Issue 1
Number 6

ISSN 2671 - 3128

SEE
LAW JOURNAL
2019

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

SEELS Network
Lawyers for Europe.

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Dear Reader,

We are glad to present the sixth edition of the SEE Law Journal, which is the third issue that we are publishing within the frames of the "Strengthening the EU Law Studies in South Eastern Europe" project, financially supported by the Erasmus+ Jean Monnet Associations programme of the European Union, and implemented by the SEELS network and the Centre for SEELS.

This second year of publication of the latest edition of the SEE LJ was marked by the successful organization of the first series of the EU Law Days within the SEELS network, which aside from their main goal to place into the focus the relevant EU Law topics, had also initiated a vivid debate on relevant legal topics from the region. The format of these events was diverse, as the faculties were given liberty to organize them to best suit their own particular needs, and thus we had round tables, forum discussions, lectures, presentations and debates all focusing on the latest editions of the SEE Law Journal and on the current topics related to the EU Law and regional legislations. It gives us outmost pleasure that on major part of these events, the significant interest was noted especially among young academics, who represent the future of the region.

This edition is also remarkable in another aspect – namely it is the second one which contains noteworthy portion of papers that were received from participants of the EU Child Doctoral conference held in one of our member faculties. The interest of these authors who submitted their papers to our calls, has given us the confidence that we are moving in a right direction. Due to the significant amount of papers received and the limitations of the format of the printed edition of the SEE LJ, we have decided to divide the portion of the papers between this and the previous edition.

Finally, the newly amended Editorial Policy provided for additional novelty which allowed the focus of the new editions of our journal to be placed on the widening of the perspectives towards new legal contexts – all with the aim of providing one particularly insightful wider view on the current legal matters be it in the SEE region, EU and wider. In that sense we have introduced the potential for inclusion of publication of scientific papers which are dealing with interdisciplinary treatment of relevant legal topic as one of the components of their analyses and opening the journal to the wider interested legal academic public that is not necessarily coming from the SEE region once in a while. In addition to this, the new policy also allows contribution from the legal practitioners, something which in our opinion, can only add to the complexity of the overall scope of the journal, incorporating yet another valuable perspective alongside the scientific and theoretical one. The SEE Law Journal, of course remains dedicated to the academics and contributors coming from the SEELS network in the first place as they are our core group, but we see our openness to be an enriching factor which can only contribute to the quality of the same.

In the end, we would like to thank all of the authors and contributors who made this issue possible. We are glad that all of our efforts are slowly coming into fruition and are making the SEE LJ a relevant interesting publication which can instigate an educated debate on current legal matters in the region.

Sincerely,

Gordana Lažetić
Editor in Chief

SEE LAW JOURNAL 2019

Publisher:
Centre for SEELS
Bul. Goce Delcev, 9B
1000 Skopje

Graphic design and print:
Arcuss Design

Circulation: 500 copies

ISSN 2671-3128

Co-funded by:

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

CONTENT:

УДК 354.11:343.431-053.2

Title:

THE ROLE OF THE MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS IN INTERNATIONAL CASES OF CHILD ABDUCTION

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The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross-border Movement of a Child in the EU (575451-EPP-1-2016-1-HR-EPPJMO-CHAIR), held at the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Republic of Croatia on 15-16 March 2018

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

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 IIbis 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 Conventions 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 IIbis Regulation supplement the provisions of the Child Abduction Convention.8 In relations between the EU Member States9, the Brussels I Ibis Regulation takes precedence over the Child Abduction Convention to the extent to which it relates to the cases governed by the Brussels I Ibis 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]

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.

2 See: Kruger, Thalia. International Child Abduction: The Inadequacies of the Law, London: Hart Publishing, 2011, 1-15.

3 HCCH, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Accessed September 25, 2018. 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. The Republic of Croatia became a contracting party of the Hague Child Abduction Convention pursuant to the Notification of Succession of 8 October 1991 – Official Gazette, International Treaties, No. 4/94.

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.

5 See: "HCCH Status Table", last modified September 12, 2018, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

6 Aiyar, Smita. „International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach." Emory International Law Review 21(2007), 281.

7 Pérez-Vera, Elisa. Explanatory Report on the 1980 Hague Child Abduction Convention, HCCH Publications, 1982. Accessed September 30, 2018, p. 429. https://assets.hcch.net/upload/expl28.pdf.

8 Pataut, Etienne. "Article 11 Return of the child." In: Brussels IIbis – Commentary, edited by Ulrich Magnus and Peter Mankowski, 246-256, München: Sellier European Law Publishers, 2012, p. 128. See also: Župan, Mirela. "Chapter 10. 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.

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.

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

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

1.1. 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

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.
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.

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]

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]

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

22 Hague Child Abduction Convention, ***op. cit***. (note 3), Art. 7(i).

23 Pérez-Vera, E., ***op. cit.*** (note 7), 14.

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.

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.

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]

1.3. 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 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

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).
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.

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]

2. 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 the UK that has available information on their web page. To accomplish the obtaining the data on 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

2.1. 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.

2.1.1. 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

42 ***Ibid.***, Art. 34.

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.

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

2.1.2. 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]

2.1.3. 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]

2.1.4. 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]

2.1.5. 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

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
56 Email from the Ministry for Foreign Affairs and Trade Promotion of Malta, 13 October 2017.

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]

2.1.6. 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]

2.1.7. 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]

2.2. 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 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;

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.
61 „International child abduction" https://oikeus.fi/en/index/esitteet/kansainvalinenlapsikaappaus/lapsionkaapattuei-sopimusvaltioon.html.
62 Consular Services Act, ***op. cit.*** (note 61) Art. 31.

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]

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

3.1. 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

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.

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**

63 Email from the Ministry for Foreign Affairs of Finland, Unit for Consular Assistance, 11 August 2017.
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**

3.2. 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.

3.2.1. 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.

3.2.2. 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.

3.2.3. 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.

3.2.4. 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.

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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УДК 314.15.045-053.2(437.5)

Title:

UN/LAWFUL RELOCATION OF A CHILD AND PARENTAL RESPONSIBILITY – CROATIAN CHALLENGES

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The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross-border Movement of a Child in the EU (575451-EPP-1-2016-1-HR-EPPJMO-CHAIR), held at the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Republic of Croatia on 15-16 March 2018

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

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.[65]

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[66], 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.

66 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[67] 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)[68], European Convention on the Exercise of Children's Rights (1996)[69], Convention on Contact Concerning Children (2003)[70], 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[71]. 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.[72] 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-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

67 Family Act, The Official Gazette no. 103/2015
68 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
69 European Convention on the Exercise of Children's Rights, Council of Europe, Strasbourg, 25 January 1996, entry into force 1 July 2000
70 Convention on Contact Concerning Children, Council of Europe, Strasbourg, 15 May 2003, entry into force 1 September 2005
71 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
72 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

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.[73]

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 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.[74] 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[75]; 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. [76]

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. [77]

73 Family Act, Art. 321
74 Family Act, Art. 322
75 Ibid, Art. 332
76 Ibid, Art. 327
77 Ibid, Art. 329

In the process of mandatory counselling, the child may be granted to express his/her opinion, with the parents` consent. [78] 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. [79] 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. [80]

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. [81]

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. [82] [83]

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. [84] 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. [85]

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

78 Ibid, Art. 329 (2)
79 Ordinance on the mandatory contents of the joint parental custody plan form, The Official Gazzette no. 123/2015
80 Family Act, Art. 106
81 Ibid, Art. 107
82 Ibid, Art. 326 and Art. 329 (2)
83 Ibid, Art. 321
84 Ibid, Art. 324 (1)
85 Ibid, Art. 324 (2) and (3)

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.[86] Even though family mediation is a procedure in which family members participate voluntarily, there is an exception: mandatory participation in family mediation before initiating the divorce proceedings.[87]

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.[88] 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.[89]

In family mediation procedure, the family mediator may allow the child to be heard with the consent of his/her parents.[90]

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.[91] 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.[92]

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[93] and Family Act, hence the Social Welfare Centre resolves issues at the first instance in 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

86 Family Act, Art. 331
87 Ibid, Art. 320
88 Ibid, Art. 334
89 Ibid, Art. 338
90 Ibid, Art. 339
91 Family Act, Art. 336
92 Ibid, Art. 337
93 Social Welfare Act, The Official Gazette no. 157/2013, 152/2014, 99/2015, 52/2016, 16/2017, 130/2017

rights and interests.[94] Social welfare centres are established for the territory of one or more municipalities or cities within the same county.[95]

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.[96] 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.[97]

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[98], 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.[99]

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.[100]

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 residence or habitual residence of the parent where the child mostly resides.[101] 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.[102]

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. [103] [104]

94 Ibid, Art. 127
95 Ibid, Art. 126
96 Family Act, Art. 353.
97 Family Act, Art. 354.
98 Ibid, Art. 355 related to Art. 383 (establishing paternity) and Art. 424 (child support proceedings)
99 Ibid, Art. 356
100 Social Welfare Act, Art. 100.
101 Ibid, Art. 101.
102 Family Act, Art. 329
103 Family Act, Art. 92
104 Ibid, Art. 104

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.[105]

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.[106] 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; in these cases, the child is represented by a special guardian, regardless of who the initiating party is.[107]

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.[108]

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.[109] 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

105 Ibid, Art. 84
106 Ibid, Art. 86
107 Ibid, Art. 414
108 Practice Guide for the application of the Brussels IIa Regulation, available online at: http://e-justice.europa.eu

109 Family Act, Art. 104

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.[110]

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 be separated from parents (except where it is in the child's best interests) and the right to family reunification.[111] Everything must be done to preserve personal relationships and, when appropriate, to 'rebuild' the family.[112]

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.[113] [114]

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.[115]

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.[116] The right to maintain contact with both parents is expressly cited within the Convention on Contact Concerning Children[117], where it states that *"a child and his or her parents shall have the right to obtain and maintain regular contact with each other*"[118]. 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

110 Ibid., Art. 105

111 Handbook on European law relating to the rights of the child, Luxembourg: Publications Office of the European Union, Council of Europe, 2015, page 77

112 Handbook on European law relating to the rights of the child, p. 77

113 Family Act, Art. 95 and 119

114 Ibid, Art. 120

115 Ibid, Art. 121

116 Charter of Fundamental Rights of the European Union, 2000/C, 364/01, Art. 24 (3)

117 Convention on Contact Concerning Children, Council of Europe, CETS No. 192, 2003.

118 Ibid., Art. 4 (1)

from the case *Olsson v. Sweden*[119]. 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*[120]**).**[121]

a) 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. [122] 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[123], 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). [124]

A child's address of residence is the address of his/her parents.[125] 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. [126]

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" 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[127], which regulates the applicable law for international private law relationships,

119 Olsson v. Sweden (No. 2), request No. 13441/87, judgement of 27 November 1992, §90
120 Sahin v. Germany, request No. 30943/96, judgement of 8 July 2003. §65, §66
121 Decision of the Constitutional Court of Croatia, No.: U-III-2047/2006, 8 May 2008
122 Family Act, Art. 100.
123 Domicile Act (Official Gazette 144/2012, 158/2013), effective from 29/12/2013
124 Ibid, Art. 2.
125 Family Act, Art. 96.
126 Family Act, Art. 96
127 International Private Law Act, The Official Gazette no. 101/2017

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.

a) 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.[128] 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 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.[129] 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[130], 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.[131]

128 Family Act, Art. 108

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

130 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

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

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.[132]

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 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.[133]

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)[134], 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.[135] 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.[136]

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

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

133 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

134 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)

135 General Comment 14 (2013), item 19

136 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)

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 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.[137]

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[138], and 21 in 2015, 14 of which concerned the children relocated from Croatia[139]. 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.[140]

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 on the territory of a third state which is a contracting Party to the

137 Family Act, Art. 484

138 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

139 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

140 The Hague Convention on the Civil Aspects of International Child Abduction, Art. 11.

Hague Convention.[141] Therefore, a key issue under the Brussels II bis Regulation is only the determination of habitual residence of the child.[142]

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. [143]
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.[144] 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.[145]

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.[146] 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.[147] 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,[148] 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 a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.[149]

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.[150]

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. [151]

141 Brussels II bis, Art. 61
142 Handbook on European law relating to the rights of the child, p. 83
143 Ibid, page 89
144 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.
145 Ibid, page 608-09
146 The Hague Convention on the Civil Aspects of International Child Abduction, Art. 3
147 Ibid, Art. 1
148 Ibid., Art. 3
149 Ibid, Art. 5
150 Loo H., In the Child's Best Interest, p. 616
151 Loo H., In the Child's Best Interest, p. 616

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."[152] *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.*[153] *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.* [154] Lastly, a court may refuse to return a child if its home country violates "human rights and fundamental freedoms".[155] [156]

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.[157] In 2005, the Permanent Bureau of the Hague Conference[158], 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.[159]

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.[160]

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152 The Hague Convention on the Civil Aspects of International Child Abduction, Art. 12.
153 Ibid., Art. 13 a)
154 Ibid., Art. 13 b)
155 Ibid., Art. 20
156 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
157 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
158 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
159 Guide To Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, p. 11
160 Ibid., p. 21

However, these suggestions are in no way legally binding upon signatory states, and the remaining legal mandates are limited supplements to the Abduction Convention.[161]

Considering the proposals regarding the issuance of travel documents to underage children, the Act on Travel Documents of Croatian Nationals[162] 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 interest of the child, the same parent can submit the request and collect the document with the written consent of the Social Welfare Centre.[163]

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[164] (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.[165]

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

161 Ibid., p. 19
162 Act on Travel Documents of Croatian Nationals, OG 77/99, 133/02, 48/05, 74/09, 154/14, 82/15
163 Ibid, Art. 34.
164 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
165 Hannah Loo, In the Child's Best Interests: Examining International Child Abduction, Adoption and Asylum, Chicago Journal of International Law, 609 (2016), p. 614

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.

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.[166] 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.[167]

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.[168] Therefore, the Committee states that the concept of the child's best interests is flexible and adaptable.[169] 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.[170]

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.[171]

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 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.[172]

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

166 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

167 Unicef, Hajduković, 2015, p. 32.

168 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.

169 General Comment No. 14 (2013), item 30

170 Ibid., item 32.

171 Bubić S., page 12.

172 General Comment No. 14, item 48

triangle, and the sides of the triangle represent the child`s developmental needs, parental competencies and family and environmental factors.[173] 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.[174]

The Convention on the Exercise of Children's Rights[175] 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.[176]

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.[177] Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases.[178]

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.[179] 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 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.[180]

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

173 Unicef, Ajduković, Radočaj, 2008, p. 88.
174 Ibid., p. 89.
175 European Convention on the Exercise of Children's Rights, Council of Europe, CETS No. 160, 1996.
176 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
177 General Comment No. 14, item 52.
178 Ibid., item 80.
179 General Comment No. 14, item 34.
180 Explanatory Report on the 1980 Hague Child Abduction Convention , by Elisa Pérez-Ver a Pérez- Vera, 1982, page 431, para. 21.

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.[181] 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.[182]

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 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[183], 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[184], 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.[185]

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.[186] 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

181 Ibid., para. 23-24
182 Pérez- Vera Report, page 433, para 29
183 Monory V. Hungary and Romania, No. 71099/01, ECtHR (Second Section), Decision of 17.02.2004
184 Adžić v. Croatia No. 22643/14, judgement of 12 March 2015
185 Croatian Criminal Code Act, Art. Official Gazette 125/2011, 144/2012, 56/2015, 52/2016, 61/2015, 101/2017, Section XVIII, Art. 174
186 Šeparović M., Dobrobit djeteta i najbolji interes djeteta u sudskoj praksi, Zagreb, 2014, p. 144

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.

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.[187] 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.

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.

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

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УДК 354.11-051:342.72/73-053.2

Title:

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?

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The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross-border Movement of a Child in the EU (575451-EPP-1-2016-1-HR-EPPJMO-CHAIR), held at the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Republic of Croatia on 15-16 March 2018

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

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).[188] 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.[189] What these immunities entail is laid down in Article 31,[190] 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.[191] 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.[192] This indicates that the awareness of possible immunity abuse[193] has always been present.

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.[194] By entering a proceeding, it is assumed that they are submitting themselves to the possibility of a full and thorough scrutiny of the case.[195] 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.[196] 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

189 Summarized from Preamble of VCDR.

190 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.

191 ***Ibid***.

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

193 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.

194 VCDR Article 32, para. 2.

195 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.

196 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.

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[197] 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.

1. 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.[198] These rights are proclaimed on the international as well as the European/regional level and are to be respected by the courts of law.

On the international level, the Convention on the Rights of the Child[199] (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)[200] further describes the child's best interest as a threefold concept.[201] 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.[202] 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.[203]

197 More on this Castro, A.M., ***op. cit.*** note 6.
198 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.
199 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.
200 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.
201 ***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.
202 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.
203 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.

Even though the European Convention on Human Rights (hereinafter: ECHR)[204] does not refer expressly to the rights of the child, these were already established,[205] 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[206] (hereinafter: Charter) laying down "the rights of the child" in Article 24.[207] A closer insight of Article 24 reveals that the EU endorsed the "basic"[208] 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.[209] 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.[210] 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.[211] The Regulation, however, does not apply in cases when diplomatic immunity is invoked, as it is laid down in paragraph 14 of the preamble.[212] 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[213] 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***[214]; ***Neulinger and Shuruk v. Switzerland***[215]). 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***[216]).

204 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.

205 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.

206 Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326, pp. 391–407.

207 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.

208 Article is based on CRC, particularly Articles 3, 9, 12 and 13 thereof.

209 Article 7 of the Charter: "Everyone has the right to respect for his or her private and family life, home and communications.".

210 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.

211 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.

212 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.".

213 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.

214 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.

215 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.

216 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.

2. ENFORCEMENT OF RIGHTS

2.1 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.[217]

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.[218] 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.[219] 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***[220] judgment as a general principle of Union law and embodied it in Article 47[221] 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 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.[222]

2.2 Case LAW

2.2.1. 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.

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217 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.".

218 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.

219 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.

220 CJEU - Case 222/84 / Judgment ***Johnston v. Chief Constable of the Royal Ulster Constabulary***, URL = http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dd6427f80b567c44628b75c709e26ebd5d.e34KaxiLc3qMb40RchOSaxyNbxnO?text=&docid=93487&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=531368. Accessed on 12 August 2018.

221 Article 47 Right to an effective remedy and a fair trial. The Charter, ***op. cit.*** note 19.

222 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.

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,***[223] 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***[224] 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[225] 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[226] 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,[227] the court of the first instance proclaimed the claim inadmissible ascertaining the importance of diplomatic immunity for the international relations,[228] 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.[229]

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.[230] 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,[231] and that they are even broadening the scope of its application to other types of immunity.[232] 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,[233] although no UK diplomatic agents were involved, arguing the principle of reciprocity.

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223 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.

224 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.

225 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.

226 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.

227 Landesarbeitsgericht Berlin-Brandenburg Berlin, Urteil vom 9. November 2011 · Az. 17 Sa 1468/11, URL=https://openjur.de/u/625515.html. Accessed on 12 August 2018.

228 ***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.

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

230 Castro, ***op. cit.*** note 6.

231 See the German case, ***op. cit***. note 40.

232 See ***Estrada v. Al-Jufali, op. cit.*** note 36.

233 ***Ibid.***, para. 24-25.

2.2.2. 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,[234] 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 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.[235]. 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.[236] 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.

234 Cour d'appel – Arrêt du février 28, 2008 (Bruxelles), point 2. para 15, see ***op. cit.*** note 9.
235 Bruxelles Tribunal Civil (ref.), 21 décembre 2007, in Kluwer, W., ed., ***Actualités du droit de la famille*** No 6, 2008, pp. 122-123.
236 Tribunal de première instance francophone de Bruxelles, Tribunal de la Famille, No. 16/7811/A, 12 July 2017, (unpublished).

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[237] in the part of the request for 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.[238]

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

237 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.
238 Considering the decision was rendered only in July 12, 2017, it is yet unknown whether an appeal was submitted.

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,[239] 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[240] 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 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.[241] 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 courts doubt regarding the seizing of jurisdiction by another national court highlights the issue of mutual trust principle,[242] 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.

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239 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.

240 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.

241 Private International Law and Procedure Act, Official Gazzete of Republic of Slovenia, No. 56/99 and 45/08.

242 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.

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.

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.[243] 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 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.[244] 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.[245] 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

243 General Comment No.14, ***op. cit.*** note 13.
244 When a diplomatic agent initiates the proceeding, he is precluded from invoking immunity. (VCDR Article 32 (3)).
245 Župan, M., ***op. cit***. note 24.

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."

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УДК 347.628.42(676.2)

Title:

COHABITEE: A THORN IN THE FLESH? A KENYAN PERSPECTIVE

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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.

INTRODUCTION

A cohabitee is a common law wife who is recognised as the result of a long relationship with a man that resembles marriage.[246] Cohabitation finds anchorage in Section 3 of the Judicature Act[247] 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.[248] The doctrine of presumption of marriage is a common Law doctrine,[249] 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.[250] 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.[251] 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.[252] 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.[253]

Presently, there has been more confusion around cohabitation relationships, through the surfacing economic concept of ***slay-queen,***[254] which is serving as a conduit for cohabitation and targets financially stable, married men.[255] 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.[256] It is also not a legally recognised form of marriage where a man had first contracted a monogamous marriage.[257] 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,[258] a criminal offence is committed with a prescribed penalty under Kenyan laws.[259] 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.[260] 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.[261]

246 ***The Marriage Act: Laws of Kenya*** Nairobi, Government press No. 4 of 2014, Section 6, p. 8.
247 ***Judicature Act Cap 8 Laws of Kenya*** Nairobi, Government press section 3, p. 5.
248 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.
249 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.
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252 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)
253 W. Kamau, ***Judicial Approaches to Applicability of Customary Law to Succession disputes in Kenya,*** East African Law Journal (I2015) p.140.
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256 S. Mzangila, "Here are some Facts about Cohabitation" ***Loc. Cit***, see also C. Kipkurui, Family ***Law- Chabiting 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.
257 ***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.
258 Kamau W. Op.Cit (n.7) p. 151
259 ***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.
260 Ang'awa, ***Procedure in the Law of Succession***, ***Loc.Cit***.
261 Men ignore their families for mistresses and cohabitees

Notably, in the event that the cohabiting man dies in the hands of the cohabitee, intestate,[262] 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.[263] 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.[264] 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.[265] 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.[266] Justice Hayanga[267] 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 the existence of any other ***marriage in the form of cohabitation*** involving their deceased husband**.**[268] 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.[269] The widow is slapped with the news about the husband's cohabitation relationship at the time of her late husband's burial arrangements.[270] That is, when the cohabitee seeks recognition in the burial programmes and or arrangements for the ***deceased husband.***[271] 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.[272] Justice Mustafa determined the key points to note if a relationship is to be recognised or presumed as a marriage in Kenya.[273] 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,[274] that is sharply contrasted with the purported presumption of marriage by African married men, and is also contrary to

262 ***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.

263 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.

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

265 ibid

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

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

268 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.

269 Mary Wanjiku Githatu V. Esther Wanjiru Kiarie [2010] eKLR.

270 Mazingira, "Here are some Facts about Cohabitation" ***Loc. Cit***.

271 Anastacia Mutheu Benjamin vs. Lakeli Benjamin and another Nairobi CACA No. 6 of 1979.

272 Evidence Act Cap 60 laws of Kenya, Rebuttable presumptions of law section 4

273 Hortensiah Wanjiku Yawe vs Public Trustee Civil Appeal No. 13 of 1976, Court of Appeal Nairobi.

274 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.

the Kenyan marriage laws. This also is the position in circumstances where a man was in a monogamous marriage which is still subsisting.[275] 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.[276] Conversely, cohabitation for the African men in most cases is practiced contrary to the real meaning and spirit behind it.[277] The said African men would have mistresses and cohabitees, while at the same time actively living with their wives whom they had married in systems of marriages that did not allow them to contract any other marriage.[278]

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.[279] On the other hand, the majority of these men cohabited while in a monogamous marriage, leading to it being regarded as an adulterous relationship.[280] 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.[281]

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.[282]

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.[283] 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:[284] 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.[285] The civil marriage is 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

275 Kamau W. loc. cit n 7
276 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.
277 N. F. Dodoo, & K. Megan "Cohabitation, Marriage and 'Sexual Monogamy in Nairobi", ***Social Science Method Vol. 64 Issue 5***(2007):1067-1078.
278 The repealed Marriage Act and the African Christian Marriage Act Cap 150 &151.
279 E. Cotran, ***Restatement of African Law: 2 Kenya 11 The Law of Succession*** (London: Sweet &Maxwell, 1969), p. 133.
280 Dodoo & Klein, "Cohabitation, Marriage and 'Sexual Monogamy in Nairobi", ***Loc. Cit.***
281 Mzangila l***oc. cit***
282 John Omondi Oleng & another vs Sueflan Radal [2012] eKLR,
283 W. Kamau loc. Cit 7
284 ***Ibid,*** also see marriage Act 2014 at p 8.
285 Cotran, ***Restatement of African Law***, ***Loc. Cit***., p. 133.

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.***[286] 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.[287].[288]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.[289]

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.[290] This was followed by dowry payment, that is the payment of the bride price, and finally a wedding was conducted.[291] 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.[292] 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).[293] 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.[294] Further, the laws 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.[295] 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

286 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
287 The Bigamy Act of 1604
288 Section 171, Penal code Laws of Kenya
289 Kizito, case
290 E. Cotran, ***Casebook on Kenyan Customary Law*** (New York: McGraw-Hill Professional Publishing, 1987), p. 18.
291 ***Ibid***.
292 ***The Law of Succession Act: Laws of Kenya*** Nairobi Chap. 160.
293 ***Ibid***.
294 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.
295 The Marriage Act Laws of Kenya, 2014. Section 2.

husband and wife even though not formally recognized.[296] 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.[297] 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.[298] 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.[299] 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.[300] 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.[301]

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.[302] 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.[303] 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

296 Civil Appeal No. 13: ***Loc. Cit.***

297 ***The Evidence Act: Laws of Kenya***, Nairobi The National Council for Law Reporting, 2012/2014, Chap. 80.

298 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.

299 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.

300 Beatrice Chelangat Cheluget: Kisii HCA 10 of 2018

301 ibid

302 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.

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

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.[304]

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.[305] 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 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.[306] 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.[307] 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[308] 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.[309]

304 Cotran, Restatement ***of African Law, Loc. Cit***.

305 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.

306 R L A vs F O & another [2015[] eKLR, Civil Suit 205 of 2015.

307 Winnie Kamau op. cit (n 7)

308 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.

309 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

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 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 mistress***. This was so stated: ***In the Matter of the Estate of Stephen Ng'ang'a Gathiru (deceased)***[310] 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:***[311] ***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,[312] a testator must have testamentary intention (***or animus testandi***) that is he must intend the wishes to which he gives deliberate expression to ***take effect only at his death***.[313]

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,***[314] the judges in court of appeal in this case stated authoritatively that:

310 Nairobi HCSC No. 500 of 1992.
311 (1865) LR 1 P&D 57.
312 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.
313 Parry & Kerridge, ***The Law of Succession***, 13th Edition (New York: Palgrave, 1998), p. 35.
314 Kenya Law Reports, Civil Appeal 128 of 1995.

"…. 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.[315] 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.[316] Further, he must endeavor to provide for all his dependants.[317] 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.[318] 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 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:

"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.[319] 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,[320] which states that, "The

315 Law of Succession: ***op. cit.*** Section 5(1), Chapter 160.
316 Per Justice Maina. J, ***James Maina Anyanga v. Lorna Yimbiha Ottaro 2014 eKLR.***
317 The Marriage Act: ***Loc. Cit.*** 8.
318 Musyoka, W. ***Law of Succession*** (Nairobi: Law Africa, 2006), p. 2.
319 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.
320 The Law of Evidence: ***op. cit.*** 25, CAP 80.

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.[321] 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."[322]

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 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.[323]

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.

321 ***In the Matter of the Estate of Samuel Muchiru Githuka (deceased)*** Nairobi HCSC No. 1903 of 1994 (Kamau J)).
322 In ***Re Estate George Robinson Wangome Thiga (Deceased) succession cause 127/2011***
323 Goodman v Goodman (1859) 28 LJ CH. 742.

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.

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[324] 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.

324 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.[325]

5.3 Minor Children and their Shares

The share of the estate that is to devolve upon minor children below 18 years old[326] 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.[327] 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.

325 Constitution of Kenya (2010) Article 27, see also Children's Act, No. 8 of 2001.
326 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.
327 ibid

CONCLUSION

Legal notice no. 46/17 issued by the attorney general of Kenya is a caveat,[328] 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 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 zegal 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

328 Legal notice no. 46/17 by the ***Attorney General of Kenya on Registration of Marriages*** (Nairobi Government Press).

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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УДК 343.131.7

Title:

IN DUBIO PRO REO PRINCIPLE IN MODERN CRIMINAL PROCEDURE

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ABSTRACT

The facts upon which the court grounds its decision must be accurately and fully proven. If the court is not completely convinced that the defendant committed a crime, the reasonable doubt principle provides that the defendant must be given the benefit of the doubt (***in dubio pro reo***).

In dubio pro reo is a fundamental principle of any judicial system. It follows directly from the principle of the rule of law and the need to protect the rights of the defendants in criminal procedure. It is considered one of the benefits of the accused in criminal proceeding (***favor defensionis***) since it favours the position of the accused to the prosecutor in cases of doubt. In other words, it is a segment of the principle of fair trial. It is also tightly connected to the principle of presumption of innocence and the principle of unfettered consideration of evidence.

This paper will show that, although at first sight ***in dubio pro reo*** seems to be a simple principle every lawyer is familiar with, its deeper analysis leads to many complex questions and reveals multiple issues, unobserved at first glance. After discussing the meaning and the scope of the ***in dubio pro reo*** principle in modern criminal procedure, its historic roots and modern manifestations, the authors give an overview of its use in Anglo-American law and jurisprudence of European Court of Human Rights.

Key words: beyond reasonable doubt, evidentiary procedure, ***favor defensionis***, presumption of innocence

INTRODUCTION

In order to be able to render a verdict on the criminal responsibility of the accused and impose a proper sentence, the judge has to accurately and fully establish the truth of many facts. Ascertaining the truth is in the interest of the State, i.e., in the public interest, and only the accused whose criminal responsibility is entirely and indisputably proven can be punished.[329] The requirement that decisions in criminal proceedings be permitted only based on truthfully established facts is one so natural that it needn't be particularly defended.[330] There is not a single justifiable reason to convict an innocent person and let the guilty escape the deserved punishment.[331] Since one of the main goals of criminal justice is to avoid conviction of innocent persons in cases when the court isn't completely confident about the existence or non-existence of certain facts, the criminal procedure theory and practice have found a way out - the application of the principle of ***in dubio pro reo***. This principle, as a postulate of common sense and practical reasoning, is based on the limitations of human knowledge, the imperfections of its sources and means of its acquiring, and is as such, a reliable guide to the court on the difficult and responsible road to discovering the truth about the facts. It shows the court the way out of doubt, keeping him from becoming the victim of error, arbitrariness, and tyranny.

The rule expressed in the famous Latin proverb ***in dubio pro reo*** ("when in doubt, for the accused") is generally accepted in contemporary law, so at the first glance it does not look a bit controversial. However, a deeper analysis of its meaning, its substance, and criminal procedure cases in which it is applied raises several questions that have not been resolved or on which the theory and practice have not yet reached a consensus.

1. HISTORICAL OVERVIEW OF THE IN DUBIO PRO REO PRINCIPLE

When talking about the origin of the principle ***in dubio pro reo*** we should be aware that it initially did not have such a wide range of applications as it has today, but has developed gradually over a long period of time. We hereby refer to the emergence of this principle in general, even to the minimal extent, while bearing in mind that it comes in a variety of different formulations.[332] It should also be noted that tracking the development of the ***in dubio pro reo*** principle is somewhat difficult because the criminal procedure laws started explicitly defining it only in the last few decades.

Although some of the legal concepts, such as ***in dubio pro reo*** or ***ne bis in idem*** were already present in the works of Greek philosophers (Aristotle) and roman thinkers (Ulpian, Paulus)[333] the expression ***in dubio pro reo*** was first used by the German jurist Christoph Karl Stűbel in 1811, in his work "***Das Criminalverfahner in deutschen Gerichten mit besonderer Berűcksichtigung Sachsens***". The attempt to formulate this principle can also be found in the memoires of the Milanese lawyer Egidio Bossi (1487-1546), as well in the works of Friedrich Spee Langenfeld from 1631.[334] Aside from the issue of the exact period of its occurrence,[335]

329 Sijerčić-Čolić, Hajrija, Krivično procesno pravo, Book I. Krivičnoprocesni subjekti i krivičnoprocesne radnje, Third revised and updated edition, Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 2012, p. 106.

330 Bayer, Vladimir, Jugoslavensko krivično procesno pravo. Book II. Pravo o činjenicama i njihovom utvrđivanju u krivičnom postupku. Second edition, Zagreb: Informator, 1978, p. 114.

331 Grubač, Momčilo, Krivično procesno pravo. Fourth edition, Belgrade: Službeni glasnik, Pravni fakultet Univerziteta Union, 2006, p. 255. See also Tomašević, Goran, Kazneno procesno pravo. Opći dio: Temeljni pojmovi. Second revised and updated edition, Split, 2011, p. 118.

332 Bayer, V., op. cit., p. 37

333 Tomić, Zvonimir, Krivično pravo I, Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 2008, p. 55-56.

334 Levack, Brian P., The Witchkraft Sourcebook, London and New York: Routledge, 2015, p. 163.

335 There are claims that this rule dates back to ancient mythology. During the trial to Oresto for the murder of his mother, the court in Areopagus

which in the end is not particularly important, it is generally accepted that the idea behind the ***in dubio pro reo*** principle dates back to Roman law.

The Roman law contains several provisions in the Digest[336] that clearly indicate the usage of ***in dubio pro reo*** principle, even though it wasn't known under this term.[337] We encounter provisions quite similar to ***in dubio pro reo*** formulation ("when in doubt, for the accused") such as: ***semper in dubiis benigniora praeferenda sunt*** ("when in doubt the more liberal constructions are always to be preferred")[338] and ***semper in obscuris, quod minimum est sequimur*** ("in obscure matters we always apply the construction that is least obscure").[339] Additionally, the Roman law also had several provisions that justified the existence of this principle. Thus, we find provisions that point to humanity as a reason for its existence, such as the following provision: ***in ambiquis rebus semper humaniorem sententiam sequi oportet*** ("in doubt always apply the most humane solution").[340] We also encounter provisions that suggest equity as the reason for the existence of this rule, such as ***in re dubia benigniorem interpretationem sequi, non minus justius est, guam tutius*** ("in cases of doubt, the moderate interpretation is just as equitable as it is safe").[341] In the end, we also detect the provisions that point to the protection of freedom as the justification for this principle, as for example ***quotiens dubia interpretatio libertatis est*** ("whenever there is a doubt between liberty and slavery, the decision must be in favour of liberty").[342]

Finally, in relation to the application of the ***in dubio pro reo*** principle in deciding criminal matters, it should be stressed that it was not applied at this stage. The reason was that the Roman law had a particular kind of „not clear" verdict (lat. ***non liquet***) which was given when criminal matter remained unresolved and when there was not enough evidence for a conviction or acquittal of the accused.[343] Such a judgement did not represent the application of the ***in dubio pro reo*** rule, as the courts, in situations of doubt, did not place preference on the accused, nor incline to rule in his favour. The ***non liquet*** verdict only declared that the guilt or innocence of the accused was "not clear", and that evidentiary procedure needed to be repeated, which did not favour the accused in any way.[344]

The principle of ***in dubio pro reo*** notes a greater development in post-classical age (IV and V century A.D) as the result of the influence of the Christian principle of "***favour miserorum***" (benevolence towards the poor) and humanism of Roman law. Centuries later, Popes Clement and Innocent III urged clergy to avoid bloodshed by following the safer path in case of doubt: the judge needed to be convinced of a person's guilt, otherwise, he himself would be punished by God.[345]

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was divided on the question of his guilt, so the goddess of justice, Athena, gave the verdict in his favour. (Ilić, Ivan, Primena principa in dubio pro reo u krivičnom postupku, Zbornik radova Pravnog fakulteta u Nišu, no. 70, year LIV, 2015, p. 468).

336 Digest (D), also called Pandectae, is a collection of passages from the writings of Roman jurists, arranged in 50 books and subdivided into titles according to the subject matter. In AD 530 the Roman emperor Justinian entrusted its compilation to the jurist Tribonian with instructions to appoint a commission to help him. The Pandects were published in ad 533 and given statutory force, which they retained into the Middle Ages in the Byzantine Empire. (Encyclopedia Britannica, Accessed 10.1.2018. https://www.britannica.com/topic/Pandects).

337 In theory there are also different opinions: „For how long the principle ***in dubio pro reo*** has been applied is still unclear. The once present belief about its application in the Roman criminal law and criminal reception procedure has with recent works been challenged." (Kern, Eduard and Roxin, Claus, ***Strafverfahrensrecht***, 14. Auflage, München: Verlag C.H. Beck, 1976, p. 71).

338 (D, 50, 17, 56). „This maxim is derived from the discussion of inheritance, and the answer is the solution which favours the successor." (Sič, Magdolna, Trajne vrednosti rimskog prava, Zbornik radova Pravnog fakulteta u Splitu, 43, no. 3-4/2006, p. 391).

339 (D, 50, 17, 9).

340 (D, 50, 17, 86).

341 (D, 50, 17, 192), Bayer, V., op. cit., p. 37.

342 (D, 50, 17, 1, 125).

343 Zlatarić, Bogdan and Damaška, Mirjana, ***Rječnik kriviičnog prava i postupka***, Zagreb, 1966, p. 188.

344 Dimitrevski, Zoran, et al. Doubt in favour of the defendant, Guilty beyond reasonable doubt - Comparative study, Mishevska, Ljubica (ed.), OSCE Mission to Skopje, 2016, p. 16.

345 Whitman,. J. Q., op.cit. p. 117.

2. IN DUBIO PRO REO PRINCIPLE IN MODERN CRIMINAL PROCEDURE

Modern criminal proceedings are mostly mixed (adversarial-inquisitorial), which is particularly characteristic for continental Europe, where inquisitorial elements, along with a series of strict guarantees for the effective exercise of the defense function at every stage of the process mainly dominate in the investigation, but are also in certain forms present in the later stages of the criminal proceedings, whilst adversarial elements are to a greater extent present in the phase of the main trial, or during the trial in the strict sense. The emergence of this type of procedure is closely related to the French Revolution (1789),[346] and was structured with the aim of unifying the highest quality forms of adversarial and inquisitorial criminal proceedings. This cumulation especially became obvious during the Napoleonic Code of Criminal Investigation (***Code d'instruction criminelle***) from 1808,[347] which would later serve as a model for other criminal procedure codes, especially in Europe.[348]

An important achievement of such modern criminal proceedings in respect to fact-finding is the application of the principle of unfettered consideration of evidence. In accordance with this principle, the court evaluates the evidence presented using logical and psychological analysis, and in doing this, is not bound by legal rules which would ***a priori*** determine the probative value of certain evidence. Even though there are opinions that the principle of unfettered consideration of evidence is in collision with ***in dubio pro reo*** principle***,*** because ***in dubio pro reo*** instructs the court on how to resolve the doubt when deciding about the facts, ***in dubio pro reo*** principle is applied ***after*** the evidentiary procedure when the court has already evaluated the results, but remains in doubt as to whether a fact is proven or not. So, in ***in dubio pro reo*** the principle represents continuance and a corrective of the principle of unfettered consideration of evidence.

All the major national legal systems proclaim the rule that the suspect or the accused is assumed innocent until proven guilty. The notion that the principle ***in dubio pro reo*** is based on the presumption of innocence is quite widespread in the theory of criminal procedural law. Both principles are intertwined and work together in order to ensure full fairness of the proceedings.[349] By accepting the principle of the presumption of innocence in modern criminal procedure, the court will acquit not only when innocence of the accused is proven, but also when his guilt has not been proven. Thus, any doubt about the existence of the legally relevant facts must be resolved in favor of the accused, and the facts to the detriment of the accused (***in peius***) must be established with certainty. This represents the application of the principle ***in dubio pro reo***.

We should emphasize that the presumption of innocence and the ***in dubio pro reo*** principle form a unity only in the event of doubt about the existence of legally relevant facts about guilt, whilst ***in dubio pro reo*** principle has a much wider effect and relates to the existence of other important facts such as, for example: legal qualification of the crime, sentencing, whether the accused was a minor at the time of the criminal offense, or whether the statute of limitations period has expired, etc.

346 Declaration of the Rights of Man and Citizen (of August 26th, 1789) in article 9 introduces the presumption of innocence principle. Subsequently this principle was accepted in almost all modern criminal procedural legislations of Europe. Acceptance of the presumption of innocence principle resulted in the disappearance of "***adsolutio ab instantia***" or the judgment by which the accused is acquitted without trial.

347 „In the nineteenth century a number of European countries accepted the French mixed type of criminal procedure introduced in the Code of Criminal Investigation, and with that also the jury and the principle of unfettered consideration of evidence. Thereby the principle of unfettered consideration of evidence established itself as a permanent institution, so that when the end of the nineteenth and twentieth century English type jury was replaced by other types of courts, the principle of unfettered consideration of evidence remained in use. This is clear from the example of the Code of Judicial Criminal Procedure of 1929, in which the courts were composed exclusively of professional judges (without a jury), but the unfettered consideration of evidence principle still remained in use when delivering the verdict." Quoted from: Bayer, V., op. cit., p. 65.

348 More about this form of criminal procedure see in: Sijerčić-Čolić, H., op. cit., p. 68-70.

349 „When it comes to acquittal, the right to presumption of innocence would be emptied of all its significance without this principle, since any doubtful situation would not be solved in favor of the defendant anymore[...]And ***vice versa***, without the right to presumption of innocence, the principle of ***in dubio pro reo*** would be of hardly any benefit to the defendant, since the suspect should bear the burden of proving their innocence." (Dimitrevski, Z., et al., op.cit., p. 72).

Given that the criminal law encompasses grave limitations to human rights and liberties, and that a prosecutor has several factual advantages compared to the accused, some benefits in favor of the accused and his defence have been established to better his position in the criminal proceedings. According to a view expressed in the doctrine, ***in dubio pro reo*** is one of these benefits ***(favor defensionis)***, and is based on the principle of equality of the procedural parties. This principle expresses desire of the legislature and the courts to eliminate any adverse effects against the accused for which the conditions have not been met with complete certainty. [350]

Despite the fact that a smaller number of legislations expressly provide for the principle ***in dubio pro reo***,[351] it is undeniable that the idea this principle expresses in modern criminal proceedings is generally accepted and recognized.[352] Failure to prescribe this rule in modern criminal procedure codes is said to be the result of the complexity of this matter, and the fact that the ***in dubio pro reo*** principle actually is a dependent legal rule which represents the logical consequence of the principle of material truth. The general acceptance of this principle is favored by the modern trends of humanization of criminal and criminal procedural law, as well as the legislation on the execution of criminal sanctions.

3.1 *In Dubio Pro Reo* Principle in the Practice of the European Court of Human Rights

Favouring the accused is a principle accepted in the practice of all major international courts. The European Court of Human Rights (hereinafter ECtHR) in Strasbourg has, in several cases, discussed the question of harmonization of national legislation with the European Convention on Human Rights (hereinafter ECHR) in relation to the issue of application of the principle ***in dubio pro reo*** in the national criminal proceedings. These are the cases where the ECtHR assessed violation of the right to a fair trial under Article 6 paragraph 1 of the ECHR and the presumption of innocence under Article 6, paragraph 2 of the ECHR, in conjunction with the principle ***in dubio pro reo***.

The first sentence of Article 6, paragraph 1 reads: "***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*** Hence, Article 6, paragraph 1 of the ECHR guarantees primarily the right to a fair trial, but also the benefits contained in the presumption of innocence under Article 6, paragraph 2 of the ECHR, as a separate element of the right to a "fair trial". This presumption is directly related to the methods and results of establishing facts in criminal procedure.[353] In the case of ***Pesa v Croatia*** ECtHR (finding the breach of the applicant's right to be presumed innocent)[354] ECtHR stated that "***the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial***...". The presumption of innocence is closely linked with the principle ***in dubio pro reo***. According to this rule, doubts about the existence of the legally relevant facts, especially the guilt, the court must resolve in favor of the accused.

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350 See: Grubač, M. ***op. cit.***, p. 258-259; Pavišić, B., op. cit., p. 66.

351 Criminal procedure code of Bosnia and Herzegovina ("Official Gazette" of Bosnia and Herzegovina, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46706, 76/06, 29/07, 32/07, 53/07, 76/07,15/08, 12/09, 16/09, 93/09, 72/13) regulates the ***in dubio pro reo*** principle in article 3(2): „If there is doubt about the existence of the adjudicating facts of the crime which the implementation of the appropriate criminal provisions shall depend on, the court shall reach a decision in a manner which will be more favorable to the accused". Macedonian Law on Criminal Procedure (Official gazette 150/10, 200/12, 142/16) in article 4 requires that: „ The Court shall decide in favor of the defendant whenever there is doubt regarding the existence or nonexistence of facts comprising the elements of crime, of facts which lead to the application of a certain provision of the Criminal Code".

352 In German criminal proceedings, the ***in dubio pro reo*** principle is now in wide use. It is applied to the facts composing essential characteristics of a criminal offense or criminal responsibility, facts that preclude crime or criminal responsibility, facts that make a crime privileged or qualified, facts that are criminal procedure prerequisites. France has a similar situation with respect to the frequency of application of this principle. Italian theory and practice also knows of it and the application of it is, on a smaller scale, similar to the German and French criminal procedure. Cited from: Pavlović, Šime, Tri načela kaznenog prava (pravičan postupak, non bis in idem, in dubio pro reo), Rijeka: Libertin naklada, 2012, p. 490.

353 Krapac, Davor, Kazneno procesno pravo, Book I, Institucije, IV revised and updated edition, Zagreb: Narodne novine, p. 356.

354 ***Pesa v Croatia***, application no. 40523/08, 8 April 2010, § 138 and 151.

According to the ECHR practice, the additional element of a fair trial is a request that the judicial decision must state the reasons on which it is based, i.e. that it must be explained. This means that it is possible to determine the violation of the principle ***in dubio pro reo*** from the information contained in the opinion of the verdict. According to ECtHR, "***the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case.***" [355] In cases when the opinion of the verdict has not been provided, the available remedy is likely to become illusory. The practice of some countries where certain judgments in criminal cases include an opinion only if an appeal is filed is contrary to that initial standpoint because the decision to initiate an appeal procedure is often made on the basis of opinion of the verdict.[356]

In the case of ***Ajdarić v Croatia***[357] ECtHR found violation of the principle of ***in dubio pro reo*** because of the lack of court reasoning. It expressed that the "***it can be said that the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely,*** in dubio pro reo.***"***Therefore the Court concluded that "***the criminal proceedings against the applicant, taken as a whole, constituted a violation of the applicant's right to a fair trial under Article 6 § 1 of the Convention***."[358]

The presumption of innocence, as one of the basic principles underlying the modern criminal procedure, proclaimed in Article 6, paragraph 2 of the ECHR expressly states that "***everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law".***

The most important aspect of the presumption of innocence is related to the grounds of the judgment. This aspect is closely linked with the requirement of judicial impartiality, respect of the presumption of innocence of the accused without prejudice, which means that the accused can be convicted solely on the basis of evidence presented during the trial. The Court formulated the essence of the presumption of innocence in the following words:" ***Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires*** inter alia***, that when carrying out the duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly, and to adduce evidence sufficient to convict him. "***[359]

Accordingly, the ECtHR has clearly confirmed that the presumption of innocence requires, among other things, that the representatives of the Court, when carrying out their duties, must not have a previously formed perception about the accused's guilt, that the burden of proof is placed on the prosecution, and that any lingering doubts must be resolved in favour of the accused.

In addition, the presumption of innocence means that the accused has the right to remain silent, to offer its own evidence, as well as the privilege against self-incrimination. [360] The ECtHR has in several judgments reiterated its position that any situation where the question regarding the evidence arises must be resolved in favour of the accused.[361]

Article 6 Para. 2 can be violated even after the formal decision on the merits of the accusation.[362]

355 ***Ruiz v Spain***, application no. 30544/96, 9 December 1996, § 26.
356 Van Dijk, Peter et al., Teorija i praksa Evropske konvencije o ljudskim pravima, Sarajevo: Muller, 2001, p. 411.

357 ***Ajdarić v Croatia***, application no. 20883/09, 13 December 2011, § 51 and 52.
358 See also: ***Lavent v Latvija***, application no 58442/00, 28 November 2002. godine, § 125; ***Melich and Beck v Chech Republic***, application no. 35450/04, 24 July 2008, § 49.
359 ***Barbera, Massegue and Jabardo v Spain***, 6 December 1988., Series A, no. 146, § 77.
360 ***Funke v France***, judgment of 25 February 1993, series A, no. 256-A, § 28.
361 Report of 31 March 1963, ***Pfunders (Austria v. Italy)***, Yearbook VI, p. 782-784; ***Telfner v Austria***, application no. 33501/96, 20 March 2001, § 15.
362 See: ***Asan Rushiti v Austria***, application no. 28389/95, 21 June 2000, § 31.

In the case of ***Geerings v Netherlands***[363] ECtHR found there had been a violation of Article 6 Para. 2 of the Convention in case of "confiscation" following on from a conviction.[364] ECtHR concluded that the presumption of innocence had been violated because, "***following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible***."

"***The Court considers that "confiscation" following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, "deprivation of illegally obtained advantage" – is a measure (maatregel) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2."***[365]

According to the Court, two circumstances were relevant in the given case. Firstly, that the applicant demonstrably held assets whose provenance could not be established. Secondly, the confiscation included assets which were not known to have been in the possession of the applicant and the measure was connected to a criminal act of which the applicant had not actually been found guilty. Hence, if it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, confiscation can only be based on a presumption of guilt, which was the case in ***Geerings v Netherlands***, where the ECtHR found the violation of the presumption of innocence from Article 6 Para. 2 of ECHR.

In the end, we can conclude that ECtHR has in its practice, by consistently applying the presumption of innocence, formed a standard according to which the accused is not required to offer his defense and prove his innocence, whilst the burden of proof is on the prosecutor. Accepting such legal logic, the court must acquit not only when he is convinced of the innocence of the accused, but also where he is not convinced of his guilt. In such situations, the court is obliged to apply the ***in dubio pro reo*** principle as an important segment of the right to a fair trial under Article 6 of the ECHR. [366]

3.2 *In Dubi Pro Reo* Principle in Anglo-American Law

The Anglo - American legal system has also developed methods of assigning legal guilt only on the basis of the highest degree of certainty. Even though we cannot speak of the ***in dubio pro reo*** standard in the classical civil law sense, any doubt about the guilt in Anglo-American law must be decided in favour of the defendant. This doctrine is known as beyond reasonable doubt standard. Unlike the principle of ***in dubio pro reo*** in civil law countries, the beyond reasonable doubt standard is interpreted more narrowly, as it is only applied to establishing guilt and not to qualification of the crime or to criminal sanctions.

The beyond reasonable doubt standard was formulated around the same time as ***in dubio pro reo.*** In fact, the US Supreme Court has expressed the view that this rule only "crystallize[d]... as late as 1798***."***[367]Whitman argues that the formula was "not primarily intended to protect accused" but that it rather "was originally concerned with protecting the souls of the jurors against damnation".[368]

363 ***Geering v Netherlands***, application no. 30810/03, .1 March 2003 § 47 and § 49.
364 The applicant was convicted for various (attempted) thefts, (attempted) burglary, and deliberately handling stolen goods and membership in a criminal organization. The Court of Appeal subsequently quashed the judgment, and the applicant was acquitted on most of the offences, except for one theft. The Regional Court issued a confiscation order, stating there remained sufficient indications that he had committed these offenses.
365 ***Geering v Netherlands***, § 47.
366 Gomien, Donna, Kratki vodič kroz Evropsku konvenciju o ljudskim pravima (Third edition), Sarajevo: Vijeće Evrope, Blicdruk, 2005, p. 69.
367 ***Apprendi v. New Jersey***, 530 U.S. 466, 478 (2000).
368 Whitman, J. Q., The Origins of "Reasonable Doubt", Faculty Scholarship Series, paper 1.,2005, p. 2-3. Accessed: 12.1.2018. http://digitalcommons.law.yale.edu/fss_papers/1

The standard of proof beyond reasonable doubt is inextricably linked to the basic premise that is fundamental to all criminal trials: the presumption of innocence.[369] The United States Supreme court has repeatedly emphasized that this standard is so important that it rises to the level of a fundamental constitutional right.[370] Due to the lack of its precise definition, the phrase is hardly easy to interpret. How exactly are you supposed to know when your doubts about the guilt of the accused are "reasonable"? Even some of the most sophisticated members of the legal profession find the question too difficult to answer.[371] Proof beyond reasonable doubt implies the plaintiff must persuade the judge or jury that no other logical explanation can be derived from the facts except that the defendant committed the crime. The degree of probability required by this standard is a high one.[372] This means that the situations where the innocence is proven and the guilt is not proven beyond reasonable doubt are equal.[373] It does not mean that no doubt exists as to the accused's guilt, but only that no reasonable doubt is possible from the evidence presented.[374] By applying this standard, the risk of error to the individual is minimized even accepting the possibility that some who are guilty might go free.[375] So the law tilts in the favour of the defendant.

One of the characteristics of American civil and criminal justice which causes and explains many other significant structural and procedural differences from corresponding civil law institutions is the participation of the lay jury in the decision making.[376] It can be said that the role of jury in a criminal trial is central, not only to the structure of proceedings and functions of its participants, but also to the fundamental values that the civil and criminal justice system protects and promotes. The right to a jury trial coincides with the reasonable doubt standard.[377] In the beginning, jurors reached their decisions on the basis of a mixture of their own knowledge of events and the personal testimony of others. By the 16th century, most of the personal knowledge had dropped away. Once jurors were clearly perceived to be reaching decisions on the basis of evidence presented in the court, the emphasis was put on the jurors' duty to reach some sort of firm assurance of guilt based on the evidence.[378]

Unlike the civil law standard where something has to be „more probable than not" which is relatively easy for a jury to understand, the beyond reasonable doubt standard causes a lot of concerns. The questions are: (1) how high the required minimum of probability should be set and (2) how should the test be articulated.[379] It is important that the jury be clearly instructed that if, on reviewing all the evidence, the jury is unsure of or is left in the reasonable doubt as to the guilt of the accused, that doubt must be resolved in favour of the accused.[380] Such an instruction has for many years in England been regarded as a conditional requirement of a properly conducted trial because misdirection (or failure to give directions) to the jury on the standard of proof could lead to quashing of conviction on appeal, unless the case against the defendant is overwhelming.[381] In the American case of Sullivan, reasonable doubt jury instructions that are unconstitutional take away the essential element of a valid basis for reasonable doubt and thus, the entire "trial cannot reliably serve its function". That is why a deficient instruction leads to a conviction being overturned.[382]

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369 Gabriel, Henry D. and Barski, Katherine A., Reasonable Doubt Jury Instructions; The Supreme Court Struggles to Live by its Principles, Journal of civil Rights and Economic Development, Issue 1, vol. 11, 1995. p. 74.

370 ***In re Winship 397 U.S 368 (1970)*** the Court has explicitly acknowledged that the Constitutional mandate for the reasonable doubt standard is embedded in 5th and 14th Amendment (Due process clause).

371 Whitman, J. Q., op.cit., p. 2.

372 Choo, Andrew, Evidence, Oxford: Oxford University Press, 2012, p. 48.

373 Lazin, Đorđe, In dubio pro reo" u krivičnom postupku, Belgrade: Narodna knjiga, 1985., p. 81.

374 Legal Dictionary, Accessed December 6 2017, http://legal-dictionary.thefreedictionary.com/Beyond+a+Reasonable+Doubt.

375 ***Addington v. Texas*** 441 U.S 418, 428 (1979).

376 Von Mehren Arthur T. and Murray, Peter L., Law in the United States, New York: Cambridge University Press, 2007, p. 206.

377 Gabriel. D., H., and Barski, A., K., op.cit., p. 75.

378 Shapiro, Barbara J., Beyond Reasonable Doubt and Probable Cause-Historical Perspectives on the Anglo-American Law of evidence, London: University on Columbia Press, 1991, p. 1.

379 Weinstein, Jack B. and Dewsbury, Ian, Comment on the meaning of 'proof beyond a reasonable doubt' Law, Probability and Risk (2006) 5, Accessed December 6 2017, http://lpr.oxfordjournals.org

380 The need to instruct the jurors that the guilt must be proven beyond reasonable doubt was confirmed by the House of Lords in the case of ***Woolmington v DPP ([1935[AC 462***) and ***Mancini v Director of Public Prosecutions (1942] AC 1, HL(E)).***

381 ***R. v. Bentley (2001) 1 Cr. APP R 21 (49).***

382 ***Sullivan v. Louisiana 113 S Ct. 2078, 2080 (1993).***

In giving such direction in England, it is not incumbent on the judge to use any particular form of words, so long as the correct message is conveyed.[383] The US Constitution does not require any particular language to be used for the instruction to be constitutional either.[384] The question whether the term „beyond reasonable doubt" should be explained to jurors is, therefore, disputed. On one hand, legal academics and judges have expressed that the undefined version of beyond reasonable doubt standard is difficult for jurors to understand. As a result several jurisdictions in the Anglo-American legal system have proposed other wordings with a view to aiding jurors' understanding. In England and Wales for instance „***proof beyond reasonable doubt is proof that makes you sure of the defendant's guilt***".[385] This wording is criticized because studies have shown that many jurors may understand this as a requirement that the prosecution establish its case as a matter of absolute or scientific certainty. Since it is impossible to be absolutely certain about evidence presented in the court, the critics claim the jurors find themselves unable to convict.[386] A very commonly used instruction in US jurisdictions is "***Proof beyond reasonable doubt is proof that makes you firmly convinced of the defendant's guilt***."[387] The Supreme Court of Canada has held that explanation of the phrase is „an essential element of the instructions that a judge must give to a jury."[388] Besides the descriptive explanations, in theory there are also suggestions of quantitative definitions of the standard, which according to some should be in the realm of 95 %[389] or a non-quantitative formulation plus a numerical formulation such as „***in the high 90's***".[390]

In the other group are the scholars and courts that think that the weakness of the formulation „beyond reasonable doubt" cannot be that it isn't precise because that is a characteristic of many other legal institutions in criminal procedure as well, and because on the other hand, a complete precision cannot always be achieved, nor is it necessary. The advantage of such a simple wording is that the expression „reasonable doubt" is emphasized so it has a psychological effect on the jurors, who will be more ready to admit they are in doubt, than if the court were not to use the words „doubt" and „reasonable doubt".[391] Wigmore on Evidence observes that "... ***when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension.***"[392] This is probably why „courts in several US states are forbidden even to try to explain the standard, and a majority of the federal circuits treat it as so elusive that trial courts cannot be required to define it."[393] For example, in 1886, the Michigan Supreme Court observed: "***We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by a trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a "doubt" is a fluctuation or uncertainty of mind arising from the defect of knowledge, or of evidence, and that a doubt of the guilt of the accused honestly entertained, is a 'reasonable doubt.'***"[394]

The Court of Criminal Appeal of England and Wales has also stressed that „***if judges stopped trying to define that which is almost impossible to define, there would be fewer appeals***."[395] The same approach is taken in Australia, where according to the model direction in Queensland Supreme

383 ***R.v Kritz (1980) 1 KB 82,89.***

384 Henry, D. G and Barski, A., K., op.cit., p. 81.

385 Choo, A, op.cit., p. 49.

386 See more in: Heffer, Chris, The language of Conviction and the Convictions of Certainty: Is Sure an impossible standard of proof? International Commentary on Evidence 5 (1), 2007.

387 The terminology "firmly convinced" is used in the Ninth Circuit Pattern Instruction (§ 3.5), Accessed December 23 2017. http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Jury_Instructions_2015_06.pdf) and the Fifth Circuit and District of Columbia Circuit have approved the Federal Judicial Center charge, that contains such terminology (Federal Judicial Center, Pattern Criminal Jury Instructions (1988) §21. States adopting such terminology include New Jersey, Arizona and Indiana.

388 ***R v. Lifchus (1997) 3 SCR 320*** at 22.

389 Weinstein, J. B and Dewsbury, I., op.cit., p. 169.

390 Ibid., p. 173.

391 Lazin, Đ., op.cit., p. 83.

392 Wigmore, John H., A Treatise on the Anglo-American System of Evidence in Trials at Common Law (1940), vol. 9, Boston: Little Brown & Co., p. 319.

393 Whitman, J. Q., op.cit., p. 2.

394 ***People v Steubenvoll 28 NW 883 (1886)*** at 885.

395 ***R v Yap Chuan Ching*** (***1976***) 63 ***Cr.App***.R 7 at 11.

and District Courts Bench book, no explanation should be given unless the jury asks a question,[396] i.e. it should be given only where the jury indicates that it is struggling with the concept.[397]

According to Weinstein and Dewsbury there are many factors which may cause enormous differences in evaluation of what constitutes beyond reasonable doubt. Some may be seen as permissible or even desirable, while others are clearly inappropriate. Jurors may evaluate the same evidence differently and adjust the burden of proof based on personal experience. Some of these variations are valid and may be relied on, some are valid (in the sense of logically relevant) but may not be relied on (such as information about the defendant's criminal history) and some may have some experiential basis, but are not permissible (such as racial stereotypes). Another factor that can alter the probability required for conviction is their degree of confidence in the police, the prosecutor, the court, and the justice system as a whole. Feelings about such matters can vary significantly from one community to another. Jurors may also require a lower standard of proof based on their perception of the danger of the moment. In a 'rash' of sex crimes or robberies publicized by the media, or post 9/11 in a case where the defendant is charged with attempting to commit terrorist acts, the jury may feel that the risk of setting a guilty defendant free weighs heavily. The jury may elect to convict a defendant for the crime charged on a lower standard of proof based on evidence of defendant's past crimes or problematic lifestyle, on the theory that the defendant probably should be in prison anyway. Jurors may also be influenced by their beliefs about the future danger of the defendant. While this may or may not be relevant to the sentence, depending on one's theory of punishment, it should not be relevant to a determination of guilt or innocence with respect to the crime charged.[398]

Despite its complexity, the beyond reasonable doubt standard is now universally recognized. It is employed throughout the common law, in several civil law countries and has been adopted by the International criminal court[399] and the International criminal tribunal for Former Yugoslavia[400] and Rwanda.[401] This standard was also previously employed at the International Military Tribunal (Nuremberg).

CONCLUSION

Today the thought expressed in the famous Latin proverb ***in dubio pro reo*** ("in doubt, the in favour of the accused") is widely recognized and known both in theory of criminal procedural law and in jurisprudence. This principle dates back to Roman law, and its general acceptance today imposes the conclusion that it is indisputable. However, a deeper analysis shows clearly that there are significant differences in terms of understanding a number of issues that are of importance for the application of this principle, starting from its contents, scope of application, the legal character, nature, and the validity of its existence, which is reflected in the different definitions of its content. In this paper, we have tried to answer some of these questions in order to contribute to a better understanding of this very complex rule. Special attention was given to the historical development of the ***in dubio pro reo*** principle in continental legal systems, whose application developed parallel to the development of the criminal procedure law in the major criminal legal systems as well as in the national legislations of particular countries.

The ***In dubio pro reo*** principle constitutes a part of a just procedure guaranteed in article 6 of the European Convention of Human Rights and is a reflection of the presumption of innocence.

396 Martin, B. C.J., Beyond Reasonable Doubt, Conference of Supreme and Federal Courts Judges, 2010, p. 18, Accessed December 30, 2017. http://www.supremecourt.nt.gov.au/media/documents/Beyond_Reasonable_Doubt.pdf
397 Ibid. p. 19.
398 Weinstein, J. B.and Dewsbury, I., op.cit., p. 171 -172.
399 Rome statute of International Criminal Court at 66 (3).
400 Rules of procedure and Evidence of the international criminal Tribunal of the Former Yugoslavia (Rule 87 (A)).
401 Rules of procedure and evidence of the International criminal Tribunal for Rwanda (87 (A)).

The European Court of Human Rights holds that there is a violation of the presumption of innocence in cases of the conviction, if the guilt has not been proven according to the law and beyond any reasonable doubt, and that the slightest doubt about any evidence must be interpreted in favour of the accused.

The ***In dubio pro reo*** principle is one of the main achievements of the modern continental legal systems. It should be noted that it does not exist in Anglo-American law in the same sense. This does not, however, mean that the doubt is resolved to the detriment of the accused there. The similar effects to ***in dubio pro reo*** are achieved in a different way, by instructing the jury on the necessary standard of proof. One of the main instructions the judge gives the jury after the trial relates to the quantum of evidence needed for conviction. If the professional judge thinks that the members of the jury might find themselves in doubt regarding the guilt of the accused, he can instruct them that the criminal offence must be proven beyond any reasonable doubt.[402] This means that if the jury has „reasonable doubt" about the guilt of the accused, it must render the verdict „not guilty". Since the same decision is rendered by the members of the jury when they find the accused is not guilty, the first decision is favouring the accused, and practically means the application of the ***in dubio pro reo*** principle.[403] It is understood that this common law rule emerged at the end of the XVIII century, which corresponds to the time of the emergence of the ***in dubio pro reo*** principle in European continental law. [404]The ***in dubio pro reo*** principle is also found in the Islamic law.[405]

The principle ***in dubio pro reo*** is not a formal evidentiary rule which would restrict the application of the principle of unfettered consideration of evidence. This is because it applies only when the evaluation of the evidence on a discretionary basis is completed, and the court remains in doubt. Therefore, this principle is not a limitation or obstacle to ascertaining the truth in a criminal proceeding, and is not opposed to the principle of substantive truth as it is applied only when the court has already exhausted all its possibilities for ascertaining the truth.

In modern law, it is not acceptable to regard the ***in dubio pro reo*** principle only as a reflection or a logical consequence of the presumption of innocence. It is because presumption of innocence cannot explain all the situations where this principle is applied in criminal proceedings, such as its application to the question of existence of the criminal offence and criminal responsibility. Principle of innocence cannot explain the application of ***in dubio pro reo*** to the facts which are determined after the criminal offence and guilt already have been established, where the question of innocence of the accused is no longer an issue (i.e. the facts that affect weighing stiffer penalties that privilege the criminal offence and mitigate the sentence).

As this principle favors the accused to the prosecutor in cases of doubt, in our opinion, it can be seen as one of the benefits of the accused: ***favor defensionis.***

In the end, there are still areas in which the application of the ***in dubio pro reo*** principle has been neglected by the theory and jurisprudence. This is mainly the case in the field of expertise and the application of ***in dubio pro reo*** as a ground for an appeal. Certainly, there are also other issues related to its application, especially in connection to some modern institutions of criminal procedure law (for example, plea of guilt or plea bargaining), or some modern forms of expertise (DNA analysis).

402 Krapac, Davor, Engleski kazneni postupak, Zagreb: Pravni fakultet u Zagrebu, 1995, p. 68.
403 Lazin, Đ., op. cit., p. 80.
404 Ibid., p. 81-82.
405 „In cases of doubt, a jurist must err on the side of forgoing punishment (idra`u al-hudud bi al-shubuhat)." Cited from: Clemens, Nathan, N., The Changing Face of Religion and Human Rights, Boston: Martinus Niijhoff Publishers, 2009, p. 131.

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