU and Directive 2004/38 provide the basis for the existence of a derived right of residence. Mr Marín's son (a minor) has always resided in the Member State of which he is a national, he is not covered by the concept of 'beneficiary' within the meaning of Article 3(1)

[73] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 14-22.

[74] *Ibid*. par 23.

[75] Article 21 TFEU: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. [..] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[76] Article 20 TFEU: Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship; Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States[...]

[77] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 32-36. See: Case C - 87/12 *Ymeraga and Others*, EU:C:2013:291, par 35; Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645, par 22; and Case C-456/12 *O. and B.*, EU:C:2014:135, par 36.

of Directive 2004/[78] as he had never exercised his right of freedom of movement; the Directive is thus not applicable to him.[79] On the other hand, Mr Rendón Marín's minor daughter, a Polish national and resident of Spain since birth, was entitled to rely on Article 21(1) TFEU.[80]
The limitations on the right of residence derive from Article 27(1) of Directive 2004/38. Under said Directive, Member States may restrict the right of residence of EU citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security. However, Article 27(2) of Directive 2004/38 provides that measures on grounds of public policy must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. Moreover, Article 27(2) of the Directive elucidates that criminal record cannot in itself constitute grounds for taking public policy or public security measures, that the personal conduct of the individual concerned must represent a genuine and present threat affecting one of the fundamental interests of society or of the Member State concerned, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.[81]
Building on the said provisions, the Court concluded that EU law precludes limitation on the right of residence founded on grounds of a general preventive nature and ordered for the purpose of deterring other third-country nationals. In particular, this refers to instances wherein said measure was adopted in response to a criminal record, without considering the personal conduct of the offender or the danger that person represents for the requirements of public policy.[82] For that reason, Mr Rendón Marín's criminal conviction from 2005 cannot in itself constitute grounds for refusing a residence permit.[83] Furthermore, to deport Mr Rendón Marín, the Member State would first have to observe fundamental rights: the right to respect for private and family life (Article 7 of the Charter of Fundamental Rights of the European Union), the obligation to take into consideration the child's best interests, recognised in Article 24(2) and the principle of proportionality. Conclusively, Article 21 TFEU and Directive 2004/38 must be interpreted as preclusive of national legislation under which a third-country national is automatically refused a residence permit on the sole ground of possessing a criminal record in the Member State wherein he or she co-resides with and parents a dependant minor child who is an EU citizen.[84]
Article 20 TFEU grants EU citizenship to all Member State nationals. EU citizenship confers on all EU citizens the primary and individual right to move and reside freely within the territory of Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation.[85] Moreover, Article 20 TFEU precludes national measures that effect depriving Union citizens of the *genuine enjoyment of the substance of the*

[78] Article 3(1) of Directive 2004/38 : „This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."
[79] See: Case C-256/11 *Dereci and Others*, EU:C:2011:734, par 57, and Case C-356/11 *O. and Others*, EU:C:2012:776, par 42.
[80] Case C-200/02 *Zhu and Chen*, EU:C:2004:639, par 26.
[81] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 55-60.
[82] Case C-33/07 *Jipa*, EU:C:2008:396, par 23 and 24; Case C -145/09 *Tsakouridis*, EU:C:2010:708, par 48.
[83] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado* ECLI:EU:C:2016:675, par 65.
[84] *Ibid*. par 67.
[85] Article 20 TFEU.

rights conferred by virtue of their status as Union citizens, as the Court held in *Zambrano*.[86] The Court also found that in a narrow set of circumstances where freedom of movement has not been exercised, the right of residence must nevertheless be granted to a third-country national who is a family member of an EU citizen. The effectiveness of citizenship of the Union would otherwise be undermined and that citizen would be obliged to leave EU territory as a whole, thus denying him the said *genuine enjoyment of the substance of the rights conferred by virtue of his status*.[87] By the same token, if the refusal to grant residence to Mr Rendón Marín, a third-country national and sole custodian of EU citizen children, were to mean that he had to leave EU territory, the effect would be a restriction of his children citizens right, in particular the right of residence. Any obligation on their father to leave EU territory would thus deprive them of the *genuine enjoyment of the substance of the rights that the status of Union citizen confers upon them*.[88]

It must be noted that, by contrast to *Zambrano* wherein the public policy or public security exception was not invoked, this limitation was addressed in detail in *Rendón Marín*.[89] In relation to the possibility of limitation of rights deriving from Article 20 TFEU (Member States' right to upholding the requirements of public policy and safeguarding public security), the Court concluded that refusal of the right of residence must be founded on the existence of *a genuine, present and sufficiently serious threat to the requirements of public policy or of public security*. This was not a case with Spanish national legislation, which automatically refused the residence permit on the sole ground of a criminal record. Conclusively, where required in effect that children leave EU territory, Article 20 TFEU must be interpreted as preclusive of national legislation under which a third-country national must be automatically refused a residence permit on the sole ground of a criminal record in the Member State wherein he or she co-resides with and parents dependant minor children who are EU citizens.[90]

The reasoning of the CJEU in *Marín* generates several discussion points. The Court does not merely follow the principle established in *Zambrano*, but rather raises it to a new level – arguably a higher level of citizen rights protection. Primarily, the Court protects the third-country national parent of minor children who are EU citizens by interpreting Article 20, Article 21 and Directive 2004/38 as preclusive of national legislation that automatically refuses residence permit on the sole ground of a criminal record, in turn requiring minor children to leave EU territory. This sheds new light on the right to family reunification (in part with regard to minor children rights) by adapting it to the circumstances of *Marín*. As emphasised by the Court, the crucial element to consider is that refusal of the right of residence must be founded on the existence of *a genuine, present and sufficiently serious threat to the requirements of public policy or of public security*. In this respect, the Court ruled that there was no ground for

[86] Case C 34/09 *Ruiz Zambrano*, EU:C:2011:124, par 42.

[87] Case C 34/09, of 8 March 2011, Ruiz Zambrano, EU:C:2011:124, par 43 and 44; Case C 256/11 of 15 November 2011, Dereci and Others, EU:C:2011:734, par. 66 and 67; Case C - 40/11of 8 November 2012, Iida EU:C:2012:691, par 71; Case C- 87/12of 8 May 2013, Ymeraga and Others, EU:C:2013:291, par 36; and Case C- 86/12 of 10 October 2013, Alokpa and Moudoulou, , EU:C:2013:645, par. 32

[88] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 67.

[89] Opinion of Advocate general Szpunat of 4 February 2016, Case C-165/14, *Alfredo Rendón Marín v. Administración del Estado*, par 160.

[90] Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, par 83-87.

the refusal of the right of residence of Mr Marín. This however does not imply direct application to all cases concerning third-country nationals with criminal records that will rather be decided severally. In other words, without children in his sole custody, the judgement in *Marín* might have been the opposite.

CONCLUSION

The paper analysed current developments in the area of family reunification, with emphasis on a number of issues raised by the Court in its jurisprudence. It specifically focused on the most recent judgment in this area: Case C-165/14 *Alfredo Rendón Marín.* Family reunification cases as presented above suggest that protection of the family life of EU citizens and the right on family reunification are still observed primarily within the context of free movement rights and secondarily within the context of EU citizenship.

In the *Marín* judgment, the Court did not merely adhere to the principle established *Zambrano*, but rather raised it to a new level – arguably a higher level of protection of citizen rights by dismissing automatic refusal of a residence permit on the sole ground of a criminal record that in turn requires minor children to leave EU territory. Such development in *Marín* judgment must be considered ambitious in terms of protection of citizen rights (especially rights of minor children), which in turn raises new questions: Had the Court prioritised individual justice over legal certainty and well-established principles? Would the judgement have been the same had Mr Marín presented genuine, or present, or sufficiently serious threat to the requirements of public policy or of public security? What would prevail in such a scenario: public policy and public security or best interests of the child?

As of yet, the right to family reunification is not an autonomous right under EU law. It merely derives from free movement rights and EU citizenship rights. To exercise the right on family reunification, beneficiaries must either provide evidence of a cross-border element or pass genuine enjoyment tests. What is vital to the protection of minor children is the fact that in all judgments analysed herein, the Court prioritized children's rights, even when it denoted expanding of the well-established scope of the family reunification right. This was evident in *Zambrano*, where the Court introduced said genuine enjoyment tests and recently in *Marín*, where the Court placed the best interest of the child before public policy and public security exceptions.

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13. Case C-200/02 *Zhu and Chen,* EU:C:2004:639
14. Case C-33/07 *Jipa*, EU:C:2008:396
15. Case C-127/08 *Blaise Baheten Metock & Others v. Minister for Justice*, ECLI:EU:C:2008:449
16. Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124
17. Case C-145/09 *Tsakouridis*, EU:C:2010:708
18. Case C-256/11 *Dereci and Others*, EU:C:2011:734
19. Case C-356/11 *O. and Others*, EU:C:2012:776
20. Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645
21. Case C-87/12 *Ymeraga and Others*, EU:C:2013:291
22. Case C-165/14 *Alfredo Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675.

Ksenja Pertinač[1]

TRAFFICKING OF CHILDREN IN THE EUROPEAN UNION[**]

Abstract:
According to rough estimates, trafficking in human beings is currently enslaving 20.9 million people worldwide. It is a serious crime and one of the worst forms of violations of human rights and dignity. Human trafficking is the second-largest illegal industry in the world, and it is second in money profit right after trafficking of drugs. With regard to trafficking in children, data shows that at any moment in the world, there are 5.7 million of children forced to work in factories, plantations and brothels. The sad fact is that most individuals think that slavery has ended decades ago, but it is tragic and real that today there are more slaves in the world than at any point of human history. We must be constantly aware that children are human beings with their respective rights and dignity. Human rights are also children's rights and because of their particular vulnerability, the children need additional protection. This should be the goal of all involved handling this crime, the maximum protection of children and the maximum punishment of all the perpetrators involved in this terrible violation of children's rights. If we pursue these goals, we will achieve the optimum of the legislation, and the good effects of our work will follow.
The author of the article, through the problems of the present state in practice, seeks legislative solutions, which she thinks will optimally contribute to the improvement of the situation. Most of the time she uses the secondary analysis method when she is analyzing data collected by other researchers in this field, primary lawyers and research journalists. At the end she sumarisez her knowledge in optimum findings.

Key words: trafficking in human beings, trafficking in children, optimum legislation, European Union, sexual exploitation, forced labor

INTRODUCTION

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According to rough estimations, trafficking in human beings is currently enslaving 20.9 million people worldwide. It is a serious crime and a serious form of human rights violation. Trafficking in human beings is the second largest illegal industry in the world and it is second in money profit right after trafficking of drugs.[2] It involves the recruitment and transportation of people, often by using force, fraud, deception or coercion for the purposes of various forms of exploitation. People can be exploited for purposes of the sex industry, housekeeping, forced labor in the industry and the use of forced criminal activity.[3] It is a form of crime - the abuse of the fundamental human rights and the dignity of an individual. It involves the exploitation of a vulnerable person by whom traders act as he/she is merchandise for the purpose of gaining economic benefits. It is a form of crime, which often has a transnational character. Because it covers victims of all ages and different sexes, it is especially difficult to discover.[4]

With regards to trafficking in children, data shows that at any moment in the world, there are around 5.7 million children forced to work in factories, plantations and brothels.[5] Under the general definitions of the international organizations (working) in this field and the European Union (hereinafter EU), every person under the age of 18 is considered a child.[6] The general public is inclined to believe that slavery has ended decades ago, but it is tragic and sad that today there are more slaves in the world that there were at any point in human history. Millions of child slaves, many of whom are sold by their impoverished parents for miserable payment, work in brothels, private homes and restaurants abroad, and even here in Europe and the EU.[7] As the situation itself is not sufficiently worrying, in the last 20 years the situation has worsened due to the use of digital technology, and especially because of the use of the Internet. Consequently, the capacity of criminal offenders trafficking in human beings for various types of exploitation has been greatly expanded.[8] In particular human trafficking in Europe is at a high crime level in those countries experiencing severe transit shocks in the 1990s.[9]

Generally it is difficult to assess the extent of trafficking in human beings at EU level, particularly because it is related to other criminal activities and also because the national legislations on this issue are different. Within the EU, this information is collected by the Commission through Eurostat. Statistics, submitted by the Member States, show that total of

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[2] Yea Sallie, Human Trafficking– A Geographical Perspective, Visiting Fellow, Geodate Department of Geography, National University of Singapore, Vol. 23, No. 3, 2010, p. 2.

[3] Hemmings Stacey, Jakobowitz Sharon, Abas Melanie and others, Responding to the health needs of survivors of human trafficking: a systematic review, Journal List BMC Health Services Research, King's College London, Vol. 16, No. /, 2016, p. 2.

[4] EUROPOL, Situation Report Trafficking in human beings in the EU, 2016. URL= https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-_europol.pdf. Accessed 5. June 2017.

[5] Kapo Mirela, Human trafficking as a threat for the security of member states of EU, Academic Journal of Business, Administration, Law and Social Sciences, IIPCCL Publishing Graz-Austria, Vol. 3 No. 2, 2017, p.117.

[6] Balan-Rusu Minodora-Ioana, Licuţa Coman Varvara, Protecting Children Victims of Crimes of Human Trafficking in the EU, Journal of Danubian Studies and Research, Universitatea Danubius Galati, Vol. 3, No. 2, 2013, pp. 58 - 64.

[7] Storm Allison, You can save a child from slavery, Redbook Magazine, Hearst Communications, Inc., Vol. 218, No. 3, 2012, p. 105.

[8] Hughes M. Donna, Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies, SAGE Open, University of Rhode Island, Vol. 4, No. 4, 2014, p.1.

[9] Kapo Mirela, *op. cit*. note 5, p. 117.

15,846 victims of trafficking in human beings were detected in the years 2013 and 2014. The most widespread form of human trafficking is still trafficking for the purpose of sexual exploitation, 67% of all recorded victims, followed by exploitation for labor purposes 21%, and the remaining 12% are recorded as victims of other forms of trade with them. As many as 76% of all victims were women and at least 15% of the victims were children, while 65% of all registered victims were EU citizens. The most frequent victims were citizens of Romania, Bulgaria, the Netherlands, Hungary and Poland. Other victims that come from countries outside the EU, most frequently came from Nigeria, China, Albania, Vietnam and Morocco. The report also shows that 4.079 criminal proceedings and 3.129 convictions for the criminal offense of trafficking in human beings were made in the EU during the period concerned.[10]

Child trafficking is practiced in all countries of Europe. There is no clear demarcation between countries of origin and final destinations for victims. More than half of all of the victims' paths lead in both directions, within and out of the country. Children are transported across the borders, but the trade is also carried out inside of the countries, as data show that domestic trafficking in children is carried out in every other European country. Such is primarily carried out for purposes of sexual exploitation, but the situation is even more complicated, as children in Europe are victims of exploitation for the purpose of labor, begging, for carrying out various criminal activities and other. Due to the latter, the vast majority of European countries (37) have created specialized national bodies or bodies with the aim of inter-state coordination and implementation of the human trafficking policy. Despite the different national definitions of trafficking in human beings, the vast majority of European countries adopted its uniform definition, which is also regulated in the Protocol for the Prevention, Suppression and Punishment of Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which has been ratified by 42 European countries and EU countries.[11] In addition, all European countries have also ratified the Convention on the Rights of the Child[12] and Convention no. 182 on the worst forms of child labor.[13] In the context of fighting against trafficking in human beings, there is a strong regional and sub-regional regulatory framework. Also, all countries concerned have jointly adopted the Action Plan to Combat Trafficking in human beings[14] and the Addendum Addressing Special Needs of Child Victims[15] of European Directorate for Integration of Organization for Security and Co-operation in Europe (OSCE). In 2005, the Council of Europe adopted the Convention

[10] Komisija EU, Poročilo Komisije Evropskemu parlamentu in Svetu – Poročilo o napredku v boju proti trgovini z ljudmi, 2016. URL= http://ec.europa.eu/transparency/regdoc/rep/1/2016/SL/1-2016-267-SL-F1-1.PDF. Accessed 5 July 2017.

[11] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution num. 55/25, 15/11/2000.

[12] Convention on the Rights of the Child - Adopted and opened for signature, ratification and accession by General Assembly resolution num. 44/25, 20/11/1989.

[13] Worst Forms of Child Labour Convention, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C 182, 17/6/1999.

[14] OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 12/2005.

[15] Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance, PC.DEC/557/Rev.1, 12/2005.

on Action against Trafficking in Human Beings,[16] and in the same year the European Commission presented its Report on Combating Trafficking in Human Beings.[17] In recent years, the EU has adopted a Plan on best practices, standards and procedures to combat trafficking in human beings and the prevention of trafficking in human beings itself, and has adopted two important work plans.[18]

1. TRENDS OF CHILD TRAFFICKING IN EU

Data shows that this is an area growing most intensively within the EU. According to the statistical data for years 2013 and 2014, out of 15, 846 recorded victims, as many as 2, 375 were children. The most vulnerable are children from socially and economically disadvantaged families, which are being forced by the traffickers into a developed scheme. This method requires the vulnerable persons or families to initially borrow some money from the traffickers, which later, they obviously cannot pay back. As a form of payment, traffickers then accept the sale or delivery of the child. It is necessary to recognize that children are one of the most vulnerable groups and thus are an easy target for traffickers. The latter choose to trade with them as children can easily be trafficked and are easy to replace. Trade with children is also widespread in non-migration related situations, but the latest information received, suggests that the current migration crisis has worsened the conditions since a large number of children migrants are also coming to the EU. In particular, it is problematic that a large proportion of children travel unaccompanied, or are left unaccompanied when they arrive to the EU. There are lot of problems with detecting children who are victims of trafficking in human beings. In addition, the problem of secondary victimization emerged when children are trafficked again and then treated as perpetrators of trafficking, and not as victims.[19]

In the period from 2010 to 2012, as many as 16% of all victims of trafficking in human beings were under the age of 18, out of which 13% were girls and 3% boys. Of the registered victims, 2% were aged from 0 to 11, 17% were aged from 12 to 17, 36% of the registered victims were aged between 18 to 24, and 45% of them were over 25 years old.[20]

1.1. LEGAL FRAMEWORK OF CHILD TRAFFICKING IN EU

[16] Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197, 16/05/2005.
[17] Communication from the Commission to the European Parliament and the Council - Fighting trafficking in human beings: an integrated approach and proposals for an action plan, COM/2005/0514, 18/10/2005.
[18] Council EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, Official Journal of the European Union, C 311/1, 9/12/2005.
[19] Komisija EU, Poročilo Komisije Evropskemu parlamentu in Svetu – Poročilo o napredku v boju proti trgovini z ljudmi, 2016. URL= http://ec.europa.eu/transparency/regdoc/rep/1/2016/SL/1-2016-267-SL-F1-1.PDF. Accessed 5 July 2017.
[20] European Commission, Study on high-risk groups for trafficking in human beings - Executive summary, 2015. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/study_on_children_as_high_risk_groups_of_trafficking_in_human_beings_-_executive_summary.pdf. Accessed 10 July 2017.

Action against trafficking in human beings on EU level dates back to the adoption of the Framework Decision in 2002, when the Council of Europe adopted the official definition of the concept of trafficking in human beings, describing it as "serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion."[21]

In 2011, the EU Directive on preventing and combating trafficking in human beings and protecting its victims,[22] which replaced the previous regime, was adopted by the Council of Europe, and the EU has adopted a wider definition of trafficking in human beings, the one of the United Nations, which is enshrined in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[23] referred to as the Palermo Protocol, all of which supplemented the UN Convention Against Transnational Organized Crime.[24]

The Palermo Protocol thus defines trafficking in persons in Article 3 as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." The main change introduced by the Palermo Protocol was that the crime of trafficking in human beings could be defined and punished as such even before the exploitation phase. Accordingly, a victim's status could have been recognized if he/she was only exposed to one of the acts or phases defined in the said third article.

The Council of Europe later enlarged the list of acts and assets used to attract victims, namely "abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep the prostitutes under their thumb, taking advantage of an adolescent's or adult's vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own or their family's lot". The Palermo Protocol has further expanded the range of forms of exploitation, but did not limit them, as it gave the legislators the possibility to include new forms. In order for the act to meet at least the minimum standards of trafficking in human beings, it must include

[21] Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), Official Journal of the European union, L 203 , 01/08/2002.
[22] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European union L 101/1, 15/4/2011.
[23] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2237, Doc. A/55/383, 15/11/2000.
[24] United Nations Convention against Transnational Organized Crime, Doc. A/55/383, 10-18/5/2004.

exploitation of prostitution, forced labor or other services as slavery or similar practices, servitude or removal of organs.[25]

EU Directive 2011/36/ EU specified types of exploitation for the purposes of forced criminality in Article 2.3, namely "pickpocketing, shoplifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain". Since trafficking in human beings always involves a vulnerable individual who is an exploitation entity, Article 2 of the Directive also clarified the situation of vulnerability as a situation in which the person concerned does not have any genuine or acceptable choices, but only to accept the abuse. In explanation of this article, it has been added that such vulnerability can be of any kind, whether psychic, emotional, family-related, social or economic. We can also talk about the uncertainty or illegality of the victim's legal status or even of a reduced state of health. Exploitation can therefore be any kind of distress in which a person is forced to accept being exploited.[26]

The issues concerned, one should be aware that there may also be a situation where the victim is aware that it is being exploited. Thus, the EU Directive provides that the consent of a victim of trafficking in human beings, either intended or actual, is irrelevant, regardless of the means of coercion employed. Thus, Article 8 of the Directive advises Member States that the competent authorities do not prosecute or punish victims, even if they are possibly involved in criminal activity, since they have been forced into the latter, as a direct consequence of the coercion itself. Children are certainly the most vulnerable category of victims in this field. This is why they were given special attention both in the Palermo Protocol and in the EU Directives. If a criminal offense of trafficking in human beings includes a child, the latter is considered a victim, even if none of the specified means have been used. In the area concerned, it is particularly problematic that there is no consensus on how to actually evaluate the exploitation of a child, especially when the act itself that has been committed is not one of the violent or exploitative type.[27]

2. CURRENT LEGISLATION PROBLEMS

In the past, a number of international and regional legal rules were adopted to prevent and combat trafficking in children, but there was a problem as all countries concerned have not ratified these rules and that is why the effective implementation of the standards is still put in question. This all is a threat to an effective childcare. The next problem is that most international standards focus only on the adult population. There is also a tendency to consider trafficking in children as a sub-question in the context of trafficking in human beings instead of being an independent and main issue which could promote and protect the rights of children at its maximum. The national legislation of individual EU Member States differs greatly from one to

[25] EUROPOL, Situation Report Trafficking in human beings in the EU, 2016. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-_europol.pdf. Accessed 10 June 2017.
[26] EUR – Lex: Access to European Union Law, Summary of legislation EU 2011/36/EU, 2011. URL= http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32011L0036&qid=1504862802002. Accessed 7 September 2017.
[27] EUROPOL, Situation Report Trafficking in human beings in the EU, *op. cit*. note. 25. Accessed 10 June 2017.

another. Therefore trafficking in human beings is dealing with different aspects of human rights, different spectrums of criminal law and various contents of children's rights in different countries. The definition of child trafficking is also problematic, because it is differently defined in different countries. So we can say that the legal protection of children, victims of trafficking in human beings in Europe and the EU is still not appropriate. In many countries, children are not protected from criminal prosecution for crimes committed in the framework of trafficking in human beings.[28]

2.1. LISBON TREATY

Just a few years ago there was no reference to children in existing EU acts which could justify a more concrete intervention by the EU in this area. The EU Treaty (hereinafter referred to as the TEU) only introduced a general EU obligation to respect fundamental rights in whatever form, but of course, in accordance with its competences (formerly Article 6 (1) of the TEU). The only provision where children were explicitly mentioned was the provision on the EU's commitment to fight crime, in particular against trafficking in human beings and crimes against children, all within the so-called third pillar of the European Community. With such a loose constitutional basis, it was clear that the EU's effectiveness on protection children's rights requires changes.[29]

Thus, the human rights defenders and the defenders of the rights of the children, with great optimism, accepted the Treaty of Lisbon that was signed on 17 December 2007 and entered into force on 1 December 2009. The latter introduced many structural, procedural, institutional and constitutional changes within the EU and their purpose was to significantly enhance the capacity of the EU and the Member States to protect and promote the rights of the children.[30] The Lisbon Treaty itself brought some good changes in the field of child trafficking by inserting provisions on fighting against sexual exploitation and trafficking in human beings (Article 79 (2) (d)) and Article 83 (1)) into the Treaty on the Functioning of the European union (hereinafter TFEU). The latter were then supplemented by more general provisions of EU citizenship (Article 21 TFEU) and provisions about non-discrimination (Article 19 TFEU). These formed the basis for the far-reaching implementation of legislative provisions and judicial decisions. Prior to the adoption of the Lisbon Treaty, trafficking in children was regulated in the third pillar, but now is regulated in the chapter of the TFEU entitled "Area of freedom, Security and Justice". These provisions made it possible to adopt more effective legal measures for the purpose of detecting offenders and victims of such offenses (Article 83 (1) TFEU). They also constituted a decent base for regulating the cross-border exchange of information between relevant authorities on convicted perpetrators of human trafficking offenses. Legislation explicitly tied to the fight against trafficking in human beings has thus been further strengthened with the provisions on migration and asylum legislation. The latter formed the basis for the

[28] UNICEF, Child Trafficking in Europe - A Broad Vision to put Children First, URL= https://www.unicef-irc.org/publications/pdf/ct_in_europe_full.pdf. Accessed 7 July 2017.
[29] Stalford Helen, Schuurman Mieke, Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda, The International Journal of Children's Rights, University of Liverpool , Vol. 19, No. 3, 2011, pp. 381-403.
[30] Stalford Helen, Schuurman Mieke, *op. cit*. note 19, p. 382.

development of a common migration policy within the EU, but its focus shifted from the exclusive concern for the protection of external borders, border immigration and the protection of national security to the fight against trafficking in human beings and the protection of the victims.[31]

3. CHILDREN AS VICTIMS OF DIFFERENT EXPLOTATION PRACTICES

Based on an analysis of risk factors, there are types of children who are more susceptible to the risk of becoming victims of trafficking in children. There are different factors, but some are common to several categories. The general conclusion is that it is not possible to address the vulnerability of children with a single approach, since the reasons for the exploitation can vary. In this field we are talking about children victims of domestic violence, abuse and neglect; children who are part of the planned migration by their families in terms of education and training abroad; children who are left alone; we are talking about children who are without parents or other relatives that can take care of them; children victims of war, crises and natural disasters; children with physical, learning and developmental disorders and children from certain marginal communities.[32]

3.1. FORCED LABOUR

Different groups of children can be exploited for various forms of trafficking in human beings. In the EU, forced labor and the exploitation of children for sexual activities are predominant, and are affecting most of the victims. Trafficking in human beings for the purpose of forced labor or exploitation of labor force in the EU is on the rise in several Member States, with data indicating currently as much as 21% of all victims falling in this chategory. Member States also report increase in male victims of forced labor for the purposes of labor in the agricultural sector. Statistically, as many as 74% of all victims were males. Traffickers exploit legal gaps in the legislation in the areas of work permits, visas, labor rights and in general loopholes regarding work conditions. It is a form of exploitation that is definitely not new within the EU, and due to the economic crisis and demand for low-cost labor these numbers are on the rise. Persons who are victims of such exploitation are extremely low paid for their work, they live and work in conditions that do not even meet the minimum standards of human dignity. Domestic servitude is also a form of trafficking in human beings, which is especially difficult to detect. Primarily its victims are women and girls and the majority of these forms of human trafficking are happening in private households, so victims are often isolated from the outside world.[33]

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[31] Stalford Helen, Schuurman Mieke*, op. cit*. note 19, pp. 383-384.

[32] UNICEF, Combating Child Trafficking, 2005. URL= https://www.unicef.org/publications/files/IPU_combattingchildtrafficking_GB(1).pdf. Accessed 20 July 2017.

[33] European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Report on the progress made in the fight against trafficking in human beings, 2016). URL= https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf. Accessed 22 August 2017.

Children can be sold for work on plantations, areas with mines or made to work in other dangerous conditions, such as handling dangerous substances or operating with dangerous machines. The latter are very often isolated from society and are afraid to report their exploitation to authorities. In some cases, children are victims of exploitation in the so-called tied work, when the child's family receives payment, which is composed in such a way that the costs and interest are deducted from the child's earnings, and the final amounts of payment is so miserable that it is almost impossible to pay off the debt, or to buy the child back. The International Labor Organization (hereinafter referred to as the ILO) estimates that most of so-called servants are girls. Both children and their parents are often lured in, with the promises of good education or a good job. When these children are once in the hands of the wrong people they also remain without all of their personal documents, which are taken from them, they become completely dependent on their exploiters and suffer from extremely difficult working conditions.[34] The ILO, EU and Benelux countries have been involved in the fight against the described form of trafficking in human beings since 1958. EU also actively participates in discussions and negotiations at institutional meetings, especially in the adoption of conventions, recommendations, resolutions and other important texts.[35]

3.2. SEXUAL EXPLOITATION

Trafficking in human beings for the purposes of sexual exploitation is still by far the most widespread form of trafficking in human beings within the EU. Statistics for the period of 2013-2014 show that as many as 67% of all registered victims, are victims of this type of exploitation. It is a form that in most cases affects girls and women. Lately, there is also a trend of increasing male victims in some Member States. The majority of victims end up in the sex industry, where traffickers are increasingly turning to new forms of trafficking in human beings, especially in this area where we are talking about moving from visible forms to the less visible ones, and there is also present the abuse of the institute of self-employed persons. In countries where prostitution is legal, the offer has increased, and as a result, the value of services has decreased. In such countries, it is much easier for traffickers who want to act in accordance with applicable legislation to exploit these frameworks and consequently also exploit the victims. But there are also changes in the implementation of this activity, as the invisible forms of prostitution are being increasingly disseminated.[36] Thus the Netherlands, which in 2000 as the first European country legalized prostitution as a profession, is experiencing a rather worrying paradox, as it turning out that legal prostitution is now becoming more difficult to implement, since it is necessary to meet various conditions and strict commandments, while illegal prostitution is becoming even more illegitimate and practically impossible for study and sanctioning.[37]

According to Eurostat in the period between years 2010 and 2012, two thirds of all registered victims were trafficked for sexual exploitation, out of which 80% were women and girls, while

[34] UNICEF, Combating Child Trafficking, *op. cit*. note 32. Accessed 20 July 2017.
[35] International Labour Organization, ILO and EU, 2016. URL= http://www.ilo.org/brussels/ilo-and-eu/lang--en/index.htm. Accessed 18 August 2017.
[36] UNICEF, Combating Child Trafficking *op. cit*. note 32. Accessed 20 July 2017.
[37] Siegel Dina, Human trafficking and legalized prostitution in the Netherlands, Temida, Viktimološko društvo Srbije "Prometej", Vol. 12, No. 1, 2009, pp. 5-16.

19% of all registered victims were children that were less than 18 years old, while 36% were aged between 18 and 24 years. More than 1000 children who were victims of sexual exploitation were registered, of which 65% were EU citizens. The highest number of victims that areEU citizens, came from Romania, Bulgaria, the Netherlands, Hungary and Poland. Even the suspected traffickers were, in the vast majority (69%) EU citizens. Most of them were citizens of Bulgaria, Romania, Belgium, Germany and Spain.[38]

3.3 Other Forms of Exploitation

Statistics for the period 2013-2014 show that other forms of exploitation account for 12% of all of the victims. These are various forms of forced begging, criminal activities, forced marriage, false marriage, resale of organs, trafficking in children or infants for adoption purposes, trafficking in women for the purposes of selling unborn babies, trafficking in human beings for purposes of cannabis production and smuggling drugs or selling them.[39] We are therefore talking about extremely creative forms of exploitation of persons, or of sophisticated ways of enslaving them. Trafficking in human organs went even so far that today, even eggs, sperm, or substitute maternity services are being traded.[40] It is also possible to detect cases where individuals are victims of multiple forms of exploitation, most cases for forced labor and sexual exploitation, or are intended as cheap labor force and at the same time they are being involved in various criminal activities. Data also show that exploiting people with physical and mental disorders is in growth. It is possible to expect that the current situation in the area of migration and refugees will lead to even higher numbers of victims, as this increases their possibilities to someday gain the right to a legitimate stay within the EU, or at least they believe it does.[41]

4. ELEMENTS FOR THE ESTABLISHMENT OF OPTIMAL LEGISLATION

In Europe, different legal and politically colored concepts related to child trafficking were adopted in the past, most of which were adopted in the wider concept of combating organized crime, sexual exploitation and illegal migration. It was very often that the latter did not provide the adequate protection of the human rights of children who were victims of trafficking in human beings. The protection measures also only concerned on the so-called short-term assistance to victims, while the conceptual widespread violations of children's social, economic, cultural, civil and political rights were usually overlooked. Many vulnerable children have thus remained unprotected and the conceptual violation of their rights is happening still.[42]

The first phase or a good foundation for good legislation is definitely a political will. This is particularly important for the ratification of the most important international legal instruments, the effective implementation of international rules, including the harmonization of national

[38] Vlada Republike Slovenije, Trgovina z ljudmi v številkah, 2016. URL= http://www.vlada.si/teme_in_projekti/boj_proti_trgovini_z_ljudmi/boj_proti_trgovini_z_ljudmi/trgovina_z_ljudmi_v_stevilkah/. Accessed 20 August 2017.
[39] UNICEF, Combating Child Trafficking, *op. cit*. note 32. Accessed 20 July 2017.
[40] Pop Lia, Trafficking of Human Beings – An Academic Attempt to Support the EU Actions in the Fight Against It, Journal of Identity and Migration Studies, University of Oradea, Vol. 6, No.1, 2012, pp. 138-145. p 139.
[41] UNICEF, Combating Child Trafficking, *op. cit*. note 32. Accessed 20 July 2017.
[42] UNICEF, Child Trafficking in Europe, *op. cit*. note 28. Accessed 7 July 2017.

legislations, and for the drawing up of national measures or plans of trafficking in children into other related national spectra all in the light of better childcare effectiveness.[43]

At EU level, the task of directing Member States' policies is led by the European Commission under the slogan "Together against Trafficking in Human Beings". They build their work on Article 5 of the European Union Charter of Fundamental Rights.[44] The political commitment to tackling the problem of trafficking in human beings and trafficking in children is reflected in a number of initiatives, measures and funding programs within the EU, as well as outside, and the first one was established in the 1990s. Political measures are targeted both within the EU and into third countries, especially in the field of forced labor and sexual exploitation.[45]

The policy of EU legislation is certainly aimed to protect children victims of trafficking in human beings. Mutual cooperation and multidisciplinary coordination are crucial in meeting the needs of different groups of children, including children victims of trafficking in human beings. With a goal to better protect the children, the Commission finances the monitoring of the development of child protection guidelines. EU policy therefore calls on the Member States to strengthen the child protection systems and to ensure that, if it turns out to be the best solution for a child to return to the country of origin, to do so in a safe way and in order to preserve the sustainability of such situation. It is also a long-term plan of the European Commission to develop a model of best practice on the role of caregivers and representatives of victims of trafficking in human beings.[46] Due to the large number of all actors involved, from governments, non-governmental organizations, UN organizations and the diversity of their responsibilities, coordination of an effective fight against trafficking in human beings remains a major challenge at both national and international level.[47] However, the best interest of the child should always be kept in mind.[48]

Regarding children affected by trafficking in human beings, there is a high degree of lack of systematization and inconsistency in the collection, analysis and dissemination of data at national, regional and international level. The data obtained are mostly undivided by age, sex, nationality or the very form of exploitation. Where such a disorganization is not present, positive effects on understanding the child trafficking are found. It is therefore necessary to establish a single system for identifying children who have been abused or exploited.[49]

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[43] Ibid.
[44] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the European Union, C 326/391, 26/10/2012.
[45] European Commission, Together Against Trafficking in Human Beings, 2016. URL= https://ec.europa.eu/anti-trafficking/citizens-corner-eu-actions-explained/eu-actions-explained_en. Accessed 12 August 2017.
[46] European Commission, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012 - 2016, 2016. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf. Accessed 10 August 2017.
[47] UNICEF, Child Trafficking in Europe, *op. cit*. note 28. Accessed 22 August 2017.
[48] U.S. Department of Health and Human Services, Determining the Best Interests of the Child, 2016. URL= https://www.childwelfare.gov/pubPDFs/best_interest.pdf. Accessed 11 August 2017.
[49] UNICEF, Child Trafficking in Europe, *op. cit*. note. 28. Accessed 22 August 2017.

In order to ensure optimal legislation, it is also necessary to involve all relevant people, since only the optimal work of the legislators is not enough. In this regard is particularly important the training of health professionals who are among the first to get in touch with the victims. In fact, they are the first in the category of "non-authority" people with whom the victims have the opportunity to meet, and therefore are also the first in a row of people that victims can trust without fear. Human traffickers are also rarely recognized by the average persons, but doctors and medical technicians are the ones who have the unique advantage to perceive this problem and then to act accordingly. But in order to know what action is appropriate, they need specific education and training. It is necessary to realize that not only employees in the field of health need such knowledges, training and education of all persons involved in the process of detection and prevention in the field of trafficking in human beings is necessary.[50] It is also important that the entire public is monitoring and knowing indicators of phenomenon called trafficking in human beings.[51] Education programs must also target the young population so that they will also become aware of their potential in persuading the execution of this crime.[52]

Another big problem in creating optimal legislation is the naming of the individual phenomena. Trafficking in human beings or children is an area that is subject of treatment of different bodies, agencies, sectors and individuals. Precisely because of the diversification of the area, it is even more difficult to understand the concepts or the definition of the individual phenomena. The consequence of this is the absence of a common language or terminology. Thus, a minor that is a victim of sexual exploitation, can be identified as a criminal, and as a result he/she may be detained, but may also be recognized as a victim of this form of criminal act and, as a result, can receive all health and social benefits.[53] Not only specific concepts in the field of child trafficking, but the content of concept of trafficking in human beings is also problematic. Until 2000, the latter was not defined at all, although different international legal documents used this term.[54] Another problem that we are also facing in the field of trafficking in human beings is the confusion of the concept with the smuggling of persons. These are different concepts and have different contents, so they should in no case be confused or equated.[55]

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[50] Roth Cheyna, Health workers to spot human trafficking, Grand Rapids Business Journal, MICHIGAN. Dept. of Community Health, Vol. 33, No. 12, 2015, pp. 18-19.

[51] US Department of State, Diplomacy in action, 15 Ways You Can Help Fight Human Trafficking, 2017. URL= https://www.state.gov/j/tip/id/help/. Accessed 5 September 2017.

[52] UNCronichle, Prevention, Prosection and Protection - Human Trafficking, 2010. URL= https://unchronicle.un.org/article/prevention-prosection-and-protection-human-trafficking. Accessed 5 September 2017.

[53] Wright Clayton Ellen, Krugman D. Richard, Simon Patti, Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States - A Guide for the Legal Sector, Institute of Medicine and National Research Council, The National Academies Press, Washington DC, 2014, pp. 6-7.

[54] International Centre for Migration Policy Development, Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member State, 2009. URL= https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/crime/docs/evaluation_eu_ms_thb_legislation_en.pdf. Accessed 20 August 2017.

[55] EUROPOL, Situation Report Trafficking in human beings in the EU, 2016. URL= https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-_europol.pdf. Accessed 15 August 2017.

A large part of the victims of trafficking in human beings are being directly or indirectly related to migrants or refugees. One of the more important novelties introduced by the Treaty of Lisbon was also the principle of solidarity. Despite that principle, the number of fatalities of migrants on the coasts of EU Member States is increasing. Migrants at sea are extremely vulnerable and suffer various forms of abuses from their smugglers, while the vast majority of them also become victims of trafficking in human beings. Member States do not want to host migrants on their territory, and therefore the principle of solidarity has not, at least in this area, came to life in all its glory.[56] In order to be able to realize the latter, there were recently present some speculations that EU legislation in this area needs to be radically changed, and that the provisions of the temporary protection directive[57] should always apply to migrants, when it is possible that they are victims of trafficking in human beings.[58]

The optimal legislator must also include children in the planning of the legislative text. Primarily, it would be necessary to take into account the views and interests of children in every step of the designing and planning the legislation in this field. In the future, it is necessary to consider a more holistic approach in the development of guidelines for the protection of children victims of trafficking in human beings. The strengthening of national child protection systems in the community is essential, and these systems should be designed to prevent and respond to violence, exploitation and abuse, and enable young people and children to personally grow. Such approaches enable rights of children as a central concern and encourage the participation of children in every stage, all of which allows more effective prevention for all forms of exploitation and abuse.[59]

4.1 PROSECUTION AND PREVENTION

Prosecution is the central aspect and the central strategy to combat trafficking in human beings. It is necessary to strengthen the capacity of official bodies to prosecute traffickers on a number of fronts. Thus, the law has to create, or to "conceive" a number of new criminal offenses, including trafficking in human beings, the sexual exploitation of persons, forced labor, and so-called "document of servitude" that includes the retention or destruction of identity documents, travel documents as means of keep humans in captivity or slavery. Legislation must increase penalties for perpetrators who put the victims into ambush, drive them to slavery, and then sell them to involuntary, modern-day slavery.[60] In practice, it has become quite clear that many victims do not identify themselves as victims of trafficking in human beings and consequently,

[56] Ventrella Matilde, Recognising Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States, Social Inclusion, University of Wolverhampton, Vol. 3, No. 1, 2015, pp. 76-87, p. 82.
[57] COUNCIL DIRECTIVE 2001/55/EC, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof Official Journal of the European Communities, L 212/12, 7/8/2001.
[58] Ventrella Matilde, Identifying Victims of Human Trafficking at Hotspots by Focusing on People Smuggled to Europe, Social Inclusion, University of Wolverhampton, Vol. 5, No. 2, 2017, pp. 69 - 80.
[59] UNICEF, Child Trafficking in Europe, *op. cit*. note 28. Accessed 22 August 2017.
[60] N.N, Remedying the injustices of human trafficking throught tort law, Harvard Law Review, 2006, Vol. 119, No. 2574. pp. 2579-2580.

do not want to recognize their traffickers as perpetrators of the crime, as they are scared of being deported. However, if they are already seeking for help, they often do not get it in the proper form or they are even denied it by the law enforcement agencies. The American legislator in the Act of TVPA solved this issue by introducing a special T visa that allows victims of trafficking in human beings to obtain temporary residence within the country.[61] Victims can receive this privilege, if they belong to a group of victims who have suffered a severe form of trafficking in human beings, and they must be willing and able to cooperate with law enforcement agencies in the investigation process and then in the law enforcement phase, and they must also suffer from a significant form of damage. Individuals who have been granted the so-called T visas may also apply for a permanent residence permit if they have stayed for at least 3 consecutive years in the US. Individuals who have suffered severe forms of trafficking and have applied for T visas and have shown their willingness to cooperate with law enforcement agencies are also eligible for a work visa and social assistance benefits. In addition to all these benefits, the Act also introduced the repayment of all the deserved assets by the convicted trafficker and the seizure of his/hers entire existing property. One of the extremely positive things of the act is the fact that victims can bring civil actions for damages against their traders and sellers and they do not have to pay lawyers and legal fees.[62]

These are, therefore, the practices and provisions that should be at least examined within the EU, if not even enacted in the legislation. In order for the public, to be acquainted with the results of the work, it is also necessary to publish the findings which the authorities have found out through their activities.[63] It is necessary to provide long-term support to children who have been victims of trafficking in human beings. We will achieve this with data collection, analysis and dissemination, monitoring and evaluation of programs, research and learning, international cooperation and coordination, with non-discriminatory treatments, special care of migrant children, establishment of national child protection systems, multi-sectoral approach, cooperation within the country and between countries, and as already mentioned - with the establishment of preventive measures and strategies.[64] A complete chain of factors is needed, if only police officers do not have clear legal provisions how to work and prosecute criminals, due to legal loopholes, they may knowingly and involuntarily release a trafficker from their hands.[65]

CONCLUSION

Children are human beings with all of their belonging rights and dignity. Human rights are also the rights of children, and because of their particular vulnerability, they need additional protection. The latter means that they must be provided with an environment that, to the greatest

[61] U.S. Deparment of State, Diplomacy in action, Trafficking Victims Protection Act: Minimum Standards for the Elimination of Trafficking in Persons, 2013. URL= https://www.state.gov/j/tip/rls/tiprpt/2013/210553.htm. Accessed 5 September 2017.
[62] N.N., *op. cit.* note 60, pp. 2580-2581.
[63] *Ibidem,* p. 2581.
[64] UNICEF, Child Trafficking in Europe, *op. cit*. note 28. Accessed 22 August 2017.
[65] O'Neill Maria, The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective, Journal of Contemporary European Research, University of Abertay Dundee, Vol. 7, No. 4, 2011, pp. 452 - 467.

extent possible, provides security and prevents them from situations in which they might become potential victims of abuse.[66] Any abuse of the child is an extremely serious violation of the rights and dignity of children, but I believe that trafficking in children is a violation of the child's integrity in the worst possible way. We have to be aware of this and also take into account this when legislating. Every step needs to be carefully considered and then properly formulated into meaningful and optimal law provisions. Despite the fact that the EU represents a high-level of integration and is made up of highly-linked Member States, the latter are still afraid to leave the whole legislative work in this field to the legislator of EU, the European Commission. It is true that each Member State is a special case for itself, and that each has its own forms of trafficking in persons that are displayed and implemented in different ways. However, we consider that the EU is primarily the one that has to create a good legal framework and leave an appropriate margin of discretion within it, which in the individual circumstances, will be filled individually by Member States with their national and internal rules. Notwithstanding everything, the maximum protection of children involved and the maximum punishment of all involved providers of this terrible violation of children's rights should be the goal. If we pursue these, we will achieve the optimum of legislation, and the good effects of this will follow our doing.

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[66] European Parliament, Violence towards children in the EU, 2014. URL= http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf. Accessed 5 September 2017.

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VIOLENCE AGAINST CHILDREN AND INTEGRATED CHILD PROTECTION SYSTEMS IN THE EUROPEAN UNION[**]

Summary

In line with international and European human rights instruments and standards, the EU Member States are under obligation to protect children from all forms of violence. The establishment of a holistic child protection system is the primary obligation of each EU Member State and a prerequisite for the effective protection of children. An integrated child protection system covers a wide range of comprehensive and integrated measures, and includes multi-disciplinary, cross-sectorial and inter-agency cooperation of all duty-bearers. Due to migration to the EU and mobility within the EU, the number of cross-border and transnational child protection situations has been increasing. These situations require cooperation between social welfare, judicial, investigative and other authorities in different EU Member States. This paper gives an overview of the EU legislation and policies relevant to child protection, and examines the EU's role in reinforcing the protection of children against violence.

Keywords: violence against children, child protection, children's rights, European Union

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1. INTRODUCTION

Violence against children is a problem that has persisted throughout history. However, it was not until 1960s and the publication of "The battered child syndrome" by Kempe and associates that this problem became an area of concern to professionals and researchers.[1] In 2006, the United Nations conducted the first global, comprehensive study on all forms of violence against children titled "World report on violence against children".[2] The aforementioned study revealed that, despite the broad acceptance of the UN Convention on the Rights of the Child (1989)[3] which prohibits all forms of violence against children, "children in almost all States are still waiting for full recognition of respect for their human dignity and physical integrity, and for adequate investment in actions to prevent all forms of violence against them".[4] Violence against children is a global phenomenon that occurs in all parts of the world, regardless of economic, social or cultural differences. Some forms of violence against children, such as corporal punishment and harmful practices, are still culturally and socially accepted in many countries. EU Member States are no exception.

The establishment of a holistic national child protection system is the primary obligation of each EU Member State and a prerequisite for the effective protection of children from violence. The integrated child protection system covers a wide range of comprehensive and integrated measures and implies cooperation between social welfare, judicial, investigative and other authorities. Additionally, cross-border and transnational child protection situations require cooperation and mutual trust between different authorities in different EU Member States. However, EU Member States respond to violence against children in different ways, have different laws, different human and financial resources and different accountability mechanisms. This paper gives an overview of the EU legislation and policy relevant to child protection and examines the EU's role in reinforcing the protection of children against violence.

2. VIOLENCE AGAINST CHILDREN

Violence against children is a complex and heterogeneous phenomenon that takes many forms. Accordingly, it is difficult to give a single comprehensive definition and conceptual model of the term. The UN Convention on the Rights of the Child obliges States Parties to take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".[5] As one can see, Article 19(1) of the Convention on the Rights of the Child guarantees a child's right to freedom from all forms of violence, but does not give an actual definition of the term. The "World Report on Violence

[1] Kempe, C. H., Silverman, F. N., Steel, B. F., Droegemueller, W., Silver, H. K., *The Battered-Child Syndrome,* Journal of the American Medical Association, No. 181, 1962, pp. 17-24, cited by Kempe, C. H., Silverman, F. N., Steel, B. F., Droegemueller, W., Silver, H. K., *The Battered-Child Syndrome*, Child Abuse and Neglect, Vol. 9, 1985, pp. 143. – 154.
[2] Pinheiro, P. S., *World Report on Violence against Children,* United Nations, Geneva, 2006, p. 3.
[3] Convention on the Rights of the Child, United Nations, Treaty Series , Vol. 1577, p. 3.
[4] Pinheiro, *op. cit.,* note 2, p. 5.
[5] Convention on the Rights of the Child, Article 19(1).

Against Children" draws on the definitions of violence and child maltreatment given by the World Health Organization and defines violence against children as "the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity".[6] In line with this definition, violence against children consists of a wide range of different behaviors that can jeopardize the child's well-being.

Violence against children is generally divided into four main categories: physical violence, mental (emotional) violence, sexual violence and neglect or negligent treatment. The Committee on the Rights of the Child complements this non-exhaustive list by adding the following specific forms of violence: corporal punishment, sexual abuse and exploatation, torture and inhuman or degrading treatment or punishment, violence among children (bullying), self-harm, harmful practices (e. g. female genital mutilation, forced and early marriage, "honor" crimes etc.), violence in the mass media, violence through information and communications technologies and institutional and system violations of child rights.[7] Adults are often perpertraters of violence, but violence may also occur among children. Furthermore, some children harm themselves. Violence against children also occurs in different settings where chilhood is spent: home and family, school, care and justice system, workplaces and the community.[8]

Due to underreporting, inadequate investigations of children's deaths and reports of violence, persistent social acceptance of some forms of violence against children and other factors, the exact number of children that have experienced violence remains unclear. There are also gaps between the prevalence rates in different studies on violence against children conducted all around the world.[9] However, the results of meta-analyses of studies on violence against children conducted in 2015 show that violence against children is a global phenomenon of considerable extent that touches the lives of millions of children.[10] Analyses of community surveys from Europe and around the world shows a prevalence rate of 9.6% for sexual abuse (13.4% in girls and 5.7% in boys), 22.9% for physical and 29.1% for mental violence.[11] Few studies have been done on neglect, but average prevalence rates are 16.3% for physical and 18.4% for emotional neglect.[12] Accordingly, about 18 million children in Europe suffer from sexual abuse, 44 million

[6] For more details, see: Pinheiro, *op. cit.,* note 2, p. 4, and Krug, E. G., Dahlberg, L. L., Mercy, J. A., Zwi, A. B., Lozano, R. (eds.), *World Report on Violence and Health,* World Health Organization, Geneva, 2002, p. 5 and p. 59.
[7] CRC, General comment No. 13 (2011): The Right of the Child to Freedom From all Forms of Violence, official websites of the United Nations, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f13&Lang=en, pp. 11 – 12. Accessed 10 September 2017.
[8] Pinheiro, *op. cit.,* note 2, p. 7.
[9] Stoltenborgh, M,, Bakermans-Kranenburg, M. J., Alink, L. R. A., van IJzendoorn, M. H., *The Prevalence of Child Maltreatment across the Globe: Review of a Series of Meta-Analyses,* Child Abuse Review, Vol. 24, 2015, p. 47.
[10] *Ibid.,* p. 48.
[11] Sethi, D., Bellis, M., Hughes, K., Gilbert, R., Mitis, F., Galea, G., (eds.) *European Report on Preventing Child Maltreatment,* World Health Organization, Regional Office for Europe, Copenhagen, 2013, p. viii.
[12] *Ibid.*

from physical abuse and 55 million from mental abuse.[13] Violence against children leads to the premature death of at least 852 children under 15 years in the European Region every year.[14] According to European Child Safety Alliance report, each year about 3000 deaths of children and adolescents aged 0-19 years in the EU are classified as intentional or of undetermined intent.[15] The rate of child intentional injury deaths for EU-28 is 2.85 per 100.000 children aged 0-19 years for boys and 1.20 per 100.000 for girls.[16]

Violence against children has many short-term and long-term consequences for the victim, victim's family and the society. The consequences of violence experienced in childhood are, of course, acute injuries and reactions. In addition, problems that affect emotional, social and cognitive functioning are identified.[17] Childhood trauma is also related to increased risk of mental disorders, alcohol and drug abuse as well as physical diseases in adulthood.[18] Violence against children has a significant impact on economy. Direct costs of violence against children include medical costs, the costs of social and judicial services and the costs of the placement of children in care institutions or foster families. Indirect costs of violence against children are associated with reduced productivity, disability, reduced quality of life and early death. The results of a study conducted in Germany show that total annual costs, which incur as follow-up costs of child abuse and neglect, amount to EUR 11.1 billion.[19] In other words, the annual per capita trauma follow-up costs in Germany would amount to EUR 134.84.[20] Applying the costs of the pessimistic scenario the upper bound of the annual trauma follow-up cost frame in Germany is EUR 29.8 billion totals or EUR 363.58 per capita.[21]

3. INTEGRATED CHILD PROTECTION SYSTEM

3.1. THE DEFINITION OF INTEGRATED CHILD PROTECTION SYSTEM

In the wider sense, "child protection" denotes the protection of children's rights in general terms.[22] However, the term "child protection" is more commonly used to denote the protection of children from violence.[23] In order to protect children from violence, it is necessary to establish national child protection systems. Spratt identified several common imperatives driving the development of child protection systems: epidemiological evidence for prevalence

[13] *Ibid.*
[14] *Ibid.*
[15] MacKay, M., Vincenten J., *National Action to Address Child Intentional Injury - 2014: Europe Summary,* European Child Safety Alliance, Birmingham, 2014, p. 12.
[16] *Ibid.*
[17] For more details, see: Bilić, V., Buljan Flander, G., Hrpka, H., *Nasilje nad djecom i među djecom,* Naklada Slap, Jastrebarsko, 2012, p. 103 – 114.
[18] Pinheiro, *op. cit.,* note 2, p. 7.
[19] Habetha, S., Bleich, S., Weidenhammer, J., Fegert, J. M., *A prevalence-based approach to societal costs occurring in consequence of child abuse and neglect,* Child and Adolescent Psychiatry and Mental Health, Vol. 6, 2012, online edition, https://capmh.biomedcentral.com/track/pdf/10.1186/1753-2000-6-35?site=capmh.biomedcentral.com, p. 5, Accessed 10 September 2017.
[20] *Ibid.*
[21] *Ibid.*
[22] Stalford, H., *Children and the European Union: Rights, Welfare and Accountability,* Hart Publishing, London, 2012, p. 167.
[23] *Ibid.*

and effects of child abuse, the related need for early investment in children, centrality of children's rights and international league tables comparing performance in protection arrangements for children.[24]

UNICEF Child Protection Strategy (2008) [25] defines child protection systems as "a set of laws, policies, regulations and services needed across all social sectors — especially social welfare, education, health, security and justice — to support prevention and response to protection-related risks".[26] It stresses out that these systems are part of social protection, but extend beyond it.[27] At the level of prevention, their aim includes supporting and strengthening families to reduce social exclusion, and to lower the risk of separation, violence and exploitation.[28] The Committee on the Rights of the Child highlights that a holistic child protection system requires the provision of comprehensive and integrated measures across stages identified in Article 19(2) of the UN Convention on the Rights of the Child.[29] Those stages include prevention, identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment, and, as appropriate, judicial involvement. In 2015, European Commission defined integrated child protection system as " the way in which all duty-bearers (namely the state authorities represented by law enforcement, judicial authorities, immigration authorities, social services, child protection agencies, etc.) and system components (e.g. laws, policies, resources, procedures, processes, sub-systems) work together across sectors and agencies sharing responsibilities to form a protective and empowering environment for all children".[30] According to some authors, child protection measures can be divided into three main categories: a) laws, regulations and policies; b) education, training, service programs, and data management; and c) the status and progress of the child's well-being, health and development.[31]

There are two main approaches to responding to violence against children: child protection orientation and family service orientation.[32] As Gilbert states, these two orientations are distinguished along four dimensions: the way the problem of violence against children was framed, response to child abuse, state-parent relationship, and out-of-home care.[33] In child protection-oriented system violence against children is conceived as an act that demands the

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[24] Spratt, T., Nett., J., Bromfield, L., Hietamäki, J., Kindler, H., Ponnert, L., *Child Protection in Europe: Development of an International Cross-Comparison Model to Inform National Policies and Practices,* British Journal of Social Work, Vol. 45, No. 5, 2015, p. 1512.

[25] UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev.1, 20 May 2008, official websites of the UNICEF, https://www.unicef.org/protection/CP_Strategy_English(1).pdf . Accessed 10 September 2017.

[26] *Ibid*, para. 12.

[27] *Ibid.*

[28] *Ibid.*

[29] CRC, General comment No. 13 (2011), note 7, para. 45.

[30] *Coordination and Cooperation in Integrated Child Protection Systems, Reflection paper for the 9th European Forum on the Rights of the Child,* European Commission, 30 April 2015, official websites of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/2015_forum_roc_background_en.pdf, p. 3. Accessed 10 September 2017.

[31] Svevo-Cianci, K. A., Hart, S. N., Rubinson C., *Protecting Children from Violence and Maltreatment: A Qualitative Comparative Analysis Assessing the Implementation U. N. CRC Article 19,* Child Abuse and Neglect, No. 34, 2009, p. 46.

[32] Gilbert, N., Parton, N., Skivenes, M., (eds.) *Child Protection Systems – International Trends and Orientations,* Oxford University Press, New York, 2011, p. 3.

[33] *Ibid.,* pp. 3-4.

protection of children from harm, the response to violence is legalistic and investigatory in order to assess the needs and formulate a child safety plans, child welfare professionals function in an adversarial way, and out-of home placements are mainly involuntary.[34] On the other hand, family service-oriented systems conceive violence against children as a result of family conflict or dysfunction that arose from social and psychological difficulties, offer therapeutic response to family's needs, child welfare professionals function in a spirit of partnership with parents and out-of-home placements are mainly voluntary.[35] Child protection orientation is characteristic to Anglo-American countries (including United Kingdom), while Continental European and Nordic countries approach the problem of violence from a family service orientation.[36] These two models of child protection seem potentially conflicting. However, most countries are trying to integrate both models. It requires flexible approach that focuses on family support as long as the development or security of the child is not significantly endangered.[37]

3.2. INTEGRATED CHILD PROTECTION SYSTEMS IN EU MEMBER STATES

In addition to different approaches to child protection, each of the 28 EU Member States has a unique historical, social and cultural background that has influenced the development of its national child protection system. The European Agency for Fundamental Rights (FRA) conducted research on national child protection systems in the 28 EU Member States and published its findings in a report "Mapping Child Protection Systems in the EU".[38] The report reveals how national child protection systems operate and how they address the specific needs of particular groups of children, while also examining national and transnational coordination and interagency cooperation. It also reveals many differences between national child protection systems in the EU (different laws, different human and financial resources and different accountability mechanisms).

National child protection systems in the EU Member States share some common challenges in preventing and responding to violence against children, with some of these challenges being complexity of different regulations, regimes and rights applicable, inadequate funding and human resources, lack of operational coordination and cooperation mechanisms horizontally and vertically; lack of supporting guidance and protocols, which can result in competition among agencies or services and insufficient attention to prevention.[39]

Transnational and cross-border elements add complexity to dealing with violence against children and demand cooperation between child protection systems in different EU Member States. Some of the challenges in transnational and cross-border situations are

[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid,* p. 4.
[37] Sladović Franz, B., *Djeca u alternativnoj skrbi*, in: Hrabar, D. (ed.), Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 227.
[38] *Mapping Child Protection Systems in the EU,* European Agency for Fundamental Rights, February 2015, official websites of the European Agency for Fundamental Rights, http://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu. Accessed 10 September 2017.
[39] For more details, see *Challenges Identified For Integrated Child Protection Systems,* official website of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/cps_annex_challenges.pdf. Accessed 10 September 2017.

difficulties in identifying counterparts in other EU Member State, lack of clarity on roles and responsibilities, lack of country of origin information, lack of formal cooperation procedures, guidance and protocols concerning a child from another country, or transfers of children across borders and lack of transnational networks.[40]

The theme of the 9th European Forum on the Right of the Child[41] was coordination and cooperation in integrated child protection systems. In the Reflection Paper for the Forum, European Commission presented 10 Principles for integrated child protection systems (hereafter referred to as: the Principles).[42] The Principles include non-discrimination and recognition, respect and protection of every child as a rights holder. Child protection systems that are in line with the Principles should include prevention measures, support families in their role as primary caregiver and ensure adequate care, support and protection for all children. Integrated child protection systems should also have transnational and cross-border mechanisms in place. They should deliver training on identification of risks to a wide range of people working for and with children and ensure safe, well-publicized, confidential and accessible reporting mechanisms. Child protection systems should also ensure that society as a whole is aware and supportive of the child's right to freedom from all forms of violence.

4. EUROPEAN UNION'S LEGAL FRAMEWORK RELEVANT TO CHILD PROTECTION

4.1. EU LEGISLATION RELEVANT TO CHILD PROTECTION AND INTEGRATED CHILD PROTECTION SYSTEMS

The primary goal of the establishment of the European Union was not the protection of human rights, but the strengthening of the economic development of its Member States. However, in the last few decades the European Union has become an important regional factor in human rights protection, including the protection of the rights of the child. Article 3(3) of the Treaty on European Union[43], as amended by Treaty of Lisbon[44], introduced protection of the rights of the child as one of the EU's core values. Additionally, article 3(5) of the Treaty on European Union identifies "protection of human rights, in particular the rights of the child" as an important segment of the EU's external relations policy. Consolidated Version of the Treaty on

[40] *Ibid.*

[41] The European Forum on the Rights of the Child was launched following the adoption of the European Commission Communication Towards the EU strategy on the rights of the child in 2006. It is organized and chaired by the European Commission and meets annually (apart from 2014) and brings together a wide range of stakeholders (ombudspersons for children, representatives of the EU's institutions, the Council of Europe, international organizations, NGO's etc.) to exchange information and good practice on the rights of the child. For more details, see: *The European Forum on the Rights of the Child,* official websites of the European Union, http://ec.europa.eu/justice/fundamental-rights/rights-child/european-forum/index_en.htm. Accessed 10 September 2017.

[42] *Coordination and Cooperation in Integrated Child Protection Systems*, *op. cit.,* note 30, pp. 10-11.

[43] Consolidated version of the Treaty on European Union, Official Journal of the European Union, C 326, 26 October 2012, pp. 1 – 390.

[44] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, Official Journal of the European Union, C 306, 17 December 2007, pp. 1–271.

the Functioning of the European Union[45] (hereafter referred to as: TFEU) includes two explicit references to children. According to Article 79(2d) of the TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, are competent to adopt measures for combating trafficking in persons, in particular women and children. According to Article 83(1) of the TFEU the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the area of, *inter alia,* trafficking in human beings and sexual exploitation of women and children.

Obligation to protect the rights of the child is an explicit objective in the Charter of Fundamental Rights of the European Union[46] (hereafter referred to as: the Charter). The Charter applies equally to all, but Article 24(1) of the Charter stresses children's vulnerability and need for special protection, and acknowledges children's right to such protection and care as is necessary for their well-being. Article 24 of the Charter also acknowledges children's right to express their views freely (Art. 24(1) of the Charter) and sets children's best interests as the primary consideration in all actions relating to them, whether taken by public authorities or private institutions (Art. 24(2) of the Charter). Other substantive rights contained in the Charter are also important in the context of child protection: right to integrity of the person (Art. 3 of the Charter), prohibition of torture and inhuman or degrading treatment or punishment (Art. 4 of the Charter), prohibition of slavery and forced labour (Art. 5 of the Charter) and prohibition of child labour and protection of young people at work (Art. 32 of the Charter).

There are several EU secondary law documents relevant to child protection. Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA[47] establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of sexual abuse and exploitation of children and provisions on victim assistance and support measures. Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA[48] contains a number of provisions relating to the protection of children from trafficking in human beings. In the preamble, it highlights the vulnerability of children, the need for specific assistance, support and protective measures for child victims of trafficking and the best interest

[45] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326, 26 December 2012, pp. 47-201.
[46] Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326, 26 December 2012, pp. 391–407.
[47] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA, Official Journal of the European Union, L 335, 17 December 2011, pp. 1-14.
[48] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, L 101/1, 15 April 2011, pp. 1-11.

of the child as primary consideration in the application of the Directive.[49] It also contains several articles that relate entirely to assistance, support and protection measures for child victims of trafficking in human beings.[50]

The purpose of the Directive 2012/29/EU 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 (2012)[51] (hereafter referred to as: The Victims' Rights Directive) is to ensure that victims of crime receive appropriate information, support and protection, and are able to participate in criminal proceedings. The Victims' Rights Directive includes extensive provisions for child victims.[52] and, *inter alia,* provides for special measures for protection of child victims during criminal proceedings (Art. 24 of the Victims' Rights Directive). Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[53] establishes procedural safeguards to ensure that children, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings, to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration.

Some aspects of EU procedural law applicable in cross-border and transnational child protection situations, e. g. legislation regulating mutual recognition of decisions concerning protection measures for victims of a crime and protection measures in civil matters among the EU Member States, are also relevant in creating integrated and cooperating child protection systems in the European Union. In this context, one should mention the following EU legislation: Directive 2011/99/EU of 13 December 2011 on European protection order[54], Regulation (EU) No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters (2013)[55] and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[56] (also known as the Brussels IIa Regulation).

[49] *Ibid,* preamble, paras 8, 12, 22 and 25.
[50] *Ibid,* Arts13, 14, 15 and 16.
[51] 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 (2012), Official Journal of the European Union, L 315, 14 November 2012, pp. 57-73.
[52] For more details, see *ibid.,* preamble, paras 14, 17, 19, 38, 42, 54, 57, 60, 66 and 69 and Arts 1(3), 10(1), 21(1), 22(4).
[53] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Official Journal of the European Union, L 132, 21 May 2016, pp. 1-20.
[54] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on European protection order, Official Journal of the European Union, L 338, 21 December 2011, pp. 2-18.
[55] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, Official Journal of the European Union, L 181, 29 June 2013, pp. 4-12.
[56] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000**,** Official Journal of the European Union, L 338, 23 December 2003, pp. 1 – 29.

In the last few years, migration to the EU has brought new challenges in child protection. Children in migration are especially vulnerable and exposed to a greater risk of violence, exploitation and trafficking in human beings. In order to reduce that risk, it is necessary to form closer ties between authorities working on asylum and migration and those on child protection. It is also necessary to ensure that all EU Member States apply common standards for safeguards and guarantees in asylum procedure, detention conditions, family reunification and other areas relevant to the protection of children in migration. Common standards are set down by several regulations and directives that contain specific references to children. Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)[57] (hereafter referred to as: Reception Conditions Directive) sets standards for detention conditions for children. It also highlights that by applying the Directive Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity.[58] Reception Conditions Directive provides rules designed to ensure access to education for children (Art. 14 of the Reception Conditions Directive), rules on the protection of physical and mental health, on ensuring adequate living standards, and rules for the placement and family tracing for unaccompanied children (Arts. 23 and 24 of the Reception Conditions Directive). It also obliges Member States to ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counseling is provided when needed (Art. 23(4) of the Reception Conditions Directive). Article 25 of the Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection[59] (Asylum Procedures Directive) contains special guarantees for children (unaccompanied minors) during those procedures. Directive 2008/115/EU of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[60] (hereafter referred to as: Return Directive) sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals. It contains provisions on taking due account of the best interest of the child (Art. 5(a) of the Return Directive) and special provisions on return and removal of unaccompanied minors (Art. 10 of the Return Directive). Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[61]

[57] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Official Journal of the European Union, L 180, 29 June 2013, pp. 96-116.
[58] *Ibid,* preambule, para. 9.
[59] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal of the European Union, L 180, 29 June 2013, pp. 60-95.
[60] Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union, L 348, 24 December 2008, pp. 98-107.
[61] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Official Journal of the European Union, L 180, 29 June 2013, pp. 31-59.

(hereafter referred to as: Dublin Regulation) contains specific guarantees for children, emphasizing the best interest of the child and cooperation of the Member States in assessing the best interests of the child (Art. 6 of the Dublin Regulation). The purpose of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[62] is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States.

4.2. EU SOFT-LAW INSTRUMENTS RELEVANT TO CHILD PROTECTION AND INTEGRATED CHILD PROTECTION SYSTEMS

Soft-law instruments have a significant role in the EU's efforts to promote and to protect the rights of the child in general. They also play a significant role in the EU's efforts to strengthen the national integrated child protection systems and to improve cooperation between child protection systems of its Member States. In 2006, European Commission adopted Communication Towards an EU Strategy on the Rights of the Child[63], the first initiative taken at the Commissions level to safeguard the rights of the child at the level of EU institutions and Member States.[64] Another important moment in the protection of the rights of the child was the adopting of the Agenda for the Rights of the Child (2011)[65] (hereafter referred to as: the Agenda). The Agenda, adopted by the European Commission, included eleven actions in four areas and introduced three general principles that should ensure that the EU action is exemplary in ensuring the respect of the provisions of the Charter and of the UN Convention on the Rights of the Child.[66] These three principles are: making the rights of the child an integral part of the EU's fundamental rights, building the basis for evidence-based policymaking and cooperation with all stakeholders.[67]

There are several other non-binding instruments relevant to integrated child protection systems. The EU Strategy towards the eradication of trafficking in human beings 2012-2016[68] highlighted that comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination, are key in catering to diverse needs of diverse groups of

[62] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal of the European Union, L 251, 3 October 2003, pp. 12-18.
[63] Communication from the Commission: Towards an EU Strategy on the Rrights of the Child, COM (2006) final, 4 July 2006, Brussels, official websites of the European Union, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:en:PDF. Accessed 10 September 2017.
[64] Iusmen, I., *Children's Rights, Eastern Enlargement and EU Human Rights Regime,* Manchester University Press, Manchester, 2014, p. 102.
[65] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An EU Agenda for the Rights of the Child, COM(2011) 0060 final, official websites of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0060&from=en. Accessed 10 Semptember 2017.
[66] *Ibid.*, p. 4.
[67] *Ibid.,* pp. 4 – 6.
[68] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions the EU strategy towards the eradication of trafficking in human beings 2012–2016, 19 June 2012, COM(2012) 0286 final, official websites of the European Union, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0286. Accessed 10 September 2017.

children, including victims of trafficking.[69] It contained a list of actions aimed at achieving the five priorities as identified in the Strategy.[70] European Commission Communication COM (2013) 833 final: Towards the Elimination of Female Genital Mutilation[71] contains a list of objectives and action aimed at better understanding and preventing female genital mutilation, promoting effective prevention and victim support measures, and supporting Member States' in enforcement of laws prohibiting this harmful practice which is present in many African countries and which has, due to migration, found its way to the EU Member States.

Communication on Protecting Children in the Digital World[72] analyses the implementation and effectiveness of measures for the protection of children while using electronic media, and stresses the importance of control systems and better cooperation and protection concerning problematic Internet content.

Commission Recommendation of 20 February 2013 Investing in Children: Breaking the Cycle of Disadvantage[73] suggests that Member States should organize and implement policies to address child poverty and social exclusion, promotes children's well-being through multi-dimensional strategies, and provides Member States with guidelines for achieving these goals. It highlights that, while policies addressing child poverty are primarily the competence of Member States, a common European framework can strengthen synergies across relevant policy areas, help Member States review their policies and learn from each other's experiences in improving policy efficiency and effectiveness through innovative approaches, whilst taking into account the different situations and needs at local, regional and national level.[74] It also explains how the EU financial instruments can be better mobilized in order to break the cycle of disadvantage and give children (especially those facing multiple disadvantages) a better start in life.

[69] *Ibid.,* point 2.1, action 3.
[70] Priorities identified in the EU Strategy towards the eradication of trafficking in human beings are: identifying, protecting and assisting victims of trafficking, stepping up the prevention of trafficking in human beings, increased prosecution of traffickers, enhanced coordination and cooperation among key actors and policy coherence and increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings. *Ibid,* point 2.
[71] Communication from the Commission to the European Parliament and the Council, COM (2013) 833 final: Towards the elimination of female genital mutilation, 25 November 2013, official websites of the European Union, http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf. Accessed 10 September 2017.
[72] Report from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry-protecting children in the digital world, COM (2011) 0556 final, official websites of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0556. Accessed 10 September 2017.
[73] Commission Recommendation of 20 February 2013 investing in children: breaking the cycle of disadvantage (2013/112/EU), Official Journal of the European Union, L 59, 2 March 2013, pp. 5-16.
[74] *Ibid.,* preambule, para. 16.

European disability strategy 2010-2020[75] provides a framework for action at European level, as well as with national action to address the diverse situation of men, women and children with disabilities. It, among other things, promotes the transition from institutional to community-based care by using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children.[76]

The first priority area of the EU Guidelines for the promotion and the protection of the rights of the child[77] adopted in 2007 (hereafter referred to as: 2007 EU Guidelines), which reaffirmed the EU commitment to promote and protect the rights of the child in its external relations, were "all forms of violence against children". Since the adoption of 2007 EU Guidelines, many things concerning child protection have changed globally, thus making the revision of the Guidelines necessary. The purpose of the revised EU Guidelines on the promotion and protection of the rights of the child[78], adopted in 2017, is to recall international standards on the rights of the child and to provide practical guidance to officials of the EU institutions and EU Member States in order to strengthen their role in promoting and protecting the rights of all children in EU external action.[79]

In the context of integrated child protection systems, one should also mention The EU Action Plan on Human Rights and Democracy (2015-2019)[80] and Guidance document related to the transposition and implementation of the Victims' Rights Directive.[81]

[75]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final, 15 November 2010, official websites of the European Union, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:en:PDF. Accessed 10 September 2017.
[76] *Ibid.,* p. 6.
[77] EU Guidelines for the Promotion and the Protection of the Rights of the Child, 10 December 2007, official websites of the European Union, http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf. Accessed 10 September 2017.
[78] EU Guidelines for the Promotion and the Protection of the Rights of the Child (2017), official websites of the European Union, https://eeas.europa.eu/sites/eeas/files/eu_guidelines_rights_of_child_2017.pdf. Accessed 10 September 2017.
[79] *Ibid,* p. 5
[80] EU Action Plan on Human Rights and Democracy (2015-2019), 20 July 2015, official websites of the European Union, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf. Accessed 10 September 2017.
[81] Guidance document related to the transposition and implementation of 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, December 2013, official websites of the European Union, https://e-justice.europa.eu/fileDownload.do?id=05758a3a-9e2e-49a5-a7ec-3737c3ad6876. Accessed 10 September 2017.

5. EUROPEAN UNION'S ROLE IN CHILD PROTECTION AND THE DEVELOPMENT OF THE INTEGRATED CHILD PROTECTION SYSTEMS IN ITS MEMBER STATES

The number of legislative and policy documents relevant to child protection shows that European Union has finally accepted the protection of the rights of the child as one of the important areas of its action in both Union affairs and its external relations.[82] As Stalford notices, child protection has drawn the EU's attention to much greater extent than other aspects of children's rights and standard rationale for non-intervention in issues that are regarded as more appropriately addressed at the national level seems to present less of a barrier in the context of child protection.[83] However, the role of European Union in the development of national integrated child protection systems and consequently in improving the position of children and their protection from violence should be further assessed.

Since the EU's approach to the rights of the child is different from that of the Council of Europe and other international organizations, it has great potential in ensuring children higher levels of protection.[84] In questions relating to child protection and integrated child protection systems, the EU operates in several ways. First, as seen in the previous sections of this paper, the EU has developed several legislative instruments relevant to child protection systems with the goal of harmonizing certain segments of child protection. The harmonization of national child protection systems facilitates cooperation and recognition of decisions of competent authorities in different EU Member States.

Second, the EU incorporates international child protection standards and principles, guaranteed by international and regional human rights instruments, into its own legislation and policy creating. In doing so, it enforces those standards with its own measures. Stalford notices that, in practice, EU measures are more efficient and easily enforced because they are subject to judicial scrutiny, while the enforcement of international instruments rely largely on political pressure and willingness of individual Member States.[85] Since the adoption of the Communication Towards an EU Strategy on the Rights of the Child, UN Convention on the Rights of the Child has a prominent position in the EU's child rights policy and serves as a framework for all EU's actions regarding the rights of the child. In the case of *Dynamic Medien* the Court of Justice even used UN Convention on the Rights of the Child to trump the fundamental freedoms associated with free movement of goods between Member States.[86]

Third, since the European Union is a *sui generis* organization, it uses specific mechanisms (financial programmes, pre-accession negotiations and EU agencies) to enhance the child

[82] Majstorović, I., *Europski obiteljskopravni sustav zaštite prava djece,* in: Hrabar, D., (ed.) Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 57.
[83] Stalford, *op. cit.,* note 22, pp. 167 – 168.
[84] Majstorović, *loc. cit.,* note 82.
[85] For more details, see: Stalford, *op. cit.,* note 22, p. 183.
[86] Judgement in the Case C-244/06 Dynamic Medien Vertriebs GmbH v. Avidesdia AG, 14 February 2008, official websites of the Court of Justice of the European Union, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6e44cc99086b4441288a4fb93595c7068.e34KaxiLc3qMb40Rch0SaxyMb3r0?text=&docid=71569&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=335874. Accessed 10 September 2017.

protection levels and to ensure development and cooperation between national, integrated child protection systems. The EU financial programmes cover a wide range of activities. For example, in the last 20 years the Daphne Initiative and later Daphne Programme[87] aimed to contribute to the protection of children, young people and women against all forms of violence. The Daphne programme continues in the period 2014-2020 as a part of the Rights, Equality and Citizenship Programme 2014–2020[88].

The EU also uses the human rights conditionality in pre-accession negotiations. This was the case with Eastern European candidates, especially Romania. During pre-accession, the EU's intervention in human rights provisions in Romania, with the focus on child protection, went well beyond the EU's internal role and mandate in human rights relation to the Member States.[89] As Isumen argues, the Romanian case raised awareness of the problems faced by children in the EU and provided the political opportunity for the EU institutions to initiate action in children's rights at the EU level.[90]

The EU agencies also play an important role in child protection, especially in cross-border and transnational situations. Agencies such as European Union Agency for Law Enforcement Cooperation (EUROPOL) and EUROJUST assist Member States in their fight against international crime involving children in cross-border cases (e.g. child trafficking, sexual abuse, and cybercrimes). European Asylum Support Office (EASO) enhances practical cooperation on asylum matters and European Union Agency for Fundamental Rights (FRA) plays a particularly important role in gathering data on rights of the child.

6. CONCLUSION

Each EU Member State creates its own national child protection system. Since the European Union has accepted the protection of the rights of the child, especially the protection of children from violence as one of the important areas of its action, the EU's legislation, activities and policies have influenced the development of national child protection systems in the EU Member States. However, the EU's activities regarding child protection have several limitations. European Union, as *sui generis* organization, has limited legal competence in child protection and its scope to act often depends on the current political situation. The EU also has to balance between measures and activities aimed at strengthening economic development and the EU's security on one hand, and measures and activities in the area of child protection on the other hand. One of the examples of this ambivalence is current migration situation. Free movement of persons increases the number of cross-border and transnational child protection situations which demand cooperation between different national child protection systems and complicates the detection and fight against violence and criminal acts involving children.

[87] For more details, see: *The Daphne Toolkit,* official websites of the European Union, http://ec.europa.eu/justice/grants/results/daphne-toolkit/. Accessed 10 September 2017.
[88] Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 Text with EEA relevance, Official Journal of the European Union, L 354, 28 December 2013, pp. 62–72.
[89] Iusmen, *op. cit.,* note 64, p. 2-3.
[90] *Ibid.,* pp. 99-100.

In order to address the omnipresent problem of violence against children properly, adequate measures and mechanisms have to be in place. However, violence against children is a complex phenomenon that cannot be addressed by a single regulation or a strategy. It requires creation of a well-organized and integrated child protection system that includes comprehensive measures at the level of prevention, identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment, and, when appropriate, judicial involvement. Different social, economic, cultural and personal factors contribute to violence against children. These risk factors should also be addressed both at national and the EU level. All of this requires the acceptance of child-rights based approach, reinforcement of cooperation and coordination among different institutions, agencies and authorities in child protection cases and data collection and exchange. The European Union's activities add value to child protection. However, there is still much to be done in the future.

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CROSS-BORDER SUCCESSION PROCEEDINGS AFFECTING A CHILD[***]

ABSTRACT
A child can be subject to various legal relationships that have a cross-border element, and one of them is succession. Cross-border succession proceedings in the European Union are governed by Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession as well as the Hague Convention of 1961. However, if a child is involved, other legal sources become relevant as well, in particular Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A child may have different roles in this process, but above all, (s)he may be a testator or a successor. In the context of the latter, if the succession proceedings take place in one Member State, and the child is habitually resident in the other, questions may arise as to representation of a child in such proceedings. Moreover, if a property settlement agreement is reached, the question arises as to which state has the authority to issue an approval of such agreement in relation to a child, i.e. to examine and determine whether it is in the best interests of the child. These issues were addressed by the Court of Justice in the proceedings brought by Matoušková (case C-404/14) and Saponaro and Xylina (C-565/16). Other EU institutions have also been occupied with the same issues in the legislative procedure aimed at amending Regulation 2201/2003, which is still ongoing. In this paper, particular attention is therefore also paid to the relevant provisions of the Proposal for amending Regulation 2201/2003. A distinction in terms of the scope of the European Union Succession Regulation in the context of children may also be relevant in relation to the application of Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Namely, if a maintenance claim is made in the succession proceedings, the question of a qualification of that claim remains open.

Key words: cross-border succession, child, habitual residence, successor, testator.

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INTRODUCTION

Intensive migration and mobility within the European Union (hereinafter referred to as "the EU") are largely due to the movement of workers.[1] By encouraging the freedom of movement for workers,[2] the EU has introduced into the lives of its citizens the need to move across borders. The implications of the movement of one, several or even all family members, i.e. families living separately in at least two Member States, have been studied for decades. They affect numerous private and family relationships of these workers who are often insecure in the legal sense. Hence, migration is a trigger for unification of private international law that takes place in the EU in the context of judicial cooperation in civil matters.[3] Focused on the principle of mutual recognition of decisions in cross-border cases, by its secondary legislation the EU harmonises and speeds up judicial protection in cross-border proceedings. This strengthens legal certainty and mutual trust in the common judicial space. However, the EU mandate to act exists only in the area of private international law. Neither substantive nor civil procedural law are areas in which its jurisdiction is exercised and thus they remain regulated by national rules. There is a gradual expansion of the number of legal areas of private international law that are subject to unification,[4] and international succession law is placed at the back of that list. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[5] (hereinafter referred to as "the EU Succession Regulation" or "Regulation 650/2012") was adopted in mid-2012 and made cross-border succession one of these areas. The EU Succession Regulation opens up a whole series of legal issues that have not been systematically addressed so far. They may relate to the functioning of its rules as a set of standards, but also to their functioning in the context of other regulations and conventions binding to Member States. In this paper, we will look at the legal position of a child in international succession proceedings, engaging vertically the two aspects mentioned above. In international succession proceedings, the child is primarily a testator or a successor. The essence of this paper are the issues that arise when the child is a successor. It discusses which national court such succession proceedings can be brought before, what would the applicable law be, and how the effects of the decision taken are transferred abroad. This discussion opens up other issues as well. For example, if a child submits a maintenance claim in succession proceedings, its qualification refers to a delimitation in relation to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of

[1] Source: Eurostat (online data code: migr_imm1ctz), Original file; http://ec.europa.eu/eurostat/statistics-explained/images/c/c8/Immigration_by_citizenship%2C_2015_%28%C2%B9%29.png, Retrieved 10 October 2018, 3:51 pm

[2] Treaty on the Functioning of the European Union (consolidated text), Official Journal of the European Union C 326, 26.10.2012, Article 45(1), p. 63.

[3] *Ibid*., Article 81(1), p. 76.

[4] See Sajko, K., Međunarodno privatno pravo. Narodne novine, Zagreb, 2009, p. 11.

[5] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Official Journal of the European Union L 201, 27.7.2012, pp. 107-134.

decisions and cooperation in matters relating to maintenance obligations[6] (hereinafter referred to as "the Maintenance Regulation"). Furthermore, there are particularly interesting questions about the position and representation of the child, replacement of parental consent and the approval of a property settlement agreement in relation to which the child is one of the successors. In this context, Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[7] (hereinafter referred to as "the Brussels II bis Regulation") comes to the forefront. Through the case of *Matoušková* v. *Czech Republic,*[8] the Court of Justice of the European Union in Luxembourg (hereinafter referred to as "CJEU") has made a valuable contribution to solving the aforementioned problem. Further clarification comes with the recent *Saponaro and Xylina*[9] of 19 April 2018;

Analysis is further focused on *de lege ferenda* solutions with reference to the relevant provisions of the Proposal of the European Commission to amend the Brussels II *bis* Regulation.[10] It should be kept in mind that in all child-related proceedings it is necessary to put the best interests of the child first. Hence, in a wider context, convention law in relation to the protection of children's rights becomes relevant, especially the Convention on the Rights of the Child.[11] From a regional point of view, the European Convention for the Protection of Human Rights and Fundamental Freedoms,[12] the Charter of Fundamental Rights[13] and the overall sectoral policy on the protection of children's rights within the EU[14] are also decisive.

1. JURISDICTION IN CROSS-BORDER SUCCESSION PROCEEDINGS

As regards its substantive scope, the Succession Regulation should include all civil-law aspects of succession to the estate of a deceased person in international cases.[15] Forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under

[6] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal L 7, 10.1.2009, pp. 1-79.
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[9] Case C-565/16, *Alessandro Saponaro,Kalliopi-Chloi Xylina* of 19 April 2018, ECLI:EU:C:2018:265.
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[11] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.
[12] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.
[13] The Charter of Fundamental Rights of the EU. OJ C 326, 26.10.2012, pp. 391–407.
[14] An EU Agenda for the Rights of the Child. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2011/0060 final.
[15] Succession Regulation, Article 1(1).

a disposition of property upon death or a transfer through intestate succession, are only some of the issues covered.[16] Due to limited internal competencies the Regulation harmonises only private international law rules. Hence, issues of succession in terms of substantive and procedural law are not affected by this Regulation. Therefore, national regimes remain in effect, as regards both substantive and procedural law. The Regulation does not prevent Member States from adopting certain implementing provisions to link and facilitate the implementation of these closely related and pertinent issues.[17] Aware of the fact that the internal organisation of countries differs significantly, the Regulation gives a broad definition of the notion of "court". Thus, it encompasses not only courts which, in the proper sense of the word, perform judicial functions, but also notary public and registry offices. Under the broad definition of the Succession Regulation, all these bodies are obliged to comply with its rules of jurisdiction.[18] Attempts to bring the rules of the Succession Regulation closer to national systems result in implementing regulations.[19] In terms of international jurisdiction, Regulation 650/2012 lays down the fundamental rule in Article 4, i.e. the court of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.[20] The concept of habitual residence has been present in convention law for more than a century. Habitual residence should be a place where a person really lives, the place of his private and social activities. Although habitual residence is close to ordinary residence, the phrases "habitual" or "ordinary" residence indicate stability, so it must be more than occasional or accidental. Although in the spirit of the Council of Europe Resolution of 1972 it is acceptable to understand habitual residence as the place where the person resides for six months or a year, it is now more convenient not to look at the duration of the stay but to pay greater attention to the intensity of that stay. Furthermore, in the context of the rules on international jurisdiction, the Succession Regulation also provides for the possibility of a choice of court agreement. When the law chosen by the deceased to govern his succession is the law of a Member State, the successors may agree that a court of that Member State is to have exclusive jurisdiction to rule on any succession matter.[21] Regulation 650/2012 also lays down subsidiary jurisdiction rules for the situation where the habitual residence of the deceased at the time of death is not located in a Member States. In such circumstances, the court of a Member State in which the testator's assets are located could have jurisdiction to rule on the succession as a whole, subject to one of the additional alternative conditions. These conditions relate to the existence of the

[16] See recital 9 in the Preamble to Succession Regulation 650/2012, p. 279.
[17] See e.g. Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi Europske potvrde o nasljeđivanju, NN 152/2014.
[18] *Ibid*., Preamble 20, p. 298.
[19] For more details, see Beaumont, P., Fitchen, J., Holliday, J., Policy Department C: Citizens', The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions, European Union, 2016.
[20] Pursuant to Preamble 23 to Succession Regulation 650/2012, op. cit., in order to determine habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should have a close and stable connection with the State concerned.
[21] Succession Regulation 650/2012, Article 5(1).

nationality the deceased had of that Member State at the time of his death or his previous habitual residence in that Member State.[22] Where no court in a Member State has jurisdiction pursuant to the given criteria, the court of the Member State may, on an exceptional basis, have jurisdiction to rule on the succession. Namely, if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected, a court of a Member State which has a specific connection with the case may establish its jurisdiction. This situation would be possible exceptionally, and such a court would be used as a forum of necessity, i.e. "*forum necessitatis*", for judicial protection. After initiating the succession proceedings before a court of a Member State, the "court" will *ex officio* decide on its jurisdiction in the said proceedings. If, after having examined the jurisdiction, it believes that it is not competent in the said proceedings in accordance with the Succession Regulation, it will declare itself as having no jurisdiction and dismiss the lawsuit. Where proceedings relating to the same case involving the same parties thereto are conducted by the courts of different Member States, all courts, with the exception of the one before which the proceedings have been initiated, shall stop the proceedings *ex officio*, pending the determination of jurisdiction of the court which initiated the proceedings, after which all other courts are declared as having no jurisdiction in favour of the said court.[23] Due to a relatively short implementation period of Regulation 650/2012, the effects of succession are still being questioned in national practices, and Member States often find it difficult to interpret the provisions of this Regulation. Accordingly, two young children became part of the first case before the CJEU in relation to Regulation 650/2012 concerning the interpretation of Article 1(2)(k) and (l) and Article 31 of the Regulation. Aleksandra Kubicka is a Polish citizen who lives with her husband and their two children in Frankfurt an der Oder. The spouses are joint owners, each with a 50% share, of land on which their family home is built. Ms Kubicka wishes to include in her will a legacy by vindication, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt an der Oder. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance. Since German law does not recognise a legacy by vindication, the notary's assistant refused to draw up such a will on the ground that creation of a will containing such a legacy is contrary to German legislation. Since Ms Kubicka's appeal to the notary was not upheld, she brought an appeal before the Regional Court in Poland, which decided to stay the proceedings and to refer the question to the CJEU for a preliminary ruling to clarify whether Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 should be interpreted as permitting refusal to recognise the material effects of a legacy by vindication, as provided for by succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect. The Court has ruled that Article 1(2)(k) and (l) and Article 31 of Regulation 650/2012 should be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy by vindication, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that Regulation, where that refusal is based on the

[22] *Ibid.,* Article 10.
[23] EU Regulation on Succession and Wills, Commentary, Sellier European Law Publishers,
A.L.C. Caravaca A. Davi, H.P. Mansel (eds.), The EU Succcession Regulation. A Commentary. Cambridge 2016.

ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.[24] This is surely only the first of many requests to be referred to the CJEU in relation to the interpretation of provisions contained in the Succession Regulation until patterns for solving such doubts occurring in national practices are created. Amount of incomming applications before the CJEU relating to this regulation is huge.[25]

1.1. SCOPE OF ARTICLE 1(2)(B) OF THE EU SUCESSION REGULATION 650/2012 AND ITS IMPACT ON CROSS-BORDER SUCESSION PROCEEDINGS WITH A CHILD AS A SUCESSOR

Succession proceedings are in principle concluded quickly and efficiently. When cross-border succession proceedings involve a child as a successor, the situation will not be so simple. In this case, the succession issues overlap with parental responsibility issues, which are regulated by the Brussels II *bis* Regulation. Moreover, the legal capacity of natural persons[26] and succession shall be excluded from the scope of Regulation 650/2012 and of the Brussels II *bis* Regulation, respectively.[27] The question then arises whether representation of the child and the necessary approval of a property settlement agreement issued by a parent of a minor or his/her guardian and required by the succession proceedings should be treated as a measure relating to the exercise of parental responsibility in terms of Article 1(1)(b) of the Brussels II *bis* Regulation or as a measure relating to succession, which then falls within the scope of the EU Succession Regulation 650/2012. The determination of the authorities of the Member State responsible for deciding on the approval and the property settlement agreement in the context of the succession proceedings will ultimately depend thereon. As two regulations that have the same legal force overlap, it is necessary to analyse their substantive fields of application in more detail. When interpreting the provision of Article (1)(2)(b) of the EU Succession Regulation 650/2012 laying down that the legal capacity of natural persons shall be excluded from the scope of that Regulation, it is important to emphasise that it is indeed excluded from the scope of that Regulation but without prejudice to the capacity to inherit[28] and substantive validity of dispositions of property upon death.[29] In cross-border succession proceedings, the child may appear as a successor, and (s)he *ex lege* has no legal capacity.[30] The child therefore has the capacity to inherit, but his/her will shall be expressed by his/her legal representative or guardian.[31] The legal capacity and applicable law are excluded from the scope of the Succession Regulation, and accordingly, they remain within the scope of national private international law.

[24] Case C-218/16, *Kubicka,* ECLI:EU:C:2017:755.
[25] CJEU rendered its judgments also in cases: C-20/17 Vincent Pierre Oberle of 21 June 2018; C-558/16 Mahnkopf of 1 March 2018; C-218/16 Kubicka of 12 October 2017; C-294/15 Mikołajczyk of 12 October 2016.
[26] Succession Regulation 650/2012, *op. cit*., Article (1)(2)(b).
[27] Brussels II *bis* Regulation, Article 1(3)(f).
[28] Succession Regulation 650/2012, Article 23(2).
[29] *Ibid.,* Article 26.
[30] In the Republic of Croatia, conditions for acquiring legal capacity are stipulated by the Civil Obligations Act, consolidated text, NN Nos. 35/5, 41/08, 125/11, 78/15, Article 18.
[31] *Ibid.,* Article 18(4).

Who will represent the child depends on the substantive rules of the State whose law is applied and the answer to this question should be sought in national private international law.

1.2. SCOPE OF ARTICLE 1 OF ARTICLA 1 OF BRUSSELS II *BIS* REGULATION AND ITS IMPACT ON CROSS-BORDER SUCCESSION PROCEEDINGS WITH A CHILD AS A SUCCESSOR– *DE LEGE LATA*

The Brussels II *bis* Regulation governs jurisdiction in matters relating to divorce, legal separation or marriage annulment, the attribution, exercise, delegation, restriction or termination of parental responsibility,[32] regardless of the court[33] or tribunal before which the proceedings are conducted. This Regulation is binding and directly applicable in the Member States and as such it prevails over national law.[34] The scope that is very close to the 1996 Hague Convention relating to measures for the protection of children requires a more detailed delimitation.[35] As regards the property of the child, the Brussels II *bis* Regulation should apply only to measures for the protection of the child, i.e. the designation and functions of a person or body having charge of the child's property, representing or assisting the child, to represent and assist the child and to manage keeping or disposing of the child's property, and the administration, conservation or disposal of the child's property.[36] Measures relating to the property of a child which do not relate to the protection of a child shall continue to be governed by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[37] Article (1)(1)(b) stipulates the application of the Brussels II *bis* Regulation with regard to matters of the exercise of parental responsibility. This is also governed by paragraph 2(e), which stipulates that matters of the exercise of parental responsibility may refer to measures for the protection of the child relating to the administration, conservation or disposal of the child's property. However, Article 1(3)(f) stipulates that the Brussels II *bis* Regulation does not refer to succession. The key question here is the issue of cross-border succession proceedings with a child as a successor - should representation of the child in cross-border succession proceedings be treated as a measure for the protection of the interests of minors in terms of Article (1)(1)(b) or as a measure within the meaning of Article (1)(3)(f) of the Brussels II *bis* Regulation, which excludes succession from the scope of that Regulation?[38]

[32] So Brussels II *bis* Regulation, Article 1(1)(b).
[33] *Ibid*., Article 2(1).
[34] For more details, see Practice Guide for the Application of the Brussels IIa Regulation, General Introduction, p. 5.
[35] Župan, M., Chapter 1, in: Honorati 2017, 16-19.
[36] See Preamble 7 to the Brussels II *bis* Regulation.
[37] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union L 351, 20.12.2012, pp. 1-32.
[38] If representation of a child and consent and the approval required in cross-border succession proceedings were treated as a measure within the meaning of Article 1(3)(f) of Regulation 2201/2003, it would automatically mean that those issues fall within the scope of Succession Regulation No 650/2012.

2. CJEU CASE LAW

The aforementioned problems in cross-border succession proceedings and the need for delimiting the issue of succession from the issue of representation and the approval of the agreement governing disposal of the child's property were presented to the CJEU in Case C404/14 Matoušková v. Czech Republic. Recently CJEU had ruled again on child related issues in a cross-border successions proceedings in C- 565/16 Saponaro and Kalliopi-Chloi Xylina.

2.1. CASE C404/14 MATOUŠKOVÁ V. CZECH REPUBLIC

By decision of 27 April 2010, the court in Brno commenced succession proceedings concerning the estate of Ms Martinus who died in the Netherlands on 8 May 2009 and Ms Matoušková, a notary, was authorised to act as court commissioner of the Municipal Court in Brno. Ms Matoušková started to work on the succession proceedings and established that the deceased was a citizen of the Czech Republic who was living in Brno (Czech Republic) at the time of her death and that her spouse and two minor children were resident in the Netherlands. The proceedings ran smoothly and on 14 July 2011 the successors concluded an agreement on the sharing-out of the estate. However, a turnaround in the proceedings was observed on 2 August 2012, when the surviving spouse stated that, at the date of her death, the deceased had been actually habitually resident in the Netherlands and that she had merely registered permanent residence in the Czech Republic, which was not consistent with the real situation. Furthermore, he also stated that succession proceedings were already ongoing in the Netherlands, and submitted an attestation to that effect, dated 14 March 2011. In the light of the new situation, the court dealing with guardianship matters returned the file to Ms Matoušková without an examination of the substance of the dispute, on the ground that the minor children were long-term residents outside the Czech Republic, stating that it could not decline jurisdiction or refer the case to the Supreme Court in order to determine the court having jurisdiction in that case. In view of that fact, Ms Matoušková applied directly to the Supreme Court asking it to designate the court with local jurisdiction to decide the matter of the approval of the agreement on the sharing-out of the estate at issue in the main proceedings. In those circumstances, the Supreme Court decided to refer a question to the CJEU for a preliminary ruling, i.e. the referring court asked whether in the given case the Brussels II *bis* Regulation shall be applied and interpreted as meaning that the approval of an agreement on the sharing-out of an estate constitutes a measure for the protection of the interests of minors, falling as a result within the scope of that Regulation, or whether the approval of such agreement constitutes a measure relating to succession, and as such, it shall be excluded from the scope of the Brussels II *bis* Regulation based upon its definition stating that it scope does not include succession.[39] By virtue of literal interpretation of the Brussels II *bis* Regulation the proceedings would be divided into two states, i.e. on the one hand, a Member State where the succession proceedings are being conducted, and on the other, a Member State in which a child is habitually resident.[40] It should be emphasised that the concept of habitual residence of a child is a new challenge for the court. It is practically very difficult to distinguish between habitual residence of a child and habitual

[39] So the Brussels II *bis* Regulation, Article 1(3)(f).
[40] *Ibid.,* Article 8(1).

residence of persons exercising parental responsibility, especially when it comes to newborns or young children who cannot establish their habitual residence independently. It is therefore indisputable that habitual residence of a minor will, as a rule, be dependent on the habitual residence of a person exercising parental responsibility. Therefore, in terms of the habitual residence of a child, an acceptable hypothesis is that it is a mixed concept of law and fact. The habitual residence of a minor will, as a rule, be dependent, requiring a projection of situations in which the habitual residence of a child may differ from that of his or her parents exercising parental responsibility. If only parents reside for a certain period of time in State A and in this way willingly change their place of residence, and if the child resides in that state only for a short period of time and continues to reside in the state where they are all habitually resident, the question arises as to whether it is justified to tie the child's residence to that of his parents. Another typical situation is when a child leaves a joint habitual place of residence to go to school in another country. The question is which element should prevail, i.e. does the fact suffice that most of the time the child resides in that other country, or is the fact that the child is not integrated into the social life of that country a sufficient condition to take into account the mere factual situation and create an artificial connection with the legal system of the country in which the child is just being educated? The third situation is related to adolescents who would independently decide to change their place of residence such that, for example, they leave the parent they usually live with to live with a parent they normally do not live with. In order to assess whether a new habitual residence is established in such new situation, it is necessary to consider the totality of the factual situation and to assess whether, according to the age and maturity of the child, it is justified to accept his/her will to change. As the Regulation does not define, but leaves the concept of habitual residence as a factual concept, an official authority is to determine where the child's habitual residence really is.[41] The CJEU has clearly interpreted the concept of the habitual residence of a child[42] and thus facilitated its application to the competent authorities, which, in the context of the application of the Regulation, must ensure systematicity and uniformity of practice guaranteeing legal certainty.[43]

According to the assessment provided by the CJEU, an approval of an agreement on the sharing-out of the estate concluded on behalf of a minor by his/her guardian, should be considered a measure directly linked to the legal capacity of a natural person,[44] or a measure relating to the exercise of parental responsibility within the meaning of Article 1(1)(b) of the Brussels II *bis* Regulation, which, by its very nature, enters into the framework of activities aimed at protecting and assisting the minors, and hence the court concludes that in the present case the said Regulation shall be applied, regardless of the need for the approval required in the succession

[41]Beaumont, P., Holliday, J., Recent developments on the meaning of "habitual residence" in alleged child abduction cases, in: Private International Law in the Jurisprudence of European Courts - Family at Focus, M. Župan, ed., Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Osijek, 2015. (pp. 39-50); Limante, A., Kunda, I., Chapter 3. In Honorati, C. (ed.) Jurisdiction in matrimonial matters, parental responsibility and abduction proceedings. A Handbook on the Application of Brussels IIa Regulation in National Courts. Giappichelli - Peter Lang, Torino, 2017. (pp. 61-93).

[42] See Case C-523/07 *A.,* (2009) ECR I-02805 and Case C-497/10 PPU Mercredi, (2010) ECR I-14309.

[43] Župan, M., Europski prekogranični obiteljski postupci, in: Petrašević, T., Vuletić, I., eds., Procesno-pravni aspekti prava EU, Pravni fakultet Osijek, 2016. (pp. 144-145).

[44] For more details, see the judgement in Schneider case C386/12, EU:C2013:633, point 26.

proccedings. Furthermore, the CJEU concludes that Succession Regulation 650/2012 is *ratione temporis* not applicable in the main proceedings, but even if it were applicable, it still believes that the issuance of an approval is to be considered a measure for the protection of the child relating to the administration, conservation or disposal of the child's property within the framework of the exercise of parental responsibility.[45] The decision of the CJEU was based upon Article 12(3) of the Brussels II *bis* Regulation. Accordingly, the courts of the Member State are responsible for proceedings relating to parental responsibility[46] if there is a substantial connection of the child with that Member State, and if the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. Furthermore, the CJEU considers that legal capacity and related representation issues should be assessed pursuant to one's own criteria, by an independent method, rather than as questions referred for a preliminary ruling that depend on the relevant legal actions. Thus, appointing an official guardian for minor children and supervising his/her activities are so closely related that it is not appropriate to apply different rules on jurisdiction, which would differ depending on the area to which the legal action in question relates. Therefore, the CJEU believed that the approval of an agreement on the sharing-out of the estate concluded by a guardian on behalf of minor children constitutes a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of the Brussels II *bis* Regulation and thus falls within the scope of that Regulation, and not a measure relating to succession, within the meaning of Article 1(3)(f) thereof. Here the CJEU followed the opinion of the Advocate General Juliana Kokott.[47] As pointed out by the CJEU in its judgement, in the case of the approval of an agreement on the sharing-out of an estate concluded by a guardian on behalf of minor children, which is a prerequisite for this agreement stipulated by the law of the Member State to be considered valid, Article 12(3) of the Brussels II *bis* Regulation may provide the foundation for making a decision on the jurisdiction of the court before which succession proceedings are conducted for the purpose of approving the agreement on the sharing-out of an estate. Such deviation from the general jurisdiction of the court of the Member State in which the child is habitually resident as referred to in Article 8 of the Brussels II *bis* Regulation is possible, but only if the aforementioned conditions have been met.

2.2. SAPONARO AND KALLIOPI-CHLOI XYLINA

CJEU recently had a chance to provide interpretation in relation to child related cross-bored sucessions preoceedings in the Saponaro and Kalliopi-Chloi Xylina. This request for a preliminary ruling initiated by Greece court raises issues of both family and sucessions areas. In concrete, parents of a Greek and Italian nationality, living with their child (holding solely Greece natonality) in Rome, sought to renounce the inheritance on behalf of their daughter. Parents initiated proceedings before Greek court, as Greece is the county where the deceased grandfather had been living and where his burdened estate is located. It is notable that grandfather whose inheritance is at stake died on May 10, 2015. The national court first of all

[45] In terms of Article 1(1)(b) and Article 1(2)(e) of the Brussels II *bis* Regulation.
[46] With the exception of those referred to in Article 1(12) of Regulation 2201/2003.
[47] Opinion of the Advocate General Juliana Kokott at the sitting on 25 June 2015 in Case C-404/14, point 51.

declared that the case at stake is outside temporal scope of application of the Sucessions Regulation. Pursuant to Article 83 the Regulation applies to succession of a persons who die on or after 17 August 2015.

The Court however invoked the Brussles II a, with several open questions. Since a child clearly held Italian habitual residence, as well as is entire family, Greek court doubted over its international jurisdiction to deal with the matter. It acctualy requested an interpretation of the Article 12(3) of Brussels IIbis Regulation providing for prorogation of international jurisdiction.

The arguments of the CJEU indicated to a holistic approach to interpretation of functioning of regulations with overlapping/tight connected subject matter. The Court thus argued for prorogation of jurisdiction, holding that joint lodging of proceedings by the parents before the courts of their choice is an unequivocal acceptance by them of that court. CJEU refered to the best interest of a child in general, concretizing it to the facts of the case. Several objective factors were identified by the court: residence of the deceased at the time of his death was in the Member State of the chosen courts; location of the assests that were the subject matter of the succession were in the Member State of the chosen courts; liabilities of the succession were situated in the Member State of the chosen courts. Since more objective factors coincided with the chosen Member State, and "there is no objective argument that the prorogation of jurisdiction was liable to have a prejudicial impact on the child's position, to the conclusion that that prorogation of jurisdiction is in the best interests of the child." [48]

2.3. ACCEPTABILITY OF THE CJEU INTERPRETATIONS, OR SEARCHING FOR A NEW SOLUTION?

After delivery of the judgement in the case of Matoušková, justification and purpose of this solution have been questioned. Namely, if we take into account that EU policy aims to ensure horizontal protection of children's rights, realisation of one of the fundamental postulates, i.e. the protection of the best interests of the child, comes to the forefront. Based upon the understanding of many theorists in private international law, it is realised through a fast and efficient process of judicial child protection.[49] Since through this Matoušková case the CJEU calls for the implementation of two proceedings in two Member States, it can hardly be said that it is in pursuit of the best interests of the child in terms of the aforementioned. In this decision, the Court opens up the possibility of having recourse to the prorogation of jurisdiction provided for in Article 12(3), by which it is possible to "merge" the proceedings for issuing the approval of the agreement governing disposal of the child's property and the succession proceedings. Recent Saponaro case confirmed that such a scenario is possible. Moreover, that case clearly indicated that interpretation of the CJEU is guided by the best interests of a child.

[48]Case C-565/16, para 40.

[49] Župan, M., The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?, in: The United Nations Convention on the Rights of the Child: taking stock after 25 years and looking ahead, Leiden, Boston: Brill/Nijhoff, 2017, pp. 213-229.

However, besides these rare situations where prorogation would work, the adequacy of the default rule established by Matoušková needs further investigation. In accordance with the fact that the court responsible for administering the succession proceedings has no authority over the issue of the exercise of parental responsibility, the court of the Member State where the child is habitually resident shall issue such type of consent, which shall be taken into account by the court before which the succession proceedings are conducted.[50] The Proposal of the European Commission to amend the Brussels II *bis* Regulation brings a number of changes in the area of parental responsibility.[51] One of these areas also affects a change in terms of facilitating and speeding up the proceedings when it comes to making judgements in relation to the same matter by two different courts due to non-jurisdiction, such as cross-border succession when a child is a successor in the proceedings. Other instruments, in particular other EU regulations in the field of family law and international instruments such as the Hague Convention of 1980[52] and the Hague Convention of 1996,[53] have been considered in the Proposal, given the importance of their application in the area of European family and civil law. A new provision of the Proposal of the European Commission to amend the Brussels II *bis* Regulation stipulates that, if the outcome of the proceedings before the competent body of a Member State which has no jurisdiction under the Brussels II *bis* Regulation depends on a decision on an incidental question falling within the scope of that Regulation, it should not prevent the competent authority from making a decision in that case. Accordingly, the authority that has competence in the succession proceedings shall have the possibility of appointing a guardian *ad litem*, who will represent the child in the ongoing proceedings, regardless of whether (s)he has jurisdiction in the sphere of parental responsibility within the framework of the Brussels II *bis* Regulation. Any such decision on an incidental issue shall only have an effect in the said proceedings.[54] Accordingly, in the Proposal of the European Commission to amend the Brussels II *bis* Regulation, Article 12 has been changed such that the title *Prorogation of Jurisdiction*[55] was deleted, i.e. it has become Article 10 in the Proposal of the European Commission to amend the Brussels II *bis* Regulation and is now entitled Choice of Court for Ancillary and Autonomous Proceedings.[56] Article 10(1) of the Proposal of the European Commission to amend the Brussels II *bis* Regulation implies that the courts of a Member State have jurisdiction in relation to parental responsibility in proceedings where the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the

[50] Similarly, the court also confirmed in Case C-215/15 V. I. Gogova v. I. D. Iliev, ECLI:EU:C:2015:710, Judgment of the Court of 21 October 2015, paragraph 35.
[51] Drventić, M., "New trends in european family procedural law", in: Duić, D., Petrašević, T. (eds.) Jean Monnet International Scientific Conference "Procedural aspects of EU law" EU and Comparative Law Issues and Challenges Series (ECLIC) – issue 1, Faculty of Law Osijek, 2017, pp. 424-447.
[52] The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Si. l. MU No. 7/91 (the Republic of Croatia became a party to the Convention pursuant to the Notification of Succession of 8 October 1991 – NN MU 4/94).
[53] The 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law of 5 June 2008, Official Journal of the European Union, L 115 /36, 11.6.2008.
[54] See Preamble 22 to the Proposal to amend the Brussels II *bis* Regulation.
[55] Brussels II *bis* Regulation, Article 12.
[56] Proposal to amend the Brussels II *bis* Regulation, Article 10.

holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, if the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the latest at the time the court is seised, or, where the law of that Member State so provides, during those proceedings, and if the jurisdiction is in the best interests of the child.[57] The jurisdiction conferred in such way shall cease as soon as the proceedings have led to a final decision.[58] This change enables the court competent to conduct the succession proceedings, after determining that one of the successors in the proceedings is a minor, to appoint a special guardian for the child and continue the proceedings, instead of staying the proceedings and asking the court of the Member State where the child is habitually resident to issue the approval and consent. This would mean, for example, that upon death of the testator who was habitually resident in the Republic of Croatia, after having established jurisdiction, the inheritance proceedings are initiated under the Inheritance Act[59] and the Center for Social Welfare is invited to appoint for the child, who is habitually resident in another Member State, a special guardian who will represent the best interests of the child in the proceedings. In such cases, the courts should clearly state in their decisions the basis for the assumption of jurisdiction in matters relating to parental responsibility.[60] However, the situation is not entirely straightforward with this scenario either. This solves the question of merging jurisdiction, but it is still necessary to determine the applicable law under the provisions of the 1996 Hague Convention. It will again refer to the law of the country in which the child is habitually resident to determine who is actually authorised to represent the child.[61] In cross-border succession, the problem is due to the fact that the law of different states regulates succession issues in various ways. No succession arrangement in the EU is the same or completely different, but it is sufficiently different to bring about problems occurring in the practice that must be singled out. Since the succession issue is the matter of national law, and given cultural, historical and developmental differences in their creation, there is no tendency towards their unification at EU level. However, the Succession Regulation is the closest step to what the EU has done in terms of succession, setting a clear boundary and giving the Member States much jurisdiction in this area. What is crucial at this point is the emphasis on differences in succession systems of Member States that determine orders of succession differently, leading to a different set of succesors, as well as not giving equal rights to the successor in every EU Member State. This raises the question whether the offspring, spouses, and other close relatives of the testator would have been given more or less rights than those they had received if the testator's habitual residence at the time of his/her death was in another Member State. It follows that their rights depend on the succession arrangements of the Member State in which the deceased was habitually resident at the time of death, which, *inter alia*, leads to the possibility of manipulation. What would happen if a person with Croatian citizenship, who has contracted a

[57] *Ibid*., Article 10(3), pp. 19-20.
[58] *Ibid.,* Article 10(4).
[59] Zakon o nasljeđivanju, pročišćeni tekst, Narodne novine br. 48/03, 163/03, 35/05, 127/13, 33/15, od 01. travnja 2015. godine.
[60] See Case C-256/09, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-7353
[61] Župan, M., Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996., in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb. Osijek, 2012, p. 214.

serious illness and does not live with his lawful wife but with his sister who takes care of him, established his habitual residence in the Netherlands, and drew up a will stating that, in addition to his wife and children, he left all his property to his sister. Later on, a non-marital child of the testator appears, who has been adopted in the meantime and lives with the adopters in Belgium, demanding his/her rights to his/her father's estates. In such and similar cases, there are a number of problems that may arise, such as the issues of different arrangements aimed at limiting the freedom to dispose of property upon death, different national regulations equalising the rights of marital and non-marital children, differences in procedures establishing paternity in the Member States and different arrangements of rights of adopted children to inherit from their biological and adoptive parents. In accordance with Dutch law, only the descendants of the deceased are entitled to statutory succession,[62] which means that the marital children of the testator would in this case be entitled to the right to part of the property belonging to them legally, but the spouse would not have that right; however, under Croatian law, the spouse would be entitled to that right if the testator were habitually resident there at the time of death. Furthermore, what will happen if Dutch law does not permit a non-marital child to inherit from a testator or if that is possible if paternity is established, and the statutory deadline for establishing paternity has expired? If paternity were confirmed and marital and non-marital children were teated equally in Dutch law, the issue of regulating the rights of adopted children to inheritfrom biological parents remains unsolved. Is the adopted child considered to have any legal relationship with the biological parent after adoption, and accordingly, the right to inherit? Does the law of that Member State entitle the adopted child to inherit from biological parents and, if the child is entitled to that right, does it mean that (s)he would lose the right to inherit from his/her adoptive parent(s)?

In addition to the above listed problems, the issues of diverse legal systems also occur in cross-border succession proceedings involving a child in terms of the following issues: establishing the age suitable for making of the will, prescribing the type and form of the will, orders of inheritance, which have not been treated equally in all EU Member States, or determining the time of transfer of the estate to testators, dealing with testator's debts, as well as numerous other clashes of laws that often appear in the domain of international succession law,[63] for which a solution should be found.

3. MAINTENANCE CLAIMS IN SUCCESSION PROCEEDINGS

Pursuant to Article 1(2)(e) of Succession Regulation 650/2012, maintenance obligations shall be excluded from the scope of that Regulation, but as set forth below, other than those arising by reason of death. It is known that the issues relating to maintenance of family members are regulated by the Maintenance Regulation and the scope of that Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity.[64] What is important for the purpose of delimiting the scope of the said two regulations is certainly to define maintenance obligations by reason of death, because in this case, instead of the

[62] https://e-justice.europa.eu/content_succession-166-nl-hr.do?member=1, Retrieved 24 October 2017, 12:45 pm
[63] Varadi, T., *et al, op. cit.,* p. 338.
[64] See Preamble 11 to Maintenance Regulation 4/2009, p. 139.

Maintenance Regulation, the Succession Regulation shall be applied, whose scope includes such maintenance obligations. Maintenance obligations upon death are obligations that did not exist before death and are often functionally equal to statutory succession for persons close to the deceased or are assigned to persons who are not entitled to the necessary part.[65] Accordingly, the law designate as applicable in the succession proceedings treats such maintenance obligations as the requirements persons close to the deceased may have against the estate or the successors.[66] Thus, the law applicable to maintenance obligations determines whether there exists and under what conditions an obligation after the death of the maintenance creditor, while the law applicable to succession determines whether and to what extent the maintenance obligation is due to death and whether it can be transferred. The maintenance claim is treated just like any other claim concerning the estate and the beneficiaries. The law applicable to succession determines whether the claim will be filed against the estate or the beneficiary and whether the beneficiary is entitled to the right to compensation from other beneficiaries.[67]

CONCLUSION

Following the analysis and discussion in this paper, it can be concluded that the matter of succession in the EU is regulated by the Succession Regulation, which provides guidelines on succession proceedings. The Regulation stipulates that Member States in which the deceased was habitually resident at the time of death shall have jurisdiction to decide on the succession as a whole. The Regulation harmonises only private international law related regulations and relies on national regimes in terms of both substantive and procedural law. Diversity in succession arrangements of Member States leads to numerous open issues that are slowly beginning to emerge in national practices, such as gaining different rights in relation to the same matter in different Member States. Since the legal capacity of natural persons is excluded from the scope of the Succession Regulation and the child *ex lege* has no legal capacity, the question arises as to representation of the child in this case. Thus the child has the capacity to be a successor, but instead of him/her, his/her will be expressed by his/her legal representative or guardian, and in so doing, in addition to the Succession Regulation, the Brussels II *bis* Regulation becomes relevant as well because it concerns the issues of the exercise of parental responsibility. Since succession is excluded from the scope of Brussels II *bis* Regulation, there have been some doubts in practice as to the interpretation of Article 1 of the Regulation and its delimitation from the scope of the Succession Regulation. Having presented the problem to the CJEU through the case of Matoušková v. Czech Republic, the CJEU issued a judgment that solved this legal problem by stating that the approval of a property settlement agreement is to be regarded as a measure for the protection of a child and thus automatically falls within the scope of the Brussels II *bis* Regulation, and accordingly, the court of the Member State in which the child is habitually resident shall have jurisdiction. The grounds of jurisdiction in matters of parental responsibility established in the Brussels II *bis* Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity,[68] and such jurisdiction

[65] The EU Succession Regulation, A Commentary, Cambridge University Press, 2016, p. 93.
[66] Succession Regulation 650/2012, Article 23(2)(h).
[67] The EU Succession Regulation, A Commentary, *op. cit*., pp. 93-94.
[68] See Preamble 12 to the Brussels II *bis* Regulation.

does not always guarantee that the child's destiny will actually be decided upon by the most appropriate court because the criterion of proximity and the best interests of the child are not always correlated.[69] Since in its ruling the CJEU declared that Article 12(3) of the Brussels II *bis* Regulation may be used as the basis for determining the jurisdiction of the court before which the succession proceedings are conducted, provided that the required conditions are met, since the treatment of two different courts in two different Member States does not preserve the best interests of the child. In accordance with that, the Commission noted the need for amending the Brussels II bis Regulation to provide to the court of the Member State in which the succession proceedings are conducted to adopt, in relation to the said proceedings only, the approval of a property settlement agreement in such proceedings, by appointing a special guardian to the child who will represent the child's interests. Since maintenance obligations, other than those arising by reason of death, are excluded from the scope of the Succession Regulation, there is a need for delimiting its scope from the scope of the Maintenance Regulation. The law applicable to maintenance obligations, determines whether there an obligation exists and under what conditions it exists after the death of the maintenance creditor, while the law applicable to succession determines whether and to what extent the maintenance obligation is due to death and whether it can be transferred. Concerning the Succession Regulation itself, it is reasonable to expect problems in national practices related to the interpretation of certain provisions of the Regulation, but it has certainly facilitated international succession proceedings.

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[69] For more details, see Beaumont, P.: *Jurisdiction of Cross-Border Cases and Recognition and Enforcement of Judgements in Family Matters*, Latvia, 2010, p. 14.

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Zlatan Omerspahić[*]

CHILD PROPERTY RIGHTS - A CHILD AS A SHAREHOLDER[**]

Abstract:
In this paper, the author analyses child's rights to property with special reference on the legal fact when child is registered as a shareholder in a company.
With an aim to emphasize legal specifics, which are conditioned with the fact that the child is shareholder of a company, the author gives a review of international legal framework, carried out of child's property rights. Then, a review in this paper is given through comparative method of Family Act of Republic of Croatia and Family Act of Federation of Bosnia and Herzegovina in the segment of protection child's property rights and it indicates on legal deficiencies in context of international legal standards of protection of child's property rights. In addition, the author gives an overview of another EU member's legislation.

In third part of the paper, the author analyses legal repercussion regarding the fact that a child is shareholder in company through prism of Companies Act of Republic of Croatia and fundamental shareholders rights which are reflected through the right to manage and right to achieve property interest in company. In concluding remarks, author gives final summary and evaluation of the research and points out legal solutions that should be further explored in the future with the aim of providing this area with better quality regulation.

Keywords: child property rights, corporate governance, Family Act, shareholder

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INTRODUCTION

In all modern states, the rights of the child, at least declaratively, occupy a significant position in the legal system. In practice, this should mean that children, as a special category of human society, have received all the necessary protection they need in order to achieve a normal life. However, if we look at the reports of relevant international organizations such as UNICEF, we will also notice that the organizations dealing with the protection of children's rights find exactly the opposite, namely that violence and the violation of the rights of the child are more explicit.[1] In this regard, not a little different picture is provided by the document titled "Revision of the EU Guidelines on the Promotion and Protection of the Rights of the Child (2017)". The introductory part of this document clearly states that the reasons for adopting such an act were based on the devastating data that speak of very difficult situation of children's human rights.[2] According to the Strategy of the Council of Europe for the Rights of the Child (2016 - 2021) one of the main causes of this disastrous state is the economic crisis that has deeply affected children.[3]

The fundamental international document governing the rights of the child is the Convention on the Rights of the Child, adopted in 1989 (hereinafter CRC)[4], which contributed to a significant step forward in the normative regulation of the whole range of rights. CRC is considered as a part of the public order because its stability at the declarative and normative level cannot be overlooked.[5] Despite the large number of international documents, it should be noted that these documents create, only the initial legal framework through which states, (at least if they want to be declaratively considered as states that are concerned with the rights of the child), must develop their national legislation. In the field of Family Act, national legislation has a dominant influence and importance, primarily because of the fact that due to the culture, tradition, and sometimes religion, the regulation of the rights of the child are to be strictly maintained within its sovereignty, to which every country still has the right.

However, even though many of these rules are different, we can say that they all guarantee a wide range of rights to a child based on the aforementioned Convention on the Rights of the Child. Within these rights, of course, one of the most important are the property rights of a child. The property rights of the child extend to include a wide area of the child's life, but for the purpose of this research, we will limit ourselves only to property rights that reflect on the situation when a child appears as a shareholder in a stock company. Our interest in this topic came from the insight into statistical data indicating that there are not only a few shareholders

1 https://data.unicef.org/topic/child-protection/overview/ (25.01.2018.)

2 In document "Revision of the EU Guidelines on the Promotion and Protection of the Rights of the Child" states that as many as 16,000 children die daily from causes that are mostly preventable or curable, and that every five minutes a child dies due to domestic or family violence, and that children are massively victims of sexual exploitation and abuse.

3 Council of Europe Strategy for the Rights of the Child, Section II, point 1. See: https://rm.coe.int/168066cff8

4 Convention on the Rights of the Child, New York, 20 November 1989. United Nations, Treaty Series , vol. 1577, p. 3. Available at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11&chapter=4&clang=_en

5 Hrabar Dubravka, *Nova procesna prava djeteta- europski pogled*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol.IV No.1 2013., p.65.

under the age of eighteen existing in the Republic of Croatia, but as much as 9062[6]. The aim and the starting point of this paper is to explore what specifics of the company, whose shareholder is a child, can have in management and supervision. In addition, the aim of the paper is to investigate whether the existing legal framework, especially in Croatia and Bosnia and Herzegovina, is sufficient to protect the child as a shareholder or to introduce some additional legal mechanisms. The specific aim of the paper is to point out the provisions of the legislation of the Republics of Croatia and Bosnia and Herzegovina and its adaptability to the needs and interests of children through the prism of child protection as a shareholder of a business society. Analysis of the existing legal framework, which provides property protection for the child, leads to the hypothesis that we will attempt to prove in this work, that the child's property rights were not sufficiently processed and were not given adequate attention, although their significance is immeasurable.

1. LEGAL FRAMEWORK FOR THE PROTECTION OF CHILD PROPERTY RIGHTS

An analysis of the legal framework that guarantees the protection of children's property rights should certainly start from the most important document that regulates the human rights of children, namely the CRC, a document that was adopted by the General Assembly of the UN on 20 November of 1989. In accordance with the Annex I of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Convention on the Rights of the Child is part of Bosnian and Herzegovina legal system. The Convention on the Rights of the Child was adopted 8th October 1991[7]. The Convention is significant and specific because it covers and processes the civic, political, economic, social and cultural rights of children in a unified manner[8]. For the property rights of the child we can say that they belong to the group of developmental ones, but on the other hand, also to the protection rights of the child, since the realization of this group of rights enables the child to develop through social segments. Additionally, they are protective because they prescribe who regulates the property rights and prescribe a series of protective measures with the aim of successfully protecting the child's property as a special category[9].

It provides that States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in this Convention.[10] With regard to economic, social and cultural rights, States Parties shall take such measures to the maximum extent of their available resources and, where necessary, within the framework of international cooperation.[11] It follows from this provision of the Convention that the Member States are not only obliged to guarantee the child's property rights, but are obliged through legislative and other measures to ensure effective application of, inter alia, economic and / or

6 http://www.skdd.hr/portal/f?p=100:77:::NO (24.01.2018.)

7 Official Gazette of SFRJ "International contracts No: 07/1991)

8 https://www.unicef.hr/wp-content/uploads/2017/05/Konvencija_20o_20pravima_20djeteta_full.pdf, page number 2 (24.01.2018)

9 The Convention guarantees the wide scope of child rights such as: rights, survivors, development rights, protection rights, and the right to participate.

10 Article 4. Convention on the rights of the child, Y.1981

11 Article 4 Convention on the rights of the child, Y.1981.

property rights. In addition, the Convention on the Rights of the Child in Article 3 sets out the general principle that all States Parties to the Convention must be guided by, which means to protect the "best interest of the child". In other words, the best interest of the child must be the primary goal in all child-related activities.[12] Therefore, any decision that concerns decision on the rights of the child must place the child's interest in the foreground. In addition, the provision in Article 12 is directly related to the principle of the best interests of the child. It relates to the obligation that all children who have the ability of forming their own opinion must have the right to express themselves freely in all matters related to that child, and that opinion must be respected in accordance with the age and maturity of the child.[13] From this provision, it is clear that child's opinion must also be respected in the domain of his/hers property rights. Croatian family legislation obliges parents and other childcare providers to respect child's views in accordance with its age and level of maturity[14]. Certainly, when talking about the right of the child to express his or her opinion, we must take care that this opinion is respected in accordance with the child's age and maturity, which will be more discussed in further parts of this work, and in the context of respecting the child's opinion as a shareholder of the economic societies.

It is very important to emphasize that the Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in Article 1 prescribed: Every natural or legal person has the right to peaceful enjoyment of his possessions.[15]

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[16] It is clear that European Convention in its Protocol 1 guarantees the right to property (property rights) to all natural and legal persons, including children. It is especially important to emphasize that no one has the right, except for the state in case of meeting the clearly prescribed conditions, to confiscate or limit the ownership of the property. Also, the above-mentioned provision does not mean that the state has no right to pass its own rules on the use of the right to property in accordance with its legal tradition, which certainly applies to Family Act.

The 2009 European Treaty (hereinafter: the Treaty), also referred to as the Treaty of European Union[17] in Article 3. par. 3. states that the European Union suppresses social exclusion and discrimination, promotes social justice and protection, equality between women and men, intergenerational solidarity and the protection of children's rights.[18] Thus, the Treaty stipulates the obligation of the member states to ensure a legal system that will protect the rights of the child as well as in property rights. At this point, it should be noted that Member States do this

12 See General Note on UNCRC No. 14 CRC / C / GC / 14, 2014

13 Article 12. UNCRC

14 Lucić Nataša, Protection of the right of the child to be heard in divorce proceedings- harmonization of Croatian law with European legal standards, Procedural aspects of EU law, Jean Monnet International Scientific Conference,2017, p.392

15 Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

16 Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

17 Treaty of Lisbon, amending the Treaty on European Union and Treaty establishing the European Community, 2007/C, 306/01)

18 The consolidated text can be found on the link http://www.mvep.hr/custompages/static/hrv/files/pregovori/111221-lisabonski-prociscena.pdf (25.01.2018.)

by national legislation. This situation should not be surprising. However, if we look at the exclusive competences of the European Union, we will see that family legal relations do not fall within the competence of the European Union, but the Member States.

Although the Charter of Fundamental Rights of the European Union[19] does not mention expressly property rights and their protection, it cannot be said that it does not provide or does not guarantee a range of human rights to children, from which it is clear that children have not only the right to property, but also the right to protection. In this context, it is very important to mention Article 21. This article clearly states that "age" must not be a basis for discrimination of any kind.[20] In the previous jurisprudence of the European Court of Human Rights, protection is provided only in the context of access to employment[21]. However, if a situation arises in which a child is discriminated, for the purpose of exercising his property rights, it is certain that the European Court of Human Rights should take a stand and prohibit discrimination on the basis of age and in that context.

The Commission of European Family law has adopted an act called the Principles of a European Family Act Regarding Parental Responsibilities[22], which belongs to the domain of soft law legal rules. In Principle 3.32. it is clearly stated that the holders of parental responsibilities should administer the child's property with due care and diligence in order to preserve and, where possible, increase the value of the property.[23] In Article 3.23. there are also restrictions on the decision-making with the child's property, which should be considered necessary in order to have significant financial consequences for the child. The national legislations are left to determine what transactions would be with or cause a significant financial consequences. In Article 24. it is stipulated that, in terms of legal representation, it should not be taken if there is a conflict of interest between the parents of the child's property interests[24].

2. RIGHT TO CHILDREN'S PROPERTY THROUGH THE PRISM OF THE FAMILY ACT OF THE REPUBLIC OF CROATIA AND FAMILY ACT OF THE FEDERATION OF FBiH AND OTHER EU LEGISLATION

In this part of the paper, we will compare the two laws that regulate family relations with a comparative approach and point out possible differences and better solutions in one legislation in relation to another legislation. In addition, the comparison is important because of the fact that we compare the law of a member state of the European Union and a state that is not a member yet, and therefore it is not obligatory to apply the legal standards applied in the European Union.

19 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN (29.05.2018)

20 Handbook on the Rights of the Child in European Law, European Union Agency for Fundamental Rights and Council of Europe, 2015, page 54.

21 Ibid, page 54.

22 http://ceflonline.net/wp-content/uploads/Principles-PRS-English1.pdf (24.01.2018)

23 Point 3.32 of Principles of European Family Act Regarding Parental Responsibilities, http://ceflonline.net/wp-content/uploads/Principles-PRS-English1.pdf

24 More about this, Rešetar Branka, Dijete i pravo, Pravni fakultet u Osijeku, 2009,

In the Family Act of the Republic of Croatia[25] the protection of the rights of the child are given special attention and the whole (third) part of the Family Act. The basic obligations of parents in relation to the property of the child are regulated in Article 97 of Family Act of Croatia.[26] The basic principle in managing the property of a child is that parents should manage with a care of a good parent, which means, in some way, that parents need to manage their assets in accordance with the principle of dealing with the care of a good businessman in commercial law. The obligation of parents is to preserve the property and, if possible, to increase it[27]. This means that they cannot take actions that would lead to the destruction and reduction of property.

Such proceedings would represent the conduct contrary to the above principle referred to in paragraph 1 of Article 97 of the Family Act of Croatia. The use of a child's property is very limited and can only be used for maintenance purposes, and the alienation is allowed only if parents do not have enough of their own resources, and again, for treatment, education or other needs of the child. In no case the child's property can be alienated in order to satisfy any needs of the parents, even if they do not have their own means of subsistence. Such a legal solution is in compliance with international acts requiring states that are signatories of the Convention on the Rights of the Child and other acts in order to create in the national legislation an effective mechanism for the protection of children's rights, and hence property.

When it comes to limiting parents' rights of the management of the child's property, it should be mentioned that they are required a permission for the management of the valuable property, or the decision of the Court in extra-judicial proceedings.[28] In property rights, parents have an obligation to represent the child agreeably.[29] Article 101 of Family Act of Croatia regulates the representing of a child by parents when it comes to assets that are more valuable.[30] Family Act,

25 Official Gazette 103/15

26 (1) Parents have the duty, right and responsibility to manage the child's property with the care of the responsible parent in a way to preserve and possibly increase. (2) The cost of managing the property of the child shall be borne by such property. (3) Income from the property of a child may be used only for the maintenance of a child. The property of the child can be alienated only if the parents do not have enough own funds for the child's maintenance, treatment or education, and the means cannot be provided otherwise. (4) Income from the property of the child may, in exceptional cases, be used for the treatment of parents or brothers and sisters of a child if they are not used for the maintenance, treatment and education of a child, which requires the court's approval in extra-judicial proceedings initiated at the proposal of the child or parent. (5) Parents represent the child in respect of property and property rights in accordance with the provisions of Articles 99 and 101 of this Act.

27 Article 97 of the Family Act of Croatia

28 Article 98 of the Family Act of Croatia

29 Article 99 of the Family Act of Croatia

30 The representation of a child in relation to his/hers more valuable property or property rights is valid if the parent representing the child receives: 1. the written consent of the other parent who exercises parental care and

2. Court approval in non-contentious proceedings.

(2) The representation referred to in paragraph 1 of this Article shall be represented in cases of disposal and burdening of real estate, movable property entered into public registers or movable property of greater value, disposal of shares and business shares, disposing of inheritance, acceptance of gifts with the burden or deduction of offered gifts and disposal (3) The representation referred to in paragraph 1 of this Article shall also be deemed advocacy for the conclusion of a contract between a child and natural or legal persons who have the object of disposing of the future property rights of a child in connection with his sporting, artistic and other rights or similar activities. (4) The contractual obligations referred to in paragraph 3 of this Article may last up to the age of the child. D. (5) If the parent representing the child in the matters referred to in paragraph 1 of this Article cannot obtain the written consent of the other parent, the Court shall, in the out-of-court procedure on the motion a child

which is very important in the context of the topic, clearly stipulates that assets that are more valuable also include the shares of the child[31]. At this point, it is important to answer the question of whether the value of a share affects the estimation whether such assets are valuable or not.

Family Act in this regard does not make a distinction, and by interpreting the provisions of the Family Act we can clearly state that the possession of shares (in itself valuable assets), no matter how much they are worth in the capital market, and management of such property always requires a special legal regime. This special legal regime implies the written consent of another parent who exercises parental care and the Court's approval in non-contentious proceedings. The parent who is child's representative must obtain these two consents. The Family Act stipulates that in case that the parent representing the child cannot obtain the written consent of the other parent, the Court will ultimately decide on the previously given approval[32].

In any case, we can say that deciding of the Court through non-contentious proceedings is a good legal solution because it provides objective judicial protection of the child's property interests, especially in a situation where there is a disagreement of the parents. Article 132. of the Family Act regulates that the Center for Social Welfare, keeps the protection of the child's property rights as a responsible body for the protection of all children's rights.[33] The Center for Social Welfare shall immediately investigate the case and take measures for the protection of child's rights immediately upon receipt of the report on the violation of property or personal rights of the child and inform the applicant accordingly. In addition, within the legal order of the Republic of Croatia, the protection of the property rights of a child are protected by the fact that the Law on Public Notary prescribes the obligation for the legal validity of a legal transaction that disposes of the assets of minors. Such a contract should be made in the form of a notary public act.[34] In this way, abuses were reduced to a minimum because an act that would not have been made with a notary public would not produce legal effects and would be null and void. It is important to emphasize that the obligation to draft a notary public document is present regardless of how valuable the property is.

The Family Act of the FBiH[35] in Article 264. prescribes that parents, in accordance with his /her interests, govern the property of a minor child.[36] The Family Act of the FBiH defined that the income from the property of a minor child can be primarily used for his/hers maintenance, treatment and education, or if another important interest of the child is required.[37]

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or a parent decide which parent will represent the child in this matter and, according to the circumstances of the case, decide on the approval referred to in paragraph 1, item 2 of this Article.

31 Article 101.point 2. Family Act of Croatia

32 Article 101 point 5. Family Act of Croatia

33 In Article 132 Family Act of Croatia defines; "Everyone is obliged to report to the Center for Social Welfare a violation of child's personal and property rights"

34 Article 53. Law on Public Notary (OG 78/93, 29/94, 162/98, 16/07, 75/09, 120/16)

35 Official Gazzete of Fedration BiH 35/05

36 The property of a minor child until his / her age, in his or her interest, is governed by the minor's parents, other than the one that the minor has acquired through work (Official Gazzete of Fedration BiH 35/05)

37Article 265. Family Act of FBiH

Parents can also use the income to support family members if a parent is someone who does not have sufficient means of living or is incapable of work.[38] The Family Act defines that parents can alienate or burden more valuable assets only with the approval of the competent guardianship authority.[39] In addition, it is stipulated that parents can take actions in the Court that aim to burden or alienate the children's property only with the approval of the guardianship authority.[40]

If we enter on a more detailed analysis of the two laws, and this is interesting and important, because FBiH is a non-EU country and the other one is, we will notice some differences in the regulation of the child's property rights. The general conclusion that we can draw is that significantly better legal solutions were included in the Family Act of the Republic of Croatia. This conclusion can be primarily derived from the fact that the Family Act in Croatia regulated the statement that parents with the property of a child should manage it with the care of a good parent, while the Family Act of the FBiH states that parents managing properties are in accordance with the interests of a child. Dealing with the child's interest does not mean that parents act in accordance with the care of a good parent or, as stated in international acts, for example Convention on the Rights of the Child, parents must act in the best interests of the child. It is definitely clear that legal solution from the Republic of Croatia initially obligates a greater degree of attention in the treatment of the child's property in relation to the provisions of the FBiH Family Act. If we could say about this formulation in the FBiH Family Act that it was a reflection of the "clumsy" formulation of a legislator, we cannot say that for other gaps in the protection of property rights of a child. More specifically, in the FBiH Family Act, the alienation or burdening of the child's property is possible even in cases where parents do not have sufficient means of living and when they are incapable of work. Moreover, the child's obligation is to support such parents. However, on the other hand, the Family Act of the Republic of Croatia states that the parents can alienate or burden property only if they do not have sufficient means to support the child, and in no case if they do not have sufficient means to sustain themselves and realize their personal needs. By comparing these two different ways of regulating this matter, we can conclude that a much safer solution that leaves little space for abuse is the solution that is offered in the Family Act of the Republic of Croatia. The property interests of the child are clearly protected, and the alienation of property and its burden can be carried out only if it is necessary to protect the interests of the child and not any other interests. This position, as we mentioned earlier, is fully in accordance with international documents regulating this matter, for example Convention on the Rights of the Child.

In the context of the topic, it may be most important to mention that, unlike the Family Act of the Republic of Croatia, the FBiH Family Act does not define what is more valuable property for which the Center for Social Work requires the consent. The fact that the law is even more vague was also indicated by the fact that no criteria have been established for determining whether a property is valuable or not, and who in any particular case should do that assessment. On the other hand, the Croatian Family Act clearly states how much the property is worth,

38 Article 265 Family Act of FBiH
39 Article 265. Family Act of FBiH.
40Article 265 Family Act of FBiH

including the shares. Regulation in the way that is done in the Family Act of FBiH contributes to the creation of legal uncertainty regarding the protection of property rights of the child. This conclusion becomes even more accurate if we add the fact that, even if we determine which asset is valuable, the Court in a non-litigation procedure as provided for in the Family Act of the Republic of Croatia, which is another additional insecurity, does not give the consent to alienation or burden of such property.

Therefore, the Family Act of the Republic of Croatia provides better protection of the child's property rights in relation to the Family Act of the FBiH. Thus, the child as a shareholder is under better protection in Croatia, because in addition to the legal regime that protects shareholders within the Companies Act, there is an additional mechanism for protection of legal solutions Family Act. Finally, we will note that the FBiH Family Act is not compliant with the Principles of European Family Act Regarding Parental Responsibilities[41].

It should be emphasized, regarding the other legislation of the members of the European Union, that the Belgian Code of Civil Code clearly distinguishes between two groups of parental rights, i.e, responsibility in respect of property and the rights to the administration of the property of the children and the right to use the enjoyment of the property.[42]

The Austrian Civil Code under section 44 defines that parents must administer a child's property with care of proper parents. They must maintain, and if possible, increase the property, unless the child's interest requires otherwise.[43]

Czech Family Code defines that parents are responsible for preserving the property's essence until the child attains majority[44]. Italian Codice Civile defines that parenting responsibilities include the right and duty to represent the child and to manage his or her property.[45]

3. CHILD AS A SHAREHOLDER THROUGH THE PRYSM OF TRADE LAW

Before embarking on a more detailed elaboration of the issues within this section of the paper, we will once again draw attention to the definition of the term share. There are no explicit legal definitions of the share, and, as the academician Jakša Barbić says, it would be almost impossible to determine the legal definition of the stock without some mistake[46]. Capital Market Act of the Republic of Croatia[47], which is in effect since 01.01.2018, defines shares as transferable securities, which represent a share in the capital and membership rights of the company. On the other hand, the FBiH Securities Market Act stipulates that the shares are equity securities, issued by a shareholder or other company, in accordance with the provisions of the law, which regulate the establishment, operation, management and termination of

41 Companies Act of Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
42 Article 376-387 Belgium - Code Judiciaire 19 May 1998
43 Article 44. Of Allgemeines bürgerliches gesetzbuch http://www.wipo.int/edocs/lexdocs/laws/de/li/li053de.pdf (20.05.2018)

46 Barbić Jakša, Društva kapitala, Organizator, Zagreb, 2013. p.52
47Capital Market Act (NN 88/08, 146/08, 74/09, 54/13, 159/13, 18/15, 110/15, 123/16, 131/17)

companies, and in accordance with the provisions of the Securities Market Act[48]. Jakša Barbić defines shares as a security issued by the company, which is a part of the share capital and gives the holder the right to membership in the company, i.e. rights and obligations arising from that membership[49].

It follows that the shares must be regarded as:
a) Share capital
b) A set of member rights and obligations of the shareholder
c) Securities [50]

In the legal theory, it is accepted that the stock offer two types of rights to the shareholder, namely management rights, that the shareholder as a member manages and makes decisions about the business with the company; and a series of property rights, defined in several parts of the Companies Act[51]. In this regard, the academician Jakša Barbić lists the entire range of property rights that shareholders have[52] in his paper "Right to a dividend as a fundamental property right of shareholders"[53]. With respect to human rights provisions, which protect the rights and the position of a child in the society, we can conclude that there is no reason why a child should not be allowed to be a shareholder. Moreover, the existence of a ban of this kind would be contrary to the Convention on the Rights of the Child, thereby violating the property rights that each child has. However, it should also be emphasized that the legal fact of a child being a shareholder, i.e. an owner of a company regardless of the percentage of ownership, would require a special legal regime and a much more complex administrative procedure compared to the usual. It is also indisputable that this would affect the way a company regularly does business. For this reason, we should not be surprised that the companies, for the legal specifics that we will discuss below, are trying to avoid the situation in which a child is a shareholder of a company. These specifics can be identified in the corporate governance segment and in the part of exercising property rights as shareholders. Although these are two different groups of rights of the shareholder, they are closely linked because the level of real

48Article 7. FBIH Securities Market Law (Official Gazette of FBiH 85/08 and 109/12)
49 Barbić Jakša, Društva kapitala, Organizator, Zagreb, 2013. p.51
50 Ibid,
51 Article 220, paragraphs 4 and Article 223 of the Companies Act ((NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
52 The right to dividend payment (Article 220, paragraphs 4 and 223 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09), 2. the right to pay compensation for the fulfillment of additional obligations to the company (Article 218, paragraph 1 of the Act), 3. the right of priority when registering new shares of the company (Article 308, paragraph 1 of the Law), 4. the right to payment of the share of participation in the company's share capital in case of its reduction (Article 345, paragraph 2 of the Law), 5. right to payment of the remainder after the liquidation of the company or the eventual remnants of the bankruptcy estate (Article 380, paragraph 1 of the Act), 6. the right of an external shareholder to an appropriate remuneration (Article 491 of the Law) and severance pay (Article 492 of the Law), 7. the right of shareholder who expires from the company for the purpose of joining another company to an appropriate severance pay (Article 504a, paragraph 2 of the Act), 8. the right of the shareholder who has voted in the prescribed manner against the decision to transform the joint stock company into a limited liability company in order for a company to repurchase its share and to pay an appropriate fee for it (Article 562, paragraph 1 of the Act).'
53 Barbić, Jakša, Pravo dioničara na dividendu kao temeljno imovinsko pravo dioničara, Zbornik Pravnog fakulteta u Zagrebu, Vol 62., No.5-6. Prosinac 2012, str. 1427

property rights directly depends on the management of the company that takes place through the administration.

The following review of legal specifics should start with the legal position of the child in legal transactions and the fact that a child under the age of 18 has limited ability to work and go into any contracting (unless it is a labor contract concluded by a minor older than 15)[54]. Limited business capacity, as we know, implies an approval by a legal representative. We have already noted that Family Act regulates the obligations of legal representatives when it comes to children. On the other hand, when we talk about trade-related law regulations and connect them to the protection of child's property rights, the fundamental principle to keep in mind is the principle of Article 3. of the Convention on the Rights of the Child, which imposes an obligation to always take into account the best interests of the child. This principle should be dominant not only in the development of family legislation, but also in the interpretation of other regulations, such as the Companies Act, in situations where the child is a shareholder of a company. This principle has consistently been transposed into the legislation of the Republic of Croatia through the provision that parents should represent the child's best interests when managing the property of a child, and manage the property with the care of a good parent. Another important principle to take into account is the principle of equal position in a company, which implies that shareholders have equal position under equal conditions.[55]

The Article 191. of the Companies Act, defines the accountability of the founders for the damage caused to the company due to the inaccuracy of the information they gave in connection with the establishment of the company.

The founders, according to the Companies Act, are also accountable for the management's or the executive directors of the company free disposal of the amounts paid for the company's shares[56]. Additionally, the founders are held accountable if they, either deliberately or by gross negligence, damage a company with a role in matters or rights; by overtaking matters of rights or costs of founding[57]. As a child does not have a business capacity and is managed by a parent in accordance with the provisions of Family Act, the question arises as to who is liable for damages in the case of meeting the conditions for compensation of damages in accordance with the provision of Article 191. of the Companies Act. The Law on Obligations stipulates that anyone who causes damage, and has delectable responsibility, is obliged to compensate it, unless it is proven that the damage occurred without his fault.[58] This means that the person who caused the damage will be considered responsible for it. Since the child as a shareholder of the company, does not perform this function actively and does not make decisions, but its parents work on its behalf, then, according to the rules of responsibility, if the child does not allow free disposal of the amounts paid for shares of the company, the parents would be responsible for the damage. If the verdict by the final Court proved that the child as the founder caused damage

54 Article 19 and Article 20. Labour Act (NN 93/14, 127/17)
55Article 211. of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
56 Article 191 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
57 Article 191 of the Companies Act (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
58 Article 8. Law on obligation of Republic of Croatia (NN 35/05, 41/08, 125/11, 78/15, 29/18)

to the company because of the parent's negligence, the damage should be compensated from the property of the child. However, the parents, according to the provisions of the family legislation, would also be responsible for the negligent treatment of the child's property that they had decreased. Based on this example, we can conclude that in addition to the responsibility of the shareholder or founder, if the child is a shareholder, the responsibility of the parents is also present, because they *de facto* manage the property and are responsible for its decrease.

The Companies Act defines that the members of the management and the supervisory board must lead the company's affairs with the care of a responsible entrepreneur, and protect the company's confidential information.[59] The Companies Act emphasizes that a member of the Management Board does not act contrary to the obligation to conduct business of the company if it is reasonable to assume that it is working for the welfare of the company when it comes to making an entrepreneurial decision, based on an appropriate information.[60] If the child is a shareholder of a company, the question arises as to whether members of the management and the supervisory board must make sure to act in accordance with the principles of the best interest of the child when managing the company, and to run the company operations in a way which would increase the child's property (through dividend payment). In other words, do the members of the board of directors and the supervisory board need to have child's best interests in mind if their leadership is to be considered that of a responsible entrepreneur? Namely, the members of the management board and the supervisory board of the company respond jointly to the damage that they commit to the company if they violate some of their obligations[61]. Children are a special category, additionally legally protected because they cannot take care of their rights because of their age. All international and national legal databases are designed to protect children legally and to take care of their interests with special care.

In this sense, the provisions of the Companies Act in the context of conscientious and orderly management should be interpreted in such a way that, if a child is a shareholder in a company, then when managing that company, it must be ensured that it was managed in a way to protect best interests of the child. If this is not properly executed, the members of the board of directors and the supervisory board would be liable for the damage they inflicted on the company because they caused damage to one of its founders. The criteria for responsibility towards the founder, who is a child, are specific and much stricter than the usual ones established by the Companies Act and the Law on Obligations. Because of that, as it was pointed out earlier, there is often a tendency to avoid a situation in which a child is a shareholder, precisely due to all the legal and administrative complications. Administrative and legal complications are also noticeable due to the provisions of Article 101 of the Family Act of the Republic of Croatia, which has already been mentioned here. This article determines the obligation that the disposition of any valuable

59 Article 252 Companies Act of the Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
60 Article 252 Companies Act of the Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)
61 Article 252 Companies Act of Republic of Croatia (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09)

property of the child, including the shares, the parent who represents the interests of the child must obtain consent of another parent and an approval of the Court in an out-of-court procedure. This procedure can demonstrably cause a number of procedural problems in practice, which can slow down the decision-making process of the company's bodies (especially the assembly) because the shareholder who is a child requires another parent's and the Court's decision. Additionally, if it was a capital market decision, the question would arise whether the Center for Social Welfare as the competent body which protects the interests of the child (including protection from abuse by a parent or legal custodian), could be considered a competent state body, with the necessary knowledge about the capital market and capable of making the right decision? For such complex transactions, in any case, expert opinion should be sought additionally in order to protect the rights of the child as much as possible.

The Corporate Governance Code has the task of establishing high standards of corporate governance and transparency in the operations of joint stock companies. A stock company that has a child shareholder in its ownership structure imposes the need to create particularly "sensitive" corporate governance codes that will ensure equity and transparency for all shareholders. If a child is a shareholder of a company, it would be necessary to include special provisions on the protection of such shareholders to the minimum in the Corporate Governance Code. In this spirit are the provisions of the OECD's corporate governance principles, where in the third section under the heading "Equal Treatment of Shareholders" is clearly indicated that all shareholders should be able to achieve effective legal protection.[62]. In this context, it is particularly important to emphasize that voting by legal representatives should take place in such a way that it is clearly established that such a vote has been agreed by the shareholders, or that it will be achieved. This means that a company that has a child as a shareholder and whose interests are represented by a legal representative should ensure that certain mechanisms were created in order to ensure that the best interests of the child were protected in such a way. Everything else would mean that the responsible person could be held liable for the harm inflicted on a child as a shareholder.

In Companies Act in Article 272. it is defined the obligation that the management and supervisory board ensure that the regular report includes the management code that the company voluntarily applies, as well as the information where this corporate governance code has been published.

It is not disputed that the Corporate Governance Code is a soft law legal rule, but if a Corporate Governance Code is adopted in a company, then its compliance is mandatory and in that sense any violation of the provisions of the code would constitute a violation that could cause damages to the company.

In direct relation with this topic, it is also the question of processing personal data of a child as a shareholder. Namely, as it is known in the EU, it has adopted the Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of

62 Principles can be found on https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en (20.05.2018.)

such data and the repealing of Directive 95/46 / EC (General Data Protection Regulation)[63]. This Regulation prescribes specific requirements that companies must comply with when processing personal data of a child. In Recital_58 it is clearly stated that everyone needs to respect the principle of transparency which requires that any information addressed to the public or to the subject be concise, easily accessible and easy to understand, and that clear and plain language, and, where appropriate, visualization be used[64]. Given that the Regulation gives special protection to children, it is clearly stated that any information and communication, where processing is addressed to a child, should be in a clear language that the child can easily understand. Although this provision refers principally to a child as a market participant or user of a service, the same standard of protection would have to be enforced when giving data and creating reports of an economic entity in which a child appears as a shareholder. Regardless of the fact that certain regulations state what reports must contain and what information they contain, if the child is a shareholder, it is necessary to implement special protection measures, and retain in official documents only those data that can prove "reasonable effort". Everything else would mean a violation of the child's right to the protection of personal data in a situation where the *lex specialis* regulation in this segment is in relation to other data.

CONCLUSION

We can conclude that the property rights of a child are very important segment in the context of human rights and interests that need to be protected by legal norms. When we talk about the child's property interests, and about Family Act generally, the specificity that determines the quality of protection is the fact that unique legal system of Family Act has not yet been created in the world and in the European Union. Thus, the level of protection of the rights and interests of the child differentiate from state to state. The most obvious thing in this paper was the careful analysis of the Family Act of the Republic of Croatia on the one hand and the FBiH Family Act on the other. It was clearly pointed out that far more quality legal regulation of provisions on the protection of property rights of children in the Republic of Croatia, as a member state of the European Union, is far higher than the protection envisaged in the Federation of BiH as an entity within Bosnia and Herzegovina. In addition, the paper gives a brief overview and provisions of Family Acts of other EU member states and it can be noted that there is an equal standard of protection, as in the Republic of Croatia.

The mere fact that a child appears as a shareholder has raised questions as to whether it implies certain specificities in the business of the company. The answer to this question in the paper was given in a way that it was noted that the management and supervisory bodies of the company must manage the company with additional care, so as not to damage the property interests of the child. They should also follow the fundamental principle that the interests of the

63 REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 27 April 2016, Official Journal of European Union I. 119, page 37

64 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG (25.01.2018) Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

child were placed in the first place as defined and the Convention on the Rights of the Child. Additionally, special attention must be given to parents who make decisions on behalf of the child as shareholders on bodies of a company where shareholders have the right to vote and influence the business of the company. All of this causes a great number of specificities and administrative complications, and in practice, the situation in which child is a shareholder of the affiliated society is very often avoided. These specifics are reflected in the fact that in relation to the property of a child, the other parent, as well as the Court must make a decision in the non-contentious procedure, which additionally complicates the decision-making process in a company. In addition, the company must also adopt a corporate governance code that should anticipate situations in which the rights of the child as shareholders must be protected. A very sensitive issue that also entails special protection within a company is the protection of personal data of a child where only those data that are necessary can be used, which the company must submit to the competent authorities and in accordance with the relevant legislation.

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