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THE PRIMACY OF PARENTS IN CHILD-REARING FOR A CHILD IN FOSTER CARE

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ABSTRACT

This study investigates the legal status of parents of children placed in foster care, in view of the constitutional principle of the primacy of parents in child-rearing. It analyzes the legal status of parents in all possible cases when a child has been placed in foster care or in a childcare facility, especially the case based on a ruling that restricts parental authority, which is the most common circumstance and the most ambiguous in terms of the research problem explored here. Moreover, this study examines the thesis that both parents and foster carers jointly affect the child, making it difficult to defend the position that parents should enjoy the primacy. Nevertheless, the purpose of the provisions of the Family and Guardianship Code and the Act on Family Support and Foster Care System is clearly to restore the primacy of parents.

KEYWORDS

parental primacy
parental authority
foster care
family court
family law
limitation of parental authority
termination of parental authority

1. Introduction

1.1. Research problem

Parents enjoy primacy in child-rearing. This is guaranteed by Article 48 item 1 of the Constitution of the Republic of Poland of April 2, 1997[1] (hereinafter, the

1 | Journal of Laws 1997, item 483 as amended.

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Polish Constitution). This study specifically analyzes atypical situations—those of parents whose children have been placed in foster care, that is, outside the family unit. It is crucial to establish whether and to what extent this primacy is then removed, restricted, or modified. It is also important to scrutinize the scope of the powers and duties of parents with respect to the child in foster care, and their legal status in relation to those who exercise foster care of the child. In terms of theory, considerations focus on the constitutional aspects of family law.

1.2. The primacy of parents in child-rearing

The following quotation from Article 48 § 1 of the Polish Constitution is helpful in fully understanding the principle of the primacy of parents:

> Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of the child, as well as his freedom of conscience and beliefs and his convictions.

Similarly, this standard of protection of rights of a human who is a parent had previously been expressed, in, among others, Article 26 of the UN Universal Protection of Human Rights, Article 18 § 4 of the UN International Covenant on Civil and Political Rights,[2] Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] Articles 5 and 18 of the UN Convention on the Rights of the Child[4] (hereinafter, UNCRC), and Article 4 § 3 of the Charter of Fundamental Rights of the European Union.[5] In the aforementioned legal acts on the primacy of parents in the upbringing of their children, the guarantee of the primacy of parents is rooted in respect for the natural relationship between parents and their children, which is worthy of protection. This is clearly demonstrated in the UNCRC, whose message may be expressed in the claim that to protect the rights of children, the state is obliged to support their parents.[6] This consensus on the legal status of parents, universal until recently, is worth emphasizing here because lately, the position of the family in the context of parent–child relations has been openly contested by gender ideology and philosophical currents referred to as neo-Marxism and the content of international documents and laws adopted in some countries (not only European), created under the influence of these trends.

The principle of the primacy of parents implies the state's special role, which is to respect the subjectivity of the family and support it, particularly the parent–children relationship.[7] Moreover, the state is obliged to 'guarantee constitutional protection of the rights of the parents against any arbitrary interference of public

2 | Journal of Laws 1977, item 167.
3 | Journal of Laws 1995, item 175 83.
4 | Journal of Laws 1991, item 526.
5 | Journal of Laws of the European Union 2016 C 202.
6 | Contradicting Art. 20 of the UNCRC and Art. 7 of the Act of June 9, 2011 on Family Support and Foster Care System (hereinafter, AFSFC). Cf. Preamble Art. 5 and Art. 18 of UNCRC; Smyczyński, 1997, pp. 293–303; Smyczyński, 1999, pp. 149–166; Andrzejewski, 2012, pp. 41–58.
7 | Borysiuk, 2016, pp. 475–495, 1196–1204.

authority.'[8] The result of such an approach is a respect for the autonomy of the family manifested in restraint in control over parents who enjoy parental authority, as opposed to imposing court supervision of the exercise of legal guardianship.[9] However, experience teaches us that state authorities, whether communist (as they once were in Central Europe) or those proclaiming themselves liberal, tend to intervene excessively in the relationship between parents and children, censuring the position of the former and weakening family ties. This is confirmed by the jurisprudence of the European Court of Human Rights[10] that indicates the over-hasty removal of children from their parents, their placement in foster care hundreds of kilometers from the parents' home, or the placement of children raised in the religious tradition of, for example, the Orthodox Church, in a Muslim foster family.[11]

| *1.3. Foster Care: Characteristics*

The purpose of placing a child in foster care (foster-care family or child-care facility) is to ensure appropriate conditions for the child in circumstances when the child cannot remain in the family unit. It is also the intention of foster care to support such families when, owing to a variety of difficulties, parents are unable to fulfil their roles in caring for and rearing the child. Support for the family must be carefully planned and preceded by a thoughtful diagnosis of the family and its situation, in which many divergent aspects—including pedagogical, psychological, and economic aspects—are considered. The ultimate goal of providing support is to enable the parents to restore their ability to fulfil their child-rearing duties.[12] The related tasks are conducted at a local level,[13] by local welfare agencies, including several types of foster-care families and child-care facilities. The child's time in foster care should be as short as possible (the time should be determined by the severity of the family crisis),[14] and it must end when the child reaches the age of majority at the latest.[15]

As a rule, before placing a child in foster care, all less severe forms of intervention with the family should have been employed and found ineffective; nevertheless, there are cases in which the child must be quickly separated from their parents.[16]

Regulations favor family-foster care, indicating that the placement of a child in a child-care facility, such as a residential children's home, should take place only if it is impossible to place a child in a foster family because none is available

8 | Borysiuk, 2016, p. 1185.
9 | Ignatowicz, 1985, pp. 851–855.
10 | Andrzejewski, 2003, pp. 200–204; Nowicki, 2010, pp. 539–555.
11 | Ct. Journal of Laws of 2022, item 447; Nitecki, 2016, p. 47; Andrzejewski, 2020, pp. 49–56; Kuźnicka, 2016, pp. 181–198; Świtło, 2021, pp. 55–70; Zajączkowska-Burtowy and Burtowy, 2020, pp. 101–115.
12 | Maluccio, 1999, pp. 185–195; Hellinckx, 1999, pp. 125–132.
13 | Art. 2 of AFSFCS; Nitecki, 2016, pp. 25–42.
14 | Art. 112^7 of Family Guardianship Code (hereinafter, FGC).
15 | Słyk, 2017, pp. 1313–1315; Zajączkowska-Burtowy, 2021, pp. 109–1102.
16 | 112^3 of FGC; Słyk, 2017, pp. 1313–1315.

or it would run counter to the good of the child. Notably, the superiority of foster families over foster-care facilities holds only for those foster families that function properly. Otherwise, a child will experience harm far greater than that it may experience in a poor foster-care institution.

2. Constitutional context

2.1. Duties of the state in relation to the family: the principle of subsidiarity

The Polish Constitution's regulations concerning the family also apply to parents whose children have been placed in foster care. The Polish Constitution posits that the state is obliged to protect and support the family,[17] and the good and welfare of the child should be considered in the state's social and economic policies. This duty should be fulfilled primarily in relation to poor families.[18] In turn, a child bereft of a family has the right to care and assistance from public authorities.[19]

The system of foster care in its current form (operating in Poland for a quarter of a century)[20] is a tool of state social policy aimed at supporting families in crisis, specifically those unable to fulfil duties related to the care and upbringing of a child.[21] This is indicated by the content of the AFSFCS, whose regulations, inspired by the principle of subsidiarity, prescribe support (in this case to families) to help them become independent, that is, leading to the parents' resumption of duties toward the child.[22] Foster care, as a method of family support, should be a mechanism that leads to the family's reintegration (reunification) at the earliest opportunity, that is, the return of the child to the parents and the resumption by the parents of their parental responsibilities. In no case should foster care make the beneficiary dependent on the assistance received or lead to a situation in which the parents become accustomed to others taking care of the child instead of them.

Subsidiarity does not apply when foster care has been established for a child placed in a foster family or foster care to protect the child from his or her parents (for their aggression, the consequences of gross neglect, or indifference) or to provide support for the family as a unit.

2.2. Limits of family autonomy

In dealing with the issue of parent–child relations addressed in the context of the primacy of parents in child rearing, Article 47 of the Polish Constitution, which guarantees everyone the protection of privacy, including the legal protection of family life, is of key importance. State intervention in this relationship is permitted only in cases specified in legal statutes (FGC)[23] and only based on the final court

17 | Art. 18 of the Polish Constitution.
18 | Art. 71 § 1 of the Polish Constitution.
19 | Art. 72 § 2 of the Polish Constitution.
20 | Chudnicki, 2016, pp. 177–194.
21 | Andrzejewski, 2011, pp. 421–435.
22 | Art. 4 items 1, 2, and 3 of AFSFCS. Dylus, 1995, pp. 52–61; Nitecki, 2008, pp. 58–87, 95–102.
23 | Ct. Journal of Laws of 2020, item 1359.

decision.[24] The state is also obliged to protect children against violence, cruelty, abuse, demoralization, and delinquency.[25] These regulations allow us to conclude that the autonomy of family life and the primacy of parents in the upbringing of children are not absolute, but are protected as they serve both the good of the family as a unit and the good of its individual members, especially the children. In no case may the autonomy of the family be a smokescreen that allows a violent person to act against other household members, especially children.[26]

3. Intervention in parental authority and other modifications thereof and the legal status of parents of children in foster care

3.1. Introductory remarks

The research problem requires us to indicate the legal basis for placing children in foster families or foster-care institutions. This legal basis is determined by the type and scale of the crisis that affects the family. It also determines the status of parents in relation to their children, as well as in relation to the institutions established to provide social, legal, pedagogical, and economic support to the family of the foster child (family court, social assistance, counseling centers, therapeutic centers of distinct types, etc.).[27]

The two most common situations that call for a child to be placed in foster care are the court's decision to either limit parental authority[28] or to terminate it,[29] and it is mainly these situations that are examined here.

The few other legal bases referred to are as follows:

1. Article 100 of FGC obliges the court and administrative authorities to support parents in the exercise of parental authority, even by placing a child in foster care;
2. Article 35 items 2 to 4 of AFCFCS, posits that should such a need arise at the request of parents or with their permission, their children may be placed in foster care based on an agreement concluded by the foster family and the county chief official. The county chief official is obliged to inform the court immediately about this agreement, and the court will then issue a decision based on Article 100 of FGC, Article 109 of FGC, or Article 111 of FGC (until which point, the parents have full parental authority and they may, in particular, take the child out of foster care);

24 | Art. 48(2) of the Polish Constitution.
25 | Art. 72 item 1 of the Polish Constitution.
26 | Ignatowicz, 1985, pp. 808–812; Sokołowski, 1987, pp. 41–57.
27 | Andrzejewski, 2020, pp. 22–26; Sokołowski, 2019, pp. 209–211.
28 | Art. 109 § 2 item 5 and Art. 109 § 4 of FGC.
29 | Art. 111 § 1 and Art. 111 § 1a of FGC.

3. Articles 58 and 103 of AFCFCS regulate the placement of a child in foster care as a result of intervention by the police, the Border Guard, or a social worker (based on Article 12a of the Act of July 29, 2005, on Counteracting Family Violence[30]). In such circumstances, the foster family and the director of the institution both should inform the court and social welfare agencies 'immediately, no later than within 24 hours.'[31] The court will then rule on the child's possible stay in foster care based on the FGC's provisions;[32]
4. Article 110 of FGC concerns the suspension of parental authority;
5. Article 7 item 3 of the Act of June 9, 2022 on the Support and Resocialisation of Juveniles (hereinafter, ASRJ); [33] and
6. Articles 11 to 16 of the Civil Code[34] concern legal capacity, including the prerequisites and effects of incapacitation that causes, among other things, the expiration of parental authority.

3.2. Limitation of parental authority

This is by far the most common legal basis for placing a child in foster care and is a response to a crisis in the family that threatens the good of the child. Its purpose is to rectify the family crisis, and later on, to repeal the restrictions by restoring to the parents their full parental authority.[35] The restriction of parental authority should be short-lived. After all, the rectification of any crisis should ideally be carried out quickly.

The restriction of parental authority is the result of family dysfunction in child care and upbringing. Although not infrequent, especially as reported in the media, it is semantically wrong to refer to these families as pathological. The social sciences have adopted the term 'pathology' from medicine, where 'pathological' is used to describe tissue that needs to be excised from the body. The word has a similar meaning in the social sciences. Meanwhile, the intended result of reducing parental authority is to consolidate the family (reintegration[36]), and not to separate a healthy tissue (the child in this metaphor) from the allegedly pathological tissue of the parents.

Although placing a child in foster care is the most decisive (onerous) form of restriction of parental authority, given that it is the only one that involves placing the child outside the family unit, its decisiveness may be compared, if we extend the medical metaphor, to a strong drug whose task is to cure the sick family, and not to a procedure that signifies an irreversible separation of the child from the family unit. Based on family law, the term 'pathological family' is appropriate only with reference to families in which the parents meet the conditions for the termination of parental authority, as discussed below.

30 | Ct. Journal of Laws, 2021, item 1249.
31 | Nitecki, 2016, pp. 301–307, 513–521.
32 | Art. 100, Art. 109 § 2 item 5, Art. 111 of FGC.
33 | Journal of Laws of 2022, item 1700.
34 | Act of April 23, 1964 Civil Code, Ct. Journal of Laws of 2020, item 1360.
35 | Smyczyński and Andrzejewski, 2022, pp. 279–282; Słyk, 2017, pp. 1287–1291; Długoszewska, 2012, pp. 175–186.
36 | Andrzejewski, 2011, pp. 432–433.

Article 109 § 2, § 3 and § 4 of FGC specify several ways in which parental authority might be limited: the referral of a child to a day-care center, referral of parents to therapy, establishment of family guardianship supervision, and placement of a child in foster care. The catalogue of methods is open, and the forms indicated directly in the legislation are only examples. It may be expanded in jurisprudential practice depending on (1) the resources of the local family-support infrastructure (day-care centers, family assistants, therapy centers, social welfare centers, and non-governmental and religious organizations), as well as (2) the background knowledge of family judges regarding educational, social, and psychological problems, and their ability to interact with institutions working in support of the family in the community.[37] The importance of these two factors cannot be overestimated, as the circumstances that form the basis for limiting parental authority by placing a child in foster care are sometimes more complex than those that prompt judges in other cases to terminate such an authority. These rulings shape the child's future, and an important criterion for choosing one of the methods is to assess the chances of rectifying the situation in the family. If, for example, the family may count on the support of the immediate family (grandparents of the child, siblings of the parents, and responsible adults from the circle of friends) and local support institutions, then the chance of achieving the desired effect by supporting the family is greater. However, in the absence of such support, the chance of returning the child to the family greatly diminishes. The cases emphasize the professional responsibility of family judges for the fate of children and their families, they and indicate the fundamental importance of developing their ability to work with family support institutions in the local environment.

To describe the legal status of such parents, we need to distinguish between the competencies, duties, and rights toward the child between foster carers (foster family or people employed in foster-care facilities) and the parents.[38] Foster-care facilities have been vested with the power of exercising day-to-day custody over the child, raising the child and representing the child in, among other things, cases to assert the child's rights to collect maintenance money, social security benefits, or pensions. Meanwhile, the child's parents are left with all other rights and duties resulting from parental authority.[39] We learn what falls within the scope of these 'other rights and duties' from the provisions delineating the scope of the rights and duties constituting parental authority, that is, primarily, Article 95 § 1 of FGC, which states that

> Parental authority shall, in particular, include the obligation and the right of parents to take care of the person and property of the child and to raise a child with respect for its dignity and rights.

37 | Andrzejewski, 2011, pp. 432–433.
38 | Art. 112[1] § 1of FGC.
39 | Zajączkowska-Burtowy, 2021, pp. 1066–1078; Słyk, 2017, pp. 1305–1310.

Then to Article 96 §1 of FGC, which states that

> Parents raise a child under their parental authority and guide it. They are obliged to care for the physical and spiritual development of the child and to prepare it properly to work for the good of society according to his or her ability.

Of the elements listed, those not attributed to foster-care providers fall within the scope of the powers and duties of the parents of the child. Article 112^1 §1 of FGC mentions neither the management of the child's property, which is, however, irrelevant in these considerations, since the vast majority of foster children come from poor families and have no property, nor the power to guide the child (listed in Article 96 §1 of FGC), in addition to parenting. This allows us to conclude that the guidance of a child is an entitlement of the parents of a foster child.

Broadly, 'guiding' a child involves deciding on matters important to the child (the term used in Article 97 §1 of FGC) such as forming a worldview, choosing an educational path, consenting to planned medical procedures, belonging to social organizations, leisure-time activities (decisions on extracurricular education, e.g., in music school or playing competitive sports) or taking religious or ethical instruction as part of school education.[40] The scopes of the meaning of the terms 'upbringing' and 'guiding' overlap to some extent. After all, decisions on important matters are relevant to the child's upbringing. Parents have the right, for example, to choose a school for their children and the impact of the form of 'guiding' a child on the process of bringing up the child is in accordance with the educational program of the institution.

The *ratio legis* of giving parents authority over key issues concerning the child in spite of the child being removed from the family lies in understanding the limitation of parental authority—as a means to help rectify family issues—in order to restore parental authority and reintegrate the family. A prerequisite for achieving family reintegration is the widest possible involvement of parents with the child.[41] If the parents are stripped of these prerogatives, then this correction becomes more difficult, if at all possible. The local foster-care system must therefore focus both on the child and on corrective actions with respect to the child's parents. If a child is in foster care to serve the purpose of returning the child to his or her family, then those in charge of foster care must not be granted the entire sphere of influence over the foster child.

The corrective nature of limiting parental authority also implies that despite the limitation, parents retain the right to contact the child,[42] and the child continues to enjoy the right to contact their parents.[43] Respect for the right of the child in foster care to maintain contact with the parents is treated in Article 4 item 3 and Article 33 of AFSFCS as an obligation of foster-care providers.

40 | Sokołowski, 1997, pp. 94–95; Strzebińczyk, 2011, pp. 265–283.
41 | Art. 8 of AFSFCS.
42 | Art. 113^1 § 2 of FGC.
43 | Art. 113 of FGC and Art. 9 § 3 of the Committee for the Protection of Children's Rights.

These rights of the parents of foster children are correlated with the responsibilities of foster families and those employed in foster-care institutions. In addition to the duty of the latter to allow parents' contact with the child, they must also respect the parents' decisions on matters that fall under the management of the child. It is also their duty to maintain a dialogue with the parents, especially on issues affecting the child either directly or indirectly. This injunction stems from the division of powers set forth in Article 112^1 §1 of FGC and the pedagogical demand, reflecting the principle of the good of the child,[44] for consistent educational interaction between the foster environment and the parents, and the realization of the idea of pedagogical influence on the parents to strengthen their parental competence (the so-called pedagogization of adults).[45] The passivity, even hostility, of the foster environment in relation to the parents of foster children would stand in axiological contradiction to the good of the child and in praxeological contradiction to the court ruling on the restriction of parental authority, as it would nullify the chances of realizing the purpose of such a ruling.

For the parents—of a child in foster care as a result of the limitation of parental authority—to improve their parental competence, the relevant local government institutions established to support the family and create a system of foster care are obliged to provide appropriate assistance to the child's family and report to the court on these matters.[46]

Because it is the duty of the family court and family foster-care institutions to work for the reintegration of the family, these institutions are prohibited from any actions that pull apart the family (e.g., obstructing contact or failing to inform parents about important matters of the child). Foster families and foster-care institutions may face criticism for engaging in such actions. This may particularly lead to the dissolution of the foster family or the imposition of labor law sanctions (for the improper or unlawful performance of labor duties) and even, in exceptional situations, criminal sanctions[47] against employees of foster-care institutions.

It may not be ruled out that the decisions of the parents concerning their guidance for the child may be contrary to the good of the child. In such a case, the foster family or the director of the foster-care facility is obliged to inform the court.[48] The director has the power to modify the custody of a child in foster care based on a ruling that restricts parental authority,[49] and the director may do so by issuing a ruling on the resolution of controversial issues (e.g., substituting parental consent for the child's education in a special school if the parents deny it) or by delegating the authority to make decisions on controversial issues to foster carers. The director may also delegate the authority to foster carers to decide on specific issues concerning a child (e.g., giving permission for medical treatment in emergencies). As such, the decisions of parents may be taken in stride because, if the decisions

44 | Sokołowski, 1997, pp. 94–95; Strzebińczyk, 2011, pp. 265–283.
45 | Ziółkowski, 2016, pp. 107–156.
46 | Art. 109 § 4 of FGC; Art. 33 of AFSFCS.
47 | Art. 231 of the Criminal Code. Ct. Journal of Laws of 2022, item 1138.
48 | Art. 572 of the Code of Civil Procedure. Ct. Journal of Laws of 2021, item 1805 as amended.
49 | Art. 112^1 § 2 of FGC.

are irrational, the child may be protected against them by informing the court about it.

State intervention may be said to break the autonomy of the family. This happens when the statutory condition of 'a threat to the good of the child'[50] is fulfilled. To the extent that the court has limited the authority of the parents, the primacy of the parents in raising the child is restricted. However, if a restriction takes the form of the child's placement in foster care (and possibly to a much lesser extent with the establishment of guardianship), the question of parental primacy arises in earnest because such a situation opens the door to the so-called divided custody, that is, the division of competencies regarding the child between the parents and foster-care providers.

Once the custody is divided, it is difficult to defend the notion that parents are entitled to primacy in raising their children. However, it may be argued incontrovertibly that the purpose of limiting parental authority is to restore this primacy to parents. This requires a change in the attitude of the parents themselves with the support of community-assistance institutions and the family court. Therefore, the realization of the child's right to live in a family and the family's right to receive support from the state appears to be a difficult, multifaceted task, requiring the participation of professionals from several fields, and fraught with the risk of failure. If it occurs, Article 111 § 1 of FGC will apply and this concerns the so-called optional termination of parental authority of parents of children in foster care based on a court decision to limit it, which is discussed below.

3.3. Foster care as a corrective measure in relation to a child and the legal status of parents

There is a similarity between the legal status of parents whose children are in foster care because of a restriction of parental authority and that of parents whose children have been placed in foster care because of Article 7 item 9 of the ASRJ.[51] The provisions of this law mean that the court applies educational and corrective measures in the cases of children (referred to in this law as 'juveniles') who show characteristics of delinquency or have committed acts prohibited by criminal law.

The ruling is thus not directly addressed to the parents. However, it may also happen that the court hearing the juvenile's case will collect evidence critical of the parents and will initiate *ex officio* proceedings for the restriction or termination of parental authority. When deciding to place a juvenile in foster care, the court tacitly expresses criticism of the conduct or attitude of the juvenile's parents. Indeed, one of the educational measures the court may select for a juvenile is responsible parental supervision.[52] This is adjudicated if the parents not only want to protect their children but also have the personality competence to do so. That the court adjudicates no responsible parental supervision but places the children outside the family unit in foster care means that it has no confidence in the parents' ability to

50 | Art. 109 § 1 of FGC.
51 | Ignatowicz and Nazar, 2016, pp. 540–542.
52 | Art. 7 item 3 of ASRJ.

influence their children's rehabilitation effectively and positively. In other words, the court finds that the parents are unable to raise their children properly, at least to the extent that they might prevent further delinquency and the commission of criminal acts. However, formally, the placement of a child in foster care under the ASRJ is not a form of intervention into parental authority (its restriction). Hence, it is the parents of the juveniles who are their legal representatives, who make decisions related to the management of the children, and who manage their property. Other issues such as the exercise of day-to-day custody and the upbringing of the child are the responsibility of foster-care providers.

3.4. Termination of parental authority

There are many children in foster care whose parents have been deprived of parental authority.[53] Among those parents who have had their parental authority restricted, many have a strong emotional bond with their children, and they try, albeit often ineptly, to fulfil their parental responsibilities. However, there are parents who meet the criteria to be stripped of parental authority and are morally charged and discredited to such an extent that it has become the duty of public authorities to take measures to protect the children from their own parents. In most cases, the behavior of these parents toward their children may rightly be described as pathological.

There are two forms of termination of parental authority: obligatory and voluntary.

The court is obliged to terminate parental authority if: a) there is a permanent obstacle to the exercise of parental authority, b) the parents abuse their parental authority, or c) they commit gross neglect of the child.[54]

Regarding item a) above, the only example of a long-term obstacle to the exercise of parental authority is when a parent serves a long-term prison sentence. A parent who commits a criminal act punishable by severe punishment deserves condemnation not only because of the crime he or she has committed but also because of the rupture he or she has caused in the relationship with his or her children by his or her own inappropriate conduct.

The decision to strip long-term mentally ill parents of parental authority on the grounds that they are unable to perform the duties of exercising parental authority runs counter to the idea of the administration of justice by the courts,[55] as it categorizes these parents as morally discredited, displaying an inappropriate attitude toward their children. In such cases, the authorities may apply for incapacitation on the grounds of a mental disorder that renders the sick person incapable of functioning independently, and therefore even less capable of fulfilling parental duties toward the child.

Regarding item b) above, the exercise of parental authority involves parental behavior characterized by concern for the good of the child and respect for the

53 | Art. 111 § 1 and § 1a of FGC.
54 | Art. 111 § 1 of FGC.
55 | Judgement of the Supreme Court of January 19, 1998, II CKN 744/98 published LEX 529706.

child's dignity, which are both crucial in the child's physical and psychological development.[56] Parental authority, as a subjective right, seeks to realize the interests of the child, which typically coincide with the interests of parents who want the best for their child. However, there are atypical situations characterized by behavior that is an abuse of parental authority. Abuse of the law is not an exercise of the subjective right and deserves no protection but instead, censure from the law.[57] This includes the termination of parental authority. In practice, behavior that is an abuse of parental authority sometimes manifests itself in the form of criminal acts (verbal and physical aggression, abuse, and sexual abuse). These acts not only involve the termination of parental authority ordered by the family court but are also subject to the scrutiny of the criminal court.

Regarding item c) above, gross neglect in the exercise of parental authority refers to the behavior of parents that involves a consistent failure to show concern for the child—the child's proper development, health, educational development, ability to live in society, and so on.

If the grounds set forth in Article 111 § 1 of FGC occur, the court is obliged to issue a ruling terminating parental authority. However, optional deprivation of parental authority, regulated in Article 111 § 1a of FGC, may be issued against parents whose children are in foster care based on the limitation of parental authority, but despite the support provided to them, the reasons for removing the child from the parents persist. Their inappropriate behavior manifests itself in this case in the lack of cooperation with the providers of the support, meaning that circumstances in which children might return to the family have failed to occur. This results from the failure of the actions taken to support the parents, which is probably due to the inappropriate attitude of the parents, but perhaps sometimes also the result of insufficient professional support failing to help reintegrate the family.

All the reasons for the removal of parental authority mandate the protection of the child from the consequences of the parents' inappropriate attitude. In essence, this attitude is characterized by violence (psychological, physical, or economic), as referred to in 19 of UNCRC. In such cases, the law imposes no obligation on public institutions to take measures to reintegrate children's families along the lines of Article 109 § 4 of the FGC concerning the restrictions of parental authority.

As a result of the termination of parental rights, parents are unable to make decisions about their children in any circumstances. Moreover, the need arises to provide legal assistance and appoint a guardian for the children.[58]

The right of parents to maintain contact with their children implies no right to decide about the children and, as such, is not a feature of exercising parental authority. Therefore, this right is accorded to parents even though their parental authority has been terminated. If this right was realized in a way that

56 | Arts. 87, 95, 96 of FGC.
57 | Pyziak-Szafnicka, 2007, pp. 771–828; Radwański and Olejniczak, 2011, pp. 240–249; Szczekala, 2018.
58 | Arts. 145 and the following of FGC.

is contradictory to the good of the child, then the court might limit the right to contact the child or even terminate it completely.[59]

Parents who have been deprived of parental authority are not relieved of their obligation for child support or the duty to pay for children's foster care. Meanwhile, institutions that form the local foster-care system are not obliged to conduct planned activities for the reintegration of the family of children whose parents have been stripped of parental authority. There is no regulation in the provisions on the termination of parental authority similar to Article 109 § 4 of FGC that prescribes such activities in the case of the establishment of foster care when parental authority is limited. However, when both parents are stripped of their parental authority, institutions that form the local foster care system (among others, directors of residential children's homes) are obliged to report the children to an adoption center[60] to initiate the adoption procedures. The decision regarding adoption of the child leads to the dissolution of the legal relationship between the children and their parents.

Therefore, if parents are deprived of parental authority, then it is not so much that they lose the primacy in the upbringing of the children but rather, that they are removed from the circle that may influence the child's upbringing.

3.5. Incapacitation of parents: expiration of parental authority

The expiration of parental authority as a result of the incapacitation of the parent(s) is distinct from the removal of parental authority. The former occurs when the prerequisites for the removal of parental authority set forth in Article 111 of FGC are absent; the parents nonetheless cease to exercise parental authority, even to a limited extent. As in the case of the removal or limitation of parental authority, in the case of the incapacitation of one of the parents, placement of a child in foster care may take place if the other parent has had his or her parental authority limited, has been stripped of it, has died, or has also been incapacitated.

The prerequisites for incapacitation are mental illness, intellectual disability, or other mental disorders if they have resulted in a situation in which the person is unable to function independently.[61] Because the person cannot cope with the duties to fulfill his or her own needs and protect his or her own interests, he or she is even less able to cope with the responsibilities of exercising parental authority. Therefore, one of the effects of a ruling on incapacitation is that parental authority is terminated, and this happens by dint of the law. The law states that a parent lacking full legal capacity (incapacitation limits or abrogation of this capacity) may not exercise parental authority.[62]

The expiration of parental authority as a result of incapacitation leads to the establishment of guardianship for the child and the appointment of a guardian. However, this is not a form of intervention in the parental authority as it is

59 | Art. 113^2–113^4 of FGC.
60 | Art. 164(1) of AFSFCS.
61 | Domański, 2014, pp. 9–48.
62 | Art. 94 § 1 of FGC.

not mentioned in Article 48(2) of the Polish Constitution but rather, the duty of the family court to provide protection for the child if the parents are unable to provide it.

Article 96 § 2 of FGC in turn posits that the parents of a child who have limited legal capacity because of partial incapacitation, among other reasons, have the right to participate 'in the day-to-day custody of their children and in the children's upbringing, unless the guardianship court decides otherwise for the sake of the child.' They also have the power to consent to the adoption of their children. However, under unusual circumstances, the court may rule on the adoption of their children despite the lack of consent, if it determines that the refusal to consent 'is manifestly contrary to the good of the child'.[63] This possibility should be ruled out if the prognosis of mental illness or other mental disorders that form the basis of partial incapacitation makes it possible to predict improvement of the condition, and revocation of the incapacitation and restoration of parental authority take place.

It may not be assumed that the incapacitation will be revoked within a brief period, and it may not be ruled out that this may never take place. Because the case defies any scheme, prudence is required when adjudicating incapacitation, determining the custody of the child of the incapacitated parent, and settling the situation of the child after incapacitation has been revoked. If this happens, the parent acquires full legal capacity, which constitutes grounds for revoking the guardianship established for the child and for the possible restoration of parental authority, but the guardianship court will then seek a solution that is in the best interests of the child.

Not only does total incapacitation remove from the parent the primacy in upbringing, but it also prohibits the parent from exercising any rights, duties, or competencies implied in parenting. It only secures the right to maintain contact with the child.

3.5.1. Suspension of parental authority

The essence of the suspension of the right lies in the temporary non-exercise of the right despite the fact that the parent is entitled to it. The rationale for the suspension of parental authority is that there may be an obstacle to its exercise, which, at the time of adjudication, is known not to be temporary (or is short-lived). In practice, this concerns obstacles that involve no criticism of parental competencies that would justify the limitation or removal of parental authority (a work trip abroad that has been planned for several months or the need for a single parent to undergo surgery and convalescence, which, according to doctors, will terminate in a similar period).

The consequence of suspending parental authority is the establishment of legal guardianship for the child and the appointment of a guardian. The guardian should maintain contact with the parents and respect their will in decisions concerning the child, especially given that modern technology allows long-distance communication with the parents, to get to know what they want in the event of difficult circumstances.

63 | Art. 119 § 2 of FGC.

Owing to the short-term nature of the suspension of parental authority, parents do not lose primacy in raising their children. This is verified by the fact that adoption proceedings may not then be initiated with respect to their children. That the suspension of parental authority is not mentioned in Article 48(2) of the Polish Constitution is noteworthy. It is not listed there as a form of judicial intervention in the rights of parents. The fact that regulating the suspension of parental authority in Article 110 of FGC follows the limitation of parental authority,[64] but precedes the termination of parental authority,[65] erroneously suggests that it is a form of intervention and stricter than limitation.

If the grounds for the suspension cease to exist, it is revoked, and the parents then exercise full parental authority. However, if the court revokes the order suspending parental authority (e.g., in the face of the parents' prolonged absence from the country, lack of contact with parents, and failure to contribute to the maintenance and upbringing of the child) and decrees a restriction or removal of parental authority, then the situation changes, and their primacy will either cease or be modified.

4. Summary

The family is an asset that merits assistance and protection, and parents are the first carers of their children. This is a constitutional standard adopted in Poland from international documents cataloguing human rights. The standard requires that efforts be made to protect these values, especially in circumstances in which parental authority is improperly exercised, particularly regarding the fulfilment of the duties of a custodial and educational nature. However, distinctions must be drawn between those cases in which a child is placed in foster care but it may return to the family after it is provided professional support, and those that compel the placement of a child in foster care to provide the child with protection from parental violence. The former case applies to parents whose children have been placed in foster care by dint of a court decision to limit parental authority, and the latter to parents who have been stripped of parental authority.

If a child is placed in foster care based on a limitation of parental authority, the parents are deprived of their autonomy in decisions concerning the child, and their primacy in raising the child is challenged. However, it should be borne in mind that the purpose of limiting parental authority is to restore fully the primacy of the parents in raising the child.

Removal of parental authority from parents and its expiration take primacy away from parents in terms of raising their children. However, the primacy of parents does not cease while the child is in foster care at the parents' behest, the juvenile court's decision, or the suspension of parental authority.

64 | Art. 109 of FGC.
65 | Art. 111 of FGC.

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THE PROTECTION OF PRIVACY OF THE IP ADDRESS IN SLOVENIA

Matija Damjan*

ABSTRACT

The protection of communication privacy covers not only the content of the conversation, but also other information related to the communication (metadata). The most prominent type of metadata in online communication is IP address, which defines the location of a computer or other connected device in the network. As a purely technical information, an IP address does not refer directly to any individual and is not in itself personal information. Yet, it can also be used to identify individuals online, track their location and online activity. An IP address is never strictly private, since any internet user's IP address is visible to other participants in regular online interactions, which differentiates it from typical private information. The paper examines the conditions, developed in case law of the European Court of Human Rights and Court of Justice of the European Union as well as the Slovenian courts, under which an IP address can be considered personal data and when it is protected as a part of one's communication privacy. The paper then focuses on the issue of whether an individual should be considered to have waived the privacy protection of their IP address if they have taken no measures to hide it. The relevance of the distinction between static and dynamic IP addresses from the perspective of privacy protection is also discussed.

KEYWORDS

IP address
metadata
internet
communication privacy
data protection

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1. Introduction

Browsing of the web and other online activities may appear anonymous to the average Internet user, yet this is an illusion. Any computer or other device connected to the Internet is assigned a numerical identifier called an IP address (Internet Protocol Address), which defines the location of the device in the network and is visible to other devices. The internet service provider (ISP) may keep logs of websites visited by their IP addresses, and the website owners may record the IP addresses of their visitors. Although an IP address does not directly reveal the user of an Internet-connected device, it can be used to track the user's location and Internet activity. An ISP can also match IP addresses with concrete subscribers of its services, thus identifying the Internet users.[1] As a link between the physical and virtual worlds, an IP address is also an almost inevitable first step in investigating online crime.[2]

The manner of protection of the IP address as a part of the individuals' private sphere is not expressly regulated either in the Slovenian or in the EU's legislation, so the answer depends on the interpretation of the relevant statutory provisions by the courts and other competent authorities. An IP address can be viewed and legally protected either as personal data or metadata related to private online communication. The distinction between the two is particularly relevant from the perspective of Slovenian law, which has established specific procedural safeguards for the protection of communication privacy. Although several judicial decisions have been made, the issue is far from settled, and opposing views are advocated in the legal literature.[3] Due to different contexts in which an IP address can appear, a uniform answer seems unlikely.

The paper will focus on the question of whether and under what conditions an IP address is legally protected as private. We will first examine its protection under the rules of data protection (information privacy) and then under the scope of communication privacy rights. Both aspects of privacy are protected under the Constitution of the Republic of Slovenia,[4] as well as the European Convention on Human Rights (ECHR)[5] and the Charter of Fundamental Rights of the European Union (EUCFR).[6] All three legal acts are directly applicable to the Slovenian legal system and take precedence before ordinary legislation; therefore, they must be read and interpreted in conjunction.

An overview of the relevant provisions will be followed by an analysis of the leading decisions of the highest Slovenian courts as well as the Court of Justice of

1 | Daly, 2022, p. 198.
2 | Golobinek, 2021, p. II.
3 | For example, the discussion between Zagozda and Lesjak for and against the protection of IP address as personal data. Zagozda, 2022, pp. 10–11; Lesjak, 2022, pp. 14–15.
4 | Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16.
5 | Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 005, adopted in Rome on 4. 1. 1950.
6 | OJ C 326, 26. 10. 2012, pp. 391–407.

the European Union (CJEU) and the European Court of Human Rights (ECtHR) on this issue. The paper will then focus on whether an individual should be considered to have waived the privacy protection of their IP address if they have taken no measures to hide it. This aspect will be examined through the Benedik case[7] decided before Slovenian courts and the ECtHR. The relevance of the distinction between static and dynamic IP addresses from the perspective of privacy protection is also discussed.

2. Privacy implications of IP addresses

An IP address is a unique series of digits assigned to every device on a network, which allows the devices to recognize and communicate with each other using the Internet Protocol.[8] When a website is accessed, the IP address of the computer seeking access is communicated to the server on which the consulted website is stored. This connection is necessary so that the data accessed may be transferred to the correct recipient. Therefore, the IP address of any Internet-connected device must be visible to other participants in online interactions. An IP address can either be static or dynamic. A static IP address is permanently allocated by the ISP to a particular device. A dynamic IP address, however, is temporarily assigned to a device by the ISP, typically each time the device connects to the Internet, and is replaced when subsequent connections are made. Most dynamic IP addresses can only be traced to the ISP to which the user is connected and not to a specific computer. Normally, only the ISP has knowledge of the IP addresses used by its customers.[9]

An IP address in itself is purely technical information that enables communication between Internet-connected devices. Under Internet Protocol Version 6 (IPv6), IP addresses consist of 128 bits and are written as eight four-digit hexadecimal numbers separated by colons.[10] The series of digits does not contain any personal data and is not directly linked to any individual, but only refers to a specific device in the network. The first two sets of quads are used to identify the network location of the device. This can show the geolocation of the device and, indirectly reveal its user. However, because most users are connected to the network through an ISP and use a router, their IP address reveals only the general geographic area from which the information was sent, whereas the user's exact geographic address is only known to their ISP.[11]

7 | ECtHR case Benedik v. Slovenia, no. 62357/14, 24. 4. 2018.
8 | The end-to-end data communication on the internet is based on a set of communication protocols commonly known as the TCP/IP. The Transmission Control Protocol (TCP) breaks the data into packets ready for transmission and recombines them on the receiving end. The Internet Protocol (IP) handles the addressing and routing of the data and delivers packets from the source host to the destination host solely based on the IP addresses in the packet headers. Murray, 2010, p. 23.
9 | Daly, 2022, p. 198.
10 | Murray, 2010, p. 24.
11 | Ibidem.

Although an IP address does not directly reveal its user's identity, it can be used to track a person's online behavior by those who know which IP address is used by which individual, for example, their employer (for work computers), their ISP or mobile service provider, or the law enforcement authorities that have obtained the information on the identity of the user of an IP address from the ISP. Most websites routinely record visitors' IP addresses. By combining the collected information on website visits, one can construct profiles of Internet users to extract their professional, consumer, sports, political, religious, and sexual interests and preferences. In fact, the EU's Data Retention Directive[12] required ISPs to retain for a limited time the name and address of the subscriber or registered user to whom an IP address, user ID, or telephone number was allocated at the time of the communication, which mandated a sort of blanket passive surveillance.[13] However, in 2014, the CJEU declared the Directive invalid on the grounds that blanket data collection violated the fundamental rights to privacy and data protection enshrined in the EUCFR.[14]

Users who are concerned about online privacy can adopt technological measures to protect themselves from the risks of surveillance or misuse. For example, a Virtual Private Network (VPN) service, which allows users to connect to the Internet through encrypted tunnels that do not reveal their true IP address, can be used. Another option is the use of an anonymous browser, such as Tor, which actively conceals the user's identity by accessing websites through several consecutive IP addresses that keep changing (onion routing).[15]

Apart from such technological solutions, however, the privacy of one's IP address is also protected by legal means. Owing to the nature and function of IP addresses, two avenues of legal protection are available: data protection rules and provisions guaranteeing communication privacy.

3. IP address as personal data

3.1. Legal bases

In Slovenian constitutional law, data protection is usually understood as an aspect of the general right to privacy, as stated in Article 35 of the Constitution. This is why it is also referred to as information privacy.[16] Article 38 of the Slovenian Constitution specifically guarantees the protection of personal data and prohibits the use of personal data contrary to the purpose for which it was collected. Everyone has the right to access the collected personal data that relates to them and the

12 | Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, pp. 54–63.
13 | Murray, 2010, p. 519.
14 | Joined Cases C-293/12 and C-594/12 Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others, 8. 4. 2014. See Brkan, 2019, p. 871.
15 | Zagozda, 2022, p. 11.
16 | Cerar, 2009, p. 1409; Brkan, 2014, p. 70.

right to judicial protection in the event of any abuse of such data. The Constitution mandates that the collection, processing, designated use, supervision, and protection of the confidentiality of personal data be regulated by law.

Under the ECHR, the origin of the right to data protection lies in the right to privacy. The Convention does not mention personal data and only speaks of the protection of private and family life,[17] but under the established case law of the ECtHR,[18] storage of information relating to an individual's private life and the release of such information is also considered to be governed by this provision. To fall within the scope of Article 8, the information or data in question must be private in the sense that it is confidential.[19] In the Council of Europe's law, the term personal data is defined in Article 2 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[20] as any information relating to an identified or identifiable individual (data subject).

European Union law distinguishes more clearly between the right to privacy and the right to data protection, and both are specifically regulated. The respect for private and family life is guaranteed in Article 7 of the EUCFR, whereas Article 8 guarantees the protection of personal data, provided that such data is processed fairly for specified purposes, and is based on the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right to access data that has been collected concerning them and the right to have it rectified. Legal theory points out that the right to data protection intends to protect interests that underlie the right to privacy, as well as other fundamental rights, such as the right to non-discrimination. Hence, both rights under the EUCFR are closely connected but separate.[21] In the Bavarian Lager case, the Court of First Instance stressed that a disclosure of personal data does not in itself also constitute a breach of the right to privacy, as not all personal data are by their nature capable of undermining the private life of individuals.[22]

The EU's data protection rules are contained in the General Data Protection Regulation (GDPR).[23] Under Article 4(1) of the GDPR, personal data refers to any information relating to an identified or identifiable natural person (data subject), whereas an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person. An almost identical and certainly equivalent definition of personal data was contained in Article 2(a) of the Data Protection

17 | Article 8 of ECHR.
18 | E.g., case M.M. v. the United Kingdom, no. 24029/07, 13. 11. 2012.
19 | Schabas, 2015, p. 383.
20 | ETS no. 108, adopted in Strasbourg on 28. 1. 1981.
21 | Kranenborg, 2021, pp. 237–239; Brkan, 2014, p. 70.
22 | Case T-194/04 Bavarian Lager v Commission, 8. 11. 2007, paras. 118–119.
23 | Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1–88.

Directive,[24] which was applicable before the GDPR, so that the case law and legal theory developed under the Data Protection Directive concerning the definition of personal data still hold true under the GPDR.[25]

The definition of personal data is of vital importance for determining whether the GDPR applies and for the general application of data protection laws.[26] Data that are not personal are usually referred to as anonymous data.[27] If an IP address is to be treated as personal data, then all the obligations under the GDPR concerning the processing of personal data apply. This means that for the processing to be lawful, it can only be performed on the basis of the consent of the data subject concerned or some other legitimate basis laid down by law.[28] Hence, the legal qualification of IP addresses is essential to determine the scope of obligations of ISPs and online service providers, as well as law enforcement authorities investigating online crime.

The GDPR does not expressly answer whether IP addresses are personal data. However, online identifiers are mentioned as an example in its definition of personal data. Recital 30 explains that natural persons may be associated with online identifiers provided by their devices, applications, tools, and protocols, such as IP addresses, cookie identifiers, or other identifiers such as RFID tags. This may leave traces that, in particular, when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them.[29] Online identifiers are non-personal metadata that contain information about other data that could be personal.[30]

3.2. CJEU case law

The CJEU first considered the question of whether an IP address can constitute personal data in the Scarlet Extended case [31] in 2011. The Court simply held that IP addresses are protected personal data because they allow users to be precisely identified.[32] No further analysis or explanation of the conditions of identification was provided, but considering the circumstances of the case, it was possible to conclude that an IP address is a piece of personal data when in the hands of an ISP that provides internet access to the relevant individual, assigns them the IP

24 | Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31–50.
25 | Zuiderveen Borgesius, 2017, p. 137.
26 | The definition of personal data is usually broken down into four constituent elements: (1) information (2) relating to (3) identified or identifiable (4) natural person. Bygrave and Tosoni, 2020, p. 109.
27 | Ibidem, p. 105.
28 | Article 6 of the GDPR.
29 | Lesjak, 2022, p. 14.
30 | El Khouri, 2017, p. 195.
31 | Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs (SABAM), 24. 11. 2011.
32 | Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs (SABAM), 24. 11. 2011, para. 51.

address, and keeps a record of this allocation.[33] Hence, the CJEU did not consider the status of IP addresses alone, separate from other information that allows an ISP to quickly identify users of specific IP addresses.

The Digital Rights Ireland case of 2014, which invalidated the Data Retention Directive, did not add further reasoning in this regard. However, it seems likely that the CJEU was concerned about the combination of IP addresses with content and subscriber information, which clearly meant that the stored data could be used to identify individuals.[34]

The Court defined the circumstances in which IP addresses constitute personal data in more general terms in the Breyer case[35] in 2016. The case involved several websites operated by German federal institutions to provide general topical information to the public. To prevent denial-of-service attacks (DDoS), the sites store information on all access operations in log files. The information stored included the name of the website, search terms entered, time of access, quantity of data transferred, an indication of whether the access was successful, and the IP address of the computer that accessed the website. Patrick Breyer sued the German federal government, seeking an order to restrain the government from storing access information relating to his visit to the website. Breyer claimed that IP addresses qualify as personal data and that the government therefore required express consent from individuals concerned to process such data. The Administrative Court dismissed Breyer's action, whereas the Court of Appeal granted the injunction in part. It held that IP addresses constitute personal data only where the Internet users reveal their identity to the website operator. While only the user's ISP can identify the user of a dynamic IP address through their account details, the IP address does not amount to personal data in the hands of a website operator. The case reached the German Federal Court of Justice, which referred the issue to the CJEU.

In its judgment, the CJEU first noted that it had held IP addresses to be personal data in Scarlet Extended but pointed out that the finding concerned a situation in which the collection and identification of IP addresses of Internet users was to be carried out by ISPs who could directly identify their customers from their IP addresses. Under the definition of the Data Protection Directive, personal data must allow data subjects to be identified directly or indirectly.[36] The use by the EU legislature of the word 'indirectly' suggests that, in order to treat information as personal data, it is not necessary that the information alone allows the data subject to be identified.[37] The CJEU then turned to Recital 26 of the Data Protection Directive which stated that 'to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person.' In the Court's reading, this wording suggested that for information to be treated as personal data, it is not required that

33 | Zuiderveen Borgesius, 2017, p. 134.
34 | Stalla-Bourdillo and Knight, 2016, p. 315.
35 | Case C-582/14 Patrick Breyer v Germany, 19. 10. 2016.
36 | Ibidem, para. 33.
37 | Ibidem, para. 41.

all the information enabling the identification of the data subject be in the hands of one person. However, it must be determined whether the possibility of combining a dynamic IP address with the additional data held by the ISP constitutes a means that is likely reasonably to be used to identify the data subject. This would not be the case if the identification of the data subject was prohibited by law or practically impossible due to a disproportionate effort required.[38] Although the referring court stated that German law does not allow ISPs to transmit data necessary for the identification of a data subject directly to online media service providers, the CJEU pointed out that in the event of cyber-attacks, legal channels exist for the service provider to contact a competent authority so that the latter can obtain that information from the ISP and bring criminal proceedings. The CJEU concluded that online media services provider has the means which may likely reasonably be used to identify the data subject on the basis of the IP addresses stored, with the assistance of the competent authority and the ISP.[39]

The CJEU adopted a relative criterion under which a dynamic IP address constitutes personal data in the hands of any party that either has or can lawfully obtain sufficient additional data from a third party to link the IP address to a specific person's identity.[40] Even where the possibility of obtaining such identifying information exists only subject to specific conditions laid down in law, this is sufficient to render the IP address personal data as long as this channel is reasonably likely to be used in the identification process.[41] However, the same IP address will not be considered personal data when in the hands of a party that has no legal means of obtaining sufficient additional data to make such a link.

3.3. Position of the Slovenian Information Commissioner

The Slovenian Information Commissioner has long held in its advisory opinions that IP addresses should be considered personal data in most situations because they can be used, at least indirectly, to identify individuals. The earliest such opinion was issued in 2006 and likened an IP address to an individual's mobile telephone number, as they both refer to individuals and can be used to identify them.[42] By 2010, the Information Commissioner had developed the position that a dynamic IP address is considered personal data when combined with information on the time it was assigned or the time of access to the network, whereas a static IP address is always considered personal data because the individual user is always identifiable. In the Information Commissioner's opinion, the publication of IP addresses of users of an online service on a website is permissible only if they voluntarily agree to such

38 | Ibidem, paras. 44–45.
39 | Ibidem, paras. 48–49.
40 | Zuiderveen Borgesius, 2017, p. 135. This position was confirmed in the CJEU's subsequent case law, e.g. in case C-597/19 Mircom International Content Management & Consulting v Telenet, para. 102.
41 | Bygrave and Tosoni, 2020, p. 111. El Khouri points out that under the same logic and metadata and, in fact, any information could potentially be personal data. The risk of identification increases with the number of databases and possible correlations that can be made. El Khouri, 2017, p. 196.
42 | 092-4/2006/359, 22. 6. 2006.

processing of their personal data. Permission can also be given tacitly, by posting an online comment where the rules of the online newspaper require the publication of the commenter's IP address together with their comment.[43]

The Information Commissioner's interpretation of IP addresses as personal data seems to have remained unchanged after the entry into force of the GDPR. In a recent opinion, the commissioner stated that an IP number is a unique number with which each computer is identified in the network as an address. With its help, the individual user is identified or at least identifiable. Accordingly, the IP address is personal data, which means that an employer needs an appropriate legal basis for processing employees' IP addresses.[44]

The Information Commissioner's position on IP addresses as personal data has not been expressly confirmed in judicial proceedings, as the courts tend to deal with the protection of individuals' IP addresses within the context of communication privacy rather than data protection. Therefore, even in cases where the Information Commissioner's opinions on this issue were involved in the proceedings, the courts tended to avoid giving a direct answer to the question.[45] The Supreme Court came close to the CJEU's later reasoning in Breyer in a criminal case decided in 2016. It held that an IP address, as purely technical data, did not in itself enable the identification of the convict who could only be identified by using additional information available to the operator of the online network.[46] Again, the reasoning behind the decision was grounded in the right to communication privacy rather than data protection.

4. Communication privacy and metadata

4.1. Legal bases

An IP address is the technical information required to establish any online communication. It is separate from the content of the communication, yet closely related to it as metadata. As such, it can also be protected under the fundamental right to communication privacy, which is guaranteed in Article 37 of the Slovenian Constitution, as well as in Article 8 of the ECHR and Article 7 of the EUCFR. The provision on communication privacy in Article 37 of the Constitution expressly refers only to letters and correspondence. Nevertheless, it is clear in the Constitutional Court's case law that the Constitution protects the privacy of any mode of communication.[47] Regardless of the technology used, protection extends to any communication that is not public and about which a person can reasonably expect privacy.[48] The same applies to the ECtHR's case law concerning the interpretation

43 | 0712-2/2010/2277, 24. 12. 2010.
44 | 07121-1/2021/1379, 4. 8. 2021.
45 | See, for example, judgment of the Administrative Court I U 1079/2012, 14. 5. 2014, and its decision I U 964/2014, 30. 6. 2014.
46 | Judgment I Ips 27119/2014, 17. 11. 2016. See Križnar, 2017, pp. 17–18.
47 | Decision Up-106/05, 2. 10. 2008.
48 | Klemenčič, 2011, pp. 530–531.

of the term correspondence in Article 8 of the ECHR.[49] As the most recent of the three documents, the EUCFR uses the term communications instead of correspondence in Article 7 to precisely account for technological developments. The protection of communication includes not only correspondence of personal or intimately private nature between natural persons but also correspondence with professional and commercial content.[50]

The Slovenian Constitution lays down stricter procedural safeguards for communication privacy than the constitutions of most other European countries: a court order is needed for any interference with the right to a person's communication privacy, and such a court order can only be issued when expressly provided for by law (adopted by the National Assembly) if such interference is necessary for the institution or course of criminal proceedings or for reasons of national security.[51] The higher threshold of constitutional protection of communication privacy is based on the fact that remote communication is conducted via the post office, telecommunication, or computer network, over which the sender has no direct control. Hence, communication is more vulnerable to interference by the state or uninvited third parties rather than other spheres of privacy.[52]

Unlike in the field of data protection, no secondary legislative act defines the exact extent of communication privacy in general. Therefore, there is no express provision specifying the conditions under which an IP address should be considered legally protected private information. However, the e-Privacy Directive[53] is relevant in this regard, as it requires Member States to ensure the confidentiality of communications made over public networks. IP addresses are encompassed by the term 'traffic data', which is defined as any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof.[54] Member States must prohibit any type of surveillance or interception of communications and traffic data without the consent of users, except if the person is legally authorized and in compliance with specific requirements. They must also guarantee that access to such information stored on the user's personal equipment is only permitted if the user has been clearly and fully informed, among other things, of the purpose and has been given the right of refusal.[55] When traffic data are no longer required for communication or billing, they must be erased or made anonymous unless the service provider has the users' consent to use these data for marketing purposes.[56]

49 | Schabas, 2015, p. 400.
50 | Mangan, 2021, p. 161.
51 | Pirc Musar, 2018, p. 559.
52 | Klemenčič, 2011, p. 530.
53 | Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, pp. 37–47.
54 | Article 2(b) of the Directive on privacy and electronic communications.
55 | Article 5 of the Directive on privacy and electronic communications.
56 | Article 6 of the Directive on privacy and electronic communications.

The requirements of the e-Privacy Directive have been transposed into Slovenian law under the Electronic Communications Act (ZEKom-1),[57] which also contained provisions[58] requiring mandatory retention of traffic data by the ISPs, including the users' IP addresses, in line with the Data Retention Directive. However, following the invalidation of the Directive by the CJEU in the Digital Rights Ireland case, the Slovenian Constitutional Court also invalidated these provisions of ZEKom-1 as unconstitutional. The review of constitutionality was initiated upon the request of the Information Commissioner, who argued that the precautionary retention of data entailed inadmissible interference with the rights to the protection of personal data as well as communication privacy.[59] Interestingly, the Constitutional Court satisfied itself with the finding that the measure disproportionally interfered with the right to the protection of personal data. Since the challenged provisions had to be abrogated due to this conclusion, the Constitutional Court did not assess the other alleged unconstitutionalities[60] and thus avoided an express statement as to when an IP address could be protected under the right to communication privacy.

4.2. Case law

In 2008, the Constitutional Court clarified that the protection of communication privacy is not limited to the content of communication but extends to traffic data that relate to it (data on the manner and parties to the communication, such as timing, duration, and geolocation).[61] The case concerned a criminal investigation of a legally seized mobile phone and SIM card. The complainant, who had been convicted based on the list of telephone numbers and text messages obtained from his SIM card, claimed that this evidence was unlawful, as the police had monitored his mobile telephone communication without a court order. The Constitutional Court upheld the complaint, stating that the protection of communication privacy also includes any data on telephone calls, which are an integral part of communication. It held that the traffic data obtained from the printout of the telephone memory should be considered an integral part of communication privacy. Accordingly, accessing the information on the last-made calls and last-missed calls, as well as examining the content of SMS messages stored on the phone, were held to be intrusions into the communication privacy for which a court order is required.

Although the Constitutional Court's decision concerned traffic data related to phone calls, the same reasoning applies to traffic data related to any kind of communication. Therefore, IP addresses must also fall within the scope of communication privacy under Slovenian law.[62] This position was expressly adopted by the Information Commissioner in several advisory opinions, which explained that information on the IP address from which an individual communicated belongs to

57 | Official Gazette of the Republic of Slovenia, No. 109/12, 110/13, 40/14, 54/14, 81/15, 40/17 and 189/21.
58 | Articles 162–169 of ZEKom-1.
59 | Articles 37 and 38 of the Constitution.
60 | Case U-I-65/13, 3. 7. 2014, paras. 27–29.
61 | Decision Up-106/05, 2. 10. 2008.
62 | Klemenčič, 2011, p. 522; Lesjak, 2019, p. 357.

the traffic data, and as part of the communication, enjoys protection under Article 37 of the Constitution. Therefore, an IP address should only be obtained by the police based on a court order.[63]

Ordinary courts have followed the same reasoning in criminal procedures, so evidence obtained by the police based on the defendant's IP address that was not acquired through a court order is usually held inadmissible due to the violation of the fundamental right to privacy.[64] However, the Appellate Court in Ljubljana developed a doctrine in which dynamic IP addresses enjoy a higher level of protection than static IP addresses. The reasoning behind this distinction will be discussed in Subchapter 5.

4.3. What constitutes a waiver of IP address privacy?

Slovenian courts have held in a number of cases that Internet users have waived the privacy of their IP address by exposing it somehow through their online activities. In such situations, the IP address did not enjoy protection under the scope of communication privacy rights, as it was no longer private. Accordingly, the courts held that IP addresses did not enjoy protection under the scope of communication privacy rights in several criminal cases where the defendants had been using a peer-to-peer (P2P) file sharing network in which all users of the network were able to see the IP addresses of other users, but not their identities.[65] Similarly, posting an offensive comment on a public online forum was held by the Supreme Court as public communication, in connection with which an individual could not expect communication privacy, even when their IP address is concerned.[66]

However, the final position on the waiver of the IP address privacy issue was developed in the Benedik case that was decided by the courts at all levels, up to the ECtHR. Mr. Benedik, who was sentenced for possessing and distributing child pornographic material, had been identified by the Slovenian police on the basis of the IP address assigned to his computer. The IP address was obtained by the Swiss police simply by monitoring the P2P file-sharing network Razorback, in which any user of the site could review the IP addresses of all other users uploading or downloading files. Without obtaining a court order, the Slovenian police requested a Slovenian ISP to disclose data regarding the user to whom the IP address had been assigned. During the house search, the police found that one of the seized computers contained files with pornographic material involving minors. Benedik was convicted, and both the Court of Appeals and the Supreme Court rejected the allegation of illegally obtained evidence.[67] The Supreme Court reasoned that the communication in question could not be considered private since the Swiss police could check the exchanges in the P2P network without any intervention in Internet traffic, simply by monitoring the users' sharing activity. Moreover, in the Supreme

63 | Advisory opinions 0712-1/2012/2854, 4. 6. 2013, 0712-1/2014/711, 20. 2. 2014 and 0712-1/2014/1651, 17. 4. 2014.
64 | Decision of the Appellate Court in Maribor II Kp 50396/2011, 9. 10. 2018.
65 | Judgment of the Supreme Court of Slovenia I Ips 216/2010, 20. 1. 2011; decision of the Appellate Court in Celje III Kp 53999/2011, 21. 4. 2015.
66 | Judgment of the Supreme Court of Slovenia I Ips 27119/2014, 17. 11. 2016.
67 | Golobinek, 2021, p. II.

Court's view, the Slovenian police had not acquired traffic data about the applicant's electronic communication, but only data regarding the user of a computer through which the Internet had been accessed.[68]

The Constitutional Court rejected Benedik's constitutional complaint.[69] While the Court acknowledged that the right to communication privacy under Article 37 of the Constitution also protects traffic data, including IP addresses, it concluded that Benedik had consciously exposed his IP address to the public by using a public P2P network in which his IP address was not in any way hidden. Hence, he could not legitimately have expected privacy and his IP address was not protected under communication privacy under Article 37 of the Constitution but only as personal data under Article 38 of the Constitution. This allowed the police to obtain data regarding the identity of the dynamic IP address user from the operator without a court order.[70]

Benedik lodged an application before the ECtHR claiming the violation of his privacy rights under Article 8 of the ECHR.[71] The ECtHR followed the assessment of the Slovenian Constitutional Court that privacy rights also refer to obtaining data on the user of a (dynamic) IP address for criminal proceedings. Contrary to the Constitutional Court, however, the ECtHR held that the complainant had not waived the expected privacy online by failing to take measures to hide his dynamic IP address. In ECtHR's view, the question was not whether the applicant could have reasonably expected to keep his dynamic IP address private, but whether he could have reasonably expected privacy in relation to his identity. The ECtHR did not overlook the fact that revealing the identity of the IP address user also discloses other intimate details of the individual's life, which are evident from his Internet activity. The complainant never disclosed his identity in relation to the online activity in question, nor was it identifiable by the service provider through an account or contact data. Therefore, the ECtHR concluded that such an online activity engaged a high degree of anonymity as the assigned dynamic IP address, even if visible to other users of the network, could not be traced to the specific computer without the ISP's verification of data following a request from the police.

The ECtHR also noted that at the relevant time, no regulation specified the conditions for the retention of communication data obtained in criminal investigations and there were no safeguards against abuse by state officials in the procedure for access to and transfer of such data. The police, with information on a particular online activity at their disposal, could have identified an author by merely asking the ISP to look up that information. Furthermore, no independent supervision of

68 | Pirc Musar, 2018, p. 555.

69 | Decision of the Constitutional Court of Slovenia Up-540/11, 13. 2. 2014.

70 | Pirc Musar, 2018, pp. 555–556; Križnar, 2018, pp. 6–7. The Information Commissioner did not follow the Constitutional Court's position and continued to issue opinions that the IP address is a traffic data that does not on its own reveal its user's identity. Therefore, the user does not give away their anonymity simply by providing the IP address to the public. See opinions 0712-1/2014/1651, 17. 4. 2014, 0712-1/2014/3025, 25. 9. 2014, and 0712-1/2017/130, 24. 1. 2017.

71 | ECtHR case Benedik v. Slovenia, no. 62357/14, 24. 4. 2018.

the use of these police powers was shown to exist at the relevant time. The ECtHR therefore found a violation of Article 8 of the ECHR, which protects privacy.[72] The most important part of the judgment might be the clear and unambiguous statement that an IP address is an integral part of not only information privacy but also communication privacy.[73]

In its action report, Slovenia informed the Council of Europe that the Criminal Procedure Act[74] had been amended accordingly following the ECtHR ruling, so that it now clearly states that a court order is required to obtain traffic data as well as to obtain subscription data where the processing of traffic data is required.[75] Slovenian courts also gave full effect to the ECtHR's judgment. The Supreme Court overturned Benedik's conviction,[76] explaining that the technical anonymity of IP addresses justifies users' legitimate expectation that their online activity will be private. Even if a user of a P2P network cannot expect privacy regarding their IP address, which is visible to other users of the network, this does not mean that they have revealed their identity. To determine whether a person has waived their privacy with regard to their identity, the court must examine whether they have disclosed their personal data in connection with the online activity so that the police can access the same based on a review of publicly available data. Otherwise, the IP address is also protected in the context of communication privacy and not only in the context of information privacy.

The Constitutional Court cited the ECtHR's decision in the Benedik case in another case[77] in which the complainant, who had published an offensive comment on an online forum, was identified through her IP address obtained by the injured party's attorney from the provider of the online forum. The appellant challenged the judgment of the District Court, which found her guilty of defamation. The Constitutional Court acknowledged that the complainant had deliberately disclosed the content of her communication to the public (i.e., the content of the disputed comment), as she wrote the comment under the article on the web portal, and any visitor to the article could access the article and comments below it. However, the comment was published anonymously (under the username 'guest-citizen') and the author's IP address or any other identifying information were not revealed on the website. Therefore, in the Court's view, it could not be argued that the complainant deliberately exposed her IP address to the public through public communication or that she thereby disclosed her identity and knowingly waived her expectation of privacy. Consequently, the dynamic IP address was the subject of the protection of communication privacy under Article 37 of the Constitution, and the acquisition of an IP address in this case constituted interference with this human right.

72 | Golobinek, 2021, p. IV.
73 | Pirc Musar, 2018, p. 560; Križnar, 2018, pp. 7–8.
74 | Official Gazette of Republic of Slovenia, no. 176/21 and 96/22.
75 | Communication from Slovenia concerning the case of Benedik v. Slovenia (Application No. 62357/14) Revised Action Report (06/10/2021), pts. 15–20.
76 | Judgment of the Supreme Court of Slovenia I Ips 31751/2018, 4. 6. 2020.
77 | Up-153/17, 9. 9. 2021.

5. Static IP addresses

The technical difference between dynamic and static IP addresses seems relevant in the context of both personal data protection and communication privacy. However, the precise legal consequences of this distinction remain unclear. Both, the Breyer and Benedik cases only concerned dynamic IP addresses, and neither the CJEU nor the ECtHR have stated the extent to which their findings also concern static IP addresses. Interestingly, the potential consequence of these technical differences is that static IP addresses can be protected more strictly than dynamic IP addresses under data protection rules, whereas the result would be the opposite in the field of communication privacy.

As static IP addresses remain unchanged for longer periods, a website operator has a better chance of recognizing returning visitors over a longer period based on their IP address in combination with some additional information derived from their online activity that could link the address to a specific individual. In terms of the Breyer criteria, the longer the same static IP address is used, the greater the likelihood that sufficient additional data will accumulate that could be used to identify the user of the IP address. Therefore, in general, a static IP address should sooner be regarded as a piece of personal data than a dynamic IP address.[78]

In the field of communication privacy, the crucial circumstance is that a static IP address is assigned to the party at its request, and the ISP maintains a directory of assigned and free IP addresses, from which it can directly extract information about the subscriber to whom the static IP address has been assigned. The Criminal Procedure Act does not require a court order for the police to obtain subscriber data from the ISP if no traffic data processing is required. On this basis, the Appellate Court in Ljubljana developed a distinction between the privacy status of dynamic and static IP addresses. It held that each attempt to access the Internet via a dynamic IP address creates traffic data that must be processed to identify the user. Since traffic data are an integral part of communication, identifying the user of a dynamic IP address always falls within the scope of protection of communication privacy. To identify the user of a static IP address, however, it is not necessary to review traffic data. As static IP addresses are assigned to an individual user for a longer period, the ISP can simply view its own records on the users of assigned IP addresses. In the Appellate Court's opinion, this procedure does not interfere with the constitutionally protected secrecy of communication under Article 37 of the Constitution. Hence, the police can obtain information about the holder of a static IP address directly from the ISP, without a court order.[79]

The Appellate Court in Maribor, however, extended the findings from the Benedik case to static IP addresses as well in two of its cases where the suspects had been identified by the police through their IP addresses obtained in a criminal

78 | Zuiderveen Borgesius, 2017, p. 136.

79 | Judgments of the Appellate Court in Ljubljana II Kp 50685/2012, 22. 3. 2018, III Kp 16465/2017, 6. 3. 2019, and V Kp 1896/2017, 12. 12. 2019.

investigation in another country.[80] The Appellate Court noted the ECtHR's emphasis that the subject of assessment was not whether the applicant had a legitimate expectation of privacy regarding the dynamic IP address but whether he had a legitimate expectation of privacy regarding the disclosure of his identity through that IP address. Hence, the ECtHR's judgment in the Benedik case did not legitimize the acquisition of a user's static IP address without a court order. An IP address, regardless of whether it is a static or dynamic IP address, is traffic data that falls within the framework of communication privacy according to Article 37 of the Constitution and not only within the framework of information privacy according to Article 38 of the Constitution. Therefore, a court order was necessary to obtain subscriber information associated with the static IP address from the ISP.

The Supreme Court has not yet decided on the dilemma, but it stated in a recent judgment that if the subscription data of IP addresses are really never made public, then there are no valid reasons for a legal distinction between static and dynamic IP addresses. However, in the concrete case, the Supreme Court was not convinced by the lower courts' finding that the convicted persona used a static IP address. It also pointed out that the findings of the challenged judgment did not reveal any circumstances that would indicate that the convicted person waived their privacy or anonymity when uploading or publishing the image file despite using a static IP address.[81] Based on these hints, it seems likely that the Supreme Court will follow the position of the Appellate Court in Maribor, so that in terms of communication privacy, dynamic and static IP addresses will be given the same level of protection. This seems appropriate because it reflects the actual reasonable expectation of privacy of Internet users rather than relying on a rather technical detail whether the ISP has had a look at traffic data or at subscriber information.

6. Conclusion

We have established that the privacy of IP addresses can be protected both under the rules for the protection of personal data and under the right to communication privacy. Both aspects of privacy are closely related and interconnected, yet the distinction between them remains relevant owing to the different conditions for interference with both rights. In privacy law, the issue is whether the information is private or revealed by the person. In data protection, however, one must ascertain whether the data subject has given valid consent for the processing of their personal data.[82]

Under the criteria developed by the CJEU in Breyer, a dynamic IP address constitutes personal data in the hands of any party that either has or can lawfully obtain sufficient additional data to link an IP address to a specific person's identity.

80 | Judgments of the Appellate Court in Maribor II Kp 50396/2011, 9. 10. 2018, and II Kp 5584/2016, 14. 2. 2020.
81 | Judgment of the Supreme Court of Slovenia I Ips 16465/2017, 28. 1. 2021.
82 | Bygrave and Tosoni, 2020, p. 185.

It remains to be seen whether the same rule will apply to static IP addresses or whether these will always be considered personal data. In the Benedik case, the ECtHR confirmed that an IP address is an integral part of not only information privacy but also communication privacy. The crucial criterion is whether the Internet user has had a reasonable expectation of privacy regarding the disclosure of his identity through the IP address. Again, it remains to be seen whether this reasoning will also be applied to static IP addresses, but the recent case law of Slovenian courts seems to be moving towards uniform treatment of both types of IP addresses.

It seems that the courts have a growing awareness of the privacy implications of IP addresses and the increasing possibilities of abuse in combination with the processing of other metadata that keeps accumulating online and can be used to identify and profile any Internet user. This corresponds to the CJEU's comment in the Tele2 Sverige case that metadata are no less sensitive with regard to the right to privacy than the actual content of the communications.[83]

83 | CJEU judgment in joint cases C-203/15 and C-698/15 Tele2 Sverige v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, 21. 12. 2016, para. 99.

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PARENTAL CARE FOLLOWING DIVORCE IN THE REPUBLIC OF CROATIA

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ABSTRACT

The author explains family law rules concerning the exercise of parental responsibility (parental care) after divorce in Croatia. The new family legislation emphasizes the importance of encouraging parents to reach agreements and reduce manipulations of their children after divorce. Parents may divorce in simplified, non-contentious proceedings, having previously reached an agreement on their divorce and on how they will exercise parental care. If there is no agreement on the exercise of parental care, they divorce in civil contentious proceedings. In that case, a parent that does not live with the child is not entitled to exercise joint parental responsibility. Novum is that a child is considered a party in all court proceedings where the court decides on his or her rights. The child is represented by a special guardian appointed by a social welfare office that is an employee of the Center for Special Guardianship. The representation system provokes new challenges due to its implementation weakness.

The author carefully analyses legal situations where parents may represent their child jointly, one of them solely, or combined: jointly regarding the essential personal rights of the child, or one of them solely with regard to any other matters. Serious questions are raised because of significant limitations on the right to parental care of the parent who does not live with the child (as a part of the content of their human right to respect for family life). According to the author's opinion, these restrictions are not justified, especially concerning the goal to protect the child's best interests in post-divorce families.

KEYWORDS

parental responsibility
parental care
representation of children
divorce
special representative of the child
the best interests of the child

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1. Introduction

Parental care[1] is a family law concept providing the legal basis for parents to care for their children, which is also protected in the international system of human rights within the right of respect for private and family life (the case law of the European Court of Human Rights is particularly extensive, resulting from the application of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms),[2] which all states are bound to actively safeguard.

In the Republic of Croatia, parents have jointly and consensually exercised their rights since 1999, regardless of whether they live together or separately.[3] Croatia is among the first European countries that have incorporated in their national legislation the requirement laid down in Article 18 para. 1 of the Convention on the Rights of the Child prescribing that the 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have joint responsibilities for the upbringing and development of the child.' This requirement was preserved in the amended legislations of both 2003 and 2007,[4] whereby the subsequent family legislations of 2014 and 2015 departed from the previous regulations. The amendments were an attempt to prevent any manipulations by either parent, most frequently the mother, following a divorce (i.e., the termination of a family union). The following is stated in the statement of reasons in the Final Draft of the Family Act:

> The establishment of joint parental care must continue to be a rule on which the child's well-being is based. Therefore, the establishment of joint care must be conditioned by the parents' agreement on the establishment of joint parental care following divorce or the termination of extramarital union – a parenting plan for their joint parental care. On the other hand, in the circumstances of very conflicting parents' relationships, it is necessary to prescribe legislative possibilities where the court may render a decision on the basis of which only one parent will be entitled to exercise of parental care when this is in the interest of the child's well-being and when the parents are permanently incapable of reaching an agreement on their joint care and the model of their mutual communication in order to exercise it (a parenting plan to ensure joint parental care). A court decision on the exercise of parental care by one parent should prevent any situations where the child would be torn between two conflicting parents who are not

1 | Instead of the legal term 'parental responsibility' (*roditeljska odgovornost*) in the Croatian legal system, the term 'parental care' (*roditeljska skrb)* is used, and both terms have almost the same content. However, the new Family Act emphasizes the rights of children first, and parental responsibilities, duties, and rights come second. Hrabar, 2007, p. 271.
2 | The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.
3 | Family Act, Official Gazette No. 162/1998.
4 | Family Act, Official Gazette Nos. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 75/2014, 5/2015, 103/2015.

able to place the child's interest and well-being before their own interests, so that the child often becomes arms in their continuous conflicts and manipulations.[5]

The legislator has developed a rather complicated system of distinguishing the representation of the child regarding its personal rights by following the criterion of importance for the child and has envisaged various intensities and forms of parents' participation in making decisions. The legislator's intention has been to enhance legal security. However, since the relevant provisions are scattered throughout the legal text, the goal of achieving clarity has not been met.

The Family Act of 2014 had been criticized by the professional public, and after numerous requests to review its constitutionality, it was suspended by the Constitutional Court of the Republic of Croatia.[6] In the new Act adopted in 2015,[7] almost all the provisions from the suspended Act on parental care and its exercise after divorce were retained. It is still applied in that form, except for judicial intervention in the rule that joint parental care is possible only upon the parents' agreement (see infra).

The new family legislation has also brought some changes to divorce proceedings. Parents may divorce in simplified, non-contentious proceedings, having previously reached an agreement on their divorce and on how they will exercise parental care. They divorce in civil contentious proceedings if there is no agreement on the exercise parental care. Prior to divorce proceedings before the court, spouses who have common minor children must first undergo a counseling procedure at a social welfare office and possible mediation.

In any family proceedings, as well as in divorce proceedings, the basic principle is the protection of the child's best interests. It is both the parents' right and duty to exercise parental care equally, jointly, and consensually. When they do not live together, they are obliged to regulate parental care through a specific parenting plan.[8] In fact, for some parents, this requirement, worded as the *ius cogens* norm, will be *lex imperfecta* because of their incapacity to reach an agreement.

Although the dissolution of a family union is a development affecting all members of a family in their individual capacity,[9] particularly children, divorce is a social issue because of an increase in various risks for both parents and children who continue to live with only one parent.

In 2020, as many as 5,153 marriages were dissolved in the Republic of Croatia (the divorce rate was 339.1 divorces to 1,000 marriages).[10] Government statistics

5 | Final draft of the Family Act, Government of the RoC [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080655/PZ_544.pdf (Accessed: 15 August 2022).
6 | Constitutional Court Decision No. U-I/3101/2014, Official Gazette No. 5/2015.
7 | The Family Act, Official Gazette Nos. 103/2015, 98/2019, 47/2020.
8 | Art. 106 of the Family Act of 2015.
9 | '... it could be argued that over a long term, women pay the greater financial price following a break-up, while men pay the greater social price.' Kreyenfeld and Trappe, 2020, p. 35.
10 | Statistical Information 2022, State Institute for Statistics, Zagreb, 2022, p. 21 [Online]. Available at: https://podaci.dzs.hr/media/dcph1du5/stat-info-2022.pdf (Accessed: 17 August 2022).

do not specify how many broken-up marriages involved children, but the Ministry responsible for families reports that in 2020, social welfare offices had received 7,499 applications for counseling preceding divorce, and that in 6,701 cases, counseling was completed. This number is higher than the number of actual divorces, which means that some spouses had given up divorce and, for some of them, court proceedings to bring their marriages to an end had not been completed. In 4,403 cases, the parents succeeded in agreeing on how to exercise their parental care, and in 631 cases, the courts decided on the sole care of a parent because no agreement had been reached.[11]

2. Divorce proceedings and decisions on parental care

As already stated earlier, through the reforms of 2014 and 2015, the Croatian legislator intended to create a normative framework to reduce the number of conflicts between spouses and to steer them to agreements on the legal consequences of their divorce affecting not only them but also their children, and to make it possible for children to express their opinions (in accordance with the Convention on the Rights of the Child and the Convention of the Council of Europe on the Exercise of Children's Rights).[12] The means used by the legislator offered parents a possible choice: either to agree on a divorce and all its consequences regarding children and resolve their legal relations in non-contentious proceedings, or their conflict would lead to contentious proceedings where a special guardian would be appointed to the child to represent them *ad litem*.[13] In this way, pressure is put on the parents to reach an agreement and not to engage in long-lasting and expensive proceedings in which their child would also take part, represented by *guardian ad litem*.

Spouses who want to break up their marriage and who have a common, minor child must first initiate the counselling procedure at a social welfare office.[14] Before the completion of counselling, they must draw up a plan on joint parental care.

11 | Annual statistical report on the applied social welfare rights, legal protection of children, youth, marriage, family, or persons deprived of civil capacity and the protection of physically or mentally incapacitated persons in the RoC in 2020, Zagreb, August 2021, p. 61 [Online]. Available at: https://mrosp.gov.hr/UserDocsImages/dokumenti/Socijalna%20politika/Odluke/Godisnje%20statisticko%20izvjesce%20u%20RH%20za%202020.%20godinu.PDF (Accessed: 17 August 2022).

12 | Cfr. Rešetar, 2018.

13 | There are some justified warnings that 'such a solution by the legislator may result in agreements which cannot be considered as such because the parties (or more often one party), entered into them being afraid of the consequences not to agree with some or all the points contained in the plan on joint parental care, or in fear of court proceedings.' Therefore, they do not reflect the parties' true will, which calls into question their implementation and viability as the time passes. Čulo Margaletić, 2021, p. 72.

14 | Art. 54 para. 1 of the Family Act of 2015.

Unless they reach an agreement, they must attend the first mediation session,[15] except in situations where the professionals employed at the social welfare office or family mediators have established that, because of domestic violence, equal participation of both spouses is not possible, or one or both spouses lack business capacity and are not capable of comprehending the meaning and legal consequences of the proceedings despite the existence of professional assistance, if one or both spouses are incapable of reasoning, or if a spouse's permanent or temporary residence is unknown.[16] Furthermore, divorce proceedings may only be initiated by the spouse who has attended the first mediation session,[17] except in circumstances where no mediation should be organized.

If the spouses succeed in reaching an agreement and making a plan for joint parental care, they will be divorced in non-contentious proceedings and the court will approve of the plan having established that the spouses had previously attended legal counseling at the social welfare office and that the content of the plan is thorough and in conformity with the child's well-being.[18] In the parenting plan, they must specify the place and address of the child's residence, the time the child will spend with each parent, the method of exchanging information when agreeing on decisions that are important for the child, when exchanging important information concerning the child, the amount of maintenance that must be paid by the parent who does not live with the child, and the model of resolving other disputable issues. They may also regulate other essential issues for exercising their parental care.[19]

The parenting plan must be made in writing. Only after having been approved by the court will it be considered an enforceable document. The decision to approve the plan on joint parental care need not be reasoned, and an appeal is allowed only in exceptional cases.[20]

The parents' duty is to acquaint the child with the content of the plan regarding their joint parental care. This is a condition for it to be recognized in the proceedings under Regulation Brussels IIbis and Brussels IIter.[21]

15 | In literature, mandatory mediation is often criticized as potentially counter-productive and the introduction of a pre-mediation procedure is proposed. See Majstorović, 2017, pp. 138 and 139.

16 | Art. 332 of the Family Act of 2015.

17 | Art. 54 para. 3 of the Family Act of 2015.

18 | Art. 465 para. 1 of the Family Act of 2015.

19 | Art. 106 of the Family Act of 2015.

20 | An appeal may be lodged for substantial violation of civil proceedings or because consent was given under misapprehension or under coercion or fraud, or if to render a decision, not all the conditions laid down in this Act have been fulfilled. Art. 467 para. 1 of the Family Act of 2015.

21 | Art. 11: A judgment relating to parental responsibility shall not be recognised: ... (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; ...
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. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in

Often, parents abandon the agreement; the most frequent reason being the level of maintenance, so that divorce proceedings then continue as a marital dispute (contentious proceedings).[22]

According to the data obtained from the Ministry responsible for social welfare, as many as 4,138 plans for joint parental care were made in 2020, but the court approved only 3,130 of them.[23] It is not clear from the statistical data whether the parents subsequently gave up the agreement or the court refused to approve it.

Contentious divorce proceedings (marital disputes) are more complex, last longer, and are more expensive and often unpredictable for the parties when it comes to their parental care decision. In a marital dispute, the child is also a party to the dispute and will be represented by a special guardian from the Special Guardianship Center.[24] The child is entitled to get to know, in the appropriate manner, the important circumstances of the case, receive advice, and be allowed to express their opinion, as well as to be informed about the possible consequences of the acceptance of the opinion. The child's opinion will be taken into account in accordance with their age, maturity, and well-being.[25] The provision laying down the procedure sets forth that the court must make it possible for the child to express their opinion unless the child is against it. The lower limit of the child's age was not determined.[26]

If the child is older than 14, the court may get the child's opinion in an appropriate place and, if necessary, in the presence of a professional. If the child is younger than 14, they will give their opinion through a special guardian or other

matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) also provides for the right of the child to express his or her views (Art. 21): '1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.'

22 | According to a qualitative research carried out before the legislative changes in 2014, when there was no such pressure for making an agreement on parental care, spouses (parents) were differentiated depending on whether they managed to reach an agreement on parental care in accordance with the following variables: professionals' assessment on the parents' willingness to cooperate on the issues of parental care, the husband's and the wife's perception that the reason for their divorce is the other spouse's violence, the husband's belief that the reason for divorce are emotional/psychic and communication problems of his partner and the wife's perception that emotional distancing was the main reason for the conflict which has led to a divorce. A good predictor that an agreement will be reached turned out to be the parents' cooperation regarding parental care already during the break-up of the family union. Štifter et al., 2016, p. 294.

23 | Annual Statistical Report, see footnote 7.

24 | A special guardian is a lawyer who has passed their Bar exam and is employed at a special guardianship office whose activities are provided for by a separate Act (*Zakon o centru za posebno skrbništvo*/Act on Special Guardianship Centre) Official Gazette, No. 47/2020).

25 | Art. 86 of the Family Act of 2015.

26 | Art. 360 of the Family Act of 2015.

professional person.[27] The concept of 'an appropriate place' implies that such a place exists in the court building or elsewhere.[28]

A special guardian of the child, the court, or a professional employed at a social welfare office must inform the child about the case, its development, and possible outcome in a way that is appropriate to the child's age and maturity, taking also into consideration that it will not endanger the child's development, upbringing, or health.

In the reports of the Ombudsperson for Children of 2014, there was a permanent emphasis on the deficiencies in the application of the concept of a special guardian,[29] primarily because of the large number of cases and insufficient numbers of employed special guardians. Such a situation leads to potential violations of the right to a fair trial or the violation of the procedural rights of the child, which are satisfied only formally. In practice, special guardians are not able to meet the high requirements placed before them by family legislation.

Despite these obstacles, a special guardian plays a very important role when passing the child's opinion, especially in cases where both parents are equally competent.

27 | Art. 360 para. 2 of the Family Act of 2015.

28 | Since March 2022, a total of 16 family divisions have been organized within municipal courts in country centers. At present, only some of them have appropriate spatial and other conditions.
'Family Division of the Municipal Court in Novi Zagreb is a positive example of how to create pleasant environment within the courts for children who take part in court proceedings. We hope that such environments will contribute to make the experience less traumatic for children.' said the Minister responsible for social welfare when visiting a Family Division of the Municipal Court in Zagreb. [Online]. Available at: https://mpu.gov.hr/print.aspx?id=25981&url=print (Accessed: 7 September 2022).

29 | 'The concept of special guardianship is an important link in the judicial protection of children... However, as we have already repeatedly emphasised, this legal concept reveals many deficiencies. It has become quite clear that 18 special guardians of legal profession, territorially positioned in Zagreb, Rijeka, Osijek and Split are objectively not able to represent children's interests. During 2021, 8,017 children had to be represented in the proceedings before competent bodies and one guardian, on average, was supposed to see to the protection of interests of 445 children in 293 cases. Apart from representing children, special guardians also represent adults (3517 cases in the course of 2021), every guardian is thus annually engaged in approximately 488 cases. In 2105 proceedings involving children, of a total of 22,202 scheduled hearings, special guardians were present at only 3,330 of them (15%). They claim that because of excessive work load, they are often in a situation where they alone have to decide which hearings to attend. ... Indeed, the duty of a special guardian is not only to attend the hearings, filing complaints or motion on behalf of the child, but primarily a direct contact with the child, acquainting the child with the special guardian's role, with the case, the child's right to express his or her opinion, informing the child about the possible consequences of the acceptance of its opinion and the possible final outcome of the proceedings. In addition, special guardians are obliged to speak with the parents to get to know their family situation and to be able to assess the best interest of the child.' Report on the work of the Ombudswoman for Children for 2021, Zagreb 2022, pp. 104, 105 [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ_PRAVOBRANITELJ_DJECA_2021.pdf (Accessed: 17 August 2022).

3. Parental care

3.1. Historical development

The Basic Acts on the Relations between Parents and Children (1947, 1956, 1965) and Marriage and Family Relations Acts 1978 and 1989)[30] used the concept of *parental right ('roditeljsko pravo').* According to these Acts, both parents had parental rights and they both exercised them. Naturally, if one of the parents died, or was proclaimed dead, was unknown, or was deprived of their parental right, only the other parent had those rights (*nudum ius*). The parent, whom the court had entrusted the child for custody after a marital dispute (dispute over divorce, annulment of marriage, or following the pronouncement of a marriage as inexistent), or upon a social welfare office's decision after the termination of a marital or extramarital union, solely 'exercised his or her parental rights.' Under these Acts, only one parent would exercise their parental rights when the other parent was deprived of legal capacity, was a minor, or had died.

The parent who did not live with the child had the right to personal relations with the child, the duty to contribute to the child's maintenance, the right to complain to the competent body if dissatisfied with the other parent's decision, and the right to seek the decision, entrusting the child for custody, to be changed (change of the decision on parental care).

According to the then-existing solutions, the parent whom

> the child was not entrusted to, lost only the possibility of exercising parental right, because in such case, the law provided for the transfer of exercising parental right only to the parent who was entrusted custody (Art. 13 of the Basic Act on the Relationship between Parents and Children).[31]

The Convention on the Rights of the Child had an impact on the family legislator, such that the Family Act of 1998[32] brought about significant changes in terms of who was entitled to exercise parental care. Under this Act, both parents exercised parental care for the child regardless of whether they lived together.

Only one parent exercised parental care based on a decision made by the social welfare office if the other parent was prevented, deprived of business capacity, or if their actions endangered the child's well-being. In addition, the social welfare office could decide

> that some duties had to be carried out by the parent who the child did not live with, like, for instance, to care for the child's health, education, out-of-school

30 | Marriage and Family Relations Act, Official Gazette Nos. 11/1978, 27/1978, 45/1989, 59/1990, 25/1994.
31 | Prokop, 1966, p. 170.
32 | Family Act, Official Gazette No. 162/98.

activities, to represent the child in some situations, to manage the child's property, and the like.[33]

The parent who did not live with the child was entitled to seek the social welfare office's decision aimed at protecting the child's well-being (on the parent's request, *ex officio* or upon a complaint) in the case of a dispute on exercising parental care, a dispute between parents on exercising the child's rights regarding contacts, or change of the decision on whom the child would live with.[34]

The Family Act of 2003 stated that the court was a competent body for any decisions on parental care because administrative proceedings did not guarantee full jurisdiction.

The solutions of 1998 and 2003 provided the impetus for positive changes in the direction of a generally accepted idea of the need for equal parenthood following divorce. In practice, fathers started to show greater interest in active care of the child with whom they no longer lived in a family union. In cases where one of the parents showed greater capacity, competent bodies were able to individualize their decisions regarding the division of rights and duties between parents. If parents disagreed with some decisions regarding how parental care should be exercised, they, as well as the child, could initiate non-contentious court proceedings.

Some deficiencies of such a solution were, for example, unclear determination in individual and concrete cases of how and in what form parents exercised their parental care, the unresolved issue of the legal change of the child's place of permanent residence, or the problems that could arise if the parents could not agree on moving to another country. Various conflicts related to divorce were in the limelight of the media, exhausting the professional services of social welfare offices. Therefore, a reform of family legislation was initiated with the main intention of reducing any negative consequences of divorces permeated by various conflicts.[35]

33 | Art. 99 para. 2 of the Family Act of 1998.
34 | Korać Graovac, 2017, p. 7.
35 | Ibid.
According to the Statement of Reasons accompanying the Family Act of 2014, the main motive for the change of regulation of parental care was to limit the parents' options in the cases of highly conflicting divorces:
'Exercising joint parental care continues to be the rule on which the child's well-being is based. Therefore, the exercise of joint parental care must be conditioned by the parents' agreement on its accomplishment following divorce or the termination of a marital union – by a parenting plan on joint parental care. In the circumstances of the parents' high conflicting relations, it is necessary to provide for the legal possibilities that the court renders a decision according to which only one parent will be entitled to solely exercise parental care when this is essential for the child's well-being and when the parents are permanently incapable of reaching an agreement on their joint parental care and the model of their mutual communication regarding its exercise (a plan for joint parental care). A court decision on exercising parental care by only one parent ought to prevent situations where the child is torn between the parents who are in permanent conflict and who are incapable of putting the child's interest and well-being before their own interests whereby the child becomes arms in their constant conflicts and manipulations.'

3.2. Joint parental care and sole parental care

The Family Act of 2015 stipulates that parental care 'comprises responsibilities, duties and rights of parents, with the aim of protecting child's welfare, personal and proprietary interests' and that 'parents are obliged to exercise it in conformity with the child's development needs and capabilities'.[36]

As regards the content of parental care, the legislator outlines the right and duty to protect the child's personal rights to health, growth, care, and protection, their upbringing and education, the development of contact when they do not live together, determination of the child's place of residence, and the right and duty to manage the child's property and to represent their personal and proprietary rights and interests.[37]

When parents do not live together, the child's place of residence can only be with one of the parents,[38] although the child may spend a significant amount of time with the parent with whom they do not live. In such a case, joint parental care is more probable because it is in the interest of the child that the parents are capable of reaching an agreement on how parental care should be exercised.

In practice, we come across situations where parents, who do not live together, mostly come into conflict over how their personal relations should be handled, the amount of maintenance and its regular payment, the issue of representing the child (particularly when changing the child's permanent or temporary residence), as well as over decisions regarding which parent should live with the child.

As a rule, both parents hold the right to parental care. The parent who is deprived of the right to parental care and the parent whose child is adopted will lose that right as soon as such circumstances set in.

When both parents must exercise parental care and are obliged to exercise it equally, jointly, and consensually; if they do not live together, they must lay down its exercise in a parenting plan on joint parental care, or their agreement may be approved by a court's decision in non-contentious proceedings.[39]

The Family Act of 2015 expressly states that if the parents fail to make and agree on their joint parental care (or to agree during court proceedings), the court must specify the parent who will exercise parental care.[40] Naturally, it is the parent with whom the child lives.

When in a dispute, a parent refuses joint exercise of parental care (i.e., by not accepting the proposed agreement), they must prove that the sole exercise of parental care is in favor of the child's well-being.[41] The relevant legal provision is a kind of threat against the parent who refuses the agreement, and it places *onus probandi* on them that joint parental care is not in the child's interest. The court may determine whether the parent, who solely exercises parental care, will represent the child in their essential personal rights alone (see infra) or whether it must

36 | Art. 91 para. 1 of the Family Act of 2015.
37 | Art. 92 of the Family Act of 2015.
38 | Art. 96 of the Family Act of 2015.
39 | Art. 104 of the Family Act of 2015.
40 | Art. 105 para. 3 of the Family Act of 2015.
41 | Art. 105 para. 4 of the Family Act of 2015.

be with the consent of the other parent. In all other matters, the parent with whom the child lives will solely represent the child.

Indeed, the legislator bases his legislative solution on the premise that joint parental care is the best solution for the child. At the same time, the legislator 'punishes' the parent who has failed in reaching an agreement by completely neglecting the fact that it takes two to make an agreement.

When the court has rendered a decision on parental care that is not based on an agreement, the parent who does not live with the child is seriously limited in exercising parental care. The Family Act does not hide this fact because there is an article entitled 'The Rights of the Parent Whose Right to Exercise Parental Care is Limited'.[42] The parent is thus limited in representing the child, and this has been strongly criticized by family law theoreticians.[43]

This legislative solution was modified by case law according to which the court is empowered to award

> exercise of joint parental care in the case of parents not living together, and in the case the matter has not been regulated by an agreement based on joint parental care plan under Art. 106 of the Family Act, or by parents' agreement reached during judicial proceedings, as well as if it appears to be in the best interest of the child.[44]

Although such competence is not derived from Article 104 para. 3 of the Family Act, it is entirely compatible with the Convention on the Rights of the Child. [45]

This position has been taken in conformity with General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration.[46] Regular courts seldom interpret legislation by directly applying international documents that provide for human rights. This decision, rendered by the Civil Division of the County Court in Zagreb and subsequently followed by others, both lower and county courts, is a welcome development.

42 | Art. 112 of the Family Act of 2015.
43 | Cfr. Korać Graovac, 2017, pp. 51–73.
44 | The Zagreb County Court's Legal Opinion of June 4, 2019.
45 | This point is additionally confirmed in the article written by Artuković Kunšt (2019). judge of the Zagreb County Court.
46 | Art. 3 para. 1 of the Family Act of 2015.
67. The Committee is of the view that shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case. General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration (Art. 3, para. 1), Committee on the Rights of the Child.

4. Exercise of parental care after divorce

4.1. Contacts

The parent who does not live with the child is entitled to contacts, except when this right has been limited or forbidden by the court decision.[47]

Article 121 of the Family Act of 2015 stipulates that contacts with the child may be made directly, in the form of meeting or getting together, or by the child's staying with a person entitled to establish contact with the child, or indirectly, through various means of communication, by sending letters, gifts, or by giving information in connection with the child's personal rights to a person who is entitled to such information, or by giving it to the child.

The parent, or any other person living with the child, has the duty and responsibility to make it possible and to encourage contact with the other parent.[48]

It is possible that the court may order that contacts must take place under the supervision of a professional appointed by the social welfare office, the other parent of the child, or another close person.[49] This measure is very expensive (because the State must pay such professional person) and it is, by nature, a short-term measure (lasting for up to six months or not longer than a year). The intention of this measure is to overcome the most difficult period of constant conflict between parents because supervision is, as a rule, ordered for both parents. At the same time, the measure is meant to fulfil the positive obligation of the State to guarantee the right of respect for family life to both the child and their parents.

Interference or obstruction of contacts is the most frequent method of manipulation during and after divorce, and prevention is extremely difficult. They are often combined with negative messages and qualifications given on account of the parent with whom the child does not live and by the parent with whom they live; consequently, the child refuses contact with the former. However, the parent who does not live with the child may manipulate by sending negative messages to the parent, or regarding the parent with whom the child lives, by criticizing the other parent's upbringing methods and abusing, in such a way, their contact with the child and encouraging the child's resistance to the parent with whom they live.[50]

The punishment to enforce a decision for the failure to organize contacts can be in the form of a fine or imprisonment.[51]

A novelty in the legislation is an express provision on the right of compensation by a person who is bound to make it possible for a parent to establish contacts. Compensation must be the result of not observing the court's enforcement document

47 | Art. 95 para. 1 of the Family Act of 2015.
48 | Art. 95 para. 3 of the Family Act of 2015.
49 | Art. 124 of the Family Act of 2015.
50 | Manipulation is manifested in many ways. Maljuna, Ajduković and Ostojić, 2020, p. 26.
51 | Art. 523 of the Family Act of 2015.
There has been some criticism by theoreticians because the procedure of handing over the child is not foreseen and because no gradation of the means of enforcement is envisaged. Pavić, Šimović and Čulo Margaletić, 2017, pp. 193 and 194.

on the establishment of contacts.[52] The Family Act refers to the provisions of the law of obligations, and it can be concluded that both material and non-material damages are involved. Such proceedings are still very rare, although many children do not establish contact with the parent with whom they do not live.[53] There are no indirect sanctions for the parent who does not establish contacts with the child.[54]

Nevertheless, some of such cases were brought to an end before the European Court of Human Rights, where the violation by the Republic of Croatia was established in favor of the fathers who had brought actions before the Court in Strasbourg.[55]

To reduce parental conflicts, complex professional work and efforts are needed, but it is difficult to find sufficient numbers of the right professionals to carry out the supervision and the necessary resources to be able to do the work. Beside the professionals, we also need appropriate space for making contacts between parents and children possible, especially when there is a danger that a parent, who does not live with the child, will stay alone with the child in any place or situation.

4.2. Parental representation of the child

According to provisions of the Family Act 2015, parents may represent their child jointly, one of them solely, or combined: jointly with regard to the essential personal rights of the child, or one of them solely with regard to any other matters.

When parents represent their child jointly, as mentioned above, they are obliged to come to terms and reach an agreement. It is sufficient for one parent to represent the child, and it is considered that the other parent has given their consent. For certain statements of will, express consent from the parent who exercises parental care is needed, and in the case of some particular statements, consent must be given in writing. As far as any other statements are concerned, the form of consent is not prescribed.

Written consent is required for decisions on the child's personal rights specified as essential in Article 100 of the Family Act of 2015: for changing the child's

52 | Art. 126 of the Family Act of 2015.

53 | According to the official data in 2020, as many as 2,083 children did not exercise their right to contacts with the other parent, or they did exercise it, but in the scope lesser than what was stated in the court decision (because of the manipulative behavior of the parent with whom they lived). As many as 352 children were exposed to manipulation by the parent with whom they lived at the time their personal relations under supervision took place. (Annual statistical report on the applied rights to social welfare, the legal protection of children, youth, marriage, family, and persons deprived of business capacity and the protection of physically or mentally handicapped persons in the Republic of Croatia in 2020).
On the other hand, 'a special problem is the protection of the rights of children whose parents, after divorce, refuse to exercise their parental duties and obligations towards the child.' Report on the Ombudswoman's Work, 2021, p. 26.

54 | Cfr. Korać Graovac, 2018.

55 | For example: Case Ribić v. Croatia, Application No. 27148/12, Judgment from 2nd April 2015, paras. 88–89 and 92–95 and Case Jurišić v. Croatia, Application No. 29419/17, Judgment from 16th January 2020, paras. 105–111.

personal name,[56] for changing the child's permanent or temporary residence,[57] the selection or change of the child's religious affiliation, and when parents give their consent for the recognition of paternity given by their minor child when they become a parent.[58]

The parents' consent may be replaced by the consent of the social welfare office if it establishes that the child's moving will not have any substantial impact on the realization of contacts with the other parent and if it establishes that the registration of permanent or temporary residence is crucial for the protection of the child's rights and interests.

A parent who cannot get the other parent's consent regarding the aforementioned representation must seek the court to render a decision on which parent is to represent the child in a particular case. When the parents' consent in the proceedings of recognition of paternity cannot be obtained, paternity will have to be established by the court or by recognition after a minor parent reaches legal age.

The other parent's written consent is also necessary when representing the child regarding some valuable property or regarding the child's property rights in cases of alienation or encumbrance on immovables or movables entered into public registers, or movables of higher value, disposition of stock or business shares, disposition of inheritance, acceptance of encumbered gifts, refusal of offered gifts, or disposition of other real property rights depending on the circumstances of a particular case.[59] Apart from written consent, approval must also be given by the court in non-contentious proceedings. Special protection must be provided to minors whose parents enter into contracts with natural or legal persons in connection with the child's sports, artistic, or similar activities, and the matter concerns a disposition of the child's future property rights and gains. The approval must be obtained from the court, but any contractual obligations may only last until the child reaches the age of majority.[60]

When dealing with decisions that are crucial for the child, it is presumed that the other parent has given consent. These are decisions that may have a significant impact on the child, such as the establishment of personal relationships with close persons, decisions on special medical procedures or treatments, and the selection of schools.[61] Naturally, it is important that the parent, before the representation, informs the other parent about it, because, in some situations, it is impossible

56 | In line with family legislation, the change of a minor's personal name is provided for in the Personal Name Act, Official Gazette Nos. 12/2012, 70/2017 and 98/2019.
57 | Change of permanent residence is provided for in the Residence Act, Official Gazette Nos. 144/2012 and 158/2013.
58 | More: Lucić, 2021.
59 | Art. 101 paras. 1 and 2 of the Family Act of 2015.
60 | Art. 101 paras. 3 and 4 of the Family Act of 2015. Cfr. Hrabar, 2021.
61 | Art. 108 para. 3 of the Family Act of 2015.
A special problem can be the diversification of everyday life issues from those that are of great importance for the child. A problem may be an everyday life issue and at the same time a matter of great importance for the child. For example, a tourist trip can be a part of the child's everyday life while a journey to a war-torn or a turbulent country may also be a decision of extreme importance. See Schnitzler, 2010, Rn. 118, cited in Maganić, 2012, pp. 139 and 140.

to rectify possible negative consequences of some decisions (e.g., in the case of medical surgeries).

Parents who exercise parental care may entrust their child to a third person for up to 30 days, and if for a longer period, their statement must be certified by a notary public.[62] However, the social welfare office need not be informed about such long period, and the parent does not even need to seek the office's approval, which is certainly the legislator's omission. At the time of economic migration, it is again possible that the choice of the person with whom parents entrust their child is not adequate (too-old parents, not-interested relatives). The issue of the child's representation has also not been solved appropriately.

It is expressly provided that every parent is entitled to make everyday decisions when they are with the child, as well as any other family member who resides with the child, upon the parents' consent. It is quite clear, even without any regulation, that in urgent situations, when there is a direct danger to the child, each parent is entitled, without the consent of the other parent, to make decisions on undertaking the necessary actions in accordance with the child's well-being. However, other parents must be informed as soon as possible. The same right is exercised by any other family member or person responsible for the child while they are in an educational institution.[63]

If parents cannot agree to their parental care and exercise it, they may seek the court to render a corresponding decision. Either the parent or the child may bring court proceedings after they have completed the procedure of mandatory counseling.

If a parent frequently initiates court proceedings, the court may entrust sole parental care completely or partially to the other parent, which is a kind of threat against the quarrelsome parent.

A parent solely represents the child in particular situations in accordance with the decision on parental care rendered by the court and when they make everyday decisions.

It is clear from the above that the parent who does not live with the child is in a much weaker legal position because, in the case where joint parental care is not exercised, they do not have any impact on the way it is exercised. When disagreeing with certain actions or decisions of the parent who represents the child, the other parent can only inform the social welfare office about the need to protect the child's rights and interests. They may seek a decision on parental care to be changed (so that the child lives with them), but cannot bring court proceedings to obtain the court's decision on whether a particular action by the parent who lives with the child is in accordance with the child's best interests.

The parent who does not live with the child is left with the right and duty to exchange information about preserving the child's health and consistent

62 | Art. 102 of the Family Act of 2015.

63 | Art. 110 of the Family Act of 2015.
This provision has been taken in its entirety from the Principles of European Family Law regarding parental responsibilities recommended by the Commission on European Family Law. Principle 3:12.

upbringing as well as about school and out-of-school activities. They are entitled to receive only the information on the essential circumstances regarding the child's personal rights, on the condition of having a justified interest in the measure not being in contradiction with the child's well-being.[64] However, it remains to be seen how case law interprets these legal standards.

5. Conclusion

As the main goal, the new family legislation emphasizes the importance of encouraging parents to reach agreements and reduce manipulations of their children after divorce. A tool for achieving this goal has been some form of threat, even punishment, against the parent with whom the child does not live because he will not be granted joint parental care after divorce. After the Croatian family legislation from 1978 to 2014 promoted the principle of joint parental care as a general and desirable rule, this constituted a significant change. Since there is no serious multidisciplinary research showing whether the goal has been achieved, the results may be assessed only according to the number of reached agreements (plans on parental care or agreements before the court), as well as the number of subsequently conducted proceedings on parental care. However, the numbers are not sufficient. It is questionable whether serious limitations on the right to parental care of the parent who does not live with the child (as a part of the content of their human right to respect for family life) are proportionate to the desirable goal of reducing manipulations. Regular courts have recognized possible violations, and in conformity with General Comment No. 14 of the Committee on the Rights of the Children, they started adjudicating by determining joint parental care even when there was no agreement between the parents, if this was in the best interests of the child.

However, other questions arise in this respect. A formal plan of joint parental care and agreement before the court, in reality, very often shows many substantial weaknesses, so that parents, even following the reached agreement, rather often initiate court proceedings. In divorce proceedings without any reached agreements, children get a special guardian whose possibilities and functions, in practice, are insufficient to ensure the prescribed participation of children. Therefore, because of the weakness of the system and inactive guardians, the child's procedural rights are violated.

Indeed, fathers' equality is rather jeopardized, as it has a minor influence on most decisions concerning their children.

However, mothers are advantaged as those who live with the child for natural and legal reasons, particularly when children of younger age are involved, but also because of stereotypical images of mothers. In the course of 2020, upon the termination of a family union, in about 80% of cases, social welfare offices proposed that children should live with their mothers. Research has shown that this

64 | Art. 112 para. 3 of the Family Act of 2015.

number is even larger.[65] At the same time, because of realistically insufficient child maintenance, their economic position is, as a rule, more difficult.

A major weakness of family law protection lies in the system of social welfare. The law *per se* and the rendered judgments were never able, and will never be able, to solve all the misfortunes of broken families. It is the duty of the State to do everything it can to preserve parenthood in the legal and every other sense. In this respect, the accessibility and charge-free services of family teams, counseling services, family therapy sessions, and mediation professionals (psychologists, lawyers, and social workers) are of utmost importance.

As Tolstoi puts it: 'All happy families are alike; each unhappy family is unhappy in its own way.' It is the task of society to ease the burden of an unhappy family as much as possible if not for adults, then certainly for the children. This awareness requires that when it comes to divorce, the system must be flexible, and it must make it possible for institutions to properly attune their family law and social protection to the current situation.

65 | A research activity of 2018 regarding the fathers' experiences during their divorce proceedings shows that in 91% of cases, children continued to live with their mothers and only in 8% of cases with their fathers. Fathers criticized the professionals working at social welfare offices for giving preference to mothers, for being dominantly a women's profession, for suggesting inappropriate agreement to alleviate court proceedings, and for dedicating insufficient time to parents in the counseling procedure.
Croatian Chamber of Social Workers (Hrvatska komora socijalnih radnika) and Croatian Association for Equal Parenthood (Hrvatska udruga za ravnopravno roditeljstvo), 2018 [Online]. Available at: https://hksr.hr/istrazivanja (Accessed: 1 September 2022).

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PARENTAL AUTONOMY V. CHILD AUTONOMY V. STATE AUTHORITY POWERS

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ABSTRACT

In this paper the author analyzes relations between parental autonomy, child autonomy and State authority powers within the purview of the content of the parental rights, family status of the child (maternity and paternity) as well as in exercise of the parental rights. These issues are presented according to Serbian law and court practice, from a comparative and international perspective.

KEYWORDS

autonomy
parents
child
State authority
powers
rights
duties

1. Introduction

This paper aims to examine legal relations between parental autonomy, child autonomy, and State authority powers in Serbian and comparative law.

During historical periods, the focus in family law was on the rights and obligations of parents with respect to their children. The next step in family law was a theory of the existence of a correlative relationship between the rights and obligations of parents and the rights of the child. In contemporary family law the child holds independent rights and also has a right to participate in the decision-making in important matters concerning him/her. Nonetheless, the State authority powers can limit the parental and child autonomy. It is important to find an appropriate balance between State authority powers and parental/child autonomy to protect the best interests of a child, as a paramount principle in family law.

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In this paper the author examines issues of the content of the parental rights, family status of the child (maternity and paternity) and exercise of parental rights within the purview of relations between parental autonomy, child autonomy, and State authority powers.

2. Content of Parental Rights/Child's Rights

The content of parental rights comprises the rights and obligations of the parents to care for the child, and includes the following: protecting, educating, upbringing, representing, and maintaining the child, and managing and disposing of the child's property.[1] Apart from defining the content of parental rights, the Family Act regulates rights of a child.[2] These rights include: the right to know who his/her parents are, to live with his/her parents, to maintain personal relations with parents and other persons, right to a proper and complete development, to education, to an opinion, as well as the obligations of the child.[3] The rights of the child can be divided into the rights regarding status (right to: family name, domicile – habitual residence, nationality, to know who his or her parents are), rights derived from parent-child relations (right to: living with parents, to maintain personal relations with parents and other persons, development, education) and the rights on child's property and maintenance.

2.1. The Child's Name

The child's name is determined by his/her parents. Parents have the right to select their child's name freely; however, they cannot provide the child a defamatory name, a name that insults morality or a name that is contrary to the customs and opinions of the community.[4] A child's surname is determined by the parents according to the surname of one or both parents. Parents may not provide different surnames to their common children.[5] Parents have the right to enter their child's name in the register of births in the mother tongue and alphabet of one or both parents, apart from the official language. These are provisions that regulate parental autonomy regarding child's personal name with certain legal limitations.

A child who has reached fifteen years of age and is able to reason has the right to change his/her personal name. A child who has reached the age of ten and is able to reason has the right to provide consent for the change of his/her personal name.[6] These are provisions that regulate a child's autonomy regarding his/her name.

1 | Articles 67–74 of Family Act. Family Act, Official Gazette of Serbia No. 18/05 with amendments (hereinafter referred to as FA). Kovaček Stanić, 2010.
2 | Serbia is a party to the United Nations Convention on the Rights of the Child, ratified: Official Journal of Yugoslavia no. 5/90.
3 | Articles 59–66 of FA.
4 | Article 344 of FA.
5 | Article 345 of FA.
6 | Article 346 of FA.

A child's name is determined by the guardianship authority if the parents are not alive, they are unknown, they have not determined the child's name within the time limit set by law, they cannot reach an agreement on the child's name or they gave the child a defamatory name, a name that insults the morality or a name that is contrary to the customs and opinions of the community.[7] These are provisions that regulate State authority powers regarding a child's personal name as a correcting factor.

2.2. The Child's Domicile/Habitual Residence

The child who lives with his/her parents has the domicile of the parents. If parents do not live together, the child has the domicile of the parent with whom he/she lives. If parents conclude an agreement on joint exercise of parental rights, it should include an agreement on what is to be considered as the child's residence.[8]

The important question related to change of the child's domicile is whether changing the domicile by one parent might qualify as child abduction. In the situation the parental rights are exercised jointly, the parents jointly and mutually agree on all issues related to the child. If one of the parents exercises parental rights independently, the other parent is authorized to decide jointly and mutually with the parent who exercises parental rights, issues of significant influence to the child's life. One of the issues of significant influence is the change of the child's domicile.[9] Thus, removal or retention shall be deemed as wrongful under the domestic family law in all situations when there is absence of agreement between the parents regarding change of domicile (habitual residence). It could be said that the regulations in Serbia are strict in this matter. In a situation when both parents are alive, one parent is authorized to make an independent decision regarding change of domicile (habitual residence) only when the other parent is fully or partially deprived of the parental right. Partial deprivation of parental rights can include deprivation of right to decide on issues of significant influence to a child's life.[10]

There exists another means by which, change of the child's domicile would not be considered wrongful despite the lack of parental consent. The Family Act regulates special procedure for protection of child's rights that could be initiated in such cases; a procedure in which a court would have to assess whether a change in child's domicile would be in the best interests of the child.[11]

A child who has reached the age of fifteen and is able to reason has the right to decide which parent he/she is going to live with; therefore, the child can decide on his/her domicile/habitual residence, as well.[12] This is a provision that regulates a child's autonomy regarding his/her domicile.

7 | Article 344/4 of FA.
8 | Article 76/2 of FA.
9 | Article 78/3, 78/4 of FA.
10 | Article 82/4 of FA.
11 | Articles 261–263 of FA; Kovaček Stanić, 2010; Драшкић, 2012; Станивуковић, 2021; Станивуковић, Ђајић 2022.
12 | Article 60/4 of FA.

2.3. The Child's Origin[13]

In the Constitution of the Republic of Serbia, 2006 and in the Family Act, 2005 it is stipulated that every child has a right to know his/her origins.[14]

A child, independent of his/her age, has the right to know who his/her parents are. A child who has reached the age of fifteen and is able to reason has the right to inspect the register of births and other documentation related to his/her origin.[15]

The issue of origin can be related to different situations: natural birth, adoption, and biomedically assisted fertilization. The issue of origin in the situations of natural birth is examined further in the section on maternity and paternity.

State authority has powers concerning the right of an adopted child to know his/her origin. The official of the guardianship authority has an obligation to advise the future adopters to inform the child regarding his/her origin as soon as possible.[16] However, it could be said that, in practice the adopters enjoy the autonomy to inform the adoptee regarding his adoption or keep it as a secret, as there is no legal obligation but only an advice of the guardianship authority. The registrar is under the obligation to refer the child to psychosocial counseling, before allowing the child to view the register of births.[17] Apart from the adopted child, only the adopters have the right to view the register of births for the child.

Concerning the right of a child conceived using biomedically assisted fertilization to know his/her origin, Serbian Law on biomedically assisted fertilization in Article 57 states:

> The child conceived by biomedically assisted fertilization (BMAF) with reproductive cells of the donor has a right to ask for medical reasons to get data on the donor from the Board of Directors for Biomedicine kept in the State Registry. This right the child obtains when reaches 15 years of age if is able to reason. These data are not on personal nature of the donor, but only the data of medical importance for the child, his future spouse or partner, or their future offspring ...

The child's autonomy regarding his/her origin is limited by State power exercised in legal provision which does not allow to reveal the donor`s identity if the child is conceived using biomedically assisted fertilization.

2.4. Upbringing and Education of the Child

A child has the right to live with his/her parents and the right to be taken care of by his/her parents, in preference to all others. The right of a child to live with his/her parents may be limited only by a court decision, when that is in the best interests of the child. A court may decide to separate a child from his/her parent if there are reasons for the parent to be fully or partially deprived of his/her parental rights

13 | Ковачек Станић, 2021.
14 | Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia 98/06, Art. 64/2. Family Act Article 59.
15 | Article 59 of FA.
16 | Article 322/1 of FA.
17 | Article 326 of FA.

or in case of domestic violence.[18] Thus, the State authority has powers regarding separation of the child from his/her parents.

Parental autonomy regarding the upbringing and education of the child is limited by State authority powers. An example of this limitation is a provision that forbids humiliating actions and punishments that insult the child's human dignity. Further, parents have the duty to protect the child from such actions by other persons.[19]

Nowadays, the issue of corporal punishment of the children is in focus in Serbia, owing to the suggestion that corporal punishment has to be explicitly forbidden in family law.

A new practice on 'sharenting' (use of social media by parents to share pictures or information regarding their child) indicates parental autonomy. However, this practice may not be in the best interests of a child, and therefore, the State authority has powers to regulate this practice. For instance, in a particular case if 'sharenting' is not in the best interests of a child, the guardianship authority can perform corrective supervision over the exercise of parental rights by making decisions that warn the parents of deficiencies in the exercise of parental rights or referring them for consultation to a family counseling service or an institution specialized in mediating family relations.[20]

The Family Act directly limits parental autonomy regarding the upbringing of the child forbidding parents to leave a child of pre-school age unsupervised[21] and by forbidding parents to entrust the child, even temporarily, to the care of a person who does not meet the requirements for being a guardian.[22]

A child's autonomy regarding education is exercised explicitly by the right of a child at the age of fifteen, if he/or she is able to reason, to decide which secondary school he/she will attend.[23]

| *2.5. Medical Issues*

The protection of life and health of the child in contemporary conditions has to a large extent become a function of healthcare institutions. However, the role of the parents is no less important. Apart from the direct care about life and health

18 | Article 60 of FA.

19 | Article 69/2 of FA. By way of contrast, the Civil Code of the Kingdom of Serbia (1844) provided that parents had the right to 'punish immoral and insubordinate children with a moderate domestic punishment.' Further, under the criminal law of that period, children could be imprisoned for up to ten days. In ancient Roman law *pater familias* had *ius vitae ac necis* toward his children (and other persons in his *patria potestas*). Nevertheless, *patria potestas* was limited by the rule that states: '*Patria potestas in pietate non in atrocitate consistere debet*' Kovaček Stanić, 2010.

20 | Article 80 of FA.

21 | Article 69/3 of FA.

22 | Article 69/4 of FA. The following persons may not be appointed as a guardian: a person fully or partially deprived of legal capacity or of parental rights, a person whose interests are adverse to the ward's interests, a person who, given his/her personal relations with the ward, the ward's parents or other relatives, cannot be expected to perform properly the activities of a guardian (Article 128 of FA).

23 | Article 63/2 of FA.

of a child, it also includes providing consent to any medical procedures being conducted on the child.

In contemporary law the child's autonomy is exercised, as an older child has the right to independently decide regarding medical procedures. The Family Act of Serbia, 2005 is in accordance with this approach by which a child who has reached the age of fifteen and is able to reason may provide consent for any medical intervention.[24]

The rights of the child to act independently have certain limitations. A question arises whether parents can or should provide consent despite the fact that their child has the right to consent to medical treatment. The Serbian Act on Patient`s Rights 2013 explicitly states that if the child refuses treatment, the doctor has to acquire consent from the legal representative of the child.[25]

In family law the important issue is to explain the relation between a child's refusal to consent to a particular treatment and a child's refusal of all treatment. In the United Kingdom (UK) various authors have expressed their opinion on this matter.

Authors Gilmore & Herring state:

> There is an important difference between a child's refusal to consent to a particular treatment and a child's refusal of all treatment. A child's capacity to consent merely requires an understanding of the proposed treatment, whereas a valid refusal of all treatment requires an understanding of full significance of a total failure to treat. It follows that a child who has capacity to consent does not necessarily have capacity to refuse all treatment; indeed the child may not even address the latter issue. Where the child lacks the capacity to refuse all treatment, the parent has the power to consent, as is usual when the child lacks capacity to resolve the issue.[26]

Author Booth expresses similar opinion:

> Until a child has attained the status of adulthood at 18, although they may consent to treatment on their own behalf, under the Family Law Reform Act 1969, parental consent will still be effective and can therefore override the 16 or 17 year olds refusal to consent.[27]

Another issue concerning the health of a child is a situation where, for religious reasons, parents refuse consent to certain medical treatments, e.g., blood

24 | Article 62/2 of FA.
25 | Article 19/5 of FA. The Law on Patient's Rights, Official Gazette of the Republic of Serbia No. 45/13, 25/19.
26 | Gilmore and Herring, 2011; Cases: Gillick v West Norfolk and Wisbech Area Health Authority 1986; Re R (A Minor) (Wardship: Consent to Treatment) 1992; Re W (A Minor) (Medical Treatment: Court's Jurisdiction), 1993 etc.
27 | Re W (a minor) (medical treatment) (1992) 4 A11 ER 627 in Booth, 2008, p. 275. The United Kingdom the Family Law Reform Act 1969, s 8 (3) states: 'Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.'

transfusion. In such scenarios, the court should appoint a guardian who will make decisions on behalf of the child, instead of the parents, thus providing the State authority power to limit parental autonomy.

Regarding child's health, there is a bizarre form of child abuse, termed 'Munchausen syndrome by proxy.' In these cases a parent (mother in most cases) has a delusion regarding the child's illnesses with the consequence of unnecessary treatment, which in some cases even results in the child's death.[28] Parental autonomy in these cases should be limited by State authority powers.

2.6. Child's Maintenance

Parental autonomy is exercised by the parents to make an agreement regarding a child's maintenance. The Family Act favors parental agreements regarding parent-child relations. In the situation of divorce by mutual consent, spouses are obliged to provide a written divorce agreement, which governs the exercise of parental rights. The agreement regarding the exercise of parental rights may be joint or independent exercise of parental rights.[29] The agreement on independent exercise of parental rights includes, among others issues, an agreement regarding child's maintenance. In cases of divorce on the grounds of disturbed marriage relations or where cohabitation of the spouses cannot be objectively realized, during the mediation procedure (the settlement phase) the court or institution implementing the mediation procedure endeavors that the spouses reach an agreement regarding the exercise of parental rights.[30]

Regarding a child's maintenance State authority powers are exercised through the provision of a guardianship authority to initiate the proceeding for child's maintenance.[31] The guardianship authority is authorized to initiate the maintenance proceedings to protect the child, per instance in the situation where the parent fails to do so. Additionally, there is a rule which states that the court is not bound by the claim for maintenance, which means the court is authorized to make a decision on child maintenance which is different from the claim.[32]

In contemporary family law an important issue regarding child's maintenance is the maintenance rules in cases of alternating residence of the child. In most countries there are no specific regulations, even there are considerable differences in cost, for example, housing. In situations of alternating residence of the child, housing is more expensive (16% more expensive than in mono-residence). For example, in Sweden there is no maintenance in situations of alternating residence of the child. This means that fathers generally gain from the lack of regulation and consequently select alternating residence as a mechanism to avoid paying maintenance, as majority of parents paying maintenance are fathers, who have higher income than mothers. Singer (2009) proposed to divide the expenses, so that one parent has the responsibility for certain costs that are independent

28 | Williams, 1986.
29 | Article 40 of FA.
30 | Article 241 of FA; Booth, 2008.
31 | Article 278/3 of FA.
32 | Article 281 of FA.

of actual care, such as clothes, fees for leisure activities, whereas the remaining costs, such as those required for daily needs, should be distributed between the parents according to the time spent with the child. In court practice in Serbia, to prevent fathers from opting for joint exercise of the parental rights to avoid paying maintenance, courts order the sum of maintenance in their decision on joint exercise of parental rights.

2.7. Child's Property

Parental autonomy in connection with child's property is exercised by the right and duty of parents to manage and dispose of the child's property.[33] Parents have the right and duty to manage and dispose of the property that the child has not acquired through his/her work.[34] Parents may use the income from a child's property for their own maintenance or for the maintenance of another common minor child.[35]

A child independently manages and disposes of the property that he/she acquires through work;[36] therefore, a child's autonomy is exercised in this situation.

State authority powers regarding child's property are exercised through the necessity of prior or subsequent consent of the guardianship authority to parental disposal of immovable property and movable property of considerable value,[37] to establish whether the disposal of property is in the best interests of a child.

3. Family Status of the Child: Maternity and Paternity

Acknowledgement of paternity depends almost entirely on parental (child) autonomy. If the man acknowledges his paternity and mother consents (and a child older than 16), the man is considered the father. The biological truth is not examined. In addition, the mother exercises her autonomy as she can decide to name (or not name) the man who is considered to be the child's father.

The possibility of anonymous birth, which exists in some European laws, for example, in the laws of France, Luxembourg, Italy, and the Czech Republic,[38] provides the mother autonomy, which is exercised in not establishing maternity (and consequently paternity) of a child.

When a mother is reporting the birth of a child born out-of-wedlock to the registrar, the registrar is under the obligation to instruct the mother regarding her right to name the man she considers to be the child's father. If acknowledgment of paternity fails, the registrar is under the obligation to instruct the mother regarding

33 | Article 74 of FA.
34 | Articles 192/2, 193/2 of FA.
35 | Article 193/5 of FA.
36 | Article 192/1, Article 193/1 of FA.
37 | Article 193/3 of FA.
38 | On Italy and Luxembourg law Rubellin-Devichi, 2000; on Czech law in: Kralickova, 2009, Act on the so-called Secret Childbirths 2004.

her right to establish paternity by a court decision.[39] If the mother and (or) the child, or the child's guardian (if mother or child are not able to provide consent), fail to provide a positive statement or refuse to consent to acknowledgment of paternity, the registrar is under the obligation to instruct the man who acknowledged paternity regarding his right to establish paternity by a court decision.[40] These provisions regulate State authority powers regarding establishing paternity.

According to Serbian law, in situations where paternity is required to be established in court proceedings, parental (father's) autonomy is exercised in a manner that the alleged father could refuse to take a DNA analysis. This in certain (most) cases prevents establishing paternity, because the Court not being willing to issue the judgment without proof of DNA, makes several attempts to obtain the DNA sample.

In the case Jevremović v. Serbia, the European Court of Human Rights was of the opinion:

> A system like the Serbian one, therefore, which has no means of compelling the purported father to comply with a court order for a DNA test to be carried out, can, in principle, be considered to be compatible with the obligations deriving from Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking the establishment of paternity must be secured when paternity cannot be established by means of a DNA test. The lack of any procedural measure to compel the supposed father to comply with the court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity speedily (ibid.). Furthermore, in ruling on an application to have one's paternity established, the courts are required to have special regard to the best interests of the child at issue. The Court finds therefore that the proceedings in the present case did not strike a fair balance between the right of the applicant to have her uncertainty as to her identity eliminated without unnecessary delay (see paragraphs 85 and 102-105 above) and that of her purported father not to undergo a DNA test, and considers that the protection of the interests involved was not proportionate. Accordingly, the length of the impugned paternity proceedings, which ended by 9 May 2007, had left the first applicant in a state of prolonged uncertainty concerning her identity. The Serbian authorities have thus failed to secure to the first applicant the "respect" for her private life to which she was entitled. There has, consequently, been a violation of Article 8 of the Convention.[41]

Child's autonomy concerning maternity and paternity is exercised by child's right to initiate (or not) court proceedings on establishing or contesting maternity and paternity. The child has no time limit to initiate the proceedings to establish and contest maternity and paternity.

39 | Article 308/1, 308/3 of FA.
40 | Article 307 of FA.
41 | Serbia is a party to the European Convention on Human Rights. The case of Jevremovic v. Serbia, No. 3150/05 [Online]. Available at: http://www.echr.coe.int/echr/en/hudoc (Accessed: 12 December 2022). Jović-Prlainović, 2021.

In the purview of provisions regulating maternity and paternity court proceedings, it could be said that parental autonomy concerning maternity and paternity is limited by court obligation (as one of the State authority powers) to respect and establish the truth of the biological origin of the child in court proceedings, which may be achieved using DNA and other biomedical evidence.

In several countries, in comparative law, State authorities have power to initiate the proceedings for establishing paternity (e.g., Sweden, Norway, Denmark), despite the wish of the mother.[42] In Serbia, according to the previous Law on Marriage and Family Relations 1980,[43] the guardianship authority could initiate court proceedings for establishing paternity, where the mother named the father in the registry, however, did not initiate court proceedings. This possibility existed only where there were no justifiable reasons why mother was against initiation of the court proceedings. Therefore, guardianship authority had limited power (or none) to initiate the proceedings, as it was difficult to prove there were no justifiable reasons. This is why the Family Act abandoned this possibility.

Parental autonomy in family status of a child is exercised in a new practice known as 'elective co-parenting,'

> This kind of arrangement, when two people who are not romantically attached decide to raise a child together, is called elective co-parenting. Call it a twist on friends with benefits—the benefits, in this case, being a partner to share in the emotional, physical, psychological and practical gauntlet of raising a child. Many of the individuals who make this decision have been unable to find a suitable romantic partner to help fulfill their wish to form a family. And the social and legal legitimacy of such arrangements is on the rise: Ontario's All Families Are Equal Act, which came into effect in January 2017, allows a birth parent to enter into a pre-conception agreement to establish parental rights for up to four people.[44]

Development of biology and medicine might cause discrepancy in legal and biological maternity and paternity in situations of biomedically assisted conception, where donor genetic material is used. Thus, autonomy of the parents acquires importance, as legal parental relations are based on the will of the parties; therefore, the principle of biological truth loses importance. Legal parents would be persons who participate in the process of biomedically assisted conception to produce a child.

42 | Saldeen, 2000.
43 | Article 99 of the Law on Marriage and Family Relations 1980. The Law on Marriage and Family Relations 1980, Official Gazette l of the Republic of Serbia 22/1980, with amendments 22/1993, 35/1994, 29/2001. The law ceased to be in force in 2005.
44 | Treleaven, 2021.

4. Exercise of Parental Rights

Parental divorce is a challenging situation that causes changes in the parent-child relationship. Exercise of parental rights (child custody or parental responsibility) is one of the most important legal consequences. The best interests of the child, as a paramount criterion in family law, are accorded utmost importance while deciding the joint or independent exercise of parental rights of both parents.

The Family Act provides that when parents (married or unmarried) do not cohabit with each other they may enter into an agreement providing for the joint exercise of parental rights. The agreement must specify that the parents, jointly and with each other`s consent, will exercise their parental rights in the best interests of the child, and it must also specify the child's domicile.[45]

Joint exercise of parental rights is considered to be in the best interests of the child as a statutory presumption in certain countries (e.g., Sweden, Germany, the Netherlands, and Belgium). In these countries there is no need for the court to decide regarding the form of custody after the divorce, as the custody remains the same as it was before the divorce (non-intervention principle). Moreover, in Sweden, for example, there is a provision for the court to decide on joint custody even where one parent makes a request for sole custody.

On the international level, Commission on European Family Law in the Principles of European Family Law Regarding Parental Responsibilities,[46] in Principle 3:10 states: 'Parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents.'

Principle 3:11 states: 'Parents having parental responsibilities should have an equal right and duty to exercise such responsibilities and whenever possible they should exercise them jointly.'

In the Primary Court of Novi Sad in 2007, independent exercise of parental rights was the prevailing form of custody in 87%, and joint exercise in 12% of cases. However, as joint exercise was introduced in 2005 this is not surprising. In comparison with data from Switzerland, where joint custody was awarded in 15% of cases in the first year of introducing this form of law, the data in Serbia and Switzerland are similar. Nevertheless, after 10 years of introducing joint exercise in Serbian law, an investigation reveals almost similar results; joint exercise was ordered in 13% of cases in 2016.[47] It is difficult to explain why joint exercise is not widely accepted. The condition of necessity of the parental agreement for having joint exercise, does not appear to be the main obstacle, as parents frequently make agreements regarding the exercise of parental rights, however, they opt for independent exercise (awarding independent custody mostly to mothers: 74%). In contrast to Serbian practice, in Sweden, in 2000-2001, joint custody was awarded

45 | Articles 75/2, 76 of FA.
46 | Boele-Woelki et al., 2007.
47 | Ковачек Станић, Самарџић and Ковачевић, 2017.

in 93% cases, whereas, independent custody in 7% cases (mothers as independent custodians in 75% of cases).[48]

There are two forms of child residence in cases of joint custody: alternating residence (residence with both parents) and mono-residence (with one parent). Alternating residence is considered to be in the best interests of the child as a statutory presumption (e.g., Sweden, Belgium, France); however, in most countries alternating residence is considered to be in the best interests of the child only if there is an agreement between parents. In certain countries alternating residence is considered to be in the best interests of the child even without an agreement between parents (Belgium, France, Sweden, England, Wales, Greece). The agreement has to be allowed by the competent authority (except Norway where there is no public scrutiny). It will be allowed unless it is clearly against the best interests of the child (Sweden, Belgium, France). In certain countries it is allowed as an exception, only if parents can establish it is in the best interests of the child (Spain, the Czech Republic). Nonetheless, alternating residence is not allowed in Bulgaria, Hungary, and Denmark. [49]

Commission on European Family Law in the Principles of European Family Law Regarding Parental Responsibilities, in Principle 3:20 (2) on residence states:

> The child may reside on an alternate basis with the holders of parental responsibility upon either an agreement approved by competent authority or a decision by competent authority. The competent authority should take into consideration factors such as: the age and opinion of the child. the ability and willingness of the holders of parental responsibility to cooperate, the distance between the residence of the holders of parental responsibility and to the child's school.

In a Serbian decision by the Primary Court of Subotica, the Court ordered alternating residence as follows: the child would reside three days with one parent and four days with the other.[50] In Sweden, alternating residence was awarded in 21% of cases, in 2005, and in the Netherlands in 20% of cases currently. In Switzerland, 40% of children after divorce were under joint parental responsibility with or without alternating residence, in 2010.[51]

Another form of living arrangement after divorce is 'bird nesting arrangement.' Under a bird nesting arrangement, the child remains in the marital home, while the parents move in and out of the home for their respective physical custody periods, thus affording the child the stability of 'nesting' in a permanent residence. Flannery (2004) indicates disadvantages of the bird nesting arrangement, simultaneously, acknowledging its advantages.

48 | Singer, 2008.
49 | Ковачек Станић, 2015.
50 | P. 2.461 [Online]. Available at: https://sudskapraksa.sud.rs/sudska-praksa/download/id/52532/file/odluka (Accessed: 12 December 2022).
51 | Singer, 2008; Bergman and Rejmer, 2017.

> The clearest disadvantage is that it is not financially feasible for many, if not most, couples. In a normal post-divorce joint custody arrangement, parents maintain two households – one for each respective parent. However, bird nesting requires that the parties maintain three separate residences – one for the child and one for each parent when they are not living with the child. Therefore, bird nesting is most likely only feasible for upper and upper – middle class families.[52]

In Serbian law, the State authority powers include a duty to examine the parental agreement regarding exercise of parental rights and to decide whether to accept it or not, based on a determination as to whether the agreement is in the best interests of the child. If there is no agreement, State authority powers include making a decision on the exercise of parental rights.

State authority powers considering parental rights include deprivation of parental rights. A parent who abuses his/her rights or grossly neglects duties that comprise a part of his/her parental rights may be fully deprived of parental rights. A parent abuses rights that comprise a part of parental rights: if he/she physically, sexually or emotionally abuses the child; if he/she exploits the child by forcing him/her to excessive labor, or to labor that endangers the moral, health or education of the child, or to labor that is prohibited by law; if he/she instigates the child to commit criminal acts; if he/she accustoms the child to indulge in bad habits; if he/she in any other way abuses rights that comprise a part of parental rights. A parent grossly neglects duties that comprise a part of parental rights: if he/she abandons the child; if he/she does not at all take care of the child he/she lives with; if he/she avoids to maintain the child or to maintain personal relations with the child he/she does not live with, or impedes the maintaining of personal relations of the child with the parent the child does not live with; if he/she intentionally and unduly avoids to create conditions for cohabitation with the child who is living in a social service institution for user accommodation; if he/she in any other way grossly neglects duties that comprise a part of parental rights. A court decision on full deprivation of parental rights deprives the parent of all rights and duties that comprise parental rights, except the duty of maintaining the child. A court decision on full deprivation of parental rights may prescribe one or more measures for protecting the child from domestic violence.[53]

A parent who exercises the rights or duties that comprise a part of his/her parental rights unconscionably may be partially deprived of parental rights. A court decision on partial deprivation of parental rights may deprive the parent of one or more rights and duties that comprise parental rights, except the duty to maintain the child. A parent who exercises parental rights may be deprived of the rights and duties of protecting, raising, upbringing, educating and representing the child, as well as of managing and disposing of the child's property. A parent who does not exercise parental rights may be deprived of the right to maintain personal relations with the child and of the right to decide on issues that significantly influence the child's life. The court decision on partial deprivation of parental

52 | Flannery, 2004.
53 | Article 81 of FA.

rights may prescribe one or more measures for protecting the child from domestic violence.[54]

In addition, State authority powers considering parental rights include corrective supervision over the exercise of parental rights performed by the guardianship authority. In performing corrective supervision the guardianship authority makes decisions that: warn the parents of deficiencies in the exercise of parental rights; refer parents for consultation to a family counseling service or an institution specialized in mediating family relations; request that parents submit an account on managing the child's property.[55]

Considering parental responsibilities, it is in the best interests of a child to have two parents (or persons) to take care of him/her. This potential interest can be examined in different family situations: natural birth, adoption, and conception using assisted reproduction technologies (ART). In situations of natural birth and adoption the child was already born, however, in situations of child's conception using assisted reproduction technologies it can be said the child is potential or future one. Family law considers the interest of a child to have two parents to take care of him/her, not explicitly, but by adopting different solutions which identify and meet this interest. These solutions are per instance: different possibilities for establishing parentage for the child born out of wedlock, priority to spouses or partners as adopters, reqirement that spouses or partners together have access to ART, only exceptionally single woman. If the child was born using ART, the solutions in comparative law are: supportive parenting as a condition that single woman must meet to have access to ART (UK solution),[56] maintenance obligation of the grandparents (some clinics in Germany require the single woman to name a person who will be responsible for the maintenance of the child, in most cases these are woman's parents),[57] right of a child to know the donor`s identity.[58]

5. Conclusion

Autonomy of the parties is broadened in contemporary family law. Apart from private initiative of each family member (parent and child) autonomy of family

54 | Article 82 of FA.
55 | Article 80 of FA.
56 | For implementing this requirement, the guideline in the Code of Practice states that '[w]here the child will have no legal father, the centre should assess the prospective mother's ability to meet the child's/children's needs and the ability of other persons within the family or social circle willing to share responsibility for those needs.' Human Fertilization and Embryology Authority, Code of Practice § 14(2) (b) (8th ed. 2017).
57 | In Germany ART is regulated by federal model of directions on ART, 2006, amended in 2017. Directions state that access to ART have spouses and partners. Access to ART is regulated by directions of medical boards in different provinces, as well (*Landesärztekammern*). However, practice differs from existing rules as certain clinics allow access to single women.
58 | Kovaček Stanić, 2021. For example, the right of a child to know the identity of a donor is introduced in Sweden, the United Kingdom, Austria, the Netherlands, Switzerland, and Croatia.

members to make decisions regarding family matters by mutual agreement and without the interference of the state acquires importance. This is found in exercise of parental rights. Parents have the autonomy to make decisions and arrange their relationship with a minor child not only during the marriage or partnership, but also after divorce or separation. Joint exercise of the parental rights extends parental autonomy, as the prerequisite for awarding joint exercise of parental rights by the court, according to Serbian law, is the existence of the mutual agreement of the parents provided that the court is satisfied that this agreement is in the best interests of the child. Thus, state authority powers are correcting factor in this legal situation.

Child autonomy is broadened in contemporary family law. For example, child has a right to participate in the decision-making in important matters concerning him/her and holds independent rights. In a family which is stable and functioning well, the rights of the child should not cause any conflict between parents and children, but should help parents to understand and bear in mind children's wishes to find the solution which would be in the best interests of their children. However, if the parents are not capable of taking care of their children and act in their best interests, the provision for independent rights of the child would be useful for the court or other institution to make a decision in the best interests of the child. The limitations to parental rights with respect to their children, by broadening child's rights and prohibiting humiliating actions and punishments that insult child's human dignity, promote a modern, democratic, less paternalistic family model. Parental autonomy might be limited by State authority powers particularly by depriving parents of parental rights. However, it is noteworthy that state interference in family life should be limited and exercised in the best interests of a child.

Regarding child status (maternity and paternity) parental autonomy exists in different ways. The situations that depend almost entirely on the will of the parties concerned are the acknowledgment of paternity and the possibility of anonymous birth. Autonomy of the parents acquires importance in situations of biomedically assisted conception if donor genetic material is used, as legal parental relations are based on the will of parties, therefore, the principle of biological truth loses importance. Legal parents would be persons who participate in the process of biomedically assisted conception to produce a child, not necessarily having genetic link with a child. Child's autonomy concerning maternity and paternity is exercised in child's right to initiate (or not) court proceedings for establishing or contesting maternity and paternity. The State authority powers in the court proceedings for establishing and contesting maternity and paternity include court obligation to respect and establish the truth of biological origin of the child, which may be achieved using DNA and other biomedical evidence.

It is noteworthy that new practices such as 'sharenting,' 'elective co-parenting,' and alternating residence of a child, are situations, where parental autonomy is exercised in contemporary family relations.

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THE RIGHTS OF THE CHILD AT RISK

Zdeňka Králíčková*

ABSTRACT

Mainly thanks to the United Nations Convention on the Rights of the Child, its philosophy, ideas and principles, the Czech legal order was changed in early ´90 and later on, in connection with the Civil Code in 2012. The child is no longer conceived as a passive object of his or her parents´ activities, their parental responsibility, but as an active subject with legally guaranteed rights. However, not only 'law in books' is relevant. There is still 'bad practice' connected with anonymous or hidden child delivery, abandoning new born children in 'baby-boxes' and older children in institutional care, although the state has attempted remedies. Besides, the number of divorces has increased in the Czech Republic over the last couple of decades, while in the last few years there are more marriages, and the divorce rate is no longer so alarming. However, the statistics reveal that minor children have not been an 'obstacle' to a 'radical termination' of the matrimonial bond.

The article aims at finding an answer to the question whether abandoning an unregistered child or applying for hidden identity by his or her mother makes the 'way' of the child to a substitute family by adoption easier. Further, an attention is paid to surrogate motherhood. These topics are linked to the right of the child to know his or her origin. As the harmony between biological, social and legal parentage and the model of 'continuing' parenting are values, the well-balanced rights and duties of both the child parents and the best interest of the child are stressed. The final words are focused on alternative measures and interdisciplinary collaboration, besides public law instruments.

KEYWORDS

child
not registered
abandoned
misused
participation
continuing parenting

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1. Introduction

The United Nations Convention on the Rights of the Child—a Magna Carta of the rights of the child—has been a part of the legal order of the Czech Republic since 1991 (published under No 104/1991 Sb., hereinafter 'CRC'). Thanks to this significant achievement, the Czech legal order had to be greatly adapted according to its philosophy, ideas, and principles in early 1990 and later, namely by passing the amendments to the old law, especially to the Act on Family from 1963 (Act No 94/1963 Sb. as amended by the Act No 91/1998 Sb.), and by adopting the public law called the Children Act (Act No 359/1999 Sb., on Socio-Legal Protection of Children).[1] However, substantial changes in this field were made in connection with the Civil Code in 2012 (Act No 89/2012 Sb., effective since January 1, 2014, hereinafter 'CC'). The incorporation of family law into the main source of private law is significant.[2] The admission of the new concept of parental responsibility,[3] conceived according to the international conventions and in harmony with the Principles of European Family Law by the Commission on European Family Law[4] must be highlighted.[5] In the light of this perception, the child is no longer conceived of as a passive object of their parents' activities but as an active subject with legally guaranteed rights.

Moreover, thanks to the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic, much has already changed, from legislation to practice. First, it must be noted that the reason for removing a child from their family may no longer be the inadequate 'housing conditions' or 'financial circumstances' of the child's parents. The Civil Code also states that the removal of a child from the family must be preceded by milder measures such as a warning to the parents or supervision of the family, including active social work. The removal must be taken as *ultima ratio* and realized only by the court.

Following long-standing criticisms of bad practice, the Czech legislator has attempted further remedies, in particular by trying to reduce the number of children in institutional care in favor of foster family care, e.g., even by financial support for foster care provided by the child's grandparents. However, the main goal of the state's pro-family policy is to gradually eliminate care for young children in nurseries and similar institutions.[6]

Besides, there have been social and economic changes in the Czech Republic, like everywhere else in Europe and in the world. There is no denying that those changes were all positive.

1 | Hrušáková and Westphalová, 2011.
2 | Králíčková, 2014a; Králíčková, 2021a.
3 | Králíčková, 2022.
4 | For details, Commission on European Family Law [Online]. Available at: www.ceflonline.net (Accessed: 20 July 2022).
5 | Králíčková, 2021b.
6 | Report on the Family from 2020 by the Ministry of Labour and Social Affairs [Online]. Available at: https://www.mpsv.cz/documents/20142/225508/Zpr%C3%A1va+o+rodin%C4%9B+2020.pdf/c3bdc63d-9c95-497d-bded-6a15e9890abd (Accessed: 20 July 20 2022).

According to the annual statistics, a very high number of children are born out of wedlock in the Czech Republic.[7] In some cases this is planned, in others it is a 'misfortune of life.' It is a well-known fact that there has been an increase in cases where the child's father is not legally determined before the birth. Therefore, there are many 'fatherless' children, especially of mothers who have only basic education, who are on the edge of social exclusion, and at the poverty line. Unfortunately, social and other reasons sometimes lead single mothers to abandon their child and leave them in the 'baby-boxes',[8] immediately after birth, or to signing an application for hidden birth in hospital under the law (for details, see below).

Without the determination of a mother-child status relationship, or in connection with its endangerment, it is absolutely difficult to establish the paternity and kinship of the child. A child whose civil status is in question, has no extended family, and cannot be in the care of their relatives, e.g., in foster care. The question is whether all these children from baby-boxes and hidden births manage to find substitute families through adoption. There is no solid research on this matter.

In addition to the low marriage rate, the number of divorces has paradoxically increased in the Czech Republic over the last couple of decades.[9] In the long term, this is an undesirable phenomenon, although in the last few years, an increase in marriages has been observed and the divorce rate is no longer so alarming. However, statistics reveal that minor children have not been an 'obstacle' to a 'radical termination' of the matrimonial bond, which is why minor children cannot be effectively protected against the divorce of their parents. Moreover, divorce is no longer stigmatized, but is considered a dignified solution to a difficult life situation. It is therefore appropriate to look for new ways to resolve family law conflicts and crises, whether through mediation or interdisciplinary cooperation between the courts and other entities. Additionally, there is a need to support parents who agree on 'continuing' parenting and not persist with the models that the courts and society in general have established over the years. As a rule, the child's parents must be held accountable for what is in the best interests of their child.

It is no secret that there are some parents who have themselves lived in dismal, inadequate, or poor family circumstances or even in substitute care (home for children). They are sometimes unable or unwilling to provide a healthy and happy childhood to their children. Many cases of pathology—the above-mentioned abandonment or uncertain legal position of children from the very beginning, intended motherhood without a 'legal' father, instability of co-existence of married or *de facto* couples with minor children, sometimes even domestic violence and child abuse and neglect—impair the position of minor children both actually and legally in the Czech Republic. Even after the passage of the new Civil Code in 2012, the

7 | See Statistical Yearbook of the Czech Republic – 2021 [Online]. Available at: https://www.czso.cz/csu/czso/statistical-yearbook-of-the-czech-republic-rtnih2q42g (Accessed: 30 July 2022).
8 | For more BabyBox[Online]. Available at: http://www.babybox.cz/ (Accessed: 15 July 2022).
9 | See Statistical Yearbook of the Czech Republic – 2021 [Online]. Available at: https://www.czso.cz/csu/czso/statistical-yearbook-of-the-czech-republic-rtnih2q42g (Accessed: 21 July 2022).

topic of the child´s rights at risk has been and is still being worked on and remains relevant.[10]

The following lines aim at finding an answer to the question whether abandoning an unregistered child or applying for hidden identity by their mother makes the 'way' of the child to a substitute family by adoption easier. Further, attention is paid to surrogate motherhood. These topics are linked to the right of the child to know their origin. As the harmony between biological, social, and legal parentage and the model of 'continuing' parenting are valued, the well-balanced rights and duties of both the child's parents and the best interest of the child are stressed in parts devoted to this issue. The final words focus on offering alternative measures and interdisciplinary collaboration, besides public law instruments. It will be stressed that the child must be guaranteed the protection of their rights, including the right to preserve identity and family ties, where possible, and participatory rights.

2. On the rights of the unwanted, unregistered, and abandoned child to motherhood and family ties

2.1. According to the Convention on the Rights of the Child, every child has the right to be registered immediately after birth. This means that the book of births and the birth certificate must, as a matter of principle, indicate who the child's mother and father are (in addition to the date of birth, name, surname, sex, etc.). The child has the right to know their parents and be under their care, as far as possible.[11] The state must not create or blindly tolerate any obstacles that enable the separation of the child from their parents or relatives.[12] Care by relatives in the family environment should take place before adoption by foreigners or abroad.[13] The principle of the best interest of the child should be applied when taking all the measures and shall be a primary consideration.[14]

In this relation, it is necessary to consider the status conception of motherhood in the Czech Republic. The ancient Roman law principle of *mater semper certa est,* respecting the incident of birth, has been traditionally considered the basis for creating the status relationship of mother-child, although it was expressly introduced into the Czech legal order only in 1998. The Civil Code from 2012 builds on this concept and explicitly states that 'the mother of the child is the woman who gave birth to the child'[15].

2.2. It may be interesting to note that during the preparation of the Civil Code, the necessity of regulating surrogate motherhood was not originally discussed. The

10 | As for the problems and their solutions under previous legislation, see earlier Králíčková, 2014b.
11 | Article 7 Subsection 1 of CRC.
12 | Article 9 of CRC.
13 | Articles 20, 21 of CRC.
14 | Preamble, Article 3 Subsection 1 of CRC.
15 | Section 775 of CC.

aim of the drafters of the Civil Code was to follow the above-mentioned principle of the origin of the child from the mother who gave them birth and to expressly state that 'an action of the genetic mother against the mother who gave birth to the child cannot be successful.'[16] Nevertheless, this 'addendum' was deleted and a provision 'against' surrogacy was not included in the final version of the Civil Code. It is a pity that the ministerial team turned away from the original aim of the drafters and many co-operators did not deal with this issue in more detail, as was done in the Slovak Republic.[17] However, the 'prohibition' of private law surrogacy agreements is derived from the general part of the Civil Code, which states that 'stipulations contrary to good morals, public order, or the law concerning the status of persons, including the right to protection of personality, are prohibited'[18].

It must be added that the term 'surrogacy' is recognized in the Civil Code. Additionally, this terminology was included in the government bill in spite of the express disagreement of many experts and main drafters. This terminology is used in the context of regulation of adoption. The Civil Code states that 'adoption is excluded between persons related to each other in the direct line and between siblings. This does not apply in the case of surrogacy'[19].

It is common knowledge that surrogacy occurs in the Czech Republic with the silence of the legislator. We emphasize that the special act makes it possible to carry out assisted reproduction only with an infertile couple.[20] Artificial insemination of a surrogate mother in health service provider facilities has thus been ruled out of law and must not be covered by the state health insurance system. Court practice shows that if there are informal private law surrogacy agreements among the relatives, conception usually takes place in the natural manner, which may sometimes disrupt a fragile family situation.

It is appropriate to ask how 'intended' parents can get an ordered child[21]? If we exclude an exchange of the identity cards of the 'legal' mother and the 'intended' mother, adoption is the only option. As mentioned above, the 'legal' mother of the child is the woman who—even if on order—gave birth to them.[22] After giving birth, she may consent to the adoption of her child. Let us emphasize that due to international conventions the consent is only valid after the expiry of puerperium and may be withdrawn! For details, see below. If the promises on both sides are kept, a direct adoption without the necessity of procuring one may be implemented. However, if the mother who gave birth to the child fails to keep her promise to consent with the adoption and hand the child over to the 'intended' parents, the adoption does not take place, and if the 'intended' parents change their minds and refuse to adopt the child, their decision must be fully respected.

16 | See Eliáš and Zuklínová, 2001, p. 167.
17 | Section 83 of Act No 36/2005 Z. z., the Slovak Act on the Family. For more, see Pavelková, 2001, pp. 504 et seq.
18 | Section 1 Subsection 2 of CC.
19 | Section 804 of CC.
20 | Section 6 of Act No 373/2011 Sb., Act on Special Health Services.
21 | An ordered child is a child they wished and have asked the surrogate mother for, the child is the object of the contract.
22 | Section 775 of CC.

During the fairly long process of adoption, there can be a number of twists and turns and unexpected problems. However, there are no known 'cases of child litigation' from current court practice and no official statistics are available. If there was a 'dispute' over the child, the 'legal' mother of the child would be the woman who gave birth to the child, regardless of any egg or embryo donation, which is based in a standard situation on the anonymity of donors.

In summary, we hold the view that uncertainty for the 'surrogate' mother and the 'intended' mother constitutes uncertainty for the child from the very beginning. There is a trivialization of the fact that a 'legal' mother or a 'surrogate' mother is instrumentalized, that her womb is factually leased for considerable financial amounts, and that the human embryo is degraded to a mere subject-matter of a contract.

2.3. In the context of the issue of motherhood, it is worth mentioning the long-time criticism of the Czech Republic by the United Nations Committee on the Rights of the Child regarding the reality of baby-boxes.[23] Unfortunately, even some experts and the general public have tolerated the abandonment of unwanted babies in these places, referring to idealistic concepts aimed at preventing murders of newborns.[24]

As already stressed in the introduction, there has been an increase in the number of private baby-boxes, i.e., places for putting away unwanted children at the premises of maternity hospitals established and financed by a private initiative, the foundation Statim, since 2005. The statistics from July 2022 indicate that there were 82 of them located throughout the country and 239 babies have already been left there.[25] It is crucial that children from the baby-boxes have a status similar to that of a 'found' child, even if the former is not legally regulated. The children from baby-boxes have neither mother nor father. Of course, the police have to search for the child's parents, as the child has the right—at least theoretically—to know their origin and identity. The search is usually fruitless. Nevertheless, in some cases mothers change their minds about abandoning their children and seek to have the children in their care and register them in the book of births.

As for adoption, the children from baby-boxes are 'legally' free and therefore immediately 'available' for adoption. However, the persons interested in adoption very often want information about them or their family medical histories. It is no secret that the state of health of these children is often problematic, as their mothers had to conceal their pregnancy by giving birth in secret places and under unsuitable conditions, by self-help, and so on.

To summarize, we may only add that in such cases the children cannot be denied the right to bring a status action for determining motherhood if they have any idea who their mother is. However, no such court cases are known to date.

2.4. As for the principal negative elements of the Czech legal order concerning motherhood, it is necessary to point out the special legal possibility pursuant to

23 | See Committee on the Rights of the Child reviews report of the Czech Republic [Online]. Available at: https://www.ohchr.org/en/press-releases/2011/06/committee-rights-child-reviews-report-czech-republic (Accessed: 15 July 2022).
24 | For the criticism see Zuklínová, 2005, pp. 250 et seq.
25 | See BabyBox [Online]. Available at: http://www.babybox.cz/ (Accessed: 15 July 2022).

which the single adult mother with a permanent residence in the Czech Republic has a right to 'hide' her identity in connection with birth. This relatively simple 'way' to 'get rid of' a child was adopted at the initiative of a small group of MPs in 2004 without going through the standard legislative process (by Act No 422/2004 Sb.). Unfortunately, this conception was later taken over in 2011 by the Parliament.[26] According to the Act, the child whose mother wants her personal data not to be revealed at birth has a 'legal' mother, however, the child does not know her identity. The child may demand that 'an envelope with their mother's personal data' be opened, for example, in court proceedings on determining parenthood.[27]

If the adoption of a child from a hidden birth is at issue, then the situation is more than precarious. We have to start with the fact that a child from the hidden birth has a 'legal' mother. It is crucial that the family of origin of a child enjoys increased protection, and adoption and other forms of an alternative family upbringing and substitute family care are really understood as subsidiary to care in the family of origin. Furthermore, according to the Civil Code, the 'legal' mother may only consent to the adoption of her newborn child after the expiry of puerperium. In practice, it often happens that mothers abandon their children after birth; they are not interested in the child and thus do not come to give their consent to adoption. If a 'legal' mother does not consent or is indifferent to the child's future, then the court decides that she 'is not interested,' as the law defines the unconcern with child, which is examined in the special procedure called proceedings on adoptability. The state authority can then start administrative proceedings on procuring the adoption of the child. For details, see below, 2.5.

In conclusion, we may only criticize the meanings of such haphazard and non-conceptual acts as creating a completely unsatisfactory state undermining pro-family conduct and disrupting the statutory law.[28]

2.5. To complete the picture, some information about the adoption of minor children in general is discussed as follows. The Civil Code protects the mothers against impetuous or immature actions while also protecting their underage children or their right to live in their family of origin in harmony with the above-mentioned principles of the Convention on the rights of the child. We emphasize that the previous legal regulation and the current Civil Code also guarantee full protection to underage parents.[29] Therefore, it is expressly set down that the consent of a parent, or parents, is the fundamental requirement for adopting a child. However, the right to give consent to the adoption does not belong to the scope of parental responsibility.

The law distinguishes two types of consent, namely:

(a) direct consent, which is given by a 'legal' mother in court proceedings on adoption after the expiry of at least 6 weeks since the birth of the child[30] and by a

26 | Section 37 of Act No 372/2011 Sb., Act on Health Services.
27 | Section 783 of CC.
28 | See Hrušáková and Králíčková, 2005, pp. 53 et seq.
29 | Section 811 of CC; Králíčková, 2003.
30 | Cf. Section 813 the first sentence of CC.

'legal' father after the child's delivery (only if the fathership is legally established[31]); however, there is a possibility to withdraw consent within 3 months; direct consent is used in case of surrogacy or adoption by a step-parent, for instance;

(b) blank or indirect consent given by a 'legal' mother after the expiry of at least 6 weeks since the birth of the child and by a 'legal' father after the child's birth (if he is legally established), with the same possibility of withdrawal as above; then the administrative proceedings on procuring the adoption by the state may start; blank consent is used in the case of adoption by strangers.[32]

As mentioned above, if 'legal' parents do not consent or are indifferent to the child's future, the court decides in the special procedure of proceedings on adoptability.[33] The participants in the proceedings on adoptability are the 'legal' parents and the child. If the court finds their unconcern (according to Sections 819 and 820 of CC), the child does not become 'legally' free, but adoptable. They may be put on the list of children eligible for adoption and an administrative body may start proceedings on procuring the adoption. Provided that suitable adopting parents are found for the child, the interested couple may ask for the child to be placed in obligatory preliminary care for at least six months.[34] If the care is 'successful,' the couple interested in adoption may file a motion with the court for the adoption of the child. Only the interested couple and the child will be participants in the proceedings on adoption. It is important that the child's parents no longer be participants in the proceedings, as the court had already decided their unconcern in the proceedings on adoptability.

In general, the legislation of both direct and indirect adoption of minor children regulates only full adoption in accordance with the principle of *adoptio naturam imitator*. The adopted child will become a member of the new adoptive family when the court decision becomes final. All ties to the family of origin cease, including maintenance obligations and any inheritance rights.[35] Registration in the book of births and issue of the new birth certificate is necessary. The child's surname is changed to the surname of the adoptive parents.

However, the myth of the anonymity of adoption is common knowledge, despite the fact that the special regulation provides that anyone affected by the registration and their family members has in principle the right to inspect not only the book of births, but also the collection of documents. In the case of adoption, the adoptive parents and, after the age of 12, the adoptee may consult the collection of documents, unless the court has decided to keep the adoption secret, in which case the adoptee may consult the collection of documents only after they have acquired full legal capacity.

In the event of hidden birth, after the age of 12, the child may consult the collection of documents kept for the registration of the birth of a child whose mother has requested that her person be kept 'secret' in connection with the birth.[36]

31 | Section 813 the second sentence of CC.
32 | Králíčková, Hrušáková and Westphalová, 2022.
33 | Section 821 of CC.
34 | Sections 826 et seq. of CC.
35 | Sections 794 et seq. of CC.
36 | Section 8a of Act No 301/2000 Sb., Act on Vital Registers, Name and Surname.

3. On the rights of the child to fatherhood and family environment

3.1. As for paternity, current theory and practice do not often deal with the question whether insisting on strict statutory law based on traditions protects fatherhood, be it biological or social. Even less frequently is the question posed whether by insisting on the old conception, the rights and legally protected interests of the child are not infringed, especially the right of the child to know their origin. However, the legal concept of fatherhood in the Civil Code does not basically differ from the conception of earlier European regulations that established legal presumptions of paternity and were created at the time when the legitimacy of a child born out of wedlock was highly valued and when methods of assisted reproduction as well as paternity tests were at their beginnings. The rights of the child were taboo, as were human rights in general.

The legal regulation of the determination of fatherhood is based on three traditional legal presumptions based on likelihood.[37] There are not many innovations in the Civil Code in this respect, except those inspired by the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic. Regarding statutory law, the first presumption is in favor of the mother's husband, if the child is born out of wedlock or within 300 days since its termination.[38] The second presumption respects the autonomy of will of the child's parents and is in favor of the man who has stated, together with the child's mother, that he is the father of her child.[39] The third presumption is based on sexual intercourse in the critical period: The father of an unmarried woman's child is considered to be the man who had sex with her within the period of 160 days before the birth and not exceeding 300 days before the birth, unless his fatherhood is excluded for serious reasons.[40]

Thanks to the jurisprudence of the European Court of Human Rights concerning Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Czech legal order enables putative parents to become 'legal' fathers even against the will of the child´s mothers. Additionally, law gives the 'legal' fathers determined by the courts on the motion of the child´s mothers against the men´s will, in years when DNA testing was not available, the possibility to disprove their fathership.

Following the case of Keegan vs. Ireland,[41] the lawmaker introduced in the year 1998, provisions aiming at strengthening the status of the man who thought himself to be the child's father even against the will of the mother who had given consent to the adoption of the child in the given case. The active legitimacy of the

37 | Sections 776–793 of CC.
38 | Section 776 of CC.
39 | Section 779 of CC.
40 | Section 783 of CC.
41 | ECHR, judgment from May 25, 1994, No 209.

putative father to bring an action for determining paternity was introduced, and in addition, the law then set forth that a child must not be adopted until the proceedings on determining paternity initiated by the putative father have finished. The current Civil Code, similarly, being built on this change, allows the father to petition the court to establish paternity[42] with the provision that the child may not be adopted until paternity has been adjudicated.[43]

In the case of men determined to be the 'legal' fathers of children according to the third presumption at a time when DNA tests were not available,[44] their situation was unresolved and unsustainable for years. This certainly had an indirect adverse impact on the children, whose legal status did not correspond to biological and social reality. Therefore, the findings in the case of Novotný vs. Czech Republic[45] were welcomed by the professional and lay public. The legislator was subsequently forced to enshrine the possibility of retrial, thus allowing these men to have their paternity annulled.[46] This remedied many 'wrongs' but also meant that now adult children can seek to establish paternity against men who fathered them. Additionally, this case law followed the previous conclusions expressed in the case Paulík vs. Slovakia,[47] especially the sentence as follows:

> when denying paternity, the lack of a procedure for bringing the legal position into line with the biological reality flew in the face of the wishes of those concerned in the given case and did not in fact benefit anyone.

The case had a direct impact on Slovak procedural law as well, as the possibility of retrial was established.[48]

To summarize, the changes in legal order mentioned above also strengthened the rights of the child to know their father, family of origin, and on so. Biological or genetic parenthood and social parenthood are of great importance for children as well, which is why it is necessary to respect the balance between legal, biological, and social parenthoods.[49]

3.2. As regards the right of the child to know their origin, it is necessary to stress that a child may seek a determination of paternity under the third presumption at any time during their lifetime, even against the wishes of their 'legal' mother and putative father. In connection with the above, it should be emphasized that the child may do so only if they have no 'legal' father, i.e., if the line 'father' is blank on the birth certificate. This refers to a situation where the child has been born out of wedlock and paternity has not been voluntarily established by a

42 | Section 783 of CC.
43 | Section 830 of CC.
44 | Section 783 of CC.
45 | ECHR, judgment from June 7, 2018, No 16314/13.
46 | New Section 425a of Act No 292/2013 Sb., Act on Specific Civil Law Proceedings as amended by the Act No 296/2017 Sb.
47 | ECHR, judgment from October 10th, 2006, No 10699/05.
48 | New Section 228 Subsection 1-d of Act No 99/1963 Z.z., former Slovak Civil Procedural Code as amended by the Act No 341/2005 Z.z. ECHR from October 10th, 2006, No 10699/05.
49 | Králíčková, 2008.

consensual declaration of the child's parents under the second presumption, or the first or second presumption has been rebutted in court at the request of the child's parents.

Regarding negatives, the position of the child as a party in court proceedings for establishing or denying paternity is more or less formal. The fact that DNA tests are currently ordered as a rule in these proceedings and that the legal parentage determined by the court under the third presumption thus corresponds to the biological parentage is to the child's advantage. However, a child, whether minor or adult, has no right to 'oppose' the determination of paternity by a consensual declaration of will by their parents under the second presumption and thus prevent the establishment of a 'legal' status that would not correspond to biological and social reality.

To the above, it should be added that unfortunately, the child's right of denial of paternity 'disappeared' from the draft Civil Code even if the explanatory note expressly mentioned its establishment in connection with the intended subject-matter, principles, and the bases.[50] By preserving the legal situation based on the first and second presumptions, the lawgiver did not give the child a chance to realize their interests in finding out their origin and bringing their biological reality in line with the 'legal' status. We may imagine a situation where the interests of the mother, the father, and the child are mutually in conflict and it is necessary to look for a solution. The fact that the child cannot directly seek the denial of paternity impedes them from establishing a legal relationship with the man who conceived them and who would fulfill his role of social father if he had knowledge of his paternity.

The presumptions mentioned above and the periods of lapse for their denial primarily protect mothers, who usually know best who the fathers of their children are. The interests of the child may be in conflict with the interests of the mother. Thus, it cannot be said that by protecting mothers the law simultaneously protects the children.[51]

4. On the rights of the child to continuing care by separating parents

As mentioned above, many children are born out of wedlock in the Czech Republic and *de facto* units with minor children are very unstable, if the parents of such children have managed to establish cohabitation. In addition, many marriages of parents of minor children are in crisis and are moving toward separation

50 | Eliáš and Zuklínová, 2001, p. 168, where the authors state that the new legal regulation will be supplemented with 'the right of a major child to deny paternity (resulting from the right of a person to know their biological origin).'
51 | Králíčková, 2011.

and divorce. It is undoubtedly in the best interests of minor children that the breakdown of their parents' relationship should affect their circumstances as little as possible.

The child's right to both parents can be found in the Convention on the Rights of the Child. There is the recognition of the principle that both parents have common responsibilities for the upbringing and the development of the child enshrined there.[52] It must be stressed that if the parenthood is legally established and both the parents are holders of parental responsibility and are allowed to exercise all the duties and rights belonging to its scope, then 'continuing' parenting should be the aim of the post-separation or post-divorce arrangement, and then it does not matter how the custody (personal care) be arranged. The parents must exercise the duties and rights arising from parental responsibility in accordance with the best interests of the child, their well-being, and with respect to their participatory rights.[53]

Following extensive case law of the European Court of Human Rights, the Czech Constitutional Court has also held that a child has the right to qualitative equal care from both the parents if the child cannot live with them as before the breakdown of the family environment. It is not decisive that the Civil Code distinguishes between different forms of custody (personal care) for minor children when regulating joint custody, alternating custody, and exclusive custody. It was the Constitutional Court of the Czech Republic that stated in its jurisprudence that there are no established models for family life and therefore it is not possible to create and preserve them.[54] If both the parents of minor children are competent, interested in the care of their children, and able to reach an agreement, their arrangement should be respected. If the parents had demonstrated their parenting skills, then they should be trusted to be good parents even after their separation. It has also been ruled that alternating custody does not have to be balanced, as it is not the quantity but the quality of the time the minor child spends with each parent.[55] Most recently, it has been held that even greater distance between the new homes of the parents of minor children may not be an obstacle to alternating custody. After all, if contact (visiting rights) with the non-custodial parent were to take place, the child would have to travel the same distance.[56]

However, regarding divorcing parents, the Civil Code provides the condition that if the married couple has minor children, the judgment on divorce must be preceded by the decision on the relation to the minors for the post-divorce period.[57] In the case of a post-divorce arrangement of the relationship of the agreed parents to the joint minor children, it is obligatory to approve an agreement on personal custody and maintenance, and optionally on visiting rights between the child and the non-custodial parent by the court.[58]

52 | Article 18 of CRC.
53 | Šínová, Westphalová and Králíčková, 2016.
54 | Constitutional Court, judgement from January 20th, 2005, No II. ÚS 363/03.
55 | Constitutional Court, judgement from May 26th, 2014, No I. ÚS 2482/13.
56 | Constitutional Court, judgement from May 3rd, 2022, No I. ÚS 3065/21.
57 | Section 755 Subsection 3 of CC.
58 | Trávníček, 2015.

There is currently a proposal by a group of deputies in the Parliament of the Czech Republic regarding this issue in relation to the previous pending draft put forward before the last elections in 2021.[59] Its aim was to make the situation of divorcing parents of the minor child equal or at least similar to the position of the non-married parents of a minor child who separated without intervention by the state, thanks to a mutual non-formal agreement. The previous pending draft was based on the opinion that the parents of the minor child know their child very well and seek to follow the best interest of the child even when separating. Should the draft be passed, the divorce of a husband and a wife—who can agree on divorce, on the consequences of divorce for property and dwelling, and on the post-divorce arrangement regarding their minor children—would be amicable, smooth, and quick. The divorcing couple would have to submit to the judge only the common motion for granting the divorce, the property and dwelling contract, and the agreement on minor child regarding custody, maintenance, and, as the case may be, visiting rights. The judge dealing with the divorce would not have to approve either the property contract or the agreement on custody and maintenance toward the minor children. However, his proposal was not adopted. It would be bold to anticipate legislative developments in this parliamentary term, as there is no official governmental draft or statement. Some liberalization of divorce law is undoubtedly in order, but the fact that a minor child would not be a properly represented party in any proceedings can be considered a weak point of the proposal.

5. On the rights of the child and alternative forms of solution to family conflicts and public law protection

In family law matters, due to the usually very highly tense emotional environment, it is necessary not only to find ways to immediately resolve family conflicts by court decision, but also pay attention to preventive action in an effort to avoid their escalation and chaining. Emphasis must also be placed on promoting the responsibility of the minor child's parents and seeking to find means for them to resolve their conflicts themselves with respect to the best interests of the child and their participatory rights. As a rule, such support cannot be provided effectively enough by the court, as its main task is to decide the conflict authoritatively. However, it may be provided by third parties in out-of-court conflict resolution procedures, especially in cases of disagreement between the minor child's parents.

59 | The new proposal in the Parliament of the Czech Republic was lodged by only 22 deputies. For details, see the Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. 9, Draft No. 40/0. It was based on the concept of the previous one; for more, see the Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. 8, Draft No. 899/0.

Mediation plays an important role in the out-of-court settlement of family disputes. The relatively recent adoption of a special law was therefore welcomed by professionals and the lay public (Act No 202/2012 Sb., on Mediation). The Mediation Act defines mediation as a procedure for resolving a conflict involving one or more mediators who promote communication between the persons in the conflict so as to help them reach a friendly solution to their conflict by concluding a mediation agreement. The Mediation Act also defines family mediation as activities aimed at resolving conflicts arising from family law by registered mediators specialized in this field.

For the effective resolution of family law matters, especially parental conflicts, there are also certain uncoded rules that are used in court proceedings and aim to end them quickly following current 'interdisciplinary cooperation,' with an emphasis on supporting parents to seek an amicable solution. One case of these rules is the Cochem practice.[60]

Moreover, let us add that the private law provisions of the Civil Code are supplemented by public law regulation. As mentioned above, the key source of law is the Children Act.[61] This piece of law is based on the public interest in the protection of children and on generally accepted values. It is universally acknowledged that the state has primarily a 'negative' obligation not to interfere in family life, but with due regard to the principle of the best interests of the child and their welfare, it is sometimes necessary to 'intervene' in very fragile family relationships. The case law of the European Court of Human Rights speaks about a 'positive' obligation to protect family life. It is then always necessary to respect the principle of proportionality of the aim and the means. In doing so, the state and its institutions must always proceed from less invasive interventions to more radical ones. Above all, everybody must respect the child's right to live with their parents (and *vice versa*) in the family of origin.[62] Therefore, the child may be removed from the family environment only under the law, by competent authorities, and for a strictly necessary period. Unfortunately, beside the criticism of the Czech Republic by the United Nations Child Rights Committee regarding the reality of baby-boxes (see above), many critical words have also been expressed in relation to the overuse of institutional care.[63] As was stressed in the introduction, the main goal of the state's pro-family policy is to at least gradually eliminate care for young children

60 | For details see COCHEM.CZ [Online]. Available at: https://www.cochem.cz/ (Accessed: 23 April 2022).

61 | Krausová and Novotná, 2006.

62 | For details see Králíčková, 2010, pp. 829–840.

63 | See UN Child Rights Committee issues findings on Czech Republic, Eswatini, Poland and Switzerland [Online]. Available at: https://www.ohchr.org/en/press-releases/2021/09/un-child-rights-committee-issues-findings-czech-republic-eswatini-poland-and-switzerland – Geneva – September 30, 2021 (Accessed: 15 July 2022). The Committee on the rights of the Child remained concerned about the high rates of institutionalization of children, particularly those with disabilities. It recommended that the State party adopt a comprehensive national policy to phase out institutionalization and support community or family-based options to take care of children in need, paying particular attention to children with disabilities, Roma children, and children under the age of three.

in nurseries and similar institutions and support foster care, even if by the child's close relatives.[64]

6. Conclusion

As has been hinted above, a minor child is often endangered due to an objectively unfavorable situation and pathological conduct of their parents. The reality of surrogacy is a global problem that introduces a number of questions regarding status issues and creates considerable uncertainty for many children. As for the legalizing of hidden births by special act and tolerating the existence of baby-boxes, both possibilities give mothers rights regardless of their children's rights and legally protected interests. Fathers' rights are often omitted completely. The question arises whether the adoption of these children by strangers is always in the best interests of such children.

The situation of minors endangered by the conflicts of their parents creates a number of problems in practice as well. This benefits no one—especially the endangered minor children.

In view of the above, it should be noted that it is necessary to protect minor children because of their immaturity, sometimes even against their parents or their decisions.[65] Besides private law concepts, there are public law options that have generally been welcomed and present a relative novelty. In addition to a range of social benefits for single mothers, the legal order enables the courts and authority for the socio-legal protection of children to impose on the parents the duty to secure professional help or attend mediation. If the situation requires it, the authority may, and indeed must, submit an application to the court to take appropriate protective measures, and if the situation is serious, the court may, and indeed must, modify the scope of the parental responsibility of the parents.[66] In extreme cases, the court shall deprive the parents of parental responsibility[67] and even apply criminal law sanctions. If the child's health and life is in danger, the court also may, or must, order removal of the child from the parents and place them into some other form of substitute family care, preferable by close relatives, the child's grandparents or adult siblings, etc.[68]

Contrarily, regarding separating and divorcing parents or parents of minor children who were initially in conflict, their voluntary agreement or an arrangement reached through mediation or interdisciplinary cooperation that respects the best interests of minor children is undoubtedly a great value to be encouraged

64 | Report on the Family from 2020 by the Ministry of Labour and Social Affairs [Online]. Available at: https://www.mpsv.cz/documents/20142/225508/Zpr%C3%A1va+o+rodin%C4%9B+2020.pdf/c3bdc63d-9c95-497d-bded-6a15e9890abd (Accessed: 20 July 2022).
65 | Hrušáková, 1993.
66 | Section 870 of CC.
67 | Section 871 of CC.
68 | See Radvanová, 2015.

and respected. The parents usually know very well what is best for their children.[69] It is up to them to decide how their minor children will be protected within exercise of the duties and rights pertaining to their parental responsibility with full respect for the rights, opinions, and wishes of their children. This approach shall also fulfill the main aim and purpose of the Convention on the Rights of the Child as expressed in the Preamble, and in particular in its key provision by the words 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'.[70]

69 | For more, see Králíčková, Hrušáková and Westphalová, 2020.
70 | Article 3 Subsection 1 of CRC.

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THE IMPLEMENTATION OF THE CHILD'S RIGHT TO BE HEARD: THE SLOVENIAN VIEW

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ABSTRACT

The Convention on the Rights of the Child represents a crucial international instrument related to children's rights. Article 12 enshrined children's right to express their views or be heard. Right to be heard ensures that children are listened to and taken seriously. They are entitled to give their opinions on all matters affecting them, especially in judicial proceedings. Slovenia adopted a new Family Code (2017) and the Non-Contentious Civil Procedure Act (2019). Both acts brought about essential improvements in the children's right to be heard. The article offers a general analysis of the conventional understanding of this right, followed by a presentation of its inclusion in the two new legal acts and Slovene contemporary case law.

KEYWORDS

right to be heard
capacity
principle of child's best interest
parental care
interim measure

1. Introduction

In the past, the child's voice, opinion, or view has often been ignored. The child has been considered legally incompetent and incapable of legal speech. They have been denied the right to express their views. Children's access to the court was not even considered possible. Children were seen but not heard.[1] The legal position of

1 | Parkes, 2013, p. 1.

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children has improved with the adoption of the Convention on the Rights of the Child[2] (CRC).

The children's right to be heard, enshrined in Article 12 of the CRC, has undoubtedly contributed to the development of the children's rights. We should not ignore that adults (for example, parents or guardians as legal representatives), still make decisions for their children, because they often think that a child is an incomplete human being.[3] However, a significant shift was observed. According to Article 12 of the CRC, children have the right to express their views and decide on matters that affect their lives. Children's opinions will be considered considering their age and maturity. The latter is particularly crucial in court proceedings where decisions are made on important issues for the children, in the short, medium, or long term. The ability to ascertain what is in the child's best interest is why the right of the child to be heard is of utmost significance. A child who is heard feels appreciated, cherished, and involved. Even if the court rules against the child's wishes, the child's involvement may help them comprehend the proceedings and reasoning behind the court's choice.

2. Constitutional bases

Today, children enjoy special protection guaranteed by many international instruments, starting with the Geneva Declaration on the Rights of the Child[4] in 1924, which clearly outlined and laid the foundations to protect children's rights. A key milestone was established in 1989 by the CRC. States quickly recognized the importance of the CRC and the resulting protection of the child and their rights. To ensure adequate protection of children and their rights, as dictated by the CRC, as well as by other comparable international instruments whose content is relevant to children's law, the Republic of Slovenia (RS) also guaranteed respect for the rights of the child in the Constitution of the Republic of Slovenia[5] (CRS). Article 56(1) of the CRS states that children should enjoy special protection and care. Article 56(2) of the CRS states that children shall enjoy human rights and fundamental freedoms consistent with their age and maturity.

Article 56 of the CRS is complemented by Article 39 of the CRS, which refers to the general freedom of expression that children enjoy in accordance with age and

2 | Convention on the Rights of the Child, 196 parties on 22 July 2022 [Online]. (Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) (Accessed: 22 July 2022).

3 | Krappmann, 2010, p. 502.

4 | The Geneva Declaration on the rights of the Child is a historic declaration adopted by the League of Nations in 1924 (26th September). It was the first declaration that acknowledged and recognized the child's rights and the responsibilities of adults toward children.

5 | Constitution of the Republic of Slovenia: Uradni list RS, no 33/1991-I, 42/1997 – UZS68, 66/2000 – UZ80, 24/2003 – UZ3a, 47, 68, 69/2004 – UZ14, 69/2004 – UZ43, 69/2004 – UZ50, 68/2006 – UZ121, 140, 143, 47/2013 – UZ148, 47/2013 – UZ90, 97, 99, 75/2016 – UZ70a, 92/2021 – UZ62a.

maturity. The above demonstrates that the CRS does not explicitly define a child's right to freedom of expression. However, it is recognized through the generally guaranteed constitutional freedom of expression.[6] On the other hand, countries have explicitly included the right of the child to be heard in their constitutions. The right to be heard prevents a person turning into an object in judicial proceedings. Therefore, the right to be heard reflects a direct expression of respect for human (child) personality and dignity.[7]

The Constitution of Ecuador (1998) contains extensive references to children's rights, including freedom of expression.[8] The Constitution of Finland provides that children shall be treated equally and given the opportunity to influence matters relating to them in accordance with their level of development.[9] The Constitution of Poland (1997) stipulates that to establish the rights of children, the state authorities and persons responsible for children shall take into account, as far as possible, the need to prioritize the views of the child.[10] The Constitution of Iceland also explicitly guarantees the child's right to be heard in matters concerning them.[11] However, like Article 12 of the CRC, the Constitution of Iceland binds it to the age and maturity of the child.

3. Article 12 of the CRC as the pathway for the Slovenia regulation

Therefore, a key milestone in the field of children's law was reached in 1989 with the CRC, which definitively placed the child in the position of a rights-bearer. One of the fundamental children's rights is undoubtedly enshrined in Article 12 of the CRC:

6 | Kraljić, 2016, p. 14.
7 | Kraljić in Kraljić et al., 2022, p. 53.
8 | See Article 39(2) of the Ecuador's Constitution (Constitución de la República del Ecuador): 'The State shall recognize young people as strategic players in the country's development and shall guarantee their right to education, health, housing, recreation, sports, leisure, freedom of expression and association. The State shall foster their incorporation into the labor force in fair and decent conditions, with emphasis on training, guarantee of access to first employment, and promotion of their entrepreneurial skills.'
9 | See Article 6(2) of the Chapter II of the Finnland's Constitution (Suomen perustuslaki): 'Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.'
10 | See Article 72(3) of the Constitution of Poland (Konstytucja Rzeczypospolitej Polskiej): 'Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.'
11 | See Article 12(3) of the Constitution of Iceland (Stjórnarskrá lýðveldisins Íslands): 'A child shall be guaranteed the right to express its views regarding all its affairs, and just account shall be taken of the child's views in accordance with its age and maturity.'

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child; the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The CRC introduced a new concept in international law in 1989 and challenged many countries where the culture of listening to children was not normative or even acceptable.[12] The provision of Article 12 of the CRC is unique as it addresses the legal and social status of children who, on the one hand, do not have full autonomy as adults but, on the other hand, children today are subjects of rights.[13] This is particularly important in judicial proceedings as it allows the child to be heard. The children's right to freedom of expression should be understood as a tool for the judge to better assess the situation, especially when it comes to making decisions that are crucial for the child at the time of the decision, as well as for the child's future.

States Parties to the CRC are obliged to guarantee the children's right to be heard in accordance with Article 12(1) of the CRC. In this respect, this guarantee by states must be seen as a legal concept with a special force, since it leaves little room for discretionary decisions by states. Indeed, States Parties are strictly obliged to adopt all appropriate measures to fully realize this right for all children.[14]

The CRC has made the child a central subject and an active voice in all matters concerning children by explicitly recognizing the children's right to be heard in Article 12. The right to be heard and taken seriously constitutes the foundation of human dignity and is essential for the healthy development of every child. Listening to the children's views and considering them in accordance with their age and maturity is necessary for the effective implementation of their rights, to ensure their best interests as the guiding principle in all matters, and to ensure adequate protection for all children from violence, abuse, neglect, and maltreatment.[15]

Article 12(1) of the CRC assures that every capable child has a right to express their own views on 'all matters affecting the child.' Such matters can concern education, dietary and lifestyle choices, and the acceptance of medical treatment. However, should the children freely express their own views, it should be weighted in accordance with age and maturity. Therefore, following Article 12(1) of the CRC, the capacity to form and express one's own views could not be possessed by all children. The decision to recognize the capacity to form and express one's own views will be made by adults (e.g., parents, judges, social workers, teachers, and

12 | Landsdown, 2011, p. 1.
13 | United Nations, 2009, p. 3.
14 | ECtHR, *M. and M. v. Croatia,* app. no. 10161/13, 3 September 2015.
15 | See Recommendation CM/Rec(2012)2.

physicians). Adults must follow the principles that consider the children's best interests.[16]

It should be stressed that a children's views under Article 12 of the CPR cannot be linked to age alone, as a child's level of understanding is not uniformly linked to their biological age. Research has demonstrated that information, experience, environment, social and cultural expectations, and level of support contribute to developing a child's understanding and ability to form their views. Therefore, children's views should be assessed on a case-by-case basis.[17]

A child's maturity refers to their capacity to understand and evaluate consequences and should therefore be considered when determining an individual's capacity. Thus, Article 12 of the CRC does not restrict the children's right to expression by any age limit. Maturity, therefore, refers to the capacity of children to express their views on issues in a reasonable and independent form and appropriately and reasonably. The impact of the matter itself on the children must also be considered. The more significant the impact of the outcome (e.g., of court proceedings) on the child's life, the more important it is to properly assess the child's maturity.[18] The more mature the child, the more weight and decisiveness their view will have.[19] [20]

In this regard, the Committee on the Rights of the Child has opined that the child's developmental capacities, as referred to in Article 5 of the CRC, must be considered, including when it comes to the child's right to be heard. The Committee on the Rights of the Child notes that the more a child knows, experiences, and understands, the more the parents, guardians, or other persons legally responsible for a child must turn guidance and direction into reminders and advice and later into an equal exchange. Similarly, as children mature, their views carry more weight in assessing their best interests. In evaluating a children's best interests, infants and very young children have the same rights as all children, even if they cannot express their views or represent themselves in the same manner as older children. States should ensure that appropriate arrangements, including representation where necessary, are in place to assess their best interests. The same applies to children who are unable or unwilling to express their views.[21] In addition, the Committee on the Rights of the Child has particularly emphasized that the mere fact that a child is very young (as mentioned above) or in a vulnerable situation (for example, disabled, belonging to a minority, unaccompanied, or a migrant)

16 | Article 3 of the CRC.
17 | United Nations, 2009, p. 8.
18 | United Nations, 2009, p. 8–9.
19 | Čujovič in Novak, 2019, p. 447.
20 | Archard and Uniacke (2021, p. 528) clarify that a threshold standard determines whether a child is either mature enough (and gets to choose) or not (and have no choice). In contrast, Article 12(1) of the CRC differs in two ways in proposing a weighting of the child's views: it adopts a scalar rather than a threshold standard of maturity and it weights the child's views as opposed to giving or not giving efect to their choices. The scalar standard recognizes that the contrast between an adult and a child is not a simple binary one and that children might exhibit more or lesser maturity.
21 | Committee on the Rights of the Children, 2013, p. 11.

does not deprive them of the right to express their views, nor does it diminish the importance of the child's views in determining their best interests.[22]

States Parties must, therefore, ensure that every child who is capable of forming an opinion has the right to express it. This should in no way be understood as a restriction, but rather as an obligation to assess the child's capacity to form their own opinion as independently as possible. However, it is impossible to assume that children cannot express their own opinions. It should not be the starting point for children to first prove their capacity. On the contrary, the assumption must be that the child has the capacity to form and express their own opinions.[23]

In this respect, the child's 'expression of views' must be seen in light of a larger dimension than mere verbal expression. Children can also express their will through non-verbal forms of communication, such as facial expressions, body language, play, artwork, music, and even silence. The child is encouraged and able to express themselves in various ways (for example, singing, dancing, and drawing).[24]

Right to be heard during court proceedings is particularly important. Until recently, this right had been neglected. The reasons for this were mainly based on the premises that: i) parents should act in a way that is in the best interests of their children; ii) children needed to be protected from a traumatic event; iii) there was a desire to prevent children from siding with one parent in a dispute between parents; and iv) children were considered incapable of action. Today, we face the opposite situation. Denying children the opportunity to express their views in court proceedings is seen as more harmful than making their voices heard. Children also desire to be heard and considered, ensuring the credibility of the whole process.[25]

The European Convention on the Exercise of Children's Rights[26] (ECECR) is also important. The objective of the ECECR is to promote the rights of the child, grant them procedural rights, and facilitate the exercise of these rights by ensuring that children are themselves or through other persons or bodies, informed and allow them to participate in proceedings affecting them before a judicial authority.[27] The ECECR provides that a child with a sufficient level of understanding, in the case of proceedings before a judicial authority affecting them, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express their views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.[28]

The ECECR provides that the children shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before

22 | Committee on the Rights of the Children, 2013, p. 13.
23 | ECtHR, *M. and M. v. Croatia,* app. no. 10161/13, 3 September 2015.
24 | Koller, 2021, pp. 1–2; Landsdown, 2011, p. 21.
25 | Ubertazzi, 2017, pp. 45–46.
26 | European Convention on the Exercise of Children's Rights: Uradni list RS – MP, no 26/1999.
27 | Article 1(1) of the ECECR.
28 | Article 3 of the ECECR.

the judicial authority affecting the child, where internal law precludes the holders of parental responsibility from representing the child as a result of a conflict of interest.[29]

In EU law, Article 24(1) of the Charter of Fundamental Rights of the European Union[30] (CFREU) also provides that children are free to express their views and that these views shall be considered in matters concerning them in accordance with their age and maturity. This provision is general and not limited to specific proceedings.[31] The CJEU explained in case Joseba Andoni Aguirre Zarraga v Simone Pelz[32] that hearing a child cannot constitute an absolute obligation. Judicial authority must always assess what is required in the best interests of the child in each individual case.[33] However, if the judicial authority decides that a hearing of a child is necessary and appropriate, it must offer the child an accurate and adequate opportunity to express their views. The CJEU held that the children's right to be heard requires that children should be subjected to legal procedures and conditions that enable them to freely express their views.[34] Information, experience, environment, social and cultural expectations, and levels of support may influence a child's capacity to form their views.

Freedom of expression is also guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[35] (ECHR), which implies that everyone, including children, has the right to freedom of expression. This right includes the freedom to have opinions and receive and impart information and ideas without interference from public authorities. In the case Sahin v Germany[36], the European Court for Human Rights (ECtHR) found that the procedural requirements of Article 8 of the ECHR do not necessarily imply an obligation to hear the child directly in court. In the present case, the expert assessed that the procedure of hearing the child in court might pose an undue risk to the child. Therefore, the court must carefully assess each case wherein the benefits of hearing the child justify distressing the child. The court should refrain from conducting a hearing if, after a careful assessment, it has concluded that the hearing is either not in the best interests of the child or that the child's statement cannot be reasonably expected to influence the decision.[37]

Owing the above-mentioned reasons, the age and capacity of the child should not be viewed as a limitation, but as obligations of the state to assess the child's capacity to form autonomous views to the maximum extent possible. The fundamental premise should not be that the child is incapable of expressing their opinion. On the contrary, states should start from the premise that the child is

29 | Article 4 in connection with Article 9 of the ECECR.
30 | Charter of fundamental rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
31 | FRA, 2022, p. 44.
32 | CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010.
33 | See CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, §64.
34 | FRA, 2022, p. 45.
35 | European Convention for the Protection of Human Rights and Fundamental Freedoms: Uradni list RS-MP, no 3-20/1994.
36 | See ECtHR, *Sahin v. Germany*, app. no. 30943/96, 8 July 2003.
37 | Rijavec in Rijavec and Galič, 2020, p. 224.

capable of forming and expressing their views. The burden cannot be placed on the child first to demonstrate their capacity.[38]

4. Implementing the child's right to be heard in Slovenian Family Matters

Slovenia's long-awaited new Family Code[39] (FC) was adopted in March 2017. Due to preparations for the changes that the FC had brought, its enforcement was postponed for two years. FC began to be enforced on April 15, 2019, and replaced the Marriage and Family Relations Act (MFRA),[40] which had been prevalent for over forty years. Although the MFRA was amended three times (1989, 2001, and 2004), family law, particularly child law, required significant substantive, material, and procedural revisions and adjustments. FC has, as a substantive law, brought newly regulated family law relations, but the FC also required an update of the procedural rules. Thus, the new Non-contentious Civil Procedure Act[41] (NCCPA-1) was adopted in 2019, constituting the fundamental procedural law on family law matters.

4.1. Informing the child

Article 45 of the NCCPA-1 provides for a child who has reached the age of 15 and is able to understand the meaning and legal consequences of their actions to become a party in the proceedings. The children may express their opinion in an interview with an expert who may be appointed in a family law case if the court finds it necessary to determine the best interest of the child.

Article 96(1) of NCCPA-1 also follows Article 12 of the CRC. In proceedings, for the protection of the best interests of the child, the court shall invite the social work center to inform the child, who is capable of understanding the meaning of the proceedings and the consequences of the decision, in an appropriate manner of the initiation of the proceedings and of their right to express their views. The content of Article 96(1) of NCCPA-1 indicates an important difference from the previous regulation in Article 410(1) of the Civil Procedure Act.[42] Under the new rules introduced by the FC and NCCPA-1, notifications are transferred to the social

38 | Ubertazzi, 2017, p. 47.

39 | Family Code (Slovene Družinski zakonik): Uradni list RS, no 15/2017, 21/2018 – ZNOrg, 22/2019, 67/2019 – ZMatR-C, 200/2000 – ZOOMTVI, 94/2022 – odl. US, 94/2022 – odl. US).

40 | Marriage and Family Relations Act (Slovene Zakon o zakonski zvezi in družinskih razmerjih): Uradni list RS, no 69/2004 – UPB, 101/2007 – odl. US, 90/2011 – odl. US, 84/2012 – odl. US, 82/2015 – odl. US, 15/2017 – DZ.

41 | Non-contentious Civil Procedure Act (Slovene Zakon o nepravdnem postopku): Uradni list RS, no 16/2019.

42 | Civil Procedure Act (Slovene Zakon o pravdnem postopku): Uradni list RS, no 73/07 – official consolidated text, 45/2008 – ZArbit, 45/2008, 111/2008 – odl. US, 57/2009 – odl. US, 12/2010 – odl. US, 50/2010 – odl. US, 107/2010 – odl. US, 75/2012 – odl. US, 40/2013 – odl. US, 92/2013 – odl. US, 10/2014 – odl. US, 48/2015 – odl. US, 6/2017 – odl. US, 10/2017, 16/2019 – ZNP-1, 70/2019 – odl. US, 1/22 – odl. US, 3/2022 – ZDeb.

work center. The court will inform the social work center about the proceedings, and the social work center will inform the child. However, neither Article 410(1) of the CPA nor Article 96(1) of the NCCPA-1 defines what constitutes an 'appropriate manner of notification.' The answer to this question will have to be sought in each specific case by the social work center, which will inform the child. The social work center informs the child, who is capable of understanding the meaning of the proceedings and the consequences of the decision. The child will be informed of the initiation of the proceedings and their right to express their views in an appropriate manner. The right to information is essential as it is a prerequisite for children's decision-making.[43]

4.2. Determining a child's capacity

Before appropriately informing the children about the proceedings and their right to express their views, the social work center will first need to establish whether the children can understand the procedure's meaning and the consequences of their decision. Therefore, the social work center will first have to interview the child to assess their capacity. In an interview to assess the child's capacity, the social work center can also conclude as to whether the child has capacity, immediately after the interview with the child. If the social work center deems that the child has the capacity, it may also inform the child in an appropriate manner of the initiation of the procedure and the right to express their views.

4.3. Freedom of expression

Children's right to express their views is their right of choice. The child should not be forced to express their views; it should be their free choice. Article 96 of the NCCPA-1 does not use the word 'freely' – i.e., to express a view freely. However, the word 'freely' is explicitly mentioned in Article 12(1) of the CRC. 'Freely' denotes that the child is free to express views without pressure and that they can choose whether or not to express them. 'Free' also means that the child must not be manipulated[44] or subjected to undue influence or pressure. Furthermore, 'free' also means inherent in the child's 'own' perspective that the children have the right to express their own views and not those of others.[45]

When a child decides to express their views, they can do so: a) at a social work center b) in an interview with the child's advocate assigned to him under the

43 | Ubertazzi, 2017, p. 47.

44 | Comp. ECLI:SI:VSLJ:2020:IV.CP.1774.2020, 21 October 2020: 'The best interests of the child is a legal concept that must be given substance in each case, considering all the circumstances of the particular case. In any event, the child's best interests include not only the best interests of the person up to the age of 18 (short-term best interests), but also the best interests that will be manifested in adulthood (long-term best interests). The healthy and holistic development of the child, that is, their development into an independent adult, must be pursued. However, the child's wishes and the child's best interests are not synonymous. The court may decide differently from the child's wishes where the court has good reasons. One of these reasons is that the child's will is not free because it is manipulated.'

45 | United Nations, 2009, p. 7; Landsdown, 2011, p. 22.

provisions of the Human Rights Ombudsman Act[46] (HROA) or c) depending on the child's age and other circumstances, in an informal interview with a judge, possibly with the assistance of a professionally qualified person, always without the presence of parents[47].

We should emphasize that these options are equivalent alternatives to hearing the child. Which of these options is applied depends on the circumstances of the individual case. Rijavec defends the opinion that a judge should interview a child if possible and acceptable according to the circumstances of the particular case.[48]

4.4. Presence of a confidential person or child's advocate

A person whom the child trusts and chooses (a so-called confidential person or confidant)[49] or the child's advocate, if assigned to the child in accordance with the provisions of the HROA, may be present at the interview at the social work center and with the judge. The confidant can only be a person spontaneously chosen by the child and cannot be a person chosen for the child by someone else, a participant in the proceedings, a proxy, or the court.[50] A confidant cannot be a parent, guardian, or person chosen by the parent.

A confidant could be a sibling or other relative, godparent, teacher, doctor, or coach. A person with whom the child has come into contact in official proceedings and trust has spontaneously developed and been established between the child and this person (for example, an expert witness in court proceedings, a social worker at a social work center, or a conflict guardian) may also acquire the position of the child's confidant.[51]

Such a person, or a child's advocate, can help the children express their views. The court may prohibit the presence of such a person if it considers that he or she is not a person in whom the child has confidence and whom the child has chosen, or if the participation of that person in the proceedings would be contrary to the best interests of the child (Article 96(3) of NCCPA-1).[52] In doing so, the child's advocate must be aware that he or she is representing the child's interests exclusively and not those of other persons (for example, parents), institutions, or bodies (for example, an institution, an association).[53]

46 | Human Rights Ombudsman Act (Slovene Zakon o varuhu človekovih pravic): Uradni list RS, no 69/2017 – official consolidated text.
47 | Article 96(2) of NCCPA-1. ECLI:SI:VSLJ:2020:IV.CP.503.2020, 17 April 2020; see also Kraljić in Kraljić et al., 2022, pp. 406–408.
48 | Rijavec in Rijavec and Galič, 2021, p. 225.
49 | See also Article 144(1) of the FC: 'In deciding on the custody, upbringing, and maintenance of the child, on contact, the exercising parental care and granting of parental care to a relative, the court shall also consider the child's views, expressed by the child themself or through a person whom they trust and had chosen, provided that the child is capable of understanding its meaning and consequences.'
50 | ECLI:SI:VSLJ:2018:IV.CP.1760.2018, 12 September 2018.
51 | Končina Peternel, 2015, p. 75.
52 | Kraljić in Kraljić et al., 2022, p. 407.
53 | ECtHR, *M. and M. v. Croatia,* app. no. 10161/13, 3 September 2015.

4.5. Language

When interviewing the child, the judge should use language that the child can easily understand. Repetition of questions should be avoided. Children have different perceptions and communication skills than adults. Words often have different meanings for children and adults. Their life experiences also differ from those of adults. The judge should use simple language appropriate to the age and maturity of the child. Children may have difficulty understanding adult language, especially if it contains foreign words (for example, procedure or process, conversation, communication, or discussion), technical terms (for example, settlement), terms that the child is not familiar with etc. The judge should use language appropriate to the child's age and level of understanding. Children also do not understand the legal system or complex legal issues. Judicial decisions affecting children should be adequately clarified and explained in a language that children understand, especially when decisions have not considered children's views.[54] Hearing a child requires a judge's empathy and awareness that children are often influenced and pressured by their parents. The judge must ensure that their questions are not suggestive. The judge must also be cautious of how the questions are asked, as children are excellent listeners and observers. How the question is asked and the tone, facial expressions, and gestures used by the judge can influence the child's responses.[55] The judge must, therefore, take care at all times to preserve their dignity, judicial impartiality, and neutrality.[56]

4.6. Record of the Interview

A record of the interview will be made. The judge or social work center may also decide to record the interview by audio or audio-visual means. To protect the child's best interests, the court may decide that the parents should not be allowed to see, listen to, or watch the recording. There is no specific appeal for such a court decision. The court will summarize parts of the statements made in the interview with the child if decisions have been based on them.[57] Although the question of ensuring the principle of adversarial proceedings may arise in this case, the ECtHR has adopted the view that the particularly sensitive nature of the relationship and child protection measures may also justify a special procedural regime–that is, in our case, the court not allowing the parents to see the recording or to listen to or view the recording. However, the procedure must not lead to the negation of the fundamental right of the parties to be informed of the opposing party's allegations, submissions, and evidence. Therefore, the assurance that in such a case, the court will summarize parts of the statements made in the child's interview and the reasons for the decision also provide adequate legal protection.[58] However, the provision of Article 96(4) of the NCCPA-1 binds the court to summarize the child's statements only with respect to relevant statements on

54 | Svet Evrope, 2013, pp. 27–28.
55 | Knittel in Schnitzer, 2008, p. 613.
56 | Kraljić, 2016, p. 25.
57 | Article 96(4) of NCCPA-1.
58 | Končina Peternel, 2019.

which the court has based its decisions. The court is not obliged to summarize other statements.

The court will not base its decision on the child's opinion if it finds that the child's expressed wishes are contrary to their best interests.[59] The child's views constitute evidence that the court must assess together with other evidence, as this is the only way to determine whether the child's expressed views are in their best interests.[60] In any event, the right of the child to express their own views must not be interpreted as effectively giving the child an unconditional veto right without considering other factors and carrying out a test to determine the best interests of the child.[61]

As adults, we must listen to children and take their wishes and needs seriously. When a child is asked to express a view and is evaluated as mature enough to understand its meaning and implications, we should take it into account and otherwise explain to the child why we have not taken it into account.[62] The principle of continuity of care and upbringing and the principle of accelerated child development also play crucial roles in the court's decision. Both these principles are the basis on which the court will assess the views expressed by the child.[63] However, if the court believes that a child's views or wishes cannot be complied with, the child must always be informed of the decision and its reasons.[64]

An exception is provided in Article 158(2) of the FC, which expressly states that a court, when deciding on a measure for the protection of the child's best interests, may issue an interim measure without first obtaining the child's opinion.[65] The procedure for issuing interim measures is based on specific features arising from their nature, which justifies and allows for particular derogations. An interim measure is a child's protection measure. It is sufficient that the application of an interim measure is well founded. In most cases, an interim measure will achieve its purpose only if it is granted in an expedited procedure.[66] Therefore, there is a permissible derogation from the general principle of the adversarial procedure. It is not necessary to ensure that the principle of audi alteram partem is complied

59 | Comp. ECLI:SI:VSLJ:2017:IV.CP.1333.2017, 12 July 2017: 'The minor A. expressed to the clinical psychology expert and to child's advocate his wish to reduce the amount of contact with his father, but the Court of First Instance was correct not to base his decision on his expressed wish. In doing so it was correct to base its decision on the expert's convincing opinion that A.'s wish was the result of the influence of his mother's statements and her suggestions. If the child's expressed wishes are contrary to the child's best interests, in particular, if they are the result of the parent's suggestions, such wishes are disregarded.'
60 | Compare also ECLI:SI:VSLJ:2019:IV.CP.830.2019, 23 May 2019; ECLI:SI:VSLJ:2019:IV.CP.2039.2019, 13 November 2019: 'While the court is obliged to take into account the child's opinion in accordance with the child's maturity and age, this does not mean, as the parents mistakenly believe, that such opinion is the sole criterion for the court's final decision, but that only a full evidentiary procedure will be able to give a convincing answer to the question of whether the creditor's application for the child's pre-adoption will be justified.'
61 | ECLI:SI:VSLJ:2021:IV.CP.1514.2021, 2 November 2021.
62 | ECLI:SI:VSLJ:2015:IV.CP.2188.2015, 23 September 2015.
63 | ECLI:SI:VSLJ:2017:IV.CP.3332.2016, 5 January 2017.
64 | Landsdown, 2011, p. 23.
65 | ECLI:SI:VSLJ:2021:IV.CP.1769.2021, 2 November 2021.
66 | Kraljić, 2019, p. 538.

with before the interim order is granted. Compliance with the principle of audiatur et altera pars is ensured by the possibility of opposing interim order. The interim order enables the court to ensure that the rights and best interests of the child are safeguarded through an expeditious procedure, thereby preventing irreparable or disproportionately serious harm to the child. An interim order may be granted based on the application itself if the protection and best interests of the child require urgent action during the proceedings, provided that statutory prerequisites are met. Therefore, the court may issue an interim order without hearing the parties or without first obtaining the child's views. The probability of the existence of the conditions for granting an interim order is sufficient, which means that the standard of proof is lowered to the level of probability.[67] However, the speed of the procedure should not precede the children's welfare.

Within a time limit set by the court, which may not be less than 30 days, the social work center must send the court an opinion that the child is incapable of understanding the meaning of the proceedings and the consequences of the decision, or a record that the child has been informed of the initiation of the proceedings and of the right to express their views, and the child's views if they have expressed them.[68]

The court will serve the child, who has reached the age of 15 and has expressed their view in the proceedings, with the decision against which they will have the right to appeal.[69]

5. Conclusion

More than 30 years have passed since the adoption of CRC. It has contributed to improving the situation of children, protecting their rights, and considering their best interests in many areas of everyday private and public life. However, it cannot be ignored that there are still too many children worldwide whose right to be heard has not yet been realized. Children belonging to marginalized groups such as girls, children with disabilities, children from indigenous groups, unaccompanied children, children in conflict with the law, and children living in extreme poverty.[70] Slovenia has taken a step towards improving children's rights and ensuring their protection by adopting new substantive (Family Code) and procedural (Non-Contentious Civil Procedure Act) legislation. In particular, it has taken an essential step in ensuring that a child's right to be heard is respected. The child, if they are capable according to age and maturity, is now an active participant in the proceedings in which decisions are taken about them and their best interests. The Slovenian courts and social work centers play a crucial role in guaranteeing this child's right.

67 | Rijavec and Ivanc, 2018, p. 1277.
68 | Article 96(5) of the NCCPA-1.
69 | Article 96(6) of NCCPA-1.
70 | Landsdown, 2011, p. vi.

The new legislation (FC and NCCPA-1) ensures respect for and the exercise of the child's right to freedom of expression. Legislative bases are in line with contemporary guidelines on this right. However, problems in practice are evident. Decision-making procedures for the protection of children's rights and best interests are often complex, emotionally burdensome, and time-consuming. Moreover, they often require the involvement of experts, of whom there is a shortage in Slovenia. To ensure that this right of the child is realized in practice, it would be necessary to ensure that court proceedings are carried out at an appropriate speed, so as to ensure that the rights and best interests of the child are safeguarded in a timely manner. Judges point out that long waiting times for hearings, especially in the context of forms, prolong the hardship and suffering of all parties involved, and in particular, children; therefore, it is important to ensure that practice can also guarantee the adequate, high-quality, and timely exercise of the child's right to express their views, which can also be crucial in the final judicial decision-making process.

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CONTENT OF THE RIGHT TO PARENTAL RESPONSIBILITY AND THE ACTIVITIES OF NON-GOVERNMENTAL ORGANIZATIONS IN POLAND

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ABSTRACT

This study analyzes the relationship between the activities of non-governmental organizations and the content of parental authority in Poland. Thus, this study presents an outline of the sources of universally applicable law in the field of non-governmental organizations' activities with respect to public tasks, with due regard to the norms of organizational units of religious associations that may conduct activities significant from the perspective of parental authority. Simultaneously, it presents the basic sources of law relating to parental responsibility in the Polish legal system, in the relevant scope. Next, it presents the objectives of the activities of non-governmental organizations in the form of child welfare and family assistance, which may relate directly or indirectly to parental authority. Thereafter, the study, presents references to the possible interference of the activities of a non-governmental organization in the sphere of parental authority. Finally, it presents general and de lege ferenda conclusions.

KEYWORDS

non-governmental organizations
public benefit activities
charity
parental authority
child welfare

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1. Introduction

Parental responsibility is essentially linked to parents.[1] However, this does not imply the isolation of the child in relation to other entities. This power is not absolute, and in certain circumstances, other entities may support, interfere, and sometimes even perform certain activities corresponding to the content of the natural parental authority for the best interests of the child.[2] Originally, such interference was restricted to State institutions because of significant interference with human rights. However, in the modern world, the dynamic development of non-governmental activities is noteworthy. A wide range of activities are conducted, including those that may involve explicit or implicit parental responsibility. These are precisely such activities of non-governmental organizations (NGOs) in the broad sense of the term that will be analyzed in this article against the backdrop of the current Polish legal system.

2. Outline of the legal basis for the activities of NGOs in Poland

In the Polish legal system, the activities of NGOs in the broadest sense are complex with respect to the sources of law. Therefore, it is worth presenting an outline of these sources, which will allow for determining the scope of the relation of the aforementioned activity toward parental authority, which is also anchored in legal sources.[3] Regarding the legal basis for the activities of NGOs, which are not unimportant from the perspective of parental authority, several branches of law can be distinguished, in particular, religious law and administrative law. Additionally, owing to the nature of many NGOs, canon law should be considered following the binding constitutional and international principle of respecting the autonomy and independence of the Church and State — each in their own scope.[4]

1 | It should be noted that the understanding of the concept of 'parental authority' has changed in the Polish legal system, which is not the same as the concept of traditional authority. Cf. Smyczyński, 2012, pp. 219–220. As M. Andrzejewski rightly indicated, the careless questioning of the position of parents and educators in the perspective of children's rights raises justified concerns. Cf. Andrzejewski, 2006, pp. 135–136.

2 | In the doctrine of family law, parental authority is indicated as a multilateral legal relationship linking parents not only with children but also with third parties and the State. Cf. Andrzejewski, 2006, p. 136.

3 | Cf. Article 18, 48 of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 No. 78, item 483), Article 3 section 2 of the Convention on the Rights of the Child of November 20, 1989 (Journal of Laws 1991 No. 120, item 526), Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950 (Journal of Laws 1993 No. 61 item 284).

4 | Pursuant to Article 25 section 3 of the Constitution: 'The relationship between the State and churches and other religious organizations shall be based on the principle of respect

Bearing in mind the historical aspect, it should be indicated that charitable activities aimed at the welfare of children have been conducted in Poland for centuries by organizational units of the Catholic Church and other religious associations, which, regardless of the State legal system, operated and still operate on the basis of internal law.[5] Historically, the above organizational units were not called 'non-governmental organizations.' This concept is new to the Polish legal system.[6] However, in a broad sense, these units can be classified into this category while respecting their distinctiveness. This is important in terms of the relationship between parental authority and the activities of this type of organizational unit, which are primarily guided in their activities by religious premises. In this case, the relationship of such entities to parental authority is even more complex than in the case of NGOs of secular origin.[7]

In addition to the internal laws of individual religious associations, charity is also regulated by religious law as a universally applicable law. It is noteworthy that the activities of the organizational units of church were heavily limited during the communist period and sometimes even banned.[8] Despite this fact, these units ran

for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.' However, pursuant to Article 1 of the Concordat between the Holy See and the Republic of Poland of July 28, 1993 (Journal of Laws 1998 No. 51 item 318): 'The Republic of Poland and the Holy See confirm that the State and the Catholic Church are – each in their field – independent and autonomous and undertake to fully respect this principle in their mutual relations and cooperation for human development and the common good.' This principle is also found in many other modern concordats. See also Poniatowski, 2016, pp. 89–109.

5 | For example, in the case of the Catholic Church, in the current legal situation, a mention should be made of Benedict XVI's motu proprio *De Caritate ministranda* of November 11, 2012 [AAS 104 (2012 996-1004], which is a key source of canon law concerning the implementation of the so-called ministry of love. It includes helping others, including children who require special care also for religious reasons, and moreover, attention should be paid to bilateral international law in the form of a concordat.

6 | However, it is also worth paying attention to the activities of foundations, the regulations of which have been in force since the 1980s (with numerous subsequent amendments). Pursuant to Article 1 of the Act of April 6, 1984 on foundations (consolidated text, Journal of Laws 2020, item 2167): 'The Foundation may be established for the implementation of socially or economically useful goals consistent with the basic interests of the Republic of Poland, in particular, such as health protection, economic development and science, education and upbringing, culture and art, welfare and social assistance, environmental protection and protection of monuments.' This catalog is open and therefore, wider than the closed catalog of public tasks conducted by non-governmental organizations, which will be described later in the study. Importantly, the catalog of the foundation's goals contained in the statute may not, as a rule, be changed. Cf. Cioch, 2010, p. 19.

7 | An example is the functioning of the so-called 'windows of life,' which are located in establishments run by religious institutions. In such a place, a parent or parents can leave the child who is thereafter, transferred for possible adoption. In this case, the main value resulting from faith is the life of the child, which precedes in rank, for example, the issues of personal data or the right to know own parents' identity. However, it should be noted, that for this reason, certain other entities demanded the liquidation of such places in Poland.

8 | For example, after the end of World War II, the communist authorities liquidated Caritas organizational units that conducted charity work within the Catholic Church. Their reactivation could only occur after the political system changed.

various shelters, nurseries, and single mothers' homes. Only toward the end of the communist regime period, in 1989, laws were issued that guaranteed the organizational units of church as legal entities and the possibility of extensively conducting 'charity and care activities.' In the Polish legal system, charity and care activities are currently guaranteed both generally and individually. In the first case, the Act of May 17, 1989, on Guarantees of Freedom of Conscience and Religion[9] is applicable, pursuant to Article 19 section 2 point 15: 'By performing religious functions, churches and other religious associations may, in particular: [...] carry out charity and care activities.' It is worth emphasizing that the legislature clearly recognized the religious grounds for conducting charity and care activities by religious associations. However, in the individual aspect, it is noteworthy that the recognition of the right to conduct such activity applies both directly to church legal persons (direct aspect)[10] and also to the so-called Catholic organizations (indirect aspect)[11] that are established with the approval of the ecclesiastical authority.

In addition to charity and care, educational and upbringing activities, as well as numerous schools and other educational institutions are worth mentioning — from the perspective of paternal authority. In Poland, these activities that are similar to charitable activities have been conducted for centuries by organizational units of religious associations, and it developed further after the communist period.[12] Guarantees of conducting this type of activity arise mainly from the constitution,[13] international agreements,[14] and statutes.[15]

Regarding the next branch of law, it is noteworthy that it was only on June 19, 2003, that the Act of April 24, 2003, on Public Benefit and Volunteer Work entered into force in the Polish legal system.[16] This act defines NGOs.[17]

9 | Consolidated text, Journal of Laws, 2022, item 1435 as amended.
10 | Pursuant to Article 38 section 1 of the Act of May 17, 1989 on the relationship of the State toward the Catholic Church in the Republic of Poland (consolidated text: Journal of Laws 2019, item 1347, as amended): 'Legal persons of the Church have the right to conduct charity and care activities appropriate for each of them.'
11 | Pursuant to Article 35 section 2 of the Act of May 17, 1989 on the relationship of the State toward the Catholic Church in the Republic of Poland: 'Catholic organizations may aim, in particular, in accordance with the teachings of the Church, for socio-cultural, educational, charity and care activities.'
12 | Cf. the preamble to the Concordat. The original wording of the currently repealed preamble to the Act of 7 September 1991 on the education system (consolidated text Journal of Laws 2021, item 1915, as amended) is noteworthy: 'Education in the Republic of Poland is a common good of the whole of society; follows the principles contained in the Constitution of the Republic of Poland, as well as the indications contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child. Teaching and upbringing – respecting the Christian value system - are based on universal ethical principles. [...]'.
13 | Article 53 sections 2–4, Article 73 of the Constitution.
14 | Article 14 of the Concordat.
15 | Cf. Article 1 point 4) of the Education Law of December 14, 2016 (consolidated text: Journal of Laws 2021 No. 1082).
16 | Consolidated text, Journal of Laws, 2022, item 1327 as amended.
17 | Pursuant to Article 3 section 2 of this Act: 'Non-governmental organizations are those: 1) which are not entities of the public finance sector within the meaning of the Act of 27

Public benefit activities can be conducted — as an additional aspect within their own autonomy and independence — also by, among others, the aforementioned organizational units of religious associations, although they are not included in the strict category of NGOs.[18] Additionally, in the case of administrative law, in the context of parental responsibility, focus should be on the activities of NGOs in the field of education. Pursuant to Article 3 section 1 of the Act of December 14, 2016, Educational Law (consolidated text 2021, item 1082, as amended): 'The education system is supported by: 1) non-governmental organizations, including scouting organizations; 2) research institutes; 3) cultural institutions; 4) entities conducting statutory activity in the field of education.' Public administration bodies, including the authorities running schools and institutions, are required to cooperate[19] with these entities in the performance of tasks specified in the broad catalog contained in the first article of this Act, *inter alia*, in exercising the right to education[20] or support by the school of the educational role of the family.[21] Nonetheless, it should be noted that NGOs may also independently establish educational institutions.[22] When such an establishment is created by organizational units of religious associations, there is a noticeable increase in the complexity of the sources of law regulating the activities of such an institution, for example, in the field of teaching in accordance with Christian values.[23]

Furthermore, the activities of NGOs are not restricted to administrative or religious law. Although these are the primary legal sources, they are not exhaustive. For example, copyright,[24] civil,[25] or penal law[26] may also apply.

Considering the above, it can be concluded that the activity of NGOs in the broad sense is regulated by many branches of law and at different levels in the hierarchy of sources of law. Therefore, a complex interpretation of the sources of law regulating the activities of these organizations should be used to subsequently refer to the relationship with the sources of law regulating parental authority. In both cases, it may also be necessary to refer to constitutional axiology owing to

August 2009 on public finance or enterprises, research institutes, banks and commercial law companies that are state or local government legal persons, 2) which do not operate in order to make a profit – legal persons or organizational units without legal personality to which a separate act grants legal capacity, including foundations and associations, subject to paragraph 4.'

18 | Cf. Article 3 of the Act on Public Benefit and Volunteer Work.

19 | Cf. Article 3 section 4 of the Educational Law.

20 | Cf. ibid., Article 1 point 1).

21 | Cf. ibid., Article 1 point 2).

22 | Cf. ibid., Article 1 point 4).

23 | In practice, certain offices even require the removal of references to the principles of the Christian faith from the provisions of their statutes. In such a case, however, the institution, while protecting its identity and own rights, should refer to the appropriate sources of religious law and properly recognized canon law.

24 | For example, the issue of the use of photographs of a child from a school trip by non-governmental organizations.

25 | For example, the issue of contractual or tort liability for an accident during a cultural event involving children.

26 | For example, the issue of penal liability for the prohibited acts of employees or volunteers of such an NGO in relation to children.

the need to analyze a given value from the perspective of its hierarchy.[27] However, it should be considered that individual values may also have a superiority relationship.[28] Interestingly, the sources of law regulating the activities of NGOs and parental authority can be found simultaneously at various levels of the hierarchy of sources of law, including the constitution, international law, or statutes. It may often happen that a conflict of law rule that gives primacy to higher-order norms may therefore be insufficient to resolve a specific legal issue. Thus, an individual approach to individual legal issues arising from the relationship between the sources of law regulating the activities of NGOs and the exercise of parental authority is advisable.

3. Child welfare and assisting the family as the goal of the activities of NGOs

The activities of NGOs are understood broadly. Bearing in mind the organizational units of religious associations, it should be noted that taking care of the child's welfare results not only from taking care of the man's good, but also the common good.[29] In this case, religious reasons are also important. Helping

27 | The Constitutional Court in its judgment of May 18, 2005 (file reference number K 16/04, Journal of Laws of 2005, No. 95, item 806, OTK ZU 5A / 2005/51) stated that: 'Once again, it is necessary to emphasize that in the light of the axiology adopted in the Polish Constitution, family and marriage are values that occupy a particularly high rank in the hierarchy of constitutional values.'

28 | In the jurisprudence of the Constitutional Court, priority is given to such values as life and human dignity. As stated by the Constitutional Court in the judgment of September 30, 2008 (file reference number K 44/07, Journal of Laws of 2008, No. 177, item 1095, OTK ZU 7A / 2008/126): 'These values constitute the foundation of European civilization and determine the semantic content of the concept of humanism, which is central in our culture (including the legal one). They are inalienable in the sense that they do not allow for being <<suspended>> or <<annulled>> in a specific situational context.'

29 | Cf. Article 25 section 3 of the Constitution, Article 1 of the Concordat. A certain refinement of the principle of cooperation can be noticed at the level of acts, which refer not only to organizational units of religious associations but also to non-governmental organizations. Pursuant to Article 2 clause 2 of the Act of March 12, 2004 on social assistance (consolidated text: Journal of Laws 2021, item 2268, as amended): 'Social assistance is organized by government and local government administration bodies, cooperating in this respect, on the basis of partnership, with social and non-governmental organizations, the Catholic Church, other churches, religious associations and natural and legal persons.' As I. Sierpowska rightly indicated, the cooperation of non-governmental organizations in this respect is optional, unlike in case of public entities. Cf. Sierpowska, 2014, p. 35. However, pursuant to Article 9 section 1 of the Act of July 29, 2005 on Counteracting Domestic Violence (consolidated text: Journal of Laws 2021, item 1249): 'Government and self-government administration bodies cooperate with non-governmental organizations, churches and religious associations in the field of providing assistance to persons affected by violence, influencing the perpetrators of violence and raising social awareness about the causes and effects of domestic violence.' See also Poniatowski, 2015, pp. 307–322; Zarzycki, 2007, pp. 23–60.

children is included in the commandments of love and the duty to help the poor, which is a broad concept. Further, these entities protect the integrity of the family. Undoubtedly, caring for a child's welfare is part of the ministry of mercy.

In the case of public benefit activities, which may be conducted by NGOs (and as mentioned also, *inter alia*, by organizational units of religious associations, i.e., as an additional or exclusive activity), it is worth indicating the so-called sphere of public tasks.[30] This sphere currently includes 41 tasks listed in the closed catalog.[31] Few of these tasks relate directly or indirectly to the welfare of the child and assisting the family.[32]

For example, the first category includes tasks such as social assistance, including helping families and people in a difficult life situation and equalizing opportunities for these families and people,[33] supporting the family and foster care system,[34] or activities for the family, motherhood, parenthood, and the protection of children's rights.[35] The second category is broader. It may include, for example: 1) providing free legal assistance and increasing legal awareness in the society;[36] 2) activities for the professional and social integration and reintegration of people at risk of social exclusion;[37] 3) charity work;[38] 4) maintaining and disseminating the national tradition, cultivating Polishness and developing national, civic, and cultural awareness;[39] 5) activities for the benefit of national and ethnic minorities and a regional language;[40] 6) activities for the integration of foreigners;[41] 7) health protection and promotion, including medical activities;[42] 8) activities for the benefit of the disabled;[43] 9) activities for the benefit of science, higher education, education, and upbringing;[44] 10) activities including leisure for children and adolescents;[45] and 11) promotion and organization of voluntary work,[46] or appropriate activities for the broadly understood NGOs that operate

30 | Cf. Article 4 of the Act on Public Benefit and Volunteer Work.
31 | This catalog is subject to gradual extension. See also Blicharz, 2012, p. 65.
32 | Simultaneously, it is noteworthy that the Constitutional Court in its judgment of October 11, 2011 (file reference number K 16/10, Journal of Laws 2011 No. 240, item 1436, OTK ZU 8A / 2011/80) recognized the child's best interests as 'a specific general clause, the reconstruction of which should take place by referring to the axiology of the Constitution and general system assumptions.' See also the judgment of the Constitutional Court of January 21, 2014, file ref. SK 5/12, Journal of Laws No. of 2014, item 135, OTK ZU 1A / 2014/2).
33 | Cf. Article 4 point 1 of the Act on Public Benefit and Volunteer Work.
34 | Cf. ibid., Article 4 section 1 point 1a).
35 | Cf. ibid., Article 4 section 1 point 31).
36 | Cf. ibid., Article 4 section 1 point 1b).
37 | Cf. ibid., Article 4 section 1 point 2).
38 | Cf. ibid., Article 4 section 1 point 3).
39 | Cf. ibid., Article 4 section 1 point 4).
40 | Cf. ibid., Article 4 section 1 point 5).
41 | Cf. ibid., Article 4 section 1 point 5a).
42 | Cf. ibid., Article 4 section 1 point 6).
43 | Cf. ibid., Article 4 section 1 point 7).
44 | Cf. ibid., Article 4 section 1 point 14).
45 | Cf. ibid., Article 4 section 1 point 15).
46 | Cf. ibid., Article 4 section 1 point 27).

within the aforementioned tasks, both those directly and indirectly related to parental authority.[47]

Therefore, it can be concluded that the activity of NGOs in Poland is extremely broad. This spectrum of goals also includes helping the children and their families. The statutory activities of NGOs may include such assistance. However, it is extremely important in the Polish legal system that such aid is both, actually provided, and for formal reasons, it should be entered into the statute of a given organization or other documents regulating its activity.[48]

Individual NGOs are free to select statutory objectives, the boundaries of which are defined or properly recognized by law. It should be emphasized that the choice of statutory goals is usually unilateral, and only a registered non-governmental organization can enter into a relationship with parents. Sometimes, however, the parents themselves may establish a non-governmental organization, for example, to run an educational institution. The performance of statutory goals is also not specified. An organization may discontinue activities that may directly or indirectly relate to parental responsibility; however, it may also begin or develop such activities.

It should also be clearly emphasized that the activity itself, which is not absolute and is related to the rights of other people, including parental authority, should be distinguished from the provisions of individual statutory provisions.[49]

4. Activities of public benefit organizations from the perspective of exercising parental authority

The activity of an NGO within the aforementioned legal basis and specific statutory activities is not always neutral from the perspective of exercising parental authority. It is worth remembering that a constitutional norm requires statutory premises and a legally valid court decision to limit or deprive parental rights.[50]

Often, there are various types of relationships between this activity and the exercise of parental authority by parents (although the international standard is that, as a rule, the rights and obligations of parents toward their children precede the rights and obligations of other entities).[51] Several situations can be distinguished

47 | Cf. ibid., Article 4 section 1 point 33).

48 | See also Staszczyk, 2013, p. 22.

49 | For example, in certain cases, both public entities and parents, as persons having a legal interest, may initiate a procedure under which the court may even remove/cancel a non-governmental organization being a limited liability company from the National Court Register, if the provisions of the subject of activity specified in the statute are contrary to the law. Article 21 § 1 point 2) of the Act of September 15, 2000, Code of Commercial Companies (consolidated text: Journal of Laws 2022 item 1467).

50 | Cf. Article 48 section 2 of the Constitution. Cf. also 109–111 of the Act of February 25, 1964, Family and Guardianship Code (consolidated text, Journal of Laws 2020, item 1359).

51 | Smyczyński, 2012, p. 221.

in this regard. One of these criteria is the degree of interference with parental responsibility. In this respect, the activities of NGOs can be distinguished, which may comprise informing, supporting, or even replacing parental authority.

NGOs conducting informative activities both for parents and children may be problematic. Such activities may fall within the sphere of public tasks (and may be financed from public[52] or non-public funds[53]). For example, an NGO can train children on road safety. To determine whether such an activity is neutral from the perspective of parental authority, the example of first-aid training is used, the element of which is practicing artificial respiration by children. Certain examples further illustrate the overlap between NGO activities and parental responsibility. For example, certain NGOs attempt to conduct classes in public or private schools without the prior consent of the parents, although their content may be contrary to the parents' worldview or religious beliefs.

However, the procedure of acquiring prior consent occurs not only in educational or cultural institutions, where it is easier for parents to control their children's activities. Nonetheless, in the juridical sense, it is much more difficult for parents to control the activities of NGOs involving their children, conducted on other forums, such as social networking sites. In this respect, the Polish legal system does not contain detailed regulations. In addition, they often function through relevant provisions of regulations based on the standards of other legal systems. Thus, a significant interference in the exercise of parental responsibility cannot be ruled out. It is worth demanding a generally applicable law that regulates such websites by making the use of their websites by minors conditional on the consent of their parents and compliance with the norms of Polish law (and other countries). Otherwise, in certain cases, the exercise of parental responsibility may be illusory.

Another degree of interference may be the activity of NGOs that support parental authority. In this regard, it is worth mentioning, for example, the psychological help provided to a child. For this purpose, consent should be obtained from the parents (by psychologists, psychiatrists, employed by NGOs). Thus, this support is, in principle, optional, similar to an informative activity. From a legal perspective, the provision of free legal assistance to parents is noteworthy, for example, in the field of solving educational problems with the help of the court or explaining the reasons for limiting or depriving parental authority. Such aid is provided in Poland by many NGOs, which in this area are financed by public or non-public funds.[54]

The most far-reaching option is to somehow replace parents as part of the activities of NGOs.[55] For example, such an activity may comprise running an

52 | For example, see Article 8 point 7) lit. b) of the Act of July 29, 2005 on Counteracting Domestic Violence.

53 | Cf. also Article 10a section 1, pkt 4 letter a) of the Act on Public Benefit and Volunteer Work.

54 | Cf. Article 11 section 1 of the Act of 5 August 2015 on free legal assistance, free civic counseling and legal education (consolidated text, Journal of Laws 2021, item 945, as amended).

55 | Similarly, in H. Ciepły's opinion, depriving parents of parental authority is the most severe measure of court interference in the sphere of relations between parents and children, because parents lose this authority completely. Cf. Ciepła, 2011, p. 807.

orphanage.[56] In this case, obtaining consent is not necessary; however, the NGO must act on a clear legal basis and an appropriate court decision.

The second criterion for dividing the activities of NGOs in relation to parental authority can be the criterion of a voluntary or coercive decision on the part of the parents. In the first case, the aforementioned informative activity of NGOs conducted with the consent of parents can be indicated. The activity of NGOs is more complicated in relation to parental authority in the case of a lack of parental consent. Such an activity must always result from a specific legal basis and an appropriate court decision. In such cases, the activity of NGOs is only a consequence of coercion applied by the public authority because it can only be applied on the basis of the law. One example is the prevention of domestic violence.[57]

Therefore, it can be concluded that the nature of the relationship between the activities of NGOs and the exercise of parental authority is multifaceted. It is likely to intensify in the future owing to the development of NGOs, and conversely, owing to the frequent questioning of the foundations of parental authority in the modern world, or even the functioning of the family as a value protected by constitutional axiology. Various degrees can be distinguished in the relationship in question, which gives rise to specific legal consequences. In certain cases, where the activity of an NGO requires obtaining parental consent, such activity without obtaining parental consent results in civil liability, and may even result in penal liability. Alternatively, in the Polish legal system, it is also possible to simulate situations in which the activities of NGOs indirectly based on a relevant legal title do not require parental consent and may interfere with the exercise of parental authority. However, such an action should, in principle, be exceptional and not arbitrary.

5. Conclusions

The relationship between the activities of NGOs and the exercise of parental authority is a complex and topical issue. Moreover, the development of NGOs within the sphere of public tasks allows us to assume that this issue may become even more complex. The increasing direct and indirect influence of NGOs on the upbringing and education of a child is noticeable, which is not indifferent from the perspective of parental authority.

Both the activity of NGOs and the exercise of parental authority are protected by the sources of universally binding law, in parallel with the constitution itself

56 | I. Sierpowska drew attention to the variety of ways of classifying educational institutions. In her opinion, one can mention public institutions that are run by a commune, *poviat* or *voivodeship* self-government, as well as non-public units run by other entities. Cf. Sierpowska, 2011, pp. 177–178.

57 | In Poland, the system of counteracting domestic violence is extensive. It includes activities undertaken by the commune, including the functioning of the so-called interdisciplinary teams, which also include representatives of non-governmental organizations. Cf. Article 9a of the Act on Counteracting Domestic Violence. See also Andrzejewski, 2021, p. 172.

and international law. However, this does not represent a sign of equality in terms of protection. Further, such parallel protection creates a relationship. Although parental authority is rooted in constitutional axiology and is natural, it is not absolute. The freedom to conduct public benefit activities by NGOs is not absolute either. The beginning of resolving a possible conflict should be a holistic understanding of the best interests of the child. However, the Polish legal system lacks detailed conflict-of-law rules. Nevertheless, it can be concluded that in principle, there is a need to obtain appropriate consent from parents in cases where the activity of NGOs affects the child and is conducted in charity, cultural, or educational institutions, both those run by public and non-public entities. Compliance with this principle should also be *de lege ferenda* required in the case of the activities of NGOs also in other spheres in which such activities may concern children, in particular as part of the cyberspace functioning.

It would be recommendable to supplement Article 4 of the Act on Public Benefit and Volunteer Work with paragraph 3 guaranteeing that the performance of tasks in the public sphere may not be directed to any persons or their representatives without their consent, unless it results from specific regulations.

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THE PIVOTAL ROLE OF DPAs IN DIGITAL PRIVACY PROTECTION: ASSESSMENT OF THE SERBIAN PROTECTION MECHANISM

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ABSTRACT

With the widespread use of the Internet in both personal and professional life, data protection has become a critical aspect of privacy protection. The mechanisms developed in administrative law are the main tools for personal data protection in modern societies. Within the European integration process, the Republic of Serbia has established an independent data protection authority (DPA) that supervises and ensures the implementation of data protection rules, conducts inspections, acts on complaints of persons to whom the data relates, and determines whether there has been a violation of the law. This paper commences with an analysis of international legal instruments imposing a duty to establish an independent data protection supervisory authority. It goes on to further analyze the main characteristics of the national data protection system, the personal, territorial, and material scope of its application, as well as specific rights of data subjects. The efficient protection of digital privacy primarily depends on the investigative powers of the independent supervisory authority, which are also analyzed in detail. Given the global character of the Internet, the protection of personal data also depends on efficient cooperation among DPAs, the extraterritorial application of data protection rules, and adequate regulation of international transfer of personal data.

KEYWORDS

right to privacy
Serbia
Internet
Data Protection Authority (DPA)
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1. Introductory remarks

With the omnipresence of the Internet in both personal and professional life, data protection has become a critical aspect of privacy protection. Nowadays, privacy is often reduced to the privacy of data relating to an identifiable individual. The concept of personal data encompasses not only names and addresses but also all data that can be traced back to an individual, such as browsing history or any other online activity. In Serbian law, the notion of personal data is broadly defined as any information relating to a natural person whose identity is determined or identifiable, directly or indirectly, in particular, by reference to an identifier, such as a name and identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person.[1] The mechanisms developed in administrative law are the main tools for personal data protection in modern societies. Within the European integration process, the Republic of Serbia has established an independent data protection authority (DPA) that supervises and ensures the implementation of data protection rules, conducts inspections, acts on complaints of persons to whom the data relates, and determines whether there has been a violation of the law. The administrative procedure before the DPA has become the preferred mechanism for personal data protection over civil and criminal law proceedings.

Like other European countries, the Serbian legal framework for personal data protection is determined by specific international obligations stemming from the country's membership in the United Nations[2] and the Council of Europe[3], as well as from the country's European Union candidate status. The paper begins with an analysis of international legal instruments imposing a duty to establish an independent data protection supervisory authority (Section 2). The study then analyzes the main characteristics of the national data protection system: the personal, territorial, and material scope of its application, as well as specific rights of data subjects (Section 3). The efficient protection of digital privacy primarily depends on the investigative powers of the Data Protection Authority, which will be analyzed in more detail (Section 4). Given the global character of the Internet, the protection of personal data also depends on efficient cooperation among DPAs, the extraterritorial application of data protection rules, and adequate regulation of the international transfer of personal data (Section 5).

1 | Law on Protection of Personal Data (hereinafter, the LPPD), Official Journal of the Republic of Serbia 87/2018, Art. 4.

2 | The Federal People's Republic of Yugoslavia was not among the signatories of the Universal Declaration of Human Rights in 1948. In 1971, within the auspices of the United Nations, the Socialist Federal Republic of Yugoslavia ratified the International Covenant on Civil and Political Rights.

3 | The Republic of Serbia became member of the Council of Europe on 3 April 2003 and ratified the European Convention on Human Rights on 3 March 2004.

2. Duty to establish an independent data protection authority

The efficient protection of personal data may be best achieved through the establishment of administrative law mechanisms, rather than through lengthy court proceedings. Indeed, administrative proceedings before an independent data protection authority correspond better with the nature of online interactions and provide a rapid response to various infringements of digital privacy. In the international context, the need for such authorities was recognized quite early. A non-binding but unanimous resolution of the UN General Assembly, adopted in 1991, was the first international data protection text to include the requirement of an independent DPA.[4] The resolution requires that such authority offers guarantees of impartiality, independence vis-à-vis persons or agencies responsible for processing and establishing data, and technical competence. In the event of a violation of the relevant national provisions, criminal or other penalties should be envisaged together with appropriate individual remedies.[5] The adoption of this UN resolution is seen by many as the moment in which personal data protection has ceased to be exclusively a 'first world problem.'[6]

For the Republic of Serbia, a duty to establish such an independent data protection authority stems from the international instruments adopted by the Council of Europe and the European Union, respectively. As a member of the Council of Europe, the Republic of Serbia ratified the Convention for the Protection of Individuals regarding the Automatic Processing of Personal Data (ETS No. 108)[7] and the Additional Protocol to the Convention for the Protection of Individuals regarding the Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (ETS No. 181)[8]. The Convention is the first binding international instrument that protects the individual against abuses that may accompany the collection and processing of personal data and simultaneously seeks to regulate the transfrontier flow of personal data. However, it does not specify any requirements for the establishment of a national data protection authority. The Additional Protocol provides for

4 | Guidelines for the regulation of computerized personal data files, G.A. res. 44/132, 44 U.N. GAOR Supp. (No. 49) at 211, U.N. Doc. A/44/49 (1989).
5 | *Ibid*, point 8.
6 | See for example: Greenleaf, 2011, p. 8.
7 | Law on ratification of the Convention for the protection of individuals with regard to automatic processing of personal data, Official Journal of the FR Yugoslavia 1/1992; Official Journal of Serbia and Montenegro 11/2005. Law on amendments of the Law on ratification of the Convention for the protection of individuals with regard to automatic processing of personal data, Official Journal of the Republic of Serbia 12/2010.
8 | Law on ratification of the Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data, regarding supervisory authorities and transborder data flows (hereinafter, the Additional Protocol), Official Journal of the Republic of Serbia 98/2008.

the setting up of national supervisory authorities responsible for ensuring compliance with laws or regulations adopted in pursuance of the convention concerning personal data protection and transborder data flows. The countries that ratified the Additional Protocol should adhere to six principles when setting up their supervisory authority (authorities).[9] First, the Additional Protocol sets out the principle of institutional autonomy, which states that each country decides whether to establish one or more independent supervisory authorities. Second, the said authority (authorities) should have powers of investigation and intervention, as well as the power to engage in legal proceedings or bring violations of the provisions of domestic law to the attention of the competent judicial authorities. Third, each supervisory authority should be empowered to hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms regarding the processing of personal data within its competence. Fourth, supervisory authorities must exercise their functions in complete independence. Fifth, the national legal framework should allow the decisions of the supervisory authorities, which give rise to complaints, to be appealed against through the courts. Sixth, the supervisory authorities of the countries that ratified the Additional Protocol should cooperate with one another to the extent necessary to perform their duties, that is, by exchanging all useful information. The Republic of Serbia also ratified the Protocol, amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223)[10], which has not yet entered into force.[11] The Protocol reinforces the powers and independence of data protection authorities and enhances the legal basis for international cooperation.[12] It requires the parties to establish DPAs that have powers to issue decisions with respect to violations of the provisions of the Convention and that may, in particular, impose administrative sanctions. Furthermore, DPAs should have the power to engage in legal proceedings or to bring to the attention of competent judicial authorities the violations of the provisions of the Convention. DPAs should promote public awareness of the rights of data subjects and the exercise of such rights and should be consulted on proposals for any legislative or administrative measures that provide for the processing of personal data. The Protocol further requires the DPAs to keep data subjects informed of the progress of proceedings initiated by complaints. The acceding parties should ensure that the supervisory authorities are provided with the resources necessary for the effective performance of their functions and exercise of their powers. Finally, certain transparency duties have been introduced in the sense that each supervisory authority is required to prepare and publish a periodical report outlining its activities.

9 | The Additional Protocol, Art. 1.
10 | Law on ratification of the Protocol amending the Convention for the protection of individuals with regard to automatic processing of personal data (hereinafter, the Protocol), Official Journal of the Republic of Serbia 4/2020.
11 | As of July 2022.
12 | The Protocol, Art. 19.

Within the European integration process, Serbia signed the Stabilization and Association Agreement with the EU (SAA)[13] in 2008.[14] Under Article 81 of the SAA, dedicated entirely to personal data protection, Serbia is required to harmonize its legislation concerning personal data protection with EU law and other European and international legislation on privacy upon the entry into force of the SAA. Serbia is also required to establish one or more independent supervisory bodies with sufficient financial and human resources to efficiently monitor and guarantee the enforcement of national personal data protection legislation. Further, within the statistical cooperation with the EU, Serbia is required to ensure the confidentiality of individual data.[15] The reason for harmonizing the national legal framework with EU rules on personal data protection is to be found in the preamble of the SAA, in which the parties to the agreement reaffirmed their commitment to respect human rights and the rule of law. One of the aims of the SAA is to support Serbia's efforts to develop its economic and international cooperation, including through the approximation of its legislation to that of the EU.[16] The respect for democratic principles and human rights, as proclaimed in the Universal Declaration of Human Rights and as defined, *inter alia*, in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), form the basis of the domestic and external policies of the parties to the SAA and constitute essential elements of this agreement.[17]

3. Main characteristics of the national personal data protection system

The first attempts to regulate personal data protection in Serbia were made in 1998, when the Law on Personal Data Protection was passed.[18] Unfortunately, that law remained 'dead letter,' since only a few marginal cases of attempted application of the law by the data handlers were recorded over a period of ten years of its application.[19] During this period, the issue of defining an independent data protection authority remained unclear.[20] To comply with the requirements stemming from the international and EU legal instruments[21], Serbia adopted its first modern legislative act regulating personal data protection in 2008[22] and

13 | Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, Official Journal of the European Union L 278, 18.10.2013.
14 | The SAA entered into force on 1 September 2013.
15 | SAA, Art. 90.
16 | SAA, Art. 1 para. 2 d).
17 | SAA, Art. 2.
18 | Official Journal of the FR Yugoslavia 24/98 and 26/98.
19 | Resanović, 2019, p. 42.
20 | Ibid.
21 | See Section 2 of this paper.
22 | Official Journal of the Republic of Serbia 97/08, 104/09, 68/12 and 107/12.

adopted the Strategy for personal data protection in 2010[23]. Following the enactment of the 2008 Law on Personal Data Protection, a national DPA was established. The Serbian DPA was established by expanding the competences of the existing independent authority in charge of assuring free access to information of public importance. This authority, entitled the Commissioner for Information on Public Importance, was established in 2004 by the Law on Free Access to Information of Public Importance. On January 1, 2009, following the entry into force of the 2008 Law on Personal Data Protection, the tasks related to the protection of personal data were included in the Commissioner's scope of work. The 2008 Law on Personal Data Protection has been in force for a decade.

The main piece of legislation currently regulating personal data protection in the Republic of Serbia is the Law on Protection of Personal Data (LPPD)[24], adopted in November 2018 and applicable since August 2019.[25] The LPPD is an 'umbrella regulation' in the field of personal data protection in Serbia. Sectoral laws also apply to personal data processing in certain areas. The LPPD lays down general rules on personal data protection, while other laws may prescribe specific legal regimes applicable in certain areas or for certain types of activities. However, the principle *lex specialis derogat legi generali* does not apply because the LPPD explicitly requires that the provisions of other laws regulating the processing of personal data must be in line with the LPPD.[26] The main reason for adopting the 2018 LPPD was the need to harmonize the Serbian legal framework with the European Union's General Data Protection Regulation (GDPR).[27]

3.1. Scope of application of the LPPD

Regarding the personal scope of application, the LPPD applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data, which form part of or are intended to form part of a filing system. Furthermore, the LPPD applies to the processing of personal data performed by a controller or processor who has its business seat/place of residence in the territory of the Republic of Serbia within the framework of activities performed in the territory of the Republic of Serbia, regardless of whether the processing takes place in the territory of the Republic of Serbia. With respect to the territorial scope of application, it has been prescribed that the LPPD also applies to the processing of personal data of data subjects with residence in the territory of the Republic of Serbia by a controller or processor who does not have its business seat/place of residence in the territory of the Republic of Serbia, where the processing activities are related to (1) the offering of goods or services, irrespective

23 | Official Journal of the Republic of Serbia 58/2010.
24 | Official Journal of the Republic of Serbia 87/2018.
25 | The LPPD entered into force on 21 November 2018, but its application started nine months from the date of its entry into force, i.e., on 21 August 2019.
26 | LPPD, Art. 2 para 2.
27 | Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union L119, 4.5.2016.

of whether a payment of the data subject is required, to data subjects in the territory of the Republic of Serbia; and (2) the monitoring of data subject's behavior as far as their behavior takes place within the territory of the Republic of Serbia.

With respect to the material scope of application, the LPPD does not apply to the processing of personal data by a natural person during purely personal or household activity.[28] By reason of the matter, the LPPD covers all forms of use or other processing of personal data. The LPPD defines personal data processing as any action taken in connection with the information, including collection, recording, transcription, multiplication, copying, transmission, search, classification, storage, separation, adaptation, modification, making available, use, dissemination, recording, storage, disclosure through transmission or otherwise, dislocation, as well as other actions carried out in connection with the personal data, regardless of whether such actions are automated, semi-automated, or carried out otherwise.[29]

3.2. Specific rights of data subjects

Like the GDPR, the LPPD prescribed several specific rights for a data subject. A data controller is required to facilitate the exercise of data subject rights. The former is required to provide information on the action taken on the request of a data subject without undue delay and in any event within 30 days of receipt of the request.[30] The LPPD prescribes additional rules with respect to processing specific categories of personal data. Namely, the LPPD prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation.[31] Exceptionally, the said prohibition does not apply in certain cases prescribed by the LPPD, such as when the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, or when processing is necessary to protect the vital interests of the data subject or of another natural person if the data subject is physically or legally incapable of giving consent.

One of the essential rights recognized for a data subject is the right to be informed. The controller is obliged to take appropriate measures to provide the prescribed information to the data subjects, that is, information concerning the exercise of rights, in concise, transparent, intelligible, and easily accessible from, using clear and plain language, if the information is intended for a minor. The requested information may be provided through electronic means. The data subject has the right to obtain the information on (1) whether its personal data is processed or not; (2) the right to access to that data; (3) the categories of personal data that are being processed and the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organizations; (4) the purpose of processing; (5) the

28 | LPPD, Arts. 1–3.
29 | LPPD, Art. 4 para. 3.
30 | LPPD, Art. 21 para. 3.
31 | LPPD, Art. 17.

envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; (6) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; (7) the existence of automated decision-making, including profiling and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject; (8) the right to lodge a complaint with a DPA.[32] If personal data are transferred to a third country or to an international organization, the data subject shall have the right to be informed of the appropriate safeguards relating to the transfer.

Further to the right to be informed, the data subject has the right to request personal data from the controller.[33] Third, the data subject has the right to rectify their inaccurate personal data without undue delay.[34] Depending on the purpose of data processing, the data subject has the right to complete their incomplete data, which includes providing a supplementary statement. Fourth, the data subject has the right to have their personal data deleted by the controller when (1) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (2) the data subject withdraws consent on which the processing is based and there is no other legal ground for the processing; (3) the data subject objects to the processing and there are no overriding legitimate grounds for the processing; (4) the personal data have been unlawfully processed; (5) the personal data have to be erased for compliance with a legal obligation; or (6) the personal data have been collected in relation to the offer of information society services.[35] If the controller has made the personal data public and is obliged to delete the personal data, the controller, taking account of available technology and the cost of implementation, is required to take reasonable steps, including technical measures, to inform controllers who are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replicate, those personal data.[36] An organization's right to process someone's data might override its right to be forgotten in the following cases: (1) the data is being used to exercise the right of freedom of expression and information; (2) the data is being used to comply with a legal ruling or obligation; (3) the data is being used to perform a task that is being carried out in the public interest or when exercising an organization's official authority; (4) the data being processed is necessary for public health purposes; (5) the data is necessary for archiving purposes in the public interest, or serves for scientific research, historical research, or statistical purposes, and erasure of the data is likely to impair or halt progress towards the achievement that was the goal of the processing; (6) the data is being used for the establishment of a legal defense or in the exercise of other legal claims.[37]

32 | LPPD, Art. 23.
33 | LPPD, Art. 26.
34 | LPPD, Art. 29.
35 | LPPD, Art. 30.
36 | See: Midorović, 2019, pp. 293–296.
37 | LPPD, Art. 30 para. 5.

The LPPD lays down the right of a data subject to an object, on grounds relating to his or her situation, at any time to the processing of personal data concerning him or her, including profiling.[38] If personal data are processed for direct marketing purposes, the data subject has the right to object at any time to processing personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing. Further to the right to object to processing of personal data, a data subject has the right to data portability, that is, the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used, and machine-readable format and has the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, if (1) the processing is based on consent or on a contract; and (2) the processing is carried out by automated means.[39]

A data subject has the right not to be subject to a decision based solely on automated processing, including profiling, if such a decision produces legal effects concerning the data subject or in a similar manner significantly affects the data subject.[40] However, the data subject may consent to such automated processing or the latter may be explicitly allowed by law in specific cases. There are at least three possible ways of monitoring and profiling that offer grounds for discrimination: (1) data collection that leads to inferences about the person (e.g., online browsing behavior); (2) profiling at large through linking Internet of Things datasets; and (3) profiling that occurs when data are shared with third parties that combine data with other datasets (e.g., employers, insurers).[41] In real life, automated decision-making supplements human judgment, and these systems appear to escape the prohibition. The LPPD's provision applies only to decisions based solely on automated processing.[42]

Finally, a data subject has the right to lodge a complaint before the DPA if he/she believes that the processing of his/her personal data was performed contrary to the LPPD.[43]

4. Main powers, duties, and responsibilities of the Serbian DPA

The national data protection authority responsible for overseeing the implementation of the LPPD is the Commissioner for Information of Public Importance and Personal Data Protection. The person appointed as Commissioner must act independently in performing its duties and must neither receive nor request instructions from anyone. He or she may not perform any other public or political

38 | LPPD, Art. 37. See also: Mišković, 2020, pp. 134–135.
39 | LPPD, Art. 36.
40 | LPPD, Art. 38.
41 | Wachter, 2018, p. 441.
42 | For an analysis of a similar provision in the GDPR see: Hoofnagle, van der Sloot and Zuiderveen Borgesius, 2019, pp. 65 et seq.
43 | LPPD, Art. 82.

function, nor be employed elsewhere. The Commissioner is chosen among persons with the reputation of an expert specialized in human rights protection. The Commissioner is appointed by the National Assembly for a period of seven years. As reflected in the title of this authority, the Commissioner oversees the enforcement of both the LPPD and the Law on Access to Information of Public Importance[44].

The main powers and responsibilities of the DPA are as follows: (1) ensuring and supervising the implementation of the LPPD; (2) raising public awareness of risks, rules, safeguards, and rights related to processing, especially if it concerns processing data of a minor; (3) giving opinion to the National Assembly, the Government, other authorities and organizations, in accordance with the LPPD, on legal and other measures related to the protection of the rights and freedoms of natural persons in connection with data processing; (4) taking care of the controller's awareness and process in connection with its mandatory regulations on the LPPD; (5) providing, at the request of the data subjects, of information on their rights prescribed by the LPPD; (6) acting on complaints of persons to whom the data relates, determining whether there has been a violation of the law and informing the submitter on the rules on the course and the results of the proceedings being conducted; (7) cooperating with the supervisory authorities of other countries with regard to personal data protection, and by sharing various information and engaging in mutual legal assistance; (8) carrying out inspection on the LPPD enforcement, in accordance with the LPPD and the corresponding law on inspections, and submitting a request for initiating misdemeanor proceedings, in accordance with the law that regulates misdemeanors; (9) monitoring the development of information and communication technologies, as well as business and other practices relevant to the protection of personal data; (10) encouraging the development of codes of conduct and giving opinions and approval to the codes of conduct; (11) encouraging the issuance of a certificate for the protection of personal data and the corresponding trademarks and labels, and setting out the criteria for certification; (12) conducting periodic reviewing of certificates; (13) prescribing and publishing of criteria for accreditation of the certification body; (14) approving binding corporate rules; (15) keeping internal records of violations of the LPPD; (16) performing other tasks in accordance with the LPPD.[45]

The DPA is authorized to take a number of substantially different corrective measures: (1) to warn the controller[46] and the processor[47] by submitting a written opinion that the intended processing operations may violate the provisions of the LPPD; (2) to issue a warning to the controller or processor if the processing

44 | Official Journal of the Republic of Serbia 120/2004, 54/2007, 104/2009, 36/2010 and 105/2021.

45 | LPPD, Art. 78.

46 | Under Art. 4 of the LPPD, a data controller is defined as a natural or legal person, public authority which, alone or jointly with others, determines the purposes and means of the processing of personal data. Where the purposes and means of such processing are determined by the law, the controller or the specific criteria for its nomination may be provided for by the law.

47 | Under Art. 4 of the LPPD, a data processor is defined as any natural or legal person, i.e., public authority, which processes personal data on behalf of the controller.

violates the provisions of the LPPD; (3) to order the controller and the processor to act upon the request of the data subject in connection with the exercise of their rights, in accordance with the LPPD; (4) to order the controller and the processor to harmonize the processing operations with the provisions of the LPPD, in a specific manner and within a specified time frame; (5) to instruct the controller to inform the person whom the personal data refers to about the violation of his/her personal data; (6) to impose a temporary or permanent restriction on processing operation, including a prohibition on processing; (7) to order the correction or deletion of personal data or restrict the performance of the processing operation, and order the controller to inform the other controller, the data subject and the recipients to whom the personal data have been disclosed or transferred; (8) to revoke the certificate or to order the certification body to revoke the certificate, as well as to order the certification body to refuse to issue the certificate if the conditions for its issuance are not fulfilled; (9) to impose a fine based on a misdemeanor warrant if during inspection it has been established that there was a breach for which the LPPD prescribes a fine in a fixed amount, instead of other measures, depending on the circumstances of the particular case; and (10) to suspend the transfer of personal data to a recipient in another country or international organization.[48] The data subject, data processor, or any other natural or legal person concerned by the DPA's decision may initiate an administrative dispute within 30 days following the receipt of such a decision.[49] Administrative disputes fall under the jurisdiction of the Administrative Court and are conducted pursuant to the Law on administrative disputes[50].

The inspections undertaken by the DPA have proven crucial for efficient enforcement of the LPPD. The inspectors act upon information acquired *ex officio* or received from the complainants. According to a recently published report, the DPA completed 303 inspections in 2021[51] and received 211 complaints for alleged breaches of data protection rules in the same period[52]. Certain breaches of law are set out as misdemeanors, for which the LPPD prescribes fines. The DPA is authorized to initiate misdemeanor proceedings before the competent court. When the legislator prescribes pecuniary fines for misdemeanors in fixed amounts, the DPA may impose the fines directly. However, fines are usually prescribed in range (minimum to maximum amount), which is why the DPA would typically need to initiate the proceedings before the misdemeanor court. The fine imposed may not, in any case, exceed the maximum amounts that can be imposed on the controller or processor for a misdemeanor under the LPPD, that is, up to RSD 2,000,000 (approx. €17,000).[53]

48 | LPPD, Art. 79.
49 | LPPD, Art. 83.
50 | Official Journal of the Republic of Serbia 111/2009.
51 | Report on the activities of the Commissioner for Information of Public Importance and Personal Data Protection for the year 2021 (hereinafter, DPA 2021 Report) [Online]. Available at: https://www.poverenik.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2021/Izve%C5%A1ta2021CIR.pdf (Accessed: 14 July 2022), p. 96.
52 | Ibid, p. 60.
53 | LPPD, Art. 95.

The LPPD provides for an individual's right to receive compensation from the controller or processor of personal data for the material or non-material damage suffered.[54] Although the breaches of privacy in the digital world may be efficiently terminated in proceedings before the DPA, the compensation cannot be obtained in the same manner but in separate civil law proceedings under the general principles of civil wrongs (torts). If personal data has been controlled and/or processed by several controllers/processors, they shall bear unlimited solidary/joint responsibility.[55]

5. Personal data protection in the context of global online markets

Given the global character of the Internet, the protection of personal data may also depend on the following factors: (1) efficient cooperation among DPAs, (2) extraterritorial application of data protection rules, and (3) adequate regulation of international transfer of personal data. We shall analyze these factors from the point of view of Serbian stakeholders.

The European right to the protection of personal data builds on three main pillars: the obligations of data controllers, the rights of data subjects, and the role of data protection authorities.[56] The GDPR recognizes the importance of international cooperation for the protection of personal data by requiring the European Commission and the national DPAs of the Member States to (1) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data; (2) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance, and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms; (3) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data; and (4) promote the exchange and documentation of personal data protection legislation and practice, including jurisdictional conflicts with third countries.[57] The Serbian LPPD contains an almost identical provision for international cooperation.[58] From the available public sources, it may be concluded that such international cooperation mainly consists of shared experiences and discussions within different international forums. The Serbian DPA participates in the activities of the Consultative Committee of Convention 108 (Council of Europe), International Conference of Information

54 | LPPD, Art. 86 para 1.
55 | Ibid, Art. 86 para 5.
56 | Giurgiu and Larsen, 2016, p. 342.
57 | GDPR, Art. 50.
58 | LPPD, Art. 72.

Commissioners, Global Privacy Assembly, European Data Protection Board, International Working Group on Data Protection in Technology (IWGDPT), Initiative 2017[59], UNESCO, etc.[60]

There is an inherent conflict between the borderless character of the Internet and the system of legal rules corresponding to state borders. To overcome this problem, data protection rules may be prescribed to have extraterritorial reach. Both Serbian and EU legislators proceeded in this manner. Consequently, the LPPD applies to the processing of personal data of data subjects with residence in the territory of the Republic of Serbia by a controller or processor who does not have its business seat or place of residence in the territory of the Republic of Serbia, where the processing activities are related to: (1) the offering of goods or services, irrespective of whether a payment of the data subject is required, to data subjects in the territory of the Republic of Serbia; and (2) the monitoring of data subject's behavior as far as their behavior takes place within the territory of the Republic of Serbia.[61] Although the Republic of Serbia is not an EU member state, the Union's General Data Protection Regulation may, under specific circumstances, be applicable in the Serbian context. The GDPR applies to the processing of personal data of data subjects who are in the union by a controller or processor not established in the union, where the processing activities are related to (1) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the union; or (2) the monitoring of their behavior as far as their behavior takes place within the union.[62] This means that companies that have a connection with the European market must follow the same standard of data protection practiced by European companies.[63]

Given the global character of the Internet, personal data transfers to a foreign country or an international organization occur rather frequently. The generalized acquisition of large amounts of data often appears to be a necessary strategy to maintain the competitiveness of companies and simultaneously introduce innovative products.[64] Therefore, all major jurisdictions regulate such international personal data transfers. The LPPD prescribes two relevant grounds for exceptions based on which personal data may be transferred to third countries or international organizations without approval of the DPA: (1) adequate level of protection or (2) adequate or appropriate safeguards.[65] A transfer of personal data to another country, to a part of its territory, or to one or more sectors of certain activities in that country, or to an international organization, without prior approval, may be performed if it is determined that such other country, part of its territory, or one or more sectors of specific activities in that country or that international organization provides an adequate level of protection of personal data. It is considered

59 | The 'Initiative 2017' group consists of data protection authorities from the countries of former Yugoslavia.
60 | DPA 2021 Report, pp. 132–133.
61 | LPPD, Art. 3 para. 4.
62 | GDPR, Art. 3 para. 2.
63 | Jaeger Junior and Copetti Cravo, 2021, p. 367.
64 | Stazi, 2019, p. 111.
65 | LPPD, Arts. 63–71.

that the appropriate level of protection is provided in countries and international organizations that are members of the Council of Europe's 'Convention 108', or in countries, parts of their territories or in one or more sectors of certain activities in those countries or international organizations for which the European Union established that they provide an adequate level of protection. The Government of Serbia has adopted a Decision on the list of countries, parts of their territories, or one or more sectors of certain activities in those countries and international organizations where it is considered that an adequate level of protection of personal data is ensured.[66] Further to the list of countries adopted by the Government, the LPPD prescribes that an adequate level of protection is deemed to have been provided if an international agreement on the transfer of personal data has been concluded with another country or international organization. If a data transfer is planned for a country that is not on the list of countries providing an adequate level of protection, the transfer can only be carried out with the special consent of the DPA.

6. Concluding remarks

An analysis of the personal data protection mechanism developed in Serbian administrative law has revealed that the procedure before the DPA represents an efficient mechanism for terminating various offline and online breaches of data protection rules. Our comparative analysis also revealed that the provisions of the Serbian LPPD are harmonized with those of the EU's GDPR to a high extent. The main deficiency of the Serbian personal data protection system that our analysis identified was the inadequate articulation of different protection mechanisms. The LPPD asserts that lodging a complaint before the DPA does not affect the data subject's right to initiate other administrative or judicial proceedings. However, the possibility that several state authorities at the same time discuss the same legal matter may lead to contradictory decisions being passed by these authorities. Another remark may be made with respect to the need for better articulation of the activities of different national DPAs. Given the global character of the Internet and the fact that most breaches of personal data protection rules take place in an online environment, that cooperation between national authorities is strengthened and regulated is of the utmost importance.[67] Presently, such cooperation mainly comprises of exchanging experiences within different international forums. Cooperation among DPAs must enter a more advanced phase, in which international mutual assistance in the enforcement of legislation should be provided, including through notification, complaint referral, and investigative assistance.

66 | Official Journal of the Republic of Serbia 55/2019.
67 | On the problem of divergent interpretation of similar GDPR-modeled rules, see: Jori, 2015, p. 133; Daigle and Khan, 2020, pp. 1–38.

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THE TRUE FACE OF THE RIGHT TO PRIVACY ON THE EXAMPLE OF THE SECRET OF CONFESSION IN CRIMINAL PROCEEDINGS

Marcin Wielec*

ABSTRACT

The scientific paper concerns the image of the right to privacy on the example of the secret of confession in criminal proceedings. First of all, the introductory comments, including the scope of the study, will be provided. After that, considerations regarding the concept of privacy as a term of fundamental importance will be presented. This will also include an indication of privacy features. Then, the right to privacy will be presented with the definition of elements forming its concepts. After the above, criminal proceedings will be outlined as an area of applying the right to privacy in criminal law practice. This will give the opportunity to present a legal institution in procedural criminal law, which is an example of the functioning of privacy. For this reason, the study will analyze the secret of confession and will deal with the relationship between the penitent and the confessor. The current reasoning in study will lead to the analysis of the standards of Polish criminal proceedings with the legal institution of the secret of confession. In this context, it will be also important for paper to deal with the sources of the secret of confession and analysis of the secret of confession in other legal acts of the Polish legal system, apart from the Code of Criminal Procedure. The paper ends with a concise summary where it will be noticed that the secret of confession is the highest-ranking example of respecting the right to privacy in criminal proceedings. The analysis contained in paper also applies to natural law.

KEYWORDS

privacy
right to privacy
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the secret of confession
natural law
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1. Introduction

The right to privacy, using the example of confessional secrecy in criminal proceedings, is an issue that combines three areas. The first is privacy as, generally speaking, a natural sphere of every human being based on individual needs, intimate requirements, dreams, peculiar intercourse, and, finally, leaving some circumstances and facts from life simply hidden. It is a thoroughly ontological, philosophical, psychological, sociological, and existential sphere, very strongly connected with the essence of humanity. Privacy is a very delicate, subjective, elitist, and personal element of the structure of human existence.[1] The second area, on the other hand, is the right to privacy, as integrated with the former, a thoroughly legal issue framed by a number of elements comprising a certain standard, scope, guarantee, or boundary that must be respected and required to be respected by other members of the human society, so that relations in this community are healthy and predictable.[2] The third is the area of criminal procedure, as one of the very complex mechanisms of the broadly understood legal system, in which the criminal procedure (also known as procedural law, criminal trial, formal criminal law) has a specific role, tasks, principles of operation, and outcomes of these actions.[3] All these elements are present in the title issue of the institution of the secret of confession.

The first two concepts, that is, privacy and the right to privacy, evoke positive associations, often with the beauty of human nature because privacy is the basic condition for being a free person. You can even allegorically indicate that privacy is like a home, not everyone is invited to the house, and not everyone can be a witness of our personal thoughts, information, actions, or conclusions. Privacy is also something of the soul; not everyone wants to be looked at because the soul is the innermost part of our existence.

On the other hand, there is no doubt that criminal proceedings are not romantic, but rather highly mechanical, characterized by repression, firmness, arbitrariness, and the categorization of public entities with monopolies on justice, determining the truth, assessment of human behavior, and for setting the boundaries of privacy.

These three areas—privacy, the right to privacy, and criminal proceedings—are very broad and controversial. This is especially true when we consider the impact of new technologies in this regard.[4] Nevertheless, these areas are united by one of

1 | See: Parent, 1983, pp. 305–338; Gehrke, 2011, pp. 432–449; Powers, 1996, pp. 369–386.
2 | See: Thomson, 1975, pp. 295–314; Rubenfeld, 1989, pp. 737–807; Marmor, 2015, pp. 3–261; McCloskey, 1980, pp. 17–38; O'Brien, 1902, pp. 437–448; Diggelmann, 2014, pp. 441–458.
3 | See: Oręziak, 2019d, pp. 61–63; Stuntz, 1994, pp. 1016–1078; Hart, 1958, pp. 401–441.
4 | In terms of the impact of new technologies on many levels of practical application, see: Oręziak, 2019c, pp. 102–109; Oręziak, 2018a, pp. 199–219; Oręziak, 2020, pp. 187–196; Oręziak, 2019a, pp. 181–192; Oręziak, 2018b, pp. 117–141; Wielec and Oręziak, 2018, pp. 50–65; Karski and Oręziak, 2021, pp. 242–261; Oręziak, 2021, pp. 47–78; Oręziak, 2019b, pp. 432–448; Wielec, 2021, pp. 311–322; Oręziak, 2022, pp. 125–140; Oręziak and Łuniewska, 2021, pp. 223–232; Oręziak and Świerczyński, 2019, pp. 257–275.

the many institutions involved in Polish criminal proceedings. This is the secret of confession, which focuses on the reasons and necessity, dangers, and benefits of exercising the right to privacy.

2. Privacy

To begin with, it is worth considering what privacy is, how to understand it, its place, and its limitations and guarantees, in the context of the right to privacy and the specific profile of criminal proceedings.

Privacy in Latin *privatus* – it is an element of human life not exposed to the outside, arranged according to one's own will, with all external interference kept at a minimum.[5] Privacy is not a legal term; it is rather a concept bordering ontology, psychology, pedagogy, or sociology. Nevertheless, privacy as a concept for further consideration has its basic and distinctive features, including legal references.

The first characteristic of privacy is autonomy. It is known that, autonomy is a concept associated with independence.[6] In this context, autonomy can be considered in two dimensions: the first as autonomy in relation to the state and public authorities, and the second as autonomy in shaping one's own personal life.[7] It is a sphere free from external interference—that is, autonomous—in which everyone has the right to minimum intimacy with the outside world.[8]

The second characteristic of privacy is self-existence. The concept of self-existence is related to individual existence, existence 'by itself,' not being related to something, or a part of something.[9] In this context, privacy is something individual, a certain legal good, something that exists independently of something else, creating a separate, unrelated whole, which is a constant and unchanging feature of human society.[10]

The third characteristic of privacy is intimacy. Intimacy is something that is intended for the loved ones, something that is strictly personal, confidential, secret, close, and intimate.[11] In this context, privacy is something exceptionally personal. It is a sphere of seclusion enjoyed by every individual, within which the individual, using their privacy, creates their own personality and reality, decides about personal matters when they wish, as well as protects and defends privacy when it is tampered with.[12]

The fourth characteristic of privacy is naturalness. Conceptually, naturalness is a property of nature, that is, compliance with its laws, in accordance with the

5 | Kopff, 1972, p. 30.
6 | Skorupka, Auderska and Łempicka, 1968, p. 24.
7 | Mana-Walasek, 2016, p. 462.
8 | Jędruszczak, 2005, pp. 197–215.
9 | Skorupka, Auderska and Łempicka, 1968, p. 733.
10 | Sakiewicz, 2006.
11 | Skorupka, Auderska and Łempicka, 1968, p. 239.
12 | Michałowska, 2013.

ordinary order of things.[13] In this context, privacy is understood as reasonable freedom – for a person doing something in an ordinary and unforced manner, inherent in nature, in accordance with its laws, and the ordinary order of things, in which man is the central figure.

Based on these four privacy features, it can be determined that it is an extremely personal sphere of every human being, protected against outside interference.[14] It is a personal sacrum derived directly from human nature as a rational and sensitive being. Privacy is an indispensable element of the life of every individual, which should be strictly protected at all times, regardless of whether it concerns the property, personal, emotional, or spiritual sphere.

3. Right to privacy

Earlier, privacy was analyzed more from a sociological or axiological point of view; now, it is worth considering the legal side of this issue. The law is necessary for the essence of privacy. It also provides the basis for its respect, observance, and compliance. As already indicated, 'privacy' — in the first place — is not a legal concept, but the concept of 'right to privacy' is a term that clearly refers to the area of law. Privacy is an inherent human trait, and hence it must be a straightforward and respectful reference. This is done by granting of 'rights,' wherein the legal system shaped one of its elements as the right to privacy.

Finding the sources of the law for this concept, it can be noted that currently neither the Polish Constitution nor the Conventions and International Covenants contain a precise definition of the right to privacy, but, on the basis of guarantees, provide the possibility of preliminary determination of the content of this right.[15] It can only be indicated by way of illustration that the elements of the right to privacy are outlined in the Constitution of the Republic of Poland and, inter alia, some acts of international law.

First, it is necessary to point to the provision of Article 8 of the Convention on Human Rights and Fundamental Freedoms of 1950, which regulates the right to respect private and family life, stating that everyone has the right to respect their private and family life, home, and correspondence. Interference by public authorities in the exercise of this right is unacceptable, except in cases provided for by law and necessary in a democratic society for the sake of state security, public security or economic well-being of the country, protection of order and prevention of crime, protection of health and morals, or protection of rights and freedom of others.

A similar statement is provided by the International Covenant on Civil and Political Rights, which expressly forbids any interference in the private life of an individual, stipulating in Article 17 that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to

13 | Skorupka, Auderska and Łempicka, 1968, p. 432.
14 | Mielnik, 1996, pp. 29–41; Banaszewska, 2013, pp. 127–136; Szabłowska, 2006, pp. 181–197.
15 | Krzysztofek, 2014; Gonschior, 2017.

unlawful attacks on his honor and reputation. In addition, under this provision, everyone has the right to legally protect themselves against such interference and attacks.[16]

These documents only state the general prohibition of violating an individual's privacy. Generally, on this legal level, it can be assumed that the right to privacy is the right to respect privacy in every area, which is also a fundamental right of the human person.[17] This law protects the individual against public authority, society, and professional actors, because it is the right of a person to be left alone. Thus, a person can live according to the natural order of things, with the least possible interference from the outside.[18]

On the other hand, the first element of respect for the right to privacy under the Polish law in the Polish Constitution is personal inviolability. Pursuant to Article 41 of the Polish Constitution, personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by the statute.

The second element is the explicit prerequisite for ensuring privacy in the Polish Constitution, although not in its legal definition. Pursuant to Article 47 of the Polish Constitution, everyone shall have the right to legal protection of his private and family life, of his honor and good reputation, and to make decisions about his personal life. The provision of Article 47 of the Polish Constitution grants everyone the right to legal protection of private and family life, honor and a good name, and to decide about their personal life. The Polish constitutional regulation of the right to privacy is based on the following components: first -the right to privacy must be enjoyed by every person; second – privacy is protected against arbitrary and unlawful violations; third – the state should provide legal remedies in the event of a breach of someone's privacy; fourth – restrictions on the right to privacy must be exceptional and dictated by a clearly more important interest than this right.[19] At the same time, it emphasizes that the essence of the right to the protection of private life is to guarantee an individual a certain sphere of 'isolation.' The individual must have the right to decide which facts in this sphere may be disclosed to other people, as well as receive guarantees that their private lives will not be violated, etc.[20]

The third element is to ensure the confidentiality of communication, because according to Article 49 of the Polish Constitution, freedom and protection of the secret of communication are ensured. Its limitation may only exist in the cases specified in the Act and in the manner specified therein.[21]

The fourth element is the inviolability of the apartment, because pursuant to Article 50 of the Constitution, the inviolability of the apartment is ensured. A search of the flat, room, or vehicle may only take place in the cases specified in the Act and in the manner specified therein.

16 | Hofmański, 1995, p. 253 i n.
17 | Winczorek, 2000, p. 66.
18 | Kustra A., 2003, p. 17 i n.
19 | Kański, 1991, p. 70; Eichstaedt, 2003, pp. 28 et seq.
20 | Braciak, 2004, p. 112.
21 | Jarosz-Żukowska, 2008, p. 11.

Complementary to respect for the right to privacy are also issues related to faith and religion, treated as one of the most important elements of every human being. Hence, the fifth element is to ensure religious freedom because, pursuant to Article 53 of the Polish Constitution, everyone is guaranteed freedom of conscience and religion. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites, or teaching.[22]

Thus, it can be seen that although there is no unambiguous definition of the right to privacy, its absolute importance for individuals and legal systems is evident. This introduction of the 'right to' causes the legal system to consider the requirements of the matter to which a certain right belongs. The introduction of the 'right to' as can be seen, the right to privacy – introduces privacy to a completely different, top level in the structure of the legal system, as a result of which privacy becomes a legally materialized area. There is a, perhaps general, specification of this privacy, its boundaries, effects, limitations, etc. It is even assumed that

> the importance of the right to privacy (Article 47 of the Constitution) in the system of constitutional protection of rights and freedoms is shown, inter alia, by the fact that this right is [...] inviolable. This means that even exceptional and extreme conditions do not allow the legislator to relax the conditions under which one can enter the sphere of private life without exposing himself to the accusation of unconstitutional arbitrariness.[23]

The importance of the right to privacy is so great that it is justified to guarantee its protection in the system of state law and in the highest-ranking statute. Often, there is an expectation of the state power to enter the most secretive nuances of an individual's life. The guarantee of the right to privacy is, therefore, particularly desirable at the present time, in which there are virtually unlimited technical surveillance possibilities.[24]

The right to privacy is the right to respect private life and is at the same time a fundamental right of the human person.[25] In defining this law, the science of law indicates that

> this law protects the individual from public authority, against society and other individuals, that is, it is the right of a person to be left alone in order to live their own life (in a way that they prefer) with the smallest possible interference from the outside.[26] This means that the individual must be protected against any interference with private, family and home life, against any attack on their physical or mental integrity or against

22 | Sobczyk, 2013; Sobczyk, 2017.
23 | Justification to the judgment of the Constitutional Tribunal of 20 November 2002; K. 41/2002; OTK ZU 2002 / 6A, item 83; 'Monitor Podatkowy' 2002, No. 12, p. 2; Glosa 2002/12, p. 5; Glosa 2003/1, p. 39; Glosa 2003/4, p. 48; Glosa 2003/5, p. 49.
24 | Kustra A., 2003, pp. 9 et seq.
25 | Winczorek, 2000, p. 66.
26 | Kustra E., 2003, pp. 17 i n.

> their moral or intellectual freedom [...] against any activity aimed at spying, controlling and persecuting them, against fraudulent use of written and oral statements and the disclosure of information provided or obtained by them under professional secrecy.[27]

4. Criminal proceedings

Criminal proceedings constitute a completely different area. The terms, privacy and the right to privacy, are concepts that can be identified as positive and pleasant. On the other hand, in criminal proceedings, the indicated positive feelings related to privacy and the right to privacy are not in the lead, but rather, those that are opposed to the natural freedom of man, such as coercion, sanctions, arbitrariness, and the power of public authorities.[28] After all, in criminal proceedings, one of the highest human values, which is truth, can often become a victim because it can be incorrectly determined and then result in an unfair sentence.

Privacy and the right to privacy take on completely different dimensions in criminal proceedings. These are concepts and areas that constitute limits to the interference of power that is possible in criminal proceedings. Often, criminal proceedings may lead to the direct elimination of most manifestations of the right to privacy. This is because criminal proceedings are a complicated mechanism in the implementation of *ius puniendi* – i.e. the state law of punishing for committed crimes.[29] Criminal proceedings are saturated with institutions that are, or may be, considered contrary to the right to privacy. In criminal proceedings, we have, after all, temporary arrest, control and recording of conversations, searches, examination of a person, extradition, exhumation, and so on.

There is no doubt that the criminal liability established in the course of criminal proceedings is the most controversial legal liability. It is in this area, as in no other area, that the status of a free individual can be penetrated most deeply in the majesty of the law. Therefore, in the area of criminal proceedings or criminal law, there must be a specific balance between the necessity to define the limits of interference with the rights of an individual by a public authority and securing these rights against possible abuses of this authority. It must be admitted that the entire criminal procedure involves a number of conflicts. Among other things, in the Polish doctrine of criminal proceedings, it is noted that, on the one hand, in criminal proceedings, it is about respecting one of the fundamental values of the form of truth regulated in Article 2 § 2 of the Code of Criminal Procedure, according to which, 'the basis of any decisions should constitute true factual findings.'[30] On the other hand, it turns out that the truth in criminal proceedings cannot be learned in certain specific circumstances. It will be the same as with privacy; on

27 | Braciak, 2004, p. 39.
28 | Wielec, 2017, p. 97.
29 | Śliwiński, no date, p. 3; Waltoś, p. 7; Waltoś, 1997a, pp. 26 et seq.
30 | Waltoś, 2014, p. 213.

the one hand, it must be protected, but it is also understandable that in the name of knowing the truth, this privacy can be severely damaged. Hence, it is so important to clearly—as far as possible—define the limits of possible interference with the right to privacy in criminal proceedings.

5. The secret of confession

In light of the comments presented; the question becomes legitimate whether there is any institution in criminal proceedings that will be an example of the functioning of privacy. It is here that the institution of the secrecy of confession comes into play.[31] Privacy and the right to privacy, also include emotions, feelings, faith, and spirituality. Confession is a thoroughly theological, religious, and spiritual issue, undoubtedly falling within the scope of individual privacy. It must be admitted that thoroughly ecclesiastical and religious institutions rarely have their respective connotations in state law. Confession itself is such an institution, which is the backbone of the secret of confession. Confession mostly has a religious purpose. Therefore, the regulation of confession and the secrecy of confession in the first place are made in canon law. Hence, the starting point is confession, which has a clear ecclesial foundation and theological character. However, the Code of Canon Law does not contain a definition of confession. This term is more appropriate to theology than to canon law, which connects confessions directly with the sacrament of penance.[32] All messages transmitted even during an unfinished confession fall within the scope of the protection of the secret of confession under canon law. However, it is worth noting that the subject of the confession is abstract and unpredictable, which eliminates the possibility of cataloguing potential information that may be passed on by the penitent to the clerical confessor. Hence, it is clear that the protection of the denomination guaranteed by the secrecy of confession must be broad and cover not only all messages presented by the penitent but also the entire course of the confession.[33] This also applies to the external reactions of the penitent, such as nervousness, self-confidence, crying, screaming, etc., which are also a sign of the privacy of the individual.

The Code of Canon Law, currently in force[34] regards the issue of confession and the secret of confession, as the basic legal act of the Catholic Church of the Latin rite. It was promulgated on January 25, 1983, by John Paul II in the apostolic constitution *of Sacre disciplinae leges* and entered into force on November 27, 1983, replacing the Code of Canon Law and numerous church laws issued after 1917.

31 | Szpor and Gryszczyńska, 2016, p. 244.
32 | Katechizm Kościoła Katolickiego, 1994, pp. 340–341: By specifying this sacrament, the Catechism of the Catholic Church assumes that it is the sacrament of penance and reconciliation, the sacrament of conversion, the sacrament of forgiveness, and the sacrament of confession.
33 | Syryjczyk, 2001, p. 113.
34 | Codex Iuris canonici auctoritate Joannis Pauli PP. II.

This ecclesiastical legislative act in Canon 959 shows that in the sacrament of penance, the faithful who confess their sins to the authorized minister, expressing sorrow for them and having a resolution to correct them, receive from God the forgiveness of sins after baptism committed by the minister and at the same time are reconciled with the Church, which by sinning they inflicted a wound.

In another provision of Canon 983, the Code of Canon Law states that sacramental secrecy is inalienable, and therefore, the confessor is not allowed to betray the penitent in words or in any other way and for any reason whatsoever. The translator, if any, is also bound by the obligation of secrecy, as well as all others who in any way learned about sins from confession.

In Canon 984, the Code of Canon Law indicates that it is absolutely forbidden for a confessor to use information obtained in a confession that causes a nuisance to the penitent, even with the exclusion of any danger of disclosure. Anyone in authority may in no way use the knowledge obtained about the sins confessed at any time in a confession in external governance.

In the regulation of Canon 1388, the Code of Canon Law specifies that a confessor who directly violates the sacramental mystery is subject to excommunication binding by the law itself reserved to the Holy See. In turn, when it violates it, it should be punished only indirectly according to the severity of the crime. The translator and others mentioned in Cannon 983 § 2 of the Code of Canon Law, who breach a secrecy, should be punished with a just penalty, including excommunication.

Finally, in the last provision, which directly relates to the secrecy of confession under canon law, that is, in the provision of Canon 1550 of the Code of Canon Law, it is assumed that priests are incapable of being witnesses in relation to everything they know from the sacrament of confession, even if the penitent asks for it to be disclosed. Moreover, what anyone and in anyway was heard during a confession cannot be accepted in court as a trace of truth.

6. The relationship between the penitent and the confessor

After analyzing the provisions of canon law in the context of confession and the secrecy of confession, it can be noticed that apart from the typically theological purpose of confession, which is the forgiveness of sins, confession is, per se, the transmission of certain information that must remain undisclosed.

The sacramental nature of the penitent's confession means that what the penitent has conveyed to the confessor cannot be made public. The secrecy of the confession must be maintained.[35] The penitent's spiritual well-being takes precedence over everything else, and using the information obtained during the confession cannot be justified by any reason. This is the right to privacy of the highest order.

The non-theological goal of the secret of confession is to protect privacy, and in it, the freedom of communication during confession between the penitent and

35 | Sitarz, 2019.

the confessor. It is a ban on the use of knowledge obtained during a confession by anyone.

Therefore, there is a vital question of what is so important in confession that it is included in the provisions of criminal procedures.

The key to answering this question is the 'relationship.' During a confession, an exceptionally personal and sensitive relationship is established between the penitent and the confessor. This relationship is an unconditional opening of one person to another. There is no more sincere and private confession than one made during the sacrament of confession. Owing to the sincerity of the confession and the enormous degree of the penitent's trust in the confessor, the protection of the secret of confession must be the greatest possible. The penitent revealing his sins, that is, information, a fragment of his private life or even a part of his worldview, does so in full trust in the confessor in order to grant him absolution by the clergyman. Church legislation strongly emphasizes that the role of the confessor is not only to mediate the administration of the sacrament of penance but also to provide advice, as well as spiritual and psychological support.[36] The confession of sins, understood as the presentation of the penitent's inner feelings, must be protected against public manifestation.[37]

Moreover, it is assumed that the priest's legal and canonical obligation to keep the secret of confession is so imperative that he must keep this secret not only towards outsiders, but also with the penitent himself outside of confession.[38] The view that the

> absolute secrecy concerning sins and the far-reaching caution concerning the other mentioned factors apply not only to the priest in the sense that they forbid him to disclose the content of his confession to third parties, but also to refer to them in non-sacramental contact with the penitent himself, unless he expressly agrees to it, preferably on his own initiative

does not raise any objections.[39] The imperativeness of the secret of confession means that the priest, even in danger of death, cannot be released from keeping this secret. Likewise, if the priest were to be called as a witness before a judicial authority, the imperativeness of the secrecy of confession releases him from the court oath taken to testify to the truth, to which every witness is obliged. The knowledge possessed by a confessor is impenetrable. In canon law, the secrecy of confession protects the priest, who is a witness, from committing a crime or perjury or giving false testimony.

The act of confession is characterized by verbal, direct, and confidential communication, in which knowledge is revealed, the public dissemination of which

36 | Can. 978 § 1: The priest should remember that when listening to confession he acts as both judge and doctor, and that he was appointed by God as a steward of divine justice and mercy in order to contribute to God's honor and the salvation of souls.
37 | Salij, 1998, p. 10.
38 | Witek, 1979, p. 187.
39 | Jan Paweł II, 1994, p. 22.

could cause irreversible retaliation for the penitent. Therefore, the basic assumption of the secret of confession is the protection of human dignity. No one shall be allowed to unlawfully harm the good name that someone has or infringe on the rights of each person to protect their own privacy.[40]

Hence, the Church and state legislators try to protect this most private confession of the penitent from being made public and then from being used. The protection covers all messages transmitted by the penitent to the confessor, surrounding them with absolute secrecy, from which nothing and no one can release a clergyman.

7. Polish criminal proceedings and the secret of confession

The Polish criminal procedure is based mainly on the provisions of the Code of Criminal Procedure and places the secrecy of confession in the issues of broadly understood issues of evidence. More precisely, it places the secrets of confession within the so-called evidence prohibitions in criminal proceedings.

In the doctrine of criminal procedure, prohibitions on collecting evidence are defined as rules that prohibit the collection of evidence under certain conditions or limit the search for or extraction of evidence.[41] The secret of confession is not the only one admitted and respected in criminal proceedings. Polish criminal proceedings also respect defense secrets, medical secrets, mental health secrets, banking secrets, and many others.[42] However, the secrecy of confession is second to none when privacy and the right to privacy is considered. Perhaps it is matched to some extent by its protective secrecy. The secret of confession is absolute and irrevocable. As discussed above, the secret of the confession is not of state origin. Its roots are clearly canonical because the prohibition of evidence of the secret of confession is the result of already existing facts on the ecclesial level, and not facts on the level of state law. The evidential prohibition of the secret of confession is one of the consequences of using the sacrament of penance.

The doctrine of the criminal trial clearly emphasizes the canonical origin of the secrecy of confession and stipulates that its evidential prohibition enables the confessor to fully implement the strict obligation of silence imposed on him in the canon law as to the facts learned during confession and to avoid possible conflict situations, where in the absence of such a prohibition, evidence would include clergy and other persons called to participate in the criminal trial as witnesses.[43] The legislator creates a ban on evidence in situations where 'the benefit of finding the truth may sometimes turn out to be less than the disadvantage that the taking of evidence may entail.'[44] In addition, respecting the secrecy of confession during

40 | Can. 220.
41 | Cieślak, 1955, p. 264.
42 | Wielec, 2014, p. 488.
43 | Kunicka-Michalska, 1972, p. 160.
44 | Śliwiński, 1959a, p. 308.

the collection of evidence is common in criminal proceedings. The counterpart of the ban on the evidence of the secrecy of confession in other regulations is, inter alia, in common law, the so-called privilege: *priest – penitent privilege*.[45]

From the previously presented definitive forms of evidence prohibitions, it can generally be stated that they block the possibility of obtaining and using evidence in a criminal trial. The role of evidence, on the other hand, is 'to obtain the judgements needed to issue a decision.'[46]

Historically, each codification of criminal proceedings in Poland strictly recognized the secret of confession. It is worth briefly presenting that, inter alia, in the provisions of the Polish Code of Criminal Procedure of 1928, the evidence ban on the secrecy of confession was included in the provision of Article 101 of the Code of Criminal Procedure, according to which it is not allowed to hear as a witness: a). Of the clergyman – as to the facts he found out in confession.[47] In the next Polish Code of Criminal Procedure of 1969, this issue was discussed in Article 161 point 2, according to which 'It is not allowed to interrogate the clergyman as witnesses as to the facts about which he learned during confession.'[48] On the other hand, in the current Code of Criminal Procedure of 1997, the prohibition of evidence of the secrecy of confession is regulated in Article 178 point 2, according to which 'it is not allowed to interrogate the clergyman as witnesses as to the facts which he learned during confession.'

The content of the current provision of Article 178 point 2 of the CCP triggers several important conclusions.[49]

First, the evidentiary prohibition of the secrecy of confession in criminal proceedings is an absolute prohibition of evidence in the sense that it applies in every possible situation, and even when the clergyman himself acting as a confessor has the will or consent to disclose information derived from confession.

Second, the prohibition applies only to those facts about which the confessor learned during the confession, which means that it is possible to question the confessor in relation to other facts. The subjective scope of the prohibition of the evidential secrecy of confession is determined by the content of the provision of Article 178 point 2 of the Code of Criminal Procedure, clearly indicating that this prohibition binds the clergyman. The difficulty arises in defining the term 'cleric' ('confessor'). The term clergyman has been made more specific by Polish jurisprudence, which supplements—by necessity—the deficiencies in legislative regulations. It is assumed that a clergyman is a person belonging to the Catholic Church or another Church or religious association, who is distinguished from all followers of a given religion by the fact that he or she has been called upon to organize and perform religious worship on a permanent basis.[50] Of course, it also applies to denominations that operate legally in the country. The objective scope

45 | Whittaker and Lennard, 2000, pp. 45–168; Mazza, 1998, pp. 171–204; Sippel, 1993, pp. 1127–1164; Walsh, 2005, pp. 1037–1089; Brooks, 2009, pp. 117–147.
46 | Śliwiński, 1959, p. 291.
47 | Nisenson and Siewierski, 1947, p. 77.
48 | Bafia et al., 1971, p. 211.
49 | Wielec, 2016, pp. 315–327.
50 | Resolution of the Supreme Court of May 6, 1992, I KZP 1/92, OSNKW 1992/7 – 8/46.

of the prohibition of evidentiary secrecy of confession in criminal proceedings covers all information disclosed by the penitent to the confessor, regardless of whether they are relevant to the conducted criminal proceedings. It is not possible to take any evidence from the information disclosed during a confession, using the confessor as the source of this information.

It is also forbidden to prove the course of the confession and final result. All messages transmitted even during an unfinished confession fall within the scope of the protection of the secret of confession under canon law.[51] However, it is worth noting that the subject of the confession is abstract and unpredictable, which eliminates the possibility of cataloguing potential information that may be passed on by the penitent to the clerical confessor. Hence, it is clear that the protection of the denomination guaranteed by the secrecy of confession must be broad and cover not only all messages presented by the penitent but also the entire course of the confession.[52] This also applies to the penitents' external reactions (nervousness, confidence, crying, screaming, etc.). The fact of hearing a confession, however, is beyond the protection of the secret of confession. This is because, although it is forbidden to hear as a clerical witness to the facts discovered during confession, this prohibition does not prohibit the clergyman from revealing the very fact that someone benefited from the confession.[53]

8. Sources of the secret of confession

In light of the comments presented, the question remains, what are the roots of respecting the secret of confession in the context of privacy?

The answer seems to be simple given the previously presented privacy features. Since privacy is natural and very closely related to human society, there is no other way but to indicate that the root of the secret of confession in criminal proceedings is natural law. In general, natural law is inherently just, something due to human dignity.[54] The secret of confession is, therefore, an inseparable element of respecting privacy, the preservation of which is a natural duty, what is just in nature. Respecting the sincerity of the act of confession during the sacrament is due to human dignity. Everyone has the right to keep absolutely secret what was confessed during the confession. This secret is justified precisely by natural law. It follows from natural law that the confessor should keep a secret as an entrusted secret that is bound by the essence of justice. In this context, it is assumed that it is precisely during a confession that a special kind of contract ('quasi-contractus') arises between the penitent and the confessor, since the latter 'implicitly' undertakes to keep the penitent's secret. The resulting obligation is based on natural law,

51 | Płatek, 2001, p. 379.
52 | Syryjczyk, 2001, p. 113.
53 | Judgment of the Supreme Court of October 24, 1932, II 1 K 1048/32, ZO 1932/231; Prusak, 1999, p. 548.
54 | Hervada, 2011, p. 4.

which requires the fulfilment of contracts and forbids violating natural secrets that take away the good name of others. Therefore, the obligation to keep the sacramental secret has its basis and justification in natural law.[55]

Specifically, in the system of natural law, the secret of confession is based on two important and closely related values: human dignity and freedom of conscience and religion. It adds up to the broadly understood right to privacy and its respect in the legal system. As mentioned earlier in the constitutional provisions, the principle of religious freedom is defined in Article 53 of the Polish Constitution, which grants everyone the freedom of conscience and religion and thus defines the subjective and objective scope of this freedom.[56] The above constitutional provisions coexist (as in the first case) with concordat norms. Thus, the right to religious freedom in the Polish concordat of 1925 was not indicated separately but resulted from the previously presented provision of Article 1. On the other hand, the current concordat regulation regulates the matter in question in Article 5, which states that, by observing the principle of religious freedom, the state ensures that the Catholic Church, regardless of the rite, carries out her mission freely and in public, including the exercise of jurisdiction and the administration of her affairs on the basis of canon law. These assumptions are specified in the Act of May 17, 1989, on Guarantees of Freedom of Conscience and Religion (Journal of Laws of 1989, No. 29, item 155, as amended), which states that religious freedom manifests itself in the performance of religious functions, including organizing and publicly celebrating worship; determining religious doctrine, dogmas, and principles of faith and liturgy; and providing religious services.[57] This is based on the view that 'faith is not limited only to the religious beliefs held by an individual and the attitudes resulting from them, but also implements external acts of worship.'[58]

Religious literature clearly indicates that the right to freedom of thought, conscience, and religion includes two powers: the right to change religion and beliefs and the freedom to demonstrate religious affiliation and beliefs individually or collectively, publicly, in the circle of believers or privately by worshipping, teaching, practicing, and ritual activities.[59] On the other hand, the form of the right to manifest religion is, first, cultivation, which includes, inter alia, prayer, services, liturgy, and second, practicing, which includes activities directly and closely related to this practice that are elements of religious practice in a generally recognized form and not of a commercial nature.[60] Therefore, it is recognized that 'the practice of religious faith takes place in a social environment and is expressed in private and public external acts.'[61] This is an evident manifestation of the professed religion, and this is the most intimate element of privacy itself. According to the assumptions of the relevant denomination, the practice of religion undoubtedly requires the practice of religious acts, such as the use of the sacraments (e.g.,

55 | Syryjczyk, 2001, p. 115.
56 | Warchałowski, 2000, p. 12; Warchałowski, 2005, pp. 17 et seq.; Sitarz, 2004, pp. 9 et seq.
57 | Radecki, 2000; IV CKN 88/00; OSP 2004/5/58.
58 | Ryguła, 2005, p. 89.
59 | Warchałowski, p. 140.
60 | Warchałowski, p. 141; Misztal, 2000, p. 46.
61 | Andrzejczuk, 2002, p. 99.

penance), which 'not only presupposes faith, but also uses words and things to increase, strengthen and express it.'[62] In the legal sense, sacraments are signs and means through which faith is expressed and strengthened, God is worshiped, and man is sanctified.[63] The above definitions indicate that the practice of confession is a direct form of manifesting religion. The state cannot arbitrarily prohibit the free exercise of religious activities by its citizens, as this would be contrary to the natural character of an individual (subject to two systems). Therefore, it is right in the view that 'although the state is not obliged to perform religious acts, it is obliged to recognize and respect the religious freedom vested in its citizens.'[64] No state authority can forbid or impede the practice of confession because it is the practice of religion. An element of confession is its inseparable secrecy. Thus, it is not only appropriate to ensure the free practice of confession, but also to provide her with special protection, on par with that which she enjoys in canon law. Through this, the state authority actively implements the principle of religious freedom. The state authority should create favorable conditions for the practice of religion because, in this way, it fulfils its social duty towards its citizens. The social nature of humans determines the public manifestation of their religious freedom.[65] Any impediments or prohibitions in religious practice that would cause a person to fear the actual fulfilment of his or her religious duties are strictly prohibited.

The second element of the natural law system is human dignity. Semantically, the word 'dignity' comes from the Latin word *dignus*, which directly means worthy of respect and worship, or obligated to respect and of great importance.[66] Among the synonymous terms of dignity are words such as pride, honor, ambition, and fame,[67] as well as venerable, respected, dignified, majestic, honest, honorable, respectable, etc. Undoubtedly, dignity is one of the oldest values recognized in society. The essence of human dignity is aptly reflected in the Stoic maxim, according to which 'man is a holy thing for man' (*homo homini res sacra*).[68] It is often emphasized that dignity is also the intangible intimate sphere of an individual falling within the broadly understood right to privacy. This is fulfiled in the context of information and circumstances derived directly from private life, but in some respects known in the realities of criminal proceedings. After all, there is no doubt that privacy, as is broadly understood, falls within the scope of the guarantee of the rights and freedoms of an individual.[69] These rights are based on the inherent and inviolable dignity of humans.[70] An example of respecting privacy derived from the value of dignity is a number of procedural institutions, such as secrets (secret of confession,

62 | Konstytucja o liturgii świętej Sacrosanctum concilium No. 59.
63 | Sztafrowski, 1985, p. 102.
64 | Krukowski, 2000, pp. 99 et seq.
65 | See Deklaracja o wolności religijnej Dignitatis humanae [Declaration on Religious Freedom Dignitatis humanae], No 3.
66 | Jedlecka, no date, p. 168.
67 | Dubisz, 2006, p. 1039.
68 | Sadowski, no date.
69 | Banaszak, 2004, p. 166 n.; Witkowski, 2001, p. 102 n.
70 | See: justification for the Judgment of the Constitutional Tribunal of April 11, 2000, file ref. Act. K. 15/98, OTK ZU No. 3 (2000), item 86.

correspondence, health, etc.).[71] Dignity is a value in the Polish legal order and is of great importance. The Constitution of the Republic of Poland emphasizes its high rank, first in the preamble, stating that the inherent and inalienable dignity of human beings is the source of human freedom and rights, and then in the provision of Article 30, maintaining that the inherent and inalienable dignity of man is the source of human and civil freedom and rights. It is therefore recognized that

> freedom and rights are justified in the very humanity and dignity of the human person. Nobody can deprive a person of this dignity because it is inalienable. Freedom and rights are not established, but are declared, guaranteed, and protected. The legislator only has to formulate them in the form of normative formulations.[72]

Dignity as a source of rights requires taking into account the individual with all his potentialities and directing this right to the development of the state and the individual.[73] The provision of Article 30 of the Constitution treats dignity not only as a foundation of rights, but also as a legal value and norm. Hence, it is also clear in the jurisprudence that

> pursuant to Article 30 of the Constitution of the Republic of Poland, the inherent and inalienable dignity of human beings is inviolable, and its respect and protection is the duty of public authorities. This obligation should be carried out by public authorities, first of all, wherever the State acts within the empire, carrying out its repressive tasks, the performance of which may not lead to a greater restriction of human rights and dignity than it results from the protective tasks and the purpose of the repressive measure applied.[74] It is therefore evident that the right to the legal protection of private life understood in this way has its source in the inherent dignity of the human person.[75]

9. The secret of confession in other legal acts of the Polish legal system, apart from the Code of Criminal Procedure

The regulation of the secret of confession is not only a norm of the criminal process or canon law. The same regulations that protect the penitent's religion are included in several other acts as well. Illustratively, for a complete picture of the analysis, it is worth getting acquainted with them.

For example, with regard to the secrecy of confession, the same regulation from the Code of Criminal Procedure[76] can be found in Article 261 § 2 of the Code

71 | Wielec, 2014, p. 487.
72 | Winczorek, 2000, p. 47.
73 | Wiśniewski and Piechowiak, 1997, p. 19.
74 | Judgment of the Supreme Court of February 28, 2007, file ref. no. V CSK 431/06.
75 | Justification to the Judgment of the Constitutional Tribunal of 11 April 2000, file ref. no. K. 15/98, OTK ZU 3 (2000), item 86.
76 | Law of June 6, 1997. Code of Criminal Procedure (Journal of Laws 1997 No. 89 item 555).

of Civil Procedure,[77] according to which a witness may refuse to answer a question asked to him, if the testimony could expose him or his relatives mentioned in the preceding paragraph to criminal liability, shame, or severe and direct pecuniary damage, or if the testimony would be combined with violation of essential professional secrecy. The clergyman may refuse to testify to the facts entrusted to him during the confession.

The difference is visible because the provisions of the civil procedure treat the secrecy of confession as a relative law resulting only in the possibility of renewing the testimony, which is a significant dissonance compared to the original regulation for this institution, that is, the code of canon law.

Diametrically different regulations for the protection of a penitent's confession made during confession appear, inter alia, in the Code of Administrative Procedure. Pursuant to the provision of Article 82 of the Code of Administrative Procedure,[78] witnesses cannot be:1) persons incapable of perceiving or communicating their observations; 2) persons obliged to keep secret classified information for the circumstances covered by the secrecy, if they have not been exempted from the obligation to maintain this secrecy in accordance with the applicable provisions; and 3) clergy as to the facts covered by the secret of confession.

In accordance with the provision of Article 43 of the Supreme Audit Office,[79] on the other hand, it is not allowed to interrogate as witnesses: 1) a defense counsel as to the facts about which he learned while giving legal advice or conducting a case; and 2) a clergyman as to the facts he learned about in confession.

Another legal act in the form of the Tax Ordinance[80] states that witnesses cannot be:1) persons incapable of perceiving or communicating their observations; 2) persons obliged to keep secret classified information on the circumstances covered by the secrecy, if they have not been, in accordance with applicable regulations, exempt from the obligation to keep this secret; 3) clergy of legally recognized denominations – as to the facts covered by the secret of confession.

The comparison reveals that there is a certain dissonance in the provisions of civil procedure. The regulation contained therein regarding the secret of confession completely misses the prototype of this institution in canon law. It is a volitional right of a clergyman, because in accordance with the provisions of Article 261 § 1 of the Code of Civil Procedure, a clergyman may refuse to testify as to the facts he learned about during confession, and in the Code of Canon Law and the Code of Criminal Procedure, it is an absolute block to disclose this type of information, even if the penitent agrees. Further, the Code of Criminal Procedure, the Code of Administrative Procedure, the Act on the Supreme Audit Office, and

77 | Law of November 17, 1964. Code of Civil Procedure (Journal of Laws 1964 no. 43 item 296).
78 | Law of June 14, 1960 Administrative Procedure Code (Journal of Laws 1960 No. 30 item 168).
79 | Act of December 23, 1994 on the Supreme Audit Office (Journal of Laws 1995 No. 13 item 59).
80 | Law of August 29, 1997. Tax Ordinance (Journal of Laws 1997 No. 137 item 926).

the Tax Ordinance, recognize the strictness of the confidentiality of confession, by which they respect its canonical form.[81]

10. Summary

In summary, the secret of confession is the highest-ranking example of respect for the right to privacy in criminal proceedings.[82] The highest level of privacy is trust in another person, honesty, and truth, which is respected through the secret of confession in criminal proceedings. The essence of the confession made during the sacrament of confession is based on the highest degree of privacy. In criminal proceedings, to protect the secret of confession, the legislator resigns from the possibility of questioning certain persons, even if their testimony could be of fundamental importance for the resolution. These ties imposed on the legislator, forcing him to respect the secret of confession, have exceptionally strong roots, derived directly from natural law, which, like nothing else, shapes order, predictability, achieving justice, and mutual respect in the functioning of human society.

81 | Rakoczy, 2003, p. 126.
82 | Wielec, 2012, pp. 111–125.

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